

Sheshrao and ors. Vs. the State

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Court : Karnataka

Decided On : Jun-27-2001

Reported in : 2001CriLJ3805

Judge : H.N. Narayan and ;N.S. Veerabhadraiah, JJ.

Acts : Indian Penal Code (IPC) - Sections 1, 34, 302 and 342; Code of Criminal Procedure (CrPC) - Sections 482, 217 and 231

Appeal No. : Cri. Appeal No. 200 of 1998

Appellant : Sheshrao and ors.

Respondent : The State

Advocate for Def. : B.C. Muddappa, Addl. SPP

Advocate for Pet/Ap. : Basavaraj Kareddy, Adv.

Disposition : Appeal allowed

Judgement :

H.N. Narayan, J.

1.This appeal is directed against the judgment of conviction and sentence recorded by the 1st Additional Sessions Judge, Gulbarga convicting accused Nos. 1 to 3 of offences punishable under Sections 342 and 302 read with Section 34,

I.P.C. and sentencing them to undergo imprisonment for life and to pay a fine of Rs. 3,000/- each for the offence punishable under Section 302 read with Section 34, I.P.C., in default to undergo Section 1. for a period of 3 months. The learned Sessions Judge further sentenced them to undergo R.I. for a period of 6 months for the offence punishable under Section 342, read with Section 34, I.P.C. and ordered the sentences to run concurrently.

2. The appellants-accused were charged and tried for the offences punishable under Sections. 342 and 302 r/w Section 34, I.P.C. All the accused denied the charges and claimed to be tried. In proof of the charges, prosecution relied on the evidence of 16 witnesses, 13 documents and 9 material objects. After hearing the arguments on both sides and on consideration of the evidence on record, the learned Sessions Judge held the accused guilty of the charges under Sections. 342 and 302 r/w Section 34, I.P.C. and passed the impugned judgment.

3. Accused Nos, 1 and 2 are brothers and accused No. 3 is their sister. They are appellants 1 to 3 before this Court. 3rd appellant who will be hereinafter called as the 3rd accused was married to the deceased-Gopal Jadhav about 20 years prior to the date of incident which occurred on the night of 2/3-1-1996 at Tugaon village. She had two sons and two daughters but to her misfortune, her sons died prematurely. It is the case of the prosecution that-she has undergone Tubectomy operation which angered her husband viz., the deceased and quarrel started between her and the deceased. Therefore, she left her husband, took her two daughters to her parents' house and stayed with accused Nos. 1 and 2 at Tugaon. The deceased thereafter married P.W. 2 Prabhavathi, 10 years prior to the date of incident and she gave birth to a son and two daughters. They were residing in Gagalegaon village which is situated at a distance of 2 kms from Tugaon. The deceased gave 5 acres of land to his first wife viz., accused No. 3 in lieu of maintenance. He was also visiting her house in order to see his daughters. However, due to family pressure, he was made to request accused No. 3 to return 5 acres of land given by him in lieu of maintenance, which was not acceptable to her and her brothers. Thus the accused were not happy with the conduct of the deceased. It is the further case of the prosecution that, on the evening of 2-1-1996 which was a Tuesday, the deceased visited Tugaon. He first visited his sister,

