

State of H.P. Vs. Jarmu

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Court : Himachal Pradesh

Decided On : May-14-2008

Reported in : 2008(3)ShimLC25

Judge : Surjit Singh and; Surinder Singh, JJ.

Appellant : State of H.P.

Respondent : Jarmu

Disposition : Appeal allowed

Judgement :

Surjit Singh, J.

1. This appeal by the State is directed against the judgment of Sessions Court, whereby respondent Jarmu who was tried for an offence under Section 302 of the Indian Penal Code for allegedly murdering one Raj Kumar, has been acquitted.

2. Case of the prosecution, as it emerges from the evidence on record, may be stated thus. On 25.5.1991, deceased Raj Kumar went to the house of PW-3 Prithia to see his ailing mother. The time was around 9 p.m. He stayed there for 10-15 minutes and left for his own house. About thirty minutes later PW-3 Prithia heard PW-6 Jai Fali crying 'MAR DIYA, MAR DIYA, BACHAO.' Hearing the cries, Prithia accompanied by his brother Nikku Ram, came out of the room to the Verandah of

his house, switched on the light and saw Raj Kumar lying in the Verandah of respondent Jarmu with an injury on the back of his head and blood coming out from his mouth and ears. He also saw respondent Jarmu standing near Raj Kumar with a 'Kulharu' in his hand. Respondent was proclaiming that whosoever come to the rescue of Raj Kumar, would be killed. Respondent tried to attack the mother of Raj Kumar, when she tried to intervene, but she was saved by PW-4 Karmu, a brother of the respondent. Raj Kumar was then lifted by Misso, wife of the respondent and taken to his house situated nearby. Next morning PW-3 Prithia went to inform PW-15 Ranjha Ram, President of Gram Panchayat, who advised that the matter be reported to the police. Ranjha Ram himself went to the house of the deceased and saw him in injured condition. Assisted by other residents of the village, he carried the deceased, who was still breathing, to the hospital at Bharmour. From there he was shifted to Civil Hospital, Chamba on 3.6.1991, where he died the same day at 6.20 p.m.

3. Post-mortem examination was conducted by PW-2 Dr. Nagesh Verma, who noticed the following external injuries:

Injury No. 1. 6 cm wound over occipital region transversely placed more towards right of midline and already stitched.

Injury No. 2. Wound 1-1/2 inch above injury No. 1. 8 CM size transversely placed in the occipital region and stitched. Wound is partially healed and there was hematoma around these two wounds with a depression in the centre.

Injury No. 3. Upper right 1-2 teeth missing and socket partially closed, upper left 2-1 right three slightly loosen. Upper lip was blueish violet in colouration.

Injury No. 4. Hematoma over the right parietal region with a depression in the centre.

On opening the skull, he noticed as follows:

Sub sponeurotic hematoma over occipital region extending over to temporal region. Mainly right of midline. Multiple fracture over the right parietal bone involving a circular segment overlying, light motor area extending anteriorly and

downward to right temporal wound and posteriorly upto suture line were seen.

There was comminuted fracture of occipital bone extending on either side of mid line below and opposite external wound already mentioned. One of the bone chip was depressed. Dura was intact except a small tear in occipital region, there was sub dural hematoma in the posterior part of the cerebrum and middle cranial fossa and the collection of clotted blood was about 150 to 200 CC. Rest of the brain matter was normal. Examination of lungs and heart were normal. On examination of the abdomen, it was found to be greenish colouration of the abdominal wall and the stomach was filled with dark coloured bowl smelling fluid. Small and large intestine were distended with gases. Rest of the examination was normal.

Cause of death was opined to be head injury, sub dural haematoma, brain compression and primary brain damage to the vital centre. The injuries were opined to be sufficient, in the ordinary course of nature, to cause death.

4. Prosecution examined PW-3 Prithia, PW-6 Jai Fali, mother of the deceased and PW-4 Karmu, brother of the respondent, as eye-witnesses. PW-4 Karmu did not support the prosecution version apparently because of his being biased in favour of the respondent on account of close relationship. He was cross-examined by the prosecution with the leave of the Court. In the cross-examination he stated certain facts favourable to the prosecution. Trial Court has not considered his testimony at all apparently because of his having been declared hostile. Evidence of PW-3 Prithia has been rejected with the observation that he himself was a suspect. Testimony of PW-6 Jai Fali, mother of the deceased, has been disbelieved on the ground that she being the mother of the deceased, her evidence could not be accepted without corroboration and also it being inconsistent with the testimony of PW-3 Prithia.

