Ram Gulam Chaudhury And Ors vs State Of Bihar on 25 September, 2001

Equivalent citations: AIR 2001 SUPREME COURT 2842, 2001 AIR SCW 3802, 2001 AIR - JHAR. H. C. R. 514, 2002 CALCRILR 184, 2001 CRILR(SC MAH GUJ) 658, 2001 (9) SRJ 585, 2001 (6) SCALE 490, 2001 ALL MR(CRI) 2384, 2001 (8) SCC 311, 2001 SCC(CRI) 1546, (2002) 1 CGLJ 64, 2001 CRILR(SC&MP) 658, (2001) 8 JT 110 (SC), (2001) 3 EASTCRIC 290, (2001) 2 UC 602, (2001) 3 BLJ 690, (2001) 3 SCJ 588, (2002) SC CR R 874, (2002) 1 MAHLR 243, (2001) 4 PAT LJR 123, (2001) 4 RECCRIR 347, (2001) 7 SUPREME 206, (2001) 6 SCALE 490, (2001) 43 ALLCRIC 929, (2001) 4 CRIMES 16, 2001 (2) ANDHLT(CRI) 296 SC, (2001) 2 ANDHLT(CRI) 296

Author: S.N. Variava

Bench: K.T. Thomas, S.N. Variava

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           CASE NO.:
Appeal (crl.)  1056 of 1998

PETITIONER:
RAM GULAM CHAUDHURY AND ORS.

RESPONDENT:
STATE OF BIHAR

DATE OF JUDGMENT: 25/09/2001

BENCH:
K.T. THOMAS & S.N. VARIAVA

JUDGMENT:
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JUDGMENT 2001 Supp(3) SCC 279 The Judgment of the Court was delivered by S.N. VARIAVA, J. This Appeal is against a Judgment dated 21st May, 1998 by which the Appeal filed by these Appellants has been dismissed. The Appeal, before the High Court was filed by 11 persons, however during the pendency of that Appeal two persons viz. Bijoy Chaudhary and Mohan Chaudhary expired. Thus, this Appeal is filed by the remaining nine persons.

Briefly stated the facts are as follows :

> On 17th July, 1980 at about 8 P.M. one Krishnanand Chaudhary and his father Nemo Chaudhary were taking their meals on the verandah of their house. The mother and sister of the said Krishnanand Chaudhary were serving the meals. It is the case of the

prosecution that the Appellants, along with some other persons came to that place variously armed with lathis, bhala and chhura. It is the case of the prosecution that they assaulted Krishnanand Chaudhary, dragged him into the courtyard of the house and further assaulted him. It is the case of the prosecution that when the mother and the father tried to save him they were also assaulted. It is the case of the prosecution that the Appellants took Krishnanand Chaudhary to a nearby ditch and pushed him down there. Bijoy Chaudhary (who had expired pending the Appeal in the High Court) is then supposed to have stated that he was still alive and should be killed. On such statement Appellant No. 9 gave a Chhura blow on the chest of Krishnanand Chaudhary which resulted in his death. It is the case of the prosecution that all those persons thereafter left the place taking away the body of the deceased. According to the prosecution the motive for this is that a child of the family of the Appellants had earlier been kidnapped and had been found dead. The Appellants suspected Krishnanand Chaudhary to be responsible for such kidnapping and death. Initially 13 persons were charge sheeted. Two persons died before trial could commence. Thus 11 persons were tried. At the trial, the prosecution examined five witnesses, of which P.W. 5 was a formal witness, who proved the FIR and the seizure list by which blood stained earth, lungi and lathi had been seized. The eye witnesses to the incident were P.W. 1-Dukha Chaudhary, who is a neighbour, P.W. 3 - Parmila Devi, who was the mother of the deceased and who had promptly lodged the FIR and P.W.4 - Munni Devi the sister of the deceased. Prosecution also examined P.W. 2 - the brother of the deceased who deposed that when he returned home he was informed about what had happened. It has come on record that the father of the deceased died before the trial started. The prosecution did not examine the Investigating Officer.

