

Sham Lal Vs. State

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Court : Jammu and Kashmir

Decided On : Mar-31-2003

Reported in : 2003(3)JKJ320

Judge : B.L. Bhat, J.

Acts : Jammu and Kashmir Ranbir Penal Code (IPC) - Sections 34, 161, 302, 304, 307 and 323; ;Jammu and Kashmir Criminal Penal Code (IPC) - Section 205D; ;Evidence Act - Section b35

Appeal No. : Cri. A. No. 25/1990

Appellant : Sham Lal

Respondent : State

Advocate for Def. : S.C. Gupta, AAG

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

Disposition : Appeal allowed

Judgement :

B.L. Bhat, J.

1. This criminal appeal is directed against the judgment and order of sentence dated 28.9.1990, whereby the learned Sessions Judge, Kathua came to convict

the appellants for offence under Section 323 RPC and also came to sentence them to undergo rigorous imprisonment of four years and fine of Rs. 500 each for offence under Section 304 Part-II and also sentenced them to undergo three months rigorous imprisonment for offence punishable under Section 323 RPC. However, both the sentences were made concurrent.

2. Briefly stating the case of the prosecution is that on 27.8.1989, one Jagmohan who was injured accompanied by his father Roop Chand injured and Ashok Kumar s/o Duni Chand lodged an ocular report before Police Station, Billawar stating therein that today he was going alongwith his father to his house at village Kishanpur, on reaching near their house at village Rishanpur, they were intercepted by Sham Lal and Shiv Kumar who were armed with lathies having previous enmity with them attacked them. Sham Lal inflicted head injury with the lathi on the head of his father with an intention to do away with his life, on his felling on the ground Shiv Kumar inflicted another head injury and exhorted to kill them. That his father fell unconscious on spot; the said persons attacked him with lathies that on his making noise Ashok Kumar and Naresh Kumar arrived on spot who intervened and the said accused took to their heels. On the receipt of this information, the police Billawar came to register a case under FIR No. 70/89 for an offence under Section 307 RPC and proceeded with the investigation of the case by preparing the injury memo of the injured persons, hospitalised Roop Chand who was later referred to SMGS, Jammu, prepared the site plan; recorded the statement of the witnesses under Section 161 and approached the hospital at Billawar and then on 27.8.89, 28.8.89, 4.9.89 and 14.9.89 made a request to the doctor attending upon Roop Chand for getting his statement recorded who informed that he is not fit to make a statement. That during the course of investigation, blood strain wearing garments of the deceased were seized and accused Sham Lal was arrested on 28.8.89 and accused Shiv Kumar on 17.9.89. That on 17.9.90, the information was received from SMGS, Jammu hospital that Roop Chand succumbed to his injuries on 16.9.89 at 11 P.M. Pursuant to this information, dead body was received and the same was sent for autopsy. After usual investigation, an offence under Section 302 RPC and an offence under Section 323 read with Section 34 RPC was found proved against the accused and they came to be accordingly challaned. On receipt of case file after commitment

under Section 205-D Cr. PC, the trial court came to frame charge against the accused for offences under Section 302 read with Section 34 and offenced under Section 323 RPC to which the accused pleaded not guilty. The prosecution in the bid to substantiate their case, came to examine Jagmohan, Ashok Kumar, Naresh Kumar, Mahant Ram, Yash Pal, Bal Krishan Patwari, Tehsildar Charanjit Singh, Dr. Vijay Kumar Gupta, Dr. Abdul Rashid, Dr. C.S. Gupta and ASI Bharat Bhushan, the Investigating Officer. In their defence the accused persons examined Sat Paul, Dr. Vipin Kumar and Dr. Rakesh Gupta. The learned trial court on conclusion of the trial on appreciation of the evidence of the prosecution witnesses, came to hold accused guilty for offence punishable under Section 304 Part-II and 323 RPC and came to convict them for said offences and passed the order of sentence as indicated above.

3. The accused persons have assailed the impugned judgment and order of sentence in this memorandum of appeal on the ground that the evidence of prosecution has not been appreciated in right perspective and the trial court has failed to appreciate the fact of suppression regarding FIR scribed by Ashok Kumar handed over to Police Station Billawar.