5. Prosecution also examined PW-15 Ranjha Ram. He too did not stick to the version given by him to the Police under Section 161 of the Code of Criminal Procedure. So he was also cross-examined by the prosecution with the leave of the Court. He stated certain facts, which indicate that it was the respondent who committed the crime, but the trial Court did not notice the said facts in its judgment.

6. The respondent took the plea that he was not at home on the relevant night and that he returned to his house only on the next day in the morning.

7. We have gone through the entire evidence as also the statement of the respondent, under Section 313 of the Code of Criminal Procedure and heard the learned Additional Advocate General as also the learned Counsel for the respondent.

8. PW-3 Prithia is a first cousin of the deceased being the son of a brother of the father of the deceased. Respondent Jarmu is also his cousin, but distant. The witness very categorically stated that on the fateful night around 9.00 p.m. the deceased came to his house and remained there only for 10-15 minutes and about 30 minutes after he left his house, he heard the mother of the deceased, namely Jai Fali (PW-6) crying 'BACHAO, BACHAO, MAR DIYA'. He stated that he went out of the room to his Verandah and then to the path and saw Raj Kumar lying in injured condition in the Verandah of Jarmu, respondent, with an injury on the backside of his head and blood coming out of his mouth and ears and the respondent also standing near him with a 'Kulharu' in his hand. He also stated that the respondent was threatening that whosoever come to the rescue of Raj Kumar would be killed and that when the mother of the deceased tried to intervene, she was sought to be assaulted by the respondent with the 'Kulharu', which he was carrying, but Karmu, brother of the respondent, intervened and she was saved. He further stated that Misso, wife of the respondent lifted Raj Kumar from the Verandah of the house of the respondent and took him to his own house situated nearby. The house of this witness is at a distance of 30 feet from the house of the respondent. The houses of the witness and the respondent overlook each other being situated opposite to each other. PW-3 Prithia very categorically stated that the distance between his house and the house of the respondent is 30 feet and that the two houses are situated opposite to each other and their doors face each other. PW-4 Karmu, the brother of the respondent, has also admitted this fact by saying that Prithia (PW-3) and his brother Nikku Ram had seen the occurrence from their Verandah, which means that the distance between the houses of PW-3 Prithia and the respondent is not much.

9. PW-6 Jai Fali, mother of the deceased, stated that on the fateful evening the deceased had gone to see Smt. Seveti, who was ailing and that after about an hour of his leaving the house, she heard some commotion and went towards the house of the respondent and saw her son Raj Kumar lying injured in the Verandah of the respondent. She also stated that the deceased was having injuries on the backside of the skull and mouth and two of his teeth were also broken. She stated that the respondent, who was also there, picked up a 'Kulharu' and attempted to give a blow to her, but respondent's brother Karmu (PW-4) prevented him from doing so. She also stated that Misso, respondent's wife, then carried Raj Kumar to his house.

10. PW-4 Karmu, brother of the respondent, stated that he saw Raj Kumar lying in the Verandah of Jarmu with bleeding injuries and that he went back to his house to fetch torch and when he returned, he saw the deceased in his own house. He denied having heard the respondent and his wife Misso altercating as to why she had called Raj Kumar in their house. He was cross-examined by the prosecution with the leave of the Court. In the cross-examination he admitted that Misso had told the respondent that she had not called Raj Kumar and asked the respondent why he had given beating to the deceased. He also admitted that Misso removed Raj Kumar from her Verandah to his house and also saw respondent Jarmu with an axe in his hand and proclaiming that if anybody intervened, he would be done away with. He also admitted that Prithia (PW-3) and his brother Nikku had been seeing the occurrence from the Verandah of their house. It was also admitted by him that the respondent used to suspect that the deceased was having illicit relations with his wife and that is why he caused injuries to him.

11. PW-15 Ranjha Ram, then Pardhan of the Gram Panchayat, stated that on 26.5.1991, early in the morning at 5.30 a.m., Prithia (PW-3) visited him and told that Raj Kumar had been given beating by the respondent on the previous night and he was lying injured in his house. He further stated that he went to the spot and arranged a 'Palki' for carrying the deceased to the hospital at Bharmour and himself accompanied the deceased. He deposed that on the way Jarmu, respondent met him and when he asked why he (Jarmu) had injured the deceased, he kept quiet. In the cross-examination he stated that once Misso, wife

of the respondent, had lodged a complaint with the Panchayat that the deceased used to proclaim that he had sexual intimacy with her and had been sleeping with her quite often all through the night.

