

STATE OF HIMACHAL PRADESH

v.

MAST RAM

SEPTEMBER 10, 2004

[B.N. AGRAWAL AND H.K. SEMA, JJ.]

*Penal Code, 1860:*

*Section 302—Conviction by Trial Court on the basis of the ballistic report, post mortem report and evidence of eye witnesses—High Court acquitting the accused—On appeal held, High Court fell into grave error of law and facts leading to miscarriage of justice—Hence, order of High Court set aside and order of Trial Court restored.*

*Criminal Procedure Code, 1973:*

*Section 293—Document purporting to be report under hand of Government scientific expert—Court to accept such document issued by officers enumerated in sub-section(4) without examining the author of the documents.*

According to the prosecution, accused fired at and killed the deceased. Prosecution case was based on testimony of eye-witnesses, report of medical expert and report of ballistic expert. The Trial Court conducted a test and found that the place where the deceased was standing and hit by the gun shot was within firing range. Accordingly, Trial Court convicted and sentenced the accused. However, High Court acquitted him. Hence the present appeal.

Allowing the appeal, the Court

**HELD :** 1. While it is true that generally, the firing range of the gun differs from gun to gun, the opinion of High Court that firing range of DBML gun and SBML gun differs is based on no expert opinion and same is based on conjectures and surmises. In the instant case both the guns are of the same categories except the one used in the commission of crime is Double Barrel and the one used during the test fire was Single Barrel. Therefore, it cannot be said that the firing range from

**A** DBML gun differed from SBML gun and *vice-versa*. This finding of High Court is fallacious and perverse. [272-H; 273-A, B]

**B** 2. The High Court has completely over-looked the provision of Sub-section (1) of Section 293 and arrived at a fallacious conclusion that a junior scientific officer is not an officer enumerated under Sub-section (4) of Section 293. Sub-section (4) of Section 293 envisages the Court to accept the documents issued by any of the six officers enumerated therein as valid evidence without examining author of the documents. [273-G, H]

**C** 3. The finding of the High Court that failure of prosecution to send the pellets, recovered from body of deceased, for examination by a ballistic expert will draw inference against credibility of prosecution story is utterly perverse. Law does not require that pellets recovered from the body be sent to ballistic expert to determine as to whether the pellets were fired from the exhibited gun or not. On the contrary, recovery of pellets from the body clearly establishes the prosecution case that the deceased died of gun shot injuries. [274-B, C]

**D** 4. The categorical testimony of eyewitnesses' account has not been considered and discussed at all by the High Court. Their testimony was thrown out at the threshold on the ground of animosity and relationship. **E** This is not the requirement of law. The only requirement of law is to examine their testimony with caution. Relationship of witnesses is no ground to disbelieve their testimony, if otherwise, it inspires confidence. The High Court also failed to discuss and consider testimony of independent eyewitness. [276-D, A; 275-H; 276-E]

**F** 5. The consistent ocular testimony of eyewitnesses corroborated by the opinion of Medical Officer, who conducted post-mortem examination on the body of deceased and ballistic expert report clearly established the prosecution case beyond all reasonable doubt. High Court fell into grave error of law and facts, resulting in grave miscarriage of justice. **G** [277-G, H]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 267 of 1999.

**H** From the Judgment and Order dated 8.5.98 of the Himachal Pradesh High Court in Crl. A. No. 195 of 1997.

J.S. Attri and L.R. Rath for the Appellant. A

A.V. Palli and Mrs. Rekha Palli for the Respondent.

The Judgment of the Court was delivered by

**SEMA, J. :** The sole respondent-accused was convicted by the learned Additional Sessions Judge (II), Kangra at Dharmshala for an offence under Section 302 IPC and sentenced to rigorous imprisonment for life and to pay a fine of Rs.5000 and in default to undergo further rigorous imprisonment for a period of six months. Aggrieved thereby, the respondent-accused preferred an appeal before the High Court, which was allowed by the impugned judgment and the sentence and conviction recorded by the Trial Court was set aside. Hence, this appeal by the State. B C

