

Phool Chand and Etc. Vs. State of U.P.

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Court : Allahabad

Decided On : Oct-23-2003

Reported in : 2004CriLJ1904

Judge : Vishnu Sahai and ;Umeshwar Pandey, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300 and 364; Code of Criminal Procedure (CrPC) , 1974 - Sections 164

Appeal No. : Criminal Appeal Nos. 3467, 2476 and 2683 of 2003 with Capital Sentence Ref. No. 5 of 2003

Appellant : Phool Chand and Etc.

Respondent : State of U.P.

Advocate for Def. : Amarjeet Singh, APP

Advocate for Pet/Ap. : P.N. Mishra, Sr. Council and ;Hari Om Khare, Adv.

Disposition : Appeal allowed

Judgement :

Umeshwar Pandey, J.

1. The aforesaid three Criminal Appeals and Capital Sentence Reference arise out of the impugned judgment and order of conviction and sentence dated 21-5-2003

rendered in Sessions Trial No. 89 of 1998 by Addl. Sessions Judge, Lalitpur. Since the judgment and order challenged in these criminal appeals is one and the same which is the subject matter of the Capital Sentence Reference made by the learned trial Judge, all the appeals and the reference are herewith, taken up together for disposal.

2. The appellant accused Phool Chand stood his trial on the charges for the offences punishable under Sections 147 364 read with Sections 149 and 302 read with Section 149 I. P. C. before the Addl. Sessions Judge and he was convicted and sentenced as following :--

(a) for the offence punishable under Section 147 I. P. C. he was sentenced to imprisonment for the period already spent by him in the lockup;

(b) for the offence punishable under Section 364 read with Section 149 I. P. C. he was sentenced to undergo rigorous imprisonment for a term of five years and to pay a fine of Rs.5,000/-, in default of payment of which he was further directed to undergo rigorous imprisonment for one year; and

(c) for the offence punishable under Section 302 read with Section 149 I. P. C. he has been sentenced to death.

The appellants Jagdish, Dhira, Nathuram, Beera, Mangi Lal, Ram Dayal, Ramdas, Gyasi Ram and Ghanshyam stood their trial on the charges for the offences punishable under Sections 147 364 read with Sections 149 and 302 read with Section 149 I. P. C. before the Trial Judge and they were convicted and sentenced as following :--

(a) for the offence punishable under Section 147 I. P. C. they were sentenced to imprisonment for the period already spent by them in the lockup;

(b) for the offence punishable under Section 364 read with Section 149 I. P. C. they were sentenced to undergo rigorous imprisonment for a term of five years and to pay a fine of Rs. 5,000/- each, in default of payment of which they were further directed to undergo rigorous imprisonment for one year; and

(c) for the offence punishable under Section 302 read with Section 149 I. P. C. they were sentenced to undergo rigorous imprisonment for life.

3. The prosecution case as it appears in the evidence is that on 22-3-1998 an incident of theft took place at the residence of accused appellant Phool Chand and the suspicion for commission of this theft was expressed upon the informant of this case, namely, Karan (P. W. 1). As such on 7-4-1998 all the aforesaid ten accused persons came to the informant, Karan and took him and his wife Smt. Malkhan (P. W. 2) along with them. They brought them to their residence and assaulted them. Karan's wife was beaten by the ladies of the appellants' family. She, however, managed to escape from there. Thereafter the accused persons took Karan to Tal Behat the next day, i.e. on 8-4-1998 and later on in the evening at about 6 p.m. they released him. The accused appellants, however, asked Karan to execute sale deed of his entire immovable property in their favour else he would be put to greater harassment. On that day i.e. 8-4-1998 at 10.30 p.m. the accused persons again knocked at Karan's door and thereafter they went to Karan's father. The appellants took his father Magan, mother Smt. Ram Dulari, brother Bhagirath and sisters Rekha, Usha and Raja Beti along with them. Later on the dead bodies of Magan, Smt. Ram Dulari, Bhagirath, Rekha, Usha and Raja Beti were noticed along the railway line by railway gang man.

