2022 INSC 678

M NO.1504 COURT NO.5 SECTION II-A
(FOR JUDGMENT)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Criminal Appeal No(s). 466/2018

VIRENDRA Appellant(s)

VERSUS

THE STATE OF M.P. Respondent(s)
([HEARD BY: HON. SANJAY KISHAN KAUL AND HON. M.M. SUNDRESH, JJ.])

Date : 11-07-2022 This appeal was called on for pronouncement of judgment today.

For Appellant(s) Mr. Aditya Vijay Kumar, Adv.
Mr. Chitranshul A. Sinha, AOR
Ms. Akshita, Adv.

For Respondent(s) Ms. Ankita Chaudhary, Dy.AG
Mr. Pashupathi Nath Razdan, AOR
Mr. Mirza Kayesh Begg, Adv.
Mr. Prakhar Srivastav, Adv.
Mr. Astik Gupta, Adv.
Ms. Ayushi Mittal, Adv.
Mr. Padmesh Mishra, Adv.
Ms. Himanshi Shakya, Adv.

The Court pronounced the following
J U D G M E N T

Hon'ble Mr. Justice M.M. Sundresh pronounced the judgment for the Bench comprising Hon'ble Mr. Justice Sanjay Kishan Kaul and His Lordship.

The Bench allowed the appeal in terms of the signed reportable judgment observing inter alia as under:

> “10. We have already discussed the evidence produced both by the prosecution and the defence and the manner in which they are dealt with by the courts. Certainly, the evidence of PW15 cannot be relied upon as against the other prosecution witnesses themselves, which stood uncontroverted. The recovery having not been proved in

the manner known to law, coupled with inadequate evidence on record to implicate the appellant, we have no hesitation in overturning the conviction rendered as we do believe that the prosecution has failed in its attempt to prove beyond reasonable doubt, that the appellant has committed the offence. Thus, the conviction rendered by Fourth Additional Sessions Judge, Chhattarpur, Madhya Pradesh in Sessions Trial No. 129 of 2001 as confirmed by the High Court of Madhya Pradesh in Criminal Appeal No. 1367 of 2005 stands set aside and the appellant is set at liberty. The appeal stands allowed. Pending applications, if any, are disposed of."

(ASHA SUNDRIYAL) **(POONAM VAID)**
ASTT. REGISTRAR-cum-PS **COURT MASTER (NSH)**

[Signed reportable judgment is placed on the file]

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 466 OF 2018

VIRENDRA ... APPELLANT

VERSUS

STATE OF MADHYA PRADESH ... RESPONDENT

J U D G M E N T

M. M. SUNDRESH, J.

1. Life imprisonment rendered by the Court of Fourth Additional Sessions Judge, Chhattarpur, Madhya Pradesh with the imprimatur of the High Court of Madhya Pradesh is assailed before us.

FACTS THROUGH THE PROSECUTION EYES

2. On 27.04.2001, the deceased Main Babu was allegedly shot dead and killed by three accused namely, Baijnath, Virendra and Suresh over a long pending property dispute, despite verdicts in their favour. Baijnath, who was the father of the other two accused, died during the trial. For the occurrence that happened at

07:30 a.m., the First Information Report (FIR) was lodged by PW14, the father of the deceased at 08:30 a.m. PW16, the Investigating Officer, arrested the accused on the next day followed by recoveries of firearms from Virendra (appellant herein) and Suresh and thereafter completed the investigation.

3. The accused were charged under Section 302 read with Section 34 of the Indian Penal Code (IPC) and the provisions of the Arms Act and tried accordingly. The prosecution examined 17 witnesses as against 8 by the defence. The trial court rendered a conviction against the appellant and the co-accused Suresh. The co-accused did not challenge the conviction and served out his sentence. The appeal filed by the appellant was also rejected by the High Court. Assailing the said conviction sentencing the appellant for life the present appeal by special leave is filed.

WITNESSES

4. We shall consider the necessary witnesses alone while testing the conviction rendered:-

(i) **PW1:** He is an eyewitness who heard the gunshot. He saw the deceased lying near the gate. There was nobody else present. Thereafter, he went to inform one Raju and found that the body of the deceased was not available. PW3 was sitting in

his tea stall at the time of occurrence. He stayed near the corpse for about 10 to 15 minutes. After the occurrence, numerous other people also came to witness the deceased. He specifically states that PW15 came much later.

The evidence of PW1 actually supports the case of the defence. Unfortunately, this witness has not been treated as hostile.

(ii) **PW3:** He is another witness who heard the gunshot. He saw the deceased lying at the spot. He identified the accused in the court and thereafter deposed that they were not present at the scene of occurrence, as the accused was shot by some other one. He heard the gunshot being fired once by the said person who was actually carrying the weapon while running. In his cross-examination he speaks of one Sushil, DW2 having tea from his shop. The evidence of PW3 synchronizes with PW1, being the tea stall owner, having heard the gunshot. He asked DW2 to inform the family members of the deceased. Thereafter, PW15 came to the place of occurrence and made the enquiry as to whether he witnessed the actual occurrence to which he replied in the negative.

