

Devkinandan Alias Pandey Vs. State

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Court : Jammu and Kashmir

Decided On : Mar-28-2005

Reported in : 2005(2)JKJ475

Judge : Nirmal Singh and; Y.P. Nargotra, JJ.

Acts : Ranbir Penal Code (IPC) - Section 302; ;Code of Criminal Procedure (CrPC) - Sections 174, 342 and 374

Appeal No. : Criminal Appeal No. 2/2002 and Confirmation No. 1/2002

Appellant : Devkinandan Alias Pandey

Respondent : State

Advocate for Def. : B.S. Slathia, AAG

Advocate for Pet/Ap. : J.P. Singh, Adv.

Disposition : Appeal allowed

Judgement :

Nirmal Singh, J.

1. This appeal has been filed against the judgment dated 12.6.2002 and order dated 14.6.2002 passed by learned First Additional Sessions Judge, Jammu, vide which the appellant Devkinandan has been convicted and sentenced under

Section 302 RPC to undergo Rigorous imprisonment of life and fine of Rs. 2.50 lakhs which is to be recovered from the moveable and immoveable property of the accused and will be paid to legal heirs of the deceased, as compensation.

2. The prosecution story is that Ashwani Kumar, complainant, elder brother of deceased had borrowed a sum of Rs. 10,000/- from Balbir Singh. He had not repaid the same. The accused used to approach Parshotam Lal deceased and his brother Ashwani Kumar for return of the money of Balbir Singh. On 13.3.1998 the accused visited the house of Parshotam Lal, early in the morning and asked for return of money and threatened that in case the money is not returned, the deceased will face the consequences. PW Geeta Devi served tea to the accused. The accused persuaded the deceased to go along with him at which Geeta Devi refrained her husband going with him but the deceased left the house in the company of the accused in presence of Geeta Devi, Anant Ram, his father and Anjali Devi, his daughter. When the accused left the house alongwith deceased, he paid Rs. 10/- to Anjali Sharma, daughter of the deceased aged 7 years. Thereafter Parshotam Lal deceased did not return to his house.

3. Some one reported to the police that some one is lying in an unconscious condition on the road side at Prem Nagar in front of a shop. On this police came to the spot and removed Parshotam Lal deceased to Government Medical College Hospital Jammu where he succumbed to injuries. Nobody came forward to identify the deceased. His post mortem was conducted and clothes were seized. Sewa Smiti thereafter cremated the dead body.

4. On 17.3.1998, father of Ashwani Kumar went to Miran Sahib, where one Makhan Lal of Prem Nagar told his father that one person on phone told him that Parshotam Lal had been beaten by some person near Hotel Asia and the said person was demanding Rs. 35000/- from him. The deceased Parshotam Lal was telling to that man that he was not to pay money to him, but his brother had to pay. His father came back to the house and he narrated this incident to him. Ashwani Kumar alongwith his father went to his brother-in-law Captain Khemnandan at Prana Pind, who advised them to approach Devkinandan. When they went to Devkinandan accused, he became perplexed. They made an enquiry from him

about Parshotam Lal, but he did not give satisfactory reply. Then he told them that they should leave some telephone number and he will disclose them the whereabouts of the deceased. The complainant requested the accused to leave his brother, whatever money is due to him, he would pay to him.

5. On the next day at 11 a.m. the complainant's brother-in-law Khemanand came to his residence and disclosed to them that he had received telephonic message from some person who disclosed him that Parshotam Lal alias Babu Ram deceased was in his office and he would come back to him in the evening. On this, suspicion arose in the mind of complainant about the conduct of the accused. Thereafter he went to police station RS Pura. It came into the notice of the complainant from the police station that the dead body of his brother was cremated by Sewa Samiti after identifying his clothes.

6. Proceeding under Section 174 of the Cr.P.C. was conducted. During the investigation it revealed that accused had killed the deceased, therefore, a case was registered against him under Section 302 RPC. Accused was arrested and was interrogated by the police. On interrogation, he made a disclosure statement that he had kept concealed Gainti and a dasta and he can get the same recovered. In pursuance of disclosure statement, accused got recovered Gainti and a dasta.

7. After completion of the investigation challan was presented against the accused appellant and the case was committed to the court of Additional Sessions Judge, Jammu.

8. From the perusal of the documents relied upon by the prosecution the learned Additional Sessions Judge prima-facie found a case under Section 302 RPC against the accused for which he was charge-sheeted. Accused pleaded not guilty and claimed trial.

