

**Court No. - 46****Case :-** CRIMINAL APPEAL U/S 374 CR.P.C. No. - 7320 of 2006**Petitioner :-** Rishi Pal**Respondent :-** State Of U.P.**Petitioner Counsel :-** Prem Prakash, Km. Akanksha Yadav**Respondent Counsel :-** Govt. Advocate**ALONG WITH****1. Criminal Appeal No. 6537 of 2006****Harnandan Vs. State.****AND****2. Criminal Appeal No. 7733 of 2006****Karu alias Surendra Vs. State.****Hon'ble Amar Saran, J****Hon'ble N.A. Moonis, J****(Delivered by Hon'ble Amar Saran, J)**

These criminal appeals arise out of a judgement and order dated 17.10.2006, passed by the Special Judge (E.C. Act)/Additional Session Judge, Badaun in S.T. No. 962 of 1996, State Vs. Rishipal and others, convicting and sentencing the appellants Rishi Pal, Karu alias Surendra and Harnandan to undergo three months RI under Section 147 IPC. The appellants Rishi Pal and Karu alias Surendra have also been convicted to six months RI under Section

148 IPC. The three appellants Rishi Pal, Karu alias Surendra and Harnandan have further been convicted to imprisonment for life under Section 302 read with section 149 IPC, together with a fine of Rs. 5000 each. In default of payment of fine they have further to undergo three months imprisonment. All the sentences were to run concurrently.

When the case was called out in the revised list, as the appellants counsel Sri Ratnesh Nandan Singh, who represented the appellant Karu alias Surendra in Criminal Appeal No. 7733 of 2006 and appellant Harnandan in Criminal Appeal No. 6537 of 2006, and Sri Prem Prakash Yadav and Km. Akansha who represented the appellant Rishi Pal in Criminal Appeal no. 7320 of 2006, chose not to appear, hence this Court proceeded to hear the learned AGA and to peruse the judgement and record of the trial court and to decide the appeal in terms of the directions given in the case of *Bani Singh v. State of U.P.*, AIR 1996 SC 2439.

The prosecution case as set out in the FIR, lodged by the informant Gajveer on 27.10.1993 at 10.10 P.M at Police Station Binawar, district Budaun was that he

along with his brother Naresh Pal had gone to Kishni Jatav's house, where they called out to Kishni's wife to come to their field the next morning for harvesting their paddy. At that time, the appellant Rishi Pal carrying a '*Gandasa*' and the accused Munendra who was also armed with a '*Gandasa*,' Guddu, and Karu, who were armed with knives and Harnandan who was armed with a Lathi emerged at that spot and caught hold of Naresh Pal and took him inside Kishni's house. On the cry of the informant Gajveer, Phoolwati the wife of Kishni came out of the house in fear and went away. On the cries of this witness, Satendra and Bhalrey and others arrived at the spot and saw the appellants and co-accused in the light of torches assaulting the deceased with their respective weapons. On the alarm, the assailants came out of

the house and ran away towards the south of the village. Munendra absconded and Guddu was murdered during the trial, hence the aforesaid two persons are not parties in these connected appeals.

The prosecution in support of its case has examined the informant Gajveer as PW-1 and Satendra as PW-2. The witness Bhalrey was not examined. Apart from

these two eye witnesses, the prosecution examined Dr. V.K. Jadaun as PW-3, who conducted the post-mortem on the body of the deceased on 28.10.1993 at 3.00 P.M at District Hospital, Budaun. PW-4 HC Krishna Gautam was also examined to prove the check FIR and GD entries etc. PW-5 D.K. Baliyan, S.O., P.S. Binawar was the second Investigating Officer, who investigated the case after transfer of the earlier Investigating Officer, the S.O of police station Binawar, namely Sri Indrajeet Singh. The earlier Investigating Officer had also conducted the inquest on the body of the deceased Naresh Pal and prepared the relevant papers which are in his hand writing.

