

Sukhram Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Oct-21-1994

Reported in : 1995CriLJ595

Judge : R.D. Shukla and ;J.G. Chitra, JJ.

Acts : [Evidence Act, 1872](#) - Sections 3; [Indian Penal Code \(IPC\), 1860](#) - Sections 302

Appeal No. : Cr. A. No. 190 of 1990

Appellant : Sukhram

Respondent : State of M.P.

Advocate for Def. : K.K. Gupta, Adv.

Advocate for Pet/Ap. : Dilip Solanki, Adv.

Disposition : Appeal allowed

Judgement :

J.G. Chitra, J.

1. For taking exception to the order of conviction and sentence passed against him by learned Sessions Judge, Shajapur in the matter of Sessions Trial No. 180/89, the appellant has approached this Court by preferring this appeal. Learned

Sessions Judge, Shajapur had convicted the appellant for an offence punishable under Section 302, IPC and sentenced him to undergo imprisonment of life.

2. The facts giving rise to the prosecution can be stated as hereunder in brief:

The appellant was residing in village Pardakhedi along with his wife in the house of his father-in-law Bherulal 3 4 years prior to the date of incident. As per prosecution case in the night of the incident, he was sleeping in the house of Bherulal along with his wife and children. It is the prosecution case that appellant was having suspicion about the character of his wife Lilabai and on account of that, the quarrel took place between them in the night of the incident, at 3.00 p.m. As per prosecution case the appellant assaulted Lilabai on her head, who was sleeping, with a grinding stone of floor mill. By hearing the noise created by the said act, the daughter of Lilabai and appellant named Rukma, who was sleeping at some distance from them, got up and after seeing her father assaulting her mother she shouted. By hearing her shouts, her grandfather Bherulal came there to whom she told that her father had assaulted her mother on the head by said grinding stone of the floor mill. Bherulal also thereafter shouted and by hearing his shouts prosecution witnesses -- Mangilal, Lakhani Chotelal, came there to whom he informed accordingly. They tried to search the appellant but he was not found.

3. Thereafter the FIR was lodged, investigation progressed and appellant was put to trial before the learned Sessions Judge, who after appreciating the evidence recorded by him in view of the arguments advanced on behalf of the parties, accepted the prosecution case as proved and recorded the conviction and sentence against the appellant and that is the subject matter of challenge in the present appeal.

4. Learned Counsel Shri Dilip Solanki appearing for the appellant appointed by Legal Aid Committee, was heard so also the Govt. Advocate Shri K.K. Gupta, for the State. Both referred to the evidence on record while canvassing their arguments.

5. The prosecution case mainly depends on the evidence of Rukma, who was aged 4-5 years old when her evidence was recorded in the Session trial. Her

evidence is the evidence without administering her oath. It is the prosecution contention that her evidence has been corroborated by the evidence of Bherulal, Chotelal, Mangilal, Lakhan and Dr. Vipin Jain. The contention of the defence is that being a child witness, it is not safe to place reliance on her testimony for basing conviction against the appellant. The criticism which has been levelled against the evidence of Bherulal, is that he was having suspicion against the appellant and, therefore, he falsely implicated the appellant in the charge of committing murder of his daughter, on suspicion. The defence contended that the evidence of other witnesses on record does not support the prosecution case to prove the guilt of the appellant.

6. We upheld the contention advanced on behalf of the defence for reasons stated here-under:

Rukma is a child witness. Her evidence is without oath and being it so, the Court should be on guard while appreciating her evidence. So also the Court should cautiously examine the evidence of Bherulal as he happens to have prejudice against the appellant on account of the quarrels between the appellant and Lilabai, which were caused by the suspicion shown by the appellant in respect of the character of his wife Lilabai who happened to be the daughter of Bherulal (PW. 4). Rukma stated in her evidence that in the night of said incident she was sleeping in the courtyard of the house of Bherulal. So far as her mother was concerned, she has stated at one time that she was sleeping inside the house and at other stage she stated that she was sleeping in the Courtyard. It is her evidence that the appellant hit her mother by the said grinding stone and quickly ran away, and because of that, she shouted and by hearing her shouts, her grandfather Bherulal came near her and when he asked her about the said shouts, she told him that her father had assaulted her mother and had ran away towards the river side. It has come in her evidence that at that time prosecution witnesses Chotelal, Mangilal and Lakhan arrived there to whom she told the same thing. According to her evidence thereafter Chokidar and Patel also came there, whom she narrated the same information.

