

Ashraf and ors. Vs. State and ors.

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Court : Rajasthan

Decided On : Oct-03-2001

Reported in : RLW2003(1)Raj475; 2002(5)WLN334

Judge : Shiv Kumar Sharma and; A.C. Goyal, JJ.

Acts : Indian Penal Code (IPC) - Sections 148, 149 and 302; Rajasthan Police Rules, 1965 - Rule 6.22

Appeal No. : D.B. Cr. Appeal No. 416 of 1995

Appellant : Ashraf and ors.

Respondent : State and ors.

Advocate for Def. : Rajendra Yadav, Public Prosecutor

Advocate for Pet/Ap. : S.R. Surana,; Rajeev surana,; Vikas Digwad,;

Disposition : Appeal allowed

Judgement :

Sharma, J.

1. Appellants Salim, Ashraf,, Races, Anis Kalu @ Rafiq, along-with Peelu and Bhura were indicted before the learned Special Judge, Communal Riots cases-cum-Additional Sessions Judge, Tonk, for having committed murder to

Mohammad Arshad in Sessions Case No. 11/1993 (49/92). The learned Additional Sessions Judge after finding them guilty vide judgment dated August 4, 1995, convicted and sentenced them as under:-

Kalu alias Rafiq, Ashraf, Salim, Races and Anis, under Section 302 read with 149 IPC to suffer imprisonment for life and a fine of Rs. 3000/- each. In default to further undergo six months simple imprisonment.

Under Section 148 IPC to suffer six month's rigorous imprisonment.

The accused Bhura was acquitted whereas accused Peelu had absconded during the trial.

Against this judgment of conviction that the present action for filing the appeal has been resorted to by the appellants.

2. The prosecution story is like this. On the basis of Parcha Bayan Ex.P.22 of Mohammad Arshad (now deceased) Ex.P.22, the Police Station Kotwali Tonk, registered a case under Sections 147-307, IPC and investigation commenced. Injured Mohammad Arshad was referred to S.M.S. Hospital, where he died at 10 a.m. on June 6, 1992. Autopsy on the body of Mohammad Arshad was conducted vide Ex.P.8, according to which the deceased sustained as many as six ante-mortem injuries. Therefore, the case was converted under Section 302 IPC. Statements of witnesses under Section 161 Cr.P.C. were recorded. Accused were arrested and weapons of offence were covered at the instance of accused persons. Site was inspected. Site plan was drawn and on conclusion of investigation, charge sheet was filed. In due course, the case came up for trial before the learned Additional Sessions Judge, Tonk. Charges under Sections 147, 148, 302, in the alternative 302/149 IPC were framed. The accused denied the charges and claimed trial. As many as 21 witnesses were examined in support of the prosecution. In their explanation under Section 313 Cr.P.C. the accused claimed innocence. Five witnesses in defence were examined by the accused. The learned trial Judge on hearing the final submissions convicted and sentenced the accused appellants as here-in-above.

3. We have heard learned counsel appearing for the appellants as well as learned Public Prosecutor and learned counsel for the complainant and closely scanned the record. The eye witnesses Jeewat Ram PW 1, Raghuvir Songar PW 2, Khalid PW 3, Parvez Ali PW 4, Naved Shami Khan PW 5, Nizamuddin PW 6, Aziz PW 7 and Mohammad Ayub PW 12 did not support the prosecution case and were declared hostile. The case of the prosecution rests on the dying declaration of the deceased Mohammad Arshad and the statement of Roopa Ram Choudhary, S.I., P.W. 18, who recorded the said dying declaration therefore, we proceed to analysis the truthfulness of the dying declaration Ex.P.22. The dying declaration of Mohammad in the form of Parcha bayan was recorded by Roopa Ram Choudhary S.I., on June 5, 1992 at 2 pm in the Sahadat Hospital Tonk. In his deposition Mohammad Arshad states that around 1.30 pm when he was coming out from the shoes shop after purchasing the shoes, 15-20 persons armed with sword, dharia and knives assaulted him. Asraf inflicted sword blow on his head. Races inflicted knife blow on his chest. Bhura Mewati, Anis Saloria, Salim Mewati, Kalu Mewati and 10-15 other persons caught hold of him and beat him indiscriminately. Naved Samim and others had seen the occurrence. Bystanders intervened and saved his life. Mohammad Arshad put his signatures on the said Parcha Bayan as 'Arshad Kesri'. At this juncture we would like to refer the Injuries sustained by the deceased. A look at the post mortem report Ex.P.8 demonstrates that the deceased sustained as many as six injuries, this;-(1) stitched wound 3 cm long having 3 stitches on dorsomedial surface of left thumb at its proximal part.

(2) Incised wound 4 cm into 1 cm into muscle deep placed obliquely on first web space between right thumb and right index finger with dried clotted blood.

(3) Stitched wound 1.5 cm long having 2 stitches on area 4 cm left lateral to left nipple placed obliquely.

