

## SUBHASH &amp; ANOTHER

v.

STATE OF U.P.

May 6, 1976

[Y. V. CHANDRACHUD, R. S. SARKARIA AND P. N. SHINGHAL, JJ.]

*Code of Criminal Procedure, S. 374—Reference for confirmation of death sentence, whether High Court obliged to examine entire evidence independently.*

Ram Sanehi received two gun-shot wounds on his chest, and died within ten minutes. Two of his children claimed to have witnessed the occurrence. The dead body was subjected to post-mortem only after about 24 hours had elapsed. The same evening, appellant Subhash surrendered, and appellant Shyam Narain was arrested, though for another offence altogether. The Sessions Court convicted them under s. 302 I.P.C. and sentenced Subhash to death and Shyam Narain to imprisonment for life. The accused moved the High Court in appeal, while the Sessions Court referred the matter to it under s. 374, for confirmation of the death-sentence.

The question before this Court was, whether in the case of such references, the High Court was obliged to examine the entire evidence independently.

Allowing the appeal, the Court,

**HELD:** On a reference for confirmation of the sentence of death, the High Court is under an obligation to proceed in accordance with the provisions of sections 375 and 376 of the Criminal Procedure Code. The High Court must not only see whether the other order passed by the Sessions Court is correct but it is under an obligation to examine the entire evidence for itself, apart from and independently of the Sessions Court's appraisal and assessment of that evidence. [589A-B]

*Jumman and Ors. v. The State of Punjab* AIR 1957 S.C. 460; *Ram Shanker Singh and Ors. v. State of West Bengal* [1962] Supp. 1 SCR 49 at 59 and *Blupendra Singh v. The State of Punjab* [1968] 3 SCR 404, followed.

**CRIMINAL APPELLATE JURISDICTION :** Criminal Appeal No. 420 of 1974.

Appeal by Special Leave from the Judgment and Order dated 27-11-74 of the Allahabad High Court in Criminal Appeal No. 2646/73 and Referred No. 95/73.

*Frank Anthony, E. C. Agarwala and A. T. M. Sampath;* for the Appellants.

*O. P. Rana;* for the Respondent.

The Judgment of the Court was delivered by

CHANDRACHUD, J. The appellants, Subhash and Shyam Narain, were convicted by the learned Civil and Sessions Judge, Farrukhabad under section 302 of the Penal Code on the charge that at about 9 a.m. on June 9, 1972 they committed the murder of one Ram Sanehi. Subhash was sentenced to death and Shyam Narain to imprisonment for life. The judgment of the trial court having been confirmed in appeal by the High Court of Allahabad, the two accused have filed this appeal by special leave of this Court.

**A** The case of the prosecution is briefly as follows : On the morning of June 9, 1972 the deceased Ram Sanahi had gone to his field along with his son Bal Kishore and his daughter Kusuma Devi for eating Kharbuzas. While they were returning from the field at about 9 a.m. the appellants, who were lying in wait near a culvert, suddenly accosted Ram Sanahi. The appellant Subhash pointed the barrel of his gun towards the chest of Ram Sanahi and said that since he, Ram Sanahi, was a witness against him in a complaint filed by Pooran Lal and since he was also doing Pairvi on behalf of Pooran Lal he would not be allowed to remain alive. The appellant Shyam Narain was armed with a *lathi*. Bal Kishore and Kusuma Devi pleaded with the appellants to spare their father but Shyam Narain asked Subhash not to delay the matter and finish Ram Sanahi quickly. Subhash thereupon fired three shots from his double-barrelled gun, the last of which mis-fired. Ram Sanahi fell down, whereupon the appellants dragged him by his legs over a distance of 6 or 7 paces. Bal Kishore and Kusuma Devi then raised an alarm whereupon Brij Bhusan, Shyam Lal, Mangali Prasad and Jhabbo Singh Thakur reached the place of occurrence and challenged the appellants. Before running away, the appellant Subhash told his companion Shyam Narain that he on his own part was going to surrender before a court and that Shyam Narain should make his own arrangements. Ram Sanahi died within about 10 minutes after receiving the injuries.

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**D**

Bal Kishore first went to his house which is at about a distance of 120 yards from the scene of offence. At about 12 O'clock at noon he went to the Kamalganj police station and lodged his First Information Report (Ex. Ka-3). S.I. Vishwanath Sharma who was posted as a 2nd Officer at the police station recorded Bal Kishore's complaint, went to the scene of occurrence, prepared the inquest report and handed over the dead body for being sent for post-mortem examination to the District Hospital at Farrukhabad which is about 10 miles away from the village of Kandharpur where the incident took place. S.I. Sharma took samples of earth from the place of occurrence and seized a mis-fired cartridge which was lying concealed in the folds of the deceased's Dhoti. The Fard in that behalf is Ex. Ka-10 and the site-plan is Ex. Ka-11.

