

Khema @ Khem Chandra Etc. vs The State Of Uttar Pradesh Etc. on 10 August, 2022

Author: B.R. Gavai

Bench: Pamidighantam Sri Narasimha, B.R. Gavai

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1200 – 1202 OF 2022
[Arising out of SLP(Criminal) Nos.8624–8626 of 2019]

KHEMA @ KHEM CHANDRA ETC.	...APPELLANT(S)
VERSUS	
STATE OF UTTAR PRADESH	...RESPONDENT(S)

JUDGMENT

B.R. GAVAI, J.

1. Leave granted.

2. These appeals challenge the judgment and order dated 30th April 2019 passed by the High Court of Judicature at Allahabad in Criminal Appeal Nos. 6961, 7260 and 6227 of 2006, thereby dismissing the appeals filed by the appellants and confirming the judgment and order dated 28 th September 2006 passed by the Additional Sessions Judge, Court No.4, Mathura (hereinafter referred to as “trial court”) in Sessions Trial Nos. 515 and 655 of 2002 convicting the appellants for offences punishable under Section 302 read with Section 149, Section 307 read with Section 149 and Section 148 of the Indian Penal Code, 1860 (for short ‘IPC’) and sentencing them to undergo imprisonment for life with a fine of Rs. 5,000/□each.

3. The prosecution case in brief is thus:

The marriage of two daughters of deceased Prakash was to be solemnized on 1st May 2002. On 27th April 2002 at around 08.00 am, when deceased Prakash and his wife Kripa were going to extend invitation to their relatives, near the house of accused Deepi, all the accused persons who were hiding themselves inside the house, came

out carrying weapons. Accused Deepi and Kanhaiya were having farsa with them whereas accused Khema @ Khem Chandra was having a club. Accused Jasram, Balveer and Mahaveer were having country made pistols with them. All of them started assaulting deceased Prakash and threw him on the brick road. Inder (PW□2), brother of deceased Prakash, his sister Omwati and wife Kripa came forward to save the life of deceased Prakash. However, accused persons assaulted them as well. In the said assault, Inder (PW□2) suffered gunshot injury. On the basis of information given by Omveer (PW□), brother of deceased Prakash, an FIR came to be lodged on 27th April 2002 at 10.10 am. On the basis of the said FIR, a crime for the offences punishable under Sections 147, 148, 149, 307, 302 and 506 of the IPC came to be registered against the accused persons. After completion of investigation, a charge sheet came to be filed in the trial court. Since the case was triable exclusively by the Sessions Judge, it was committed to the learned Sessions Judge. The learned Sessions Judge framed the charges against the accused persons for the offences punishable under Sections 147, 148, 302 read with 149 and 307 read with 149 of the IPC. Charge was also framed against accused Balveer under Section 25 of the Arms Act, 1959 (hereinafter referred to as the “Arms Act”) and against accused Deepi under Section 4/25 of the Arms Act. The accused persons pleaded not guilty and claimed to be tried. At the conclusion of the trial, the trial court convicted the appellants as aforesaid. Being aggrieved thereby, the appellants had filed appeals before the High Court, which were also dismissed, thereby confirming the judgment and order of conviction and sentence passed by the trial court. Being aggrieved thereby, the appellants have approached this Court.

4. We have heard Shri Rajul Bhargav, learned Senior Counsel appearing on behalf of the appellants, Ms. Garima Prashad, learned Additional Advocate General for the State and Shri S.R. Singh, learned Senior Counsel appearing on behalf of the first informant.

