

Modiya Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Jan-04-1985

Reported in : 1985WLN(UC)11

Judge : D.P. Gupta and; S.K. Mal Lodha, JJ.

Appeal No. : D.B. Cr. (Jail) Appeal No. 208 of 1978

Appellant : Modiya

Respondent : The State of Rajasthan

Advocate for Pet/Ap. : Mr. J.M. Bhandari

Disposition : Appeal dismissed

Judgement :

S.K. Mal Lodha, J.

1. Accused-appellant Modiya has filed this appeal against conviction and sentence passed by the learned Additional Sessions Judge, Sirohi vide Judgment dated May 8, 1978. The learned Additional Sessions Judge has convicted him under Section 302 IPC and sentenced him to rigorous imprisonment for life and a fine of Rs. 200/ in default of payment of fine to further undergo four months rigorous' imprisonment.

2. The prosecution story is that on July 20, 1977, deceased Mota and PW 1 Dharma were going to their village with buffalo and she-buffalo. They reached village Korta at about 1 PM and stayed under a tree outside the hotel belonging to PM 2 Kapoora, for rest. The appellant Modiya is the resident of that village. He came there with a 'genthi' and told the deceased Mota that he has disreputed him. While saying so the accused appellant inflicted two 'genthi' blows on the back and hands of Mota and also inflicted blows on the neck. As a result of that Mota fell down on the stones. Thereupon, accused-appellant lifted axe of Mota which was lying there and attacked him. When PW 1 Dharma attempted to protect him, the accused Modiya terrified him and inflicted blows with axe on Mota. On account of the injuries, Mota died on the spot. The First Information Report was got written on that very day at PS. Sumerpur at 4 30 PM by PW 1 Dharma Case No. 77 was registered. The police inspected the site and prepared the site inspection memo Ex. P. 3, inquest memo Ex P 2 of the dead body and sent the dead body for post mortem. PW 6 Dr. S.P Purohit conducted the post mortem examination. His report is Ex P 4. The blood-stained clothes of the deceased Mota were taken by the Police vide seizure memo Ex. P 6 and were sent for chemical examination. The investigating Officer recorded the statements of the witnesses under Section 61 Cr. PC. The accused supplied information regarding axe on July 20, 1977 vide Ex. P8 and thereafter, the axe was recovered at the instance of the accused Modiya vide Ex P 9 dated July 20, 1977. The police submitted the challan in the court of Munsif & Judicial Magistrate, Bali, who committed the case for trial to the court of Additional Sessions Judge, Sirohi.

3. The learned Additional Sessions Judge, Sirohi framed charge under Section 302 IPC on January 24, 1978. The accused denied the charge and claimed trial. Since the accused had no financial means to engage a defence counsel, the learned Additional Sessions Judge appointed Shri Vishan Singh Deora as Amicus Curiae for his defence in accordance with the provisions of Section 304 Cr. PC.

4. The prosecution examined 10 witnesses viz., PW 1 Dharma, PW 2 Kapoora, PW 3 Otaram, PW 4 Rama, PW 5 Bhiksingh PW 6 Dr S.P. Purohit, PW 7 Amarsingh, PW 8 Harisingh, PW 9 Nabbukhan and PW 10 Chattarsingh. The statement of the accused was recorded under Section 313 Cr. PC wherein he

denied that he had committed the crime and stated that the witnesses produced by the prosecution are false. He stated that his ration card was with Mota, he was taking benefit out of it and so the ration-card was taken back by him after a quarrel and, therefore, he was unhappy with him. In defence, DW 1 Shivsingh and DW 2 Sakharam were examined by the accused. According to these witnesses, accused appellant was not present at the place of the commission of the crime. In other words, the plea of alibi was taken. The learned Additional Sessions Judge by his Judgment dated May 8, 1978 convicted the accused-appellant under Section 302 IPC sentenced him as mentioned above. Aggrieved, the appellant filed the appeal against his conviction and sentence.

