

Surjan Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Sep-30-1993

Reported in : 1994CriLJ1776

Judge : R.S. Verma and; R. Balia, JJ.

Acts : [Arms Act, 1959](#) - Sections 5, 25 and 27; [Indian Penal Code \(IPC\), 1860](#) - Sections 120B, 299, 302, 306, 429, 435 and 436

Appeal No. : Criminal Appeal No. 113 of 1985

Appellant : Surjan

Respondent : The State of Rajasthan

Advocate for Def. : Haider Agha, Public Prosecutor

Advocate for Pet/Ap. : Doongar Singh, Adv.

Disposition : Appeal allowed

Judgement :

R. Balia, J.

1. This is an appeal against judgment of conviction passed by learned Sessions Judge, Jalore dated 22nd February, 1985, in Sessions Case No. 11/83, by which the accused-appellant Surjan was convicted under Section 302, Indian Penal

Code and under Section 27 of the Arms Act, and sentence to undergo imprisonment for life and pay a fine of Rs. 1000/-, or on failure to pay fine to further undergo 6 months rigorous imprisonment, under Section 302, IPC and 2 years rigorous imprisonment under Section 27 of the Arms Act.

2. The accused Surjan son of Ganesh, was found guilty of having committed murder of one Ram Chander, at about 10.00 a.m. on 20th December, 1980, in the field of Dharma, by causing injuries by gun-shot by a double-barrel gun.

3. The proceedings commenced with lodging of a written complaint by one Kana Ram, PW3, at about 5.00 p.m. on 20th December, 1980, at Police Station, Sanchor. In brief, the prosecution case, as spelt out in the First Information Report, is that, while in his 'dhani' near village Khara, Tehsil Sanchor, at about 12.00 noon, Kana saw blaze of fire and smoke coming from dhani of Ram Chander. He, along with Sad Ram, rushed towards the dhani of Ram Chander and found that Surjan, armed with a double barrel gun and riding on a mare, was there. When asked, why he has put the dhani on fire, Surjan warned if he came further near he will kill him and fired towards Kana; which hit the buffalo of Ram Chander which has come in between. Thereafter, the accused ran away from the site. On coming near the dhani, Kana found wife of Ram Chander and children, standing outside and wailing. Wife of Ram Chander informed that Surjan, as soon as he came, fired his gun and after getting down from the mare, pushed them out and put the 'kad', in which cwats, beds, and 'ran of guwar' and fodder was there, on fire. She also informed that Surjan has earlier come in the morning, between 10-11 a.m. and told Ram Chander that Jawanta etc. are at the place of Sunda and we should settled our dispute and with this representation took Ram Chander with him. Surjan was accompanied with Jawana.

4. On hearing this, Kana and Sad Ram went in search of Ram Chander. Near the dhani of Jawana, they met Waringa - PW 4, who told Kana that while he was waiting at Jawana's dhani. Jawana, Surjan and Ram Chander came there. Harji was also sitting there. Jawana, Harji and Surjan went on one side of the dhani and talked something between themselves. Thereafter, Harji asked Ram Chander to go to the dhani of Sunda Ram-Sarpanch, where they will follow. Ram Chander has

gone about 250-300 'panwdas' from Jawana's dhani, when Surjan riding on mare and armed with double-barrel gun followed. Waringa feeling suspicious, came out and while he was looking at them, Surjan shot Ram Chander. Waringa shouted and Khangana, who was shepherding nearby, also came near. The accused Surjan after shooting Ram Chander has gone towards the dhani of Ram Chander. Waringa and Khangana thereafter went near the dead-body of Ram Chander, who died instantaneously on being hit by the bullet. Leaving Khangana behind, Waringa while coming to Ram Chander's house, met these two people.

5. Kana Ram also told Warings the story of Ram Chander's dhani, being put on fire by Surgan. Thereafter, sending Waringa and Sadram to Ram Chander's dhani, Kama came to the Police Station and lodged the report.

