

Samson Hyam Kemkar

Vs

State of Maharashtra

Criminal Appeal No. 65 of 1970

(H. R.Khanna, A. Alagiriswami, R. S. Sarkaria JJ)

20.09.1973

JUDGMENT

KHANNA, J. -

1. Samson Hyam Kemkar (35) was tried in the Court of the learned Additional Sessions Judge Greater Bombay for an offence under Section 302 Indian Penal Code for causing the death of Lalta Prasad (50) and was acquitted. On appeal filed by the State of Maharashtra, the Bombay High Court reversed the judgment of acquittal and convicted Samson under Section 302 Indian Penal Code and sentenced him to undergo imprisonment for life. Samson thereafter came up in appeal to this Court by special leave.

2. The prosecution case is that the accused was inimical to Lalta Prasad deceased. The accused used to do illicit liquor business and suspected that information regarding the said illicit business was conveyed to the police by Lalta Prasad deceased. On August 1, 1966, at about 12 noon, it is stated Lalta Prasad deceased was present near the pan shop of Rammurat Tewari in Gondivali in Greater Bombay, for purchasing a pan. Rammurat Tewari was standing close to his shop, while his ten-year-old son Umakant was sitting on the gaddi. Baijnath Baghelu PW, who owns a hair-cutting saloon in the premises adjoining the pan shop of Rammurat was present on a wooden platform in front of his saloon. Bhiku Shankar and George Enus Almeda PWs were also present there as they wanted to purchase pan from the shop of Rammurat. The accused is then stated to have come there armed with an iron axe. On arrival, the accused gave a blow with that axe on the head of Lalta Prasad. The accused thereafter ran away. While he was running with the blood stained axe in his hand he was seen by Smt. Balubai PW.

3. Bhiku PW immediately went to police station Andheri and lodged report Exhibit 6 there at 12.25 p.m. Two Police Constables were then sent along with Bhiku PW in a van to the place of occurrence. Lalta Prasad was then put in that van and taken to the police station. From the Police station, Lalta Prasad was sent to King Edward Medical Hospital. In the hospital, the injuries of Lalta Prasad were examined by Dr. Ravi Bapat. At 4 p.m., Sub-Inspector Tawade went to the Hospital and after obtaining the certificate of Dr. Bapat that Lalta Prasad was in a fit condition to make statement, recorded dying declaration Exhibit 15-A of Lalta Prasad. In the aforesaid dying declaration, Lalta Prasad stated that he had been given a blow with an axe by the accused in the circumstances mentioned above.

4. At about 6 p.m. on the day of the occurrence Sub-Inspector Tawade went to the house of the accused. The accused was not found present there. Nothing incrimination was recovered as a result of the search of the house. Axe Exhibit 7 was, however, recovered from a mori under a fowl cage at

a distance of about 16 feet from the house of the accused.

5. Lalta Prasad died in the hospital on August 12, 1966.

6. The accused could not be arrested soon after the occurrence. On September 2, 1966 Head Constable Dinkar arrested the accused from a village at a distance of about one mile from Baroda.

7. At the trial, the accused denied the prosecution allegations about his having given any blow with an axe to Lalta Prasad deceased. According to the accused, he was served with an externment order on July 30, 1966. He thereafter left Bombay on July 31., 1966 and went to Baroda where, according to the accused, he took up employment. Defence evidence consisting of the statements of three witnesses was produced on behalf of the accused on the point that he was away to Baroda on the day of the occurrence.

8. The trial Court did not accept the prosecution evidence. The trial Court also did not place any reliance upon the dying declaration of the deceased. It was further of the opinion that the defence evidence adduced on behalf of the accused was convincing. In the result, the accused was "given the benefit of the doubt and acquitted". On appeal, the learned Judges of the High Court held that the trial Court Had rejected the evidence of the eye witnesses on grounds which were not tenable. The High Court found the evidence of the eye-witnesses to be worthy of credence. The dying declaration of Lalta Prasad deceased too was accepted by the High Court. So far as the defence evidence produced by the accused in support of his plea of alibi was concerned, the High Court found the same to be wholly unreliable. In the result, the State appeal was accepted. The Judgment of the trial Court was reversed and the accused was convicted and sentenced as above. The High Court also directed notices to issue to the defence witnesses to show cause why they should not be proceeded against for offences of perjury and fabrication of false evidence.

