
(1988) 09 MP CK 0015
In the Madhya Pradesh High Court
Case No : F.A. No. 97 of 1981

Ramchandra Badri Prasad Gour and others	APPELLANT
Vs	
Associated Cement Co. Ltd. and others	RESPONDENT

Date of Decision : 20-09-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302

Citation : (1989) MPLJ 265

Hon'ble Judges : S. Awasthy, J; B.C. Varma, J

Bench : Division Bench

Advocate : V.S. Dabir with P.P. Naolekar, for the Appellant; Y.S. Dharmadhikari for Respondent No. 1 and T.C. Naik for Respondents Nos. 2 to 5, for the Respondent

Final Decision : Allowed

Judgement

Rampal Singh, J.

Appellant Vijay Shankar has challenged his conviction in this appeal, recorded in judgment dated 27-7-1983 in Sessions Trial No. 29 of 1983 of the Court of Additional Sessions Judge, Hoshangabad, Camp Harda. He has been convicted u/s 302, of the Indian Penal Code and has been sentenced to imprisonment for life. Appellant was tried alongwith twelve other accused persons who were acquitted in the trial. The State has not preferred any appeal against that part of the impugned judgment by which those twelve co-accused have been acquitted.

On 12th February 1982, one Kailash in Handia Bus-Stand at 6 or 6.30 a.m. was boarding a bus alongwith deceased Virendra and one Motilal (PW-14). It is alleged that at this very time, the appellant with a ballam in hand arrived on the spot alongwith other co-accused who were also armed with deadly weapons and lathis. According to the prosecution case, it is alleged that the appellant gave a ballam blow from behind as a result of which Virendra fell down on the ground. Kailash (PW-12) when tried to save the deceased, it is alleged that he was also

given a thrash. He therefore ran away towards his house and met Chhotibai (P.W. 3), who questioned Kailash (PW-12) as to why he was fleeing away. Chhotibai was informed by Kailash that "Golapur Walon Ne Virendra Ko Mar Data Hai."

It is further alleged that Chhotibai saw appellant with a ballam in hand and his companions pursuing Kailash (PW-12). She returned back to the house of Motilal (PW-14) and asked his daughter Kusum to go and lodge the report. Kusum rushed to the Police Station and lodged a report therein which is Ex. P-24. Ex. P-24 is a cryptic rojnamcha-sahna entry dated 12-2-1982. This document contains the fact that her brother Kailash has received injuries upon his head and Virendra is lying injured in the Bus Stand and her Badi Maa Mst. Chhotibai had sent her to the Police Station for lodging the report. Upon this, the police proceeded towards the spot where, according to Badri Lal Soni (PW-15), Sub-Inspector, he found Kailash in an injured condition. Hence, he took down Ex.D-6 the report lodged by Kailash (PW-12). This was early in the morning. Then according to Badrilal Soni (PW-15), he proceeded to the Police Station and wrote out a First Information Report (Ex.P-20), which is the exact reproduction of Ex.D-6. This Ex.P-20 was recorded at 12.30 in the noon. The case of murder was registered and the appellant alongwith others was arrested and trial ensued. The appellant alone was convicted and sentenced as indicated hereinabove.

According to the prosecution, there were two eye witnesses of this incident, -- P.W. 12 Kailash and P. W. 14 Motilal. Learned trial Judge has rejected the testimony of P. W. 14 Motilal in para 21 of his judgment. The trial Judge has placed reliance upon the testimony of Kailash (PW-12) alone and convicted the appellant alone.

Learned counsel for the appellant Shri Rajendra Singh, Sr. Advocate, confined his argument only to the point that P. W. 12 Kailash was not a reliable witness and the trial Judge has committed illegality in placing reliance upon his testimony. He further criticised Ex.D-3, the alleged dying declaration of Kailash from which the trial Judge drew corroboration. According to him, the dying declaration was not recorded by Tahsildar according to law. Shri Rajendra Singh, learned counsel also contended that the trial Judge has arrived at the conclusion that if P. W. 12 Kailash was not a reliable witness with regard to other twelve acquitted persons, then how he can be relied upon with regard to the appellant only.

Shri U. K. Sharma, learned counsel for the respondent-State controverted the arguments of Shri Rajendra Singh and supported the impugned judgment of conviction.

