SUPREME COURT OF INDIA

Radhey Shyam

Vs.

State of Rajasthan

Crl.A.No.593 of 2005

(Ranjana Prakash Desai and Madan B. Lokur JJ.)

25.02.2014

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. The appellant was convicted by Additional Sessions Judge Kota, Rajasthan for offence punishable under Section 302 of the IPC. He was sentenced to life imprisonment.

2. In short, the case of the prosecution is that on 24/2/1997, the appellant cut the throats of his children Rakesh and Rajkanta with a blade in the house of his in-laws where he was staying for his treatment. He was suffering from tuberculosis. According to the prosecution, this incident was witnessed by Banwari, the brother-in-law of the appellant. Banwari informed about it to his brother Kajod, who had come from the market. Kajod found Rakesh dead. Rajkanta was alive and was in pain. Kajod took her to the doctor and the doctor declared her dead. Kajod lodged FIR. Investigation was started. The appellant was arrested. After completion of the investigation, the appellant came to be charged under Section 302 of the IPC. In support of its case, prosecution examined 14 witnesses. PW-2 Banwari is the eye-witness. He is a child witness. His evidence is material to the prosecution. The appellant pleaded not guilty to the charge. He stated that he was falsely implicated in the case, because his relations with his wife's family were strained.

3. Shri Santosh Mishra, learned counsel appearing for the appellant submitted that the entire case rests on the testimony of a child witness. The child witness's evidence has to be carefully scrutinized and, only if it is found reliable, it can be

accepted. He submitted that PW-2 Banwari's evidence does not answer the test laid down by this Court in numerous judgments and, hence, no reliance can be placed on him. In support of this submission, counsel relied on Rameshwar s/o. Kalyan Singh v. The State of Rajasthan[1], Panchhi & Ors. v. State of U.P.[2], Ratansinh Dalsukhbhai Nayak v. State of Gujarat[3] and Raj Kumar v. State of Maharashtra[4]. He submitted that the entire incident appears to be inherently improbable. If throats of two children were cut with a blade, they would have raised loud cries and that would have brought the neighbours to the room. Counsel submitted that there are inconsistencies in the evidence of the witnesses. The story that PW-2 Banwari saw the incident through the hole of the door is difficult to digest. Counsel submitted that recovery of blade from the possession of the appellant is also not proved. Motive is also not established. In the circumstances benefit of doubt must be given to the appellant, who is in jail for about 19 years.

4. Shri Milind Kumar, learned counsel for the State, on the other hand, submitted that child witness PW-2 Banwari inspires confidence. It is established that the appellant was alone in the room with his children and, hence, none else but he can be held responsible for their murder. Counsel pointed out that pertinently on the clothes of the appellant, blood was found. The blood group of those stains matched with that of the blood found on the clothes of deceased Rajkanta. This indicates that the appellant killed his children. Counsel submitted that, therefore, the conviction and sentence of the appellant be confirmed.

5. The post-mortem notes make it clear that the throats of the children were cut. We have gone through the evidence rather minutely because we felt that the approach of the trial court and the High Court was not right. We shall therefore briefly refer to the evidence.

6. There is no challenge to the prosecution case that at the material time, the appellant was staying in his in-law's house with his children. PW-1 Kajod stated that on the date of incident at about 2.00 p.m., the appellant sent him to bring Kachodi and Jalebi. Within half an hour, he came back. Since deceased Rakesh had high fever, the appellant told him to bring a tablet from the shop. When he came back with a tablet, he saw a crowd gathered in front of his house. The appellant was holding a blade in his hand and throats of Rakesh and Rajkanta had been cut. Rajkanta was in pain. He lifted her and took her to Dr. R.N. Khan, where she was declared dead. He brought her home. He then gave his statement to the police. In his cross-examination he stated that his sister and mother had gone to the market. He added that his sisters PW-3 Suganya and PW-10 Nati had gone to the

market and when he went to purchase the tablet there was no one present at home except the appellant and his children Rakesh and Rajkanta. When his police statement was shown to him, he stated that he could not say why the fact that he had seen a blade in the appellant's hand was not recorded by the police. He then stated that he did not see the blade in the appellant's hand. He denied that the police recovered the blade from the almirah. He added that the blade was in possession of the police. He stated that when he came back, the appellant was sleeping and there was blood on his clothes. He stated that blood stained clothes of the appellant were seized and he signed on the panchnama. He changed his version and stated that the police did not seize and seal the blood stained clothes of the appellant before him. He clearly admitted that he had not actually seen the appellant cutting the throats of the deceased but he got to know about it from the people. Therefore, this witness is not an eye witness. While in examination-in-chief, he states that he had seen the appellant holding a blade in his hand, in the cross-examination, he denies having seen a blade in the appellant's hand. His case that his sisters had gone to the market is not consistent with the evidence of PW-2 Banwari, the eye-witness as we shall soon see. He stated that he had conversation with deceased Rajkanta when he was carrying her to the doctor and she named the appellant as her assailant, but this fact is not noted in his police statement. He has denied that blood stained clothes of the appellant were seized in his presence, thus making the panchnama on which he is stated to have signed a fabricated document.

