

Daya Ram Vs. State of Chhattisgarh

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Court : Chhattisgarh

Decided On : Mar-07-2008

Reported in : 2008CriLJ2091

Judge : L.C. Bhadoo and; T.P. Sharma, JJ.

Appellant : Daya Ram

Respondent : State of Chhattisgarh

Advocate for Pet/Ap. : Mr. J.A. Lohani

Disposition : Appeal dismissed

Judgement :

L.C. Bhadoo, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 30th August, 2002 passed by the 3rd Additional Sessions Judge (Fast Track Court), Raigarh in Sessions Trial No. 133/2001, whereby & where-under learned Additional Sessions Judge after holding the accused/appellant guilty for commission of offence under Section 302 of the IPC, for committing the murder of Khadbad, sentenced him to undergo imprisonment for life, however, he has been acquitted from charge under Section 201 of the IPC.

2. Case of the prosecution, in brief, is that wife of accused Dayaram started residing with Anjore Singh {son of deceased Khadbad) as his wife and for that reason the accused was having grudge against the family of Khadbad. On 6-5-2001 at about 4 p.m. Khadbad along with his granddaughter Nidra Bai went to his agricultural field, the accused/appellant came there and pushed Khadbad as a result of which he fell down. Thereafter, the accused attacked Khadbad on his head with a stone. Seeing this, Nidra Bai returned to her house and informed her mother Rath Kunwar about the incident, Rath Kunwar, in turn, informed the villagers. Yadunandan (P.W. 5) tried to intervene, but on account of the injuries sustained by Khadbad, he succumbed to the injuries instantaneously. The matter was reported by Rath Kunwar to Police Station Kotwali, Raigarh under Dehati Nalishi Ex. P-1, Merg intimation Ex. P-2 was also given by Rath Kunwar. FIR Ex. P. 18 was registered by the Station House Officer, Police Station Kotwali, Raigarh.

3. The Investigating Officer left for the scene of occurrence and after giving notice Ex. P-10 to the Panchas, he prepared inquest Ex. P-11 on the body of Khadbad. One axe was seized under Ex. P-13. Bloodstained soil and plain soil were seized under Ex. P-14 from the place of occurrence. Stone, the weapon of offence, was seized under Ex. P-15 from the place of occurrence. One Lungi was seized under Ex. P-16. The body of Khadbad was sent to K.G. Hospital, Raigarh for post-mortem examination where Dr. Ekbal Singh conducted post-mortem on the body of Khadbad. He opined that cause of death is injuries to brain & face, multiple fracture of facial bone and death was homicidal in nature. He prepared post-mortem report Ex. P-3.

4. After completion of investigation, charge-sheet was filed in the Court of Chief Judicial Magistrate, Raigarh, who in turn committed the case to the Sessions Judge, Raigarh, from where learned Additional Sessions Judge, Raigarh, received the case on transfer for trial. The prosecution in order to establish charges against the accused examined seven witnesses. Statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the material appearing against him in the prosecution evidence and stated that he is innocent, he has been falsely implicated in the crime.

5. Learned Additional Sessions Judge after hearing respective counsel for the parties, convicted and sentenced the accused/appellant as aforementioned. We have heard Mr. J.A. Lohani, learned Counsel on behalf of the appellant and Mr. Ravindra Agrawal, learned Panel Lawyer on behalf of the State/respondent.

6. Mr. J.A. Lohani, learned Counsel for the appellant, has not disputed the homicidal death of Khadbad. Moreover, Nidra Bai (P.W. 2) has stated in her evidence that the accused attacked Khadbad with a stone. Yadunandan (P.W. 5) has corroborated the above evidence. This ocular evidence is corroborated by the medical evidence of Dr. Ekbal Singh (P.W. 3) who has stated in his evidence that he conducted post-mortem on the body of Khadbad on 7-5-2001, left eye was coming out, right eye was open, there was haematoma on right side of skull in frontal region in the size of 4' x 4', there were lot of abrasions on the body & hands, one abrasion on right scapular region in the size of 8' x 6', one abrasion on left gluteal region in the size of 4' x 4' and one abrasion on right gluteal region in the size of 3' x 3'. On dissection it was found that there was haematoma on right side of skull and 3rd, 4th & 5th ribs were fractured. Injuries were ante-mortem in nature. Right side of mandible, nasal bone & right side jugular bone were fractured. Cause of death was fracture of bones as also injury to brain and death was homicidal in nature. His report is Ex. P-3. In view of the above ocular and medical evidence, it is established that the death of Khadbad was homicidal in nature.

7. As far as complicity of the accused in the crime in question is concerned, learned Counsel for the appellant argued that in the first instance, Nidra Bai (P.W. 2) is a child witness and she is related to the deceased being granddaughter, as such reliance cannot be placed on her evidence. He also argued that Nidra Bai has stated in her evidence that near the place of incident houses of Vipin, Bhohjram, Anand & Jagatram are there. Therefore, the prosecution ought to have examined the neighbours without which based on the testimony of Nidra Bai, the trial Court has wrongly convicted the accused. Learned Counsel further argued that the manner in which the accused alleged to have attacked the deceased, no motive has been proved for the attack, therefore, offence against the accused does not travel beyond Section 304, Part-II of the IPC.

