Shivaji Genu Mohite

Vs

The State of Maharashtra

Criminal Appeal No. 109 of 1971

(J. M. Shelat, S. N. Dwivedi, Y. V. Chandrachud JJ)

20.09.1972

JUDGMENT

SHELAT, J. -

1. Six persons stood their trial before the Sessions Judge, Sangli, the appellant on the charge of murder of one Rukhamabai and the rest under Section 201, read with Section 34, Penal Code, for causing the evidence of the said murder to disappear by burning her dead body in survey No. 178 of village Jarandi. Of these persons, the appellant, hereinafter referred to as accused 1 and accused 2 and 4 are the sons of accused 5, and accused 6 is his wife. The victim was the widow of one Dhondi Mohite, the nephew of accused 5, who after the death of her husband was living with accused 5. The relations between the deceased and the accused were, it was said, normal on the whole, but during the past year before the alleged murder, accused 5 was insisting upon the deceased either transferring a piece of land standing in her name in favour of the accused, or adopting one of his sons. The motive for the crime alleged by the prosecution was the refusal of the deceased to follow either of the two courses and the consequent fear of the accused that Rukhama would at any time convey it to one of her other relations.

2. On December 9, 1966 at about 9 a.m. Rukhama started for her field to pluck ground-nut creepers. On her way, she passed through the field of P. W. Shivram Ramoshi and took along with her his daughter Phuba, aged about 12 years, to help her in her work. While Rukhama and Phuba were pulling out the ground-nut creepers from the ground, accused 1 came there armed with an axe. He asked Rukhama what her plan was for that day and at once struck her on her neck with the axe he had with him. Rukhama collapsed under that blow and Phuba frightened at what she had seen, ran to her father in the neighbouring field and told him of what she had seen. At that very juncture, Shivram also heard the screams of Sundarabai, the wife of accused 2, who also had seen the incident from a field nearby, where she was working at that time. On Shivram going to the place where Sundarabai was, the two of them went to the place where Rukhama was lying dead. Shivram then went to the field of one Tatoba nearby and told Tatoba that accused 1 had killed Rukhama. After a little while, the two of them saw accused 2 and 4 carrying away the dead body of Rukhama in a blanket to survey No. 178 belonging to the accused. Seeing this, they went to Dattu Pawar, the brother of Rukhama, who also was working in his field. After telling Dattu of what had happened, Shivram and Tatoba went towards the village to inform the Kotwal and to find out where the village Police Patil was. Dattu went towards the accused's field and saw the dead body of Rukhama having been set on fire and all the accused standing nearby, accused 1 being still with the axe. When Dattu went near the place, accused 1 threatened him with evil consequences if he proceeded to where the body was being burnt. In the meantime, some relations of Rukhama came there and seeing them the accused went away. Those relations the dragged out the body of Rukhama from the burning pyre.

Dattu thereafter contacted the Police Patil. Both of them went to Tasgaon Police Station about 22 miles away from the village reaching there at about sunset. The delay in reaching the police station wad due to the fact that they had to wait for some conveyance to traverse that distance, such a conveyance becoming available to them only in the afternoon. At the police station Dattu gave his first information report. Thereafter the police investigation commenced, during the course of which the police took charge of the charred body of the deceased and sent it for post-mortem. Dr. Gadre who performed the post-mortem, found, apart from the burn injuries, two external injuries on the body -

> (1) a wound 2" x 1 1/2" up to the vertebral column upon the right of the neck just below the right ear, and
>
> (2) a wound 2 1/2" x 1/2" with the fracture of the vertebral column.

An internal examination by him revealed that part of the occipital bone under injury No. 1 had been fractured and the seventh cervical vertebra had been completely fractured. The brain as also several other parts of the body were either completely or partially burnt. According to the post-mortem notes made by Dr. Gadre, death was probably caused by the aforesaid two injuries on the neck resulting in the failure of the heart and respiration. On the dead body were found a silver waste band and a silver necklace chain. The police noticed signs of trampling and blood over the ground-nut creepers where Rukhama and Phuba has been working at the time of the assault.

