

CASE NO.:
Appeal (crl.) 290 of 1995

PETITIONER:
State of Himachal Pradesh

RESPONDENT:
Prem Chand

DATE OF JUDGMENT: 16/12/2002

BENCH:
S. RAJENDRA BABU & P. VENKATARAMA REDDI.

JUDGMENT:

J U D G M E N T

RAJENDRA BABU, J. :

The respondent was charged for offences under Sections 302, 307 and 382 of the Indian Penal Code (for short 'IPC') for committing murder of Dhobi Devi and Madhu Devi and attempting to commit the murder of Pawan Kumar (PW 4), causing him grievous injuries and for committing theft of ornaments belonging to Dhobi Devi and her daughter-in-law Kanta Devi from the house of Majnu Ram.

The prosecution case, in brief, is that on 10th February, 1992, the respondent came to the house of Dhobi Devi in the evening and took his meals in the company of Dhobi Devi, Madhu Devi and Pawan Kumar; that Geeta Devi, wife of Udho Ram, came to fetch milk from the house of Dhobi Devi and when she asked about the whereabouts of the man sitting near the hearth, Dhobi Devi informed her that the respondent is the real brother of her brother-in-law; that the respondent, after taking meals, slept in the company of Pawan Kumar whereas Madhu Devi, a minor aged about 3 years, slept with her grand-mother, Dhobi Devi; that in the morning on 11th February, 1992, the respondent, after taking tea, left the house; that on the same day, the respondent again came to the house of Dhobi Devi late at night; that since there was a dog, the respondent asked Dhobi Devi to tether the dog; that after doing so, Dhobi Devi asked as to who was giving the calls and the respondent replied that he was the same person who had come to her house the previous night; that the respondent was asked by Dhobi Devi about his meals and he said that he had his meals but indicated his willingness to have 'kheer'; that Dhobi Devi prepared 'kheer' which was taken by the respondent, Madhu Devi and Pawan Kumar; that thereafter Madhu Devi slept with Dhobi Devi and Pawan Kumar slept with the respondent who was the real uncle of Pawan Kumar; that in the night the respondent gagged the mouth of Pawan Kumar and gave 'danda' blows to Dhobi Devi and immediately, Dhobi Devi called upon Pawan Kumar to free the dog which was tethered; that Pawan Kumar took out the muffler from his mouth and ran towards the stairs and when he had hardly covered two to three stairs the respondent noticed him and caught hold of him from the neck and caused injuries on his head with the help of iron pipe; that thereafter Pawan Kumar was caught hold of and his neck was put on the threshold of the door and the respondent caused injuries on his neck by a 'darati'; that the respondent after committing the murder of Dhobi Devi put a bundle of quilts on Dhobi Devi and her minor grand daughter Madhu Devi aged about 3 years who was sleeping with her; that Madhu Devi being a small child was not able to bear with the weight of quilts or remove the same and died of suffocation; that the respondent also inserted 'sanshi' in the rectum of Dhobi Devi; that thereafter the respondent searched the boxes and took the entire jewellery of Dhobi Devi and her daughter-in-law Kanta Devi and fled away from the scene of crime; that Kanta Devi on the fateful day had gone to village Majherna to see her off in her in-laws house; that husband of Dhobi Devi and her son, Krishan alongwith the mother of Pawan Kumar, Lila Devi had gone to Kullu; that on the intervening night of 11th and 12th

February, 1992 the only occupants in the house were Dhobi Devi, Madhu Devi and Pawan Kumar. Ajudhia Devi, a neighbour, who visited the house of Dhobi Devi to give water to the buffalo belonging to her which she had tethered in the cow-shed of Dhobi Devi found that there was no response to her calls to Dhobi Devi and saw Dhobi Devi and Madhu Devi underneath the bundle of quilts and injured Pawan Kumar laying in a serious condition; then she raised alarm that someone had killed Dhobi Devi and her children and thereupon, Prem Chand, husband of Ajudhia Devi, heard the cries and came to the house of Dhobi Devi and found that Pawan Kumar was still breathing and removed the bundle of quilts and found that Dhobi Devi and Madhu Devi were dead. Prem Chand immediately informed the Pradhan Udho and thereafter both of them went to the police station and reported the matter. Pawan Kumar was shifted to the hospital at Palampur and after being treated in the hospital, he made a statement that Dhobi Devi and Madhu Devi had been killed by the respondent and he had been caused injuries by his 'Chachu' Prem Chand. On this when the respondent was interrogated he made a disclosure statement resulting in the recovery of ornaments kept concealed in his house. Thereafter, the Investigation Officer sent the dead bodies of Dhobi Devi and Madhu Devi for post mortem examination after conducting the necessary inquest. Pawan Kumar, PW 4, was aged about 10 years and was found competent witness. He reiterated what has been narrated by us earlier. He was very clear in his evidence as to the identity of the respondent who was present in the court and also clearly identified him in the court. It is on the basis of his evidence and other material on record through the evidence of other witnesses, the learned Sessions Judge, Kangra Division, found that the prosecution had been able to prove the following points against the respondent :-

