

**Shambhusingh Vs. the State**

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**Court :** Rajasthan

**Decided On :** Feb-28-1975

**Reported in :** 1975WLN(UC)139

**Judge :** V.P. Tyagi and; S.N. Modi, JJ.

**Appeal No. :** D.B. Criminal Appeal No. 684 of 1975

**Appellant :** Shambhusingh

**Respondent :** The State

**Disposition :** Appeal allowed

**Judgement :**

**V.P. Tyagi, J.**

1. Shambhusingh has filed this appeal against the judgment of the Additional Sessions Judge, Bundi, dated 27th November, 1973, challenging his conviction under Section 302 IPC and sentence of life imprisonment for committing the murder of one Deena. He has also challenged the conviction under Section 27 of the Indian Arms Act.

2. Briefly stated, the prosecution story, as revealed by the eye-witnesses, is like this.

3. About 15 to 20 residents Jaisalmer District including deceased Deena migrated in 1973 on account of severe drought condition in that region to Bundi District. On 22.4.73, deceased Deena along with his other colleagues viz PWs, Haiyat Dina and Ali went to graze their cattle in the nearby fields which were limit guaranty after harvesting of the crops. Ali and deceased Deena went to nearby Baveri to quench their thirst. According to the prosecution case, when these two persons went down the Baveri, they saw Shambhusingh armed with a single barrel muzzle loaded gun at the top of the Baveri. It is alleged the it Shambhusingh threw a challenge to these persons and said that the members of the migrating party had created another Pakistan in the town of Keshroi Patan and therefore he would finish them On hearing this threat, both Ali and Deena went a way from the Baveri towards the field where their other colleagues viz PWs. Dina and Hayat were grazing their cattle. When they had hardly gone one and a half furlong from the Baveri, they were over powered by Shambhusingh. It is said that Shambhusingh reached the place marked as B in the site-plan Ex. P. 2 and the deceased and his friend Ali were at that time at point A. Shambhu Singh opened a fire towards them which hit Deena at two places causing wounds in his chest as well as on his thigh. Deena fell down. Bachaya PW 3 who was at the 'dera' about half a mile away heard the gun-shot fire and he rushed towards the scene of occurrence. PW 1 Hayat, PW 2 Dina and PW 3 Ali who were already at the spot and were later on joined by PW 4 Bachaya, brought deceased Dina to their camp and found that Dina had breathed his last. Hayat Dina, Ali and Bachaya then went to the Police Station, Kesborai Patan to lodge the report It is in the evidence of these witnesses that Sbambhu Singh had already reached the Police Station and he was there when Hayat lodged the First Information Report Ex. P. 1. The report was recorded at about 10 a.m. This document is quite exhaustive giving the entire narration about the manner in which the incident took place. Head Constable Pooran Brahm PW 6, who was in-charge of the Police Station in the absence of the SHO, after recording the FIR, examined the alleged eye-witness under Section 161 Cr.PC. (old) and then proceeded to the 'dera' where he found deceased Dina lying dead. He prepared the inquest report Ex P. 3 and then went to inspect the site and prepared the site plan Ex. P. 2. Thereafter he returned to the Police Station where he met Roopkishore PW 8 who after having seen the diary, instructed Pooran

Brahm to arrest the accused. By that time, the SHO Abdul Wahid PW 11 returned from his duty and took over the investigation in his hand. He arrested the accused at about 4 o'clock who was already at the Police Station. After about half an hour, the accused furnished an information that the gun which was used by him to commit the crime was lying in his house and it is said that in pursuance of that information the gun was recovered from the appellant's house. It may be mentioned here that Shambhusingh's father had a licence for this gun. The gun was sent for ballistic examination and from the report Ex. P. 15 it is clear that the ballistic examination could not connect the gun with the crime nor could the expert say that the two pellets which were taken out the body of the deceased Dina were fired from the gun recovered at the instance of the accused.

