

State of Uttar Pradesh

Vs

Suresh Alias Chhavan and Others

Criminal Appeal No. 503 of 1976

(Syed M. Fazal Ali, Baharul Islam, Varadarajan JJ)

05.05.1981

JUDGMENT

VARADARAJAN, J. –

1. This appeal by special leave is by the State of Uttar Pradesh against the acquittal of the respondents-accused, Suresh alias Chhavan son of Kalyan Singh (hereinafter referred to as Suresh) and Ram Kishan and Bhajorey sons of Madho Singh, all residents of Miholi village situate within the limits of Auraiya Police Station in Etawah District. Suresh is said to be the first cousin of Ram Kishan and Bhajorey, who are brothers. The learned Sessions Judge, Etawah, who tried these three accused in Sessions Trial No. 140A of 1974, convicted all of them under Section 302 read with Section 34, IPC for the murder of Virendra Singh, the husband of Kanti Devi, PW 1 and sentenced Suresh to death and Ram Kishan and Bhajorey to imprisonment for life. The usual reference for confirmation of the sentence of death by the High Court was made by the learned Sessions Judge. All the three accused filed Criminal Appeal No. 2508 of 1974 against their conviction by the Sessions Judge and the sentences awarded to them.

2. The case of the prosecution was this : There was enmity between the three accused, Suresh, Ram Kishan and Bhajorey on the one hand and the deceased victim Virendra Singh on the other. There were a number of criminal cases between the accused and Virendra Singh. In the last of those cases, Virendra Singh was convicted by the trial court for the murder of one Ram Swarup, the brother of Ram Kishan and Bhajorey; but on appeal Virendra Singh was acquitted by the High Court on December 11, 1972 (vide judgment Ex. Ka-24). Shital, the brother of Suresh was the prosecution witness in that case against Virendra Singh. Virendra Singh figured as a prosecution witness in the case in which accused Ram Kishan was prosecuted for the murder of his wife. The occurrence in the present case is stated to have taken place in this background.

3. On February 7, 1974 Virendra Singh had gone to the Panchayat Bhavan, Miholi for having darshan of Jaini Baba, who appears to have come there with certain Jain pilgrims. Virendra Singh's wife, PW 1, went to that place for having darshan of the Jain pilgrims and also for calling her husband for taking his meals. Virendra Singh was standing at that time on the chabutra of the Panchayat Bhavan. Then Suresh armed with a double barrel gun and Ram Kishan and Bhajorey armed with a Dharia and a Kanta respectively came there at about 6 p.m. Suresh proclaimed that "the enemy is standing alone, kill him" and fired at Virendra Singh with his gun on the back side (arm side). When Virendra Singh turned, Suresh fired a second shot at him and struck him on the front side of the abdomen. Virendra Singh fell down on the chabutra. Thereafter Ram Kishan and Bhajorey attacked Virendra Singh with their respective weapons. Virendra Singh and PW 1 raised alarm, and Chotey Lalla alias Avinash Kumar (PW 5) and Gorey Lal (PW 6) and Ram Sandhani

came there and saw the incident. All the three accused ran away towards the south. The injured Virendra Singh was taken by the villagers accompanied by PW 1 to the Government Hospital, Auraiya, situated five miles away at about 8.45 p.m.

4. Dr. Chandrajeet Singh, PW 4, who was in the Hospital at Auraiya, examined Virendra Singh and gave him first aid. As the condition of Virendra Singh was serious, PW 4 sent an intimation to the Tahsildar/Magistrate (PW 3) for recording his dying declaration. PW 3, who received that intimation at about 9.10 p.m. reached the hospital at 9.25 p.m. and recorded Virendra Singh's statement, Ex. Ka-4 in the presence of the doctor, PW 4, who has certified in Ex. Ka-4A that the patient was conscious throughout. PW 3 obtained the thumb impression of Virendra Singh in the dying declaration Ex. Ka-4. PW 4 referred Virendra Singh to the hospital at Kanpur for further treatment.

5. After Virendra Singh was taken to Kanpur in a mini bus, PW 1 went to the police station at Auraiya, and her First Information Report Ex. Ka-1 was recorded at 9.45 p.m. by the constable, PW 7. Virendra Singh died on the way to Kanpur and was brought back by the same mini bus to the police station at Auraiya at 11.30 p.m. The case registered under Section 307, IPC was altered into one under Section 302, IPC.

