

Jagannath Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Mar-24-2004

Reported in : 2004(3)MPHT249

Judge : S.L. Kochar and ;Ashok Kumar Tiwari, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302; [Evidence Act, 1872](#) - Sections 45, 118 and 145; Code of Criminal Procedure (CrPC) , 1974 - Sections 161 and 162

Appeal No. : Criminal Appeal No. 769/97

Appellant : Jagannath

Respondent : State of Madhya Pradesh

Advocate for Def. : G. Desai, Dy. Adv. General

Advocate for Pet/Ap. : J.L. Jain, Adv.

Disposition : Appeal allowed

Judgement :

S.L. Kochar, J.

1. This appeal has been preferred by the appellant against the judgment and finding dated 22-7-97 passed by the learned Sessions Judge, Rajgarh (Biaora) in

Sessions Trial No. 66/96 thereby convicting the appellant under Section 302, Indian Penal Code and sentencing him to suffer imprisonment for life with fine of Rs. 500/-, in default of payment of fine to suffer six months additional R.I.

2. Briefly stated, the prosecution case before the Trial Court was that the deceased Mangilal went to graze she-buffaloes to the forest on 9-2-96 in the morning between 7 and 8.00 A.M. In the noon at about 1.00 P.M., his brother Badesingh also went to the forest with noon-meals. Badesingh, after giving food to the deceased Mangilal, returned back to his house. Thereafter at 3.00 P.M. the she-buffaloes returned back to the house but the deceased Mangilal was not with them. On this, Bherulal, father of the deceased, brother Badesingh, and one Kalu went in search of the deceased Mangilal in the forest situated in Village Devziri. They saw the appellant and Mangilal Sondhia going hurriedly towards the Village Devziri with their buffaloes. Just thereafter Kamalsingh (P.W. 6) and Karansingh (P.W. 7) met them in weeping condition. On asking by Bherulal about whereabouts of Mangilal, they, while weeping disclosed that the appellant had driven out their she-buffaloes from the forest and assaulted the deceased Mangilal and made him to lie in the Devziri rivulet. On this information, Bherulal and his companions reached at the rivulet and found Mangilal lying there sustaining several injuries on his person. Mangilal was dead. Bherulal went to the Police Station and lodged the First Information Report (Ex. P-1 1). According to this report, on account of dispute over grazing of cattle the appellant had assaulted the deceased Mangilal. The First Information Report was recorded by Bhimsingh Aharwal (P.W. 10).

3. The police party reached at the spot and after preparing the inquest and spot-map sent the dead-body of Mangilal for post-mortem examination. The autopsy conducted by Dr. R.C. Banjare (P.W. 5), who found some abrasion, ligature mark, bruises and fractures of numerous bones of both hands. On internal examination, the doctor also found fracture of fourth and 7th and 8th ribs of the deceased. The thyroid cartilage and tracheal ring were broken. According to him, the deceased died because of asphyxia due to strangulation. The post-mortem report is Ex. P-5.

4. After completion of investigation, the appellant was charge-sheeted for the above mentioned offence. The appellant denied the charge and claimed trial. He,

however, did not examine any witness in defence while the prosecution, to prove its case, examined as many as 11 witnesses, before the Trial Court. On conclusion of the trial, finding the appellant guilty of the offence charged, the learned Trial Court convicted and sentenced as indicated above.

5. We have heard Shri Jayantilal Jain, learned Counsel for the appellant, duly appointed by the Legal Aid Committee and Shri Girish Desai, learned Dy. Advocate General for the respondent-State and gone through the entire record.

6. The conviction of the appellant is mainly based on the testimony of solitary child eye-witness Kamal (P.W. 6), who was aged about ten years on the date of his examination in the Court. Looking to his young age, the Trial Court did not administered oath to him. The say of this witness is that the deceased Mangilal and appellant Jagannath were grazing their cattle. They all were grazing the cattle in the area known as Sunderpura field. He was present there upto 6.00 P.M. in the evening. According to this witness, the incident had occurred in the noon at 2.00 P.M. The appellant Jagannath assaulted Mangilal by Ballam (spear). He dealt several blows and caused a number of injuries to Mangilal. Karansingh, the brother of this witness had gone with goats towards Motipura Forest/field. After assaulting Mangilal, Jagannath also ran away towards this witness on which, this witness ran away and reached near his brother Karansingh. Kamal (P.W. 6) further stated that on the way, he met with witnesses Mangilal (P.W. 4), Bherulal and Bajesingh. He disclosed about killing of Mangilal by appellant to his brother Karansingh. Thereafter, he went to his house.

