

HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. Criminal Appeal No. 117/1991

1. Smt. Bhanwari,

2. Dalla,

----Appellants

Versus

The State Of Rajasthan

----Respondent

For Appellant(s) : Mr. Vineet Jain, Senior Advocate
assisted by Mr. Ashok Chouhan

For Respondent(s) : Mr. R.R. Chhapparwal, PP

HON'BLE THE ACTING CHIEF JUSTICE MR. MANINDRA MOHAN SHRIVASTAVA**HON'BLE MS. JUSTICE REKHA BORANA****Judgment****28/04/2023****BY THE COURT : (PER HON'BLE BORANA, J.)**

1. This instant criminal appeal has been filed by the accused appellants Smt. Bhanwari & Dalla under Section 374 Cr.P.C. being aggrieved of judgment dated 23.02.1991 passed by the Additional Sessions Judge, Rajsamand in Session Case No.21/1989 (50/1986) whereby accused appellant No.1-Smt. Bhanwari has been convicted for the offence under Section 302/34 IPC and accused appellant No.2-Dalla for offences under Sections 302 and 201 IPC and sentenced as below :

Name	Offences	Punishment
Smt. Bhanwari	u/s. 302/34 IPC	Imprisonment for life and a fine of Rs.200/-, in default of

		payment of fine to further undergo two months' rigorous imprisonment.
Dalla	u/s. 302 IPC	Imprisonment for life and a fine of Rs.500/-, in default of payment of fine to further undergo five months' rigorous imprisonment.
	u/s.201 IPC	Rigorous imprisonment for 5 years and a fine of Rs.200/-, in default of payment of fine to further undergo two months rigorous imprisonment.
The sentences were ordered to run concurrently.		

2. Before advertng into the facts of the present case, it is relevant to mention here that at the first instance, after investigation, the Sessions Case was registered as 12/84 wherein trial was completed and vide judgment dated 16.07.1986, both the accused Smt. Bhanwari and Dalla were found guilty and punished with life imprisonment. On an appeal being filed by them, vide judgment dated 15.10.1986, the judgment dated 16.07.1986 was set aside and the matter was remanded to the trial Court for trial afresh. Therefore, the case was again registered on 29.10.1986 as Sessions Case No. 50/86(renumbered as 21/89) and re-trial in the matter was undertaken.

3. Succinctly stated, the prosecution case is that the deceased Kishan Singh Rajput was the father of PW 2 Raisingh, PW 3 Khemsingh, PW 4 Khumansingh, DW 1 Kumari Sayari and husband of accused Smt. Bhanwari. He was living with them in his house in village Matri P.S. Nathdwara. Kishan Singh was a Compounder in the Government Hospital, Nathdwara. He used to take up and down journeys from his village to Nathdwara to attend his duty. On Friday

preceeding 23rd August 1983, Kishan Singh came from the hospital and reached his house at about 10.00 P.M. He took his meals and retired to sleep. While he was asleep, accused Mst. Bhanwari and DW 1 Kumari Sayari went out-side the house and came back with accused Dalla with them. Accused Dalla came with a big stone in his hand weighing nearly 20 kilograms. Accused Mst. Bhanwari sat on the chest of Kishan Singh and DW 1 Kumari Sayari caught his feet. Accused Dalla struck three blows with the stone on the head of Kishan Singh. He thereafter pressed his throat. DW 1 Kumari Sayari also struck a few blows with the stone on the head of Kishan Singh. Kishan Singh passed away instantaneously on the spot. The incident was seen by PW 2 Raisingh, PW 3 Khemsingh and PW 4 Khuman Singh. Accused Mst. Bhanwari threatened them with dire consequences in case they divulged the secret. The dead-body of Kishan Singh was taken out-side the house and was burried in a pit. When the whereabouts of Kishan Singh could not be traced out for three or four days, PW 1 Vadan Singh son of Devisingh went to Police Station, Nathdwara and lodged report EX. P 1 of the occurrence. It was mentioned therein that foul smell was emitting from the place situated near the house of Kishan Singh. The police registered a case under section 201 and 302, I.P.C. and proceeded with investigation. The Station House Officer Badami Lal (PW 17& 17A) arrived on the spot. The dead body of Kishan Singh was disinterred from the pit and inquest report was prepared. The post-mortem examination of the victim's deadbody was conducted by PW16 Dr. S.K. Lodha the then Medical Officer Incharge, Government Hospital, Nathdwara. He noticed some external injuries over the