5. Shri Bhargav submitted that the trial court and the High Court have grossly erred in convicting the appellants. He submitted that the appellants have been falsely implicated in the case. It is submitted that though Omveer (PW□) is projected as an eye witness, it is clear from his testimony that he could not have witnessed the incident. He submitted that even the trial court has held that from the deposition of Omveer (PW□), it is clear that he has not witnessed the incident. He further submitted that Inder (PW□2) who is said to be an injured witness, also appears to be a planted witness. It is submitted that from the evidence of the prosecution witnesses, there is serious doubt with regard to the timing as to when Inder (PW□2) has sustained injuries and as to when he was medically examined. He submitted that there are material contradictions and inconsistencies in the evidence of Inder (PW□2) and Dr. Anoop Kumar (PW□6).

6. The learned Senior Counsel further submitted that the so-called recoveries at the instance of appellants are also false and could not have been relied upon. The learned Senior Counsel submitted that the prosecution has not examined Vijay Singh, brother of the deceased, who was the first to inform the incident to the Police Station Shergarh on telephone. It is submitted that the station diary entry on the basis of telephonic information given by Vijay Singh has also not been brought on

record by the prosecution. It is therefore submitted that the prosecution has tried to suppress the real genesis of the incident. It is further submitted that though Kripa and Omwati, wife and sister of the deceased are said to have received injuries, they have not been examined. It is further submitted that though independent witnesses were available, the prosecution has failed to examine them and as such, an adverse inference is required to be drawn against the prosecution. The learned Senior Counsel therefore submitted that the judgment and order passed by the trial court and maintained by the High Court is liable to be quashed and set aside.

7. Ms. Prashad submitted that merely because Omveer (PW□) and Inder (PW□2) are relatives of the deceased, it cannot be a ground for discarding their testimonies. It is submitted that both of them have undergone cross□examination and nothing damaging could be elicited in their cross□examination. She further submitted that the ocular testimonies of Omveer (PW□) and Inder (PW□2) are duly corroborated by the recovery of incriminating material on the memorandum under Section 27 of the Evidence Act, 1872 (hereinafter referred to as the “Evidence Act”). The learned Senior Counsel therefore submitted that no interference is warranted in the concurrent orders passed by the trial court and the High Court.

8. Shri Singh, learned Senior Counsel submitted that Inder (PW□2) is an injured witness. He therefore submitted that in view of the law laid down by this Court in the case of Jarnail Singh and Others v. State of Punjab¹, the testimony of the injured witness will have a special evidentiary status. He also relies on the judgment of this Court in the case of Abdul Sayeed v. State of Madhya Pradesh² to further buttress his submission.

9. Shri Singh further submitted that the findings of the trial court as well as the High Court are based upon appreciation of evidence. He submitted that this Court will not normally enter into re□appraisal or review of the evidence unless the decision of the High Court is vitiated by error of law or procedure. He relies on the judgment of this Court in the case of Smt. Dalbir Kaur and Others v. State of Punjab³.

10. A perusal of the judgment of the trial court as well as the High Court would reveal that the conviction is based 1 (2009) 9 SCC 719 2 (2010) 10 SCC 259 3 (1976) 4 SCC 158 basically on the testimonies of Omveer (PW□) and Inder (PW□2). The Court has sought corroboration to the testimonies of these witnesses from the recoveries made on the basis of memorandum of the accused under Section 27 of the Evidence Act. The trial court observed that the farsa was seized on the basis of identification done by accused Kanhaiya. The trial court further observed that the weapons farsa and rifle were seized at the instance of accused Deepi and Balveer.

11. To examine the correctness of these findings, we will first assess the testimony of Omveer (PW□1) and Inder (PW□2). Both these witnesses are brothers of deceased Prakash. As such, they would fall in the category of interested witnesses, being related to the deceased. However, their testimonies cannot be discarded only on the ground that the witnesses are interested witnesses. The only requirement would be that the evidence of such witnesses is required to be scrutinized with greater care and circumspection.

