

Jetha Ram Vs. State of Rajasthan

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Court : Rajasthan

Decided On : May-21-1985

Reported in : 1985(1)WLN581

Judge : S.K. Mal Lodha and; S.B. Byas, JJ.

Appeal No. : D.B. Criminal Appeal No. 14 of 1981

Appellant : Jetha Ram

Respondent : State of Rajasthan

Disposition : Appeal allowed

Judgement :

S.K. Mal Lodha, J.

1. This appeal is directed against the judgment of the learned Additional Judge (2) Hanumangarh dated December 1980, by which the appellant Jetharam was convicted Under Section 302, I.P.C. and was sentenced to imprisonment for life with a fine of Rs. 3000/-, in default of the payment of fine to further undergo three years' rigorous imprisonment.

2. Succinctly stated, the facts and circumstances leading to the prosecution and conviction of the appellant are as follows.

3. Mst. Bhuri the deceased victim in the case, aged about 40 years, was the wife of PW 3 Ganpat and mother of PW 4 Guddi. They were living in village Meshitawali P.S. Tibi district Ganganagar. The appellant is also a resident of the same village and his house is situate not far away from that of Ganpat. A day prior to the occurrence (December 23, 1979) while Ganpat's daughter was coming to her house with a bundle of grass through the field of the appellant, his wife picked-up some quarrel with the girl. This led to an exchange of abuses between the wife of the appellant and Mst. Bhuri. PW 2 Madu Nayak intervened and separated the two women. At about 4.00 P.M. on December 23, 1979, Mst. Bhuri went to shop of PW 1 Ramchandra Arora to purchase Gur. Her daughter Guddi (PW 4), aged about 9-10 years and her son younger to Guddi, also accompanied her. No Gur was available at the shop of Ramchandra. Mst. Bhuri and her children returned from the shop to go to their house. The appellant met them sitting near the corner of Ram Chandra's house. He had a Kassi in his hand. The appellant ran after Mst. Bhuri with Kassi in his hand. Mst. Bhuri ran in panic to save herself and the accused followed her. He struck a blow of Kassi to Mst. Bhuri which fell on her hand. Mst. Bhuri fell down. The accused there after struck 4-5 blows on the head and other parts of Mst. Bhuri with the Kassi he had with him. There was profuse bleeding from the wounds of Mst. Bhuri. PW 1 Ramchandra came running on the spot and challenged the accused. Madu (PW 2) and Hariram also came there. The accused managed to run away. Guddi and her brother went to their father Ganpat who was working in the field of one Khinya Suthar and apprised him of the incident. Ganpat came to the spot and found Mst. Bhuri lying dead. He immediately left the place to go to Police Station, Tibi where he reached at about 1.30 p.m. He there verbally lodged report Ex. P 2 of the occurrence. The police registered a case and proceeded with the investigation. The Station House Officer Jagdish Prasad (PW 6) arrived on the spot on December 24, 1979. He inspected the site and prepared the inquest of the victim's dead body. The blood-stained soil was lifted from the site and was sealed. Some articles were also seized and sealed. The autopsy of the victim's dead body was conducted on December 24, 1979 by PW 5 Dr. Narendra Singh Godara the then Medical Officer Incharge, Government Hospital, Hanumangarh. The doctor noticed the following injuries on the victim's dead body:

External:

- (1) Incised wound 5' x 3' on the left side of neck. The spinal cord, vertebrae are cut at level of C 3 and C 4. The blood vessels are cut on left side
- (2) Incised wound 3/2' x 1/2' on left side of face. Bone deep-mandible fractured. Wound extending upto left ear. Left ear was also out. Bone deep
- (3) Incised wound 3' x 1' x 1' below left ear
- (4) Incised wound 4' x 1-1/2' left temporo parietal part of scalp. Bone deep
- (5) Incised wound 2' x 1-1/2' x Bone deep. Dorsal surface of right hand. Hand near left little finger metacarpal bone was cut

Internal:

- (1) Fracture of 3rd and 4th cervical vertebrae
- (2) Mandible left side
- (3) Metacarpal bone of right little finger

4. In the opinion of Dr. Godara, the cause of death of Mst. Bhuri was shock due to severe haemorrhage from large vessels of the neck and injury to spinal cord. He was further of the opinion that injury No. 1 alone and all the injuries collectively were sufficient in the ordinary course of nature to cause the death. The report of autopsy issued by him is Ex. P 3. The accused was arrested on December 24, 1979 and in consequence of the information furnished by him, Kassi alleged to have been wielded by him in inflicting the blows to Mst. Bhuri was recovered. The blood-stained clothes of Mst. Bhuri were also seized and sealed. Some of the articles were sent for chemical examination. Kassi was found stained with blood. On the completion of investigation, the police submitted a challan against the appellant in the Court of Judicial Magistrate, Hanumangarh, who in his turn, committed the case for trial to the Court of Sessions Judge. The learned Additional Sessions Judge framed a charge Under Section 302, I.P.C., to which the accused pleaded not guilty and claimed absolute innocence. He denied that he had killed