(5) Slitched wound 24 cm long having 24 stitches placed transversely and a little oblique up to left lateral side of chest extending from left side sternum. This stitched wound is at the level 5 cm below left nipple. On dissection under neath muscles at the level of 5th inter coster space found stitched on the inner aspect of chest wall probably done surgically for surgical treatment.

(6) Incised wound 1 cm long placed obliquely at left 7th inter costal space probably done surgically for putting Inter Costal drainage tube. All injuries were ante mortem in nature. The cause of death was shock as a result of the injury to heart. The injuries to heart were sufficient to cause death in the ordinary course of nature.

Evidently the deceased sustained injuries on the surface of left thumb and between right thumb and right index finger.

4. Now we proceed to consider the statement of Roopa Ram Choudhary PW 18. In his deposition Roopa Ram Choudhary stated that while posted as SI on June 5, 1992, at Kotwali Tonk, he was directed by Incharge Police Station Tonk, to record the statement of Mohamrnad Arshad who was admitted at the Sahadat Hospital Tonk. He reached there around quarter to two. Arshad gave him oral statement vide Ex.P.22 and put his signatures. He further stated that Arshad was fully conscious at the time of giving sidtement, therefore, he did not consider it proper to call the doctor and ascertain his opinion about the physical and mental state of Arshad. Thereafter he transmitted the Parchabayan to Police Station Kotwali Tonk, for registering the case. He also recorded the statement of Arshad under Section 161 Cr.P.C. which was Ex.P.24. As per the advice of the doctor he directed a constable to take Arshad to Jaipur. However, in the cross examination Roopa Ram stated that he did not make any entry in the 'Roznamcha' when he left for the hospital. When he reached the hospital Arshad was admitted in Ward No. 19. He did not remember as to whether primary aid was given to Arshad or not and who was his treating doctor. He also stated that he did not remember as to whether Arshad put his signatures by right hand or left hand. The prosecution also examined Mohamrnad Usman PW. 10, Anjum Miya PW 14 and Noor Miya PW 15 as witnesses of the dying declaration. Mohamrnad Usman PW 10 brother-in-law of Arshad, in his cross examination stated that when the reached at the hospital, he has seen the injuries sustained by Arshad. When Arshad was giving statement to the Police, doctor was also present there. He admitted this fact that Arshad sustained injuries on his thumb and index finger of both the hands and bandages were wrapped over his both the hands. The injuries were so serious that Arshad was not in a position to move his hands. Anjum Miya PW 14 has been declared

hostile. Noor Miya PW 15, in his cross-examination, stated that when he reached at the hospital, doctor. Doctor examined the injuries sustained by Arshad and advised him to take Arshad to Jaipur. Arshad became unconscious and doctor told that something in his heart was burst.

5. The fact situation that may be deduced from the evidence of above witnesses may be sustained thus:-

(i) Although Doctor was present in the Hospital yet Roopa Ram(PW.18) did not ascertain his opinion about the mental and physical state of Arshad.

(ii) No independent person was associated at the time of recording the dying declaration.

(iii) While going to the hospital for recording the statement of Arshad. Roopa Ram did not make any entry in the 'Roznamcha' and no satisfactory explanation for not doing so was put forth.

(iv) Arshad sustained serious injuries on his thumb and index finger and it was not possible for him to put his signatures.

(v) Arshad was unconscious and was referred to Jaipur.

6. Disputing the signatures of deceased Arshad allegedly put on the dying declaration, the accused produced Vakalatnamas and personal bonds executed by Arshad in another case while he was alive. The signatures of Arshad put by him over these documents were sent for comparison with the signatures put over the dying declaration. Krishan Charan DW 5 compared the disputed signatures and gave his opinion in Ex.D.21 thus:-

'Considering all the points referred above, I have no hesitation in declaring that the disputed signature 'Q' is not written by the same hand which has written the standard signatures S1 to S5 i.e. the disputed signatures are not written by the writer of the standards.'

7. Abdul Kadir DW 1 is the advocate who exhibited Vakalatnama Ex.D 3 and deposed that on the said Vakalatnama deceased Arshad put his signatures. He

also exhibited personal bond executed by Arshad Ex.D 4 in the said case and also marked his signatures. Zuber Ahmed Basri DW 2 also exhibited Vakalatnama Ex.D.5 and personal bond Ex. D. 6, alleged to have been executed by the deceased Arshad. Prem Narayan DW 3 Civil Clerk in the office of District and Sessions Judge Tonk deposed that Vakalatnama Ex.D 3 and personal bond Ex.D4 were filed by Advocate of Arshad before him. Vallabh Gautam DW 4 Reader of M.J.M. Tonk exhibited order sheet Ex.D. 8, Vakalatnama Ex.D.5 and personal bond Ex.D6 and deposed that Arshad put his signatures in front of him over Ex.D. 6. On a close scrutiny of material on record we are satisfied the Arshad who had sustained severe injuries over his thumb and index finger and whose both the hands were wrapped in bandages, was not in a position to put his signatures and the prosecution has failed to establish beyond doubt that signatures over dying declaration were put by Arshad.