6. In the written report, Kana Ram also detailed about the enmity existing between Surjan and Ram Chander, on account of break-up in engagement of Surjan, for which he blamed Ram Chander and, because Ram Chander was a witness in a criminal case lodged by Harchand son of Jawanta against Surjan, for an incident alleged to have occurred in the night intervening between 28th and 29th November, 1980, at the house of Jawanta. This written report is Ex.P/2 on record on which a case was registered and FIR was recorded by the S.H.O. as case No 157/80).

7. The accused could be arrested only on 28-4-1982, by arrest-memo Ex.P/1 at Ganwani Bera of village Nohra. Earlier to that, the accused was declared absconding. At the time of arrest, a double-barrel ML gun, loaded, along with 20 cartridges, 139 pellets and 16 caps, with other articles were found with the accused.

8. As the accused was absconding, two separate charge-sheets were filed. One under Section 302/299, I.P.C. read with Sections 25 and 27 of the Arms Act, which is subject matter of Sessions case No. 11 / 83 and, another under Section 436, 299, I.P.C. read with Sections 25 and 27 of the Arms Act, which is subject matter of separate Sessions Case No. 12/ 80. In the First Information Report, Surjan along with Jawana son of Kheta and Harji son of Mana were all accused, having committed offence under Sections 302, 306, 436, 435, 429 and 120B of the Indian

Penal Code. However, charge-sheet was filed only against Surjan. After the case was committed to Sessions, the Sessions Judge, Jalore held the trial and found Surjan accused of having committed murder of Ramchander by causing injuries with gunshot by a double-barrel gun, and sentenced him as aforesaid.

9. The accused is in jail since his arrest on 28-4-1982.

10. In the first instance, learned counsel for the appellant urged that there are serious infirmities in the investigation of the case, which throw serious doubts on the prosecution case. It was pointed out that as per Ex.P/2 the written report and Ex.P/7 the F.I.R. registered by the Police, the first information was lodged at 5.00 PM, on 20th December, 1980 by Kana Ram at Sanchor. According to the statement of PW 8, Gulabsingh, the Investigating Officer, the Munsif court as well as the house of the Munsif, is hardly 15-20 pawns from the place of incident. From the endorsement on Ex.P/ 7, it is apparent that the F.I.R. has been received by the learned Munsif only on 22nd December, 1980, at about 1.00 PM. This delay in submission of the F.I.R. has not been explained. It was further pointed out that according to the statement of PW 8 Gulabsingh, the Investigating Officer, he reached the place of occurrence at 7:00 PM on that very day. According to the Investigating Officer, certain persons were sitting around the dead-body. The names of alleged eyewitnesses, if it were already lodged at the time, had already been disclosed in the F.I.R., yet he made no attempt to make any enquiry from the persons on the site or to find out about the alleged eye-witnesses. Even thereafter, when he returned, according to him, at about 8.00 AM, in the next morning, he made no attempt to call the alleged eye-witnesses on site or record their statements, until 12.00-1.00 in the noon.

11. In this connection, it was pointed out by learned counsel for the appellant that while PW 8, the Investigating Officer, is categorical in his statement that when he reached the site, at 7.00 PM on 20-12-1980, Khangara PW 5, the alleged eye-witness, who said that he was throughout with the dead-body and remained with the dead-body even when he made his categorical statement with the Police, did not come on the site on the very day, but came only next day in the morning. According to Khangara, Waringa, the another eye-witness PW 4, has come with

