

(2009) 06 CHH CK 0034
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 201 of 1988

State of M.P. (Now State of Chhattisgarh)	APPELLANT
Vs	
Setaaram	RESPONDENT

Date of Decision : 22-06-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 116, 313, 378(1)
Evidence Act, 1872 — Section 106, 118
Penal Code, 1860 (IPC) — Section 302

Citation : (2009) CriminalCC 653

Hon'ble Judges : Rajeshwar Lal Jhanwar, J; Dilip Raosaheb Deshmukh, J

Bench : Full Bench

Advocate : Bhaskar Payasi, for the Appellant; Parag Kotecha, for the Respondent

Judgement

Dilip Raosaheb Deshmukh, J.—This State Appeal u/s 378(1) of the Criminal Procedure Code is directed against the judgment dated 14th July 1987 delivered in Sessions Case No.33 of 1987 by the Sessions Judge, Raigarh whereby the respondent was acquitted of the charge u/s 302 of the IPC

2. Shri Parag Kotecha, learned counsel for the respondent did not dispute that Usha Bai, the deceased who was the mother of the respondent and used to live with him in village Manikpur, Police Station Sariya, Tahsil Sarangarh, District Raigarh had died a homicidal death. The slain body of Usha Bai without her head was lying in the Purchi of the house of the respondent, as mentioned in spot map Ex.P12. Ganeshram PW1 is the brother of the respondent who had separated in residence from the respondent and the deceased. On 25.12.1986 Dr. J.N. Shukla had conducted the autopsy and found that the head matched perfectly on the body of Usha Bai.

3. Briefly stated the prosecution story is that the respondent was not in good terms with his mother Usha Bai. On 20.10.1986 the respondent had abused and assaulted her. On 25.10.1986 Usha Bai had lodged a report Ex.P13 that the respondent was quarrelling and threatening her from entering the house. On

31.10.1986 Usha Bai had lodged another report Ex.P14 that the respondent frequently used to quarrel and would turn her out of the house and was capable of committing any serious offence with her. On such report, proceedings u/s 107 and 116 of the Code of Criminal Procedure were initiated against the respondent vide Ex.PI6. On 22.12.1986 Sumitra PW3, daughter of the respondent saw Usha Bai, her grandmother go to the room of the respondent at night. Thereafter, Usha Bai did not return to her room. On 23.12.1986 she saw the respondent carrying the head of the deceased in a plastic bag. The respondent confessed to her that he had killed his mother Usha Bai. On the same day Court Moharrir Constable Bhagirathi PW7 also saw the respondent entering and exiting the Court room time and again while carrying a bag in his hand. Noticing that the respondent was carrying the blood soaked head he informed Constable Prakashnath Tiwari PWS who took the respondent to police station Sariya. Sub-Inspector Krishna Kumar Singh PW14 on receiving information registered merge intimation Ex. P17, took the plastic bag containing the head of the deceased and one knife from the respondent into his possession and thereafter went to village Chhote Manikpur and saw the stained body of the deceased lying in the house of the respondent. The head of the deceased was missing. Seizure of the head carried by the respondent in the bag was not effected. On 24.12.1986 Sub-Inspector Krishna Kumar Singh PW14 conducted Inquest Ex.P3. A Dhoti and banian having blood like stains were seized from the respondent on 24.12.1986 vide Ex.P4. Blood-stained soil, plain soil, blood-stained ash, plain ash and one brass bucket and white khol having blood like stains was seized from the place of. occurrence i.e. the house of the respondent vide Ex.P5. Offence u/s 302 of the IPC was registered vide FIR. Ex.P18A on 24.12.1986. Spot map was prepared by Giridhari Lal, Patwari PW12 vide Ex.P12. Dead body of Usha Bai, her head, plastic bag and Chhuri were sent for postmortem examination on 24.12.1986. Dr. J.N. Shukla, PW9 conducted the autopsy on 25.12.1986 at 8.00 A.M. and found that the head matched with the body of the deceased. He found the following injuries:

- (i) Through and through cut incised wound with margins over neck bones (cervical) between 3rd and 4th and all the vessels & muscles and soft particles had been cut/through & through.
- (ii) Margins of injury over body and head were clear cut and incised. Margins of wound and soft tissues of neck and head were corresponding with extravasations of blood.
- (iii) Two incised wounds were present over right side back (scapular region) measuring 3 cm x 0.5 cm each with gaping in between parallel to each other vertical oblique.
- (iv) There was cut between cervical 3rd & 4th vertebra with injury over 4th cervical vertebral body. Brain and membrane were pale.
- (v) Larynx was cut through & through.