8. At this juncture it will be useful to refer the Provisions contained in Rule 6.22 of the Rajasthan Police Rules, 1965, which reads thus:-

'6.22. Dying declarations.-(1) A dying declaration shall, whenever possible, be recorded by a Magistrate.

(2) The person making the declaration shall, if possible, be examined by a medical officer with a view to ascertain that he is sufficiently in possession of his reason to make a lucid statement.

(3) If no Magistrate can be obtained, the declaration shall, when a gazetted police officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case.

(4) If not such witnesses can be obtained without risk of the injured person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers.

(5) A dying declaration made to a police officer should, under Section 162, Code of Criminal Procedure, be signed by the person making it.'

9. In the instant case Roopa Ram Choudhary P.W. 18 has not followed the mandate of Rule 6.22 of the Police Rules. He did not care to call Magistrate to record the dying declaration. He did not deem it proper to ascertain the opinion of the doctor about the condition of Arshad. The alleged dying declaration was not recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case. The philosophy in law underlying admittance in evidence of dying declaration is based on the 'Nemo moriturus praesumitur mentire- No one at the point of death is presumed to lie;' Considering this maxim, their lordships of Supreme Court in Laxmi v. Om Prakash (1), indicated thus:-

'One of the important tests of the reliability of the dying declaration is a finding arrived at by the Court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief or longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance. If the Court finds that the capacity of the maker of the statement to narrate the facts was impaired or whether the deceased was in a fit physical and mental state to make the statement the Court may in the absence of corroborate evidence lending assurance to the contents of the declaration refuse to act on it.'

10. Mr. All, learned counsel appearing for the complaint canvassed, that Roopa Ram had no enmity with the appellant. Therefore, if he was negligent in his duty, the appellant should not get benefit out of it. Learned counsel Mr. All contended that Ashrad was in a fit condition to give statement, therefore, Roopa Ram, did not think it proper to ascertain the opinion of the doctor. Mr. All placed reliance on Prakash and Anr. v. State of Madhya Pradesh (2), Shamshul Kanwar v. State of U.P. (3), Nanahau Ram and Anr. v. State of Madhya Pradesh (4), Mohd: Nasir and Anr. v. State of Rajasthan (5), Smt. Paniben v. State of Gujarat (6) and Mohammad Usman, Mohammad Hussain, Maniyar and Anr. v. the State Maharashtra (7). In Prakash and Anr. v. State of M.P. (supra), victim was alive for

about 1/2 hour after assault. There was absence of medical evidence to indicate that e was not in position to make dying declaration. Their Lordships were of the view that as to victim was knowing assailants, it was reasonable to expect that he would give names of assailable to expect that the would give names of assailants to his family members at first opportunity and in those circumstances, the dying declaration was relied upon. In that case it was not borne out from the evidence of doctor that the injuries were so grave that he could made any dying declaration. It was indicated by their Lordships that in the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate it is reasonable expected that he would give the names of the assailant if he had recognized the assailants.

Ratio of Prakash v. State (supra) is not applicable to the facts of the instant case. In this case, looking to the injuries sustained by the deceased, on chest and on his thumbs and finger and the conduct of Roopa Ram we are of the view that the deceased was not in a fit state of mind to narrate the incident to Roopa Ram.

11. Smt. Paniben (supra) was the case wherein Hon'ble Supreme Court observed that once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. But in the instant case we find that the alleged dying declaration of Arshad was neither true nor voluntary. Roopa Ram deliberately flouted the Provisions contained in Rule 6.22 of the Rajasthan Police Rules.

12. We find following infirmities in the dying declaration Ex.P.22:-

(1) It was not attested by the doctor.

(2) Two independent witnesses were not associated while recording the said declaration in view of Rule 6.22;

(3) No attempt was made to call the Magistrate for recording dying declaration and Roopa Ram Choudhary has not explained as to why he did not call the Magistrate.

(4) Defence witnesses, including the hand-writing expert testified that the deceased did not put his signatures over the dying declaration.

In view of these infirmities, we are satisfied that the dying declaration Ex.P.22, is satisfied that the dying declaration Ex.P. 22, is a highly suspicious document and we are unable to place reliance on it.

13. The approach of the trial Court in our opinion has been on an infirm footing and the evidence has not been scrutinised in its proper light. In order to pass the test of reliability a dying declaration has to be subjected to the strict scrutiny and the closest circumspection. In the instant case, when the dying declaration was recorded in the circumstances which do not inspire confidence, we would be most reluctant to convict the appellants.

14. Consequently, we allow all the appeals and set-aside the conviction of the appellants under Section 302 read with 149 and 148 of the IPC and acquit all the accused appellants Salim, Raees, Anis Ashraf and Kalu from the said charges. Salim, and Raees are in Jail. They shall be released forthwith, if not required in any other case. Anis, Ashraf and Kalu are on bail. They need not surrender and their bail bonds stand cancelled.

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