

ZAFAR
v.
STATE OF U.P.

JANUARY 15, 2003

[S. RAJENDRA BABU AND P. VENKATARAMA REDDI, JJ.]

Evidence Act, 1872—Section 3—Testimony of child witness—Reliability—Both trial court and High Court placing reliance on testimony of child witness convicting accused for murder—Appeal—Held : In view of the doubtful features and other infirmities in the prosecution evidence, reliance cannot be placed on the evidence of child witness—Hence accused entitled to benefit of doubt and conviction to be set aside—Penal Code, 1860—Section 302.

Constitution of India, 1950—Article 136—Special Leave Jurisdiction—Evidence—Fatal infirmities in the prosecution case—Not adverted to by the High Court—Hence fit case for interfering and re-appreciating evidence.

According to the prosecution, due to some ill-feelings, appellant-accused shot his relative H at a public street. The victim was shot in front of house of S and he collapsed before the meat shop of PW 3 and succumbed to his injuries. At that time, deceased had gone to the meat shop with his son-PW2. Some people tried to over power the appellant, but he threatened them and thereafter fled away from the scene. Father of the deceased-PW1 on coming to know of the incident came to the spot immediately. He then lodged an FIR. Appellant was charged for offence under Section 302 IPC. Prosecution examined two eye witnesses out of which meat shop owner turned hostile and the other one was child witness-son of the deceased. Both trial court as well as High Court held the testimony of child witness as clear, trustworthy and reliance could be safely placed on his evidence and convicted the appellant for offence under Section 302 IPC. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. In view of the doubtful features and other infirmities in the prosecution evidence it is not safe to rely on the evidence of child witness whose evidence needs to be scrutinized with due care and caution. Though it is a case of concurrent finding by both the Courts resting on

A the appreciation of evidence of child witness, trial Court and High Court overlooked certain important aspects in the practical application of the rule of prudence and caution. It failed to take note of certain crucial factors emerging from the evidence on record. There was no critical appraisal of the evidence of child witness except focusing attention on two alleged contradictions of no significance and repelling the arguments based on them. Even if the finding that medical evidence does not go counter to the prosecution case is allowed to remain, there are other fatal infirmities in the evidence relied upon by the prosecution which were not adverted to by High Court. In these circumstances, it is a fit case for interference under Article 136 of the Constitution. [370-E, H]

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C 1.2. There are two different versions from child witness-P.W.2 as regards the scene of offence and the evidence of P.W.2 does not fit into the prosecution case about the place of occurrence. Thus, a reasonable doubt arises as to the reliability of the evidence of child witness.
[368-H; 369-A]

D 1.3. The fact that P.W.2 was examined and taken to the spot only four or five days after the incident while making it appear on record that he was examined on the same day of the incident casts further doubt on the prosecution case. If P.W.2 was in the know of things, then there should not have been inordinate delay in examining him unless the prosecution was trying to project him as eye-witness, having failed in their attempts to get direct evidence of others. These are the imponderables and on account of this, a doubt has to be necessarily entertained as to whether P.W.2 claimed to be an eye-witness on the day of incident itself in fact witnessed the occurrence. [369-E, F-H; 370-A]

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F 1.4. Statement of child witness that police personnel were already there at the spot by the time his grand-father reached and policeman brought a cot and placed the dead body on it, is inconsistent with that of P.W.1 as well as I.O. According to them, police reached the scene of offence only after complaint was lodged by P.W.1. P.W.6-Sub-Inspector

G found the dead body lying flat on the ground. This gives rise to a doubt as to when exactly P.W.2 was at the scene of offence, and makes the version of P.W.2 vulnerable to criticism. [370-A, B]

H 1.5. In the cross-examination, P.W.1 stated that he forgot to mention that PW2 told him that accused killed his father. One way of looking at it is that having regard to the tenor of FIR in which he made a general

statement that many persons tried to catch the accused, the omission to mention what P.W.2 told him need not be viewed seriously. Though, by itself, it may not be a significant omission, but, coupled with other doubtful features emerging from the evidence of P.W.2 and I.O., this aspect cannot be brushed aside. [370-C, D] A

1.6. In view of the aforesaid infirmities in the prosecution case, the appellant-accused is entitled to benefit of doubt. Hence his conviction is set aside. [370-H; 371-A] B

Leela Ram (D) through Duli Chand v. State of Haryana J.T., (1999) 8 S.C. 274, referred to. C

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 498 of 2000.

