

Shambhusingh and ors. Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Sep-06-2007

Reported in : 2007(4)MPHT203

Judge : A.K. Gohil and ;Sheela Khanna, JJ.

Appellant : Shambhusingh and ors.

Respondent : State of M.P.

Advocate for Pet/Ap. : Shri. Ankit Saxena

Disposition : Appeal dismissed

Judgement :

A.K. Gohil, J.

1. This appeal is directed under Section 374, Cr.PC against the judgment dated 31-8-1998 of conviction under Section 302 read with Section 149, IPC and sentence of life imprisonment and fine of Rs. 5,000/- and in default of payment of fine further six months SI passed by IInd Additional Sessions Judge, Guna in S.T. No. 356/97.

2. Prosecution story in brief is that on 6-7-1998, deceased Samandar Singh along with his younger brother Raghu and Gangaprasad was going to his Village Bade Gaon from Guna. A day before he had brought his wife Smt. Rupkamal to Guna for treatment. He left his wife at her brother's house. In the way when he reached

near his Badi at Village Fattukhedi, Shambhusingh and his sons Bhanwar Singh, Manoj Singh, Chhota Bana and his nephew Mahendra Singh, those who were hidden behind the bushes came out and started beating Samandar Singh. Shambhusingh caught hold Samandar Singh from behind and Mahendra assaulted by Farsa, Manoj Singh by ballam and Chhotta Bana by lathi and on account of the aforesaid beating he sustained various injuries. He fell down on the spot. Thereafter Gangaprasad and younger brother of the deceased went to Bade Gaon and informed the family members of Samandar Singh and thereafter the family members of Samandarsingh namely Prahladsingh, Bhanwar Singh, Phool Singh etc. came on the spot and lifted him and took him to the police station. In the way Samandar Singh succumbed to injuries. Matter was reported at Police Station. Thereafter the matter was investigated and charge-sheet was filed. Co-accused Chota Bana was juvenile, therefore he was referred to Juvenile Court. During trial all the appellants abjured their guilt and during trial prosecution examined as many as 13 witnesses and one witness Kalyan (D.W. 1) was examined to prove the alibi of appellant Mahendra.

3. Trial Court after considering the evidence on record acquitted the appellants from the charges under Section 148, IPC but found all the appellants guilty of commission of crime under Sections 302 and 149, IPC and sentenced as aforesaid, against which the appellant have preferred this appeal.

4. We have heard the learned Counsel for the parties at length. Shri Ankit Saxena, learned Counsel for the appellant categorically analysed the prosecution evidence and he pointed out various infirmities and discrepancies in the statement of the witnesses and submitted that looking to the various discrepancies in the evidence of Gangaprasad (P.W. 1), Harivallabh (P.W. 2) and Raghunandan (P.W. 3), it cannot be held that they are the eye-witnesses of the incident. They have not identified any of the person in the Court whether they were present on spot or not. Therefore, it was argued that they are all tutored witnesses. It is also submitted that the statement of Raghunandan was recorded after 10 days and there is no explanation for this delayed recording. Gangaprasad (P.W. 1), who was the complainant, was declared hostile, therefore Trial Court has committed illegality in placing reliance on his statement. The evidence of Raghuveer (P.W. 4), who is

uncle of the deceased is hearsay and Lallu (P.W. 5) has also not supported the prosecution, though he was also an eye witness, and was declared hostile. The evidence of Ramnath Singh (P.W. 8) and Phoolsingh (P.W. 11) is also hearsay. Ultimately he submitted that the prosecution evidence is not at all reliable and conviction is bad in law and the judgment be set aside and appellant be acquitted.

5. Shri C.S. Dixit, learned Public Prosecutor for the respondent/State has supported the judgment and submitted that the appeal is liable to be dismissed.

6. First of all we have examined medical evidence of Dr. M.K. Jain (P.W. 7), who had performed the autopsy of dead body. According to post-mortem report Exh. P-6, the deceased had received following injuries:

(1) Incised wound 5 cm. x 2 cm. bone deep over right parietal region of scalp with fracture.

(2) Incised wound 1 cm. x 1 cm. x 1 cm. over right side of upper lip.

(3) Incised wound 3 cm. x 1 cm. x 1 cm. deep over right ear lobule and mastoid region.

(4) Punctured wound 2 cm. x 0.5 cm over forehead just above right eyebrow.

(5) Punctured wound 2 cm. x 0.5 cm. Bone deep over lateral end of right eyebrow.

(6) Punctured wound 1 cm. x 1 cm. x 3 cm. over right maxillary ulna with fracture of right side of maxilla.

