

Gambhir

Vs

State of Maharashtra

Criminal Appeal No. 746 of 1980

(O. Chinnappa Reddy, R. B. Misra JJ)

15.04.1982

JUDGMENT

MISRA, J. -

1. The present appeal is directed against the judgment of the Bombay High Court at Nagpur dated June 19/25, 1979, convicting the appellant under Section 302 of the Indian Penal Code and sentencing him to death for the murder of Laxmi and her two children.
2. One Namdeo Gopal, resident of Shelgaon-Jahagir, was in the employment of Shankarrao Shewale, resident of the same village, as an agricultural labourer. Shankarrao Shewale had also land in another village Andrul at a distance of 15 miles from Shelgaon-Jahagir. Shankarrao had deputed Namdeo to cultivate his fields at Andrul about three weeks prior to the date of occurrence on February 26, 1975. He accordingly went to village Andrul leaving his wife Laxmi and daughter Manda aged about 10 years and his son Samadhan aged about four years at his residence in a locality known as Tagwale locality. During his absence Gambhir the appellant used to visit the house of Laxmi off and on.
3. The prosecution story as unfolded in evidence is that on February 26, 1975 Gambhir was seen in the house of Laxmi in the evening. He was also seen in the company of Laxmi at about 10.00 p.m. at night on the same day under a neem tree. Thereafter neither Laxmi nor her children were seen alive. Next morning that is on February 27, the neighbours found that the thatched door to the house of Namdeo was open and household utensils and other goods in the house were lying in disorder. Laxmi and her children were not found there. The news spread in the village about the disappearance of Laxmi and her children. When Shankarrao Shewale, the employer of Namdeo got the news, he proceeded to village Andrul and brought Namdeo back in the evening of February 27, 1975.
4. Namdeo along with Shankarrao Shewale and certain other persons proceeded to police station, Chikhli, at a distance of eight miles from village Shelgaon-Jahagir for making a report. Shri Chaudhary incharge of the police station recorded the first information report and proceeded to village Shelgaon-Jahagir. He also sent a requisition for the assistance of a dog squad to the authority concerned at Aurangabad. Shri Chandhary for some time waited for the arrival of the dog squad, but when the dog squad did not arrive, he commenced preliminary investigation. He tried to open the lock of the inner living room. The lock, however, could not be opened so he pulled up and seized the same under a Panchnama. He peeped into the room through the shutters and found things lying in disorder. He, however, did not enter the room so that the effectiveness of the dog squad might not be lost by the entry of other persons in the house. He closed the door and locked the room with

another lock.

5. The dog squad did not arrive till the evening of February 28, 1975. The Investigating Officer lost his patience and he along with the Punchas climbed on the roof of the house and pushed aside the tin sheets covering the room. He peeped into the room with the help of a torch light and found foul smell coming from the room. He also sought to remove the clothes covering a corn-bin with the help of an iron bar and on removing the clothes he found less of human being. He thereafter set right the tin sheets on the roof as before.

6. At long last the dog squad arrived on March 1, 1975, and the police with the Punchas entered the house. One broken trunk lying inside the house and the lock which was broken open was shown to the dog, which took its smell and started moving about searching the area and locality around. Eventually the dog went to the house of the appellant and stopped there. The appellant was attested and at the time of his arrest some injuries were found on his person. The shirt and the dhoti put on by him at the time of his arrest were also found to contain stains of blood. On interrogation, the accused offered to point out the well where the dead bodies of Laxmi and her daughter Manda were laying. Many more articles are alleged to have been recovered on his pointing out in various instalments during the course of three to four days.

7. The accused was, therefore, sent up to the Court of Sessions to stand his trial for an alleged offence under Section 302 of the Indian Penal Code. The accused pleaded not guilty to the charge. Apart from making the statement under Section 313 of the Criminal Procedure Code, he also filed a written statement and produced some documents. His defence was that Kisan Govinda, the Surpanch of the Gram Panchayat bore enmity against him and other members of his family. He had quarrel with his father and uncles. Kisan Govinda has claimed passage through the field of Sahebrao, uncle of the accused. When he refused to grant him the way he filed a suit in the court. Kisan had again made a company to the police on the allegation that he had obstructed 400 labourers. There was again a theft in the house of Patilbuwa, another uncle of the accused. Kisan made a false charge of theft against his another uncle Rajaram. He had also given evidence against Rajaram. On account of this long standing enmity between Kisan Govinda Rao and the family of the accused, he had sought to implicate the accused falsely in the case. Other neighbours who gave evidence against the accused are all relations of one another and they deposed against the accused at the instance of Kisan Govinda.

8. There is no eye-witness of the occurrence and the case proceeded only on the basis of circumstantial evidence. The Sessions Judge, however, convicted the appellant under Section 302, Indian Penal Code and sentenced the accused to life imprisonment. The accused went up in appeal to the High Court. The State also filed a criminal revision for enhancement of the sentence. The High Court allowed the revision of the State and dismissed the appeal of the appellant and enhanced the sentence of the appellant from life imprisonment to death. The appellant has now come to challenge the judgment of the High Court by the present appeal.

9. It has already been pointed out that there is no direct evidence of eye-witness in this case and the case is based only on circumstantial evidence. The law regarding circumstantial evidence is well-settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests : (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was

committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. In the light of the legal position about the circumstantial evidence, we have to examine whether the circumstantial evidence in the instant case satisfies the requirements of law. The circumstantial evidence in the instant case may be broadly classified into three parts : (1) oral evidence to prove that in the absence of Namdeo, the accused used to visit the house of Laxmi regularly and he was seen in the evening of February 26, 1975 in the company of Laxmi and her children. He was also seen at about 10.00 p.m. the same night in the company of Laxmi under a neem tree in the village. At midnight he was again seen going along the way near in the house of Babulal, (2) the various recoveries most of them at the instance of the accused, and (3) medical evidence.

10. Dwarka, PW 2 and her husband Babulal PW 6 are next-door neighbours. They deposed that the accused used to visit the house of Laxmi during the absence of Namdeo from the village. He, generally, came to the house of Laxmi in the evening and chatted with her and her children. On February 26 also he was seen in the company of Laxmi and her children. At midnight they heard some noise from the house of Namdeo. They woke up and opened their door. They found accused coming out from the house of Namdeo in white dhoti, full sleeves shirt with a cap on his head. In cross-examination both of them admitted that they could identify the accused in the dark night from behind from a distance of 20 to 24 feet when the accused turned his face towards the back. They did not question him. They did not report to anybody in the village nor did they gave this information even to the police when it came to the village. Although they were the next-door neighbour they did not go to the house of Laxmi even when they found that the household utensils were lying scattered.

11. At the face of it, it looks rather improbable that they would recognise the accused at the dead of night from behind during the twinkling of an eye when the accused turned his face back. Further the conduct of these witnesses in not informing the police what they had heard or seen at midnight and their omission to report about it to anybody in the village are also significant. In the circumstances it is unsafe to rely on their testimony.

12. Mathurabai PW 3, also deposed that in the evening of February 26, she saw the accused going to the house of Namdeo twice or thrice. She again saw the accused and Laxmi going towards the village from the house of Laxmi. At that time she asked Laxmi as to where she was going. She answered that her daughter had gone to the house of Himmatrao Patil for fetching milk but she had not turned back so far. She also deposed that her daughter Vimal used to go to the house of Laxmi in the night for sleeping as Laxmi used to call her for a company in the absence of Namdeo. Thus she is a witness of seeing the accused going in the company of Laxmi at dinner time. But in cross-examination she admitted that he went away near dinner time and thereafter she talked to Laxmi for about half an hour. Thus from her own admission she belies the prosecution story of the accused going in the company of Laxmi at dinner time.

13. She further admitted in cross-examination that besides the accused other persons also used to come to the house of Laxmi in the absence of her husband. Kisan Govinda Rao in whose service Namdeo previously was, also used to go to the house of Laxmi to enquire about her children.

14. Vimal PW 19, is the daughter of Mathurabai, PW 3. According to her deposition she used to go to the house of Laxmi for sleeping during the absence of Namdeo. On February 26, as Laxmi and her children used to call her for giving a company she took her meals and went to the house of

Laxmi, on the day of occurrence. At that time Laxmi was busy preparing tea. Samadhan was sleeping inside the house and Manda had gone to fetch milk. The accused was also sitting there. The accused took a cup of tea without milk. As Manda had not returned till then. Laxmi and accused both proceeded towards the village. Laxmi asked her to go home.

15. She also like her mother admitted in cross-examination that the accused got up from the house of Laxmi and went away in her presence. Laxmi thereupon asked her to come again for sleeping. According to her Kisan Govinda Rao also used to come to the house of Laxmi. She also like her mother Mathurabai believed the prosecution case of the accused being seen in the company of Laxmi while going towards the village at dinner time.

16. This leads us to the evidence of Satya Bhama PW 21, daughter of Patilbuwa, aged about 15 years. She deposed that at about dinner time she was standing on the terrace which is on the fit floor of her house along with her brother Ramesh and Khushal. From there she saw one female standing below the neem tree. On enquiring the female said that she was the wife of Namdeo. Gambhir was also standing at a distance of two or four feet from her.

