Lahu Kamlakar Patil & Anr vs State Of Maharashtra on 14 December, 2012

Author: Dipak Misra

Bench: Dipak Misra, K. S. Radhakrishnan

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 114 of 2008

Lahu Kamlakar Patil and Anr. ….. Appellants

Versus

State of Maharashtra … Respondent

J U D G M E N T

Dipak Misra, J.

The present appeal has been preferred by original accused Nos. 2 and 3 assailing the judgment of conviction and order of sentence passed by the High Court of Judicature at Bombay in Criminal Appeal No. 790 of 1989 whereby the High Court has confirmed the conviction and sentence passed by the learned Additional Sessions Judge, Raigad, Alibag in Sessions Case No. 113 of 1988 for offences punishable under Sections 302, 147, 148, 149 and 452 of the Indian Penal Code, 1860 (for short "the I.P.C.") and sentenced the appellants to suffer life imprisonment and pay a fine of Rs.1,000/- each, in default, to suffer simple imprisonment for six months.

2. Filtering the unnecessary details, the prosecution case is that on 19.2.1988, PW-1, Chandrakant Phunde, the informant, who is the owner of a rickshaw bearing No. MCT-858, while going from Somatane to Panvel for his business, met PW-2, Janardan Bhonkar, who hired his rickshaw for Panvel. On the way, they met the deceased Shriram @ Bhau Harishchandra Patil who wanted to go in the rickshaw and with the consent of Janardan, the three of them proceeded towards Panvel. The deceased, Bhau Harishchandra Patil, went to Gemini Tailors to pick up his stitched clothes at Palaspe Phata and thereafter they stopped near Milan Hotel to have some snacks. As the

prosecution story proceeds, when they were inside the hotel, 10 to 15 people entered inside being armed with swords, iron bars and sticks. As alleged, Lahu Kamlakar Patil, the appellant No. 1, had an iron bar and appellant No. 2, Bali Ram, had a sword. Bali Ram and Lahu assaulted the deceased on his head with their respective weapons and the other accused persons also assaulted him. Janardan tried to resist and got hit on his right hand finger due to the blow inflicted by the sword. As there was commotion in the hotel, people ran hither and thither, and PW-2, Janardan, also took the escape route. After the assault, the accused persons ran away and Bhau was left lying there in the hotel in a pool of blood.

3. As the facts are further unfurled, Chandrakant Phunde went to the police station, lodged an F.I.R. and handed over the stitched clothes of the deceased which were in the rickshaw to the police. On the basis of the F.I.R., a case under Sections 147, 148, 149, 302 and 452 of the I.P.C. was registered and the criminal law was set in motion. In the course of investigation, the investigating agency got the autopsy conduted, seized the weapons, prepared the `panchnama', examined the witnesses under Section 161 of the Code of Criminal Procedure, 1973 (for short "the Code") and arrested six accused persons including the present appellants. After completing the investigation, the investigating agency placed the charge-sheet before the competent Court who, in turn, committed the matter to the Court of Session and, eventually, it was tried by the learned Additional Sessions Judge, Raigad Alibag.

4. The accused persons abjured their guilt and pleaded false implication and, hence, faced trial.

5. In order to prove its case, the prosecution examined nine witnesses; PW-1, Chandrakant Phunde, the informant, PW-2, Janardan Bhonkar, who was an eye-witness to the occurrence, PW-3, Shantaram Jadhav, from whom the accused persons had made enquires relating to the whereabouts of the deceased, PW-4, Baburao Patil, father of the deceased, PW-5, Prakash Patil, a post-occurrence witness who had reached Hotel Milan to find that Bhau was lying in a pool of blood, PW-6, the Inspector who had registered the complaint of PW-1, PW-7, Dyaneshwar Patil, a panch witness who has proven the blood-stained clothes and the iron bar, PW-8, Eknath Kamble, and PW-9, Shrirang Wahulkar, the two other panch witnesses who have been declared hostile.

6. The defence chose not to adduce any evidence.

7. The learned trial Judge, after scrutiny of the evidence, found that the prosecution had been able to prove the case against the present appellants and, accordingly, convicted them for the offences and imposed the sentence as has been stated hereinbefore. As far as the other accused persons are concerned, he did not find them guilty and, accordingly, recorded an order of acquittal in their favour.

8. The convicted-accused persons assailed their conviction by filing an appeal and the High Court, placing reliance on the seizure memoranda, namely, Exhibits P-25, 26, 35 and 36 and accepting the credibility of the testimony of PW-2 and a part of the evidence of PW-1, the informant, who had turned hostile, affirmed the conviction and the sentence.