Mst. Bhuri. According to him, he has been falsely impleaded merely on suspicion. In support of its case, the prosecution examined six witnesses and filed some documents. In defence, no evidence was adduced by the accused. On the conclusion of trial the learned Additional Sessions Judge found the charge duly established against the appellant. The appellant was consequently convicted and sentenced as mentioned at the very out-set. Aggrieved against his conviction, the accused has come-up in appeal.

5. We have heard Shri Rajendra Singhvi the learned Amicus Curiae for the accused and Mr. Niyazuddin Khan the learned Public Prosecutor for the State. We have also carefully gone through the case file.

6. Before proceeding further, it may be pointed out that the learned Amicus Curiae did not challenge the testimony of Dr. Godara (PW 5) relating to the cause of death of Mst. Bhuri. We have also gone through the testimony of Dr. Godara, and find no reason to distrust his opinion about the cause of death of the victim. Five external and three internal injuries were found on the victim's dead body. Injury No. 1, according to Dr. Godara, was sufficient in the ordinary course of nature to cause the death. Further, according to him, the injuries were collectively also sufficient in the ordinary course of nature to cause the death. The death of Mst. Bhuri was, thus, homicidal and not natural.

7. It may be recalled that the prosecution has examined six witnesses in all. PW 5 is Dr. Godara and PW 6 Jagdish Prasad is the Investigating Officer. The remaining four are PW 1 Ramchandra, PW 2 Madu, PW 3 Ganpat and PW 4 Guddi. Guddi (PW 4) is the ocular witness of the incident and PW 2 Madu is also alleged to have reached the spot and had seen the accused fleeing from the site towards his house. PW 1 Ramchandra has also been alleged to have seen the occurrence and reached the spot while the appellant was still landing blows to the victim. It was on his intervention that the accused took to heels. Unfortunately, PW 1 Ramchandra turned hostile to the prosecution and lent no support to it. The testimony of PW 3 Ganpat is more or less of formal nature, adding nothing material against the accused. The learned Additional Sessions Judge accepted PW 4 Guddi as a witness of absolute truth. He further relied upon PW 2 Madu and held that this

witness had seen the appellant running away from the site. The hostile attitude of PW 1 Ramchandra was taken of no importance in view of the direct testimony of PW 4 Guddi and the corroborative evidence of PW 2 Madu. It is in this back ground that the accused was convicted and the charge was taken as duly brought at his door steps.

8. In assailing the conviction, it was vehemently contended by Mr. Singhvi that the trial court crept into an error in accepting PW 4 Guddi as a witness of truth. She was a child of nine years' age. She did not understand the sanctity of oath and as such oath was not administered to her. She did not narrate the incident to PW 2 Madu who, admittedly, arrived on the spot while the accused was on heels. In site memo Ex. P 5A, it has been specifically mentioned as to where PW 1 Ramchandra was sitting and has witnessed the occurrence from there. But curiously enough, the presence of Guddi has not been shown in Ex. P 5A. It shows that she was later-on falsely introduced as ocular witness of the incident. It was further argued that a record of the questions put to Guddi in her preliminary examination to test her competency to testify was not maintained. In her statement, Guddi deposed that she was giving the statement as was directed by her father (Ganpat PW 3). It was only later on when she was questioned by the trial court that she corrected herself. It was argued that it would not be proper and at any rate free from risk in basing the conviction of the appellant on the sole testimony of a child witness, particularly when heavy suspicious circumstances are there to damage her testimony. It was further argued that PW 2 Madu is a witness with no regard for truth. He did not depose before police during investigation that when he arrived on the spot of occurrence, Guddi (PW 4) told him that her mother was assailed and belaboured by the appellant. It was urged that in view of these grave infirmities, the conviction should not be maintained.

9. It was, on the other hand, contended by the learned public prosecutor that the evidence led in by the prosecution was properly weighed, scrutinised and scanned by the court below. The presence of Guddi (PW 4) on the spot is quite natural, She accompanied her mother throughout when she went to the shop of Ramchandra to purchase Gur. Guddi was found competent to testify and though she did not understand the sanctity of oath yet it was found that she understood that one

should speak truth and avoid lies. Though a record of the questions put to her in preliminary examination was not kept, it can be gathered from the statement given by her that she had a rational understanding and was competent to testify. The evidence PW 2 Madu was also not open to any challenge. He has seen the accused running away towards his house. We have taken the respective submissions into consideration.

