
(2010) 06 MP CK 0011

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 126 of 2000

Nandgir and Others

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 23-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 154(1), 157, 374
Evidence Act, 1872 — Section 114, 32
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 2
Juvenile Justice (Care and Protection of Children) Rules, 2007 — Rule 97(2)
Juvenile Justice Act, 1986 — Section 2, 24
Penal Code, 1860 (IPC) — Section 148, 149, 302

Citation : (2011) 3 Crimes 265

Hon'ble Judges : S.L. Kochar, J;S.K. Seth, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.L. Kochar, J.—By this appeal u/s 374 of the Code of Criminal Procedure, the Appellants seek to challenge their conviction u/s 302 read with Sections 149 and 148 of the Indian Penal Code and consequent sentence of imprisonment for life with fine of Rs. 1,000, in default of payment of fine to suffer additional RI for six months and RI for one year with fine of Rs. 500, in default of payment of fine to suffer additional RI for one month each respectively vide judgment dated 7.1.2000 passed in Sessions Trial No. 55/1998 by the learned Second Additional Sessions Judge, Neemuch.

2. Here, it would be worthwhile to mention that the Appellant No. 1 Nandgir died during pendency of this appeal on 27.4.2007 and as such, his appeal stood abated and his name was directed to be deleted from the cause title of memo of appeal vide this Court order dated 18.3.2010.

3. The facts of the prosecution case in narrow compass are that on 17.11.1997 in village Sawan, the complainant Mohangir (since deceased) was getting the plinth of house dug by the laborers Shankarlal and Shambhu son of Patiya. At 11.00

a.m., the deceased/Appellant Nandgir, his wife Mohanbai, two daughters named Manjubai and Ashabai and son Pawan armed with lathis and sickle reached over there started making war cry and started assaulting Mohangir saying that as to why he was getting the plinth dug on their land. Nandgir, Mohanbai and Manjubai assaulted Mohangir by lathi causing injuries on his head, both hands and legs, Pawan caused injuries by sickle on head and both legs while Asha caused injuries by lathi on various parts of the body. On the spot, Khemraj, Bherulal, Bansilal and Onkarlal intervened. Dehati Nalishi Ex.P1 of the incident was lodged by Mohangir on the basis of which FIR Ex.P17 was registered. At the time of lodging the report, Bansilal, Khemraj and Bherulal were present. Since the complainant Mohangir had sustained injuries on his hands, he could not put his signature on the report. While taking to the hospital, he breathed his last on the way. The police, after completion of inquest proceedings, sent the dead body of Mohangir for postmortem examination which was performed by PW4 Dr. S.M. Baghel. Post-mortem examination report is Ex.P17. The Appellants were arrested vide arrest memos Ex.P2 and P3. On disclosure statements from Ex.P4 to P8 made by the accused persons, lathis and a sickle were seized vide seizure memos Ex.P9 and P10. After completing usual investigation, the Appellants were charge-sheeted for the offences punishable under Sections 148 and 302 read with Section 149 of the Indian Penal Code.

4. The Appellants denied the charges and pleaded their false implication in the crime. They, however, did not examine any witness in defense. Learned trial Court, after conclusion of trial and hearing both the parties, finding the prosecution case proved, convicted and sentenced the Appellants, as indicated hereinabove.

5. We have heard Learned Counsel for the parties and also perused the entire record carefully.

6. It is culled out from record that the conviction of the Appellants is based on the eye-witnesses account of PW1 Bansilal, PW2 Khemraj, PW5, Govindgir and Dehati Nalishi Ex P1 said to have been lodged by the deceased himself and treated as dying declaration (for short, the DD), because it relates to the cause of death of Mohangir, therefore, admissible in evidence u/s 32 of the Indian Evidence Act as dying declaration.

7. First of all we would deal about genuineness of Dehati Nalishi Ex.P1 which is said to have been recorded by PW7 Shri K.C. Pandey, Sub-Inspector at the instance of deceased on 17.11.1997 at 11.35 a.m. on the spot itself in village Sawan, where the deceased Mohangir aged 70 years was found in injured condition. According to Shri Pandey, the Station House Officer had received telephonic information in his presence at about 11.00 a.m., thereafter, he sent him along with police constables to village Sawan. He crossed some distance by travelling on motorcycle and the remaining distance by travelling in a bus and reached on the spot after half an hour. Further say of this witness is that he recorded the Dehati Nalishi Ex.P1 as disclosed to him by the deceased Mohangir

who was lying in injured condition on the spot. Dehati Nalishi was recorded in presence of two witnesses namely, PW1 Bansilal s/o Devichand and Khemraj (PW2). Both these witnesses were also the eye-witnesses of the incident. Shri Pandey has also stated that in presence of witnesses, he recorded the statement of the deceased.