From the Judgment and Order dated 21.2.99 of the Allahabad High Court in Crl. A.No. 2937 of 1981. D

Shushil Kumar, Ajay Bhalla and Ms. Abha R. Sharma for the Appellant.

Vivek Singh and A.S. Pundir for the Respondent.

The Judgment of the Court was delivered by

P. VENKATARAMA REDDI, J. This appeal by Special leave is preferred by the sole accused in the Sessions Trial No. 583 of 1980 on the file of the Additional District & Sessions Judge, Gorakhpur. The accused was convicted under Section 302 I.P.C. on the charge of murdering his relation by name Hidayat Hussain at about 8 A.M. on 28.6.1980 on a public street. The accused was sentenced to life imprisonment. On appeal the High Court confirmed the conviction and sentence. E F

The prosecution case is that on the crucial day at about 8 A.M. the deceased was going to a meat shop with his son Aizaz @ Guddu (P.W.2). As they came close to the meat shop, the accused fired a shot from his country-made pistol in front of the house of one Sidhu. The victim collapsed before the meat shop of Achhan (P.W.3) and succumbed to the injuries then and there. Though some people tried to overpower the accused, he reloaded his pistol and threatened them not to risk their lives. Thereafter, he fled away from the scene. P.W.1, the father of the deceased, on coming to know of the incident came to the spot immediately. He saw the son of the deceased H

A (P.W.2) weeping by the side of the dead body. His clothes were blood-stained. After some time he got a complaint drafted by one Yusuf and handed over the same in the police station at 9.15 A.M. The Head Constable registered the F.I.R. P.W. 6, the sub-Inspector of police immediately went to the scene of offence, took custody of the dead body after having it photographed and prepared a Panchnama. Thereafter, P.W.7, the Senior Sub-Inspector, took over the investigation and seized the blood-stained earth, empty cartridge and blood stained Kurta of P.W.2. On search at the house of accused he found nothing incriminating.

C Post-mortem examination was conducted by P.W.5 who was the Medical Officer attached to District Hospital, Gorakhpur, on the evening of the same day. The following ante-mortem injuries were found on the body of the deceased:

1. Gun shot wound-1-12" x 1.2" cavity deep on the right back 9" below the root of the back and adjacent to the mid line. Margins black, contused and inverted wound of entry.

2. Gun Shot wound ½" x 4/10" x cavity deep on the chest 2" inner to right nipple, margins black everted contused, wound of exit. 6 pellets recovered underneath this injury."

E The Doctor further noted that the injuries were caused by fire arm. On internal examination, he found 8 ounces of clotted blood in the thorax cavity and laceration of right lung at several places. He found one pound of blood in the stomach. According to the doctor, the deceased died due to shock and haemorrhage caused by the fire arm injuries and the death would have occurred instantaneously. P.W. 7 conducted the inquest and recorded the statements of witnesses. He filed the charge-sheet.

G The motive for the crime as disclosed by P.W. 1 is that the accused was under the impression that the deceased was having illicit relations with the wife of the accused as the deceased was often protesting against the cruel treatment being meted out to her and trying to help her. P.W.1 also stated that there was some altercation a week earlier whereupon the accused threatened the deceased with dire consequences. The accused and the deceased are related.

H The two eye-witnesses examined by prosecution are P.Ws. 2 and 3. The eye-witness P.W.2 Aizaz Hussain was aged 7 years at the time of the incident and 8 years at the time of giving evidence. He was studying in class I in the

local school. He gave an account of the incident and the circumstances in which his father was killed. He clearly implicated the accused as assailant. P.W. 3, the meat shop owner turned hostile. However, he supported the prosecution case partly. A

Therefore, much turns on the evidence of the child witness P.W.2. The trial court as well as the High Court were of the view that the testimony of P.W.2 was clear and trustworthy and reliance could be safely placed on his evidence. The learned trial Judge noted that he had put several questions to satisfy himself if he could give rational answers to the questions. The learned Judge then noted that the witness was intelligent. However, a rider was added to the effect that he could not fully understand the sanctity of oath. However, that does not by itself vitiate his evidence. B C

