

Vinay Kumar and ors. Vs. State of J and K

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Court : Jammu and Kashmir

Decided On : Apr-07-1998

Reported in : 1999CriLJ1537

Judge : Bhawani Singh, C.J. and; R.C. Gandhi, J.

Acts : Arms Act - Sections 4 and 25; ;Code of Criminal Procedure (CrPC) - Sections 313 and 342; ;Ranbir Penal Code (IPC), 1989 Smvt. - Sections 34, 147, 148, 149, 302 and 307

Appeal No. : Cr. 1st Appeal No. 21/95

Appellant : Vinay Kumar and ors.

Respondent : State of J and K

Advocate for Def. : Sunil Sethi, Adv. and; P.C. Sharma, Govt. Adv.

Advocate for Pet/Ap. : J.P. Singh,; Rajesh Kotwal and; Vikram Dogra, Adv.

Disposition : Appeal allowed

Judgement :

R.C. Gandhi, J.

1. Appellants-accused have preferred this appeal questioning their conviction and sentence as recorded by the learned Sessions Judge, Jammu, under the

impugned judgment and order dated 28-6-1995, holding them guilty of the charge of murder of Subhash Chander under Sections 302/34, R.P.C. Accused Vinay Kumar and Ram Dass have also been found guilty of possessing sharp edged weapons in contravention of SRO-175 of April, 1974 and further convicted under Section 4/25 of the Arms Act. The appellants are sentenced to undergo imprisonment for life under Section 302 read with Section 34, R.P.C. and appellants Vinay Kumar and Ram Dass are further sentenced to undergo one year's rigorous imprisonment under Section 4/25 of the Arms Act.

2. Brief facts of the prosecution case are: that the deceased used to work on dairy owned by Dilbagh Rai, his brother-in-law, and leave his house for dairy early in the morning. On October 22, 1990, the fateful morning of the day of occurrence, he left his house round about 6 a.m. followed by his brother Sikander Arora. It is alleged that while the deceased reached near the dairy, he was attacked by the accused-party. He managed to escape while he was being assaulted and entered the house of one Sunil Kochhar in the same vicinity. The assailants followed him and forced their entry into the house and continued their assault till he fell unconscious. One of the inmates of the house of Kochhars, namely, Hanish Kochhar, was also injured. Leaving the deceased waylaid in the house of Kochhars in Mohalla Jullaka the accused-party fled away. The occurrence is said to have been witnessed by the prosecution witnesses, Sikander Arora, brother of the deceased and one Ram Parshad, his friend, who also used to fetch milk from the dairy daily and met in the way to Sikander Arora who was following the deceased to the dairy. FIRV as registered on information from reliable sources at about 7 a.m. under Sections 307/147/148/149, R.P.C. and 4/25 of the Arms Act which was subsequently converted to under Section 302, R.P.C.

3. The prosecution presented the challan in the Court against the accused who pleaded not guilty and were put to trial. The prosecution, to prove the guilt, examined 11 witnesses out of 16 cited in the challan before the trial Court. Besides, the prosecution produced circumstantial, direct and medical evidence, discovery of weapons in support of the charge. The trial Court relying upon the evidence has convicted and sentenced the accused as mentioned hereinbefore.

4. Learned counsel for the appellants, Shri J.P. Singh, submitted that the judgment under appeal is not sustainable for the reason that there is no circumstantial evidence and the conviction is based on highly unreliable evidence besides the incriminating blood stained articles have been relied upon though not proved. There is proof of enmity between the deceased and the witnesses of the prosecution on the one side and Vinay Kumar accused, on the other. The deceased was a known criminal of Jammu and PW Sikander Arora was also a criminal who was later killed in the jail as an under-trial. It is urged by him that according to the FIR the incident has taken place in the precincts of the dairy of Dilbagh Rai and identity of the informant has not been disclosed to suppress the genesis of the crime.

