

Phoolchand vs State Of Rajasthan on 2 September, 1976

Equivalent citations: AIR1976SC315, (1976)4SCC405

Author: R.S. Sarkaria

Bench: P.N. Shinghal, R.S. Sarkaria

JUDGMENT

R.S. Sarkaria, J.

1. This is an appeal under Section 2 of the Supreme Court Enlargement of Criminal Appellate Jurisdiction Act, 1970. It is directed against an appellate judgment of the High Court of Rajasthan whereby the acquittal of the appellant was set aside and converted into a conviction under Section 302 read with Section 34, Penal Code. The facts are as follows:
2. Birdhichand deceased was a goldsmith. He had a shop in Purani Mandi, Aimer. He used to reside in his house at Aimer at some distance from his shop. He used to keep his cash and valuables in a safe in his shop. He had raised funds to start new business. He had received a loan of Rs. 5,000/- in instalments from the Rehabilitation Department. He had raised funds by selling some property, also.
3. Shivprasad another resident of Aimer, was a friend of the deceased. The appellant, Phoolchand is a resident of Kishansarh and is the brother of Shivprasad's wife.
4. The prosecution case, as it emerges from the record, is, that Phoolchand and Shivprasad hatched a conspiracy to murder Birdhichand with a view to take away cash and valuables from his shop.
5. On May 20, 1966, in the evening, Phoolchand and Shivprasad went to Shamlal, the Caretaker of the Tourist Bungalow at Pushkar, which is about 21 miles from Kishangarh. There, they talked to Shamlal who also joined them in the conspiracy. When these three were conferring with each other in confidence, Jagmohan, the Farash-cum-Chowkidar of the bungalow also came there. Shamlal asked Jagmohan to go away as he did not want him to intrude into their conversation. Jagmohan obeyed.
6. On May 21, 1966, at about 8 p.m., Shivprasad and Phoolchand both went to the house of Birdhichand. Phoolchand remained outside while Shivprasad went to the poli of the house and called Birdhichand. As Birdhichand was, at that time, in the latrine, his daughter, Chandrakala, aged 11 years, responded to the call. She went downstairs and met Shivprasad. She saw Phoolchand standing at a short distance behind Shivprasad near the Chabutra. Shivprasad told her that he wanted to see Birdhichand. In the meantime Birdhichand came out of the latrine. His wife, Shanti who was on the 1st floor, asked him to take his dinner. Birdhichand put on his shirt and told her that

Shivprasad and Phoolchand were waiting outside and that he would return within five minutes after seeing them. He asked his wife, that she should in the meantime prepare mango juice.

7. On Shanti's enquiry, the deceased told her that the keys of the shop were with him. Saying this, the deceased went away from his house in the company of Shivprasad and Phoolchand, never to be seen alive, again.

8. After awaiting in vain the return of her husband till 1 A. M. Shanti went to sleep.

9. On the same day at the Tourist Bungalow, Pushkar, at about 9 P. M. Jagmohan. Farash was about to close the door of the bungalow, as usual, when Shamlal, Care-Taker stopped him from doing so, saying that he was expecting three visitOrs. At about 11 P.M., on May 21. 1966, the Farash saw Shivprasad and Phoolchand accompanied by another person coming into the bungalow. All the three went to Shamlal's office and talked to him. Shamlal made an entry in the Visitors' Book with regard to the fact that two persons were put up in Room No. 2F. There after Shamlal took all the three up stairs into Room No. 2F. There were only two beds in that room. Shamlal asked Jagmohan Farash to put a third bed therein for use by the visitOrs. Accordingly, Jagmohan laid the third bed in that room. Jagmohan was living, at the material time, in a quarter within the precincts of the bungalow along with his two daughters, Ruth Prem (19) and Vimla (17) and his son Ullas (16). At that time, his wife was not present there. She was in the family way and had gone to her parents' village.