The learned Judges of the High Court having noted the proposition that cautious approach has to be adopted in appreciating the evidence of a child witness, proceeded to discuss the evidence. The High Court has pointed out that the presence of this witness-P.W.2 in the company of his father at the time of the incident cannot be doubted in view of the evidence of P.W.3 (who was declared as hostile witness) and P.W.1, the informant. The High Court then discussed the two alleged contradictions, i.e., about the dress he was wearing and the deceased not having any money in his pocket. The High Court rightly explained away these contradictions by giving cogent reasons. The High Court then discussed at length the medical evidence and came to the conclusion that there was really no inconsistency between the ocular testimony and the medical evidence. In any case, the High Court relying on the decision of this Court in *Leela Ram (D) through Duli Chand v. State of Haryana* J.T. (1999) 8 SC 274, observed that the prosecution case cannot be rejected outright, even if there was some doubt on the question whether one shot was fired or two shots were fired. The fact that the FIR was lodged promptly naming the accused as the assailant on the basis of first hand information which P.W.1 got was also considered to be an important factor in support of the prosecution. D E F

However, we find on a perusal of the evidence on record that the trial court as well as the High Court failed to focus their attention to certain crucial aspects which have undoubted bearing on the reliability of the evidence of the child witness-P.W.2. The first and foremost aspect which deserves attention is about the version of P.W.2 as regards the actual scene of offence. According to the prosecution case, the deceased was shot at in front of the G H

- A house of one Sidhu and he fell down in front of the meat shop of P.W.3 after walking for a little distance. In the site plan (K-9) the place of occurrence is marked as 'A' as spoken to by P.W.7, the I.O. That spot is just in front of the house of Sidhu. The distance between the place of shooting, i.e. Sidhu's house and the meat shop of P.W. 3 is about 5 to 6 'paces' according to P.W.7. P.W.7 stated more than once that the spot of shooting was pointed out to him by P.W.2. P.W.7 further stated that P.W.2 informed him that his father after having been hit by the bullet walked some distance and fell down near the meat shop. The fact that the site plan was drawn up after P.W.2 pointed out the place of occurrence was stated by the I.O. (P.W.7), even in chief examination. The version of P.W.2, the child witness is materially different.
- C According to him, the incident took place at the meat shop itself. This is what P.W.2 categorically stated:

D "The meat shop is at Baxipur. It is the shop of Achhan (P.W.3). I and my father reached the meat shop. Before my father could purchase meat, the accused Budhu came there and fired a shot. After receiving the bullet injury, my father fell before the shop of Achhan." This statement in chief examination was further reinforced and clarified in the following words:-

E "At the meat shop my father asked Achhan to weigh meat. At that time, beside my father other customers were also present in the shop. Achhan was weighing meat for the customers who were standing ahead of my father. There were many customers present at the shop of Achhan for buying meat. While my father was standing there were many persons standing before and after him for buying meat. I was standing ahead of my father. My father was fired at the place where he was standing. It is true that he fell flat."

G Thus the witness was categorical about the spot of occurrence being at the meat shop itself. He further stated in the questions put to him by the Court that the bullet hit his father on his back. To a question as to what his father was doing when he was shot at, the witness stated that his father was buying meat. As already noted, according to P.W.7, the earliest version of P.W.2 was that the accused shot him at a spot close to the meat shop but before he reached the shop. P.W. 7 drew the site plan as pointed out by P.W.2. If what is stated by P.W.7 is correct, we have two different versions from P.W.2 as regards the scene of offence. In any case, the evidence of H P.W.2 does not fit into the prosecution case about the place of occurrence.

