

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1159 OF 2005

Jumni and OthersAppellants

Versus

State of Haryana ...Respondent

AND

CRIMINAL APPEAL NO. 603 OF 2005

Prem Nath and AnotherAppellants

Versus

State of Haryana ...Respondent

J U D G M E N T

Madan B. Lokur, J.

1. The two questions for consideration and discussion relate to the value of the testimony of alibi witnesses and the severability of a dying declaration.

2. In the present appeals, we are of the opinion that the testimony of the alibi witnesses of two of the four appellants deserves acceptance and the dying declaration so closely concerns all four appellants that it is not possible to sever the role of the sets of appellants, resulting in our giving the benefit of doubt to the remaining two appellants.

The facts:

3. Six relatives (by marriage) of deceased Asha Devi were accused of having murdered her and thereby having committed an offence punishable under Section 302 of the Indian Penal Code. The accused persons were Rati Ram (father-in-law, now died), Jumni (mother-in-law and appellant in Criminal Appeal No. 1159 of 2005), Sham Lal (brother-in-law and appellant in Criminal Appeal No. 1159 of 2005), Balbir Prasad (brother-in-law and appellant in Criminal Appeal No. 1159 of 2005, who, we were told has since died), Prem Nath (brother-in-law and appellant in Criminal Appeal No. 603 of 2005) and Raj Bala (wife of Prem Nath and appellant in Criminal Appeal No. 603 of 2005).

4. Asha Devi was married at the age of 16 to Jagdish who was employed in the army. According to her father, Asha Devi lived with Jagdish for about one year and thereafter she lived in village Bhojpur in district Jagadhari, Haryana, in a one room tenement along with her two children aged 5 years and 1½ years. Her in-laws were staying in an adjacent tenement. There is no allegation or evidence of any matrimonial disharmony between Jagdish and Asha Devi who had been married for about nine years nor is there any allegation of any demand or harassment for dowry from Asha Devi.

5. The case of the prosecution is entirely dependent on the dying declaration of Asha Devi. In her statement, Asha Devi stated that at about 12.00 noon on 4th April 1996 she was given a severe beating by all her in-laws. Thereafter, at about 3.00 p.m. she wanted to lodge a complaint with the police but all her in-laws prevented her from doing so. Rather, they suggested that she should be set ablaze.

6. On the morning of 5th April 1996, Asha Devi seems to have had a quarrel and in a fit of anger she broke her bangles. Upon this, Jumni said that she should be finished. Consequently, all her in-laws tied her up and poured kerosene on her and set her on fire. This was at about 7.30 a.m.

7. At about 10.30 a.m. Asha Devi was taken to the Civil Hospital at Jagadhari. Seeing her condition with 100% burns, the doctor on duty, Dr. M.R. Passi (PW-1) immediately informed the police who took urgent steps for having her statement recorded. Ms. Sarita Gupta, Judicial Magistrate, 1st Class (PW-9) was deputed for this purpose. According to Ms. Sarita Gupta, she recorded the statement of Asha Devi in the Civil Hospital between 11.22

a.m. and 12.05 p.m. on 5th April 1996. The statement/dying declaration reads as follows:-

"Stated that I was married at the age of 16 years. I am 25 years old. I have two sons, one is 5 years old while the second is 1= old. My husband is serving in military. Sometimes he visits us after a week and sometimes after 15 days. In my house, my father-in-law Rati Ram, mother-in-law Jumni, Jeth Prem Chand, Jethani Bala Rani, two Devars Sham Lal and Balbir Parshad are staying. My father-in-law, mother-in-law, Jeth Jethani and both the Devers had been harassing me from the very beginning. My mother-in-law, father-in-law, Jeth Jethani and both the Devers had been making plans to eliminate me. Last week my mother-in-law, father-in-law, Jeth, Jethani and Devers said, "let us get her bitten from a dog and in this way she would be eliminated". Yesterday, during noon time, my mother-in-law, father-in-law, Devers, Jeth and Jethani had given me severe beatings. Thereafter yesterday at about 3.00 PM when I was about to go to police station to lodge a report, all of them prevented me and said, "if she is bent upon to do so, she should be eliminated by setting her ablaze". After getting up today morning, I went to my mother-in-law and in a fit of anger, I broke my bangles (a sign of indignation against the married status). My mother-in-law, said that fault lies with her (Asha) and she should be finished. Mother-in-law, father-in-law, Jeth, Jethani and both the devers after conniving with one another tied me with my Chuni (head gear) and poured kerosene oil upon me. The kerosene oil also entered in my eyes. Mother-in-law, father-in-law, Jeth Jethani and both the devers set me on fire together. I made a lot of noise. The incident occurred at 7.30 AM. My mother-in-law Jumni, father-in-law Rati Ram, Jeth Prem Chand, Jethani Bala Rani and both the Devars Sham Lal and Balbir Parshad are responsible for setting me on fire. After my death, both of my children be handed over to my parents. Otherwise my in-laws would kill them also."