17. In cross-examination she admitted that her sister Rukhmini was married to the nephew of Kisan Rao Sarpanch. She denied whether her father Patilbuwa had prosecuted Rajaram and Himmat Rao for the offence of theft. The neem tree according to her was at a distance of 25 feet from her house. It is difficult to see a person standing under a neem tree from a distance of 25 feet even if it was a moonlight night. A person standing under a tree at night can see a person in the moonlight night but not vice versa.

18. In view of the close relationship between Patilbuwa, her father and Kisan Govinda Rao there is no wonder that this minor girl came to depose against the accused at the instance of Kisan Govinda Rao who is the moving spirit in the case. While discussing the evidence of Mathurabai PW 3 and Vimal PW 19 the theory of accused going in the company of Laxmi from her house at dinner time has already been disbelieved and thus there was no occasion for his witness to see Laxmi and the accused under the neem tree. Her evidence is too good to be relied upon.

19. On scrutiny the only thing established is that the accused and other persons used to visit the house of Laxmi during the absence of her husband and that he was again seen in the company of Laxmi of February 26, in the night till before dinner time. This single circumstance by itself is too feeble to connect the accused with the murder of Laxmi and her children.

20. Now we take the evidence relating to various recoveries most of which are alleged to be on the pointing of the accused. These recoveries were made during the course of four days from March 1 to March 4, 1975. In Panchnamas regarding all these recoveries Kisan Govinda Rao is one of the witnesses including Ex. 27 on which his signature was subsequently appended by way of interpolation. At one stage the High Court felt suspicious about the Panchnamas EX. 27. It, therefore, directed the Sessions Court to take additional evidence of other Panchas. Accordingly the evidence of Narain and Sukhdeo was recorded.

21. From the deposition of Kisan Govinda Rao PW 8, it appears that he was called by the police first on the night of February 27 at 2.45 a.m. and Waman Janu was the other Panch. They were taken to the house of Namdeo. Some breads, vegetables and some utensils were lying in the osari. The Panchnama Ex. 19 was drawn up. For the second time he was called along with Waman Janu, another witness of the Panchnama, at 3 p.m. They were taken to the house of Namdeo. They

climbed over the tin roof. The tin was removed from the roof. They could see the legs of a child after the removal of the clothes from the surface of a corn-bin. Panchnama Ex. 21 of the same was drawn up. He was called for the third time by the police on March 1, 1975 with two other Panchas Waman Janu and Sada Shiva Mhaske. Police took them and the dog and her master to the house of Namdeo. The dog was allowed to take the smell of the box which was lying open. The lock thereof was lying by the side. The dog then came out. Her, Master followed her and the Panchas followed the master. The dog stopped under the neem tree on the way and took the smell. The dog then came at the back side of Rajarma's house. She then again went to the house of the accused. The dog then went near the stone embankment near the tarmarind tree. Eventually she went inside the house of the accused. Panchnama EX. 22 of the same was drawn up. Kisan Govinda Rao was called for the fourth time at 5 p.m. along with Rambhau Nandu and took them to the nala to the west of the bridge at about 10 feet. Four stones were found in the bed of the nala by the side of the stream. All these stones were stained with blood. They were sealed under a Panchnama EX. 28.

22. He was called for the fifth time at 6 p.m. along with Waman Janu and Rambhau Nandu. Police took them to the house of Namdeo. Household utensils were lying scattered. Police Station Incharge asked Namdeo to verify whether his cash and ornaments were missing or intact. Namdeo told that one box and one bhagona were missing. Panchnama Ex. 29 of the scattered articles was drawn. Kisan Govinda Rao was called for the sixth time on March 2, 1975 at 11 a.m. with Waman Janu, the other Panch. Police took them to the house of Namdeo. Police opened the door and asked Namdeo to tell which articles of his were missing. Namdeo on examining the articles said that a box and a blanket were missing. His cash and gold and silver ornaments were intact. Panchnama Ex. 30 of what happened there was drawn up.

23. For the seventh time he was again called at 1 p.m. at the school along with Janardan Shripat and Wamanrao Bhikanrao, other Panchas. The police asked them to hear what the accused had to say. Accused informed that he had kept the keys of the lock burried underground near the kud wall of osari of Namdeo. The memorandum of his statement was recorded under the signature of the two Panchas.

24. Kisan Govinda Rao was called for the eighth time at 1 p.m. on March 3, 1975. Dashrath Yeduji was the other Panch at the school. Police asked them to hear what the accused was saying. The accused offered to show the well in which he had thrown the blanket and the box. The memorandum of his statement Ex. 33 was recorded.