8. It is an admitted position that alongwith the charge-sheet and also during the course of trial, intimation received by the Station House Officer on telephone, has not been filed.

9. Eye-witness PW1 Bansilal has deposed that the telephonic information was given to the police by him and after one hour police had reached on the spot. Further say of this witness is that the deceased himself had lodged the report to the police vide Ex.P1, but he could not put his signature, because of fracture in hand and he (the witness) and PW2 Khemraj put their signatures on the report as witnesses. Same is the statement given by PW2 Khemraj. The procedure adopted by PW7 Sub-Inspector Shri K.C. Pandey for recording the first information report on the spot is completely foreign to law. If the deceased was not in a position to put his signature and he was conscious, Shri Pandey could have obtained his thumb impression on Dehati Nalishi and could have put a note to this effect. Procedure for recording the first information report about cognizable offence is prescribed u/s 154 of the Code of Criminal Procedure (for brevity "the Code") which reads as under:

154. Information in cognizable cases--(1) Every information relating to the commission of a cognizable offence, if given orally to an officer-in-charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant and every such information, whether given in writing or reduced to writing as aforesaid, shall be entered in a book to be kept by such officer in such form as the State Government may prescribe to this behalf;

(2) A copy of the information as recorded under Sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person, aggrieved by a refusal on the part of an officer-in-charge of a police station to record the information referred to in Sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offences shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer-in-charge of the police station in relation to that offence.

10. In the aforementioned provision, it is nowhere mentioned about obtaining of signatures of the witnesses on the first information report.

11. The difference between a Dehati Nalishi and the first information report is that the first information report recorded anywhere else than the police station

and not on prescribed printed form on zero number then it is called in local parlance as Dehati Nalishi and the investigating agency or the concerned police is required to record the first information report in prescribed form as per provision u/s 154 of the Code, giving crime number in the police station and simultaneously summary of the same must be recorded in daily diary and its number must be mentioned in column No. 3 as well as compliance of Section 157 of the Code must also be mentioned in column No. 13 (See first information report Ex.P17). Ex.P1 was not recorded as D.D. of the deceased, therefore, there was no necessity for obtaining signatures of PW1 Bansilal and PW2 Khemraj as witnesses of lodging of the report by the deceased.

12. PW1 Bansilal and PW2 Khemraj have also deposed that the police reached on the spot in a jeep and in the same jeep deceased was taken to the hospital, but this statement of both the witnesses stood contradicted by the statement of Shri K.C. Pandey who has deposed in para 7 of his statement that he travelled up to some distance from police station on motorcycle and some distance by bus for reaching at village Sawan where the incident had taken place.

13. Both the independent eyewitnesses viz. PW1 Bansilal and PW2 Khemraj have deposed that the incident occurred at 11.00 a.m., thereafter, intimation was given by Bansilal to the Police Station Neemuch on telephone and thereafter, after an hour police reached on the spot. If this is so, the Dehati Nalishi could not have been recorded at 11.30 a.m. The incident commenced at 11.00 a.m. which must have continued for some time, thereafter, message was sent on telephone to police and after receiving the message, Station House Officer directed PW7 Shri K.C. Pandey to go to the spot alongwith staff. This must also have taken some time and the police reached on the spot after one hour, meaning thereby the police reached on the spot at any rate not before 12.00 noon. Suggestion to the Investigating Officer and witnesses in their cross-examination was given by the defense that because of inimical terms between the complainant party and the Appellants, a false report Ex.P1 was got prepared by the police at the instance of complainant party and the deceased was not in a position to lodge any report. We find substance in this defense suggestion.

14. It is clear from the prosecution evidence that the incident occurred in front of the house of the deceased and the Appellants were also residing adjacent to his house. The deceased and Appellants were cousins having dispute over house and land. According to all the three eyewitnesses, apart from them, Onkarlal, Laxman Mali and Bherulal Kothari were also present on the spot. PW5 Govindgir is the nephew of the deceased. But, all these six persons did not try to save the deceased who was being assaulted by the Appellants namely; Nandgir aged 62 years, his son Appellant No. 2 Pawangir and three women accused/Appellants aged about 42, 19 and 16 years respectively. Number of witnesses was more than the number of Appellants, and if really they were present on the spot and had witnessed the incident, especially when out of five accused persons, amongst whom, three were women, even then they failed to save the deceased

in any manner is not believable.