the Police along with Sadram and many other persons were there. This version of the eye-witness Khangara, is quite contrary to the statement of the Investigating Officer, who states that when he reached the site, at 7.30 AM in the morning, there was nobody except two constables. Thus, while according to the Investigating Officer neither Khangara nor Waringa were present on the site, in the morning at 7.30 AM when he reached and, statement of these persons were recorded only at about 12.00 noon; according to PW 5 Khangara, both the alleged eye-witnesses were available on site, when the Investigating Officer reached there, yet their statements were not recorded. This further throws doubt on the veracity of the prosecution story, about the manner in which the crime is alleged to have been committed. It was further pointed out that if the prosecution story as set out in the F.I.R. and the statement of the Investigating Officer is to be believed, the incident occurred at about 10.00 am on 20th December, 1980 and the first information was lodged at 5.00 pm. at the police station, which is about 25 kms. away from the place of occurrence and the Police reached at the site at 7.00 pm. on that very day. The post-mortem was conducted also on site, yet only at about 4.00 p.m. on 21st December, 1980. The written report clearly discloses that it is not a spontaneous reporting by the complainant, but is a premeditated report, drafted with particular purpose. It is otherwise admitted in his statement by PW 3 Kanaram, the complainant, that after reaching Sanchor, he got the report drafted by some clerk of an advocate in the court. The report is prefaced with the background of enmity and ends with the particular provisions of I.P.C. under which crime has been attributed to have been committed by the accused persons. This clearly goes to show that the written report was drafted with deliberation and pre-meditation. The fact that the court as well as the Magistrate's residence is hardly 20 panwdas away from the Police Station and the FIR has reached the Magistrate on 22nd December, 1980 only, give rise to a reasonable apprehension that the written report has been made with a premeditated cool mind, in consultation with legal expertise and, has been antedated and ante-timed, by incorporating the names of eye-witnesses when there was no eye-witnesses.

12. It was also contended on behalf of the appellant that the medical evidence also does not support the prosecution case. As to time of death it was contended that the postmortem was conducted at about 4.00 p.m. on 21 -12-1980. The time of

death of Ramchahder at the time of post-mortem was given to be within 24 hours. That puts the outer limit of 4.00 p.m. on 20-12-1980, at which Ramchander could have died earliest. Then by travelling on foot, as stated by Kana PW 3, FIR could not have been lodged at 5.00 p.m. on that very day, when, admittedly Police Station is about 25 Kms. away from the place of occurrence. It also belies the story of alleged witnesses, who put the time of death at about 10.00 a.m. on 20-12-1980. This highly probabalises the fact of ante-dating and ante-timing the F.I.R. and concocting story to implicate Surjan, enmity beinng a double edged sword.

13. It was also pointed out that it is case of the prosecution that the gun injuries were caused by pellets, but no pellets were recovered either at the alleged site of the occurrence or in the body of the deceased. Whereas, the alleged eye-witness say of only one gun-shot having been fired at the deceased, the medical evidence clearly indicates that at least two gun-shots have been fired at the deceased and there is no explanation about it. The attention of the court is drawn to the fact that as per the statement of Doctor Mohanlal Dosi, PW 7, injuries No. 1 to 8, which were on the front of the body, were having 'inverted margins, and injury No. 9, which was of the size 2 1/2 x 2 1/2 cms. and 3 inch deep, was also having inverted margins, situated at the back of chest and middle bones of scapular region, which is like an 'entry wound'. Doctor Dosi, in his cross examination, explained that in the description of injury No. 9, resembling like 'wound of exit', has been described by mistake due to hurry. Injury No. 9, appears to have been hit from the back.

14. On this material, learned Counsel contended that Doctor's evidence read with post-mortem report clearly establishes that there were pellet injury in the front, with inverted margins, as well as injury in the back also bear inverted margins; there being no 'exit wounds', therefore, it firmly establishes that the deceased has received two gun-injuries, One in the front and one on the back; and, the alleged eye-witnesses only say about one gun-shot, which hit the deceased Ramchander from the front. Thus, the medical evidence does not support the version of the eye-witnesses.

15. In this connection, it was further pointed out that the injuries No. 1 to 8, are, in the post-mortem report Ex.P/6, stated to bear the same characteristics, as injury

No, a, in which the injury has been described - 'burning all around with black spots (blackening)'. The blackening of the skin round the injury clearly suggests that such injury could have been caused only if the gun shot has been hit from a very close range, distance not exceeding 4 to 5 feet; whereas, the Investigating Officer, in his statement, and in the site inspection report, has clearly recorded that the place from which the accused is alleged to have fired the shot was at a distance of 44 feet from the place where the dead body is lying. It is the statement of alleged eye-witnesses that deceased Ramchander fell on the ground, as soon as he was hit by the gun-shot, at the very spot. In that view of the matter, the nature of wounds speak that the story made out. Surjan, who was at a distance of 44 feet, could not be author of gun shot resulting in blackening of skin of the deceased around the gun-shot injuries.

