

Santosh Mandal Vs. State

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Court : Kolkata

Decided On : Sep-13-1982

Reported in : 1983CriLJ773

Judge : B.C. Chakrabarti and ;N.G. Chaudhuri, JJ.

Appellant : Santosh Mandal

Respondent : State

Judgement :

B.C. Chakrabarti, J.

1. This is an appeal from an order of conviction and sentence of imprisonment for life passed by the learned Sessions Judge, Howrah in Sessions Trial No, 18 of July, 1978.

2. The prosecution case as made out in the F.I.R. (Ext. 1) is as follows:

The accused and the deceased, Nemai Mondal were two brothers who lived in the same homestead with a common courtyard. Both of them worked in the same Jute Mills. The accused is addicted to drinks and unruly in character. About six months before the incident, the accused had severely beaten Nemai as a result of which Nemai had to undergo treatment at the Hospital for a considerable time. About one and half month before the incident, Nemai came back home on being released

from the Hospital. On the relevant day that is 31-1-1977, the informant who happens to be the wife of the deceased, went to Bauria market for selling vegetables, leaving her husband and the daughters at home. At about mid-day, Sabitri, mother-in-law of the informant and her nephew Haradhan informed her that the accused returned from the mills at about 9 a.m. and picked up quarrel with Nemai and in course of the quarrel the accused hit Nemai severely with a bamboo stick causing thereby multiple injuries on different parts of his body including the head and chest. On getting this information, the informant rushed back home and found her husband lying unconscious in the courtyard. On reaching home she removed the victim to the room. In the afternoon she tried to contact the local doctors but none was available and her attempt to remove the victim to the hospital also failed. He died on the early hours of the morning of 1-2-77. Thereafter she came to the Uluberia P.S. and lodged the information. The P.S. is about 8 k.m. from the village of occurrence and the incident was reported at about 8.45 a.m.

3. The Officer-in-Charge of the P. S., P. W. 10 thereupon took up investigation of the case, visited the place of occurrence held inquest on the dead, body, examined witnesses and arranged for the post-mortem examination of the deceased. The accused was not available until 14-2-77 when on the basis of some information the accused was apprehended, After completion of investigation charge-sheet was submitted against the accused under Section 302 of the I. P. Code.

4. The accused pleaded not guilty. It was suggested during trial that the victim might have received the injuries under different circumstances.

5. Ten witnesses were examined for the prosecution and none for the defence.

6. P. W. 1 is the wife of the deceased Nemai Mondal. As it appears from her evidence and, the F.I.R. that she was not a witness to the occurrence. She stated that once before her husband was severely beaten by the accused for which he had to undergo treatment at the Hospital for about five months. She conceded however, that no criminal case was started over that incident. She also admitted that previously her husband entertained some suspicions about her fidelity but

categorically denied the suggestion that she was not in good terms with her husband. P. W. 2 Surya Kanta Bera is a witness to the inquest held by the I. O. At that time he saw the dead body lying on the courtyard,

7. P. Ws. 3, 4 and 5, Haradhan, Shyamali and Bhawani are witnesses of tender age. They were aged 12 years, 7 years and 9 years respectively. They claimed to be witnesses to the incident, P. W, 3 is a nephew of the accused and the deceased (sister's son). P. Ws. 4 and 5 are daughters of the deceased. All of them have stated that the accused beat the deceased with a bamboo stick, P. W. 3 corroborated the informant by saying that he accompanied his maternal grandmother to Bauria to inform P. W. 1 of the incident. P. W. 4 besides corroborating P. W. 3 also identified the bamboo stick (Ext. 1). Though P. W. 5 materially corroborated P. Ws. 3 and 4 in regard to the incident, her evidence was rendered doubtful in view of her earlier statement to the police where she said that at the time of occurrence she had gone out to the shop.

8. P. W. 6 Kanailal Mandal is a local witness. On the relevant day while he was working in the field he got information of the marpit, later while he was returning home he was called by Nemai's mother. He came and found Nemai lying in an unconscious state in the courtyard and helped in removing the victim inside the room.

9. P. W. 7 is the doctor who held post-mortem examination on the dead body of Nemai. He found as many as 8 injuries. Of them some injuries were rather severe. There was depressed fracture of the left region of the skull with extravasation of blood underneath the scalp. There was another fracture - 8' long - on the right side of the skull extending from the vault to the temporal bone. Underneath the fracture there was big extra dural haematoma. On the chest wall there was contusion and also blood in the pleural cavity. He also noticed blood coming out of the mouth. Death in his opinion was due to the severe head injuries, which were ante-mortem and homicidal in nature. The severe injuries described, above could be caused by a bamboo stick like Ext. 1. The abrasions could be caused by a hard blunt substance. In cross-examination, the witness at first said that the injuries were fresh and might be caused within 12 to 14 hours. Then he said that the injuries

might be caused within 24 hours.

10. P. W. 8 is a constable who escorted the dead body and identified the same to the autopsy surgeon.

11. P. W. 9 is a constable who arrested the accused on 14-12-1977 from near his house.

12. And P. W. 10 is the I. O.

13. This is all the evidence in the case. The learned Sessions Judge, relying mainly upon the evidence of P. Ws. 3 and 4 concluded that Nema Mondal died as a result of the injuries inflicted by the accused. He also found that the injuries were inflicted on a vital part of the body with such vehemence and violence that knowledge must be imputed to the accused that such injuries were likely to cause death and were inflicted with the intention of causing such bodily injuries. He found that there was no suggestion or evidence of any provocation on the part of the deceased. The act of the accused came within the meaning of Section 300 I. P. Code and he was accordingly found guilty of the charge under Section 302 I. P. Code and sentenced to imprisonment for life.

14. Mr. Poddar appearing on behalf of the appellant contended that the learned Judge had not taken adequate precaution to satisfy himself that the two witnesses on whose testimony reliance was placed, were, by reason of their tender age, and immaturity competent witnesses. He also complained that no local witness was examined and also referred to some other aspects of the evidence which indicate, according to him, an attempt to suppress the real truth and an attempt to falsely implicate the appellant.

15. It is true that P. W. 4 is a child witness and P. W. 3 is, if not a child, at least a witness of very tender age. On the question of competency of witnesses, the relevant provisions of law is to be found in Section 118 of the Evidence Act. It provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age,

disease, whether of body or mind, or any other cause of the same kind. As regards child witnesses there has been a mass of case law on the subject. It is now well settled that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial judge, who notices his manners, his apparent possession or lack of intelligence and may resort to any examination which will tend, to disclose his capacity and intelligence as well as his understanding of the obligation. The decision of the trial court may however, be disturbed on review if from what is preserved in the records it is clear that he was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs.

16. In the instant case, the record shows that the learned Judge had tested, the capacity of the witnesses and found them competent, (vide order No. 5 dated 24-11-1978). Mr. Poddar however, referred to a decision in the case of Ram Hazoor Panday v. State : AIR1959 All409 and argued that it is very desirable that a trial judge should preserve on the record, apart from the child witnesses' evidence, some other questions and, answers which could help the court of appeal to come to the conclusion whether or not the trial Judge's decision on the competency of the child witnesses was right or erroneous. This decision again lays down that it is not necessary to have a preliminary examination, namely, *voire dire*, of a child witness in order to make his testimony admissible. Such a course however was considered necessary, for it offers an opportunity to the court to assess the mental capacity of the witness. The preliminary examination of the witness in order to determine competency is known as *voire dire*. In this case the learned Judge did in fact resort to a preliminary examination although no record of what questions were put and what answers were given are preserved on the record. This, in our view has not rendered the evidence inadmissible or doubtful. Keeping a record of the preliminary examination is not a condition precedent to the taking of evidence of a child witness. It may be desirable but not an invariable requirement of law, that a record of the *voire dire* should be pro-served on the record. The whole object Behind such examination is to assess whether the witness has understood the questions put and has been able to give rational answers to them. That the witnesses have stood the test would be apparent from the evidence given by them in this case. In order to guard against possible adverse comments, the learned

Judge took pains to record the evidence of these witnesses in question and answer form to make it possible for the appellate court to determine for itself whether they comprehended the questions and gave rational answers to them.

