
(2002) 02 RAJ CK 0172
In the Rajasthan High Court
Case No : Criminal Appeal No. 349 of 1995

Ram Avtar and Sawai Singh	Vs	APPELLANT
The State of Rajasthan		RESPONDENT

Date of Decision : 08-02-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 147, 149, 302, 323, 34

Citation : (2002) 02 RAJ CK 0172

Hon'ble Judges : Y.R. Meena, J;A.C. Goyal, J

Bench : Division Bench

Advocate : A.K. Gupta, Mr. Vishal Bansal, Mr. Rinesh Gupta, for the Appellant;
Rajendra Yadav, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.C. Goyal, J.—This appeal is preferred against the judgment dated 10.7.95 passed by learned Sessions Judge, Jhunjhunu in Sessions case No. 105/90, whereby the appellants Ram Avtar and Sawai Singh were convicted and sentenced u/s 302/34 IPC to suffer imprisonment of life.

2. Five persons namely Ram Avtar, Sawai Singh (both sons of Shri Gadsai Ram), Smt. Gaura Devi W/o Shri Gadsai Ram, Narain Ram and Rajpal were put to trial for offences under sections 147, 302, 302/149, 379 and 447 IPC. Out of five persons three Narayan Ram, Rajpal and Smt. Gaura Devi were acquitted of all the charges. The appellants were acquitted for the offences under sections 147, 379 and 447 IPC but convicted and sentenced u/s 302/34 IPC instead of u/s 302/149 IPC.

3. Briefly narrated the prosecution story runs like this that PW11 Shri Mahfooz Ali, Head Constable, Police Station Udaipurvati, District Jhunjhunu came to the hospital at Udaipurwati and recorded parchabayan of PW3 Shri Onkar (Ex.P/2) at about 7.30 a.m. on 28.5.90. According to the Parchabayan Ex.P/2, Shri Surjaram (deceased) of 60 years age, resident of village Navaldi (at present residing in his

field in Dhani Pujariyan) was coming from village Navaldi to his Dhani at about 8-9 p.m. on 27.5.90. Four accused persons Ram Avtar, Sawai Singh, Narayan Ram and Smt. Gaura Devi who were hiding themselves attacked Surjaram on the way. Shri Ram Avtar having burchi and remaining three accused persons having lathi started beating Shri, Surjaram. Having board hue and cry he came from his own Dhani and from the other Shri Laxman and Smt. Bhagwani (PW2) also rushed to the place of occurrence. All the four accused persons ran away. Shri Surjaram was lying there with bleeding from his legs. He was brought to hospital by a jeep. Shri Surja Ram was not speaking since night. One Shri Kurda Ram also reached the place of occurrence. Litigation for division of land was going on between Shri Surja Ram and his nephews Ramavtar and others for a number of years.

4. A formal FIR (Ex.P/7) was registered at police station, Udaipurwati under Sections 341, 323/34 IPC. Since injured Surja Ram succumbed to his injuries on 2.6.90 in the hospital, the offence u/s 302 IPC was added. After usual investigation charge-sheet came to be filed against five accused persons in the court of Judicial Magistrate, Navalgarh, who committed this case to the court of learned Sessions Judge, Jhunjhunu. Charges were framed against all the five accused persons under Sections 147, 302, in the alternative under Sections 302/149, 379 and 447 IPC. They pleaded not guilty and claimed trial. As many as 11 witnesses were examined on behalf of prosecution. The statements of the accused persons were recorded as provided u/s 313 Cr. P.C. while denying the evidence of the prosecution, they stated that the witnesses have deposed on account of enmity. However, no witness was examined on behalf of accused. Having heard final submissions, learned Sessions Judge passed the judgment on 10.7.1995 as stated above.

5. We have heard learned counsel Sh. A.K. Gupta, learned Public Prosecutor Shri Rajendra Yadav and have scanned the entire material on record.

6. Now we proceed to consider the medical evidence PW4 Dr. Dinesh Choudhary the then Medical Officer, Referral Hospital, Udaipurwati, examined injured Shri Surja Ram on 28.5.1990, at about 7.30 a.m. and noted following injuries vide Injury Report Ex. P/ 4.

