

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CRA-D-728-DB-2004
Reserved on : 29.01.2020
Date of decision : 02.03.2020

Om Parkash alias Kala

... Appellant

Versus

The State of Haryana

... Respondent

CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: Mr.V.K.Sachdeva, Legal Aid Counsel with
Ms.Savi Nagpal, Advocate and
Mr.Mohit Dahiya, Advocate
for the appellant.

Mr.Vivek Saini, DAG, Haryana.

RAJIV SHARMA, J.

This appeal has been instituted against the judgment dated 27.07.2004 and order dated 28.07.2004 rendered by the learned Sessions Judge, Kurukshetra, in Sessions Trial no.8 of 2004 whereby, the appellant was charged with and tried for the offence punishable under Section 302 of the Indian Penal Code (in short 'IPC'). The appellant was convicted thereunder and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.5,000/- and in default of payment of fine, to further undergo rigorous imprisonment for six months.

2. The case of the prosecution in a nutshell is that complainant Des Raj resident of Village Murtazapur was brother of deceased Vir Bhan as well as accused Om Parkash alias Kala. Vir Bhan had constructed a room in his bara. He was residing with his family in village Foosgarh, District

Karnal. Accused Om Parkash alias Kala was residing with his family in the room of Vir Bhan. The accused was addicted to drinking. He used to beat his family members under the influence of liquor. About 4/5 days before this occurrence, accused Om Parkash under the influence of liquor, armed with kulhari (axe) started chasing his wife. Other persons rescued her. The wife of accused along with her children went to her parental home. Two days before this occurrence, Vir Bhan had come to his native village Murtazpur to sacrifice lamb. Vir Bhan was staying with the accused. On 17.10.2003, complainant Des Raj had seen both the deceased and the accused taking liquor together during the day time. On the night between 17/18.10.2003, both the deceased and the accused were sitting in the bara. They had some altercation about the bara and the room. Des Raj and his brothers Chhitar Ram and Ram Dia counselled the deceased and the accused. At about 7.00 A.M. on 18.10.2003 accused Om Parkash came to the house of complainant Des Raj and told that he had finished Vir Bhan and asked the complainant to look after the deceased. The accused ran away. Des Raj along with his brothers Chhitar Ram and Ram Dia went to bara of Vir Bhan. Vir Bhan was lying dead on a cot in front of the room. They noticed cut (injury marks) of axe on his neck, back of head, right shoulder etc. According to the complainant, there was enmity between the brothers over bara and room. Des Raj made statement Ex.PF on the basis of which FIR Ex.PF/2 was registered. The dead body was sent for post-mortem examination. Dr.Surinder Kumar and Dr. Sarah Aggarwal conducted the post-mortem examination. Accused was arrested. He made disclosure statement Ex.PH/2. The investigation was completed. The challan was put up after completing

all the codal formalities.

3. The prosecution examined a number of witnesses. Statement of the appellant was recorded under Section 313 Cr.P.C. He denied the case of prosecution. The appellant was convicted and sentenced, as noticed hereinabove. Hence, this appeal.

4. Learned counsel appearing on behalf of the appellant have vehemently argued that the prosecution has failed to prove the case against the appellant.

5. Learned counsel appearing on behalf of the State has supported the prosecution case.

6. We have heard learned counsel for the parties and have gone through the judgment and record very carefully.

7. PW-1 Dr.Surender Kumar testified that he along with Dr.Sarah Aggarwal conducted the post-mortem examination on the dead body of Vir Bhan. He noticed the following injuries on the person of deceased:-

“1. Incised wound 12 cm x 4 cm starting from chin middle going to right side of neck.

2. 10 cm x 6 cm incised wound placed 1 cm below injury no.1 starting from center going to left side of neck.

3. Incised wound 5 cm x 2 cm on neck placed slightly towards right side.

4. Incised wound 7 cm x 2 cm placed on the centre of neck.

5. Incised wound 3 cm x 0.5 cm on neck placed 2 cm below injury no.4.

On dissection of neck, all the structures underlying in the neck were cut, i.e. both jugular veins, both carotid arteries, trachea, muscles of neck and thyroid carotid was cut. Clotted and liquid blood was present in and around the wound.

6. *Incised wound 14 cm. long curved with avulsion of scalp present on the right occipital region. It was bone deep and underlying bone was found to be fractured. On dissection of skull, haematoma was present in the cranial cavity.*

7. *4 cm. x 5 cm incised wound on the hip of right shoulder joint. It was skin deep and clotted blood was present.*

8. *5 cm x 0.5 cm incised wound on the hip of right shoulder 1 cm. away from injury no.7. Clotted blood was present.”*

The cause of death, in their opinion, was haemorrhage and shock as a result of injuries which were ante mortem in nature and sufficient to cause death in ordinary course of nature. Probable duration between injuries and death was within few minutes and between death and post-mortem examination was within 6 to 24 hours. In his cross-examination, he deposed that possibility of death having taken place around 5.00 P.M. on 17.10.2003 could not be ruled out.