The trial Court, after considering the evidence convicted Appellant No. 9 of the offence under Section 302 I.P.C. and sentenced him to life imprisonment. The other Appellants were convicted under Sections 302 read with 149 I.P.C. and were also awarded life imprisonment. All the Appellants were also convicted under Section 201 and sentenced to seven years rigorous imprisonment. All the accused then filed an Appeal. As stated above, during the pendency of the Appeal, two of the accused persons expired. The Appeal came to be dismissed by the impugned Order.

Mr. Mishra submitted that this was a case where the corpus delicti had not been found. He submitted that there was no proof that Krishnanand Chaudhary has actually died. He submitted that there was no medical evidence of death. He submitted that the evidence of the prosecution witnesses, to the effect that they had seen Appellant No. 8 killing Krishnanand Chaudhary, could not be believed. He submitted that all that the prosecution could be said to have established was that the said boy had been assaulted and had then been taken away by the Appellants. He submitted that the defence theory that the boy was still alive at the time of the trial could not be ruled out. He submitted that the conviction under Sections 302 and 201 of the Indian Penal Code could not be sustained.

Mr. Mishra took us through the evidence of the various witnesses. He submitted that P.W. 1 was a neighbour who is supposed to have seen the incident. He submitted that this witness has deposed that on hearing a noise he had come out of the house and had started running. He submitted that he has deposed about the assault on the boy and that the Appellants had caught hold of the boy by the side of the road and had then dragged him towards northern side. Mr. Mishra pointed out that both the trial Court and the High Court had not believed this witness. He submitted that there was no reason why this witness should not have been believed. He submitted that the evidence of this witness categorically shows that the assault was not in the courtyard, as claimed by the other witnesses, but was on the road adjoining the house. He submitted that the evidence of this witness establishes that the other witnesses could not have seen the said Krishnanand Chaudhary being killed by the Appellants.

Mr. Mishra pointed out that P.W. 2 had not actually witnessed the incident but had merely been told about the incident on his return in the night.

Mr. Mishra submitted that even according to P.W. 3 i.e. the mother, the incident had taken place outside the courtyard. In support of this he relied upon the following statement of this witness :

"My son was taken to the pit near the Kanti outside the courtyard."

He submitted that admittedly P.W. 3 had not gone outside the courtyard. He submitted that this clearly established that P.W. 3 could not be believed when she deposed that she had seen Appellant No. 9 giving a dagger blow and her son had died there and then.

Mr. Mishra submits that P.W.4 had also deposed that the Appellants had dragged the boy to the "Tat". Mr. Mishra submits that it is well known that a "Tat" was a manure pit which was always outside the courtyard. He submits that the evidence of this witness also shows that the incident had taken place outside the courtyard. He submits that neither P.W.3 nor P.W.4 could have seen the Appellants actually killing Krishnanand Chaudhary.

Mr. Mishra relied upon the decision in Ram Chandra v. U.P. State, reported in AIR (1957) SC 381. In that case it has been held that even though it was not necessary for conviction that a corpus delicti should be found still there must be other clear and reliable evidence of murder.

Mr. Mishra also relied upon the case of Rama Nand v. State of Himachal Pradesh, reported in [1981] 1 SCC 511. In that case also it was held that discovery of a dead body was not a sine qua non for a conviction. It was held that a homicidal death could be proved even on the basis of circumstantial evidence provided that the circumstances were of a clinching and definitive character unerringly leading to the inference that victim concerned had met a homicidal death at the hands of the accused.

Mr. Mishra also relied upon the case of Shambhu Nath Mehra v. The State of Ajmer, reported in [1956] SCR 199. In that case it has been held that Section 106 of the Evidence Act does not abrogate the well-established rule of criminal law that the burden lies on the prosecution to prove its case and that such burden never shifts. It has been held that Section 106 of the Evidence Act is not intended to relieve the prosecution of the burden, but that it only seeks to meet certain exceptional cases where it is impossible, or disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused.

Mr. Mishra also relied upon the case of Kali Ram v. State of H.P., reported in [1973] 2 SCC 808. In that case it has been held that one of the cardinal principles which has always to be kept in mind in our system of administration of criminal justice is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of the burden, the Court cannot record a finding of the guilt of the accused. It is also held that if two views are possible one pointing to the guilt of the accused and the other to his innocence the view which is favourable to the accused has to be accepted.