7. In cross-examination, para 2, a positive admission of this witness is available that the Police Constable read-over his statement to him. He was also asked to give the same statement but, he had denied the fact that he had given the statement in the Court as tutored to him by the Police Constable. He has further stated that the appellant Jagannath pierced the Ballam inside the body of the deceased Mangilal. The Ballam was containing an iron blade and the same iron blade was thrust. The act of thrusting of Ballam continued eight to ten times and all this was seen by him from a distance of one furlong. He further testified that because of cries, he was attracted towards scene of occurrence. In para 3, this

witness was contradicted from the statement (Ex. D-2) portion marked A to A as well as his statement recorded under Section 164, Cr.PC by the Magistrate (Ex. D-3). In all these statements, it is mentioned that the appellant assaulted the deceased by lathi. There is no mention about use of any sharp edged side of Ballam for causing injury to deceased as narrated by this witness in the Court. All these material contradictions in Ex. D-2 portion marked A to A and B to B were denied by this witness. He has also denied the statement made at portion marked A to A in the statement recorded by the Magistrate (Ex. D-3).

8. This child witness has not stated that he disclosed about witnessing of the incident to the witnesses Mangilal, Bherulal and Bajesingh. Karansingh (P.W. 7) is the brother of Kamal (P.W. 6) who has stated that Kamal informed him about assault given by appellant Jagannath to deceased Mangilal by lathi. On this information, he himself and Kamal reached at the rivulet and saw the deceased lying there in injured condition. At that time, the brother of deceased named Kamal and father Bherusingh also reached over there to whom, the witness Kamal had disclosed about the incident. This statement of Karansingh (P. W. 7) is not admissible in evidence because Kamal (P.W. 6) has nowhere stated that he disclosed about the incident to Kalu (P.W. 3) and Bhimsingh (P.W. 10). According to Kamal (P. W. 6), the deceased was assaulted by Ballam, but his brother Karansingh (P.W. 7) has stated that Kamal (P.W. 6) disclosed before him about use of lathi.

9. This is also the important and material contradiction in the statements of both the witnesses. We find certain important and material contradictions in the statement of Karansingh (P.W. 7), but we do not feel it necessary to mention the same in detail, because we do not find reliability in the evidence of solitary child eye-witness Kamalsingh (P.W. 6) who was read-over his case-diary statement and was tutored before entering into the witness box.

10. The Division Bench of this Court in the case of Ramvilas and Ors. v. State of M.P. (1984 J.L.J. 521), relying on the Privy Council Judgments in Zahiruddin v. Emperor (AIR 1941 PC 75) and Kambi-Vaghji Savji v. State of Gujrat (1968 Cr.L.J. 54), held that : 'Evidence of a witness in Court to whom his previous statement

was read-over before he stepped into the witness-box becomes inadmissible because nobody can say what he would have said, had his memory not been refreshed in that manner before he entered the witness box.' Further, the statement of the witness recorded during the course of investigation under Section 161, Cr.PC and its use is prescribed in Section 162, Cr.PC, this statement is a previous statement of the witness and can be used with the permission of the Court by the prosecution to contradict such witness in the manner provided by Section 145 of the Indian [Evidence Act, 1872](#), and any part of his statement, if duly proved may be used by the accused. [See : Mohd. Jenal Abidi v. State of Assam, 1997 (Volume 2) Crimes 660]. Use of the statement recorded under Section 161, Cr.PC by the police otherwise than prescribed under Section 162, Cr.PC would render the statement of the witness in Court inadmissible.

11. The statement of child-witness Kamal (P.W. 6) is materially contradicted by the medical evidence. The Autopsy Surgeon R.C. Banjare (P.W. 5) did not find any incised and penetrated wound on the person of the deceased. He found all the injuries caused by hard and blunt object. He found abrasions and bruises and fractures of humerus bones and ribs. According to the expert, the deceased died because of asphyxia due to strangulation, whereas the evidence of Kamal (P.W. 6) is completely silent on this aspect. This material variance between the medical evidence and ocular account of child-witness (P.W. 6) can not be marginalised and blinked away. The learned Trial Court, to explain this ambiguity in the prosecution case, has placed reliance on the Supreme Court judgment passed in the case of Aharmaya v. State of Gujrat (AIR 1992 SC 2155). We have carefully gone through this judgment and we find that the same is not covering this question of conflict between medical and ocular evidence.

12. The solitary child eye-witness who was tutored and was read-over his earlier statement before entering the witness box and his testimony is contradicted by medical evidence regarding weapon used by the appellant and cause of death, we feel, it would be hazardous to place reliance on the testimony of such witness. Excluding the statement of child-witness Kamal (P.W. 6), there is no other substantial evidence available on record to connect the appellant.

13. For the reasons stated hereinabove, we are of the opinion that this appeal deserves to be allowed. Accordingly the appeal is allowed. The conviction of the appellant for the offence Section 302, Indian Penal Code and consequent sentence of imprisonment for life with fine of Rs. 500/- are hereby set aside. He shall be set at liberty forthwith if not required in any other criminal case. Fine if recovered or realized, be refunded to him.

14. A copy of this judgment alongwith the record of the Trial Court be transmitted immediately to that Court for compliance.

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