One witness DW-1 Smt.Phoolwati alias Phulwa widow of Kishni Jatav has appeared as a witness in defence. The plea of the accused was of denial. It was further suggested by the defence that when the deceased Naresh Pal did not return home in the night, then his family members went to search for him and found his body lying in the house in some other circumstances.

The informant Gajveer PW-1, brother of the

deceased substantially affirmed his FIR in the court that he had gone along with the deceased to Kishni 's house at about 7.00 P.M on the date in question for calling labourers for harvesting their paddy and in this connection they had called Smt. Phoolwati alias Phulwa, the wife of late Sri Kishni. At that time, the appellants Rishi Pal and Munendra, who were armed with '*Gandasas*,' Guddu and Karu alias Surendra who were armed with knives and Harnandan who was armed with a lathi came out of Ved Raj's house and they caught hold of the deceased, who was standing outside the door of Kishni's house. They cried out that he should be murdered. Then they caught hold of Naresh Pal and took him inside Kishni's house. At that time, Smt. Phulwa ran away from the house. On his alarm, Satendra and Bhalrey reached there carrying torches. They entered 2 or 3 paces into the house from where they saw the five assailants attacking the deceased Naresh Pal with *Gandasa* and knives. He was lying on the floor. When the informant raised further alarm, then the accused bolted from the house from the southern door by which they had entered the house. Out of

fear, the witness did not intervene in the incident or give any chase to the accused. The deceased was lying dead inside the house as a result of his injuries. Gajveer dictated the report to Shiv Kumar Sharma of Binawar and he handed over the same to the H.C. at P.S. Binawar. The appellant Rishi Pal bore enmity against Naresh Pal Singh because Rishi Pal would often let loose his animals causing damage to the crops of Naresh Pal in his field. They had also beaten Naresh Pal on one or two earlier occasions.

The version of Satendra PW-2 was that in the evening at about 7.00 P.M on the date of incident, when he was returning from his field carrying a torch, he met Mallo who also reached the spot along with him. He saw Gajveer standing at the door of Kishni's house. When they flashed their torches, he saw the five assailants attacking the deceased Naresh Pal Singh and Naresh Pal was lying on the floor in Kishni's house.

PW-3 Dr. V.K. Jadaun who conducted the post-mortem on the body of the deceased Naresh Pal on 31.10.93 found the following ante-mortem injuries:

1. Incised wound 16 cm x 4 cm x bone deep in

- front of neck. Muscles, skin, arteries, veins, nerves, trachea, oesophagus cut above adam's protuberance
2. Stabbed wound left side of thyroid 6 cm x cmx 3 cm x cavity deep 15 cm below left nipple at 6' O clock position Intestines had come out which were punctured at places. The spleen was punctured or cut.
 3. Stabbed wound 1 cm x 2 cm x cavity deep on right side of abdomen, above the Pelvic bone.
 4. Incised wound 2 cm x 1 cm x muscle deep inside on left eye medial angle.
 5. Stabbed wound 1 cm x .5 cm x cavity deep on middle of abdomen 8 cm above umblicus at 12 'o clock position.
 6. Incised (cut) 8 cm x 6 cm x muscle deep, with scrotum and penis separated from its base.
 7. Incised wound 10 cm x 4 cm x bone deep on left side neck. Muscle arteries cut, all cervical vertebrae cut.

According to the doctor rigor mortis had passed of from the upper limb which was present in the lower limbs. There was post mortem staining

on dependent parts.

The deceased could have died on 27.10.1993 at about 10.00 PM. On examining the stomach condition, the doctor opined that the deceased could have consumed food 2 or 3 hours before his death. The cause of death was due to ante-mortem injuries. DW-1 Smt. Phoolwati alias Phulwa who was examined in defence has stated that the deceased Naresh Pal Singh had come to her house in the night in question and was lying with her on the same cot at the time of incident. At that time two persons jumped over her boundary wall, crying out that he was a witness in Mahipal's murder case and that he would not abstain from giving evidence in the case, hence they attacked Naresh Pal with sharp edged weapons. The said accused persons also gave kicks and fist blows to her, because of which her bangles were broken. Finding an opportunity, she ran away from her house. The deceased was a witness in the murder case of Mahipal in which the persons belonging to village Sikroli were threatening him not to give evidence. She further stated that the appellants Rishi Pal, Harnandan and Karu alias

