SUPREME COURT OF INDIA

Shyam

Vs.

State of Madhya Pradesh

Crl.A.No.215 of 2007

(Arijit Pasayat and S. H. Kapadia, JJ)

15.02.2007

JUDGMENT

Dr.Arijit Pasayat, J.

SLP.(Crl.)No.2493 of 2006

1. Leave granted. Challenge in this appeal is to the order passed by a Division Bench of the Madhya Pradesh High Court, Indore Bench. On the basis of the accusations that appellant and four others were responsible for the homicidal death of one Kailash (hereinafter referred to as the 'deceased') on 27.10.1995, the accused persons faced trial. The learned First Additional Sessions Judge, Shajapur, found two of the accused persons i.e. Prakash and appellant herein Shyam to be guilty of offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC'). Each was sentenced to undergo imprisonment for life and to pay a fine of Rs.1, 000/- each with default stipulation. The other three were acquitted. The appellant and co-accused Prakash preferred an appeal before the High Court which was dismissed by the impugned order, so far as appellant is concerned. Prakash was directed to be acquitted.

2. Prosecution version as unfolded during trial is as follows:

> "On 27.10.1995 wife of the deceased Bhagwantibai (PW-1) was in her house, when at about 11.00 o' Clock, she heard the alarm raised by her husband. When she came out, she witnessed that the accused persons and the acquitted co- accused were grappling with him. Just then, appellant Shyam went to his house and brought a knife while accused Babloo @ Prakash exhorted them to kill him. Acquitted co-accused Dhapubai and Kirshnabai then caught the deceased and Shyam and Prakash administered several blows of knife causing injuries in various part of the body of deceased Kailash. Bhagwantibai (PW-1) raised an alarm and informed Mohanlal, Babu and Ramchandra about the incident. Kailash was carried on a cot to the hospital, but he succumbed to the injuries. Report of the incident Ex.P/1 was lodged at the police station by Bhagwantibai (PW-1), which was recorded by B.L. Meena, Station

House Officer (PW-8) and an offence was registered against the accused. During investigation, inquest was held and inquest report Ex.P/6 was prepared. The body was forwarded for post-mortem examination vide requisition Ex.P/3. Spot map Ex.P/10 was prepared and samples of blood stained and simple earth were obtained vide Ex.P/11. A pair of chappals from the spot was seized under memo Ex.P/12. During investigation, accused persons were arrested and the disclosures made by them were recorded and in pursuance thereof, knife, vest (baniyan) from Shyam and a knife and kurta, pyajamas from Prakash were seized. The seized articles were sent to the Forensic Science Laboratory for analysis and charge sheet was filed against the appellants and co-accused."

2. On consideration of evidence on record, appellant and Prakash were convicted and others were acquitted. The convicted accused persons preferred an appeal before the High Court.

3. The primary plank of the argument of the appellant before the High Court was that the medical evidence was at variance with the so called eye witnesses' version. The High Court did not accept the stand. The High Court found that actually there was no variance between the medical evidence and the ocular evidence. The High Court found no substance in the said plea of the accused appellant. It, however, found that accusations were not established so far as the accused Prakash was concerned. Accordingly his conviction was set aside and he was acquitted. However, the High Court found that the conviction under Section 302 Indian Penal Code, 1860 was not appropriate, the proper provision applicable would be Section 304 Part II Indian Penal Code, 1860 so far as present appellant is concerned. Custodial sentence of 7 years was imposed. Accordingly the appeal was partially allowed.

4. Learned counsel for the appellant submitted that since on the very same evidence three persons have been acquitted, it would not be proper to convict accused appellant on the self-same evidence, that too of a relative i.e. deceased's widow. There was also delay in lodging the FIR. Alternatively, it was submitted that the High Court was not justified in holding that the appellant was responsible for the death of the deceased and/or that he had knowledge that the act committed by him would result in death.

5. Learned counsel for the State on the other hand supported the judgment of the High Court. Coming to the case of appellant Shyam, the eye witness has right from the stage of the first information report, given a vivid description about the participation from the beginning, the manner in which he went to his house and brought the knife and he assaulted and caused injuries to Kailash. The evidence of Dr. H.L. Arya (PW-3) and his autopsy report clearly recorded four external injuries on the body of the deceased Kailash. The testimony of this witness has been subjected to searching cross-examination, but nothing has been brought on record to discredit the statement of Bhagwantibai (PW-1). What has been suggested is that the deceased was drunken and that there was grappling between the two in which the deceased sustained injuries. As seen from the injuries recorded in post mortem report, first injury has been sustained in the lumbar region, second on the shoulder, third in the inguinal region and the fourth on the left forearm. It appears incredible that in grappling, a person would sustain injuries on places where it would be difficult for his hand to reach. It is also

beyond comprehension that in such grappling with a knife in the hand of the deceased, the other party, namely the accused, would escape unscathed. We have recorded the submission only to discard it. Thus the prosecution has fully succeeded in showing that it was on account of the injuries inflicted by accused Shyam that death of Kailash occurred.

6. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused. No evidence has been led in this regard. So far as the delay in lodging the FIR is concerned, the witnesses have clearly stated that after seeing the deceased in an injured condition immediate effort was to get him hospitalized and get him treated. There cannot be any generalization that whenever there is a delay in lodging the FIR, the prosecution case becomes suspect. Whether delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case, would depend upon the facts of each case. Even a long delay can be condoned if the witnesses have no motive of implicating the accused and have given a plausible reason as to why the report was lodged belatedly. In the instant case, this has been done. It is to be noted that though there was cross-examination at length no infirmity was noticed in their evidence. Therefore, the trial Court and the High Court were right in relying on the evidence PW-1.

7. So far as the alleged variance between medical evidence and ocular evidence is concerned it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case the Court has to draw adverse inference.

8. In some cases persons may not like to come and depose as witnesses and in some other cases the prosecution may carry the impression that their evidence would not help it as there is likelihood of partisan approach so far as one of the parties is concerned. In such a case mere non-examination would not affect the prosecution version. But at the same time if the relatives or interested witnesses are examined, the Court has a duty to analyse the evidence with deeper scrutiny and then come to a conclusion as to whether it has a ring of truth or there is reason for holding that the evidence was biased. Whenever a plea is taken that the witness is partisan or had any hostility towards the accused, foundation for the same has to be laid. If the materials show that there is partisan approach, as indicated above, the Court has to analyse the evidence with care and caution. Additionally, the accused persons always have the option of examining the left out persons as defence witnesses.

9. Over dependence on such opinion evidence, even if the witness is an expert in the field, to checkmate the direct testimony given by an eyewitness is not a safe modus adoptable in criminal cases. It has now become axiomatic that medical evidence can be used to repel the testimony of eyewitness only if it is so conclusive as to rule out even the possibility of the eyewitness's version to be true. A doctor usually confronted with such questions regarding different possibilities or probabilities of causing those injuries or post- mortem features which he noticed in the medical report may express his views one way or the other depending upon the manner the question was asked. But the answers given by the witness to

such questions need not become the last word on such possibilities. After all he gives only his opinion regarding such questions. But to discard the testimony of an eyewitness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice. (See, *State of U.P. v. Krishna Gopal and Anr*[1]. *and Ramanand Yadav v. Prabhu Nath Jha & Ors*[2].

10. In this case it has been categorically held that there is no variance. That being so, even the hypothetical plea is also applicable.

11. In the aforesaid circumstances the judgment of the High Court does not suffer from any infirmity.

12. The appeal is dismissed.

Judgment Referred.

[1]*AIR 1988 SC 2154*
[2]*(2003) 12 SCC 0606*