12. Omveer (PW□) states that when his deceased brother Prakash and Kripa (wife of Prakash) along with their sister Omwati were going to extend invitation for the upcoming marriage, all the accused persons were hiding themselves in the house of Deepi. On seeing deceased Prakash, all of them came out. Accused Deepi and Kanhaiya were armed with farsa, accused Khema @ Khem Chandra was armed with lathi, accused Jasram and Mahaveer were armed with country made pistols and accused Balveer was having a rifle and they assaulted his deceased brother Prakash. He states that the blows were given from the reverse side of the farsa. He states that on hearing hue and cry, he as well as other residents of the village reached at the spot and saw the occurrence. There are many improvements in the deposition of Omveer (PW□). It will be relevant to refer to an excerpt from the cross-examination of Omveer (PW□):

“When the quarrel started, then I was inside my house. I heard four□five rounds of firing. I came out of the house after hearing the sound of firing and after reaching the spot, then I found that Prakash was lying dead. When I reached at the spot, then Inder was at the spot. Inder had fallen after sustaining the injury. He was not fully unconscious.”

13. It will also be relevant to note that even Inder (PW□) has also admitted that Omveer (PW□) was inside the house when the incident occurred.

14. Not only this, but the trial court itself has observed in its judgment thus:

“It is explicit on perusal of testimony of said witness in entirety that said witness was not present at the spot since earlier, but he reached at the spot after hearing the gunshots. Therefore he did not see the occurrence, but due to he having reached at the spot after hearing the hue and cry, so the testimony of said witness is significant with respect to presence of the accused at the spot and they had been armed with the weapons as disclosed and that having been given by them that in case anybody would get the first information lodged, then he would be killed.”

15. It is thus clear that even the trial court has come to a conclusion that Omveer (PW□) could not have witnessed the incident.

16. That leaves us with the testimony of Inder (PW□). No doubt that Inder (PW□) is an injured witness and therefore, his testimony could not be brushed aside lightly. The reliance placed by Shri Singh on the judgments of this Court in the cases of Jarnail Singh (supra) and Abdul Sayeed (supra) is well merited. The fact that the witness received injuries establishes his presence at the scene of occurrence. The evidence of such a witness cannot be rejected unless there are strong grounds for such rejection. Inder (PW□) has given detailed narration as to how the incident has occurred. He has stated that accused Deepi and Kanhaiya assaulted with farsa, accused Khema assaulted with lathi and accused Balveer, Mahaveer and Jasram assaulted with the butts of their guns. Accused Balveer, Mahaveer and Jasram fired simultaneously. He states that when Omwati lay on him to save him, accused persons assaulted Omwati with stones and danda.

17. The incident had occurred on 27 th April 2002. However, the statement of Inder (PW□2) was recorded under Section 161 Cr.P.C. on 21st May 2002. In his cross□examination, he admitted that the police did not interrogate him on 30th April 2002. Not only is there a long delay in recording his statement but there are serious discrepancies with regard to the medical examination of Inder (PW□2) as well. In the injury report (Ex.□P7), the time of examination is stated to be 10.20 pm. From the evidence of Omveer (PW□1) and Inder (PW□2), it is clear that after the incident occurred, they had gone to Police Station Shergarh and they were in the Police Station Shergarh from 10.00 am to 11.00 am. In his evidence, Inder (PW□2) has stated that he has reached the hospital at 12.00 o'clock and that his medical check□up was done during day time. In his examination□n□chief, Dr. Anoop Kumar (PW□6) has stated that there was a possibility that the injuries were inflicted at 08.00 am on 27 th April 2002. In his cross□examination, he admits that in the report of medical examination, he has mentioned the injuries as fresh meaning thereby that such injuries had been inflicted within a period of 2 hours to 6 hours. He further admits that the medical examination was done at 10.20 pm on 27 th April 2022. As such, the injuries could be inflicted subsequent to 04.20 pm. He has further admitted that there are no entries made with respect to the injuries caused to Inder (PW□2) in the concerned register.

