

Jiwa Ram Vs. the State

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Court : Rajasthan

Decided On : Sep-10-1964

Reported in : AIR1965Raj32; 1965CriLJ219

Judge : L.N. Chhangani, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300, 302 and 304; [Evidence Act, 1872](#) - Sections 45; Code of Criminal Procedure (CrPC) - Sections 286

Appeal No. : Criminal Appeal No. 447 of 1964

Appellant : Jiwa Ram

Respondent : The State

Advocate for Def. : A.R. Mehta, Deputy Govt. Adv.

Advocate for Pet/Ap. : O.C. Chatterji, Adv.

Disposition : Appeal partly allowed

Judgement :

L.N. Chhangani, J.

1. This is an appeal by Jiwaram against the judgment dated 13th July, 1964 of the Additional Sessions Judge, Bharatpur, convicting him under Section 304 Part II, Indian Penal Code, and sentencing him to three years rigorous imprisonment and

a fine of Rs. 500/-, in default, 3 months further rigorous imprisonment, and under Section 323, Indian Penal Code to a fine of Rs. 100/-, in default, month's further rigorous imprisonment.

2. The facts leading to the prosecution of the appellant and two other persons, Roop Singh-his father-and Mst. Bhudevi- his wife- may be briefly stated as follows:

3. Deceased Kalyansingh and the injured Sughadsingh Pw/3 and the three accused were all residents of village Noorpur. The accused Roopsingh is the uncle of Sughadsingh and the deceased Kalyansingh (alias Kaluva). It is said that relations between the accused and the deceased and Sughadsingh had not been happy for some years past. The prosecution case further is that in the evening of 13th March, 1963, a she-buffalo of Sughadsingh caused some damage to the fodder of Roopsingh and Jiwaram in consequence of which Jeewaram and Mst. Bhudevi belaboured Mst. Bhanwari Pw/5 mother of Sughadsingh and Mst. Draupadi--wife of Kalyansingh. Sughadsingh was out in the village but was at Bharatpur in connection with his service in Central India Machine Manufacturing Company, When he arrived in the village in the morning of 14th March, 1963, Mst. Bhanwari and Mst. Draupadi narrated to him the incident which had happened the previous evening. Thereupon Sughadsingh went to Roopsingh to protest. Roopsingh is reported to have said that till then he had belaboured his mother and sister-in-law but now he would belabour Sughadsingh also. Sughadsingh then went to the common 'baithak' and sat there. After a while, all the three accused came armed with lathi and spear and assaulted Sughadsingh. Kaluva, the deceased, also happened to arrive on the scene and the three accused, it is alleged, inflicted injuries both upon Sughadsingh and Kaluva. Kaluva on receiving the injuries fell on the ground and died on the spot. A report was lodged by Kanjra Pw/6 at the Police Outpost, Chiksana, and the same was forwarded to the Police Station, Sevar, After investigation the Police submitted a charge sheet against the appellant and Roopsingh and Mst. Bhudevi under Section 302 read with Section 34, Indian Penal Code, in the Court of Munsif Magistrate, Bharatpur. After enquiry, the Munsif Magistrate committed them to the Court of Sessions Judge, Bharatpur. The case was tried by the Additional Sessions Judge, Bharatpur.

4. The prosecution examined ten witnesses to prove its case. The accused denied their guilt but led no evidence in defence.

5. The Additional Sessions Judge held that Jiwaram inflicted injuries to Sughadsingh. He also held that Jiwaram inflicted three spear blows to the deceased Kaluva. He, however, held that the other two accused did not inflict any injuries to the deceased Kaluva as long as Kaluva was alive. According to the Additional Sessions Judge if they caused any injuries, they had been inflicted after Kaluva had died. The Additional Sessions Judge considered the question of the applicability of Section 34, Indian Penal Code, and recorded a conclusion that the three accused had not been animated by any common intention. They might have had similar intention but similar intention could not be equated with common intention. In the result, he acquitted the two co-accused Roopsingh and Mst. Bhudevi, and convicted the appellant and sentenced him as stated earlier.

