
(1988) 09 MP CK 0032
In the Madhya Pradesh High Court

Harda and Another

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 22-09-1988

Acts Referred:

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

Citation : (1989) CriLJ 1058

Hon'ble Judges : T.N. Singh, J;R.M. Rustogi, J

Bench : Division Bench

Judgement

T.N. Singh, J.—Each of the two appellants has filed separately appeal from Jail challenging his conviction and sentence. They are uterine brothers and are convicted for the murder of their step-brother Rajaram, under Sections 302/34, I.P.C. and sentenced to R.I. for life.

2. The occurrence took place, as per F.I.R., on the mid-night. of 20th/21st December, 1982 in the field at a distance of 10 K.Ms. from the Police Station. However, the F.I.R. came to be lodged next day at around 11.30 a.m. by P.W. 2, Raghuweer, brother to the deceased and step-brother to the accused/appellants. Besides the informant Raghuweer and deceased Rajram's son (P.W. 1), their common father Mannu (P.W. 7) was examined and his son P.W.3, Hajrat, another uterine brother to the deceased and P.W. 2 was also examined. However, the star witness in the case is the child Ramkumar, examined as P.W. 1 who would be about five years of age at the time of occurrence. It is prosecution's case that he was sleeping in the fields with his father, the deceased, when the occurrence took place and that he ran home and informed others of the occurrence. It is also prosecution's case that the dying man made oral declarations before some of the witnesses examined at the trial. However, admittedly, despite the appellants being named in the F.I.R., they were arrested by the I.O. (P.W. 14), according to his evidence, six days after the occurrence. He also proved some recoveries, but those have been discarded and disbelieved by the trial Court.

3. Obviously, appellants' conviction was based on the oral dying declarations and

the evidence of the child witness, but what did not weigh with the trial Court, while that is of signal relevance according to us, is the fact that the prosecution did not examine Phulia (alias Phundia), wife of P.W. Mannu, though she was a charge-sheeted witness. Indeed, no explanation also appears in the evidence of I.O. for that serious lapse. That she was an important and pivotal witness is established on the evidence of other witnesses inasmuch on the evidence of the child (P.W. 1), it was she to whom the child first reported the occurrence and she could have accordingly unfolded truly and faithfully the prosecution story. Indeed, without her evidence, the defence was deprived of the opportunity to test the veracity of P.W. 1. This important and crucial lapse apart, the other serious lapse which has impaired the fairness of the prosecution is lack of any explanation for belated arrest of the appellants.

4. Before we read evidence of the star witness or other witnesses who deposed to dying declaration, it may be appropriate to read first the evidence of the Autopsy Surgeon as that would conform to the chronological sequence of events P.W. 12, Dr. Kedarnath, deposed that at 4.15 p.m. on 21-12-1982, he carried out post-mortem examination on the body of deceased Rajaram. He noted three external injuries, one each on the left leg, right thigh and the parietal region of the head. He deposed the cause of death as unconsciousness due to head injury and also excessive bleeding from the other injuries. He proved the post-mortem report. Ex. P/18, which he had prepared and signed. Therein, the description of the head injury is properly recorded in detail, giving the dimensions, 4 x 2 x 1 cm. incised wound on the right side of scalp 6 cm. over the pinna of right ear. It is also recorded that in the membrane clotted blood was present and as to brain, it is recorded that "the parietal lobe is filled with clotted blood". Further details to be read about the head injury bear extraction:

Fracture of parietal bone & incised wound which was cause of fracture, was very grave. It involved all the layers of scalp, with clear cut in peritrium & deeper part of bone. Membranes were covered with clotted blood. Brain substance was showing the same process as that of membranes.

Cause of death was Coma : Head injury & syncope : due to multiple fractures (Traumatic shock).

He also deposed categorically that the head injury was of such nature that the injured could be alive only for 10/15 minutes and because of the serious injury on the brain, he must have become unconscious due to coma.

5. That the deceased suffered profuse bleeding from the injury caused on his two legs is also clear from nature of those injuries described in the post-mortem report, there was a complete separation of lower end of Tibia and Fibula with all tarsal bones of left foot and complete fracture of lower 1/3rd of right femur, these are clearly mentioned in that report. The full and complete description of the several injuries found on the dead-body evidently lends credence to the opinion of the witness. What else appears of paramount importance in the

postmortem report must also be noticed. It is stated that mouth, oesophagus and pharynx were found "full of emitted food particles" and the stomach was also found "full of food" while the bladder was found empty. We have noted these salient features of the post-mortem report which escaped the notice of the trial Court.

6. Let us now read what the child deposed. When he was asked the question as to what happened when he was sleeping with his father in the field, he answered that the two accused dragged his father outside. To the question as to what was done to him, he answered, Harda had an axe and Barelal had a pharsa. they inflicted injuries on his father with those weapons. One blow with the axe was given on the head and another on the chest. Lathi blow was given in the stomach. To next question as to what happened thereafter, he replied, after inflicting the injuries, Harda and Barelal fled away and he came home and informed Phundia (not examined) that Harda and Barelal had killed his father. When he was asked if he daily accompanied his father to the field, he replied in the affirmative. It is also in his deposition that he was standing at a distance of 15 cubits and watching the two appellants inflicting injuries on his father. The voluntary statements which the child made in his deposition are noteworthy inasmuch as they impinge on his credibility. He also stated voluntarily that besides Harda and Barelal whom he could recognise, there were others also present at the place of occurrence though they did not participate in the crime. He said that there were some persons near a cart, others were near a Mauha tree and some others were also standing near Tatia, but he could not recognise those persons. Another significant voluntary statement that he made is also noteworthy. The child said that his father had given land to Harda and Barelal which they had sold away and they wanted more land. When he was asked how Harda and Barelal were related to him, he replied point-blank, "I don't Know". When he was asked who told him that those two persons had been given land and that they had sold the same, he replied- "Nobody told me, I was there". To the next question as to when land was given to them, he replied-"Four or five years ago". His deposition is also that from the place of occurrence, their house was at a sufficient distance and he went alone running to his house. It was a dark night. To the question as to how he could recognise the assailants, he retracted his earlier statement that it was dark night and said that "there was slight light".

7. We are surprised to note that although trial Court did not administer oath to the child and prefaced record of his statement by the remark that the witness had sufficient understanding and intelligence to answer questions, there is no record before us to accept the assessment of the trial Court as the normal procedure in that regard was not followed. It was incumbent on the trial Court to place on record facts on which it had based its assessment. It is the usual practice of trial courts in such matters to put ordinary questions to such a witness to test his understanding and intelligence and to make a record of that so that the appellate Court is able to make its own assessment on the basis of

the material found on record in that regard. We would analyse the deposition of this witness later and indeed, in that connection, we would advert to the tests judicially evolved for that purpose. At this stage, suffice it to say only this much that in the medical evidence, no injury on deceased's chest, inflicted with an axe or any injury inflicted by Lathi on his stomach was found.

8. The other glaring infirmity in the deposition of this witness which would be borne out on the evidence of the other witnesses may also be noted even at this stage. Nowhere else in the evidence of any other witness the story which the child gave about many other persons besides the appellants being present though not participating in the crime, has come out. P.W. 7 deposed that the two appellants Harda and Barelal lived separately in a different village Ganeshkheda, for the last 3/4 years and he lived separately in village Dhaura with deceased Rajaram and his other two sons Raghuweer, P.W. 2, and Hajrat (P.W. 3). His evidence is that at midnight, his grand-son Ramkumar (P.W. 1) came home and told his wife (Phundia) that Barelal and Harda assaulted his father. This fact, he learnt when his wife came to him with his grand-son. He did not go to the fields though his wife went there with the child. Sometime later. P.Ws. 2, 3, 4, 5 and 13 came home with his wife carrying on a cot injured Rajaram, who was then alive. It is also his evidence that Rajaram gave him the names of the two appellants as assailants in presence of the other witnesses and he was given milk to drink. After half an hour, Rajaram died. He gives a lie to the child by deposing that the "child did not accompany every day his father to the field to sleep there at night. However, his evidence is also that the appellants were not on good terms with deceased Rajaram and they were quarrelling about lands. P.W. 4 Nathuram Purohit is said to be an independent witness who is said to have espied the injured Rajaram being carried on the cot to his house though he had not joined the group. He also deposed that Rajaram was alive when they reached his house, but he said that he was given a glass of water to drink after which he died, though Rajaram had disclosed the names of two appellants before collapsing. He also deposed that Rajaram had sustained not only injuries on his head and leg, but also on the back. Another significant fact which he deposed is that the child Ramkumar had told him that he was caught hold of by two or three persons though he could not recognise them. In his evidence, it has also come out that it was dark night and that he had to use the lantern while coming to Rajaram's house.

9. Besides them, the other so-called independent witnesses examined in the case are P.Ws. 4, 5 and 13 who are said to have carried from the field injured Rajaram. The evidence of P.W. 4 is that Hajrat (P.W. 3) came from the field at mid-might where villgers were revelling and holding a function in connection with the Holi. P.W. 2 Raghuweer was also there with him as was P.W. 5, Ramsingh, or P.W. 13, Kishunlal. they all went to the field and there found Rajaram lying injured, but alive, and bleeding profusely. They were told by the injured that the appellants had injured him with an axe and Pharsa. They carried him to his house, and within half an hour of arrival there, he died. He deposed that since 4

to 6 years before the occurrence, the two appellants were living separately in village Ganeshkheda. The evidence of P.W. 5 is on the same lines except that he also deposed of Rajaram being given "Milk and water" to drink. In his evidence, P.W. 13, Kishunlal, did not say that he went with others to the field to carry injured Rajaram to his house. He said that on hearing halla at around mid-night when he was asleep in his house, he woke up and he went to Rajaram's house where he found Rajaram dead. The inmates of the house told him that Rajaram was killed by the appellants.

10. Government Advocate Shri Govind Singh has strenuously urged that we have to give credence to the ocular evidence and not to medical evidence. Indeed, this submission, counsel was compelled to make as the medical evidence conclusively established that the deceased was not in a position to make any dying declaration. Due to the serious head injury, according to medical evidence, the deceased must have been unconscious immediately and died soon after. Counsel has relied on Maharaj Singh and Another Vs. State of Rajasthan, as also on Solanki Chimanbhai Ukabhai Vs. State of Gujarat, , wherein the facts were entirely different and the holding therein also does not, in our opinion, support counsel's contention. In Maharaj Singh, the evidence of the eyewitness was not only "fully corroborated" by the F.I.R., but also by two other witnesses and his evidence was not positively contrary to what the Autopsy Surgeon had deposed. His testimony was assailed because the Doctor did not note or find any imprints on the wrist of the dead body which could have lent support to the evidence of the witness that the hands of the deceased had been tied at his back when he was forcibly taken by the accused to the fields and shot dead there. In the other decision, Chimanbhai's case, it was similarly observed this much only that inconsistency between testimony of eyewitness and medical evidence was no ground to discard the testimony of eye-witnesses. It was held that defence could make use of medical evidence to prove that injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witness. However, it was also clearly observed that the medical evidence could "completely rule out all possibilities whatever of injuries taking place in the manner alleged by the eyewitness".

11. In the instant case, not only the so-called independent witnesses (who were not eye-witnesses) give materially discrepant versions impinging on their veracity, the medical evidence is so complete, conclusive and clinching that the version of dying declarations of the deceased which those witnesses give cannot be preferred to the medical evidence. That apart, the two decisions cited speak of preference to be given to "eye-witnesses" and not to any kind of ocular evidence. In the instant case, except the child, none else has deposed as eyewitness. Long back, in Smt. Nagindra Bala Mitra and Another Vs. Sunil Chandra Roy and Another, it was observed by Hidayatullah, J. (as his Lordship then was) that "the value of a medical witness is not merely a check upon the testimony of eye-witness, it is also independent testimony, because it may establish certain facts, quite apart from other oral evidence". As noted in the P.M.

Report, Ex.P/17, deceased's mouth, oesophagus and pharynx were found choked ("full of food particles") which obviously made it impossible for him to speak. Deceased's stomach was also found "full of food" which possibly resulted in the choking as nausea and vomiting, according to Modi's Medical Jurisprudence (p. 257, 18th edition) could easily happen in the case of head injury of the type which deceased suffered. Apex Court has repeatedly held that physical fitness of the deponent at the time of alleged dying declaration must be carefully examined to dispel all doubts of the same being concocted. See - State (Delhi Administration) Vs. Laxman Kumar and Others, ; Darshan Singh alias Bhasuri and Others Vs. State of Punjab, .

12. Circumstances or facts disclosed in medical evidence indent seriously the veracity of witnesses of dying declarations. The more important, independent and crucial circumstance is, however, the questionable deposition made by the child. If he is disbelieved, the entire prosecution case would fall to pieces. Importantly also, is the fact that after almost twelve hours of the occurrence it was reported at the Police Station which was barely ten K.Ms. away. Indeed, circumstances make it doubtful as to whether in the dark night (deposed to by all witnesses) the assailants could be recognised at all and there was the clear possibility, therefore, of story to be concocted to implicate the appellants during the long interval that elapsed between death of Rajaram and lodgment of the F.I.R. Why arrest of appellants was made six days later and why witnesses gave different versions of the date of arrest is another strong circumstance which seriously indents prosecution's case lending credence to the theory that the dying declarations and child's story were all cooked up.

13. We had an occasion recently to examine in some detail the law bearing on the testimony of a child witness in Krishna Sewak's case 1988 J LJ 321 and after examining authorities, including Apex Court's decisions, we took the view that the statement of a child witness had to be carefully examined to see whether he could be said to be a "witness of truth" and that there was no possibility of his being tutored or of his deposing on his own imaginations. We accepted the test evolved by the privy council that it was necessary to see in such a case as to "how consistent the story is with itself, or withstands test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case". In State of Assam Vs. Mafizuddin Ahmed, , it was observed that the only eyewitness was a child and he was found tutored; conviction on his testimony on a charge of murder was held to have been rightly set aside by the High Court.

14. In the instant case, we have no hesitation to say that the child, PW 1, was not deposing the truth. It rather appears that names of the assailants were put into his mouth. He could not have known the two assailants who were living separately for 5/6, years in a different village and indeed he himself said that he did not know them by relationship. He could not have known about the transaction of giving of lands to them by his father, or of those lands being sold by the appellants, though he stated that those facts were within his personal

knowledge. As pointed out earlier, if those events happened 5 years ago he might have only been born then and his knowledge of those events was impossible. The story he gave does not fit in with the other evidence in the case. His grandfather himself gave evidence that only on that particular night of occurrence, he had gone with his father to sleep in the field, though the child himself stated that he used to accompany his father every day to sleep in the field at night. It must have been put into his mind and mouth that the two appellants were inimical to his father and, therefore, they had to be implicated and their names had to be given as the culprits.

The fact that the child made voluntary statements about which we have just observed indicates positively of his being tutored as those facts to which he deposed could not be within his knowledge. Further, his story that he stayed put at the place of occurrence watching his father being assaulted does not also appear probable. A child of 5 years' age would naturally flee in such circumstances, scared away by the ghastly sight. It is indeed very doubtful that the child could at all recognise the assailants because it was dark night as deposed to by him and also by PWs 5 and 13.

15. We are also of the view that for further non-examination of the child's grandmother adverse inference has to be drawn against the prosecution. Though she was cited in the charge-sheet, no explanation has been given for her non-examination. Had she been examined, it would have been possible to demolish perhaps, very conclusively, the evidence of the child witness because she was the person to whom, according to the child, the incident was first reported by him. It has to be presumed that had she been examined she would have given a lie to the prosecution story set-up through the mouth of the child. It is in evidence that deceased's house was about a mile from the place of occurrence. For the deceased to remain alive for even an hour or so or the grandmother and the grand-child (PW 1) to reach him and hear his first dying declaration appear most improbable on the medical evidence which we have earlier analysed. Further embellishments of the deceased making second dying declaration to others who followed the grandmother and grand-child to the place of occurrence and of the third dying declaration by the deceased made to another group which, had assembled at his house, are to be considered merely as props to support the first lie. Indeed, evidence being that the deceased's mouth was choked with food particles, he could neither have taken milk and/or water as deposed to by witnesses, nor could he be in a position to utter even a single word even if it was assumed that he was all along alive and did not die for long hours after the occurrence.

16. For the several reasons aforesaid, we are of the view that the prosecution has failed to bring home the offence of murder of deceased Rajaram to the two appellants. We have rejected the deposition of the child witness, PW 1, and we have also rejected the oral dying declarations and there being no other materials to sustain their conviction, we would be justified in holding the appellants to be

not guilty for the charge preferred against them u/s 302/34, I.P.C.

17. In the result, both the appeals succeed and are allowed. The conviction and sentences passed against the appellants are set aside. They shall be set at liberty forthwith if not required in any other case.