4. Heard Mr. J.P. Singh, Senior Advocate, the learned counsel for the appellants and Mr. S.C. Gupta, learned AAG.

5. As indicated that the trial court after considering the evidence of the prosecution witnesses examined in the case, came to find complicity of the accused in the offence punishable under Section 304 Part-II and 323 RPC, therefore, I am constrained to consider the entire evidence on the record of the case and test its correctness in the light of the allegations levelled by the learned counsel for the appellants against the said conclusion of the trial court, for this a brief discussion of the evidence relevant to the case cannot be avoided.

6. The case of the prosecution is mainly resting on the evidence of the listed eye witnesses who are Jagmohan, Ashok Kumar and Naresh Kumar. PW Jagmohan is the son of the deceased. PWs Ashok Kumar and Naresh Kumar are his brother's sons who as alleged in the ocular report lodged by them before the police have stated that they have previous enmity with the accused, therefore being partisan

witnesses, their evidence is to be read very carefully and cautiously against the accused. PW Jagmohan has deposed that on 17.8.89 after taking round of the Billawar town at 7.45 PM they left for their house when it was dark, on reaching near the Orchard located near their house, the accused persons intercepted and beat them with lathies and inflicted injuries. His father fell down because of the injuries; he (the witness) raised a cry as a result of which Ashok Kumar and Naresh Kumar reached on spot and the accused took to their heels. Thereafter he alongwith these persons removed his father to the hospital and lodged the Report EXPW J-1. This is also in his evidence that Ashok Kumar and Naresh Kumar are his cousin brothers. On the date of occurrence, his mother and mother of the accused had a quarrel. He did not state these things in his report. His father sustained injuries on the left side of his head. On his raising cry besides Ashok Kumar and Naresh Kumar, other villagers whose number was 20 to 25 persons reached on spot amongst them he remembers the names of Varinder Kumar, Kuldeep, Pawan Kumar and Manhor Lal, but these persons did not witness the occurrence. He has further added that accused Sham Lal and Shiv Kumar inflicted 5 to 6 injuries each on the deceased. This is also in his evidence that because of darkness, he could not find out as to whether the injury upon the deceased was inflicted from his back or on his front side. Because of darkness, he could not find as to which type of clothes or colour was put on by the accused PW Ashok Kumar has deposed that in the evening at 8 P.M. on 27th of August after finishing his days' business at his shop at Billawar he was enroute to his house. He heard the cries of quarreling near the garden of Mango trees. He hastened his steps and found accused persons beating Roop Chand and Jagmohan with lathies.

In the meantime Naresh Kumar alongwith five persons also arrived on spot. Thereafter other 20 to 25 persons also assembled thereon going nearer found Roop Chand bleeding removed him to police station by a cot, where Jagmohan got the occurrence report diarised. He has also signed this document which is marked as EXPW-J/1. Thereafter he was removed to Billawar hospital then on the following day he was removed to Jammu hospital where he expired. On cross-examination he has deposed that at the time when he closed the shop, it was complete dark, he was not having a torch along. Immediately, when he reached on spot he enquired from the parties as to why they are fighting, the accused took to

their heads. It is the cry of Jagmohan which attracted him to reach at the place of occurrence. Both Sham Lal and Shiv Kumar accused gave a lathi blow each on the head of Jagmohan's father. The report which was lodged by Jagmohan before police was scribed by him. He has not seen that report today in the court. About 7 to 8 months back, he had a litigation with accused Sham Lal but that stands now compromised. He and accused persons have a joint estate. The occurrence took place on the road side. To the closed of his evidence, he has deposed that when he reached on spot, he found the deceased laying on his back on the ground. PW Naresh Kumar has deposed that on 27.8.89, he after closing his shop at 8 P.M. left for his home Jagmohan and his father were walking about 100 yards ahead of him. He was about 150 yards away from the place of occurrence, heard the cries of Jagmohan. Ashok Kumar who was little ahead of him ran towards the place where from the noise was coming, he followed him. On reaching there, found accused persons inflicting one injury each on Jagmohan and Roop Chand and Roop Chand was bleeding from his head and had fallen unconscious.