6. The Investigating Officer, PW 11 proceeded to the scene of occurrence and recovered blood-stained earth from the chabutra of the Panchayat Bhavan, Miholi. Dr. Gupta, PW 2, conducted autopsy on the body of Virendra Singh and found sixteen wounds including three gunshot wounds of which two were entry wounds, on the epigastrium 5" about the umbilicus on the left side of the abdomen and on the left side of the chest, incised wounds, lacerated wound and abrasions. The 10th and 11th thoracic vertebrae were found fractured. Both the kidneys were found lacerated and torn. The right eyeball was found cut. The pleura was found punctured on the right side. The gall bladder was lacerated. The doctor PW 2 opined that the injuries were sufficient in the ordinary course of nature to cause death.

7. The accused could not be traced in the village when PW 11 searched for them but they surrendered in the court on February 11, 1974. Ram Kishan and Bhajorey admitted that the deceased Virendra Singh was convicted by the trial court for the murder of their brother Ram Swarup but acquitted by the High Court and that Virendra Singh figured as a prosecution witness in the case in which accused Ram Kishan was tried for the murder of his wife. All the three accused pleaded that they had been falsely implicated in this case. They examined a police constable of the Police Lines, Etawah as DW 1 to prove that a head constable and some constables had been deputed from February 9, 1974 to February 17, 1974 for protecting some Jain pilgrims who were on pad yatra.

8. Of the 11 witnesses examined on the side of prosecution, PWs 1, 5 and 6 were put forwarded as eyewitnesses. Before the learned Sessions Judge, it was contended on behalf of the accused that the presence of PW 1 at the time of the occurrence is doubtful. PW 1 has denied the suggestion that she did not go to call her husband Virendra Singh for taking his meals prior to the occurrence, that the occurrence did not take place at the chabutra of the Panchayat Bhavan, that she did not see the occurrence and that she did not go to the police station at Auraiya. But it is significant to note that the evidence of PW 11 that blood stains were found in the chabutra of the Panchayat Bhavan, has not been challenged in cross-examination and it has not been suggested to PW 7 that PW 1's report Ex. Ka-1 was not recorded at the police station at Auraiya though it has been suggested to him that the report was not written at 9.45 p.m. on February 7, 1974 but was written on the next morning, and he has denied the suggestion. PW 1 has stated that the meal time is 6 p.m. The learned Sessions

Judge accepted the evidence of PW 1 and found that she would not have given the FIR Ex. Ka-1 at the police station at Auraiya at 9.45 p.m. mentioning the names of the accused and the witnesses and the weapons used if in fact she had not witnessed the occurrence.

9. PW 5 has no doubt admitted that in March 1959 his elder brother Sarwan Kumar was shot at and that in the case brought against one Sone Lal Chamar and Madho, the father of the accused Ram Kishan and Bhajorey they were acquitted but he has denied the suggestion that he did not witness the occurrence in this case. He has deposed about PW 1 and others accompanying the injured Virendra Singh to the hospital at Auraiya and has stated that it is he who got Virendra Singh admitted in that hospital. The learned Sessions Judge accepted the evidence of PW 5 as that of a natural witness who has been mentioned even in the FIR as a witness and he has observed that the fact that Madho Singh, the father of accused Ram Kishan and Bhajorey had figured as an accused in the case of murder of PW 5's brother Sarwan Kumar in 1959 is not a sufficient reason for suspecting his evidence.

10. PW 6 no doubt belongs to a different village. But it is in evidence that people from other villages also had come to the Panchayat Bhavan at Miholi for having darshan of the Jain pilgrims on the day of occurrence. Therefore, it is not improbable that PW 6 was present at the time of the occurrence. There is no enmity between the accused and PW 6 for the latter to falsely implicate the accused in this case. PWs 5 and 6 were examined by the Investigation Officer, PW 11 on February 8, 1974. PW 6 could not be examined during the night of February 7/8, 1974 because PW 11 had to return to the police station at Auraiya during the night itself on receipt of information that the dead body of Virendra Singh had been brought to the police station. Even PW 6 is mentioned in the FIR as a witness. The learned Sessions Judge accepted the evidence of PW 6 also.