**E**

**F**

**G** The appellant Subhash surrendered before the Additional District Magistrate (Judicial) at Farrukhabad at about 4 p.m. on the very day. The appellant Shyam Narain was arrested at about 2-40 p.m. on the same day under section 122 of the Railway Act for crossing the railway lines at Fatehgarh.

The appellants denied the charge that they had committed the murder of Ram Sanahi and stated that they were involved in the case due to enmity. This defence has been rejected both by the Sessions Court and the High Court.

**H** Before referring to the evidence in the case it has to be mentioned that the High Court had before it not only the appeal filed by the accused but also a reference made by the Sessions Court for confirmation of the capital sentence under section 374 of the Code of Criminal

Procedure. Time and again this Court has pointed out that on a reference for confirmation of the sentence of death, the High Court is under an obligation to proceed in accordance with the provisions of sections 375 and 376 of the Criminal Procedure Code. Under these sections the High Court must not only see whether the order passed by the Sessions Court is correct but it is under an obligation to examine the entire evidence for itself, apart from and independently of the Sessions Court's appraisal and assessment of that evidence. From the long line of decisions which have taken this view it would be enough to refer to the decisions in *Jumman and Ors. v. The State of Punjab*<sup>(1)</sup>, *Ram Shanker Singh & Ors. v. State of West Bengal*<sup>(2)</sup> and *Bhupendra Singh v. The State of Punjab*<sup>(3)</sup>.

The High Court has failed to show due regard to this well-established position in law. It did not undertake a full and independent examination of the evidence led in the case and it mainly contented itself with finding out whether the Sessions Court had in any manner erred in reaching the conclusion that the charge of murder levelled against the appellants was established beyond a reasonable doubt. The High Court is right in saying that the main question in the case was whether Bal Kishore and Kusuma Devi who were examined as eye-witnesses were truthful witnesses. But then it did not subject their evidence to any minute scrutiny. Impressed overbearingly by the circumstance that the Sessions Court "had the opportunity of observing the demeanour" of the witnesses, the High Court apparently thought that such an opportunity gave to the Sessions Court's judgment a mystical weight and authority, even though the learned Sessions Judge had not, in his judgment or while recording the evidence, made any special reference to the demeanour of the witnesses. The High Court accepted the evidence of Ram Sanehi's children by observing that there was no material contradiction in their evidence and that certain statements in the F.I.R. afforded a guarantee that the two witnesses were present when their father was done to death. We will now proceed to show how several significant circumstances either escaped the attention of the High Court or were not given their due and rightful importance.

First as to the manner in which S.I. Sharma conducted investigation into the case. The offence took place at about 9 a.m. on June 9 and though the District Hospital at Farrukhabad was just 10 miles away, the dead body was not received at the hospital for nearly 24 hours after the incident had taken place. The excuse offered by the prosecution that cartman was not willing to take the body at night is utterly flimsy because the Investigating Officer could have easily made some alternate arrangement for despatching the dead body for post-mortem examination expeditiously. With the dead body lying at the scene of offence for nearly 12 hours and thereafter at the police station for another 8 or 9 hours, it was easy enough for the witnesses to mould

(1) A. I. R. 1957 S. C. 460.

(2) [1962] Supp. 1 S. C. R. 49 at 59.

(3) [1968] 3 S. C. R. 404.

- A their statements so as to accord with the nature of injuries. The Investigating Officer did not make any note at all in the General Diary as to which witnesses were examined by him on the date of the occurrence which was obligatory upon him to do under paragraph 44 of the U.P. Police Act. The time when the investigation was commenced and the time when it was concluded are not mentioned in the case diary.
- B The time when the Investigating Officer reached the village and the time when he returned to the police station are also not noted in the case diary. S.I. Sharma stated in his evidence that several important facts concerning the investigation were being stated by him in his evidence from memory. He reached the scene of offence at about 2-30 p.m. but it was not until about 6 p.m. that he inspected the site. The dead body was not removed from the scene of offence till
- C about 9 p.m. and even that is open to grave doubt because the Investigating Officer has admitted in his evidence that he was unable to say as to when the dead body was taken away from the spot and whether it was taken directly to the hospital or was detained somewhere on the way. He was unable to say whether it was right or wrong that the dead body remained in the village till about 4 O'clock on the morning of the 10th. Forty or fifty persons had gathered at the
- D scene of offence when the Investigating Officer arrived but the record of the case does not show that the statement of any of those persons was ever recorded. In fact even the statement of Kusuma Devi was recorded late at night for which the reason is stated to be that her elder sister Pushpa Devi died of shock on the evening of the 9th after hearing of her father's murder. It may be that Pushpa Devi died on the 9th, but apart from the cause of her death, the statement of Kusuma
- E Devi need not have been held up so long. We are doubtful if the Investigating Officer at all knew on the 9th that Pushpa Devi had died. He has admitted that his knowledge in that behalf was derived from hearsay reports. The appellant Subhash had surrendered before the Additional District Magistrate, Farrukhabad on the afternoon of the 9th itself while the other appellant Shyam Narain was arrested at Fatehgarh at about 2-40 p.m. The Investigating Officer did not even
- F know of these significant developments, though they had taken place just a few miles away from the scene of investigation. He says that he learnt of the surrender and the arrest of the appellants on the evening of the 12th. Mangali Prasad has been examined by the prosecution as an eye-witness and his name is mentioned in the F.I.R. as one of the four persons who arrived at the scene of offence even before the
- G appellants had run away. His statement was recorded 11 days later on June 20. The F.I.R. mentions expressly that the appellants caught hold of the legs of the deceased and started dragging him. The Investigating Officer has not stated in the Panchnama of the scene of offence whether the ground was soft or hard or sandy which had great relevance on the allegation that the deceased was dragged over a certain distance. Finally, it is surprising that the Investigating Officer did not think it
- H worthwhile to pay a visit to the field where the deceased is alleged to have gone with his children for eating Kharbuzas. Indeed, he stated that he was not in a position to say if there were Kharbuzas at all in the field, when the occurrence took place.