5. When the appeal came up for hearing, it was contended on behalf of the accused-appellant that the trial stood vitiated because the amicus curiae who defended the accused-appellant in the trial court did not at all cross-examine the prosecution witnesses. It was submitted that the trial was not fair. This Court vide its judgment dated December 16, 1983 (now reported in 1984 Cr. LR (Raj) 270) directed that PW 1 Dharma, PW 2 Kapoora, PW 3 Otaram, PW 6 Dr. S.P. Purohit. and P W 7 Amarsingh should be recalled and an opportunity should be given to the accused to cross-examine them afresh. The directions made are as follows:

We, therefore, direct the learned Additional Sessions Judge, Sirohi to appoint afresh amicus curiae in this case and to allow him to cross-examine the witness referred above viz., PW 1 Dharma, PW 2 Kapoora, PW 3 Otaram, PW 6 Dr S.P. Purohit and PW 7 Amarsingh. We further direct that the accused should be examined under Section 313 Cr. PC and an opportunity should be given to ' him to produce the defence evidence if he so desires. The record of this case may be sent to the Additional Sessions Judge. Sirohi immediately. He shall examine all the witnesses as directed within a period of two months and shall submit the record and the statements so recorded within period of three months to this Court.

In pursuance of the directions, PW1 Dharama, PW 2 Kapoora. PW3 Otaram PW 6 Dr. S.P. Purohit and PW 7 Amarsingh were examined by the newly appointed amicus curiae Shri R.K. Surana. After the receipt of the record the appeal was listed for hearing.

6. We heard Mr. J.M. Bhandari, learned counsel for the appellant and Mr. N. Khan, learned Public Prosecutor for the State.

7. The learned Additional Sessions Judge in his Judgment dated May 8, 1978 has recorded the following findings:

(1) that on July 20, 1977, Mota died and it was a case of murder;

(2) that the accused Modiya inflicted blows on the vital parts of Mota's body by 'genthi' and axe and on account of the injuries caused by inflicting of blows, he died;

(3) that the accused appellant has committed an offence under Section 302 IPC.

The learned Additional Sessions Judge has relied on the testimony of PW 1 Dharma, PW 2 Kapoora and PW 3 Otaram who are said to be eye witnesses. For holding that Mota died on account of the injuries caused by the blows which were inflicted by accused appellant, statement of P W 6 Dr. S.P. Purohit was also believed. For the purpose of recovery of axe Article 4 reliance was placed on the testimony of PW 8 Harish and PW 10 Chattarsingh.

8. It may be stated that PW 2 Kapoora and PW .3 Otaram when they were examined in pursuance of the order of this Court on July 12, 1984 they were declared hostile and the learned Public Prosecutor was also permitted to cross-examine them. So also PW 1 Dharma was declared hostile and the Public Prosecutor was permitted to cross-examine him on July 26, 1984. In his statement PW 6, Dr. S.P. Purohit has stated that there were 13 injuries on the body of the deceased Mota which are as follows:

(1) Incised wound 4' x 1/2' x 1/4', 1' above an anterior to right ear to vertically downwards causing fracture of mandible

(2) Incised wound 3-1/2' x 2-1/2' x 1-1/2', 1' above the mid-clavicular line transversely on neck

(3) Incised wound 2' x 1/2' x 2-1/2' on middle of the neck left side transversely

- (4) Incised wound 2-1/2' x 1-1/2' x 1-1/2' in between injury No. 2 and on the left side of
- (5) Incised wound 2-1/2' x 1' x 3-1/2' on left mastoid process transversely
- (6) Incised wound 3' x 1' x 3' on posterio lateral side of middle of neck transversely
- (7) Incised wound 2' x 1' x 2' at the level of 6th and 7th cervical vertebrae causing fracture dislocation of 6th and 7th cervical vertebrae
- (8) A Shaped incised wound 4' x 2' bone deep on left cheek (maxilla) vertically downwards to left angle of mouth causing fracture of left mandible
- (9) Crush injury of chin 2' x 2' bone deep causing comminuted fracture of mandible with extraction of 6 teeth of lower jaw i.e. 2 incisor, 2 canines and 2 premolar
- (10) Incised wound 6' x 2-1/2' x bone deep extending from right frontal eminence to right chin medial to right eye and lateral to nose causing fracture of frontal bone (brain matter coming out) nasal bone and maxilla
- (11) Bruise 1' x 1-1/2' on left side of chest at 2nd costal cartilage
- (12) Bruise with abrasion 2' x 1/4' on left side of shoulder
- (13) Incised wound 4' x 1/2' x 1/4' on inferior angle of right scapula transversely.

