[2024] 7 S.C.R. 50 : 2024 INSC 482

Vishwanatha
v.
The State of Karnataka by the Secretary, Home Department

(Criminal Appeal No. 129 of 2012)

08 July 2024

[Sudhanshu Dhulia* and Prasanna B. Varale,JJ.]

Issue for Consideration

High Court reversing the order of acquittal found the appellant along with co-accused (now deceased) guilty of offences under Sections 302 and 450 read with Section 34 of Penal Code, 1860 and sentenced them. In view of doubt as regards the identity of the appellant, whether it was the accused persons who were responsible for the death of PW-1 and PW-3's mother.

Headnotes†

Evidence – Test Identification Parade (TIP) – Absence of – When fatal – As per the prosecution, the appellant and the co-accused (now deceased) broke into the house of PW-1 and PW-3 to commit robbery when they were not at home and killed their old mother – However, this was witnessed by PW-1 when she returned home at around 12:30 in the afternoon but, she could not enter the room as it was locked from inside – On raising alarm, PW-2, a neighbour came and they both peeped through the window of the bedroom and saw the incident – TIP not conducted, PW-1 and PW-2 identified accused in Court – Trial Court acquitted the accused persons – Acquittal reversed by High Court – Correctness:

Held: As per the eyewitnesses, PW-1 and PW-2 they saw the two accused strangulating PW-1's mother by pulling both ends of the rope – However, their evidence does not corroborate with the post mortem report – The report does suggest that the deceased was indeed strangulated to death but, it could not be in the manner as seen by PW-1 and PW-2 as the ligature mark extended only from one angle of the mandible to the other and no such mark was seen at the back of the neck – Absence of any reasonable explanation as to how PW-1 reached her house in a

* Author

short span of time of $2^{1/2}$ hours, after leaving home at 10:00 AM, creates doubt on the prosecution story – Furthermore, appellant was not known to any of the witnesses and more pertinently, the two eyewitnesses – Co-accused was related to the complainant and was thus, known to the eyewitnesses – Hence, there was no requirement of TIP as regards him – But, the appellant was a total stranger to PW-1 and PW-2 – His name 'Vishwanatha' came to their knowledge, only after co-accused called him by name exhorting him to run – The identification of an accused in court is acceptable without a prior TIP and absence of TIP may not be fatal for the prosecution – It would depend on facts of each case – In a case where the identity of the accused is not known and TIP has not been conducted, the court has to see if there was any description of the accused either in the FIR or in any of the statement of witness recorded during the investigation – There was none in the present case – There were six persons by the name of 'Vishwanatha' in the locality and when there is doubt on the presence of the two star witnesses PW-1 and PW-2 (who identified the accused), the identity of the present appellant remained in doubt – Not safe to convict the appellant solely only on the basis of the testimony of PW1 and PW2 – Prosecution not able to prove its case beyond reasonable doubt – Appellant acquitted by giving him the benefit of doubt – Impugned judgment set aside as far as it relates to the conviction of the appellant. [Paras 13-17, 19]

Case Law Cited

Mulla v. State of U.P. [2010] 2 SCR 633 **: (2010) 3 SCC 508;** *Malkhansingh v. State of M.P.* [2003] Supp. 1 SCR 443 **: (2003) 5 SCC 746 – relied on.**

List of Acts

Penal Code, 1860.

List of Keywords

Test identification parade; Absence of test identification parade; Order of acquittal reversed; Doubt as regards the identity of the accused; Robbery; Stareyewitnesses; Identity of accused not known; Identification of accused in court; Prior TIP; Description of accused either in FIR/ statement of witness; Benefit of doubt; Case not proved beyond reasonable doubt.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.129 of 2012

From the Judgment and Order dated 06.06.2009 of the High Court of Karnataka at Bengaluru in CRLA No. 1217 of 2002

Appearances for Parties

X M Joseph, Omanakuttan K. K., Antony Ignatius M J, Advs. for the Appellant.

R Nedumaran, D. L. Chidananda, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Sudhanshu Dhulia, J.