9. To prove the case, the prosecution examined PWs Ashwani Kumar, complainant who is brother of the deceased, Gita Devi, Anjali Sharma and Anant Ram, wife, daughter and father of the deceased. In their presence, the appellant had taken the deceased alongwith him, Khemanand, brother-in-law of the deceased, Om Parkash who is alleged to have seen the appellant causing injuries

to the deceased, Swaran Singh has also last seen the deceased in the company of the appellant, Swaran Singh, Ashok Kumar, Balbir Singh, Gurdayal, Bihari Lal, Om Parkash, Harbans Lal, Kuldip Raj Sharma, ASI, and Dr. Anayat Ullah Sheikh who conducted post mortem examination on the dead body of deceased Parshotam Lal and found the following injuries:-

(1) Contusion of outer aspect of left arm mid part 4' dia and on left thigh 5' dia outer aspect defused. And a similar contusion on left leg in front on its middle part 2' diameter.

(2) Bruises on both cheeks, defused extending over nose with fracture of nasal bones.

(3) Bruises diffused on dorsum of right and right forearm on left wrist and dorsum of left hand.

(4) Simple fracture of right shaft thigh.

(5) Diffused extravasations of blocs all over the scalp, more on the top with fissure fracture of right carieto temporal and occipition bone.

10. There was diffused extra and intracarebral hemorrhage on the right side brain was edematous.

11. In the opinion of Doctor cause of death was crania cerebral damage due to blunt injury on the head and time since death and the post mortem examination was three days. He also proved his report exhibited as EXPW-M. Kuldip Raj Sharma, is the investigor of the case.

12. Accused was examined under Section 342 Cr.P.C. to explain the incriminating circumstances appearing in the prosecution evidence. He denied simplicitor and false implication.

13. Accused was called to lead defence. In his defence, he has examined DWs, Jeet Lal, Gian Chand and Yog Raj.

14. The trial court on evaluation of the prosecution and defence evidence found the appellant guilty, convicted and sentenced him as stated in paragraph 1 of the judgment aggrieved by which the appellant has preferred this appeal whereas the learned Additional Sessions Judge has made a reference to this court as is required under Section 374 Cr.P.C. for confirmation of the sentence.

15. Mr. JP Singh, learned counsel for the appellant vehemently contended that the learned trial court has not appreciated the evidence in its right perspective. He submitted that the entire version has been concocted by the complainant with the connivance of the police as Khem Nandan brother-in-law of the deceased Parshotam Lal was working in police department. He contended that in all probabilities, the deceased met with an accident and expired. He further contended that there was a long delay in lodging the report with the police and sending to the Illaqa Magistrate. He contended that the prosecution has introduced the witnesses who had not witnessed the occurrence. The evidence led by the prosecution is weak, shaky, contradictory and unreliable.

16. On the other hand, Mr. B.S. Slathia, learned AAG submitted that the prosecution has proved its case beyond shadow of reasonable doubt. He submitted that the appellant persuaded the deceased to go with him and he took the deceased in presence of his wife , father Sh Anant Ram and daughter. He further submits that Om Parkash PW had seen causing injuries to the deceased and Swaran Singh had also seen the accused in the company of the deceased. He also contended that the motive for committing crime was that the brother of deceased Ashwani Kumar, complainant owed money to Balbir Singh, he employed the appellant for recovery purpose. Therefore, he had killed the deceased after taking him from his house. He also supported the judgment of learned Additional Sessions Judge.

17. We have given thoughtful consideration to the submissions made by learned counsel for the appellant Mr. JP Singh and Mr. B.S. Slathia, learned AAG for the State and have perused the record. The case of the prosecution hinges on the following sets of of evidence, (a) that Smt. Gita Devi, Anjali Sharma and Anant Ram had last seen the deceased in the company of appellant when he was taken

from his house by the appellant. (b) that Om Parkash PW had seen the accused causing injuries to the deceased. (c) That Swaran Singh PW has also seen the appellant in the bus in the company of the deceased. (d) That the accused had made a disclosure statement. On his disclosure statement he got recovered Gainti and a dasta.

18. First of all, we will evaluate the evidence of Om Parkash PW who is alleged to have seen the accused causing injuries to the deceased Parshotam Lal and he has also identified the accused in the identification parade conducted by PW Harbans Lal, Naib Tehsildar in April 1998.

