

(1994) 01 MP CK 0019

In the Madhya Pradesh High Court

Case No : Criminal Reference No. 4 of 1993

State of Madhya Pradesh

APPELLANT

Vs

Samaylal Vishwanath Chandra and Others

RESPONDENT

Date of Decision : 19-01-1994

Acts Referred:

Arms Act, 1959 — Section 25, 27

Criminal Procedure Code, 1973 (CrPC) — Section 354, 366

Evidence Act, 1872 — Section 114

Penal Code, 1860 (IPC) — Section 302, 392, 396, 398, 411

Citation : (1994) ILR (MP) 238 : (1995) 40 MPLJ 843 : (1995) MPLJ 843

Hon'ble Judges : P.N.S. Chouhan, J; D.K. Jain, J

Bench : Division Bench

Advocate : Dilip Naik, Deputy Advocate General, for the Appellant; S.C. Datt, for the Respondent

Judgement

P.N.S. Chouhan, J.

On 8-6-1991 Babulal (P.W.I) had gone to Kharsia to see off his son who was to go to Gujarat that day by train. His wife Sobhna Ben was in his house at village Singhara about 20.00 kms. from Police Station Malkharoda. Family servant Bisesar (P.W.7) was with her. In the night to keep company with Sobhna Ben Geetabai (P.W.2) a lase of 14 years and Kaundi alias Kaushalaya (not examined) had come and after playing for some time the game of Kaudi with Sobhna Ben all of them went to sleep in the same house. Sobhna Ben slept on her cot while the two girls slept on a platform in the same room. In the adjoining room was Bisesar. During night miscreants broke open the window of the room where Sobhna Ben was sleeping and committed her murder and made good their escape with six thousand rupees cash and silver and gold ornaments. The two girls informed Bisesar of the tragedy. In the morning neighbour Chhotelal (P.W.8) was sent to Kharsia to inform Babulal. Chhotelal reached Kharsia on motor cycle but did not think it wise to tell Babulal of the death of his wife. He, therefore, informed him only of the fact of burglary. Babulal on reaching his house found

Sobhna Ben dead on her cot with numerous stabbed wounds and the aforesaid cash and ornament missing. He then went to the police station and lodged first information report Ex. P. I at 9.30 a.m. on 9-6-1991. Crime was registered. The looted property was recovered from the possession of the seven accused persons who were tried on charge of committing armed dacoity with murder u/s 396 read with Section 398, Indian Penal Code and 25/27 Arms Act, in Sessions Trial No. 478/91 of Bilaspur Sessions Division. The learned Sessions Judge vide judgment dated 29-10-1993 convicted all the appellants u/s 396, Indian Penal Code and sentenced appellant Samaylal, Harishankar alias Matwar and Leelakant to death subject to confirmation u/s 366, Criminal Procedure Code and life imprisonment to the remaining four. Cri. Ref. 4 of 1993 is for confirmation of death sentence. The appeal filed by all the seven convicted persons is Cr. A. No. 1053/93. This judgment disposes of both these matters.

Samaylal and Harishankar alias Matwar are residents of village Singhara. Koundi alias Kaushalya is sister of Matwar who is called uncle by Geetabai. The prosecution case is that on the fateful night the three condemned men entered into the room where the deceased was sleeping after breaking upon the window. Leelakant pressed the head and hands of Sobhna Ben, legs were caught hold of by Harishankar when Samaylal is said to have stabbed her with the knife causing six incised wounds cutting the liver and the lungs and relieved the body of all the ornaments which she was wearing. They then took out the keys of the safe from underneath the pillow, ransacked the house and decamped with six thousand rupees cash and the following ornaments : a gold neckless with locket (Art.A), two pairs of gold bangles (Arts. B-1 to B-4), one golden bali (Art.C), one golden charphokla (Art.D), three silver buttons (Arts. T1, T2 and T3), nine silver coins (Arts. 0-1 to 0-9) a silver Bicchiya (Arts. P-1, P-2) a pair of golden tops (Arts. G-1, G-2), 18 golden Khunti (Arts. F-1-F-18), a pair of silver Pairpatti (Arts. P-1, P-2), a gold gathi (Art.J), a golden chain (Art.K), a pair of gold ear tops (Arts. H-1, H-2), a small piece of gold (Art.L), silver guchha (Art.E), a pair of silver pial (Arts. S-1, S-2), a pair of gold tops (Arts. L-1, L-2), a golden nose ring and four golden puli diamond tipped (Arts. M-1 and M-18 to M-21), one pair of silver Tora (Arts.U-1, U-2), six golden Kangan (Arts.W-1, to W-6), 8 silver bangles (Arts. X-1 to X-8), seven pieces of silver Nagmori (Arts. V-1 to V-7), one pair of silver Sati (Arts. Y-1, Y2). Next day when the matter was reported to the police crime was registered and the Investigating Officer Shri H. P. Singh (P.W.I2) reached Singhara. He inspected the spot and seized pieces of glass bangles, blood-stained towel, Dibba vide Ex. P.10. He also seized three bent iron rods and the wooden parts of the broken window and the broken boxes and safe vide Ex.P.11. Two saris and small screw driver were seized vide Ex.P-12. All these seizures were made from the room where the incident took place. He then held inquest vide Ex.P-9 and sent the dead body for post mortem examination. The homicidal death of Sobhna Ben is not disputed and, therefore, details of the medical evidence in this behalf need not be mentioned. The same day he recorded the statements of Babulal, Geeta, Kaundi, Rakesh Kumar, Bisesar Singh, Chhotelal

