

Sanjay Vs. State

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Court : Delhi

Decided On : May-20-1996

Reported in : 1996CriLJ3347

Judge : Arun Kumar and; Mohd Shamim, JJ.

Acts : Indian Penal Code (IPC) - Sections 302, 363 and 364; Code of Criminal Procedure (CrPC) - Sections 173 and 313

Appeal No. : Criminal Appeal No. 193 of 1992

Appellant : Sanjay

Respondent : State

Advocate for Def. : Mr. Anil Soni, Public Prosecutor

Advocate for Pet/Ap. : Mr. B.B. Rana, Adv

Judgement :

Mohd. Shamim, J.

1. The convict/appellant Sanjay (hereinafter referred to as the appellant for the sake of convenience) has preferred the present appeal against the judgment and order dated September 26, 1992 passed by the learned Additional Sessions Judge whereby he found the appellant guilty under sections 302 & 364 of the Indian

Penal Code and sentenced him to undergo life imprisonment with a fine of Rs. 500/- under Section 302 of the Indian Penal Code. In case of default of payment of fine he was directed to undergo RI for one month. He was further sentenced under section 364 of the Indian Penal Code to undergo RI for five years with a fine of Rs. 500/-. In case of his failure to clear the fine he was directed to undergo RI for one month.

2. The case of the prosecution as set out in the report under Section 173 Cr.P.C. FIR and the evidence led by the prosecution is as follows : that one Shri Bhagwan Singh son of Buchi Singh (PW 9), a resident of village Burari, Delhi, approached the police station Timarpur, Delhi on September 4, 1989 and lodged a report with them to the effect that he was working in Ayodhya Textile Mills, Azadpur. He has got three children. Eldest of them was Amit Kumar, aged 7 years. The other one is a female child named Shilpi (PW 1), aged 4 years. Both the above said children are studying in R.K. Public School, Burari, Delhi. His mother-in-law known as Smt. Tapesra Devi (PW 15) went to the above said school today in the afternoon to take the above children back to their house. She found over there one of the children known as Km. Shilpi (PW 1) only. The other child known as Amit was found missing. Hence she could not meet him. The bag of Amit Kumar (hereinafter referred to as the deceased) was found with Km. Shilpi (PW 1). On enquiries from Km. Shilpi as to where the deceased was, she came to know that the appellant came to the school and took away deceased on the pretext that somebody was waiting to see him at the bus stand. Since then he has been searching for his son, but to no avail. He suspected the hand of the appellant in the disappearance of his son. The above statement was reduced to writing. A case under Section 363 IPC was registered on the basis of the said statement (vide Ex. PW 3/A). A copy of the said statement was handed over to SI Raj Singh (PW 19) for the purposes of investigation. He searched for the appellant along with the complainant PW 9 Bhagwan Singh at several places, including his house, but was unable to trace him out on the said date.

3. On the next day i.e. September 3, 1989 he again reached village Burari along with Constable Sansar Pal. He again looked for the appellant and in connection there with reached ISBT at about 1.00 p.m. The appellant was found standing at a

D.T.C. bus stop at ISBT, PW 9 Bhagwan Singh identified the appellant. He apprehended him and interrogated him. The appellant made a disclosure statement and stated therein that he could get the dead body of the deceased and his belongings recovered from Shamli (U.P.). The said disclosure statement was recorded vide Ex. PW/8/A. The appellant was formally arrested. His personal search memo is Ex. PW 19/A. Some blood stains were noticed on the shirt worn by the appellant. The same was taken into police custody vide Ex. PW 8/B. The shirt is Ex. P7, SI Raj Singh recorded the statements of PW 1 Km. Shilpi, PW 9 Bhagwan Singh, father of the deceased, and Smt. Tapesra Devi (PW 15). He further recorded the statement of PW 8 Ram Phal and PW 10 Raja Ram. The appellant was thereafter taken to the police station and produced before Shri D. N. Kaushik (PW 18).