1. The appellant in this Criminal Appeal challenges judgement and order dated 06.06.2009 passed by the High Court of Karnataka which has allowed the Criminal Appeal of the State; thereby reversing the order of acquittal of the Trial Court, thus convicting the present appellant of offences under Sections 302 and 450 read with Section 34 of the Indian Penal Code and sentenced him, *inter alia*, to life imprisonment, under Section 302 of IPC.

2. The case of the prosecution is that Rohini (PW-1) and Rohithaksha (PW-3) were residing with their mother Devaki (deceased; aged 86 y/o) at Kudupu, Mangalore. Devaki was strangulated to death by the present appellant and co-accused Ravikumar. On 26.12.2000 when PW-1, PW-3 and PW-4 (wife of PW-3) were not present in their home, and their 86-year-old mother was alone, the present appellant and the co-accused broke into their house with the intention to commit robbery and killed Devaki. A written complaint was filed before the police at 2:30 p.m. by PW-1 which formed the basis of the FIR which was registered at PS: Mangalore Rural Circle at approximately 3:00 p.m, in which the two accused Ravikumar and the present appellant Vishwanatha were named.

3. In the FIR, it was mentioned that on that fateful day (26.12.2000), she (i.e. PW-1/Complainant), had gone out for some work and when she returned home at about 12:30 in the afternoon, she heard some

sound coming from inside her house which alerted her, but she could not enter the room as it was locked from inside. PW-1 then raised an alarm and as a result PW-2, who is a neighbour came for her help. Then both PW-1 and PW-2 managed to peep through the window of the bedroom, where they saw that the accused had twisted a cloth around the neck of the deceased (PW-1's 86-year-old mother), which they were pulling at the two ends, each holding one end of the rope. PW-1 recognised the first accused as Ravikumar as he was the nephew of PW-4 (the daughter-in-law of the deceased). PW-1 called Ravikumar by name which alerted the two and they escaped.

4. The police submitted its chargesheet on 05.03.2001 against both the accused, who were caught the same day. The case was committed to Sessions and ultimately assigned to the Court of II[nd] Additional Sessions Judge, Mangalore who framed charges against the accused on 20.09.2001 under sections 450 and 302 read with 34 of IPC. The prosecution examined 18 witnesses and 11 documents as exhibits placed by the prosecution. The Sessions Judge passed its order on 18.12.2001 acquitting both the accused.

5. What weighed with the Sessions Court was the apparent contradictions between the oral testimony and autopsy report. PW-1 and PW-2 who were eye-witnesses to the crime and had identified both the accused and had deposed that the two had committed the murder of Devaki. Dr. Bhaskar Alva, (PW-6) Sr. Specialist in Wedlock District Hospital, Mangalore who conducted the post-mortem of deceased-Devaki on 26.12.2000 had given his opinion that the cause of death was asphyxia as a result of strangulation. The Sessions Court observed that PW-1 and 2 had deposed that cloth was tied around the neck of the deceased which was used to strangulate her, however, PW-6 had deposed there were no ligature marks on the back of the neck of the deceased. Under these circumstances, the Sessions Court discredited the two eye-witnesses, PW-1 and PW-2 and also noted the discrepancies in the deposition of PW-1 as regards the identity of the appellant and consequently his role in the crime.

6. The appeal of the State against this acquittal was allowed by the High Court on 06.06.2009, which reversed the order of acquittal, and found both the accused guilty of offences under Sections 302 and 450 read with Section 34 of IPC and sentenced them to Rigorous Imprisonment for 5 years and Rigorous Imprisonment for life along

with fine of Rs. 5,000/- respectively. The High Court held that the contradictions in the case of prosecution were minor and not material enough to warrant acquittal of the accused persons. These were the observations made by the High Court at paragraph 27 of the Impugned Judgement:

> ***"27.*** *Test Identification Parade not being conducted for the identification of accused No. 2 is also not fatal to the prosecution because by 6'O clock in the evening both accused Nos. 1 and 2 were apprehended and produced before the investigating officer P.W.18. It is also apparent on record that when accused No. 1 uttered the name of accused No. 2 both P.Ws. 1 and 2 learnt the name and they had seen exactly what was happening inside the bedroom. Therefore, question of mistaking in identifying accused Nos. 1 and 2 does not arise. However, both P.Ws. 1 and 2 identified accused Nos. 1 and 2 before the Court. The time gap between the date of crime and the evidence being only 10 months, we are of the opinion that it was quite possible for any who witnesses and especially P.W.1 to remember the details of the assailants who took the life of her mother. Therefore, this discrepancy also would not come in the way of the prosecution."*

7. Shortly after the Judgement was passed by the High Court, Ravikumar, who was accused no. 1 passed away. The present criminal appeal thus has been filed on behalf of the remaining accused Vishwanatha.

8. The learned counsel on behalf of the appellant would argue that PW-1 and PW-2 are not credible witnesses pointing again towards the contradictions in their testimony and autopsy report. He would submit that there has been no test identification parade (hereinafter referred to as 'TIP') to establish the identity of the appellant who was a total stranger to the two witnesses and in the absence of TIP, the appellant cannot be convicted, as then it cannot be said that the prosecution has proved its case beyond a reasonable doubt.

9. The learned counsel for the State would argue that the High Court has rightly observed that this is not a case of mistaken identity. Further, TIP is not a substantive piece of evidence and absence of TIP would not be fatal for the prosecution case as PW-1 & PW-2 had already identified the accused before the court. As far as discrepancies in

the testimonies of the witnesses are concerned, they are minor in nature and do not affect the case of prosecution in any manner.

10. We have heard the submissions of the learned counsel of the State and that of the State and also perused the material on record.

11. In the present case, there are concurrent findings by both the courts below as to the death of the deceased Devaki, being a homicidal death and these findings are corroborated by the testimony of PW-6, the doctor who conducted the autopsy and issued the post-mortem report on 26.12.2000. There cannot be any doubt that the death of the deceased was homicidal and the only question for determination before this Court is whether it is the accused persons who were responsible for this death?

12. PW-1 and PW-2 are the star witnesses of the prosecution. They had deposed during the trial that the two accused had strangulated the deceased to death. PW-1 had said that on the day of the incident, she left home at around 9:30 in the morning and when she returned at 12:30 in the afternoon she found that her room was bolted from inside and then she heard her mother screaming. It was then that she called PW-2 for help. PW-1 further states that she saw through the window both the accused strangulating her mother by pulling the rope at the two ends. She further states, that when PW-1 called one of the accused Ravikumar by name, who she immediately recognised being their relative, Ravikumar called the name of the other accused i.e., the present appellant and the two escaped. The relevant extract of the deposition given by PW-1 on 22.10.2001 before the trial court is reproduced below:

> *"…When I came to courtyard of our house I heard sound full of pain and scream. I found that both the bolts of the house was locked inside. Immediately I called my neighbour Rajesh. He came there. Since Northern side of window was kept opened my self and Rajesh peeped inside the room……we saw in the western side of the room and found Accused Ravi, who is standing before the Court now and he used to twist the cloth rope and put round the neck and caught one end of rope. Another end of the rope was in the hands of another person. They were tightening the rope, which was round the neck of my mother. I made a big noise. I addressed Accused Ravi "what he is doing" (In Tulu*

'Dane Malpuva'). What is he doing, I asked. Immediately he (Accused Ravi) told Accused Vishwananth that "the work is spoiled", you run (In Tulu 'KelasaKettand'). Said accused ran through the back door of the house, after unlocking bolts. My neighbour Rajesh followed them in the back of them……..when seeing my mother I found her right leg and right hand was in twisting condition and found no clothes on the body of my mother and found little temperature in the body. Immediately called Dr.K.B Shetty by phone…..After 10 minutes from my phone call, doctor came there. After coming to our house, said doctor examined my mother and told us that she was dead…."