4. The body of Dina was sent for post mortem examination. Dr Ram singh PW 7 performed the post-mortem examination and found two external injuries, namely, wound on the right side of the thigh lateral aspect and oval opening 1/4' x 1/4' in between 5th and 6th postal cartilages on left side near sternum. On opening the body and further exploring the wounds, the doctor discovered a pellet which caused wound No. 1 on the right side of the thigh. He also found an oval opening 1/4" x 1/4' in the 10th rib posteriorly with fracture of that rib. A pellet was also found in the subcutaneous tissue in the left side of chest in back corresponding to 10th rib. He also noted down that injury No. 2 had a charring in 3/4' diameter on the medical side of the wound In his opinion, the injury caused by the entry of the pellet in the chest was fatal and the death was caused on account of that injury. It was sufficient in the ordinary course of circumstances to cause death. After investigation, a challan was put up in the Court of the Additional Munsif-Magistrate No. 2, Bundi, who after taking committal proceedings, sent the accused to stand his trial for the Under Section 302 IPC & Section 27 of the Arms Act before the learned Additional Sessions Judge, Bundi Except the testimony of the eye-witnesses, there is no other circumstantial evidence to connect the accused with the crime. The gun which was recovered in pursuance of the information supplied by the accused when he was under custody, however, could not be connected with this murder.

5. The learned trial Judge which placing reliance on the oral testimony of PW 1 Hayat, PW 2 Dina, PW 3 Ali and PW 4 Bachaya came to the conclusion that it was Shambhusingh who was responsible for murder of Deena and therefore convicted him for the offence under Section 302 IPC Since the gun was recovered at his instance, he was also found guilty of an offence under Section 27 of the Arms Act.

6. Learned Counsel appearing on behalf of the appellant argued very vehemently that the conviction of the appellant, under the circumstances of this case, which we shall deal with presently, was unwarranted. He challenged the order of conviction on the following grounds;

1. That the eye-witnesses were strangers to the accused and did not know him from before and therefore in order to establish the identity of the culprit it was necessary that the test identification parade should have been arranged to identify the accused before he was identified in the dock by the eye-witnesses. Since the investigating agency did not take care to get the accused properly identified at the test identification parade, the identity of the accused in the dock should not be given any credence.

2. That the investigation in this case right from the very beginning upto the end is tainted and the police authorities in-charge of the investigation bade a good-bye to all canons of fairness and therefore on that ground the case of the prosecution should have been thrown out.

3. That the medical evidence not only does not corroborate the prosecution story but it definitely demolished the prosecution case inasmuch as the charring found on the body of deceased Deena suggests that it was a case of two shots and not of one shot as was described by the eye-witness and that the second shot must have been fired from a very close range causing charring effect around wound No 1.

4. That the recovery of the gun could not be pressed into service to connect the accused with the crime as the gun was not found in pursuance of the information given by the accused but it was handed over to the investigating officer by the father of the accused who had licence for this gun.

7. The learned Public Prosecutor, on the other hand, argued that even if the identification parade had been arranged by the investigating officer, it would have been an exercise in futility as all the eye-witnesses after the incident had an opportunity to see the accused at the police station where, according to the eye-witnesses, he remained present for the whole day till he was arrested and therefore this argument has lost its weight as the absence of the test identification parade, in these circumstances, cannot be said to have any adverse effect on the credibility of the eye-witnesses who correctly identified the accused at the trial. As regards the medical testimony, it is contended that the prosecution evidence is consistent with the theory that only one shot was fired from a distance of 15.16 paces as the dispersal of the pellets fully supports the prosecution evidence. He further submitted that if there was any discrepancy between the medical testimony and the eye-witnesses and if the eye-witnesses were reliable then no importance should be attached to such minor discrepancies.

8. Regarding the tainted nature of the investigation, the learned Public Prosecutor urged that this is all an imagination of the defence that the police officers did not fairly conduct themselves in the discharge of their duties while investigating this case and, therefore, this argument, in his opinion, does not cut much ice. It is, however, admitted by the learned Public Prosecutor that the gun is not directly connected with the firing made by the accused, but as it was recovered in pursuance of the information given by the accused and at his instance, it can be treated as a corroborative circumstance to fasten the guilt on the accused.

9. We take these points raised by the learned Counsel for the parties seriatim.

Absence of the test identification parade:

10. It cannot be denied that the eyewitnesses in this case were residents of Jaisalmer and they had gone to the area of Bundi District for the purpose of grazing their cattle for a short period. They had put up their 'deras' (camp) about a mile away from Bundi Road Station. PW 4 Bachaya has stated in his cross-examination that he did not know Shambhusingh from before and that he had seen him for the first time on the date of the occurrence. Similarly, PW 3 has deposed that he had seen Shambhusingh only on the day when he opened the fire.

