

Phoolchand

Vs

State of Rajasthan

Criminal Appeal No. 207 of 1971

(R.S. Sarkaria, P.N. Shinghal JJ)

02.09.1976

JUDGMENT

SARKARIA, J. -

1. This is an appeal under Section 2 of the Supreme Court (Enlargement of Criminal Appellant Jurisdiction) Act, 1970. It is directed against an appellate judgment of the High Court of Rajasthan whereby the acquittal of the appellant was set aside and converted into a conviction under Section 302 read with Section 34, Penal Code. The facts are as follows :
2. Birdhichand deceased was a goldsmith. He had a shop in Purani Mandi, Ajmer. He used to reside in his house at Ajmer at some distance from his shop. He used to keep his cash and valuables in a safe in his shop. He had raised funds to start new business. He had received a loan of Rs. 5000 in installments from the Rehabilitation Department. He had raised funds by selling some property, also.
3. Shivprasad another resident of Ajmer, was a friend of the deceased. The appellant, Phoolchand is a resident of Kishangarh and is the brother of Shivprasad's wife.
4. The prosecution case, as it emerges from the record is that Phoolchand and Shivprasad hatched a conspiracy to murder Birdhichand with a view to take away the cash and valuables from his shop.
5. On May 20, 1966, in the evening, Phoolchand and Shivprasad went to Shamlal, the caretaker of the Tourist Bungalow at Pushkar, which is about 21 miles from Kishangarh. There, they talked to Shamlal who also joined them in the conspiracy. When these three were conferring with each other in confidence, Jagmohan, the farash-cum-chowkidar of the bungalow also came there. Shamlal asked Jagmohan to go away as he did not want him to intrude into their conversation. Jagmohan obeyed.
6. On May 21, 1966, at about 8 p.m., Shivprasad and Phoolchand both went to the house of Birdhichand. Phoolchand remained outside while Shivprasad sent to the poli of the house and called Birdhichand. As Birdhichand was, at that time, in the latrine, his daughter, Chandrakala, aged 11 years, responded to the call. She went downstairs and met Shivprasad. She saw Phoolchand standing at a short distance behind Shivprasad near the chabutra. Shivprasad told her that he wanted to see Birdhichand. In the meantime Birdhichand came out of the latrine. His wife, Shanti who was on the first floor, asked him to take his dinner. Birdhichand put on his shirt and told her that Shivprasad and Phoolchand were waiting outside and that he would return within five minutes after seeing them. He asked his wife, that she should in the meantime prepare mango juice.

7. On Shanti's enquiry, the deceased told her that the keys of the shop were with him. Saying this, the deceased went away from his house in the company of Shivprasad and Phoolchand, never to be seen alive, again.

8. After awaiting in vain the return of her husband till 1 a.m. Shanti went to sleep.

9. On the same day at the Tourist Bungalow, Pushkar, at about 9 p.m., Jagmohan, parash was bout to close the door of the bungalow, as usual, when Shamlal, caretaker stopped him from doing so, saying that he was expecting three visitors. At about 11 p.m., on May 21, 1966, the farash saw Shivprasad and Phoolchand accompanied another person coming into the bungalow. All the three went to Shamlal's office and talked to him. Shamlal made an entry in the Visitors' Book with regard to the fact that two persons were put up in the room No. 2F. Thereafter Shamlal took all the three upstairs into room No. 2F. There were only two beds in that room. Shamlal asked Jagmohan farash to put a third bed therein for use by the visitors. Accordingly, Jagmohan laid the third bed in that room. Jagmohan was living, at the material time, in a quarter within the precincts of the bungalow along with his two daughters, Ruth Prem (19) and Vimla (17) and his son Ullas (16). At that time, his wife was not present there. She was in the family way and had gone to her parents' village.

10. At about 4 a.m. on May 22, 1966, Ruth Prem woke up on hearing shrieks emanating from room No. 2F. She awakened her father, Jagmohan, who was lying asleep on a nearby cot. Jagmohan also heard the shrieks. He went to Shamlal who was lying on a cot in front of his quarter within the precincts of the bungalow and told him about the shrieks. Shamlal then went to room No. 2F and returned and informed Jagmohan that Shivprasad was crying because a table had fallen and hurt his leg. Shamlal advised Jagmohan to go and rest. Jagmohan laid himself on his bed; but being in a disturbed state of mind, was unable to get a wink of sleep. About 15 minutes thereafter, he was Shivprasad coming down and going to Shamlal and then returning to room No. 2F. After a lapse of hour and half. Shivprasad again came downstairs and went back with Shamlal to room No. 2F. Shivprasad had then a kurta and a towel in his hand.

