

(2013) 04 CHH CK 0021
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 1640 of 1997

Bhoj Kumar and Others

APPELLANT

Vs

The State of Madhya Pradesh

RESPONDENT

Date of Decision : 26-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437A

Evidence Act, 1872 — Section 134

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

Citation : (2013) 3 CGBCLJ 60 : (2013) 3 CGLJ 216 : (2013) CriLJ 4034

Hon'ble Judges : Sunil Kumar Sinha, J; Rangnath Chandrakar, J

Bench : Full Bench

Advocate : Surendra Singh, with Mr. Vishnu Koshta, for the Appellant; Ashish Gupta, Panel Lawyer, for the Respondent

Judgement

Sunil Kumar Sinha, J.—Appellants (A-1 to A-5) are aggrieved by the judgment and order dated 9th of August, 1997 passed in Sessions Trial No. 214/96 by the Additional Sessions Judge, Sakti, District Bilaspur. They have been convicted u/ ss. 302/ 34 IPC and sentenced to undergo R.I. for life and to pay fine of Rs. 1,000/- with default sentence of R.I. for 1 year. The facts, briefly stated, are as under:-

1.1. Appellants (A-1 to A-5) are residents of village Kawaripali. Appellant-Hariram (A-3) is father-in-law and appellant-Lata @ Kiran Kumari (A-5) is wife of deceased-Abhaylal Patel. The three other appellants (A-1, A-2 and A-4) are close relatives of Hariram (A-3).

1.2. Deceased Abhaylal was a resident of village Tadola. The case of the prosecution is that 15 days prior to the date of incident i.e. 24.3.95, the deceased had left his wife and children in his in-laws place in village Kawaripali. On 24.3.95 at about 7.00 p.m., the deceased came on a scooter to the house of Hariram (A-3) and fell down in front of the house. He was having a small bottle of insecticide. The deceased was taken inside the house of Hariram (A-3), where

he died.

1.3. Hariram (A-3), father-in-law of the deceased, lodged mereg intimation (Ex.-P/5). In mereg intimation, he gave all these descriptions. The Investigating Officer reached to the place of occurrence, gave notice (Ex.-P/6) to the Panchas and prepared inquest (Ex.-P/7) on the dead body of the deceased. Inquest was prepared in presence of Vijay Lal (PW-10), Ram Pukar (PW-11) and Navdha Prasad (PW-12) etc. It was observed in the inquest that it may be a case of consumption of poison, therefore, the dead body should be sent for postmortem.

1.4. The dead body was sent for postmortem examination which was conducted by Dr. V.P. Jaiswal (PW-4). He noticed following symptoms on the dead body:-

(i) It was the dead body of 26 years old male; froth was coming out from the mouth; mouth was closed; tongue was inside the mouth; eyes were reddish and nails of hands were bluish;

(ii) On internal examination, it was found that the brain and brain membrane, trachea and both the lungs were congested; right chamber of heart was full of blood and the left chamber was empty; intestinal membrane was also congested;

The Autopsy Surgeon opined that the cause of death was asphyxia, however, viscera was preserved to confirm the death by poisoning. The postmortem report is Ex.-P/11.

1.5. The viscera preserved by Autopsy Surgeon was sent for its chemical examination to Forensic Science Laboratory (FSL), Sagar and a report (Ex.-P/21) was received. According to the FSL report, an organophosphorus pesticide namely dichlorvos (neuwan) was found in the viscera of the deceased.

1.6. Looking to the above material collected during the mereg inquiry, the Investigating Officer took it to be a case of suicide and closed the investigation some time in the month of May-June 1995. However on 26.11.95 a communication (wireless message) dated 17.10.95 (Ex.-P/15) from Superintendent of Police, Bilaspur was received and it was directed that on account of certain order from Police Headquarters, Bhopal, a crime for commission of murder on the above mereg inquiry be registered. It is after receiving such communication (wireless message) from the concerned authority, an F.I.R. (Ex.-P/14) was registered against the appellants u/ss. 302/ 34 IPC on 26.11.95.

1.7. Though it was contended that the memo (Ex.-P/15) was based on some C.I.D. Investigation, but no record relating to such investigation was filed along with the charge-sheet.

1.8. In further investigation on 5.1.96, 164 Cr.P.C. statements of two witnesses, namely Sunderlal (PW-7) and Rambati (PW-6) were recorded. Their 161 Cr.P.C. statements were also recorded on 15.3.96. Sunderlal (PW-7) stated that he had seen the appellants (A-1 to A-5) smothering/strangulating the deceased in the

house of Hariram (A-3) and the deceased, in fact, was murdered by these appellants. Diary statements of other witnesses were also recorded thereafter and then a charge-sheet was filed u/ss. 302/ 34 IPC.

1.9. The case of the prosecution was based upon the solitary evidence of Sunderlal (PW-7). The learned Sessions Judge relied on his testimony and held that the appellants had committed murder of the deceased in the above manner, therefore, they were liable for punishment u/ss. 302/ 34 IPC. The appellants, thus, were convicted and sentenced as above.

Hence this appeal.

2. Mr. Surendra Singh, learned Sr. Counsel appearing on behalf of the appellants, has argued that the solitary testimony of Sunderlal (PW-7) was not reliable; his testimony was not corroborated by the medical evidence; he made disclosure after a very long time and his conduct was also doubtful; therefore, conviction based on his solitary testimony cannot be sustained.

3. On the other hand, Mr. Ashish Gupta, learned Panel Lawyer appearing on behalf of the State, has opposed these arguments and supported the judgment passed by the Sessions Court.

4. We have heard counsel for the parties.

5. Sunderlal (PW-7) deposed that "On 22.3.95 the deceased had gone to the house of his in-laws. He (PW-7) had also gone from village Jampali to village Kawaripali. He had gone to interview a girl for marriage of his son. Vijay Lal (PW-10) had advised him to take Abhaylal (deceased) also for the interview of the girl. He met Abhaylal (deceased) on 24.3.95 in village Kawaripali. Abhaylal told that he has some work in his in-laws place, therefore, they will go tomorrow for seeing the girl. On this, he (PW-7) stayed in village Kawaripali. He had stayed in the house of Navdha Prasad (PW-12). In the evening, he went to the in-laws place of the deceased for a visit. As soon as he reached near their house, he heard noise like . The door of the house was closed. He pushed the door which got opened. When he went inside, he saw that Paluram (A-2), Hariram (A-3), Ramdhan (A-4) and Bhoj Kumar (A-1) had thrown the deceased in the verandah of the house of Hariram (A-3). Wife of the deceased (A-5) was also standing there. Paluram (A-2) and Hariram (A-3) had caught the hands of Abhaylal (deceased) and Ramdhan (A-4) had closed the nostrils and mouth of the deceased. Bhoj Kumar (A-1) had pressed both the legs of the deceased. Thereafter Abhaylal (deceased) became silent. This was the incident of about 8.00 p.m. He saw the incident from a distance of 30 feet. Paluram (A-2) had seen him and had threatened him to life saying that he should not disclose the incident to anyone. Thereafter he immediately returned to his village Jampali. His wife-Rambati (PW-6) opened the door of the house and asked as to how he is coming in the late night because it was about 1-11/2 a.m. He narrated the incident to her. He disclosed her that the persons of the place of father-in-law of the deceased have committed murder of the deceased in the above manner.

Thereafter they went to sleep". This is the entire examination-in-chief of Sunderlal (PW-7).

6. Though the incident took place on 24.3.95, Sunderlal (PW-7) did not disclose the incident to anyone (except his wife as he claimed) till 5.1.96 when his 164 Cr.P.C. statement was recorded by the concerned Magistrate. Thereafter his 161 Cr.P.C. statement was also recorded on 15.3.96. Mr. Singh has argued that the above inordinate delay in disclosure by the solitary eye-witness was fatal to the prosecution. He cited many decisions, including *Surajit Sarkar Vs. State of West Bengal*, . It is almost settled by the Supreme Court that unjustified and unexplained long delay in disclosure by an eye-witness will render his evidence unreliable because the delay would give an opportunity to concoct a different version than what actually took place. Even the delay of shorter period in a given facts and circumstances has also been held to be fatal creating a doubt on the credibility of the eyewitness. Some of the important judgments in this regard are *Balakrushna Swain Vs. State of Orissa*, ; *State of Orissa Vs. Mr. Brahmananda Nanda*, ; and *Bachhu Narain Singh -Vs- Naresh Yadav and Others*, AIR 2004 SC 3055. On the above principles, we have no doubt to say that no straight-jacket formula can be applied in all cases of late disclosure by eyewitnesses and the credibility of the eye-witnesses are to be judged on the facts and circumstances of each case. However a judgment has to be arrived at keeping in mind the normal human conduct vis-?-vis conduct of the witness; probable circumstances appearing in the case; and the explanation if any which the witness has offered regarding non-disclosure of such important fact.

7. In the instant case, the delay is not of 1 or 2 days, but it is a case in which the delay is of about 9 months. Why Sunderlal (PW-7) did not disclose these facts to the police or other persons for such a long period. No plausible explanation in this regard has been brought on record except the bald statement of Sunderlal (PW-7) that Paluram (A-2) had seen him at the place of occurrence and had threatened him to life.

8. In *Brahmananda Nanda (supra)*, the eye-witness claimed to see the incident in the night of 13th June 1969 and yet she did not come out with the name of the accused until the morning of 15th June, 1969. She offered explanation that she did not disclose the name of the assailant earlier on account of fear of them. The Supreme Court held that there was no question of any fear from the assailant because in the first place, the assailant was not known to be a gangster or a confirmed criminal about whom people would be afraid and that the police had already arrived to investigate the offence, therefore, there was no question of fear and in such situation the non-disclosure was a serious infirmity which destroy the credibility of the evidence of eye-witness. In the instant case also, just after the incident, a merg intimation was lodged and the police party had already reached to the village and proceedings of inquest were conducted. The house of this witness was not very far away from the house of the appellants. Therefore, he was having full opportunity to disclose the alleged incident to the

police on the date of inquiry of merg. Even if he could not disclose the alleged facts on the said date, he being the solitary witness would have gone to the police station on his own and would have made a disclosure, but nothing like that was done for about 9 months, and after the lapse of this period only, his 164 Cr.P.C. statement was recorded on 5.1.96.

9. We also take note about the conduct of Sunderlal (PW-7). According to him, after seeing the incident, he immediately went to his house in village Jampali. He did not make any alarm at the time of the incident. Even he did not return to the house of Navdha Prasad (PW-12), where he was allegedly staying in village Kawaripali. He did not think it better to disclose the incident even to Navdha Prasad (PW-12). Not only this, according to him after making the disclosure to his wife-Rambati (PW-6), he quietly slept in his house in the night. Even he did not go to the village Sarpanch or Kotwar or any other responsible person in the village. In normal human conduct, if a person witnesses an incident of above nature, on the first instance, he would make hue and cry, and then, of course he may run away or he may react in any other manner on account of any factor like threatening etc, but in any case he may not adopt a course to keep quite for 9 months. Almost in similar situation, the Supreme Court held in Para-3 of Peddireddy Subbareddi and others Vs. State of Andhra Pradesh, that in such cases false implication of accused was not completely ruled out, we quote:-

3. The learned counsel for the appellants contended that the evidence of P.W. 1 who is the sole eye-witness in this case cannot be accepted and acted upon since his evidence is highly interested besides being highly artificial. We have gone through the testimony of P.W. 1 carefully. As we have pointed out earlier that P.W. 1 is none other than the son-in-law of the deceased. After witnessing the occurrence he did not go to the village and inform any one of the villagers, but on the other hand, he went to his village which is said to be at the distance of four furlongs. He states that he informed only his mother-in-law (P.W. 3). P.W. 1 came with the present version only on the next morning. The conduct of P.W. 1 in not reporting to any of the villagers about the occurrence throws a considerable doubt on the veracity of his evidence which is incredible.

10. We also note that the presence of Sunderlal (PW-7) in village Kawaripali is ruled out by the evidence of Navdha Prasad (PW-12). He deposed in clear words in Para-5 that Sunderlal (PW-7) was his father-in-law (maternal) and was residing in village Jampali. Sunderlal (PW-7) was in visiting terms with his family. Sunderlal (PW-7) had not visited his house within at least 8-10 days prior to the date of inquest on the dead body of the deceased. In this period he was present in his house. In Para-6 he further deposed that Sunderlal (PW-7) had not visited his house since last 1 year. He further asserted in Para-7 that it is not correct to say that Sunderlal (PW-7) had visited his house one day prior to the date of incident. Navdha Prasad (PW-12) was not declared hostile by the prosecution. Mr. Singh has argued that the above evidence of Navdha Prasad (PW-12) was binding on the prosecution, and thus, it makes the presence of Sunderlal (PW-7)

doubtful in the village on the said date. He cited the decision of Javed Masood and Another Vs. State of Rajasthan, . In the said case the Supreme Court held in Para-12, we quote:-

12. ...The testimony of Mohammad Ayub (PW-6) cannot easily be surmounted by the prosecution. He has testified in clear terms that PWs 5, 13 and 14 were not present at the scene of occurrence. It is not known as to why the public prosecutor in the trial court failed to seek permission of the court to declare him "hostile". His evidence is binding on the prosecution as it is. No reason, much less valid reason has been stated by the Division Bench as to how evidence of PW-6 can be ignored.

11. In the instant case, Navdha Prasad (PW-12), as we have stated, was not declared hostile by the Public Prosecutor. It was contended by Sunderlal (PW-7) that he was staying in the house of Navdha Prasad (PW-12) since last 2 days which Navdha Prasad (PW-12) has completely ruled out. On the above principles, evidence of Navdha Prasad (PW-12) was binding on the prosecution who has clearly deposed that Sunderlal (PW-7) has never visited his house since last 1 year. Therefore, version of Sunderlal (PW-7) to the effect that he was staying in the house of Navdha Prasad (PW-12) since last 2 days becomes unreliable, and thus, his presence at the place of occurrence also becomes doubtful.

