

Modan Singh

Vs

State of Rajasthan

Criminal Appeal No. 14 of 1973

(Jaswant Singh, P. S. Kailasam JJ)

31.08.1978

JUDGMENT

KAILASAM, J. -

1. This appeal is preferred by Modan Singh under Section 2 of the Supreme Court (Enlargement of Criminal appellate Jurisdiction) Act, 1970 against the judgment of the High Court of Rajasthan in Criminal Appeal No. 664 of 1968 reversing the order acquittal of the appellant by the session judge.
2. The appellant, Modan Singh, and one Sampuran Singh, were tried by the Session Judge of Ganganagar for causing the death of one Prithvi Singh on December 16, 1966 and acquitted.
3. The case for the prosecution may be briefly stated. Jugraj Singh, PW 1 was a resident of the village of Banwala and was Sarpanch of Gram panchayat of the village. On the evening preceding the night of the occurrence, Prithvi Singh, the deceased came to PW 1's house and requested him to provided accommodation for the night. PW 1 allowed him to stay in an outer room of his house. While PW 1 was talking with others, the two accused, Sampuran Singh and Modan Singh, appellant herein, came there with Mewa Singh, PW 10, belonging to Banwala. At that time, the appellant, Modan Singh had a pistol, container and bandolier on his shoulder. Sampuran Singh had a pistol. PW 1 served both the accused with food and provided beds for them in the room where the deceased, Prithvi Singh was staying. When PW 1 left the room, the two accused, Sampuran Singh and Modan Singh and the deceased, Prithvi Singh and Mewa Singh, PW 10 were together. In the morning when PW 1 went to the outer room, he found the shutter open and gadela and razai lying burnt outside. Prithvi Singh was lying injured and dead on his cot and a live cartridge, an empty cartridge, and used bullets were found lying near the room. A report was lodged by PW 1 at the Sadar Ganga Nagar Police Station at 11 a.m. Padamsingh, Station House Officer, reached the scene at 2.45 p.m. and took up investigation. He recovered an empty cartridge, a loaded cartridge and lead pieces of fired pellets in the room. On December 20, 1966 Sampuran Singh and Modan Singh appeared themselves at the Police Station and were arrested. From the person of Modan Singh, the police seized 303 country-made pistol. On December 23, 1966, Modan Singh while in police Custody, gave information and pointed out a pistol case and a live cartridge and an empty cartridge from a pistol case which was hanging on a peg fixed in the wall of his Kotha.
4. In the trial Court, 12 witnesses were examined in support of the prosecution. PW 1, Jugraj Singh, is the Sarpanch of the village, who accommodated the two accused and the deceased in his house and spoke to his leaving the outer room of his house when the two accused, the PW 10 were together. According to the prosecution, in his statement, PW 10 stated that when he took leave, the two accused and the deceased bolted their room and were together. The two witnesses were

examined for the purpose of establishing that the accused and the deceased were together on that night. It is not disputed that when in the morning PW 1 came to his outer room, he saw the deceased lying dead with injuries.

5. Apart from these two witnesses, the prosecution relied on the evidence of the recovery of a fired cartridge. Ex. 9 which was recovered from the scene of occurrence and Ex. 8, a pistol which was recovered from the person of the appellant, Modan Singh, When he was arrested at the Police Station. According to the prosecution the fired cartridge Ex. 9 and the pistol Ex. 8 were recovered after observing due formalities and were kept sealed properly till they were sent to the Ballistic expert, Shri Sharma, who was examined as PW 9 in the case. The expert in his evidence stated that on an examination of the fired cartridge, Ex. 9 and the pistol Ex. 8 he found that the cartridge Ex. 9 had been fired from the pistol Ex. 8. The trial Court found that to the extent that Sampuran Singh, Modan Singh and Mewa Singh were the only persons left with the deceased in the outer room of Jugraj Singh, had been satisfactorily proved by the evidence of PW 1. It also found that the prosecution had proved beyond doubt that the empty cartridge, Ex. 9, recovered from the place of occurrence was fired from the pistol, Ex. 8, found in possession of the appellant, Modan Singh. But as PWs 1 and 10 had turned hostile, the court found that there was no material for coming to the conclusion that the two accused and the deceased were seen together on the night of the occurrence. The trial Court acquitted Modan Singh on the ground that it has been established that Sampuran Singh had also a pistol with him at the time when he came to PW 1's house and therefore it was possible that the pistol, Ex. 8 could have been fired by Sampuran Singh as well.

6. On appeal by the State, the High Court allowed the appeal holding that the guilt of Modan Singh has been established beyond doubt. The High Court accepted the prosecution story that Ex. 9, the fired cartridge and pistol Ex. 8, were properly recovered from scene and the person of Modan Singh respectively, and that it was established from the evidence of PW 9, the Ballistic expert that the cartridge was fired from the pistol belonging to Modan Singh. It also accepted the evidence of PWs 1 and 10 that the accused were last seen in the company of the deceased in the outer room of PW 1.

7. The case for the prosecution as already stated, rests on the evidence of PWs 1 and 10 and the circumstantial evidence relating to the recovery of Exs. 8 and 9 and the deposition of ballistic expert, PW 9.