16. In this connection, it was also pointed out by learned counsel for the appellant that learned Sessions Judge has placed great reliance on the fact that the soil around the dead-body was found soaked with 'human' blood. This is total mis-reading of the report Ex.P/11 of the Forensic Science Laboratory; which nowhere states that the blood smeared soil or other articles examined by it, were stained with 'human' blood. Ex.P/11 only states that the blood was detected in Ex. 1, from packet marked 'A' which contain blood smeared soil and, Exs. 3, 4, 5, 6 and 7, from other wearing articles of the deceased; the blood stained samples have been forwarded to the Serologist for serological examination. The report of the Serologist, if any, is not on record.

17. Learned Public Prosecutor, in reply, candidly stated that the infirmities or contradictions, pointed out by learned counsel for the appellant, do exist, but he contended that merely because there is some irregularity in the investigation, the prosecution case cannot fail which is otherwise fully proved by the statement of eye-witnesses who are of sterling-worth; and, if their statements are found to be trust-worthy, the aforesaid infirmities pointed out by learned counsel for the appellant, are of no avail.

18. Regarding the medical evidence, it was urged by learned Public Prosecutor that the injury No. 9 cannot be treated as an 'entry wound' but it is only an 'exit

wound'. He pointed out that the Doctor in his report, while has clearly stated that the wound No. 9 resembles as an 'exit wound' and this is correct statement of fact; the description of wound as 'having inverted margines' is not the correct entry in the post-mortem report.

19. It is true that any one of the infirmity in the investigation pointed out by learned counsel for the appellant does not by itself result in failure of the prosecution case, though it may be a pointer to the lapses in the investigation, which may lead to the conclusion that the investigation has not been fair, and, if the guilt of the accused is brought home without any reasonable doubt even by statement of a solitary witness; the conviction can be based thereon. These infirmities only require the Court to examine the evidence with greater care and caution. The question, therefore, in the present appeal that arise for consideration are- (1) Whether the theory of two gun-shot placed by the Defence, is reasonably plausible on the evidence on record and if so, to what effect? and, (2) whether statemens of PW 4 Waringa and PW 5 Khangara, in the face of infirmities in the investigation pointed out above, about which there is no dispute, can be stated to be of sterling-worth, so as to sustain the conviction based on their testimony, without any corroboration?

20. First coming to the two-gun-shot theory. It may be stated that from the injury-report, both the wounds at the back as well as in the front, of the body have been described as 'having inverted margines'. The inverted margines on the wounds are suggestive of the fact that the alien material hitting the body, has entered through that space by twisting the wounded skin towards inside of the wound. The exact description of the wound, with its size, shape, and the character, as to its colour, size and type of cutting; are all questions of fact, as physically exist, based on observation and is not a matter of opinion. However, the question whether it is caused by a particular type of weapon or whether it is a 'entry wound' or 'exit wound', or are relates to each other or not; are the facts which are on opinion, as contra-distinguished from an observation. Therefore, what is recorded in Ex.P/ 8, as to the shape, size and existing state of affairs as to the wound, are the facts which have been observed by the Doctor and recorded; and his conclusion about it is an exit or entry wound, is a matter of opinion. The Doctor has stated in his

report that injury No. 9 is a 'exit wound'. The Doctor has physically observed that injury No. 9 has 'inverted margines' and what is stated in his opinion, is that the injury No. 9 resembles like wound of exit. When he was asked to clarify this in his statement, in his cross-examination, he slied to his findings based on the observation of the wound and explained his opinion about its resemblance to exit wound that it has been written by mistake but commensurating with them his observation, the word 'exit' ought to have been 'entry'. After this explanation has been brought on record, the prosecution did not want any further re-examination of this witness. Thus on this aspect of the matter, the statement of Doctor remained un-rebutted. Therefore, if the statement of Doctor is read with Ex. P/8, the probability of the fact that the deceased has received two gun-injuries, one in the front and one in the back, cannot be ruled, out, beyond reasonable doubt.