(vi) Injuries were ante-mortem in nature.

In his opinion, death was due to syncope due to incised wound cutting the neck through and through and was homicidal, caused by hard and sharp object. Duration of death was 2 to 5 days prior to the time of autopsy. On examining the Chhuri he opined vide Ex.P7A that the Chhuri could cause the chopping of neck and the injuries found on Usha Bai. He returned the plastic bag, Chhuri and the clothes of the deceased to Constable Jovakin Lakda PW11 which were seized from him vide Ex.PH.

4. Excepting plain soil and plain ash recovered from the place of occurrence, presence of blood was confirmed on all other articles by the State Forensic Science Laboratory, Sagar, vide report Ex.P19. After completion of investigation, the respondent was prosecuted and charged under Section. 302 IPC. The respondent abjured the guilt and pleaded that he had inimical relations with his brother Ganeshram. Sumitra had informed him in the field that Usha Bai was lying dead in the Purchi. He came to the house and found that head of Usha Bai was missing from the dead body. He informed Chowkidar who went to lodge a report. He did not lodge any report.

5. The prosecution examined as many as 14 witnesses. No witness was examined by the defence. On appreciation of evidence, the trial Judge recorded a finding in paragraph 7 that Usha Bai had died a homicidal death. In paragraph 8, it also recorded a finding that death of Usha Bai was caused inside, the house of the respondent. In paragraph 9 placing reliance on map Ex.P12, it held that the dead body of Usha Bai was found in the house of the respondent Setaaram. In paragraph 9, it took into consideration the testimony of Sumitra PW3 that extra-judicial confession was made by the respondent in the presence of the Station House Officer. In paragraph 11 and 13 it took in to consideration the reports Ex.P13 and Ex. PH lodged by the deceased against the respondent. The acquittal of the respondent by the learned trial Judge is founded on the following:

(a) That the testimony of Sumitra PW3 regarding the extra-judicial confession made by the respondent is not trustworthy,

(b) That there is no material to show that the head of the deceased was being carried by the respondent in a plastic bag or that it was seized from the respondent,

(c) The place where the dead body of Usha Bai was found was an open place and the murder of Usha Bai could have been caused by any other person, and

(d) The weapon of offence i.e. Chhuri was not seized from the respondent.

6. Shri. Bhaskar Payashi, learned counsel for the appellant/State argued that the learned trial Judge did not take into consideration the wholly un-rebutted testimony of Sumitra PW3 that the respondent was carrying the head of the deceased in a bag. It also did not minutely examine the map Ex.PI 2 which revealed that the place where the dead body was found is not an open place. To

substantiate this, reference was made to Dehati Nalishi Ex.P 18 showing that after getting the door opened by Ganeshram; the police had entered the room where the dead body of Usha Bai was lying. The circumstances established by the prosecution proved that the respondent alone, who also had a strong motive to eliminate Usha Bai and none-else had committed the murder. There was no explanation offered by the respondent for the blood-stains found on the Dhoti and banian seized by the police from him vide Ex.P4. The explanation offered by the respondent in his examination u/s 313, Cr. P.C. that on seeing the beheaded body of Usha Bai he did not lodge any report revealed the guilty mind and conduct of the respondent. So far as the fact that Sub-Inspector Krishna Kumar Singh did not seize the head of the deceased from the respondent, it was argued that this defect in investigation could not be fatal to the prosecution. The circumstances proved by the prosecution undoubtedly pointed towards the guilt of the respondent. It was also urged that the learned trial Judge erred in not placing reliance on the testimony of Sumitra, a child witness. It was also argued that the learned trial Judge ought to have drawn an inference against the respondent u/s 106 of the Indian Evidence Act for not offering any explanation " for the facts which were especially within his knowledge. Reliance was placed on State of Rajasthan v. Kashi Ram 2007 (1) ACJ 454 (S.C.) : 2007 (1) CCC 304 (S.C.) : AIR 2006 SCW 5768 and Trimukh Maroti Kirkan v. State of Maharashtra 2006 (3) ACJ 698 (S.C.) : 2006 (4) CCC 1040 (S.C.) : AIR 2006 SCW 5300.

