

The State Vs. Lobsang Sharap

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Court : Himachal Pradesh

Decided On : May-12-1972

Reported in : 1973CriLJ85

Judge : R.S. Pathak, C.J. and; D.B. Lal, J.

Appellant : The State

Respondent : Lobsang Sharap

Judgement :

D.B. Lal, J.

1. This is an appeal by the State against the judgment dated 24th October 1970 of the Sessions Judge Kangra, acquitting the accused Lobsang Sharap (60 years) of the charges under Sections 302 and 309 of the Indian Penal Code for committing the murder of one Lobsang Zimba (35 years) on 20th June, 1968 and thereafter attempting to commit suicide by inflicting injuries on his person.

2. The prosecution case was that both the accused and the deceased as well as many others were Tibetans and were occupying a building known as 'Alamanzil,' Dalhousie their resting house as they were patients of tuberculosis. The accused Lobsang Sharap was deputed to distribute ration to his fellow Tibetans. The deceased Lobsang Zimba from sometime before 20th June, 1968 was in the service of some tourists who had arrived in Dalhousie and everyday in the evening

he used to take for a stroll a young child of one of the tourists. The deceased used to be accompanied by a fellow-Tibetan child (6 years) by the name Chima Chharing (P.W. 18). They used to return to Alamanzil at about 8 P.M. everyday. Accordingly on 20th June 1968 both of them had returned at about 8.30 P.M. and when the deceased Lobsang Zimba was entering the 'kothi' Alamanzil and reached the staircase, he was asked by the accused from where he was coming. Before the deceased could reply, it is stated that the accused Lobsang Sharap gave him a blow by the dagger which he was holding, on his back below the left shoulder. After receiving the wound, the deceased fell down over the staircase while the accused ran away. The lad Chima Chharing saw the occurrence. The accused had also raised an alarm by shouting that he was being killed. Several Tibetans including Tashi (P.W. 19) and Namla (P.W. 20) had arrived and the lad narrated to them how the incident took place. It is stated, that these two persons also saw the accused running away with the dagger in his hand. However, they did not give a chase, nor did they raise any alarm. The accused thus made good his escape. One Dawa who was the leader of the camp, thereafter went to the Police Station and lodged the First Information Report (Ex. P.U.) and came back to the scene of occurrence along with the police. Soon after the assault, Lobsang Zimba had died and was lying with face downwards over the flight of stairs which he had attempted to negotiate. After completing the preliminary investigation at the spot, it is stated, that the police followed the trail of blood which was found lying on the ground and they reached near another 'kothi' which is known as Mary Villa. At that spot reclining against a stone wall, the accused was found lying in an unconscious state. Injuries were noticed on the right chest and genital organs of the accused. He was removed to the hospital. It was stated that the accused made a disclosure statement at the hospital, and as a result to that, the investigating officer searched out the dagger which was found lying by the side of a bush at some distance below Alamanzil. In this manner, the recovery of the dagger was made. The investigating officer also found a piece of stone embedded in that wall smeared with blood and some human hair were also found mashed in it. Accordingly the said stone along with blood and pieces of hair, was recovered and was subsequently sent to the chemical examiner for report. It is stated that the condition of the accused was found serious and the investigating officer reported

to the Sub-Divisional Magistrate one Shri P. Chakaravarti (P.W. 2) for recording his dying declaration. Accordingly the said Magistrate went to the hospital and recorded the statement (Ex. PL) of the accused on 20th June, 1968. The accused, however subsequently recovered and was prosecuted for the offence of murder and also for attempting to commit suicide.

3. The defence of the accused was_ one of denial. He did not even admit that he gave any statement to the Magistrate. Rather he stated that he was sleeping outside 'kothi' Alamanzil as it was sufficiently warm inside. Some persons whom he could not know, inflicted injuries upon his person while he was sleeping. He had run from the spot because he was afraid of his life. That is how he was found lying near Mary Villa and was arrested from there.

