

ÑIT E M No.1- G  
(For Judgment)

Court No.3

S E C T I O N I I A

S U P R E M E C O U R T O F  
R E C O R D O F P R O C E E D I N G S

I N D I A

Criminal appeal No. 5 0 9 of 2 0 0 6

Virendr a @ Buddhu & Anr.

Appellant (s)

VER SUS

State of U.P.

Respondent (s)

Date : 1 7 / 1 0 / 2 0 0 8

This Appeal was called on for judgment today.

For Appellant (s)

Mr. Salm a n Khurs hid, Sr. Adv.  
Mr. Imtiaz Ahmad, Adv.  
Mrs. Naghma Imtiaz, Adv.  
For M/s Equity Lex Associates, Advvs.

For Respondent(s)

Hon'ble Dr. Justice Mukunda k a m Shar m a  
pronounced Judgment of the Bench comprising His  
Lordship and Hon'ble Dr. Justice Arijit P a s ayat.

The appeal is dismissed in terms of the signed  
judgment.

(Hemal ath a Mohan)  
Sr. P.A.

(Shashi Bala Vij)  
Court Master

Signed Reportable judgment is placed on the file.  
IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION  
CRIMINAL APPEAL No. 509 OF 2006

Virendra @ Buddhu & Anr.

.... Appellants

versus

State of U.P.

.... Respondent

JUDGMENT

Dr. Mukundakam Sharma, J.

1. This appeal is filed by the two accused who have been convicted by the Division Bench of th  
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Allahabad High Court under Section 302 read with Section 34 of the Indian Penal Code (for s hort

'IPC') and sentenced to undergo imprisonment for life.

2. Originally, there were three accused persons, namely, Virendra @ Buddhu, Ram Asrey @ Tami and Girish Chandra @ Gappu and they were charged under Section 302 read with Section 34 IPC and Girish Chandra was also charged under Section 307 IPC. The Trial Court after recording evidence and hearing arguments acquitted all the accused persons of the charges leveled aga inst

them under Section 302 read with Section 34 IPC and Girish Chandra from the charges leveled against him under Section 307 IPC. Being aggrieved by the order of acquittal passed by the Trial

Court an appeal was filed by the State of U.P. before the Allahabad High Court. The said ap peal

was allowed in part to the extent that acquittal of the accused - appellant in the present appeal was

set aside and they were sentenced to undergo imprisonment for life under Section 302 read w ith

Section 34 IPC, while the acquittal of third accused, namely, Girish Chandra was affirmed b y the

same judgment and order of the High Court of Allahabad. Being aggrieved by the said order o f the

High Court the present appeal was filed by the accused persons, in which notice was issued and an

order was also passed rejecting the prayer for bail but with direction for expeditious disp osal of the

appeal. Pursuant to the said order, the present appeal was listed before us for hearing and disposal

and we heard the learned counsel appearing for the parties. In this appeal, learned counsel appearing for the parties have taken us through the entire evidence on record in support of their

contentions before us.

3. Before analyzing the submissions made before us by the counsel appearing for the parties, i t will

be necessary to set out the factual position leading to the filing of the present appeal by both these

accused persons.

On 05.10.1979 at about 4.45 p.m. Smt. Sarla Devi, wife of Rameshwar Dayal (hereinafte r

referred to as 'deceased') lodged a First Information Report at police station Shamshabad, Dis trict

Farrukhabad alleging that Pyarey Lal who happened to be her grand father in relation had execu ted a