6. The convictions and sentences of the appellants have been challenged in this appeal and the first submission made by Mr. Chatterji is that even on accepting the prosecution allegation in its entirety, no case under Section 304, Part II, Indian Penal Code, is made out on a proper interpretation of the medical evidence. Dr. B. P. Jangid Pw/I is the medical witness who had conducted the post mortem examination on the person of deceased Kaluva. He noticed four injuries on the person of the deceased. These four injuries are detailed below:

1. Incised wound 1' x 1/8' x 17.4' on the ulnar side of right forearm in the middle placed vertically.

2. Incised wound 1/2' x 1/4' x 1/4' on the right parietal region, 2 1/2' away from the middle line, parallel to the sagittal suture.

3. Contusion 3' x 1 1/2' on the left parietal region.

4. There was separation of the fronto-parietal suture on left side.

His further statement is that he conducted the post mortem examination within four to twenty-four hours of the death of the deceased. According to him, 'the death was due to shock and haemorrhage by the above mentioned injuries, which were

ante-mortem in nature.' His further statement was that the external injuries Nos. 1 and 2 could have been caused by spear Ex. M.i. The witness did not express any opinion as to whether the injuries received by the deceased Kaluva were sufficient in the 'ordinary course of nature to cause death to invite the applicability of Sections 300 and 302, Indian Penal Code, or they were likely in the ordinary course of nature to cause death to invite the applicability of Sections 299 and 304, Indian Penal Code. The Doctor no doubt says that the death was caused on account of shock and haemorrhage on account of the above mentioned injuries but this statement cannot be considered equivalent to the statement that 'the injuries by themselves were in the ordinary course of nature likely to cause death'. In the absence of a proper opinion by the Doctor, it is difficult to arrive at a positive conclusion that the injuries should be considered as likely to cause death. It is regrettable that the Doctor was not properly examined at the trial stage and no question was put to him as to the likely effect of the injuries. It will be proper to observe in this connection that the Public Prosecutors should be careful in examining medical witnesses and should bring on record the opinion of the Doctor as to whether the injuries in a given case were sufficient in the ordinary course of nature to cause death or, were in the ordinary course of nature likely to cause death. It will also be proper if the Judges exercise proper care in recording the statements of the medical witnesses and see that proper dates and materials are brought on record. I would have recalled the Doctor for further examination in this Court but in the view which I propose to take of the evidence, I consider it unnecessary to recall the Doctor for further examination. Be that as it may on the statement of the Doctor as it stands, the conviction of the appellant under Section 304, Part II, Indian Penal Code', is not safe and cannot be sustained.

7. Next submission made by Mr. Chatterji is that there is no satisfactory evidence on record to justify a finding that the appellant inflicted spear blows on the deceased Kaluva. In dealing with this submission, it may be stated at the outset that the Additional Sessions Judge has himself noted in his judgment that the three eye witnesses. Sughadsingh Pw/3, Mst. Draupdi Pw/4 and Mst. Bhanwari Pw/5, who stated at the trial that the appellant inflicted spear blows upon the deceased? Kaluva, had stated at the investigating stage that Jiwaram gave only lathi blows and it was Roopsingh who gave spear blows to the deceased. It may

be observed in passing that the Additional Sessions Judge is not completely accurate when he accepts the position that all the three witnesses had stated in police that Jiwaram only gave lathi blows and Roopsingh gave spear blows. A reference to the statement of Sughadsingh at the police stage (Ex. Di) shows that he had not stated that Roopsingh gave spear blows to the deceased Kaltiva. His statement at the police stage as is on the record is to the effect that Jiwaram gave a lathi blow and then he also gave spear blows. Mr. Chatterji suggests that the mention of Jiwaram as the person who gave spear blows in the police statement is a mere slip of pen. Be that as it may, the observations of the Additional Sessions Judge that all the three witnesses had stated at the police stage that Jiwaram only gave lathi blows and Roop--singh gave spear blows are not quite accurate. In view of these circumstances, the position may now be stated as follows:

'That there are two contradictory statements by Mat. Draupdi Pw/4 and Mst. Bhanwari Pw/5 one set of statements at the police stage and the other at the trial stage. In their statements at police stage they clearly stated that Roopsingh was armed with a spear and inflicted spear blows to the deceased. At the trial stage, their statements are that Jiwaram was armed with spear and inflicted spear blows to the deceased Kaluva. As regards Sughad-singh, the contradiction is only to this extent that while at investigating stage according to him. Jiwaram was armed both with a lathi and a spear and used both but at the trial stage he stated that Jiwaram used only the spear and was not armed with a lathi.'

I may atonce state that the statement of Sughadsingh Pw/3 at the investigating stage that Jiwaram first gave a lathi blow and then gave a spear blow, does not purport to be a natural statement and there appears to have been some confusion in his statement at the police stage and it may be accepted generally that the prosecution case at the investigating stage was different from the case as sought to be proved at the trial. There being thus two contradictory versions, a question arises whether the version as given at the trial stage can be safely accepted or not? The Additional Sessions Judge in preferring the version at the trial stage has advanced his reasoning as follows:

'Accused Jiwaram is an young man of robust health, whereas accused Roopsingh is very old about 75 years of age (there appears to be a mistake-- Eoopsingh having his age as 70) and of very weak health. In the ordinary course, a spear being a heavier weapon than an ordinary lathi, it was quite natural that Jiwaram would have been armed with the spear. I have examined Ex. M.1 the spear. If that is the spear, which is said to have been used in the occurrence, I am doubtful, whether because of its weight, it could have been handled by accused Roop Singh.'

It is this reasoning which has been seriously challenged as unsound by the learned counsel for the appellant, and I proceed to examine the correctness of this reasoning.

8. It is a fundamental rule of evidence that except for certain exceptions provided in some of the provisions of the Evidence Act or other enactments no statement or matter should be used against an accused unless he has had an opportunity of testing the statement or matter by cross-examination. Similarly, no circumstance or matter should be used against an accused unless he has had an opportunity of offering his explanation for the same under Section 342, Criminal P. C. Now, in the present case, the Additional Sessions Judge has referred to his own knowledge as to the weight of the spear which was produced in Court as also his knowledge as to the state of health of Roop Singh and on the basis of his knowledge thought it proper to infer that Roop Singh could not have handled the spear. In doing so, he has reduced himself to the position of a witness even though the appellant had no opportunity of cross-examining him. The Additional Sessions Judge has utilised his knowledge and inference not only for giving benefit of doubt to Roop Singh but he has gone further and has used his inference for a finding that Jiwaram must have necessarily used the spear. Jiwaram obviously had no opportunity to test the knowledge of the Additional Sessions Judge by cross-examining him nor had he any opportunity to explain the circumstance arising out of the knowledge of the Additional Sessions Judge by putting forward his explanation under Section 342, Criminal P. C. The Additional Sessions Judge, in my opinion, was hardly justified in using his own knowledge impression and inference against the accused Jiwaram and his action is not supported by any provisions of law either in the

Evidence Act or in the Criminal Procedure Code. Reliance may be placed in this connection upon *Pritam Singh v. State of Punjab*, (S) AIR 1956 SC 415 referred, to by the learned counsel for the appellant. In that case, a question arose whether the shoes recovered from the house of the accused belonged to the accused. The Additional Sessions Judge attempted in examining the accused under Section 342, Criminal P. C. if the shoes recovered fitted his feet. The accused agreed to the suggestion offered by the Additional Sessions Judge and tried the shoes, and complained that the shoes were too tight for his feet. The Additional Sessions Judge, however, formed an impression that the shoes had fitted the feet of the accused, and he recorded his impression accordingly and used it against the accused. Their Lordships of the Supreme Court disapproved the mode adopted by the Additional Sessions Judge and made the following observations:

'The learned Additional Sessions Judge was certainly not entitled to allow his view or observation to take the place of evidence because such view or observation of his could not be tested by cross-examination and the accused would certainly not be in a position to furnish any explanation in regard to the same.'

