

(1958) 11 AHC CK 0012

Allahabad High Court

Case No: Criminal Appeal No. 1383 of 1958

Ram Hazoor Pandey

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Nov. 14, 1958**Acts Referred:**

- Evidence Act, 1872 - Section 118

Citation: AIR 1959 All 409 : (1959) 29 AWR 248 : (1959) CriLJ 796**Hon'ble Judges:** H.P. Asthana, J; B. Mukerji, J**Bench:** Division Bench**Advocate:** P.C. Chaturvedi, for the Appellant; Govt. Advocate, for the Respondent**Final Decision:** Allowed

Judgement

B. Mukerji, J.

This is an appeal by Ram Hazoor who has been convicted by the learned Sessions Judge of Gorakhpur u/s 302 of the Indian Penal Code and sentenced to death. Along with the appeal there is also a reference by the learned Judge for the confirmation of the sentence of death.

2. According to the prosecution case, Ram Hazoor, a young man of 19 years, is alleged to have killed one of his collaterals, namely, Hardwar Pande, by attacking him with a gandasa on the night between the 6th and the 7th of November, 1957, when Hardwar Pande was sleeping in his osara along with his two grand-children, Markande, aged between 8 and 9, and Sadho alias Kripa Shanker, aged between 7 and 8 years. The motive for the crime was said to have been a subsisting enmity between Ram Hazoor and Hardwar Pande: this enmity is said to have been accentuated by an incident that took place during the Panchayat elections when the accused is alleged to have beaten the deceased and in respect of which beating the deceased filed a complaint before the Panchayati Adalat.

This complaint was pending at the date when Hardwar Pande was murdered. According to the prosecution case, the assault on Hardwar Pande was made in the small hours of the morning between 3 and 4 O'clock on the 7th November, 1957. The assault was alleged to have been actually witnessed by Markande and Kripa Shanker, the two grandchildren, who, as we have already noticed earlier, were sleeping alongside the deceased, Markande, it was said, slept on the same bed on which slept Hardwar Pande, while Kripa Shanker, the other grandson, slept on a bench which was adjacent to Hardwar Pande's bed.

At the time when the actual assault was made nobody save the two aforementioned individuals woke up or witnessed the assault. Two witnesses, Srimati Anari and Santokhi, are alleged to have seen the assailant running away from the scene of occurrence after the crime with a gandasa in his hand. Srimati Sumitra, the mother of Markande and the aunt of Kripa Shanker, is alleged to have come out on the cries of the two young lads and to have seen Hardwar Pande lying dead and to have learnt from the two young boys the fact that Hardwar Pande had been assaulted by Ram Hazoor, the appellant, with a gandasa. Jagarnath, deceased's cousin some degrees removed, who lived in a house some 20 paces to the south of the house of the deceased, also arrived on hearing the cries emanating from Hardwar Pande's house: he also gathered the fact that the murder had been witnessed by Markande and Kripa Shanker.

3. Jagarnath thereafter went to police station Bansgaon, which was two miles away from Saintal, the village of incident, and there he made a first information report at 5.30 in the morning. This is what Jagarnath said in his report which he scribed himself and which he handed over at police station Bansgaon :

"I beg to say that my cousin brother Hardwar Pande, son of Deo Narain Pande, resident of Saintal, P. S. Bansgaon, was sleeping last night in the osara at his door. His grandson, Markande, aged 10 years, was sleeping on his charpoy and another grandson of his, Sadho, aged 9 years was sleeping on a Bench by his side. I was sleeping at my house.

At about 3 or 4 O'clock when I heard the sound of weeping and wailing of women, I went running to his door and saw the throat of Hardwar Pande cut and him lying dead on the charpoy. There is a good deal of blood and blood stains on the face and Kurta of Markande and the wall and the bed on which Hardwar Pande had been sleeping. Markande who was sleeping with him disclosed that he woke up on hearing a dog-bark, that Ram Hazoor Pande who belonged to his village had struck his grandfather on the throat with a gandasa, that man who was in his company was standing under the osara, that he could identify him if confronted, and that he had remained lying quietly out of fear. Litigation has long been going on and there was old enmity between Ram Hazoor Pande and Hardwar Pande. I am making a report. Necessary action may be taken."

4. After the aforementioned report had been taken down at the police station Deep Narain Singh, the Second Officer of Bansgaon Police Station, received information of the incident at about 6.30 a.m., at Kauriram and from there he went to Saintal, which was about three miles away, and on reaching there he found the deceased lying on a cot in the osara. He accordingly prepared an inquest report and recovered the blood-stained clothes and bedding in respect of which he prepared certain memoranda.