15. Eyewitness Bansilal (PW1) gave information on telephone to Station House Officer and the Station House Officer in his turn must have recorded the intimation in daily diary of the police station but copy of which has not been filed by the prosecution and for non-filing of the copy of daily diary, we are constrained to draw adverse inference against the prosecution as per provision u/s 114(g) of the Indian Evidence Act which says that:

That evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it.

16. If Bansilal (PW1) happened to be an eyewitness and had really witnessed the incident then he must have disclosed the names of the assailants and the deceased and brief summary of facts of the incident on telephone to the Station House Officer and as a matter of fact, this would have been the first information report which has been suppressed by the prosecution. For the sake of argument, if Bansilal had not given the names of the assailants and the deceased and some sort of information about incident, then it can be said that he was not a witness of the incident and became a witness later on because of inimical terms with the Appellants as suggested to him by the defense in his cross-examination.

17. Non-filing of the copy of information given on telephone to the Station House Officer would also reveal that the same was not in the line of first information report (Dehati Nalishi Ex. P1) and that is why it was suppressed.

18. PW6 Shri S.C. Pateria, the then Station House Officer has nowhere stated in his examination-in-chief about his having received the telephonic information sent by Bansilal about the incident and sending of Sub-Inspector Shri K.C. Pandey with police constables on the spot. In cross-examination, he has admitted that the entries in daily diary in regard to sending of Sub-Inspector Shri K.C. Pandey and receipt of Dehati Nalishi Ex.P1 were not filed in Court. He has also stated that there was no entry in the daily diary about receiving information and sending of Sub-Inspector Shri K.C. Pandey on the spot. The Station House Officer was not able to state as to how information was received. This statement of the Station House Officer has given further support to the aforementioned inference that the Dehati Nalishi Ex.P1 was not recorded as shown to have been recorded at the instance of the deceased. It appears that the witnesses had not witnessed the incident and when they came to know about the death of the deceased in front of his house, information on telephone was sent and after arrival of Shri Pandey, because of inimical terms with the Appellants, against almost all the family members including three female, a case has been concocted by them.

19. The abovementioned conclusion also finds support from the fact that in the document of registration of crime as per provision u/s 154 of the Code, vide Ex.P17 in column No. 3A, the number of daily diary is not mentioned and in column No. 13 nothing is mentioned about sending of copy of the first

information report to the concerned Magistrate as per provision u/s 157 of the Code. It appears that the printed form of the first information report has been supplied to the investigating agency by the Department so that there may be no concealment and lapse in regard to the compliance of mandatory provision and prosecution case may not suffer on account of non-compliance thereof. But, it is our general experience that the investigating agency does not write the first information report as required to be written in printed Performa and also failed to assign any reason as to why the same could not be complied with. PW6 Shri Pateria has stated that on 17.11.1997, Constable Govind Singh produced the Dehati Nalishi Ex.P1 in the police station and he registered the first information report Ex.P17 which is in printed form No. 1 having several columns to fill while writing it. In column No. 3A, number of daily diary is required to be mentioned. According to Police Regulation No. 971 (f) and 971, which has the force of law. See Shyambabu Verma Vs. State of M.P. and Others, while registration of first information report, as per provision u/s 154 of the Code, the substance/summary of the report must separately be mentioned in the daily diary. It appears that this procedure is prescribed just to put a check on the registration first information report. Further, in column No. 13, the scribe of the first information report is required to mention about compliance of Section 157 of the Code with regard to sending of the copy of the first information report to the concerned Magistrate. This also has been prescribed in the first information report itself just to counter check the registration of first information report, its time and genuineness. If copy of the report is not sent immediately or there is delay in sending the copy of the first information report to the concerned Magistrate, inference can be drawn that the first information report was brought into existence in ante date and time.

20. When the investigating agency has been supplied printed form No. 1 regarding registration and recording of first information report as per provision u/s 154 of the Code, then it is the onerous duty of the recording officer to fill each and every column properly and if some are not applicable in the facts and circumstances of the case, then to mention specifically not applicable.

