

SUPREME COURT OF INDIA

Ram Nath Madhoprasad

Vs.

State of M.P.

CrI.A.Nos.69,70 and71 of 19510

(Mehr Chand Mahajan, S. R. Das and Ghulam Hasan, JJ.)

30.01.1953

JUDGEMENT

MAHAJAN, J. :-

1. These are appeals by Ramnath, Pratap and Purshotham under Art. 134 (1) (c) of the Constitution of India from the Judgment and Order of the High Court of Judicature at Nagpur dated 22-8-1952 in Criminal Appeal No. 74 of 1951.

2. Sunder, a goldsmith by profession and leader of one of the two rival factions in the town of Gadarwara (Madhya Pradesh) was shot while returning from a meeting at the ganj (grain market) and walking on the main cement road of the town at a spot in front of one Narayandas's house, where Phullu Mithya's lane meets that road, at about 11 or 11.30 P.M. on 6-4-1950. The night was dark and cloudy and the road had no street lights. He was taken in a tonga to the hospital and after enquiry from him, Mulchand (P. W. 20), his muneem lodged the first information report about this incident at the police station Gadarwara at about 11-40 P. M. Half an hour, later, G. D. Mukherji (P. W. 5), first class magistrate, recorded Sunder's dying declaration, Ex. P-17, which runs as follows:

"Q : Who assaulted you?

A: Purshotham, Pratap, Mamaji and Hanna Ahir shot me by means of a pistol.

Q: Where were you going?

A: Pratap had called and had taken me to Nakalganj, and struck me on bringing me, in front of the chudiwara.

Q: Who were there?

A: I flashed the torch. All the four individuals were standing.

Q: Had you hostility with these individuals?

A: Yes, sir. I had hostility with all

Q: Whoever else was with you?

A: I was alone."

After his wounds had been dressed, Shri S. S. Naidu (P. W. 49), Assistant Medical Officer, took him by passenger train to Jubbulpore for admission into the Victoria Hospital. Sunder was operated upon by Shri Chari (P. W. 52), Civil Surgeon, on 7-4-1950 and died on the same day. The autopsy showed that there were two punctured wounds on the left side of the mid-auxiliary line which had been caused by shots from a firearm.

3. The three appellants along with two others, viz., Hari Shankar and Chiddi were tried by the Additional Sessions Judge, Narsimhapur (Madhya Pradesh) as persons responsible for this murder. Ramnath, Pratap, Purshotham, Harishankar and Chiddi were charged under S. 120-B, I. P. C., for having entered into a criminal conspiracy at Gadarwara to murder Sunder. Ramnath was also charged under S. 302, I.P.C. for having in furtherance of the above conspiracy murdered Sunder by shooting him with a pistol. Pratap and Purshotham were further charged under S. 302 read with S. 34 I. P. C. for having acted in concert with Ramnath in the murder of Sunder. An alternative charge under S. 302 read with Ss. 109 and 114, I.P.C. for abetment of the murder by Ramnath was also framed against them. Harnarain alias Harnna was given a pardon and he appeared as the first witness for the prosecution.

4. The learned Additional Sessions Judge reached the conclusion that the charge of criminal conspiracy under S. 120-B, was not proved. All the appellants were therefore acquitted of this charge. Ramnath was found guilty for the murder of Sunder and was convicted under S. 302, I. P. C. and sentenced to death. Pratap and Purshotham were convicted under S. 392 read with S. 34, I. P. C., and each of them was sentenced to transportation for life. Harishankar and Chiddi were acquitted. Against their convictions and sentences the appellants preferred appeals to the High Court of Judicature at Nagpur.

The State of Madhya Pradesh presented a petition for enhancement of sentence passed against Pratap from transportation for life to death. The High Court by its judgment under appeal altered the conviction of Ramnath under S. 302, I. P. C., to one under S. 302 read with S. 34, I. P. C. and sentenced him to the transportation for life. It confirmed the conviction of Pratap and Purshotham under S. 302 read with S. 34, I. P. C., and maintained the sentence of transportation for life passed against them. The petition of the state for enhancement of Pratap's sentence was dismissed.