8. Soon after the statement was recorded Asha Devi's father Devi Dayal (PW-6) arrived in the Civil Hospital (although he says that he reached the hospital at about 11.45 a.m. but after the Magistrate left) and he made arrangements to take her to Chandigarh but she died on the way.

9. On these broad facts, investigations were carried out and a charge sheet was filed against the six accused persons for having murdered Asha Devi.

Proceedings in the Trial Court:

10. Before the Additional Sessions Judge, in Case No. 35 of 1996, the principal argument of the prosecution was that in view of the dying declaration there was no doubt at all that the accused persons were guilty of having murdered Asha Devi.

11. Prem Nath and Raj Bala produced alibi witnesses before the Trial Judge to show that Prem Nath was an employee in the HMT factory in Pinjore and that on 4th April 1996 as well as on 5th April 1996 he was in Pinjore and there was no question of his or his wife's involvement in the incident. The accused also produced Chandan Singh, Sub-Inspector, Food Supply, Yamunanagar as DW-7 to prove, on the basis of the ration card issued to Jagdish and Rati Ram, that they lived in the same neighbourhood but not together as stated by Asha Devi. Similarly, Puran Chand a neighbour of Jagdish was produced as DW-8 and his testimony was to the effect that he saw smoke coming out of Jagdish's house and he heard some children making a noise. Thereupon he went to Jagdish's house and found that the door of the tenement was bolted from inside. He, along with one Gurbachan broke open the door and found Asha Devi lying burnt in the tenement. They put out the fire and called Rati Ram who was working in the nearby fields. Thereafter, Rati Ram took Asha Devi to the Civil Hospital. Puran Chand also stated that Prem Nath and Raj Bala were not present at the spot.

12. One of the questions considered by the Trial Judge was whether Asha Devi was in a fit condition to make a statement, particularly since, according to Dr. M.R. Passi, she had 100% superficial as well as deep burns. The Trial Judge noted that Dr. Passi testified that Asha Devi was fit to make a dying declaration and that he was present when Ms. Sarita Gupta was recording her dying declaration. He stated that Asha Devi was responding to the questions put to her by the Magistrate.

13. The Trial Judge also considered the statement of Ms. Sarita Gupta who had confirmed from Dr. Passi regarding the fitness of Asha Devi to make a statement. Ms. Sarita Gupta stated that only after Asha Devi was declared fit to make a statement that her statement was recorded and read over to her. According to Ms. Sarita Gupta, during the recording of her statement, Asha Devi was conscious and responding to verbal commands. She also stated that Dr. Passi was present throughout when Asha Devi's dying declaration was being recorded.

14. On these facts, the Trial Judge concluded that Asha Devi was fit to make a dying declaration.

15. The next question addressed by the Trial Judge was whether the dying declaration contained any falsehood. In this regard, the Trial Judge came to the conclusion that there was nothing to suggest that the dying declaration was incorrect in any manner or that Asha Devi made allegations out of some vengeance.

16. Finally, the Trial Judge examined the plea of alibi raised by Prem Nath and Raj Bala and in this regard he concluded that there was every possibility of both of them being present in village Bhojpur both on 4th April 1996 when Asha Devi was given a beating as well as in the early morning of 5th April 1996 when Asha Devi was set on fire.

17. On the above conclusions, the Trial Judge held, in his judgment and order dated 28th October 1998, that all the accused were guilty of having murdered Asha Devi.

18. Feeling aggrieved, the accused persons filed Criminal Appeal No. 524-DB of 1998 in the High Court of Punjab & Haryana. By its judgment and order dated 25th October 2004, the High Court dismissed their appeal.

Proceedings in the High Court:

19. The High Court considered the evidence of Dr. Passi as well as the evidence of Ms. Sarita Gupta and upheld the conclusion of the Trial Judge that Asha Devi was in a fit state of mind to make a statement before the Magistrate.

20. The High Court also upheld the conclusion that Asha Devi was in a condition to speak coherently and was capable of making a statement. Consequently, the High Court accepted the validity of the dying declaration.

21. The High Court then considered the question whether it could be held, despite the dying declaration, that Prem Nath and Raj Bala were not involved in the incident concerning Asha Devi. Relying upon a few decisions of this Court, the High Court was of the view that there was no error in law in accepting a part of the dying declaration and rejecting another part of the dying declaration. The High Court then examined the evidence of the alibi witnesses in an attempt to 'bifurcate' the dying declaration. However, the High Court rejected their testimony and concluded that there was every possibility of Prem Nath and Raj Bala being present both on 4th April 1996 when Asha Devi was subjected to a beating as well as on 5th April 1996 when she was allegedly set on fire.

22. The High Court affirmed the conviction of the accused as well as the sentence imposed upon them.

23. Unfortunately, the High Court overlooked the evidence of Puran Chand (DW-8) who stated that Asha Devi's tenement was locked from inside and that the door had to be broken open by him and Gurbachan who found her burning.

Plea of alibi

24. On a consideration of the material before us, what strikes us as a little odd is that insofar as Prem Chand and Raj Bala are concerned, both the Trial Judge and the High Court have given us the impression that they proceeded on the basis that these two accused persons are required to prove their innocence. In fact it is for the prosecution to prove their guilt and that seems to have been lost in the consideration of the case.

25. It is no doubt true that when an alibi is set up, the burden is on the accused to lend credence to the defence put up by him or her. However the approach of the court should not be such as to pick holes in the case of the accused person. The defence evidence has to be tested like any other testimony, always keeping in mind that a person is presumed innocent until he or she is found guilty.

26. Explaining the essence of a plea of alibi, it was observed in *Dudh Nath Pandey v. State of U.P.*[1] that:

"The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only

if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed."

This was more elaborately explained in *Binay Kumar Singh v. State of Bihar*[2] in the following words:

"We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant."

Illustration (a) given under Section 11 of the Evidence Act is then partially reproduced in the decision, but it is fully reproduced below:

"The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant."

This Court then went on to say,

"The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi."

This view was reiterated in *Jayantibhai Bhenkarbhai v. State of Gujarat*.[3]

27. On the standard of proof, it was held in *Mohinder Singh v. State*[4] that the standard of proof required in regard to a plea of alibi must be the same as the standard applied to the prosecution evidence and in both cases it should be a reasonable standard. *Dudh Nath Pandey* goes a step further and seeks to bury the ghost of disbelief that shadows alibi witnesses, in the following words:

"Defence witnesses are entitled to equal treatment with those of the prosecution. And, courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses."

28. The defence put up by Prem Nath and Raj Bala needs to be examined in the light of the law laid down by this Court. What is the defence put up by them? Subhash Saini, Office Assistant with HMT in Pinjore appeared as DW-1 and stated that Prem Nath was on duty on 4th April, 1996 from 2.00 p.m. to 10.00 p.m. On the next day that is on 5th April, 1996 he was on half day leave and was on duty from 6.00 p.m. to 10.00 p.m.

29. This witness also stated that the entry and exit of an employee to and from the factory premises is recorded in a punching machine and two employees of the factory supervise the machine to avoid proxy punching. If there is any suspicion about any employee, the identity card is demanded from him or her. The Trial Court and the High Court had observed that it is possible to 'manipulate' the punching machine. While this may be so, there is nothing to suggest that despite the presence of employees and other safeguards having been set up by HMT, Prem Nath had manipulated the punching machine. The view of both the courts was speculative in nature and cannot form the basis for rejecting the alibi.