10. It may be stated at once that the fact of the prosecution case looms largely on the testimony of PW 4 Guddi. In case she is taken to be a witness of truth and her testimony is found reliable and dependable, there is no escape for the appellant. But in case she is not taken to be a witness of truth, there is no other formidable evidence in the prosecution camp to connect the appellant with the murder of Mst. Bhuri.

11. PW 4 Guddi is admittedly a child witness. The competency of child witness to testify, his credibility and the evaluation, of his testimony have always been intricate questions. Manu-the earliest Jurist of Global reorganization placed a child in the category of those persons who were not competent to testify;

u lk{kh-----AAu o`/nks u f'k'kSu dks uk UR;ks u foDysfUnz;% AA66AA

The reason assigned by him is:

ckyc`/nkrqjk.kka o lk{k;srq onrka e`x AA

tkuh;knfLFkrk okpeqfLrscyeukalk rFkk AA71AA

But Manu also felt the difficulty that at times the only witness available of the occurrence may be a child witness e.g. the offence has been committed in a house where no person other than a child was present. In that contingency, Manu allowed the child to be a competent witness:

fL=;kal;laHkos dk;Z ckySu LFkfojs.k ok AA

f'k';s.k cU/kquk okfil nklsu Hkwrdsu ok AA70AA

Coming to the modern era, Section 118 of the Evidence Act lays down a general rule that every person, irrespective of his age, is competent to testify unless he is found incompetent due to the reasons mentioned therein. Section 118 makes the understanding as the sole test of the competency of a witness. Therefore, the competency of child to give evidence depends not on his age but the degree of his understanding. The sections lays emphasis on the understanding and not on the age of a witness.

12. Now, there is a general belief that a child is artless, innocent and uncrafty. But at the same time, a child is susceptible to external influences and can be easily tutored as to what he is to speak in a court. Once the child has been influenced and tutored to give a particular statement, he fails to distinguish between that he has seen and what he has been tutored due to his raw understanding and softness of brain. Therefore, while assessing and evaluating the testimony of a child witness, the possibility of his being tutored and influenced, especially when there is an opportunity for doing so, will have to be consistently kept in view. If after carefully scrutinizing the testimony of a child witness, it appears pure, serene and unpolluted from external influences, it is entitled to the highest credit.

13. This court had the occasions from time to time to decide the questions of the competency and credibility of a child witness. Recently in *Mst. Dhapi v. State of Rajasthan* 1983 RLW 80 decided by one of us Hon'ble S.K. Mal Lodha, J.) (on a reference made due to difference of opinion between two learned Judges of a Division Bench of this Court), various text-books and the decisions of this Court and of Supreme Court were noticed. It was observed in para 10 of the judgment:

The tender years of the child, coupled with other circumstances appearing in the case such for example as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary, but this is a question of fact in every case. Corroboration is not a rule of prudence but of practice. The court should not lightly rely upon an uncorroborated evidence of child witness unless after adopting all precautions it is considered reliable. The statement of a child witness should be scrutinized with 'extreme care and caution' when he is the only eye witness.

14. The position, therefore, boils down to this that the courts are generally chary and reluctant of putting absolute reliance on the evidence of a solitary child witness and look for corroboration of the same from other circumstances in the case. When the only witness speaking about the occurrence is a child witness, extreme care and caution is required in scrutinizing his testimony.

15. Turning to the case in hand, PW 4 Guddi is the daughter of the deceased-victim. Her father is PW 3 Ganpat. Her age has been shown to be of nine/ten years in her statement recorded during trial. In the Voir Dire she was found as to have no understanding for the sanctity of oath. As such, oath was not administered to her. She deposed that at about 4.00 p.m. on the day of occurrence, her mother went to the shop of Ramchandra (PW 1) to purchase Gur. She and her younger brother Pappu accompanied their mother. No Gur was available at the shop of Ramchandra (PW 1). While the three were returning to their house, the accused met them near the corner of the house of Ramchandra (PW 1). The accused had a Kassi with him. He lifted the Kassi to strike her mother. Her mother ran towards the house of Ramchandra and the accused followed her. He struck a blow of his Kassi on the wrist of her mother. She fell down. Thereafter the accused struck five more blows on her mother's head, cheeks and other parts. There was profuse bleeding from her wounds. Ramchandra came there while the accused was still striking the blows to her mother. Ramchandra asked the accused as to why he was killing her mother. The accused thereafter took to heels. She further stated that Hariram and Madu (PW 2) also came there. She and her brother went to her father who was working in the field of Khinya Suthar. She apprised him of the incident. In her cross-examination she admitted that when she and her mother were at the shop of Ramchandra (PW 1), Hazari Nayak and two other Jats came to pass that way. She further admitted that when the accused ran after her mother, some of these persons also challenged the accused. In her police statement Ex. D-3 with which she was confronted, she did not depose that Madu (PW 2) and Hariram had also arrived on the spot and that she narrated the incident to them as to who had struck blows to her mother. In Ex D-3 she had named only Ramchandra (PW 1) as the person who had arrived on the spot and challenged the accused. In her cross-examination, she further admitted that she was tutored by her father (Ganpat PW