The High Court has condoned these lapses on the part of the Investigating Officer with the observation that he "appears to have been inexperienced and somewhat negligent". The Investigating Officer has stated in his evidence that he had put in 7 years of service. It is difficult to understand on what basis the High Court attributed the lapses on his part to mere inexperience. We will presently indicate the significance of the various lapses and loopholes in investigation but to say, as the High Court has done, that the Investigating Officer was "somewhat negligent" seems to us in the circumstances a grave euphemism.

We will now proceed to deal with the various circumstances which, in our opinion, render it unsafe to accept the prosecution case.

Dr. S. C. Pandiya who performed the post-mortem examination has described in his evidence the injuries received by Ram Sanahi. In all he found 7 injuries on the dead body, out of which injuries 1, 3 and 7, injuries 2 and 4, and injuries 5 and 6 are interconnected. Injury No. 1 is described as a "shot wound" with its entry above the left nipple. Injury No. 3 is described as multiple rounded abrasions on the left side of the chest. Injury No. 7 is the wound of exit on the right scapular region, corresponding to injury No. 1. Injury No. 2 consists of 8 gunshot wounds of entry below the right nipple while injury No. 4 consists of multiple rounded abrasions above the right nipple. Injury No. 5 is a gun-shot wound of entry on the back of the left forearm while injury No. 6 is the corresponding wound of exit near the ulnar aspect of the left forearm.

The evidence of Dr. Pandiya and the description of the injuries given by him in the post-mortem report tend to show that two different kinds of firearms were used by the assailants of Ram Sanahi. Injury No. 1 was caused by a bullet and that is clear not only from the description of the injury but from what Dr. Pandiya has stated in his evidence. He says: "The *bullet*, which had entered through injury No. 1 went out straight after emerging from injury No. 7". Injuries Nos. 2 and 5 were caused by pellets. This shows that whereas injury No. 1 was caused by a firearm in the nature of a rifle, injuries 2 and 5 were caused by an ordinary gun. The medical evidence thus falsifies the eye-witnesses' account according to which, the appellant Subhash alone was armed with a double-barrelled gun, the other appellant Shyam Narain being armed with a *lathi*. The objective inference arising from the nature of injuries received by the deceased has a significant impact on the case of the prosecution, which has been overlooked by both the Sessions Court and the High Court.

While we are on the medical evidence it would be appropriate to mention that there was no tattooing or charring on any of the firearm injuries which, according to the doctor, shows that the firing was done from a distance of more than 4 feet. In the First Information Report Bal Kishore has stated that as soon as he, his father and sister, reached the culvert, Subhash "touching the chest" of Ram Sanahi "with the

- A barrel of his gun" said that he shall not leave him alive; Shyam Narain thereupon exhorted Subhash not to delay and fire immediately; Subhash then fired three shots in quick succession, one of which misfired. The trend of the F.I.R. is that Subhash fired the first two shots at Ram Sanehi from a point blank range, in which event indisputably, there would have been tatooing and charring around the injuries. Bal Kishore has attempted to offer an explanation that what he meant to say in his complaint was that Subhash trained his gun "towards" Ram Sanehi's chest and not "on" his chest. This explanation is an after-thought and in the circumstances difficult to accept. Thus in another important respect, the medical evidence falsifies the case of the prosecution.
- C There is another aspect of the medical evidence which, though, not as important as the two aspects mentioned above, may also be referred to. The case of the prosecution is that Ram Sanehi had gone to his Kharbuza field with his son and daughter for eating Kharbuzas. There is evidence that they did eat Kharbuzas and almost immediately thereafter they started back for home. Within less than 5 minutes, Ram Sanehi met with his death near the culvert. The post-mortem report shows that Ram Sanehi's stomach was empty which means that the evidence that he had eaten Kharbuzas just a little time before his death is untrue. Bal Kishore tried to wriggle out of this situation by saying that Ram Sanehi had eaten just a small slice of Kharbuza. But even there, Dr. Pandiya has stated that if the entire slice of Kharbuza was eaten by Ram Sanehi, its remains would be found in the stomach provided there was no vomiting after the gun-shot injuries. Since Ram Sanehi had not vomited, his large intestines could not have been found to be empty if the story of his children was true.
- E

