

(2008) 03 MP CK 0064
In the Madhya Pradesh High Court

State of Madhya Pradesh

APPELLANT

Vs

Ashok and Another

RESPONDENT

Date of Decision : 26-03-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 378
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2008) ILR (MP) 1503 : (2008) 2 JLJ 152 : (2008) 3 MPHT 194 :
(2008) 3 MPJR 1

Hon'ble Judges : Subhash Samvatsar, J; A.K. Shrivastava, J

Bench : Division Bench

Judgement

A.K. Shrivastava, J.

Feeling aggrieved by the judgment of absolvitur passed by learned 4th Additional Sessions Judge, Gwalior in Sessions Trial No. 228/1992, dated 26-11-1993 acquitting the respondents for the offence punishable u/s 302/34, IPC, the State of Madhya Pradesh has preferred this appeal u/s 378(3) of the Code of Criminal Procedure, 1973.

In brief the case of prosecution is that on 22-6-1992 at 8/30 in the morning Jagdish who is a labour went to his work place. After departure of Jagdish his father Chunnilal (hereinafter referred to as "the deceased") also proceeded to his work place. After some time, one girl of the locality came and informed Laxmi Bai at her home that some persons were assaulting the deceased by knives, as a result of which said Laxmi Bai rushed towards the place of occurrence which is situated near by a Jain Temple at Gandewali Sadak. The deceased who was the father-in-law of Laxmi Bai was lying near the door of temple and he gave oral dying declaration to Laxmi Bai that respondents had assaulted him. It is the further case of prosecution that respondent No. 2-Dewanand was having a knife and respondent No. 1-Ashok was having a hockey stick. Respondent No. 2-Dewanand has dealt the blows of knife to the deceased. The blood was oozing from the abdominal region of the deceased and it is said that on account of some

dispute of partition, the incident had taken place. It is the further case of prosecution that by making the point of partition, earlier also respondent No. 2- Dewanand assaulted Jagdish by knife and on account of enmity, they have caused injuries by knife and hockey stick resulting into the death of deceased at the spot.

Laxmi Bai lodged First Information Report in Police Station, Janakganj. On lodging of the First Information Report, criminal was triggered off and set in motion. After registering the case, the investigating agency sent the deceased to the hospital; arrived at the spot and prepared the spot map; recorded the statement of the witnesses; arrested the accused persons and after completion of the investigation, submitted a charge-sheet in the Competent Court which, on its turn, committed the case to the Court of Sessions and from where it was received by the Trial Court for its trial.

Both the respondents were charged u/s 302, IPC and in the alternative they were charged u/s 302/34, IPC. Needless to emphasis, both the accused persons abjured their guilt and pleaded complete innocence.

In order to prove the charges, prosecution examined as many as 11 witnesses and placed Exhs. P-1 to P-11, the documents on record. The defence of the respondents is of false implication and the same defence they set forth in their statement recorded u/s 313, Cr.PC., however, they did not choose to examine any witness in their defence.

Learned Trial Judge, on the basis of the evidence placed on record, came to hold that since Laxmi Bai was cited as an eye witness and from her testimony, it is not proved that she has seen the incident, therefore, learned Trial Court had acquitted the respondents from the charges by the impugned judgment.

In this manner, present appeal has been filed by the State of Madhya Pradesh.

The contention of Shri Bhadoriya, learned Public Prosecutor, is that learned Trial Court erred in law in holding that Laxmi Bai (P.W. 1) has not seen the incident and since she is an eye witness and on the basis of her unimpeachable evidence the offence committed by the respondents has been duly proved, hence learned Trial Court erred in law in acquitting the respondents. Further it has been contended by learned Public Prosecutor that even if it is held that Laxmi Bai (P.W. 1) has not seen the incident, but it is borne out from her testimony as well as from the FIR that deceased gave oral dying declaration to her, therefore, it would be sufficient evidence against the respondents holding them to be guilty for the charges levelled against them. On the premised submissions, it has been argued by learned Public Prosecutor that by allowing this appeal, the judgment of absolvitur be set aside and the respondents be convicted for the charges levelled against them.