Briefly stated the facts are as follows:-

The accused and the prosecution witnesses are all from the same village Sug Tarkhana, Tehsil Indora, District Kangra. The accused and PW-5 Gian Chand were at loggerheads over the dispute of abadi and civil litigation between them was pending. The deceased Uttam Chand was employed as a carpenter at Delhi and had come to village on 5.8.1995 to attend the performance of first death anniversary of his mother. It is stated that on 14.8.1995 at about 10.00 A.M. Gian Chand - PW-5 had an altercation and quarrel with the accused Mast Ram with regard to the dispute over the abadi and the deceased Uttam Chand said to have intervened and advised both Gian Chand and Mast Ram not to quarrel and wait for the decision of the court in civil litigation. Thereupon, the accused Mast Ram became furious and threatened the deceased Uttam Chand that he would deal with him first of all as he was siding with Gian Chand with whom the accused had the civil dispute over the abadi. It is further stated that at about 10.30 a.m. on the same day, when the deceased Uttam Chand along with his brother Hans Raj PW-1 and Vijay Kumar PW-3 was proceeding towards the fields to get fodder for the cattle and was passing through the passage in front of the house of the accused Mast Ram, the accused with DBML (Double Barrel Muzzle Loaded) gun in his hand challenged Uttam Chand stating that he would be done to death and then fired at Uttam Chand. The deceased Uttam Chand received injuries on his arm, chest and shoulder, fell down on the ground, and became unconscious. Thereafter, the accused ran away towards the field with his gun. In the meantime, PW-4 Tarsem Lal also arrived and PWs 1, D E F G H

A 3, and 4 together shifted the deceased Uttam Chand to his nearby house where he breathed his last after sometime. The matter was reported to the Pradhan of the village, who advised to lodge a report with the police and the First Information Report was, accordingly, lodged. The accused was arrested on 18.8.1995 by PW-15 and pursuant to a disclosure statement, the DBML gun (Ex.P-11) was recovered from underneath the bushes near his house. Ex.P-11 was sent for examination to the Forensic Science Laboratory and it was found to be in working condition and having been fired. The accused pleaded ignorance in his statement under Section 313 but he did not lead any defence evidence. The spot inspection, was, however carried out at the request of the accused in his examination under Section 313. It appears that the defence of the accused in his examination under Section 313 was that from the place where the accused is alleged to have fired at the deceased and the place where the deceased was standing and hit by the gun shot was not within the firing range. This has led to the Trial Court for spot inspection. The inspection was carried out by the Trial Court on 25.2.1996 in the presence of the accused, his counsel and the Public Prosecutor. The Trial Court conducted a test gun shot fire from the place where the accused was alleged to have fired at the deceased and it was observed that the place where the deceased was standing and hit by the gun shot was within the firing range.

E The Trial Court after considering the evidence and eye witnesses accounts of PWs 1, 3, 4, and PW-2 - Dr. Sanjay Kumar Mahajan, who conducted the post-mortem examination and the report of forensic laboratory has recorded findings that the prosecution has established his case beyond all reasonable doubts and convicted the respondent as aforesaid.

F The High Court upset the conviction recorded by the Trial Court, firstly that the DBML gun (Ex.P-11) alleged to have been used in the commission of offence was not used in a test fire at the time of local inspection conducted by the Trial Court and instead a test fire was carried out with the help of SBML(Single Barrel Muzzle Loaded) gun belonging to PW-1 Hans Raj. The High Court held that this has materially affected the prosecution story. According to the High Court, the firing range differs from gun to gun and, therefore, the firing test not having been conducted from the Exhibit P-11, the finding of the learned Trial Court Judge that the deceased has been hit by the gun shot was within the firing range from the verandah of the house of the deceased could not have been relied upon. This finding, in our opinion, is not only fallacious but also perverse. While it is true that generally, the

firing range of the gun differs from gun to gun, the opinion of the High Court that firing range of DBML gun and SBML gun differs is based on no expert opinion and the same is based on conjectures and surmises. In the instant case both the guns are of the same categories except the one used in the commission of crime is Double Barrel and the one used during the test fire was the Single Barrel. Therefore, it cannot be said that the firing range from DBML gun differed from SBML gun or *vice-versa*.

That apart, the local inspection envisaged under Section 310 Cr.P.C. is for the purpose of properly appreciating the evidence already recorded during the trial. Memorandum of spot inspection recorded by the trial Judge has to be appreciated in conjunction with the evidence already recorded. Any omission and/or commission in the memorandum recorded by the trial Judge by itself would not constitute material irregularity, which would vitiate the prosecution case. In our view, it is difficult to accept the reasoning recorded by the High Court in this regard.

