

State of J and K Vs. Phangi

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Court : Jammu and Kashmir

Decided On : Jun-10-2004

Reported in : 2005(1)JKJ216

Judge : V.K. Jhanji and S.K. Gupta, JJ.

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

Appeal No. : Confirmation No. 25/1998

Appellant : State of J and K

Respondent : Phangi

Advocate for Def. : Harbans Lal, Adv.

Advocate for Pet/Ap. : S.C. Gupta, AAG

Judgement :

S.K. Gupta, J.

1. Proceedings in case entitled State of Jammu and Kashmir v. Phangi, in terms of Section 374 of Cr. P.C. have been received from the learned Sessions Judge, Udhampur, for confirmation of sentence of rigorous imprisonment for life awarded to the accused for the commission of offence under Section 302 RPC and also a

fine of Rs. 10,000/- and in the event of non payment of fine, he shall further undergo an imprisonment of like nature for a period of two years, vide judgment and order dated 28-08-1998.

2. The case of the prosecution, as unfolded during the trial, in nutshell, is that the accused, the deceased and PW Des Raj used to work as Butchers in the Army at Pathankot. They left Pathankot for their native place at Ram Nagar on 13-08-1996, On reaching Udhampur Bus Stand at 6.30 P.M., they could not find any Bus for Village Barmeen. There were, however, about 30/32 passengers, including the deceased, the accused and PW Des Raj who were also going to Village Barmeen and jointly chartered a Bus which left Udhampur at 7.30 P.M. The Bus, however, could not proceed further from Amb Lair as the road was blocked by another Bus which was out of order on account of some mechanical defect. PW Des Raj alongwith the accused and deceased, however, started journey on foot and after covering a distance of about half Km, the deceased purchased the torch from a shop as it had become dark and further proceeded in the light of torch. On reaching near Dhabair, torch was handed over by deceased to PW Des Raj as the deceased wanted to light a cigarette. In the meanwhile, the accused Phangi caught hold of the deceased from throat and threw him on the ground and hit with a boulder 3/4 times on the head. The accused, Phangi, thereafter inflicted blows on the right leg of the deceased with a Toka which he had taken out of his bag, as a result of which the deceased died on spot. PW Des Raj enquired from the accused about the cause of inflicting injuries on the deceased who later threatened him to remain silent and both accused and PW Des Raj, leaving the deceased there left the place. PW Des Raj, however, was not allowed to go to his Village and remained in the company of the accused. The weapon of offence was thrown away by the accused from Tawi Bridge into the River after reiterating the warning to PW Des Raj not to divulge about the occurrence to any body, but allowed him to go to his Village and himself left for Pathankot. On reaching his village, PW Des Raj maintained silence. When the deceased did not return Home, PW Gobindo Ram, his brother went to PW Des Raj to enquire about the whereabouts of the deceased Fami. PW Des Raj disclosed about the occurrence to Gobindo Ram and latter took him to the Police Station and reported about the murder which led to the registration of the case under Section 302 RPC with

Police Station, Ram Nagar and investigation ensued. On the completion of the investigation, the accused Phangi was sent up for trial before the learned Sessions Judge, Udhampur, for commission of offence under Section 302 RPC. The trial court, after recording the evidence and hearing the arguments, held the accused Phangi guilty for commission of offence under Section 302 RPC for causing the murder of deceased Phangi in the night intervening 13/14th August, 1996 at Barmeen and sentenced him to undergo rigorous imprisonment for life and also a fine of Rs. 10,000/-

3. The accused has not preferred any appeal against the order of conviction and subsequent sentence, recorded by the trial court, but however, this confirmation has been received from the learned Sessions Judge, Udhampur, in the terms of Section 374 Cr.P.C.

4. We have heard Mr. S.C. Gupta, learned AAG as well as Mr. Harbans Lal, Advocate, appearing for the accused in extenso and perused the record meticulously.

5. It may be pointed out at the first flush that the entire prosecution case hinges on the sole evidence of PW Des Raj eye witness of the occurrence. According to PW Des Raj, the occurrence had taken place in the intervening night of 13/14th August, 1996. The FIR was lodged on 20-08-1996. The dead body of the deceased had already been recovered by that time and proceedings under Section 174 Cr.P.C. had been initiated. PW Des Raj, however, returned home, whereas the accused left for Pathankot. It is also in the evidence of PW Des Raj that he did not disclose about the occurrence till 18th August, 1996 when Gobindo Ram came to his house and enquired about the deceased Fami. It is also in the evidence of PW Des Raj that the accused had hit the deceased on his head 10/15 times with a stone and also pressed the throat of deceased as a result of which the deceased Fami died on spot. He further narrated that the accused caught hold of his neck and threw him on the ground after sitting on the back of the deceased. It is also found from his cross examination that the police recorded his statement on 18th August, 1996 in Dak Banglow in Barmeen and by that time the police had arrested the accused. He further stated to have seen the occurrence from a short

distance of about 10 steps. PW Des Raj further disclosed that the police had also slapped him on the pretext that he was not telling the truth and the accused was also beaten by the police by that time. He further stated to have been called by the police station and physically chastised by the police. There is nothing found in the evidence of PW Des Raj as to why he with-held the information with regard to the murder of the deceased by the accused by the accused from the villagers and inmates of the house particularly when he left the company of the accused on the next day of occurrence and remained in the village with his family till PW Gobindo Ram came to him and when enquired about the whereabouts of the deceased, he disclosed about the occurrence.