PW-2 also claimed to have seen the incident from the window along with PW-1 and he then narrates his unsuccessful attempt to catch the accused persons. The relevant portion of PW-2's examination-in-chief is as follows:

"When seeing through the window we found mother of Rohini (PW-1), Smt. Devaki (deceased) was on the cot. On the right side of Devaki, Ravikumar was standing and in another side another accused was standing. We found cloth was rolled round neck of Devaki. The one end of cloth rope was found in the hands of 1st Accused and cloth ropes another end was found in the hands of 2nd Accused. Both accused were, found dragging the cloth rope on both sides……Accused ran away through back door of the house."

13. The above evidence of PW-1 and PW-2, all the same, does not corroborate with the post mortem report, which shows that the ligature marks, though round the neck, but are missing on the back of the neck. If the testimony of PW-1 and PW-2 is to be believed then the ligature marks should have been all round the neck, including the back. The ante mortem injuries in the post mortem report are as follows:

"On examination, I found the following external injuries:

(i) Ligature mark round the neck above the thyroid cartilage, extending from 1 angle of mandible to the other- size 8"x ¾"

(ii) Finger nail marks over the tip of the nose.

(iii) Fracture of both legs below the knee and fracture of right forearm below the elbow"

The report does suggest that the deceased was indeed strangulated to death. But it could not be in the manner as seen by PW-1 and PW-2 (who had seen the two accused strangulating the 86 years old woman by pulling both ends of the rope) as the ligature mark extended only from one angle of the mandible to the other and no such mark was seen at the back of the neck. Had the strangulation been in the manner as described by PW-1 and PW-2, the ligature marks would have been different.

14. The aspect which perhaps weighed heavily in the mind of the Trial Court which had acquitted the two accused was the fact that the first complaint, inquest report, the 'autopsy report' and the ocular evidence of PW-1 (also of PW-2) did not match. Having regard to the positioning of the bed on which the deceased was allegedly strangulated, the trial court has given a finding that it would be highly improbable for two persons to strangulate the deceased by pulling the two ends of the rope of cloth from behind, since the cot was touching the northern and western walls. Moreover, the fact that Dr. K.B Shetty, (who was the first doctor to examine the deceased within 10 minutes of the incident), was never examined by the prosecution. The absence of any reasonable explanation as to how PW-1 reached her house in a short span of time of $2^{1/2}$ hours, after leaving home at 10:00 AM[1], creates doubt on the prosecution story. Trial Court also expressed its doubt as to the involvement of the present appellant (Accused No.2), as no TIP was conducted. This aspect was argued at length before this Court as well, since it goes to the very root of any criminal trial. Admittedly, no TIP was conducted in the present case. This Court in ***Mulla v. State of U.P.*****, (2010) 3 SCC 508** had emphasized the scope and object of TIP as follows:

"55. The identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was

1 The complaint (Ex.P1) given by PW-1 to the PSI on the spot, mentions that she left her house at around 10.00 am, whereas in her deposition before the Trial Court, she mentions the time as 9.30 am.

seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence."

15. This Court in ***Malkhansingh v. State of M.P*** ***(2003) 5 SCC 746***[2] has held that:

"The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings."

In the case at hand, it is an admitted position that the Appellant was not known to any of the witnesses and more pertinently, the two eyewitnesses, PW1 and PW2.

16. Coming back to the facts and circumstances of the present case, it is an admitted fact that Ravikumar (Accused No.1, now deceased) was known to the eyewitnesses and was also related to the complainant. Hence, there was no requirement of TIP as regard to Ravikumar (accused no.1). But the case of appellant- Vishwananth stands on a different footing. He was a total stranger to the two eye witnesses i.e. PW-1 and PW-2. The name 'Vishwanath' came to their knowledge, only after Ravikumar (Accused no. 1) called his co-accused, by name exhorting him to run. In a case where the identity of the accused is not known and TIP has not been conducted, the court has to see if there was any description of the accused either in the FIR or in any of the statement of witness recorded during the investigation. There is none in the present case.

The identification of an accused in court is acceptable without a prior TIP and absence of TIP may not be fatal for the prosecution. It would depend on facts of each case. In the case at hand, though the appellant was identified in court by PW-1 and PW-2, the Trial Court

2 Para 7.

did not attach much weight to it, as no identification proceedings were conducted, and the Court found it unsafe to acknowledge the identity merely on the basis of identification in the Court.