7. PW-2 Banwari is a child witness. He was ten years old when he gave evidence. Before we proceed to his evidence, we must refer to the judgments of this Court on which reliance is placed by the counsel to show how child witness's evidence is to be appreciated.

8. In Ratansinh Dalsukhbhai Nayak, this Court considered the evidentiary value of the testimony of a child witness and observed as under:

> "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 the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle

that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

9. In Panchhi, after reiterating the same principles, this Court observed that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness is an easy pray to tutoring. This Court further observed that the courts have held that the evidence of a child witness must find adequate corroboration before it is relied upon. But, it is more a rule of practical wisdom than of law. It is not necessary to refer to other judgments cited by learned counsel because they reiterate the same principles. The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness's evidence. If found, reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation. We will scrutinize PW-2 Banwari's evidence in light of the above principles.

10. PW-2 Banwari stated that on the date of incident his sisters PW-3 Suganya and PW-10 Nati were at home. PW-1 Kajod was also there. The appellant and his children were in the house. At about 1.00 p.m., Kajod was sent to bring Jalebi. He was sitting outside the house. According to him PW-3 Suganya was also sitting outside the house. At that time, his cousin came there and asked for a matchbox. He went to the house to bring the matchbox. From the hole of the door he saw the appellant cutting the necks of Rakesh and Rajkanta with a blade. He then opened the door by inserting his fingers through the hole. He saw the appellant cutting the neck of deceased Rakesh. He went to call his sister PW-3 Suganya. According to him, the appellant cut the neck of Rajkanta while he had gone to call his sister PW-3 Suganya. Both his sisters rushed to the room. PW-1 Kajod also came there. Upon arrival of PW-1 Kajod, he told him the entire story. In the cross-examination, he again reiterated that PW-3 Suganya and PW-10 Nati were present near the scene of offence. They were sitting with him outside the house. Thus, there is a glaring discrepancy in the evidence of PW-1 Kajod and this witness as regards presence of PW-3 Suganya and PW-10 Nati near the scene of offence at the time of incident.

His version that he saw the incident through the hole of the door does not inspire confidence. He has changed his version frequently. At one stage, he says that when he went to bring the matchbox, he peeped through the hole of the door and saw necks of Rakesh and Rajkanta being cut. Then he says that he opened the door by inserting his fingers through the hole and saw the appellant cutting the throat of Rakesh and when he went to call his sister, the appellant cut the throat of Rajkanta. A doubt is, therefore, created as to whether he really saw the incident. Moreover, if the throats of two children were cut, it is inconceivable that he would not have heard cries of the children. It is also difficult to accept that at that time, his cousin came there to ask for a matchbox and he went to the house to bring the matchbox. This story appears to have been created to establish that PW-2 Banwari went to the house and saw the incident through the hole of the door. In such a situation, when it is difficult to place reliance on the testimony of a child witness, it is necessary to look for corroboration to his evidence from other witnesses. We find that the other prosecution witnesses do not corroborate the evidence of PW-2 Banwari, at all, as we shall soon see. It is, therefore, very difficult to rely on PW- 2 Banwari's evidence.

11. PW-3 Suganya stated that at about 2.30 p.m. the appellant was sleeping in her maternal house at Kotdi. Deceased Rakesh and Rajkanta were playing near him. At that time she, her sister PW-10 Nati and children were present there. The appellant asked for Jalebi and Kachodi. PW-1 Kajod went and brought Jalebi and Kachodi. The appellant ate them and gave some to his children Rakesh and Rajkanta. According to her, Rajkanta had fever and, therefore, the appellant had sent PW-1 Kajod to bring tablets. When she went inside the room, the appellant sent her away. He told her younger sister PW-10 Nati that he wanted to ease himself and, therefore, PW- 10 Nati should stay outside. PW-10 Nati then sat in the courtyard along with the children. After that, the appellant shut the door. Thereafter, when she went with a tablet to the house, PW-10 Nati told her that as the appellant wanted to ease himself she should not go inside. She, therefore, sat outside the house. Thereafter, her cousin Man Singh came there. He wanted a matchbox. PW-2 Banwari went to the house to bring the matchbox. PW-2 Banwari saw through the hole of the closed door the appellant cutting the throat of his daughter with a blade. Thereafter, he unbolted the door by putting his fingers inside. He then screamed that the appellant had cut the throats of the children and called her. She rushed to the room. She saw the appellant sitting inside the room after cutting the throats of his children. There was blood in the room. Clothes of the appellant were also blood stained. When she entered the room, she did not see anything in the hands of the appellant. She saw a blade lying there. According to her, PW- 1 Kajod