Surendra were not involved in the murder of Naresh Pal. She had even filed an affidavit to this effect before the Chief Judicial Magistrate. She was the wife of Kishni Jatav, who had died and after his death, she had developed illicit relations with the deceased Naresh Pal. She admits in her cross-examination by the State that she had 10 or 12 bighas land, which was being looked after by her husband's elder brothers (i.e. '*jeth* and *jithau*') who used to also bear her expenses. They had objected to Naresh Pal's visits to her place. There is also a suggestion of the defence that the said elder brothers might have murdered the deceased because of his illicit relations with Phulwa.

The crucial question which arises in this case is which of the two versions, the one set out by the prosecution or the one set out by DW-1 Smt. Phoolwati alias Phulwa is more worthy of credence. As witnesses may tell lies, but circumstances tell the truth, we need to analyze the three significant circumstances which help us resolve this question.

One, the most important circumstance is that an amputated penis of the deceased was lying in the

room of DW-1 's house. This was noted in the site plan as also in the inquest report. PW 3 Dr. V.K. Jadaun had also narrated that the penis and scrotum had been cut.

Two, some broken piece of bangles were lying near the blood of the deceased which had spilt in the room, and are marked as 'X' in the site plan.

Three, the deceased was not done to death out side Kishni's house at point 'B' where he was apprehended by the assailants, but he was allegedly dragged inside and done to death at point 'X' which was 15 paces from the door of the house of the courtyard of Kishni Jatav where the witnesses were standing.

The allegations mentioned in the examination in chief of PW 1 Gajbir that appellant Rishi Pal's animals used to damage the crops of the deceased Naresh or that they had earlier beaten Naresh would hardly provide any motive for Rishipal and his companions to commit his murder, although it could provide a reason for the false implication of the appellants. Even the motive belatedly suggested in the cross examination of Gajbir that the deceased was

murdered because he was a witness in the murder case of Mahipal, would not give rise to the factual situation that we notice in this crime, and in our view the crime would never have been committed in the manner alleged. We find that the amputated piece of penis was lying inside Phoolwati's room in the house. Such crimes usually have sexual overtones, or perhaps they could have been committed by her brothers-in-law as has been suggested by the defence, who may have felt resentful of the deceased's intimacy with Phoolwati after her husband Kishni's death, for reasons of family dishonour or a possible future threat to their joint family property, as Phoolwati admitted that 10 or 12 bighas had fallen to her share. Even though the defence witness Smt. Phoolwati alias Phulwa has denied that she developed illicit relations with any other person after Naresh's death, the possibility of her having other suitors who may have nurtured some sexual jealousy cannot be ruled out. Incidentally the murder case of Mahipal had resulted in acquittal because the parties had compromised their dispute.

The second circumstance, viz. the presence of broken bangles at the spot near the dead body and the amputated penis and blood is more consistent with the explanation offered by Smt. Phoolwati alias Phulwa who stated that the assailants had assaulted her also after they had arrived in her room, when the appellant was lying with her on her bed and in the process her bangles were broken which were lying at the spot. The explanation of the witnesses as to the presence of broken bangles, which PW 1 Gajbeer denies having noticed and PW-2 Satendra initially denies seeing the broken bangles, but later explains that the wife of Naresh Pal and his mother had broken their bangles when they were crying and lamenting near the dead body, seems less acceptable than Phulwa's version as to how the broken bangles were found at that spot.

The third circumstance of the deceased not having been done to death at the door of Kishni's house where he was apprehended by the assailants, but his having been dragged 15 paces inside the house, into the room which possibly belonged to Phulwa is inexplicable on the prosecution version. According to

PW-1 Gajbir, the appellant Rishi Pal had been given *Gandasa* blows, at the door of the house of Smt. Phoolwati alias Phulwa which had caused instantaneous bleeding from the the neck, yet no blood was found at the door of the house where the first attack was initially made. Blood was only found in the inner room where Phulwa used to reside.