7. On the other hand Shri Parag Kotecha, learned counsel for the respondent while supporting the impugned judgment argued that the finding of acquittal recorded by the trial Judge strengthened the presumption of innocence of the respondent and was not to be lightly interfered with by the appellate Court unless it was shown to be manifestly erroneous, contrary to evidence or record or perverse. Reliance was placed on Ramswaroop & Ors. v. State of Rajasthan 2004 (2) ACJ 76 (S.C.) : 2004 (3) CCC 359 (S.C.) : AIR 2004 SC 2943 . Learned counsel argued that the prosecution had failed to produce any material to show that the respondent was present inside the house at the time of the death of Usha Bai. It was also argued that there was no evidence to show that the respondent had carried the head of the deceased in a plastic bag to the Court or the police station or that it was seized from his possession. The weapon of offence was also not seized from the respondent. The possibility that any other person who had access to the open Puchi could have caused the death of Usha Bai could not be ruled out. The learned trial Judge was right in not relying on the inconsistent version of Sumitra PW3, a child witness. Reliance was placed on Bhagwan Singh and Others Vs. State of M.P., Bhim Singh Vs. State of Haryana, Orsu Venkat Rao Vs. State of Andhra Pradesh, Mangal Singh v. State of M.P., (Now C.G.) 2009 (2) CCC 056 (Chh) : 2009 (1) C.G. LJ 303 and Ram Gopal Vs. State of M.P., . It was further argued that the learned trial Judge rightly refused to rely upon the testimony of Sumitra PW3 relating to the extrajudicial confession made by the respondent. Reliance was placed on Shambhu Singh, Vs. State of Uttar Pradesh, and Kishore Chand Vs. State of Himachal Pradesh,

8. Having heard the rival contentions, we have perused the record. In *State of Goa v. Sanjay Thakran & Anr. and Subhash Chandra Nanda v. Sanjay Thakran & Anr.* AIR 2007 SCW 2226 the principles of appreciation of circumstantial evidence were reiterated in paragraph 13 as under:

13. The prosecution case is based on the circumstantial evidence and it is a well-settled proposition of law that when the case rests upon circumstantial evidence such evidence must satisfy the following tests:

(1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulative, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should, not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

Bearing the above principles in mind, we shall now consider the evidence led by the prosecution in the present case. The finding recorded by the learned Sessions Judge that the beheaded body of Usha Bai was lying in an open place is based on misreading of evidence. In his examination u/s 313 of the Cr. P.C. the respondent did not explain that the Puchi where the dead body was lying is open. Sub-Inspector Krishna Kumar Singh PW14 has proved Dehati Nalishi Ex.PI8 which finds a clear mention that on reaching the house of respondent and on opening the door the beheaded body of Usha Bai was found lying on the floor inside the room.. In his cross-examination paragraphs 17 & 18, he has stated as under:

No suggestion was put to the Investigating Officer that the dead body was lying in an open place. Patwari Giridhari Lal PW12 has proved the spot map Ex.PI2 which shows that the Puchi is not an open Puchi but there is a door for entrance to the Puchi, No suggestion was given by the defence to Khemanidhi PW4, a witness of Panchnama Ex.P3 in which it has been clearly mentioned that the beheaded body of Usha Bai was found inside the house of the respondent. There is thus overwhelming evidence on record which proves that the beheaded body of Usha Bai was found inside the house of the respondent.