19. PW-Om Parkash has deposed that accused was not known to him prior to the occurrence. He had gone to his village Kharian in connection with his personal work and at about 9, 9.30, 10 p.m. he was coming back when he reached near Prem Singh's shop, he saw with the scooter light that one person was beating to another person with a danda. He stopped and went near and found that the accused was beating the deceased. Parshotam Lal was known to him earlier, deceased was crying for his help. He asked the accused, why he was beating Parshotam Lal. The accused said to him that it is their personal dispute with regard to the money transaction. However, he requested the accused to leave Parshotam Lal and not to beat him. He further deposed that in his presence accused caused injuries on the head and right leg of the deceased. The accused rebuked him and threatened that if he would not leave the place, he will met the same treatment. On this threat he left the place of occurrence and never came back. After about 20/25 days he learnt that Parshotam Lal had died. Thereafter he went to Parshotam Lal's house for condolence. When he was crossed examined he deposed that he has sold buffalo in village Kharian to one Jeet Lal who had paid Rs. 4000/- and remaining 2500/- was to be recovered from him. The buffalo was sold to him in the month of February 1998.

20. This Version given by Om Parkash has been belied by two defence witnesses namely Jeet Lal and Gian Chand. Gian Chand is the resident of village Kharian. He deposed that no person other than the name of Jeet Lal is putting up there and there is no body by the name of Jeet Lal in village Kharian. Father name of Jeet

Lal is Shankar. Jeet Lal who is resident of village Kharian has deposed that there is no other person by his name in his village . Jeet Lal and Gian Chand were cross-examined by the Public Prosecutor, but he failed to make any dent in their evidence. Rather from the evidence of Jeet Lal and Gian Chand DWs, it appears that there is no other person by the name of Jeet Lal in village Kharian. Jeet Lal is the only person in the said village whose father's name is Shankar Dass. So the story put forth by Om Parkash that he has gone to village Kharian for receiving the money from Jeet Lal is made up one and highly doubtful.

21. PW Om Parkash has further admitted in his cross-examination that there are shops at the place of occurrence and residential houses are at a distance of 50 yards from the place of occurrence. He has also admitted that if someone raises hue and cry, it can be heard from the residential houses. The witness further admitted that the deceased was crying 'Bachao Bachao'. This version given by the witness is not believable. The deceased Parshotam Lal was known to the witness and was asking the witness to save him. PW Om Parkash has neither tried to overpower the accused nor raised any hue and cry. If the version of PW Om Parkash would have been true than on hearing the cries of Parshotam Lal deceased, the people who were residing in the nearby houses and the persons who are running the shops must have attracted to the spot and saved the deceased.

22. PW Om Parkash has admitted that he has not reported the matter to the Police even though he passed by the side of the Police Post Miran Sahib. He has not disclosed to any person that the accused had given a beating, even to the persons who are residing nearby, even though he has admitted in his cross examination that that he knew the deceased 3/4 years prior to the occurrence and the deceased used to visit his house off and on. The conduct of PW Om Parkash is highly improbable. From his evidence it is clear that he has not seen the accused causing injuries to the deceased.

23. PW Swaran Singh has been examined by the prosecution to prove that the accused was dragging and beating the deceased. He has deposed that on 13.5.1998 at 6/7 p.m. he was going to his home in a bus in which deceased was

also traveling alongwith the accused. The accused alighted from the bus while catching hold the arms of Parshotam Lal deceased. On enquiry by him, the accused told him that there is some money transaction between him and the deceased. The accused told him that they will come in another bus. Thereafter he went to R.S. Pura Bazar. After one month he came to know from Khemnandan, the uncle of the deceased about his death. He went to the house of deceased on that very day for condolence and told the family members that he can identify the person if that person comes before him who has given beating. On the next day he went to Police Station RS Pura and identified the accused there. But when Swaran Singh was cross-examined he admitted that he did not disclose about this incident to anyone though he used to come to RS Pura from the date of the incident till the date he came to know about the death of the deceased. He admitted that he used to purchase the household articles on cash payment as also on credit from the uncle of the deceased. He disclosed the incident to the uncle of Khemnandan in the month of April. He had gone to the residence of deceased alone. The members of the family of the deceased told him that one person had taken the deceased with him, that person was served tea and the said person paid Rs. 10/- to Anjali Sharma daughter of the deceased.