1. Swelling lower part with surgical emphysema 6"x4" on lower part right chest.
2. Fracture on 9th, 10th, 11th rib exclusive.
3. Compound fracture with lacerated wound 1" x 1/2" x 1/4" on left lower leg.
4. Lacerated wound 1/2" x-1/4"" x 1/4" right lower leg.

According to Dr. Choudhary, all the injuries were caused by blunt weapon. Injuries Nos.1.2. 3 where grievous in nature while Injury No.4 was simple. The patient was in semi conscious condition. PW9 Dr. H.L. Bairwa, the then Medical Jurist, S. M.S. Hospital, Jaipur, conducted the Post Mortem on the dead body of Shri Surja

Ram at about 5.40 p.m. on 2.6.90, and prepared the Post Mortem Report Ex.P/6. According to Ex.P.6, Shri Surja Ram died at about 12.30 p.m. on 2.6.1990. Dr. Bairwa noted following 11 ante-mortem injuries.

1. Defused swelling present on the scalp, posterior aspect of occipital region present.
2. Abrasion of size 1x1 cm posterior aspect of right elbow joint.
3. Lesion (infected wound of size 4x 1 cm x bone deep, oblique and over right side tibial skin middle 1/3rd part interior aspect.
4. Multiple abrasions of size 4x3 cm to 1 x2 cm placed over dorsum of left foot & lower 1/3rd of leg left side into skin deep.
5. Lesion (infected wound) of size 3x2 cm left side tibial skin middle 1/3rd part present.
6. Lesion (infected wound of size 2x 1/2 cm x skin deep oblique over posterior lateral aspect of lower part of left leg. On dissection there is fracture of fibula left leg with haematoma present.
7. Lesion (infected wound of size 8 cm x 4 cm x muscle deep irregular anterior lateral aspect of left thigh-middle 1/3rd.
8. Bruise of size 1.2 x 8 cm, bluish brown in colour over right buttock irregular.
9. Bruise of size 3x2 cm top of right shoulder at clavicular acromion joint. On dissection there is dislocation of acromioclavicular joint with tears of all segment of joint with haematoma present right side present.
10. Bruise of size 6 x 8 cm irregularly over posterior lateral aspect of chest and abdomen irregularly placed.
11. Blackish colour stain skin area over back of pelvis over lateral region irregularly placed over with peeling of skin at places profusely bed sore (tissue sore).

In the opinion of doctor cause death was coma brought as a result of head injury and cumulative effect of other injuries.

Thus, it is well proved that Shri Surjaram died mainly on account of head injury No. 1 and also on account of cumulative effect of all the injuries. It was not even disputed that, he died on account of these ante-mortem injuries.

7. We now turn to other evidence. PW1 Pitram, PW2 Smt. Bhagwani, PW3 Shri Onkar and PW8 Shri Kurda Ram, were examined as eye witnesses. PW1 Shri Pit Ram (not named in FIR) turned hostile. He did not support the prosecution case. PW3 Onkar was the informant. He also turned hostile. He denied all the contents of his parchabayan Ex.P/2. The statement of PW8 Sh. Kurdaram as an eye witness was disbelieved by learned Sessions Judge and rightly so because

even according to parchabayan Ex.P/2, he was not an eye witness. His statement u/s 161 Cr.P.C. Ex.D/5 was recorded on 24.9.1990 i.e. about four months after the occurrence and no explanation for such inordinate delay was given. Even otherwise, the statement of PW8 Shri Kuras Ram can not be relied upon at all. According to him, there were five accused persons who were beating Shri Surja Ram. He stated that he was witnessing this occurrence from far away and he saw the sticks in the hands of the accused persons. It was next stated that all the accused persons ran away and then they were near Surja Ram, who was conscious and Shri Surja Ram said that five persons gave him beating while according to the medical evidence Shri Surja Ram did not speak after getting these injuries and this fact is mentioned even in parchabayan Ex.P/2. Learned Sessions Judge has also come to this conclusion that Shri Surja Ram did not speak after receiving injuries. Therefore, the statement of PW8 Shri Kurda Ram rightly disbelieved by learned Sessions Judge.

8. Learned Sessions Judge has convicted the appellants only upon the sole testimony of PW2 Smt. Bhagwani wife of deceased Shri Surja Ram. It was argued by learned counsel Shri Gupta that conviction can be sustained only on the sole testimony provided it is found wholly reliable but the statement of Smt. Bhagwani was not reliable on a number of grounds. Learned Public Prosecutor urged that learned Sessions Judge has rightly placed reliance upon the sole testimony of Smt. Bhagwani qua the appellants.