10. At about 4 a.m. on May 22, 1966, Ruth Prem woke up on hearing shrieks emanating from Room 2F. She awakened her father. Jag mohan, who was lying asleep on a nearby cot. Jagmohan also heard the shrieks. He went to Shamlal who was lying on a cot in front of his quarter within the precincts of the bungalow and told him about the shrieks. Shyamlal then went to Room 2F and returned and informed Jag mohan. that Shivprasad was crying because a table had fallen and hurt his leg.. Shamlal advised Jagmohan to go and rest. Jagmohan laid himself on his bed; but being in a disturbed state of mind, was unable to get a wink of sleep. About 15 minutes thereafter, he saw Shivprasad corning down and going to Shyamlal and then returning to Room 2F. After an elapse of hour and half, Shivprasad again came down-stairs ' and went back with Shyamlal to Room 2F. Shivprasad had then a kurta and a towel in his hand,

11. On the morning of May 22, 1966 at about 7, Jagmohan saw Phoolchand, Shivprasad and Shamlal going out of the bungalow after locking behind Room 2F. Thereafter, Shyamlal and Phoolchand returned to the bungalow in the evening.

12. On the night between the 22nd and 23rd of May at about 11 p.m., Ruth Prem heard the sound of "khat khat" coming from the first floor of the bungalow. She awakened her sister Vimla. Then both these girls saw two persons coming down by the staircase with a heavy load on their shoulders from the 1st floor. Shamlal was also with them. She then saw those persons carrying away that bundle out of the bungalow.

13. On May 23, 1966, at about 7 a.m. Chootu went to his field which is at a distance of about 2 furlongs from the bungalow. There he saw a dead-body wrapped in a gunny bag. There was blood on the bag Chhotu forthwith went to the Police Station, Pushkar, made the report Ex. P/1. The report was recorded by A.S.I. Mohinder Pal Mohinder Pal accompanied Chhotu to the field and sent an information to the Circle Inspector, Aimer. Mohinder Pal posted constables to guard the dead-body at the spot. H.M. Tak, Sub-Inspector who was deputed to investigate the case, reached Pushkar at about Noon and got the dead-body taken out of the gunny bag. A number of articles were found on the dead-body, Those articles included a ring (Ex. 4), silver buttons (Ex. 5), some silver ornaments (Exhs. 11, 12, 13 and 14), one-rupee currency note and a key (Ex. 17).

14. The autopsy was conducted by Dr. Chander Mohan Mathur at Pushkar. The Doctor found 5 stab wounds en the body. Wound No. 1 was on the thoricic cavity on the left side of the chest. Wound No. 2 was in the abdominal cavity. A loop of small intestines was found protruding out of the wound. Wound No. 3 was also going deep into the abdominal cavity! Wound No. 4 was on the left lumber region and had pierced the left kidney. There were also marks, each 1/2" wide around both the legs in their lower one- third part. The Doctor also found reddening on both sides of the neck of the body. In the opinion of the Doctor, wounds 1 to 4 were sufficient to cause instantaneous death in the ordinary course of nature. The reddening on the neck, in the Doctor's opinion, might be the "result of applying of hands on the neck."

15. The Investigating Officer found blood on the floor outside Room 2F, on the staircase and also on the way leading to the field of Chhotu, where the dead-body was found. The Investigating Officer recorded the statement of Jagmohan and his daughters, Ruth Prem and Vimla, on the 24th May. On 24th May, the Sub-Inspector took into possession the stock Register (Ex. 27) and the Visitors' Book (Ex. 25) of the Bungalow. He also seized blood-stained Dari (Ex. 30). He also took possession of blood-stained bed-sheets (Ex. 31, Ex. 32) and the blood-stained table Ex. 33 from Room No. 2F. On the 25th May he arrested Phool Chand, appellant, Shyamlal, Care taker and one Prabhatilal. In consequence of the information supplied by Phool Chand, the Police Sub- Inspector recovered a silken kurta and a towel from the house of Kishorilal. On June 1, 1966, pursuant to information given by Prabhatilal, he recovered a towel (Ex. 23) of the Tourist Bungalow, chappel (Ex. 6) of the deceased and pyjama (Ex. 22) lying in room 2F.

