

(1992) 11 MP CK 0006

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 401 of 1991

Kalu Singh Chander Singh and Others

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 27-11-1992

Acts Referred:

Evidence Act, 1872 — Section 11
Penal Code, 1860 (IPC) — Section 302

Citation : (1994) 39 MPLJ 560 : (1994) MPLJ 560

Hon'ble Judges : V.D. Gyani, J;A.R. Tiwari, J

Bench : Division Bench

Advocate : P.K. Saxena, for the Appellant; S.K. Nigam, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

A.R. Tiwari, J.

The convict-appellants have preferred this appeal against the judgment dated 28-8-1991 rendered by IIIrd Addl. Sessions Judge, Dewas in Sessions Trial No. 56/90 whereby they were held guilty of the offence punishable u/s 302/34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay a fine of Rs. 250/- each and in default to suffer simple imprisonment for three months.

Adumbrated in brief the prosecution case at the trial was that on 29-9-1989, Shersingh (PW 3) had gone out for latrine at about 6.00 A.M. when he was near the KHALA the appellants Bhagwansingh, Tufan Singh and Kalusingh all sons of Chander Singh armed with stick, axe and GETI (Shovel) assaulting the deceased Terusingh alias Tejsingh. PW 3 informed his elder brother Rajendra Singh (PW 1) who immediately rushed to the place of occurrence. The injured Terusingh alias Tejsingh was put in a tractor and taken to the hospital at Dewas for the purpose of treatment, but he succumbed to the injuries on way to the hospital. The incident occurred due to trivial dispute of cutting the tree of Palmyrapalm. The report of the incident was lodged by Rejendra Singh at the Police Chowki, Tonk

Kala which is marked in this case as Ex. P/1 on the basis of which, a crime was registered vide Ex. P/23 at Police Station Tonk Khurd. The post mortem was conducted by Dr. Yogesh Shankar (PW 2). The post mortem report is Ex. P/3. The weapons of assault were seized from the appellants pursuant to the information and submitted along with certain other articles for chemical examination. The report of Chemical Examiner is Ex. P/19 and the report of the Serologist is Ex. P/24. The spot maps Ex. P/2 and P/1 7 were prepared. After completion of investigation the charge-sheet was filed against the appellants. They were charged u/s 302/34 of the Indian Penal Code to which they pleaded not guilty. On trial, they were convicted and sentenced as above.

We have heard Shri P. K. Saxena, learned counsel for the appellants and Shri Sheel Kumar Nigam, learned Government Advocate for the State-respondent.

Shri Saxena directed scathing attack against the prosecution evidence and criticised the impugned judgment. He submitted that the trial Court has erred in placing reliance on the unreliable testimony of the prosecution witnesses (PW 3 and PW 5). He particularly criticised the late interrogation of the principal witness-Ramkunwar Bai (PW 5). Her testimony, urged the counsel, was unsafe to be acted upon. Similarly, he argued that Sher Singh (PW 3) was also a child-witness and as such, it was hazardous to sustain the conviction on his testimony. It also suffered from various infirmities. On these contentions, he submitted that the appellants deserve to be exculpated. On the other hand, Shri Nigam, supported the impugned judgment and submitted that the conclusion reached by the Trial Court was on firm foundation and was not vitiated in any manner. Proceeding further, he stated that the delay in interrogation was of no consequence when the name of PW 5 Ramkunwar Bai was included in the promptly lodged First Information Report (Ex. P/1). On these grounds, he urged that the appeal deserves to be dismissed.

The point for consideration is whether this appeal deserves to be allowed?

First thing first. It was not disputed before us that Tej Singh died a homicidal death. Even otherwise PW 2 Dr. Yogesh Shankar, who conducted the autopsy has proved that there were as many as four injuries, all contused lacerated wounds, on the person of the deceased. He has proved the post mortem report which is marked in this case as Ex. P/3. The cause of death, as pointed out by him, was recorded as under :-

"In my opinion the cause of death is injury to the vital organ i.e. brain. Homicidal in nature."

It was thus, fully established that the deceased died a homicidal death. The essential point for consideration is however, is as to who has done him to death?

Right at the threshold, it may be noticed that the linchpin of Trial Court's conclusion of guilt is the statements of Sher Singh (PW 3) and Ramkunwar Bai (PW 5) (para 28 of the judgment). The other two, Pawan (PW 4) and Hari (PW

14) both child witnesses, were not held to be reliable witnesses (para 21 of the judgment). The crucial point for consideration is thus whether the trial Court was right in placing implicit faith in the statements of the aforesaid two witnesses i.e. PW 3 Sher Singh and PW 5 Ramkunwar Bai. We shall, therefore, evaluate the worth of the evidence of these two witnesses.

We notice the incongruity in approach of the trial Court at least on one aspect. PW 4 Pawan, PW 14 Hari and PW 3 Sher Singh were all child witnesses and were examined in the Court without administration of oath. The Trial Court declined to rely upon the testimony of PW 4 and PW 14, as noted above, but opted to place reliance on the testimony of another child-witness PW 3 Sher Singh. The trial Court noted in para 21 of the judgment that PW 4 Pawan is not found to be a reliable witness. Similarly, the trial Court deemed it proper to exclude the evidence of PW 14 Hari from consideration (para 20). We shall keep this in-built inconsistency in mind.

PW 3 Sher Singh was the person who claimed to have seen the incident and narrated it promptly, before memory could play false, to his elder brother PW 1 Rajendra Singh. On being so informed, PW 1 narrated it to Tej Singh and Lakhan Singh (PW 8). Tej Singh was not examined PW 8. Lakhan Singh, however, exploded the myth, (Para 1) when he omitted out that all that he was told was that Terusingh was murdered. Names of the assailants were not disclosed. The explanation about paucity of time, furnished by PW 8 but withheld by PW 1, seems difficult of being digested. It is not inbred that such a vital fact, if known, would have remained uncommunicated. It is also noticed that the report (Ex. P/I) lodged by PW 1, offensively omitted reference about Tej Singh and Lakhan Singh.

Ex. P/I thus rested on the fulcrum of what was narrated to PW 1 by PW 3. Ex. P/I, however, embodied an omnibus allegation and omitted even particularisation about the weapons. PW 3, however, when examined in Court after about 14 months, gave vivid description about each and every minute detail. Let us pause here for a moment. If PW 3 had actually seen all that was deposed by him in the Court, then surely he would have narrated it to PW 1 also and PW 1 would have in turn disclosed it to PW 8. And if PW 3 had deposed in Court what he had not actually witnessed, then his version was the product of tutoring to which a child of tender age of 13 years was easily susceptible. Has he, infected with the desire of notoriety, introduced the succulence to his version? Either way, this circumstance delivered dent, almost beyond repair, on the account furnished by him. It is pertinent to refer to Ram Kumar Pandey Vs. State of Madhya Pradesh, observing as extracted below :-

"No doubt an FIR is a previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it. But, in this case, it had been made by the father of the murdered boy to whom all the important facts of the occurrence, so far as they were known upto 9.15 p.m. on 23-3-1970, were bound to have been communicated. If his daughters had seen the appellant inflicting a blow on Harbinder Singh, the father would certainly have mentioned it

in the FIR. We think that omissions of such important facts, affecting the probabilities of the case, are relevant u/s 11 of the Evidence Act in judging the veracity of the prosecution case."

-X- - X- - X-

The obvious illation is that the statement of PW 3, when scrutinised vis-a-vis Ex. P/I, seemed to be undependable and imposed a question mark on the veracity of the prosecution case in terms of Section 11 of the Evidence Act.

There was yet one more infirmity, glaring indeed, which rendered his testimony additionally unacceptable. Ex. P/I recited that the assault was directed by axe and shovel also. In sworn testimony, PW 3 spoke about the infliction of injuries by these weapons, both sharp-edged instruments. Ex. P/3 is the post mortem report, proved by PW 2 Dr. Yogesh Shankar, which noted in all four contused lacerated wounds, all by hard and blunt objects. In Hallu and Others Vs. State of Madhya Pradesh, it is succinctly held that -

"According to the High Court, axes and spears may have been used from the blunt side and therefore, the evidence of the eye-witnesses could safely be accepted. We should have thought that normally when the witness says that an axe or a spear is used there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used. If that be the implication it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-edged or a piercing instrument was used as a blunt weapon."

-X- - X- - X-

There was thus, apparent inconsistency between ocular and medical evidence. This then was the most fundamental defect in the prosecution case which remained totally unexplained. In Ram Narain Singh Vs. State of Punjab, it is observed that -

"Where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this is most fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case."

-X- - X- - X-

Anvaruddin and others Vs. Shakoor and others, shed enough light in the following words :

"The part played by Alam and Wasla is not corroborated for want of spear injuries, they should be given benefit of doubt."

-X- - X- - X-

The aforesaid infirmities cogently x-rayed the testimony of PW 3 and exposed its susceptible content. Apart from this, he was a child witness. In Krishna Sewak v. The State of Madhya Pradesh 1988 MPLJ 481 , the Divisional Bench of this Court

sounded the precautions which must be borne in mind in evaluating the evidence of a child-witness. In AIR 1936 60 (Privy Council) it was pointed out that -

"The real tests are how consistent the story is with itself, how-it-stands the test of cross-examination and how far it fits in with the rest of the evidence and circumstances of the case."

-X- - X- - X-

In Mohd, Sugal Esa v. King, AIR 1945 PC 3, it was observed that it was sound rule of prudence not to act on the uncorroborated evidence of a child witness, whether sworn or unsworn. In Abbas Alikhan v. Emperor, AIR 1933 Lahore 667, the following passage illumines the path :

"Children are a most untrustworthy class of witnesses, for when of tender age, as our common experience teaches us, they often mistake dreams for reality, repeat glibly as their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward, and by desire of notoriety."

-X- - X- - X-

And the Apex Court in Bharvad Bhikha Valu and Others Vs. The State of Gujarat, approved the line of reasoning adopted by the High Court in the following terms :-

"The High Court adopted the correct approach in finding that though there were no infirmities of Khangar's evidence as it stood but in view of the fact that he was a young boy it would be prudent to seek corroboration of Khangar's evidence."

-X- - X- - X-

We find that the evidence of PW 3 was not corroborated by medical evidence. It was bruised to a large extent even by Ex. P/I and PW 8. It thus, did not fit in with the rest of the evidence as also circumstances of the case. These infirmities galore apart, there was no reliable corroboration even from ocular version. The evidence of PW 5 Ram Kunwar Bai is being dealt with hereafter. PW 3 was a child witness. His testimony was devoid of naturality. Applying the aforesaid tests as enunciated by the aforesaid decisions and taking into account the above stated circumstances and infirmities, we hold that the evidence of PW 3, like that of PW 4 and PW 14, was incredulous and consequently rejectable.

We are thus left only with the statement of PW 5 Ram Kunwarbai. Her name was available in the FIR (Ex. P/I). It was, however, an inexplicable riddle as to how her name came to be incorporated therein when PW 2 did not speak about her presence on the spot and even PW 1 conspicuously kept mum on her presence. In the FIR (Ex. P/I), three persons, Pawan, Hari (both disbelieved by the trial Court) and Ram Kunwarbai were named as eye witnesses. PW 1, maker of FIR and PW 3, informant of the incident, both did not testify about the presence of

PW 5 on the spot. It thus, remained esoteric as to how she figured as a witness and who imprimis introduced her name. The learned Government Advocate, on being questioned, was unable to solve this conundrum. This mystery further deepened when we noticed that she was interrogated only on 5-10-1989 i.e. after about 7 days from the date of the alleged incident.

PW 11 Ravidutta Sharma, the investigator offered no explanation with regard to this delay. This circumstance convincingly casts a cloud on the entire warp and woof of the story. In Ganesh Bhavan Patel and Another Vs. State of Maharashtra, it is held that -

"Delay of a few hours, simpliciter, in recording the statements of eye-witnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced. Thus under the facts and circumstances of the case delay in recording the statements of the material witnesses, casts a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story."

"Normally in a case where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence over the evidence of other witnesses."

-X- - X- - X-

In Palanisamy v. State of Tamil Nadu, 1986(1) WN 178, it is observed that -

"It is really surprising that PWs 5 and 6 did not inform anyone at the scene of occurrence of this dastardly crime even when they knew who the assailants were. It is equally surprising that they did not make themselves available to the police or to any other important person in the locality till 6-7-1980."

-X- - X- - X-

Apart from delayed disclosure, we observed that her testimony did not inspire confidence. There was material inconsistency as regards the place of occurrence, particularisation of the weapon, and manner of assault. Moreover, the evidence was in direct conflict with medical evidence as well so far as two, appellants, allegedly armed with axe and shovel, were concerned. There was no guarantee with regard to the remaining appellant as well in such setting of the accusation.

In the face of these infirmities, we find it extremely hazardous to act upon the testimony of PW 5 Ram Kunwarbai as well who clearly seemed to be a got up witness. The entire evidence thus lacked contiguity to truth.

On perspicacious probe, we thus find that PWs 3 and 5 were thoroughly unreliable and undependable. The line of reasoning adopted by the Trial Court in placing reliance on this kind of evidence was ex facie inappropriate, invalid and

infirm.

The conclusion thus, was unsupportable. Yet we deem it proper to point out two more factors as emerging from the record. One, the finding about the presence of the appellants, despite discrediting all witnesses as regards attack by axe, was sought to be reinforced by certain suggestions made by the defence counsel in cross-examination (para 16 Paper Book Page 61). This approach is clearly contrary to law. In *Koli Trikam Jivraj and Anr. v. State of Gujarat* AIR 1969 Guj 69, it is held that -

"To put it shortly Mr. Nanavati in advancing this argument merely repeated the main ground on which the conviction of the appellants was based by the learned Sessions Judge viz., that the accused No. 1 and accused No. 2 admitted their presence at the scene of the offence and that they were beaten by Dharmshi and Talshi. If the lawyer of the accused puts a suggestion to a prosecution witness that a particular event happened, or happened in a particular manner, then it cannot be implied that the lawyer commits himself to such an assertion. Suggestions put in cross-examination are not evidence at all and on the basis of such suggestions no inference can be drawn against the accused that he admitted the facts referred to in the suggestions. It is possible that in putting suggestion the lawyer of the accused, if he thinks fit and proper, may not put the entire case of the accused in the cross-examination of a prosecution witness."

-X- - X- - X-

Relying on the aforesaid decision as also on a Division Bench decision reported in *Rangappa Goundan v. Emperor*, AIR 1936 Madras 426, a Single Bench judgment of this Court in *Sakariya v. State of M. P.* 1991 MPLJ 878 : 1990 JLJ 785, rendered by one of us sitting singly, observed as under :-

"In criminal cases a suggestion thrown to prosecution witness under cross-examination by defence counsel cannot be used as an implied admission so as to dispense with proof of the prosecution case. It is only the plea of guilty, pleaded by an accused which can relieve the prosecution of its burden of proof. The learned Judge of the Trial Court contrary to these settled principles of criminal jurisprudence has acted upon the suggestion made to the prosecutrix, about her being consenting party to the act."

-X- - X- - X-

The aforesaid approach, marred by all-clouding circumstances, has further vitiated the conclusion. The trial Court was thus clearly in grave error in drawing support or depending on suggestions. Two -In FIR, the time of incident is indicated as about 6.00 A.M. The date of incident was 29-9-1989. On this day, the Sun rose at 6.05 A.M. i.e. after 6.00 A.M. in any case. PW 3 Sher Singh deposed (para 3) that there was less light when he went for latrine. And the incident is prior in point of time (para 2 of PW 3). It thus, appeared that it must have been dark at that time obstructing prospects of vivid visibility and proper

identification. In requisition (Ex. P/22) for post mortem on 29-9-1989; there was column and statement as under -

"ko vkSj e`R;q laca/kh tkudkj tks vc rd iqfyl dks fey ikbZ gS flj esa ekjihV ls vkbZ pksVksa ds dkj.k ejuk ik;k tkrk gSA

The scribe of this requisition was PW 12 Bahadur Singh who claimed to have penned it after lodgment of the FIR (Ex. P/I). It is then not understood as to why Ex. P/22 -

- a) Omitted the names of the assailants i.e. the appellants..
- b) Omitted the description of weapons.
- c) Omitted the time of assault/death.

The aforesaid requisition was received by the doctor at 11.30 A.M. whereas the FIR (Ex. P/I) was said to be lodged at 7.30 A.M. which contained the aforesaid particulars. It emerged from this that Ex. P/I was ante-timed and nothing was actually known till the time of issuing this requisition. This precisely explained the delay in arrest of the appellants (Ex. P/6 - 30-9-1989 - para 2 of PW 11). It thus seemed probalised that the case was foisted on the appellants after due deliberation and the entire fabric of the story was meretricious. The investigator had only indulged in gesticulation in a grotesque fashion. The debility thus, stood exposed even by the aforesaid piece.

In the circumstances, we find that the prosecution story was redolent of doubt and was associated with infirmities, prodigious in number. The evidence with regard to seizure etc. was equally inutile and futile. Minors (below 16 years) and majors (over 60 years) i.e. young and old ones seem to have contrived a story prone to suffer sure flop on scrutiny.

It also seemed unnatural that all the three sons of Chander Singh would choose to commit crime of such an enormity on such a trivial reason as cutting of palmyrapalm tree and would feel disinclined to use sharp side of weapons like axe and shovel, though armed. The real story thus remained untold. Moreover, if this tree was decollated by the appellants, as recited in Ex. P/I, then in normal course it would be the deceased who would feel enraged and irked. This, then could furnish no cause for the appellants to behave that way. We searched in vain the logic but succeeded in removing the wimple.

In Vijayee Singh and others Vs. State of U.P., the phrase "burden of proof" has been explained as under :-

"The phrase "burden of proof is not defined in the Act. In respect of criminal cases, it is an accepted principle of criminal jurisprudence that the burden is always on the prosecution and never shifts. This flows from the cardinal principle that the accused is presumed to be innocent unless proved guilty by the prosecution and the accused is entitled to the benefit of every reasonable doubt."

-X- - X- - X-

In this case, the prosecution miserably failed to discharge this burden.

Burger C. J. of the American Supreme Court once observed -

"A sense of confidence in the Courts is essential to maintain the fabric of ordered liberty for a free people and it is for the subordinate judiciary by its action and the High Court by its appropriate control to ensure it."

We are, thus obligated to exercise appropriate control. In our view, the trial Court has not handled the evidence in correct legal perspective. We thus, interfere to prevent the miscarriage of justice and opt to vacate the verdict.

As noted above, we have thus, scrutinised scrupulously and enubilated cautiously and on our evaluation, we find that the story as set up in the FIR and unfolded in the Court is apocryphal. The conclusion is thus, subvertible.

Ex consequenti, we accept this appeal, set aside the conviction as also the sentences recorded by the Trial Court and acquit the appellants of the charge as levelled against them. The appellants are in custody. They are directed to be set at liberty forthwith in case they are not required in connection with any other case.

The appeal, thus stands allowed.