deadbody. He was of the opinion that the cause of death of Kishan Singh was asphyxia resulting from strangulation on throat. The duration of death was stated to be three to six days preceding the post mortem examination conducted on August 23, 1983. The post-mortem report prepared by him is EX. P 8. Two persons Prithvisingh and Bhanwarsingh were arrested by the investigating officer on August 26, 1983. In consequence of the information furnished by Prithvisingh, blood-stained soil, stone, spade and Getti were recovered from his house. The investigation thereafter changed hands and it was entrusted on September 11, 1983 to the Deputy Superintendent of Police Mr. Duli Chand Sharma (PW 20). He once again recorded the statements of Raisingh, Khem Singh and Khumansingh, according to whom their father Kishan Singh was killed by their mother Mst. Bhanwari, sister Kumari Sayari (DW 1) and appellant Dalla. These three persons were thereafter arrested by the Deputy Superintendent of Police. On the completion of investigation, the police presented a challan against the accused Dalla, Mst. Bhanwari and Kumari Sayari in the Court of Munsif & Judicial Magistrate, Nathdwara. The police further prayed that Prithvisingh and Bhanwarsingh who were earlier arrested during investigation be released under section 169, Cr.P.C. The learned Magistrate disallowed this prayer of the police and refused to release Prithvisingh and Bhanwarsingh. However, the case of Bhanwarsingh was referred to the Children's Court as he was found below 18 years of age. The learned Magistrate committed the case for trial to the Court of Sessions, who conducted the trial against accused Dalla, Mst. Bhanwari, Ku. Sayari and Prithvisingh. The

learned Sessions Judge, by his order dated August 6, 1984 discharged Prithvisingh and framed charges under sections 302 and 201, I.P.C. against accused Dalla, Smt. Bhanwari and Ku. Sayari, to which they pleaded not guilty and claimed to be tried. It was contended on behalf of Ku. Sayari that she was below 18 years of age and as such she could not be tried by the Sessions Judge and that her case should be referred to the Children's Court. This prayer found favour with the Sessions Judge and he, by his order dated June 25, 1985 dropped the trial against Ku. Sayari and referred her case to the Children's Court. There, thus, remained accused Dalla and Smt. Bhanwari to face the trial. In support of its case, the prosecution examined 20 witnesses and filed some documents. In defence, the appellants examined three witnesses including Ku. Sayari (DW 1). According to the appellants, they were innocent and had been falsely implicated by Manoharsingh and others whereas the real culprits were Bhanwarsingh and Prithvisingh. On the conclusion of trial, the learned Sessions Judge found the prosecution case substantially true against the appellants and no material worth in the defence raised by them. The appellants were consequently convicted and sentenced with life imprisonment vide judgment dated 16.07.86.

4. An appeal was preferred before this Court against the judgment dated 16.7.86 and this Court vide judgment dated 15.10.86, set aside the judgment dated 16.7.86 and ordered *de novo* trial.

5. During the course of re-trial, certain witnesses were re-called and statements of certain witnesses were admitted by the accused.

6. The prosecution examined 18 witnesses and 3 witnesses were examined by the defence. On the basis of the evidence led and the material available on record, the learned trial Court proceeded on to hold the appellants guilty and punished them as mentioned above. Against the said order of conviction the present appeal has been preferred.