21. The statement of Waringa as well as Khangara, is categorical on this aspect that there was only one gun-shot fired by accused Surjan and the shot was fired from the front of the deceased. Thus, the direct evidence of these two eye-witnesses is inconsistent with the medical evidence on the most material part of the prosecution case.

22. In this connection, it may also be noticed that the skin around the wounds on the front side of the body was blackened. The blackening of skin is possible only if the gunshot is hit from a very close range. In the site plan Ex.P/8, place 'A' has been stated to be where the dead-body was lying, place 'B' has been stated to be where the blood is lying and, place 'C' has been stated to be place from which accused Surjan is alleged to have fired the shot. The distance between 'C' to 'A' has been stated by PW 8 Gulab Singh, the Investigating Officer to be 44 feet. In its judgment, learned Sessions Judge has assumed that the deceased was hit at point B. Both the witnesses, Waringa PW 4 and Khangara PW 5, have stated that Ramchander fell on his back as soon as he was hit by the gun-shot. It is not the case of either of the witness that the deceased staggered for a distance after he was hit by a gun-shot before he fell on the ground. The distance between 'A' to 'B' is stated to be 35 feet. The dead body is said to be lying at point 'A'. In these circumstances, this assumption of the learned trial Judge that the deceased must have been hit at point 'B', which is about 9 feet from the place from which Surjan

fired, is wholly unfounded and contrary to the statement of alleged eyewitnesses. PW 4 Waringa has stated that the distance between Surjan and Ram Chander was 4-5 panwdas and Khangara PW5, has stated that it is 3-5 panwdas. According to these eye-witnesses, one 'panwda' is of 5 1/2 feet. Thus, according to their estimate, the distance between the deceased and the assailant was between 15 to 20 feet. While the discrepancy in the exact distance which has been stated on estimate by these eye-witnesses may be ignored; it must be held that the place from where Surjan has hit the deceased, must have been recorded by the Investigating Officer only on the information of Waringa or Khangara as the case may be. Khangara has clearly stated that he himself is barely 5-6 panwdas from the place where Ramchander was hit. Therefore, the place from which Surjan is alleged to have fired the gunshot, must have been entered with fair exactitude in the site-inspection report Ex.P3; and, if that report along with the statement of PW 4 and PW 5 is taken into account, the distance between the deceased and the gun from which the shot is alleged to have been fired, after taking into account the length of the barrel ranges between 20-30 feet.

23. In this connection, it is to be noticed that there is positive evidence of existence of blackening of skin around the wounds in the front of the dead body. This is suggestive of the fact that shot was fired at a very close range. The evidence produced by the prosecution, in the form of site-inspection report and statement of Gulabsingh, PW 8, Waringa PW 4 and Khangara PW 5, does not support firing at such a close range that could result in blackening of the skin around the wounds. The gun recovered from the accused has not been connected with the injuries received by the deceased. No evidence in form of opinion of ballistic expert or medical expert has been produced to establish that such blackening of skin could reasonably exist in the dead body in the type of gun allegedly used by the accused is fired at a range disclosed by the prosecution. In the absence of such evidence, the unexplained blackening of skin around the injuries on the person of the deceased leaves a big gap in the prosecution story. The blackening of the skin around the wound, therefore, also raises doubts about the prosecution case.

24. In this connection reference may be made to *Ram Narain v. State of Punjab* etc. : 1975 CriLJ1500 , wherein it was held by their Lordships of Supreme Court

(at p. 1735):

'It is obvious that where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence....'

25. Keeping in view the aforesaid principle, and considering against the aforesaid background; the argument of learned counsel for the appellant that the evidence of eyewitnesses is inconsistent with the medical evidence, appears to be well-founded.