Mr. Mishra next relied upon the case of Bandhu v. Emperor reported in (1924) Allahabad Law Journal 340. In that case it was held that before a conviction for murder can be recorded the Court must be satisfied that the person alleged to have been murdered is actually dead. In this case one D was brutally beaten with Lathis and then dragged away towards river. D was never again seen alive. The Court held that the conclusion that D was dead could not be arrived at though it was exceedingly unlikely that he was alive. The Court held that in the circumstances the Appellants could not be convicted of murder under Section 302 of the Penal Code but of an attempt to murder under Section 307.

Mr. Mishra also relied upon the case of State v. Sardara reported in (1974) Crl. LJ. 43. It is held that conviction need not necessarily depend upon the corpus delicti being found. It is held that there should be reliable evidence of murder before a conviction can take place. It must be mentioned that in this case the bodies of the two children who had disappeared were not found but the clothes and the Chappals had been recovered. On the basis of such recovery the Court held that the children had been murdered.

On this aspect Mr. B.B. Singh had also cited certain authorities. It would be convenient to set out those also. Mr. B.B. Singh relied on the case of Maya Basuva, reported in AIR (1950) Madras 452. In this case the Court did not accept the view expressed in Bandhu's case (supra) and held that it was not obligatory, for proving the death of an individual, that his dead body should be recovered. It was held that the mere fact that the dead body had not been found was not a ground for refusing to convict the accused person of murder. It was held that if there were eye witnesses who had seen the accused persons brutally beating and stabbing the victim and then carrying away the body it would be sufficient to record a conviction of murder.

In the case of Brijesh Kumar v. State, reported in AIR (1958) Allahabad 514, it was held that the failure on the part of the prosecution to recover the dead body will not indicate that there was no murder. It was held that the fact of murder can be proved by circumstantial evidence which leads only to that one conclusion, although no body was found.

In the case of Rama Nand & Ors. v. State of Himachal Pradesh reported in [1981] 2 SCR 444 it was held that even though the corpus delicti was not found still an inference of guilt could be drawn when the other circumstances established on record were sufficient to lead to the conclusion that within all human probability the victim was murdered by the accused.

In the case of Sevaka Perumal v. State of Tamil Nadu, reported in [1991] 3 SCC 471, it was held that it is not necessary or essential to establish corpus delicti. It was held that the fact of death must be established like any other fact. It was held that in some cases it may not be possible to trace or recover corpus delicti. It was held that a conviction for murder could, even in absence of corpus delicti, be based on reliable and acceptable evidence.

Mr. B.B. Singh also relied upon the case of In Re Naina Mohamed reported in AIR (1960) Madras 218. In this case it has been held that Section 106 of the Evidence Act does not shift the burden of proof in a criminal case. It is held that the true rule is that where the accused does not throw any light upon facts which are especially within his knowledge and which could not support any theory or hypothesis compatible with his innocence the Court can consider his failure to adduce any explanation as an additional link which completes the chain. It is held that in cases where it is impossible for the prosecution to give wholly convincing evidence on certain issues which are within the knowledge of the accused it is for the accused to give evidence on them if he wishes to escape. It is held that positive facts must always be proved by the prosecution but that the same rule cannot always apply to negative facts. It is held that when a person does not act with some intention other than that which the character and circumstances of the act suggest, it is not for the prosecution to eliminate all the other possible intentions. It is held that if the accused had a different intention that is a fact especially within his knowledge and he must prove the same.

Mr. B.B. Singh also relied upon the case of Sucha Singh v. State of Punjab, reported in [2000] 4 SCC 375. In this case two persons were abducted by armed assailants from their house at night. The next day their bodies were found riddled with gunshot injuries. The accused persons were convicted by use of the presumption under Section 106 of the Evidence Act. The circumstances found sufficient were, amongst others, that the incident had taken place during the period when the Punjab was boiling with terrorist activities; that the terrorists treated the house of the deceased as the home of police tout; that the accused had gone to the house of the deceased armed with AK-47 rifles and forcibly taken away the two boys; that the deceased then did not return home but their bodies were found the next morning riddled with bullets. The Court held that what happened after the two boys were abducted was within the exclusive knowledge of the accused and that they did not tell the Court as to what they did with the boys after they abducted them.