3) to give the statement in particular manner in the Court. Of course, on court-question she corrected herself and denied that she was tutored by her father. But the truth of her being tutored by her father slipped from her tongue. In F.I.R Ex P 2 lodged by her father Ganpat (PW 3), it has been stated that Guddi went to him alongwith, her brother and told him that the accused had killed her mother. It does not transpire from the contents recited in F.I.R. Ex P 2 that she had seen the occurrence. In Ex. P. 2, the whole incident had been recited on the basis of the information given to Ganpat (PW 3) by PW 1 Ramchandra When Ganpat arrived on the spot and contacted Ramchandra (PW 1) he learnt from him how the incident had taken place. It has not been mentioned in FIR Ex. P. 2 that the incident was narrated to him by this witness Guddi (PW 4).

16. There are certain other striking features also which persuade us to hold that Guddi (PW 4) has been falsely introduced as an ocular witness of the occurrence. The Investigating Officer arrived on the spot and prepared the site plan-Ex. P. 5 and site inspection memo Ex. P. 5-A. In memo Ex P. 5-A, the place has been shown where Ramchandra (PW 1) was standing and from where he had seen the occurrence. Curiously enough that place has not been shown in Ex. P. 5-A where this witness Guddi (PW 4) was standing and from where she had seen the occurrence. In fact, in Ex. P. 5-A, the name of Guddi has not, at all, been mentioned. This is a serious infirmity and damages the prosecution case beyond repair. In Ex. P 5-A, the name of Gnddi has not been mentioned and the place where she was standing at the time of the incident has also not been shown because of the simple reason that she was not present on the spot where the incident had taken place. The learned Sessions Judge sought corroboration from the statement of PW 2 Madu. According to him, when Madu arrived on the spot within a few seconds of the occurrence, Guddi (PW 4) narrated the incident to him and told that her mother was killed by the accused. The learned Sessions Judge was not correct and crept into an error in seeking corroboration from the statement of Madu (PW 2). In his cross-examination, Madu was confronted with his police statement Ex. D 1, recorded during investigation. In Ex D 1, he did not state that Guddi narrated the incident to him. In portion E to F with which he was confronted, he stated that when he arrived on the spot it was Ramchandra (PW 1) who narrated the incident to him. He has not stated therein that it was Guddi (PW 4)

who apprised him of the incident. Therefore, the statement of Madu (PW 2) renders no corroboration to the testimony of Guddi (PW 4). The matter would have been otherwise if Guddi (PW 4) would have gasped out the incident to Madu (PW 2) when he arrived on the spot after the occurrence had taken place. Taking these various infirmities into consideration, the testimony of Guddi (PW 4) does not inspire confidence. At any rate, she is not a witness of truth. The possibility of her being tutored by her father cannot be totally ruled out. We are, therefore, unable to maintain the conviction of the accused on the sole testimony of PW 4 Guddi. At any rate, maintaining the conviction on her uncorroborated testimony would not be free from risk. She does not appear to be a witness of sterling worth, on whose uncorroborated testimony the conviction can be safely maintained.

17. As stated earlier, PW 1 Ramchandra, who has been cited as an eye witness in FIR Ex. P. 2, has lent no support to the prosecution. He is Arora by caste and is not related to either party. The accused is a Chammar by caste. Ramchandra (PW 1) is an independent person having no bias against the deceased and no soft corner for the accused. It is difficult to imagine that he would conceal the truth. There are no reasons that had he seen the occurrence, he would have not stated the same during trial. We have pointed out earlier that according to PW 4 Guddi, some persons who were standing at the shop of Ramchandra (PW 1) had challenged the accused. But none of them has been cited by the prosecution in the calender of witnesses, nor any of them has been examined during trial. The reasons for not citing and examining them in evidence are obscure. Anyway, it leaves the impression that the prosecution is guilty of with holding the material evidence.

18. For the reasons stated above, we are unable to maintain the conviction of the accused.

19. In the result, the appeal of accused Jetharam is allowed. His conviction and sentence under Section 302, I.P.C. are set aside and he is acquitted of the said offence. He is in custody and shall be forthwith set at liberty if not wanted in any other case.