9. We have heard Mr. K.N. Rai, learned counsel for the appellants, and Mr. Sanjay V. Kharde, learned counsel for the respondent.

10. Mr. Rai, learned counsel for the appellants, criticizing the judgment of conviction passed by the High Court, submitted that when the version of PWs-3 to 5 have not been given credence, the evidence of PW- 1 and PW-2 should not have been relied upon by the trial court as well as by the High Court and due to such reliance, the decision is vitiated. It is urged by him that when the informant had turned hostile, the F.I.R. could not have been relied upon as a piece of substantial evidence corroborating the testimony of PW-2, the alleged eye-witness. It is vehemently canvassed by him that the conviction has been rested on the testimony of PW-2 who has claimed to be the eye-witness though his version is totally unreliable because of his unnatural conduct and his non-availability for examination by the police which is not founded on any ground. It is urged by him that the Investigating Officer had not been examined as a consequence of which prejudice has been caused to the appellants. That apart, the seizure of weapons has not been established since the panch witnesses have turned hostile and the High Court has relied upon the discovery made at the instance of accused No. 1 who has been acquitted. The last plank of argument of the learned counsel for the appellants is that the conviction is recorded on the basis of assumptions without material on record to convict the appellants.

11. Mr. Kharde, learned counsel for the State, supporting the judgment of conviction, contended that though the informant had turned hostile, yet his evidence cannot be totally discarded as it is well settled in law that the same can be relied upon by the prosecution as well as by the defence. It is his further submission that the evidence of PW-1, Chandrakant Phunde, clearly proves the first part of the incident and what he has stated in the examination-in-chief cannot be disregarded. It is urged by him that once that part of the testimony is accepted, the deposition of PW-2, the eyewitness to the incident gains acceptation as he has vividly described the incident and the assault. Learned counsel would further submit that the minor contradictions and discrepancies do not make his deposition unreliable.

12. At the very outset, we may state that the learned trial Judge had placed reliance on the evidence of PWs-3 to 5, but the High Court has not accepted their version and affirmed the conviction on the basis of the testimony of PWs-1 and 2 and other circumstances. Therefore, the evidence of the witnesses which are required to be considered is that of PWs-1 and 2 and their intrinsic worth.

13. PW-1, the informant, has stated in the examination-in-chief that the deceased had taken PW-2, Janardan Bhonkar, to the tailor's shop and, eventually, took Bhau to Milan Hotel where he waited outside in the rickshaw. He has also deposed that he was asked to come inside the hotel and while he was having water, 8-10 boys arrived there and started assaulting the deceased. Seeing the assault, he got scared and ran away. After deposing to that effect, he has stated that he had not seen anything and he was taken to the police station and his signature was taken on the complaint which was not shown to him. After being declared hostile, in the cross-examination he has denied the contents of the F.I.R. and has deposed that he came to know that Bhau had been murdered.

14. In the cross-examination by one of the accused, he has stated that he was brought to the police station in a drunken state and kept in the police station till 10.00 a.m. the next day. The trial court as well as the High Court has accepted his version in the examination-in-chief to the extent that he had taken the deceased and PW-2 to the tailor's shop and thereafter to the hotel and further that he had seen 8-10 boys entering the hotel and assaulting the deceased.

15. The learned counsel for the appellants submitted that the whole evidence of PW-1 is to be discarded inasmuch as he has clearly stated that he has not seen anything and his signature was taken on the blank paper. In any case, he has not deposed anything about the assailants except stating that 8-10 boys came and assaulted. Emphasis had been laid that the informant having been declared hostile, the whole case of the prosecution story collapses like a pack of cards. Thus, emphasis is on the aspect that once a witness is declared hostile, that too in the present circumstances, his testimony cannot be relied upon by the prosecution.

16. It is settled in law that the evidence of a hostile witness is not to be rejected in toto. In Rameshbhai Mohanbhai Koli and Others v. State of Gujarat[1], reiterating the principle, this Court has stated thus:-

> "16. It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide Bhagwan Singh v. State of Haryana[2], Rabindra Kumar Dey v. State of Orissa[3], Syad Akbar v. State of Karnataka[4] and Khujji v. State of M.P.[5])

17. In State of U.P. v. Ramesh Prasad Misra[6] this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra[7], Gagan Kanojia v. State of Punjab[8], Radha Mohan Singh v. State of U.P.[9], Sarvesh Narain Shukla v. Daroga Singh[10] and Subbu Singh v.