Chandrakar (P.W.8) and some other witnesses. On 10-6-1991, Samaylal was arrested from his house and Matwar was arrested from a Khandhar outside the village. They were interrogated in presence of Lalaram (P.W.6) and Peela Dau (not examined). Confessional memorandum of Samaylal, Ex.P. 13, was recorded which led to the recovery and seizure vide Ex.P.34 from his house of the following articles :

1. a gold neckless with locket (Art.A); 2. a gold bangle (Art. B-1); 3. one gold bali (Art. C); 4. one golden charphokla (Art.D); 5. three silver buttons (Arts. T1, T2 and T3); 6. nine silver coins (Arts. O-1 to O-9); 7. one Silver Diya (Arts. P-1, 2) 8. Rs. 1500/-; and 9. a knife with button.

Confessional memorandum of Matwar (Ex.P.14) led to the recovery and seizure vide Ex.P.15 of the following articles :

1. a gold bangle (Art. B-3); 2. Two gold tops (Arts. G-1, G-2) 3. Three gold Khunti (Arts. F-5 F-6); 4. a pair of silver Pairpatti (Arts. T-1, 2); 5. Rs. 1000/- cash; and 6. an iron Chhuri.

The same day blood-stained clothes from Samaylal were also recovered vide Ex.P-35 and from Matwar vide Ex. P.-16. From these two accused persons information on complicity of others was obtained by the Investigating Officer. Appellant Leelakant, Chandradeo, Bhikham and Ramkumar were arrested from their houses. Their confessional memorandums being Exs. P.-18, P-20, P-22 and P-24 respectively were recorded in presence of the witnesses which led to the recovery and seizure vide Exs. P-17, P-19, P-21 and P-25 of the articles detailed below :

From Leelakant :

a gold bangle (Art. B-4); 2. a gold Gathiya (Art. J); 3. a gold chain (Art. K); 4. 2 gold Khunti (Arts. F-13, F-14); 5. Rs. 500 + 100 + 100; and 6. a countrymade Katia

From Chandradeo :

a pair of gold ear tops (Arts. H-.I, 2); 2. a small gold piece (Art.L); 3. 6 gold Khunti (Arts. P-7 to 12); 4. Rs. 885/- cash; and 5. country made revolver.

From Bhikham :

a gold a bangle (Art. B-2); 2. a silver guchha (Art. E); 3. 4 gold Khunti (Arts. F-1 to F-4); 4. a pair of silver payal (Arts. S-1, 2); 5. Rs. 1000/- cash; and 6. a katar.

From Ramkumar:

a pair of gold tops (Arts. L-1, 2); 2. 3 gold Khunti (Arts. 15 to 17); and 3. Rs. 40 + 50 + 10 cash.

From the possession of Leelakant blood stained clothes were also seized vide Ex. P.-19. The knife seized from Samaylal was sent to the autopsy surgeon, Dr. N. P.

