

(2000) 09 SHI CK 0012
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 464 of 1999

Amar Bahadur

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 29-09-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154

Evidence Act, 1872 — Section 118

Penal Code, 1860 (IPC) — Section 302, 324, 34, 342

Citation : (2000) 3 ShimLC 238

Hon'ble Judges : Kuldeep Chand Sood, J; Kamlesh Sharma, J

Bench : Division Bench

Advocate : Harish Behal, for the Appellant; M.C. Mandhotra, A.A.G. and Ashok Sharma, Assistant A.G., for the Respondent

Final Decision : Dismissed

Judgement

Kuldeep Chand Sood, J.—This appeal, from Jail, by Appellant Amar Bahadur, hereinafter referred to as "the accused", is directed against his conviction recorded by learned Additional Sessions Judge, Shimla, in Sessions Trial No. 6-S/7 of 1998, vide his judgment dated September 29, 1999, for offences punishable under Sections 302 and 324 of the Indian Penal Code. The accused has been sentenced to suffer imprisonment for life and to pay a fine of rupees 7,000/- for offence punishable u/s 302, Indian Penal Code. In case of default of payment of fine, he is to suffer further rigorous imprisonment for two years. The accused is further sentenced to suffer rigorous imprisonment for three years and to pay a fine of rupees 2,000/- for the offence punishable u/s 324 of the Indian Penal Code. In default of payment of fine, he is to undergo rigorous imprisonment for one year. The substantial sentences have been directed to run concurrently.

2. Shri Harish Behal, Advocate, was appointed Legal Aid Counsel for the accused in view of his prayer for Legal Aid.

3. Facts in brief.

Chandermani alias Bhag Singh, having migrated had settled near Giri. Ganga in Tehsil Jubbal of District Shimla alongwith his two wives, Guddi Devi (PW9), Lali deceased, four children including Kapil Dev deceased and Arjun Singh (PW7). He was running "Dhaba" at Giri Ganga alongwith his wife Lali. The other wife Guddi Devi (PW9) was living at village Sanabha at a distance of about 4 kms. from Giri Ganga alongwith two of her children. Accused Amar Bahadur alias Amar Singh and Prem Bahadur, Gorkhas, were employed by him to assist him in the Dhaba. On the night intervening May 30 and 31, 1998, Bhag Singh, as usual, slept in his Dhaba alongwith his wife Lali, sons Kapil Dev and Arjun at 11.00 p.m. There is a temple nearby the Dhaba of Bhag Singh at Giri Ganga. Roshan Lal (PW19) is Priest of the Temple. At about 2.00 a.m. Roshan Lal he woke up to answer the call of nature but found his door to have been bolted from outside. He gave call to Chandermani alias Bhag Singh but without any response. Ibrahim (PW1) alongwith other Gujjars had their "Dera" at about 200 feet from the Temple. In the early hours of the morning, he left his dera for Shimla to sell "Khoya" (a milk product). While crossing Giri Ganga, he found one pant and one shirt stained with blood lying on the bridge. He also found a bag lying ahead of the road. The bag was also blood stained. He got suspicious and turned towards Dhaba of Bhag Singh. No body responded his calls. Ibrahim then went towards the Temple and called for Roshan Lal who is also known as Pandit. Roshan Lal, in turn, informed him that the door of his house is bolted from outside. Ibrahim opened the door for Roshan Lal. Both of them came to Dhaba. They found blood scattered in the Dhaba. Bhag Singh, his wife Lali and one of the Sons Kapil Dev were found to have been killed. The second son Arjun Singh though escaped death, was found to have been seriously injured. They also saw axe, smeared with blood, belonging to Chandermani lying nearby. Roshan Lal and Ibrahim informed the Police. Roshan Lal went to Police Post at Khar a Pathar and informed the Police about the incident in terms of report mark "X". He returned back to Dhaba of Chandermani alongwith Police. Dy. Superintendent of Police, Devinder Singh (PW20) also reached the spot. He recorded the statement of Roshan Lal u/s 154 of the Code of Criminal Procedure (Ext. PW10/A) and sent the same for registration of First Information Report Exhibit PW10/B. The spot was inspected by the Dy. Superintendent of Police. The dead bodies of Chandermani, his, wife Lali and son Kapil Dev were lying in a pool of blood on their respective beddings in the Dhara. Inquest Report was prepared. Blood smeared axe lying nearby was taken into possession by the Dy. Superintendent of Police Devinder Singh vide memo Exhibit PW1/A. Similarly, blood stained earth, blankets and cotton mattresses were also taken into possession after preparation of the site plan Ext. PW20/A. Dead bodies were sent for post mortem alongwith the Inquest Reports.