5. According to the eye account of the prosecution witnesses, Sikander Arora PW has stated that he and Ram Parshad were following the deceased and while he reached near the dairy, the accused-party attacked him and caused injuries with sharp edged weapons. Accused Vinay Kumar inflicted the injuries with Kirch, Ram Dass with Dah and the other two accused with knife. While the accused were assaulting the deceased near the dairy, Kirch of Vinay Kumar accused fell down which was subsequently recovered by the Investigating Officer. While the deceased was being assaulted, he managed to escape and the accused followed him and in the process they assaulted the deceased outside the house of Kochhars also. He cried for help to save his brother but no resident of the vicinity came out. On seeing this PWs Sikander and Ram Parshad left the spot and did not witness the occurrence in the house of Kochhars. PW Sikander Arora informed his brothers Surinder and Kamal who came on spot and took the deceased from Kochhars house in an auto rickshaw to the hospital where the deceased was declared dead. To the same effect are the statements of PWs Ram Parshad Surrinder and Kamal stating that they had taken the deceased to hospital from within the premises of the house of Kochhars. According to the prosecution story there were 18 incised, and 17 stab wounds inflicted with sharp edged weapon by the accused.

6. Learned counsel for the appellants further contended that the eye witnesses have not seen the incident which took place inside the house of Kochhars and the

only witness, Hanish Kochhar, who is also said to be injured in this incident in his house, has not been produced. The argument of the learned counsel is that there is no eye account of the evidence with regard to the injuries inflicted on the deceased in the house of Kochhars and this piece of evidence has also not been put to the accused under Section 342, Cr. P.C., therefore, the prosecution has failed to establish the identity of the spot of occurrence. His another limb of argument is that the incriminating articles which were blood stained, have not been proved by the production of Shri S.A. Kanth, Scientific Assistant who had opined that all these weapons of offence were stained with human blood and unless this evidence is proved before the Court it is not worthy to be used against the accused. The non-production of Hanish Kochhar has also damaged the prosecution case as there is no other evidence to tell the eye account with regard to the incident which happened in the house of Kochhars and, therefore, the prosecution has suppressed the evidence. His further argument is that PW Sikander Arora being the relative and interested witness and also inimical to the accused, his evidence could not be relied upon and similar is the effect of evidence of PW Ram Parshad who is a friend of PW Sikander Arora.

7. Learned counsel for the respondent has submitted that PW Sikander Arora was not involved in any case before the murder of his brother-deceased. His evidence cannot be brushed aside A related witness is the best piece of evidence as he is also interested to seek conviction of the defaulter and not of an innocent person. There is no motive proved in the evidence against PW Sikander Arora, therefore, his statement cannot be discarded. With regard to the production of Hanish Kochhar for recording his statement before the trial Court, warrants were issued by the trial Court for his production but it was reported that he had left without any address, as such the argument of learned counsel for appellants that it had caused damage to the prosecution story, should not be accepted.

8. We have heard learned counsel for the parties and perused the record.

9. Considering the arguments of learned counsel for the parties, the points which emerge for adjudication are: (i) that Whether there was enmity between the prosecution witnesses on the one hand and the accused on the other and the

deceased and Sikander Arora PW had criminal background; (ii) that the prosecution witnesses are related and interested witnesses and their statements should not be relied upon; (iii), the prosecution has not proved the place of occurrence and has withheld and failed to produce Hanish Kochhar who was the best available witness to reveal the prosecution story; and (iv) all the injuries inflicted on the deceased and the incident of occurrence in Kochhars house have not been put to the accused while recording their statements under Section 342, Cr. P.C.

10. Dealing with the statements of PWs. Sikander Arora, Surrinder and Kamal, it is seen that they are the brothers of the deceased. PW Ram Parshad is a friend of PW Sikander Arora. It is not disputed that PW Sikander Arora has been killed in jail while he was under trial. There is no evidence on record to establish conclusively that the prosecution witnesses had the criminal background. It is urged by Shri Sethi that prior to the commission of this offence by the accused, Sikander Arora and his brothers were not involved in any criminal case. There is no rebuttal evidence on record, therefore, it is not possible and safe to record such a finding against the prosecution witnesses that they are having criminal background. The law is settled by the Supreme Court in AIR 1977 SC 701 : 1977 Cri LJ 343 holding that where there is previous enmity between the deceased or his relatives on the one side and the accused on the other, evidence given by the relatives of the deceased cannot be regarded as suspect needing corroboration from independent witnesses.