Thus both on principle as also on the authority of cases the reasoning adopted by the Additional Sessions Judge had no validity in law and the learned Deputy Government Advocate found it difficult to support the reasoning of the Additional Sessions Judge. This ground relied upon by the Additional Sessions Judge being not available a question arises whether there can be any other good and cogent ground for preferring one set of the contradictory statements of the prosecution witnesses to the other set of statements. The learned Deputy Government Advocate suggested that the statement at the investigating stage might have been on account of either slip of tongue on the part of the witnesses or on account of slip of pen on the part of the investigating officer who recorded the statements.: The first suggestion of the learned Deputy Government Advocate has no basis. The witnesses made no effort to put forward such an explanation. When faced with their earlier contradictory statements, they merely made statement to the effect that they had never made such statements at the investigating stage. They had no courage to suggest that in making the earlier statements they had made some mistake on account of slip of tongue. Similarly, the Station House Officer,

who recorded the statements. had clearly stated that he recorded the statements as were made by the witnesses before him and he was not examined as to the possibility of there being an error in the statements on account of slip of pen. It has been noticed in several cases that the witnesses make no effort to explain the various contradictory statements and come forward with mere statements to the effect that earlier statements either at the investigating stage or even at the committing stage had not been made by them. I desire it to be noted by the agencies incharge of the prosecution and the prosecution witnesses interested in the punishment of wrongs and the prosecution of the accused, particularly the private complainants, that contradictory statements at the various stages of the case, namely, investigation stage, committal stage and trial stage, not only affect their reliability but also introduce serious difficulties in the way of the Judges in arriving at the truth and it is imperative that the witnesses should not make contradictory statements deliberately. It may also be added that if the contradictory statements are not explained in a reasonable manner and appear to have been made deliberately and motivated by improper ulterior considerations, the witnesses run the risk of getting their statements completely discredited. It is high time that the witnesses should realise that they play an important role in achieving a purer and proper administration of criminal justice and that there are indeed limitations on the capacity of the Judges to separate the truth from falsehood. Naturally, deliberate falsehood on their part should be and will be seriously viewed. In the present case, I do not find any reasonable explanation for the varying versions given by the prosecution witnesses at the investigation stage and at the trial stage. It appears to me that the prosecution at a later stage thought it proper to impute serious part to the junior and younger member of the family and thus came forward with the changed version. In these circumstances, considering the contradictory statements at the two stages, I do not feel safe in arriving at a conclusion that Jiwaram was armed with a spear and inflicted injuries with the spear on the deceased. The liability of Jiwaram, therefore, even under Section 324, Indian Penal Code, also is not established,

9. Lastly, I take up the question of the liability of Jiwaram under Section 323, Indian Penal Code. Mr, Chatterji contended that the statements of the eye witnesses at the trial to the effect that Jiwaram inflicted spear blows having been

discarded, there remains no legal basis for convicting the appellant under Section 323, Indian Penal Code. The witnesses do not say at the trial stage that the accused Jiwaram inflicted injuries with a lathi and, therefore, they do not provide any basis for conviction under Section 323, Indian Penal Code. Dealing with the statements at the investigating stage, Mr. Chatterji's contention is that the statements at the investigating stage cannot be considered as substantive piece of evidence and can only be used for the purpose of contradiction and, therefore, those statements cannot be relied upon for convicting the appellant under Section 323 Indian Penal Code. Another argument advanced by Mr. Chatterji in this connection is that the witnesses having made contradictory statements they cannot be treated as wholly reliable witnesses and. can at the best be witnesses partly reliable and partly unreliable and, therefore, their statements cannot be considered sufficient to sustain conviction in the absence of other corroborative evidence.