7. Learned trial Judge accepted the evidence of Rukma by holding that as she was a small girl, naturally she must have been sleeping with her mother in the said night. He mentioned in his judgment that by hearing sound created by the hit of the said grinding stone, she must have been awakened and thereafter she must have seen the appellant and must have identified him. He pointed that immediately she narrated the same to her grandfather, who corroborated the testimony of PW. 5, Rukma. The learned trial Judge also held that the presence of grinding stone near the dead body of Lilabai at the relevant time corroborated the evidence of Rukma and Bherulal. On these grounds, he accepted the evidence of Rukma, Bherulal and other witnesses and held that the prosecution had proved the guilt of the appellant, beyond reasonable doubt.

8. Learned Judge did not note properly that at the time of giving evidence in the court, Rukma had come with her grandfather's house. Further, learned Judge did not also notice that when her statement was recorded by police, her grandfather had instructed her to tell police that when she was awoken, her father had hit her mother with the said grinding stone. Not only that but she stated in her evidence that before giving the evidence, her grandfather had instructed her to state that in the said night she was awoken and she saw her father assaulting her mother with the grinding stone. The learned trial Judge did not note that the mind of a small child is very much sensitive, receptive and such small children generally accept whatever told of them by their elders/relatives. In the present matter the person who was telling her about the statement which she was to give before the police and before the Court was none else but the father of her mother and some days prior to the incident of night, she was residing with her mother in his house. The learned Judge did not also note that it has come in her evidence that prior to the said night, according to her evidence, her father had abused her mother when she was cooking. The total effect of all that is that Rukma had sufficient grounds to believe that her father had hit her mother with grinding stone as told by her grandfather. As it was told by her grandfather immediately after death of her mother, she might have accepted it as truth and might have told it accordingly before police and court.

9. Bherulal did not see as to who had assaulted his daughter Lilabai in the said night because it is evident from his evidence, if carefully scrutinised. It is his evidence that after hearing shouts of Rukma alias Rukkia, he went near her and found that his daughter Lilabai was lying near grinding stone and blood was oozing from the wound which was near her ear portion on face and head. It is his evidence that at that time he saw appellant running away, hence he also started shouting that the appellant Sukhram had killed his daughter. It is his evidence further that by hearing shouts, Kishan, Sitaram, Ramprasad had come there to whom he told the same thing. Further, when Chokidar and Patel had come there, he told them also the same.

10. He stated in his evidence at one stage that the said night was a dark night, so also, stated at other stage that at the said time the moon was shining in the sky. However, he stated in his evidence that when he saw the appellant, he was at the distance of 15-20 paces away from him and his back was towards him. On this point, other witnesses who have been examined by the prosecution namely Deviprasad, Sitaram and Mangilal stated something else. According to evidence of Bherulal, Rukkia alias Rukkma had told him that her father had assaulted her mother; however, he was unable to give explanation as to why the same information was not mentioned in his statement recorded by the police during the course of investigation and that is D. 11. PW. 9 Mangilal stated in his evidence that when he heard shouts of Bherulal, he went to his house and after him Lakhan came there. It is his evidence that at that time Bherulal told them that he had seen the appellant Sukhram assaulting Lilabai. He further stated in his evidence that PW. 4 Bherulal had also stated at that time that none except his son-in-law Sukhram, would have assaulted his daughter Lilabai. Lakhan also stated that when he went to the house of Bherulal, after hearing the shouts, Bherulal told him and Mangilal that except his son-in-law (Sukhram) none could have assaulted his daughter and he was having suspicion against him.