In the *Karunakaran Vs. State of Tamil Nadu*, , the Hon, Apex Court held that in a serious charge of murder, it is necessary that the court should closely scrutinize the evidence to come to an unhesitating conclusion that the eye witness on whose testimony the conviction is based is absolutely reliable.

In *Prem Singh Vs. State of Punjab*, , there were only two eye witnesses. They were brothers of the deceased. The evidence of both these witnesses in regard to the participation of the four other accused was rejected, as unreliable as it was falsified by the medical evidence. In view of these facts, it was held by their lordships that if the evidence of these two witnesses was disbelieved in regard to participation by the four other accused in the incident, it is difficult to say how it can be accepted so far as the role assigned to the appellant is concerned. The conviction of the appellants is founded solely on the evidence of these two witnesses whose testimony can not be said to inspire confidence in the mind of the court.

In *Sudhir and Another Vs. State of Madhya Pradesh*, , it was held by their lordships that in view of the infirmities in the evidence of sole eye witness, the conviction can not be based on such sole testimony. Yet in another judgment *Anil Phukan vs. State of Assam* (JT 1993(2) SC 290), it was held by their lordships that conviction can be based on the testimony of sole eye witness provided he passes the test of reliability. Where the sole eye witness is not wholly reliable, the court would generally insist upon corroboration in material particulars.

9. Thus, conviction can be based on the testimony of sole eye-witness provided such witness is wholly reliable. In the case in hand, PW2 Smt. Bhagwani, being wife of the deceased naturally is an interested witness. Therefore, her testimony should be scrutinized with care and caution. On careful scrutiny of her statement it appears that it is extremely difficult and unsafe to place any reliance upon her statement qua appellants also. Her statement suffers from a number of serious infirmities. According to Parchayabayan, Ex.P/2, which was recorded about 11/12 hours after the said occurrence only four persons Narain, Ramavtar, Sawai Singh and Smt. Gaura Devi attacked Shri Surja Ram. The name of Shri Raj Pal as accused does not find any mention in Ex.P/2, while all the accused persons and the witnesses are of some village. No explanation has come forward as to why the name of Shri Rajpal as an accused was not disclosed at the time of recording Parchayabayan Ex.P/2. Contrary to it, Smt. Bhagwani stated that accused were fives in number including Rajpal. The second serious infirmity is with regard to weapons used by the assailants. According to Ex.P/2, only accused Ramavtar had "Barchi" while remaining three accused were having lathi and all the four started beating Surja Ram. But according to the statement of Smt. Bhagwani all the five accused were inflicting lathis and burchi blows. In cross-examination, it was stated by her that two or three persons were having burchi. In the next line she specified three accused Ramavtar, Sawai Singh and Rajpal who were inflicting barchi blows while Smt. Gaura Devi and Narain were standing at some distance. Thus, the statement of Smt. Bhagwani is not only self contradictory but contrary to Parchayabayan Ex.P/2 also. This important infirmity is that according to Parchayabayan Ex.P/2 injured Surja Ram was not speaking since night i.e. from the time of occurrence, while Smt. Bhagwani stated in the court that Shri Surja Ram was in conscious condition, he asked to bring major early; that Shri Surja Ram narrated before her and Onkar that all the five accused gave him beating. According to Parchayabayan, as stated earlier, Shri Surja Rim was not speaking and this fact is corroborated by PW4 Dr. Dinesh Choudhary who stated that the injured was in semi conscious condition. Shri Surja Ram died on the 6th day after the occurrence. His statement was not recorded by the police during this period. There is no other evidence to show that Shri Surja Ram was ever conscious during this period. Even the learned Sessions Judge came to this conclusion that Shri Surja Ram did not speak after the occurrence. In view of these facts and circumstances, it is not believable that Shri Surja Ram narrated the incident as well as the names of all the five accused. Fourth serious infirmity is of complete variance between oral and medical evidence. As per Ex.P/2 Shri Surja Ram was given beating with barchi and lathies. According to the statement of Smt. Bhagwani both appellants and Rajpal were armed with barchi and they inflicted injuries with barchi but according to the medical evidence, there was not a single injury caused by any sharp weapon. According to the judgment in Karuna Karan's case (supra) where the sole witness contradicted from the version given in FIR and from the medical evidence, no-reliance should be placed upon such sole statement. In the case in hand Smt. Bhagwani not only contradicted from the version of FIR but also contradicted from the medical evidence. In Surendra