4. Accused Amar Bahadur and Prem Bahadur were missing from their Dhara.

Prosecution case.

5. Accused and Prem Bahadur had left employment of Bhag Singh few days

before the occurrence. On the evening of May 30, 1998, Amar Bahadur came in a Jeep No. HP-10-1294 from Khara Pathar to Giri Ganga. Amar Bahadur got the jeep stopped at Giri Ganga, asked the Driver to wait for him, then he and Prem Bahadur killed Bhag Singh, Lali, Kapil Dev and inflicted serious injuries on the person of Arjun Singh, decamped with the money in their cash box and left for Teuni in the same jeep owned and driven by Sanjiv Kumar (PW3). Sanjiv Kumar left them at Teuni from where they entered Uttar Pradesh. Amar Bahadur was arrested at Som Paryag, District Chamoli (UP) on June 11, 1998. The other accused could not be traced and had been declared proclaimed offender.

6. Accused was charged for offences punishable under Sections 302, 342 and 324 read with Section 34 of the Indian Penal Code. Accused claimed trial. After the trial of the accused, he was convicted by the learned Additional Sessions Judge by his impugned judgment, noticed earlier.

7. The prosecution case rests on the evidence of Arjun Singh (PW7) son of the deceased, who was also injured but escaped death and is an eye witness to the incident as supported by other corroborative evidence.

8. There is no dispute that Bhag Singh, his wife Lali and Son Kapil Dev met homicidal death. Dr. Luxmi Nand (PW17), the then Medical Officer in Civil Hospital, Jubbal, conducted the post-mortem on the dead bodies of Bhag Singh, his wife Lali and son Kapil Dev. As many as six ante-mortem homicidal sharp injuries were found on the person of Bhag Singh caused by sharp edged weapon on various parts of the body, including temporal region of the head and temporal right parietal and frontal region. Similarly, four ante-mortem homicidal injuries were found on the body of deceased Lali Devi and one ante-mortem homicidal injury with sharp edged weapon was found on the left side of the body of Kapil Dev.

9. In the opinion of Dr. Luxmi Nand, all of them died as a result of "direct effect of ante-mortem homicidal injuries with sharp cutting, heavy weapon on vital part of the body, i.e., head injury involving vital part of the brain." The homicidal death of deceased Bhag Singh, his wife Lali and son Kapil Dev is not disputed before us.

10. Arjun (PW7), who was sleeping with his brother Kapil Dev on the fateful night, states that he alongwith his father Bhag Singh, mother Lali and brother Kapil Dev, was sleeping in the Dhara of the Dhaba at Giri Ganga on the fateful night. During night, accused Amar Bahadur alongwith Prem Bahadur, entered their Dhaba and assaulted them with axe. His father, mother and brother died due to injuries received in the hands of the accused. He hid himself under the blanket as he got scared. It is his evidence that he knew Amar Bahadur and Prem Bahadur as both used to work as servants in their Dhaba at Giri Ganga. It is true that he is a child witness being about seven years of age at the time of commission of offence. His statement has been recorded without oath. Learned Additional Sessions Judge, who tried this case, observed that the witness, though

a child, is knowledgeable and has understanding of things around him. Learned Additional Sessions Judge found him reliable and competent to give evidence. From the questions put by the learned Additional Sessions Judge to the witness, it is apparent that Arjun Singh could distinguish between the truth and falsehood. He was studying in class II when examined. There is nothing in the cross-examination of this witness which may impair his creditworthiness. It is not disputed in the cross-examination that Bhag Singh, Lali and Kapil Dev were axed to death and he himself was injured by the axe blows. In cross-examination, he is categorical that he identified both the accused when they were assaulting with the axe. He is categorical that axe was with accused Prem Bahadur. In his own words in the cross-examination:

Our Dhaba was open having no door. Both the accused persons came after short while when we had gone to bed. We all were enjoying sound sleep. I identified both the accused persons when they were assaulting us with axe, although it was darkness around the Dhaba. The axe was with the accused Prem Bahadur. Firstly my father was assaulted with the axe and thereafter Lali and subsequently my brother. I was sleeping with my brother. When the accused assaulted my father, Lali also woke up and she raised hue and cry. The clothes worn by me were also stained with blood.

11. Relying upon *Haria and Ors. v. State of Himachal Pradesh* 1975 Cri. LJ 78; *Lalu Chaudhury Vs. State*, and *Ramesh Laxman Shendre Vs. State of Maharashtra*, Shri Harish Behal learned Counsel for the accused vehemently contends that evidence of Arjun Singh cannot be relied upon to convict the accused for the reasons:

(a) Conviction cannot be based on the testimony of a child witness which is inherently weak.