6. Whereas, evidence provided by PW Gobindo Ram who happens to be a cousin of the deceased and brother in law of PW Des Raj is the effect that he went to PW Des Raj on 18th August, 1996 to know about the whereabouts of the deceased Fami. When PW Des Raj narrated about the accused having killed the deceased, PW Gobindo Ram brought PW Des Raj to his house and report was got written on 19th August, 1996 from a teacher and the report was lodged on the same day at Police Station Ram Nagar. They, however, returned home on 22nd August, 1996 when the accused was arrested and police enquired from him about torch and pajama. It is also in the evidence of the PW Gobindo Ram that when he asked PW Des Raj as to why he remained silent about the occurrence, the latter told that accused had threatened to kill him in case disclosure of occurrence was made to any body.

7. Further evidence relied upon by the prosecution in support of the testimony of PW Des Raj, the only eye witness of the occurrence, is the statement of Dr. Des Raj, the only eye witness of the occurrence, is the statement of Dr. Sham Parshad Gupta who conducted the autopsy on the dead body of the deceased. The doctor found the following injuries on the dead body during examination:--

- i. Fracture left leg (tibia fibula) about 4' above ankle joint disintegrated blood clots found (closed fracture).
- ii. Open fracture lower end of femur (right) about 3' femur exposed above the knee joint, Blood and disintegrated blood clots were found at the side if the fracture.

- iii. lacerated wound over forehead 1'x1/8' x 1/8' above left eye brow, bluish reddish contusion around it.
- iv. Lacerated wound over forehead 1' x 1/2' x 1/2' over left forearm near elbow joint placed externally.
- v. Abraded skin over chest left side.
- vi. Swelling and tenderness over hip joint. More marked on the right buttock.
- vii. an incised wound over right leg about 3' above the knee joint. The wound had dimensions of 4' x 4' bony deep distorted. The injuries were antemortem in nature.'

The cause of death given by the Doctor was due to sunstroke (haemorrhagic shock) though as a result of multiple fractures.

8. It has been found during investigations, as is disclosed by the Investigating Officer Rajinder Kumar, that the accused had obtained loan of Rs. 1000/- from the deceased Fami in presence of PW Gobindo Ram and its repayment was claimed by the deceased from the accused in presence of PW Des Raj. Nothing is, however, found in the evidence of PW Gobindo Ram about this transaction. Even PW Des Raj did not state anything about this fact in his evidence. His evidence is rather to the effect that neither the deceased in his presence had given Rs. 1000/- to the accused on loan nor he knew about the same. It is also in the evidence of Rajinder Kumar Investigating Officer that PW Des Raj did not disclose during investigation in his statement that deceased had demanded Rs. 1000/- from the accused, but stated for the first time in the court at the time of recording his evidence.

9. In appreciating the evidence against the accused, the prime duty of a court is firstly to ensure that the evidence is legally admissible, that the witnesses are credible and have no interest in implicating him or have ulterior motive. In order to judge the credibility of witnesses the court is not confined only to the way in which the witnesses have deposed or to the demeanour of witnesses but it is open to it to look into the surrounding circumstances as well as the probabilities. Reliance is

placed in *Ramchandra v. Champabai*, AIR 1965 SC 354. The real tests are, how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. The veracity of a witness is judged not solely from his individual statement but from his testimony taken in conjunction with all other facts brought out in the course of the testimony. Where the evidence of ocular witness is in direct conflict with the medical testimony with regard to the nature of the injuries caused, place of its infliction and weapon of offence used in the commission of crime, it will be extremely unsafe and hazardous to convict the accused as is reported as AIR 1981 SC 1578, *Mohar Singh v. State of Punjab*.

10. In the instant case, PW Des Raj, though has been examined as an eye witness of occurrence, but his testimony neither appears to be consistent, positive, cogent and trust worthy nor appears to be confident in the court. PW Des Raj though left the company of the accused on 14th August, 1996 and came back to his Village in his family. He, however, did not disclose about the occurrence to any body either in the family or to the Villagers. The evidence in the case forthcoming from the record is that the accused threatened him to kill in case of his disclosure about the occurrence. It is in the evidence of PW Des Raj that he did not join the Army Butchery in Pathankot. The explanation in such circumstances, in non-disclosure of occurrence till 18th August, 1996 neither seems to be sufficient nor satisfactory, genuine acceptable and believable. When he remained in his family in his own Village, all fear and threat in normal course no longer remained in the mind of the witness particularly when he has seen the murder of the deceased who happened to be his near relation. This plea gets support and strength when he has stated about the injuries alleged to have been caused by the accused on the deceased possibly in the manner and the place of its infliction and repeated 10/15 blows with a stone on the head of the deceased does not find corroboration with the medical evidence. The injuries noted by the Doctor in certificate after having been observed by him during examination of the dead body of the deceased does not show any such injury on the head of the deceased.

