SUPREME COURT OF INDIA

Darbara Singh

Vs.

State of Punjab

Crl.A.No.404 of 2010

(B.S.Chauhan and Fakkir Mohamed Ibrahim Kalifulla,JJ.)

12.09.2012

JUDGMENT

B.S. Chauhan,J.

1. This appeal has been preferred against the judgment and order dated 6.2.2008 passed by the Punjab and Haryana High Court at Chandigarh in Criminal Appeal No.248-DB of 1998, by which the High Court affirmed the judgment and order dated 7.4.1998 passed by The Additional Sessions Judge, Ferozepur in Sessions Case No.11 of 1996, by which the appellant stood convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter called „IPC') and was awarded the imprisonment for life and a fine of Rs.5,000/- was imposed upon him. In default of payment of fine, he was further ordered to undergo rigorous imprisonment for 2 years. Co-accused Kashmir Singh @ Malla Singh @ Malli was also similarly convicted and sentenced.

2. Facts and circumstances giving rise to this appeal are as follows:

> "A.On 28.10.1995, FIR No.150/95 was registered under Section 302 IPC at Police Station Dharamkot, alleging that Kashmir Singh and Hira Singh had gotten into a verbal feud with Mukhtiar Singh over the sale of country liquor on credit. Upon Mukhtiar Singh's refusal to give them liquor on credit basis, they threatened to teach him a lesson. Kashmir Singh and Hira Singh returned after 15-20 minutes along with Darbara Singh, the appellant herein. Upon instigation by Hira Singh, the appellant hit Mukhtiar Singh on the head with a Kirpan, while co- accused Kashmir Singh hit him on the chest with a Kirpan, as a result of which, Mukhtiar Singh died instantly.
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> B. On the basis of the aforesaid FIR, investigation ensued and the dead body of Mukhtiar Singh was recovered and sent for post-mortem, which was conducted by Dr. Charanjit Singh (PW.11) on 29.10.1995. After the conclusion of the investigation, the police submitted the final report under Section 173 of the Criminal Procedure Code,

1973 (hereinafter referred to as 'Cr.P.C.') against all 3 accused named in the FIR including the appellant. The case was thereafter committed to the Sessions Judge, Ferozepur for trial. The appellant as well as the other co-accused pleaded innocence and claimed trial. Thus, the appellant Darbara Singh and Kashmir Singh were charged under Section 302 IPC while the co-accused Hira Singh was charged under Section 302 r/w Section 34 IPC. During the course of the trial, the prosecution examined Amrik Singh (PW.1) and Gurdial Singh (PW.2) as eye-witnesses. They also examined other witnesses including Dr. Charanjit Singh (PW.11) and Investigating Officer Sukhwinder Singh, S.I. (PW.9).

C. In their statements under Section 313 Cr.P.C., the accused denied their involvement in the incident and also examined 2 witnesses in their defence included Dr. Rachhpal Singh Rathor (DW.2) who had examined Bohar Singh, Kashmir Singh and Paramjit Singh in the hospital on the night of 28/29.10.1995.

D. The learned Trial Court after appreciating the evidence on record and considering the arguments raised on behalf of the prosecution as well as the accused, convicted the appellant and Kashmir Singh, for the said offence while Hira Singh was acquitted vide judgment and order dated 7.4.1998.

E. Aggrieved, the appellant and Kashmir Singh preferred Criminal Appeal No. 248-DB/98 before the High Court which was dismissed vide impugned judgment and order dated 6.2.2008. Hence, this appeal.