8. PW-3 HC Raj Kumar led his evidence by filing affidavit Ex.PC. According to the averments made in the affidavit, PW-12 SI Paras Kumar had deposited with him on 18.10.2003 clothes of deceased Vir Bhan

as well as one parcel containing axe, sealed with seal 'MS' along with sample seal.

9. PW-6 Des Raj deposed that they were five brothers. All the five brothers were living separately. Vir Bhan had constructed a room in bara in the village Murtzapur. Vir Bhan along with his family was residing in village Foosgarh, District Karnal. He had given this room to accused for residence. Accused was residing there with his family. Accused was habitual of drinking liquor. He used to beat his wife and children. About 4/5 days before murder of Vir Bhan, accused Om Parkash started beating his wife and children. Accused armed with axe started chasing his wife to kill her. Neighbours rescued her. Then she went to her parental home along with her children. Two days before his murder, Vir Bhan came to Murtzapur to sacrifice lamb. He was staying with accused. Vir Bhan and accused Om Parkash were consuming liquor for two days. The deceased and the accused started quarreling with each other after consuming liquor in the bara. All the three brothers counselled the accused and the deceased. They came back to their home. In the next morning, i.e. on 18.10.2003 at about 06.00 A.M., accused came to him and told that he had killed Vir Bhan and asked him to look after the deceased. All the brothers went to the spot. They saw the dead body of Vir Bhan lying on the cot. He went to Ex.Sarpanch Pirthi Ram. Thereafter, he got recorded his statement Ex.PF. In his cross-examination, he deposed that village Foosgarh might be 50 kms. from their village but he had not seen village Foosgarh. Vir Bhan was married in village Foosgarh. He was residing there for 15 years. He had seen Vir Bhan alive lastly at 8.00/9.00 P.M. on 17.10.2003. Accused Om Parkash stayed in the room at that bara room during the night of occurrence.

10. PW-7 Chhitar Ram deposed that Vir Bhan had a room in bara in village Murtzapur. Accused was residing in that room. Vir Bhan was living in village Foosgarh along with his family. About 2/3 days before the occurrence, accused had beaten his wife and children. He chased his wife with an axe to kill her. Neighbours saved her. Vir Bhan came to Murtzapur two days before his murder. He stayed with the accused. He had come with a lamb to sacrifice. The accused and the deceased consumed liquor during day time. In the evening, they were quarreling with each other. They went there and counselled them. Next morning at about 7.00 A.M. accused came to Des Raj and told that he had killed Vir Bhan. They went to bara. They noticed some injuries on the throat, one on the neck and two on the back. Des Raj went to the police station. Police came to the spot. Police seized the axe from the heap of wood on the same day, i.e. on 18.10.2003. The dead body was lying on the cot. He was declared hostile and was cross-examined by the learned Public Prosecutor. He denied the suggestion that he produced the accused before the police on 19.10.2003 and then he made disclosure statement and got recovered the axe and his blood stained clothes from the heap of wood. On the other hand, on 18.10.2003 itself, accused had been tied with a tree and he made disclosure statement that the axe was kept in the heap of wood. Disclosure statement Ex.PH/2 was also thumb marked by him. He denied the suggestion that he was confusing the date and in fact the accused was arrested on 19.10.2003 on being produced by him. In his cross-examination by learned defence counsel, he deposed that accused made disclosure statement when he was beaten up by the police while being tied with a tree.

11. PW-8 Ram Kumar deposed that on 19.10.2003 he was posted

as Head Constable in Police Station Pehowa. Chhitar Ram produced the accused before SI/SHO Paras Kumar at bus stop of village Murtzapur. On interrogation, the accused made disclosure statement Ex.PH/2 that he had kept hidden a blood stained axe and his own clothes in the heap of wood lying near southern western corner of his house and nobody was aware of it. The disclosure statement was thumb marked by the accused and Chittar Ram and signed by him. Accused got recovered the axe and the clothes from the stated place.

12. PW-9 ASI Maya Chand deposed that police went to the spot along with the complainant. The cot was stained with blood. Pieces of niwar were cut from the said cot. Blood stained earth was also lifted.

13. PW-11 Constable Rishi Pal had prepared the site plan Ex.PL.

14. PW-12 Paras Kumar recorded the statement of Des Raj vide Ex.PF on the basis of which FIR Ex.PF/2 was recorded. He went to the spot. He prepared the inquest report Ex.PB. He lifted the blood stained earth and prepared its sealed parcel. He prepared rough site plan Ex.PM. On 19.10.2003 also, search for accused was carried out. Chhitar Ram produced accused Om Parkash before him. He interrogated him. Accused made disclosure statement Ex.PH/2. He got recovered the axe and the clothes from the heap of wood lying in the court yard. These were taken into possession. In his cross-examination, he deposed that accused was not found in the village on 18.10.2003. After 18.10.2003 Chhitar Ram and Ram Dia did not come to police station. On 19.10.2003 they met him. Chhitar Ram met at bus stop Murtzapur. Accused was produced before him at about 11.00 A.M. He tried to join some independent witnesses. He interrogated the accused in open space in front of bank.

