MADHYA PRADESH HIGH COURT

Mardansingh

Vs.

State of M.P

Criminal Appeals Nos. 13, 14, 15 and 22 of 1960, Decided on 18.8.1962, from order of 2nd Addl. S. J., Morena
(P.R. Sharma, J. (On Difference Of Opinion Between A.H. Khan and Shiv Dayal, Srivastava, JJ.)

29.12.1959. 18.8.1962

JUDGMENT

Sharma, J.

1. The facts of the case have been set out in great detail in the orders passed by the learned Judges who heard these appeals.

2. Sukhesingh, the deceased, lived at Durgadas-ki-Gadia - a hamlet of village Kirrainch. He had on the 20th of October, 1958 gone to attend a feast at the place of P. W. 5 - Chetsingh. He left for his house in the company of P. W. 1 - Gayaramsingh and P. W. 2 - Babu singh from Kirrainch at about 10 A.M. While these three persons were passing through a 'khand' accused Mardansingh, Yudhisthirsingh, Shivnathsingh armed with 'farsas' and Buddhesingh, armed with a stick, were seen lying in wait on the right-hand side. It is alleged that on the opposite side 5 other persons were standing, who on seeing Sukhesingh gave a signal to the present appellants about the approach of their enemy. On hearing this Yudhisthirsingh advanced and struck a blow with a 'farsa' on Sukhesingh's head, as a result of which he fell down. There-after blows were showered on the deceased by all the four appellants. After they had stopped beating they took Sukhesingh towards a rivulet. At this stage Gayaramsingh and Babusingh returned to Kirrianch and informed Chetsingh about what they had seen. Chetsingh went to Porsa police station through Durgadas-ki-Gadia. He left word with Gajendrasingh and Vijendrasingh to search for Sukhesingh in the 'khand'. On reaching the police station he lodged the first-information-report (Ex. P/4) at 4 P.M. It was stated therein that Babusingh and Gayaramsingh bad told him that the present

appellants had caught hold of Sukhesingh and forcibly carried him away towards the khand saying that they would kill him.
On the basis of this report P. W. 11 - Sri Rupchand Sharma S. I. P. registered an offence under section 364 Indian Penal Code and proceeded to the place of occurrence which is at a distance of about 4 miles from the police station. On reaching there he seized a 'safi' (Art. B) to which was tied a piece of paper (Article 3) from a pit. A cane (Art. A) was also found lying near the rivulet. On the next day he prepared the site-plan of the place of incident and seized blood-stained earth from the pit. From the pool of water nearby the trunk of a human body was recovered. Tied to the skeleton was the 'dhoti' (Art. C), and a piece of turban (Art. E) as also a rope (Art. H). These articles were seized under seizure-memo Ex. P/2.

3. P. W. 10 - Dr. Dube Medico-Legal expert J. A. Hospital Lashkar who examined the skeleton was of the opinion that it was of a male person above 25 years of age. On the same day Sri Rupchand Sharma registered an offence under section 302 Indian Penal Code against among others the present appellants. They were all found to be absconding. Shivnathsingh, Buddhesingh and Mardansingh were arrested on 29-1-1959; whereas Yudhisthirsingh was arrested on 9-5-1959.

4. It is not disputed before me that there were two parties among Thakurs of the village, and that prior to this occurrence Chhotesingh, a cousin of the present appellant Yudhisthirsingh, was murdered on the 23rd of May, 1958. Sukhesingh's son Meghsingh, his brother Bhausingh and other members of his family, were prosecuted by the police in respect of Chhotesingh's murder. Sukhesingh used to attend the Court in order to assist the defence. The appellants, all of whom belong to Chhotesingh's family, have, it is alleged, committed Sukhesingh's murder in order to wreck their vengeance on him.

5. Relying on the direct testimony of P. W. 1 - Gayaramsingh and P. W. 2 - Babusingh, as supported by other circumstantial evidence, the trial Court convicted the present appellants of offences under section 302 read with section 34 and Section 201 Indian Penal Code. The learned Judges, who heard the appeals, having differed in their opinion, the case has been referred for opinion to me.

6. The first-information-report in this case was, as stated above, lodged by Chetsingh on the basis of information alleged to have been given to him, soon after the incident,

by the two eyewitnesses Gyaramsingh and Babusingh. In this report all that was stated was that the present four appellants had forcibly carried away Sukhesingh; and that while doing so they had declared that they would rest at peace only after they had put Sukhesingh to death. At the trial both Gyaramsingh and Babusingh deposed that they had seen nine persons lying in wait at opposite Bides of the 'khand' - the four appellants being on the right-hand side; that three of the present appellants, namely Yudhisthirsingh, Mardansingh and Shivnathsingh, who were armed with 'farsas', and Buddhesingh, who was armed with a stick showered blows on Sukhesingh, after he had fallen down as a result of a 'farsa' blow given by Yudhisthirsingh. When the beating was over the present appellants, along with the other five accused, who were acquitted by the trial Court, carried away Sukhesingh's body towards the rivulet. According to Gyaramsingh, Sukhesingh was dead at that time; whereas Babusingh vaguely stated that they carried away Sukhesingh's body.