24. The version given by Swaran Singh is not believable. If the version given by Swaran Singh would have been true then the family members instead of telling Swaran Singh that one person had taken away the deceased with him then they can tell that Devkinandan alias Pandey was the person who had taken the deceased alongwith him as the appellant was known to the family members. The version given by Swaran Singh is also not probable. He has also admitted in his cross-examination that he knew the deceased and his brother Ashwani Kumar who was working as VLW. He also admitted that he used to purchase the household articles from the shop of Khemnandan, the uncle of the deceased, but he did not disclose the incident either to the public or to Khemnandan that the deceased was forcibly taken away by a person. This version given by Swaran Singh also does not appeal to reason that if deceased was taken by the appellant forcibly then the deceased could have raised hue and cry in the bus. Therefore, after appreciating the evidence of Swaran Singh, we have no hesitation to say that this witness has been planted to corroborate the version given by PWs Gita Devi,

Anant Ram and Anjali Sharma.

25. The prosecution has relied upon the identification parade conducted by PW18- Harbans Lal, Tehsildar from PWs Om Parkash and Swarn Singh. We have already discarded the evidence of PWs Om Parkash and Swarn Singh that they had not seen the appellant causing injuries to the deceased. This piece of evidence that Harbans Lal, Tehsildar, has conducted the identification parade is padding. PW Harbans Lal has admitted his cross-examination that identification papers were prepared by the police and were given to him. He has also admitted that he did not know as to how the identification parade was being conducted. He also admitted that the witnesses were already present in the police station and the appellant was also sitting with those persons. The persons who had to identify the accused were sitting with him. It has also come in his evidence of PW Om Parkash that when Swarn Singh identified the accused, he was with the police inside. The place where identification parade was conducted was visible to all i.e. the persons were mixed up. PW Om Parkash further admitted that the time of second and third round the place of identification parade was not changed but had remained same. The persons mixed up with the accused were neither changed in the second and third round nor their clothes were changed. He has deposed that he cannot say whether the accused was bearing beard or the persons who were mixed up were having the beard. The marginal witnesses of the identification parade are related i.e. Ashwani Kumar and Khemnandan. Ashwani Kumar is the complainant and Khemnandan is brother-in-law of the deceased. PW18- Harbans Lal has admitted that proforma identification parade has been prepared by the police but it is the duty of the Magistrate to prepare the identification proforma himself, therefore, this identification parade is a farce.

26. The recovery of Gainti and Danda seems to have been planted upon the appellant. The prosecution has not examined the investigator who has interrogated the appellant and in whose presence disclosure statement was made and on the basis of which recovery was made. Even otherwise, the disclosure statement had not been made by the appellant before any independent witness, therefore, no reliance can be placed on the statement of Ashwani Kumar, complainant, and Khemnandan that appellant made the disclosure statement.

Even in their statement it has not come that the accused has kept concealed the Gainti and Danda at a place which only he knew rather the evidence of Ashwani Kumar , complainant, is that accused produced the Gainti and Danda before the police.

27. The other set of prosecution evidence is that deceased was taken away by the appellant in the presence of PWs Gita Devi, Anjali Sharma and Anant Ram on 13.3.1998. From the perusal of the evidence of Gita Devi, Anant Ram and Anjali Sharma it is not established that deceased left the house with the appellant on 13.3.1998.

28. Gita Devi, Anant Ram and Anjali Sharma are the wife, father and daughter of the deceased. When the prosecution has examined the related and interested witnesses, it puts the court on its own guard to scrutinize their evidence with great care and caution. When the evidence of these witnesses scanned, it establishes that they are planted witnesses because of their contradictory statements. Gita Devi has deposed that accused has given threat to the deceased in presence of PW Anant Ram that in case the money was not repaid to Balbir Singh, he will have to face the consequences. Whereas PW Anant Ram deposed that when the accused and the deceased left the house together, he enquired from his daughter-in-law about their conversation on which she disclosed that accused was threatening the deceased for return of the money. Anjali Sharma deposed that her grand father, accused and the deceased took tea together and thereafter the accused and the deceased left the house and her grand father went out of the house for playing cards. Whereas PW Anant Ram deposed that he was working in the nearby field when the deceased and the accused took tea in their house. PW Anjali Sharma admitted in her cross-examination that she cannot tell as to who told her the name of the accused as Pandey. The perusal of the statement of Anjali Sharma shows that she has been introduced as a witness to corroborate the statement of PW Geeta Devi. So no reliance can be placed on the statements of these witnesses who are making contradictory statements.