5. The prosecution case which was based merely on the evidence of the approver is as follows:

6. In the town of Gadarwara, where the deceased and the accused persons lived there were two factions, one of which was led by Sunder and the other by Pratap. Since 1948 there had been quarrels between the members of these factions and in 1949, proceedings under S. 107, Cr. P. C. were taken against both but after some time they were dropped and a settlement it was reached between them. The settlement, however, was short-lived as within a few weeks they quarrelled again and some of them abused and beat each other. Security, proceedings were again taken against them in March 1950. Some members of Sunder's party were bound over, but Sunder himself and his brother, Munde, and two others were discharged. Proceedings against Purshotham, Pratap and his brother Durga were pending, when Sunder was shot dead on 6th April 1950.

Appellant Ramnath did not belong to either of the factions and he was not involved in the S. 107 proceedings of 1949 or 1930. But it is alleged that in 1948 Hari Shankar, his sister's grandson was beaten by Sunder or by his friend Ramrattan. P. W. 42, and that in a gambling quarrel between

Sunder and Ramnath, the former beat Ramnath with a shoe and the latter threatened to see Sunder killed. In 1949 Sunder received three anonymous letters which were handed over to the police. The approver Hanna is a milkman of Gadarwara and sells pan and bidi. He was originally in Sunder's faction and was bound over under S. 107 in March 1950.

It is said that about a fortnight before the murder he demanded two rupees from Sunder's brother, Munde (P. W. 11), which were due to him for supply of pan and bidi but Munde refused to pay and abused him, upset at this incident, he decided to leave Sunder's party and join the opposite faction of Pratap and Purshotham. As usual with new recruits, he started taking an active part in the meetings of the other faction. Some of these meetings were held at Pratap's hotel and the last two at Purshotham's house. In these meeting it was decided to kill Sunder. In pursuance of this conspiracy it was settled that Sunder should be taken behind the ganj and killed there without delay.

Pratap agreed to go to the ganj where Sunder was attending a meeting, to call him. He was followed by the other three, to whom he subsequently reported that Sunder had told him that he would see him on the following morning. Ramnath then hired Chiddi's tonga and he and his companions went to a place on the main road where Sunder was expected to pass on his way, home from the meeting. They entered a lane and after a few minutes Pratap went to see whether Sunder was coming. He reported that he was on his way, flashing a torch from time to time. Shortly after, Ramnath and Purshotham emerged from the lane, while Hanna and Pratap remained in it, and Ramnath fired two shots at Sunder at close range. Sunder flashed his torch and collapsed. Ramnath fired another shot at him before he and his companions took to flight. Hearing Sunder's cries some persons living in the neighbouring houses came to the spot and heard Sunder cursing by name person who he thought were his assailants.

7. The charge of conspiracy under S.120-B was sought to be established from the direct evidence of the approver Hanna, P. W. 1, and Shibbu (P. W. 8) and from other circumstantial evidence. The learned Sessions Judge held that the alleged express and sustained criminal conspiracy as alleged in the charge was not proved. The approver's testimony was rejected as worthless in view of the variety of versions on material particular of the incident given by him on different occasions. Shibbu was held to be an outright accomplice like Hanna with the difference that the latter was a pardoned accomplice while the former was not.

The learned Sessions Judge further held that there was no independent corroboration worth the same even in the circumstantial evidence as to the alleged criminal conspiracy. The State Government did not file an appeal against the acquittal of the appellants under S. 120-B and the charge, therefore, under S. 120-B must be taken to have failed. While dealing with the approver's evidence, the High Court observed that it was difficult to discard the whole of the approver's testimony but it did not proceed further to record any positive finding as to the portion of the evidence of the approver it considered trustworthy. In para. 49 of its judgment the High Court stated its conclusion in the following terms.

"Our conclusion are, shortly stated, that the material on record showed that Sunder was shot by a member of the group which consisted of the appellants and Hanna but that it did not definitely show that Ramnath was the firer, although it was probable that he was because of his experience in the use of a firearm and his expressed desire to have his enemy Sunder shot. His conviction under S. 302 alone of the I.P.C. cannot in the circumstances be sustained; and the appellants' learned counsel contended that as the other appellants and he were acquitted under S.120-B, they could not now be convicted under S. 302 read with S. 34. This argument was based on the hypothesis that the

acquittal under S. 120-B connoted the applicability of S. 34, because the facts which resulted in the acquittal under S. 120-B were the same as those which would render resort to S. 34 unwarranted. This contention was, as adumbrated, one which would have been readily met, if an appeal against the appellants' acquittal under S. 120-B had been, as it should have been, filed by the State. We say so because the case was undoubtedly one in which there had been a conspiracy of the character contemplated by sub-s. (1) of S. 120-B. I. P. C."