26. Coming to the statements of the two alleged eye-witnesses, Waringa PW 4, is a uterian half-blood brother of Kana, the complainant, who was earlier been prosecuted for burning the dhahi of deceased Ram Chander. He stated in his statement that he turned up after hearing the cries caused by Khangara. It is undisputed that where the incident alleged to have taken place, is not an isolated jungle, but the field of Dharma is surrounded by dhanis in the fields of other persons. PW 3 Kana has stated that Jawana's dhani is on one side of Harji's field. Between Dharma's and Jawana's dhani, is situated Balroopa's dhani. Kebu's dhani is also not very far. According to these witnesses, the murder was committed in broad day light. It does not stand to reason that when the field where the incident has taken place, is surrounded by so many other fields, in which dhanis are there, no one would have turned up even after hearing the cries, much less to say, that in the ordinary course of human conduct, people would have rushed to the place, as a matter of curiosity on hearing the gun-shot. In this connection, it may be relevant to refer to the statement of PW 5, who has stated that 4-5 people came while he was sitting near the dead body, which includes Sunda Ram Sarpanch, Ginudaram, Singaram and Hardan. The Investigating Officer also in his statement has stated that when he reached at the scene of occurrence at 7.00 p.m. there were quite a few people sitting at a distance though he did not enquire anything from them. But, the fact remains that the field was surrounded by other habitated fields and incident having occurred in the broad day light, and the accused immediately decamped, no one turned up on the site if Waringa is to be believed, though his

statement is not in conformity with the statement of Khangara, the another alleged eye-witness, nor it reflect probable course of human conduct in such a situation. He has been contradicted in another vital aspect of the matter. Waringa has stated that he was called by the Police on the site, whereas, Khangara in his statement has categorically stated that Waringa came to the site along with the Police. Even the excuse of this witness for being present in dhani of Jawana in the early morning of the winters at 8.00 a.m., does not inspire confidence.

27. PW 5 Khangara has sought to improve upon the story and there are many inherent contradictions in his statement. He, in his statement, has stated that he gave a call not to kill but while he was giving the call, Surjan shot at Ramchander. Further, he made a statement that he told Surjan as to why he has killed Ramchander, on that he (Surjan) threatened him also with dire consequences. This statement does not find place in the Police Statement, which is Ex.P/1. At one stage, he has stated that he remained with the dead-body whole night and the Police did not come in the night but came only early in the morning and Waringa and Sadram were with the Police. However, in another part of the statement, he stated that he stayed with the dead body until afternoon and when 4-5 persons came, he left. He was not called by the Police but when Police came, he himself went to the Police. These two statements are not consistent with each other. He has also denied certain parts of the statement, which find place in Ex.D/1 as Police Statement. He further admits in his statement that many persons came on the site, around 30-40 persons, in the night; but, assiduously, both he and Waringa as well as Kana have avoided to mention that any person from the nearby site had come at the scene of occurrence. It is very strange that people from distance would come and stay around the dead body but persons whose fields were situated nearby and who have had a chance to see the occurrence or reach immediately at the occurrence, and who could be witness of the corroborative circumstances, their presence have been excluded assiduously. This is a strange phenomenon which makes us to think that it is not safe to. convict the accused on capital charge, particularly when their statements were not corroborated by medical evidence. We are, therefore, of the opinion that the prosecution has failed to prove beyond reasonable doubts the guilt of the accused qua the offence under Section 302, I.P.C. and, therefore, conviction of the appellant under Section 302, I.P.C.

cannot be sustained.

28. As discussed above, the prosecution has failed to prove beyond reasonable doubts that the accused-appellant caused death of Ramchander by firing gun-shot and, the firearm recovered from the accused has not been connected with the crime; conviction of appellant under Section 27 of the Arms Act for using arm, in contravention of Section 5 of the said Act, also cannot be sustained.

29. Accordingly, appeal is allowed. The order dated 22nd February, 1985, passed by Sessions Judge, Jalore, convicting and sentencing the appellant under Section 302, I.P.C. and under Section 27 of the Arms Act, is set aside. The amount of fine, if recovered from the appellant, be refunded to him. The appellant shall be released forthwith, if he is not wanted or serving sentence under any other proceedings.

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