sale deed of his landed property in favour of her son Pradeep Kumar but subsequently Het Ram and Sahdev got a deed of will regarding the same property allegedly executed by their maternal uncle Pyarey Lal in their favour. Therefore, in respect of the same piece of land, litigation was going on between her deceased husband on one hand and Het Ram and Sahdev on the other hand. Three months prior to the occurrence Sahdev was murdered and in connection with the said murder her son Pradeep Kumar, brothers Jaidev and Rakesh were falsely roped in as accused and Pradeep was still in jail at the time of murder of his deceased father. It was also alleged that proceedings under Section 107 and 117 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C) were also going on between the deceased on one hand and Het Ram and his son Virendra @ Buddhu were nursing grudge against the deceased. On the fateful day i.e. on 05.10.1979, early morning the deceased, the complainant Sarla Devi, P.W. 1 and their daughter Km. Guddi, P.W. 2 had gone for taking a holy dip into the river Ganges on the pious occasion of "Poornamashi". Thereafter, at about 10.00 a.m. while they were returning back after seeing Patavar in their field through the field of Raghubar Dayal and reached near mango tree standing in that field, Virendra alias Buddhu along with his cousins Ram Asrey alias Tami and Girish Chandra alias Gap pu armed with country made pistols emerged from Patavar standing at the medh of Chhavinath and rushed towards the deceased. Ram Asrey was shouting that the deceased should be caught hold of as they had to take revenge of the murder of their maternal uncle. Upon hearing the said shouting the deceased tried to run for his life but he could not escape and Virendra and Girish caught hold of him under the mango tree and Virendra and Ram Asrey fired at him with country made pistols causing fatal injuries on him. On hue and cry raised by Smt. Sarla Devi and Guddi, Girish fired commanding them not to come forward and all the three accused ran away towards left. Sustaining fatal injuries at his head and eye the deceased died on the spot instantaneously.

Thereafter on reaching of some of the co-villagers near the dead body Sarla Devi went to the village and got the report scribed by Deep Chand and then went to the police station Shamshabad

situated at a distance of about 7 miles from the village. She lodged the First Information Report, upon

which a criminal case was registered and investigations of the crime was taken up.

During the course of investigation all the three accused persons were arrested. Autopsy was

conducted on the dead body and post-mortem report was obtained. After completion of the

investigation, the police submitted charge sheet against the three accused persons. The trial court

framed charges against all the three accused persons under Section 302 read with Section 34 IPC and

against accused Girish also under Section 307 IPC. The charges were read over to the accused and

were explained to them in Hindi language. They pleaded not guilty and expressed their desire to be

tried. Since the learned counsel for the accused admitted under Section 294 of the Cr.P.C. the

prosecution records from Ext. Ka-2 to Ext. Ka-18, the prosecution examined no other person as

prosecution witness other than Smt. Sarla Devi the complainant as PW-1 and Km. Guddi as PW-2,

who are stated to be eye-witnesses of the said occurrence. The learned trial court thereafter critically

examined the depositions and the evidence on record and on appreciation thereof acquitted all the

three accused persons of all the charges leveled against them.

On appeal being filed, the High Court on re-appreciation of the evidence and records found

that the grounds of acquittal as given by the learned trial court were unjustified and for the reasons recorded in the judgment set aside the order of acquittal passed against Virendra and Ram Asrey. The

High Court, however, maintained the order of acquittal passed in favour of Girish Chandra.

Consequently, the present appeal is filed by the two accused persons who were held to be guilty of the

charge under Section 302 read with Section 34 IPC.

4. Mr. Salman Khurshid, the learned senior counsel appearing for the appellants submitted that the

High Court was not justified in setting aside the order of acquittal inasmuch as the reasons given

by the High Court for reversing the order of acquittal are unsustainable. He submitted that the

discrepancies between the ocular evidence and the medical evidence are so vital that no Court

could convict the two accused persons and they were required to be treated similarly as the third

accused, namely, Girish Chandra who was acquitted of all the charges. Relying on the post-mortem examination report of the deceased, he submitted that the said report clearly proves and

establishes that there was 4 oz of semi digested food in the stomach of the deceased at the time

when autopsy was conducted, which clearly belies the prosecution case that the deceased died at

about 10.00 a.m. in the morning inasmuch as PW-1 - Smt. Sarla Devi, wife of the deceased, had

herself stated that the deceased did not take any food in the morning on the fateful day and he had

taken his meal at about 6-7 p.m. on 04.10.1979. He further submitted that presence of 4 oz of

semi-digested food in the stomach of the deceased at the time when autopsy was done, clearly

pinpoints to the fact that the deceased was murdered at about 10.00 p.m. on 04.10.1979 by some

unknown person and in order to make out a got up story it is now shown that the deceased was

murdered in the morning in presence of his wife and daughter while returning after taking bath on

the occasion of Poornamashi in river Ganges. He also pointed our attention to the discrepancy in

the statement made by PW-1 - Smt. Sarla Devi and PW-2 Km. Guddi for PW-1 has stated that

near the place of occurrence in the field there was bajra and jawar crop standing whereas PW-2

Km. Guddi has stated that at that time there was no crop in her field except pataur standing.

