A STATE OF U.P.

v.

SATVEER & ORS.

B (Criminal Appeal Nos.623-624 of 2008)

JULY 01, 2015

[PINAKI CHANDRA GHOSE AND UDAY UMESH LALIT, JJ.]

C

Penal Code, 1860: s.302 r/w s.34 – Conviction by trial court – High Court ordered acquittal – State's appeal against acquittal – Prosecution case was that the respondents were indulging in Tantrism and for the said purpose killed 8 years D *old boy – PW-2 saw respondents taking the boy inside the baithak and coming out after half hour without the boy and going towards Chamunda Math with a thaal filled with articles of worship – Thereafter, PW-2 went along with another person inside baithak and saw the dead body of the boy in pool of* E *blood – The villagers caught hold of respondents and beat them up – Trial Court held respondents guilty u/s.302 r/w s.34 – High Court acquitted the respondents on the ground that the prosecution had failed to prove their complicity in the offence – On State's appeal, held: There was no evidence* F *to prove presence of sole eye witness at the spot – Place from where he allegedly witnessed the incident was not a natural place where either witness resided or carried on vocation – The witness also could not give reason of his presence at the spot and his continuing to be there for 20-25* G *minutes – The family members of the boy were not examined – Moreover, no blood stained clothes were recovered from any of the respondents though they were allegedly to be authors of the crime which left body of the deceased boy in a*

H

pool of blood – Case against respondents not made out and therefore, entitled to benefit of doubt. A

Appeal: Appeal against acquittal – Scope of interference – Discussed – Penal Code, 1860.

Dismissing the appeals, the Court B

HELD: 1. It is the case of the prosecution that the victim was last seen in the company of the respondents. The last seen theory having dimensions in terms of time as well place, would certainly clinch the matter if the testimony of PW2 is accepted. Everything hinges on his testimony as he is the sole witness. The evidence of the sole witness thus needs to be considered with caution and after testing it against other material and further, such evidence must inspire confidence and ought to be beyond suspicion. [Paras 10, 11] [315-F; 316-C; 317-A] C D

2. According to PW2, he was sitting on a bench in front of the clinic of a doctor with 'V' when he saw the deceased being led inside the *baithak* by the respondents. Apart from his own testimony, nothing was placed on record by the prosecution which could lend corroboration to his own presence and the content of his version. First, no reason was given why PW-2 and 'V' were sitting on the bench outside the clinic of the doctor. Neither the doctor nor 'V' were examined. Beyond the testimony of the witness himself there was nothing to indicate whether PW2 was actually there at the relevant time or not. Secondly, the place from where he allegedly witnessed the occurrence was not a natural place where either the witness resides or carries on any vocation. The reason for his being there was not placed on record. Again the reason for his continuing to be there for 20-25 minutes was also not spelt out. Thirdly, none from the house of the deceased was examined nor E F G H

A did PW1 throw any light as to when the deceased left the house and in whose company was he playing. Neither has the prosecution given the names of those children nor has anybody else been examined to say that he had seen the children playing at the place in B question. Fourthly, there was nothing to indicate how far was the house of the deceased and whether that was the normal place where the deceased would always be playing. Lastly, if the incident created chaos in the village so much so that the villagers went and thrashed the C respondents, there was no reason why none of them was examined. [Para 12] [317-B-G]

3. It is doubtful whether PW2 could be called a natural and truthful witness and could be completely relied upon. D The movements of the deceased are also not established to show that he was actually there as suggested by the witness. The assessment of the entire material has left many doubts and questions unanswered. Two facts, that the *baithak* was of ownership of the respondents E and that the body of the deceased was found there, though very crucial, cannot by themselves be sufficient to fix the liability. The *baithak* was not part of the house, was across the road and apparently accessible to others. And importantly, presence of respondents—whether F some or all of them, was not fully established. [Para 13] [318-B-E]