3. At the trial, the prosecution examined Phuba claiming her to be an eye-witness of the assault by accused 1, her father Shivram to whom she had narrated the assault almost immediately and Dattu and Tatoba. Sundarabai, the wife of accused 2, was also examined, but was declared a hostile witness since her evidence was contrary to her statement before the police. There were other witnesses also to prove their having dragged out the dead body of Rukhama from the burning pyre. Besides Dr. Gadre, the prosecution examined Dr. Sodas, the Civil Surgeon at Sengli.

4. The accused denied any knowledge of the incident. The defence of accused 1 was that he was at the time working in his field where his wife's sister came and told him that Rukhama had a snake bite. When he came near his house he found several persons there, who had already placed her dead body on a pyre and set fire to it. After sometime Pawars, the relations of the deceased, came there armed with axes and sticks and dragged the burnt body of Rukhama out of the pyre. His case was that Phuba's evidence was false and that she was made to give such evidence on account of enmity between Shivram and the accused. That enmity arose because Shivram had often resorted to stealing the crops from the accused's lands. The other witnesses also had given false evidence against them owning to similar hostility existing between them for one reason or the other.

5. The Trial Judge accepted the fact that Dattu had given the first information report but refused to rely on it as Dattu had not specifically stated therein the fact of his having been told by Shivram that accused 1 had struck the deceased with an axe. He declined to accept the prosecution story of motive on the ground that accused 5 had earlier executed a Hayat Patra, which belied the allegation that he had insisted upon Rukhama conveying her land to him or his sons or adopting one of his sons. He also declined to accept the prosecution case that the death of Rukhama was homicidal as Dr. Gadre was not able to say in the condition in which the dead body was brought to him whether the two external injuries he had seen were ante-mortem or post-mortem. He doubted the claim of Phuba as an eye-witness on the ground that it was improbable that she had gone with Rukhama to her field to assist her. He also found the version of Shivram unacceptable that Phuba had come

running to him or that she had told him of the assault on Rukhama by accused 1 with an axe or his having then gone to Tatoba and telling him of what he had been told by Phuba, or the two of them having gone to Dattu and then to the Kotwal and the Police Patil and telling them that accused 1 had killed Rukhama with an axe and accused 2 and 4 had brought the body to their field for burning it. On these findings the Trial Judge acquitted all the accused.

6. The approach of the Trial Judge was that because, according to him, the prosecution had failed to establish an adequate motive, the evidence of Phuba and her claim of being an eye-witness could not be accepted as true or even probable. His reasoning for such a conclusion was that it was unlikely that she had accompanied Rukhama to her field to assist her in plucking out the ground-nut creepers when her father himself was busy doing similar work in his own field. He refused to accept Shivram's evidence on the ground that being the village Ramoshi and bound as such to help the police whenever a crime took place in the village, he was likely to be under police influence and that it was as a result of such influence and at the instance of the police that he and Phuba gave their evidence. Having come to the conclusion that the prosecution had not been able to prove that Rukhama's death was homicidal, the learned Judge even felt inclined to accept the defence story of snake-bite and of the belief amongst village people that in such cases the victim's body should be cremated immediately and that too in the vicinity of the residence of such victim. That was how the learned Judge explained away the two circumstances : (1) the body having been sought to be done away with without informing the deceased's relations living in the village, and (2) cremating it right in front of the accused's residence. On these premises, the Trial Judge held the prosecution case not proved and acquitted all the six accused. The Trial Judge ended his judgment in the following words :

> "To summarise, therefore, this is a case where there does not seem to be any plausible motive for criminal behaviour on the part of any of the accused, and if the evidence of Phuba is excluded, as I have done, there is no direct evidence. The expert medical opinion is of no assistance for coming to the conclusion that the death in this case is homicidal. The report of the Chemical Analyser shows that the origin of the blood which was detected at the spot shown by accused No. 1 and on his dhoti and on the axe could not be determined. Then, what we are left with are the suspicious circumstances that the dead body appears to have been hurriedly burnt at an unusual place with ornaments on its person and the accused are falsely denying their connection with the cremation. But then in view of the medical opinion and the opinion of the Chemical Analyser and the absence of motive, all that could be said is that those circumstances would create a suspicion; but suspicion, is no evidence. That being the position all the accused are entitled to an acquittal, and I order accordingly."