16. Shiv Prasad absconded and could not be arrested despite search. Therefore, after completing the investigation against Phoolchand, Shyamlal and Prabhatilal, the police sent them under a charge-sheet before a Magistrate, who after a preliminary enquiry committed them to the Court of Additional Sessions Judge, Ajmer, who tried the case and acquitted all the three accused. Against the acquittal of Phoolchand and Shymalal, the State preferred an appeal to the High Court. The High Court set aside the acquittal and convicted Phoolchand under Section 302, read with Section 34 Penal Code and sentenced him to imprisonment for life. The High Court maintained the acquittal of Shyamlal in respect of offences under Section 302 read with Section 109 and Section 465, Penal Code but convicted him for an offence under Section 201, Penal Code, with a sentence of 3 years' rigorous imprisonment.

17. Shyamlal filed a special leave petition in this Court under Article 136 of the Constitution which was rejected by this Court.

18. Phool Chand's appeal is now before us.

19. At the trial the prosecution demanded conviction of the appellant and his co-accused purely on the basis of circumstantial evidence which may be catalogued as under:

1. On May 20, 1966, Shivprasad and Phoolchand visited Tourist Bungalow at Pushkar in the evening and talked to Shyamlal, Caretaker in confidence.

2. Shivprasad and Phoolchand (appellant herein) together visited the house of Birdhichand, deceased, at 3 p.m. on May 21, 1966 at Aimer. Thereafter, Shivprasad called out the deceased and took him away.

3. On May 21, 1966 at about 11 p.m. Phool Chand and Shiv Prasad, accompanied by another person (who according to the prosecution was the deceased) came to the Tourist Bungalow. Pushkar. Shyamlal, Care taker took them upstairs, and lodged them in Room No. 2F.

4. On the night, between the 21st and 22nd May, 1966, at about 4 a.m., shrieks emanating from this Room 2F were heard.

5. Next morning at about 7 A. M. on the 22nd May, 1966, Phoolchand and Shivprasad were seen going out after locking Room No. 2F, and the third visitor was not with them Shyamlal, carrying a Lota was also going out.

6. On May 22, 1966 at about 11 a.m.. Phoolchand and Shivprasad came back to the Tourist Bungalow; Shivprasad then seated himself on the chabutri, while the sound of some footsteps of the other going upstairs were heard.

7. On the night between the 22nd and 23rd May 1966, two persons were seen carrying a heavy load from the Tourist Bungalow. Shyamlal was with them, Shortly thereafter, Shyamlal alone returned to the Bungalow.

8. On May 23, 1966, the dead- body of Birdhichand wrapped in a gunny bag was found in the field of one Chhoti PW at a distance of about furlongs from the Tourist Bungalow, Pushkar. It bore several injuries including stab wounds and reddening on both sides of the neck. The stab wounds were ante mortem and sufficient to cause death in the ordinary course of nature.

9. The Dari of Room No. 2F, Seized on the 24th May, 1966 from the store-room, and one bed sheet were found stained with blood which according to the Serologist was human blood.

10. Blood was found on the stone pieces of the floor just outside Room 2F and on the slab of the staircase. This blood according to the report of the Serologist was of human origin.

20. Evidence with regard to circumstance No. 2 was given by Smt. Shanti Devi (PW 6) and Chandrakala (PW 7) the wife and daughter, respectively of the deceased. Evidence with regard to Circumstances 1, 3, 4, 5 and 6 consisted wholly or chiefly of the testimony rendered by Jagmohan, PW 26, Evidence with regard to Circumstance 7 was given by Ruth Prern, PW 27, and Vimla, PW 25. To substantiate Circumstance No. 8, the prosecution examined Chhotu (PW2) the Investigating Ofifcer, H.N. Tak (PW 33) and Dr. Chandra Mohan Mathur PW. Evidence with regard to Circumstance 9 was given by Mr. Tak Investigating Officer and Ullhas PW 29. Evidence with regard to Circumstance 10 was furnished by the statement of the Investigating Officer.