- This last circumstance may at first sight seem trivial but its importance consists in the fact that the visit of Ram Sanehi, along with his children, to the Kharbuza field for the purpose of eating Kharbuzas is the very genesis of the incident which happened on June 9, 1972.
- F Coupled with the circumstance that the Investigating Officer did not even pay a visit to the Kharbuza field, leave alone making a Panch-nama thereof, the conclusion is irresistible that the story that the children had accompanied their father to the Kharbuza field lacks a factual basis.

- G The other circumstances which render the prosecution case suspect are these : (1) Ram Sanehi is alleged to have been dragged over 6 or 7 paces by the appellants but not even an abrasion was found on his back or stomach which could be attributed to dragging. (2) Thirty or forty persons are alleged to have collected at the scene of occurrence but Bal Kishore was not able to mention the name of even one of them and it is common ground that the Investigating Officer did not record the statement of any of them. (3) Jhabboo Singh, Shyam Lal, Brij, Bhushan and Mangali Prasad reached the scene of offence even before the appellants had fled away but none from amongst the first three was examined by the prosecution. Mangali Prasad was examin-
- H

ed as an eye-witness but he has been concurrently disbelieved by the Sessions Court and the High Court. (4) Though the motive of the offence is alleged to be that in a complaint filed by Pooran Lal against the appellant Subhash, the deceased Ram Sanehi was cited as a witness, Mangali Prasad's evidence shows that immediately after the firing, Bal Kishore told him that Ram Sanehi was murdered because of the disputes concerning the election to the Pradhanki. What Bal Kishore told Mangali Prasad immediately after the incident seems more probable because, one Virendrapal had contested that election and the appellant Subhash had defeated him. When Bal Kishore went to lodge his F.I.R. at the police station he was accompanied by Virendrapal, though an attempt was made to show that Virendrapal was only standing outside the police station and had met Bal Kishore accidentally. (5) The story of Bal Kishore that after the appellant Subhash fired 2 shots he re-loaded his gun but the re-loaded cartridge misfired makes hardly any sense. Subhash was armed with a double barrelled gun and having fired 2 fatal shots from a close range at his target, it is unlikely that he would re-load the gun and that too with only one cartridge. And if that cartridge misfired, it is impossible to understand how it could be found concealed in the folds of Ram Sanehi's *dhoti*.

There is only one other aspect of the matter which remains to be considered and since the High Court has placed great reliance thereon, it is necessary to deal with it. The F.I.R. which lodged at about 12 O' clock at noon on the 9th itself mentions that after Ram Sanehi was murdered, the appellant Subhash told his companion Shyam Narain that he himself was going to surrender before a court and that Shyam Narain should make his own arrangement. In fact, Subhash did surrender in the court of the Additional District Magistrate, Farrukhabad, at about 4 p.m. on the 9th. What the High Court has overlooked is that Subhash did not surrender in connection with the murder of Ram Sanehi but he surrendered along with the 13 or 14 other accused against whom Pooran Lal had filed a complaint. In so far as Shyam Narain is concerned, the High Court is wrong in saying that he managed somehow to get himself arrested. The evidence of Constable Virendra Singh shows that Shyam Narain was arrested because he was crossing the railway lines and if he was not caught, he would have been run over by the two trains coming from Kanpur and Farrukhabad. This was hardly any sensible way of making an "arrangement" for himself, as directed by Subhash. It is therefore not as if the statement attributed to Subhash in the F.I.R. is corroborated by subsequent events so as to afford a guarantee to Bal Kishore's presence at the culvert.

We are conscious that the Sessions Court and the High Court have both held that the appellants committed the murder of Ram Sanehi but the weight of the circumstances which we have discussed above is so preponderating that even the concurrent finding cannot be allowed

A to stand. In any event, it seems to us impossible to hold that the prosecution has established its case beyond a reasonable doubt.

We therefore allow this appeal, set aside the order of conviction and sentence recorded by the High Court and the Sessions Court and direct that the appellants shall be set at liberty.

B

M.R.

*Appeal allowed.*