The trial Judge was in a quandary as to which of the document should be treated as the First Information Report, -- whether the report Ex.P-24 lodged by Kusum (PW-2) in the Police Station immediately after the incident, or report Ex.D-6 i.e. Ex.P-20 which is exact reproduction of Ex.D-6. Without entering into any controversy, it is settled that the report of the crime which is lodged in the police station first in order for persuading the police machinery towards starting

investigation is the first-information-report. Whichever subsequent reports were written, they are hit u/s 161 of the Code of Criminal Procedure and cannot be treated as the First Information Reports of the crime. In this case, the first information report Ex.P-24 lodged by Kusum (PW-2) does not contain the name of the appellant or any of the co-accused persons. Ex.P-24 was lodged promptly.

Kailash (PW-12), in his deposition, says that he informed about the incident to P.W.3 Chhotibai who informed Kusum with regard to the facts of the case and sent her for lodging the report. When Kusum lodged Ex.P-24 report in the Police Station, the Police machinery moved. Badrilal Soni (PW-15), Sub-Inspector and M. L. Sandlaya (PW-16), Sub-Inspector both arrived on the spot and started investigation. Hence, we are of the firm opinion that the FIR of the crime is Ex.P-24 and no other document. Neither Ex.D-6 nor Ex.P-20 can be treated as the First Information Report. But as the learned trial Judge has considered Ex. D-6 as the FIR of the crime, we shall examine it also.

With regard to Ex.D-6, there is contradiction in the deposition by Motilal (PW-14) and M. L. Sandlaya (PW-16), Sub-Inspector, Badrilal Soni (PW-15) in his cross-examination in para 8, has admitted that there is overwriting so far as the dates in Ex.D-6 are concerned. According to Badri Lal Soni (PW-15), Ex.D-6 was recorded by him in the hospital where Kailash (PW-12) was admitted for treatment while his companion Investigating Officer M. L. Sandlaya (PW-16) says that the Ex.D-6 was recorded in the Bus-Stand near about 7 a.m. where Kailash (PW-12) was present and he gave the first information report Ex.D-6, to Badri Lal Soni (PW-15). Closer scrutiny of Ex.D-6 indicates that this document cannot be relied upon because the dates written therein contained overwriting with regard to the date of incident and also with regard to the recording of the FIR.

According to M. L. Sandlaya (PW-16), Ex.D-6 was recorded by Badri Lal Soni (PW-15) in the Bus Stand at 7-15 a.m. from the Bus Stand, the Police Station is only half kilometer away, Ex.P-20 was written at 12.30 in the noon. What was the reason of this delay on the part of Badri Lal Soni (PW-15) for getting the First Information Report Ex.P.20 written after more than five hours. Ex.D-6 prima facie appears to be a document upon which the reliance cannot be placed. We are of the view that this document is hit by the provisions of Section 161, Criminal Procedure Code and it should be rejected outright. Similarly, Ex.P-20 is exactly the copy of Ex.D-6. When we have rejected Ex.D-6 from consideration, there arises no question of considering the correctness and authentic nature of Ex.P-20.

Kailash (PW-12) is not corroborated by the versions he had given out to the Police Officers. The variance in the testimonies of Investigating Officers P.Ws. 15 and 16 is a further indication that Ex.D-6 was created and is a product of deliberations and consultations. This unfair act on the part of the Police in a murder case is strongly deprecated. A fair and prompt investigation inspires confidence in the mind of the judge but where it is not fair and is riddled with suspicions, such evidence must be rejected. We therefore arrive at the conclusion

that Kailash (PW-12) is not supported either by P.W. 15 or by P.W.16 or by Ex.D-6 or by Ex.P-20 or by Ex.P-24.

The only reliable part of information contained in the FIR Ex. P-24 is that some people assaulted Kailash on the head and Virendra is lying injured in the Bus Stand. If the name of the appellant was known to Kailash P.W. 12, if Kailash saw the incident of murder committed by the appellant, what prevented him from running towards the Police Station and lodging the true First Information Report. The manner in which Kailash has observed the incident also does not inspire confidence. According to his testimony, he was entering the bus and it is at this very time that a ballam blow was given by the appellant to Virendra who was behind him. Nowhere Kailash (PW-12) says that he turned and saw the incident. He further says in Ex.D-6 that when he came home, he narrated the incident to Chhotibai and Chhotibai sent Kusum for lodging the report in the Police Station. If these statements in Ex.D-6 were correct, then why Kusum failed to narrate that it was the appellant who had given the ballam blow to the deceased Virendra. The testimony of Kailash also does not get any corroboration from the testimony of P.W.2 Kusum and P.W. 3 Chhotibai.