21. The trial Court while holding that Birdhichand had met a homicidal death, rejected the prosecution evidence with regard to Circumstances 1 to 7. In its opinion, "Shanti Devi's statement in this Court, that Phool Chand visited her house along with Shiv Prasad during the night of May 21, 1966 when her husband accompanied them, does not seem to be true so far as Phool Chand is concerned." It further held that Jagmohan's statement was "wholly unacceptable." It further found that the infirmities in Ruth Prem's evidence go to show that she had seen (or heard) nothing during the nights between 21/22-5-66 and 22/23-5-66, and that her evidence has been created." On these findings," the trial Court acquitted Phoolchand and Shyamlal.

22. On appeal by the State, the High Court reversed these findings. In its opinion, the evidence of the aforesaid witnesses was entirely trustworthy and therefore, the circumstances enumerated above which had been cogently established, were sufficient to bring home the guilt to the appellant beyond doubt.

23. Mr. Mulla, learned Counsel for the appellant contends that in the circumstances of the case, the High Court was totally unjustified in reversing the acquittal. It is maintained that the reasons given by the trial Court for the acquittal of the appellant Phool chand were very cogent and convincing and the same have not been effectively displaced by the High Court. It is submitted that in any case, the view of the evidence taken by the trial Court was also reasonably possible and consequently, the High Court should have, in accordance with the well settled rules of caution laid down by this Court stayed its hands from interfering With the order of acquittal. Apart from reiteratnig the reasons given by the trial Court Counsel has pointed out several features of this case, which according, to him, had made the testimony of Jagmohan an unsafe basis for convicting the appellant. It is contended that the investigation was not fair; that the investigator fabricated evidence of the recovery of some incriminating articles to implicate the appellant; that this piece of evidence was found wholly unreliable by both the courts below; that Jagmohan was , first rounded up as one of the suspects and after some detention, a statement was extorted from him after a delay of at least two days and the story of Jagmohan's proceeding on two days' leave was fabricated to cover up the delay; that Jagmohan's evidence be sides being of an accomplice character, was a got up one; that to tie down Jagmohan to the story put in to his mouth by the Police, his statement was got recorded before a Magistrate under Section 164, Cr.P.C., that in any case, Jagmohan according to his own

admission, had never seen Phoolchand, appellant before the 20th May, and on that day, too. for some fleeting moments in the darkness; that on the morning of 20th May, also, he claims to have seen Phoolchand from a distance; that in these circumstances it was hazardous to convict the appellant on the basis of the uncorroborated testimony of Jagmohan; that no such corroboration was forthcoming since the evidence with regard to Phoolchand's visit to the house of the deceased on the night of the 21st May, 1966 was utterly unreliable.

24. As against this, Mr. Jain, appearing for the respondent-State has tried to support the judgment of the High Court.

25. After a careful consideration of the evidence on record and the arguments advanced on both sides, we are of opinion that the conviction of Phoolchand, appellant cannot be upheld.

26. The case against the appellant hinges to a very large extent on the testimony of Jagmohan. Was his evidence "wholly unacceptable", as the trial Court denounced it? Or, was it so flawless that it could be safely accepted as the last word as to the identity and connection of the appellant with the commission of the murder in question? For reasons that follow, we are of opinion that Jagmohan's evidence was neither "wholly unacceptable"; nor wholly impeccable. There are certain features in this case which should put the Court on its guard not to rely on his bare word, without some assurance from independent sources, about the identity of the companion of Shivprasad at the material times and places on the 20th, 21st and 22nd of May. 1966.