11. It is pertinent to note that both Lakhan and Mangilal had stated in their evidence that when they went to the house of Bherulal, the night was dark. PW Mangilal stated specifically that because of the darkness of the night, the person at a distance of 20-25 paces, could not be identified. Further, it is important to note

that the evidence of Mangilal and Lakhan shows that if anybody has to go or run from the house of Bherulal towards river side, he has to pass by the side of their houses. Mangilal further stated in his evidence that when he went near Bherulal, appellant Sukhram did not meet him. Similarly is the evidence of PW Lakhan, who has stated in his evidence that if at all anybody wants to go towards river from the house of Bherulal, he has to go from the side of his house and in the same night when he went near Bherulal's house, none met him on the way. Had appellant ran away from the house of Bherulal in the said night, he could have been seen by those two witnesses, who were very friendly with PW. 4 Bherulal. But prosecution evidence does not show that way.

12. Though PW. 4 Bherulal has stated in his evidence that moon was shining in the sky at the relevant time, no importance can be given to it because evidence of Mangilal and Lakhan was showing that said night was dark and the person at near distance could not be identified in the said darkness. According to PW. 9 Mangilal a person at the distance of 20-25 paces, could not be identified in the said darkness. However, PW. 10 Lakhan had gone ahead and stated in his evidence that a person standing at the distance of 4-5 paces, could not be identified in the said darkness. It is important to note that PW. 5 Rukma alias Rukkia, has also stated in her evidence that said night was dark. When that was the visibility, it is very difficult to accept that Rukma and Bherulal must have identified the appellant as the person assaulting Lilibai with the said grinding stone and running away from the spot. Of course, we are aware that close relatives can identify the person in some darkness; but that cannot be the case in the present matter because the evidence of concerned witnesses is showing persistently that it was pitch-dark. Neither Bherulal, Rukma nor prosecution witnesses Mangilal and Lakhan stated that they saw and identified the appellant at the said spot near the dead body of Lilibai in the said darkness because they were well acquainted with him. Furthermore, it is important to keep in mind that all those witnesses got up suddenly from the sleep after hearing noise, which indicates that they may not be also having fully settled enabling them to identify correctly the assailant of Lilibai.

13. Thus, keeping in view the evidence of these witnesses, one thing is clear that even according to the prosecution case Rukma was the only person, who could

have seen the appellant hitting the said stone on the head of Lilabai and she narrated the same to her grandfather: Bherulal who narrated it to prosecution witnesses Mangilal and Lakhan and afterwards to Chokidar and Patel. Therefore, the evidence of Rukma alias Rukki will have to be assessed very carefully for the purpose of coming to the conclusion whether her evidence is fit to be relied for basing conviction against the appellant in a murder case which prescribes the lesser sentence, in the nature of imprisonment for life.

14. Rukma was not sure as her evidence shown whether her mother was sleeping in the house or in the courtyard. She has stated in her evidence that her elder sister Sumitra (who was aged at that time, as it has been disclosed by the prosecution, near about 7-8 years) was sleeping near Rukma. Rukma stated in her evidence that she got up by the noise which was created by hitting of stone.. However, Sumitra who was sleeping near her, did not get up, May it be. There is nothing unnatural in it. But what is unnatural is that though she told everybody that her father had assaulted that way her mother, she did not tell it to her elder sister Sumitra. Naturally, when she was telling it to other persons, she would have definitely told it to her elder sister Sumitra, on her own accord or being questioned by her.

15. Further more, it is important to note that she has stated in her evidence that by hearing the big noise, she got up and at that time she saw that the person who had assaulted her mother with stone ran towards river side and at that time it was dark. She further stated that at that time her grandfather was saying that Sukhram had assaulted his daughter. At one stage Rukma stated in her evidence that her father had assaulted her mother with the said grinding stone, but general tone of her evidence shows that she must not have seen the assailant at all and she was influenced by her grandfather and was telling that her father was the said assailant.