4. The learned Sessions Judge who tried the accused did not find him guilty as according to him, the two offences were not brought home beyond the realm of doubt and so he acquitted the accused, The State has felt aggrieved of the decision and has preferred this appeal.

5. The learned Counsel for the State strenuously urged that the child witness Chima Chharing should have been believed. It is manifest that he is the only eye witness and in case absolute reliance is placed upon his statement, there would be no difficulty in convicting the accused. A child is a competent witness and although legally there is no bar to accepting the uncorroborated testimony of a child witness, yet prudence requires that Courts should not act on the uncorroborated evidence of a child whether sworn or unsworn. It would, therefore, be a matter of enquiry for the Court to ascertain as to whether the testimony of the child witness can be absolutely relied upon. For this, certain precautions have been prescribed and the trial Judge is expected to observe such precautions so that not only he is satisfied as to the veracity of the witness, but the Court before which the case goes in appeal is also in a position to ascertain the merit of evidence in order to uphold or reject the opinion thus formulated by the trial Judge. The usual precaution is what has been described as *voire dire* of a child witness, which is a sort of preliminary examination on matters other than those for which the witness is produced so that the mental capacity of a child witness is

ascertained and it is also known as to whether he has an appreciable regard for speaking truth. In the instant case, the learned Sessions Judge has adopted this procedure and the questions and answers have been recorded to help himself as well as the Court of appeal; But it is significant that the learned Sessions Judge has neither asked any question, nor did he make a note regarding this, to indicate that the child witness really understood the duty of speaking the truth. This would seriously affect the credibility of the witness. It is, however, desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether see *Rameshwar Kalyan v. The State of Rajasthan*. : 1952 CriLJ547 . The learned Sessions Judge did not record his opinion regarding this important aspect, nor he put any question to the child witness as to whether he understood the desirability of speaking truth. From this circumstance coupled with so many others, which we are to discuss presently, the child witness could not be absolutely relied upon. For that matter, in our opinion, the learned Sessions Judge rightly discarded his testimony. As we have already stated, a child witness even if uncorroborated would be believed, provided no doubt is left in the mind of the Court as to the voluntary nature of his statement. However, if circumstances otherwise are made out and it is indicated that there were chances of tutoring or that the child witness had travelled to some extent in realm of imagination, it would be unsafe to rely upon his testimony. In that contingency, some corroboration of his statement would necessarily be required, and we are naturally reminded of the inherent weakness which can be attributed to the statement of a child witness. In *Abbas Ali Shah v. Emperor* AIR 1933 Lah 667 : (1933) 34 Cri LJ 606 it has been observed that children are a most untrustworthy class of witnesses, for. when of a tender age they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, and are greatly influenced by fear of punishment, by hope of reward, and by desire of notoriety. This warning was repeated in *Inder Singh v. The State of Pepsu* AIR 1953 Pepsu 193 : 1953 Cri LJ 1835 and is also to be found in *Ram Hazoor Pandey v. State* : AIR1959 All409 . The difficulty which a child witness faces is that he is made to believe in things which he himself has not seen. Once such a belief

holds on his memory, it is difficult to shake it. It has also been observed that a child witness is tutored much better than adults and once he is properly tutored, he remains unshaken subsequently. The trial Judge has to keep guard against all these likely influences upon the testimony of such witness. This is so specially in a case where other circumstantial evidence casts a great reflection upon the veracity of the statement of a child witness.

6. It would, therefore, be appropriate for us to point out important circumstances which greatly weaken the story narrated by the child witness. The learned Sessions Judge has discovered contradictions in his statement in as much as he has pointed out that the child witness stated that the 'dagger' might have got stuck up behind the back of the deceased, that he could see the assault while both the accused and the deceased were facing each other, that the time for taking food was 9 p.m. and not 5 p.m. as stated by other witnesses, and that he did not tell the incident out of his own accord to persons who came to the scene of occurrence. In our opinion, all these could be classified as minor contradictions and perhaps much reliance could not be placed upon them, There are, however, other important circumstances which, in our opinion, greatly affect the credibility of the witness.