9. Head Constable Domar Prasad Chandra has proved a report Ex.P13 lodged by the deceased on 25.10.1986 against the respondent. The report shows that the respondent used to threaten to kill her and would not allow her to enter the house. It also shows that the respondent would not even obey the decision taken in the Panchayat and used to quarrel with his mother. He has also proved the report Ex.P14 lodged by Usha Bai at Police Station Saria against the respondent

which shows that the respondent would not allowed her to stay in the house and would beat her. Report Ex.PI 5 was lodged by Head Constable Domar Prasad Chandra PW13 during village patrol which reveals that on enquiry from Usha Bai it was learnt that she was living with the respondent who was her youngest son and the respondent did not want that she should live with him and would therefore always quarrel with her and throw her out of the house. It further mentions the two incidents reported vide Ex.PI3 and P14 and also mentions the possibility that the respondent was capable of committing a serious crime with his old mother. Therefore, preventive action u/s 107 and 116 of the Cr.P.C. was initiated against the respondent vide Isthagasha Ex.PI 6 u/s 107 and 116 of the Cr.P.C. Copy of the order sheet dated 30.12.1986 drawn by the Sub-Divisional Magistrate, Sarangarh in proceedings u/s 107 and 116 of the Cr.P.C. Ex.P9 is also proved. No question was put to Head Constable Domar Prasad Chandra PW13 in cross-examination. The learned Sessions Judge, Raigarh has overlooked this material aspect that there is clinching evidence to show that the respondent had strong motive to commit murder of his old mother Usha Bai.

10. Sumitra PW3 is the daughter of the respondent aged about 9 years. After asking preliminary questions and certifying that she was able to understand and answer the questions, she was examined by the prosecution. She has categorically stated in paragraph 4 as under:

She has further stated as under:

There is absolutely nothing in her cross-examination to disbelieve her testimony. She is the daughter of the respondent and would never falsely implicate her father to protect the real culprit. Her testimony inspires confidence as it is un-rebutted in cross-examination. In Acharaparambath Pradeepan & Anr. v. State of Kerala 2007 (1) CCC 447 (S.C.) : 2006 (13) SCC 643 it was held by the Supreme Court that a child indisputably is competent to testify if he understands the questions put to him and gives rational answers thereto. The Supreme Court observed in paragraphs 47 & 48 are as under:

47. In Ratansinh Dalsukhbhai Nayak Vs. State of Gujarat, this Court stated the law, thus:

6. Pivotal submission of the appellant is regarding acceptability of PW 11's evidence. The age of the witness during examination was taken to be about 10 years. The Indian Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in

Wheeler v. United States, 159 US 523. The evidence of a child witness is not required to be rejected parse, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.

48. Indisputably, certain factors are required to be considered as regards reliability of the testimony of the child witnesses but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of child witnesses.

On careful examination of the evidence of Sumitra PW3, whose age during examination was taken to be about 9 years, we do not find that her testimony suffers from any intellectual incapacity to understand the question and give rational answers" thereto.

11. Constable Bhagirathi PW7 the Court Moharrir in Sarangarh deposed that on 23.12.1986 the respondent was holding a bag in his hand and would repeatedly enter and exit from the Court. Therefore, he had sent the respondent with Constable Prakashnath Tiwari to the Police Station. He further stated that in the evening he learnt that the respondent had murdered his mother. There is nothing in his cross-examination to give any explanation for the above mentioned suspicious behavior of the respondent on 23.12.1986, on the day next to the occurrence. Constable Prakashnath Tiwari PW8 has corroborated the testimony of Bhagirathi and deposed that before handing over the respondent to him, Constable Bhagirathi had told him that the respondent was carrying the head of his mother inside the bag, and therefore, he should be taken to the police station. Nothing has been elicited in cross-examination which would rebut the testimony of this witness.

12. Sub-Inspector Krishna Kumar Singh PW14 has also proved that on 24.12.1986 at 10.00 A.M. he had seized the dhoti and banian wore by the respondent vide Ex.P4. These articles were sent for chemical analysis to the Forensic Science Laboratory. Vide report Ex.PI 9 the presence of blood on the dhoti and banian wore by the respondent was proved. No explanation is forthcoming regarding this circumstance from the respondent. Sub-Inspector Krishna Kumar Singh PW14 has categorically stated in paragraph 9 that he had seized the knife and the bag containing the head from the respondent but did not prepare the seizure memo. Again there is nothing in cross examination to rebut this testimony. On the other hand, there is a leading question by the defence in paragraph 19 that the head of the deceased as seized at Police Station Saria on production by the respondent. It is also pertinent to note that Chhuri recovered from the respondent was actually sent for opinion to Dr. J.N. Shukla PW9 who had proved opinion Ex.P7 in paragraph 7 of his testimony which has also remained wholly un-rebutted. Therefore, the lacuna in investigation regarding non-preparation of seizure memo of Chhuri from the respondent is not fatal to the prosecution.