P.W. 6-Kamalabai and thereafter left to see his wife, accused No. 3. It is the further case of the prosecution that on the date of Incident during night at about 1.00 or 1.30 a.m., P.W. 1-Baburao, P.W. 3-Anjalibal, P.W. 4-Rekhabai, P.W. 5-Vithal and P.W. 6-Kamalabai heard some noise in front of the school situated very near to their houses. Hence they came out of their houses and found accused Nos. 1 to 3 assaulting the deceased. The hands and legs of the deceased were tied with a rope. While accused No. 3 assaulted the deceased with stones, accused No. 3 assaulted with axe on his head and accused No. 1 assaulted with a stick. They so assaulted the deceased by saying that he had deserted accused No. 3 ten years back and had now come in search of holdings. P.W. 1 who is the village Dalapathy went to rescue the deceased taut he was threatened by the accused persons. Thereafter, all the witnesses went back to their houses as if nothing had happened. They witnessed this incident in the electric light. On the next day morning at about 6.00 or 6.30 p.m., P.W. 1 came out of his house and found that the deceased was still alive. The deceased requested him to give some water and P.W. 1 gave him water. Since there was no vehicle in the village, P.W. 1 took him in a bullock cart to Government Hospital, Aland where he was declared dead by the doctor at. about 11.30 a.m. P.W. 1 thereafter went to Aland Police Station and gave an oral complaint which was recorded by P.W. 15 as per Ex. P.I. On the basis of the said complaint, P.W. 15 registered a criminal case in Crime No. 2/96 and forwarded the FIR to the JMFC, Aland. P.W. 14-Mallikarjun, CPI, who came to know of the registration of the case immediately took over further investigation of this case. At about 1.15 p.m., he visited the Government Hospital, Aland and conducted inquest mahazar on the dead body in the presence of witnesses. The dead body was thereafter handed over to the police constable for getting the post-mortem examination done. On the same day, he visited Tugaon village and drew spot mahazar Ex. P.4 and seized 3 big stones, one small stone, a pair of shoes, wrist watch, one rope and one stick. The accused were absconding from the place. He made arrangements to trace them. In the meantime, he recorded the statements of witnesses. The accused were arrested on 17-1-1996. Upon the voluntary statement made by accused No. 2 as in Ex. P. 11, he recovered axe M.O. 5 which was produced by accused No. 2 from his house. He seized it under panchanama Ex. P. 5. The further investigation was taken over by

P.W. 16 who after verifying the Investigation made so far, filed the charge-sheet against all the accused persons.

4. The prosecution mainly rests its case on the direct evidence of P.Ws. 1, 3, 4 to 6 out of them P.W. 3 is the daughter of the deceased through accused No. 3. P.W. 4-Rekhabai is a neighbour, P.W. 5-Vithal is another neighbour and P.W. 6-Kamalabai is the sister of the deceased. P.W. 3-Anjalibai turned hostile to the prosecution. P.W. 4-Rekhabai supported the prosecution case in part while others supported the prosecution in full. The learned Sessions Judge who was persuaded to accept the evidence of eye-witnesses supported by the recovery panchanama of seizure of M.O.5, going back of accused No. 3 to her parents' house, giving of 5 acres of land to her by the deceased in lieu of maintenance and the conduct of accused No. 3 in assaulting her husband, has held this evidence firm, truthful and reliable and also held all the accused guilty of the offences punishable under Sections. 342 and 302 r/w Section 34, I.P.C. The accused-appellants have questioned the legality and correctness of the finding of the learned Sessions Judge.

5. We have heard the arguments of Sri Basavaraj Kareddy, learned counsel for the appellants and Sri B.C. Muddappa, learned Additional SPP for the State. We have scrutinised the evidence placed before the Court.

6. Sri Basavaraj Kareddy, learned counsel for the appellants has contended that the very genesis of the prosecution case is doubtful. He further contended that though the police registered a case on the oral complaint of P.W. 1 at about 12.05 p.m. on 3-1-1996, the eye-witnesses viz., P.Ws. 1 and 3 have unequivocally stated the presence of police people in the Tugaon village at about 7 a.m. on the said day who questioned P.W, 1 and learnt about the incident. They also shifted the injured Gopal Jadhav in the police jeep to the Government Hospital, Aland and promptly Informed P.W. 2 about, it. The prosecution has failed to explain as to why the case was not registered earlier upon the information furnished by P.W. 1. It is further contended that Ex. P.I, the complaint does not disclose the names of other eyewitnesses to the incident even though the complaint was lodged after long lapse of time and after much deliberation and thus the whole case of the

prosecution is full of contradictions. The learned Sessions Judge has failed to scrutinise this material placed by the prosecution while holding the accused guilty of the offences alleged against them. It is further submitted by the learned counsel for the appellants that the case projected by the prosecution is different from the case projected at the time of trial and the prosecution is not honest in placing all the material before the Court. It withheld certain vital information only to snatch an order of conviction by somehow, This is unknown to the criminal jurisprudence, Therefore, it, is submitted that the judgment of conviction and sentence recorded by the learned Sessions Judge is not sustainable in law and is liable to be set aside.