According to the senior counsel, the said discrepancy is very vital and clearly belies the prosecution case and therefore both the accused persons should be acquitted of all the charges.

5. Learned counsel for the State on the other hand while supporting the judgment of the high court

stated that the findings recorded by the Trial Court were clearly erroneous in law and the High

Court has rightly appreciated the evidence on record while coming to its conclusion.

6. In order to appreciate the contentions raised, we have read the entire evidence on record. The two

witnesses, PW-1 and PW-2, are the eye-witnesses. The incident had taken place in their presence

when they were coming back after taking a holy dip in the river Ganges. PW-1 had also stated in

her deposition about the motive for the murder of the deceased as according to her there was

s a long

animosity between the deceased and the accused persons. About the incident she has stated that on

the day of Poornamashi at about 10.00 a.m. when she along with her deceased husband and daughter Km. Guddi was returning after having a holy-dip in the river Ganges, the deceased expressed his desire that they should have a look of their crop and then go home and when these

persons reached near the field of Chhabinath, the accused persons emerged from behind the crops.

She had also stated that all the three persons were armed with country made pistols and at that time

Ram Asrey exhorted others to catch hold of the deceased in order to take revenge of murder of

their maternal uncle. She also stated that thereupon Ram Asrey, Virendra and Girish Chandra caught hold of the deceased. She further stated that first of all Ram Asrey caught hold of the

deceased and then Virendra caught hold of him and then Ram Asrey and Girish Chandra fired shots with their country made pistols which hit at the skull of the deceased upon which deceased

fell down on the field and died on the spot. The accused persons fled away from there towards

west direction to the village.

She also stated that after the co-villagers arrived at the place of occurrence she went home and

met the brother-in-law of her deceased husband, namely, Deep Chandra and got the Report of the occurrence written by him. She thereafter accompanied by her son-in-law Prem Chand went to the police station Shamshabad where she submitted the said written report Ext. Ka-1 and lodged the First

Information Report Ext. Ka-2 at about 4.30 p.m. She had of course stated in her statement that her

deceased husband took his last meal at about 6.00 - 7.00 p.m. on the previous evening and did not take

anything in the morning.

7. The prosecution also examined Km. Guddi, PW-2 daughter of deceased. The Trial Court, of

course disbelieved the evidence of PW-2, namely, Km. Guddi, who stated her age to be about 14

or 15 years on the date of incident. According to the Trial Court, she was not a dependable and

reliable witness as she does not understand the meaning of the expression "oath" and also as she

has no idea about the direction and boundaries of her field. The High Court in the appeal however

considered her deposition and held that the Trial Court was not justified in rejecting her testimony

totally. The Trial Court did not administer oath to her observing that she appeared to be a  
ged

about 12 years and also opined that she did not understand sanctity of oath. The High Court  
held

that PW-2 might not be in a position to understand the significance of Shapath (oath) but t  
he Trial

Court should have satisfied himself if she understood the significance of desirability of s  
peaking

the truth.

8. The Indian Evidence Act, 1872 does not prescribe any particular age as a determinative fact  
or to

treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act env  
isages

that all persons shall be competent to testify, unless the court considers that they are pr  
evented

from understanding the questions put to them or from giving rational answers to these quest  
ions,

because of tender years, extreme old age, disease, whether of mind, or any other cause of t  
he same

kind. A child of tender age can be allowed to testify if he or she has intellectual capacit  
y to

understand questions and give rational answers thereto. The evidence of a child witness is  
not

required to be rejected per se, but the court as a rule of prudence considers such evidence  
with

close scrutiny and only on being convinced about the quality thereof and reliability can re  
cord

conviction, based thereon. In Dattu Ramrao Sakhare v. State of Maharashtra [(1997) 5 SCC  
341] it was held as follows: (SCC p. 343, para 5)