11. On the morning of May 22, 1966 at about 7, Jagmohan saw Phoolchand, Shivprasad and Shamlal going out of the bungalow after locking behind room No. 2F. Thereafter, Shyamlal and Phoolchand returned to the bungalow in the evening.

12. On the night between May 22 and 23 at about 11 p.m., Ruth Prem heard the sound of 'khat khat' coming from the first floor of the bungalow. She awakened her sister Vimla. Then both these girls saw two persons coming down by the staircase with a heavy load on their shoulders from the first floor. Shamlal was also with them. She then saw those persons carrying away that bundle out of the bungalow.

13. On May 23, 1966, at about 7 a.m. Chhotu went to this field which is at a distance of about 2 furlongs from the bungalow. There he was a deadbody wrapped in a gunny bag. There was blood on the bag. Chhotu forthwith went to the police station, Pushkar, made the report Ex. P/1. The report was recorded by A. S. I. Mohinder Pal. Mohinder Pal accompanied Chhotu to the field and sent an information to the Circle Inspector, Ajmer. Mohinder Pal posted constables to guard the deadbody at the spot. H. M. Tak, Sub-Inspector who was deputed to investigate the case, reached Pushkar at about noon and got the deadbody taken out of the gunny bag. A number of articles were found on the deadbody. Those articles included a ring (Ex. 4) silver button (Ex. 5), some silver ornaments (Exs. 11, 12, 13 and 14), one rupee currency note and a key (Ex. 17).

14. The autopsy was conducted by Dr. Chander Mohan Mathur at Pushkar. The doctor found 5 stab wounds on the body. Wound 1 was on the thoracic cavity on the left side of the chest. Wound 2 was in the abdominal cavity. A loop of small intestines was found protruding out of the wound. Wound 3 was also going deep into the abdominal cavity. Wound 4 was on the left lumber region and had pierced the left kidney. There were also marks, each 1/2" wide around both the legs in their lower one-third part. The doctor also found reddening on both sides of the neck of the body. In the opinion of the doctor, wounds 1 to 4 were sufficient to cause instantaneous death in the ordinary course of nature. The reddening on the neck, in the doctor's opinion, might be the "result of applying of hands on the neck".

15. The Investigating Officer found blood on the floor outside room No. 2F, on the staircase and also on the way leading to the field of Chhotu, where the deadbody was found. The Investigating Officer recorded the statement of Jagmohan and his daughters, Ruth Prem and Vimla, on May 24. On May 24, the Sub-Inspector took into possession the stock register (Ex. 27) and the Visitors' Book (Ex. 25) of the bungalow. He also seized bloodstained dari (Ex. 30). He also took possession of bloodstained bedsheets (Ex. 31, Ex. 32) and the bloodstained table Ex. 33 from room No. 2F. On May 25, he arrested Phool Chand, appellant, Shamlal, caretaker and one Prabhatilal. In consequence of the information supplied by Phool Chand, the Police Sub-Inspector recovered a silken kurta and a towel from the house of Kishorilal. On June 1, 1966, pursuant to the information given by Prabhatilal, he recovered a towel (Ex. 23) of the Tourist Bungalow, chappal (Ex. 6) of the deceased and pyjama (Ex. 22) lying in room no. 2F.

16. Shivprasad absconded and could not be arrested despite search. Therefore after completing the investigation against Phoolchand, Shamlal and Prabhatilal, the police sent them under a chargesheet before a magistrate, who after a preliminary enquiry committed them to the court of Additional Session Judge, Ajmer, who tried the case and acquitted all the three accused. Against the acquittal of Phoolchand and Shamlal, the State preferred an appeal to the High Court. The High Court set aside the acquittal and convicted Phoolchand under Section 302, read with Section 34, Penal Code and sentenced him to imprisonment for life. The High Court maintained the acquittal of Shamlal in respect of offences under Section 302 read with Section 109 and Section 465, Penal Code but convicted him for an offence under Section 201, Penal Code, with a sentence of 3 years' rigorous imprisonment.

17. Shamlal filed a special leave petition in the Court under Article 136 of the Constitution which was rejected by this Court.

18. Phoolchand's appeal is now before us.

19. At the trial the prosecution demanded conviction of the appellant and his co-accused purely on the basis of circumstantial evidence which may be catalogued as under :

1. On May 20, 1966, Shivprasad and Phoolchand visited Tourist Bungalow at Pushkar in the evening and talked to Shamlal, caretaker in confidence.
2. Shivprasad and Phoolchand (appellant herein) together visited the house of Birdhichand, deceased, at 8 p.m. on May 21, 1966 at Ajmer. Thereafter, Shivprasad called out the deceased and took him away.
3. On May 21, 1966 at about 11 p.m. Phoolchand and Shivprasad, accompanied by

another person (who according to the prosecution was the deceased), came to the Tourist Bungalow, Pushkar. Shamlal, caretaker took them upstairs and lodged them in room no. 2F.