He also recovered the blood-stained garments of Markande which were also sealed and a recovery memorandum prepared in respect of these clothes. Deep Narain Singh also recovered some blood-stained earth from the ground underneath the cot, the wall of the osara and also from a place in the lane in front of the house of Srimati Anari. He also recorded the statements of Jagarnath, Markande, and Kripa Shanker and prepared a site-plan of the place where the murder had taken place.

5. A post-mortem was conducted on the body of Hardwar Pande on 8-11-1957, at 1.30 p.m. The post-mortem revealed four incised wounds on the left side of the neck. The exact situations of these injuries have been shown by means of a diagram attached to the post-mortem report. There was one more incised wound which probably comprised of at least four separate cuts which completely cut the mandible as also the spinal cord. There was an incised wound at the dorsal of the right hand cutting the second and the third metacarpal. This injury completely severed the bones underneath. The stomach was found to be full of rice and Dal which were in a partially digested state. Death was due to shock and haemorrhage.

6. The accused was apparently not found in the village that day for he was arrested on 8-11-1957, by Ram Krishna Rao, Station Officer, Kotwali, Basti, at the Basti Bus Stand at about 11 a.m. This arrest of the accused appears to have been on information supplied to the police by an informant. The clothes that the accused wore appeared to be blood-stained and, therefore, they were taken off from his person and a recovery memorandum prepared in respect of them. A cake of soap was also recovered from the pocket of the shirt of the accused.

The recovery memorandum which was drawn up was attested by three witnesses, Baijnath Tewari, Abdul Wahid and Mahadeo. Out of these, only Baijnath Tewari was examined as a witness; the other two were not. The recovery memorandum that was prepared in respect of the recovery of the clothes and the cake of soap from the person of the accused makes a record of the fact that an attempt appeared to have been made to wash off the blood-stains on the clothes with soap.

7. The bedding of the deceased, the clothes of the deceased, the clothes of Markande and the clothes recovered from the person of the accused were all sent to the chemical examiner for examination in order to see whether or not there was blood on them. The chemical examiner found large quantities of blood on certain items of the bedding, on some of the clothes of the deceased and on the shirt and

Underwear taken off from the person of Markande.

He also noticed blood on the chadar and shirt which were alleged to belong to the accused. The serologist confirmed that the blood that was found on the aforementioned articles was of human origin. Blood-grouping test was done in respect of these items but the reaction in respect of most of these articles was such as not to lead to any definite conclusion. Nevertheless the serologist was able to say that the blood found on some of the items of the bedding fell in blood Group "O".

8. The defence of the accused was a denial. He, however, admitted having been arrested at the Bus Stand at Basti but he said that he had gone there in search of employment. He further admitted that the clothes, which were alleged to have been on his person, were his. He further explained the blood-stains on his clothes by saying that he had been beaten by the police at the time of his arrest and the result of that beating was that he received bleeding injuries which stained his clothes with blood. It may be noticed here that the explanation which the accused gave in regard to the bloodstains found on his clothes was at the earliest, namely, in the Court of the Committing Magistrate.

9. The prosecution in this case mainly relied on the testimony of Markande and Kripa Shanker to prove the case against the appellant. They relied further on circumstantial evidence offered in the testimony of Srimati Sumitra, Srimati Anari, Santokhi and Jaleshar Ram. Sumitra's evidence, if believed, only established the fact that when she came out she learnt on Her enquiry from Kripa and Markande that the accused Ram Hazoor had come and cut the throat of Hardwar Pande. Anari's evidence attempted to establish that about four hours before day-light she saw Ram Hazoor accused going away with a gandasa along the gali, which runs to the north of her house, and further that on seeing her the accused turned back and went away to the south.

She also attempted to establish that when she arrived at the house of Hardwar Pande the boys stated that Ram. Hazoor had assaulted their grandfather and had gone away. Santokhi's evidence also attempted to establish that at about 4 a.m., he saw the accused running from the side of Sainthal and fleeing to the south of his field with a gandasa in his hand. Santokhi further attempted to prove that he challenged the accused and on his challenge the accused disclosed his identity and went away.

Jaleshar Ram Tewari attempted to do something more than either Anari or Santokhi did, for he tried to prove that he saw the accused washing his clothes with soap in river Sarju, early in the morning and that when he questioned the accused as to why he was washing his clothes with soap in a sacred river, he replied that he had "cut down" Hardwar with a gandasa which he had thrown away and that he had come to the ghat to wash his clothes which had become blood-stained. This witness further stated that the accused requested him to look after his children as he was going away. What is interesting to observe is that this witness even makes the accused tell

him the motive for the murder.

10. The learned trial Judge found it difficult to rely on the testimony of either Santokhi or Jaleshar Ram Tewari, but the learned Judge accepted the testimony of the two alleged eye-witnesses, namely, Markande and Kripa Shanker, and he also accepted the testimony of Srimati Sumitra and Srimati Anari.