On the other hand, Shri R.K. Sharma, learned Counsel for the respondents, argued in support of the impugned judgment and has submitted that cogent

reasons have been assigned by learned Trial Court holding Laxmi Bai (P.W. 1) not to be an eye witness. Further it has been contended by learned Counsel that on the basis of the solitary evidence of Laxmi Bai (P.W. 1) without any corroboration, the conviction cannot be accorded. In support of his contention, learned Counsel has placed reliance on Mahabir Singh etc. etc. Vs. State of Haryana, , Joseph Vs. State of Kerala, and Lallu Manjhi and Another Vs. State of Jharkhand, . learned Counsel has also placed reliance on the decision of the Supreme Court Vadivelu Thevar Vs. The State of Madras, .

By placing reliance on the Division Bench of this Court Amar Singh v. State of M.R. 1996 J.L.J. 52, it has been argued by learned Counsel for the respondents that looking to the injuries sustained by the deceased, it was not possible for him to speak and, therefore, question of giving oral dying declaration by the deceased to Laxmi Bai (P.W. 1), does not arise.

Lastly, it has been argued by learned Counsel that if two views are possible on the basis of the evidence placed on record, the view which has been taken by the learned Trial Court acquitting the respondents should be given credence and weightage and the judgment of absolitur should not be converted into the judgment of conviction merely on the basis that another view is also possible. On these premised submissions, it has been argued by learned Counsel for the respondents that this appeal sans substance and the same be dismissed.

Having heard learned Counsel for the parties, we are of the considered view that this appeal deserves to be allowed in part.

In the present case, sole eye witness which has been examined by the prosecution is Laxmi Bai (P.W. 1). No doubt, it is true, that this witness is the daughter-in-law of the deceased as she is the wife of Jagdish who is the son of the deceased. However, merely because Laxmi Bai (P.W. 1) happened to be the close relative of the deceased would, in itself, be no ground to discard her testimony if the same is found to be otherwise reliable.

It is well settled in law that the evidence of the close relative and friends of the deceased is to be scrutinized with great care and caution. By keeping this well settled principle of law, we shall now examine the testimony of sole eye witness Laxmi Bai (P.W. 1)

According to eye witness Laxmi Bai, on the fateful day one girl of her locality came to her home when she was cooking the food and informed that two persons are assaulting by knives to the grand-father of Neetu (it would be relevant to mention here that Neetu is the daughter of this witness and hence the deceased was her grand-father). Immediately this witness rushed to the place of occurrence and found that both the respondents were causing injuries by knives to her father-in-law. Thereafter she went to call her Jaith (husband's elder brother) Ghanshyam who happened to reside near by her house. She has further stated that when she arrived at the spot, at that time both the accused persons were giving blows of knives to the deceased.

Firmly this witness has stated that the deceased told her that respondents had caused injuries to him. According to this witness, the respondents were armed with knives and both of them were giving blows of knives on the chest region of the deceased. On being asked to this witness, she explained that on account of property dispute there is enmity. The name of the brother of deceased is Dharm Singh and respondents -are the sons of Dharm Singh.

This witness Laxmi Bai is also the author of FIR (Exh. P-1) and she has proved her FIR (Exh. P-1). On going through the cross-examination of this witness, it is gathered that this witness is an illiterate lady because she has stated in Para 5 of her cross-examination that she does not know the measurement of the distance as she is not acquainted with Furlong, Mile etc. However, she has stated that within ten minutes she reached at the place of occurrence from her house. In Paras 6 and 8 of her cross-examination, though she has stated that when she arrived at the spot, at that juncture, respondents were causing injuries by knives to the deceased, but, she has put her ignorance that why this fact has not been mentioned in FIR (Exh. P-1) and her case diary statement (Exh. D-1). The factum of causing injuries by knives by both the accused persons is neither in the FIR (Exh. P-1) nor in her case diary statement (Exh. D-1).