4. The respondents were apprehended the same day when one of them i.e. respondent 'Sa' was allegedly G found to be in possession of blood stained *dharati* or sickle. According to the prosecution, the weapon was blood stained and was kept in the folds of *dhoti* by said 'Sa'. However, no such blood stained *dhoti* of 'Sa' was recovered. For that matter no blood stained clothes were H recovered from any of the respondents though they were supposed to be authors of the crime which left body of

the deceased in a pool of blood. Even the blood stains found on the cemented portion from Chamunda Math, though of human origin, were quite disintegrated as per FSL examination. The material on record definitely fell short and the respondents are entitled to benefit of doubt. [Paras 14, 15] [318-F-H; 319-C]

State of U.P. v. Satish **2005 (2) SCR 1132: (2005) 3 SCC 114;** *Joseph v. State of Kerala* **2002 (4) Suppl. SCR 439: (2003) 1 SCC 465;** *State of Haryana v. Inder Singh* **(2002) 9 SCC 537;** *Ramnaresh v. State of Chhattisgarh* **2012 (3) SCR 630: (2012) 4 SCC 257 – relied on.**

Case Law Reference

2005 (2) SCR 1132	**Relied on**	**Para 10**
2002 (4) Suppl. SCR 439	**Relied on**	**Para 11**
(2002) 9 SCC 537	**Relied on**	**Para 11**
2012 (3) SCR 630	**Relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 623-624 of 2008

From the Judgment and Order dated 24.04.2007 of the High Court of Judicature at Allahabad in Criminal Appeal No. 7911 of 2006 and Criminal Reference No. 15 of 2006.

WITH

Criminal Appeal No. 622 of 2008.

Kamlendra Mishra, Ranbir Singh Yadav for the Appellant.

Rani Chhabra, Raj Singh Rana for the Respondents.

The Judgment of the Court was delivered by

UDAY UMESH LALIT, J. 1. These appeals by Special Leave arise out of judgment and order dated 24.04.2007

A passed by the High Court of Judicature at Allahabad in Criminal Appeal No.7911 of 2006 and Criminal Reference No.15 of 2006. While rejecting the Reference, the High Court allowed the Appeal and acquitted the respondents of the charges under Section 302 read with Section 34 IPC.

B

2. Pursuant to the statement of PW1 Roop Basant recorded by scribe Soran Lal at 12:45 p.m. on 24.02.2006, Crime No.23 was registered with Police Station Khurja Dehaat, Bulandshahar against the respondents. It was alleged that on C that day Akash aged about 8 years, nephew of said PW1 was playing near Ambedkar Park. At about 10 a.m. respondent Subhadra took said Akash to her *baithak*, which was seen by villagers Mewa Ram and Vijay Pal. At that time three sons of said Subhadra, who along with Subhadra are respondents D herein, were sitting in the Verandah. They went inside taking Akash along with them and did not come out for about half an hour. It was alleged that the respondents then came out with a "thaal" filled with articles of worship (pooja samagri) and went towards Chamunda Math for worship. Since Mewa Ram and E Vijay Pal did not see Akash coming out, they suspected some foul play and soon after the respondents had left for Chamunda Math they went inside the b*aithak*. As they entered, they saw dead body of Akash lying in a pool of blood with nostrils and F ears cut. They raised hue and cry, which attracted number of villagers. When the villagers saw body of Akash, the situation took an ugly turn and there was complete chaos. The people then went to the Math and assaulted the respondents.

3. The police thereafter arrived in the village and Inquest G *Panchanama* was conducted between 2:30 p.m. to 4:00 p.m. Around this time, the respondents were arrested at about 3:30 p.m. After the inquest, the body of Akash was sent for post mortem. PW7 Dr. Rajesh Kumar conducted post mortem at H 4:30 p.m and found following ante mortem injuries on the body

of said Akash :-

1. An incised wound size 1cm X 0.5cm X muscle & cartilage deep present over pinna of right ear.

2. A contusion 5 cms X 3 cms present over right side of face just anterior to the right ear.

3. A braded contusions 5 cms X 3 cms present over left side of face 3 cms away from nose.

4. A contusion 4 cms X 3 cms present over left side of face 3 cms away from nose

5. An incised wound 1 cm X .5 cm X muscle & cartilage and muscle deep present over left side of nostril.

6 An incised wound 1 cm X .5 cm X muscle & cartilage deep present over right side of nostril.

7. An incised wound 1 cm X .5 cm X muscle deep present over tip of chin.

8. Multiple contusion in the area of 7cms X 5 cms over anterior & right side of neck at the level of Adam's apple

9. Abraded contusion 4 cms x 4cms present over anterior aspect of neck over Adam's apple and towards left side.

It was found that there was bleeding from the mouth and nostrils. As per PW7 Dr. Rajesh Kumar, the cause of death was asphyxia resulting from throttling. The witness stated that injury Nos.1, 5, 6 and 7 were possible by a sharp cutting weapon.

4. While the respondents were arrested, on personal search of accused Sanjay, blood stained *dharati* or sickle was recovered. Since the respondents were found to be having

A injuries, they were referred to PW3 Dr. A. Kumar, who found seventeen injuries on the body of respondent Sanjay, one injury on the body of respondent Satveer and four injuries on the person of respondent Subhadra. The injuries were fresh and in the opinion of the witness were possibly received around
B 11:15 a.m. on the same day. Investigating Officer prepared Site plan Ext.Ka-15 according to which *baithak* in question was about 12' x 12' with one door and an adjoining verandah in front and the *baithak* was bounded by a boundary wall. He recovered blood stained earth from the *baithak* and blood
C stained cemented portion from Chamunda Math, which blood was later found to be of human origin.

5. After completing investigation, charge sheet was filed against the respondents and they were tried in the court of
D Additional Sessions Judge (Fast Track Court), Bulandshahar in Sessions Trial No.516 of 2006 for having committed the offences under Section 302 read with Section 34 IPC and Section 7 of Criminal Law Amendment Act. The prosecution in support of its case examined seven witnesses including two
E Doctors namely PWs3 and 7 and Informant Roop Basant as PW1. Mewa Ram was examined as PW2. In his testimony PW2 stated that on 21.02.2006 at about 10:00 a.m. while he was sitting in front of Ambedkar Park on a bench outside the clinic of a doctor along with Vijay Pal, he saw respondent
F Subhadra take Akash to the *baithak* by holding his arm, where respondents Satveer, Sanjay and Shishpal were already present. All the respondents then went inside along with Akash and did not come out for about half an hour. Thereafter the
G respondents came out with a "thaal" with "pooja samagri" and went towards Chamunda Math. Since Akash was nowhere to be seen, the witness and Vijay Pal suspected foul play. They immediately went inside the *baithak* and saw the dead body of Akash lying in a pool of blood. He further stated that in
H Chamunda Math he could see stains of blood on cemented

portion and according to the witness the respondents were indulging in *Tantrism*. The witness stated that the injuries on the person of respondents were as a result of beating given by the villagers and that the respondents had thereafter fled away. In the cross examination of the witness nothing was suggested to the effect that said *baithak* was not of the ownership and control of the respondents.

6. The Trial Court after considering the material on record found the eye witness account coming from PW2 Mewa Ram to be trustworthy and that the case was fully established against the respondents. It recorded findings; a) That on 24.02.2006 at about 10:00 O'clock accused Subhadra took the deceased Akash by holding his hand to their *baithak*. b) That the accused Satveer, Sanjay and Shishpal also accompanied Subhadra while going inside the *baithak*. c) That all the accused Subhadra, Sanjay, Shishpal and Satveer came out of *baithak* after 20-25 minutes. d) That they were holding the Pooja Samagiri. e) That all the accused offered prayer at Chamunda Math and offered flowers, batasa and lit the lamp there. f) That PW2 Mewa Ram had seen the dead body of Akash and found that ears and nose of Akash were cut and he was in pool of blood. g) That PW2 Mewa Ram was sitting on the bench near the clinic of a doctor which was 10-12 feet away from the place of incident. h) That the dead body of deceased Akash was found in the *baithak* of accused persons which proved the death or human sacrifice by all the accused persons.

The Trial Court convicted the respondents under Section 302 read with Section 34 IPC. After considering the submissions advanced on behalf of the prosecution and the respondents on the issue of punishment, the Trial Court by its further order found the case to be rarest of rare warranting extreme punishment of death penalty. It thus imposed death penalty on the respondents subject to confirmation by the High Court.