"A child witness if found competent to depose to the facts and reliable one such  
evidence could be the basis of conviction. In other words even in the absence of  
oath the evidence of a child witness can be considered under Section 118 of the  
Evidence Act provided that such witness is able to understand the questions and  
able to give rational answers thereof. The evidence of a child witness and credibilit

y

thereof would depend upon the circumstances of each case. The only precaution  
which the court should bear in mind while assessing the evidence of a child witness  
is that the witness must be a reliable one and his/her demeanour must be like any  
other competent witness and there is no likelihood of being tutored."

Subsequently, in the case of Ratansinh Dalsukhbhai Nayak v. State of Gujarat, [(2004) 1  
SCC 64] wherein one of us (Dr. Arijit Pasayat) was a member the bench held that though the dec  
ision

on the question whether the child witness has sufficient intelligence primarily rests with the  
trial Judge

who notices his manners, his apparent possession or lack of intelligence, and the said Judge m  
ay resort

to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath but the decision of the trial court may, however, be

disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion

was erroneous. The bench further held as under: (SCC p. 67, para 7)

"This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of

a child witness."

9. In the present case, a perusal of the statement of PW 2 goes to show that she had no idea of

directions, distance, area etc. She remained silent to some questions put to her such as what was

the area of her father's field or whose fields were situated around the field of her father. The High

Court observed that it is not expected from a girl of 14 years to answer these questions put to her.

Besides it, a rustic girl of tender age of 14 years is likely to be overawed by the Court atmosphere

and the piercing cross-examination made by the defense counsel and out of nervousness she may

get confused and may not be able to answer some questions. PW2 could not tell the actual name

of Buddu saying that it was slipping from her mind. The Trial Court while disbelieving her testimony stated that she could not tell the real name of Buddhu. The High Court held that on that

ground that PW-2 could not answer few questions, her evidence could not be rejected if otherwise

it was reliable and trustworthy. We have been taken through her evidence by the learned counsel

and on perusal of the same we find that the testimony of PW-1 Sarla Devi stands corroborated by

the testimony of PW 2 Guddi on all material points. We are of the considered opinion that the

prompt answers from her, to the questions put to her during cross-examination, can be accepted

even though she was aged about 14 years when the occurrence had taken place.

Even otherwise it is not the case of the prosecution that the conviction has to be based on the

sole testimony of PW 2. In the FIR itself there was a reference to the fact that PW 2 was also an eye

witness to the incident in addition to PW 1, as PW 2 was also accompanying the deceased and PW 1

on the fateful day. The testimony of PW 2 is used by the prosecution only to the extent that the same

corroborates the evidence led by the prosecution through PW 1 and was also in conformity with the

medical evidence. It appears to us from a reading of her deposition that she had deposed whatever she

had seen and the same corroborates the testimony of PW 1 on all material points. She was a rustic

village girl aged about 14 years and such a girl cannot always be expected to have an alert mind so as

to be able to answer all questions such as directions, area, and distance with precision.

10. This brings us to the main contention of the counsel appearing for the appellants regarding the

presence of 4 oz of semi-digested food in the stomach of the deceased. Similar contention was

also raised before the High Court and the High Court in its judgment had mentioned that the Trial

Court observed that the deceased was murdered on 04.10.1979 at about 10.00 p.m. because the doctor who conducted autopsy on the dead body of the deceased mentioned in the post mortem report that stomach contained 4 oz of semi-digested food and PW 1 Sarla Devi stated in her cross-

examination that her husband had not taken food after last evening. Answering the said contention

the High Court observed that such observation made by the Trial Court is wholly erroneous as both

the eye-witnesses stated that the deceased was murdered while returning to the village after taking

bath in the river Ganges as there was Poonamashi that day. Regarding the statement of PW 1

Sarla Devi to the fact that deceased had not taken anything on that fateful day since morning, it

was held by the High Court that the possibility cannot be ruled out that the deceased might have

taken something after taking bath in the morning and that Sarla Devi might not have noticed the

same.