Based on the principles laid down in the authorities cited by him Mr. Mishra submitted that even though it is not necessary that corpus delicti be found, still the prosecution must prove that

Krishnanand Chaudhary had died. He submitted that the prosecution had failed to prove this fact by any reliable evidence. He submitted that the testimony of PW 3 and PW 4, to the effect that the Appellants had killed Krishnanand Chaudhary, could not be believed. He submitted that it was proved that the alleged act took place outside the courtyard and thus PW3 and PW4 could not have seen the incident. He submitted that even if they could have so seen, still it was merely their surmise/conjecture that Krishnanand Chaudhary had died before he was taken away. Mr. Mishra submitted that as there was no reliable evidence proving the factum of death the conviction under Section 302 could not be maintained.

There can be no dispute with the proposition of law set out above. As is set out in the various authorities (referred to above) it is not at all necessary for a conviction for murder that the corpus delicti be found. Undoubtedly, in the absence of the corpus delicti there must be direct or circumstantial leading to the inescapable conclusion that the person had died and that the accused are the persons who had committed the murder. Both the Courts below have come to the conclusion, based upon the evidence of P.Ws. 3 and 4 (who were eye witnesses) that Appellant No. 9 had killed the accused before the body was taken away by all the Appellants. We have read the evidence of all the witnesses. We have given a careful consideration to the material on record. We see no reason to take a different view. The evidence in this case is direct and there is no reason to disbelieve this evidence. We see no substance in the submission of Mr. Mishra that these two ladies could not have seen the boy being killed and could not have in any case come to a conclusion that he had died. Their presence at the place of incident could not be doubted. Their evidence clearly indicates that the incident took place before their eyes. We cannot accept the submission of Mr. Mishra that their evidence discloses that the incident took place outside the courtyard and on the road. Mr. Mishra has relied on stray sentences. The evidence has to be read as a whole. Read as a whole both the ladies have given positive evidence that the murder took place in the courtyard. We also see no substance in the submission that PW 3 and PW 4 could not positively say that Krishnanand Chaudhary had been killed. The evidence is that Bijay Chaudhary stated that "he is still alive and should be killed". On this statement Appellant 9 gave a chhura blow on the chest. The evidence is that Krishnanand Chaudhary, who was till then struggling twitched and thereafter his body became still. From this it could be concluded that death had taken place. It must be mentioned that even P.W. 1, whose evidence Mr. Mishra relied upon, has deposed that Krishnanand Chaudhary had died.

Even otherwise, in our view, this is a case where Section 106 of the Evidence Act would apply. Krishnanand Chaudhary was brutally assaulted and then a chhura blow was given on the chest. Thus Chhura blow was given after Bijoy Chaudhary had said " he is still alive and should be killed". The Appellants then carried away the body. What happened thereafter to Krishnanand Chaudhary is especially within the knowledge of the Appellants. The Appellants have given no explanation as to what they did after they took away the body. Krishnanand Chaudhary has not been since seen alive. In the absence of an explanation, and considering the fact that the Appellants were suspecting the boy to have kidnapped and killed the child of the family of the Appellants, it was for the Appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the Court there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section

would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The Appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr. Mishra.

Mr. Mishra next submitted that the Investigating Officer was not examined in this case. He submitted that this has caused serious prejudice to the accused persons inasmuch as if the Investigating Officer had been examined then the Appellants could have established that the assault had taken place not in the courtyard but had actually taken place on the road. He submitted that the non examination of the Investigating Officer has deprived Appellants from showing that there was no water in the pit as claimed by P.W. 3.

In the case of Ram Dev v. State of U.P, reported in [1995] Supp. 1 SCC 547, this Court has held that it is always desirable for the prosecution to examine the Investigating Officer. However, non examination of the Investigation Officer does not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of the eye witnesses.

In the case of Behari Prasad v. State of Bihar, reported in [1996] 2 SCC 317, this Court has held that for non examination of the Investigating Officer the prosecution case need not fail. This Court has held that it would not be correct to contend that if the Investigating Officer is not examined the entire case would fail to the ground as the accused were deprived of the opportunity to effectively cross-examine the witnesses and bring out contradictions. It was held that the case of prejudice likely to be suffered must depend upon facts of each case and no universal strait- jacket formula should be laid down that non-examination of Investigating Officer per se vitiate the criminal trial.