12. PW-18 Amar Singh, Inspector stated that Misso, wife of the respondent, produced one 'Jungla' Ext. P-1, 'Kulharu' Ext. P-2 and PW-3 Prithia identified the 'Kulharu' to be the same, which had been used by the respondent to hit the deceased.

13. PW-1 Dr. Sudesh Pandey, who attended upon the deceased at Bharmour Hospital and conducted his medico-legal examination, stated that he noticed three lacerated wounds, one on the occipital region, another above the first one and the third on the lip. He opined that all the injuries could have been caused by means of 'Jungla' Ext. P-1. PW-2 Dr. Nagesh Verma, who conducted the post-mortem examination of the dead-body at the District Hospital, Chamba, stated that the external and internal injuries, observed by him, which have been noticed here-in-above, were possible with 'Jungla' Ext. P-1.

14. Trial Court has disbelieved the testimony of PW-3 Prithia, because PW-6 Jai Fali, mother of the deceased, does not say that PW-3 Prithia was present there and he witnessed the occurrence. Trial Court has not given any reason for not relying upon the testimony of PW-4 Karmu, made by him in the cross-examination by the prosecution, despite its having rejected the contention raised on behalf of the defence that his testimony could not have been used by the prosecution on account of promissory estoppel as held by High Court of Gauhati in Krishna Sonowal v. State of Assam 1987 (1) Crime 336. Another reason given by the trial Court for disbelieving the version of PW-3 Prithia is that while he claims to have seen the respondent inflicting the injuries with 'Kulharu' Ext. P-2, PW-1 Dr. Sudesh Pandey, who conducted the medico-legal examination and PW-2 Dr. Nagesh Verma, who conducted the post-mortem examination of the deceased, state that the injuries could have been caused by means of 'Jungla' Ext. P-1.

15. Before proceeding to analyze the above summarized evidence of the material witnesses of the prosecution and expressing our opinion as to the approach of the trial Court, we may take notice of legal position as to the value of evidence of a

hostile witness. The Hon'ble Apex Court in a catena of cases has held that the evidence of a prosecution witness, who has been treated as hostile by the prosecution, cannot be rejected in its totality on the ground that he has been cross-examined by the party summoning him and that much part of his statement, which on careful scrutiny is found to be credible, can be made use of. Some of the judgments, in which this proposition of law has been laid down and followed, are:

- (i) Bhagwan Singh v. State of Haryana : 1976 CriLJ203 ;
- (ii) Rabindra Kumar Dey v. State of Orissa : 1977 CriLJ173 ;
- (iii) Sayad Akbar v. State of Karnataka : 1979 CriLJ1374 ;
- (iv) Khujji v. State of M.P. : 1991 CriLJ2653 ;
- (v) State of U.P. v. Ramesh Prasau Misra : 1996 CriLJ4002 ;
- (vi) State of Gujarat v. Anirudhsing and Anr. : 1997 CriLJ3397 ;
- (vii) Koli Lakhmanbhai Chanabhai v. State of Gujarat : 2000 CriLJ408 ;
- (viii) Gura Singh v. State of Rajasthan AIR 2001 SC 330; and
- (ix) Leila Srinivasa Rao v. State of Andhra Pradesh : AIR 2004 SC1720 .

16. In the present case hostile witness, namely PW-4 Karmu, is a real brother of the respondent and naturally he is supposed to be biased in his favour. Now, a witness who wants to help a party on account of bias or for any other reason, states something against that party, that statement can easily be believed, because he being interested in that party would not state a fact that is not true. His statement qua such fact cannot be discarded only for the reason that he happened to be a hostile witness.

17. Testimony of PW-4 Karmu, brother of the respondent, corroborates the testimony of PW-3 Prithia to the extent that Prithia is an eyewitness. Testimony of Prithia also corroborates the testimony of PW-4 Karmu that the latter was also there. No doubt initially Karmu (PW-4) did state that he did not hear Misso and the

respondent altercation with each other over the issue of causing injuries to the deceased, but when cross-examined by the Public Prosecutor, he did state that Misso said to her husband-respondent that she had not called Raj Kumar and instead questioned him why did he give beating to the deceased (Raj Kumar) and that instead he (the respondent) should have given beating to her (Misso). In the cross-examination by the respondent, the witness stated that on the day of occurrence the respondent was away from the house during day time. He also stated that he came to the village after 2-3 days of the occurrence. Even though he did not say specifically that the respondent was not in his house on the night when the occurrence took place, the prosecution re-examined him with the leave of the Court to get it clarified whether he was present on the relevant night or not and the witness admitted that the respondent was in his house on that night.