(b) It was dark night and Arjun Singh could not have identified the culprits in the absence of any light.

12. It is now well settled and no longer *res integra* that a child witness is a competent witness and conviction can be based on the basis of evidence of a child provided child witness understands the nature of the questions and gives rational answers thereof. The Court has to assure itself, before relying upon the testimony of a child witness, that witness has not been tutored. There is no rule of law or practice that the evidence of such a witness should be corroborated before conviction is recorded. Nevertheless, as a matter of prudence, the Court may look for corroboration to such evidence from other evidence on record,

13. In *Haria and Ors.* (*supra*), a child witness, of 13/14 years was found, as a matter of fact, to have been tutored by the Police. The witness remained in the Police Station for about 10 or 15 days. It is in these circumstances that reliance on the evidence of such witness was not placed by a Division Bench of this Court. In *Lalu Chaudhary's* case (*supra*). A Division Bench of Calcutta High Court discussing the evidence of a child witness put a word of caution that child is

susceptible easily to tutoring and to telling imaginative stories and, therefore, its evidence should be scrutinised with extreme care and caution before it is acted upon as true and dependable evidence. The Court ruled that the first test to assess the evidence of a child witness is whether there is any evidence of tutoring and if this test is found to be positive, the Court should not convict an accused on serious charge, like, murder on the sole evidence of a child witness unless it is corroborated in material particulars connecting the accused with the crime. In *Ramesh Laxman Shendre (supra)*, a Division Bench of Bombay High Court restated the rule that evidence of child witness should be appraised with great caution in view of the fact that children are susceptible to tutoring. In that case, a child did not disclose the fact that his mother poured kerosene oil on her person from the bottle and ignited herself, either immediately to the relations and neighbours assembled at the spot or to the police at any time. The witness for the first time, in his evidence recorded in the Court, twisted the story and deposed to this effect. There was no corroboration to the statement made by the child witness. In these circumstances, the Court held that it is unsafe to rely on the evidence of such a witness.

14. In the present case, the questions put by the learned Additional Sessions Judge show that Arjun Singh, though of tender age, has a good understanding of things around him. His answers to the questions are rational. There is nothing in the searching cross-examination which may indicate any tutoring of the witness or make his evidence undependable. It is the evidence of Arjun Singh that he hid himself under the blanket after having watched and seen his father, mother and brother being assaulted by the accused with an axe. As he was lying with his brother, he also received injuries in his leg and arm. Accused Amar Bahadur and Prem Bahadur were working as servants with this family and therefore, were well known to this witness. He categorically states:

I identified both the accused persons when they were assaulting us with the axe although it was dark. The axe was with accused Prem Bahadur. Firstly, my father was assaulted with the axe and thereafter Lali and subsequently my brother. I was sleeping with my brother.

15. The witness narrated the occurrence to his mother Guddi (PW9) on the very next morning. In these circumstances, the evidence of Arjun Singh cannot be discarded merely on the ground he is a child witness which otherwise is dependable and without any ambiguity or contradiction.

16. This apart, evidence of Arjun Singh is corroborated from the medical evidence of Dr. Luxmi Nand (PW17) who conducted the post mortem on the dead bodies of deceased Bhag Singh, Lali Devi and Kapil Dev. It is undisputed testimony of Dr. Luxmi Nand that the fatal injuries on the person of deceased were caused with heavy sharp edged weapon. Axe is a heavy sharp edged weapon. Evidence of Arjun Singh is further corroborated from the fact that immediately after the occurrence, both accused Amar Bahadur and Prem Bahadur absconded and the accused could only be arrested from Som Prayag,