18. It is pertinent to note that after noticing such inconsistencies with regard to time of injuries sustained and the time of medical examination of Inder (PW□2), Dr. Anoop Kumar (PW□6) was recalled at the request of the Additional District Government Pleader. In his re□examination, he has stated that due to some mistake, 10.20 pm was mentioned in the medical examination report and actually, it was done on 27th April 2002 at 10.20 am. In his further cross□examination, he has given contradictory answers. He has stated that he had never done duty in the night and therefore, he could say that he had not done the medical examination at 10.20 pm. He has further admitted that the duties are fixed on the basis of the roster and the duties are not on a regular basis. He has further admitted that they are required to do the duties on shift basis. It could thus clearly be seen that there are serious discrepancies with regard to the time of injuries sustained and the time of medical examination of Inder (PW□2).

19. The version of Dr. Anoop Kumar (PW□6) that he had examined Inder (PW□2) at 10.20 am itself is falsified by the evidence of Omveer (PW□1) and Inder (PW□2). According to both of them, they were in the Police Station Shergarh from 10.00 am to 11.00 am and thereafter, Inder (PW□2) left for Mathura. Even according to Inder (PW□2), he reached Mathura after 12.00 o'clock. He stated that after reaching the hospital, he was examined after about 2 hours. As such, even if the version of Dr. Anoop Kumar (PW□6) in re□examination that he had examined Inder (PW□2) at 10.20 am is to be accepted, the same is totally inconsistent with the testimony of Omveer (PW□1) and Inder (PW□2). As such, the possibility of some fabrication in the injury certificate cannot be rejected.

20. We are conscious that on the ground of minor inconsistencies, the evidence of Inder (PW□2) cannot be brushed aside. However, it is to be noted that there are material improvements in his evidence. His evidence therefore is required to be scrutinized with greater caution and circumspection. It is further to be noted that even according to the prosecution, there is previous enmity between the accused and the deceased. As held by this Court in the case of Ramashish Rai v. Jagdish Singh⁴, previous enmity is a double□edged sword. On one hand, it 4 (2005) 10 SCC 498

provides motive to the crime and on the other, there is a possibility of false implication.

21. This Court, in the celebrated case of *Vadivelu Thevar v. State of Madras*⁵, has observed thus:

“.....Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way — it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.....” 5 [1957] SCR 981

22. We find that the testimony of Inder (PW²) would fall under the 3rd category i.e. his evidence can be said to be “neither wholly reliable nor wholly unreliable”. As such, it will be necessary that there is some corroboration to his ocular testimony.

23. The trial court had relied on the recoveries of the weapons on the memorandum of the accused persons alleged to have been used in the commission of crime. Insofar as the seizure at the instance of accused Kanhaiya is concerned, he was arrested on 1st May 2002. It is to be noted that there are no independent panchas to the seizure memo. Apart from that, the memorandum statement of accused Kanhaiya, as is required to be recorded under Section 27 of the Evidence Act, has also not been brought on record.

24. Insofar as the recoveries at the instance of accused Deepi and Balveer are concerned, the said accused have surrendered in court on 7 th May 2002. Inspector Ashok Kumar Singh, Investigating Officer (PW⁷) has stated that on 8th May 2002, a search for the weapons was made in Burji at Kosi Road, but he could not recover any weapon. However on 17th May 2002, the recoveries are alleged to have been made at the instance of accused Deepi and Balveer. Even the seizure memo of the recovery in respect of these two accused is not signed by any independent panch witness. In the case of these two accused, the memorandum recorded under Section 27 of the Evidence Act is also not placed on record. As such, the said recoveries cannot be said to be free from doubt.

25. It is further to be noted that immediately after the incident, Vijay Singh, brother of deceased Prakash as well as Omveer (PW¹) and Inder (PW²), informed about the incident to Police Station

Shergarh on telephone which fact has come on record in the evidence of Omveer (PW□) and Inder (PW□). Neither Vijay has been examined nor has the station diary entry with regard to the said telephonic message been placed on record. Though Inder (PW□) has admitted that the incident was witnessed by Parmal, Rajveer and other residents, none of them was examined. As such, the possibility of the prosecution not bringing on record the real genesis of the incident cannot be ruled out.