7. Sri B.C. Muddappa, learned Additional SPP, however, attempted to justify the nature of evidence placed before the Court by the prosecution and the conclusions reached by the learned Sessions Judge. Upon reading the evidence of P.Ws. 1 and 2, the learned Public Prosecutor fairly conceded that there is something hidden in the case of the prosecution which he is unable justify at this stage. We appreciate this fair submission of the learned Additional SPP.

8. The question which calls for consideration in this appeal is whether the finding of guilt recorded by the learned Sessions Judge is sustainable in law?

9. We may start with the preface that the presence of five eye-witnesses does not deter us from taking a different view of the case. It is not enough for the prosecution to produce number of eye-witnesses, but it must further show that all those eye-witnesses are really speaking truth before the Court. It is not the quantum, but quality of evidence produced before the Court that matters. Very often, even untruthful witnesses give evidence with firmness which is not discredited in cross-examination. We have to examine the case of the prosecution in this background.

10. It is undisputed that accused No. 3 left her husband long back with her two daughters and stayed with accused Nos. 1 and 2, her brothers at Tugaon village. Since she gave birth to four children, she had undergone Tubectomy. Unfortunately, her two sons died prematurely. The deceased was not happy with his wife who has undergone Tubectomy. Therefore, quarrel ensued between the

husband and wife. She deserted her husband, took her two daughters and took shelter in her parents' house. The deceased thereafter took a second wife viz., P.W. 2. It is also not in dispute that the deceased visited his first wife viz., accused No. 3 and demanded return of 5 acres of land which was given to her in lieu of maintenance. It is the case of the prosecution that accused Nos. 1 and 2 were angry with the conduct of the deceased who frequently visited their house demanding return of 5 acres of land. The two daughters of accused No. 3 including P.W. 3 grew up to a marriageable age and that they had a duty to arrange their marriage. In the light of the convincing evidence let in by the prosecution in proof of these facts, we proceed from here to examine the evidence of the eye-witnesses as to whether they are reliable, truthful and whether the Court can safely rely upon their evidence to convict the accused persons for the offence of murder.

11. P.W. 1 was a village Dalapathy of Tugaon village. According to him, on the date of incident during night when he was sleeping in his house, at about 1.00 a.m., he heard some galata and, therefore, went near the school at Tugaon. He noticed all the accused persons assaulting the deceased-Gopal. Accused No. 1 assaulted the deceased with stick all over his body while accused No. 2 assaulted the deceased with axe on his head and accused No. 3 assaulted the deceased with stones all over the body. There was electric light by the side of the said school. He also noticed that the hands and legs of the deceased were tied with a rope at the time of incident. After seeing the incident, he went back to his house as the accused were telling that nobody has to come to the place of the incident. Thereafter, in the early morning at about 6.00 a.m., he again went to the place of incident. Gopal was still alive. He asked him to give some water and he gave water to him. He then took the injured in a bullock cart to Aland hospital where the doctor declared him dead. He thereafter went to Aland police station and lodged the oral complaint.

12. P.W. 3, the daughter of the accused No. 3 and the deceased, has not supported the case though she is examined as an eyewitness to the prosecution.