(7) Punctured wound 1 cm. x 1 cm. x 1 cm. over right mid mandible region.

(8) Punctured wound 1 cm. x 0.5 cm. x 0.5 cm. over right side of lower lip.

(9) Abrasion 2 cm. x 2 cm, anteriorly over upper part of right leg.

(10) Abrasion 2 cm. x 1 cm. anteriorly over upper part of left leg.

He found fracture in the right parietal bone of skull as well as in the right maxilla bone. All the injuries were ante mortem. Injury Nos. 1, 2 and 3 were caused by

hard and sharp edged weapon. Injury Nos. 4,5,6,7 and 8 were caused by sharp edged and piercing weapon and injury Nos. 9 and 10 were caused by hard and blunt object. Cause of death was coma due to head injury and duration of death is within 24 hours. In the opinion of doctor Injury No. 1 was sufficient to cause death in the ordinary course of nature. In the cross-examination he has admitted that injury Nos. 9 and 10 were simple in nature and except injury No. 1, other injuries were not sufficient to cause death in the ordinary cause of nature.

7. So far as the ocular evidence on record is concerned, as per prosecution story deceased Samandar Singh was going to his village from Guna and in the way all the appellants, those who are also the assailants were hidden behind the bushes. They were all carrying farsa, ballam and lathi in their hands. Raghu and Gangaprasad were also going with the deceased. Therefore naturally Raghu and Gangaprasad are the eye-witnesses of the incident and Harivallabh was also with them. They had seen the incident, they did not interfere due to fear. Thereafter they went to the village and informed the family members and thereafter family members; father and cousin brother, came on the spot. Gangaprasad was examined as P.W. 1. His examination in chief was recorded on 22-1-1998, but his cross-examination was recorded on 5-5-1998.

8. First of all we have considered this aspect of the matter that why his cross-examination was delayed. In the order sheet dated 22-1-1998, it has been mentioned that prosecution witnesses Gangaprasad, Harivallabh, Bhamar Singh, Durgaprasad, Ramcharan, Moolchand, S.N. Mukharji, Dr. M.K. Jain were present but one Rajesh Agrawal, Advocate filed an application that yesterday only he has received the copies of challan papers and he is busy in marriage of his younger sister on 25-1-1998. Therefore, he prayed for adjournment. A.G.P. Shri G.N. Sharma requested that eye-witnesses Gangaprasad and Harivallabh are present. Their examination-in-chief be recorded and for cross-examination case may be adjourned. The prayer of AGP was accepted and examination-in-chief of Gangaprasad and Harivallabh was recorded and next date for cross-examination of the witnesses and for the examination of other witnesses was fixed on 26-2-1998. Before 22-1-1998, one P.K. Sood, Advocate was appearing for the accused persons and on 22-1-1998 he had withdrawn his power and Rajesh Agrawal,

Advocate has filed his power. On 26-2-1998 Rajesh Agrawal, Advocate withdrawn his power and one Bhanu Raghuvanshi, Advocate appeared for accused Mahendra and D.D. Tiwari, Advocate appeared for other accused persons. Though the witnesses Gangaprasad, Harivallabh and Lallu were present but AGP took the adjournment on the ground that due to Loksabha election accused persons could not be produced from jail and also on 27-2-1998 the case was adjourned for 27-3-1998. Harivallabh was cross-examined on 27-3-1998 but Gangaprasad was cross-examined on 5-5-1998, and during cross-examination he has not supported the prosecution and he has turned hostile.

9. According to us, if adjournment was sought by Advocate Shri Rajesh Agrawal on 22-1-1998 on the ground of marriage of his sister on 25-1-1998, then instead of granting adjournment of 26-2-1998, Court ought to have listed the matter on any date after 25-1-1998 and could have examined him within a week instead of granting such a long adjournment because Gangaprasad (P.W. 1) fully supported the prosecution case in examination-in-chief, but in the cross-examination he resile from his earlier statement and was declared hostile. Though, again in the cross-examination in Para 17 he has affirmed and admitted that they were in all four persons, who were going on foot. Near Fattukhedi accused persons were hidden behind bushes, there was exchange of abuses between Samandar and Shambhusingh. Three sons of Shambhusingh and one nephew was also with Shambhusingh and thereafter the witness says that he had not seen anything and he left the place, but he admitted that thereafter he had not seen Samandar alive. He says that earlier he had given the statement against Shambhusingh and accused persons because of the threat given by family members of Samandar Singh. In Para 19, he has admitted that he has informed Ramnath Singh, Phoolsingh, Prahlad Singh etc. that 'Samandar Singh and Shambhusingh are abusing each other and you go there'. He has further submitted that he was threatened by complainant party for lodging such a report.