Pratap Chauhan vs. Ram Naik and others (Air 2001 SC 164), eye witnesses stated that accused rasped the neck of deceased by using Gandasa. But medical evidence, however, not suggesting the neck of deceased having been rasped. There was no explanation by witnesses as to how deceased sustained injury on hand. In view of these facts and strained relations between parties over a land dispute, acquittal of accused was sustained. In A v. ?desh and another vs. State of M.P. (), it was held that when medical opinion is inconsistent with testimony of eyewitnesses, it indicates that eye witnesses had not seen occurrence and the offence is not proved beyond reasonable doubt. Yet, there is another serious infirmity in medical evidence ACr. L.R.(SC) 1988, 269 according to PW4 Dr. Dinesh Choudhary, he noted only four injuries on the body of Surja Ram when he was examined on 28.5.1990. Out of four injuries two were on chest with fractures of four ribs and two lacerated wounds on legs with compound fractures of four ribs and two lacerated Wounds on legs with compound fracture on left leg. Thus, it is evident that there was no injury at all on the head, right elbow, thigh, buttock and right shoulder. As stated earlier Shri Surja Ram died on the sixth day after the occurrence and consequently the Post Mortem was conducted on 2.6.1990 by PW9 Dr. Bairwa, who noted 11 injuries including injuries on head, right elbow, left thigh, right buttock and right shoulder. There is absolutely no explanation as to how Shri Surja Ram received the injuries on head and other parts of the body which do not find any mention in Injury Report Ex.P/4. Now the crucial question arises as to who caused remaining 7 injuries which were noted at the time of Post-Mortem? Explanation has come only with regard to Injury No. 11 because it was a bed sore as noted by PW9 Dr. Bairwa. According to both the doctors, all the injuries were caused by blunt weapon while according to the sole statement of Smt. Bhagwani, both the appellants were armed with barchi and they inflicted barchi blows. No such suggestion was even given to Smt. Bhagwani that any of the appellant used barchi with blunt side. Therefore, in view of the law laid down by Hon. Supreme Court in cases of Karuna Karan, Prem Singh, Surendra Pratap and Awadesh. and another (supra) the sole testimony of Smt. Bhagwani cannot be believed at all as it is completely inconsistent with medical opinion. Fifth infirmity in this case is that of strained relations between the parties. Both the appellants are sons of Smt. Gaura Devi, who is real sister of deceased Shri Surja Ram. There was long standing litigation for land between the deceased and the appellants. Sixth infirmity is that the evidence of Smt. Bhagwani in regard to the participation of the three other accused was rejected by learned Sessions Judge as unreliable. If the evidence of this sole witness Smt. Bhagwani was disbelieved in regard to participation by the three other accused in the incident it is difficult to see how it could be accepted so far as the role assigned to the appellants is concerned. The conviction of the appellants is founded solely on the evidence of Smt. Bhagwani whose testimony can not be said to inspire confidence. The next serious infirmity is abnormal behavior of PW2 Smt. Bhagwani at these time of said occurrence and subsequent to that. On the one hand she stated that she was sitting out side her house and waiting for her husband's arrival. On the other hand she did not make any effort to save him from the assailants. She

even did not accompany her husband to hospital even though her son PVV7 Shri Birbal Singh was away in Haryana for his further studies. According to the statement of Smt. Bhagwani she went to the hospital on third day of the occurrence. In view of these facts and circumstances, the contention of learned counsel Shri Gupta seems to be acceptable that, had she been there, she would have tried to save her husband and naturally she would have accompanied her husband to the hospital. All these facts indicate that she had not seen the occurrence. The conduct of this witness under such circumstances was abnormal and her evidence does not inspire any confidence. Accordingly, the offence against the appellants is not proved beyond reasonable doubt.

10. Consequently, we allow this appeal set-aside the conviction and sentence passed by learned Sessions Judge, Jhunjhunu, and acquit the appellants u/s 302/34 IPC. The appellants are in jail since last six years they shall be released forthwith if not required in any other case.