7. Learned senior counsel for the appellants submitted that **firstly**, the three alleged eye witnesses on the basis of whose statements the learned trial Court proceeded on to convict the appellants, are the most unreliable and unworthy witnesses. According to learned counsel it is clear on record that one of the so called eye witnesses- Khuman Singh (P.W.4), the youngest son of the deceased Kishan Singh specifically admitted that he was sleeping at the time when the alleged incident took place and it was only on the next morning, his sister Sayari informed him that his father had been murdered in the night. Therefore, by any stretch of imagination the said witness cannot be termed to be an eye witness. **Secondly**, the alleged eye witness Rai Singh (P.W.2) who was the eldest son of the deceased Kishan Singh and was about 13 years of age at the time of incident stated that in spite of witnessing the incident and knowing everything about the same, he did not disclose the fact of murder of his father for almost 10-12 days to anyone. Moreover, the witness alleged that on the very next morning, he went to Badmula to fetch his mother and returned to his village along with his mother and his maternal uncle on the next day. But till that time also, he preferred not to disclose the incident to anybody. Accordingly, learned counsel submitted that it is highly

improbable that a child of thirteen years of age having witnessed the murder of his own father would not disclose the same to anybody for such a long period. Moreover, there was no reason to conceal the said fact on the next day when he was out of reach of the so called person (accused Dalla) who, according to him, had threatened him not to disclose the incident to anyone. Learned counsel submitted that therefore, the testimony of so called eye witness is also wholly misconceived and this witness also cannot be said to be trustworthy. **Thirdly**, it is an admitted case on record that all the three so called eye witnesses, the minor sons of the deceased, had been in the custody of police for more than 10 days before recording of their statements. It is also an admitted fact on record that it is only for the first time after coming out of the custody of the police that these so called eye witnesses disclosed the incident and prior to that, they did not narrate any fact to anyone which is most unnatural for the children below thirteen years of age. Therefore, learned counsel submitted that the conviction based on the statements of the so called child witnesses deserves to be set aside.

8. Learned Senior counsel appearing for the appellants further submitted that the stark contradictions in the statements of all the three eye witnesses also prove that none of them had witnessed any such incident and the story as framed by the prosecution was totally concocted one. The most glaring fact in the present matter is that at the first instance, investigation was done by Badami Lal (P.W.17) who has been examined by the prosecution and he specifically admitted that on the basis of material and evidence

investigated by him, he found Prithvi Singh and Bhanwar Singh to be the main culprits and arrested them. Subsequently, the investigation was taken over by the Deputy Superintendent of Police and interestingly, the complete scenario changed after that. After the Investigating Officer being changed, the investigation took a complete new turn and the challan was filed against the present appellants Smt. Bhanwari, Dalla and Sayari (daughter of the deceased). So far as Prithvi Singh and Bhanwar Singh are concerned, they were given clean chit by the Investigating Authority. Learned counsel accordingly submitted that the above facts are sufficient to prove that the appellants had been falsely implicated by the Investigating Officer at the instance of Manohar Singh (brother of the deceased) who had an enmity with his *Bhabhi*, the present appellant Smt. Bhanwari Devi.

9. Learned counsel for the appellants further submitted that the motive as alleged to be set up by the prosecution is that Smt. Bhanwari and Dalla were in illicit relationship and therefore, they murdered Kishan Singh (husband of Bhanwari Devi) but there is not an iota of evidence on record to prove the fact of illicit relationship of the two appellants. None of so called eye witnesses have stated a single fact to corroborate the said allegation. Only one witness namely Lal Singh (P.W.5) made a cursory statement to that effect and he too had turned hostile. Meaning thereby, no motive for the alleged murder was proved on record against the appellants by the prosecution, what to say of proof beyond reasonable doubt.

10. It is submitted that it was very well proved on record that Bhanwari was not present on the site on the day of incident but the same fact had been totally ignored by the trial Court.

11. With the above submissions, learned counsel submitted that the impugned judgment deserves interference and both the accused deserve to be acquitted.