7. On appeal by the State, the High Court reversed the order of acquittal and convicted accused 1 under Section 302 and sentenced him to life imprisonment. The High Court also convicted accused 4, 5 and 6 under Section 201 of the Penal Code, but confirmed the order of acquittal so far as accused 2 and 3 were concerned. In doing so the High Court accepted Phuba as the eye-witness and found her evidence corroborated by the evidence of Sundarabai, the wife of accused 2, of her having drawn Shivram's attention by her screams to the place where Rukhama was attacked and was lying and Shivram, thereupon, having gone to that place and found Rukhama having been already dead with axe injuries. The High Court next accepted Dattu's version of having been informed of the assault by Shivram and Tatoba, his having then gone near the accused's house, his having seen all the accused near the burning pyre and accused 1 having threatened him with the axe, which he still

had in his hand, if he proceeded any further to the place where the body was being burnt. The High Court declined to accept the defence theory of the snake-bite or the alleged belief that in such cases the dead body had to be cremated immediately and at the residence of the victim or any of the two external injuries deposed by Dr. Gadre having been caused as a result of the dead body having subsequently been rolled out of the burning pyre. The High Court reached these conclusions after elaborately reappraising the entire evidence on record, which on an appeal against acquittal, it is well settled, it could, and recording correctly the principles laid down in the decisions of this Court guiding its approach in the appeals against acquittal, and also examined the reasons given by the Trial Judge for non-acceptance of the prosecution evidence.

8. These principles are that under the Code of Criminal Procedure the High Court has full power to review at large the evidence upon which an order of acquittal has been passed by the Session Court and to reach the conclusion that upon that evidence the order of acquittal should be reversed. However, in exercising that power and before reaching its conclusion upon facts, the High Court should give proper weight and consideration to such matters, as the views of the Trial Judge as the credibility of the witnesses, the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, the right of the accused to the benefit of any doubt and the slowness of the appellate court in disturbing a finding of fact arrived at by the Judge who had the advantage of seeing the witnesses. Sheo Swarup v. King Emperor. (61 IA 398 : AIR 1934 PC 227(2) : 1934 ALJ 905 : 151 IC 322 : 11 OWN 1119). These principles were approved of and repeated in Sanwat Singh v. Rajasthan. ([1961] 3 SCR 120 : AIR 1961 SC 715 : (1961) 2 SCJ 179 : (1961) 1 Cri. LJ 766). Counsel for the appellant was not able to point out to us anything in the High Court's judgment which would suggest that it had not followed these principles while reappraising the evidence and disagreeing with the findings of fact given by the Trial Judge.

9. A perusal of the Judgment of the Trial Judge shows that his reluctance to accept the evidence of Phuba and her father Shivram principally stemmed from : (1) his disbelief of the evidence on motive and its adequacy, (2) his view as to the improbability of Phuba having gone to the deceased's field to help the deceased, and (3) the omission by Dattu in the first information report of the fact that accused 1 had struck the deceased with an axe.

10. It is true that the deceased had been living with accused 5 and his family. It is true that until the incident in question there had been no open rupture between the deceased and accused 5 and his family members. That fact, however, does not preclude the possibility of accused 5 having asked the deceased to settle the land held by her upon his sons, or in the alternative to adopt any one of them. Either of these two courses would have ensured the land coming to his family and not being disposed of in favour of any outsider. The evidence of Dattu in this regard showed that the deceased had refused to comply with such requests by accused 5, which were so persistent that the deceased had complained to him about them. That the deceased would so complain to Dattu would not in any manner be improbable as Dattu was her brother and residing in this very village. It is difficult also to conceive that Dattu, in collusion with any of the witnesses in this case, could have invented such a story so as to afford to the prosecution evidence of motive. There is no indication in the evidence of any previous hostility between Dattu and the accused which could impel Dattu either to invent such evidence himself or to permit himself to be manoevered by any other person into inventing such a story for a motive. The refusal by the deceased to comply with the request persistently made and the possibility of the land going out of the reach of the accused could not also be regarded as an inadequate motive. Numerous crimes have been perpetrated for reasons less adequate then the possible loss of land.