18. Trial Court has completely overlooked the testimony of PW-4 Karmu, which is quite material from the view point of the prosecution as it not only proves the fact that PW-3 Prithia was an eye-witness, but also proves the motive behind the beating given to the deceased by the respondent. He being a brother of the respondent and thus having bias towards him, his testimony to the extent it supports the prosecution cannot be brushed aside lightly.

19. No doubt Prithia (PW-3) states that the weapon used was 'Kulharu' while the two doctors say that the injuries could have been possible with 'Jungla' (Ext. P-2) but only for this reason the ocular version of the incident given by PW-3 Prithia cannot be disbelieved. There are two reasons for this. First the two doctors have nowhere stated that these injuries could not have been caused by means of 'Kulharu' Ext. P-2; secondly even if it be assumed for the sake of argument that it was not 'Kulharu', which was used as weapon of offence, that by itself would not mean that the statement of PW-3 Prithia is completely discarded. It was admitted by the parties during the course of hearing of the matter that 'Jungla' is also an axe like instrument as the 'Kulharu' is and that the only difference is that while 'Jungla' is larger in size, 'Kulharu' is smaller.

20. Testimony of PW-3 Prithia can also not be disbelieved for the reason that PW-6 Jai Fali, mother of the deceased, has not named him as one of the persons

present on the spot in her testimony. She was not supposed to be noticing as to who were present on the spot, when her young son was lying unconscious, with a head injury. Her entire attention was supposed to be focussed on her son and his assailant.

21. It was argued on behalf of the respondent that there was no light either in the Verandah of the respondent where the injured was allegedly lying or in the open space between the said Verandah and the house of PW-3 Prithia and, therefore, Prithia was not in a position to see how the deceased had received the injuries. It has been testified by PW-3 Prithia that he had switched on the light of his Verandah and that light spread over not only on the open space between his house and the house of the respondent, but also to the Verandah of the respondent. His testimony is corroborated by PW-4 Karmu, who has stated that PW-3 Prithia and his brother Nikku were present in their Verandah, which implies that light was there in their Verandah because otherwise how could he have spotted them.

22. The upshot of the above discussion is that the respondent is guilty of causing head injury to the deceased, which ultimately resulted in his death ten days later in the hospital at Chamba.

23. Next question that arises is whether the act of the respondent amounts to culpable homicide or an offence of causing hurt and it amounts to an offence of homicide, whether the homicide is murder punishable under Section 302, I.P.C. or homicide not amounting to murder punishable under Section 304, I.P.C.

24. PW-2 Dr. Nagesh Verma stated that the injuries were sufficient to cause death in ordinary course of nature. In the cross-examination the witness, however, did not deny the suggestion that the injured would have survived had he been shifted to a hospital with better facilities of treatment promptly. It may be stated that the injuries were caused on 25th May, 1991. The deceased was shifted to the hospital at Bharmour on 26.5.1991. He was advised to be shifted to District Hospital, Chamba, but his father Neeru (PW-7) could not manage to shift him immediately because of non-availability of funds. He arranged money and shifted the deceased to Chamba only on 3rd June and on the next following day he died. The fact that

the deceased survived for nine days after the infliction of injuries and the non-denial of the suggestion by PW-2 Dr. Nagesh Verma that the deceased could have survived had he been shifted to a hospital with better medical facilities without loss of time, weaken the opinion evidence of PW-2 that the injuries were sufficient to cause death in the ordinary course of nature. The head injury, which proved fatal, was a lacerated wound. No doubt on opening the skull at the time of post-mortem examination multiple fracture of the right parietal bone was noticed, which fact implies that the deceased was hit with considerable force, but that by itself would not indicate that the respondent intended to cause an injury which was sufficient to cause death in the ordinary course of nature.

25. Evidence on record shows that the deceased was at respondent's house. The deceased, per testimony of PW-15 Ranjha Ram, used to proclaim that he had been having illicit relations with the wife of the respondent. PW-4 Karmu, brother of the respondent, has admitted that the respondent used to suspect the deceased and his wife Misso having illicit relations. Testimony of PW-4 Karmu further shows that the respondent was not at home on the fateful day during day time. He returned in the night. On seeing the deceased at his house with his wife, he was supposed to get provoked and loose power of self-control. Therefore, his act, even though amounts to the offence of homicide, because of his having hit the deceased on his head with considerable force, does not come within the four corners of Section 302, I.P.C. Consequently, he is held guilty of the offence punishable under Section 304 (Second Part), I.P.C. Accordingly he is convicted of the said offence. He is ordered to be produced in person on 5.6.2008 for being heard on the quantum of sentence.