11. So far as the statements of the related and interested witnesses are concerned, those are required to be appreciated with circumspection. Merely a fact that the witness is related to the deceased, is not a sufficient ground for discarding the statement unless a motive is alleged and proved against him to involve any other person instead of the accused-assailants. The Apex Court in AIR 1972 SC 677: 1972 Cri LJ 487 held that 'In a murder trial, relationship of the prosecution witnesses to the deceased is not a sufficient ground for discrediting their testimony unless motive is alleged and proved against them to spare the real assailant and falsely involve other in place of the assailant.' (See also 1995 Cri LJ 2458, 1996 Cri LJ 889, 1993 Cri LJ 411, AIR 1994 SC 1534: 1994 Cri LJ 1379 and

1992 Cri LJ3958).

12. His next contention is that the prosecution has not disclosed the names of the informant who was the best witness as he had seen the occurrence and reported the matter to the police. The attempt of the prosecution by concealing the identity of the informant, has suppressed the genesis of the crime causing doubt regarding the truthfulness of the prosecution version and also that Hanish Kochhar, the best possible independent witness in whose house part of the crime did take place, has not been produced before the Court. The argument of Shri Singh is that the identity of the informant should have been disclosed by the prosecution to support the story projected by the eye witnesses. The prosecution has not shown as to why identity of the informant has not been disclosed whereas it is the duty of the prosecution to disclose the source of information also and to record the FIR according to the version of the informant. Such an attempt by the prosecution by not disclosing the identity of the informant casts a cloud upon the prosecution version for suppression of the genesis of crime and unfolding the actual occurrence. Moreover, the prosecution has not been able to secure the presence of Hanish Kochhar and the only reason advanced is that he had left his house without address. Shri Sethi has contended in rebuttal that lot of efforts had been made by the prosecution to trace out this witness by issuance of warrants which could not be served as he was untraceable and the inevitable result was to give up the witness and as such no adverse inference or presumption would rise against the prosecution that the witness has not been produced and that had the same been produced he either would have not supported the prosecution version or would have stated a different version altogether. Whatever the case may be, the only independent witness of the prosecution is Ram Parshad PW who is said to be a friend of PW Sikander Arora, brother of the deceased.

13. Another circumstance which needs to be examined is that the weapons of offence recovered at the instance of the accused were blood stained but the prosecution failed to examine Shri S.A. Kanth, Scientific Assistant who has opined that the weapons are stained with human blood. The prosecution has not conducted the case seriously and such a lapse has been permitted to occasion. Unless the document is proved in the Court of law, it is only thereafter that it can

be taken into evidence, relied upon and Used against the accused. Therefore, such a situation also impels to draw adverse inference and is bound to affect the prosecution adversely.

14. The most vital point urged by Shri Singh is that the prosecution has failed to establish the place of occurrence. According to the statements of PWs Sikander Arora and Ram Parshad, occurrence is said to have taken place outside the dairy in the street, outside and inside the house of Kochhars though there is evidence on record that it took place in the street, outside and inside the Kochhars' house. In the FIR it is recorded that the occurrence has taken place in the dairy. The informant has not been named in the FIR, has taken place in the dairy has not been proved by producing evidence. There is also no eye account of the prosecution that the occurrence has been witnessed by anybody inside the house of Kochhars. The prosecution, in order to make out a case free from discrepancies, for recording conviction against the accused, have to establish definitely and conclusively the place of occurrence which it has failed. Not only that the evidence collected and produced before the trial Court including the statements of the prosecution witnesses, is required to be put to the accused under Section 342, Cr. P.C. while recording his statement which has not been done according to law. It has been pointed out from the record that all the 35 injuries have not been put to the accused and instead only 14 injuries have been recorded in the statement and put to the accused. It is in the prosecution evidence that the assailants after waylaying the deceased in Kochhars house, fled away. It has also come in the evidence that PWs Surrinder Kumar and Kamal had taken the deceased to hospital from Kochhars house. Unfortunately, this part of the occurrence has not been put to the appellants-accused in the statements under Section 342 Cr. P.C. The purpose of recording the statements of the accused is to confront them with all the material which has come on record and is likely to be used against him with the purpose to make him understand the exact case and nature of offence, which he has to meet in his defence and to explain. If the gist of entire evidence is not put to the accused, there rises no question of any explanation from the accused to that part of the evidence which has not been put to them. There is a legal lapse caused in the prosecution case by not putting to the accused the evidence of occurrence in Kochhars house and all the injuries inflicted