13. P.W. 4-Rekhabai owns a house which is very close to the school at Tugaon. According to her, on the date of incident at about 1.00 or 1.30 a.m., she heard some galata from the school side. She, therefore, woke up and opened the door of her house. The school is at a distance of about 10 to 12 feet from her house. The hands and legs of the deceased were tied with a rope and all the accused were assaulting the deceased. She has narrated the overt acts committed by each one of them. She saw the said incident in the electric light. She has stated that P.W. 1 - Baburao was also present there and except him no other persons have witnessed the incident. After seeing her, the accused left the deceased and went away. On the next day morning, she noticed P.W. 1 giving water to the injured and taking him in a bullock cart to Aland. She was treated as hostile at that stage and she was cross-examined by the Public Prosecutor.

14. P.W. 5-Vithal is another neighbour who witnessed this incident. According to him, the incident occurred at about 1.30 a.m. on the said night. His house is situated by the side of the school. He has stated that he came out of his house and saw the incident. He has also given the specific over acts of the accused. He has corroborated P.Ws. 1 and 4 in all material particulars.

15. P.W. 6-Kamalabai is none other than the elder sister of the deceased. She was residing with her husband C.W. 23, Rangarao and her brother-in-law C.W. 7, Maruthi, in Tugaon village. According to her, on the date of incident, the deceased-Gopal had come to Tugaon village at about 6.00 p.m. He visited her at about 6.00 p.m. He went out of her house stating that he was going to the house of accused No, 3. On that day, during night at about 1.00 or 1.30 a.m. after hearing some galata, herself and her husband came out of the house and found accused Nos. 1 to 3 assaulting the deceased with stick, axe and stones. But she had not seen any other person witnessing the incident. She became unconscious after seeing the incident. She has stated that the legs and hands of the deceased were tied with a rope. She has identified the weapons of offence used by the accused persons on the said night.

16. These witnesses were cross-examined at length by the defence. P.W. 1-Baburao who lodged the complaint, at about 12.05 p.m. on 3-1-1996 has admitted

in his cross-examination that on the date of incident; during night. P.W. 6, the sister of the deceased or her husband did not come to his house. They did not meet him at all on the said day. He has further stated that on the date of incident at about 7.00 or 8.00 a.m., police had come to Tugaon village in a jeep and that they were brought by accused Nos. 1 and 3 themselves. It is also admitted by him that he informed the incident to the police at Tugaon. The police, after seeing Gopal and the place of incident wrote something. When the police had come to the spot, none of the villagers were present there. The police were at Tugaon village for about half an hour. Thereafter, they went in a jeep. He has denied the suggestion that the police took the injured to the hospital. It is admitted by him that when the police had come to Tugaon village in the morning hours, accused Nos. 1 and 3 were present at the place of incident and the police arrested accused Nos. 1 to 3 on the same day in the afternoon.

17. P.W. 2-Prabhavathi, in her cross-examination endorsed some of these admissions made by P.W. 1 in the cross-examination. At para 4 of her evidence in cross-examination, she has admitted that at about 9.00 a.m., police came to her village and informed that her husband was admitted in the hospital. She has also stated that the police informed her that her husband was taken in a jeep and admitted to the hospital at Aland. She first went to Aland police station and then to the hospital. It is stated by her that except the police, no other person informed her that accused assaulted her husband.

18. It emerges from these admissions made by P.Ws. 1 and 2 in the cross-examination that Aland police were very much present at Tugaon village near the place of incident at about 7 or 8 a.m. on that day. They came in a jeep and shifted the injured Gopal to the Government hospital, Aland. They were also appraised of the incident in question by P.W. 1. But they have not recorded the statement of P.W. 1 at Tugaon village. The police who came in a jeep are none other than P.Ws. 14 and 15. There was no reason for not recording the statement of P.W. 1 at Tugaon village on the said morning by the police, P.W. 14 has denied and disputed this evidence of P.Ws. 1 and 2 that he visited Tugaon village on the said day morning and came to know of the incident through P.W. 1. P.W. 14 who was very much present in Aland police station on the early morning of 3-1-1996 must