12. Per contra, learned Public Prosecutor appearing for the State supported the findings of the impugned judgment and submitted that it was clearly proved on record on the basis of the statements of the eye witnesses that the accused Bhanwari and Dalla had killed the deceased Kishan Singh. He further submitted that all the three sons of the deceased who were eye witnesses to the incident deposed on the same terms and said evidence has remain uncontroverted. So far as the second investigation conducted by the Deputy Superintendent of Police is concerned, learned PP submitted that the inquiry/investigation was changed on the request made by the complainant only and it was proved beyond doubt on record that all the three minor sons of the deceased were threatened by the accused and therefore, they made statements against Prithvi Singh and Bhanwar Singh at the first instance. The statements proved out to be made under duress. He further submitted that even otherwise Prithvi Singh was discharged by the court below during the course of trial. He also submitted that the allegation of the accused of the prosecution having framed a concocted story at the instance of Manohar Singh also falls flat on record as the said fact has not been proved by any of the defence witness rather the same has been specifically denied by all the three sons of the

deceased. With the above submissions, while supporting the impugned judgment, learned Public Prosecutor prayed for dismissal of the present appeal and affirmation of the order of punishment as passed by the court below.

13. We have heard learned Senior counsel appearing for the accused appellants as well as learned Public Prosecutor, perused the impugned judgment passed by the court below, appreciated the evidence and have gone through the complete record of the case.

14. The first aspect for consideration in the matter is whether the three sons of the deceased actually witnessed the alleged incident. Rai Singh (PW2), the eldest of the sons, who was 13 years of age at the time of incident and 16 years while deposing before the court below on 16.07.87, deposed as under :

"मैं पहले से ही जगा हुआ था ये सारी बातें मैंने देखी। मेरे दूसरे दो भाई भी जग गये थे। उन्होंने भी वारदात देखी।"

Khem Singh (PW3) stated as under :

"मैं उस समय बैठा हुआ था और खुमाणसिंह सोया हुआ था।"

Khuman Singh (PW4), who was 7 years of age at the time of incident and 10 years of age while deposing before the court below specifically admitted in the cross-examination as under :

"वक्त घटना मैं सो रहा था।"

15. A bare perusal of the above statements makes it clear that Khuman Singh was not the eye witness to the incident and the said fact has been admitted by he himself as well as by Khem Singh. So far as Rai Singh is concerned, it is clear that he has exaggerated his statement which is totally contrary to the other alleged eye witnesses.

16. Now coming to the fact whether Rai Singh and Khem Singh were the eye witnesses to the incident and whether they deposed the correct facts before the court. For the purpose, their statements as recorded by the Investigating Officer under Section 161, CrPC and as recorded by the court under Section 164, CrPC become relevant.

17. Narrating the facts which took place soon after the incident, Rai Singh submitted that soon after the incident, his sister and all the three brothers went to their second house situated just in front of the house where incident took place and Dalla went to his house and returned back at 4:00 AM in the morning. His mother Bhanwari went with Dalla at that time. Khem Singh (PW3) stated that soon after the incident, they all went to other room in the house and Dalla also left the house. In his cross-examination, he submitted that Dalla returned back only on the evening of the next day and did not come back to the house prior to that. The specific statements made by both these witnesses were as under :

"इन लोगों ने मेरे पिता की लाश के उपर चदर डालकर पलंग के नीचे सुला दिया। उसके बाद हम दूसरे कमरे में चले गये।" (PW3 Khem Singh)

"इस घटना के बाद मेरी मां मेरी बहन और हम तीनों भाई हमारा दूसरा घर जो घटना स्थल के सामने ही था उसमें चले गये। दल्ला उसके घर चला गया, यह कहकर की सुबह 4 बजे आऊंगा। सुबह 4 बजे दल्ला आया तब मैं जग गया था। मेरी मां भंवरी दल्ला के साथ चली गई ये हमें कह गये थे किसी को कुछ मत बताना।" (PW2 Rai Singh)