4. Since it was found during the course of investigation that the instant case was a case of murder, hence the investigation was taken over by PW 18 Inspector D. N. Kaushik. He interrogated the appellant further. He formed a raiding party consisting of SI Raj Singh PW 19B, SI Hari Kishan, HC Kela Nath and other police officials. The complainant PW9 Bhagwan Singh was also included in the raiding party. The appellant led the police party to Shamli (U.P.) SI O. P. Singh Chauhan of P8 shamli (PW 16) was also joined in the raiding party. The appellant led the raiding party to the place of occurrence which was sugarcane field situated at Mazra Road. One Yash Pal Singh (PW 5) was also joined in the investigation. The dead body was recovered from the said field on pointing out of the appellant. The dead body was identified by the father of the deceased PW 9 Bhagwan Singh (vide Ex. PW 5/B). A pair of slippers was also found by the side of the dead body (Ex. P5/1-2). The earth soaked with blood was lifted for the purposes of sample and taken into police custody vide memo Ex. PW 5/F. An inquest report was prepared at the spot (Ex. PW 15/A). The brief facts of the case were prepared vide Ex. PW 17/A. The site plan of the place of occurrence was prepared (vide Ex. PW 17/B). The scene of the crime was got photographed from PW 12 Virender Kumar Garg (vide Ex. PW 12/A-1 to A-6 and Ex. PW 12/A-7 to A-12).

5. The appellant thereafter took the raiding party to a garbage near V.V. Degree College, Bhamli, and pointed out towards the bundle which contained one shirt,

one belt and neck tie, tied with a piece of rope (vide Ex. PW 5/D). The said bundle was opened. A shirt, a belt, a neck tie and a piece of the rope were taken out of the same. The piece of rope was sealed separately from the other articles and taken into possession vide Ex. PW 5/C. The neck tie is Ex. P1, belt is Ex. P2 and the shirt is Ex. P3. He recorded the statements of Yash Pal Singh (Ex. PW 5/A) and PW 10 Raja Ram. He sent the dead body for the purposes of post mortem. The post mortem on the dead body of the deceased was conducted by Dr. LT. Ramani, (PW 7). The post mortem report relating to the same is Ex. PW 7/A. He prepared the site plan Ex. PW 17/E. He also got prepared a scaled site plan through Inspector Devinder Singh (PW 6) vide Ex. PW 6/A. He collected photo copy of attendance register from R.K. Public School (vide Ex. PW 14/A). The packets containing the different articles such as clothes of the deceased and the shirt of the appellant and other articles were sent to C.F.S.L. through Constable Brahma Nand (PW 11). The reports in this connection are Ex. PX, PY & PZ.

6. After completing the investigation a charge sheet was submitted against the appellant before the Magistrate concerned. The learned Magistrate was of the view that the instant case was exclusively triable by the Court of Session. He thus committed the appellant to the Court of Session for standing his trial before the said Court under Section 302/364 of the Indian Penal Code.

7. The learned Additional Sessions Judge on the appraisal of the evidence, documentary as well as oral, was of the view that the prosecution had succeeded in bringing home the guilt to the appellant under Section 302/364 of the Indian Penal Code. In view of the above, the appellant was convicted under the said Sections and sentenced to different terms of imprisonments, referred to above.

8. Aggrieved and dis-satisfied with the said judgment and order the appellant has approached this Court.

9. The learned counsel for the appellant Mr. Rana has contended with great zeal and fervour that there is absolutely no evidence worth the name on record against the appellant to warrant a finding of conviction. There is no ocular evidence with regard to the alleged murder. The judgment of the learned lower court is based on surmises and conjectures. The learned Additional Sessions Judge while doing so

was oblivious of the fact that in case of circumstantial evidence the chain of the circumstances must be a complete one, and the circumstances appearing against the accused must be of conclusive in nature, and the established facts on record must be incapable of Explanationn on any other hypothesis except the guilt of the accused and must be inconsistent with his innocence. Judged by that standard the prosecution, according to the learned counsel, has miserably failed to prove the guilt of the appellant.

10. The learned P.P. Mr. Anil Soni has urged to the contrary.

11. There is no dispute with regard to the proposition of law put forward by the learned counsel for the appellant that in case of circumstantial evidence the circumstances which are a pointer towards the guilt of the accused must be conclusive in nature and must be incapable of Explanationn on any other hypothesis except the guilt of the accused. Further more, the circumstances which appear in evidence against the accused must be inconsistent with his innocence.

12. Before embarking upon a detailed discussion of law and evidence on this point in the present case, we would like to illustrate the above view with the help of certain authorities. It was observed by the Hon'ble Supreme Court as : 1982 CriLJ1243 , Gambhir v. State of Maharashtra 'The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three 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 cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of Explanationn of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.'

13. To the same effect are the observations of the Hon'ble Supreme Court in the case : 1979 CriLJ1310 Pohalya Motya Valvi v. State of Maharashtra and : 1979 CriLJ1057 State (Delhi Administration) v. Bulzarilal Tandon.

