

Afsar Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Aug-24-2009

Reported in : 2010(1)MPHT343

Judge : A.K. Shrivastava and ;S.S. Dwivedi, JJ.

Appellant : Afsar

Respondent : State of Madhya Pradesh

Advocate for Pet/Ap. : Shri. Kunal Suryawanshi

Disposition : Appeal allowed

Judgement :

A.K. Shrivastava, J.

1. Feeling aggrieved by the judgment of conviction and order of sentence dated 8-7-1997 passed by the learned Additional Sessions Judge, Dabra, Distt. Gwalior, in Sessions Trial No. 246/94, convicting the appellant under Section 302/34 of IPC and thereby sentencing him to suffer life imprisonment, this appeal has been preferred by the appellant under Section 374 (2) of the Code of Criminal Procedure, 1973.

2. In brief, the case of the prosecution is that on 25-3-1974 at 7 in the morning Lachchhiram (hereinafter referred to as 'the deceased') along with his brother

Sunman was going to Dabra to purchase house hold items. He was accompanied by Hukuma and Puran. All these persons were going on their foot. As soon as they reached nearby Bhadau Nariya, it is said that appellant as well as absconding co-accused Ramesh met these persons. It is said that absconding accused Ramesh hurled a taunt to him and by hurling the abuses, stated that he was waiting for the deceased and thereafter absconding accused Ramesh dealt axe blow on his person. Thereafter, in order to share the common intention to kill the deceased appellant also dealt axe blows on his waist as well as on his neck region.

3. On account of receiving the injuries, the deceased died. According to the prosecution, the brother of deceased Sunman lodged the report and on lodging of the report, the investigating agency came into action.

4. After the investigation was over, a charge-sheet was submitted in the Committal Court, who committed the case to the Court of Session and from where it was received by the Trial Court for its trial.

5. The learned Trial Judge framed charge punishable under Section 302/34 of IPC against the appellant, which he denied and requested for the trial.

6. In order to prove the charge of Section 302/34 of IPC, the prosecution examined as many as 9 witnesses and placed Exh. P-1 to Exh. P-19, the documents on record. The defence of the appellant is of false implication and the same defence he set forth in his statement recorded under Section 313 of Cr.PC. However, in support of his defence, he did not choose to examine any witness.

7. The learned Trial Judge on the basis of the evidence placed on record, came to hold that charge under Section 302/34 of IPC has been found to be proved against the appellant and eventually convicted him and passed the sentence, which we have mentioned hereinabove.

8. In this manner, this appeal has been filed by the appellant assailing the judgment of conviction and order of sentence.

9. Vehemently, it has been contended by Shri Kunal Suryawanshi, learned Counsel for the appellant, that according to the prosecution, there are as many as

three eye-witnesses, they are Sunman (P.W. 1), Hukum Singh (P.W. 2) and Puran, who has not been examined. The contention of the learned Counsel is that the entire story moves around the statement of eye-witnesses; Sunman and Hukum Singh, but if their testimony is considered in proper perspective, it is difficult to hold that the appellant is the person who had caused the injuries by axe to the deceased. Hence, according to the learned Counsel, the appellant, who is languishing in jail for the last 15 years as after his arrest he is throughout in the custody, be acquitted from the charge under Section 302/34 of IPC.

10. By putting a deep dent on the authenticity and hallmark of the testimony of the eye-witnesses; Sunman and Hukum Singh, it has been contended by the learned Counsel that for the first time this witness saw the appellant at the time of commission of the offence and if that is the position, the investigating agency was obliged to put the appellant for test identification parade. Having not done so, according to the learned Counsel, the learned Trial Court erred in convicting the appellant. In support of his contention, learned Counsel for the appellant placed reliance on the following decisions:

(1) *Tamilselvan v. State* : (2008) 7 SCC 755;

(2) *Mohd. Abdul Hafeez v. State of Andhra Pradesh* : AIR 1983 SC 367; and

(3) *State of Maharashtra v. Sukhdeo Singh* : AIR 1992 SC 2100.

On these premised submissions, it has been contended by the learned Counsel that by allowing this appeal, the impugned judgment convicting the appellant be set aside.

11. Per contra, Shri M.P.S. Bhadoriya, learned Public Prosecutor, argued in support of the impugned judgment.

12. Having heard the learned Counsel for the parties, we are of the view that this appeal deserves to be allowed.

13. In the present case, the prosecution has examined only two eye-witnesses Sunman and Hukum Singh as P.W. 1 and P.W. 2 respectively and Puran, who is

also an eye-witness, has not been examined for the reasons best known to the prosecution. We shall now examine the testimony of these two eye-witnesses.

14. On going through the evidence of Sunman (P.W. 1), who is brother of the deceased and the author of the FIR, we find that categorically he has stated that on the date of incident at the time of commission of the offence for the first time he saw the appellant. Further, he has admitted that he is not acquainted by the name of the appellant. Further, this witness is saying that appellant is the same person who had caused the injuries to the deceased. On going through cross-examination of this witness, we find that on several dates the witness was present in the Court and although he has stated that he did not see the appellant in the Court, however, we can infer that he is concealing the reality because the appellant is throughout in jail and was brought in the Court on each and every date, and therefore, the occasion not only once, but for several times to see the appellant was available to this witness, and therefore, according to us, since this appellant was not known to this witness earlier to the incident, his testimony saying that appellant is the same person who caused the injuries by axe to the deceased becomes highly doubtful. In this context, we may profitably place reliance on the above decisions cited by the learned Counsel for the appellant.

15. So far as the testimony of Hukum Singh (P.W. 2) is concerned, he too has stated the same thing. This witness is also not acquainted with the appellant earlier to the incident. Further, this witness in Para 1 of his examination in chief has put his inability to identify the appellant because according to him on account of lapse of three years he is not in a position to identify him.

16. This is the total evidence of the prosecution against the appellant. Looking to the evidence of Autopsy Surgeon V.P. Mathur (P.W. 4) and his post-mortem report (Exh. P-3), there are incised wounds on the person of the deceased, but still it is a mystery whether the appellant has caused those injuries or not. We have already disbelieved the evidence of Sunman (P.W. 1) and Hukum Singh (P.W. 2) in respect to the identification of the appellant, and therefore, by extending the benefit of doubt, according to us, charge under Section 302/34 of IPC has not been proved by the prosecution and the Trial Court erred in convicting the

appellant for the said charge.

17. Resultantly, the appeal succeeds and is hereby allowed. The impugned judgment of the conviction and order of sentence is hereby set aside and the appellant, who is languishing in jail for the last 15 years, be set at liberty forth with, if not required in any other case.

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