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Court : Rajasthan

Decided On : Jan-05-1979

Reported in : 1979WLN(UC)1

Judge : S.C. Agrawal, J.

Appeal No. : S.B. Criminal Appeal No. 706 of 1973

Appellant : Ashraf and ors.

Respondent : The State of Rajasthan

Disposition : Appeal allowed

Judgement :

S.C. Agrawal, J.

1. This appeal has been filed under Section 410 of the Code of Criminal procedure, 1973 against the judgment dated 27th November, 1973 pissed by the Sessions judge, Bharatpur. in Sessions Case No. 36 of 1973 whereby all the appellants have been convicted under Section 325/149 IPG& Section 147 IP C. and appellants Ghosi, Sodan and Maman have been further convicted under Section 323 IP C. Appellant Ashina has been given the benefit of the provisions of Section 4 of the Probation of Offenders Act, but the other appellants have been sentenced to rigorous imprisonment for 2 years and a fine of Rs. 500/- in respect

of offence under Section 325/149 IPC and rigorous imprisonment for one year in respect of offence under Section 147 IPC Appellants Ghosi, Sodan and Mamman have been sentenced to 6 months' rigorous imprisonment in respect of offence under Section 323 I.P.C.

2. In Sessions Case No. 36 of 1973, 10 persons i. e. appellants and four other persons viz Nijra, Dhoopa, Nuru and Chavkhan, were prosecuted Appellants Ashraf and Rustam were charged under Sections 302 IPC and 148 IPG and the rest of the accused persons were charged under Sections 302 read with Section 149 IPC and Section 147 IPG Appellants Ghosi, Mamman, Sodan and Ashina & accused Nijra were also charged under Section 323 IPC.

3. The case of the prosecution is that on 7th October, 1972 at about 4 P M. in Village Nagla Dubokhar (P.S. Kama) one Samsoo son of Sooraj Mal (PW 1) went to the pond to water the buffaloes, there he had a quarrel with accused Nijra, who gave him a beating. Sanasoo complained about it to his father, Soorajmal, and thereafter Soorajmal went to Ghosi to coinplain about the mis-conduct of his son Nijra When Soorajmal had reached near the Nohra of Dalla on his way to the house of Ghosi all the accused persons who were sitting in the house of Ghosi armed with lathies and Pharsas, rushed towards Soorajmal and attacked him Ghosi appellant gave a lathi blow on his left shoulder and Sodan gave a lathi blow on his left fore-arm. Upon hearing the alarm raised by Soorajmal, his brother Ladha (deceased) came to the spot and entreated the accused persons hot to beat Soorajmal Thereupon Asharaf gave a pharasa blow on the head of Ladha and Rustam also gave another pharsa blow where upon Ladha fell down unconscious. In the meantime Pahloo (PW 4) rushed to save his uncles and he was also belaboured by Mamman and Ashina, Nijra, Dhoopa, Chavkhan and Nuru had exhorted their companions to kill the complaint Soorajmal and Ladha In the meanwhile Salooka (PW 5), Ghotekhan PW 2) and other villagers came to the spot and thereupon the assailants left. The injured persons were taken to Kama but as the condition of Ladha was serious he was removed to the General Hospital, Bharatpur and later on Ladha succumbed to the injuries on 1-11 1972. the First Information Report of the occurrence was lodged by Soorajmal at the P.S Kama, on 8th October, 1972 at 9 A.M.

4. It appears that on the side of the accused persons. Sodan and Ghosi had also received injuries and a report in respect of said injuries was lodged by Ghosi at P.S Kama on 8th October, 1972 at .0 30 A.M in which deceased Ladha, Surajmal (PW 1, Sahebkhan (PW 10), Chotekhan (PW 2) were named as the assailants.

5. After completing the investigation, the Police filed separate charge-sheets in both the cases.

6. In support of its case against the appellants and four other accused persons, the prosecution has examined 15 witnesses out of whom Surajmal (PW1), Chhotekhan (PW 2), Samsu PW 3), Pahaloo (PW4), Saluka (PW 5), Lalkhan (PW 6), Sahebkhan (PW .0) and Chandmal (PW 13 are claimed to be eye witness of the occurrence. PW 3 Samsu and PW 13 Chandmal have however been declared hostile by the Public Prosecutor and were allowed to be cross-examined.