11. There is marked inconsistency between the eye witness account and the medical evidence. This inconsistency pertains to number of injuries stated to have

been inflicted on the deceased with the stone on the head with the injuries noted by the Doctor in his certificate without specifying any such injuries on the head.

12. The conduct of the eye witness is found un-natural on both counts, firstly, with holding the information about the murder of the deceased for four days after the occurrence and also the manner of injuries and the place of its infliction suggested in his evidence to have been caused by the accused at the time of occurrence on the head of the deceased, renders the testimony of the eye witness wholly unreliable, unbelievable and incredible.

13. The evidence provided by PW Des Raj, the star witness in the case, suffers from glaring discrepancy and is in direct conflict with the evidence of PW Gobindo Ram who lodged FIR about the occurrence after having been informed about the incident by PW Des Raj. According to PW Des Raj, his statement was recorded by Police Station on 18th August, 1996 and by that time the accused had already been arrested. He was beaten by the Police in the Guest house and was told not to have been making truthful statement. Whereas the evidence of PW Gobindo Ram is to the effect that he lodged the report with the Police Station on 19th August, 1966 and when returned to the Village on 22nd August, 1996 the accused was arrested by the Police from his house. If, the statement of PW Des Raj is to be believed then what is said by PW Gobindo Ram cannot be accepted and believed. The alleged cause of murder, found by Investigating Officer during investigation that when deceased demanded repayment of loan of Rs. 1000/-, the accused caused his murder, did not find support either from evidence and statement of PW Gobindo Ram or from the evidence of PW Des Raj.

14. The serious infirmities and material contradictions found in the testimony of PW Des Raj on the one hand and PW Gobindo Ram on the other gives rise to grave doubts as to the involvement of the accused in the commission of offence. There was absence of plausible explanation by PW Des Raj for having remained mute for four days and did not disclose about the occurrence to any body, which makes his conduct highly unnatural and improbable the version given by him about the incident. The evidence of PW Des Raj with regard to the nature of the injuries inflicted on the head of the deceased by 10/15 blows with stone did not

find confirmation with the injuries noted by the Doctor on the dead body of the deceased at the time of autopsy. It stands whittled down as un-believable and unreliable. The deceased was related to both PW Des Raj and also Gobindo Ram who lodged First Information Report in the Police Station after being informed by PW Des Raj about the occurrence. Their evidence has to be viewed with great caution and circumspection.

15. The trial court, while appreciating, assessing and estimating the prosecution evidence of PW Des Raj seems to have neither looked into the conduct of the witness for having not disclosed about the occurrence for four days nor the absence of plausible explanation rendered in this behalf, besides his evidence being in direct conflict with the medical testimony with regard to the number of injuries narrated by PW Des Raj eye witness with the injuries recorded in the medical certificate by Dr. Sham Parshad Gupta.

16. In such circumstances, without testing the credibility of the sole witness to the incident on the touchstone of the evidence tendered by other witnesses or evidence as recorded in the case particularly in the medical testimony, it is highly un-safe and improper for basing the conviction of the accused.

17. Ordinarily, the High Court would not interfere in the conviction recorded by the trial court by entering into the domain of appreciation of evidence. But in a case like this where there was no proper and objective appreciation of evidence by the trial court, the High Court would fail in its duty of re-appreciating the evidence and reviewing the evidence objectively and simply endorses the conclusion arrived at by the trial court, resulting in patent miscarriage of justice. The patent infirmities and inherent improbabilities in the prosecution case after analyzing it on the touchstone of litmus test of reliabilities, we find ourselves unable to endorse the conclusion arrived at by the trial court in holding the accused guilty of commission of offence under Section 302 R.P.C. and awarding sentence to undergo rigorous imprisonment for life. The conduct of PW Des Raj right from beginning remained un-natural and inherently improbable and this conduct belies normal human conduct. A careful analysis of the evidence on the record has created an impression in our minds that the evidence of eye witness Des Raj being in direct

conflict with medical testimony and PW Des Raj for having yet remained silent for four days, though deceased happened to be his near relative, is wholly un-reliable and does not inspire confidence. His conduct also gives us an impression that he was not telling the truth.

18. After giving our cheerful consideration to the material on record, we are of the opinion that prosecution has not been able to connect the accused with the commission of crime beyond any pale of doubt. Under these circumstances, sentence awarded by the trial court does not deserve to be confirmed. The conviction and sentence awarded to the accused, for commission of offence under Section 302 R.P.C. is, accordingly, set aside. The accused, Phangi, is ordered to be released forthwith, provided his complicity is not forthcoming in any other case. Record be remitted back to the trial court forthwith.

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