took the children to the hospital but the children were dead. She admitted that she went to the room after PW-2 Banwari called her and she had not seen anything before that. It is clear from PW-3 Suganya's evidence that she is not an eye-witness. Her version differs from that of PW-2 Banwari. PW-2 Banwari stated that he saw Rakesh's throat being cut. He went to call PW-3 Suganya. By that time, the appellant had cut the throat of Rajkanta. PW-3 Suganya stated that PW-2 Banwari saw that the appellant had cut the throats of the children. He screamed and, thereafter, she rushed to the house.

12. PW-7 Prithviraj turned hostile. He did not support PW-1 Kajod's version that he accompanied PW-1 Kajod to the doctor when PW-1 Kajod carried Rajkanta to the doctor; that he was present when the incident took place and that he saw the chopped throats of the deceased children. PW-10 Nati, the sister of PW-1 Kajod also turned hostile. She went to the extent of saying that she did not know who killed Rakesh and Rajkanta.

13. PW-12 Tej Singh, the Investigating Officer gave a new twist to the prosecution story. He stated that while in custody, the appellant gave information that he had hidden a blade in the upper section of an almirah situated in the room. He recorded the said statement and, pursuant to the said statement, he seized the blade, which was kept in the almirah and sealed it. This is contrary to the evidence of PW-1 Kajod that the blade was in the hand of the appellant and the evidence of PW-3 Suganya that the blade was lying in the room. He also stated that the appellant was admitted in the hospital because he was unwell. However, he admitted that no hospital record was produced by him about the admission of the appellant in the hospital. He stated that he did not know whether there were any cut marks or abrasions on the fingers of the appellant. PW-13 Vimala is the wife of the appellant. Her evidence gives a set back to the prosecution case. She stated that she went to the market leaving her deceased children with the appellant. According to her, she rushed to the house when the police told her that the appellant had cut the throats of her children. Surprisingly, in the cross-examination, she stated that the appellant used to love her children very much and that he was also not angry with her. She further stated that the appellant was a normal person and was not suffering from insanity.

14. Upon a careful perusal of the evidence on record, we feel that there are too many drawbacks in the prosecution case. Firstly, we find the prosecution story to be inherently improbable. The post-mortem notes of the deceased children show that their throats were badly cut. The injury of Rajkanta is described as under:

"Incised wound 13"x1"xTr.cut Tr.upto cervical vertebral column in front of neck middle region cutting all structures including muscles, vessels, nerves, trachea & Oesophagues etc. Bleeding profusely & soft red clots present.

The cause of death was shock as a result of ante mortem injury to neck leading to haemorrhage."

The injury of Rakesh is described as under:

"Incised wound 8"x1"xTr.cut Tr.upto vertebral column (Cervical) x 1.1/2" cutting all structures including muscles, vessels, trachea, Oesophagues & nerves etc. Bleeding profusely & soft red blood clots.

The cause of death was shock as a result of ante mortem injury to neck leading to haemorrhage."

There is nothing to suggest that the children were drugged. If the appellant had cut the throats of the children in such a brutal manner leading to above-mentioned serious injuries, the children would have raised loud cries drawing attention of PW-2 Banwari and his sisters PW-3 Suganya and PW-10 Nati to the house. Neighbours would have also rushed there. It is inconceivable that the appellant would carry out such a sinister operation within a short span, quietly without drawing attention of people sitting outside. Moreover, while the appellant was cutting the throat of one child, the other child would have reacted and tried to stop him. The children would certainly have resisted the attempt in their own way. The appellant is stated to have used a shaving blade which had sharp edges on both sides. In the scuffle which must have ensued, the appellant must have received injuries on his fingers. As already noted, the appellant was admitted in a hospital but the Investigating Officer has not produced his hospital record which could have shown injuries sustained by him on his fingers. The prosecution story that blade was used by the appellant is also not established. PW-1 Kajod stated that he saw the appellant holding a blade in his hand. In the cross-examination, he stated that he did not see a blade in the appellant's hand, but it was in possession of the police. PW-3 Suganya stated that she saw the blade lying in the room. PW- 12 Tej Singh, the Investigating Officer introduced an entirely new story. He stated that the blade was discovered at the instance of the appellant from the upper section of an almirah where the

appellant had hidden it. Thus, the prosecution case that the appellant used a blade is shrouded in suspicion.