4. On the night between May 21 and 22, 1966, at about 4 a.m., shrieks emanating from this room no. 2F were heard.

5. Next morning at about 7 a.m. on May 22, 1966, Phoolchand and Shivprasad were seen going out after locking room no. 2F, and third visitor was not with them. Shamlal, carrying a lota was also going out.

6. On May 22, 1966 at about 11 a.m., Phoolchand and Shivprasad came back to the Tourist Bungalow; Shivprasad then seated himself on the chabutri, while the sound of some some footsteps of the others going upstairs were heard.

7. On the night between May 22 and 23, 1966, two person were seen carrying a heavy load from the Tourist Bungalow. Shamlal was with them. Shortly thereafter, Shamlal alone returned to the bungalow.

8. On May 23, 1966, the deadbody of Birdhichand wrapped in a gunny bag was found in the field of one Chhotu PW at a distance of about 2 furlong from the Tourist Bungalow, Pushkar. It bore several injuries including stab wound and reddening on both sides of the neck. The stab wound were ante mortem and sufficient to cause death in the ordinary course of nature.

9. The dari of room no. 2F, seized on May 24, 1966 from the storeroom, and on bedsheet were found stained with blood which according to the serologist was human blood.

10. Blood was found on the store pieces of the floor just outside room no. 2F and on the slab of the staircase. This blood according to the report of the serologist was of human origin.

20. Evidence with regard to the circumstance 2 was given by Smt. Shanti Devi (PW 6) and Chandrakala (PW 7), the wife and daughter, respectively of the deceased. Evidence with regard to circumstances 1, 3, 4, 5 and 6 consisted wholly or chiefly of the testimony rendered by Jagmohan, PW 26. Evidence with regard to circumstance 7 was given by Ruth Prem, PW 27, and Vimla, PW 25. To substantiate circumstance 8, the prosecution examined Chhotu, (PW 2) the Investigating Officer, H. N. Tak (PW 33) and Dr. Chandra Mohan Mathur PW. Evidence with regard to circumstance 9 was given by Mr. Tak Investigating Officer and Ulhas PW 29. Evidence with regard to circumstance 10 was furnished by the statement of Investigating Officer.

21. The trial Court while holding that Birdhichand had met a homicidal death, rejected the prosecution evidence with regard to circumstances 1 to 7. In its opinion,

Shanti Devi's statement in this Court, that Phoolchand visited her house along with Shivprasad during the night of May 21, 1966 when her husband accompanied them, does not seem to be true so far as Phoolchand is concerned.

It further held that Jagmohan's statement was "wholly unacceptable". It further found that "the

infirmities in Ruth Prem's evidence go to show that she had seen (or heard) nothing during the nights between May 21/22, 1966 and May 22/23, 1966 and that her evidence has been created". On these findings, the trial Court acquitted Phoolchand and Shamlal.

22. On appeal by the state, the High Court reversed these findings. In its opinion, the evidence of the aforesaid witnesses was entirely truth worthy and therefore the circumstances enumerated above which had been cogently established, were sufficient to bring home the guilt to the appellant beyond doubt.

23. Mr. Mulla, learned Counsel for the appellant contends that in the circumstances of the case, the High Court was totally unjustified in reversing the acquittal. It is maintained that the reasons given by the trial Court for the acquittal of the appellant Phoolchand were very cogent and convincing and the same have not been effectively displaced by the High Court. It is submitted that in any case, the view of the evidence taken by the trial Court was also reasonably possible and consequently, the High Court should have, in accordance with the well settled rules of caution laid down by this Court, stayed its hands from interfering with the order of acquittal. Apart from reiterating the reasons given by the trial Court, Counsel has pointed out several features of this case, which according to him, had made the testimony of Jagmohan an unsafe basis for convicting the appellant. It is contended that the investigation was not fair; that the investigator fabricated evidence of the recovery of some incriminating articles to implicate the appellant; that this piece of evidence was found wholly unreliable by both the courts below; that Jagmohan was first rounded upon as one of the suspects and after some detention, a statement was extorted from him after a delay of at least two days and the story of Jagmohan's proceeding on two days leave was fabricated to cover up the delay; that Jagmohan's evidence besides being of an accomplice character, was a got-up one; that to tie down Jagmohan to the story put into his mouth by the police, his statement was got recorded before a magistrate under Section 164, Cr. P.C.; that in any case, Jagmohan according to his own admission, had never seen Phoolchand, appellant before May 20, and on that day to for some fleeting moments in the darkness; that on the morning of May 20, also, he claims to have seen Phoolchand from a distance; that in these circumstance it was hazardous to convict the appellant on the basis of the uncorroborated testimony of Jagmohan; that no such corroboration was forthcoming since the evidence with regard to Phoolchand's visit to the house of the deceased on the night of May 21, 1966 was utterly unreliable.