Mishra, who opined vide Ex.P-28 that the injuries found on Sobhna Ben could have been caused by that knife. The blood-stained clothes seized from the suspects were also examined by the said doctor who vide his report Ex. P.-29 encircled the suspected blood marks and advised for chemical examination. On 11-6-1991 Executive Magistrate Shri R. R. Kujur (P.W.13) conducted test identification of appellant Leelakant who was correctly identified by Geeta and Kaundi vide memorandum Ex. P.-3. On 11-6-1991 Sub-Inspector, P. K. Gajbhiye (P.W. 14) arrested appellant Kamalprakash at Raigarh and recorded his confessional memorandum Ex. P.4 in presence of Nanhelal (P.W.3) and Bhakulal (not examined). On the basis of the said memorandum the following articles were recovered from the place of hiding and seized vide Ex. P.51.

1. a gold nose-ring diamond tipped, 4 gold phuli (Arts. M- F-18 to 21); 2. a pair of silver Toda (Arts. U-1, 2); 3. 6 silver Kangan (Arts. W-1-6); 4. 8 silver bangles (Arts. X-1 to 8); 5. 7 silver Nagmori (Arts. V-1 to 7); and 6. a pair of silver sati (Arts. Y-1s, 2).

On 20-6-1991 the aforesaid Executive Magistrate P.W.13 on receipt of sealed ornaments conducted their test identification and Babulal correctly identified them vide memorandum Ex.P-2. Vide Chemical Examiner's report Ex.P-38 and Serologist's report Ex.P.-39, bangles, sari, petticoat, towel recovered from the room all belonging to the deceased and shirt seized from Matwar and looser seized from Leelakant were found to be stained with human blood. The looser was found to be stained with O group of blood. The defence is one of bald denial.

The learned Trial Judge held the eye witness account of Geetabai reliable and accepting the evidence of recovery of looted booty from the possession of present appellants concluded that though the murder of Sobhna Ben was committed by the three condemned men all the seven were involved in the crime and convicted and sentenced them as aforesaid.

The appellants have not claimed the valuables seized from their possession. The fact of such seizure at their instance has not been challenged. What is challenged with understandable vehemence is the credibility of Geetabai whose evidence forms the basis for awarding death sentence to the three miscreants.

Geetabai has admitted that though she identified the three killers she and her companion did not disclose their names to Bisesar immediately after departure of the miscreants. She has admitted that she and Kaushilyabai stayed with Bisesar till dawn and then went together to the mother of Kaushilyabai and told her. Geetabai has further stated that thence she came to her own house and told her mother. She has not elaborated as to what she told to these two ladies. From the context if it may be inferred, as has been done by the learned trial Judge, that they told the said ladies what they had seen in the house of the deceased. Admittedly thereafter they kept silent about the incident till their statements were recorded by the Investigation Officer, Shri Singh, and, in the meantime, the first information report (Ex.P- 1) was recorded, inquest held (Ex.P.-9) and

requisition written for post mortem examination (Ex.P.-27A). That is why none of these documents contains the names of the assailants. On this basis of delayed disclosure the evidence of Geetabai is assailed as unreliable. Reliance in this behalf has been placed on Panda Nana Kare Vs. State of Maharashtra, Babuli v. State of Orissa, AIR 1974 SC 775, Awadhesh and Anr Vs. State of Madhya Pradesh, , Peddireddy Subbareddi and others Vs. State of Andhra Pradesh, and Ram Pukar Thakur and Others Vs. The State of Bihar,