This witness has further stated that on account of the external injuries on the body of the deceased Mota, on post mortem, he found the following internal injuries

- (1) External injury No. 1 causing fracture of mandible right side upper 1/3rd
- (2) External injury No. 2 causing injury to left sub-clavian vessels
- (3) External injury No. 3 causing cutting of left jugular veins carotid artery and trachea at 2nd ring
- (4) External injury No. 4 causing cutting of carotid artery and thyroid cartilage
- (5) External injury No. 5 causing fracture of mastoid process

- (6) External injury No. 7 causing fracture and dislocation of 6th and 7th cervical vertebrae
- (7) External injury No. 8 causing fracture of left side of maxilla and mandible
- (8) External injury No. 9 causing fracture of left mandible with extraction of 6 teeth
- (9) External injury No. 10 causing fracture of frontal bone right side with laceration of frontal lobe of brain, nasal bone, right maxilla.
- (10) External injury No. 6 causing fracture of occipital bone.

He proved the post mortem report (Ex P. 4). in the opinion of P.W. 6 Dr. S.P. Purohit, injuries No. 1 to 10 were caused by sharp weapon and were grievous in nature. External injuries No. 1 to 13 were simple in nature and they were caused by blunt weapon. All the injuries were ante mortem According to this witness, the cause of death was syncope as a result of haemorrhage and injury to the vital organs (Brain, blood vessels). He opined that the external injuries No. 2, 3, 4, 7, and 10 were individually sufficient in the ordinary course of nature to cause the death and external injuries No 9, 11, 12 and 13 could be caused by 'genthi' (Article 1) and all other injuries could be caused by axe (Article 4). In this cross-examination which was done on June 11, 1984 in pursuance of the directions of this Court, this witness stated injury No. 11 and 12 cannot be caused by axe and 'genthi' but injury No. 13 can be caused by axe or 'genthi'. He has corrected himself by saying that injury No-13 could be caused by a fall on a blunt object contacting his back with the hard object.

9. It was contended by the learned counsel for the appellant that the prosecution has failed to prove that the accused-appellant Modiya inflicted blows on the body of Mota with 'genthi' and axe as there is no reliable evidence on record in this regard, The learned Additional Sessions Judge has relied on the testimony of P.W. 1 Dharma and P.W. 2 Kapoora and P.W. 3 Otaram. According to the learned counsel, PW Kapoora and PW. 3 Otaram are not ocular witnesses. He submitted that the testimony of PW 1 Dharma cannot be relied upon as his statement is discrepant because of the various contradictions in his statement. The evidence of

the aforesaid three witnesses is contradictory and so, it will not be safe to maintain the conviction of the accused appellant.

10. Before we scrutinise the evidence of the aforesaid three witnesses, it may be mentioned as stated above that, in pursuance of the order dated December 16, 1983, these witnesses were recalled by the learned Additional Sessions Judge, Sirohi and they were further cross-examined on behalf of the appellant. They were declared hostile and the learned Public Prosecutor was permitted to cross examine them. We are, therefore, called upon to appreciate the statements of the aforesaid three witnesses afresh, for, they were declared hostile after the judgment of conviction and sentence was passed by the learned Additional Sessions Judge during their cross-examination in pursuance of the order of this Court passed on December 16, 1983.

11. Here, it may be stated that the Supreme Court in *N.N. Naik v. State of Maharashtra* : [1971]1SCR133 , used the evidence of the prosecution witnesses who had partly resiled from the previous statements to the extent they supported the prosecution for corroborating the other witnesses. It was, of course, held in *Jagir. Singh v. State* : 1975 CriLJ1009 that when a witness, who has been called by the prosecution is permitted to be cross-examined on behalf of the prosecution, the result of that course being adopted is to discredit that witness altogether and not merely to get rid of a part of his testimony.

12. In *Bhagwan Singh v. State of Haryana*, while considering the question relating to the value of the evidence of the hostile witnesses, it was ruled that where the Court gives permission to the Prosecutor to cross examine his own witness, thus characterising him as a hostile witness, that fact does not completely efface his evidence, and the evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence.

