

CASE NO.:
Appeal (crl.) 1174 of 1998

PETITIONER:
MAJID

Vs.

RESPONDENT:
STATE OF HARYANA

DATE OF JUDGMENT: 11/12/2001

BENCH:
K.T. Thomas & S.N. Phukan

JUDGMENT:

WITH
CRIMINAL APPEAL NO.1173 OF 1998

J U D G M E N T

PHUKAN, J

Four brothers were booked for trial under Section 302 read with Section 34 and other lesser offences of the Indian Penal Code. The Sessions Judge acquitted one accused namely, Aas Mohammed and the High Court acquitted another accused (Sher Mohammed). The High Court affirmed the conviction of two other brothers, namely, Majid and Bashir who have filed these two appeals by special leave and we are disposing of the appeals by this common judgment.

On the intervening night of August 11/12, 1995 in the wee hours i.e. about 4 a.m. Smt. Hamidi and her husband Abdul Rahim (PW-7) were subjected to murderous assault and at that time their minor son Hasham (PW-6), aged about 11 years, was the only person present. Both Smt. Hamidi and her husband Abdul Rahim became unconscious and fell down. Hasham saw the assault, raised an alarm and persons from nearby houses came to the house of Abdul Rahim. At about 5.50 a.m., Hasham (PW-6) was taken to the Police station by Jamaluddin, Shaurab and Tahir where Hasham was purported to have made a statement on the basis of which the First Information Report was recorded. In this statement, Hasham was alleged to have made a statement that there was a quarrel between his parents followed by assaults and as a result both of them were injured. Tahir was the nephew of the accused. Hamidi who was taken to the hospital remained unconscious till her death on August 14, 1995. Abdul Rahim (PW-7) who became unconscious after the assault was also taken to the hospital and he regained consciousness only after more than ten days. After Hamidi succumbed to her injuries, on August 15, a supplementary statement of Hasham (PW-6) was recorded by a Police officer of the rank of the Dy. Superintendent and in this Hasham stated that all the four accused assaulted his parents. After further investigation, police submitted charge sheet against the four accused and they were

convicted as stated earlier. According to the prosecution, four years prior to occurrence, all the four accused assaulted Abdul Rahim (PW-7), as his eldest son Sher Mohammed was suspected of having illicit relationship with Mehmooda, sister of the accused. Abdul Rahim and his deceased wife with their two sons left the village out of fear of the accused and on their return to the village after more than four years, the present occurrence took place.

The plea of the accused was total denial and to prove the alleged statement of Hasham (PW-6) made on August 12, 1995 before police, D.W.1 Jamalludin - ex-Sarpanch of the Village, was examined as defence witness.

The crucial question to be determined in this case is as to whether eye-witness Hasham (PW-6) minor son of the deceased made any statement to the police on August 12, 1995 or not and in the alternatively his alleged statement was under the influence of Jamaluddin, Shaurab and Tahir. If this statement is discarded, the statement recorded by police under section 161 on August 15, 1995 on the line on which Hasham deposed before the court fully supports the case of the prosecution and in addition the evidence of his father- PW-7 also supports the said statement.

We may now refer to both the statements made by Hasham (PW-6) on 12/15 August, 1995. This witness was examined in court with reference to his statement recorded by the Dy. Superintendent under Section 161 Cr.P.C. on August 15. He stated before the trial court that on August 12, at about 4 a.m. he woke up on hearing noise and saw all the accused inside their house; accused Majid armed with Kulhari (axe) and remaining three accused with lathies. Accused Aas, Bushir and Sher inflicted lathi blows on the head of his mother Hamidi, who became unconscious and fell down. Thereafter, accused Majid inflicted Kulhari blow on the neck of his father Abdul Rahim (PW-7), who also fell on the ground and became unconscious. Thereafter, accused ran away. On alarm being raised by him, people from nearby houses came to their house. Thereafter, Jamaluddin, Shaurab and Tahir took him to the police station and obtained his signatures on a blank piece of paper. He admitted his signature but denied making of any statement before the police on August 12.

His alleged statement made to the police on August 12 when he was taken to the police by Jamaludin, Shaurab and Tahir was put to him in cross examination and he denied to have made any such statement. This statement formed part of the FIR where Hasham (PW-6) was supposed to have stated that in the evening of the date of occurrence, his mother demanded money for buying vegetable from his father who declined the request, as he had no money. As his mother refused to prepare meals, his father gave slaps and fist blow on his mother. Thereafter, his mother prepared 'dry meals'. After taking meals, all of them went to sleep and in the morning at about 4.00 a.m. on hearing noise he woke up and saw his father giving two-three blows to his mother by the handle of an axe, which he was holding. Thereafter, his father laid down on the ground. His mother took the axe and gave a blow on the front side of the neck of his father who took away the axe and threw it. Thereafter, he got nervous, raised the alarm and many persons including Jamaluddin Sarpanch, Shaurab Ex.Sarpanch, Tahir and other neighbours came to their house and Jamaluddin, Shaurab and Tahir took him to the police station.

