

(1999) 10 GAU CK 0001
In the Gauhati High Court
Case No : Criminal Appeal No. 12 of 1995

Jharna Debnath (Smti)

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 06-10-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161

Evidence Act, 1872 — Section 118

Penal Code, 1860 (IPC) — Section 302, 304

Citation : (2000) 1 GLT 220

Hon'ble Judges : H.K.K. Singh, J

Bench : Single Bench

Advocate : D. Guha, for the Appellant; S. Das, for the Respondent

Final Decision : Allowed

Judgement

H.K.K. Singh, J.—This appeal is against the judgment and order dated 29.5.1995 passed by the learned Sessions Judge, West Tripura, Agartala in Sessions Trial No. 157(W.T./A) of 1994 convicting the present accused-Appellant for the offence u/s 304 Part-II of I.P.C. and sentencing her to undergo 5 (five) years rigorous imprisonment and also to pay fine of Rs. 3000/- (three thousand), in default, to suffer another 6(six) months rigorous imprisonment.

2. The case of the prosecution is that deceased Sadhana Rani Paul was residing in the house of the father of the accused Jharna Debnath as a tenant. Accused Jharna was also residing with her father even after her marriage. On 28.4.92 in the morning at about 7 a.m. there was a quarrel between Sadhana and the accused regarding exchange of one "Ganji" and they also started fighting and the accused picked up a "Piri" and gave a blow on the head of Sadhana and Sadhana fell on the ground in the courtyard. Sadhana was hospitalised but she died in the night of 29.4.92. Thereafter the husband of the deceased (Sadhana) lodged an ejahar on 30.4.92 at the Airport Police Station. The O/C, Airport Police Station on receipt of the ejahar registered a case being Airport P.S Case No.

8(4)/92 u/s 302 of I.P.C. and after investigation he submitted charge-sheet against the accused. Thereafter the case was committed to the Court of Sessions. Thus, the accused was tried for the offence u/s 302 of I.P.C. and the learned Sessions Judge passed the judgment of conviction and sentence as noted above.

3. Mr. D. Guha, the learned Counsel for the accused-Appellant has submitted that there is no evidence against the accused for the crime and the learned Sessions Judge committed manifest error in relying upon the uncorroborated sole testimony of a child witness. The learned Counsel has also taken me through the judgment passed by the learned Sessions Judge and also the evidence and other materials on records.

4. In this case there are only 7 witnesses on behalf of the prosecution and one witness on behalf of the defence.

5. P.W. 1 Shri Uttam Ghosh only says that son of the deceased told him that his mother was killed by the accused. The witness did not see the occurrence. But he was a witness at the time of seizure of the "Piri", Ext M.O.-1 and also the witness in the inquest Report.

6. P.W. 2 Chandan Paul is the child witness who was present at the time of occurrence and as such, much depends upon the testimony of this witness. According to him there was a quarrel between the accused and her mother. In course of the quarrel the accused gave a blow with a "Piri" on the head of his mother. His mother fell on the ground and she was shivering, some blood also oozed out from the injury. I will discuss more about this witness later on.

7. P.W. 3 Nani Gopal Paul is the husband of the deceased. According to him, on the day of occurrence while he was taking tea in a tea stall which was about 5/6 bighas away from his house, one Mahadeb Kar of his village came and informed him that a quarrel was going on between the accused and the deceased, so he requested Hiredra Debnath who is the father of the accused to go to the house and settle the matter. Thereafter his son (P.W. 2) came to the tea stall and informed that the deceased was assaulted and killed by Jharna. On hearing this, he rushed to his house and found his wife lying on a wooden chowki inside the hut and she was found unconscious. They gave some treatment to her and at about 8 to 9 p.m. of the day she was taken to the hospital where she expired at about 11/11.30 p.m. of 29.4.92.

8. P.W. 4 Mahadeb Kar only says that while passing on the road he heard Jharna and Sadhana quarrelling in their house and on reaching the tea stall he informed the husband of Sadhana about the quarrel.

9. P.W. 5 Smti. Lalita Debnath is also a tenant of the father of the accused. According to prosecution she was present at the house at the time of occurrence. But the witness has been declared hostile by the prosecution.

10. The remaining 2 witnesses are the doctor who conducted autopsy on the

dead body of Sadhana and the Investigating Officer, P.W. 6 and P.W. 9 respectively.

11. According to doctor (P.W. 8) the following injuries were found on the body of the deceased during post mortem examination:

Head injury found. Body fresh. Face injury found. Eyes closed. Mouth open. Nostrilise blood froth soon.

1. One contortion 2" X 2" found in the right parital region.

2. Contortion 6" X 2" found in the right side of the face in front of right ear with fracture of right zygoma.

Above injuries were found grievous caused by hard and blunt substance. Scalp-found fracture on right zygoma. Membrane and brain-blood found.

All the parts of the thorax and abdomen found healthy.

No disease found. No other visible injuries found detected on P.M.

and the doctor gave the following opinion:

Cause of death of Sadhana is for shock haemorrhage as a result of injuries received on head and face which was caused sudden contact by hard and blunt substance.

The injuries as found by me are sufficient to cause death. Injury was found ante mortem.

Thus, according to doctor the victim died due to the injuries on her head and face.

12. The learned Sessions Judge relied upon the statement of the child witness P. W. 2 Shri Chandan Paul before whom the occurrence took place and recorded the finding of conviction.

13. The occurrence took place on 28.4.92 at about 8 a.m. and the deceased Sadhana Paul was admitted to the hospital on the next date at about 1 p.m. and she died at the hospital at about 11/11.30 p.m. on the same day i.e. on 29.4.92 The F.I.R. was lodged on 30.4.92 at about 11.45 a.m. The husband P.W. 3 lodged the F.I.R. but neither in the F.I.R. nor in his deposition the delay in lodging the F.I.R. is disclosed. In the F.I.R. the informant has categorically stated that while he was at the nearby tea stall, Madhab Kar came and reported to him that mere was a fight going on between the accused and the deceased and on hearing that the informant requested Hirendra Debnath, the father of Jharna who was also at the tea stall by then, to go to the house and settle the matter and after about 5 minutes or so, the said Hirendra Debnath came back hurriedly and told him to go to the house quickly as the condition of the deceased Sadhana was serious. But the informant while deposing before the court stated that his son Chandan Paul (P.W. 2) himself came at the tea stall and informed that Sadhana had been

assaulted and killed by Jharna. So, he went home and found his wife Sadhana lying unconscious on a Chowki inside their house. 14. The learned Counsel for the Appellant has submitted that the informant admitted in his cross-examination that he did not state to the police that Chandan informed him at the tea stall that Jharna assaulted his wife. Thus the learned Counsel has also submitted that the informant is not to be relied upon. The learned Counsel further submitted that the story of the prosecution that the deceased died as a result of the injury caused to her by "Piri" blow is not to be relied upon. On the contrary, the learned Counsel submits that the deceased was a patient of hypertension and due to some quarrel she might have fainted, thereafter she was put in a wooden chowki from which she fell on the ground and as a result of the fall from the wooden chowki on the hard ground the injury on the head and face might have been caused. Again, the learned Counsel for the Appellant submits that D.W. 1, who was the incharge doctor at the G.B. Hospital, Agartala on 28.4.92 proved the Bed Head Ticket and other material documents Exhibit-D/1 and Exhibit-D/2 wherein it is shown that the patient was brought and hospitalised with a history of " sudden fall"- pain in the abdomen and chest due to fall. It is also shown that besides others, she was suffering from ailment of Malignant Hypertension and her B.P. was recorded as 210/130 and even after some treatment also her B.P. was recorded as 220/130. According to the doctor, the death was due to cardio respiratory failure. On the basis of the statement of the doctor(D.W. 1) the learned Counsel for the Appellant has strongly submitted that the story of "Piri" blow cannot be relied upon.

15. The most important witness in this case is the child witness Chandan Paul (P.W. 2). He was examined on 6.4.95 and he was shown to be eight years of age at the time of deposition i.e. he was deposing with regard to the occurrence which took place three years back from that day.

16. The learned Sessions Judge also made an enquiry regarding the capability of the witness and after putting many questions and finding the witness to be competent and capable, the learned Sessions Judge recorded the statement of the Child witness. Here the learned Counsel for the Appellant has submitted that the child was not properly tested and his evidence is a tutored one and as such it is unsafe to rely upon the statement of the child witness.

17. Section 118 of the Indian Evidence Act says that all persons are competent to testify unless they are prevented from understanding the question put to them or from giving rational answers to the questions by tender years, extreme old age, disease, whether of body or mind, or any other causes. Thus, normally anybody is competent to be a witness unless the court considers him to be incompetent for any of the aforesaid reasons. It is generally accepted and settled point that a preliminary enquiry is to be conducted to test competency of a child to become a witness, generally, called voir dire. In the present case, the learned Sessions Judge has given the certificate that after enquiry he found the child to be a competent witness. But the learned Sessions Judge has not put in record

the questions put to the child and answers given by the child in the course of the enquiry.

18. The Indian Evidence Act or any other law in this regard does not expressly require that the record of the preliminary enquiry i.e. voir dire should be kept and maintained and the Indian Evidence Act left it to the decision of the court to decide about the competency of the child to be witness. Here, the trial Judge is the best to form the opinion regarding competency of the child witness as he is the one who has seen and tested the child personally, the behaviour, expression, demeanour etc. But it is also true that the appellate court has the same duty to ascertain the competency of the child to be a witness. In absence of the record of the preliminary enquiry conducted by the trial Judge, the appellate court is left only to the deposition recorded by the trial Judge in connection with the case, not the record of the voir dire. Accordingly, the maintenance and keeping of the record of the preliminary enquiry is highly desirable. Again, it is equally desirable that the statements of the child witnesses are recorded in the form of questions and answers.

19. Competency of a person to be a witness is quite different from reliability of the witness. Unless a child is found competent to be a witness, his statement is not admissible as evidence. Thus, a child has to be a competent witness first then only his statement is admissible. Thereafter, the evidence of the child witness has to be considered for reliability. On scrutiny of his evidence, if the child is found to be reliable then only the child may be taken as a reliable witness. Otherwise, the rule of prudence which has been christened as a rule of law is that generally it is unsafe to rely upon statement of a child witness as children are easily tutored or threatened or persuaded to speak in the way as told by others. Hence the statement of the child witness has to be examined carefully to see that he has not been tutored.

20. A few decisions may be noted in this respect. In the case of *Rameswar, Appellant v. The State of Rajasthan Respondent* reported in AIR 39 1952 SC 54, a girl of 7/8 years was examined without administering of oath as the judge who recorded the statement certified that she did not understand the sanctity of the oath and judge also did not certify that the child understood the duty of speaking the truth. The Apex Court held that omission to administer oath even to an adult only goes to the credibility of the witness and not to his competency. The question of competency is dealt with in Section 118 of the Evidence Act. The Apex Court further held:

It is, however, desirable that judge and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether.

21. In the case of *Santosh Mandal Vs. State*, the Sessions Judge conducted the

preliminary enquiry but no record of the questions and answers were preserved on record. The Division Bench of the Calcutta High Court held that though keeping of the record of the preliminary enquiry is desirable, it will not render the evidence inadmissible or doubtful. The Division Bench also found that in that case, the learned trial Judge also took the pains to record the evidence of those child witnesses in questions and answers form to make it possible for appellate court to determine for itself whether they prevented the questions and give rational answers to them.

22. A Division Bench of the this High Court in (1993) Supp(1) GLR 253 (Md. Bachhu Miah and Alinoyaj, Appellants v. State of Tripura) held that:

Child witnesses are a most untrustworthy class of witnesses for, when a tender age, they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others and are greatly influenced by fear for punishment, by hope of reward and by desire of notoriety. In considering the evidence of child witnesses, these observations should not be lost sight of, although each case would depend upon its particular facts and circumstances. The evidence of a child witness should be scanned carefully. If no flaws or infirmities are found therein, there is no impediment in accepting his evidence. The court should also make endeavour to see whether there is sign of tutoring. The court should always look for corroboration, more by way of caution and prudence and not as by a rule of law.

23. In the case at hand it is disclosed in the F.I.R. that on the day of occurrence accused Jharna and her husband entered into the house of Sadhana and they abused Sadhana and also gave blows to Sadhana and thereafter they brought Sadhana out of her hut to the courtyard by catching her hair and in the courtyard Jharna gave a blow with a wooden piri on the chest and back of Sadhana. Thus she became unconscious. But the child witness (P.W. 2) never mentioned about the participation of the husband of the accused while quarrelling and giving blows to Sadhana inside the house and also at the time when Sadhana was brought out in the courtyard. The child witness (P.W. 2) says that only Smti. Lalita Debnath (P.W. 5) was present at the time of occurrence in the house. Incidentally, Smti. Lalita had not supported the prosecution case and thus the prosecution declared her to be hostile. In her (P.W. 5) statement before the court she stated that Sadhana and Jharna were quarrelling regarding a ganji and she (P.W. 5) left her house. But in her statement recorded u/s 161 of Code of Criminal Procedure which was confronted to the witness (P.W. 5) and proved later on by the Investigating officer she stated that she (P.W. 5) saw accused Jharna giving a piri blow to the deceased. Again, in cross-examination she stated that after the quarrel Sadhana was brought inside the hut and she was put in a wooden chowki which is about 3/4 cubits in height from the floor and Sadhana fell down on the floor from the Chowki. And thereafter she (P.W. 5) and Nani Gopal Paul (P.W. 3) put her back on the wooden Chowki and according to the witness (P.W. 5) Sadhana became ill due to the quarrel with the accused and her

husband and thus she fell down on the ground.

24. Law is settled that if a witness is declared hostile by the prosecution it only shows the intention of the prosecution that they did not want to rely upon the statement of the hostile witness. But the mere fact that the witness has been declared hostile by the prosecution or any party producing the witness does not necessarily mean that the statement of witness is to be totally discarded. It is for the court to find out any grain out of the chaff and if it is found that the statement of the hostile witness or some portion of the statement is found to be relied upon, then court may act upon such statement or part there-of which is found to be reliable. The maxim "Falsus In Uno, Falsus In Omnibus" is not applicable in Indian Law. From the evidence it is found that Smti. Lalita was staying in the house of the accused Jharna as tenant and the witnesses also have deposed that she was there at the time of occurrence. Thus the portion of me statement that there was a quarrel between the accused and her husband on the one side and the deceased Sadhana on the other may be accepted and nothing more.

25. Child witness (P.W. 2) never stated that he went to the tea stall and reported the matter to his father (P.W. 3) and P.W. 3 also in his ejahar (Ext."P"-3) never stated that P.W. 2 (Child witness) came to the tea stall and reported the matter to him. But in his statement before the court as P.W. 3 stated that his son P.W. 2 came to the tea stall and reported that Sadhana was assaulted and killed by accused Jharna. On the contrary in the F.I.R. it is stated by the informant (P.W. 3) that Madhab Roy came to the tea stall and stated to him that there was a quarrel between Jharana and Sadhana. So, he asked the father of the accused to go to the house and settle the matter and thereafter Hirendra Debnath who is the father of the accused hurriedly came back to the tea stall and reported that the condition of Sadhana was serious and asked the informant to go to the house quickly. The child witness also stated before the court that he was reading in blind school and he also did not know any of his next door neighbour. Another important fact is that the child witness himself admitted before the court saying "I came to the court with my brother-in-Law Swapan. Madan and Swapan told me how to depose before the court." The learned Counsel for the defence has vehemently argued that this statement amounts to admission of the fact that the child witness was deposing before the court in the way she was tutored so by Swapan and his step brother Madan. Whereas the learned Public Prosecutor has submitted that the child witness was only told to make statement before the court, not exactly as to what should be stated before the court.

26. Another pertinent point is that when Sadhana was admitted to the hospital, the doctor who examined her for the first time recorded in the medical papers (Ext. D-1 and Ext. D-2) as noted above, never mentioned regarding piri blow but it was mentioned that it was a case of "sudden fall after quarrel and dizziness". And as per those medical papers blood pressure of the patient was reading as 210/130 at 1 p.m. of 29.4.92 and as 220/130 later the day.

27. On considering the evidence of the child witness which does not rule out tutoring by his step brother and also from other relevant facts as noted above, particularly the medical papers as produced by the defence, it cannot be held that the prosecution has been able to prove the case that the death of Sadhana was caused due to piri blow given by the accused. There might have been some quarrel out of trifling matter regarding exchange of "Ganji" and for that fighting might have been there between the deceased and the accused and her husband and, as deceased Sadhana was having a very high blood pressure, as a result of the fight she might have fainted and also the injury on her head might have been caused due to the fall on the hard ground from the chowki.

28. Considering the totality of the evidence and the evidence on record it is found that there is a serious doubt in the prosecution case and the accused is entitled to get benefit of the doubt.

29. For the aforesaid reasons and conclusion, the appeal is allowed. The; conviction and sentence recorded by the court below is set aside. The accused Smti. Jharna Debnath is acquitted. She need not surrender to her bail. The surety is also discharged from the liability.