13. In *Sat Paul v. Delhi Administration* : 1976 CriLJ708 , it was observed as under:

From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by

the party calling him his evidence cannot as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands throughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with the caution and care, accept, in the light of the other evidence on the record that part of his testimony which he finds to be credit worthy and act upon it. If in a given case,; the whole of the testimony of the witness is impugned, and in the process the witness stands squarely and totally discredited, the Judge should, as matter of prudence discard his evidence in toto.

In *K Thevar v. State of T.N.* : 1976 CriLJ708 , Chandrachud, J., as he then was, speaking for the Court made the following observations:

A hostile witness may not be rejected outright out the Court has at least to be aware that, prima facie, a witness who makes different statements at different times has no regard for truth. The Court should, therefore, be slow to act on the testimony of such a witness and normally, it should look for corroboration to his evidence. Far from doing so, the High Court utilised a contradiction in the evidence of the hostile witness for corroborating the evidence of five other witnesses.

On the basis of the above principles we proceed to examine whether from the testimony of the aforesaid three witnesses the prosecution has succeeded in establishing that Modiya has inflicted blows with 'genthi' and axe on the body of Mota. P.W. 1 Dharma had accompanied Mota. He has stated that both of them reached Korta village at about 1 P.M. and sat under a tree. which was near P.W. 2 Kapoora's hotel Modiya came there and told Mota that he has disreputed him and has again come to the village and after that he inflicted two blows with 'genthi' on the back of Mota. As a result of that result of that Mota fell down and thereafter the accused-appellant Modiya lifted Mota's axe which was lying there and inflicted blows on Mota's face. In the cross-examination which was conducted on July 26. 1984 he has stated that after inflicting one injury on the body of Mota, he ran away. He farther stated that the accused Modiya had inflicted blows with 'genthi' and axe

and saw the inflicting of these injuries while running, According to this witness the accused came running and thereafter, again went and inflicted blows with axe on the body of Mota. He has said that he went in the hotel and Moidya ran away.

14. PW 2 Kapoora is the owner of the hotel. The incident had taken place outside hotel. PW1 Dharma was sitting near the deceased Mota He has deposed that he saw the deceased Mota with PW 1 Dharma under the tree near his hotel. After sometime, he heard the voice of jumping of she-buffalos and so he came out and saw PW 1 Dharma and PW 3 Otaram running. At that time, Mota was lying on the ground and blood was oozing out from his body. He further saw that the accused was running 5 to 7 steps away. After he was declared hostile in his cross-examination dated July 12 1984, he stated that PW 1 Dharma came to his hotel but did not tell him anything. When he came out of hotel, he saw the dead body near a Pipli tree and thereafter, he went inside the hotel. He has admitted that he correctly stated in his examination in chief, the portion C to D that he saw Modiya running at a distance of 5 to 7 steps from the Pipli tree. Having considered the statement of P W 2, we are unable to say that he is an eye witness of the inflicting of blows by the accused- None the less, from his testimony, it can safely be inferred that he saw the accused Modiya running at a distance of 5 to 7 steps from the Pipli tree PW 3 Otaram has stated that at that time at about 1 PM, he had gone to the shop of PW 2 Kapoora to talk in connection with a pipe and at that time, he saw two persons sitting under the tree having buffalo and she-buffalo. When he came out, he found Mota lying on the land & blood was coming out from his body. He has also stated that he saw the accused standing near the dead body of Mota and soon thereafter, he ran away. The learned Additional Sessions Judge has stated that two facts are established from his testimony viz , that when he came out of the hotel, Mota was lying on the ground and blood was coming out from his body and that the accused was standing near the dead body. In the cross-examination which was conducted on July 12, 1984, he has stated that he did not see the accused running. He has further stated that the statement which he gave in the examination in chief on March 13, 1978 was given on account of policy fear. Having read his statement we are of opinion that though' he has been produced by the prosecution as an eye witness, but he is not an eye witness who has seen inflicting of the blows by the accused Modiya on the body of Mota deceased. We

