

**SUPREME COURT OF INDIA**

Bihari Singh Madho Singh

Vs.

State of Bihar

Crl.A.No.2 of 1954

(Mehr Chand Mahajan, C.J.I., Vivian Bose And Ghulam Hasan, JJ.)

18.03.1954

**JUDGEMENT**

**BOSE, J . :**

1. The appellant Bihari Singh has been convicted of the murder of his brother Fakira Singh and has been sentenced to death. The conviction is based on the evidence of the appellant's wife Mst. Gujri. She has been believed and ordinarily that would have concluded the matter. But the trial has been so perfunctory and the examination of the evidence so careless and uncritical that we consider it proper to exercise our special powers to set aside the conviction and acquit appellant.

2. To begin with, there is the examination of the appellant under Section 342 of the Criminal Procedure Code. Despite the repeated pronouncement of this Court about the importance of this part of a trial and despite the decision reported in ----- " Tara Singh v. The State ", AIR 1951 SC 441 (A), the provisions of Section 342, as expounded by this Court, have been disregarded and, in our opinion, grave prejudice has been caused to the appellant because of it.

3. In the Committal Court this was all the examination:

"Q. Have you heard the statement of the witnesses ?

A Yes , Sir.

Q. Did you commit the offence ?

A . No, Sir."

In the trial Court it was no better . The trial was held by the Additional Judicial Commissioner of Chota Nagpur , the learned Additional Judicial Commissioner acting as a Sessions Court.

The questions and the answers were :

" Q Did you , on 1-10-51, in your house at village Demu , tola Semri , knowingly strangle to death your brother Fakira Singh ?

A.No. Sir.

Q. Did you, on the same day or the 1st to 2nd , conceal the dead body of Fakira with this intention that you may be exonerated from the charge ?

A No , Sir.

Q. Have you got anything more to say ?

A. I have been falsely implicated."

4. The first two questions in the trial Court are cross -examination pure and simple. The very question the Court had to determine was whether the appellant had knowingly stragled his brother to death. Neither this question, nor the next, indicates any of the circumstances appearing in the evidence against him, that is to say, the circumstances which the Court intended to use as proof of the question it had to determine.

The learned Sessions Judge had no difficulty in collecting this material in his judgment. He has there summarised the eight points on which he proceeds. It was his duty to explain those points clearly and explicitly to accused and afford him an opportunity of meeting them. So also in the High court. The learned Judges held that the evidence of the wife on which the whole case rests had been wrongly admitted to evidence. She had been examined in the Committal Court but was not called at the sessions trial and the learned Additional Judicial Commissioner simply transferred her deposition under Section 288 of the Criminal Procedure Code and used it as substantive evidence without making any effort to fund out whether she was available and could be found.

This was rightly condemned and the High Court had her evidence recorded by the learned Additional Judicial Commissioner who tried the case. But the accused was not questioned afresh about this additional evidence. That answers were possible is evident from the appellant's petition to this Court and also from a perusal of the Case Diary. Had these answers been given at the proper time no Court could have disregarded them. Grave prejudice has therefore ensued. We now intend to use this matter and interpret the evidence and circumstances afresh in the light of the material now placed before us.

5. The facts are these. The deceased Fakira, the appellant Bihari and a third person Kunja were brothers who formed joint Hindu family. On the death of their father disputes arose between them and they divided the property (except one item) with the help of 'punches'. The excluded item was a 'bari' which contained standing crops of maize and Bodi. This could not be divided because the appellant Bihari claimed the crops for himself. This fact and the partition led to strained feeling between the three brothers.

The case for the prosecution is that these facts occasioned the murder.

6. According to the prosecution the deceased Fakira told his brother Kunja on Monday the 1st of October 1951 that he was going to the 'bari' that day to pluck some of the disputed Bodi. He went there accompanied by one Bhandar Singh. There was an altercation between him and the appellant. The appellant then called him inside the house and three either throttled or strangled him to death. This was about 10 in the morning. What happened to Bhandar Singh and what he was doing all this while is not explained. All that Gujri says is that this was the first time Bhandar Singh had visited her house.

7. No one saw the actual killing but, according to the wife Gujri, she was inside the house and when

she saw her husband take Fakira into the house she was "terrified and fled outside". She heard the deceased cry for help and heard sounds of strangulation. According to her examination-in-chief she met Tapu Singh (P. W. 3) outside and he asked her why she was trembling and she told him that her husband had strangled his brother to death. In her cross-examination she says she did not disclose this fact to anybody till several days later.

8. According to Tapu Singh (P.W. 3) he was at his house when he heard a "slow strangulating sound" so he went up to Gujri who was standing under a tree and asked her why she was trembling. She then told him what had happened. But he did not tell anybody either. Apart from the question of motive that is all the evidence there is to connect the appellant with the crime.

9. Gujri says that after the murder her husband locked the house and warned her not to raise an alarm or he would kill her. She however peeped in through a chink in the door and saw Fakira's toes.