27. The trial Court gave eleven main reasons to show that this witness was wholly unworthy of credit. While most of these reasons were effectively dispelled by the High Court, two of them in our opinion, have not been considered in the right perspective, nor entirely neutralised. The first of them relates to his statement that on May 20, 1966, also, at about 8 p.m. Phool Chand appellant and Shivprasad came to the Tourist Bungalow, Pushkar and began having a talk with Shyamlal accused. When the witness tried to go near them, Shyamlal asked him to be off, and the witness went away.

28. The trial Judge did not believe the above version of Jagmohan because in his opinion the defence version rendered by two Audit Officers, B.P. Mathur (DW 3) and R.L. Sharma (DW 4) showed that at 8 P.M. on the 20th May. 1966, Shyamlal was at the Bus Stand, Pushkar to see off the said Officers. On these premises, the trial Judge concluded:

The statement of Jagmohan that accused Shivprasad and Phoolchand came to the Tourist Bungalow in the evening of 20-5-66 does not seem to be correct in point of time.

(Underlining ours)

29. We agree with the trial Judge that Jagmohan's version as to the visit of Shivprasad and his companion to the Tourist Bungalow, Pushkar on the 20th May not be correct with regard to the time of the visit. The visit appears to have been sometime after 8 p.m. under cover of darkness. The time of this visit and keeping Jagmohan away, have an important bearing on the question of Phool

Chand's identification. In cross-examination, Jagmohan admitted that he had not seen Phool Chand before his visit to Shyamlal on the 20th May. In other words, Phool Chand was not known to the witness. The witness according to his own showing, was not allowed to come near and participate in the talk between the visitors and Shyamlal. He had therefore, caught only a momentary glimpse of the visitors in the darkness. In spite of the fact that Phool Chand was a stranger to Jagmohan, no test identification of Phool Chand was held before a Magistrate. On the 21st May, also, he according to his own version, saw Phool Chand and Shiv Prasad coming to the Bungalow at 11 P.M. at night time. He did not escort the visitors to lodge them in Room No. 2F. Nor did the witness contact them. It was Shyamlal only who took them to that room to be lodged for the night. It seems that Jagmohan was deliberately not allowed by Shyamlal to get near the visitors.

30. Under these circumstances, Jagmohan could commit an honest mistake as to the identification of Phool Chand who was not previously known to him.

31. The second infirmity in Jagmohan's evidence stems from the circumstance that there was a delay of two days in recording his statement by the Police. Jagmohan has tried to explain it away by saying that he had gone away from Pushkar after taking two days' leave for the 22nd and 23rd May, 1966 and his statement was recorded on his return from leave on the 24th May. There is a discrepancy as to the place where Jagmohan's statement was recorded. The Investigating Officer stated that he had examined Jagmohan in the Tourist Bungalow. Inconsistently with it, Ruth Prem (PW 27) daughter of Jagmohan stated that their statements were recorded in the Police Station where her father had been kept under restraint for some days. No leave application of Jagmohan was forthcoming. Jagmohan gave a cock and bull story inasmuch as he said that he had sent his son Ullhas (PW 29) to borrow Rs. 5/- to cover his travelling expenses to Beawar, while he himself could do the same on his way to Beawar via Aimer.

32. In view of all these circumstances, the trial Court's finding that the story of Jagmohan going on two days' leave, had been invented merely to cover up the delay of two days in his examination by the Police, could not be said to be clearly wrong. The fact remains that there was hesitation on his part to disclose the facts within his knowledge, concerning the commission of this murder. Then, his statement was got recorded by the Police before a Magistrate, under Section 164, Cr.P.C. Might be that this precaution to get a hold on the witness was taken, because there was an apprehension of the witness resiling from his statement under pressure of the accused. Such an apprehension could not be altogether unfounded because one of the accused, namely, Shyamlal, was his immediate Officer, and another, Shivprasad was absconding. Nevertheless, the fact that his statement was got recorded under Section 164, Cr.P.C., in the circumstances of this case emphasises the need for caution in apprising his evidence.

