

SUPREME COURT OF INDIA

Rahman

Vs.

State of U.P.

Crl.A.No.178 of 1970

(J. M. Shelat, I. D. Dua and S. C. Roy, JJ.)

27.08.1971

JUDGEMENT

SHELAT, J.:-

1. Appellant Rahman and his wife Zaibun were tried by the Sessions Judge, Gorakhpur, on charges among others of murdering by strangulation Jasoda the three year old daughter of P. W. 1, Bhagwati, and of stealing twelve silver chharhas from her person. The Sessions Judge convicted both of them under Sections 302/34, 369, 379 and 201 of the Penal Code and sentenced the appellant to death and his wife to life imprisonment in addition to various other terms of imprisonment. On an appeal filed by them, the High Court of Allahabad acquitted Zaibun, but confirmed the conviction and sentence passed against the appellant. This appeal, founded upon special leave obtained by the appellant, is against that judgment and order of the High Court.

2. Bhagwati and the appellant lived in the village Semra Khurd with their respective families not far from each other. The prosecution case was that on November 26, 1967 Bhagwati started for Madanpur, a village nearby at about 3 p.m. to purchase medicine for his ailing wife. At that time he

noticed his daughter Jasoda playing outside the appellant's house with Sugheri, the daughter of Zaibun by her previous husband. On his return, Bhagwati found Jasoda missing and the members of his family searching for her. He joined them in that search. P. W. 7, Dhansiria, a neighbour, came to him in the meantime and informed him that she had seen the appellant and Zaibun lifting the girl and carrying her into their house that afternoon. On that information, Bhagwati sought out the appellant and his wife, but both of whom replied that they did not know the girl's whereabouts. Such a reply aroused suspicion in Bhagwati's mind against the appellant and his wife. He, therefore, met some of the villagers at the house of the Sarpanch Ram Bali where they decided to search the houses of every body starting, however, with the house of the appellant. By that time it had become dark and the sarpanch, accompanied by Bhagwati and some of the other witnesses, came with torches to the appellant's house for the search. The appellant was said to be at that time just outside his door and upon Bhagwati and his companions saying that they wanted to search his house he called out to Zaibun, who was inside, that those persons had come to search their house and that she should permit them to do so. This was according to the prosecution, a warning to the wife to put her on guard. Bhagwati, the sarpanch and four or five others went inside the house, while others stood outside where the appellant was.

3. By this time a crowd numbering about 100 or so had collected outside the appellant's house. Zaibun at that time was taking her meals, but on the sarpanch and the others going inside, she got up but stood so close to the wall behind her that the sarpanch and his companions suspected that she was trying to hide something. They, therefore, moved her away and on their doing so found basket hanging on an iron peg. On removing the basket they found the dead body of Jasoda tied in a bundle, which was hung with a string on that peg. The silver chharhas which the girl had on her person that afternoon were missing. The sarpanch and his companions brought the dead body of the girl and Zaibun outside. In the meantime, the appellant had slipped away and could not be found in spite of a search made for him. They all then went to the house of Ram Swarup, the Sabhapati of the village, where on being interrogated, Zaibun made a statement which the Sessions Judge treated as an extra judicial confession. In that statement Zaibun was said to have admitted that while Jasoda was playing with her daughter outside her house, she and the appellant carried her inside. The appellant then strangled the child and when he was so doing, she i.e., Zaibun, helped him by holding the girl's legs. She further stated that after killing the girl, the appellant took off the silver chharhas and handed them over to her, but a little later he took them away from her, that they intended to throw away the dead body into the river nearby as soon as it became dark and in the meantime the appellant tied it into a bundle and hung that bundle on to a peg covering that bundle with the basket, that they could not discard the body into the river, as, soon thereafter the family members of Bhagwati and others started searching the girl, and ultimately, as stated earlier, the sarpanch, Bhagwati and others came to their house and on search of it found the dead body. Accompanied by some of the villagers Bhagwati thereafter went to the nearby police station taking with him Zaibun the dead body of Jasoda, the basket and other articles, and there, at about 4.30 a.m., he lodged the first information report.

4. The defence of the appellant was that he had nothing to do with the death of the child as he was not in the village that day and that he was ultimately caught hold of by one Salig and others in Rudrapur about a month after the date of the occurrence and handed over to the police.

5. Two facts clearly emerge from the evidence which cannot possibly be disputed: (a) that the girl Jasoda was killed by strangulation, and (b) that her dead body tied in a bundle was found from the house of the appellant.