Later on, she has stated that when she arrived at the spot, at that time she saw accused persons were running away from the place of occurrence and ultimately she has stated that when she arrived at the spot, by that time, respondents had already fled from the place of occurrence. Thus, according to us, learned Trial Court did not commit any error in holding that this witness is not an eye witness. We have also minutely scrutinized the evidence of this witness particularly Para 8 of her cross-examination and we find that this witness has not seen the incident because she is not firm on the point of causing injuries by the respondents by knives in her presence.

However, on deeper scrutiny of the testimony of this witness and by keeping her evidence in juxtaposition to the FIR (Exh. P-1) lodged by her and by reading them conjointly, we find that the deceased gave oral dying declaration to her that respondents have caused injuries to him. In the FIR, it has been specifically mentioned by this witness that respondent No. 2- Dewanand was having knife and respondent No. 1-Ashok was having hockey stick. The blood was oozing from the abdominal region of the deceased. In her testimony, she has also stated and this fact also find place in the FIR (Exh. P-1) lodged by this witness that there is enmity between the accused persons and the complainant party in respect of the immovable property.

On close scrutiny of the evidence of this witness, we find that her testimony is in two parts. In the first part, she has demonstrated herself to be an eye witness which has not been found to be proved and in the other part she has stated that there is an oral dying declaration of the deceased. In Para 2 of her testimony, she has specifically stated that deceased gave oral dying declaration to her about causing of injuries by the respondents and this fact also finds place in her prompt

FIR (Exh. P-1). On going through FIR, we find that the incident took place at 8.30 in the morning and within half an hour at 9.00 a.m. on 22-6-1992 FIR was lodged and, therefore, it cannot be said or inferred that the oral dying declaration is a concoction. Apart from this, there is no cross-examination on this vital and turning point of the case. In the cross-examination not even a single question was put by the respondents in regard to giving oral dying declaration by the deceased to Laxmi Bai (P.W. 1). Thus, giving of oral dying declaration by the deceased to this witness, as stated by her in Para 2 of her testimony, is unchallenged. The Supreme Court in the case of Prakash and another Vs. State of Madhya Pradesh, , in Para 11 has held that if the oral dying declaration is reliable, the conviction could be accorded on its basis.

We are not at all impressed by the submission of learned Counsel for the respondents that it was the duty of the prosecution to ask the Autopsy Surgeon that despite deceased having received injuries, whether he was able to give oral dying declaration. Since, no cross-examination was put by respondents in respect to the oral dying declaration given by the deceased to Laxmi Bai (P.W. 1), according to us, it was not necessary for the prosecution to put this question to the Autopsy Surgeon because the oral dying declaration was not challenged in the cross-examination of Laxmi Bai (P.W. 1) who was examined earlier to the doctor. Apart from this, the Supreme Court in the case of Prakash and Anr. (supra), in Para 11 has held as under:

11. ...It is not borne out from the evidence of the doctor that the injuries were so grave and the condition of the patient was so critical that it was unlikely that he could make any dying declaration.

The Supreme Court also held in the same Para 11 that in ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants.

The Supreme Court further held that there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused persons. The Supreme Court hence held that it is quite likely that on being asked, the deceased would name the assailants. The Supreme Court did not interfere in the finding of the High Court accepting the oral dying declaration. In the present case also the respondent are well known to the deceased and, therefore, on being asked by Laxmi Bai (P.W. 1) who is the daughter-in-law of the deceased, the deceased had told the names of the respondents.

The decision of Division Bench of this Court in the case of Amar Singh (supra) is quite distinguishable on the facts and circumstances, because, on going through Para 4 of the said judgment, we find that after a considerable long period of the incident, the oral dying declaration was given by the deceased to the witnesses

and in that situation, it was held by the Division Bench of this Court that looking to the serious injuries sustained by the deceased it was not possible for him to give oral dying declaration after a considerable long period. However, in the present case within a span of few minutes only, Laxmi Bai (P.W. 1) arrived at the spot and at that time the deceased was in a position to give oral dying declaration which he gave to Laxmi Bai (P.W. 1), therefore, the decision of Amar Singh (supra) is not applicable in the present factual scenario.