9. In appeal before us, Mr. Harbans Singh one behalf of the accused-appellant has argued that the trial court had considered the evidence adduced by the prosecution in this case and found the same to be unreliable. The High Court, according to the learned Counsel, was not justified in interfering with the appraisal of evidence of the prosecution witnesses by the trial Court. In our opinion, there is no force in the above contention.

10. There can be no manner of doubt that Lalta Prasad deceased was the victim of a murderous assault. Dr. Bapat (PW 7), who examined Lalta Prasad deceased, soon after the latter was admitted in the King Edward Medical Hospital found that Lalta Prasad had a contused lacerated wound on the right occipital region. The dimensions of the wound were 4" X 1 1/2". It was bone deep and had resulted in a depressed fracture underneath. According to Dr. Bapat the senior nerve surgeon in the hospital advised that an operation should be performed upon Lalta Prasad. As Lalta Prasad was not willing to undergo the operation, he left the hospital on August 7, 1966. Lalta Prasad returned to the Hospital on August 8, 1966. On August 11, 1966, an operation was performed. Lalta Prasad succumbed to the injury received by him on August 12, 1966. Dr. Kamath (PW 8) performed the post mortem examination on the dead body of Lalta Prasad. According to Dr. Kamath the injury that had been caused to Lalta Prasad was necessarily fatal. The doctor also stated that the injury could have been cause with axe Exhibit 7.

11. According to the prosecution case, the injury to Lalta Prasad was caused by the accused-appellant. The accused, as already mentioned, has denied the allegation. In support of its case, the prosecution relied upon the dying declaration Exhibit D 15-A of Lalta Prasad. The fact that the

aforesaid dying declaration was recorded by Sub-Inspector Tawade, while Lalta Prasad was in a fit condition to make statement, is proved by the evidence of Sub-Inspector Tawade and Dr. Bapat. In the said dying declaration, Lalta Prasad stated that it was the accused-appellant who had given a blow with an axe on his head. There appears to be no reason whatsoever as to why the statement of Lalta Prasad in this respect be not accepted. It is difficult to believe that Lalta Prasad would spare his real assailant and falsely give the name of the accused appellant as the person who had caused the aforesaid injury.

12. Apart from the dying declaration of Lalta Prasad deceased, we have on record the evidence of five eye-witnesses, Bhiku (PW 2), Baijnath Bahgelu (PW 3), George Enus Almeda (PW 4), Rammurat Tewari (PW 5) and Uma Rammurat (PW 6) who have deposed about the assault by the accused on Lalta Prasad deceased in the circumstances mentioned above. The High Court accepted the evidence of those witnesses and after having been taken through their evidence, we find no particular reason to take a different view. The fact that some of those witnesses had been involved in cases of illicit liquor, or had strained relations with the accused, would not by itself justify the rejection of their testimony. These witnesses have given satisfactory explanation for their presence at the scene of occurrence. The learned Judges of the High Court considered all the circumstances and came to the conclusion that the evidence of the above witnesses was worthy of credence. Nothing cogent has been brought to out notice as may justify interference with the above conclusion of the High Court.

13. In addition to that, we have the evidence of Balubai (PW 9), who has deposed that when an alarm was raised at the time of the occurrence, she saw the accused running away with an axe in his hand. This witness had no animus against the accused and there appears to be no reason as to why she should make a false statement against the accused.

14. So far as the defence evidence is concerned regarding the alibi of the accused, the High Court considered it in detail and found the same to be wholly unreliable. Mr. Harbans Singh took us through the defence evidence. After having been taken through that evidence, we find no cogent reason to take a view different from that of the High Court. It is plain that if we accept the ocular evidence adduced in this case as well as the dying declaration of Lalta Prasad deceased, the defence evidence must be rejected. We agree with the High Court that the defence evidence is wholly unreliable and as such should be rejected.

15. The circumstances in which the High Court in an appeal under Section 417 of the Code of Criminal Procedure can reverse the judgment of the trial Court are now well-settled. The High Court while dealing with an appeal against an order of acquittal has full power to review at large the evidence on which the order of acquittal was founded and to reach a conclusion that upon that evidence, the order of acquittal should be reversed. No limitation should be placed upon that power unless it be found expressly stated in the Code, but in exercising the power conferred by the Code and before reaching its conclusion upon fact, the High Court should give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witness; (2) 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; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. After having been taken through the judgments of the trial Court and the High Court, we find that the High Court has kept those principles in view and its judgment is not vitiated by any such infirmity as may call for interference of this Court. The appeal fails and is dismissed.

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