25. Kisan Govinda Rao was called for the ninth time on March 4, 1975 at 3 or 3.30 p.m. at school. Waman Janu and Rambhau Nanduji were the other Panchas. Police asked them to hear what the accused was going to say. He said that a string containing black beads is contained below the stone behind his house. The memorandum of his statement was drawn up under the signature of the Panchas which is Ex. 34.

26. For the last time Kisan Govinda Rao was called by the police at 5 p.m. at school and the other Panch was Waman Janu. Again they were asked to hear what the accused had to say and the accused said that he had kept one brass pot into the stone embankment of his wadga. The accused offered to discover the same. The memorandum of his statement Ex. 36 was recorded.

27. The various recoveries made in various instalments most of them on the pointing of the accused appears to be suspicious. On February 27 when the Investigating Officer along with the Panchas peeped inside the room after removing the tin roof they found foul smell coming out. If the body

had decomposed just within one day of the occurrence obviously much more foul smell would be coming out from the well, on March 1, where two corpses were lying. It has come in evidence that people used to go towards the well to ease themselves. They must have come to know about the foul smell specially when the dog squad was there and it would have been not at all difficult for the dog to locate the place where the foul smell was coming from. In our opinion this must have been known to all concerned that foul smell was coming out of the well and people must have tried to find the reason thereof. In such a situation it was not at all necessary for the accused to have pointed out the place where the dead bodies were lying.

28. Coupled with this fact we know that Kisan Govinda Rao had been called as a Panch in respect of each and every recovery made during the course of four days. There is both oral (evidence) and documents on the record to establish that there was a long standing enmity between Kisan Govinda Rao on the one hand and the members of the family of the accused on the other.

29. The High Court has, however, ignored the documentary evidence including the judgment produced on behalf of the accused on the simple ground that they indicate enmity not with the father of the accused, but with his uncles, who were separate from the accused and his father and therefore, that enmity can be of no avail for the accused. His uncle may be living separately from the accused and his father, but that does not destroy the relationship of the members of the family. Blood is thicker than water. If the uncle of the accused were involved in criminal and civil litigation with Kisan Govinda, the evidence of Kisan cannot be safely relied upon.

30. This leads us to the medical evidence. The two doctors, Dr. Tapre PW 14 and Dr. Koti, PW 12, who conducted the post-mortem examination could not give the probable time of death of the three deceased as the bodies were in a high state of decomposition. The High Court, however, tried to delve deep into the matter and after a long drawn-up reasoning came to the conclusion that the death of the three deceased had taken place late in the night on February 26, 1975. In this connection, the High Court made the following adverse remarks about the doctors :

We feel and regret that Dr. Tapre as well as Dr. Koti have failed to bring the case in their notes and care and circumspection, and considerations which are patent and necessary before giving their opinion in regard to such a vital as to the probable time of death of the deceased.... he failed to do his duty by the profession which he professed to practice.... Dr. Koti who is an M.D. in General Medicine says that "no opinion could be given as to the probable cause of death (which appears to be a mistake for time) as the body was in high state of decomposition".

The High Court came to its own opinion when the doctors failed to give opinion. The Court has to draw its conclusion on the basis of the materials supplied by the expert opinion. The High Court has tried to usurp the functions of an expert. Accepting that the accused was seen in the evening of February 26 in the company of Laxmi, in the absence of any positive evidence about the probable time of death, it is difficult to connect the accused with the crime as there might be a long gap between the accused being seen in Laxmi's company and the time of the death of the three deceased. Many more persons might have come in between. Besides there is evidence on the record to show that other persons also used to visit Laxmi's house.

31. The last but not the least in importance is the question of motive. The motive alleged by the prosecution is of robbery or theft of the cash and the ornaments to the tune of Rs 7000. But curiously enough not a single item of cash or the ornaments was touched. The High Court had been

impressed by the fact that the accused could not locate the place where the cash or the ornaments were kept. If the prosecution case is that the accused had been coming regularly to the house of Laxmi, it is too much to assume that he would commit the murder of Laxmi and her children without first ascertaining where the cash and valuables were kept. The Sessions Judge himself did not accept the prosecution case regarding motive and it is on this account that he chose to award lesser punishment of life imprisonment.

32. From the evidence discussed above, we find that the three conditions which are necessary to be satisfied before circumstantial evidence can be made the basis for conviction have not been fulfilled. There may be suspicion against the accused but the suspicion cannot take the place of evidence. The approach of the High Court in the appraisal of evidence is not at all satisfactory. The evidence on the record falls short of proving the guilt of the accused beyond all reasonable doubt.

33. We accordingly allow the appeal set aside the conviction and sentence of the appellant and he is acquitted of the charge. He shall be set free forthwith.

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