State[11]."

17. Recently, in Bhajju alias Karan Singh v. State of Madhya Pradesh[12], a two-Judge Bench, in the context of consideration of the version of a hostile witness, has expressed thus: -

> "Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 CrPC, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to cross- examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so

> desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination- in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution." [Emphasis added]

18. In the case of Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)[13], while discussing about the evidence of a witness who turned hostile, the Bench observed that his evidence to the effect of the presence of accused at the scene of the offence was acceptable and the prosecution could definitely rely upon the same.

19. Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the F.I.R. but has given the excuse that it was taken on a blank paper. The same could have been clarified by the Investigating Officer, but for some reason, the Investigating Officer has not been examined by the prosecution. It is an accepted principle that non-examination of the Investigating Officer is not fatal to the prosecution case. In Behari Prasad v. State of Bihar[14], this Court has stated that non-examination of the Investigating Officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In Bahadur Naik v. State of Bihar[15], it has been opined that when no material contradictions have been brought out, then non-examination of the Investigating Officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial judge nor the High Court has delved into the issue of non-examination of the Investigating Officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in Arvind Singh v. State of Bihar[16], Rattanlal v. State of Jammu and Kashmir[17] and Ravishwar Manjhi and others v. State of Jharkhand[18], has explained certain circumstances where the examination of Investigating Officer becomes vital. We are disposed to think that the present case is one where the Investigating Officer should have been examined and his non-examination creates a lacuna in the case of the prosecution.

20. Having stated that, we may proceed to analyse his evidence. He has supported the prosecution story but to the point of assault and thereafter he has resiled from his version. The submission of the learned counsel for the State is that to such extent his testimony deserves acceptance. Even if the said submission is accepted, it only goes to the extent of proving that PWs-1 and 2 and the deceased had travelled in a rickshaw, went to the tailor's shop, entered inside the Milan Hotel and some boys came inside the hotel and started assaulting the deceased. PW-1 had not named any assailant in the court to support the version of the FIR. On a scanning of the evidence, we find that he had stated that he had run away from the scene of assault and, therefore, his testimony does not, in any way, establish the involvement of the appellants in crime.

21. On a scrutiny of the entire material on record, we find that the conviction is based on the testimony of the sole eyewitness, PW-2. True it is, corroboration to the extent of going to Milan

Hotel is there from the testimony of PW-1, but the question remains whether the conviction can be sustained if the version of PW-2 is not accepted. The learned counsel for the appellants has seriously challenged the reliability and trustworthiness of the said witness, PW-2, who has been cited as an eyewitness.

22. The attack is based on the grounds, namely, that the said witness ran away from the spot; that he did not intimate the police about the incident but, on the contrary, hid himself behind the pipes near a canal till early morning of the next day; that though he claimed to be eye witness, yet he did not come to the spot when the police arrived and was there for more than three hours; that contrary to normal human behaviour he went to Pune without informing about the incident to his wife and stayed for one day; that though the police station was hardly one furlong away yet he did not approach the police; that he chose not even to inform the police on the telephone though he arrived at home; that after he came from Pune and learnt from his wife that the police had come on 21.2.1988, he went to the police station; and that in the backdrop of such conduct, his version does not inspire confidence and deserves to be ignored in toto.

23. From the aforesaid grounds, the primary attack of the learned counsel for the appellants is that there has been delay in the examination of the said witness and he has contributed for such delay and, hence, his testimony should be discredited. In Mohd. Khalid v. State of W.B.[19], a contention was raised that three witnesses, namely, PWs-40, 67 and 68, could not be termed to be reliable. Such a contention was advanced as regards PW-68 that there had been delay in his examination. The Court observed that mere delay in examination of the witnesses for a few days cannot in all cases be termed fatal so far as prosecution is concerned. There may be several reasons and when the delay is explained, whatever the length of delay, the court can act on the testimony of the witnesses, if it is found to be cogent and credible. On behalf of the prosecution, it was urged that PW-68 was attending to the injured persons and taking them to the hospital. Though there was noting in the medical reports that unknown persons had brought them, yet the court did not discard the evidence of PW- 68 therein on the foundation that when an incident of such great magnitude takes place and injured persons are brought to the hospital for treatment, it is the foremost duty of the doctors and other members of the staff to provide immediate treatment and not to go about collecting information, though that would be contrary to the normal human conduct. Thus, emphasis was laid on the circumstance and the conduct.