are, thus, left with the testimony of PW 1 Dharma who was declared hostile when further cross-examined on July 26, 1984, after a lapse of about 6 years, from the date of his previous statement which was recorded on March 13, 1978 and we have to consider whether his statement stands corroborated or not. PW 1 Dharma has stated in the cross-examination, which was conducted by the Public Prosecutor on July 26, 1984 that accused Modiya had inflicted two 'genthi' blows and one axe blow on the face of the deceased Mota. According to this witness, he has seen inflicting of blows by the axe on the body of Mota while running and, when he came out of the hotel after a short time. The statement that the accused Modiya was running is corroborated from the testimony of PW 2 Kapoora. It is, thus, clear that PW 1 Dharma is an ocular witness as he had seen inflicting of blows with 'genthi' and axe on the body of Mota. He also stands corroborated by the statement of PW 6 Dr. S.P. Purohit. According to PW 6, Dr. S.P. Purohit injuries caused by axe blows are on the face, and injuries No. 2, 3, 4, 7 and 10 should be caused by axe (Article 4) and other injuries 9, 11, 12, could be caused by 'genthi' (Article 1). Thus, the medical evidence corroborates the statement of PW 1 Dharma.

15. The corroboration is also found from the recovery of axe (Article 4) It may be stated that the accused furnished information (Ex. P. 8) dated July 20, 1977 regarding recovery of axe. The recovery memo of axe (Article 4) is Ex. P 9 and it has been proved by PW 10 Chattarsingh Motbir and PW 8 Harisingh, S.H.O. Sumerpur. According to PW 8 Harisingh, the recovered axe contained blood stains. Ex. P. 10 is the report of Director, State Forensic Science Laboratory, Jaipur. On a result of the analysis, the blood was detected on the axe (Article 4) which was in parcel No. 2 and marked as Ex P. 10 by the Director, State Forensic Science Laboratory. The report of the Serologist and Chemical Examiner is Ex. P. 11 dated October 17, 1977. The axe was stained with human blood but report of the blood group could not be determined which was on the axe because it was not sufficient for test. The Road Certificate is Ex P. 12 dated August 9, 1977 and sample seal is contained in Ex. P. 11 Ex. P. 14 is the report by the S.P. Pali regarding forwarding of cases to the Director, Forensic Science Laboratory, Rajasthan, Jaipur in which it is stated that specimen of seal with description is attached herewith. The receipt of Articles issued by the Receipt Clerk of Forensic

Science Laboratory is Ex. P. 15 dated August 24, 1977. On behalf of the accused appellant, the documents Ex P 12 to Ex P. 15 were admitted as is borne out from the proceedings dated April 18, 1978. A perusal of Ex. P. 10 and Ex. P. 11 shows that the seals were intact. From Ex. P. 11, it is clear that axe (Article 4) was stained with human blood. In face of the admitted documents Ex. P.12 to Ex P. 15, there is no substance in the contention of the learned counsel that evidence was not led by the prosecution that the packets containing various articles inclusive of Article 14 were not tampered with and that the seals were intact. The testimony of PW 1 Dharma, thus, stands corroborated from the medical evidence as well as recovery of axe (Article 4).

16. It is established that the injuries No. 2,3,4, 7 and 10 which were noted by PW 6 Dr. S.P. Purohit on the dead body of Mota could be caused by the axe and further that PW 1 Dharma saw the accused Modiya running after the infliction of the blows on the dead body of Mota is corroborated by PW 2 Kapoora. In this way, we find corroboration of the statement of PW 1 Dharma who is an eye witness.

17. Learned counsel for the appellant pointed out some minor discrepancies in the statement of P W 1 Dharma which had come in cross-examination which was done on July 26, 1984 but that is due to the fact that this was conducted after about seven years of the occurrence. Having considered the statement of PW 1 Dharma in the light of the aforesaid corroborative piece of evidence, we are opinion that these discrepancies in the statement of PW 1 Dharma after the lapse of seven years are due to normal errors of observation laid normal errors of memory due to lapse of time. PW 1 Dharma is the only eye witness and his testimony cannot be discarded on account of these minor discrepancies. They cannot be characterised as material.

18. Injuries No. 2,3, 4, 7 and 10, as stated by PW 6 Dr. S.P. Purohit were individually sufficient in the ordinary coarse of nature to cause death. Thus, the guilt of the accused-appellant Modiya has been established by the prosecution beyond reasonable doubt. The learned Additional Sessions Judge was right in convicting the accused under Section 302 IPC and sentencing him to imprisonment for life.

19. Consequently, the appeal filed by the appellant Modiya fails and is, hereby dismissed.

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