Human mind, its reactions and reflexes are so intricate and infinitely complex that in the realm of administration of justice which endeavours to contain the criminal/disruptive tendencies to create situation for civilized living and orderly growth it is impracticable to lay inflexible norms of natural behaviour in the matter of appreciation of evidence. Each case presents its own panorama of facts, facets and circumstances with reference whereto the credibility of a witness must be judged. We should be willing to admit the limitations of our reach and understanding in this behalf. Therefore, instead of trying to resort to the soft option of judging the veracity or otherwise of a witness on the basis of decided cases we should as honest seekers of truth pour our limited intellectual capacity and the light of our conscience to pronounce, in the facts and circumstances of a particular case, whether a witness is truthful. Geetabai was an adolescent aged 14 years at the time of the incident. It is well known that adolescent behaviour is distinct from adult behaviour primarily on account of lack of maturity which years of experience breed. Therefore, on the basis of the aforesaid cases which all relate to the delayed disclosure of a crime by grown up adults of matured understanding, it is not prudent to discard the testimony of Geetabai on the said ground. Besides the age factor of the witness, this case has peculiar facets not to be found in any of the above cited authorities. Then, it cannot be said that Geetabai kept silent about the crime for a considerable time. From her evidence it is clear that she along with her companion gave information about the crime to mother of Kaushilyabai and then to her own mother. She was not related with the deceased but called appellant Matwar uncle. She was in the company of Kaushilyabai, sister of Matwar. In these circumstances her failure to inform Bisesar of the names of the assailants during the night cannot be treated as a circumstance which will render her testimony unworthy of reliance. The trial Judge has rightly observed that a girl of her age and background was not expected to do anything better. Kaushilyabai and her mother have not been examined and that is understandable as they were not expected to support the prosecution case inter alia against Matwar. From the evidence of Babulal and Investigating Officer, Shri Singh, it is clear that when they interrogated Geetabai she disclosed the names of the assailants. It was argued that Babulal is not to be believed when he says that he proceeded to the police station without making inquiry from Geetabai and Kaushilyabai. We are unable to agree. Babulal must have been in great shock after seeing his wife dead and, therefore, he immediately went to the police station without making inquiry from the said girls and mentioned in his first information report that the said girls may be able to

give information touching the crime. His version is not liable to be rejected as unnatural. We have perused his evidence and hold him to be wholly truthful witness. Similarly, the criticism that Investigating Officer, Shri Singh was on the spot at 10.00 a.m. and, must have first interrogated the said girls and, therefore, omission of assailants' name in Ex.P-9 and Ex.P-27A indicates that Geetabai is a got up witness, appears to be unfounded. Evidence of Shri Singh shows that he recorded statements of witnesses including Geetabai after inspection of spot, seizure of articles from there, holding of inquest and sending of the dead body for post mortem examination. Sequence of investigation proceedings depends on the discretion of the officer conducting the same. In absence of mala fides the propriety of such sequence cannot be questioned and, therefore, we are of view that non-mention of assailants' name in Ex.P-9 and Ex.P-27A does not in any way render the testimony of Geetabai infirm.

It was then argued that there is no evidence of presence of light in the room where the murder was committed. Therefore, Geetabai's claim of having identified the assailants is subject to doubt. We accept the submission that Babulal's evidence that Geetabai told her of burning electric bulbs in the room in absence of Geetabai's evidence to that effect is not usable being hearsay. Geetabai was sleeping in the very room where the murder was committed. Like light darkness too has shade and quasi darkness affords sufficient visibility. The incident took place in summer night and the window was broken open by the miscreants. Geetabai has given a detailed account of the incident. She had ample opportunity to see the murderers from close proximity. The miscreants had tied her with a sari and in that process must have come very close to her. She was subjected to a grilling cross-examination. Had she not been a truthful witness a girl of her age could have easily been exposed as a got-up witness. She stood the test of cross-examination well. It appears that no question on the aspect of visibility inside the room was put to her. We, therefore, conclude that there was visibility in the room and the evidence of Geetabai, otherwise found to be wholly reliable is not liable to be discarded for her failure to mention the source of light which enabled her to identify the assailants.

The argument then centred round Leelakant described by Geetabai as Pipriparwala as he comes from Pipripar village. The submission is that Geetabai did not know this appellant by name. The police reached him through some agency other than Geetabai as is evident from the fact that a test identification parade was arranged to enable Geetabai to identify him. In this background, since Geetabai has admitted in answer to question No. 65 that she had seen Pipriparwala the following day of the incident in the company of the police in front of her own house the subsequent test identification before the Magistrate in view of Laxmipat Choraria and Others Vs. State of Maharashtra, was merely a farce. In absence of a proper test identification it was hazardous to place implicit reliance on the evidence of Geetabai so far as participation of Leelakant in the murder is concerned. We hold that in view of Geetabai's above admission that Leelakant was shown to her by the police before the test identification the

proceeding of test identification parade and its outcome must be held to carry no evidentiary value. She has admitted that Leelakant studies in boys' school in her village and never came to her own school meant for girls. She has also stated that she never visited the boys' school or Pipripar Village. She does not know any other man from that village. In such circumstances, it is not very clear as to how she came to know Leelakant. Therefore, the best way to test her assertion in this behalf was the safeguard of test identification and since the same though held is of no evidentiary value considering the compulsions of due process of law Leelakant's claim for benefit of doubt deserves to be accepted.