District Chatnoli (U.P.). (The other accused has not been traced so far). It is so apparent from the evidence of Mehar Singh (PW5), Investigating Officer Dy. Superintendent of Police Devinder Singh (PW20) and Roshan Lal (PW19). It is established on record that accused Amar Bahadur alongwith Prem Bahadur left Giri Ganga in the early hours of the morning of May 31, 1998 for Teuni, a border village with Uttar Pradesh. It is the evidence of Sanjiv Kumar (PW3) that on the fateful day, he was at Khara Pathar when Prem Bahadur approached him for hiring his jeep to drop him at Teuni. He refused and told him that he can arrange another vehicle at Jubbal. Both of them came to Jubbal. However, no vehicle was available at Jubbal. Prem Bahadur persisted that he should drop him at Teuni. Sanjiv agreed. Prem Bahadur insisted to go via Giri Ganga, whereas, Prem Bahadur could have gone to Teuni from other route. Prem Bahadur made up a story to justify going via Giri Ganga and told Sanjiv that he had married a girl against the wishes of her parents and the girl happened to be in village Barkot (near Giri Ganga) and that he had to take the girl to some other place and, therefore, he should drop him and his brother at Teuni. Prem Bahadur got the jeep stopped 2 kms. short of Giri Ganga and asked Sanjiv Kumar to wait for him on the pretext that the parents of the girl are present in the Dhaba of the deceased and his brother who had to accompany him, is near about that Dhaba. Both of them returned back after about 45 minutes. Prem Bahadur accompanied by accused Amar returned back at about 12.30 a.m. or so. He dropped both Prem Bahadur and accused at Teuni. He was paid rupees 3,000/- as hiring charges for his vehicle by the accused. His testimony is not disputed in the cross-examination. He explains in his cross-examination that they started from Jubbal for Giri Ganga at 9.30 p.m. and reached there at about 11.00 p.m. and thereafter left Giri Ganga for Teuni at about 12.00 in the mid night. He further states that Prem Bahadur was known to him as he was doing some sewing work in his area. It is not disputed in the cross-examination that accused and Prem Bahadur hired his vehicle and went to Teuni on the fateful night. Now this evidence of Sanjiv Kumar lends necessary assurance and corroboration to the testimony of Arjun Singh that accused and his companion Prem Bahadur after committing the murder of Bhag Singh, Lali Devi and Kapil Dev fled away towards U.P. in the vehicle of Sanjiv Kumar. This apart, evidence of Roshan Lal (PW19), the temple priest, also corroborates the prosecution case. It is his evidence that on the fateful night, when he woke up at about 2.00 a.m., he found his door to have been bolted from outside and he could not get any response from Chandermani/ Bhag Singh when he called him for help. It is in the early hours of the morning when his door was opened from outside by Ibrahim (PW1) that he came out and both of them found the entire family of Bhag Singh to have been butchered except Arjun Singh, who survived injuries inflicted upon him. He identifies axe Exhibit P1 which was lying near the dead bodies in the Dhaba of Bhag Singh. According to this witness, Chandermani had a good business at his Dhaba due to Basakhi Festival. He also had income as wood cutter. It is the evidence of Roshan Lal that Chandermani alias Bhag Singh earned profits from Basakhi Festival season and thereafter, Kumbh Mela which was celebrated for a

month as also from Amabas festival which fell on May 25, 1998 about 5/6 days prior to the incident. It is the evidence of Roshan Lal that when Dhaba of Bhag Singh was searched by the Police, Galla (chest) was found empty. Only rupees 8,500/- were found beneath the pillow of the bed on which Bhag Singh was sleeping. The evidence of this witness corroborates the prosecution case to the extent that accused and Prem Bahadur who were employees of deceased Bhag Singh knew about large cash with the accused and, therefore, they entered the Dhaba, which had no doors, during night and decamped with the money in the cash box after killing three of them. The murder was well planned as one of the accused had taken great pain to hire a vehicle in the evening so as to escape to safe place during the night itself.

17. After appraising the evidence, in all its aspects, we are of the view that there is no infirmity in the conviction of the accused on the basis of the evidence of Arjun Singh, child witness, which evidence is otherwise reliable, acceptable and unblemished. Moreso, when necessary assurance and corroboration to his evidence is available from the other evidence on record as discussed above.

18. In *Dattu Ramrao Sakhare and Ors. v. State of Maharashtra* (1997) 5 Supreme Court Cases 341, the prosecution rested on the evidence of a child witness aged about 10 years. The witness was found competent to depose to the facts. The likelihood of the witness having been tutored was ruled out. In these circumstances, Their Lordships of the Apex Court ruled:

The entire prosecution case rested upon the evidence of Sarubai (PW2) a child witness aged about 10 years. It is, therefore, necessary to find out as to whether her evidence is corroborated from other evidence on record. A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered u/s 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however, as a rule of prudence the Court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record. In the light of this well-settled principle we may proceed to consider the evidence of Surubai (PW2).

(Emphasis supplied)

19. The next contention of the learned Counsel for the accused is that even if Arjun Singh be considered to be a competent witness, he cannot be relied upon as it was a dark night and Arjun Singh could not have identified the accused and

Prem Bahadur. We are not persuaded.

