Husaina vs The State Of U.P. on 12 October, 1970

Equivalent citations: AIR1971SC260, 1971CRILJ278, (1970)3SCC204, AIR 1971 SUPREME COURT 260, 1970 UJ (SC) 881, 1972 (1) SCJ 359, 1972 MADLJ(CRI) 213

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Bench: I.D. Dua, K.S. Hegde, S.M. Sikri

JUDGMENT

S.M. Sikri, J.

1. This appeal by special leave is directed against the judgment of the High Court of Judicature at Allahabad accepting the reference made by the learned Sessions Judge and dismissing the appeal of Husaina. There was a difference of opinion between Khare, J. and Hari Swarup, J., and the matter was referred to the third Judge, Gyanendra Kumar, J., who agreed with the opinion of Khare, J., and held that the offence of murder had been brought home to Husaina.

2. The prosecution case in brief Is that Smt. Chhoti and her son Khalil lived in village Sirai. A wall divided their house from the house of Husaina, appellant before us. This wall had fallen down and Smt. Chhoti and Khalil wanted to reconstruct the wall in the morning of December 15, 1970, but Husaina took objection to this reconstruction and there was an altercation between them. Smt. Chhoti, Khalil and Husaina are khumhars. Mst. Chhoti and Khalil then proceeded to the village pond for digging earth. At about 12.30 p.m. Husaina also reached the pond and seeing Smt. Chhoti and Khalil digging the earth told them that they would not be permitted to build the wall. Husaina then gave blows on the head of Chhoti with his spade. Khalil got up and tried to save his mother but he was also struck by Husaina with the spade. Some persons chased Husaina but could not catch him. Smt. Chhoti died at the spot. Khalil who had become unconscious due to those injuries was taken to the police station on a tonga by Allahdiya, P.W. 8, and thereafter admitted into the hospital The First Information Report was lodged by Allahdiya, P.W. 8, at 1.30 p.m. at the police station Main-ather, which was about 5 miles from the place of occurrence, and the investigation followed. The accused was committed to Sessions. The appellant's defence was that he was not present in the village Sirsi on the date of occurrence and had been implicated in the crime due to enmity.

3. The post-mortem examination of Smt. Chhoti showed that she had sustained the following ante-mortem injuries:

> 1.Incised wound 2" x 1/4 " x bone deep cutting the bone underneath on right side back of head.

2. Incised wound 1 1/2 " x 1/2 " x muscle deep on right arm outer side in middle.

3. Incised wound 2" x 1" x bone deep. Right scapula cut underneath on right side back.

4. Incised wound 1/2 x 1/2" x bone deep on the top of left index fingers.

Dr. A.P. Singh, P.W. 3, who performed the post-mortem examination on the body of Mst. Chhoti deposed that the following injuries were found on internal examination:

Right occipital bone was found cut under injury No. 1.

There was contusion over the membranes of the brain under injury No. 1. There was clotted blood in an area of 1 1/2" x 1" under injury No. 1. The bone of the right shoulder was found cut under injury No. 3.

He opined that "cutting of bone shows that the weapon was very heavy." He was recalled by the High Court and stated before it as follows:

The spade, Ex. 1, which is alleged to be the weapon of attack is now being shown to me. All the four external injuries could have been caused with the sharp side of this weapon. These injuries could not have been caused with the remaining three sides of this weapon.

He did not agree with the suggestion that with the sharp edge of the weapon, which is the lower edge of the weapon, no incised wound could be caused.

4. Dr. Singh had also performed post-mortem on the dead body of Khalil. He noticed the following ante-mortem injuries:

1. Healing wound, 2" x 1/2 ", on the left side of the head, back part bone was visible.

2. Healing wound 2" x 1/4 ", at the back of neck.

3. Swelling 1" x 1/2 ", on the right side of head 2 1/2 " above the ear.

4. Healed abrasion, at the back of right little finger.

On internal examination he found the following things:

Temporal and parietal bones on the right side were found fractured under injury No. 3. There was clotted blood in an area of 2" x 2" over the membranes of the brain under injury No. 3. The remaining organs had become pale.

5. It was urged that the evidence of Dr. Singh showed that Smt. Chhoti and Khalil could not have been injured by one weapon alone. The injuries on Smt. Chhoti were clearly incised and caused by a sharp-edged weapon while the injuries on Khalil were caused by a blunt weapon.

6. Dr. N.R. Bhatia, P.W. 1 had examined the injuries of Khalil when he was brought to the hospital. Dr. Bhatia was re-examined in the High Court. He stated:

> I have examined the spade (Ex. 1) today. Injuries Nos. 1 and 2 could be caused with this weapon from any of the four sides of this weapon. The spade (Ex. 1) as it is can be described as a blunt weapon, because there are no fine edges on any of its sides. Injury No. 3 mentioned by me in my statement dated 19th July, 1968, could also be caused with the spade (Ex. 1). Injuries Nos. 4 and 5 could either be due to fall or by friction with the back side of the spade. Injuries Nos. 1 and 2 could be caused even if the front side of the spade was used.
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> In cross-examination he stated that injuries Nos. 1 and 2 could be caused also with the back side of the spade.