Khet Singh, the railway gang man gave information to Station Superintendent, Tal Behat, who in response thereto sent a memo to the Police Station. Constable Chhabi Lal (P. W. 8) made an entry of this information in the General Diary on 9-4-1998 at 9.05 hours and the police came into action.

S. I. Sheshmali Dubey (P. W. 9) immediately rushed to the railway line where the dead bodies were lying and inquired upon it from 9.05 to 10 a. m. After completion of formalities the dead bodies were dispatched for post mortem examination.

Informant Karan (P. W. 1) as per his F. I. R. in the morning of 9-4-1998 at about 9.30 a. m. while coming from M. E. S., happened to meet the accused appellant, Gissa, who told him that the dead bodies of his parents, brother and sisters were lying by the side of railway line and they died of injuries sustained in railway

accident. He, therefore, ' went to the scene of occurrence and thereafter on getting suspicious against the accused appellants, he lodged the F. I. R. naming all the accused therein the same day on 12.05 p. m.

4. The autopsies on dead bodies of all the six deceased persons were done by Dr. M. K. Singh (P. W. 7) and he found following ante mortem injuries on the corpse of :

Magan:

1. Crushed injury on scalp 10 cm x 08 cm x (P. T.) deep with multiple fracture of underneath scalp bone, all brain tissue is loss,
2. L. W. 5 cm x 3 cm x muscle deep at left side (P. T.) with fracture of underneath mandible bone,
3. L. W. 8 cm x 04 cm x muscle deep at left side (P. T.) 5 cm above the medial end of clavicle.
4. Traumatic amputation of right forearm at the (P. T.) elbow.
5. Traumatic amputation of left fore-arm at (P. W.) level of 6 cm below the elbow.
6. L. W. 10 cm x 6 cm at right groin with fracture of under (P. T.) bone
7. Traumatic amputation of right foot at the (P. T.) of ankle joint.
8. Traumatic amputation of left leg at the (P. T.) 11 cm below the knee joints all parts are lost except left foot.

Raja Beti :

1. Crush injury over frontal and left temporal region of skull 10 cm x 8 cm x cavity deep with multiple fracture of underneath skull bone.
2. L. W. 8 cm x 3 cm x muscle deep over left cheek 0.3 cm ant. to left ear.

Smt. Ram Dulari :

1. L. W. 8 cm x 4 cm x bone deep at vault of skull with fracture of underneath skull bone 11 cm above the right ear.
2. L, W. 12 cm x 3 cm x bone deep of frontal region of skull.
3. L. W. 6 cm x 3 cm x bone deep at mid of forehead.
4. L. W. 4 cm x 2 cm x muscle deep at right angle of mandible.
5. Multiple abrasion in area of 18 cm x 14 cm over chest.
6. L. W. 8 cm x 4 cm x muscle deep at roast aspect of right upper arm with fracture of underneath humerus bone.
7. L. W. 4 cm x 3 cm x muscle deep at posterio - lateral aspect mid of left fore-arm,
8. Traumatic crush injury 16 cm x 10 cm at right knee joint with fracture underneath bone.
9. L. W. 12 cm x 8 cm at anterio aspect of left thigh 10 cm above the knee joint.

Bhagirath :

1. Crush injury over skull with multiple fractures, brain matter missing.
2. both mandible fractured.
3. Traumatic amputation of right upper limb at the level of shoulder joint.
4. Fracture of left humerus slough.
5. L. W. 12 cm x 4 cm muscle deep on the anterio medial aspect of left thigh just above knee.
6. Fracture of left femur slough present.
7. Fracture of both left leg bones.
8. Lacerated wound 8 cm x 3 cm x muscle deep on the dorsum of foot (Left).