29. PWs Aswani Kumar and Gita Devi have stated that the deceased left the house on 13.3.1998. When the deceased did not return to the house on the same

day, none of them enquired from the office where the deceased was working or from the accused. Anant Ram had deposed in his statement that on 17.3.1998 he came to know from one of the relations, PW Makhan Lal that he had received a telephonic call from some unknown person that deceased had been given beating near Hotel Asia. Despite to the fact that they came to know about the beating given by some unknown person, they had not reported the matter to the police. Gita Devi in her statement has admitted that she came to know after 4/5 days that her husband has been murdered, but the FIR has been lodged on 11.4.1998. There is no satisfactory explanation from the prosecution for this inordinate delay. When PW Gita Devi and other family members came to know about the death of the deceased after 4/5 days but the FIR was registered after 23 days of the knowledge of the occurrence. It is not the case of the complainant that he reported the matter to the police but case was not registered. There is not only delay in recording the FIR, but even there is delay in dispatching the FIR to the concerned Magistrate. FIR was registered on 11.4.1998 but it has been dispatched on 15.4.1998 i.e. after lapse of four days, when the distance between the police station and the court is only one or two furlongs. The prosecution has not given any explanation for this inordinate delay. In *Ishwar Singh v. State of UP*, : 1976 CriLJ1883 the apex court has held as under:-

'The extraordinary delay in sending the F.I.R is a circumstance which provides a legitimate basis for suspecting that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. In this case the suspicion hardens into a definite possibility when the case made in court differs at least in two very important particulars from that narrated in the F.I.R. In such a case, the evidence of the eye-witnesses 'cannot be accepted at its face value'.'

Similar view has been taken in *State of Rajasthan v. Teja Singh and Ors.*, 0085/2001 : 2001 CriLJ1176 .

30. The entire case of the prosecution hinges in this case on the motive that Ashwani Kumar had taken loan of Rs. 10,000/- from Balbir Singh and he failed to

repay and the appellant asked the deceased Parshotam Lal to repay the said amount which was due. Firstly, the deceased has not taken the loan. Ashwani Kumar had to repay the loan. It is also not the case of the prosecution that Parshotam Lal deceased stands guranteer for his brother Ashwani Kumar. As per the version given by Gita Devi, Ashwani Kumar was living separately. If the money is to be paid i.e. to be paid by Ashwani Kumar and not by Parshotam Lal. If the demand of money was to be made, that was to be made to Ashwani Kumar.

31. Balbir Singh while appearing as prosecution witness has deposed that in the year 1991 some monetary help was asked by Ashwani Kumar for Rs. 10.000/- which he got managed from New Chance Finance Company and Ashwani Kumar used to repay the said amount alongwith interest, but after sometime he stopped paying the interest. Once or twice he approached Ashwani Kumar and asked the accused who promised him to clear the same on 31st March. However, thereafter the Company was closed and he did not ask for the money from Ashwani Kumar. Devkinandan Pandey was not known to him. This witness was declared hostile and was subjected to searching cross-examination prosecution, but from his cross-examination , the prosecution has failed to prove that the accused was employed by Balbir Singh or by Chance Finance Company. The money was to be returned to the Finance Company. Balbir Singh is not the proprietor of the said company as per the prosecution.

32. It is settled proposition of law that motive looses its importance when the case of the prosecution is based on the eyewitnesses account. When the case is based upon the circumstantial evidence and the prosecution case hinges on the specific motive then the prosecution has to prove the motive in its entirety. If the prosecution fails to prove the motive then the link in the chain will be missing. In the instant case the prosecution has taken a specific motive that the Parshotam Lal deceased has been killed by the appellant on account of money transaction between Balbir Singh and Ashwani Kumar, but the prosecution has failed to prove that the appellant has to pay any money to Balbir Singh or that appellant was employed by Balbir Singh to recover the same.

33. The case in hand was based on circumstantial evidence. In the circumstantial evidence, there must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with innocence of the accused, it must be such as to show within all human probability the act must have been done by the accused as it has been laid down in 2002 (4)RCR (Crl.) page 95 Balasonba Shinde v. State of Maharashtra. But the prosecution has miserably failed to connect the appellant with the crime that he was the person who has killed the deceased none else.

34. For the reasons mentioned above, we are of the view that the learned Additional Sessions Judge has committed a legal error in appreciating the evidence on record. The conviction and sentence recorded by the learned Additional Sessions Judge cannot sustain.

35. Accordingly, we allow this appeal, set aside the conviction and sentence of the appellant and acquit him of the charge leveled against him. Reference is rejected. Appellant, if in custody, be set free forthwith, if he is not required in any other case.