Unfortunately, even the evidence adduced by PW3 despite being destructive to the prosecution version has not been impeached either by seeking to declare him as hostile or by way of re-examination and thus allowed to stand as in the case of PW1.

(iii) **PW7:** He is the doctor who examined the deceased and conducted the post-mortem. Though he deposed that the deceased died of the external injuries caused, it is his evidence that both the major injuries, namely injury nos. 1 and 3 having the same size with similarity *qua* the nature, it is possible that they are from the same firearm and therefore, could have been caused by a single shot.

(iv) **PW10:** This witness is the wife of the deceased, who at the time of deposing, was living with her brother-in-law, namely the brother of the deceased. She had not spoken about the presence of PW15 and resiled from the prosecution version. As wisdom dawned, she was treated as hostile at the request of the prosecution.

(v) **PW13:** He is the brother of the deceased. He not only deposed that he came to the place of occurrence on being informed but also saw a girl bleeding along with the deceased. In his chief examination, he states that he met the appellant on 27.04.2001 in police custody. This witness not only speaks about his presence after the occurrence, having seen the deceased and the girl with injuries; but was also called to be a *mahazar* witness for the recovery of arms from both the accused. It is his evidence that the police had called him to depose along with another witness by name Manoj Dixit, who is also a close relative but not examined. It is his further case that the pistol was recovered from the appellant on the night of the occurrence itself. This evidence of PW13 is contrary to the evidence of PW16, the

investigating officer. This witness has not read the contents of the recovery *mahazar* and stated to have cases pending against him.

The evidence, as discussed above, not only contradicts the one deposed by PW16 but also that of the prosecution. It is rather strange how he was called by the police after the arrest of the appellant for the purpose of recovery when scores of others were available.

(vi) **PW-14:** PW14 is the author of the FIR. He is the father of the deceased. He has stated that the deceased died on the spot. This statement is obviously against the evidence of PW13. He was informed by PW15 about the occurrence. When he went to the place of occurrence, the police were also there. However, the FIR was recorded neither at the place of occurrence nor at the hospital as it is his case that police told him to come to the police station from the hospital. It is also strange to note as to how the police could reach the place of occurrence since the source of information is not known.

(vii) **PW-15:** PW-15 is the star witness for the prosecution. It is the testimony of this witness which made the courts to render the conviction. In the chief examination, this witness states that between 8 to 8.15 a.m., he left his house to meet the deceased for the purpose of seeking some monetary help. Thereafter, he went in search of the deceased. We do not know as to how he could be an

eyewitness when the prosecution case is very specific that the occurrence took place at 7.30 a.m. This very witness was facing cases of varying types starting from theft, dacoity, double murder and the cases under the NDPS Act. He is also a dismissed police constable.

According to this witness, he saw only Suresh carrying the gun and shooting the deceased. This testimony was not corroborated by all the prosecution witnesses. Even his presence is doubted as he was seen at the place of occurrence much after the incident. He is the one who opposed the bail application of the appellant apart from filing an FIR for a subsequent event that he was threatened not to depose. Despite being an ex-policeman, he did not bother to go to the police station nearby or to inform PW10, the wife of the deceased who was residing nearby. Instead, he went home and thereafter informed PW14 and others. It is his evidence that there was no tea stall near the place of occurrence. In one of the criminal charges against this witness, the accused was a witness. He admits that it would take 15 minutes to reach the place of the deceased. Despite his evidence that another girl was also injured, there was no investigation on this aspect by the prosecution particularly when most of the prosecution witnesses do not speak about her presence.

From the nature of the testimony and the background surrounding, this witness certainly cannot be relied upon as the reputation and conduct of a man is a

fact under Section 3 of the Indian Evidence Act and thus, becomes relevant. It is highly improbable that this witness would have been present at the place of occurrence.

(viii) **PW-16:** He is the investigating officer. The investigating officer speaks about arrest and recoveries from all the accused. In so far as the recovery of arms from the appellant is concerned, this witness states that he did not prepare the recovery memo under Section 27 of the Indian Evidence Act. There is absolutely no evidence to show as to how the recovery was made. To many of the queries raised, he feigned ignorance. The trial court did find that the original FIR was torn, and the serial numbers did not tally. He admits that there may be some changes in the paragraph numbers between the one available in the police station and the other sent to the jurisdictional magistrate.

The evidence of PW16, having the characteristics of an opinion, cannot be put against the appellant in the light of the assessment of the other evidence available on record, as discussed.