If the assailants had emerged from Ved Raj's house and two of the assailants Surendra alias Karu and Guddu were sons of Ved Raj, they could either have caught hold of the deceased out side the house of Phoowati and Kishni, and murdered him at that very point, or they could have dragged him to Ved Raj's house which has been shown in the site plan and was close by. It defies reason why the assailants on apprehending the deceased outside Kishni's house would take him inside Kishni's house for the purpose of committing his murder.

We therefore think that the version given by Phulwa that the deceased was done to death in that very room where he was lying with her on her cot, when the assailants came and attacked him and caused him the injuries which were present on his body

(including his amputated private organs) and slapped her and broke her bangles which were found lying at the spot appears to be more probable, than the version set out by the prosecution that the deceased was apprehended at the door of the courtyard of Kishni's house, and dragged inside the room and murdered there.

The Sessions Judge without analysing the significance of these circumstances for deciding whether the prosecution version or the defence version given out by Phulwa appears more probable, has blithely chosen to disbelieve the defence version by simply declaring Smt. Phoowati to be a woman of loose character. She may also not have spoken out the whole truth, as when she mentioned that the two assailants (who were not the named accused of this case) had jumped over her boundary wall and attacked her and cried out that Naresh should be murdered because he was a paiokar and witness in the murder case of Mahipal. Likewise where she states that the deceased used to lie with her, rather than at his home because he had a fear for his life may not appear believable. She may have stated

these facts possibly to save her brothers-in-law (*jeth and jethau*) who might have been involved in this incident, as she may have not wanted to incur their wrath after being widowed from her husband, as she was dependent on them, or for any other reason. It is well settled that there can be no whole sale rejection of a witness' testimony because of some embroidery or embellishments in his testimony, although the same needs to be critically appraised.

A Division Bench of the Delhi High Court in ***Shyam Sunder v State, 1997 Cri.L.J 35*** has placed reliance on a decision of the Supreme Court in ***State of Maharashtra v. Madhukar Narayan Mardikar, AIR 1991 SC 207*** for the proposition that even if a woman is considered a person of easy virtue, her testimony cannot be excluded on that ground alone. At best it needs to be evaluated with caution. In this context paragraphs 13 and 14 of the law report reads:

“13. Learned counsel for the appellant while animadverting on the above testimony of PW 5 Smt. Om Wati has contended that she is a lady of easy virtue. Thus it would be highly unsafe to place reliance on her statement. We are sorry we are unable to agree with the contention of the learned counsel. We feel that it cannot be laid down as a rule that in each case if a particular witness is found to be

a bad character in that eventuality her testimony is liable to be flung to the winds. To our mind, it will be a very risky proposition of law. We feel that the Court while dealing with the testimony of a witness who is not of good character is required simply to examine the statement of such a witness with great care and caution. Her statement in such a case would be subjected to a greater scrutiny. If the Court even then comes to the conclusion that it would be safe to base the conviction on the said testimony, there is no such bar which would come in the way of the Court.

14. *The above view finds support from the view which the Hon'ble Supreme Court took in a case reported as (1990) 4 JT (SC) 169 : (AIR 1991 SC 207), State of Maharashtra v. Madhukar Narayan Mardikar. In the said case the complainant was a lady of loose and licentious character. However, while dealing with the evidence of the said lady it was opined by their Lordships of the Supreme Court "...Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard. At the most the officer called upon to evaluate her evidence would be required to administer caution unto himself before accepting her evidence."*

It would further be useful to reproduce sections 146

and 148 of the Evidence Act here:

146: Questions lawful in cross-examination- When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend-

1. *to test his veracity,*
2. *to discover who he is and what is his position in life, or*
3. *to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture:*

Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character.