In his cross-examination (PW3 Khem Singh) stated as under :

"दल्ला शाम को आया था। मेरा भाई अकेला ही चला गया था। दल्ला दूसरे दिन शाम को मेरे पिता को गाड़ने के लिये घर आया था इसके बीच में नहीं आया।"

18. From a bare perusal of the statements of the two alleged eye witnesses, it is clear that there are stark contradictions in their statements regarding the alleged incident; the circumstances soon after the incident; and presence of accused Dalla and Bhanwari at the place of incident. As observed above,

(i) Rai Singh (PW2) submitted that soon after the incident they went to their second house situated in front of the place of incident whereas both Khem Singh and Khuman Singh stated that after the incident, they went to the other room in the house and went to sleep.

(ii) Regarding the return of accused Dalla to the place of incident, Rai Singh stated that he returned back at 4 'o' clock in the morning and his mother went away with him on that day. Whereas both Khem Singh and Khuman Singh stated that Dalla returned back only in the evening of the next day and not before that.

(iii) Regarding the leaving of the accused Bhanwari from the house, Rai Singh stated that she went with Dalla in the next morning at about 4:00 AM whereas Khem Singh stated that before leaving, Dalla asked his mother to go to her maternal place and that he would return in the evening of the next day to bury the dead body. He also admitted that Dalla did not return before the evening of the next day.

(iv) Regarding the facts of their maternal uncle Sohan Singh coming on the next day and narration of the incident to him by accused Sayari, Rai Singh stated that in the morning when his uncle went to the backyard (Khandar), he saw the head of the dead body burried in the ground and then he asked Sayari as to who burried the dead

body there to which Sayari replied that she and three sons jointly killed him. Whereas Khem Singh stated that when his maternal uncle went to the backyard(Khandar), he complained of some foul smell and slapped Sayari and asked her the truth to which she replied that they all jointly killed their father. Therefore, his uncle, mother and they all jointly decided to dig out the dead body in the night to dispose of the same in the *Talab* nearby. But as the dead body had deteriorated by then, they put some soil on it and did not dig out the same. Whereas, Sohansingh (DW-2) himself stated total new facts. He stated that when he reached the house along with his sister Bhanwari and Raisingh on Monday, all the other three children were locked in a room. He opened the door and Sayari, after coming out, stated that it has been 4 days since her father has been killed and that Bhanwarsingh and Prithvisingh killed him. Interestingly, Sohan Singh, who had come in the witness box had not been cross examined regarding the statements as made by Khumansingh.

19. The above statements makes it crystal clear that there are stark contradictions in the statements of all the three alleged eye witnesses, which makes the complete prosecution story doubtful. First version of the alleged eye witnesses was that Prithvi Singh and Bhanwar Singh killed their father; second version was that their mother, sister and Dalla jointly killed him; the total new version in the statements is that the fact of the father having been killed jointly by the three children was informed to their maternal uncle and after the said information, they all decided to dispose of the

body in the talab nearby but the same could not be done as the body has deteriorated by then.

20. The next question would be whether the accused Bhanwari was present on the spot on the date of incident. Although, all the three alleged eye witnesses have stated that Bhanwari left the spot early morning the next day, Gopal Singh (PW6) specifically submitted that he had seen Bhanwari at Village Budgula which is her maternal place prior to Rakhi festival and that she stayed at Budgula for 4-5 days and after his son came to take her away, she went along with her brother Sohan Singh.

21. Gulab Singh (PW10) also stated that he had seen Bhanwari at Budgula on the days of the festival of Rakhi. Statement of Gopal Singh have not been controverted by any of the prosecution witnesses nor has he been cross-examined on the said statement therefore, there was no reason to disbelieve the said witnesses.

