Mohan Vs State of Madhya Pradesh

Court: Madhya Pradesh High Court

Date of Decision: June 25, 2000

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 313
Penal Code, 1860 (IPC) â€" Section 302

Citation: (2005) CriLJ 79

Hon'ble Judges: Dipak Misra, J; A.K. Shrivastava, J

Bench: Division Bench

Advocate: R.N. Roy, for the Appellant; S.K. Yadav, for the Respondent

Final Decision: Allowed

Judgement

A.K. Shrivastava, J.
Appellant, Mohan, has knocked the door of this Court by preferring an appeal u/s 374(2) of the Code of Criminal

Procedure, 1973, (hereinafter referred to as "the Code") assailing the judgment of conviction and order of sentence dated 28-2-1992 passed by

the First Additional Sessions Judge, Sagar, in Sessions Trial No. 181 of 1990 convicting the appellant u/s 302 of I.P.C. and sentencing him to

suffer rigorous imprisonment of life.

2. In brief the case of prosecution is that Laxman Singh and Gulab Bai (hereinafter referred to as "the deceased persons") were living as husband

and wife, they were residents of village - Toda. On 11-3-1990 Malthu (PW-4), who is the neighbour of deceased persons, on the basis of

suspicion, climbed on the house of the deceased persons and when he peeped from a window he saw the dead bodies of the deceased persons

lying on the Ataari (roof). It is said that Narayan Singh (PW-1) also saw the dead bodies of the deceased persons. The F.I.R. (Ex.P/9) was

lodged by Abhay Singh alias Gudde (PW-3) who is the son of Narayan Singh and is nephew of deceased Laxman Singh. It is seen that Narayan

Singh (PW- 1), Dangal Singh and deceased Laxman are the real brothers.

3. On lodging of the first information report by Abhay Singh the criminal law was set in motion. The investigating agency arrived at the spot, seized

the dead bodies, sent them for post-mortem where doctor found incised wounds on the persons of the deceased and both of them were found to

be dead due to excessive haemorrhage. The injuries sustained to the deceased persons are referred in the post-mortem report. Ex. P/5 is the post-

mortem report of Gulab Bai and Ex.P/6 is the post-mortem report of Laxman Singh.

4. In furtherance to his investigation the Investigating Officer arrested accused persons, seized the axe which is said to be used as weapon in the

commission of the offence, wearing apparel, bood-stained and ordinary earth etc. statement of witnesses were also recorded, the accused persons

were put for test identification parade and the lady''s wrist watch and gent''s wrist watch were put. to test identification.

5. After completion of the investigation a charge-sheet was filed in the competent Court, who on its turn committed the case to the Court of

Session and from where it was received by the trial Court for trial. Apart from appellant another co-accused Nirpat was also tried, however, the

learned trial Judge acquitted him since no offence was found to be proved against him. Acquitted co-accused Nirpat was charged under Sections

302 and 460 of I.P.C. and appellant was charged u/s 302 read with Sections 34 and 460 of I.P.C. Since both the accused persons denied the

charges, the prosecution examined the witnesses.

6. The learned trial Judge acquitted co- accused Nirpat, however, on the basis of the same evidence convicted the appellant u/s 302 of I.P.C. and

passed the sentence which we have already mentioned hereinabove.

7. In this appeal Shri R.N. Roy, learned counsel for the appellant has contended that there is no direct evidence available against the appellant and

the prosecution has based its case on circumstantial evidence. It has been further contended by him that, though the learned trial Judge found

insufficient evidence in order to prove the charge against the appellant, but on the basis of the statement of accused-appellant recorded u/s 313 of

the Code, has convicted him. The submission of the learned counsel is that since the prosecution has utterly failed to prove its case, it was not

justifiable for the trial Court to convict the accused-appellant on the basis of his statement recorded u/s 313 of the Code. It has been propounded

by him that if the statement of accused-appellant u/s 313 of the Code is read in proper perspective, one cannot say that there is any inculpatory

statement of the accused. The learned counsel for the appellant has placed reliance on the decision of the Apex Court Mohan Singh v. Prem Singh

(AIR 2002 SC 3582).