Moreover, the doctor who conducted autopsy on the dead body on 06.10.1979 at 4.30 p.m., in

the report has mentioned that rigor mortis had passed through upper extremities and was present in

lower extremities. It is mentioned at page 125 of Modi's Medical Jurisprudence and Toxicology, Edition 1977 that in general rigor mortis sets in 1 to 2 hours after death, is well developed

from head

to foot in about 12 hours, is maintained for about 12 hours and passes off in about 12 hours.  
In the

instant case rigor mortis was present in lower extremities at the time autopsy was conducted on the

dead body after 30 hours. As according to ocular testimony deceased was murdered on 05.10.1979  
at

about 10.00 a.m. and the doctor conducted autopsy on the dead body on the next day at about 4.  
30

p.m. after 30 hours of death but rigor mortis was found present in lower extremities. Had he died on

04.10.1979 at about 10.00 p.m. or so rigor mortis would have passed off from the dead body

completely at the time of autopsy. Thus the ocular testimony that he was murdered on 05.10.1979 at

about 10.00 a.m. stands corroborated from the medical evidence pin-pointing that rigor mortis was

present in lower extremities at the time when the autopsy was conducted on the dead body after  
30

hours.

11. We find no reason to discredit the evidence of the two eye witnesses, whose presence could not

have been doubted at the place of occurrence of death of the deceased on the sole ground that at PW

1 in her cross examination has mentioned that her husband had not taken food after the previous

evening. They were natural witnesses who were present at the time of occurrence and the possibility that the deceased might have taken something after taking bath in the morning which

Sarla Devi might not have noticed. Such a situation as held by the High Court cannot be ruled out.

In a similar case of Sarbul Singh and Others v. State of Punjab, [1993 Supp (3) SCC 678], where some semi-digested food was found in the stomach of the deceased therein although the re

was evidence that they had taken food immediately before the occurrence, this Court held as under:

"6. We see absolutely no reason to discredit the evidence of the three eyewitnesses whose presence cannot be doubted. Now coming to the semi-digested food, it cannot be ruled out that the old lady might not have eaten anything earlier. Merely because the illiterate witnesses stated that they took their meals immediately before the occurrence cannot by itself be a circumstance to discredit their evidence on the basis of medical evidence regarding the presence of semi-digested food. It is also clear from the textbooks on medical jurisprudence that the stomach contents cannot be determined with precision at the time of death. As rightly held by the High Court, the trial court grossly erred in basing its verdict mainly on the nebulous medical observation."

12. In this view of the matter, we are unable to accept the contentions of the learned senior counsel

appearing for the appellants that the appellants should be acquitted for the reasons stated hereinabove. We reject the contentions because of the reasons set out hereinabove. Reliance was

also placed by the learned senior counsel for the appellants to the fact that there was discrepancy

between the evidence of PW-1 - Smt. Sarla Devi and PW-2 Km. Guddi to the extent that PW-1 has

stated that near the place of occurrence in the field there was bajra and jwar crop standing whereas

PW-2 Km. Guddi has stated that at that time there was no crop in the field except pataur standing.

The said discrepancy is of no significance at all. Both the witnesses were found to be natural eye-

witnesses, who were present at the place of occurrence on the fateful day, they were wife and

daughter of the deceased and they would rope in only the culprits to be punished and will not rope

in someone who is not at all involved in the incident. The medical evidence available on record

fully corroborates the ocular evidence and proves and establishes the guilt of the accused persons.

There could be no doubt in the prosecution case regarding the manner in which the incident happened. The case of prosecution by recovery of blood, pellets, tiklis and empty cartridge from

the place of occurrence stands proved and therefore there could be no doubt with regard to the time

and place of occurrence and also regarding the weapons used in the assault. We, therefore, find no

reason to take a different view than what was taken by the High Court.

13. The appeal is devoid of merit and is dismissed.

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J.

it Pasayat)

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(Dr. Arij

.....J.

dakam

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(Dr. Mukun

Sharma)  
New Delhi,  
October 17, 2008