7. In their statements recorded under Section 342 Cr PC, accused Nijra, Dhoopa, Chavkhan Ashina, Moman Rustam and Ashraf have denied their presence in the village1 at the time of 'the alleged occurrence and have pleaded that they have been falsely implicated due to enmity. Accused Ghosi and Sodan have admitted that an occurrence did taken place that after noon but according to them they were at their house separating the ears of the corn when Ladha (deceased), Surajmal, Pahloo, Sahebkhan and Chhotekhan came armed with lathies and belaboured them. As a result of which both of. them sustained injuries and Ghosi sustained the fracture of radius bone of the right fore-arm and fracture of the middle finger of the right hand and that thereafter Hurmat, Chandmal, Lallu, Harisingh and other villagers arrived and saved them The aforesaid accused persons have stated that in pushing them out of the house, deceased Ladha fell down and had sustained an injury on the head. In support of the aforesaid defence, five witnesses, including Dr. S.N. Sharma (DW 1) who had examined the injuries found on the persons of Ghosi and Sodan, have been examined.

8. The Sessions Judge has1 acquitted accused Nijra, Dhoopa, Nuru & Chav Khan on the view that the complicity of the aforesaid accused persons in the crime had not been established beyond reasonable doubt. The Sessions Judge has held that only one injury had been found on the person of deceased Ladha & it was not

established beyond reasonable doubt as to which of the two accused viz. Ashraf and Rustam had caused the said injury. The Sessions Judge has also found that there was hardly any pre plan or pre concert on the part of the accused persons to launch any attack on the complainant and that the episode had developed all of a sudden. According to the Sessions judge, it was an unexpected event that one of the assailants struck a lathi blow on the head of Ladha without realizing its serious consequences and it ultimately proved fatal to the victim and that it could not be the common object of the assembly to take the life of Ladha their neighbour on this petty issue The Sessions Judge, therefore, acquitted the appellants of the charges under Section 302 IP 21 but convicted appellants Ghosi, Sodan and Mamman of the offence under Section 323 IPG.

9. Shri V.L. Mathur, the learned Counsel for the appellants, has assailed the conviction of the appellants and has, submitted that in the present case two of the accused persons viz. Ghosi and Sodan had sustained injuries and the eye-witnesses examined by the prosecution have offered no explanation whatsoever for the said injuries The submission of the learned Counsel for the petitioners is that in the absence of the injuries having been explained by the prosecution, the Sessions Judge has erred in convicting the appellants on the vie v that the accused party were the aggressors. In support of the aforesaid submission, the learned Counsel for the appellants has placed reliance on the decision of Supreme Court in Lakshmi Singh v. State of Bihar : 1976 CriLJ1736 . The learned Counsel for the appellants has also submitted that this was a case of a free fight between both the parties and that the appellants could not be convicted with the aid of Section 149 IPC and that only the persons who had been proved to have caused the injuries to the persons on the complainant's side could alone be held responsible for the individual act committed by them. In support of the aforesaid contention, the learned Counsel for the appellants has placed reliance on the decision of the Supreme Court in Kanbi Nanji Virji and Ors. v. State of Gujarat : 1970 CriLJ363 and the decision of this Court in Ram Swaroop v. State of Rajasthan 1972 RLW 325.

10. From the evidence of Dr H.N. Sharma (DW 1), who was Medical Officer, Public Health Centre, Jurhera, Bharatpur, it is established that on 7th October, 1972 at

about 5 AM he had examined accused Sodan and he found the following injuries on his person : -

1. Lacerated wound 1 1/2' x 1/8' situated on the right clavicular surface.

2 Contusion 3' x 3/4' situated on the back (left side).

11. According to the evidence of Dr Sharma, the said injuries were received by a blunt weapon within 12 hourse of the examination.