8. Per contra Shri S.K. Yadav, learned counsel appearing for the respondent/State has argued in support of the impugned judgment.

9. After having heard the learned counsel for the parties we are of the view that this appeal deserves to be allowed.

10. In the present case, there is no direct evidence against the appellant and the prosecution has based its case on the basis of circumstantial

evidence. If the prosecution has based its case on circumstantial evidence, the Supreme Court has laid down certain norms for convicting the

accused. In the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, the Apex Court has laid down the test which should pre-exist before

the conviction could be accorded. They are:-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must or should"

and not "may be" established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that Is to say, they should not be explainable

on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the

accused and must show that in all human probability the act must have been done by the accused.

11. The same principle was reiterated by the Apex Court in a later decision in the case of K.V. Chacko @ Kunju Vs. State of Kerala,

12. The latest pronouncement of the Apex Court is Ashish Batham Vs. State of Madhya Pradesh, . In this case the Apex Court placed reliance on

its remarkable earlier decision in Hanumant Govind Nargundkar v. State of Madhya Pradesh 343). Before we proceed to analyse the statement

recorded u/s 313 of the Code, of the accused-appellant, we would like to narrate those circumstances which led the prosecution pointing out the

guilt of the accused-appellant. They are :-

(i) deceased persons were seen last in the company of the accused persons;

(ii) the accused persons were identified in the test identification parade;

(iii) seizure of 12 bore gun from appellant Mohan, which is of the deceased Laxman Singh;

(iv) acquitted co-accused Nirpat produced a blanket, which was seized;

(v) seizure of lady"s wrist watch at the in- stance of acquitted co-accused Nirpat;

(vi) seizure of a wrist watch and an axe at the instance of accused-appellant;

(vii) the watches were identified in the test identification;

(viii) the axe which was seized at the instance of accused-appellant was sent for chemical examination and on which presence of blood was opined

by the chemical examiner; and

(ix) blood-stained white shirt and a trouser of appellant were seized from him, these clothes were sent for chemical examination and in the report

presence of blood was opined.

13. We shall now examine that whether the prosecution has succeeded in proving the abovesaid circumstances.

(i) deceased persons were seen last in the company of the accused persons and (ii) the accused persons were identified in the test identification

parade : The learned trial Judge in para 11 of his judgment totally disbelieved the evidence of last seen on the ground that Manoj Kumar (PW-2)

saw the accused persons from their back side, he also did not narrate the appearance (Huliya) of accused persons. The learned trial Judge also

came to hold that appellant Mohan is having marks of small pox on his face but no person having marks of small pox on his face was mixed in the

test identification parade. According to the learned trial Judge, because, PW-2 Manoj Kumar saw the accused persons from their back, it could

not be said that he rightly identified the accused persons. On these premised reasons the evidence of last seen and test identification was not found

to be trustworthy by the learned trial Judge.

(iii) Seizure of 12 bore gun from appellant Mohan which is of the deceased Laxman Singh : The learned trial Judge in para 12 of his judgment

disbelieved the seizure of gun from the appellant.

(iv) Acquitted accused Nirpat produced a blanket which was seized ; The seizure of blanket was also disbelieved by the trial Court in para 12 of

its Judgment. According to the prosecution, this blanket was seized at the instance of the acquitted co-accused Nirpat.

(v) Seizure of a lady''s wrist watch, at the instance of apquitted co-accused Nirpat: (vi) Seizure of a wrist watch and an axe at the instance of

accused/appellant: and (vii). The watches were identified in the test identification : The seizure of watches and axe has not been supported by the

witness of seizure Santosh (PW-8). According to us, the accused-appellant did not give any memorandum in respect to these articles. According

to the learned trial Judge, since the recovery is not in result to the discovery of fact, it bears no meaning. The learned trial Judge further came to

hold that the seized axe was not sent to the doctor for obtaining his opinion whether the injuries sustained to the deceased persons could have been

caused by the seized axe.