21. The eyewitnesses account as well as the contents of Dehati Nalishi/dying declaration do not find support from the medical evidence with regard to the overt act attributed to Appellant No. 2 Pawangir. All the three eye-witnesses have deposed that Pawangir caused injuries by sickle which is a sharp edged weapon, but the autopsy surgeon PW4 Dr. Baghel did not find even a single injury caused by sharp edged weapon. He found one lacerated wound on head, seven contusions on left and right legs, chest and on left hand as well as abrasions on right forearm and abdomen. The deceased also suffered fracture of left leg. In the opinion of autopsy of surgeon, the deceased died because of fracture of skull bone. In cross-examination, the medical expert has admitted that the injuries could be sustained by the deceased, aged about 70 years, by fall from "roof of the house". The conflict between medical evidence and eye-witnesses account has been considered in detail by the Supreme Court in the case of Thaman

Kumar Vs. State of Union Territory of Chandigarh, relevant para 16 thereof is reproduced as under:

The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault, but they are not found on that portion of the body where they are deposed to have been caused by the eyewitnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straight-away be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony.

22. In view of the above verdict of the Supreme Court, the instant case would fall under the first category. No injury was found on the person of the deceased who could be caused by sickle. Looking to the number and nature of injuries and 70 years" age of the deceased, it is also doubtful that he could give such a detailed report Ex.P1 to PW7 Shri Pandey.

23. PW7 Shri K.C. Pandey has admitted in para 8 of his deposition that when he reached on the spot villagers were present alongwith two/ three Kotwars and the tiles of roof of the house of Appellant Nandgir were found removed and disturbed. The case of the defense was that the deceased was removing the tiles of the house of Appellant Nandgir which was situated adjacent to his house and while doing so, he fell from the roof and sustained injuries, thereafter, his nephew PW5 Govindgir concocted a false case against the Appellants to grab the entire property of Mohangir because he was unmarried and on his property the Appellants being legal heirs were having equal right.

24. The foregoing serious infirmities in the prosecution case probably the defense case especially when there is non-availability of even a single injury caused by sickle and admission by medical expert that injuries found on the person of the deceased could be sustained by fall from the roof.

25. Now, we turn to another aspect of the case. Appellant No. 5 Asha was shown to be 16 years of age by the police in her arrest memo Ex.P3 and nobody has disputed her age, but neither both the parties i.e. the prosecution and defense nor the trial Court took cognizance of this fact that she was a juvenile on the

date of incident i.e. 17.11.1997. At that time, Juvenile Justice Act, 1986 (for brevity the Act, 1986) was in force and according to Clause (h) of Section 2 thereof, juvenile is defined as under:

(h) "Juvenile" means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years.

26. Asha was below 18 years of age, therefore, she should not have been tried alongwith major co-accused persons as per provision u/s 24 of the Act, 1986. Juvenile Justice Act, 1986 is substituted by the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short (hereinafter referred to as the Act 2000) u/s 2 (k) and (l) of the Act 2000, there is no difference of age between boy and girl and same is prescribed for both the categories i.e. 18 years on the date of commission of offence.

27. The Juvenile Justice (Care and Protection of Children) Rules, 2000 (hereinafter referred to as the Rules 2000) were brought into force on 26.10.2007. As per Rule 97(2), all the pending cases which have not received finality will be dealt with and disposed of in terms of the provision of the Act, 2000 as amended on 22.3.2006 and Rules, 2000. It is clear from the record that the incident occurred on 19.11.1997 and judgment was pronounced on 7.1.2000. The Act 2000 came into force on 1.4.2001 meaning thereby on the date of judgment the old Act of 1986 was in force and the trial of Appellant Asha was illegal as per provision u/s 24 of the Act. Otherwise also, in view of Rule 97(2) which is applicable for all pending cases, the trial of Appellant Asha is wholly illegal, but looking to the lapse of such a long period of about 13 years, it would not be conducive to remand the case of Appellant Asha for fresh trial in accordance with the provision of Juvenile Justice Act. This legal position has been considered by the Supreme Court in a series of judgments, such as:

Vikram Singh v. State of Haryana 2009 ALOL 627; Mohan Mali v. State of M.P. 2010 ALOL 251; Dharambir v. State (NTC of Delhi) 2010 ALOL 240; Jabar Singh v. Dinesh and another 2010 ALOL 139; Ram Suresh Singh v. Prabhat Singh alias Chhote Singh 2009 ALOL 661 and Hari Ram v. State of Rajasthan 2009 ALOL 646 28. Ex-consequent, in the light of aforesaid discussion we are of the firm view that the prosecution has failed to establish its case beyond reasonable doubt against the Appellants. Their conviction and sentences as passed by the learned trial Court are hereby set aside.

29. Let a copy of this judgment be sent to the trial Court along with its record in due course.

Appeal allowed.