9. L. W. 15 cm x 6 cm x muscle deep on the perineal region and left groin.

10. Fracture of head of (Rt) femur present.

11. Fracture of thoracic vertebra at the level of 7th thorax vertebra.

Beti Bai:

1. Crush injury over skull with multiple fracture of skull bone, brain tissue missing, both eyes missing.

2. Left upper arm amputated at the level of 4 cm below shoulder joint.

3. Lower left limb amputated at the level upper shaft of femur.

4. L. W. 10 cm x 4 cm muscle deep on the left groin.

5. Rt. lower limb amputated at level of just below knee.

6. L. W. 10 cm x 5 cm x muscle deep on antero medial and posterior aspect of the , lower thigh.

Keshar Bai alias Maghali :

1. L. W. 10 cm x 5 cm x bone on the left occipital region Of skull.

2. L. W. 5 cm x 3 cm x bone deep on the top of head.

3. L. W. 2 cm x 1 cm x muscle deep of cheek.

4. Abrasion multiple on left shoulder.

It is pertinent to note that Dr. M. K. Singh (P. W. 7) has specified in his examination-in-chief itself that the ante-mortem injuries of all the deceased persons were inflictible by collision with train.

5. The matter was investigated by P. W. 10, Hafiz Khan, Deputy Superintendent of Police, who received the record of investigation from earlier Investigating Officer on 2-6-1998. He recorded statements of witnesses, Smt. Makkhan, Smt. Radhiya,

Smt. Parvati, Phool Chand and other formal witnesses also. The statements of complainant Karan and his wife Smt. Makkhan were also recorded under Section 164 Cr. P. C. before the Magistrate.

After completing all the formalities of investigation P. W. 10 submitted charge-sheet in this case.

6. On the materials submitted along with the charge-sheet the Magistrate committed the case to the Court of Session as the offences punishable under Sections 364/149 and 302/149 I. P. C. were exclusively triable by the Court of Session.

7. The accused appellants were charged on the aforesaid counts by the trial Court. They pleaded not guilty to those charges and claimed for their trial.

The prosecution examined as many as eleven witnesses in this case and proved twenty eight documents in its support.

The appellants, however, did not submit any document before the trial Court nor did they examine any witness in their defence.

8. The learned trial Judge after hearing the parties and on consideration of the material available found all the charges against the appellants as proved to the hilt and here recorded the order of conviction and passed the sentences against them in the impugned judgment dated 21-5-2003 as detailed above.

9. We have heard Sri P. N. Mishra, Senior Advocate, for all the appellants and Sri Amarjeet Singh, Addl. Public Prosecutor, for the State of U. P. We have also perused the prosecution evidence as recorded in the statements of the witnesses, and the exhibits tendered and proved by it. We have also gone through the statements of the accused appellants recorded under Section 313 Cr. P. C. and the impugned judgment.

10. In our view the Criminal Appeals No. 2467, 2476, 2683 of 2003 deserve to be allowed and the Capital Sentence Reference No. 5 of 2003 made by the learned trial Judge for confirmation of death sentence of appellant Phool Chand warrants

to be rejected.

11. At the very outset it is pertinent to mention that even though this case is claimed to be a case of multiple murders, there is no ocular account of the alleged actual assault, which resulted into the death of six deceased persons. The first informant of this case, Karan (P. W. 1), who happens to be the son of deceased Magan would have been the star witness of prosecution, in case he could support even that part of story/circumstance, which he has disclosed in his F. I. R. and which led to the arousal of suspicion about the involvement of the ten accused-appellants in the murder of his family members. But he declined to support the F. I. R. when he was brought before the trial Judge to depose for the prosecution. He, altogether, disowned the F. I. R. and has stated that he did not submit it at the Police Station even though it has the impression of his thumb on it. Consequently, P. W. 1 has been declared hostile by the prosecution.

12. The next witness is Smt. Makkhan (P.W.2), the wife of Karan (P. W.1). She is said have been tortured along with her husband, on 7-4-1998 at the residence of appellant, Phool Chand. She in the same manner as her husband, has not supported the prosecution, which in turn, has declared her also as a hostile witness.