(viii) The axe which was seized at the instance of accused-appellant was sent for chemical examination and on which presence of blood was

opined by the chemical examiner: and (ix) blood-stained white shirt and a trouser were seized from, him. These articles were sent for chemical

examination and in the report presence of blood was opined. Though the report of Chemical Examiner (Ex. P/32) is that on the axe, bipod stains

were found but there is no evidence that these blood-stains were of human blood. Similarly, there is no evidence that the stains of blood which

were found on the clothes were of human blood.

14. The learned trial Judge disbelived the entire story of the prosecution and evidence laid by it and on its basis acquitted co-accused Nirpat.

However, on the basis of same evidence has convicted the appellant on the basis of certain admissions made by him in his statement recorded u/s

313 of the Code.

15. Before we deal with the applicability of the admission made by accused-appellant u/s 313 of the Code in the present factual scenario of the

case, we would like to say something about the motive in the present case. Indeed, the learned trial Judge has also found that there is no evidence

on record in regard to the motive. Though, in a case u/s 302, I.P.C. the motive is altogether foreign, but, if the case is based on circumstantial

evidence, according to us, the motive has some significance. The Supreme Court in the case of Tarseem Kumar Vs. The Delhi Administration, has

held as under :-

Normally, there is a motive behind every criminal act and that is why investigating agency as well as the Court while examining the complicity of an

accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. It has been repeatedly pointed out

by the Court that where the case of the prosecution has been proved beyond all reasonable doubts on basis of the materials produced before the

Court, the motive loses its importance. But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the

accused assumes greater importance. Of course, if each of the circumstances proved on behalf of the prosecution is accepted by the Court for

purposes of recording a finding that it was the accused who committed the crime in question, even in absence of proof of a motive for commission

of such a crime, the accused can be convicted. But the investigating agency as well as the Court should ascertain as far as possible as to what was

the immediate impelling motive On the part of the accused which led him to commit the crime in question. In the present case, no motive on the

part of the appellant to commit the murder of Gulshan, has been suggested or established on behalf of the prosecution.

Thus, absence of any motive would be an additional factor in order to hold that the prosecution case based on circumstantial evidence is not

proved.

16. Now we shall deal with the statement of accused-appellant recorded u/s 313 of the Code. Indeed the trial Court has based the conviction

solely on the basis of the statement of appellant recorded u/s 313 of the Code.

17. Before we deal with the statement of the accused-appellant recorded u/s 313 of the Code, we would like to say that this section is based on

the principle involved in the maxim ""Audi alteram partem"" which would mean that no-one should be condemned unheard. According to us, the

accused should be heard not only on what is prima facie proved against him but in every circumstances appearing in evidence against him. In the

present case, none of the circumstances, which we have discussed in detail hereinabove, do not warrant to bring home the guilt of the accused-

appellant, not even prima facie. According to us, the conviction of the accused cannot be based merely on his statement recorded u/s 313 of the

Code because it is not a substantive piece of evidence and it can be used only for corroboration of the prosecution''s case since the entire

prosecution evidence do not warrant recording of guilt of the appellant. According to us, the conviction cannot be based merely on the statement

recorded u/s 313 of the Code. In this context we may profitably rely the recent pronouncement of the Apex Court in the case of Mohan Singh v.

Prem Singh (AIR 2002 SC 3582).

18. We have given our bestowed consideration to the statement of accused-appellant recorded u/s 313 of the Code. In his statement nowhere he

has admitted that he committed the offence. Whatever he has said that he was present along with Sunder. He has stated that one Kulhari (axe) was

kept beneath the bed-stead and an an- other axe was brought to home. But the police did not seize any axe beneath the bed stead of deceased

Laxman Singh nor seized any axe from the house of the appellant but according to the prosecution, the axe was found and seized from bushes. The

learned trial Judge in para 15 of its judgment held that on dissecting the statement of accusedappellant it appears that he was giving the statement

just to save acquitted co-accused Nirpat. This being the position, according to us, even if some inculpatory statement has been accorded by him, it

cannot be said to be his confession free from doubt.

