

Rameshwar Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Mar-11-2005

Reported in : RLW2005(2)Raj1059

Judge : Shiv Kumar Sharma and; Shashi Kant Sharma, JJ.

Acts : Evidence Act - Sections 118; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 313; Indian Penal Code (IPC) - Sections 34 and 302

Appeal No. : D.B. Criminal Appeal No. 737 of 1999

Appellant : Rameshwar

Respondent : State of Rajasthan

Advocate for Def. : B.N. Sandhu, Public Prosecutor

Advocate for Pet/Ap. : A.K. Gupta, Adv.

Disposition : Appeal dismissed

Judgement :

Shashi Kant Sharma, J.

1. Both these appeals i.e. D.B. Criminal Appeal No. 737/1999 (Rameshwar v. State of Rajasthan) and D.B. Criminal Appeal No 15/2001 (State of Rajasthan v. Sohan and Another) have arisen out of a common judgment dated 29.9.1999

delivered by Addl. Sessions Judge, Kishangarh, Ajmer in sessions case No. 28/1998 (State v. Rameshwar and Ors.) whereby he convicted the accused Rameshwar for the offence under Section 302 IPC and sentenced him to undergo life imprisonment and a fine of Rs. 500/- and in default of payment of fine he has to further undergo 6 months RI and acquitted accused Sohan and Jeevan for the offence under Section 302/34 IPC.

2. The brief facts essential for the disposal of these appeals are that as per the case of the prosecution, on 29.9.98 at about 10 AM Smt. Papudi was cleaning utensils in front of her house in Kishangarh. Her brother Rameshwar came there and pressed her neck and threw her on the stones. Thereafter, Rameshwar went to his house and brought a sword and ran towards Smt. Papudi. Another brother of Smt. Papudi Jeevan slapped her. Rameshwar inflicted injuries by sword on her person. Sohan and Jeevan also helped Rameshwar in this occurrence. Shankar and Kishan sons of Smt. Papudi have seen the entire occurrence and also tried to save her but Rameshwar inflicted many injuries on the person of Papudi. Rameshwar and other accused persons ran away from the place of occurrence. Therefore, police reached at the spot and Shankar (PW 13) gave a written report (Ex.P-16) to police. The police registered a case and started investigation. All the three accused persons were arrested and blood stained sword was recovered from the hand of Rameshwar. His blood stained shirt and pant were also recovered. Post-mortem Examination of the body of deceased Papudi was got conducted. After completion of investigation challan was filed. In due course the case came up for trial before learned Addl. Sessions Judge, Kishangarh, Ajmer who framed the charge for the offence under Section 302 IPC against accused Rameshwar and charge for the offence under Section 302/34 IPC against accused Sohan and Jeevan. Prosecution examined as many as 17 witnesses viz. PW-1 Chand Mohammad, PW-2 Ganesh, PW-3 Kalu, PW-4 Pratap, PW-5 Ramswaroop, PW-6 Banwarilal, PW-7 Chetan, PW-8 Premraj, PW-9 Mohammad Usman, PW-10 K.P. Shshi Kumar, PW-11 Surendra Singh, PW-12 Ramdev, PW-13 Shankar, PW-14 Kishan, PW-15 Gordhan, PW-16 Ramchandra and PW-17 Ratan Singh. Statement of accused persons-Ramesh-war, Sohan and Jeevan were also recorded under Section 313 Cr.P.C. The accused persons examined DW 1 Ram Swaroop as defence witness. Arguments were heard and the learned Addl.

Sessions Judge, Kishangarh, Ajmer convicted the accused Rameshwar for the offence under Section 302 IPC and sentenced him as stated above and acquitted the accused Sohan and Jeevan for the offence under Section 302/34 IPC. The appellant Rameshwar filed this appeal against the judgment and order of conviction and sentence and the State has also preferred appeal against judgment and order of acquittal of accused Sohan and Jeevan.

3. As both these appeals have arisen from the common judgment, therefore, we are disposing of the both these appeal by a common judgment.

D.B. Criminal Appeal No. 737/99:

4. Advocate for the appeal Rameshwar submits that the Trial Court has wrongly convicted the accused Rameshwar for the offence under Section 302 IPC. He further submits that in this case post mortem report of Smt. Papudi (Ex.P-6) has not been proved by the prosecution as the medical officer who conducted the post-mortem on the body of Smt. Papudi has not been examined. He further submits that as the concerned medical officer has not been examined, this post mortem report is, therefore, not proved. He further submits that no question has been put to accused Rameshwar in the statement recorded under Section 313 Cr.P.C. relating to this post mortem report, therefore, also this post mortem report cannot be read into a an evidence against him. Under these circumstances accused Rameshwar should be acquitted from the charge for the offence under Section 302, IPC. He further submits that in this case, the Trial Court based his conviction on the statement on PW 13 Shankar and PW 14 Kishan, both these witnesses are children and they come within the definition of child witness and they are also the interested witnesses as they are sons of the deceased, therefore, their statement should not be believed and conviction of accused Rameshwar should be set aside.