have been informed of the incident. The defence has suggested specifically that P.W. 14 visited Tugaon village at the instance of accused Nos. 1 and 3 which is admitted by P.W. 1, the eye-witness supported by P.W. 2, the wife of the deceased. But the Investigating Officer refused to admit this truth. We are aware that the object of cross-examination is to elicit truth if any. These facts which are suppressed by the prosecution witnesses in examination-in-chief have come out with the truth in cross-examination. What emerges from this material is that the Investigating Officer who recorded the complaint of P.W. 1 at Aland police station at about 12.05 p.m. was buying time to give shape to the case. Here is a case where the incident is stated to have been witnessed by not less than five witnesses whose attention was drawn by the galata created by the accused persons while assaulting the deceased. There were other residential houses around the school. But the residents of those houses did not come out of their houses. It is not the case of the prosecution that those houses were not occupied by the residents.

19. Apart from P.W. 1, the incident was witnessed by two neighbours who are projected as independent and disinterested witnesses by the prosecution. P.W. 16 is none other than the elder sister of the deceased. Her house is situated little away from the school beyond the house of P.W. 1. If she could hear the galata and come to the place of incident, it is not known why the people residing in the neighbouring houses did not come out. P.W. 6 came out of the house with her husband C.W. 23, Rangarao. Both of them actually witnessed these accused persons assaulting the deceased whose hands and legs were tied with a rope. There was no attempt by them to rescue the deceased by personally interfering or by raising hue and cry to attract the attention of the residents of that locality. It is in evidence that there are about 20 residential houses near the school. According to P.W. 6, after seeing the incident, she became unconscious. It is not known that happened to her husband C.W. 23, Rangarao. He is not examined by the prosecution for reasons not explained. Having regard to the human conduct, it is highly impossible for P.W. 6 and her husband to have gone back without rescuing the deceased. P.W.1 who saw the incident went back as a helpless man so also P.W. 6 and her husband. We may ignore P.Ws. 4 and 5 who are the other neighbours. None of these persons informed the police when they visited Tugaon

village at 7.00 or 8.00 a.m. in the morning.

20. One another unacceptable circumstance placed by the prosecution is shifting of the injured by P.W. 1 in a bullock cart to Aland which is at a distance of 20 kms. from Tugaon village. P.W. 1 has denied the suggestion that the deceased was shifted in the police jeep on the said morning. P.W. 2 however, has confirmed the suggestion of the defence that the police came to her village at about 9.00 a.m. on the said day and informed that her husband was admitted in the Government hospital, Aland. She therefore, went to the police station first and then to the hospital by which time her husband was dead. P.W. 1 is obviously speaking untruth.

21. The question for consideration after this elaborate discussion is whether the theory of the prosecution that the incident occurred near the school of Tugaon village at about 1.00 or 1.30 p.m. could have been witnessed by these witnesses.

22. We may add at this stage that we have read the prosecution papers in its entirety. On careful perusal of the prosecution papers, we find that there is an attempt to suppress some material facts from the purview of the Court.

23. An important question that arises for consideration at this stage is what is the duty of the prosecutor who was entrusted with duty of presenting the prosecution case before the Sessions Court.

24. We have come across a catena of decisions on this question rendered by the Apex Court and other High Courts. In *State of Bihar v. Ram Naresh Pande*, : 1957 CriLJ567 , the Apex Court at page 393 (of AIR) : at p. 571 of Cri LJ observed as follows :-

It is right to remember that the Public Prosecutor (though an Executive Officer as stated by the Privy Council in , is in a larger sense, also an officer of the Court and that he is bound to assist the Court with his fairly considered view and the Court is entitled to have the benefit of the fair exercise of his function. It has also to be appreciated that in this country the scheme of the administration of criminal justice is that the primary responsibility of prosecuting serious offences (which are

classified as cognizable offences) is on the executive authorities. Once information of the commission of any such offence reaches constituted authorities, the investigation, including collection of the requisite evidence, and the prosecution for the offence with reference to such evidence, are the functions of the executive. But the Magistrate also has his allotted functions in the course of these stages.