14. The above view was again reiterated in 1987 C.C. Case 82 : : 1987 CriLJ1857 Kansa Behera v. State of Orissa 'It is a settled rule of circumstantial evidence that each one of the circumstances have to be established beyond doubt and all the circumstances put together must lead to the only one inference and that is of the guilt of the accused'

15. There is no doubt that the deceased was studying in R.K. Public School. According to the case of the prosecution the sister of the deceased PW 1 Km. Shilpi, aged 4 years, was also studying in the same school along with him. PW 15 Smt. Tapesra Devi used to drop both the children in the said school in the morning. She used to collect the children after the school hours (vide the statement of PW 1 Km. Shilpi, PW 2 Smt. Nirmala and PW 9 Bhagwan Singh). As usual the deceased along with his sister was taken to the school by their grand-mother, PW 15, Tapesra Devi on 4th September, 1989. She went to the school again to collect the children from the school after school hours. She found to her dismay and horror that the deceased was missing whereas PW1 Km. Shilpi only was available. She enquired of her as to where her brother was Whereupon she was told that the appellant had come to the school during the recess and had taken away the deceased on the pretext that someone was waiting for him at the bus stand. The deceased left his bag in the custody of his sister PW 1 Km. Shilpi. To the same effect are the statements of PW 1 Km. Shilpi, PW 2 Smt. Nirmala, mother of the deceased, and PW 14 Smt. Janak, Principal of R.K. Public School (vide Ex. PW 14/A).

16. The learned counsel while animadverting on the above evidence with regard to the fact that the deceased was last seen in the school by the above named witnesses has contended that no reliance can be placed on the statement of PW 1 Km. Shilpi. According to the learned counsel, she is a child of tender years. She is unable to make an independent statement. She is amenable to the influence of her elders as well as that of her superiors. Thus she can be tutored. The learned

counsel in support of his argument had laid a lot of stress on the statement of PW 1 Km. Shilpi in her cross-examination wherein she has admitted that whatever she has stated before the court she has done so at the instance of her father. The learned counsel thus wants to infer there from that PW 1 Km. Shilpi is a tutored witness and as such her statement is liable to be ignored and no reliance should be placed thereupon.

17. We are sorry we are unable to agree with the contention of the learned counsel. We are of the view that in the case of evidence of a child some sort of relaxation must be given while assessing his evidence keeping in view his age and tender years. We feel that children never tell lies. They are closer to Nature and God. In fact, they are taught to tell lies. If they are left to themselves, they would never do so. Thus we feel that in case the testimony of a child is worthy of placing reliance in a particular set of circumstances and inspires confidence and is corroborated by other evidence, there is no reason why a child should not be believed. After all he is a competent witness under section 118 of the Evidence Act. We are tempted here to cite the observations of the Hon'ble Supreme Court as : 1981 CriLJ746 Suresh v. State of U.P., wherein their Lordships while relying on the testimony of the child observed as under :

'..... Coupyed with these considerations is the fact that the basic evidence in the case is of a child of five who answered many vital questions with a nod of the head, one way or the other. A witness who, by reason of his immature understanding was not administered oath and who was privileged, by reason of his years, not to make his answers in an intelligible and coherent manner is unsafe to be trusted wholesale. We cannot also overlook, what Shri L. N. Gupta highlighted, that Sunil's statement was recorded about 20 days later. There is valid reason for the delay, namely, his state of mind (he was a witness to the murder of his mother and an infant brother) and the state of his body (he was gagged as a result of which his clavicle was fractured). 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'

18. Thus the mere fact that PW 1, Km. Shilpi admitted being tutored by her father would not ipso facto wash her evidence off the record. A close scrutiny of her statement reveals that her testimony was never challenged by the learned counsel during the course of her cross-examination on the point that the appellant came to the school and then took her brother away on the pretext that he was being called by someone who was waiting for him at the bus stand. Thus her statement on this point goes unchallenged and remains uncontroverted.