A 7. The matter reached the High Court upon Reference so made by the Trial Court. The respondents also preferred Crl. Appeal No.7911 of 2006 challenging their conviction and sentence. By its judgment under appeal the High Court rejected the Reference and allowed the Appeal acquitting the B respondents of the charges leveled against them. The High Court accepted that the prosecution had proved that Akash a boy of eight years was done to death at about 10 a.m. on 24.02.2006 in the *baithak* owned by respondents. It however took the view that the prosecution had failed to prove the C complicity of the respondents in the offence. It observed that looking to its contents and language, the First Information Report did not appear to be a genuine document and the scribe Soran Lal was also not examined. According to the High D Court it did not stand to reason that large number of villagers had apprehended the respondents and given them thrashing and yet allowed them to escape, that respondent Subhadra, a lady of 58 years, would so succeed in running away. It also found force in the contention of the respondents that the place E of occurrence was an open place and accessible to all.

8. The State being aggrieved has preferred the instant appeal challenging the order of acquittal passed by the High Court. The informant Roop Basant also filed Crl. Appeal F No.622 of 2008. Mr. Ratnakar Dash, learned Senior Advocate appearing for the State contended that the evidence on record clearly established that PW2 Mewa Ram had seen Akash being taken inside the *baithak* by the respondents, that the respondents came out after about 25 minutes without said G Akash and proceeded towards Chamunda Math and that being suspicious the witness and Vijay Pal entered the *baithak* and found the body lying in a pool of blood. It was submitted that nothing was brought in the cross examination of the witness that the *baithak* was not under the control of the respondents H accused. Though separate appeal was preferred by informant

Roop Basant, none appeared in support thereof. Mrs. Rani Chabra appeared for the respondents and supported the assessment made and conclusions drawn by the High Court. It was submitted that there was no direct evidence regarding murder by the respondents and that except PW2 Mewa Ram none of the villagers was examined by the prosecution.

9. In the instant case two facts were accepted to have been proved on record by the trial court as well as the High Court, namely, (a) the dead body of Akash was found inside the *baithak* and (b) said *baithak* belonged to the respondents. The prosecution has examined only one witness i.e. PW2 Mewa Ram who can throw some light. The spot *panchnama* Ext. Ka-15 shows that on one side of the road is the house of the respondents next to which is Chamunda Math and on the other side of the road is the *baithak* in question. Thus, according to the sole witness he saw respondent Subhadra coming from her house on one side of the road and then proceeding across the road towards the *baithak* holding the arm of Akash. According to him the respondents were inside the *baithak* for some 20-25 minutes, and when they went towards Chamunda Math i.e. to the other side of the road, he and Vijaypal could immediately enter the *baithak* and see the dead body lying in a pool of blood, which meant that the *baithak* was not locked at all.

10. It is the case of the prosecution that the victim was last seen in the company of the respondents. The "last seen" theory in the present case has two facets, (i) in terms of proximity of time and (ii) as regards the place itself, as the dead body of Ashok was found from the very same place where the victim was seen to have been taken by the respondents. The law on the point is summed up by this Court in ***State of U.P.*** v. ***Satish***[1] as under:

[1] (2005) 3 SCC 114

A "The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime
B becomes impossible."

11. The last seen theory in the present case having dimensions in terms of time as well place, would certainly clinch the matter if the testimony of PW2 Mewa Ram is accepted.
C Everything hinges on his testimony. He is the sole witness. It was stated by this Court in ***Joseph*** v. ***State of Kerala***[2] that where there is a sole witness his evidence has to be accepted with an amount of caution and after testing it on the touchstone of other material on record. Further, in ***State of Haryana*** v.
D ***Inder Singh***[3] it was laid down that the testimony of a sole witness must be confidence inspiring and beyond suspicion, thus, leaving no doubt in the mind of the Court. Noticing these two Judgments this Court in ***Ramnaresh*** v. ***State of Chhattisgarh***[4] summed up the principles as under:
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"The principles stated in these judgments are indisputable. None of these judgments say that the testimony of the sole eyewitness cannot be relied upon or conviction of an accused cannot be based upon the statement of the sole
F eye-witness to the crime. All that is needed is that the statement of the sole eye-witness should be reliable, should not leave any doubt in the mind of the Court and has to be corroborated by other evidence produced by the prosecution in relation to commission of the crime and
G involvement of the accused in committing such a crime."