24. In Gopal Singh and others v. State of Madhya Pradesh[20], this Court had overturned the judgment of the High Court as it had accepted the statement of an eyewitness of the evidence ignoring the fact that his behaviour was unnatural as he claimed to have rushed to the village but had still not conveyed the information about the incident to his parents and others present there and had chosen to disappear for a couple of hours on the spacious and unacceptable plea that he feared for his own safety.

25. In Alil Mollah and another v. State of W.B.[21], an eyewitness, who was employee of the deceased, witnessed the assault on the employer but did not go near the employer even after the assailants had fled away to see the condition in which the employer was after having suffered the assault. His plea was that he was frightened and fled away to his home. He had admitted in his

cross-examination that he neither disclosed at his home nor in his village as to what he had seen in the evening when the incident occurred. He gave the information to the police only after 2-3 days. The plea of being frightened and not picking up courage to inform anyone in the village or elsewhere was not accepted by this Court.

26. From the aforesaid pronouncements, it is vivid that witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. That apart, a court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individuals to individuals. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accord with acceptable human behaviour allowing of variations, then his testimony becomes questionable and is likely to be discarded.

27. Keeping in mind the aforesaid, we shall proceed to scrutinize the evidence of PW-2. As is evincible from his deposition, on seeing the assault he got scared, ran away from the hotel and hid himself behind the pipes till early morning. He went home, changed his clothes and rushed to Pune. He did not mention about the incident to his family members. He left for Pune and the reason for the same was also not stated to his family members. He did not try to contact the police from his residence which he could have. After his arrival at Pune, he did not mention about the incident in his sister-in-law's house. After coming back from Pune, on the third day of the occurrence, his wife informed that the police had come and that Bhau, who had accompanied him, was dead. It is interesting to note that in the statement under Section 161 of the Code, he had not stated that he was hiding himself out of fear or he was scared of the police. In the said statement, the fact that he was informed by his wife that Bhau was dead was also not mentioned. One thing is clear from his testimony that seeing the incident, he was scared and frightened and ran away from the hotel. He was frightened and hid himself behind the pipes throughout the night and left for home the next morning. But his conduct not to inform his wife or any family member and leaving for Pune and not telling anyone there defies normal human behaviour. He has also not stated anywhere that he was so scared that even after he reached home, he did not go to the police station which was hardly at any distance from his house. There is nothing in his testimony that he was under any kind of fear or shock when he arrived at his house. It is also surprising that he had not told his family members and he went to Pune without disclosing the reason and after he arrived from Pune and on being informed by his wife that his companion Bhau had died, he went to the police station. We are not oblivious of the fact that certain witnesses in certain circumstances may be frightened and behave in a different manner and due to that, they may make themselves available to the police belatedly and their examination gets delayed. But in the case at hand, regard being had to the evidence brought on record and, especially, non-mentioning of any kind of explanation for rushing away to Pune, the said factors make the veracity of his version doubtful. His evidence cannot be treated as so trustworthy and unimpeachable to record a conviction against the appellants. The learned trial court as well as the High Court has made an endeavour to connect the links and inject theories like fear, behavioural pattern, tallying of injuries inflicted on the deceased with the Post Mortem report and convicted the

appellants. In the absence of any kind of clinching evidence to connect the appellants with the crime, we are disposed to think that it would not be appropriate to sustain the conviction.

28. In the result, the appeal is allowed. The judgment of conviction and sentence recorded by the learned Sessions Judge and affirmed by the High Court is set aside and the appellants be set at liberty forthwith unless their detention is required in connection with any other case.

.....J.
[K. S. Radhakrishnan]

New Delhi; .....J.
December 14, 2012 [Dipak Misra]

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[1] (2011) 11 SCC 111
[2] (1976) 1 SCC 389
[3] (1976) 4 SCC 233
[4] (1980) 1 SCC 30
[5] (1991) 3 SCC 627
[6] (1996) 10 SCC 360
[7] (2002) 7 SCC 543
[8] (2006) 13 SCC 516
[9] (2006) 2 SCC 450
[10] (2007) 13 SCC 360
[11] (2009) 6 SCC 462
[12] (2012) 4 SCC 327
[13] (2010) 6 SCC 1
[14] (1996) 2 SCC 317
[15] (2000) 9 SCC 153
[16] (2001) 6 SCC 407
[17] (2007) 13 SCC 18
[18] (2008) 16 SCC 561
[19] (2002) 7 SCC 334
[20] (2010) 6 SCC 407
[21] (1996) 5 SCC 369