6. But there was no direct evidence on the question as to who killed the girl except of course the oral statement said to have been made by Zaibun at the house of the village Sabhapati. Except for that, the prosecution case depended on circumstantial evidence which according to the prosecution consisted of the following:

(i) that a about 3 P.M., as deposed to by Bhagwati, the girl Jasoda was playing outside the appellant's house with Zaibun's daughter,

(ii) that she had on her feet twelve silver chharhas,

(iii) that wit. Dhansiria had seen the appellant and his wife lifting and carrying the child inside,

(iv) that in response to the enquiry made by Bhagwati that evening both the appellant and Zaibun falsely replied that they did not know the child's whereabouts,

(v) that a warning was given by the appellant to his wife when Bhagwati and others went to search his house to enable her to be on her guard,

(vi) the discovery of the dead body in the condition aforesaid in the appellant's house,

(vii) the fact that at that time the silver chharhas were missing, and

(viii) the fact that the appellant had slipped away and disappeared until he was arrested.

7. As regards the extra judicial confession, the High Court refused to accept it on the ground, that

the evidence of the witnesses as regards it, including that of Bhagwati, was inconsistent with the first information report, wherein he had failed to state that Zaibun had confessed to her having participated in the murder by holding the girl's legs when the appellant was strangulating her. The view of the High Court was that if that part of her statement was eliminated the rest of the statement would not amount to a confession so far as Zaibun was concerned, that it would then be a mere explanation as to her conduct which would be neither evidence against her nor against the appellant. In that view the High Court acquitted her holding that it was the appellant who caused the death of Jasoda while Zaibun was and could only be a passive spectator.

8. Dealing with the case against the appellant the High Court observed:

"So far as the accused Rahman is concerned, the circumstances made out against him, are that he along with his wife was seen taking the girl Jasoda inside his house. He could not give any satisfactory explanation as to how he parted company with the deceased after the deceased was seen last alive in his company. Instead he gave a wrong explanation by saying that he was not in the village at all. When enquiries were made from him he feigned ignorance about the whereabouts of the deceased. The fact that when the villagers came to take search of his house he told his wife from outside to give the search and thereafter escaped and absconded also shows his guilty knowledge. In the normal course in case he was no party to the commission of the crime and the girl had been murdered without his knowledge, he should have gone in with the villagers when they came to search his house. The fact that he escaped and left it to his wife to give the search of his house shows that he had full knowledge that the dead body of Jashoda was lying inside his house. Since the girl Jashoda was done to death shortly after she was carried inside the house by Rahman and Zaibun the crime in all probability must have been committed in the presence of both the husband and wife. Considering what normally happens in villages, we think that it may be possible that the husband committed the murder in the presence of the wife who was a helpless spectator, but it is highly improbable that Zaibun killed the child without the consent and connivance of Rahman. We feel that if the crime was committed in the presence of Rahman it would be so committed only by him or by his wife with his active connivance. In either case full responsibility for the murder of the child would lie on his shoulders."

9. It would appear from the above reasoning that the High Court felt that the girl was killed "in all probability in the presence of both the husband and the wife", that it was possible that the husband killed the child and the wife was only a helpless spectator, that it was highly improbable that the wife would have killed the child without the consent and connivance of the appellant and that in either case full responsibility for the crime lay on the shoulders of the appellant. The High Court thus did not rule out the possibility of the wife having killed the child. What it ruled out was that it could not have been done without the consent or connivance of the appellant. The whole of the conclusion was on the basis that the evidence established that both the appellant and Zaibun had taken the child inside the house and since the child was done to death "shortly" after that, the appellant must have been in the house when the child was strangulated. The High Court rejected the possibility urged by the appellant's counsel that the appellant might have gone out after the child was taken in and that Zaibun might have killed the child in his absence on the ground that the

appellant had never stated so at any stage, namely, that he and Zaibun had both taken the child in, that he had thereafter left the house, and that therefore, he had nothing to do with the crime. The rejection of that argument also was on the basis that the prosecution had establish (i) that the appellant, was present in the house that afternoon, (ii) that as deposed to by Dhansiria, he and Zaibun had both taken the child inside where she was done to death, (iii) that he was present in the village when Bhagwati, during his search for the girl, confronted him and upon that he feigned ignorance about the girl's whereabouts, and (iv) that he was present when Bhagwati and others came to search the house and then slipped away leaving his wife to face the consequences.

10. As against the evidence as to these four circumstances, the appellant's case was that he was not in the village on that day. The question is whether the circumstances relied on by the High Court against the appellant could be said to have been proved beyond any reasonable doubt, and if held to be proved, whether they formed so complete a chain of evidence that it showed not only his guilt but ruled out any reasonable possibility of his innocence.