7. The first-information-report in this case was not made by an eye-witness, but by a person who claimed to have received an account of the incident from the eye-witnesses. It is a well established principle that a first-information-report is not substantive evidence and it can be used for the limited purpose of corroborating or contradicting the evidence given by the information in Court or of confirming or impeaching his credit. (See - *State of Bombay v. Rusy Mistry :.)*[1]In the present case Chetsingh has deposed that he was told by Gyaramsingh and Babusingh that all the nine persons who were prosecuted in this case, were seen present by them at the place of occurrence and that Sukhesingh had been killed due to blows given with 'farsas' and a stick by the present appellants. Whether one believes this statement of Chetsingh is a different matter altogether. The fact remains that he repudiates the first-information-report and supports fully the evidence given in Court by the two eye-witnesses. Chetsingh may be, and in this case I agree with my learned brothers that he is, a liar. The first-information-report can legitimately be used for discrediting the evidence given by Chetsingh. But once you discard his evidence on the strength of the first-information-report the matter ends there. The first-information-report lodged by Chetsingh cannot further be used to discredit the direct testimony of Gyaramsingh and Babusingh. On Chetsingh being found to be an untruthful witness, his previous statement as contained in the first-information-report, cannot be treated as substantive evidence in the case for convicting the present appellants of an offence under section 364 Indian Penal Code. No one has stated on oath in this case that he saw the present appellants forcibly carrying away Sukhesingh in order that he may be murdered.

Gayarmsingh and Babusingh have not deposed to that effect, nor has Chetsingh deposed that any such statement was made to him by the two eye-witnesses. The only basis for a finding that Gyaramsingh and Babusingh did not see anything more than what Chetsingh had stated in the first-information-report could be his report to the police. Such a use of the first-information-report, lodged by a person other than an eye-witness, cannot, in my opinion, be legally justified.

8. The Privy Council held in the case of *Begu v. Emperor,* [2] that Sections 236 and 237 would apply if having regard to the information available to the prosecuting authorities it was doubtful which one or more offence would be established by the evidence at the trial. A Full Bench of the Bombay High Court held in *D. K. Chandra v. The State,* [3] that section 236 relates not to distinct acts, but to a single act or series of acts.

The Calcutta High Court held in *Goloke Bihari v. Emperor,* [4] as follows :

> "The uncertainty referred to in section 236 of the Code must necessarily be an uncertainty arising out of a postulated set of facts, not an uncertainty regarding the facts which the prosecution may be ultimately able to establish. Therefore, Section 237 does not deal with a case where the evidence falls short of proving the offence which the prosecution had set out to prove; that would b
> e governed by section 238 if it could be made to apply."

These observations were quoted with approval by Das, J. in *Bijo Gope v. Emperor* [5] Narasimham, J. in *Indramani v. Chanda Bewa,* [6] also took a similar view and held that the applicability of section 236 is, limited to those classes of cases where it is doubtful which of several offences the facts, if proved, would constitute. Where, however, there is no doubt about the offences which those facts would constitute, neither section 236 nor Section 237, has any application. It was no doubt held in some cases that the doubt may be not only about the law applicable to the facts but also about the facts themselves. (See - *Nga Po Kyone v. Emperor* [7] and *Mangalsingh v. Rex)*.[8] But their Lordships of the Supreme Court have held in *Nanakchand v. State of Punjab,* [9] that the provisions of section 236 can apply only in cases where there is no doubt about the facts which can be proved, but a doubt arises as to which of several offences have been committed on the proved facts, in which case any number of charges can be framed and tried or alternative charges can be framed. In the present case the appellants were charged with having committed Sukhesingh's murder; whereas