- 1) On 10-2-1992 and on 11-2-1992, the accused came to the house of Dhobi Devi, the deceased;
- 2) Pawan Kumar, the injured witness was living in the house of Dhobi Devi and this fact has been admitted by the accused;
- 3) Pawan Kumar received grievous injuries seven in number from the hand of the accused;
- 4) Accused is the real "Chacha" of Pawan Kumar and he made no mistake to identify the accused on both the occasions i.e. 10-2-1992 and 11-2-1992;
- 5) The accused, after committing murder of Dhobi Devi and Madhu aged three years caused grievous injuries to Pawan Kumar, removed the jewellery from the house and silently left the house during the intervening night of 11th and 12 February, 1992;
- 6) The ornaments, which were removed by the accused from the house of Dhobi Devi after committing the double murder, were got recovered by him after making the disclosure statement from his house;
- 7) The ornaments have been duly identified by Kanta Devi (PW 8) in the presence of the Executive Magistrate, Shri Salig Ram (PW 10);
- 8) The accused was arrested on 13.2.1992 when the name of accused was disclosed by Pawan Kumar from his house. The arrest has been admitted by the accused;
- 9) The accused after committing the murder put bundle of quilts on the bodies of Dhobi Devi and Madhu, aged about 3 years. Madhu died due to suffocation as per report of Doctor. Madhu being a little child, it was not possible for her to remove the weighty quilts from her body and died;
- 10) It is also proved on record that death of Dhobi Devi is homicidal as testified by PW 1 Dr. V.P. Sood;
- 11) That the injuries were ante-mortem and were sufficient to cause death in the ordinary course of nature;
- 12) The Doctor further clarified that the suffocation could be caused by blocking the nose and mouth with the help of hand or otherwise by placing quilts and clothes, etc. upon Madhu, deceased.

On the basis of this conclusion, the learned Sessions Judge found that the case was established that Prem Chand, the respondent, alone had committed the murder of Dhobi Devi and Madhu Devi and caused grievous injuries to Pawan Kumar and removed the jewellery; that the said conclusion was beyond

any reasonable doubt. After hearing the respondent on sentence the learned Judge felt that the murders had been committed by the respondent in a ghastly, fiendish and gruesome manner of his victims who were helpless and attempted to kill Pawan Kumar for gain. Holding this case falls in the category of rarest of the rare cases, the learned Sessions Judge convicted the respondent and sentenced him to death and made a reference to the High Court for confirmation of the same.

The High Court took up the criminal reference and criminal appeal together for consideration. The High Court held as under:

"After going through the material evidence against the appellant, consisting of testimony of PWs 1, 2, 4 to 8, 19 and 20, we do find that there is some amount of consistency in their evidence which could have been based for the conviction of the accused. However, mere congruity or consistency is not the sole test of truth. The force of the evidence does not depend merely on the credit attached to the 'factum probandum' but to the result by which process of reasoning, it indirectly establishes in the mind of the Judge. Of course, if direct evidence is credible, it is superior to any other class and more satisfactory to the judicial mind. However, it must be borne in mind how easy it is to fabricate direct evidence. For example, how simple a matter it is for a witness to swear falsely; "I saw "A" dealing the fatal blow". It is also stated that circumstances cannot lie. It is also equally fallacious as appears from every day's experience. Circumstances do lie most cruelly. The innocent often succumbs to the unfounded suspicions from circumstances which appears to tell strongly against him the true bearing which the accused has neither the opportunity nor often means to explain. The truth is that either kind of the evidence whether direct or circumstantial, has its peculiar advantages and defects. Sometimes even falsehood is given an adroit appearance of truth, so that truth dis-appears and falsehood comes on the surface. The instant case appears to be one of those cases. There are many inherent improbabilities in the prosecution case so far as the participation of the appellant is concerned.