10. I have given due consideration to the argument advanced by Mr. Chatterji. It no doubt possesses some kind of attractiveness but on the whole, I am unable to accept the contention considering the facts and the circumstances of the present case. The position properly analysed in the present case is this. At the investigating stage the prosecution case was that the accused Jiwaram was one of the assailants and that he was accompanied by his old father Roop Singh and by his wife Mst. Bhudevi. At that stage, the case was that the accused Jiwaram was armed with a lathi and used the lathi during the incident. At the trial stage also the case is that Jiwaram was one of the assailants and accompanied by his old father and his wife. The changed version at the trial stage is that instead of being armed with a lathi he was armed with a spear and used spear both from the sharp side as also from the blunt side. Now, so far as the participation of Jiwaram in the assault is concerned, the two statements agree. The only improvement is with regard to the use of the weopan and as indicated earlier it appears that the complainant desired to impute serious part to the junior and younger member of. the family.

11. In considering the effect of contradictory statements, one should not ignore the purpose and the mode of exaggeration. The subsequent statements at the trial do not in any way improve upon the earlier version with regard to the participation in the incident by the appellant. The exaggeration is confined merely to the manner

in which the accused played his part during the course of the incident. Looking to the mode and purpose of exaggeration I consider that the accused should be given benefit only in respect of the controversy as to whether he used the spear or not during the course of the incident. No benefit of doubt should necessarily be given to him in respect of his participation in the incident, If once his participation in the incident is established there remains no difficulty in arriving at a conclusion that he at least caused simple injuries to Sughadsingh and the deceased Kaluva. It may be remarked here that having regard to the definition of the word 'proved' in Section 3 of the Evidence Act in considering the question whether a particular fact is proved or not the Court should primarily consider whether there is a requisite degree of probability of the fact having existed on a consideration of the various matters properly brought before it and it should not overstress the need of accuracy in the statements of witnesses. There are indeed a few important features of the case to which reference may be made at this stage.

1) That there was some incident between the accused and the female relations of Sughadsingh and the deceased Kaluva, on the day previous to the date of the incident. This fact is not only proved by the evidence of the prosecution witnesses but even the accused Roop Singh does not dispute this fact. Thus there was some proximate cause for the incident.

2) The name of the appellant Jiwaram as an assailant was disclosed in the first information report lodged by one Kanjra,

3) That there is the medical evidence lending corroboration to the fact that the deceased received injuries. Though the medical evidence does not provide any corroboration with regard to the particular person who caused the injuries but it does lend general corroboration to the prosecution case.

4) That the exaggeration by the prosecution was only with regard to the part played by the accused Jiwaram.

On these considerations, I have no doubt that participation by Jiwaram and infliction of some injuries to the deceased and Sughadsingh by Jiwaram, stands reasonably proved within the meaning of Section 3 of the Evidence Act.

12. Now, I take up the argument of Mr. Chatterjj based on the observations made in *Vadivelu Thevar v. State of Madras*, (S) AIR 1957 SC 614. In that case, their Lordships of the Supreme Court divided witnesses into three classes:

1. Wholly reliable.
2. Wholly unreliable.
3. Neither wholly reliable nor wholly unreliable.

In para 12 at p. 619 of the judgment their Lordships further observed:

'It is the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.'

Thereafter, their Lordships further took up the question of the dangers involved in insisting on plurality of witnesses. In the first instance, it may be mentioned that their Lordships were dealing with a case of a solitary eye witness and they made it clear that conviction on the solitary evidence is permissible under law and that the Courts should not insist upon plurality of witnesses. Their Lordships no doubt made further observations as to the need of corroboration, direct or circumstantial, in respect of witnesses neither wholly reliable nor wholly unreliable. These observations were made in the context of a case resting upon a solitary witness. Further, their Lordships were only laying down a rule of prudence and were not stating as a matter of law that if witnesses are not wholly unreliable the Courts cannot in any case act upon such evidence. It may be significantly: pointed out that in case where more than one witnesses are not wholly reliable and are partly reliable and partly unreliable, two questions arise for determination:

Whether the statement of one partly reliable witness can be corroborated by the statement of similar witness?