10. Harivallabh (P. W. 2) has deposed that he was going to Village Bade Gaon. Lallu was with him. From Guna they boarded in a bus and they left the bus at Belka Gaon, from where they were going on foot and he identified Shambhusingh, Bhanwar Singh, Manoj and Mahendra in the Court. He stated that nephew of

Shambhusingh gave farsa blow in the head of Samandar Singh and his elder son assaulted by ballam and other two sons in the legs. Shambhusingh has caught hold of Samandar. In the cross-examination he has stated that he was not knowing Samandar Singh, nor his brother and nor family members. He was also not knowing accused persons. No identification parade was arranged, but he has admitted that he had seen the accused persons beating Samandar Singh. He was not knowing that by which weapon accused persons caused injury to Samandar Singh. Gangaprasad had told him about the name of the assailants. Nobody had intervened in the said incident; neither he, nor Lallu, nor Gangaprasad and nor Raghu. He twisted and half-heartedly resiled from his earlier statement that nephew of Shambhusingh gave farsa blow in the head of Samandar Singh, now he says that he has not given such a statement. Though, Harivallabh was not declared hostile but he twisted his evidence.

11. Raghunandan Singh (P.W. 3), who is the brother of Samandar Singh, was accompanying him to his village and was the eye-witness of the incident. Though he was a child witness aged about 9 years, he supported the prosecution case and stated that when he was going with Samandar Singh and Gangaprasad, Shambhusingh and his three sons and one nephew met them and Shambhusingh caught hold of Samandar Singh and his three sons and nephew assaulted him and gave Ballam, Farsa and lathi blows. When they came to beat him, Gangaprasad with the view to save him took him away from the spot and Samandar Singh died. In Para 3 he has stated that at the time of beating, he cried that save his brother. Though he has stated that he does not know which accused gave how many ballam, lathi and farsa blows to the deceased and deceased sustained how many injuries on his body. He was also not knowing that what was the reason of this quarrel but he has denied this suggestion that he is giving false statement because Samandar Singh was his brother.

12. Raghuveer Singh (P.W. 4) has stated that he was on the other side of the river. Gangaprasad was crying and telling that Samandar has been killed. When he went near the dead body Gangaprasad told him that Shambhusingh, Bhanwar Singh, Devendra Singh, Mahendra Singh, and Surendra Singh have killed Samandar Singh. Thereafter he brought dead body of Samandar Singh on a cot to

Village Belka Gaon, from where he was taken to P.S. Daurana in a jeep and at P.S. Daurana Samandar Singh died. His whole body of deceased was stained with blood. He was also witness of Japti Panchnama (Exh. P-3) and the recovery of umbrella of Samandar Singh (Exh. P-4). Though in the cross-examination he has stated that police has recorded his statement after two months and when goods were seized and seizure memos were prepared his statement was not recorded and on the suggestion he denied that he is telling lie because he is the relative of deceased.

13. Lallu (P.W. 5) has not supported the prosecution and was declared hostile. Rajendra (P.W. 6) has supported the prosecution. He deposed that Gangaprasad came in the village and informed about the incident and also about the assaults gave by the appellants and thereafter he went on the spot and had seen the deceased, who had received injuries on the head near nose and chick. He was taken to police station and thereafter he died and there was a dispute between Samandar Singh and Shambhusingh about the agriculture land. In the cross-examination he had admitted that Gangaprasad had informed him about the incident. Similar is the evidence of Karan Singh (P.W. 8), who is the father of the deceased Samandar Singh. He has stated that Gangaprasad had informed him about the incident and killing of his son by the accused persons. Moolchand (P.W. 9) is the witness of arrest Panchnama (Exh. P-8), memorandum of recovery of lathi on the information of Manoj Singh under memo Exh. P-11, and seizure of ballam Exh. P-14. Durgaprasad (P.W. 10) has stated that Samandar Singh was in service on his land and Bhanwar Singh had informed him about the incident that all the accused persons have killed Samandar Singh. Phool Singh (P.W. 11) has stated that Sarvan has informed him about the incident and thereafter he along with Bhanwar Singh, Prahlad Singh, Rajendra Singh went to the place of occurrence, where deceased was unconscious and bleeding from the injuries. He had seen him injured. Rupkamal (P.W. 12), wife of the deceased, was also examined to prove about the death of his husband but she was not the eye witness. The incident was informed to him by his brother-in-law as well as by father-in-law. In defence Kalyan was examined as D.W. 1, who is Sarpanch of Gram Panchayat Sindogadha and has deposed about plea of alibi of Mahendra singh that on 6-8-97 he had come to his house to make a complaint against Kan

Singh and he was with him between 12 to 3 p.m.