The entire case hinges upon the direct and circumstantial evidence. The central evidence consists of PWs 4, 5, 6, 7, 8, 19 and 20 besides the medical evidence consisting of PWs 1 and 2. The motive alleged by the prosecution is theft. Further the incident is stated to have been witnessed by Pawan Kumar (PW 4) an injured person. It is needless to say that when there is acceptable evidence of the eye witnesses to the commission of an offence the question of motive cannot loom large. However, the Courts cannot lose sight of the fact that when motive forms an integral part of the prosecution case and circumstances depicted by the factual position existing at the spot through the documentary evidence does not corroborate the testimony of the eye witnesses, then the prosecution story becomes doubtful and hence unacceptable. In the instant case, no doubt, PW 4 Pawan Kumar an injured person, should, ordinarily, be the most competent and reliable witness but the question is as to whether he falls in that category. We answer it in the negative."

The High Court merely took into consideration the site plan Exhibit PW 20/A and referred to various positions of different rooms and place where the four beds were kept. The High Court on that basis, which was not the case of defence either, tried to make out a case and proceeded to suspect the evidence tendered before the court. This conclusion of the High Court is based upon the fact that the building in which the occurrence took place is a double storeyed building; that each storey had three rooms; that there were four beds lying at place where both the deceased and the injured were sleeping at places marked in the sketch; that if really Pawan Kumar was sleeping with the respondent and Madhu Devi with her grand-mother Dhobi Devi, there would have been only two beds and not four and this document therefore proved that the testimony of Pawan Kumar was doubtful. The High Court proceeded further to analyse the evidence tendered by PW 4, Pawan Kumar with meticulous detail and as to

where the 'masala ghotne ka danda' (P-10) and hollow iron pipe (Exhibit P11) stained with blood had been found at place. The High Court also differed as to when the respondent began to give blows to Dhobi Devi and Madhu Devi and why the respondent should have intended to kill Pawan Kumar by inflicting 'darati blow on his neck. The High Court found it difficult to believe that the injury inflicted on Pawan Kumar within a few seconds after attacking Dhobi Devi with a new kind of weapon namely a hollow iron pipe and it is difficult to think that he could change the weapon within a few seconds. It was not possible for the respondent to pick up the pipe from kitchen and use it as a weapon of offence. The above sequence of facts narrated by PW 4 in his testimony appeared to the High Court to be unnatural. It is on this basis the High Court concluded that the evidence of eye witness PW 4 was not worthy of belief. The High Court also disbelieved the recovery of apparel of the respondent as well as the other evidence and noticed that the circumstances indicating commission of theft in the form of scattering of clothes etc. were existing at the scene of occurrence and further commented as to why these facts were not indicated in the inquest report despite the fact that it formed integral part of the offence committed by the respondent as was the case of the prosecution. The High Court concluded that death was not caused in consequence of the use of various weapons by one man - the respondent and held that prosecution had not been able to establish the case and, by giving the benefit of doubt, acquitted the respondent. Hence, this appeal has been filed by special leave.