24. As against this, Mr. Jain appearing for the respondent-State has tried to support the judgment of the High Court.

25. After a careful consideration of the evidence on record and the arguments advanced on both sides, we are of opinion that the conviction of Phoolchand, appellant cannot be upheld.

26. The case against the appellant hinges to a very large extent on the testimony of Jagmohan. Was his evidence "wholly unacceptable", as the trial Court denounced it ? Or, was it so flawless that it could be safely accepted as the last word as to the identity and connection of the appellant with the commission of the murder in question ? For reasons that follow, we are of opinion that Jagmohan's evidence was neither "wholly unacceptable"; nor wholly impeccable. There are certain features in this case which should put the court on its guard not to rely on his bare word, without some assurance from independent sources, about the identity of the companion of Shivprasad at the material times and places on May 20, 21 and 22, 1966.

27. The trial Court gave eleven main reason to show that his witness was wholly unworthy of credit.

While most of these reasons were effectively dispelled by the High Court, two of them, in our opinion, have not been considered in the right perspective, not entirely neutralised. The first of them relates to his statement that on May 20, 1966, also, at about 8 p.m. Phoolchand appellant and Shivprasad came to the Tourist Bungalow, Pushkar and began having a talk with Shamlal, accused. When the witness tried to go bear them, Shamlal asked him to be off, and the witness went away.

28. The trial Judge did not believe the above version of Jagmohan because in his opinion the defence version rendered by two Audit Officers, B. P. Mathur (DW 3) and R. L. Sharma (DW 4) showed that at 8 p.m. on May 20, 1966, Shamlal was at the bus stand, Pushkar to see off the said officers. On these premises, the trial Judge concluded :

The statement of Jagmohan that accused Shivprasad and Phoolchand came to the Tourist Bungalow in the evening of 20-5-66 does not seem to be correct in point of time.

29. We agree with the trial Judge that Jagmohan's version as to the visit of Shivprasad and his companion to the Tourist Bungalow, Pushkar on May 20 may not be correct with regard to the time of the visit. The visit appears to have been sometime after 8 p.m. under cover of darkness. The time of this visit and keeping Jagmohan away, have an important bearing on the question of Phoolchand's identification. In cross-examination Jagmohan admitted that he had not seen Phoolchand before his visit to Shamlal on May 20. In other words, Phoolchand was not know to the witness. The witness according to his own showing, was not allowed to come near and participate in the talk between the visitors and Shamlal. He had therefore, caught only a momentary glimpse of the visitors in the darkness. In spite of the fact that Phoolchand was a stranger to Jagmohan, no test identification of Phoolchand was held before a magistrate. On May 21, also, he according to his own version, saw Phoolchand and Shivprasad coming to the bungalow at 11 p.m. at night time. He did not escort the visitors to lodge them in room no. 2F. Nor did the witness contact them. It was Shamlal only who took them to that room to be lodged for the night. It seems that Jagmohan was deliberately not allowed by Shamlal to get near the visitors.

30. Under these circumstances, Jagmohan could commit an honest mistake as to the identification of Phoolchand who was not previously know to him.

31. The second infirmity in Jagmohan's evidence stems from the circumstance that there was a delay of two days in recording his statement by the police. Jagmohan has tried to explain it away by saying that he had gone away from Pushkar after taking two days' leave for May 22 and 23, 1966 and his statement was recorded on his return from leave on May 24. There is a discrepancy as to the place where Jagmohan's statement was recorded. The Investigating Officer stated that he had examined Jagmohan in the Tourist Bungalow. Inconsistently with it, Ruth Prem (PW 27) daughter of Jagmohan stated that their statement were recorded in the police station where her father had been kept under restraint for some days. No leave application of Jagmohan was forthcoming. Jagmohan gave a cock and bull story inasmuch as he said that he had sent his son Ulhas (PW 29) to borrow Rs. 5 to cover his travelling expenses to Beavar, while he himself could do the same on his way to Beawar via Ajmer.