Thereafter other people assembled on the spot and Roop Chand was removed to hospital immediately wherefrom he was removed to hospital at Jammu, where after some days, he expired. On cross-examination, he has deposed that by the time he left Billawar, it was dark, he was not carrying torch along. He identified Jagmohan by his cries. The intensity of darkness was so great that another person walking on the road could not be identified. It took him one to two minutes to reach on spot. Other seven to eight persons also arrived there. They enquired about the occurrence and Jagmohan narrated the occurrence but he and Ashok Kumar remained quite. Before the said persons arrived on the spot, the accused had left the scene. About two to three persons who arrived on the spot were having torches along and in this torch light they detected the head injuries on the person of Roop Chand. He has further deposed that it is incorrect to say that Roop Chand sustained head injuries by having a fall in the hospital. Dr. Vijay Kumar, the Medical Officer, Billawar, who as per prosecution version has examined Roop Chand deceased immediately after the occurrence on 27.8.89, has found as follows:

1. CD A lacerated wound 2 1/2' scalp deep on the right occipital area. Red in colour bleeding.

(2) A lacerated wound 2' x 1' skin deep on the right side of forehead. Just above the right eye brow on its lateral aspect. Red in colour bleeding.

(3) Abruise 6' x 2' on the right side of forehead starting from injury number one to injury No. 2. Red in colour.

(4) An abrasion 1' x 1' on the right temporal area. Red in colour.

(5) A hematoma 5' x 5' on the right scapular area. Red in colour.

(6) Black eye on the right side. Bleeding through right nostril.

7. He also deposed that at the time of his examination, the petitioner was unconscious. He was admitted to SDH Billawar for the night and was referred to SMGS Hospital, Jammu on the following day. The witness has testified of his certificate marked as EXPW-VK issued with respect to deceased, Roop Chand. He has further deposed that on the same day, he has also examined Jagmohan s/o Roop Chand medically and found:

(1) A hematoma 5' x 4' on the lower left leg on its lateral aspect at the distal 1/3rd with a bruise 4' x 2' on it. Red in colour. Tendor.

(2) A hematoma 2' x 2' on the right thinner area of palm. Red in colour.

(3) A bruise 1' x 1/3' on the right lower lid. Red in colour.

8. With respect to these injuries, he has opined that they are simple in nature caused by a blunt object within six hours of the medico-legal examination and has also testified the correctness of his certificate marked as EXPW-VK/I. The witness has further added that on receipt of the opinion of the Radiologist, he recorded his opinion in the following words that 'I have seen X-Ray from the Radiologist Dr. Abdul Rashid, SMGS Hospital, Jammu and in the light of his opinion which has been initiated by me. The injury No. 2, 3 and 4 are all grievous in nature caused by blunt object within 12 hours of the Medico-legal examination conducted on

27.8.89. Regarding injury Nos. 1 and 5 are simple in nature but injury No. 6 is as a result of head injury caused within 12 hours of the medical examination'. About the lathies produced before him, he has opined that the injuries found on the person of Roop Chand, could be possible with these lathies, and injuries mentioned in the certificate EXPW-VK are sufficient in the ordinary course of nature to cause death. On cross-examination, he has deposed that Roop Chand was fairly an old person. Since the deceased had injuries on the head and the injured was bleeding through nose coupled with the blackening of eyes, it made him to infer because of such a head injury even death could be result. Injury Nos. 1 and 2, could be possible by a fall on the hard substance. Injury No. 6 is a corresponding injury. Injury Nos. 4 and 5 can be direct injuries. Injuries 1 to 5 are independent injuries while injury No.6 is result of head injury. Injury No. 6 could be the result of injury Nos. 1 to 4 taken together or individually. During the course of attending on a dying person he had no time to enquire from the injured Jagmohan, the manner in which he has sustained injuries. Dr. Abdul Rashid, Radiologist has deposed that he, in the capacity of Radiologist examined M.L.C. SKI Gram No. 930 dated 28.8.89 pertaining to one Roop Chand as per reference No. 2862/14/SKG has opined as fracture of frontal and fracture of right parietal regions. Medical witness Dr. C.S. Gupta has deposed that he has conducted the post mortem on the dead body of Roop Chand on 17.9.89 at 12.45 PM who was identified by Jagmohan his son and Ashok Kumar his nephew. The dead body was brought for post mortem examination by Bharat Bhushan Gupta ASIP/S Billawar found:

(1) Sticked wound 3.5 cms. With these stiches present over left frontal region of scalp (Healed).