towards his colleague Deena and then when he saw him at the Police Station Dina PW 2, however, in his earlier statement Ex. D/5 admitted that there were no occasions for him to visit the village where the accused lived. From this evidence, it is clear that these three witnesses were strangers to the accused. PW 1 Hayat who was the author of the First Information Report, has however, stated that he had once seen the accused prior to the date of the occurrence, at the grinding mill but that too does not show that he was intimately familiar with the accused. The investigating officer after the arrest of the accused did not take care to see that a test identification parade may be arranged to get the accused identified by such witnesses who were strangers to him. It is true that all these witnesses correctly identified the accused in the dock at the trial and it is also true that identification at the trial is a substantive piece of evidence about the identification of the accused, but the Supreme Court has held in *Vaikuntam Chandrappa and Ors. State of Andhra Pradesh* : AIR 1960 SC1340 .-

It is true that the substantive evidence of a witness is his statement in court; but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding.

11. We do not find any ground on the record to treat these stranger-witnesses as an exception to the general rule as laid down by the Supreme Court, specially when one of these witnesses even at the trial could not identify correctly the accused in the dock though he explained this could not be by stating that he was perplexed. However, the identification of the accused in the dock by these stranger witnesses cannot be given much weight in the absence of a guarantee that one can get from the procedure of putting the accused to the test identification proceedings before the witnesses are asked to identify him in the court. The Supreme Court in *Budhsen and Anr. v. State of U.P.* : 1970 CriLJ1149 has laid down--

The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe

rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when, for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bonafides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in Court.

12. The Supreme Court has no doubt laid down certain exceptions to this general rule of arranging the test identification parade for identifying unknown culprit before he is identified in the court and one of the exception is that no such parade is necessary if the Court is impressed by the testimony of a particular witness on whom reliance could be placed implicitly without corroboration. Let us see whether any such reliance can be placed on the evidence of the eye-witnesses, namely, PW 1, PW 2, PW 3 and PW 4 and whether their testimony regarding identification of the accused can be accepted without putting accused to the test identification parade. There is one circumstance which we cannot lose sight of and it is that when Haiyat PW 1 went in the company of his colleagues PWs 2, 3 and 4 to the Police Station to lodge the First Information Report, they found the accused present there, but none of them pointed out to Pooran Brahm PW 6 that Shambhusingh was the person who WAS responsible for killing Dina. One of the witness has gone to the length of saying that the accused was sitting by the side of the Head Constable who had been described by him as Thanedar. It is really very strange of the eye-witnesses that none of them pointed out the accused at the Police Station as being the perpetrator of that heinous crime. This conduct of the witnesses can be explained only on this hypothesis that none of them by that time knew that it was Shambhusingh accused and none else who had committed the murder of Deena. This conduct of the eye-witnesses becomes all the more strange when the name of Shambhusingh was mentioned by them in the First Information Report. Haiyat PW 1 went to the length of disclosing the name of Shambhulingh's

father as Bhawarsingh, still he was not in a position to point out the witnesses and the Head Constable Pooran Brahm, who had already started the investigation did not show the wisdom to arrest him.

13. The contention of the learned Counsel for the appellant is that Shambhusingh's name was not actually disclosed by Haiyat while narrating the manner in which the incident had taken place and it is why Shambhusingh who was all through present at the Police Station was not even arrested by the Head Constable. We find some force in this contention of the defence PW 1 Hayiat, in his cross examination, has admitted that after the matter was reported to Pooran Brahm, the latter first went to inspect the dead body at the 'dera' and the site and it was after returning from that place that the First Information Report was actually registered by Pooran Brahm. It also appears to be quite unnatural that an unknown person who was going to commit such a heinous crime would proclaim his identity by disclosing his name and his father's name to the victim in the manner it is said to have been done by Shambhu Singh. If it was really done, then there was no reason why the man present at the Police Station was not pointed out when the eye-witness went to the Police Station to lodge the report. The arrest of Shambhusingh had taken place at 4 p.m. when the investigation was taken over by the SHO Abdul Wahid PW 11 and it is in the evidence of all these witnesses that till then Shambhusingh was at the Police Station. If really these eye-witness had seen Shambhusingh actually firing at deceased Deena, then there was no reason why he was not identified by them at the time when the eye-witnesses immediately went to the Police Station.