11. The dying declaration Ex. Ka-4 is brief and starts in an abrupt manner. It is stated clearly in the dying declaration that Suresh caused the gunshot injuries and that Bhajorey and Dharia residents of Miholi struck the deceased with Kanta. The time of occurrence is mentioned in the dying declaration as 4/5 o'clock in one place and as 6/6.30 o'clock in the evening at another place in Ex. Ka-4. Reference is made in the dying declaration to motive, and it is stated that the deceased was a witness in the case of murder of the wife of Ram Kishan and that there is enmity on that account. The learned Sessions Judge accepted the dying declaration as genuine. Relying upon the oral evidence of PWs 1, 5 and 6, corroborated by the medical evidence of PW 2, and the dying declaration Ex. Ka-4, the learned Sessions Judge convicted all the three accused and sentenced them as mentioned above, observing that Suresh deserves the sentence of death as he had used a firearm, a deadly weapon, and he had fired a second shot at Virendra Singh, not being satisfied with having fired the first shot and that Ram Kishan and Bhajorey have used only Dharia and Kanta and, therefore, they deserve the lesser of the two sentences.

12. But on appeal the learned judges of the High Court acquitted the accused. They have observed in their judgment that PWs 1, 5 and 6 could not be stated to be independent witnesses and that the prosecution has not examined other persons, who were stated by those eyewitnesses to have been present at the time of the occurrence or even any of the Jain pilgrim or police personnel escorting the Jain pilgrims. The learned judges have doubted the time and place of the occurrence and have observed that the occurrence must have taken place much later than 6 p.m. after sunset which had taken place at Etawah at 5.45 p.m. They declined to accept the evidence that the deceased was taken to the hospital at Auraiya by a bullock cart on the ground that he could have been taken by a faster vehicle and the private car of one Tiwari of Miholi was available, one mile away from the village and that that car was used by PW 1 for going back to Auraiya from Miholi after she received

information about the death of her husband. The learned judges declined to place reliance upon the dying declaration Ex. Ka-4 on the ground that the time of occurrence is mentioned differently as 4/5 o'clock and 6/6.30 o'clock in the evening and that the place of occurrence, the number of shots fired and the persons present in the vicinity are not mentioned in it, and also that it is defective with regard to the names of the assailants. They have observed that the victim Virendra Singh was not in a position to make a coherent statement and that he was obsessed with the enmity which existed between him and accused Ram Kishan. They have further observed that having regard to the nature of the injuries sustained by the deceased, he could not have been in a position to make a coherent and intelligent statement specially with regard to the identity of the assailants with "unmistaken certainty". They have observed that it is improbable that PW 1 would have gone to call her husband for taking meals without first calling her young children for taking their food. They have further observed that in the FIR Ex. Ka-1 PW 1 has stated that her husband was shot by Suresh and that in her evidence she has stated that he did so after exhorting the other accused to kill the deceased. They have stated that if PW 1 had gone to Auraiya with her husband by the bullock cart it is improbable that she would not have gone with him by the mini bus to proceed to Kanpur. For these reasons the learned judges of the High Court have held that the prosecution has not proved the time and place of occurrence and the guilt of the accused beyond reasonable doubt and they have observed that the possibility of the deceased having been attacked by some unknown assailants in darkness could not be ruled out. They, thus, allowed the criminal appeal and acquitted the accused and set aside the convictions and the sentences awarded to them.