As the respondent was not represented, we requested Shri P.V.Dinesh, Advocate, to act as amicus curiae. He has contended that PW.4, the injured witness, who is also the eye witness to the incident, is not worthy of belief. He pointed out that when he was sleeping with the accused, the accused gagged his mouth with muffler and thereafter inflicted a danda blow to Dhobi Devi, the deceased. When PW.4 heard the sound of Dhobi Devi directing him to free the dog, he took out the muffler from his mouth and ran towards the stairs by the time the accused caught hold of him and inflicted injuries. It is contended that the statement cannot be true because he had also stated in the course of cross-examination that he woke up when he heard the cries of his grandmother and moreover he lays emphasis on the presence of one Ramesh, who had visited the house of Dhobi Devi on 10.2.1992. However, the prosecution has not made any attempt to identify who Ramesh is, particularly when on the second day, they heard a call to release the dog and when they asked him as to who the caller was, he stated that he was the same person who had come the previous day and, therefore, it was absolutely necessary to identify who that Ramesh is. He further submitted that PW.4 could have mistaken that his Chacha was involved in the incident and he had hardly seen the accused. In his life, only twice PW.4 has seen his Chacha, that is, on the nights of 10th and 11th February, 1992 and in the absence of Test Identification Parade, the identity of the accused was not properly established. He also contended that PW.4 regained consciousness in the hospital between 1 and 2 p.m. the next day and at that time PW.4 had told that his Chacha has committed the offence and it is also the case of the prosecution that PWs.5, 6 and 7 have come to know about the offence at about 9 p.m. and they saw the injured PW.4 in a very serious condition and the prosecution has not explained as to why they took three hours to take PW.4 to the hospital. PWs.5, 6 and 7 also did not make any attempt to hospitalise PW.4 though his condition was so serious. Another discrepancy the learned amicus curiae has tried to point out, is that PW.4's deposition that his mouth was gagged with the help of muffler is an improvement as no such statement had been made by him to the police and that course was adopted only to see that he should not be asked the question as to why he did not make any noise at the time of the offence to draw the attention of the neighbours. He submitted that the accused has three names and, therefore, whether PW.4 had identified the accused correctly is also doubtful. The medical evidence is also contrary to the evidence tendered by PW.4 inasmuch as he has stated that he was hit by blunt weapon whereas the doctor stated that injury no. 3 was with "margins so regular and well defined covered with blood clots." He further drew our attention to the fact that the accused visited on the 10th night and left the house on 11th morning and again came back on the night of 11th. The motive attributed by the prosecution is theft and if the accused had an idea to commit theft he could have done the same on the 10th itself. The explanation offered by the prosecution is that his

presence was made known to PW.6 when he left the place. PW.6 also could not also properly identify the accused. He commented upon the recoveries having been effected of the blood stained clothes and the same were of the accused. The accused had been arrested in the presence of Binda who was the father of PW.4 and also the brother of the accused, but he was not examined as a witness in the case. He, therefore, contended that the manner in which the accused was stated to have been apprehended by PW.19 is doubtful due to many circumstances. The recovery of stolen articles and silver ornaments would not establish anything because the value of the same being very little, the accused would not commit such a heinous offence. He contended that the offence could not have been committed by a single person because there was double murder and different kinds of weapons had been used in different rooms.

Though PW.4 is a child witness, he has been clear and cogent in giving his evidence. In spite of being put to severe cross-examination he has come out clean and he has stuck to the statements made by him. Whether he woke up at the call of his grandmother is a matter which can be understood because what he has stated earlier was that when his grandmother was calling him to release the dog and when he was about to run, he was beaten and by that time the accused had already inflicted 'danda' blow to Dhobi Devi. Therefore, the version given by him is consistent with what he has stated earlier. The attempt of the learned amicus curiae to attach importance to the presence of one Ramesh on 10th February 1992 cannot assume any significance because PW.4 is categorical in identifying the accused as having committed the offence. When he had clearly seen the accused at least on two occasions whom he had known to be his Chacha there was no need to hold further Test Identification Parade. In what condition he was at the time when PWs.5, 6 and 7 saw him or whether he could have removed him to hospital and what facilities they had will not militate against the evidence tendered by PW.4 before the court. The contention that PW.4 having been gagged in the mouth with a muffler was not stated earlier but an improvement made before the court is not very material as it is a detail of minor nature. The visit of the accused on the 10th February 1992 night appears to us only to survey the situation and after ensuring himself that it was possible for him to commit the crime, he returned the next day. Non-examination of Binda, father of PW.4 and the brother of the accused, will not carry the matter any further because their evidence would not establish any connection with the crime committed by the accused. Fact remains that the accused had been apprehended and produced before the court. In this background, we find no merit in any of the contentions advanced by the learned amicus curiae on behalf of the respondent.

The learned counsel, however, pleaded that in the special features of this case, in the event we did not agree with him, the sentence to be imposed upon the accused should not be capital but the lesser one. Relying upon the decision of this Court in *Suresh vs. State of U.P.*, 1981 (2) SCC 569, the learned amicus curiae submitted that when the prosecution case is based solely on the evidence of a child, who is stated to be present at the time of occurrence of the offence and was injured by the accused and owing to his state of mind and state of his body, his testimony though reliable as regards conviction but need not be acted upon as regards imposition of death sentence and therefore urged that the death sentence may be reduced to the lesser punishment.