Whether the corroboration should be in the nature of an independent evidence directly tending to establish the commission of the crime as also the connection of the accused with the crime or it should be enough if there are materials which lend

assurance to the testimony of the witness?

13. Dealing with the first question, it may be stated generally that the Judges should be cautious in appraising the evidence of such witnesses but there is no legal bar nor there should be any insurmountable difficulty in accepting a case supported by more than one partly reliable witness even if one is not prepared to accept the case on the evidence of a solitary witness. By way of analogy I may mention that the vitality of rope or cable composed of different strands depends on the aggregate strength of the strands and is only partially affected by the weak elements therein.

14. The answer to the second question, in my opinion, should be that the corroboration need not be of independent evidence trying to establish the commission of the crime or the connection of the accused with the crime and a Court may act upon the evidence if there are circumstances lending assurance to the testimony of the witnesses.

15. Appraisal of evidence is after all a question of fact and though Judges should be and are to be guided by rules of prudence but in the ultimate analysis they should reach their conclusion in any case on an overall consideration of the facts and the circumstances of individual cases. It will be dangerous in such cases to import inflexibility.

16. In this view of the matter, I am not prepared to accept Mr. Chatterji's argument that the statements of the witnesses should be discarded summarily. I may also point out that sufficient assurance is lent to the testimony of these witnesses by the circumstances indicated by me at an earlier stage. I am quite satisfied that Jiwaram was concerned in the assault that was made upon Sughadsingh and Kaluva and that he was at least responsible for the infliction of simple injuries to them.

17. The Deputy Government Advocate suggested that the finding of the Additional Sessions Judge that the accused had no common intention and had only similar intention, is not proper and that it should be set aside and that I should have recourse to Section 34, Indian Penal Code, in convicting the appellant. Mr.

Chatterji, however, submitted that the acquittal of the two co-accused Roopsingh and Mst. Bhudevi having remained unchallenged and final, there can be no recourse to Section 34, Indian Penal Code, on an assumed complicity of the accused. He relied upon the observations of Supreme Court in *Prabhu Babaji Navle v. State of Bombay*, (S) AIR 1956 SC 51 and *Krishna, Govind Patil v. State of Maharashtra*, AIR 1963 SC 1413. The Deputy Government Advocate relied upon my decision reported in *Mohan Lal v. State*, ILR (1960) 10 Raj 1200: (AIR 1961 Raj 24). In my opinion, the conviction of the appellant under Section 323, Indian Penal Code, is sustainable even apart from the applicability of Section 34, Indian Penal Code, on the basis of the reasoning adopted above and I consider it unnecessary to examine the finding of the Additional Sessions Judge with regard to the applicability of Section 34 and to invoke that section for convicting the appellant under Section 323, Indian Penal Code.

18. In the circumstances, the appeal is partially accepted and the conviction of the appellant is altered from Section 304, Part II to Section 323, Indian Penal Code, in respect of injuries caused to Kaluva.

19. Now, I take up the question of sentence. The Deputy Government Advocate suggests that as Kaluva died in consequence of the injuries received by him in the course of the assault in which the appellant was concerned, a serious view of the sentence should be taken and the maximum sentence should be awarded. Mr. Chatterji, however, contends that when the use of spear by the accused is ignored, the conduct of the accused cannot be treated as of very serious nature. He also contended that the accused-appellant remained under trial-prisoner for over a year and, consequently, the sentence under Section 323, Indian Penal Code, should be a lenient one. Balancing all considerations, I consider a sentence of six months rigorous imprisonment for simple hurt in respect of injury to Kaluva, will meet the ends of justice. No sentence of fine is necessary.

20. No separate sentence in respect of simple injury to Sughadsingh is called for. The sentence of fine passed in that connection is set aside.