15. Another significant lacuna in the prosecution case is the contradictory statements of PW-1 Kajod and PW-2 Banwari as regards presence of PW-3 Suganya and PW-10 Nati in the house. While PW-1 Kajod stated that they were not present, PW-2 Banwari stated that they were present and, in fact, on seeing the incident, he called PW-3 Suganya to the house. If the two sisters were present, there was no need for them to wait for a call from PW-2 Banwari. The children's cries would have made them run to the house. It is, therefore, doubtful whether the deaths of Rakesh and Rajkanta occurred in a manner in which the prosecution wants to project they had occurred.

16. The appellant's wife has gone on record to say that the appellant was a normal person; that he was not suffering from insanity; that he loved her children very much and that he was not angry with her. If the appellant had killed her two children, she would never have given such a certificate to him. PW-3 Suganya stated that the appellant sent for Kachodi and Jalebi and when PW-1 Kajod brought them, he gave them to his children Rakesh and Rajkanta. This happened just before the incident. PW-1 Kajod stated that because Rakesh was having fever, the appellant sent him to buy tablets. These are not signs of a person who would want to kill his children. Nothing has been brought on record to suggest why the appellant killed his children. The prosecution has failed to prove motive. It is true that if there is eye-witness account, absence of motive is immaterial. But as we have already noted the evidence of lone eye-witness i.e. child witness PW-2 Banwari does not inspire confidence. The other evidence on record is so infirm that it cannot supply the required corroboration to his evidence.

17 It is the prosecution case that the clothes of the appellant were blood stained and that blood group of the blood found on the clothes of deceased Rajkanta was the same as the blood group of the blood found on the clothes of the appellant. Blood found on the clothes of Rakesh is stated to be of 'O' group. Pertinently, the pancha to the seizure panchnama under which the clothes of the appellant and deceased children were seized, has turned hostile. PW-1 Kajod who is signatory to the panchnama of seizure of clothes denied that the clothes of the appellant were seized before him. The blood groups of the appellant, deceased Rajkanta and deceased Rakesh were not ascertained. To establish its case, the prosecution should have brought on record blood group of the appellant, blood groups of the deceased children and the medical record of the appellant from the hospital in which he was

admitted. Moreover, the prosecution case that the blood found on the clothes of the appellant was of the same group as that of the blood found on the clothes of Rajkanta, was not put to the appellant in his statement recorded under Section 313 of the Criminal Procedure Code. This is a most vital circumstance which, if established, would have linked the appellant to the crime in question. It was obligatory on the part of the prosecution to put it to the appellant so that he could have offered explanation for the same. The prosecution failed to do so. This is a serious lacuna which cannot be condoned.

18. It is also surprising that if the appellant had committed such a heinous crime he would continue to sit in the room. His first reaction would have been to run away. It is also difficult to appreciate as to how those who had gathered at the scene of offence kept quiet after seeing such a gruesome crime. The reaction of the people would have been to take him to the police station. The prosecution is heavily relying on the fact that the appellant was alone in the room along with the children and no one else could have gone inside the room to kill the children. Normally, this argument would have impressed us if the prosecution had established the other circumstances to the hilt. But in this case the prosecution has not established even a single circumstance beyond doubt. We are of the opinion that the prosecution has suppressed the genesis of the case. The incident does not appear to have happened in the manner in which the prosecution wants the court to believe it had happened. The police came to the scene after about one hour. As to what happened in between is anybody's guess. The story of alleged dying declaration of Rajkanta is not established. The discovery of blade from the almirah is not established and has rightly been rejected by the trial court. The panch witness turned hostile. Resultantly, the recoveries are not established. PW-13 Vimala, the wife of the appellant, categorically stated that the appellant loved his children and he was a normal person. His conduct prior to the incident does not suggest guilty mind. He fed his children Jalebi and Kachodi. He ordered tablets for Rakesh because he had high fever. The injuries suffered by the children are so grave that the children would have raised cries. Nobody has stated that they heard any cries. The story that the child witness saw the incident through the hole is difficult to digest. No independent witness has been examined and the evidence of all the witnesses is replete with inconsistencies. All these circumstances make the prosecution story doubtful. The appellant, therefore, must be given benefit of doubt. In the circumstances we set aside the impugned order. The appellant is directed to be released forthwith unless required in any other case.

19. The criminal appeal is disposed of in the afore-stated terms.

[1] AIR (39) 1952 SC 54
[2] (1998) 7 SCC 177
[3] (2004) 1 SCC 64
[4] (2009) 15 SCC 292