12. Dr. H N. Sharma (DW1) had also examined accused Ghosi on 7th October, 1972 at 5 10PM and had found the following injuries on his person:

1. Contusion (fracture 2' x 1 1/2', on the right forearm ulnar surface (about 4i above the ulnar Atyloid process)

2. Fracture of proximal phalanx of right middle finger.

3. Lacerated wound 1/2' x 1/4' x 1/8' on the proximal inter phallangeal joint (Dorsal surface of ring finger)

4. Contusion 3/4' x 1' on the back right side.

13. According to Dr. Sharma injuries No. 1 and 2 were grevious whereas the injuries No, 3 & 4 were simple and all injuries were received within 12 hours. The evidence of Dr. Sharma with regard to the injuries found on the person of accused Sodan and Ghosi is corroborated by the injury report (Ex. D 14) relating to the injuries found on the person of Sodan and the Injury report (Ex. D. 15) regarding the injuries found on the person of Ghosi as well as the letter (Ex D. 16) addressed by him to the S.HO. Police Station, Kama with regard to the X-ray report about the injuries found on the per son of Ghosi During the course of cross-examination Dr. Sharma has stated that the injuries found on the person of Sodan could not be self inflicted and the said injuries cannot be received either by falling on stones or bricks. As regards the injuries found on the person of Ghosi, Dr. Sharma has staled that the said could not be sustained by falling on stones The learned Public Prosecutor has submitted that be sustained by falling on stones. The learned Public Prosecutor has submitted that Dr. H.N. Sharma (DW1) during the course of

cross-examination, has stated that the injuries found on the person of Ghosi could be self-inflicted. In my view, there appears to be some error in recording the said answer of Dr. H N. Sharma because earlier, with reference to the injuries of Sodan, Dr. H,N Sharma has stated that the said injuries were not self inflicted. The injuries on the person of accused Ghosi were more serious than those found on accused Sodan in as much as two of the injuries were fractures, of the injuries found on the persons of Sodan were not self-inflicted, it is difficult to appreciate how the injuries found on the person of Ghosi which were of a more serious nature could be self inflicted. The Sessions Judge has found that Ghosi had sustained injuries in the scuffle. I find myself in agreement with aforesaid finding and I hold that the injuries found on the person of accused Sodan and Ghosi were received by them during the course of occurrence.

14. The aforesaid circumstances with regard to the injuries sustained by Ghosi and Sodan was put to all the eye-witnesses during the course of cross examination and all of them have denied the fact that any person on the side of the accused persons had sustained any injury during the course of occurrence. Soorajmal (PW 1) has stated that he did not see any injury on the person of Ghosi and Sodan Chotekhan (PW 2) has also denied that the complainant party had inflicted any injuries on the person of Ghosi and Sodan. Similarly Pahloo (PW 4) has denied that he along with Ladha, Soorajmal and Sahebknan had assaulted Ghosi and Sodan and had inflicted any injuries on them and has stated that he did not see any injuries on the person of Ghosi and Sodan Salooka (PW 5) also has stated that he did not see any injuries on the person of any of the accused persons. Lalkhan (PW 8) has also denied that Soorajmal, Ladha, Chotekhan, Pahloo and Sahebkhan had assaulted Ghosi and Sodan with lathies. Similarly Sahebkhan (PW 10) has denied that he along with Soorajmal, Chotakhan, Pahloo and Ladha had assaulted Ghosi and Sodan with lathies and has stated that he did not see any injuries on the person of Ghosi and Sodan or any of the accused persons. Chandmal (PW 13), who was declared hostile by the prosecution, has, however, stated that he had seen both the parties fighting and all of them were armed with lathies.

15. Thus from an examination of the evidence adduced by the prosecution, it is found that the prosecution has completely failed to offer any explanation about the injuries found on the person of Sodan and Ghost appellants & on the other hand the eye- witnesses examined by the prosecution have asserted that they did not see any injuries on the person of said appellants. While dealing with the question as to the failure on the part of the prosecution, to offer an explanation for the injuries found on the person of the accused, the Supreme Court in Laxshmi Singh v. State of Bihar : 1976 CriLJ1736 has observed:

It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version. .

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.

16. In the aforesaid case, the Supreme Court has observed that non-explanation of the injuries by the prosecution may not affect the prosecution case in a case where the injuries sustained by the accused are minor or superficial or where the, evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit worthy, that it far outweighs the affect of the emission on the

part of the prosecution to explain the injuries.