In the face of this discrepancy on a very important aspect, a reasonable doubt arises as to the reliability of the evidence of this child witness. A

Another circumstance which deserves notice is that as per the version of P.W.2, the police came to him four or five days after the occurrence and enquired him about the details of murder and had also taken him to the place of murder. P.W.7, the I.O., has a different story to tell. According to him, after sending the dead body for post-mortem, he recorded the statements of witnesses, Achhan (P.W.3) and Aizaz Hussain (P.W.2) and got the blood stained kurta removed from the body of P.W.2 and collected samples of blood stained soil etc. and thereafter inspected the place of occurrence on being pointed out by P.W.2 and prepared the site plan accordingly. That means P.W.7 claims to have examined P.W.2 on the day of incident itself. But this version is belied by the categorcial statement of P.W.2 that the police came to him only after four or five days and made enquiries about the murder. P.W.7 admitted that he did not record the dates when he took the statement of each witnesses in the case diary-which is very strange. Amongst the statements found in the first running pages of the case diary, the statement of P.W.2 does not figure at all, as seen from the cross-examination of P.W.7. All this supports P.W.2's version that he was contacted and examined by police only after four or five days. The question then arises as to why there was such an inordinate delay in examining him. No explanation was forthcoming from the investigating officer in this regard. However, the learned counsel for the respondent-State has endeavoured to give a plausible explanation for this. According to him, the I.O. would not have felt it necessary to adduce the evidence of the child witness on account of the fact that there was another eye witness, namely, P.W.3, who was examined on the same day and who unfortunately became hostile later on. This explanation remains in the area of surmise. The best person to throw light on this aspect is P.W.7 but he did not say a word about it. Moreover, P.W.7 came forward apparently with an untrue version that he examined P.W.2 on the day of the incident itself and drew up the site plan as per the information given by him. The fact that P.W. 2 was examined and taken to the spot only four or five days after the incident while making it appear on record that he was examined on the same day of the incident casts another doubt on the prosecution case. If P.W.2 was in the know of things, why should the police postpone the event of examining him for so many days? Were they trying to project P.W.2 as eye-witness, having failed in their attempts to get direct evidence of others? These are the imponderables in this case. On account of this, a doubt has to be necessarily entertained as to whether P.W.2 claimed to be an eye-witness B
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A on the day of the incident itself and he in fact witnessed the occurrence.

One more point of doubt which makes the version of P.W.2 vulnerable to criticism is this: P.W.2 stated that the police personnel were already there at the spot by the time his grand-father (PW1) reached and that the policeman brought a cot and placed the dead body on it. However, this version is inconsistent with that of P.W.1 as well as the I.O. According to them, the police reached the scene of offence only after the complaint was lodged by P.W.1 P.W.6 found the dead body lying flat on the ground. All this gives rise to a doubt as to when exactly P.W.2 was at the scene of offence.

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C Lastly, it is urged by the learned counsel for the appellant that although in the FIR, P.W.2's presence was mentioned by the informant, he did not mention in the FIR that P.W.2 told him that the accused killed his father. In the cross-examination, P.W.1 stated that he forgot to mention this fact. One way of looking at it is that having regard to the tenor of the FIR in which he made a general statement that many persons tried to catch the accused, the omission to mention what he had been told by P.W. 2 need not be viewed seriously. Though, by itself, it may not be a significant omission, but, coupled with other doubtful features emerging from the evidence of P.W.2 and the I.O., this aspect cannot be brushed aside.

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E In view of the doubtful features and other infirmities in the prosecution evidence as discussed above, we are of the view that it is not safe to rely on the evidence of P.W.2 whose evidence needs to be scrutinized with due care and caution. It is, however, unnecessary to probe into the other question whether the ocular evidence is inconsistent with the medical evidence. Though it is a case of concurrent finding by both the Courts resting on the appreciation of evidence, we are of the view that the trial court and the High Court overlooked certain important aspects in the practical application of the rule of prudence and caution which the High Court itself proceeded to apply in appreciating the evidence of child witness. The High Court failed to take note of certain telling factors emerging from the evidence on record. There was no critical appraisal of the evidence of P.W.2 except focusing attention on two alleged contradictions of no significance and repelling the arguments based on them. Even if the finding that medical evidence does not go counter to the prosecution case is allowed to remain, there are other fatal infirmities in the evidence relied upon by the prosecution which were not adverted to by the High Court. In these circumstances, we are of the view that it is a fit case for interference under Art. 136. Accordingly, we hold that the accused

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is entitled to benefit of doubt and his conviction ought to be set aside. We. A
therefore, allow the appeal and direct the authorities concerned to release the
accused from the prison forthwith.

N.J.

Appeal allowed.