8. The evidence as to the two accused having been seen alive for the last time with the deceased on the night of the occurrence is given by PWs 1, 9 and 10. In the First Information Report, PW 1 stated that when he left the outer room of his house, the two accused, the deceased and Mewa Singh (PW 10) were together. Even according to this version, the prosecution has not established that the two accused and the deceased alone were last seen together. According to the F.I.R., PW 10 was also along with them. PW 1 turned hostile before the sessions Court and stated that when he was about to leave the deceased and others in the night, the deceased told him that he was expecting one more man in the night and so asked him provide for another bedding. He further added that during the night some one called him and asked him whether a man from Shergarh, referring to the deceased, is staying in his outer room and that he replied that he should look into the outer room. PW 1 did not in his earlier statement refer to the deceased stating that he was expecting one more man that night or of another person inquiring about the deceased later that night. As this version was given by PW 1 for the first time and as it is contrary to the prosecution case, PW 1 was rightly treated as hostile but the only version on which the prosecution can rely is PW 1's evidence that when he left the outer room, the two accused, the deceased and Mewa Singh, PW 10 were together. The next witness relied on was PW 10, Mewa Singh. Mewa Singh was also treated as hostile in the

Section Court as he stated that on the night he along with the two accused left PW 1's baithak at 9 p.m. and later left the two accused at Banwala station where they boarded a train for Sadulshahar and he returned to his house. It was put to the witness that he stated in his statement under section 162 that when he left, both the accused persons and the deceased were together and that they bolted the door from inside, but the statement which is made during the investigation, to the police cannot be treated as substantive evidence. Therefore, there is no evidence to prove that on that the two accused and the deceased were alone seen together.

9. The only other material on which the prosecution can connect the appellant with the crime is the recovery of the fired cartridge, Ex. 9 and the seizure of the pistol Ex. 8 and the deposition of the ballistic expert, PW 9. It is found that the witnesses who have been examined for attesting the seizure have not supported the prosecution version. On behalf of the defence it was submitted that the seizure witnesses were men of status in the village and their not supporting the recovery would be fatal to the prosecution. We would rather not place any reliance on the witnesses who attested the seizure memo. If the evidence of the investigation officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version. According to the investigating officer, PW 12, he recovered a live cartridge lying on the ground towards the head of the cot wherein the dead body was found lying and an empty cartridge lying near the cot of that room. The recovery memo was marked Ex. P-14. The recovery of the pistol, Ex. 8 from the person of Modan Singh was on December 20, at the police station itself and the recovery memo is Ex. P-23. An empty cartridge, a live cartridge and a pistol case were recovered from the house of Modan Singh on the 23rd and the seizure memo was prepared but the prosecution failed to lead evidence that the material objects were properly kept till they were sent to the expert on February 6, 1967 by a special messenger. The investigation officer would only say that the material objects were kept sealed up to December 14, 1966. The prosecution is silent as to in whose custody the material objects were till February 6, 1967. Added to all these infirmities, we find that the ballistic expert, PW 9 had in his report, Ex. P-25 stated as follows :

The fired cartridge has been marked C/1 by me. It had been fired from the pistol under reference. The barrel of the pistol is loose for .303 bullets and hence, reliable markings on the test bullets could not be obtained. Therefore, the bullets mentioned above could not be identified in respect of the weapon under reference.

In the evidence, no doubt, the ballistic expert stated that he fired test cartridge studied them and found that the markings on the test cartridges were similar to the markings in cartridge, Ex. 9. Though he had referred to his report, Ex. P-25, which has been extracted above, no question was put to the ballistic expert as to how he was able to fire test cartridges when in his statement he stated that the barrel of the pistol was loose and the bullets mentioned could not be identified in respect of the weapon under reference. It is strange that the witness was not asked to explain the statement in Ex. P-25; neither the trial Court nor the High Court has referred to this aspect. After reading carefully the evidence of PW 9, the ballistic expert, and his report, we are far from satisfied that the prosecution has established that the cartridge, Ex. 9 was fired from Ex. 8.

10. The prosecution has not established that Ex. 8 belonged to appellant, Modan Singh, apart from the evidence as to recovery of the weapon from his person. It is also the case for the prosecution that the appellant, Modan Singh as well as the acquitted accused, Sampuran Singh were both armed with pistols on that night. When admittedly, PW 10, and the acquitted accused, Sampuran Singh were present along with the appellant and the deceased, the prosecution cannot be said to have succeeded in proving that it was the appellant, Modan Singh, that fired the pistol and caused the gunshot

injuries to the deceased.

11. The High Court was in error in coming to the conclusion that both the accused were last seen in the company of the deceased in the house of PW 1 as there is no evidence to that effect. Equally unsustainable is the conclusion arrived at by the High Court that evidence of the ballistic expert has established that the cartridge, Ex. 9, was fired from Ex. 8 and that the pistol belonged to the appellant, Modan Singh.

The High Court has also failed to consider the fact that the appellant, Modan Singh, as well as the acquitted accused were both armed with pistols and it cannot, with certainty be said that the appellant fired the pistol.

12. We are satisfied on the perusal of the records that there is hardly any evidence to hold that the accused and the deceased were alone last seen left on the night of the occurrence or that the cartridge was fired from the pistol by the appellant. In the result, we allow the appeal and set aside the conviction and sentence imposed on the appellant by the High Court and confirm the order is acquittal passed by the trial court.

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