16. Furthermore, it is important to note that it has come in the evidence of Rukma that she was at the distance of about 20-25 paces away from her mother in the said night. If that is so and if the said night was dark it is very difficult to digest that such a small girl could have correctly seen the said assailant in the said darkness

when Rukma suddenly got up by hearing the said noise.

17. When much are infirmities in her evidence, her admissions that her grandfather had told her to tell police at the time of recording her statement that her father had assaulted her mother Lilabai and the fact that before giving evidence in the Court her grand father had told her to tell that her father had assaulted her mother Lilabai, gives a decisive fatal blow to the prosecution case. It surely shows that before her statement was recorded by Police and before she gave evidence in the Court, her grandfather had tutored her. It is further important to note that when she was giving evidence in the Court she was tutored by her grand father because she was residing with him at that time, and she was being maintained and brought up by him. It is further important to note that when her statement was recorded by police she was with her grandfather and prior to that also for some month she was residing in the house of her grand-father along with her mother. When that was the influence of Bherulal over Rukma, keeping her tender age, one will have to conclude that she was very much under influence of her grand father Bherulal and, therefore, it is difficult to believe that she had identified the appellant correctly as the person assaulting her mother in the said night with grinding stone.

18. When the prosecution case is solely resting, on the evidence of a small child witness of tender] age and it is tainted with infirmities of description, on the point of proper identification and when there is evidence to show that she was tutored, it is very unsafe to base conviction on such evidence in murder case. The prosecution cannot take advantage of so-called corroborating by prosecution witnesses Mangilal, Lakhan, Chokidar and Patel because Rukma was the person who gave the information to them that her father present appellant had assaulted her mother in the said night by grinding stone.

19. Another aspect which needs consideration is that it has come in the evidence that the appellant was residing in the house of PW.4 Bherulal with his wife Lilabai as well as used to cultivate his land situated in another village Mundla at short distance from the said village where Bherulal was residing. The appellant examined two witnesses namely Jagdish Prasad and Babulal who had stated in

their evidence that in the night of the said incident, the appellant was present in the village Mundla. According to the evidence of PW. Jagdish, the appellant was attending his house in a religious discourse in the said night and he was present there from 12.00 mid night till 6.00 a.m. Not only that, but he stated that appellant was also further present in his house till 12.00 noon on 24-5-86, and on 24-5-86 Jagdish had sent the appellant to Sehore. DW Babulal stated that Jagdish had told him that in the said night the appellant was present with Jagdish. Though DW Babulal happens to be brother of appellant, his evidence cannot be totally ignored which supports the evidence of DW Jagdish. There is nothing in the evidence of Jagdish that he was telling falsehood only for the purpose of saving the appellant. The learned Judge has not given proper reasons for discarding evidence of DW Jagdish and Babulal.

20. The learned trial Judge should have kept all these important points in mind while assessing the evidence of such a child witness but he failed to appreciate evidence of this child witness properly, and, therefore, landed in error in holding that in the said night PW. 5 Rukmabai had seen the appellant assaulting her mother with grinding stone on the head.

21. When the prosecution evidence is not proving beyond reasonable doubt, that appellant was present in the house of Bherulal in the night when Lilabai was assaulted on the head by grinding stone, when prosecution evidence not sufficient to prove that appellant was the assailant, when evidence of DW Jagdish is available to show that in the said night the appellant was present in village Mundla, the conviction for an offence punishable under Section 302 cannot be sustained. Thus, we find that learned trial Judge has committed an error in convicting and sentencing the appellant for an offence under Section 302, IPC in view of discussion above.

22. Thus, the appeal is allowed. The order of conviction and sentence recorded by the Sessions Judge, Shajapur against appellant in S.T.M. 180/ 89 is hereby set aside. The appellant is acquitted. He be set at liberty forthwith, if not required for any investigation, proceedings or trial. No interference in respect of the order of disposal of property.