3. Shri Rohit Sharma, learned counsel appearing for the appellant has submitted that the appellant has falsely been enroped and that he did not have any proximity with Kashmir Singh. In fact, on the contrary, his family had a rather strained equation with the family of Kashmir Singh as one person from the family of the appellant had in the past (20 years ago), been prosecuted and convicted for the offence of committing rape upon Kashmir Kaur, a relative of Kashmir Singh. In fact, on refusal to give liquor on credit, Kashmir Singh, Paramjit Singh and Bohar Singh had teased Mukhtiar Singh, deceased. Mukhtiar Singh caused injuries to them and the appellant intervened in the scuffle. Thereafter, when brother of the deceased, namely Amrik Singh asked the appellant to be a witness for them, the appellant refused, thus the appellant has falsely been enroped in the crime. The manner in which the appellant has been accused of causing injury is not in fact at all possible because the medical evidence is not in consonance with the ocular evidence. The appellant had not been charged under Section 302 r/w Section 34 IPC, and even if it is assumed that the appellant had also participated in causing injury to the deceased Mukhtiar Singh, he should not be held responsible for the offence punishable under Section 302 IPC, as the said injury

could not be proved to be fatal. No independent witness has been examined even though the incident occurred at 5 p.m., at a liquor vending shop, where a few persons can reasonably be expected to be present at that time. The appellant has served more than 8 years. Thus, the appeal deserves to be allowed.

4. On the contrary, Shri V. Madhukar, learned AAG, Punjab has vehemently opposed the appeal contending that the appellant had in fact, participated in the incident and as a result, caused grievous injury to the vital part of the body of the deceased Mukhtiar Singh. He should not be allowed to take the benefit of technicalities in the law. Thus, even if the charge for offence under Section 302 r/w Section 34 IPC has not been framed against the appellant, no prejudice would be caused to him. The co-accused Kashmir Singh, who was convicted by the trial court as well as by the High Court alongwith the appellant had filed a special leave petition against this very impugned judgment, which has also been dismissed by this court. The appeal is, hence, liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the record.So far as the question of inconsistency between medical evidence and ocular evidence is concerned, the law is well settled that, unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. In the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis--vis medical evidence and when medical evidence makes the oral testimony improbable, the same becomes a relevant factor in the process of evaluation of such evidence. It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved. (Vide: *State of U.P. v. Hari*[1] *and Bhajan Singh @ Harbhajan Singh Ors. v. State of Haryana*[2]

6. In the post-mortem report, the following injuries were found on the person of the deceased:

(i) An incised wound 3 cm x 1.5 cm on the left parietal region of the head obliquely placed 12 cm above the left ear pinna and 1.5 cm from mid line 6 cm behind the anterior hair line.

(ii) An incised penetrating elliptical shaped wound 6 cm x 1.5 cm on front aspect of left side of chest 4 cm below the nipple 5 cm from midline. Clotted blood is present. Dr. Charanjit Singh (PW.11), who conducted the post-mortem further opined that the cause of death was haemorrhage and shock as a result of injury to vital organs i.e. lung heart, which was sufficient to cause death in the ordinary course of nature. Dr. Charanjit Singh (PW.11), in his cross-examination explained that injury No.1 would have been impossible to inflict, if the deceased was running and the assailant was chasing him. Injury No.1 was caused by a sharp edged instrument like a Kirpan from the upper to the lower part of the back of the deceased.

The ocular evidence so far as the injuries are concerned, has been by Amrik Singh (PW.1), who deposed that after 15-20 minutes of the first part of the incident the assailants turned up. Darbara Singh inflicted a blow, using a Kirpan, to the head of Mukhtiar Singh and, thus, he attempted to run towards Fatehgarh. Kashmir Singh then thrusted a Kirpan, which hit the left flank of Mukhtiar Singh. After receiving these injuries Mukhtiar Singh fell down.

7. In fact, Mukhtiar Singh, deceased attempted to run upon the apprehension that, he would be attacked, and it was exactly at this time that the appellant, Darbara Singh caused injury to his head using a Kirpan. This explains the reason for the direction of injury No.1 extending from the upper to the lower part of the back of the deceased. Had it been the case that the deceased Mukhtiar Singh was not running at the said time, the direction of the injury would have in all likelihood been straight. If the entire evidence with respect to the method and manner of causing injuries 1 and 2, is conjointly read, it becomes crystal clear that the ocular evidence is in conformity and in consonance with the available medical evidence. In view of the above, we do not find any force in this submission.