30. Jagan Nath Mishra (DW-2) is the tenant of Prem Nath and he stated that he met Prem Nath at about 10.30 p.m. on the night of 4th April 1996.

31. This witness further stated that he left his residence to attend duty the next morning at about 7.45 a.m. (This has wrongly been mentioned as 5.45 a.m. in the impugned judgment and we have verified from the original record that it is actually 7.45 a.m.) At that time he met Prem Nath and Raj Bala. He also stated that when he returned at about 5.45 p.m. he was given sweets by Raj Bala because they had purchased a new scooter.

32. On 5th April 1996 Prem Nath had taken half day leave for the purpose of purchasing a scooter. This was testified by Bhim Sen Verma (DW-3). It was stated by K.N. Sharma (DW-5) that Prem Nath was on duty on 4th April 1996 up to 10.00 p.m. and on half day duty on 5th April 1996.

33. K.K. Kanwal from Hind Motors Ltd. in Chandigarh entered the witness box as DW-6 and affirmed that at about 11.00 a.m. on 5th April 1996 Prem Nath had purchased and taken delivery of a scooter from his company. He further stated that prior to taking delivery of a vehicle, it takes about an hour to complete all procedural formalities in this regard.

34. The evidence of the alibi witnesses clearly brings out that on 4th April 1996 Prem Nath was in his factory from 2.00 p.m. onwards till 10.00 p.m. and later in the night he was seen by his tenant at about 10.30 p.m. On the next day that is 5th April 1996 Prem Nath and Raj Bala were seen by their tenant at 7.45 a.m. and about 11.00 a.m. Prem Nath purchased and took delivery of a scooter from Hind Motors Ltd., Chandigarh before going to the factory at about 6.00 p.m. On 5th April 1996 his wife Raj Bala distributed sweets on the purchase of a new scooter.

35. The Trial Court and the High Court have disbelieved the entire case put up by Prem Nath and Raj Bala by holding that they could very well have been in village Bhojpur at 12.00 noon on 4th April 1996 when Asha Devi was given a beating and they could have travelled back to Pinjore to enable Prem Nath to be in the factory at 2.00 p.m. Nothing is said about how they could have stopped Asha Devi at 3.00 p.m. from going to the police to lodge a complaint. The same night, they could have left Pinjore to be in village Bhojpur early morning on 5th April 1996 at about 7.30 a.m. when Asha Devi was set on fire. Thereafter, they could have come back to Pinjore to enable Prem Nath to be in Hind Motors at about 10.00 a.m. to purchase a scooter at 11.00 a.m. There is nothing on record to indicate the distance between Pinjore and village Bhojpur but we were orally told that it takes more than a couple of hours to cover that distance. Prem Nath did not have any means of personal conveyance which could have enabled him to undertake these journeys.

36. Apart from the conclusions of the Trial Court and the High Court appearing far-fetched, the testimony of Jagan Nath Mishra (DW-2) the tenant of Prem Nath has not been correctly appreciated because of a typing error in transcribing it from the original record. As mentioned above, Jagan Nath Mishra had seen Prem Nath and Raj Bala at 7.45 a.m. on 5th April 1996 (and

not at 5.45 a.m. as wrongly transcribed in the impugned judgment). Consequently, Prem Nath and Raj Bala could not have been in village Bhojpur at 7.30 a.m. on 5th April 1996. This evidence has gone unchallenged.

37. It seems to us that although the High Court has given due weightage to the dying declaration of Asha Devi but having accepted it, it has tried to pick holes in the defence evidence to justify the contents of the dying declaration. Given the law laid down by this Court, this was not the correct manner of approaching the evidence brought forth by Prem Nath and Raj Bala. In our opinion, the alibi witnesses have made out a strong case of demonstrating the improbability of Prem Nath and Raj Bala being involved in the incident of beating up Asha Devi at about 12.00 noon on 4th April 1996, of stopping her at about 3.00 p.m. from going to the police to lodge a complaint and setting her on fire at about 7.30 a.m. on 5th April 1996.