(2) Scabbed separated abrasion 1.5 cm. X 1.5 cm present over right side front of chest.

(3) Scabbed separated abrasion 0.8 cm x 0.6 cm present over back of left elbow.

9. With respect to the internal injuries, head effusion of blood was present under the scalp over both sides frontal and right parietal regions. Fracture right frontal and right parietal bones 4.2 cms. was present over the valut of skull. Contusion laceration of right parietal love was present near the outer side in 3.5 x 3 cms.

Brain was pale and eedematous. He has opined that death in this case was due to cerebral damage as a result of head injury consequent upon blunt force impact. All the injuries are ante-mortem and old. The witness has testified the correctness of the post mortem report and same is marked as EXPW-CS on the file. He has further opined that the injuries mentioned in the certificates are sufficient in the ordinary course of nature to cause death. On cross-examination, he deposed that he has disclosed the cause of death as per information received by the person who identified the deceased. To a question that in case of effusion of blood under scalp it can remain present upto seven days; the medical witness has replied in affirmative but has stated that exceptions are there, and in this case the deceased was old, the effusion remained present due to result of impact of injury No. 1. The fractures in the head could be possible by a fall also.

10. Considered the rival contentions of the learned counsel for the appellants and of the AAG.

11. From the evidence of PWs Jagmohan, Ashok Kumar and Naresh Kumar, it is proved on the file that the occurrence took place in the pitch darkness. PW Jagmohan has deposed that when alongwith his father were returning from Billawar, it was dark. On cross-examination, he has reaffirmed this version by deposing that because of darkness, it could not be detected as to whether Sham Lal appellant/accused inflicted an injury on the front side or on the back side of the deceased. PW Naresh Kumar has also on cross examination deposed that it was dark when he left Billawar, he was not carrying torch along. The darkness was to this extent that a person walking on the road could not be identified. The evidence of Ashok Kumar is also to the extent that at the time of his closing his shop, it was complete dark, he was not carrying a torch along is nothing in the evidence of these witnesses that the accused during the occurrence made any voice or speak to anybody which facilitated them to identify the accused without any light. The case of the prosecution is that the occurrence took place on the road side near mango grove, therefore in the natural course of events this place must have been more dark as compared to the open and vacant place at that time. This being so, the evidence of the said listed eye witnesses being inherently discrepant and unreliable, cannot be believed to the extent that it is the accused and the accused

alone who participated in the alleged occurrence.

PW Jagmohan the son of the deceased had deposed that the deceased sustained injury on the left side of his head. This evidence of PW Jagmohan is sharply contradicted by Dr. Vijay Kumar who as per prosecution version examined Roop Chand immediately after the occurrence on 17.8.89, has deposed that he found as many as five injuries on the right side of person of Roop Chand, the first on right side of the occipital area; the second, a lacerated wound on the right side of the forehead, bleeding, just above the right eye brow; the third, a bruise on the right side of the forehead starting from injury No. 1 to injury No.2; the fourth an abrasion on the right temporal area; and the fifth a hematoma on the right scapular area and the sixth, a black eye on the right side. Dr. Abdul Rashid, Radiologist has also contradicted the said eye witness, Jagmohan by deposing that on examination of the SKI Gram, pertaining to one Roop Chand, he has opined fracture of frontal and fracture of right parietal regions. Besides this, evidence of medical witness namely Dr. Vijay Kumar, who has immediately examined the deceased after the occurrence and Dr. Abdul Rashid, Radiologist is further contradicted by Dr. C.S. Gupta, who has conducted the post mortem of the dead body of deceased Roop Chand who expired well after twenty days of the occurrence. He has proved his post mortem report by deposing that on autopsy of the dead body of the deceased, he found three injuries, first stiched wound with three stiches present over left frontal region of scalp, second scabbed separated abrasion 1.5 cm x 1.5 cm present over right side front of chest and third scabbed separated abrasion 0.8 cms x 0.6 cms present over back of left elbow. He has opined that death in this case was due to cerebral damage as a result of head injury consequent upon blunt force impact. Besides, this is in the evidence of PW Ashok Kumar, that the report which was lodged before the police station by Jagmohan about the alleged occurrence was scribed by him but he has not seen that report today on the file. He has further elucidated this version by deposing that the said report was handed over by him to SHO after telling him that he has seen the occurrence. The prosecution is bound by this version of this witness because it is the prosecution who has examined him in the case. This report is not on the file when the case of the prosecution at the very out-set is that an ocular report with respect to the occurrence was lodged. This suppression of the written report scribed by PW