22. In view of the clear contradictory statement of all the three alleged eye witnesses, this Court is under an obligation to reach to a definite conclusion whether such evidence could have been relied upon by the Trial Court convict the accused appellants. In ***Bhagwan Singh Vs. State of M.P.; 2003 SCC (Cri) 712***, Hon'ble Apex Court, while dealing with the issue as to what extent, the evidence of child witness can be relied upon, held as under:

"22. It is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incident and before there were any possibility of coaching and tutoring him....."

The Hon'ble Apex Court further held as under :

"19. The law recognises the child as a competent witness but a child particularly at such a tender age of

six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied upon without other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony.(See *Panchhi v. State of U.P.*)

20. In the case before us, the trial Judge has recorded the demeanour of the child. The child was vacillating in the course of his deposition. From a child of six years of age, absolute consistency in deposition cannot be expected but if it appears that there was a possibility of his being tutored, the court should be careful in relying on his evidence....."

23. In the matter of ***Digamber Vaishnav & Anr. Vs. State of Chhattisgarh; 2019 Cr.L.R. (SC) 256***, the Hon'ble Apex Court again reiterated as under :

"21. The case of the prosecution is mainly dependent on the testimony of Chandni, the child witness, who was examined as PW-8. Section 118 of the Evidence Act governs competence of the persons to testify which also includes a child witness. Evidence of the child witness and its credibility could depend upon the facts and circumstances of each case. There is no rule of practice that in every case the evidence of a child witness has to be corroborated by other evidence before a conviction can be allowed to stand but as a prudence, the Court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Only precaution which the Court has to bear in mind while assessing the evidence of a child witness is that witness must be a reliable one.

22. This Court has consistently held that evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. Therefore, the evidence of a child witness must find adequate corroboration before it can be relied upon. It is more a rule of practical wisdom than law.[See *Panchhi and others Vs. State of U.P., (1998) 7 SCC 177, State of U.P. Vs Ashok Dixit and another, (2000) 3 SCC 70, and State of Rajasthan Vs. Om Prakash, (2002) 5 SCC 745*]."

24. Keeping into consideration the ratio as laid down by the Hon'ble Apex Court, this Court is of the specific opinion that the

statements as made by all the three children alleged to be the eye witnesses to the incident in the present case cannot be relied upon because of the following reasons :

- (i) The statements as made by the children were not the one made immediately after the occurrence of the incident;
- (ii) Admittedly all the three children had been in police custody for 10 days and it is only after coming out of the said custody that they, for the first time, accused the present appellants of the murder of their father. It is clear that the same was a result of some tutoring and the said fact becomes more relevant when they had at the first instance, accused two other persons of the murder;
- (iii) No independent witness besides these three children have been examined by the prosecution and none of the other prosecution witness has corroborated the story of three child witnesses and;
- (iv) The statements of all the three alleged eye witnesses are contradictory to each other and also does not corroborate to the circumstances as narrated by the prosecution.

25. Therefore, the statements of all the alleged three eye witnesses could not have been relied upon by the learned trial court so as to convict the accused appellants.

26. As a consequence of the above discussion, we have no hesitation in holding that the prosecution has failed to prove the charges against the appellants by leading reliable evidence. The impugned judgment does not stand to scrutiny.

27. As a consequence, the present appeal is allowed. The impugned judgment dated 23.02.1991 passed by the learned Additional Sessions Judge, Rajsamand in Session Case No.21/1989

(50/1986) is hereby quashed and set aside. The appellants are already on bail and therefore, their bail bonds are ordered to be discharged.

28. However, keeping in view the provisions of Section 437-A Cr.P.C., the appellants are directed to furnish a personal bond in the sum of Rs.40,000/- each and a surety bond in the like amount before the learned trial court, which shall be effective for a period of six months to the effect that in the event of filing of a Special Leave Petition against the present judgment on receipt of notice thereof, the appellants shall appear before the Hon'ble Supreme Court.

29. Record be returned to the trial court forthwith.

(REKHA BORANA),J

(MANINDRA MOHAN SHRIVASTAVA),ACJ

Vij/-