In the case of Ambika Prasad v. State (Delhi Admn.), reported in [2000] 2 SCC 646, it was held that the criminal trial is meant for doing justice not just to the accused but also 'o the victim and the society so that law and order is maintained. It was held that a Judge does not preside over criminal trial merely to see that no innocent man is punished. It was held that a Judge presides over criminal trial also to see that guilty man does not escape. It was held that both are public duties which the Judge has to perform. It was held that it was unfortunate that the Investigating Officer had not stepped into the witness box without any justiifiable ground. It was held that this conduct of the Investigating Officer and other hostile witnesses could not be a ground for discarding evidence of P.Ws. 5 and 7 whose presence on the spot was established beyond any reasonable doubt. It was held that non-examination of the Investigating Officer could not be a ground for disbelieving eye witnesses.

In the case of Bahadur Naik v. State of Bihar, reported in [2000] 9 SCC 153, it was held that non-examination of an Investigating Officer was of no consequence when it could not be shown as to what prejudice had been caused to the appellant by such non-examination.

In our view, in this case also non-examination of the Investigating Officer has caused no prejudice at all. All that Mr. Mishra could submit was that the examination of the Investigating Officer would have shown that the occurrence had taken place not in the courtyard but outside on the road. The

Investigating Officer was not an eye witness. The body had already been removed by the Appellants. The Investigating Officer, therefore, could not have given any evidence as to the actual place of occurrence. There were witnesses who have given credible and believable evidence as to the place of occurrence. Their evidence cannot be discarded merely because the Investigating Officer was not examined. The non-examination of the Investigating Officer has not lead to any prejudice to the Appellants. We, therefore, see no substance in this submission.

Mr. Mishra next submitted that, admittedly blood stained mud and lungi had been seized but they were not produced. He submitted that these were also not produced. He submitted that this has resulted in prejudice to the Appellants and for that reason also the conviction should be set aside. In our view, there is no substance in this submission. Non production of these items has not resulted in any prejudice to the Appellants.

Mr. Mishra submitted that the lanterns which were supposed to be there on the verandah had not been seized or produced at trial. He submitted that as the lanterns were not seized it was not established that there was any source of light. He submitted that for this reason also the evidence of the witnesses cannot be accepted. We see no substance in this submission also. It must be remembered that the evidence exclusively established that the deceased and his father were having meals in the Varandah and that the mother and sister were serving the meals. It is clear that they had put a source of light at that place. This view of ours finds support from the observations made in the case of B. Subba Rao v. Public Prosecutor, High Court of A.P., reported in [1997] 11 SCC 478. In this case also an argument had been made that the hurricane lamp had not been seized and produced. This Court held that as it was proved that the deceased was issuing copies of voters' list and caste certificates and it was a night time, it could legitimately be inferred that there would be some source of light to enable him to perform his job.

Mr. Mishra next submitted that, according to the witnesses, the only sources of light were two lanterns which were lying on the Varandah. He submitted that the evidence of the witnesses shows that the lanterns were lying on the floor. He submitted that as the lanterns were lying on the floor they would only cast their lights near the floor. He submitted that, therefore, there was no light by which the witnesses could have identified the Appellants or seen the incident even if it took place in the courtyard. He submitted that for this reason also the evidence of the witnesses could not be believed and the Appellants should be acquitted.

We see no substance in this submission also. It must be remembered that the incident had taken place in a village. As has been held by this Court in the case of Kalika Tiwari v. State of Bihar, reported in [1997] 4 SCC 445, the visible capacity of urban people who are acclimatised to fluorescent lights or incandescent lamps is not the standard to be applied to villagers whose optical potency is attuned to country-made lamps. It has been held that the visibility of villagers is conditioned to such lights and hence it would be quite possible for them to identify men and matters in such light. Also the Appellants were from the same village and were known to PW 3 and PW 4.

No other point was raised before us. We thus see no substance in the Appeal. The same stands dismissed.