17. We have carefully considered the evidence of these witnesses and we are satisfied that they understood the questions and gave rational answers to these questions. They have stated in unmistakable terms in answer to the question as to how the victim died. They have said that the victim was killed by the accused by inflicting injuries with a bamboo stick. Mr. Poddar objected) to the manner in which the questions were put and complained that the answers were implied in the questions themselves. We are unable to agree on this point. The witnesses were asked whether Nema Mandal was dead or alive. They said he was dead. The next question necessarily was how did he meet with death. There was no impropriety in the questions put and we are unable to call them leading questions. We are in agreement -with the learned Trial Judge that the witnesses, P. Ws. 3 and 4 are eye witnesses to the Incident and that there is no reason to discard their testimony as being the result of tutoring. On the other hand there was an unwholesome attempt at tutoring P. W. 3 the other way and obviously by the defence which proved futile. He gave out in course of his evidence in chief that he was taken to the defence lawyer who advised him to depose falsely as to the incident. This statement should have been challenged in cross-examination if it was untrue. But nothing was asked with regard to it in cross-examination. This is an aspect which speaks a volume.

18. Mr. Poddar also commented upon the medical evidence given by P. W. 7. This witness has said that the injuries 5, 6 and 7, meaning thereby the more severe Injuries on the head and chest, could be caused by a bamboo stick like Ext. 1. With regard to the other injuries which were mainly bruises and abrasions on different parts of the body, the doctor said that they might be caused by a hard blunt substance. From this it was argued that the doctor categorised two different types of weapons of assault, whereas the evidence is that only a bamboo stick was used. We however fail to see any contradiction in the evidence for a bamboo stick like Ext. 1 is also a hard blunt substance the use of which might cause the other injuries as well.

19. Mr. Poddar then argued that in the opinion of the doctor the injuries might have been caused about 24 hours earlier at the most. The post-mortem was held at 2 p.m. on 1-2-77. Therefore, it was argued that the evidence suggests that the incident happened at about 2 p.m. of the previous date if not still later. The doctor's evidence as to the time is necessarily a matter of opinion and guesswork. It cannot outweigh the positive evidence that the incident happened at about 10 a.m. This little variation in the opinion and the actual state of things proved by reliable evidence is of no significance,

20. Mr. Poddar also commented on the evidence of P. W. 2 who said that at the time of inquest by the I. O. he found the dead body in the courtyard, Therefore it was argued that the evidence that the victim was taken inside the room on the previous day must be false and necessarily the evidence as to how it all occurred must also be false. This witness spoke of inquest. The family of the victim is a poor family. The wife of the victim has to sell vegetables at a far off market in order to sustain themselves. Obviously they do not live in spacious and well lighted rooms where the inquest could be conveniently held. It is quite likely that in order to facilitate proper examination, the body was brought out. There is nothing inherently improbable in that,

21. Finally Mr. Poddar argued on the absence of any neighbouring witnesses who were likely to have assembled at or after the occurrence. It is true that only one such witness namely P. W. 6 was examined,. Experience tells us that witnesses, even those who have witnessed an occurrence are some times reluctant to get involved and thereby incur the wrath of the assailant or his associates. Therefore mere absence of some likely witnesses may not always be looked upon with suspicion particularly when the evidence on record is by itself sufficient to bring home the charge. We are satisfied in this case that the charge has been well established by cogent and reliable evidence.

22. Finally, it may be pointed out that the appellant in his examination under Section 313 took a special plea of alibi by saying that at the relevant time he was at his place of employment. No evidence in that regard was forthcoming and no suggestions to the witnesses were also made in that behalf. Therefore there is no

merit in the plea.

23. Having thus considered all the materials, we find no substance in the appeal. The appeal accordingly fails and is hereby dismissed.

N.G. Chaudhuri, J.

24. I agree.

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