13. In State of U.P. Vs. Satish, Criminal Court Cases 305 (S.C.) : 2005 (3) SCC 114, it was held by the Supreme Court that defective investigation by itself is not sufficient to draw a conclusion regarding the innocence of the accused. It was further held that unless the investigating officer was categorically asked regarding any discrepancy in his evidence, the defence could not gain advantage therefrom. In State of W.B. v. Mir Mohammad Omar & Ors. 2000 (2) ACJ 569 (S.C.) : 2000 SCC (Cri.) 1516, the Supreme Court observed as under:

...In our perception, it is almost impossible to come across a single case wherein the investigation was conducted completely flawless or absolutely foolproof.

In State of Madhya Pradesh Vs. Mansingh and Others, Apex Court Judgments 277 (S.C.) : 2003 (3) Criminal Court Cases 559 (S.C.): 2003 (10) SCC 414 it was held that deficiency in the investigation cannot be a ground to discard the prosecution version which was authentic, credible and cogent.

14. From the above discussion, the following facts have been proved by the prosecution beyond the shadow of doubt:

(A) The respondent hated his mother, frequently quarreled with her, threw her out of the house and would not want that she should live with him. He not only beat her but also threatened to kill her. Thus, the respondent had a strong motive to commit the crime.

(B) On the date of incident i.e. on the night of 22.12.1986 Usha Bai and respondent were present in the house. Sumitra Bai PW3 saw Usha Bai go to the room of the respondent. Usha Bai did not return from the room of the respondent.

(C) On 23.12.1986 Sumitra PW3 saw that the respondent was carrying the head of Usha Bai in the bag,

(D) The testimony of Constable Bhagirathi PW7 and Constable Prakashnath Tiwari PW8 read with the testimony of Sub-Inspector Krishna Kumar Singh PW14 in paragraph 9 show that the head of the deceased carried in the bag by the respondent and the knife were taken from the respondent. The testimony of Constable Bhagirathi depicts a highly suspicious behavior of the respondent on 23.12.1986 while he was carrying a bag in his hand.

(E) The testimony of Constable Prakashnath Tiwari PW8 also shows that in all probabilities it was the respondent who was carrying the head of the deceased in a bag.

(F) The beheaded body of the deceased Usha Bai was lying inside the house of the respondent.

(G) Usha Bai had died a homicidal death.

(H) No explanation was offered by the respondent as to why he did not lodge the report on seeing the beheaded dead body of Usha Bai or for the un-rebutted

testimony of Sumitra PW3 that he was carrying the head of Usha Bai in a bag or for the fact that weapon of offence i.e. Chhuri was in fact recovered from him.

15. The above mentioned circumstantial evidence completely excludes the hypothesis of innocence of the respondent and is wholly consistent with the guilt of the respondent for committing the murder of Usha Bai. It clinching shows that it was the respondent and no one else who had brutally committed the murder of Usha Bai by slitting her neck by the Chhuri in the intervening night of 22nd-23rd December, 1986. The conclusion of innocence of the respondent drawn by the learned trial Judge is not even plausible on reappraisal of evidence and is thus perverse. We, therefore, find this to be a fit case in which the appeal should be allowed while setting aside the acquittal of the respondent.

16. We, therefore, hold that the prosecution had successfully established the guilt of the respondent for the murder of his mother Usha Bai in the intervening night of 22nd-23rd December, 1986. We allow the appeal and set aside the impugned judgment and convict the respondent Setaaram u/s 302 of the IPC for committing murder of his mother Usha Bai in the intervening night of 22nd-23rd December, 1986.

17. A warrant of arrest be issued against the respondent for his production before this Court on 13th July, 2009 at 11.00 A.M. for hearing him on the question of sentence.