7. It was made abundantly explicit in the statements of prosecution witnesses that the accused walked a distance of more than 100 feet after inflicting injuries on his person, so that he fell unconscious and was found reclining against the wall near Mary Villa. According to medical evidence, the accused had received seven injuries of which one was on the chest which had pierced the left lung. The other five injuries were over the urinary bladder, abdominal wall and right half of scrotum. The last injury was a lacerated cut wound over the skull. According to Dr. Chakki (P.W. 14) who examined the injury of the accused on 25th June. 1968 (Ex. PY). two of the injuries were of grievous nature and had not medical aid been given, these would have proved fatal. The doctor further stated that the accused must have fallen unconscious no sooner he received two of the injuries, one on the chest and the other upon the urinary bladder. If that was the situation, we fail to understand how could the accused have walked a distance of more than 100 ft. and this renders the prosecution case extremely doubtful. According to the witness

Parshotam Lal (P.W. 1), the distance where the 'dagger' was found lying from the place where the accused was discovered unconscious, was at least 70ft. According to Vidya Sagar (P.W. 6) who prepared the site-plan, this distance is 147 ft. Either the accused inflicted injuries on his person first and then went up to that wall or he inflicted the injuries near the wall and thereafter came back and threw the dagger at that place. Distance which he covered must be near about 100 ft. and this distance he could not have covered in that state of health. This circumstance in our opinion, is very material. This would cast a great reflection upon the truth of the version given by the child witness. According to Vidya Sagar (P.W. 6). the accused had thrown the dagger at a distance of 75 ft. from the foot path. The dagger was discovered from there and so it is obvious the accused must have thrown it there according to the prosecution case. After receiving such serious injuries, how could the accused throw the dagger upto that distance? This is again a feature of the case which renders it extremely doubtful.

8. There is also a serious medical discrepancy in as much as according to Dr. Chakki, the dagger which was used for causing the injury upon the deceased must have been sharp at both edges, But the weapon of offence (Ex. P. 1) which is a dagger is, only sharp at one edge and not at both edges. The doctor was no doubt hesitant to say as to whether this particular dagger was used for causing the injuries. However he became definite subsequently and said that the dagger which caused the injuries must have been sharp at both edges. That would be so as it is in accord with the nature of the wounds found on the person of the deceased. If hesitating evidence is given by the doctor, the advantage will go to the accused. Therefore, the medical evidence suffers from great infirmity inasmuch as it would rather disprove the utilisation of the dagger (Ex. P. 1) in causing the injury. That is again a circumstance which favours the accused.

9. Another curious feature of the case is, that the First Information Report was not instituted in the manner it was required under law, Dawa (p.W. 12) very clearly stated before the trial Judge that he had gone to inform at the Police Station, but the Head Constable instead of recording his report came to the spot of occurrence. Thereafter he went back and the signatures of Dawa were taken on papers on the next day, At any rate, the witness was emphatic that the report was

not written as soon as he had gone to the Police Station to inform about the occurrence. In this manner, the report was brought into existence during the course of investigation. As such it could not be used as First Information Report. The inference can be drawn that the prosecution story was improved subsequently.

10. Above all there was absolutely no motive for the accused to have caused the attack upon Lobsang Zimba. It was not difficult for the prosecution to have discovered a motive, as some evidence regarding motive could be made available from the fellow Tibetans of that resting house. In the statement of the accused which he is supposed to have given before the Magistrate, there is some indication regarding the motive. However we cannot utilise that statement for certain reasons which will be set out later and, therefore, we cannot take help from it. It was, therefore, a very abnormal feat on the part of the accused to have arrived and asked Lobsang Zimba as to from where he was coming and that without waiting for an answer, to have attacked him. There is no evidence of altercation of any nature having arisen at the time. There should have been a very strong motive for this extraordinary behaviour and this is again a circumstance which raises a suspicion as to whether the occurrence really took place in the manner stated by the witnesses. The very method adopted by the accused for attacking the deceased, as observed above, is rather abnormal. Unless the accused was moved by a deep-seated enmity, it is difficult to believe that events followed the course as narrated by the witnesses.