11. The important question for our determination is whether we could rely safely on the testimony of Markande and Kripa Shanker. Both these two are witnesses who may be termed as "child witnesses," for they are both of tender age. The learned Judge did not make any preliminary examination of these two boys in order to satisfy himself as to their intellectual capacity or their "mental age."

The learned Judge, it appears to us, as a matter of course administered the oath to both these boys without satisfying himself whether or not these two boys understood the significance of the oath or even that they understood the significance of the desirability of speaking the truth. Although it is not necessary to have a preliminary examination, namely, *Voire dire*, of a child witness in order to make his testimony admissible, nevertheless, we are of the opinion that such a course is desirable and should be resorted to, for it offers an opportunity to the Court to assess the mental capacity of a child witness.

The difficulty with child witnesses often is that they can be made to believe in things which they themselves have not seen and this belief, when once it gets hold of a child witness, is difficult to shake. It is also well known that child witnesses "can be tutored much better than adults and further that when once a child witness has been properly tutored then such a child witness cannot easily be shaken in cross-examination. A preliminary examination has the merit of leaving the child witness in the hands of the Court for it to discover by asking questions which have no relevance or connection with the facts about which that witness was expected to give evidence, so that the evil effects of tutoring could not mar the assessment of the mental capacity of the witness by the Court.

We are aware of the fact that the position of the evidence given by a child witness in India is different from the position of that evidence given in other countries, for u/s 118 of the Indian Evidence Act, all persons are deemed to be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tenderness of age or other such disabilities.

The question naturally arises how is the Court to determine whether a particular child witness is capable of understanding the questions and capable of giving rational answers unless the Court resorts to some sort of preliminary examination of the child witness before the witness is actually put into the witness-box to give evidence.

12. It has been very rightly pointed out by Mr. Justice Brewer in *George L. Wheeler v. United States* (1895) 159 US 523 that there is no precise age which determines the competency of a witness. He observed that :

"This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial Judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous."

From the above quotation it would be clear that it is very desirable that a trial Judge, who has a child witness before him, should preserve on the record, apart from the child witness's evidence in the case, some other questions and answers which could help the Court of Appeal to come to the conclusion whether or not the trial Judge's decision in regard to the competency of the child witness was right or erroneous.

13. It is well settled that although legally there is no bar to accepting the uncorroborated testimony of a child witness yet prudence requires that courts should not act on the uncorroborated evidence of a child whether sworn or unsworn. This was so held by their Lordships of the Privy Council in *Mohamed Sugul Esha Mamasan Rer Alalah v. The King* 1946 ALJ 100: AIR 1946 PC 3.

14. The same view was taken by their Lordships of the Supreme Court in [Rameshwar Vs. The State of Rajasthan](#), . Their Lordships in the case of Rameshwar son of Kalyan Singh pointed out the nature and extent of the corroboration which should be required. They relying on the observations of Lord Reading in the well known case *King v. Baskerville* 1916 2 KB 658 said that the independent evidence from which corroboration was to be sought

"must not only make it safe to believe that the crime was committed but must in some way reasonably connect Or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime."

Although this did not mean that the corroboration as to the identity must extend to all the circumstances necessary to identify the accused with the offence, yet there has to be independent evidence which would make it reasonably safe to believe the witness's story that the accused was the one who committed the offence.

15. The prosecution, in the case before us, sought corroboration from the testimony of the other witnesses to whose evidence we have briefly referred above. The trial Judge very rightly refused to rely on the testimony of Santokhi and Jaleshar. He,

however, relied on the testimony of Srimati. Sumatra and Srimati Anari, The testimony of Sumitra lends corroboration only to the fact that at the time when she went to the osara, she learnt on her enquiry from Markande and Kripa that Ram Hazoor had committed the murder.

Her testimony does not show that the children. on their own told her what they had seen as one . would have expected them to say, if they had in fact seen, Ram Hazoor cutting up their grandfather. What is significant to notice in the testimony of Sumitra is that when she reached the osara she found Markande, her son, lying in the lap of the deceased, and Kripa living on the bench nearby. If these two boys had actually seen the assailant committing the crime then we cannot imagine them lying, one in the pool of blood and the other on the bench : under such circumstances one would expect them to have shrieked and run away from the ghastly sight as soon as they felt safe after the assailant had left.

The evidence of Sumitra makes us entertain serious doubt as to whether or not Markande and Kripa did actually see the assailant of Hardwar Pande. The possibility that these two boys took the cue from Sumitra in regard to the assailant cannot be completely overruled. In regard to Anari's testimony we find it difficult to accept the version that she gave in the Court of Session, namely, that the boys declared in her presence, of their own accord, that Ram Hazoor had assaulted their grandfather, or that she then and there mentioned the fact that she had seen the accused running away with a gandasa in his hand soon after the assault.