12. The learned Sessions Judge has also held that the evidence of Sunderlal (PW-7) was corroborated by the evidence of Vijay Lal (PW-10). Vijay Lal (PW-10) is elder brother of the deceased. He deposed in Para-3 that 1 month after the date of incident, Sunderlal (PW-7) had told him that the deceased had not died on account of consuming poison, but he was murdered by the appellants in the above manner by strangulation and smothering. The Sessions Judge did not take cognizance that the diary statement of Vijay Lal (PW-10) was record on 22.3.96. Even if we take that he was informed by Sunderlal (PW-7) in the month of May 1995 (after 1 month) why he did not disclose the above fact to the police prior to 22nd March 1996. On account of non-disclosure of such an important fact within reasonable time, his evidence ought to have been discarded by the Sessions Judge. We are of the view that the Sessions Judge was not justified in holding his evidence as a corroborative evidence of Sunderlal (PW-7).

13. The Sessions Judge completely ignored that the above evidence of solitary eye-witness-Sunderlal (PW-7) was not corroborated by the medical evidence. According to Sunderlal (PW-7), the deceased was committed to death by closing his nostrils and mouth, whereas, according to the Autopsy report as also FSL report, an organophosphorus pesticide namely dichlorvos was found in the viscera of the deceased. It is nobody's case that the deceased was forced to take the above pesticide or the above pesticide was administered upon him. Mr. Singh has shown us the literature of the said pesticide. According to that dichlorvos is an organophosphorus pesticide and is therefore a cholinesterase inhibitor. In the Chapter of its effect of human body and signs and symptoms of exposure, it has been mentioned that death is usually caused by respiratory muscle paralysis and

consequent asphyxiation. It is not mentioned in the postmortem report and even the Autopsy Surgeon has also not opined that the death of the deceased was homicidal in nature. Thus asphyxia, as opined by the Autopsy Surgeon, was quite possible on account of consumption of the above pesticide.

14. In Modi's Textbook of Medical Jurisprudence and Toxicology, 24th Edition 2011, pp. 462 & 466, it has been described that "The term, suffocation, is applied to that form of death that results from the exclusion of air from the lungs, by means other than that of the compression of the neck. Smothering or closure of the mouth and the nostrils has been held to be one of the causes of suffocation. It has further been described that in homicidal smothering, affected by the forcible application of the hand over the mouth and the nostrils, bruises and abrasions are often found on the lips and on the angles of the mouth, and alongside the nostrils. The inner mucosal surface of the lips may be found lacerated from pressure on the teeth. The nose may be flattened, and its septum may be fractured from pressure of the hand, but these signs are very rare. There may be bruises and abrasions on the cheeks and the molar regions, or on the lower jaw, if there has been a struggle. Rarely, fracture or dislocation of the cervical vertebrae may occur if the neck has been forcibly wrenched in an attempt at smothering with the hand. However, no local signs of violence will be found, if a soft cloth or pillow has been used to block the mouth and nostrils". Apart from the above, appearance due to asphyxia may also be seen and internal appearance as defined at page 466 may also be seen. In the instant case, we do not find such signs or appearance. On the contrary, the above poison was found in the viscera and thus the medical evidence was completely contrary to the eyewitness account of Sunderlal (PW-7).

15. In Joseph Vs. State of Kerala, it was held that Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact and, therefore, it is permissible for a court to record and sustain a conviction on the evidence of a solitary eye-witnesses. However in such cases the evidence of solitary witness has to be accepted with an amount of caution and after testing it in light of the evidence tendered by other witnesses. If the evidence of the solitary eye-witness is cogent, reliable and in tune with probabilities and inspires implicit confidence, the conviction can be based on his solitary testimony, that is to say that he should be wholly reliable.

16. In case on hand, we do not find the evidence of Sunderlal (PW-7) to be wholly reliable. His evidence was not corroborated by the medical evidence; he made disclosure after about 9 months; his conduct was unnatural; and further that his presence at the place of occurrence was also doubtful.

17. We are of the view that the learned Sessions Judge was not justified in relying upon the solitary testimony of Sunderlal (PW-7) for resting the conviction of the appellants u/ss. 302/ 34 IPC. For the foregoing reasons, the appeal is allowed. The conviction and sentences awarded to the appellants u/ss. 302/ 34 IPC are set-aside. The appellants are acquitted of the charges framed against

them. It is stated that the appellants are on bail. Their bail bonds shall continue for a period of 6 months in view of Section 437-A Cr.P.C.

HEADLINE

Non-disclosure by the solitary eye-witness for 9 months - effect - fatal.