To appreciate the statement made by this witness on August 12, we may extract the injuries sustained by deceased Hamidi and Abdul Rahim (PW-7). Dr. (Mrs.) Santosh Jain (PW-3) examined Abdul Rahim on August 12, 1995 and found the following injuries: -

"Incised wound of size 13 x 13 x 5 cms x deeply placed trachea seen. Fresh bleeding was coming from the wound. The patient was unconscious. The wound was present on front side of neck".

On the same day, she examined deceased Hamidi and found the following injuries: -

"1. Lacerated wound of size of 5 x ½ x bone deep at the left side of skull, 5 cms above the left eye brow. Fresh bleeding was present".

2. Lacerated wound of size 3 x ½ cms x bone deep on the left side of skull, 1 cm above injury No.1.

3. Lacerated wound of size 6 x ½ cms x bone deep on the left side of skull, 4 cms above injury No.2 and 9 cms above the left ear and 4 cms away from the midline. Fresh bleeding was present."

Dr. Saxena (PW-2) treated Abdul Rahim in the hospital from August 12 to August 30, 1995 and deposed that he was admitted with respiratory distress, bleeding from the mouth and open neck and was operated for tracheostomy and repair of the injured wound on neck was done.

Dr. Amar Singh Rathore (PW-10) conducted post-mortem on the dead body of deceased Hamidi on August 14, 1995 and on opening the skull, he found sub-scalp haematoma greenish brownish in colour all over the skull; there was fracture of left temporo parietal bone which was depressed in nature and was of size of 6 X 5 cms; another fracture of left side fronto parietal bone going towards right side mid parietal bone with tissue staining present on the fractured site and extra sub-dural haemorrhage left side fronto parietal area sub-dural haemorrhage all over both hemisphere more on occipital side.

According to Hasham PW-6, his father - Abdul Rahim gave 2-3 blows by the handle of the axe on the body of his deceased mother Hamida and thereafter he laid on the ground in the room. His mother took the axe and gave one axe blow on the neck of his father from the front side. Both the above external and internal injuries found by Dr. Rathore on the body of the deceased Hamida could not have been caused by two-three blows of the handle of the axe and moreover with the above injuries she would not have been able to get up and gave blow with the axe on the neck of her husband. At the time of the occurrence, Hasham was all alone in the house. After the incident, he raised alarm and people from the neighbourhood including Jamaluddin, Shaurab and Tahir came. Taking advantage of the helpless condition of Hasham, the above three persons took him to the police station and got his statement recorded on 12th August. After the death of Hamida police realized the gravity of the occurrence and a superior Police Officer took up investigation and recorded the statement of Hasham on August 15 which was the correct version of the incident as it was supported by medical evidence and also the evidence of his father, Abdul Rahim (P.W.7). Another important factor, which the High Court correctly noticed, was that though in the statement of August 12, Hasham stated that the axe was thrown away but the Investigating Officer did not find any axe at the place of occurrence.

Learned counsel for the appellant has strenuously urged that the courts below ought not to have discarded the evidence of defence witness Jamaluddin D.W.1. Jamaluddin deposed before the court that on hearing alarm coming from the house of Abdul

Rahim, he went there and found Hasham weeping and on being asked Hasham told him that his parents quarrelled over meals and thereafter his father gave Kulhari blow on the head of his mother deceased Hamidi, who at the same time gave Kulhari blow on the neck of his father.

What is the utility of the evidence of DW-1 in the case? All that the defence can possibly contend is that his evidence could be used to discredit the testimony of PW-6 Hasham. Of course it is a method recognised by law under Section 155(3) of the Indian Evidence Act (for short 'the Act') that the credit of a witness can be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. Can the evidence of PW-6 be contradicted with the evidence of DW-1 unless at least the attention of PW-6 has been drawn to the fact that he had made such an inconsistent version to DW-1?

If the former statement was in writing or was reduced to writing, Section 145 of the Act requires that attention of the witness must be called to those parts of it which are used for the purpose of contradicting him. Here the statement allegedly made by PW-6 to DW-1 was not in writing, nor was it reduced to writing. Nonetheless, if the object of examining DW-1 as a witness was to discredit PW-6 it is only fair to insist that PW-6 himself should have been given an opportunity to explain it. Without PW-6 being asked about that aspect, it is unreasonable to expect PW-6 to explain about it. Hence it is immaterial that the statement claimed by DW-1 as made to him by PW-6 was not reduced to writing.

When PW-6 was cross-examined by the defence counsel he was not asked anything about the alleged statement made by him to DW-1. In such a situation we cannot give any credence to the evidence of DW-1.

Both the courts below have also recorded a clear finding that previous enmity between the parties was duly proved which was the motive of the crime. We do not find any material to disturb the concurrent findings recorded by the trial court as well as by the High Court that the appellants were the perpetrators of the crime and accordingly we do not find any merit in these appeals.

Before parting, we record our appreciation for valuable assistance rendered by the learned counsel Mr. V.K. Mehta, Amicus Curiae appointed by this court.

In the result, the appeals fail and are dismissed.

..J.
[K.T. Thomas]

J.
[S.N. Phukan]

December 11, 2001