The High Court, by examining the evidence with reference to the rough sketch prepared by the I.O., drew an inference that there should have been two beds in the room if the evidence of PW.4 is to the effect that he was sleeping with the respondent and that three-year old Madhu Devi was sleeping with her grandmother is to be believed. In *Tori Singh & Anr. vs. State of U.P.*, AIR 1962 SC 399, this Court had occasion to consider the admissibility of a plan drawn to scale by a draftsman in which after getting information from the witnesses where exactly the assailants and the victim stood at the time of commission of the offence, the draftsman put down the places in the map, it was held that such a plan drawn to scale was admissible after the witnesses corroborated the statements of the draftsman that they had shown him the places and would not be hit by Section 162 CrPC. Another sketch also had been prepared in that case by the Sub-Inspector on the basis of what the witness had

stated to him but the same was ruled as inadmissible in view of Section 162 CrPC. The sketch/map in the present case has been prepared by the I.O. and particularly when no evidence has been adduced with reference to the sketch by the witnesses such statement even if admissible in evidence and is not hit by Section 162 CrPC, still it cannot be of much use unless some of the witnesses state as to the state of affairs at the scene. No such attempt has been made nor evidence has been adduced through any of the witnesses. Therefore, we think that the caution indicated in that decision should be borne in mind.

The High Court held that as the site plan indicated that there were four beds, the testimony of PW.4 has become doubtful. It is difficult to accept the view taken by the High Court that when the clear evidence tendered by PW.4 is to the effect that the small child of three years was sleeping with her grandmother and that PW.4, who is nephew of the respondent, was sleeping in the same bed, it would not mean that the existence of the other two beds could be doubted. In that view, the High Court has attached undue significance to this aspect of the matter and has misled itself. PW.4 who is a very young boy, was an inmate of the house on the fateful day was seriously injured and Dhobi Devi and Madhu Devi were murdered by the respondent. The fact that PW.4 sustained injuries on that day cannot be seriously disputed. The circumstances in which PW.4 sustained those injuries have been clearly explained by him and the manner in which the respondent attacked Dhobi Devi and Madhu Devi and later on himself cannot be doubted at all. The presence of the respondent on 10.2.1992 is established by evidence of Geeta Devi. That indicates that the respondent having noticed that there was an old lady with a small child and PW.4, Pawan Kumar was a young boy, took the opportunity to do away with them but he could not execute his plan completely because Pawan Kumar survived, though the respondent had caused him grievous injuries. PW.4 had in the course of his evidence has clearly deposed that his "Chachu" has committed the murder of his "Nani" and sister Madhu Devi and he caused injuries to him with the help of iron pipe and sickle. PW.4 has in clear and cogent manner described the incidence that had taken place. When he is related to the respondent there is no reason to suspect that he had given any tutored version or there is no clarity or consistency in his evidence. Even discarding the recoveries that are stated to have been effected, it is clear that there is enough evidence on record to show that the respondent committed the murder of Dhobi Devi and Madhu Devi as held by the Sessions Court. But, the High Court, was carried away by figments of imagination, by incorrectly and unduly relying upon rough sketch of the scene of crime. We do not think that unless with reference to the rough sketch the scene was recreated before the court through the evidence of one or the other witness, the High Court could have placed much reliance upon that aspect.

Therefore, we have no hesitation in setting aside the order made by the High Court acquitting the respondent and restoring the conviction passed by the Sessions Court.

Though the Sessions Court has imposed death sentence upon the respondent by an order made on 29.9.1992, the High Court by its judgement dated 28.4.1993 acquitted him. In view of the following observations of this Court in Suresh vs. State of U.P. [supra]:

"Children, in the first place, mix up what they see with what they like to imagine to have seen and besides, a little tutoring is inevitable in their case in order to lend coherence and consistency to their disjointed thoughts which tend to stray. The extreme sentence cannot seek its main support from evidence of this kind which, even if true, is not safe enough to act upon for putting out a life". [p.574]

and keeping in mind the fact that there is a long time gap between the date of the murder and conviction now by us and particularly when in the intervening period there is an order of acquittal in favour of the respondent, we do not think it is expedient to award the capital sentence upon the respondent. Therefore, we reduce the sentence to life imprisonment while upholding the conviction given by the Sessions Court. The appeal is allowed accordingly. If the respondent is on bail, the same shall stand cancelled and he shall surrender forthwith to serve out

his sentence in accordance with law.

Before we part with this case, we place on record our appreciation of the valuable assistance rendered by Shri P.V.Dinesh as Amicus Curiae.

JUDIS