17. In the present case, accused Ghosi had received four injuries out of which two were fractures and were thus serious injuries. Similarly one of the two injuries received by accused Sodan was Lacerated wound on the right clavicular surface. It cannot be said that the aforesaid injuries sustained by accused Ghosi and Sedan were of a minor and superficial nature.

18. As regards the evidence adduced by the prosecution in support of its case it may be noticed that the Sessions Judge has observed that all of the 7 eye-witnesses, except Chandmal (PW13) who has been declared hostile by the prosecution, are members of the same family. Soorajmal (PW 1), Ghhotekhan (PW 2) and Lalkhan (PW 8) are real brothers. Samsu (PW3) is the son of Soorajmal (PW1). Sahebkhan (PW10) is the son of Lalkhan (PW8) and Pahloo (PW4) is the son of Chhotekhan (PW2) and Salooka (PW5) was a distant relative of Soorajmal (PM1). The Sessions Judge has also Observed that the prosecution has not produced any person of the locality in which the occurrence took place and neither Dalla, Dalpat, Hurmat etc. whose homes were located near the place of occurrence had been produced nor any male or female member of their family had been examined. The present case, therefore, does not fall within the category of cases where non-explanation of injuries sustained by the accused may not affect the prosecution case and it must be held that from the failure on the part of the prosecution to offer an explanation for the injuries found on the person of accused Ghosi and Sodan which were received at about the time of the occurrence, the only inference that can be drawn is that the prosecution has suppresed the genesis and the origin of the occurrence and has not presented the true version, and the witnesses who have defied the presence of the injuries on the person of accused Sodan and Ghosi are lying on a most material point and, therefore, their evidence is unreliable.

19. The Sessions Judge has also expressed doubts about the veracity of the testimony of the witnesses examined by the prosecution & has observed that it was unlikely that Lalkhan (PW 8), Chhotekhan (PW-2, Pahloo (PW4) & Sahebkhan (PW10) would have witnessed what took place between Sooraj mal

and' Ghosi as a prelude to this affray and that it was not possible for these witnesses to have witnessed how the whole episode started. The Sessions Judge has also disbelieved the evidence of the witnesses produced by the prosecution in so far as they have implicated accused Dhupa, Nijra, Chavkhan and Nuru. In my view the evidence of the witnesses examined by the prosecution in support of its case cannot be relied upon as against the appellants also

20. Another circumstance which cannot be ignored is that even though the complainant had reached Kama on 7th October, 1972 at about 7 P.M., the FIR was lodged at P S. Kama on 8th October, 1972 at about 9.15 AM and thus there was considerable delay in the lodging of the FIR. The only explanation that has been offered for this long delay of more than 12 hours is that the medical injury reports were given by the Medical Officer, Kama on the morning of 8th of October, 1972 and that after getting the Medical injury reports, the informant got the report drafted by a petition writer. I am in agreement with the observations made by the Sessions Judge that the delay in lodging the FIR has not been satisfactorily explained by the complainant & the said delay raises a strong doubt about the veracity of the statements made therein. This assumes importance when we find that in the FIR. the complainant has implicated Ghosi and all his three sons, Sodan, Nijra and Dhupa, all the three sons of Ghosi's brother Dalshera, viz., Ashraf, Rustam and Ashina and the two sons of Dalpat the cousin of Ghosi, viz., Munman and Nuru.

21. Taking into consideration the facts and circumstances referred to above, I am of the opinion that the Sessions Judge has committed an error in placing reliance on the evidence adduced by the prosecution and in convicting the appellant] of the offences under Section 325 read with Section 149 IPC and Section 147 IPC and in convicting appellants, Ghosi, Sodan and Mamman of the offence under Section 323 IPC. In my view the conviction of the appellants for offences aforesaid can not be upheld.

22. I would, therefore, allow this appeal, & set aside the judgment of Sessions Judge, Bharatpur, dated 27th November, 1973 in Sessions Case No. 36 of 1973 convicting all the appellants of the offences under Section 325/149 I.PC. and

Section 147 I PC. and convicting appellants Ghosi, Sodan and Mamman under Section 323 I.P.C The appellants are acquitted of the said offences. The appellants are on bail, they need not surrender and their bail bonds shall stand cancelled.

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