Another significant fact has been brought to our notice that Ex. D-3 is the dying declaration of Kailash (PW-12) which was recorded by the Tahsildar when Kailash was admitted in the hospital. Leaving aside the other defects of this alleged crying declaration, nowhere in this document, Kailash has narrated that it was Vijay Shankar who pierced ballam in the side of deceased Virendra. He narrates of other irrelevant facts except this important fact. P. S. Kulkarni was the Tahsildar who has recorded this dying declaration on 12-2-1988. The omission of a very important fact in this document also deprives the prosecution further of a valuable corroboration to the testimony of single eye witness Kailash (PW-12).

We have already stated earlier that the F.I.R. of the case Ex.P-24 is completely bereft of any facts concerning the involvement of the appellant in the crime. We have also observed that Ex.D-6 and its mirror Ex.P-20 are not at all honest. We have also observed that the witness Kailash (PW-12) does not stand corroborated with his own previous statement Ex.D-3 recorded by the Tahsildar on the date of the incident in the Hospital. Complete omission of the fact that the appellant had pierced the ballam, in the side of Virendra makes us more cautious in accepting the testimony of Kailash (PW-12). It is the duty of this Court to separate the grain of truth from the chaff of falsehood. We therefore, anxiously examined whether the case of the appellant can be separated from the case of accused persons acquitted by the trial Court and we are convinced that the evidence with regard to the acquitted accused is the same which has been used for convicting the appellant. Where the grain of truth cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation, the Court will have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made,

hen this principle will not apply. The Supreme Court was also of this view in Balaka Singh and Others Vs. The State of Punjab, . It would be pertinent to produce the observation of the Supreme Court for clarity:

(1) that the prosecution case against the convicted accused and the acquitted accused was so inextricably mixed up that it was not possible to sever one from the other. Having regard to the partisan and interested prosecution evidence, it was not possible to reject the prosecution case with respect to the four acquitted accused and accept it with respect to the five convicted accused. If the case against the four accused failed, then the entire prosecution would have to be discarded and it would not be possible for Supreme Court to make out a new case to convict the appellants as had been done by the High Court.

and (2) that the prosecution case against the five appellants had also not been proved beyond reasonable doubt and the manner in which the FIR and the inquest report had been made threw considerable doubt on the complicity of the five appellants in the crime.

As the trial Judge has based the conviction of the appellant upon the testimony of a single eye witness, we shall have to examine on the anvil of the pronouncement of the Supreme Court whether P.W. 12 Kailash comes in the category upon which the reliance can be placed. In Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, , a three Judge Bench, by V. R. Krishna Iyer, J. pronounced the judgment and in para 19, it observed:

Now let us sum up the whole case in the light of the evidence we have found to be of worth. We must observe that even if a witness is not reliable, he need not be false and even if the police have trumped up one witness or two or has embroidered the story to give a credible look to their case that cannot defeat justice if there is clear and unimpeachable evidence making out the guilt of the accused. Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

Informing ourselves of this important principle, we now proceed to analyse the evidence of Kailash (PW-12). The fate of the appellant hangs on the single testimony of this eye witness. We therefore have to see whether the conviction can be given on the sterling testimony of a competent honest man, although as a rule of prudence, the courts do seek the corroboration. We are also aware of the principle that witnesses have to be weighed and not counted and when we weighed the testimony of P.W. 12 Kailash, we found that he is not only underweight but very light. We also found that he is not honest man and his sterling testimony cannot be utilised for convicting the appellant. We are therefore of the view that the prosecution has not been able to prove its case against the appellant and the sole testimony of Kailash (PW-12) cannot be relied upon for maintaining conviction of the appellant.

To conclude, we allow the appeal and set aside the order of conviction and sentence, as passed by the trial Judge against the appellant. The appellant, if in custody, be released forthwith, if not required in any other case.