14. It was argued that the evidence of Raghuvir Singh (P.W. 4), Rajendra (P.W. 6), Ramnath (P.W. 8), Phoolsingh (P.W. 11) is hearsay evidence but it cannot be held that their entire evidence is hearsay. All the witnesses have stated that they received information about quarrel through Gangaprasad (P.W. 1) and other persons those who were present on spot and thereafter they went on spot and had seen that Samandar Singh was injured, unconscious and bleeding and his body was lifted from that spot by them firstly to Village Belka on cot and from Village Belka to police station in the jeep and he died in the way. Rajendra Singh has also stated about motive. Therefore, all the witnesses had seen that deceased was injured, he was bleeding and died in their presence. Dr. Jain (P.W. 7) has found that these injuries were ante-mortem and homicidal. Therefore, it is clear that it is not the case of natural death or accidental death, but it is a case of homicidal death.

15. Now the material question is that who caused these injuries, and whether the evidence of Gangaprasad (P.W. 1), who has supported the prosecution in the examination-in-chief and in the cross-examination which took place after three months partly supported the prosecution and partly turned hostile and also whether the evidence of Harivallabh (P.W. 2), who supported the prosecution in examination-in-chief but after two months when he was cross-examined he has conveniently partly supported the prosecution and partly not can be relied. Raghunandan Singh (P.W. 3) though is the brother of deceased, has supported the prosecution story as a child witness. His evidence cannot be discarded totally.

16. Trial Court found that the evidence of motive is also available on record. Durgaprasad (P.W. 10) has deposed that he was having 51 bigha of land in Fattukhedi, which was given by him as a grass land to Shambhusingh and the period of agreement had expired on 31-3-1997 thereafter on 21-4-1997 Shambhusingh filed a suit showing him as a Shikmi and on 15-5-1997, Durgaprasad had kept deceased as servant on the aforesaid land and therefore the incident took place and the deceased Samandar Singh was beaten by the accused persons. But this evidence is a very remote kind of evidence of motive. In

fact, when there is a direct ocular and medical evidence is available on record, the question of motive is quite irrelevant. There may be many more reasons. One does not know the mind and intention working behind the criminal act of a person. The Trial Court has also considered this aspect of the matter that in a case where witnesses supported the prosecution case at the time of examination-in-chief and if there was time gap in cross-examination and if he resiles from his earlier statement in the cross-examination, that part of his statement can be discarded in which he has not supported the prosecution and it can be held that subsequently in the cross-examination he gave the statement with a view to help the accused persons and in that case the statement given by him in the examination-in-chief can be considered and reliance can be placed thereon and other evidence can be discarded. The evidence of Gangaprasad, who was very well on spot and accompanying with the deceased alongwith. Harivallabh (P.W. 2) and Raghunandan (P.W. 5), is fully reliable. Gangaprasad had informed to other family members and villagers such as Raghuveer Singh (P.W. 4), Rajendra Singh (P.W. 6), Ramnath Singh (P.W. 8) and Phool Singh (P.W. 11) and on the information of Gangaprasad they came on spot and had also seen the deceased in injured condition immediately after the incident, he was unconscious and bleeding from injuries. This proves the conduct of Gangaprasad, who had given information to them. Gangaprasad has also admitted his signatures on the FIR (Exh. P-I) and Court placed reliance on the evidence of this witness of his examination-in-chief, corroborated by other ocular as well as medical evidence and convicted all the appellants.

17. Regarding the value of evidence of hostile witness, in the case of Bhagwan Singh v. State of Haryana : 1976 CriLJ203 , the Supreme Court held as under:

Where the Court gives permission to the Prosecutor to cross-examine his own witness, thus characterising him, as a hostile witness, that fact does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence.