11. It is again unexplainable how and why the accused attempted to commit suicide. Lobsang Zimba was not his close relation so that feelings of remorse dawned upon the accused and he attempted to finish his own life. After all the accused got the opportunity to escape, and why should he commit the folly of killing himself. The learned trial Judge has rightly pointed out that if the accused had attempted suicide there was no reason for his throwing away the weapon, In ordinary cases of suicide, we usually find the implement very near the dead body. In the instant case, the accused is said to have gone walking up to some appreciable distance and thereafter to have thrown the weapon. The manner in which the injuries were inflicted is also highly curious. Besides the deep wound

given over the chest which had pierced the lung, the accused seems to have inflicted cut injuries over his genitals. We are at a loss to understand why should he inflict injuries on his genitals in case he really wanted to commit suicide. He could have simply taken a jump in the 'Khud' itself and finished his life. This is again an indication that perhaps both the accused and the deceased were beaten by somebody else, as was asserted by the accused in his statement before the trial Judge.

12. It is obviously correct that sufficient darkness prevailed at that time. As such how could Tashi and Namla see the dagger from the distance in the hand of the accused while he, was supposed to be running from the spot, That is why the child witness has also prevaricated as to the actual position of the accused and his victim and they according to him, were facing each other at the time of the assault which is apparently wrong. The child witness could not deny that the dagger got stuck up in the wound and the deceased carried it on his person while he fell over the staircase. The distance given by Tashi (P.W. 19) is also totally discrepant when compared to the distance at which the accused was found lying in an unconscious state. Accord-ins to Tashi he had seen the accused at 20ft. distance and thereafter the accused had gone for another 15ft. According to the witness, it was at that place that the accused was found lying by the Police. In this manner, the total distance, according to Tashi (P. W. 19) was only 35 ft. which is absolutely incorrect because according to other witnesses the weapon of offence was found lying not less than 50 ft. from Alamanzil and the accused was found reclining at least at about 60 ft. from the site of the weapon. In this manner the distance far exceeded 100 ft. and was not 35 ft. as stated by Tashi. There is. thus an indication that Tashi (P.W. 19), and for that matter Namla (P.W. 20), could not have noticed the accused running away from the spot.

13. The conduct of Tashi and Namla witnesses by itself is unnatural. They did not chase the accused, nor did they raise any alarm. It was not difficult for them to have summoned other Tibetans and all of them could have run after the accused. They could have even called others to intercept him. This they never did and rather permitted the accused to slip away quietly. Not only that, the accused got time to inflict several injuries on his person and he even dashed his head against

the wall, which was also a very curious conduct in the circumstances.

14. The learned Sessions Judge noted the demeanour of the child witness as well as other witnesses, and. it need not be stated that whatever observation he made has its value for the appellate Court. Unless anything substantial is discovered so that the assessment made by the learned trial Judge is proved faulty, it would be difficult to permit any interference in his assessment as to the veracity of witnesses. If the child witness did not inspire confidence with the learned trial Judge, and we too consider that circumstances do exist which reasonably lead to suspicion as to his veracity, it would be difficult to place absolute reliance upon his statement. We have, therefore, decided to discard the testimony of the child witness. Similarly no reliance can be placed on Tashi and Namla witnesses.