14. We may at this stage notice one more glaring discrepancy which exists in this case and it is with regard to the exact place of occurrence. According to the prosecution case, Shambhusingh fired at Deena when Deena was standing at place A in the site-plan Ex. P 2 from the point B which was at a distance of about 15 to 16 paces. Ali PW 3 is a witness who was all through with Deena and he went in the company of Deena to Baveri to quench his thirst. Baveri has been shown at mark C in the site plan which is about two furlong from place and one and a half furlong from the spot A. The Police took precautions to get the statement of Ali recorded under Section 164 CrP.C. before a Magistrate. In his statement Ex D/6,

the place of occurrence as deposed by Ali is the Baveri and not the point A or B. When he was confronted with this statement in his cross-examination, he denied to have made that statement before the Magistrate. This denial demolishes the credibility of the witness and makes the prosecution case doubtful. According to Mr. Mulla, the venue of the occurrence has been shifted by the prosecution to enable the other two witnesses, namely, PW 1 Hayat and PW 2 Deena, to play the role of the eye-witness because it is that place where they were grazing their cattle. Whatever may be the reason, it is however clear that the statement of Ali under Section 164 Cr.P.C. (old) casts a shadow of doubt on the prosecution Case regarding the place of occurrence.

#### Medical Evidence:

15. There is another circumstance which makes the case of the prosecution still more doubtful and it is the testimony of the doctor. According to the eye witnesses, there was only one shot fired from the spot B to Deena who was standing at the spot A and both the injuries on his person were sustained as a result of that one gun shot fire. PW 7 Dr. Ramsingh has categorically stated that injury No. 1 on the chest was caused in an area of 3/4. The charring effect can be caused only when the gun is fired from the point blank range. There is no charring of wound No. 2 on the thigh of the deceased which shows that injury must have been sustained by him from a long distance. From the medical testimony, it can be safely inferred that the deceased sustained injuries not from one fire but from two fires and this inference totally demolishes the premises on which the prosecution has come out to involve Shambusingh. We are therefore of the opinion that the prosecution has failed to prove the story as revealed by the eye-witnesses.

#### Tainted investigation:

16. From the testimony of PW 1 Hayat, we do not find any difficulty to hold that the F.I.R. Ex. P. 1 was not recorded by PW 6 Pooran Brahm at 10 a. m. when Hayat and his colleagues went to lodge the report. It appears as is clear from the testimony of Hayat, that the Head Constable immediately rushed to see the dead body lying at the 'dera' of the complainant-party and after having prepared the inquest report as well as the site-plan Ex. P. 2, the report Ex. P. 1 was taken down

in the register. There is one intrinsic circumstance to corroborate this doubt of ours and it is that the report mentions that there was no blood at the place where deceased Dina received gun-shot injuries. In the first place, it may be that a person who had lost an intimate colleague of his would not care to see whether any blood that came out of the body of the deceased fell on the place of the occurrence or not, because that is an insignificant detail which no body looks at. We however sent for the clothes of the deceased and from the look at the tahmad, it can be easily said that it was almost soaked in blood. When so much blood had come out of the body of the deceased, it was not possible that blood could not have spread over on the earth at the place where the deceased actually sustained injuries. The statement of these eye-witnesses that they had put a wet cloth on the injuries and thereby prevented the blood to flow appears to be concocted and unreliable as we find that the entire tahmad watch was on the body of the deceased at the time of the occurrence was almost soaked in blood. The absence of blood at point A which is said to be the place of the occurrence also throws doubt on the prosecution story about the actual spot of occurrence. The criticism of the learned Counsel for the appellant that the investigation was not fair has some force.

17. The benefit of such a defective and tainted investigation shall naturally go to the accused and will render the story of the prosecution incredible,

Recovery:

18. The recovery of the gun cannot help the prosecution to connect the accused with the crime as the ballistic expert was not in a position to say that the bullets recovered from the body of the deceased were fired from that very gun. The recovery was made from the house of Shambhusingh where the licence-holder of the gun also resided and therefore it is difficult to place any reliance on the seizure memo prepared by the investigating officer in a very peculiar circumstance that the accused himself called the SHO from behind the bars and gave this information suo motu. However, in the absence of the link between the gun and the crime its recovery is of little avail to the prosecution.

19. Since the gun was recovered from the house where the father of the accused also lived and he happened to be the licence holder of the gun, it is difficult to hold

that the gun was recovered from the possession of the accused and that it was used by him for an unlawful purpose. His conviction under Section 27 of the Arms Act therefore cannot be sustained.

20. The result is that the appeal of Shambhusingh is allowed He is acquitted of the charges under Section 302 IPC and Section 27 of the Arms Act and the sentence awarded to him under these counts are quashed Shambhusingh is in jail. He shall be released forthwith if not required in any other case. The gun Article 3 seized during the course of investigation shall be returned to the licence-holder Bhanwarsingh.

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