148:- *Court to decide when question shall be asked and when witness compelled to answer:- If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall*

decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:-

- 1. Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;*
- 2. Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies;*
- 3. Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;*
- 4. The Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that*

the answer if given would be unfavourable”

It may be noted that section 146(3) of the Evidence Act permits putting questions to a witness which may shake his credit, by injuring his character, but section 148 clarifies that if the question only injures the character, but is otherwise irrelevant to the suit or proceeding, the Court may permit the witness not to answer it. In exercising this discretion the Court may consider such questions proper only if the truth of the imputation could seriously affect the credibility of the witness, but they are improper if the imputations are so remote or of such a character, that they would not affect the Court's opinion as to the credibility of the witness. Questions are also improper if there is disproportion between the imputation against the witness' character and the importance of the evidence.

In the present case it may be noted that no suggestion has been given to this witness that she is a woman of easy virtue. She also denies having developed illicit relations with any other person after Naresh's death. It has only been suggested that she has deposed in favour of the accused in order to

save them, without substantiating this allegation in any manner.

Indeed if Smt. Phoolwati, who belonged to the Scheduled caste had developed illicit relations with the deceased, then it was more probable that any assailants who may have been unhappy with the alliance may have attacked him at the spot where his dead body was found in her room, resulting in the circumstances indicated above. Her so called “loose character” would therefore provide more reason to believe her testimony than to disbelieve it.

In this connection section 7 of the Evidence Act may be extracted:

7. Facts which are the occasion, cause or effect of facts in issue- Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant”.

Thus Section 7 of the Evidence Act makes relevant, facts which are the occasion or which afford an opportunity for the occurrence of the transaction. The

visits of the deceased to Phulwa's house in the background of what the learned Sessions Judge has decried as her 'looseness of character' would thus provide the occasion for the crime, because they would afford an opportunity to the assailants to commit the crime in her house, if she was entertaining a visitor whose presence they resented, and make the testimony of this witness that much more relevant and credible for this reason.

We also find that Bhurey father of Mahipal and not Satendra or Bhalrey, who were the other witnesses of the incident had gone along with Gajbir when he went to the police station to lodge the report. At that time, Bhurey could easily have prevailed over Gajbir to nominate Rishipal, Guddu and others who were earlier nominated by him in the murder case of his son Mahipal.

Furthermore only a single other witness Satendra PW-2 who is the cousin brother of deceased Naresh Pal has supported the version of Gajbir. Even Bhalrey whose house adjoins Kishni's house and who is also said to have arrived at the spot along with Satendra has not come forward to give testimony in

support of the prosecution case. It is thus clear that no witnesses of the neighbourhood was prepared to support this prosecution story.

Some other discrepancies, which assume significance in the light of the crucial circumstances described above may now also be considered. It was put to the Investigating Officer that in his 161 Cr.P.C statement Satendra had deposed that he was going to ease himself and not that he was returning to the village. In his 161 Cr.P.C statement, this witness had stated that Gajbir had told him that his brother had been murdered by Rishi Pal after dragging him into the house of some Jatav. Satendra had told the Investigating Officer that he would produce his torch at a later stage as he was going for the autopsy of the deceased, but the torch was not produced.

Another major failing in this case is that neither the first Investigating Officer Indrajeet Singh nor the final Investigating Officer D.K. Baliyan PW-5 tried to record the 161 statement of Smt. Phoolwati @ Phulwa whom we have shown to be a crucial witness in whose room the incident had taken place. Their explanation that they had made attempts to contact

Phulwa but she could not be found seems unacceptable.

For all the aforesaid reasons, we are of the opinion that the prosecution has not been able to establish its case against the appellants. They are adjudged not guilty of the offence for which they have been charged and are acquitted. The appeal accordingly succeeds and is allowed.

The appellant Harnandan, who is on bail, need not surrender. His bail bonds are cancelled and sureties discharged. The other appellants Rishipal and Karu alias Surendra who are in jail shall be released forthwith unless they are wanted in connection with any other case.

Order Date :- 3.3.2011

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