15. The learned Counsel for the State then referred to the statement (Ex. PL) of the accused recorded by the Magistrate. At one stage, he emphasised that this statement could be considered an admission of the accused under Section 21 of the Evidence Act and could be proved against him. We have given our careful consideration to this aspect of the case. The statement of the accused no doubt amounted to an admission under Section 21, but it was not recorded after following the procedure laid down in Section 164 of the Criminal Procedure Code. The provisions of that section, in our opinion, are mandatory and obviously safeguard the interest of the accused in a criminal trial. The purpose behind that section is based on an important principle of criminal jurisprudence. If, during investigation, an accused makes a confession before a Magistrate, decidedly he runs a great risk as he can be convicted barely on his confession. Therefore, the law has enjoined that the Magistrate has to assure himself that the accused has really placed himself outside the realm of influence and is properly warned that he is not bound to make the confession, and if he does so, it would be used against him during the trial. Only after such warnings are administered that the confession becomes admissible and its voluntary nature is assured. It cannot be denied that the confession of the accused was recorded, in this case, during investigation. The necessary warnings were not administered by the Magistrate and no compliance was made of Section 164. Therefore, in our opinion, the confession could not be utilised as a piece of evidence in the case.

16. The learned Counsel referred to Willie (William) Slaney v. State of Madhya Pradesh : 1956 CriLJ291 for the proposition that the Code is a Code of Procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. In this context, we consider that the provision embodied in Section 164, specially when it leads to a serious consequence for the accused, can by no means be considered only a procedural matter which may or may not be observed by a Magistrate. That is a vital provision and if it is not meticulously followed, the statement is rendered totally ineffective. We, therefore, do not consider that a confession which is recorded during investigation and for the recording of which compliance of the prescribed procedure under Section 164 is not made, can at all be utilised by the prosecution as an admission simpliciter by taking help of Section 21 of the Evidence Act. The learned State counsel brought to our notice Natesen. Accused AIR 1960 Mad 443 : 1960 Cri LJ 1340. But in that case as well, such a confession which had not followed the procedure of Section 164 was not held valid and was not considered as evidence against the accused. It could not be stated that the Magistrate was not in a position to observe the requirements of Section 164, as he could administer the necessary warnings even in the hospital where he had gone to record the statement. His failure to do so makes the statement inadmissible under Section 164 and the inadmissible cannot be availed of. Their Lordships of the Judicial Committee in Nazir Ahmad v. King Emperor AIR 1936 PC 253 (2) : (1936) 37 Cri LJ 897 referred to a well recognised rule of construction that where a power is given to do a certain thing in a certain way the thing must be done in that way for that act to have legal consequence. Other methods of performance are by necessary implication, excluded. In our opinion, that observation of their Lordships of the Judicial Committee still holds the field and the power that is exercised under Section 164 is required to be exercised in a certain way because otherwise the limitations embodied in that provision would not have been there. Therefore, we have no hesitation in disregarding the statement of the accused recorded by the Magistrate.

17. The learned Counsel then further invited our attention to a supposed change of defence attempted by the accused. It was stated that while cross-examining prosecution witnesses, it was asked whether Tashi and Namla or some other persons had beaten the accused; but when the accused himself gave the statement, he said that he was sleeping outside and he did not see as to who had actually beaten him. We do not think the accused could at all be stated to have changed his defence nor any serious notice could be taken of this circumstance.

18. The investigation itself was highly defective. The First Information Report was not properly recorded. The blood grouping test was not done so that the accused could be connected with the articles recovered. The stone piece was recovered on the next day for reasons better known to the police, as it was not discovered on the very day when the accused was found reclining against the wall. All these circumstances would rather favour the accused than the prosecution.

19. The upshot of all that we have stated above is that the guilt was not brought home to the accused beyond the realm of a reasonable doubt. The learned Sessions Judge was absolutely right when he gave the benefit of doubt and acquitted the accused. In the result, we do not find any grounds to interfere, and dismiss the appeal.

20. The accused is on bail and his bonds are cancelled.