In spite of the acquittal of the appellants under S. 120-B, I.P.C. the High Court by making use of the provisions of S. 34 proceeded to convict the appellants and thus deprived them of the benefit of the acquittal order. It did not accept the evidence that it was Ramnath who fired the shots which resulted in injuries on the person of Sunder.

8. We are constrained to say that the approver's evidence and the evidence of Shibbu. P. W.8, having been rejected, there was no justification for the conclusion of the High Court that this was undoubtedly a case in which there was a conspiracy of the character contemplated by sub-section (1) of S. 120-B, particularly when the State had not appealed against the acquittal order. There was nothing in the dying declarations justifying the above conclusion. The charge of criminal conspiracy must thus be taken to have been finally negatived by the judgment of the learned Sessions Judge.

9. The prosecution produced three witnesses to prove that it was Ramnath who fired the pistol shots which hit Sunder and which eventually resulted in his death. The first witness on the point was Hanna, P. W. 1, whose evidence, as we have already said, has been rejected in the courts below. The other two witnesses on this point were Nanda, P. W. 2, and Ramswarup, P. W. 4. Nanha is the father of the approver Hanna. The learned Sessions Judge held that Nanha and Ramswarup witnessed the shooting and that though Ramswarup could not identify either the assailant or his one companion there was no reason to disbelieve Nanha when he said that he identified Ramnath as the person who actually shot Sunder.

It was further remarked that Nanha and Ramswarup's statement that the assailant shot Sunder from the front was not correct, and that the witnesses mistook the respective position of Sunder and of the assailant at the moment of the firing. On this evidence the learned sessions Judge reached the conclusion that Ramnath was actually the person who shot Sunder and that Pratap and Purshotham and Hanna were his companions. Reliance was also placed on the dying declaration which implicated the appellants. It was in view of this finding that Ramnath was held guilty under S. 302, while the other appellants were held guilty under S. 302 read with S. 34, I.P.C.

The High Court on appeal disbelieved the evidence of Nanha and Ramswarup in its entirety. It was said that the testimony of Nanha even to the limited extent to which the learned trial judge found it acceptable was not worthy of reliance and that it was introduced with the object of showing that the shots had been fired by Ramnath and that his description of what happened emanated from his imagination. As regards Ramswarup, it was said that his testimony was equally unsatisfactory. Although in examination-in-chief the witness affirmed that he saw Ramnath shooting Sunder from the front with a pistol and that Purshotham was behind him, he admitted in cross-examination that he had not recognised these two appellants on that occasion. The firing was not, as stated by him, frontal. The evidence of both these witnesses having been disbelieved it was concluded that there was no material on the record from which it could be held proved that it was Ramnath who was responsible for firing the shots which hit Sunder.

10. The only other piece of evidence against the appellants was the dying declaration of Sunder

recorded by the Magistrate at 12-15 a. m. on 7-4-1950 at the hospital. The High Court placed reliance on it and held the appellants guilty under S. 302 read with S. 34, I.P.C. and sentenced them to transportation for life.

11. It was conceded by the learned counsel appearing for the State that the conviction of the appellants rests only on the evidence furnished by the dying declarations made by the deceased on different occasions and that if these dying declarations are held unreliable, or it is considered unsafe to convict the appellants on their basis alone, then the decision of the High Court could not be sustained and has to be reversed. Dr. Tek Chand for the appellants contended with great force that the dying declarations on which the High Court had placed reliance were not only unreliable but were in fact untrue, and it was unsafe to base the convictions of the appellants on the testimony furnished by these declarations.

12. It is settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without, further corroboration because such a statement is not made on oath and is not subject to cross-examination and because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration. It is in this light that the different dying declarations made by the deceased and sought to be proved in the case have to be considered. P. W. 3, Narbada Prasad, and P. W. 7, Narayandas, gave evidence as to what they heard the deceased exclaiming soon after he was shot. Narbada Prasad stated as follows:

"I rose from my bed and peeped outside from the window. I saw a man sitting on the road in front of Narayandas Soni's house and then he lay down on the road and uttered something. He uttered Pratap, Purshotham and he uttered one more name which I could not catch and Mamaji 'Ki bittia chud gai mar dala bachao'..... . .".

The exclamation deposed to does not affix blame on any particular individual for the firing and does not amount to a statement that he had seen anyone firing at him. It may well be that having been suddenly shot at that hour of the night, Sunder's first reaction was that nobody else but his arch enemies could have shot him and he cursed them and exclaimed that they had been successful in taking their revenge.