Ashok Kumar and its handing over to the police by the son of the deceased Jagmohan effects the case of prosecution adversely and the tainted investigation cannot be ruled out in the case.

12. From the perusal of the trial court file, it appears that medical record of deceased Roop Chand was called from JMC, which comprises two books bearing No. 286214, MLC No. 2389 Batch No. 18 and 289788. MLC No. 2758. These books are the public documents and entries in these books which are made by the doctors who are admittedly the public servants are admissible under Section 35 of the Evidence Act. Entry of Book No. 286214 MLC No. 2389 which is proved by DW Vipan Gupta and is marked as EXDA/I by deposing that on 17.9.89 he was posted in Emergency Casualty Ward on SMGS Hospital, the Bed head ticket in question is the same which is issued by the SMGS Hospital. It reveals that on 25.8.89, the deceased Roop Chand was admitted in hospital who was referred to SMGS Hospital by the Sub District Hospital, Billawar. The treatment prescribed to him are entries on page No. 5 and 6 of this book which was prescribed to him after his examination. These entries are in his hand were made by him under the instructions of Dr. Bushan Gigoo. As per the entry of this Book EXDA/I, the patient was admitted in surgical Unit No. 1 on 28.8.89 and discharged on 15.9.89. The entry dated 13.9.89 in this book reveals that patient had a fall from bed and sustained a wound over his left forehead. He does not know the name of the doctor who made the entry. On cross-examination, he has deposed that the patient was given treatment on 17.9.1989 but expired on the same day at 12.25 P.M. Dr. Rakesh Gupta has deposed that on 28.8.89 he was posted as Registrar, Surgical Unit-I, SMGS, Jammu. On this day, as per EXDA/I, deceased Roop Chand was admitted in Ward No. 3 as per this record maintained on EXPDA/I, the deceased was discharged on 15.9.89. The entry dated 13.9.89 of this book is the endorsement to the effect that the patient had fall from the bed and sustained injury was made in his supervision. This endorsement was made by Doctor on duty. This entry is marked as EXD4 on the file. On cross-examination, P.P. has deposed that on 15.9.89, the patient was discharged for referring him to specialist centre. But in this behalf, no entry exists in the Book EXDA-I. The MLC No. 289788 discloses that the deceased was admitted on 17.9.89 but expired on the same day in the hospital. From the evidence of these witnesses and the entry

dated 13.9.89 in the medical case sheets of deceased Roop Chand marked as EXDA-I and then on his subsequent discharge on 15.9.89 coupled with his readmission in hospital on 17.9.89 and the evidence of the Medical witness Dr. C.S. Gupta, this cannot be overruled that the deceased died because of his fall from the bed in the hospital where he was got admitted firstly as a result of which sustained injury on the left frontal region of scalp, which led in turn to his death.

13. The trial court has not considered these aspects of evidence on record and has wrongly come to the conclusion that the guilt against the accused is proved beyond any shadow of doubt. The prosecution story 'may be true' but between 'must be true', there is long distance to travel and whole of this distance must be covered by legal, reliable and un-impeachable evidence. In this behalf, reference is made to AIR 1957 SC, Page 637 at 645,

14. In view of the afore discussion, I am of the considered opinion that it is not proved from the evidence of the listed eye witnesses that the occurrence took place in the manner as alleged by the prosecution and it is not also proved that it is the accused and the accused alone who participated in the alleged occurrence in which Roop Chand deceased lost his life. Therefore, they are entitled to benefit of doubt.

15. Therefore, I find great force in the appeal, the same is allowed and impugned judgment and order of sentence is hereby set aside. The appellants who are on bail, their bail and personal bonds shall stand released. The seized articles shall be destroyed after the time of appeal is over.