11. On the first circumstance, there was the evidence of Bhagwati only that he saw Jasoda playing outside the appellant's house at the time when he started for Madanpur. It was not his case that he saw the appellant also at that time. He, however, admitted that the road to Madanpur passed along his house and that the appellant's house was so situate that while leaving his house for Madanpur that house would not be visible to him. It would seem, therefore, that unless he went near that house, which he did not say he did, he could not have noticed Jasoda playing just outside the appellant's house. This part of his evidence thus throws doubt on his statement that he had seen the girl playing when he left for Madanpur. Such a conclusion finds some support from another fact deposed to by him namely, that on his return when he learnt that the girl was missing he did not tell his family members that he had seen her playing outside the appellant's house when he left for Madanpur, nor did he straightway to the appellant's house to inquire of him or his wife as to where the girl had gone from near their house. Instead, according to his evidence, he took several rounds in the village along with the members of his family in search of the girl. He did this until about 6 P.M. when, according to him, Dhansiria told him that she had seen the appellant and his wife lifting the girl inside their house. It is important to remember in this connection that according to him there was with him at that time witnesses Ram Bali, Ram Kalap, Raj Mangal and Hiralal and Dhansiria gave the aforesaid information when they were all at his door. As regards his having confronted the appellant after Dhansiria had given him this information, there is again his word only to establish the appellant's presence in the village at that time.

12. The next attempt to fix the appellant's presence in the village was Bhagwati's evidence, as also the evidence of other witnesses, that on their reaching the appellant's house for searching it, the appellant was present at his door and gave a warning to his wife inside about their having come to search the house thereby putting his wife on guard. Curiously, such a vital matter relied on by the prosecution as a warning to his wife to be careful was not stated by Bhagwati either in the first information report or before the committal Court. Therefore, so far as he was concerned he stated that fact for the first time in the Trial Court although it was important for the prosecution to establish the appellant's presence at the time of the search of the house. That is particularly so

because his slipping away a little later obviously depended on the proof that he was there when Bhagwati and others arrived to search the appellant's house.

13. If the appellant was there when these people went to search the house, in view of the information which Dhansiria had earlier disclosed to Bhagwati in the presence of his companions, would they have not demanded the appellant to accompany them inside the house? That would seem natural in the circumstances especially when they had already begun to suspect the appellant. Assuming that they need not have asked him to accompany them inside, the question still would be whether it was possible for the appellant to slip away after the dead body of Jasoda was found. The evidence of Bhagwati and others showed that about 100 or more persons had collected outside the appellant's house had amongst them was the village Chowkidar. As Bhagwati himself described, between him and where the appellant was the place was packed with men. Considering the high feeling prevailing at that time after the girl's body was found, it seems somewhat difficult to believe that the appellant could have slipped away as deposed to by Bhagwati and the other witnesses.

14. While assessing the veracity of Bhagwati's evidence we have to consider not only these factors, but also the fact that while deposing about the statement which Zaibun was said later on to have made he attributed to her an admission that she had caught hold of the child when the appellant was strangulating her. This was clearly a false testimony as admittedly he had not attributed such a statement to Zaibun either in his first information report or before the committal Court. By inserting that admission in her alleged statement, the attempt was obviously to make Zaibun an active participant in the crime. In the light of these facts it would be difficult to place implicit confidence in Bhagwati's word though he happens to be the unfortunate parent of the victim, whose incensed feelings at the tragedy one can well realise.

15. Two further questions which arise for consideration would be, (1) whether Dhansiria saw that she was alleged to have reported, and (2) whether she in fact reported to Bhagwati as alleged by the prosecution and on the basis of which Bhagwati and others began to suspect the appellant and his wife and decided to search their house.

16. If Dhansiria were to be believed, she saw the appellant and Zaibun both lifting the child and carrying her into their house. According to her, she went to the fields to scrape grass and returned in the evening. Her version then was that she met Bhagwati and wit. Hira Lal at her door and it was to these two persons only that she disclosed what she had seen in the afternoon when she was in her cattle trough. Several questions at once spring to one's mind while considering her evidence. If she saw what she deposed to, would she not ask the appellant and his wife why they were lifting the girl and carrying her inside their house? If she was at that time in her cattle trough which was opposite to the appellant's house, she would be seen by the appellant and Zaibun. Would they in that case carry the child inside the house in Dhansiria's presence when their intention in doing so was to commit her murder? If Dhansiria had seen what she said she did and reported that fact to Bhagwati, would she have not gone with Bhagwati either on her own or at Bhagwati's behest when Bhagwati

was said to have gone to the appellant and asked him where the girl was and when the appellant and Zaibun feigned ignorance? There is, of course, next the fact that her statement that she reported the information (1) at her door, and (2) to Bhagwati and Hira Lal only, contradicted Bhagwati's evidence, and as will be presently seen, the evidence of other witnesses also. What is most significant is that though she was examined for two purposes only, namely, (1) to depose to the fact that she had seen the appellant and Zaibun carrying the child inside their house, and (2) that she had reported that fact to others, yet strangely, she had not stated in her Section 161 statement the fact that she had seen the appellant and his wife carrying the child inside their house while she was playing with their daughter.