13. Two other witnesses of the circumstances, namely Nand Lal (P. W. 3) and Sripati (P. W. 4) who could have established the guilt for the offences with which the appellants were charged, too have not supported the prosecution and have been consequently declared hostile. Thereafter, we are left with only two witnesses, namely Phool Chand (P. W. 5) and Bhagirath (P. W. 6), who have not been declared hostile by the prosecution. Their statements being intact have to be examined to find out if they have given out such facts/circumstances in their deposition, which are sufficient to lead to an irresistible conclusion of the establishment of guilt of the offences with which the accused-appellants have been charged and tried.

14. P. W. 5 is the brother-in-law of P. W. 1, Karan, who states that the accused Phool Chand and nine others had visited his house in village Kunwarpura in the forenoon at about 10.00 a. m. on a jeep. They had brought Karan (P. W. 1) with

his hands tied backward and had enquired from him if his brother-in-law (Karan) had concealed certain ornaments etc. in his house. They also made some search inside the residence of P. W. 5, but when they did not find any article of theft concealed there, they threatened him and took him along with Karan to Tal Bahet Police Station. Phool Chand (P. W. 5) and Karan (P. W. 1) both were detained at the Police Station till evening when they were released by the police. P. W. 5 also claims to have stayed back at the residence of Karan that night when at about 10 p. m. he found the accused persons again coming to Karan's house and they took away all the deceased persons along with them.

15. As regards the credibility of this witness, it is relevant to mention that he did not remember the names of all the ten accused persons. But for Phool Chand, Gissa alias Gayasi, he does not remember the name of any other accused. His statement did not get corroboration from any other evidence/material on record. He claims to have been taken by the accused persons to Tal Behat Police Station on 8-4-1998 along with his brother-in-law Karan (P. W. 1), but as already observed by us, P. W. 1, who has been declared hostile by the prosecution, does not support this version. Consequently, he also does not support the fact of P. W. 5, Phool Chand, staying with him in the night of 8/9-4-1998 at his residence. The informant Karan, who lodged the F. I. R. of this incident on 9-4-1998 about the entire episode preceding the death /murder of his family members, does not mention the name of his brother-in-law, Phool Chand (P. W. 5) in that F. I. R. If in the night of 8/9-4-1998 this witness was present at the residence of Karan when the accused persons forcibly kidnapped the deceased for committing their murder, he was definitely a very important witness of this fact. On the day the F. I. R. was lodged P. W. 1 was not a hostile witness. There was no reason why he would not mention the name of his brother-in-law, Phool Chand (P. W. 5), disclosing him as a witness of the incident of kidnapping for committing murder. Therefore, it would be extremely hazardous and unsafe to place reliance upon the evidence given by P. W. 5 treating his deposition as sufficient for proving the relevant circumstance without any suitable corroboration of the same from any other evidence on record.

16. As regards the evidence of P. W. 6 Bhagirath, he is a truck Driver. He claims that his truck was taken by the accused persons who had come to him at about

mid night on the date of incident. They took him to village Bidhari at the resident of Karan, Therefrom they forcibly took Karan and his wife Smt. Makkhan in the truck and they took them to village Gajaura. There he left accused Karan and his wife and went away. This is the entire circumstance, which has been disclosed in his deposition by P. W. 6. His statement is not worth credence. The case of the prosecution is not that the accused took Karan and his wife Smt. Makkhan on truck in the mid night. On the contrary, the story as has been disclosed in the F. I. R. is that the accused persons had taken Karan and his wife to their residence where they assaulted the couple. It is nowhere in the F. I. R. that P. W. 6 Bhagirath was engaged to carry Karan (P. W. 1) and his wife (P. W. 2) in his Truck No. URY 864 to the house of accused Phool Chand. P. W. 6 is also not a witness of the circumstance of accused persons forcibly kidnapping the deceased persons in his truck for committing their murder. Therefore, such statement of P. W. 6 in addition to its being incredible does not have worth to prove a circumstance which would lead us to conclude that the appellants had actually committed the kidnapping and murder of all the deceased persons.