(ix) **DW-1 & 2:** Now, we shall come to the evidence of the defence witnesses. DW1 is the milk vendor whose presence was also spoken of by PW3. Similarly, the presence of DW2 who was having tea in the tea stall belonging to PW3 was also spoken of by him. These two witnesses state that the person who committed

the offense was not the accused. However, the court rejected the evidence placing the onus heavily on the defence and approving the statement of PW15. We may also note that DW1 has deposed in tune with the evidence of PW1 and PW3 in so far as the delayed presence of PW15 is concerned. Further, DW1 has stated in the same lines as that of PW3 that the said witness has asked DW2 to inform the family members of the deceased.

FORENSIC SCIENCE LABORATORY (FSL) REPORT

5. The FSL report given by the State Forensic Science Laboratory, Sagar, Uttar Pradesh, states that Exhibit A-1 is a .12 bore locally manufactured pistol and Exhibit A-2 is a .12 bore single barrel gun. It is the case of the prosecution that the shot was fired from Exhibit A-1 while the opinion of the officer concerned indicates that the empty cartridge was fired from Exhibit A-2. Though the courts made reliance upon this report, we do not wish to give our seal of approval as we find certain contradictions which have not been dispelled by the presence of the officer who authored it.

RECOVERY

6. PW13 and one Manoj Dixit were made as witnesses to the recovery memo from the appellant. We have already discussed the evidence of PW13 which is in

contradiction with that of PW16. The other witness, who is also a close relative of the deceased was not examined for reasons unknown. PW13 has stated that the appellant was arrested on the same day therefore, his evidence creates a serious doubt on the arrest and recovery. The place and time of arrest and recovery could not be spoken with clarity by PW16. The prosecution tried to put up a case that shots were fired from both the weapons which were not proved even with the evidence available. The recovery of gun made from the co-accused was owned by the appellant. How the weapon came into the possession of the co-accused and who used it, has not been proved by the prosecution. Even the evidence of PWs-13 & 15 is to the effect that only one was carrying a gun and that could be the co-accused Suresh. We have already held that from the evidence produced by the prosecution, leaving alone that of the defence, the presence of appellant in the place of occurrence is highly improbable.

REASONING OF THE TRIAL COURT AND THE HIGH COURT

7. Both the courts shifted the burden on the defence. The evidence rendered by the prosecution witnesses was rejected, either as that of indifferent witnesses or as irrelevant evidence. We may note that these are all prosecution witnesses who were not treated as hostile. No attempt whatsoever was made either to treat them as hostile or to re-examine them except that of PW10. Not even a suggestion was put

to them on the presence of PW15. In such a scenario, the statement made by the prosecution witnesses in favour of the accused would certainly inure to his benefit. Our view is fortified by the decision of this Court in ***Raja Ram*** v. ***State of Rajasthan***, *(2005) 5 SCC 272*:

> "**9**. But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (*sic* declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined."

It is reiterated in ***Javed Masood*** v. ***State of Rajasthan***, *(2010) 3 SCC 538*:

> "20. In the present case the prosecution never declared PWs 6, 18, 29 and 30 "hostile". Their evidence did not support the prosecution. Instead, it supported the defence. There is nothing in law that precludes the defence to rely on their evidence."

Reliance was made on the recovery from the appellant. The fact remains that there was sufficient evidence to conclude that only one shot was fired which could be seen even from the evidence of PW15. While assessing the evidence produced by the defence, courts discarded them without appreciating the fact that it has to be seen only on the degree of probability.

SUBMISSIONS

8. Ms. Nitya Ramakrishnan learned senior counsel appearing for the appellant reiterated the infirmities noted by us above. Additionally, it has been submitted that literature produced before the Court on the procedure to test the firearms, the FSL Report is found wanting. It being an opinion, at its best, ought not to have been relied upon by the courts, particularly when the other has not been examined.

9. Per contra, Ms. Ankita Choudhary, learned Deputy Advocate General, appearing for the State submitted that the defective trial and inconsistency in the statement made by the prosecution witnesses *per se* would not absolve the accused of guilt. There is evidence sufficiently in place to implicate the appellant. As both the courts have considered them *in extenso*, there is no interference required at the hands of this Court.

CONCLUSION

10. We have already discussed the evidence produced both by the prosecution and the defence and the manner in which they are dealt with by the courts. Certainly, the evidence of PW15 cannot be relied upon as against the other

prosecution witnesses themselves, which stood uncontroverted. The recovery having not been proved in the manner known to law, coupled with inadequate evidence on record to implicate the appellant, we have no hesitation in overturning the conviction rendered as we do believe that the prosecution has failed in its attempt to prove beyond reasonable doubt, that the appellant has committed the offence. Thus, the conviction rendered by Fourth Additional Sessions Judge, Chhattarpur, Madhya Pradesh in Sessions Trial No. 129 of 2001 as confirmed by the High Court of Madhya Pradesh in Criminal Appeal No. 1367 of 2005 stands set aside and the appellant is set at liberty. The appeal stands allowed. Pending applications, if any, are disposed of.

……..……J.
(SANJAY KISHAN KAUL)

……J.
(M.M. SUNDRESH)

New Delhi
July 11, 2022