5. On the other hand, learned PP submits that as the post mortem report (Ex.P-6) was admitted by the counsel for the accused Rameshwar, therefore, concerned medical officer was not examined. He further submits that law is very clear that if post mortem report is admitted by the accused then there is no necessity of examining the concerned medical officer and such admitted post mortem report should be read as substantive piece of evidence against accused persons. For

this, he has relied upon the decision given by the Full Bench of this court rendered in the case of Shabbir Mohammad v. State of Rajasthan, 1996 Cr.L.J. 2015. He further submits that even by the statement of defence witness DW 1 Ram Swaroop, it is clear that there is no dispute about the cause of death of Smt. Papudi. Learned Public Prosecutor has also placed reliance on the judgment of the Hon'ble Apex Court given in the case of Kehar Singh v. State, AIR 1988 SC 1883, and submitted that in that in that case it has been held:

'If the cause of death is absolutely certain and beyond the pale of doubt or controversy, it is unnecessary to have the post-mortem done by Medical Officer. In the instant case, there was no controversy about the cause of death of Mrs. Gandhi. A complete post mortem of the body was therefore uncalled for.'

6. We have considered the argument advanced by both the parties on this point. In this matter, post mortem report (Ex.P6) was admitted as genuine by learned counsel for the accused, therefore, it can be read as a substantive piece of evidence without examining the doctor who has conducted the post mortem. Under these circumstances, the argument of defence raised by learned counsel for the accused Rameshwar is not tenable in the eye of law and this post mortem report cannot be ignored on the ground that statement of concerned doctor has not been recorded.

7. Now let us examine the second argument of learned counsel for the accused Rameshwar that as the question relating to post mortem report has not been put to accused Rameshwar in examination under Section 313 Cr.P.C. therefore, this post mortem report cannot be taken into consideration. On this point, learned Public Prosecutor has submitted that now legal position is well settled that omission to examine under Section 313 Cr.P.C. on some point does not by itself vitiate the trial unless it has caused prejudice to the accused. He has further submitted that in the present matter, post mortem report was admitted by learned counsel for the accused, therefore, no prejudice is caused if no question relating to this post mortem report has been put to him. He has placed reliance on the the judgment of the Hon'ble Apex Court in the case of K.C. Mathu v. State, AIR 1956 SC 241.

8. We have also considered the argument advanced by both the parties on this point. We are of the considered opinion that if one question is not put to accused in the examination under Section 313 Cr.P.C. it does not itself necessarily vitiate the trial unless such omission has caused prejudice to such accused and Now we should see whether by not putting such question, any prejudice has been caused to accused Rameshwar. In the present case, post mortem report has been admitted by the counsel for the accused and even his defence witness says that Smt. Papudi was murdered, we are of the view that in such circumstances no prejudice has been caused to him, even such question relation to post mortem report has not been put to him, therefore, this argument of learned counsel for the appellant is also not tenable. The next argument advanced by learned counsel for the appellant is that PW-13 and PW-14 are child witnesses, therefore, conviction of Rameshwar cannot be based on their statements. On the other hand learned Public Prosecutor submits that these both witnesses namely Shankar and Kishan are child witnesses but looking to all the facts and circumstances of the case, their statements are reliable as there is no reason to infer that they have given their statement under the influence of any other person. He also submits that their statements are also corroborated by the post mortem report and the recovery of blood stained cloths from the persons of accused Rameshwar and by the recovery of blood stained sword from the accused Rameshwar and prompt first information report.

9. We have also considered this argument advanced by both the parties on this point of child witness. In the case of Dattu Ramrao v. State of Maharashtra, 1997 (3) Mah. LJ 452, 454, the Hon'ble Supreme Court has laid down rule of prejudice and desirability of corroboration in the matter of child witness as under:

'A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to given rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a

child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record.'

10. Law is settled that courts should examine the child witness with care and caution. The court should bear in the mind that child witness is susceptible to influence from other persons.

11. When we examine the present case with this angle, we find that father of these child witnesses died about 10 years before the date of occurrence and their mother was also died in this occurrence. Now their maternal uncles and maternal grand father remain. So far as maternal uncles are concerned they are accused in the present case so they cannot tutor them to give statement against themselves. So far as maternal grand father is concerned he has appeared as defence witness in the present case and is trying to save all these accused, therefore it cannot be imagined that their maternal grand father would tutor them to give statements against these accused persons. Accused Rameshwar has also not stated in this statement under Section 313 Cr.P.C. that anybody has tutored these witnesses to give statement against him. In this way, we are of this view that these child witnesses have not given their statements against accused Rameshwar under the influence of anyone, therefore, these statement cannot be ignored on this count.