18. Again in the case of Rabinder Kumar Dey v. State of Orissa : 1977 CriLJ173 , the S.C. has summarised the legal portion as under:

Section 154 confers a judicial discretion, on the Court to permit cross-examination and does not contain any conditions or principles which may govern the exercise of such discretion. It is, however, well settled that the discretion must be judicially and properly exercised in the interest of justice. The law on the subject is well settled that a party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the Court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement which he made before an earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. One of the glaring instances in which this Court sustained the order of the Court in allowing cross-examination was where the witness resiles from a very material statement regarding the matter in which the accused committed the offence. In Dayabhai v. State of Gujarat : 1964 CriLJ472 this Court made the following observations:

Section 154 does not in terms, or by necessary implication confine the exercise of the power by the Court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the Court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief is to make it ineffective in practice. A clever witness in his examination-in-chief faithfully conforms to what he stated earlier to the police or in the Committing Court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If he designs is obvious, we do not see why the Court cannot, during the course of his cross-examination, permit the person calling him as a witness to put questions to him which might be put in cross-examination by the adverse party.

'12. It is also clearly well settled that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him as unreliable witness so as to exclude his evidence from consideration

altogether. In *Bhagwan Singh v. State of Haryana* : 1976 CriLJ203 , Bhagwati, J., speaking for this Court observed as follows:

The prosecution could have been avoided requesting for permission to cross-examine the witness under Section 154 of the Evidence Act. But the fact that the Court gave permission to the Prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence.

19. Again same principle is reiterated in the case of *Syed Akbar v. State of Karnataka* : 1979 CriLJ1374 by the Supreme Court and S.C. has held as under:

As a legal proposition, it is now settled by the decisions of this Court, that the evidence of a prosecution witness cannot be rejected wholesale, merely on the ground that the prosecution had dubbed him 'hostile' and had cross-examined him. We need say no more than reiterate what this Court said on this point in *Sat Paul v. Delhi Administration* : 1976 CriLJ295 :

Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be credit worthy and act upon it,. If in a given case, the whole of the testimony of the witness is impugned, and in the process the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto.

20. In the case of *Khujji v. State of M.P.* : 1991 CriLJ2653 it is held that:

The evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

21. If the case in hand is examined, as has been discussed by the Trial Court and in view of the aforesaid law laid down by the Apex Court, there is a clear evidence of Gangaprasad (P.W. 1), who in the examination-in-chief fully supported the prosecution case. He submitted his signatures on FIR, which is Exh. P-1. He also identified all the accused persons in the Court except Devendra Singh, who was referred for trial to Juvenile Court. He is also the witness of Exh. P-2 stop map, seizure of soil from the spot Exh. P-3 and seizure of one umbrella Exh. P-4 which he has proved, which goes to show that he fully supported the prosecution, thereafter the Trial Court conveniently granted time for cross-examination and thereafter he conveniently resile from his earlier statement and stated that he was threatened by the complainant party to lodge the FIR though he was going with the deceased when the accused persons were present in the way. There was exchange of abuses between the deceased and the accused persons and thereafter he says that he left the place and informed the family members of the deceased. He admitted that thereafter he had not seen the deceased alive. He again came on spot alongwith the family members and the injured was taken by him to Village Belka and from Village Belka to Vijaypur Thana in the jeep. His admission in Para 17 of his cross-examination is sufficient to discard his other statement of cross-examination. As the incident took place on 6-8-1997 at about 4.30 p.m. and report of the same was lodged on 20.15 p.m. and the distance of the place of incident from the police station was shown as 10 km, therefore, it is very much clear that the report of the incident was promptly lodged and on the next day the post-mortem of the dead body was performed and the duration of injuries was within 24 hours. The aforesaid prosecution evidence is fully corroborated by medical evidence as well as by other ocular evidence is fully corroborated by medical evidence as well as by other ocular evidence. Thus, we find that the Trial Court has rightly and properly appreciated the legal position in the matter.

22. We have also considered that as per the chemical examination report (Exh. P-15), the blood was found on the farsa (Art. D), which was seized at the instance of Manoj Singh, which also corroborates the prosecution case. All the accused persons were the member of unlawful assembly, as they were standing in the way and waiting for Samandar Singh. Therefore, from the prosecution evidence, it is clear that the appellants are the assailants and their presence shows their intention in committing crime. Ballam and farsa are the dangerous weapons. The injuries received by the deceased are also corroborated by the weapons, i.e., Farsa and Ballam, which are seized. The injury No. 1 was found fatal as the farsa blow was severe that has caused two fractures in the skull and that injury was sufficient to cause death in the ordinary course of nature. Therefore, there is no iota of doubt that the crime was not committed by appellants or the appellants were successful in raising serious doubts in the prosecution story. On the contrary, we are of the view that the prosecution has proved the charges against the appellants by producing evidence beyond reasonable doubt.

23. Consequently, we do not find any scope of interference in this appeal. Appeal fails and is hereby dismissed.