Secondly, the ground on which the High Court has thrown out the prosecution story is the report of ballistic expert. The report of ballistic expert (Ex. P-X) was signed by one junior scientific officer. According to the High Court, a junior scientific officer (Ballistic) is not the officer enumerated under sub-section (4) of Section 293 of the Code of Criminal Procedure and, therefore, in the absence of his examination such report cannot be read in evidence. This reason of the High Court, in our view, is also fallacious. Firstly, the Forensic Science Laboratory Report (Ex. P-X) has been submitted under the signatures of a junior scientific officer (Ballistic) of the Central Forensic Science Laboratory, Chandigarh. There is no dispute that the report was submitted under the hand of a Government scientific expert. Section 293(1) of the Code of Criminal Procedure enjoins that any document purporting to be a report under the hand of a Government scientific expert under the section, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under the Code, may be used as evidence in any inquiry, trial or other proceeding under the Code. The High Court has completely over-looked the provision of sub-section (1) of Section 293 and arrived at a fallacious conclusion that a junior scientific officer is not an officer enumerated under sub-section 4 of Section 293. What sub-section 4 of Section 293 envisages is that the court to accept the documents issued by any of six officers enumerated therein as valid evidence without examining the author of the documents.

A Thirdly, the High Court was of the view that during the course of post-mortem examination conducted by PW-2 Dr. Sanjay Kumar Mahajan, two pellets were recovered - one each from the right and left lung of the deceased, which were handed over to the police. However, the pellets recovered were never sent for examination to a ballistic expert in order to find out if such pellets were fired from the gun (Ex. P-11) or not. According to the High Court, failure of the prosecution to send the pellets for examination by a ballistic expert will draw an inference against the credibility of the prosecution story. This finding, in our view, is utterly perverse. It is not the requirement of law that pellets recovered from the body be sent to ballistic expert to determine as to whether the pellets were fired from the exhibited gun or not.

B

C On the contrary, the recovery of pellets from the body clearly establishes the prosecution case that the deceased died of gun shot injuries.

The fourth reason assigned by the High Court in discarding the prosecution story is with regard to the non-explanation of injury No.2 on the body of the deceased. The injury No.2 was described as under:-

D

“A circular area about 1.5 cm diameter in left axilla towards left arm.”

E PW-2 Dr. Sanjay Kumar Mahajan during the course of cross-examination stated that the aforesaid injury could not have been caused had the injured Uttam Chand not raised his arm while walking. The High Court was of the view that PW-1 and PW-3 who were accompanying the deceased Uttam Chand at the relevant time had never stated that deceased Uttam Chand had at any point of time raised his arm while walking or on being challenged by the accused. It is the categorical statement of PW-1 Hans Raj and PW-3 Vijay Kumar that while they were accompanying the deceased, the accused had challenged the deceased and thereafter fired at him. It is but quite natural that the deceased when challenged would have reacted by raising his hands either in defence or in accepting the challenge and in the process he would have sustained injury No. 2, as described. The reaction of the deceased in raising his hands, in such circumstances, would be in tune and in consonance with the natural human behaviour in ordinary circumstances. There is no set of rule that one must react in a particular way. The natural reaction of man is unpredictable. Every one reacts in his own way. Such natural human behaviour is difficult to be proved by credible evidence. It has to be appreciated in the context of given facts and circumstances of each case.

F

G

H

Fifthly, the High Court was also of the view that PW-1 Hans Raj and PW-3 Vijay Kumar were accompanying the deceased and the prosecution story shows that the pellets from the gun shot had scattered and hit even the tree but the absence of injuries on the person of PW-1 and PW-3 render their presence at the place of occurrence doubtful. This finding of the High Court, in our opinion, is also fallacious and perverse. PW-1 and PW-3 had categorically stated that the deceased was walking ahead of them. The accused undisputedly nurtured a grudge against the deceased for alleged siding with the PW-5 Gian Chand, with whom the accused had civil dispute, challenged the deceased, the gun was aimed at and fired at him. It is, in these circumstances, the absence of pellet injuries on the persons of PW-1 and PW-3 will be no ground to render the presence of PW-1 and PW-3 at the place of occurrence doubtful.

The last and the most perverse and fallacious finding of the High Court is with regard to discarding the evidence of eye-witnesses account of PW-1 Hans Raj and PW-3 Vijay Kumar. The High Court recorded the finding as under:-

“PW-1 Hans Raj is the real brother of the deceased, while PW-3, Vijay Kumar, apart from being a cousin brother of the deceased is the son of PW-5, Gian Chand, with whom admittedly the accused had litigation. It is the prosecution own case that the accused was nursing a grudge against the deceased and PW-1, since they were helping and siding with PW-5, Gian Chand. Both PW-1 and PW-3 are, therefore, interested witnesses and in view of the evidence coming on the record, cannot be safely relied upon.”