Severability of a dying declaration:

38. The next question is whether Asha Devi's dying declaration can be split up to segregate the case of Prem Nath and Raj Bala from the case of the other accused persons.

39. In *Godhu v. State of Rajasthan*[5] this Court found itself unable to subscribe to the view that if a part of the dying declaration is found not to be correct, it must result in its rejection in entirety. It was held,

"The rejection of a part of the dying declaration would put the court on the guard and induce it to apply a rule of caution. There may be cases wherein the part of the dying declaration which is not found to be correct is so indissolubly linked with the other part of the dying declaration that it is not possible to sever the two parts. In such an event the court would well be justified in rejecting the whole of the dying declaration. There may, however, be other cases wherein the two parts of a dying declaration may be severable and the correctness of one part does not depend upon the correctness of the other part. In the last mentioned cases the court would not normally act upon a part of the dying declaration, the other part of which has not been found to be true, unless the part relied upon is corroborated in material particulars by the other evidence on record. If such other evidence shows that part of the dying declaration relied upon is correct and trustworthy the court can act upon that part of the dying declaration despite the fact that another part of the dying declaration has not been proved to be correct."

40. Although at law there is no difficulty in segregating the role of two sets of accused persons if the dying declaration is severable, the present case indicates that the role of the accused persons cannot be segregated. This is because Asha Devi's dying declaration mentions all the accused persons as being involved in all the events that had taken place on 4th April 1996 and 5th April 1996. There is no distinction made in the role of any of the accused persons and they have all been clubbed together with regard to the harassment of Asha Devi; making plans to eliminate her; Asha Devi being beaten up on 4th April 1996; all the accused persons preventing her from lodging a complaint with the police; all the accused persons tying up Asha Devi with her chunni and pouring kerosene oil on her and then setting her on fire. Asha Devi has referred to each one of them as being involved in every incident on 4th April 1996 and 5th April 1996. If somewhat different roles were assigned to at least some of the accused persons, segregation or severance could have been possible. But with everybody being roped in for every event, it is not possible in this case to segregate or sever the actions of one from another.

41. Notwithstanding this, as we have seen, it is not possible to accept the involvement of Prem Nath and Raj Bala in the events that took place on the two fateful days. Nevertheless, it is quite possible that the other four accused were involved in beating up Asha Devi on 4th April 1996 and setting her on fire on 5th April 1996. But, what is of equal importance is that neither the Trial Court nor the High Court adverted to the crucial evidence of Puran Chand (DW-8) who stated that he saw smoke coming out of Jagdish's tenement and children were making a noise. When he reached there, he saw flames and smoke coming out from the ventilator of Jagdish's tenement and along with Gurbachan, he had to break down the door of the tenement which was locked from inside and they found Asha Devi on fire. If this statement of Puran Chand is correct, and there does not seem any

Date: 12/03/2014 This Appeal was called on for Judgment today.

For Appellant(s) Mr. D.P. Singh, Adv.
Ms. Sonam Gupta, Adv.
Mr. Sanjay Jain, Adv.

For Respondent(s) Mr. Manjit Singh, AAg
Mrs. Vivekta Singh, Adv.
Mrs. Nupur Chaudhary, Adv.
Mr. Tarjit Singh Chikkara, Adv.
Mr. Kamal Mohan Gupta, Adv.

Hon'ble Mr. Justice Madan B. Lokur, pronounced the judgment of the Bench comprising of Hon'ble Mrs. Justice Ranjana Prakash Desai and His Lordship.

Both the appeals are allowed in terms of the signed judgment.

[Gulshan Kumar Arora]
Court Master

[Indu Pokhriyal]
Court Master

(Signed reportable judgment is placed on the file)

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- [1] (1981) 2 SCC 166
 - [2] (1997) 1 SCC 283
 - [3] (2002) 8 SCC 165
 - [4] 1950 SCR 821
 - [5] (1975) 3 SCC 241