19. Besides the above, her statement is fully corroborated by the statement of PW14 Smt. Janak who took the attendance of the class in which deceased studied on the fateful day and found him present in his class, and her mother Smt. Nirmala (PW2) who has deposed to the fact that the deceased was sent to the school on the ill-fated day along with his sister PW1 Km. Shilpi. Then there is the statement of PW15 Smt. Tapesra who dropped the deceased at the school. The prosecution has also placed on record a photocopy of the attendance register (Ex. PW14/A) in order to substantiate the above point that the deceased was present in the school on September 4, 1989. It is true, as argued by the learned counsel, that the entry in the attendance register with regard to the presence of the deceased on September 4, 1989 is not very clear and legible. It appears that initially 'A' was being recorded against the name of Amit. Subsequently it has been changed to 'P'. However, we need not go into that controversy since the statement of PW14 Smt. Janak, Principal of the School, is very much categorical and unequivocal that the deceased was present in the class on the said date. A close scrutiny of the extract from the attendance register reveals that there were three Amits in the class. Thus it is possible that there might have been some confusion while recording their attendance, specially in view of the fact that Smt. Janak (PW14) is the Principal of the school and was taking the class of Amit due to the regular teacher being on leave on that day.

20. It is in the statement of PW2 Smt. Nirmala, mother of the deceased, that the appellant was initially quite close to her as the mother of the appellant helped her during the birth of her younger son. She used to treat the appellant as her own son. This fact has been admitted by the appellant during his statement recorded under Section 313 Cr.P.C. However, subsequently the appellant started casting

amorous glances at her. She objected to the ogling by the appellant. Thus by spurning his advances she incurred his wrath. According to her, there was a quarrel in between her and the appellant on August 4, 1989 and a report to that effect was lodged with the police on the said date (vide Ex. PW2/DA). Smt. Nirmala is alleged to have sustained injuries in the said quarrel as the appellant hit her with a helmet on her nose. However, later on the said matter was compromised (vide Ex. PW2/DB) on the condition that the appellant would neither talk to her nor would have any connection, whatsoever, with her and would not quarrel with her in future. The terms of the said compromise are very much relevant and material to substantiate the version of PW2 Smt. Nirmala that the appellant was misbehaving with her. She has further stated that the appellant threatened her in case she would bring this fact to the notice of his parents he would kill the whole family. The appellant is further reported to have pressurised her to sign certain papers which she was stated to have done so on account of fear. We further find in her statement that once when she went to her village the appellant followed her and informed her and her other relations that her husband had fallen ill and as such her presence was required at her house in Delhi to look after her husband. She consequently returned to Delhi and found her husband hale and hearty. The appellant, it is clear from above, made use of every possible ruse to bring Smt. Nirmala back to Delhi. This again substantiates that the appellant was bent upon to have her in one way or the other. However, she did not submit to his advances. It thus can be safely concluded from above that the appellant was having strained relations with the mother of the deceased and thus he had a motive to commit the alleged offence.

21. PW18 Inspector D. N. Kaushik has deposed to the fact that the appellant made a disclosure statement (vide Ex. PW8/A) and got the dead body of the deceased and the clothes and other articles recovered from Shamli, district Muzaffarnagar. The dead body is reported to have been recovered at the instance of the appellant from a sugarcane field whereas the other articles were recovered from a garbage near V.V. Degree College, Shamli wherefrom a shirt, a belt, a neck tie and a piece of rope were recovered (vide Ex. PW5/B, C, D & E). This again is a link which completes the chain of circumstances against the appellant. Admittedly, the murder is alleged to have been committed on September 4, 1989. The recovery is

alleged to have been effected by the police from Shamli, District Muzaffarnagar on September 5, 1989. The police could not have thought of even in their wildest of dreams that the dead body Along with the wearing apparels of the deceased would be recovered from such a distant place i.e. Shamli, District Muzaffarnagar. This fact admittedly must have been within the knowledge of the appellant and none else. Thus the disclosure statement is worth placing reliance and we can repose confidence safely on the same.

22. Furthermore, the appellant is alleged to have been arrested from DTC Bus Terminus at I.S.B.T. His shirt (Ex. P7) was found to be blood stained and the same was taken into police custody vide Ex. PW 8/B (vide the statement of PW 19 SI Raj Singh). The said shirt was subsequently sent to the C.F.S.L. The reports of the C.F.S.L. in this regard are Ex. PX, PY & PZ. A perusal of the said report reveals that the blood group of the deceased was 'O'. The blood of the said group as per the said reports was found on the bush shirt of the appellant. This again connects the appellant beyond any shadow of doubt with the murder of the deceased.

23. Learned counsel for the appellant Mr. Rana has vehemently contended that the F.I.R. in the instant case was lodged with the police after the recovery of the dead body from Shamli, District Muzaffarnagar and the present case which was a case of blind murder was foisted on the appellant. We are sorry we are unable to agree with the contention of the learned counsel as the same, we find, is without any substance. Had the contention of the learned counsel for the appellant been correct, in that eventuality the F.I.R. which was recorded with regard to the kidnapping of the deceased under Section 363 of the Indian Penal Code would not have been recorded under the said Section. There was no impediment or any kind of obstruction in the way of the police in recording the F.I.R. under Section 302 of the Indian Penal Code.