26. Shri Singh has strongly relied on the judgment of this Court in the case of Smt. Dalbir Kaur (supra) in support of the submission that in view of the concurrent findings of fact, this Court should not reappreciate the evidence. No doubt that the reliance placed by Shri Singh on the judgment of this Court in the case of Smt. Dalbir Kaur (supra) is well merited. However, it is to be noted that this Court, in a catena of cases, has held that though in cases of concurrent findings of fact this Court will not ordinarily interfere with the said findings, in exceptional circumstances, this Court is empowered to do so. If this Court finds that the appreciation of evidence and findings is vitiated by any error of law or procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse, this Court would not be powerless to reappreciate the evidence. Reliance in this respect could be placed on the judgments of this Court in the cases of Himachal Pradesh Administration v. Shri Om Prakash⁶, Arunachalam v. P.S.R. Sadhanantham and 6 (1972) 1 SCC 249 Another⁷, Mithilesh Kumari and Another v. Prem Behari Khare⁸, State of U.P. v. Babul Nath⁹, and Pattakkal Kunhikoya (Dead) By LRs. v. Thoopyakkal Koya and Another¹⁰.

27. Recently, this Court in the case of Ashoksinh Jayendrasinh v. State of Gujarat¹¹ had also held that when the High Court has failed to appreciate the oral evidence, this Court would certainly be entitled to appreciate the evidence in correct perspective. In the said case also, this Court, finding that the conviction was recorded after ignoring the vital evidence, has set aside the order of conviction and acquitted the accused.

28. In the present case, we notice that the trial court as and the High Court have failed to take into consideration the vital discrepancies and inconsistencies in the evidence of the prosecution witnesses.

29. From the perusal of the evidence as well as the findings of the trial court itself, it is clear that Omveer (PW□) ⁷ (1979) 2 SCC 297 ⁸ (1989) 2 SCC 95 ⁹ (1994) 6 SCC 29 ¹⁰ (2000) 2 SCC 185 ¹¹ (2019) 6 SCC 535 cannot be said to be an eye witness. Though, Inder (PW□) is an injured eye witness, there are serious discrepancies and inconsistencies with regard to time of the injuries sustained and time at which he was medically examined. Dr. Anoop Kumar (PW□), in his evidence, has changed his stance on several occasions. His testimony is totally contrary to that of Omveer (PW□) and Inder (PW□). As held by us, it will not be safe to base the conviction on the sole testimony of Inder (PW□) though he is an injured witness. The corroboration sought by the prosecution with regard to alleged recoveries of the weapons used in the crime is also not free from doubt. Neither the station diary entry with regard to telephonic intimation given by Vijay Singh at 9.05 am has been brought on record nor has Vijay Singh been examined. Though independent witnesses were available, the prosecution has failed to examine them. We therefore find that this is a

case wherein the appellants are entitled for benefit of doubt.

30. In the result, we pass the following order:

(i) The appeals are allowed;

(ii) The judgment and order dated 30th April 2019 passed by the High Court of Judicature at Allahabad in Criminal Appeal Nos. 6961, 7260 and 6227 of 2006 and the judgment and order dated 28 th September 2006 passed by the trial court in Sessions Trial Nos.

515 and 655 of 2002 are quashed and set aside; and

(iii) The appellants are acquitted of all the charges charged with. Deepi, who has been enlarged on bail, shall have his bail bonds cancelled, while the rest of the accused are directed to be set at liberty forthwith, if not required in any other case.

31. Pending application(s), if any, including application for bail, shall stand disposed of in the above terms.

.....J. [B.R. GAVAI]J. [PAMIDIGHANTAM SRI
NARASIMHA] NEW DELHI;

AUGUST 10, 2022.