13. Narayandas, P. W. 7, stated as follows: "I rose and sat on my bed from where I could see the road below. I saw that Sunder was standing on the road about 3'-A' towards its middle from the opposite edge of the road with a hand kept on his belly. I had sat on my bed and seen Sunder standing on the road just after Sunder had uttered 'Bachao bachao baimano ne mar dala.' After uttering the abusive words and the words 'Bachao bachao' I saw Sunder sit down on the road and later lie down."

This statement again is of a neutral character and does not afford any assistance in the case. All that he uttered was that these dishonest people had killed him. The evidence of these two persons therefore is not of much value in this case.

14. Three witnesses, Munde (P. W. 11), Phakire (P.W. 31), and Hajari (P.W.32) gave evidence as regards a statement alleged to have been made to them by the deceased when they came to his help and took him in a tonga to the hospital. Munde, P. W. 11, is the brother of the deceased. He said as follow,

"On reaching Sunder I asked him what happened to him, and where he had gone. He replied that he was returning after the meeting from the Nakalganj and that he was treacherously shot by Mama. I said who else was with Mama. He replied that the accused Purshotham, Pratap and Hanna were also with Mama."

In cross-examination he admitted having made the statement, Ex. D-20-B, before the police. In that statement he had stated that Sunder had named four persons as having shot at him. There he did not say that Sunder had told him that Ramnath had fired the shots at him. The witness thus improved upon his original statement during the trial. Phakire, P. W. 31, stated as follows:

"Sunder caught me with his one hand and said he was killed and stated that Mamaji, Pratap, Purshottam and Hanna had shot him with a bullet."

He made no mention of the torch being in the hand of Sunder or at the spot. The third witness Hajari, P. W. 32 deposed as follows:

"Munde asked Sunder who had hit Sunder and Sunder said that 'Mama Betichoud Dogla' had shot him with a bullet and he named the accused Mama, Pratap, Purushotham and Hanna as having been present together at the shooting."

In cross-examination he admitted having made the statement, Ex. D.39, before the police. He conceded that therein he had not stated that Sunder had specifically accused Ramnath of firing at him. The learned Sessions Judge was of the opinion that these witnesses had made improvements in their statements and to that extent they were unreliable. The High Court made no reference to these statements and did not take into consideration the oral dying declaration of the deceased in arriving at its conclusion. In our opinion, unless one is certain about the exact words uttered by a deceased no reliance can be placed on verbal statements of witnesses and such oral declarations made by a deceased.

15. A third dying declaration is alleged to have been made by the deceased to his muneem Mulchand (P.W. 20). He said as follows:

"I thus came to the hospital. Sunder was lying in the verandah of the hospital surrounded by a number of persons. He had injuries on his chest, abdomen and on the buttock and was bleeding from the injuries. His clothes were bloodstained with blood from his injuries. He was however in his senses. I asked him what happened. He said that Pratap, Purushotham, Mamaji and Hanna had 'jointly shot him with pistol'."

Umashankar, P. W. 30, also gave evidence about this declaration. The learned Sessions Judge accepted this evidence. It was corroborated by the first information made by Mulchand to the police the same night. In the first information report there is a post-script after the words "Same is correctly recorded", in these terms:

"Sunder had stated on seeing, by means of a torch that all the four individuals were seen."

It was contended by Dr. Tek Chand that this sentence was a subsequent interpolation in the report and that there was no satisfactory evidence that Sunder was in possession of a torch at the time that he was fired at. This torch was not found on the spot or produced before the police on the 6th night or the 7th morning. It was only on the 10th that Munde gave it to the police by saying that it had been given to him by some person who was not produced as a witness, Dr. Tek Chand argued that

the incident took place at about 11-30 p. m, on a dark and cloudy night and that the firing was sudden and that in this situation it was not likely that Sunder identified his assailants particularly when the shots were not being fired from the front.

The learned counsel argued that the story of the torch had been introduced in the case in order to make out that Sunder had some means by which he could identify, his assailants on a dark night. Though the learned Sessions Judge had placed reliance on the testimony of Mulchand, the High Court did not attach any particular value to his evidence in view of the dying declaration, recorded by the Magistrate. As already said above, a dying declaration was recorded by the Magistrate at the hospital at 12-15 A. M. and it is on this dying declaration that the High Court placed considerable reliance.