However, in the FIR (Exh. P-1), it has been stated by Laxmi Bai (P.W. 1) that by giving oral dying declaration to her, deceased told that respondent No. 1-Ashok was having a hockey stick while respondent No. 2-Dewanand was having a knife. But, nowhere in her entire testimony she has stated anything about the hockey stick. Since as per prosecution's own case respondent No. 1-Ashok has been assigned by a hockey stick in the FIR, but, Laxmi Bai (P.W. 1) has not at all stated about using of hockey stick by respondent No. 1-Ashok, we are of the view that respondent No. 1- Ashok is entitled for the benefit of doubt. Respondent No. 2- Dewanand has been assigned by knife and it has also been stated by the deceased by giving oral dying declaration to Laxmi Bai (P.W. 1) and since there are umpteen injuries of knife, we are of the view that respondent No. 2-Dewanand is responsible for causing death to the deceased.

On going through the testimony of Autopsy Surgeon Dr. J.N. Soni (P.W. 6), we find that deceased sustained following injuries;-

(i) Lacerated wound 7 cm above the nasion and tern, left to mid line, 3 cm x 0.5 cm x 0.3 cm margin abraded for 0.5 cm both side sagittally placed.

(ii) Rail pattern contusion right shoulder 6 cm x 3 cm, superior aspect anterior posteriorly.

(iii) Contusion 6 cm above the right wrist posteriorly 5 x 1.5 cm vertical.

(iv) Incised wound right index finger distal phalanx, 1.5 cm x 0.5 cm x 0.5 cm flapping effect, distally.

(v) Incised wound 5 cm above right subcostal margin, 1 cm x 0.5 cm x 0.5 cm, anteriorly, transverse.

(vi) Stab wound 1.5 cm above the right iliac crest 2 cm x 0.5 cm flapping upwards it was 5 cm deep in the muscles.

(vii) Stab wound 12 cm below the iliac crest, lateral aspect of right thigh 3.5 cm x 1.5 cm x 5 cm deep, vertically placed.

(viii) Stab wound two cm below the injury No. 7, two posterior one, 1.5 cm x 0.5 cm and posterior one 3 cm x 1.0 cm, they are communicated subcutaneously 5 cm apart.

(ix) Stab wound 2 cm anterior to injury No. 8. 1.5 cm x 0.5 cm x 1.5 cm.

(x) Stab wound 2 cm above and 1 cm above the posterior injury of No. 8, 1.5 cm

x 0.5 cm x 1 cm deep.

(xi) Abrasion right leg mid 4 x 1 cm anteriorly.

(xii) Stab wound 17 cm below the supra sternal notch and 5 cm left to mid line over chest 2.5 cm x 0.5 cm. It passes between 5th and 6th ribs inside the thorax, after cutting the lung through and through to pericardium, pericardial cavity full of blood and had given the laceration on lateral border of the left vertical wall cut and cavity opened 6 cm deep.

(xiii) Stab wound 6 cm below the injury No. 12 and 1.5 cm left to mid line 2 cm x 0.5 cm x 5 cm deep. It has cut the lower portion of lung. (5 cm deep).

According to the doctor, death was due to shock and haemorrhage as a result of thoracic injury caused by sharp penetrating object. On going through injury No. xii and other injuries, we find that on thoracic region there were injuries of sharp and penetrating object like knife. The deceased sustained as many as eight injuries of knife and, therefore, looking to the nature of injuries, we are of the view that respondent No. 2-Dewanand has committed the offence u/s 302, IPC.

In the case of Jagdish and Anr. v. State of M.R. AIR 2000 SC 2059, three persons were prosecuted and the Trial Court found that two persons namely Vidyaram and Jagdish are entitled for acquittal because the prosecution has failed to prove its case against them, but convicted Uttam causing fatal injuries on the vital parts by Farsa, which were found to be established and, eventually, convicted him for the offence punishable u/s 302, IPC. In appeal by the State, High Court also convicted the acquitted accused persons (sic)