8. Learned counsel for the appellant would submit that as Dr. Charanjit Singh (PW.11), undoubtedly deposed in the cross-examination that the shirt worn by the deceased was torn in several places, it clearly suggests that there was in fact, a scuffle between the deceased and the assailant, and, therefore, in the light of the same, the case of the prosecution becomes doubtful. The case of the prosecution has been that upon seeing the assailants, the deceased started running and 2 injuries were inflicted upon him by the appellant and Kashmir Singh. None of the prosecution witnesses has been asked in the cross-examination to explain the condition of the shirt which was worn by the deceased at the relevant time. More so, no suggestion was ever made by any of them regarding the aforementioned scuffle. In absence thereof, such a statement made by Dr. Charanjit Singh (PW.11) does not in any way point towards the innocence of the appellant.

9. So far as the issue of motive is concerned, it is a settled legal proposition that motive has great significance in a case involving circumstantial evidence, but where direct evidence is available, which is worth relying upon, motive loses its significance. In the instant case, firstly, there is nothing on record to reveal the identity of the person who was convicted for rape, there is also nothing to reveal the status of his relationship with the appellant and further, there is nothing on record to determine the identity of this girl or her relationship to the co-accused Kashmir Singh. More so, the conviction took place 20 years prior to the incident. No independent witness has been examined to prove the factum that the appellant was not on talking terms with Kashmir Singh. In a case where there is direct evidence of witnesses which can be relied upon, the absence of motive cannot be a ground to reject the

case. Under no circumstances, can motive take the place of the direct evidence available as proof, and in a case like this, proof of motive is not relevant at all.

10. Motive in criminal cases based solely on the positive, clear, cogent and reliable ocular testimony of witnesses is not at all relevant. In such a fact-situation, the mere absence of a strong motive to commit the crime, cannot be of any assistance to the accused. The motive behind a crime is a relevant fact regarding which evidence may be led. The absence of motive is also a circumstance which may be relevant for assessing evidence. (Vide: *Gurcharan Singh Anr. v. State of Punjab*[3]*Rajinder Kumar Anr. v. State of Punjab*[4]*Datar Singh v. State of Punjab*[5]*and Rajesh Govind Jagesha v. State of Maharashtra*[6]

11. In *Sheo Shankar Singh v. State of Jharkhand Anr*[7] while dealing with the issue of motive, this Court held as under:

> "Proof of motive, however, recedes into the background in cases where the prosecution relies upon an eye-witness account of the occurrence. That is because if the court upon a proper appraisal of the deposition of the eye¬witnesses comes to the conclusion that the version given by them is credible, absence of evidence to prove the motive is rendered inconsequential. Conversely even if prosecution succeeds in establishing a strong motive for the commission of the offence, but the evidence of the eye-witnesses is found unreliable or unworthy of credit, existence of a motive does not by itself provide a safe basis for convicting the accused. That does not, however, mean that proof of motive even in a case which rests on an eye¬witness account does not lend strength to the prosecution case or fortify the court in its ultimate conclusion. Proof of motive in such a situation certainly helps the prosecution and supports the eye witnesses. (See: *Shivaji Genu Mohite v. The State of Maharashtra*[8]*Hari Shanker v. State of U .P*[9] *and State of Uttar Pradesh v. Kishanpal and Ors*[10]*".*