In the present case, where there are six persons by the name of 'Vishwanatha' in the locality and where this Court has doubts on the presence of the two star witnesses PW-1 and PW-2 (who have identified the accused), we are of the opinion that the identity of the present appellant remained in doubt.

17. Another fact which casts a doubt on the identity of the present appellant, is that there is no description in the FIR of 'Vishwanatha' except that his name is mentioned. He then becomes the first of the two to be arrested by the police. Learned counsel of the appellant would submit that there were six persons by the name of 'Vishwanantha' in Kudupu village at the relevant point of time, a fact which was placed by the defence during trial, which has not been confronted. In such a situation, it was the duty of the prosecution to show as to how and on what basis, the appellant came to be apprehended by the police. The Sub-Inspector, PS-Mangalore Rural (PW-19), who apprehended the appellant, had also failed to explain how he came to apprehend the appellant without any information regarding his description. In his examination-in-chief, the Sub-Inspector (PW-19) explained the arrest of the appellant in the following manner:

> *"2. In respect of this case, crime no.388-2000 on 26.12.2000 my inspector instructed me to find out the accused. The same day myself and my staff taken into custody the accused Vishwananth at 4:30 PM near Goraksha Jnana Mandira, Near Kadri Park, Mangalore. Said accused is before the Court. I identify him. With the help of Vishwanath we had arrested another accused, Ravi Kumar at 5 P.M in a 'Galli' near State Bank of Mysore, Silver gate, Kulashekara, Mangalore…"*

A perusal of the testimony of the Sub-Inspector/PW-19 indicates that there is not even a whisper as to what formed the basis of the appellant's arrest. He was cross-examined and what was gathered from his cross-examination is that the appellant was arrested in absence of any independent witnesses and without preparing any arrest memo. All these facts combined together cast a doubt on the

identity of the appellant. Thus, it is not safe to convict the appellant solely only on the basis of the testimony of PW1 and PW2, which itself.

18. Another aspect which needs to be considered is that the prosecution case rests primarily on the evidence of PW-1 and PW-2, who were the star witnesses. The admitted case of the prosecution is that PW-1, who is the daughter of the deceased, had gone out for some household work and there was no one in the house when the crime was committed. First, PW-1 had gone to a place named 'Kulshekara' and then to the Post Office, and in the end to her uncle's house at 'Ullal'. The distance between her residence at Kudupu and Ullal is about 20 km. She first walks some distance and then catches a bus to reach Kulshekara and from there she went to the post office, and after attending to her work, she takes a bus to go to her uncle's house at Ullal. Finally, she returned home in Kudupu and all of this was done by her within a period of 2½ hours. But this is not enough, as per the prosecution version, she also reached her house at the very moment when the deceased was being strangulated and then peeping through the window pane, she witnessed the two accused pulling the two ends of the rope. She called Accused no. 1-Ravikumar by his name, which led to the two accused fleeing from the spot and PW-2 who is the neighbour, chased them but in vain. This whole story of the prosecution is unbelievable for more reasons than one. Even if it is assumed for the sake of argument that PW-1 had reached the house at the exact time when the crime was being committed, the testimony to the effect that her mother was strangulated to death by a rope-like material, in the manner narrated by her, is not corroborated by the post-mortem report where ligature marks on the neck were not found to be encircling the neck in a round manner, as it should have been in such a case of strangulation. There were no ligature marks on the back of the neck. As discussed earlier, the marks were only on the front side extending from one angle of the mandible to the other. We therefore conclude that the prosecution has not been able to prove its case beyond reasonable doubt.

19. In view of the above, we allow this appeal and acquit the appellant in this case by giving him the benefit of doubt. Consequently, the impugned judgment and order dated 06.06.2009 is set aside as far as it relates to the conviction of the appellant, and the order of acquittal

of the Trial Court is upheld qua the appellant. The appellant, who is already on bail, need not surrender. His bail bonds and sureties stand discharged.

Pending application(s), if any, also stand(s) disposed of.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey