
(1959) 04 MP CK 0015

In the Madhya Pradesh High Court

Case No : Death Ref. No. 4 of 1959 and Criminal Appeal No. 37 of 1959

State of Madhya Pradesh

APPELLANT

Vs

Kalu Kachru Keer

RESPONDENT

Date of Decision : 14-04-1959

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 162
Evidence Act, 1872 — Section 145

Citation : AIR 1959 MP 391 : (1959) CriLJ 1340 : (1961) JLJ 110

Hon'ble Judges : V.R. Newaskar, J; Shiv Dayal Shrivastava, J

Bench : Division Bench

Advocate : P.R. Sharma, Government Advocate in Death Ref. No. 4 of 1959 and D.P. Bhargava, in Cri. A. No. 37 of 1959, for the Appellant; D.P. Bhargava in Death Ref. No. 4 of 1959 and P.R. Sharma, Government Advocate in Cri. A. No. 37 of 1959, for the Respondent

Judgement

V.R. Newaskar, J.—Accused Kalu son of Kachru Keer of Metwas was convicted by the Sessions Judge Ujjain u/s 302 of the I. P. C. and was sentenced to death. The accused has preferred appeal against his con-viction. The proceedings for confirmation of the sentence of death have also been placed before us for consideration. Both the appeal as well as the proceedings for confirmation of the death sentence are being considered together and disposed of by this judgment.

2. The facts of the case as alleged by the prosecution may be briefly stated as under:

The houses of the accused and deceased Ratan-singh were close to each other with an intervening lane belonging to Ratansingh. The accused Kalu lived in his house along with his two brothers and mother Gangabai. The brothers opened a window in their wall on the side of Ratansingh's lane. Ratansingh objected to this and later filed a suit for mandatory injunction for securing closure of the window. This suit succeeded and a decree for injunction as prayed for was granted on 10-10-1958.

3. Ratansingh during the pendency of the suit or even before had agreed to sell his house to Rajaram and had delivered possession of his house to him but no registered deed of sale had been executed and the legal title continued to rest with Ratansingh. After delivery of possession of his house to Rajaram, Ratansingh along with his wife Pyaribai went to reside with his sister Sajanbai who had her house just in front of these two houses. This house had a main door opening into the road which used to be lightened by electric light during the night.

Inside Sajanbai's house was an Osari and just behind the Osari was a room and just behind the room there is another room. The wall into which the main door of Sajanbai's house opened was not too high and could be scaled over. On the night intervening 11th and 12th of October 1958 Ratansingh returned from the Mills at Nagda where he was working as a labourer at 11 P. M. He then slept in the Osari. His wife had slept in the adjoining room and Sajanbai had slept at the door of the third apartment just in front of the main door.

4. Some time after the midnight the accused Kalu secured the entry into the house by scaling the wall of the main door as that door had been latched from inside. He carried with him a sword then. He went to the Osari where Ratansingh was sleeping and gave him blows with the weapon earned by him. While giving one of the blows the weapon struck the roof of the Osari causing noise. This awakened Sajanbai. She saw the accused standing near the bed of Ratansingh in the light of a lamp burning nearby. She cried out. The accused thereupon hurried out after opening the main door. Sajanbai got up and closely followed him.

She found her brother injured and bleeding. She came to the door and raised cries naming the accused Kalu as the assailant who had killed her brother Ratansingh. She also again identified the accused while he was escaping in the electric light from the electric poles on the road. Pyaribai also woke up and saw somebody running but as she was somewhat late in getting up she could not identify the absconder. Sajanbai's cries brought a neighbour Madhosingh on the spot. To him she told the name of Kalu as the assailant. Another person in the locality Motiram also woke up on hearing Sajanbai's cries. He also went to the spot and found Ratansingh lying injured on his cot.

5. The first information report was lodged at the Police station Nagda at 2-30 A. M. the same night by Madhosingh, who along with several other persons of the village including Laxmikant, Motiram, Dewa, Lalsingh had taken the injured Ratansingh to the police station on a cot. The police sent him to the hospital for treatment. He however died in the hospital on 12-10-1958 at 8 A. M. Head Constable Bhagwatsingh went to the spot. He commenced investigation into the matter. A stick was found on the roof of Sajanbai's house.

This it was believed must have been used for climbing up the roof. The accused was not to be seen anywhere in the village. He was arrested later on 18-10-58 on the information given by one Hiralal, the uncle of Kalu of Khalkhala, which

was at a distance of 40 miles from Metwas. The accused was said to have gone there and had asked Hiralal to bring money from home. After the arrest of Kalu, he was brought to Metwas. On the information given by him on 23-10-1958 a sword was recovered from the bushes near the house of his relation Nathu.

6. Although the sword was sent for examination to the Chemical Analyser Indore, it appears that it was not bloodstained as there is no report of the Chemical Analyser or Sexologist about it. The autopsy of the dead body of Ratansingh was performed by Dr. Chandra on 12-10-1958 at 2-30- P. M. He found that there were five incised wounds three upon the face and two upon the palm of the right hand. The incised wounds on the face were as below:

1. Incised wound running from the tip of nose to the left occipetal prominence cutting through the eye-brow and left frontal region. It was oblique, and the direction was upwards and then downwards, The wound was on the left side. Its dimensions were 9" x 3". It was bone deep, the frontal and parietal bones underneath were cut. The gap of the fracture was 1". The brain matter and meninges were found cut up to the depth of 1/4".

2. Incised wound running from the left angle of the mouth to the left mastoid bone cutting through the maxillary bone. The left ear in the middle and the mastoid bone were also cut. The maxillary, temporal, mastoid bones under the injury were fractured. The dimension of the wound was 8 1/2 x 2" x 1". The depth was more in the centre portion. 3. Incised wound running from the middle of the left cheek to the front of left ear. The dimensions were 4" x 1" x 1/2". The wound was horizontal.

7. The cause of death was said to be the head injuries resulting in Haemorrhage and shock. According to Dr. Chandra, the injuries on the head, were such as would in the ordinary course of nature cause death, and the blows which caused them must have been dealt with a great force.

8. On these facts the accused was prosecuted. The accused denied his complicity in the murder and suggested in his statement at the trial that he had left Metwas that evening for Khachrod by 7-30 P. M. train and had been there throughout on 11th night and left for Barnagar by the morning bus and from there left for Khalkhala reaching there at 5 P. M. He stayed there that night.

On the 13th he asked for his father's dues from Hiralal at 11 A. M. or so on the ground his brother was in need of them. Hiralal agreed to arrange for the amount or to induce his brother not to press for them just then. Hiralal then left for Nagda and brought Thanedar with him, who arrested him. He admitted that "the stick Article B recovered from the roof of Saijanbai's house belonged to his brother. He admitted to have met Lachhmansingh of Metwas in the evening preceding the incident on the outskirts of the village.

9. The principal evidence against the accused is that of the eye-witness Sajanbai. Besides her statement there is some circumstantial evidence.

10. One of the pieces of circumstantial evidence consists of the evidence of motive referable to the litigation between Ratansingh on the one hand and Kalu, his brothers and mother on the other, regarding the opening of a window in the lane intervening their houses, which had terminated in favour of Ratansingh on 10-10-1958. The incident in question closely followed this date. Second piece of circumstantial evidence consists of the recovery of a stick said to belong to the house of the accused from the roof of the back portion of Sajanbai's house where it was lying until it was recovered by the police.

The third piece of evidence is the recovery of sword at the instance of one Nathu to whom the accused had given two or three days subsequent to the commission of the crime. The absence of the accused from the Mills in Nagda where the accused was working as a Mill-labourer from 10th onward right up to the date of his arrest on 18th is also relied upon. Lastly the conduct of Sajanbai raising a cry naming the accused as the assailant, the appearance at the scene of occurrence of neighbours including Madhosingh, Laxmikant, Motiram and others on hearing her cries and the complaint made by her to them that it was the accused who had killed her brother, and the presence of a lamp of kerosene burning at or near the place where the deceased was asleep and the presence of electric light at the poles on the road are the additional circumstances to corroborate what Sajanbai stated.

11. I shall first discuss the eye-witness account given by Sajanbai and consider the criticism levelled by the learned counsel for the appellant as regards its authenticity,

12. Sajanbai states that her brother Ratansingh returned from the Nagda Mills at 11 P. M He took food and slept in the "Dhalia" (low roofed Verandah) on a cot kept there. The roof of this Dhalia was about 5 feet high. She was asleep at a distance of about 5 or 7 paces from the also of Ratansingh. His wife Pyaribai was sleeping in the room adjoining the verandah. The door leading to the public road in front of the house was at a distance of about 10 paces. This door was closed from inside. At night she heard a sound of something dashing against the corrugated sheets of the "Dhalia" where Ratansingh was sleeping. She was awakened by the sound.

At first she thought that the sound might have been caused by her she-buffalo. She however got up and started for proceeding towards the Dhalia. Just then she saw a human figure near Ratansingh's cot. She recognised that figure to be accused Kalu. He had then in his hand a sword. She at once cried out. The accused Kalu then at once darted for the outer-door. He opened it and ran along the road. She again confirmed him to be the accused when she saw him running past the electric lamp at a distance of about 10 paces from her house. She cried out saying that Kalu had cut her brother.

The first to arrive on hearing her cry was the neighbour Madhosingh. Others also followed including Muti Maharaj. Ratansingh was lying on the cot bleeding

severely from the injuries caused to his face, head and hand. She also stated about the litigation regarding the lane which had been decided in favour of Ratansingh. In her cross-examination she was questioned about the absence of reference to the alleged litigation in her statement to the police. She stated she was unable to say why it did not appear in the record of the statement suggesting thereby that she had stated to the police about it.

She was also asked why no mention was made in her police statement about her having seen the accused at the cot. She did not give proper answer to this question. She was also asked why did she not mention the presence of a Kerosene "Chimany" near Ratansingh's cot in her statement to the police. She was unable to say why did she not do so. She spoke of a sheath of a sword in the hand of the accused when he was inside the house. But when questioned why did she not mention this particular to the police, she was unable to give any reason. She was also unable to say why she had not stated to the police about her running after the accused. In answer to a question put by the Court she stated that she had identified the accused while he was inside the house as she had seen his face. She had also seen him at the door and identified him then too.

13. Considerable argument was addressed on the question whether the omission amounts to contradiction and whether the particular portions intended to be used as contradiction had been proved or not. It was contended on behalf of the accused that Sajanbai had failed to state in her police diary statement:

1. That there had been litigation about the lane between the accused and the deceased,
2. That she had seen the accused standing at the cot.
3. That there was a Kerosene lamp burning near the place where the deceased was sleeping,
4. that the accused carried in his hand a sheath of the sword when he was emerging from the house by opening the front door, and
5. that she had run after the accused.

14. She was questioned about them and she had failed to give any reason why these statements had not been then made. The provisions of Section 145 of the Evidence Act therefore are complied with and in view of these statements it has to be said that the witness had made considerable improvement over her case diary statement and brought in details to support the prosecution case. It ought therefore be unsafe to consider her testimony as reliable and to convict the accused on the basis of her solitary statement.

15. On the other hand it was contended by the learned Government Advocate that all the omissions are not contradictions and the mere fact that a particular matter did not appear in the statement of a witness to the police cannot mean that the witness is making a contradictory statement when he refers to that

matter in his statement at the Trial. Reference in this connection was made to the decision reported in AIR 1937 50 (Nagpur) and it was contended that the decision clearly held that an omission does not amount to contradiction.

16. It was next contended that even on assumption that an omission amounts to contradiction it has to be proved by examining the police officer who recorded that statement that the witness did not state to him what he later stated at the trial. This was not done in this case. A bare statement by the police officer Bhagwatsingh, that the copy produced at the trial about her statement in the police diary is a true one cannot be said to be sufficient.

17. In order to consider in the first place this question whether and under what circumstances omission in a police diary statement amounts to contradiction it will be proper to refer to the provision of Section 145 of the Evidence Act which requires the contradiction to be put to a witness before it is used to discredit his testimony. That section is as follows:

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him".

18. Another and material provision in this regard is Section 162 of the Cr. P. C. and particularly proviso in sub Section (1) of Section 162, Cr. P. C.

"Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination".

19. It will be clear from these provisions that the only use to which any part of the statement in the police diary can be put is to contradict the witness called for the prosecution with regard to what he states in court. If what is said in the police diary statement is either reconciled by the explanation offered by the witness or is reconcilable apart from the explanation there is no contradiction. And this brings in the question whether an omission of a detail in the police diary statement can be used for contradicting that detail which the witness supplied in court.

It is not possible to give a general and categorical answer to this question. Just as it is too much to say that all omissions are contradictions it is equally hazardous

to say that all omissions are not contradictions. It will depend on facts and circumstances of each case whether a particular omission ought to be taken as amounting to contradiction. Since before the contradictory statement is to be used as evidence against the prosecution and also to discredit the witness, the attention of the witness ought to be called to that particular part and his explanation sought, it follows that calling attention to the whole of that statement and showing that the contradictory portion does not exist is not enough.

Its non-existence may quite conceivably be consistent with its existence in the Court statement or not so in a given case. A statement may contain various details which may not have any bearing whatsoever upon the statement sought to be contradicted and may be irrelevant for the purpose. There would be no point in putting such statements to the witness who possibly will not be in a position to appreciate the difference when the whole statement is put to him and may even feel confounded. What is necessary to put in such cases to the witness is what he actually stated to the police with regard to the particular detail of the incident and what he stated in Court, And when these two statements are either not reconciled by the explanation offered by the witness or are irreconcilable then contradiction may be said to exist. Desai, J., in *Ram Bali and Others Vs. State*, aptly expresses thus:

"Omission is not contradiction unless what is actually said contradicts what is omitted to be said".

20. In other words the omission must refer to a detail which if it really existed could not have been missed by the witness as being an essential link in the chain of events. Decision in AIR 1937 50 (Nagpur) lays down that an omission on a vital point is contradiction and this would obviously be so. An illustration would make the point clear. Supposing a witness in his police diary statement says that he met the accused one hour subsequent to the incident and then they walked together to the station but says nothing about his having made the confession of his guilt to which he refers in his statement in Court while stating the facts of their meeting at the time and walking together. In this case although there is an omission, the improvement is on a vital point and unless the witness satisfactorily explains why he failed to make a mention of it in the police statement his improved version would amount to contradiction. Here what he said to the police clearly stands in contradiction to what he said in Court. To put it tersely what is unsaid in police statement itself speaks against what is said in court.

21. Section 162 Cr. P. C. further requires due proof of the contradictory statement in order that the contradiction may be available to the defence for discrediting the witness for the prosecution. In *Shivlal v. Emperor* AIR 1938 Nag 110, Grille J., following the decisions in *Nga U Khine v. Emperor* AIR 1935 Rang 98 & *Emperor v. Mahomad Adam Chohan* AIR 1937 Rom 60, held that although formal proof of prior contradictory statement in the police diary prior to the cross-

examination of the witness may not be necessary yet such a contradictory statement, when used in the cross-examination and denied by the witness, has to be proved and brought on record by the examination of the police officer who recorded it.

It was further held that such a statement may be allowed to be put to the witness in the cross-examination subject to its subsequent proof. When such a statement is denied by the witness and no formal proof is given of it, the same has to be disregarded. Where the contradictory statement in the police diary is something positive, that is where there is direct contradiction between what is said to the police and is said in court, the proof has to be confined to particular part of the contradictory statement of the witness in the police diary but where contradiction consists in omission the said omission can be proved either by bringing on record the whole of the statement confining its use to the actual absence of the statement made in Court or the police officer might be asked to refer to the police statement of the witness for refreshing his memory and asked whether such statement had been made.

If, in spite of the absence of such a statement in his record, the police officer is bold enough to say that the witness had made the statement but that he had not recorded it, since such omission could only be provable if it is on a vital point, the witness could further be cross-examined for his failure to take down a vital detail and after he is given opportunity to explain for his omission, may be condemned for his attempt to improve upon the record if the explanation be unsatisfactory.

22. Now bearing in mind these principles we may examine the statement of Sajanbai with regard to five portions of her statement set out above. While examining them it has to be borne in mind that the statement had not been taken by the Sub-Inspector of Police Jankilal who later joined in the investigation but by the Head Constable Bhagwatsingh. In the police statement there is no reference to litigation about the lane. But this could have occurred because the Head Constable might have confined his questions pertaining to the actual incident.

The omission can hardly be said to be an attempt at improvement on a vital point as the proof of the existence of the dispute about the window in the lane was capable of decisive proof from Court record. Moreover the existence of such a dispute and litigation pertaining to it was practically admitted although the accused in answer to question No. 26 stated that the litigation was between his brother and Ratan-singh. The last mentioned statement was obviously incorrect as the judgment in the case Ex. P/17 clearly disclosed that he too was a party.

23. As regards the second portion of omission in her police statement that she had seen the accused standing at the cot, it is no doubt an omission on a vital point and there is an attempt at improvement as there is no reference to her having seen any person standing at the cot then. Sajanbai was asked for her

failure to mention this and she gave no answer. The whole of the statement is brought on record to prove this omission in Bhagwatsingh Head Constable's statement. This omission on a material point exists and has to be taken into account while assessing the evidence of Sajanbai along with the rest of the evidence.

24. As regards the omission regarding reference to Kerosene lamp it cannot be said to be a material contradiction because the existence of a Kerosene lamp near the cot of Ratansingh was clearly referred to by Pyaribai in her statement to the police and was also implicit in the statement of Sajanbai when she stated in that statement that she saw her brother groaning in agony and profusely bleeding. Her having seen her brother in that condition was clearly corroborated by the cry she raised which brought the neighbours on the scene.

It is therefore difficult to call this omission a contradiction since it is neither an omission on a vital point nor does it appear that it was referred to at the trial with a view to bring about an improvement over Sajanbai's police statement. The reference to sheath in her statement at the trial and absence of such reference in the police statement also cannot be said to be an omission on a vital point. It is not a material detail as to the incident out a minor particular. Moreover she stated in her cross-examination that she had mentioned this fact to the police. No question is put to Head Constable Bhagwatsingh whether she had stated to him to that effect. The omission is therefore neither a contradiction nor is it proved through Head Constable Bhagwatsingh who recorded her police statement.

25. As regards the fast portion of the so-called omission namely that she ran after the accused to the door it is clear that this cannot be said to be an omission at all. In her statement to the police she definitely stated that she got up, on hearing a sound went out and found a man running whom she recognised as the accused in the light outside. It is clear from this description of her movements and of that of the accused that she must have rushed to the door and could not have got up at leisure.

26. It will thus appear that barring the omission regarding her having seen the accused at the cot there is no omission on a vital point. Whether, in view of the fact that she is the only eye-witness, she should be relied upon for her having identified the accused as the culprit with the aforesaid attempt at Improvement, will depend upon the existence or non-existence of other corroborative circumstances to connect the accused with the crime.

(His Lordship then considered the depositions of other witnesses and proceeded:)

27. On consideration all these pieces of evidence it appears that the statement of the only eyewitness Sajanbai that she had seen the accused running along the road between the houses of the accused and Sajanbai in the electric light is fully corroborated by her own conduct in raising cries mentioning the accused as the culprit, that of Pyaribai her sister-in-law and that of the neighbours, Madhosingh,

Ramsingh, Laxmikant and Motiram in coming upon the scene on hearing her cries and by her further conduct in complaining to them that it was the accused who had struck the deceased causing him injuries.

Therefore even if we assume that she has tried to improve upon her statement to the police by suggesting her having seen the accused at the cot, the aforesaid part of the version is reliable and corroborated. Besides this there are the admitted circumstances regarding recovery of the stick which could easily have been availed of by the accused from the ora of Sajanbai and also regarding the recovery of sword thrown by Nathu in the "Bagad" (bushes) at the instance of the accused. This sword according to the statement of his maternal cousin Mangu and his maternal uncle's wife Narbadi had been procured by the accused on the evening of the incident from her through Mangu on the pretext that it was needed for butchering a goat in the Mills, when he had stopped going to the Mills since the earlier day.

His disappearance from Metwas from the date of the incident his approach to Nathu 2 or 3 days later at midnight and delivery of sword to him, his going away to Khalkhala at a distance of 40 miles from Metwas, and his asking Hiralal to bring money from Metwas cannot be said to be consistent with his want of connection with the incident. His statement to his cousin Hiralal that he had come after a dispute with a Thakur with a Pharsa and Lathi is also not without significance. The explanation given by the accused at the trial that he had gone to demand his father's debt from Hiralal is falsified by the statement of his mother regarding the nature of the debt.

She stated that she had spent money in the obsequies of her father-in-law. Hiralal had agreed to contribute towards it and as he had failed to pay the same the accused had gone to recover it. Hiralal was not questioned about the father's debtor mother's debt. Moreover the conduct of Hiralal in going to Metwas thereafter would not be consistent with this theory. There was besides this clear evidence of motive. Only the earlier day Ratansingh had succeeded in the litigation pertaining to the lane. (28) On the whole therefore there was sufficient material to connect the accused with the incident.

29. The learned Sessions Judge was therefore right in holding him guilty to the offence.

30. Mr. Deviprasad Bhargava for the appellant contended that if Sajanbai had not seen the accused at the cot or at the door of her house but only while he was running away with back towards her, there could be an honest mistake due to the existence of ill-will over the lane and the window. Had there been no corroborating circumstances discussed above it might have become necessary to consider whether it was safe to convict the accused on her sole testimony. But we have here several circumstances pointing to nobody else than the accused.

31. The learned Sessions Judge was therefore right in holding the accused responsible for causing injuries, to deceased Ratansingh with a sharp-edged

weapon. These injuries were such as would in the ordinary course of nature cause death as is deposed to by Dr. Chandre. There would moreover be reason to hold that the accused intended to cause death from the circumstances regarding motive, nature of the weapon, the place of the body where injuries were caused of the nature described and stealthy manner in which the accused went to the place where the deceased was sleeping at the night time.

32. The conviction of the accused u/s 302 of the Indian Penal Code is therefore proper.

33. The conviction of the appellant for an offence u/s 452, I. P. C. is also correct.

34. This brings us to the question of sentence. The learned Sessions Judge sentenced him to death in respect of the offence u/s 302, I. P. C. and Rigorous Imprisonment for two years in respect of the offence u/s 452, I. P. G.

35. As regards the sentence of death the learned Sessions Judge feels that there is no extenuating circumstance to award lesser penalty provided by law for the offence. I should have agreed with him but for the fact that the accused is a young man just above his teens. The decision in the case regarding right of opening a window in the disputed lane seems to have weighed with his mind to a disproportionately heavy extent and unhinged it as appears from the evidence of P. W. Lachmansingh, who found him moving with a woollen garment on his person towards the riverside on the outskirts of the village in the evening preceding the incident.

The action of stealthily entering the house at midnight and dealing blows with a deadly weapon upon a sleeping man, though despicable, cruel and devoid of justification must have been, to my mind, the result more of thoughtlessness and morbid sense of frustration than of anything else. In these circumstances, I feel, that the interest of justice will be met by imposing the lesser penalty provided by law for the offence. Sentence of two years Rigorous Imprisonment for the offence u/s 452, I. P. C. needs no interference.

36. The appeal is, therefore, dismissed except as regards the sentence in respect of the offence u/s 302, I. P. C. The sentence of death imposed by the learned Sessions Judge for that offence is set aside and the appellant is sentenced to undergo life imprisonment instead.

Shiv Dayal, J.

37. I agree.