13. We were taken through the evidence and the judgments of the learned Sessions Judge and the High Court by the learned counsel for the parties. After a careful consideration of the evidence on record, we are clearly of the opinion that it is not possible to sustain the judgment of the High Court. The reasons given by the learned judges of the High Court for not relying upon the oral evidence of the eyewitnesses PWs 1, 5 and 6 corroborated as it is by the evidence of the doctor PW 2, who conducted autopsy on the body of deceased Virendra Singh, and for suspecting the genuineness of the dying declaration Ex. Ka-4 recorded by the Taluk Magistrate, PW 3 in the presence of the doctor, PW 4 are not convincing. The learned judges are not right in observing that all the three witnesses, PWs 1, 5 and 6 are interested. It is true that PW 1 is the wife of Virendra Singh. But it is not possible to reject her evidence for that reason alone though her evidence would have to be scrutinised with care. The mere fact that Madho, the father of the accused Ram Kishan and Bhajorey and one Sone Lal Chamar had been prosecuted in March 1959 in a case for the murder of PW 5's brother Sarwan Kumar, is not a sufficient reason for holding that PW 5 is interested in the prosecution of the accused in this case nearly 15 years after the murder of his elder brother. There is nothing on record to show that PW 6 who belongs to another village is in any way related to the deceased or PW 1. The evidence of PWs 1, 5, and 6 no doubt shows that some 50 or 60 persons had gathered at the Panchayat Bhavan where some Jain pilgrims had camped for some time in the course of the pad yatra. It is true that none of those persons who came to the Panchayat Bhavan in connection with the visit of the Jain pilgrims and none of the Jain pilgrims has been examined in this case. It may be that the Jain pilgrims were strangers ordinarily they must have been more interested in their pad yatra than in figuring as witnesses in this case of murder. Therefore, it is not possible to blame the prosecution for not examining any of the Jain pilgrims as witnesses in this case. There is no evidence to show that any police personnel was present at the time of the occurrence. The question is not whether the prosecution should have examined some other persons, who were present at the time of the occurrence, but it is whether the evidence of PWs 1, 5 and 6, who have been put forward as eyewitnesses is acceptable or not for proving the case of the prosecution against the accused. The learned judges of the High Court were not right in doubting the

time and place of the occurrence in this case and observing that the occurrence must have taken place much later than 6 p.m. after sunset, which had taken place at Etawah at 5.45 p.m. The evidence of the Investigation Officer PW 11 that blood-stained earth was recovered from the chabutra of the Panchayat Bhavan has not been challenged in the cross-examination. The presence of blood-stains in the Panchayat Bhavan would probalilise the case of the prosecution that the occurrence had taken place in that chabutra. The time of occurrence has no doubt been given variously in the dying declaration Ex. Ka-4 as 4/5 o'clock and 6/6.30 o'clock in the evening. There is no satisfactory reason for not accepting the evidence of PWs 1, 5 and 6 that the injured Virendra Singh was was taken by his own bullock cart from the place of occurrence to the Government Hospital at Auraiya situated five miles away from the scene of occurrence. The doctor, PW 4, saw the injured Virendra Singh at 8.45 p.m. and he thereafter sent a memo to the Tahsildar Magistrate, PW 3 for recording his dying declaration. PW 3 received that intimation at 9.10 p.m. and recorded the dying declaration Ex. Ka-4 at 9.25 p.m. Having regard to the distance between the scene of occurrence and the Government Hospital, Auraiya which is five miles, and the fact that the injured Virendra Singh had been taken there from the scene of occurrence by a bullock cart, during night, there is no reason to suspect the case of the prosecution that the occurrence had taken place at about 6 p.m. on February 7, 1974. It is not reasonable to expect that PW 1 and others should have waited for securing a faster moving vehicle for taking the injured Virendra Singh to the Hospital and thereby lose time in making medical attention available to him immediately. It may be that they thought that the car of Tiwari, who appears to live one mile away from Miholi village, might not have been readily available at that time for taking the injured Virendra Singh to the hospital. No doubt PW 1 had gone by that car to Auraiya at about 1 or 1.30 a.m. on February 8, 1974 after receipt of information that her husband had died. PW 1 might have reasonably expected that car to be available at the residence of its owner during that part of the night. Therefore, there is nothing strange or unreasonable in Virendra Singh having been taken by his bullock cart. The fact that the time of occurrence has been given differently in the dying declaration Ex. Ka-4 namely 4/5 o'clock at one place and 6/6.30 o'clock in the evening at another place and that the place of occurrence, the number of shots fired and the number of persons present in the vicinity are not mentioned therein, are not sufficient reasons for not relying upon it. Virendra Singh appears to have been seriously injured and he could not have been in a position to make a more coherent statement though it is seen from the evidence of the doctor PW 4 that he was conscious right through. PW 4 has appended the certificate Ex. Ka-4A to that effect. The learned judges of the High Court were not right in observing that having regard to the nature of the injuries sustained by Virendra Singh, he could not have been in a position to make a coherent and intelligent statement specially as to the identity of the assailants, for as stated earlier, the evidence of the doctor PW 4 shows that Virendra Singh was conscious throughout when he made the dying declaration Ex. Ka-4 before the Taluk Magistrate, PW 3. In observing that PW 1 could not have gone to call her husband for taking his meals without first calling her young children for taking their food, the learned judges of the High Court have overlooked the evidence of PW 1 that the children were not available in the house and had gone somewhere to play when she went to call her husband for taking his meals. It is a matter for PW 1 to decide, whether she should have called her husband who had gone to Panchayat Bhavan for having darshan of the Jain pilgrims first for taking his meals or gone in search of her children who had not (sic) somewhere for playing for calling them first for taking their food. There is nothing unnatural in her having gone to call her husband for taking his meal at the meal time. Therefore, it is not possible to reject the evidence of PW 1 that she went to call her husband for taking his food without first calling her young children for the purpose. There is no doubt some confusion in the dying declaration Ex. Ka-4 regarding the assailants, for only the names of Suresh and Bhajorey are mentioned and Dharia and Kanta are referred to, and it is stated that there is enmity because the