As already noticed PW-1 Hans Raj and PW-3 Vijay Kumar are two eyewitnesses who accompanied the deceased on the fateful day. Both the eyewitnesses had stated categorically that they accompanied the deceased while going to the fields to fetch fodder for the cattle. When they were passing through the passage in front of the house of the accused, the accused challenged the deceased and in the meantime fired at him, with the result deceased Uttam Chand fell down on the ground after having sustained gun shot injuries on his person. The two eyewitnesses were subjected to lengthy cross-examination but nothing could be elicited to doubt the creditworthiness of their testimony. No doubt that PW-1 and PW-3 are relatives but this will be no ground to disbelieve their testimony, if otherwise, inspired confidence.

A The Law on the point is well settled that the testimony of relative witness cannot be disbelieved on the ground of relationship. The only requirement is to examine their testimony with caution. In the given facts of the case, it is but quite natural that the relatives would have accompanied the deceased to collect the fodder for the cattle from the fields at about 10.30 a.m. on the fateful day. It is also in the prosecution evidence that the incident at 10.30 a.m. is preceded by an altercation and quarrel between the accused Mast Ram and PW-5 Gian Chand, on the same morning at about 10.00 a.m. with regard to the disputed abadi and the deceased Uttam Chand is said to have intervened in the matter and advised both PW-5 Gian Chand and the accused Mast Ram not to quarrel and wait for the decision of the civil litigation. It is also in the evidence that thereupon the accused Mast Ram threatened the deceased Uttam Chand that he would deal with him first of all as he was siding with Gian Chand with whom the accused is having pending litigation with regard to abadi. The categorical testimony of eyewitnesses' account has not been considered and discussed at all by the High Court. Their testimony was thrown out at the threshold on the ground of animosity and relationship. This is not the requirement of the Law. That apart, PW-4 Tarsem Lal is an independent eyewitness. PW-4 also hails from the same village. He is neither related to the complainant party nor to the accused party. He has stated that he saw the accused Mast Ram, in his verandah with a gun in his hand and also saw him running away from the spot after the gunfire. The High Court has not considered and discussed the testimony of PW-4 at all.

F The testimony of PWs 1, 3 and 4 was consistent with the report of ballistic expert and the evidence of PW-2 Dr. Sanjay Kumar Mahajan who conducted the post-mortem examination on the body of the deceased and found the following injuries:-

1. A circular area about 1 cm diameter on Antero-lateral surface of left arm about 9 inches from Acromion.
2. A circular area about 1.5 cm diameter in left Axilla toward left arm.
3. A circular area about 1 cm diameter on Anterior surface of left shoulder.
4. An area circular about 1.2 cm diameter about 3 cm below injury No.3.



5. A circular area of 1.3 cm diameter on medial wall of left axilla which is formed by chest wall. Tract has been formed on Probing:-3 inches of probe went inside. A
  6. A circular area of about 1.4 cm diameter in left Infra clavicular region 7 cm below mid clavicular point. B
  7. A circular area 1.2 cm diameter about 2.3 cm below injury No.6.
  8. An area 2 cm x 1 cm about 2 cm away from left nipple medio-supiriorly. C
  9. An area of 3.2 cm x 2.3 cm on sternum about 5 cm below sternal notch.
  10. An area of 4.1 cm x 2.3 cm above left costal margin about 5 cm away from Xiphi-Sternum. D
  11. A circular area of 1 cm diameter on right side of sternum.
  12. An area of 7.2 cm x 2.1 cm on right side of chest in Midline about 10 cms below mid clavicular point, widest in centre, tapering on periphery. E
  13. An area of 6.5 cm x 3.1 cm about 13 cm from mediai end of right clavicle.
  14. An area of 15 cms diameter just below right nipple. F
- On probing:- No.13 it came out of injury No.14 though subcutaneous planer.”

PW-2 Dr. Sanjay Kumar Mahajan, opined that all the injuries were ante-mortem having been sustained by a firearm like gun and such injuries were sufficient in the ordinary course of nature to cause death. G

In our view, the consistent ocular testimony of PWs 1, 3 and 4 corroborated by the opinion of PW-2 Dr. Sanjay Kumar Mahajan and ballistic expert report clearly established the prosecution case beyond all reasonable doubts and the High Court fell into grave error of law and facts, H

**A** resulting in grave miscarriage of justice.

**B** For the foregoing reasons, the order of the High Court is set aside and the order of the Trial Court is restored. The appeal is allowed. The bail bond of the respondent-accused Mast Ram is cancelled. He is directed to be taken back into custody forthwith. Compliance report within one month from today.

K.G.

Appeal allowed.