16. After hearing Dr. Tek Chand for the appellants and Mr. Mehta for the State Government, we have reached the conclusion that in view of the sudden firing that took place at that hour of the night it was not possible for Sunder to clearly identify the persons who had fired the shots at him, that in all likelihood the names he mentioned at the time were the result of the reaction on his mind on the occasion. He thought he must have been fired upon by his arch enemies, he cursed them and exclaimed that after all they had succeeded in finishing him. The dying declaration relied upon by the High Court and recorded by the Magistrate on 7th April at 12-15 a.m. does not seem to us to contain a truthful version of what actually happened.

What is stated there is what Sunder imagined had happened. The first question put to him was: "Who assaulted you?" The answer was "Purshotham, Pratap, Mamaji and Hanna Ahir shot me by means of a pistol" It is difficult to conceive how four persons could shoot him by means of a single pistol and how he could have actually seen the persons who fired at him with a single pistol. The Magistrate in his evidence made it clear that it was "a pistol" with which these four persons were stated to have fired at Sunder. Mr. Mehta for the State Government attempted to argue that what Sunder was really stating was that each of these four persons had a pistol and four shots were, fired at him from four different pistols.

This argument cannot be seriously considered in view of the injuries on the person of Sunder. It is quite contrary to the case as set out by the prosecution in court. Sunder seems to have made this vague statement because he had not in fact seen who had fired at him. He merely thought that nobody else but these four persons could have fired at him and he therefore made this statement in the vague form in which it is recorded. The answer to the second question put to him cuts at the very root of the prosecution case. The question was: "Where were you going?" The answer was:

"Pratap had called and had taken me to Nakalganj, and struck me on bringing me, in front of the chudiwala."

This answer suggests that Pratap, appellant, took him to Nakal Ganj and struck him in front of the chudiwala, i.e., at the place where the occurrence took place. As we have already said, this is wholly contrary, to the story of the prosecution and the case that it set out to prove. The High Court thought that Sunder made some mistake in answering this question. There is no warrant for such a suggestion. In the case of a dying declaration where the exact words stated by a deceased matter and are of importance, a suggestion of the kind that the deceased might have said something by a mistake cannot be entertained.

The third question was: "Who were there", and the answer was: "I flashed the torch. All the four

individuals were standing." This answer seems to have been given in order to make out that he really was able to see his assailants. This answer does not carry conviction in view of the circumstances of the case. It is in evidence that five or six persons were surrounding Sunder when he was answering the questions and the answers seem to be the result of declarations and advice of those persons and given under their influence.

17. In our judgment, the High Court was in error in basing the conviction of the appellants much on the uncorroborated dying declaration of the deceased recorded by the magistrate and which was not only vague but which admittedly did not at all events represent the whole truth.

18. The further contention of Dr. Tek Chand that the High Court was in error in holding that the provisions of S. 34 were attracted to the facts of the case is also well founded. There is no evidence whatsoever of any premeditation or of a prearranged plan by the assailants of murdering Sunder. The conclusions of the High Court in para. 53 of its judgment seem to be based more on conjectures than on admissible material. No act or conduct on the part of the accused has been proved from which an inference of a prearranged plan to murder Sunder could be raised.

Even if it is held proved that all the appellants were seen at that spot at the time of firing this fact by itself could not be held enough to prove a common intention of the appellants to murder Sunder. It can well be that these four persons were standing together and one of them suddenly seeing Sunder fired at him. This possibility has not been eliminated by any evidence on the record. In such a situation when it would not be known who fired the fatal shot, none of such persons could be convicted of murder under Section 302, I. P. C. It seems to us that in this case the High Court failed to appreciate the true effect of the decision of the Privy Council in -.- 'Mahbub Shah v. Emperor', AIR 1945 PC 118 (A), and its judgment in regard to the applicability of S. 34, I. P. C. has to be reversed

19. We are also of the opinion that the evidence as to conspiracy under S. 120-B, I.P.C. having been rejected, the same evidence could not be used for finding a common intention proved under Section 34, I. P. C.

20. The result is first there is no satisfactory evidence for concluding positively that the three appellants were responsible for the murder of Sunder, though it may be that they were behind this murder. At best the matter is in doubt, and they are entitled to the benefit of that doubt. We therefore allow all these appeals, set aside the convictions of, all the appellants and direct that they be acquitted.

Appeals allowed.

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