The evidence of the sole witness thus needs to be

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[2] (2003) 1 SCC 465

H [3] (2002) 9 SCC 537

[4] (2012) 4 SCC 257

considered with caution and after testing it against other material and further, such evidence must inspire confidence and ought to be beyond suspicion. A

12. We now proceed to examine the testimony of the sole witness in the context of the material on record. According to PW2 Mewa Ram he was sitting on a bench in front of the clinic of a doctor with Vijaypal when he saw Akash being led inside the *baithak* by the respondents. Apart from his own testimony nothing has been placed on record by the prosecution which could lend corroboration to his own presence and the content of his version. First, no reason has been given why Mewa Ram and Vijaypal were sitting on the bench outside the clinic of the doctor. Neither the doctor nor Vijaypal were examined. Beyond the testimony of the witness himself there is nothing to indicate whether PW2 Mewa Ram was actually there at the relevant time or not. Secondly, the place from where he allegedly witnessed the occurrence is not a natural place where either the witness resides or carries on any vocation. The reason for his being there is not placed on record. Again the reason for his continuing to be there for 20-25 minutes is also not spelt out. Thirdly, none from the house of Akash was examined nor did PW1 Roop Basant throw any light as to when Akash left the house and in whose company was he playing. Neither has the prosecution given the names of those children nor has anybody else been examined to say that he had seen the children playing at the place in question. There is nothing on record which could corroborate that Akash was actually present with other children. Fourthly, there is nothing to indicate how far was the house of Akash and whether that was the normal place where Akash would always be playing. Lastly, if the incident created chaos in the village so much so that the villagers went and thrashed the respondents, there is no reason why none of them was examined. B C D E F G

13. As regards his version about the incident, the manner H

A in which it statedly occurred, the involvement of the respondents—whether all or some of them, we have nothing on record which could possibly allow us to test the veracity of the version of the sole witness. To us, it is doubtful whether PW2 Mewa Ram could be called a natural and truthful witness B and could be completely relied upon. The movements of Akash are also not established to show that he was actually there as suggested by the witness. Since PW2 Mewa Ram is the sole witness and the entire case depends on his testimony, we have looked for even minutest detail which could possibly lend C corroboration. We have however not been able to locate any such material. In order to evoke confidence and place intrinsic reliance on the testimony of this sole witness, we tried to find some corroboration on material particulars, which unfortunately D is lacking. The assessment of the entire material has left many doubts and questions unanswered. Two facts, that the *baithak* was of ownership of the respondents and that the body of Akash was found there, though very crucial, cannot by themselves be sufficient to fix the liability. The *baithak* was not part of the E house, was across the road and apparently accessible to others. And importantly, presence of respondents—whether some or all of them, has not been fully established.

14. Now the other features on record need consideration. F The respondents were apprehended the same day when one of them i.e. respondent Sanjay was allegedly found to be in possession of blood stained *dharati* or sickle. According to the prosecution the weapon was blood stained and was kept in the folds of *dhoti* by said Sanjay. However, no such blood G stained *dhoti* of respondent Sanjay was recovered. For that matter no blood stained clothes were recovered from any of the respondents though they were supposed to be authors of the crime which left body of Akash in a pool of blood. Even the blood stains found on the cemented portion from Chamunda H Math, though of human origin, were quite disintegrated as per

FSL examination. A

15. In the circumstances and particularly when we are considering an appeal against acquittal, the interference in the present case would be justified and called for, only if we were to find the testimony of the sole witness of such character B that it could be fully relied upon. In the present matter where the accused are being tried for an offence punishable with capital punishment, the scrutiny needs to be stricter. In our view the material on record definitely falls short and the respondents are entitled to benefit of doubt. We, therefore, C affirm the view taken by the High Court and dismiss the state appeals. The appeal preferred by the Complainant is also dismissed.

Devika Gujral Appeals dismissed.