Lastly, we come to the nature of the offence made out. It was argued that Geetabai's evidence proves commission of Sobhna Ben's murder by three men. Offence u/s 3%, Indian Penal Code presupposes commission of dacoity requiring participation of five or more in the crime. The learned trial Judge was patently in error to hold all the seven appellants responsible for the commission of dacoity merely on the basis of recovery of part of the looted booty from their possession. On behalf of the Lachhman Ram and Others Vs. State of Orissa, and Shivsahai Singh v. State of M. P. 1985 (1) CriLJ 730 were cited to support the approach of the learned trial Judge for holding even those who were not present inside the room during the commission of murder liable for it merely on the basis of recovery of some of the stolen property from their possession. On behalf of the appellants reliance was placed on Nagappa Dondiba Kalal Vs. State of Karnataka, , Earabhadrapa v. State of Karnataka : AIR 1983 SC 446, Sanwat Khan and Another Vs. State of Rajasthan, and Mohan Lal and Another Vs. Ajit Singh and Another, in support of the proposition that in such circumstances the only inference with aid of Section 114 of the Evidence Act which can be drawn is that the person is a receiver of stolen property and not that he has committed the robbery or murder as the case may be. We need not discuss these authorities for and against in detail because all of them relate to cases where there was no direct evidence available on the commission of crime. In the present case, we have the eyewitness account of Geetabai and, therefore, since the murder was committed only by three men others from whom looted property of this crime was recovered cannot be held liable for the murder by resort to Section 114 of the Evidence Act. Charges framed against the appellants include the charge of commission of murder of Sobhna Ben, and, therefore, the argument is futile that those found guilty of such murder are not liable to be convicted for want of proper charge. We have carefully scanned the evidence of Geetabai and hold her to be wholly reliable witness. Had she been a got up witness she would have given out the name of Leelakant as well in her statement before the police and then during trial. From her evidence the commission of murder of Sobhna Ben stands proved beyond reasonable doubt. Samaylal and Matwar are proved to be two of the three perpetrators of this crime. As observed earlier, Leelakant is entitled to acquittal on the charge of murder as he is entitled to benefit of doubt in this behalf. Thus, offence proved against Samaylal and Matwar is not dacoity with murder punishable u/s 396, Indian Penal Code but robbery and murder

punishable under Sections 392 and 302, Indian Penal Code as there is no specific section like 396 for punishment of robbery with murder. As far the remaining five appellants are concerned from whose possession looted property was recovered within a very short time the offence that is made out with the aid of Illustration (a) of Section 114 of the Evidence Act will fall u/s 411, Indian Penal Code.

The learned trial Judge has discussed Bachan Singh Vs. State of Punjab, and Machhi Singh and Others Vs. State of Punjab, besides some other cases on the aspect of sentencing and concluded that the extreme penalty of death sentence was warranted in the facts and circumstances of the case. In Bachan Singh's case, it has been held :

"From a reading of Section 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because "style is the man". In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist, (para 199)

There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. It cannot be overemphasized that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be blood-thirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, in the instant case, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated, will discharge the onerous function with evermore scrupulous care and human concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be

done save in the rarest of rare cases when the alternative option is unquestionably foreclosed." (Para 207).

We do not find in this case any "special reasons" which could justify awarding of death sentence to those found guilty of the aforesaid murder. It appears to be an ordinary case of murder to facilitate robbery and, therefore, we find ourselves unable to accept the reference in this behalf.

In result, Cr.Ref. No. 4/93 is hereby rejected. Criminal Appeal No. 1053/93 is partially allowed thus :

Conviction of appellants Samaylal and Harishankar alias Matwar u/s 396, Indian Penal Code is hereby set aside. Instead, both of them are convicted u/s 392 and 302, Indian Penal Code and sentenced to ten years" rigorous imprisonment on the first charge and life imprisonment on the later charge of murder. We direct both the sentences to run concurrently. Conviction of appellants 3 to 7 u/s 396 and sentence of life imprisonment are hereby set aside. Instead, all of them are convicted u/s 411, Indian Penal Code and sentenced to three years" rigorous imprisonment and a fine of Rs. 15,000/- (Rupees fifteen thousand) each. In default of payment of fine they are ordered to suffer rigorous imprisonment for nine months, the maximum permissible u/s 65, Indian Penal Code.