Anari had before the Investigating Officer stated that she first told the boys that she had seen the accused going away with a gandasa and then the boys told her that the accused had struck their grandfather. When she was faced with the statement which she had made before the police she got confused and had difficulty in answering subsequent questions. She was, however, unable to give any adequate explanation as to why there was such a vital difference between the statement that she made to the police and the statement that she made in Court.

In our opinion, there was clear indication in the statement that she made to the police that the hoys - the two alleged eye-witnesses - possibly got the name of the assistant from suggestions which were made in their presence by those witnesses who arrived on the scene earliest in point of time.

16. The prosecution relied on the circumstance that the accused was not found in the village when searched for and further that blood-stained clothes were recovered from his person when he was arrested on the morning of the 8th of November at the Basti Bus Stand. The accused has given a reasonable explanation for both these circum-stances, for in regard to his absence he stated that he had gone to Basti to seek employment and in regard to the blood stains found on his clothes he said that those stains were there because he had been beaten by the police at the time of his arrest and his own blood got on to his clothes.

There is evidence furnished by the prosecution's own document of the fact that the accused had injuries on his person at the time when he was put inside the lock-up and those injuries were such as must have bled : this is furnished by an entry in the general diary. On the 12th of November, 1957, a Magistrate of the First Class Sri Kamta Prasad before whom the accused had been produced by the police to obtain an order of remand, made a note of the fact that the accused had one injury on his right elbow and another on the ankle of the right leg on its left side. The explanation which the accused offered cannot be said to be unreasonable.

Therefore, we are unable to draw any adverse inference against the accused from either the fact that he was not found in the village when he was searched for or the fact that his clothes showed marks of human blood. It is interesting in this connection to notice that in the recovery memorandum a note was made to the effect that efforts appeared to have been made to wash off the bloodstains with soap but no attempt was made in the evidence to substantiate this record made in the memorandam Ex. P-10, for Baijnath P.W., who was produced as the solitary witness of the recovery, did not state that the blood-stains which were found on the clothes of the accused appeared to have been washed.

The puerile attempt which the prosecution made to prove the accused's attempt to wash away the blood-stains on the banks of river Sarju, and further the attempt to prove an extra judicial confession were, in our opinion, clear indications of the unfair manner in which the investigation in this case was conducted. The place where Jaleshar Ram Tewari is alleged to have seen the accused washing his blood-stained clothes at sun-rise on the Poornamashi day was at least 12 miles away from the place of incident and if the incident had taken place, as was alleged by the prosecution, between 3 and 4 a.m., then we could not reasonably expect the accused to get 12 miles away at sun-rise because it was not suggested that the accused went by any other means than on foot from his village to the banks of Sarju.

We have found it as difficult, if not mere, to accept the testimony of Jaleshar Ram Tewari as the trial Judge. Santokhi's testimony falls in the same category in which fell Jaleshar Ram Tewari's, We have considered with care the corroborative value of the testimony of both Sumitra and Anari and we are unable to hold that their testimony really lends assurance to the testimony of the two child witnesses.

17. There is yet another difficulty which faces the prosecution and that is that on the medical testimony the time of death as given by the prosecution appeared to be in conflict with the time of death as discovered at the post-mortem by an examination of the stomach contents. Dr. B. C. Joshi, who conducted the post-mortem, found rice and Dal in some quantity in the stomach in a partially digested state.

It takes about one and a half hours to two hours for rice and Dal to get into a partially digested state. It is no doubt true that Dr. Joshi stated that it was possible

that the deceased might have taken his meal some five or six hours before his death but nevertheless Dr. Joshi did state that the deceased could have taken his food from one and a half hours to three hours before his death.

Since we found the evidence of Dr. Joshi inconclusive we summoned the Civil Surgeon of Allahabad and examined him as an expert on this aspect of the case. From his testimony it is clear that it takes about three hours for a normal man at the age of 55 to digest normally cooked meal of rice and Dal. If we accept this as a safe basis for calculating the time of death, then we find that Hardwar Pande must have been killed by about midnight. If this were so, then the entire fabric of the prosecution case gets knocked down, for on the prosecution version the assault was made between the hours of 3 and 4 in the morning.

We, however, wish to say that we have not been really influenced in arriving at our decision by this aspect of the case. We have arrived at our conclusion that the case against the appellant had not been proved beyond reasonable doubt on the main ground that we have found it difficult to rely on the testimony of the two child witnesses Markande and Kripa Shanker.

18. In the result we allow this appeal, set aside the conviction and the sentence of the appellant and direct that he be set at liberty forthwith unless required for some other offence. The reference by the trial Judge for the confirmation of the sentence of death is accordingly rejected.