12. In view of the above, the argument advanced by the learned counsel for the appellant does not merit consideration. It has further been submitted on behalf of the appellant that, as the appellant was never charged under Section 302 r/w Section 34 IPC, unless it is established that the injury caused by the appellant on the head of the deceased, was sufficient to cause death, the appellant ought not to have been convicted under Section 302 IPC simplicitor. The submission so advanced is not worth consideration for the simple reason that the learned counsel for the appellant has been unable to show what prejudice, if any, has been caused to the appellant, even if such charge has not been framed against him. He was always fully aware of all the facts and he had, in fact, gone alongwith Kashmir Singh and Hira Singh with an intention to kill the deceased. Both of them have undoubtedly inflicted injuries on the deceased Mukhtiar Singh. The appellant has further been found guilty of causing grievous

injury on the head of the deceased being a vital part of the body. Therefore, in the light of the facts and circumstances of the said case, the submission so advanced does not merit acceptance.

13. In *Sanichar Sahni v. State of Bihar*[11]this Court dealt with the aforementioned issue elaborately, and upon consideration of a large number of earlier judgments, held as under:

> "Therefore, unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory."

14. The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465 Cr.P.C., which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage, during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge.

15. The 'failure of justice' is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be 'failure of justice'; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under Indian Criminal Jurisprudence. 'Prejudice', is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then the accused can seek benefit under the orders of the Court. (Vide: *Rafiq*

Ahmed @ Rafi v. State of U.P[12]*Rattiram Ors. v. State of M.P. through Inspector of Police*[13]and Criminal Appeal No.46 of 2005 (Bhimanna v. State of Karnataka) decided on 4th September, 2012).

16. Learned counsel for the appellant has submitted that there is nothing on record to show that the appellant had a common intention with co-accused to kill the deceased and therefore the appellant could not have been convicted as such. In order to fortify his submission, he placed heavy reliance on the judgment of this *Court in Dhanna v. State of M.P*[14] wherein this Court held as under:

> "It is, therefore, open to the Court to make recourse to Section 34 IPC evenif the said section was not specifically mentioned the charge Of coursea finding that the assailant concerned had a common intention with the other accused is necessary for resorting to such a course."

17. Even this submission does not tilt the balance in favour of the appellant. The manner in which injury no.1 has been caused clearly suggests that both the accused persons acted in furtherance of a common intention. Thus, we do not find any force in the aforesaid submission.

18. Learned counsel for the appellant further submitted that investigation conducted by the police was tainted, favouring the complainant, as the Investigating Officer (PW.9) himself admitted in his cross-examination that, he had recorded the statement of one Bohar Singh to the effect that, the appellant was the only witness and had seen Bohar Singh and others being attacked and injured by the deceased on being teased. Bohar Singh had also been medically examined and injuries were found on his person. However, his statement regarding such facts has not been produced before the court.The trial court dealt with the said issue elaborately, and held that the story that the reason that Bohar Singh and the other co- accused went to Civil Hospital, Zira, a far away place, and got themselves medically examined there and not in a nearby hospital, was in order to avoid conflict with the complainant party as the police would have taken the body of the deceased there for post-mortem examination, for which the complainant party would also be present, was a concocted story. In fact, the dead body of Mukhtiar Singh was taken to Civil Hospital, Zira itself for post-mortem and, therefore, the case put forward by defence was clearly a false story, and there was absolutely no material whatsoever on record to show that Bohar Singh or any other accused had received any injury in the said incident.

19. In view of the above, we do not find any force in the said appeal. Facts of the appeal do not warrant review of the findings recorded by the courts below. Appeal lacks merit and is dismissed accordingly.

Judgment Referred

[1] (2009) 13 SCC 0542
[2](2011) 7 SCC 0421
[3]AIR 1956 SC 0460
[4]AIR 1966 SC 1322
[5]AIR 1974 SC 1193
[6]AIR 2000 SC 160
[7] AIR 2011 SC 1403
[8]AIR 1973 SC 0055
[9](1996) 9 SCC
[10] (2008) 16 SCC 073
[11]AIR 2010 SC 3786
[12]AIR 2011 SC 3114
[13]AIR 2012 SC 1485
[14](1996) 10 SCC 0079