15. According to FSL report Ex.PK, exhibit 2 (Niwar), exhibit 3a (shirt), exhibit 3b (pants), exhibit 3c (banian), exhibit 3d (underwear), exhibit 4a (shirt), exhibit 4b (pants) and exhibit 5 (kulhari / axe) were stained with blood.

16. PW-11 Constable Rishi Pal had prepared site plan Ex.PL after inspecting the spot. He had categorically admitted in his cross-examination that he had not shown pile of wood in the site plan. He had not shown any peepal tree in the site plan. We have seen Ex.PL, i.e. site plan prepared by PW-11 Constable Rishi Pal. Neither pile of wood nor peepal tree has been shown in Ex.PL. Site plan of place of recovery of axe and clothes is Ex.PH/3. In this heap of wood and peepal tree have been shown at place 'A'. There is variance in the site plan earlier prepared vide Ex.PL and Ex.PH/3. In case there was pile of wood and peepal tree, PW-11 Constable Rishi Pal could not miss the same. In the inquest report, there is also rough site plan where neither heap of wood nor tree was shown.

17. PW-1 Dr.Surender Kumar in his cross-examination admitted that possibility of death having taken place around 5.00 P.M. on 17.10.2003 could not be ruled out. PW-6 Des Raj deposed that he had seen his brother alive lastly at about 8.00/9.00 P.M. on 17.10.2003. According to PW-6 Des Raj and PW-7 Chhitar Ram, the accused and the deceased were drinking for the last two days but the viscera was not sent to find out the presence of ethyl alcohol in the viscera.

18. The prosecution case is that the deceased was living at village Foosgarh. Accused had driven away his wife. The wife of accused has not been cited as a witness. The prosecution has also not examined the wife of deceased Vir Bhan. There was no litigation between the accused and the

deceased, rather the evidence as noted above is that they were drinking for the last two days.

19. PW-7 Chhitar Ram categorically stated in his examination-in-chief that the police apprehended the accused on 18.10.2003 itself. Police on search seized the axe from the heap of wood. He was declared hostile and cross-examined by the learned Public Prosecutor. He specifically denied the suggestion that accused was arrested on 19.10.2003 and axe and blood stained clothes were recovered from the heap of wood. He further stated in his cross-examination by the learned Public Prosecutor that accused was tied with a tree on 18.10.2003 and he disclosed that he had kept the axe in the heap of wood and it was recovered from there. However, PW-8 HC Ram Kumar deposed that accused was produced before SI/SHO Paras Kumar on 19.10.2003 and he made disclosure statement Ex.PH/2. PW-12 SI Paras Kumar deposed that Om Parkash was not found in the village on 18.10.2003. On 19.10.2003 they met Chhitar Ram and Ram Dia. Chhitar Ram produced the accused before him at 11.00 A.M. There is major contradictions in the statement PW-7 Chhitar Ram (brother of deceased) and the official witnesses. According to PW-7 Chhitar Ram, accused was arrested on 18.10.2003 itself and according to PW-8 HC Ram Kumar and PW-12 SI Paras Kumar, accused was arrested on 19.10.2003.

20. According to PW-7 Chhitar Ram and PW-4 HC Raj Kumar, recoveries were made on 18.10.2003 and the same were deposited in the Malkhana with HC Raj Kumar by SI Paras Kumar. However, PW-8 HC Ram Kumar and PW-12 SI Paras Kumar deposed that accused was arrested on 19.10.2003. Accused made disclosure statement Ex.PH/2 on the basis of which recoveries were made on 19.10.2003. According to PW-3 HC Raj

Kumar, the axe and clothes worn by the deceased were already deposited in the malkhana on 18.10.2003. There was no occasion to recover the same on 19.10.2003 on the basis of disclosure statement Ex.PH/2 made by accused.

21. The defence taken by the accused in his statement recorded Section 313 Cr.P.C. is that he was tied with peepal tree and he made disclosure statement after being beaten. PW-7 Chhitar Ram in his cross-examination also admitted that accused was tied with tree and thereafter he made disclosure statement. Thus the disclosure statement made by accused was also not voluntary.

22. There are major contradictions in the statements of witnesses. It casts doubt on the story of the prosecution. The motive attributed to the appellant is also very weak. The prosecution has failed to prove the case against the appellant beyond reasonable doubt.

23. Accordingly, the appeal is allowed. The judgment dated 27.07.2004 and order dated 28.07.2004 are set aside. The appellant is acquitted of the charges. The appellant is on bail. His bail bonds and surety bonds are discharged.

(RAJIV SHARMA)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

March 02, 2020.

Davinder Kumar

Whether speaking / reasoned

Yes/No

Whether reportable

Yes/No