7. In the High Court Gyanendra Kumar, J., carried out some experiments on 8 fold blotting paper to see the impression the spade made. The learned Judge observed:

> The experiment made by me on the 8 fold blotting paper also demonstrated that stroke made on it from the sharp edge of the blade (Ex. 1) created a clean cut incised. Therefore, relying on the testimony of the eye-witnesses Allah Dia (P.W. 8), the other Allah Dia (P.W. 10), the medical opinion of Dr. A.P. Singh, the report of the Chemical Examiner and Serologists and the experiment performed by me in the presence of the learned Counsel for the parties, I am convinced that all the incised wounds of Smt. Chhoti were caused by the sharp edge of the iron blade of the spade (Ex. 1) used by the appellant.
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> It seems to us that if the witnesses are believed, the so-called inconsistency in the opinion of the two doctors loses much of its force, specially as the appellant could have used the blunt side of the spade. The learned Counsel for the appellant has not been able to show any convincing reason why the eyewitnesses should not be believed. They all support the prosecution case, as set out in the beginning of the judgment.

8. It was urged that there was no reason for Allah Dia (P.W. 8) to be present there. We are unable to appreciate the contention. He was after the death of the husband of Mst. Chhoti, looking after their land and he happened to be in the village at that time. In the morning when Mst. Chhoti went to the pond it was natural that he would also go there. The fact that the F.I.R. was lodged by him at 1.30 p.m. on December 15, 1966, at Police Station Mainther, 5 miles from Sirsi, also shows that he was present at Sirsi at the time of the occurrence.

9. It was urged by the learned Counsel that Budhan, son of Allah Dia, P.W. 8, was also alleged to be present there but was not produced as a witness, but it is not necessary that every person who was present should be produced, especially when he was the son of Allah Dia, P.W. 8.

10. The fact that P.W. 8, Allah Dia, was not injured does not weaken the prosecution case. He was an old man of 70 years and it may be that he thought it fruitless to intervene when he was not armed.

11. There is nothing against Rahim Baksh, P.W. 9, who was a khumhar by profession. He was digging earth some 35 paces in front of Smt. Chhoti.

12. The third eye-witness, P.W. 10, Allah Dia alias Gurra, was again a khumhar and his presence at the pond at that time was quite probable. It has not been established that he had any grievance or ill-will against the appellant.

13. We agree with the conclusion arrived at by Khare, J., and Gyanendra Kumar, J.

14.The learned Counsel, relying on Bashira v. State of U.P. , urged that the appellant was not given reasonable opportunity of defending himself because the amicus curiae counsel was appointed only on July 19, 1968, i e., on the day when the trial commenced. This point was, although not raised before the High Court when the case was heard by Khare, J., and Hari Swarup, J., was raised before Gyanendra Kumar, J., and the facts relating to this point, as found by Gyanendra Kumar, J., are as follows: On July 19, 1968, the State Counsel only opened the case and examined two formal witnesses, viz., P.W. 1, Dr. N.R. Bhatia, who had examined the injuries of Khalil, and P.W. 2, Prayag Singh, Head Constable, who had recorded the F.I.R. Both the witnesses were duly cross-examined by the counsel for the appellant. On July 20, 1968, five formal witnesses were examined. Dr. A.P. Singh, P.W. 3, who had conducted autopsy on the dead bodies of Smt. Chhoti and her son Khalil; Dr. K.P. Gupta, P.W. 4; P.W. 5, Radha Raman, Head Clerk in the office of the Civil Surgeon, Morada-bad; and Constable Akbar Ali, P.W. 6, and P.W. 7, Harnam Singh. The next hearing of the case took place on July 22, 1968, when the three eye-witnesses, among other witnesses, were examined. No application was made by the counsel before the learned Sessions Judge asking for time to prepare the case and no application was made to recall any witness for further cross-examination. The appeal was filed in the High Court on July 30, 1968, but no application Was made to recall any witnesses for cross-examination. It was the Judges hearing the appeal who considered it necessary to recall the Doctors to clarify their statements and this evidence was recorded on March 17, 1969.

15. We agree with Gyanendra Kumar, J., that in the circumstances narrated above it cannot be said that the counsel was handicapped for want of time and opportunity to prepare, the case. It seems to us that Bashira's case has no application to the facts of this case.

16. The learned Counsel finally urged that the capital sentence awarded was too severe in the circumstances of the case, and the only fact relied on is that the appellant was aged only 25 years at the time of the incident. This is no reason for us, in an appeal by special leave, to interfere with the sentence passed by the learned Sessions Judge and confirmed by the High Court.

17. In the result the appeal fails and is dismissed.