deceased had figured as a witness against Ram Kishan in the case of murder of his wife. Dharia and Kanta are weapons and not names of persons. We are, therefore, of opinion that PW 3 had probably not understood the deceased correctly when he was narrating the dying declaration Ex. Ka-4 in relation to the third assailant. But the dying declaration read with the evidence of the eyewitnesses PWs 1, 5 and 6 would show that another person in addition to Bhajorey must have used one of the weapons Dharia and Kanta, and that that person is accused Ram Kishan. The learned judges of the High Court are not right in observing that if PW 1 had gone to Auraiya with her husband by the bullock cart she would not to have failed to go with him by mini bus when he was sent to the hospital at Kanpur. This observation overlooks the evidence of PW 1 that she did not proceed to Kanpur with her husband by the mini bus because he was being taken by other persons and she thought that she must go and give a report at the police station at Auraiya. PW 1 has denied the suggestion that she came to know about the occurrence at 7.30 p.m. through other persons. As stated earlier, the FIR Ex. Ka-1 was recorded by the head constable PW 7, at 9.45 p.m. after the doctor PW 4 saw the injured Virendra Singh at 8.45 p.m. in the hospital at Auraiya. If PW 1 had received information about the occurrence only at 7.30 p.m., it is not probable that she would have been in the police station at Auraiya at 9.45 p.m., after he husband had been despatched by a mini bus to Kanpur for further treatment. There is nothing on record to hold that the deceased might have been attacked by some unknown persons in darkness.

14. PWs 1 and 5 are natural witnesses. There is no reason to hold that PW 6 could not have been present during the occurrence. The evidence of PWs 1, 5 and 6 is clear and convincing. There is no reason to suspect the genuineness of the dying declaration Ex. Ka-4. The evidence of PWs 1, 5 and 6 and the dying declaration Ex. Ka-4 prove satisfactorily and beyond reasonable doubt that the three accused came to the scene of occurrence armed with deadly weapons, that Suresh fired two shots at the deceased Virendra Singh with his double barrel gun with the intention of killing him, and that after Virendra Singh fell down on receipt of the two gunshot injuries, Ram Kishan and Bhajorey attacked him with Dharia and Kanta respectively with the common intention of murdering him as a consequence of which Virendra Singh died at some time before 1 or 1.30 a.m. during the night of February 7/8, 1974. The evidence of the doctor PW 2, who conducted autopsy on the body of Virendra Singh, proves that the injuries sustained by Virendra Singh are sufficient in the ordinary course of nature to cause death. In these circumstances we are of the opinion that the learned Sessions Judge was perfectly justified in relying upon the oral evidence of PWs 1, 5 and 6 and the dying declaration Ex. Ka-4 and convicting the accused under Section 302 read with Section 34, IPC and that the learned judges of the High Court were not justified in rejecting the evidence and coming to the conclusion that the prosecution has not proved the time and place of the occurrence as well as the guilt of the accused beyond reasonable doubt. Thus, the discussion of the evidence and its appreciation by the High Court is largely tainted by speculation and we are clearly of the opinion that this is certainly not a case where it can be said that the view taken by the High Court was reasonably possible. Therefore, we allow the appeal and find all the three accused guilty under Section 302 read with Section 34, IPC of the murder of Virendra Singh and convict them accordingly. Though the learned Sessions Judge might have had justification for awarding the extreme penalty of the law to Suresh, yet having regard to the fact that we are convicting the accused after they had been acquitted by the High Court and more than 7 years after the date of the occurrence, we are of the opinion that the extreme penalty of the law is not called for in regard to Suresh. We accordingly sentence each of the accused to imprisonment for life.

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