8. On the other hand, learned Panel Lawyer supported the judgment of the trial Court.

9. Law in respect of the evidence of a child witness is well settled. Section 118 of the Evidence Act envisages that 'all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind'. The Apex Court while interpreting the provisions of Section 118 of the Evidence Act. In respect of a child witness, in the matter of Arbind Singh v. State of Bihar 1995 Supp (4) SCC 416 : 1994 Cri LJ 1227 held that 'child witness is prone to tutoring and hence Court should look for corroboration particularly when the evidence betrays traces of tutoring.'

10. In the matter of Panchhi v. State of U.P. : 1998 CriLJ4044 , the Apex Court held that it cannot be said that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is a susceptible to be swayed by what other tell them and thus a child witness is an easy prey to tutoring.

11. In another matter Suryanarayana v. State of Karnataka 2001(1) Crimes 99 (SC): 2001 Cri LJ 705 the Apex Court held that evidence of a child cannot be rejected per se, but the Court as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of statements and its reliability, base conviction by accepting the statements of the child witness. The evidence of child cannot be discarded only on the ground of her/his being teen age. The evidence of a child witness would require the Court to scrutinize the evidence with care and caution. When the witness is shown to have stood the test of cross-examination and there is no infirmity in the evidence, the prosecution can rightly claim a conviction based upon the said testimony alone. Corroboration of testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be

made the basis for discarding the testimony.

12. Further, in the matter of Ratan Singh Dalsukhbhai Nayak v. State of Gujarat 2004 SCC (Cri) 7 : 2004 Cri LJ 19 the Apex Court held that the evidence of a child witness is permissible if such witness is found competent to testify and the Court after careful scrutiny of its evidence is convinced about the quality and reliability of the same, where the witness described the detail scenario implicating the appellant, conviction can be based placing reliance thereupon. It was further held that the evidence of a child is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability, can record conviction, based thereon and the trial Judge is required to take a decision as to whether the child witness has sufficient intelligence to understand the questions and in order to decide the intelligence the Court may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath.

13. Therefore, it is settled law that before placing reliance on evidence of a child witness the Court is required to satisfy with the following requirements (1) before examining the child witness the Court must put questions in order to ascertain that the child witness is competent to testify and understand the questions put to him/her and not prevented from giving rational answers on account of tender age (2) oath should be administered to the child witness only after ascertaining by putting questions that the child witness understands the sanctity of the oath (3) before placing reliance on the evidence of a child witness the evidence must be scrutinized carefully and it should be ascertained that the child witness is intelligent enough to understand the questions, there is no likelihood of tutoring or influencing by anyone and if the Court is convinced about the quality and reliability of a child witness then and then only the Court can base conviction on such evidence without corroboration. In other cases it is safe to seek corroboration of the evidence of a child witness.

14. Applying the above principle, if we scrutinize the evidence of Nidra Bai (P.W. 2), who was aged about 13 years at the time of incident, it shows that Nidra Bai

passed the test before placing reliance on her evidence, because in the first instance, learned trial Judge put certain questions to her in order to ascertain that whether she was intelligent enough to understand the questions and give their answers, as also whether she was able to memorise the incident and after satisfying the Court proceeded further recording the fact that the witness is competent to understand the questions & answers, but oath was not administered to this witness. She has categorically stated in her evidence that on the fateful day at about 4 p.m. she went along with her grandfather Khadbad (since deceased) to see the standing crop, at that time, accused Dayaram came and pushed her grandfather as a result of which he fell down, thereafter, the accused attacked him with a stone. Seeing this, she rushed back to her house and informed her mother Rath Kunwar, her mother informed Patel, Rajendra, Vijay & Jadu about the incident. At that time, Rajendra, Vijay & Jadu came running to intervene. In cross-examination of this witness, defence has not been able to bring on record any circumstance, which discredits the evidence of this witness. She has categorically replied as to how and with which weapon the accused attacked her grandfather, She had stated that when she witnessed the incident, she came running to her house and informed her mother Rath Kunwar.

15. Rath Kunwar (P.W. 1) has corroborated the above testimony and stated that her daughter along with Khadbad went to the field, thereafter, her daughter came running and informed that Dayaram has attacked her grandfather on which she informed her son Vijay, Jadu and sent them to see Khadbad, after some time, Vijay, Rajendra & Jadu came and informed about the incident and injuries sustained by Khadbad. She had also stated that as there was a dispute between the accused and his wife, wife of the accused came to their residence and on account of that, the accused used to carry grudge against her husband.