17. To make matters more confounded, the version of the other witnesses as to where and in whose presence Dhansiria gave the information of what she alleged she had seen that afternoon was highly inconsistent. As aforesaid, Bhagwati's case was that she reported this matter to him at his door when witnesses Ram Bali, Ram Kalap and others were present. According to Dhansiria herself, she did this at her door and only to Bhagwati and to Hira Lal. Wit Ram Kalap did not depose as Bhagwati had done, that he and the others had collected outside Bhagwati's door or that it was there that Dhansiria disclosed her information. According to him, Dhansiria had come to the door of Sarpanch Ram Bali where she disclosed what she had seen that afternoon. Wit. Hira Lal had yet another story to tell. According to him, Dhansiria came to his door at about 6 P. M. when she told him what she alleged she had seen that afternoon and that at that time no one, except his wife and children, was present. Apart from his version being quite different from that of the other witnesses, he did not go to Bhagwati to share this information with him or to the appellant to confront him with it but instead went in search of the girl to the neighbouring villages. He was certain that when he at last went to Bhagwati's house to help search the girl, Dhansiria was not there and in fact did not come there at all. Sarpanch Ram Bali's case struck yet another discordant chord, for according to him, after Bhagwati told him, amongst other things, what Dhansiria disclosed to him, he called Dhansiria at Bhagwati's house where that witness repeated what she had already told before. This again is contrary to Dhansiria's evidence, for, she did not say that she had been called by anybody at Bhagwati's house.

18. The High Court, as stated above, treated the presence of the appellant at the time of the search of his house, his remaining at the door, his failure to accompany Bhagwati and others inside and his calling out to his wife as and by way of a warning as important circumstances indicating his responsibility for the crime. The question once again is : was his presence at the time established conclusively?

19. It is true that Bhagwati deposed that the appellant was at the time at his door and gave the warning to his wife of their arrival to search the house. The latter part of his statement, however, was not stated by him before the police or the committal court. It is difficult to believe that if the appellant had given such a warning to his wife, its significance could have escaped either Bhagwati or those with him. It is, therefore, hardly conceivable that he would forget to mention not at one but at two stages when he had the opportunity to say it. Wit. Ram Kalap also asserted the presence of the appellant at his door when they went to search the house, his remaining there even when they

went inside and giving at the time the said warning. Curiously, his case before the committal Court was that the appellant accompanied them inside. He did not say then that the appellant had given any warning to his wife, as naturally there would be no question of his giving that warning if he had gone inside along with them. Hira Lal's version differed from that of both Bhagwati and Ram Kalap inasmuch as according to him the appellant was at that time moving about Bhagwati's house from where they took him with them. In his Police statement, no mention was made by him regarding the warning and when asked to give reasons for that failure, he had no reasons therefor. Like Bhagwati and others, Ram Bali also deposed about the appellant's presence outside his door and his having given the warning. No mention was made by him of either of these two matters in his Police statement. The unanimity with which all these witnesses deposed as to the presence of the appellant at his door and his having uttered the warning to his wife coupled with their failure to mention these matters in their previous statements cannot be without significance. Both the facts were important from the point of view of the prosecution case, in that, it sought to prove the appellant's guilt by the proof of his presence at the time of the search. Yet, significantly they were not to be found in their earlier disclosures before the Police or the committal Court.

20. The aforesaid analysis of the evidence as regards (1) the presence of the appellant in the afternoon, (2) the fact of his and his wife carrying the child inside his house in the evening, the three pieces of circumstantial evidence relied on by the State against the appellant throws out considerable difficulty in holding that they were established, as Section 3 of the Evidence Act lays down, beyond any reasonable doubt. In such a state of evidence it is difficult to say with full confidence that the appellant was present at the time of the offence, or that the evidence was of such a character that his defence of not being in the village on that day had to be repulsed.

21. It is true that the appellant was concealing himself for nearly a month though he must have known that he was wanted by the Police and that he left his wife to face the situation alone. But absconding by itself is not conclusive either of guilt or of a guilty conscience. For, a person may abscond on account of fear of being involved in the offence or for any other allied reason.

22. In our view, the case against the appellant cannot be said to have proved beyond reasonable doubt, and the appellant must obtain the benefit of that doubt. This means, in view of Zaibun's acquittal by the High Court and the absence of any appeal by the State against her acquittal, that a heinous crime of a dastardly character has to go unpunished. That is obviously regrettable but a conviction of the appellant on the evidence as it stands on the record would not be, in our view, in conformity with the well-settled principle regarding circumstantial evidence, that the circumstances forming that evidence must be conclusively established and even when so established, they must form such a complete chain that it is not only consistent with his guilt but is inconsistent with any reasonable hypothesis of his innocence.

23. The appeal is, therefore, allowed and the order of conviction and sentence passed against the appellant is set aside.

Appeal allowed.