12. We should also examine whether these two witnesses are competent to understand the question put to them and gave rational answers to those questions, for this, we have gone through the statements of these two witnesses. The Trial Court has asked many questions to them and after putting those questions testified that they are competent to understand the questions and in giving rational answers.

13. We have also considered arguments advanced by counsel for the accused that as these both witnessed are interested witness, therefore, their statement should not be believed. We agree that both these witnesses are sons of the

deceased but in the present circumstances and looking to the place of occurrence and all other circumstances of the case, they are the natural witness and looking to their statements we are of the view that their statements cannot be ignored only on the ground that they are sons of the deceased.

14. We have also examined the statement given by both the child witnesses, they have categorically deposed that they have seen the entire occurrence and in their presence, Rameshwar inflicted many injuries on the body of their mother Papudi by sword, due to which she fell down and died and the accused persons ran away from the spot. Name of these child witnesses find place in the FIR itself. In this matter a written report was presented to police officer very promptly, just after the occurrence. In this Fir the name of these witnesses and the name of appellant Rameshwar and detail of the occurrence are mentioned. There is no material contradictions in the statements of these witnesses relating to the role of the accused Rameshwar. After reading the statement of these two witnesses and considering all the facts of the case we are of the view that statement of these witnesses are reliable. Statement of these witnesses are corroborated by post-mortem report (Ex.P-6) and the recovery of blood stained sword and shirt and pant which the accused Rameshwar was wearing at the time of arrest and with prompt FIR. It is also material that blood group found on the clothes of deceased, the clothes of accused Rameshwar and on the sword was the same one. So far as motive of this murder is concerned, it is clear from the statement of DW1 Ram Swaroop, father of the accused Rameshwar, who has clearly stated in his cross-examination that there was dispute between Smt. Papudi and Rameshwar in regard to some land. He further stated that there was dispute relating to cabin. It is also clear from his statement that accused party had also doubt about the character of deceased Smt. Papudi. After reading the statement of Shankar PW 13 and Kishan PW 14 and statement of DW 1 Ramswaroop, it is clear that there was motive behind this offence.

15. After considering the arguments of both the parties and after minutely examining the evidence adduced by the prosecution, we are of the view that the Trial Court has rightly convicted the accused Rameshwar for the offence under Section 302 IPC. We are of the view that his appeal is liable to be dismissed.

Hence, it is dismissed. The judgment and order of conviction and sentence passed by Trial Court against appellant Rameshwar is confirmed. Appellant Rameshwar is in jail, so copy of this judgment be sent to him through concerned Superintendent Jail.

D.B. Criminal Appeal No. 15/2001:

16. We have heard learned counsel for the parties on the appeal preferred by the State of Rajasthan against the order of acquittal of accused Sohan and Jeevan. Learned PP submits that learned trial judge has wrongly acquitted these accused respondents for the charge of the offence under Section 302/34 IPC. He further submits that both the eye witness namely Shankar PW 13 and Kishan PW-14 have deposed that these two accused respondent have also participated in this occurrence, therefore, they are also liable to be convicted. On the other hand, learned counsel for the accused respondent Mr. A.K. Gupta submits that the Trial Court has rightly acquitted them of the charge and there is no reliable evidence for convicting them.

17. We have examined the entire evidence on this point also. After reading the entire evidence we come to the conclusion that the Trial Court has rightly acquitted them to these charges. There is lot of difference between the evidence against accused Rameshwar and against these two accused persons namely Jeevan and Sohan. So far as accused Rameshwar is concerned, blood stained sword, blood stained shirt and pent were also recovered from him and blood group found on the clothes of deceased, the clothes of accused Rameshwar and on the sword was the same one and these was evidence of motive against him. So far as these accused persons Sohan and Jeevan are concerned, no weapon has been recovered from them. There is no corroboration of evidence of Shankar and Kishan and there are material contradictions in the statements of these two child witnesses relating to the involvement of these two accused persons. Legal position is also clear that in the appeal filed by the State against the order of acquittal, if appellate court finds that the evaluation of the evidence of the Trial Court does not suffer from illegality, manifest error or perversity and the judgment of the Trial Court is reasonable and plausible, this court should not disturb the order of

acquittal; even if another view is possible. After reading the judgment of the Trial Court and appreciating the entire evidence we are of the view the judgment of acquittal of the accused persons namely Sohan and Jeevan is reasonable and plausible. We are also of the view that there is no illegality, manifest error or perversity in the judgment of the Trial Court. We are also of the view that the evidence adduced by the prosecution is not sufficient to hold these accused persons guilty. We are also of the opinion that the appeal preferred by the State deserves to be dismissed. Consequently, it is hereby dismissed. The accused respondents are on bail their bail bonds stand discharged.

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