33. In view of the special features noticed above which project their shadow on a part of Jagmohan's evidence, it was not prudent to accept his bare word of mouth, with out independent confirmation as to the identity and connection of the appellant, with the crime in question.

34. It remains to be seen further whether such confirmation, circumstantial or direct, was available, in this case.

35. That Birdhichand was murdered sometime on the night between 21st and 22nd of May, 1966 is not disputed. The medical witness who conducted the autopsy found redness on both sides of the neck of the deceased. There were several ante-mortem stab wounds on the body which were sufficient to cause death in the ordinary course of nature. The Doctor opined that the redness on the neck was caused by the application of pressure on the neck. The medical evidence thus indicates that the murder was in all probability, committed by two assailants acting in concert. While the medical evidence fixes the number of the assailants at two, it cannot fix their identity.

36. There was yet another circumstance which, if established, could have, with some certainty, connected Phool Chand with the murder in question. This circumstance, as alleged by the prosecution, was that on the evening at about 8 P.M. on May 21, 1966, Shiv Prasad absconder and Phool Chand appellant, both decoyed and took away Birdhi Chand from the latter's house at Aimer.

37. The prosecution had examined two witnesses to substantiate this circumstance. The witnesses were Smt. Shanti, the wife, and Chanderkala, aged 11 years, the daughter of the deceased. The trial Court found that Chanderkala even at the time of her examination in court, was too immature to understand the sanctity of oath, and therefore no oath was administered to her. The Court further held that she was a child witness and as such her evidence was "dangerous in the extreme" as child witnesses not un-often live in a climate of "make-believe."

38. The trial Court also took note of the fact that Shanti Devi while informing on the 22nd May, about the non-return of her husband, to her brother Rattan Lal (PW 4), did not name Phool Chand, but named Shiv Prasad only as the person who had taken her husband away from the house:

39. The High Court has tried to counter these reasons by saying that in cross-examination no questions were put to the child witness to establish that she had been tutored to make that statement: that Smt. Shanti's statement at the trial was of a derivative nature and her omission to name Phool Chand before the police as the companion of Shiv Prasad when the latter took away her husband from his house at Aimer, could not be used to contradict or discredit either Shanti or her daughter Chander Kala.

40. In our opinion, the High Court did not appraise the failure of Smt. Shanti to implicate Phool Chand, while reporting the matter to her brother, in the right perspective. Firstly, her report to her brother was not a statement made to police in the course of investigation. Consequently, the bar of Section 162, Cr.P.C. as to the use of that statement, did not apply. Secondly, Smt. Shanti must have made full enquiries from her daughter, Chanderkala, as to the number of persons who had been seen by her when she went downstairs to meet Shiv Prasad. Smt. Shanti has stated that soon after the departure of her husband her suspicions about the security of their valuables were (Ref. (I.T.) No. 158 of 1967, D/-6-3-1970 of the Award of Ind. Tri. Maharashtra) aroused. Consequently, she got a double lock put on the shop of her husband. Conversely, if Phool Chand had really been seen standing behind Shiv Prasad near the chabutri by Chanderkala, she would not have failed to pass on that information to her mother when she asked her to put another lock on the door of the shop. We would therefore, hold that the trial Court was right in holding that Circumstance No. 2 was not established so far as Phool Chand was concerned.

41. Be that as it may, the view of the evidence of Shanti Devi and Chander Kala taken by the trial Court was not such as could not be reasonably taken by any tribunal. As a matter of caution, therefore, the High Court should not have disturbed that finding.

42. In view of the finding that Circumstance 2, in so far as it implicates Phool Chand, was not satisfactorily established, there remains no independent evidence on the record to confirm the oral testimony of Jagmohan in regard to the identity, and connection of the appellant with the murder of Birdhi Chand. We would, therefore, in the peculiar circumstances of the case, as a matter of abundant caution, refrain from accepting the uncorroborated, infirm testimony of Jagmohan with regard to the identification of the appellant, and in the result allow his appeal, accord him the benefit of doubt and acquit him.