It is admitted and not in dispute that deceased Bhag Singh was living in his Dhaba which was a make shift Dhaba. It had no doors or curtains. In fact, it was open from the front. There is no evidence on record to show that it was a dark night in which nothing could be seen. None of the witnesses including Ibrahim (PW1), Sanjiv Kumar (PW3), Guddi Devi (PW9) and Roshan Lal (PW19) is suggested that it was a dark night and not possible to identify any person. Even Arjun Singh is not suggested that he could not have identified the accused and his companion Prem Bahadur. It is true that in cross-examination, Arjun Singh admits that there was no electricity in the Dhaba but then he further states that Dhaba was open having no door. He states that he "identified both the accused persons when they were assaulting us with axe though it was darkness around the Dhaba". He is not questioned as to how he could identify the accused in darkness. We have already observed that accused and Prem Bahadur were not strangers to Arjun Singh. They were well known to him for the last one year. It has to be borne in mind that there is nothing like absolute darkness. A person who is well known can be identified by his profile and features even in poor visibility. A person can be identified through shape of the body, gait, manner of walking, voice and other peculiar traits. As the Dhaba was open, therefore, there should be some light in the Dhaba from stars and moon. There is nothing on the record to suggest that Arjun Singh did not have adequate visibility to correctly identify the accused and Prem Bahadur whom he had known well for more than one year. In *Nathuni Yadav and others Vs. State of Bihar* and another, deceased Bhagelu Singh Yadav and his wife were gunned down by armed assailants during summer night in the month of June, 1980. A neighbour Ram Janam Rai was also shot dead. It was contended on behalf of the accused that the witness could not have identified the assailants as it was a moonless night and there was no lamp burning and therefore, it would have been pitch dark when the occurrence took place. In this background, Their Lordships of the Apex Court in para 8 of the judgment observed thus:

8. We have considered the said contention from all its angles. Even assuming that there was no moonlight then, we have to gauge the situation carefully. The proximity at which the assailants would have confronted with the injured, the possibility of some light reaching there from the glow of stars, and the fact that the murder was committed on a roofless terrace are germane factors to be borne in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. Over and above those factors, we must bear in mind the further fact that assailants were no strangers to the inmates of the tragedy bound house, the eye witnesses being well acquainted with the physiognomy of each one of the killers. We are, therefore, not persuaded to assume that it would not have been possible for the victims to see the assailants or that there was possibility for making a wrong identification of them. We are keeping in mind the fact that even the assailants had enough light to identify the victims whom they targetted without any mistake from among those who were

sleeping on the terrace. If the light then available though meager, was enough for the assailants why should we think that same light was not enough for the injured who would certainly have pointedly focussed their eyes on the faces of the intruders standing in front of them. What is sauce for the goose is sauce for the gander.

20. Again in Kedar Singh and Ors. v. State of Bihar AIR 1999 S C (Ist) Supplement, an argument was raised that eye witness could not have witnessed the occurrence as it was a dark night and that the temple where an electric bulb of high power was said to be on could not be enough to identify the assailants. Their Lordships in the circumstances ruled:

...It has also to be observed that even on a full dark night there is never total darkness. There can be other means to identify another through the shape of his body, clothes, gait, manner of walking etc. etc....

21. Shri Behal, learned Counsel for the Appellant, then drew our attention to one line in the cross-examination that mother of Arjun Singh told him to make a statement in the Court and submits that the possibility of Arjun Singh having been tutored cannot be ruled out altogether. We are not impressed. Arjun Singh in the opening lines of his cross-examination states:

I have come to the Court today alongwith my mother Guddi. My mother told me to make the statement in the Court.

Simply because Guddi Devi mother of Arjun Singh told him to make a statement in the Court is not indicative of tutoring of the witness. Even Arjun Singh is not suggested that he was tutored or stated in the Court what he was told by his mother. The argument is fallacious.

22. In the end, learned Counsel for the accused-Appellant submits that indication of the spot by the accused from where dead bodies of Bhag Singh, Lali Devi and Kapil Dev were found can not be considered against the accused. It appears, after the arrest of the accused, Deputy Superintendent of Police Devinder Kumar (PW20), in his wisdom, recorded disclosure statement (Ext. PW8/A) in pursuance whereof Amar Bahadur identified the place of occurrence. Indeed, such a statement is not admissible in evidence nor it can be considered against the accused for the reason that the place of occurrence was already known to the police and it cannot be said to have been discovered pursuant to the statement of accused Amar Bahadur. Even after the exclusion of this evidence, the case of the prosecution is not weakened.

23. The ocular evidence of Arjun Singh as corroborated by the other evidence on record and the probability factors proves beyond any reasonable doubt that accused Amar Bahadur and Prem Bahadur, who has been declared proclaimed Offender brutally murdered Bhag Singh, Lali and Kapil Dev and caused injuries to Arjun Singh with an axe for money inspite of the fact that they had worked as servants with Bhag Singh.

24. No other point is urged.

25. In result, appeal fails and is dismissed.