on the person of the deceased. Shri Singh in support of his contention has cited AIR 1953 SC 468 : 1953 Cri LJ 1933 wherein it is observed that (at page-1936 of Cri LJ):

We have a further comment to make. Both the Sessions Judge and the High Court have attached importance to the fact that both accused absconded, but at no stage of the case have they been asked to explain this. We have stressed before the importance of putting to the accused each material fact which is intended to be used against him and of affording him a chance of explaining it if he can. We regret to find that this rule is so often ignored.

A reference for the same purpose also can be made to AIR 1955 SC 792 : 1955 Cri LJ 1644 wherein it is observed (at page 1645 of Cri LJ):

This is another of those cases in which Courts are compelled to acquit because Magistrates and Sessions Judges fail to appreciate the importance of Section 342 Criminal Procedure Code and fail to carry out the duty that is cast upon them of questioning the accused properly and fairly, bringing home to his mind in clear and simple language the exact case he has to meet and each material point that is sought to be made against him, and of affording him a chance to explain then if he can and so desires. Had the Sessions Judge done that in this case it is possible that we would not have been obliged to acquit.

Reliance can also be placed on 1997 (1) CLR 122 : (1996 Cri LJ 4441) wherein it is observed that:

After giving my thoughtful consideration to the rival contentions, I am of the view that no doubt all can be entertained that the examination of the accused under Section 313, Cr. P.C., is an important part of the trial. It can also not be described as a technical defect in recording the statement of the accused under the said provision of law. It has its own significance and importance, having material bearing on the ultimate decision in the case. The accused might be knowing what case against him was, but the object of Section 313, Code of Criminal Procedure, is to afford an opportunity to the accused to explain each and every piece of evidence relied upon and adduced by the prosecution, and if each and every

circumstance appearing in the prosecution evidence against the accused is not put to him when he is examined under Section 313, Code of Criminal Procedure, the accused is well within his right to plead that great prejudice was caused to him.

15. The purpose of the compliance of the provisions of Section 342, Cr. P.C., as explained above, has not been met with and thus has cast serious lacunas in the prosecution case which has not been proved against the accused beyond reasonable doubt. The evidence which has not been put to the accused, cannot be used against them. The incidence in Kochhars house can also not be taken to be a minor contradiction or discrepancy for the obvious reason that this is a place, a part of the occurrence, where the deceased was lastly and finally assaulted and from where he was lifted and taken to the hospital and where Hanish Kochhar, an inmate of the house, was injured. The mandate of Section 342, Cr. P.C. for achieving a purpose required by law for using the evidence against the accused, has not been complied with. We feel no hesitation in holding that the place of occurrence has not been conclusively proved and the evidence which has not been put to the accused under Section 342, Cr. P.C, cannot be used against them. It is also found that the genesis of the crime by not naming or producing the informant in the Court and also by not producing any witness to support and prove the fact of incident which took place in the Kochhars house, has been suppressed by the prosecution which is materially fatal to its version.

16. For the aforesaid reasons, we are of the view that the prosecution has not been successful in bringing home the guilt against the accused and the findings recorded by the trial Court deserve to be interfered with and are set aside. The accused are acquitted of the charge and directed to be released from custody forthwith.