32. In view of all these circumstances, the trial Court's finding that the story of Jagmohan going on two days leave, had been invented merely to cover up the delay of two days in his examination by the police, could not be said to be clearly wrong. The fact remains that there was hesitation of his part to disclose the facts within his knowledge, concerning the commission of this murder. The, his

statement was got recorded by the police before a magistrate, under Section 164, Cr. P.C. Might be that this precaution to get a hold on the witness was taken, because there was an apprehension of the witness resiling from his statement under pressure of the accused. Such an apprehension could not be altogether unfounded because one of the accused, namely, Shamlal, was his immediate officer, and another, Shivprasad, was absconding. Nevertheless the fact that his statement was got recorded under Section 164, Cr. P.C. in the circumstances of this case emphasises the need for caution in appraising his evidence.

33. In view of the special features noticed above which project their shadow on a part of Jagmohan's evidence, it was not prudent to accept his bare word of mouth, without independent confirmation as to the identity and connection of the appellant, with the crime in question.

34. It remains to be seen further whether such confirmation, circumstantial or direct, was available in this case.

35. That Birdhichand was murdered sometime on the night between May 21 and 22, 1966 is not disputed. The medical witness who conducted the autopsy found redness on both sides of the neck of the deceased. There were several ante-mortem stab wounds on the body which were sufficient to cause death in the ordinary course or nature. The doctor opined that the redness on the neck was caused by the application of pressure on the neck. The medical evidence thus indicates that the murder was in all probability, committed by two assailants acting in concert. While the medical evidence fixes the number of assailants at two, it cannot fix their identity.

36. There was yet another circumstance which, if established, could have, with some certainty, connected Phoolchand with the murder in question. This circumstance, as alleged by the prosecution, was that on the evening at about 8 p.m. on May 21, 1966, Shivprasad absconder and Phoolchand appellant, both decoyed and took away Birdhichand from the latter's house at Ajmer.

37. The prosecution had examined two witnesses to substantiate this circumstance. The witnesses were Smt. Shanti, the wife and Chanderkala, aged 11 years, the daughter of the deceased. The trial Court found that Chanderkala even at the time of her examination in court, was too immature to understand the sanctity of oath, and therefore no oath was administered to her. The court further held that she was a child witness and as such her evidence was "dangerous in the extreme" as child witness not unoften live in a climate of "make-believe".

38. The trial Court also took note of the fact that Shanti Devi while informing on May 22, about the non-return of her husband, to the brother Rattan Lal (PW 4) did not name Phoolchand, but named Shivprasad only as the person who had taken her husband away from the house.

39. The High Court has tried to counter these reasons by saying that in cross-examination no questions were put to the child witness to establish that she had been tutored to make that statement; that Smt. Shanti's statement at the trial was of a derivative nature and her omission to name Phoolchand before the police as the companion of Shivprasad when the latter took away her husband from his house at Ajmer, could not be used to contradict or discredit either Shanti or her daughter Chanderkala.

40. In our opinion, the High Court did not appraise the failure of Smt. Shanti to implicate Phoolchand, while reporting the matter to her brother, in the right perspective. Firstly, her report to her brother was not a statement made to police in the course of investigation. Consequently, the bar

of Section 162, Cr. P.C. as to the use of that statement, did not apply. Secondly, Smt. Shanti must have made full enquiries from her daughter, Chanderkala, as to the number of persons who had been seen by her when she went downstairs to meet Shivprasad. Smt. Shanti has stated that soon after the departure of her husband her suspicions about the security of their valuables were aroused. Consequently, she got a double lock put on the shop of her husband. Conversely, if Phoolchand had really been seen standing behind Shivprasad near the chabutri by Chanderkala, she would not have failed to pass on that information to her mother when she asked her to put another lock on the door of the shop. We would therefore, hold that the trial Court was right in holding that circumstance 2 was not established so far as Phoolchand was concerned.

41. Be that as it may, the view of the evidence of Shanti Devi and Chanderkala taken by the trial Court was not such as could not be reasonably taken by any tribunal. As a matter of caution, therefore, the High Court should not have disturbed that finding.

42. In view of the finding that circumstance 2, in so far as it implicates Phoolchand, was not satisfactorily established, there remains no independent evidence on the record to confirm the oral testimony of Jagmohan in regard to the identity, and connection of the appellant with the murder of Birdhichand. We would therefore, in the peculiar circumstances of the case, as a matter of abundant caution, refrain from accepting the uncorroborated, infirm testimony of Jagmohan with regard to the identification of the appellant, and in the result allow his appeal, accord him the benefit of doubt and acquit him.

</html