19. The Division Bench of this Court in the case of Ramkaran v. State of Madhya Pradesh (2000 (2) V Bh 245) held that the Court was not

justified in basing the conviction on the statement recorded u/s 313 of the Code. In the present case also if the whole statement of accused-

appellant recorded u/s 313 of the Code is read, it would not warrant to connect the appellant with the offence. In the present case the prosecution

has failed to produce legal and reliable evidence and failed to prove the case against the accused-appellant. The learned trial Judge has totally

disbelieved the evidence of the prosecution and, therefore, the conviction cannot be based on the basis of statement u/s 313 of the Code, specially

when the finding of the Court below is that the appellant was giving such type of statement Just to rescue the co-accused Nirpat, who was

ultimately acquitted by the trial Court. We have discussed hereinabove that there is no clinching evidence against the accused-appellant, as a matter

of fact, the trial Court has disbelieved every piece of evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain

the conviction of the accused, according to us, the inculpatory part of the statement of the accused-appellant u/s 313 of the Code cannot be made

the sole basis of his conviction. See Mohan Singh''s case (supra). We may add that where the facts which are put forward on behalf of the

prosecution did not arrest the accused to prove his guilt and unless an inference of guilt is drawn against the accused on the basis of the evidence

placed on record by the prosecution, it would not be lawful and proper to consider the explanation of those facts which the accused puts forward

in his defence. If the prosecution failing to affirmatively prove the offence, the Court cannot proceed on the basis that admitted facts are true and

do riot warrant any evidence,

20. The examination of accused u/s 313 of the Code is primarily to be attracted to those matters on which evidence has been laid by the

prosecution, to ascertain from the accused his version or explanation, if any, of the incident which forms the subject-matter of the charge and his

defence. If the accused-appellant in his examination u/s 313 of the Code confesses to the commission of the offence charged against him, the Court

may, relying upon that confession, proceed to convict him. But, if he does not confess and in explaining circumstances appearing in the evidence

against him sets up his own version and seeks to explain his conduct pleading that he has committed no offence, his statement can only be taken

into consideration in its entirety. According to us, it was not open to the Court below to dissect the statement and to pick out a part of the

statement, which may be in- criminative, and then to examine whether the explanation furnished by the accused for his conduct is supported by the

evidence on record. In the present case, the accused-appellant has not admitted to have done an act which would but for the explanation furnished

by him be an offence. Thus, according to us, the admission made by him u/s 313 of the Code cannot be used against him divorcing him from the

explanation. In this context we may profitably rely the case of the Supreme Court in the case of Narain Singh v. State of Punjab (1964 (1) Cri LJ

730). We may further add that the proof of the case against the accused must depend not on the absence of explanation on his part but upon the

positive affirmative evidence of his guilt given by the prosecution. We have discussed hereinabove there is no positive affirmative evidence of the

prosecution in order to prove the guilt of the accused. We may further add that in the present case, because the prosecution evidence is entirely

untrustworthy and it has not been accepted by the trial Court also, in these facts and circumstances it was not open to the Court below to rely

upon the admission of the accused, if any, made in his statement recorded u/s 313 of the Code and to base a conviction thereon. In the present

case, the entire prosecution evidence was positively held to be untrue and if this be the position, according to us,- there was hardly any occasion to

consider the piece-meal statement of accused. We have seen the statement of the accused and we find nothing contrary or inherently improbable in

his statement. The intention of Section 313 of the Code cannot be stressed up to the extent that it may lighten the burden of the prosecution.

According to us, the prosecution must by its own evidence bring home the charge of the accused without relying upon the statement of the accused

recorded u/s 313 of the Code. We may not hesitate to say that where the statement made by an accused is partly inculpatory, the Court accept it

or reject it as a whole, however, the Court is not entitled to convict the accused relying on the inculpatory part and ignoring the exculpatory part. In

this regard we may profitably rely the decision of the Apex Court in the case of Dagadu Anna Vaze v. The State of Maharashtra (1966 Cri. (SC)

303).

21. Since the conviction has been passed by the trial Court not on account of the prosecution''s evidence, but on account of the statement of the

accused-appellant recorded u/s 313 of the Code, according to us, it cannot be sustained in the eyes of law for the reasons, which we have already

discussed hereinabove.

22. In the result, the appeal succeeds and is hereby allowed. The conviction of the appellant is hereby set aside. As the appellant is in jail, he be set

at liberty forthwith, if not required in any other case.