Mardansingh, Buddhesingh and Shivnathsingh were further charged with the offence under section 201 Indian Penal Code. The evidence of Babusingh and Gyaramsingh at all stages of the case was clearly to the effect that these appellants made a concerted attack on Sukhesingh with 'farsas' and a stick, and caused several injuries to him. The charge under section 201 Indian Penal Code was based on the allegation made by these witnesses to the effect that Sukhesingh's dead body was removed from the spot, with intention to cause disappearance of the evidence of murder. If the allegations made against the appellants by Gyarmsingh and Babusingh to the effect that they had caused injuries to the deceased with 'farsas' and a stick, were believed, there could be no doubt that the offence of murder had been committed. In the present case the prosecution evidence, if believed, would lead to only one result; namely that Sukhesingh was murdered by the present appellants and his dead body was removed from the spot by Mardansingh, Buddhesingh and Shivnathsingh, along with the other accused who were acquitted, with a view to cause disappearance of the evidence of murder. It was no one's case at the trial that Sukhesingh was forcibly carried away by the present appellants from the place of incident in order that he may be murdered. Such a case was put forward only by Chetsingh in the first-information-report, and subsequently repudiated by him as also by the two eye-witnesses, on whose information the first-information-report was based. There could in the circumstances be no doubt as to what offences would be constituted by the facts, which could be proved in this case. I am, therefore, of the opinion that the present appellants cannot, on the charges framed and the evidence on record, be convicted with the and of Sections 236 and 237 Criminal Procedure Code of an offence under section 364, Indian Penal Code. The power of an appellate Court to alter a finding under Clauses (a) or (b) of Section 423 Cri. P. C. so as to convict the accused of an offence disclosed by the evidence on record, even though no charge in respect of that offence had been framed, is limited to cases falling under Sections 236 and 238 of the Code of Criminal Procedure. (See - *Zamir Qasim v. Emperor,* [10] Even the view to the contrary expressed in *Damei Sethi v. Udi Behera,* [11] and The *State v. Karu Gope,* [12] suggests that the appellate Court should not ignore the provisions of Sections . 237 and 238 Cri. P. C. while exercising its power to 'alter a finding'.

9. The accused were in the present case charged with murdering Sukhesingh and causing disappearance of his dead body. The evidence of the eye-witnesses had throughout been to that effect. The cross-examination of these witnesses would certainly have been on entirely different lines if the accused were told that they did not

commit a murderous assault on the deceased when they first laid their hands on him; but that they merely compelled him by force to go from one place to another in order that he may be murdered. Such a case would have been very different from the one with which they were charged, and which was sought to be proved by the direct testimony led by the prosecution in the case to the effect that they murdered Sukhesingh and thereafter carried away his dead. body. Yudhisthirsingh was not alleged to have taken part at all in carrying away Sukhesingh's body, whether dead or alive. It was presumably for this reason that he was not charged with the offence under section 201 Indian Penal Code. The examination of the present appellants under section 342 Criminal Procedure Code does not even remotely suggest that the accused were to meet a case of compelling Sukhesingh by force to go with them from the 'khand' to some other place; and that this was done by the accused in order that he may be murdered. I am, therefore, distinctly of the opinion that the alteration of conviction from section 302 and Section 201 Indian Penal Code to one under section 364 Indian Penal Code would result in prejudice to the accused. I have already observed above that there is no evidence on record on which such a finding could be legally based.

10. The fact that there were two factions amongst Thakurs, and that the present appellants and the deceased belonged to opposite factions is not disputed before me. There was bitter enmity between these two factions in consequence of which Chhotesingh, a cousin of the appellant Yudhisthirsingh, was murdered on 23-5-1958. Sukhesingh's son Meghsingh, his brother Bhausingh and other members of his family were prosecuted by the police in respect of Chhotesingh's murder. It is also an admitted fact that the fathers of Gyaramsingh and Babusingh respectively were also being tried in that case. Sukhesingh used to attend Court in order to assist the accused in their defense. On these facts there could be no doubt that both Gyaramsingh and Babusingh were on inimical terms with the present appellants. Gyaramsingh had stated in the Committing Court

On being confronted at the trial with this portion of his statement he replied as follows :

> This answer would only show that the witness has scant regard for truth. Another statement marked as B to B in Ex. D/1 which he made in the Committing Court was completely disowned by the witness at the trial. In the same statement the witness had admitted that he had not told Chetsingh that

blows with 'farsas' were struck by his assailants on Sukhesingh's person. At the trial the witness stated that he had narrated to Chetsingh the entire story including the assault on Sukhesingh with 'farsas' and a stick. The statement to the contrary marked C to C in Ex. D/1 was entirely disowned by the witness.

11-13. (His Lordship discussed the evidence of Babusingh and Gyaramsingh in the light of other evidence and proceeded :)

14. In the circumstances stated above, I consider it highly unsafe to base an order of conviction on their sole testimony, without there being any evidence on record to show that Sukhesingh was in fact murdered in the circumstances and the manner suggested by them.

15. In the result I am of the opinion that each of the present appellants is entitled to the benefit of doubt and that their appeals should, therefore, be accepted.

Khan and Shiv Dayal, JJ.

16. According to Section 429 Criminal Procedure Code an order of acquittal is passed in consonance with the opinion of the third Judge. Appeal is allowed and the accused acquitted.

Appeals allowed.

Cases Referred.

1. AIR 1960 SC 391
2. AIR 1925 PC 130
3. AIR 1952 Bom 177
4. AIR 1938 Cal 51
5. AIR 1945 Pat 376
6. AIR 1956 Ori 191
7. AIR 1933 Rang 236
8. AIR 1949 All 599
9. AIR 1955 SC 274
10. AIR 1944 All 137 (FB)
11. AIR 1954 Ori 145

12. AIR 1954 Pat 131