10. Gujri did not sleep with her husband that night but went to a friend Mahesh Sah and slept at his house. She did not tell him about the murder and said that her husband was away and so she wanted to sleep there.

11. Nothing was known or heard of the murder till the following day when one Begul Singh, who has not been examined, is said to have told the choukidar of the village, Chandranath Lohar (P.W. 2) that Fakira had been murdered by the appellant Bihari. This choukidar told the third brother Kunja at 2 p.m. on Tuesday, and Kunja then organised a search and discovered the body under a paras tree hidden by twigs about a mile from Fakira's house. Kunja then went to the police station and lodged the first information report at 7 p.m. He accused his brother Bihari of the crime or, to be more accurate, he said he suspected his brother.

12. The police began their investigation on Tuesday the 2nd at 7 p.m. but they did not examine Tapu Singh (P.W. 3) till Wednesday the 3rd. Tapu tells us that he told no one of what he knew till he went to the police of his own accord on the 3rd. Gujri was not traceable and so was not examined till the 11th. Her evidence was recorded by the Committing Magistrate on 16-5-1952 but her regular evidence in the Additional Judicial Commissioner's Court (the sessions Court for present purposes) was not taken till 23-9-1953.

13. As we have said, the appellant was not specifically questioned about Gujri's evidence either in the committal Court or in the sessions trial. In his petition for special leave to appeal made in this Court should not be believed. Had he been questioned at the proper time about this woman he would probably have said the same thing and there is material on record to indicate that what he says is probably true. He says that she is unreliable and a woman of loose character and that the statement given by her is not her own. He says that as soon as he was arrested she ran away with her lover.

14. We have seen from her own admission that she went to Mahesh Sah's house on the night of the murder. We also know that the police could not trace her till the 11th that is to say, not until ten days later. We also know that she was not examined in the session Court and that her real evidence was not recorded till nearly two years later.

15. The deceased was a stout and well nourished young man of 20. The appellant is 35. In his petition the appellant points out the improbability of a man being able to strangle a stout youth of 20

unaided. It will be noticed that Gujri said that Bhandar Singh had also accompanied the deceased to the appellant's house that morning and does not explain what became of him. There is considerable force in the appellant's contention that one man alone could not have strangled Fakira, so it is evident that Gujri is shielding a second person, and if she is shielding him and he is, as the appellant suggested to the police, her paramour, it is equally likely that she has wrongly implicated her husband as she would, in that event, have a strong motive to get rid of him.

It is also relevant to notice that if the appellant is hanged, then, with Fakira out of the way the third brother Kunja, who put the police on the track of Bihari because of information that is said to have originated from a person who has not been called, would be in the happy position of getting for himself, except for Gujri, all the family estate.

16. It is true that Gujri was not cross-examined about all this and that of course would ordinarily be fatal but the appellant was defended as a pauper accused and the counsel assigned to him is described in the Order Sheet as one of the A.P.Ps. which we take it means Assistant Public Prosecutor. We say one of the A.P.Ps. because the counsel who conducted the prosecution has also been described as an "A.P.P." But whether that accounts for the prefatory conduct of this trial or not, it is evident to us that the counsel assigned to the appellant, whatever may have been his position, did not do his duty. Quite apart from the matters we have already indicated there were many obvious flaws in the case which require explanation.

17. The murder is said to have been committed at 10 a.m. in the house of the appellant. Tapu Singh (P.W. 3) says that he heard the sound of a man being strangled and that that was what attracted his attention and took him to the spot. He was there told about the murder by Gujri and yet he told no one. If he raised a hue and cry the murderer or murderers would either have been caught on the spot before they had a chance to escape or at least the body would have been found at once. His conduct is unnatural and inexplicable, for we cannot see what he had to fear with all the villagers around. It seems probable that he was not told at the time but much later. We have already pointed out that Gujri said in cross-examination that she did not tell this fact to 'any one' till several days later.

18. If the murder was in the "bari" the body must have lain there all day. It could hardly have been carried over a mile to the place where it was found in broad daylight. Tapu's house is close by Bihari's house because, according to Tapu, he was in his house at the time and was near enough to hear the sounds of the stragling. The choukidar's house is only 150 paces from him and he did not tell him; and not only did he not tell any one in the village but he did not even inform anyone of the many persons he must have seen at the market which he visited later that day. This is impossible conduct. Men cannot be convicted and hanged on this sort of evidence.

19. There old not seem to have been any signs of a struggle in the house, for if there had been the investigating Sub-Inspector would have told us about it, so there is no factual corroboration of Gujri's story. The only relevant evidence against the appellant is that of Gujri. For the reasons we have given, we cannot permit a conviction to be based on evidence of that character.

20. We allow the appeal, set aside the conviction and sentence and acquit the appellant. He will now be set at liberty.

Conviction and sentence set aside.

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