16. Yadunandan (P.W. 5) has stated in his evidence that on the fateful day at about 4 p.m. he along with Rajendra & Vijay were watching T.V. at the residence of Patel where wife of Anjore came and informed that Dayaram has attacked her father-in-law, therefore, he along with Vijay & Rajendra went towards the place, he saw that the accused was attacking the deceased who was lying on the ground, when he intervened the accused ran away, there were injuries on nose & mouth of

Khadbad and blood was oozing out of the injuries. Therefore, testimony of Nidra Bai is corroborated to a certain extent by the evidence of Rath Kunwar (P.W. 1), mother of Nidra Bai, to whom Nidra Bai informed about the incident, in turn, she informed the villagers and lodged a complaint Ex. P-2 & Dehati Nalishi Ex. P-1 in Police Station Kotwali, Raigarh. In the circumstances, we do not find any infirmity or illegality in the finding of the trial Court placing reliance on the evidence of Nidra Bai (P.W. 2). Coming to the question that Nidra Bai (P.W. 2) has stated in her evidence that there were houses near the place of incident and they were occupied by certain persons, but they have not been examined, in the first instance, Nidra Bai has not stated that those persons in fact, witnessed the crime, but on the contrary she has stated that she raised cries, but nobody came to intervene and help them. Therefore, non-examination of any of the persons who were residing in the nearby place is not fatal to the prosecution case. The evidence of Nidra Bai (P.W. 2) coupled with the evidence of Rath Kunwar (P.W. 1) & Yadunandan (P.W. 5) is sufficient to establish crime against the accused. Moreover, quality of the evidence is to be seen, not the quantity.

17. As far as the question that Nidra Bai (P.W. 2) is grand-daughter of the deceased, therefore, reliance cannot be placed on her testimony is concerned, it is settled law that the testimony of a witness cannot be rejected outrightly on the ground that the witness is relative of the deceased. On the contrary, in order to ascertain veracity of the evidence of such witness the Court has to scrutinize the evidence of such witness with care and circumspection. In the matter of *Namdeo v. State of Maharashtra* 2007 AIR SCW 1835 : 2007 Cri LJ 1819 the Apex Court has held that a close relative cannot be characterized as an 'interested' witness, he is a 'natural' witness, his evidence however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole' testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent person.

18. In the matter of *Dalip Singh v. State of Punjab* : [1954]1SCR145 speaking through Vivian Bose, J. the Apex Court observed that (AIR p. 366, para 25):

25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *Rameshwar v. State of Rajasthan* : 1952 CriLJ547 . We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel.

19. Again in *Masalti v. State of U.P.* : [1964]8SCR133 the Apex Court observed that (AIR pp. 209-10, para 14):

14. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of Justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

20. As far as motive behind the crime is concerned. Rath Kunwar (P.W. 1), daughter-in-law of the deceased, has categorically stated in para 3 of her evidence that relations between the accused and his wife were strain, therefore, wife of Dayaram left the house and started residing with her husband and on account of that, the accused was having grudge against their family. Said fact was also mentioned by this witness while lodging FIR. Therefore, motive behind the crime is also established, in view of the evidence of Rath Kunwar (P.W. 1).

21. As far as the argument of learned Counsel for the appellant that there was a sudden quarrel and there was no motive for the accused to commit the crime, therefore, offence against the accused does not travel beyond Section 304, Part-II of the IPC is concerned, the help of Exception 4 to Section 300 of the IPC can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c)

without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed.

22. Heat of passion requires that there must be no time for the passions to cool down. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provisions means unfair advantage'.

23. In the matter of Kikar Singh v. State of Rajasthan : 1993 CriLJ3255 the Apex Court held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that by using the blows with the knowledge that they were likely to cause death he had taken undue advantage.

24. If we look into the facts and circumstances of the present case, Rath Kunwar (P.W. 1) has categorically stated in her statement and same has also been mentioned in the FIR (Ex. P. 18) made by her that relations between the accused and his wife were strain, therefore, wife of the accused started living with her husband Anjore Singh as his wife, as such, accused/appellant Dayaram was having animosity against their family. In the circumstances, there was a motive to the accused to commit the crime.

25. As per the evidence of Nidra Bai (P.W. 2), on the fateful day deceased Khadbad along with Nidra Bai went to his agricultural field to watch the standing crop, the accused without any rhyme or reason came and in the first instance, pushed Khadbad as a result of which he fell down, thereafter, the accused attacked Khadbad with a stone on his face & body. Resultantly, there was haematoma on right side of skull in frontal region, right side of mandible, nasal bone & right side jugular bone were fractured, even 3rd, 4th & 5th right side ribs were fractured. All these injuries go to show that there was no sudden quarrel and the accused acted in a cruel and unusual manner because when Khadbad fell down, the accused continued to attack him with stone and caused multiple injuries. Seeing Khadbad, the accused immediately rushed towards him and pushed him.

Therefore, as per the principle laid down in the matter of Kikar Singh (supra), case of the accused/appellant is not covered under Exception 4 to Section 300 of the IPC and there is a strong motive for the accused to attack Khadbad.

26. In the given situation, we do not find any substance in the arguments advanced by learned Counsel for the appellant. Simultaneously, we do not find any illegality or infirmity in the judgment of conviction and order of sentence passed by the trial Court.

27. In the result, the appeal being devoid of merit is liable to be dismissed and it is hereby dismissed.

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