25. In *Hitendra Vishnu Thakur v. State of Maharashtra* : 1995 CriLJ517 , the Apex Court held that the Public Prosecutor is not a part of the investigating agency. He is an independent statutory authority. It is held by the Apex Court in *Mukul Dalai v. Union of India* : [1988]3SCR868 that the office of the Public Prosecutor is a public one and the primacy given to the Public Prosecutor under the Scheme of the Code has a social purpose.

26. The role of Public Prosecutor in conducting the trial of a warrant case before the Sessions Judge is highlighted by a number of judgments of various High Courts in this country. The pronouncements on the point is unanimous. There should be on the part of the Public Prosecutor no unseeingly eagerness for or grasping at conviction. His duty as Public Prosecutor is not merely to secure the conviction of the accused at all costs but to place before the Court whatever evidence is in his possession, whether it be in favour or against the accused and to leave it to the Court to decide upon all such evidences whether the accused had or had not committed the offence with which he stood charged. The Public Prosecutor is not supposed to go out of his way to secure a conviction. He has to be truthful and impartial. A Public Prosecutor is not a mouth-piece for the State. He must not consciously misstate the facts, nor knowingly conceal the truth. The Public Prosecutor must not suppress or keep back from the Court evidence relevant to the determination of the guilt or innocence of the accused. He must present a complete picture and not be partial. He has to be fair to both sides in the presentation of the case. The ideal Public Prosecutor is not concerned with securing convictions, or with satisfying the departments of the State Government, with which he has to be in contact. He must consider himself as an agent of justice.

27. We have already noticed that truth has come out from the mouth of eye-witnesses about the suppression of material facts in the prosecution case. The genesis of the prosecution case itself is doubtful as there is an attempt to suppress some important material from the purview of the Court at the trial. If that material was placed before the Court, the trial Court would have reached a different conclusion. However, in fairness to the learned Sessions Judge, we state with caution that the learned Sessions Judge has not scrutinised the entire evidence on record carefully before reaching the conclusion that the accused alone are guilty of the offence of murder.

28. P.W. 1 has admitted in cross-examination that accused Nos. 1 to 3 were very much present at the time of police visit to their village on the morning of 3-1-1996 and were taken to custody by the Investigating Officer. P.W. 14 has disputed this fact. The prosecution has come out with a case that the accused were absconding till 17-1-1996 and thereafter P.W. 14, the Investigating Officer recorded the so-called disclosure statement of accused No. 2 leading to the recovery of M.O.5 Axe. This piece of evidence placed on record by P.W. 14, the Investigating Officer is not acceptable. It is not the duty of the Investigating Officer to place false facts. If his evidence is scrutinised in this background, it has the tendency of committing perjury. However, having regard to the circumstances under which the matter is investigated, we do not propose to initiate any action against the officer for perjury.

29. The defence in this case has nothing to boast of, for the simple reason that a very important incriminating evidence is not brought on record. There is a failure on the part of the defence also to bring this very material suppressed by the prosecution. It is not out of place to record here that the investigation papers disclose that the incident of assault of the deceased occurred in the house of the accused on the said night and the injured was thereafter thrown out near the school to suffer his fate. If this is true, then the so-called eye-witnesses could not have witnessed the incident at all which took place in the house of the accused. The Investigating Officer therefore shifted the place of incident itself. Our experience on the criminal side tells us that this is the handiwork of the Investigating Officer in projecting the case in this manner only to gain conviction somehow. This suppression of truth gives rise to many doubts and, therefore, we

hesitate to rely upon such concocted material to convict the accused for a heinous offence of murder specially when the Court expects a very honest, truthful and reliable evidence from the prosecution in proof of the charges against accused persons. Therefore, in our opinion, the Judgment of the learned Sessions Judge is clearly not sustainable in law and it is liable to be reversed.

30. In the result, this appeal is allowed. The judgment of conviction and sentence recorded by the learned Sessions Judge is set aside. We acquit the appellants-accused of all the charges framed against them. Accused are on bail. Their bail bonds stand cancelled.

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