Thus, on the total evaluation of evidence of P. W. 5 and P. W. 6, it cannot be said that such evidence could be such as to lead to an irresistible conclusion of the fact that the ten accused-appellants were the actual culprits who committed the murders in the present case.

17. The learned Senior Advocate Sri P. N. Mishra submitted that in the present case in spite of the fact that P. Ws. 5 and 6 have not been declared hostile by the prosecution, yet the entire evidence if taken on totality has absolutely no substance to the extent warranting a conclusion of establishment of guilt for the offences with which the appellants were charged. The contention of the learned counsel appears to be wholly correct. There is no evidence on record on the basis of which we could find out that there is involvement of the ten appellant-accused persons in the present murder case. P. W. 5 and P. W. 6 both as already observed by us, are not worth credence. They have even failed to give full names of all the ten accused persons.

18. Learned Additional Public Prosecutor Sri Amarjeet Singh has tried to emphasise that Karan (P. W. 1) and his wife Smt. Makkhan (P. W. 2) were produced before the Magistrate for recording their statements under Section 164 Cr. P. C. in which they fully supported the facts/circumstances leading to the commission of multiple murders in this case. The learned counsel has contended that these statements should be given due weight and should be considered for proving the offences with which the appellants were charged. On thoughtful consideration on this legal aspect of the matter, we find that the aforesaid submission has no substance in it. The statement of a witness under Section 164 Cr. P. C. is one where the accused have hardly any occasion to cross examine him and if it is to be treated as substantive piece of evidence, it should be duly tendered before trial Court and then a witness should be produced by the prosecution for his cross examination. In this context the learned Senior Advocate appearing for the appellants has cited the case law of Brij Bhushan Singh v. Emperor and Ram Kishan Singh v. Harmit Kaur : 1972 CriLJ267 .

In these cases the Privy Council and the Hon'ble Supreme Court have categorically held that the statements recorded under Section 164 Cr. P. C. are not substantive evidence. It can be used only to corroborate the statements of the witness or to contradict them. In the present case, when the witnesses (P. W. 1 and P. W.2) have themselves did not support their version, their statements earlier recorded under Section 164 Cr. P. C. could not be available to the prosecution for their corroboration. It could, to the maximum, be used by the prosecution for their contradiction, but that too has not been done in the present case. It is obvious that it would be a fallacy of a legal approach to have reliance upon the statement of a witness recorded under Section 164 Cr. P. C. and thereby to record conviction of the accused persons on that basis.

19. For the aforesaid reasons, we have no hesitation in holding that in the present case the prosecution has miserably failed to establish the guilt for the offences punishable under Sections 147 364 read with Sections 149 and 302 read with Section 149 I. P. C. with which the accused appellants were charged and the trial Court has grossly erred in recording an order of conviction against the appellants for those offences. The judgment and order of conviction and sentence so

recorded and challenged in these appeals are obviously liable to be set aside and the appeals deserve to be allowed. The Capital Sentence Reference as made by the trial Judge is liable to be rejected.

20. In the result, Criminal Appeals No. 2467, 2476 and 2683 of 2003 are hereby allowed. The judgment and orders of conviction and sentence dated 21-5-2003 passed by the Trial Judge are set aside. The appellants having not been found guilty for the charges punishable under Sections 147 364 read with Sections 149 and 302 read with Section 149 I. P. C. are hereby acquitted for the same. The accused-appellant Phool Chand who is languishing in the lockup shall be released, if not wanted in any other case. The other accused-appellants Jagdish, Dhira, Nathu Ram, Beera, Mangi Lal, Ram Dayal, Ramdas, Gyasi Ram and Ghanshyam are on bail. They need not surrender. Their bail bonds are cancelled and sureties are discharged.

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