24. The learned counsel has led us during the course of his arguments through the statement of PW 15 Smt. Tapesra Devi, grandmother of the deceased, and has argued that she was not in a position to tell any thing about the school where she is alleged to have dropped the deceased and his sister for the purposes of their studies. She neither could tell on being asked the distance in between the house

and the school. She could also not tell the name of the school on being asked. Then she was unable to tell how big the school was. She further could not give reply as to whether it was single storey or double storey. She was also not in a position to give any reply to the question whether any peon or watchman stood at the gate of the school. The learned counsel in view of the above wants us to conclude there from that Smt. Tapesra Devi never dropped the children at the school as asserted by her. The contention of the learned counsel does not hold any water.

25. Admittedly, Smt. Tapesra Devi is an illiterate person. She is a resident of village Lakhan, District Chhapra (Bihar). Thus there is nothing strange if she was unable to give replies to the above questions asked by the learned counsel from her during the course of her cross-examination. Hence, we find that there is nothing unusual in her cross-examination to render her testimony unworthy of credence.

26. The learned counsel has then argued that all the three witnesses namely, PW5 Yash Pal, PW8 Ram Phal and PW10 Raja Ram who are the members of the public have not at all supported the case of the prosecution. Thus it renders nugatory the entire prosecution version. The learned counsel wants us to ignore the said statements. We feel the contention of the learned counsel is devoid of any merit.

27. It is well-established principle of law that the mere fact that a witness has turned hostile and not supported the case of the prosecution is no reason to ignore his statement in entirety. Such statements can be used and relied upon, if they find support from other evidence on record. We are supported in our above view by the observations of the Hon'ble Supreme Court as : 1976 CriLJ203 Bhagwan Singh v. State of Haryana The fact that the witness was declared hostile did not completely efface his evidence; it remained admissible in the trial. Since his testimony was corroborated by other evidence, there was no legal bar to base his conviction upon it.'

28. To the same effect are the observations made by the Hon'ble Supreme Court in a subsequent case : 1979 CriLJ1374 Syed Akbar v. State of Karnataka,'

Even in criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other testimony which he finds to be credit-worthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto.'

29. Let us now examine the evidence of the above witnesses in the light of the observations referred to above.

30. PW5 Yash Pal is retired Naib Tehsildar. He is a graduate. He is a resident of Shamli. He has stated before the court that he did not know anything about this case. However, on being cross-examined by the learned P.P. he has admitted his signatures on all the recovery memos i.e. Ex. PW5/B, Ex. PW5/C, Ex. PW5/D, Ex. PW5/E and Ex. PW5/F. Thus if he was not joined in the investigation by the police how he could have signed the said recovery memos Admittedly, he has been an officer of the Government. He is a qualified person, being a graduate. He has further admitted on being cross-examined that during his service career he never signed on the blank papers. Hence his contention that his signatures were obtained on blank papers does not, stand to reason and nobody would believe him on this point. We conclude in view of the above that he made a false statement to help the appellant.

31. PW8 is Ram Phal. Initially he supported the case of the prosecution. However, during the course of his cross-examination by the learned counsel for the appellant he took a somersault and went back on his previous statement made before the court. However, this much has been admitted by him during the course of his cross-examination by the learned counsel for the appellant that the shirt (Ex. P7)

of the appellant was seized and sealed by the police in his presence, though, he says, at the police station and not at the I.S.B.T. as stated by him earlier. Thus this fact that the shirt of the appellant was seized by the police is admitted by him in unequivocal terms and this part of his statement lends supports to the case of the prosecution.

32. This brings us to the statement of PW10 Raja Ram. He is a witness with regard to the identification of the dead body of the deceased. He also went back on his statement. However, during the course of the cross-examination by the learned P.P. he admitted his signatures on the identification memo Ex. PW10/A. His statement, we feel, is not of much avail inasmuch as the same is confined to the identification of the dead body of the deceased. Admittedly, there is no dispute with regard to the fact that Amit is dead. His dead body was identified by his father i.e. PW9 Bhagwan Singh.

33. In the above-stated circumstances, we do not see any justification to take a view different from the view taken by the learned Additional Sessions Judge. We do not see any justification to interfere with the impugned judgment and order and the appeal is as such liable to be dismissed. The appeal is accordingly dismissed.

34. Appeal dismissed.