11. Assuming that the prosecution evidence was not sufficient or cogent enough for a motive to be spelt out of it, the fact that the prosecution was not able to discover such an impelling motive would not reflect upon the credibility of a witness, proved to be a reliable eye-witness. Was Phuba such an eye-witness ? The answer to that question must depend upon the intrinsic value of her evidence, the absence of any possibility of her having been put up as an eye-witness or tutored by any interested person or persons and the circumstances in which the incident in question had occurred, and not upon whether the prosecution was able or not to prove an adequate motive. What the Trial Judge, however, did was precisely the opposite, that is to say, he looked at her evidence not from the point of view of whether it was intrinsically genuine, but with distrust because the evidence with respect to motive was, according to him, not satisfactory. As regards the evidence relating to motive, one of the facts which weighed with him for discarding that evidence was the fact that accused 5 had earlier executed a Hayat Patra in respect of the deceased's land. We do not know what its terms were, for, it was not produced during the trial. But the very title of the document would seem to suggest that accused 5 by that document acknowledged the title of the deceased to the land for her life-time. The document did not acknowledge her absolute title and her right to alienate the land during her life-time or to make a bequest of it by a testamentary instrument in favour of any one. The accused must, therefore, know that the Hayat Patra would not have ensured the land to them or prevented its alienation or transfer by Rukhama. Its execution by accused 5, therefore, could not render Dattu's evidence as to motive untrue.

12. As stated earlier, the fact that the prosecution in a given case has been able to discover a sufficient motive or not cannot weigh against the testimony of an eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would from one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye-witnesses of credibility, though even in such cases if a motive is properly proved, such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if a motive is not established the evidence of an eye-witness is rendered untrustworthy.

13. It is true that there was only a solitary eye-witness in the present case and that too a girl of twelve years of age, to whom the Trial Judge did not consider it expedient to give the oath, since according to him, she was not mature enough to understand the significance of the oath. At the same time there was, in the circumstances of the case, scarcely any possibility of there being a number of eye-witnesses. Even Phuba happened to be there only because she had gone to the field with the deceased at the latter's request to her father Shivram for assistance. But there was nothing improbable in Phuba having done so, for, what was expected of her by the deceased was to pluck out from the ground-nut creepers and collect them into heaps. The Trial Judge, however, though this to be unlikely for he said that she had gone with her father to his field precisely for this kind of work, and therefore, was not likely to leave him alone to do the entire work. There the Trial Judge was in error, for, Shivram's evidence showed that the ground-nut creepers had already been taken out from the ground and collected in small heaps at various places and the work for which he had gone to the field that morning was to collect all these heaps at one place so as to enable him to pluck out the ground-nuts from the creepers so collected. Being a teenager, Phuba perhaps would not have been of much assistance to him for that king of work, and therefore, it was not unlikely that Shivram would, when requested by the deceased, allow Phuba to go with her for assisting in taking out the creepers from the ground. Such assistance to neighbours by children of cultivators is not uncommon in villages. There was, therefore, nothing improbable in Phuba being in the deceased's field when the incident in question occurred.

14. Once it was shown that Phuba was present in that field, the only question for consideration would be whether her evidence was acceptable or not. Her evidence in that connection had to be scrutinised with care and caution, as she was not only a teenager but the only witness claimed to be an eye-witness. The Trial Judge conceded that her evidence was not marred by any material discrepancy or contradiction. But the absence of any such infirmity, according to him, was not enough, and brought in the omission of Dattu to specifically mention the fact of accused 1 having struck the deceased with an axe in the first information report as a reason for discarding Phuba's evidence. That omission by Dattu, however, could not lend any infirmity to Phuba's testimony, for, it was not as if Phuba had narrated the incident to Dattu and Dattu relying on such narration had lodged the first information report, so that an omission by him may be said to raise a possibility that Phuba might not have told him that she had seen accused 1 striking the deceased. The evidence was that she first filed to Shivram in the neighbouring field and told him of what had happened, whereupon Shivram first went to Tatoba and both of them then found out Dattu and told him about the incident. The omission by Dattu, even if it can be regarded as an omission, cannot thus have any bearing on the question of Phuba's credibility as an eye-witness.

15. A perusal of the F.I.R. lodged by Dattu would seem to show that the omission was not such as would justify the claim of Phuba being an eye-witnesses begin discarded. Before it can be held as an omission, it has to be borne in mind that according to the F.I.R., Dattu had been informed by Shivram and Tatoba that his sister Rukhama "was killed by her cousin father-in-law and husband's brother" and that they were about the set fire to her dead body near their residence in their field. According to Dattu's evidence, when he went to that field on getting that information, he found that the dead body of Rukhama was already set on fire. The pyre was surrounded by all the accused and accused 1 at that time was having an axe with which he threatened Dattu against coming near the dead body. It was only when the Pawars, according to the evidence, came there armed with axes and other weapons, that the accused retired from the place and the body could be dragged out from the burning pyre. In this background, Dattu must have felt that all the accused were concerned in the killing of his sister and that that was why they were anxious to dispose of the dead body so that it may not indicate the manner and the cause of her death. The F.I.R. however, did assert that "the cousin father-in-law and husband's brother" were responsible for killing, though it is true it did not mention specifically that accused 1 had struck Rukhama with an axe. Dattu might not have made a specific mention of it probably because he must have thought all the accused responsible for the death of Rukhama from the manner in which they had surrounded the body for disposing it of quickly. If viewed from this point of view, the omission to mention expressly that accused 1 had struck the deceased with an axe cannot be said to have such importance.

16. Shivram's evidence, if accepted, would corroborate Phuba's claim of being an eye-witness in two respects : (a) her having gone to the field with Rukhama and being with her when the incident occurred, and (b) her having fled to Shivram in a frightened state immediately after the incident and telling him of the assault by 1 with an axe. The accused challenged Shivram's veracity on the ground that he had been stealing their crops and on being scolded therefor by them being hostile to them. But barring their bare allegation, no proof whatsoever was adduced to show any such hostility between Shivram and the accused. But the Trial Judge disbelieved Shivram on the ground that being village Ramoshi, he would be under the police influence. That could hardly be a justifiable ground for discarding his testimony. The High Court accepted his evidence and also that of Tatoba and no reason has been made out to warrant any disagreement on our part with that conclusion.

17. Once, therefore, Shivram was found to be an acceptable witness, his evidence corroborated in a large measure Phuba's evidence, for, it was only on her going to him and telling him as to what had

happened that the entire chain of subsequent events took place, his going first to Tatoba, then the two of them going to Dattu, Dattu going to the accused's field and Shivram and Tatoba contacting other villagers, the Kotwal and the Police Patil, and finally rescuing the body from the pyre by the other relations of the deceased. As regards Phuba's testimony, it has to be observed that the High Court considered it in great details. Indeed, the High Court quoted it almost verbatim in its judgment to demonstrate that it was natural and free from any material blemish in spite of a long, and what the High Court called, a gruelling cross-examination.

18. Counsel took us through the medical evidence, including the post-mortem notes by Dr. Gadre to show that his opinion on the two external injuries was not only indefinite, but was on the contrary equivocal and shaky on the question whether the injuries were ante-mortem or post-mortem. But that was because the body was at many places charred and several internal organs were burnt or roasted. But the absence of a definite medical opinion on that question could not be very material once Phuba's evidence was found acceptable. There would, therefore, be no difficulty in coming to the conclusion that the deceased had died as a result of her having been struck with a weapon such as an axe. The defence story that she died as a result of a snake-bite and that her body had to be immediately burnt because of a belief or practice to that effect in the village has only to be stated for its rejection. No such evidence was available. There could be no doubt, as the High Court has said, that it was set on fire so that the body would not show how the deceased had died. The two circumstances, viz., that it was sought to be disposed of without informing her parents and her brother Dattu though all of them were in the village and without carrying it to the village cremation ground were tell-tale circumstances showing the desperate anxiety on the part of the accused to dispose it of as quickly as possible.

19. The principle upon which this Court in appeals of this type would act is that once it is found that the High Court has applied the correct principles in setting aside an order of acquittal, this Court would not ordinarily interfere with the High Court's order of conviction in an appeal against acquittal or enter into the evidence to ascertain for itself whether the High Court was right in its view of the evidence. Only such examination of the evidence would ordinarily be necessary as is needed to see that the High Court approached the question properly and applied the principles correctly. See Harbans Singh v. Punjab. ([1962] Supp 1 SCR 104 : AIR 1962 SC 439 : (1962) 2 SCJ 662 : (1962) 1 Cri LJ 479). Counsel, nonetheless, was at pains to take us through the major part of the evidence. After having gone through that evidence, we find no reason to come to the conclusion that the High Court made any error in applying the principles which should guide it in an appeal against acquittal, nor has any reason been established which would make us disagree with its findings on the appreciation of evidence.

20. That being the position, the appeal must fail and has in the result to be dismissed.

</html