Supreme Court of India
Karnesh Kumar Singh & Ors vs The State Of Uttar Pradesh on 15 April, 1968
Equivalent citations: 1968 AIR 1402, 1968 SCR (3) 774
Author: Shelat
Bench: Shelat, J.M.

PETITIONER:
KARNESH KUMAR SINGH & ORS.

Vs.

RESPONDENT:
THE STATE OF UTTAR PRADESH

DATE OF JUDGMENT:
15/04/1968

BENCH:
SHELAT, J.M.
BENCH:
SHELAT, J.M.
RAMASWAMI, V.
BHARGAVA, VISHISHTHA

CITATION:
1968 AIR 1402 1968 SCR (3) 774

ACT:
Indian Penal Code, 1860, ss. 302, 201 and 149--Whether inconsistencies and discrepancies in evidence showed miscarriage of justice--Four out of ten appellants sentenced to death and others to life imprisonment--Distinction based on the four being armed with dangerous weapons--If sustainable on evidence.
Evidence Act, 1872, s. 114(8)--Adverse inference when prosecution does not produce some of the eye-witnesses--When may be drawn.

HEADNOTE:
The ten appellants were convicted under ss. 302 and 201 both read with s. 149 of the I.P.C. mainly on the evidence of four eye-witnesses who were members of the family of the two murdered persons. Four of the appellants were sentenced to death and the rest to imprisonment for life. The High Court confirmed the convictions and sentences. in appeal to this Court by special leave it was contended, inter alia, on behalf of the appellants that (i) there were various discrepancies and inconsistencies in the evidence showing miscarriage of justice; (ii) though two independent eye-witnesses were available they were purposely excluded and

only the family members were examined as eye-witnesses; and the High Court had wrongly refused to draw from their non-examination an adverse inference under s. 114(g) of the Evidence Act; and (iii) the sentences on the appellants were wrongly confirmed by the High Court.

HELD : (i) There was no reason to interfere with the concurrent findings of the trial court and the, High Court that the appellants were responsible for the deaths of the two deceased persons and were guilty of ,the offences they were charged with. [782 E]

(ii) The prosecutor need not examine witnesses who, in his opinion, have not witnessed the incident. Normally, he ought to examine all the eye-witnesses in support of his case. But in a case where a large number of persons have witnessed the incident, it is open to him to make a selection which must, however, be fair and honest and not with a view to suppress inconvenient witnesses. If it is shown that persons who had witnessed the incident have been deliberately kept back, the court may draw an adverse inference and in a proper case record such failure. as constituting a serious infirmity in the proof of the prosecution case. [781 G-H; 782 A]

In the present case, the prosecution had explained that the two independent eye-witnesses were not necessary. The defence remained content with that explanation and did not ask the other concerned witnesses any questions to elicit why these two persons were considered unnecessary witnesses. Furthermore, there was nothing in the evidence to suggest that they were not produced because they would have turned out to be inconvenient witnesses. It was not therefore possible to say that the prosecution had deliberately withheld these two persons for any oblique motive or that the High Court ought to have drawn an adverse inference. [782 C-D]

(iii) The sentence of death on four of the ten appellants must be set aside and the sentence of rigorous life imprisonment substituted therefore.

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In imposing the sentence of death on four of the appellants the trial court made a distinction between them and the others as three of them were armed with firearms and the fourth with a hatchet. This reason for imposing the extreme penalty on the four appellants could not be sustained on the evidence as the others were also armed with equally, dangerous weapons. In the absence of evidence as to who inflicted the fatal blows, the same punishment should have been imposed on all of them. [783 C-D]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 213 of 1967.

Appeal by special leave from the, judgment and order, dated May 19, 1967 of the Allahabad High Court (Lucknow Bench) at Lucknow in Criminal Appeal No. 118 of 1967 and capital sen- tence No. 11 of 1967.

R. K. Garg, S. C. Agarwala, D. P. Singh and A. K. Gupta, for the appellants.

O. P. Rana, for the respondent.

The Judgment of the Court was delivered by Shelat, J.-This appeal, by special leave is directed against the judgment of the High Court of Allahabad which confirmed the convictions and sentences passed by the Sessions Judge, Hardoi, in respect of the murders of Lal Singh and his father Harihar. The ten appellants on being convicted under ss. 302 and 201 read with S. 149 of the Penal Code were awarded various sentences. Four of them, namely, Karnesh Kumar, Krishna Kumar, Kaushal Kumar and Chhetrapal were awarded death sentence and the rest imprisonment for life. At the material time, the two deceased, along with the mem- bers of their family, and the appellants lived in village Nir in District Hardoi, and, except for appellants Jugal Kishore and his brother Kailash Narain, they are close relations, their common ancestor being one Jhabha Singh. The evidence, however, shows a long-standing enmity between the members of the branch of Sobaran Singh, one of the sons of Jhabha Singh, on the one hand and the rest of the descendants of Jhabha Singh on the other. It also shows that since 1950, there has been intermittently civil and criminal litigation between the parties, the last of such litigation before the incident in question being in respect of an incident which took place on April 3, 1966 when appellant Ram Kumar charged the deceased Harihar and Lal Singh, and witnesses Jitendra and Virendra and two others with rioting and witness Virendra, in turn, filed a cross complaint against the appellants and some others. According to the prosecution, at about 1 p.m. on June 5, 1966, Lal Singh was irrigating his field with canal water when appellants L8 Sup. C.1.168-10 Karnesh and Avdesh diverted the water into their field. There was an exchange of abuses between them in the course of which appellant Karnesh was said to have threatened that he would not rest until Lal Singh was done to death. At about 5.30 that evening, Jitendra, Virendra and Girendra, P. Ws. 1, 6 and 8 were in the main room of the Chaupal where Lal Singh lived and Lal Singh was in a room nearby. Fifty paces away from this house is the house where the deceased Harihar lived, Suddenly, a shout was heard to the effect that Lal Singh should be dragged out. On hearing the shout, these witnesses and Lal Singh came out. The witnesses saw appellants Krishna and Chhetrapal armed with guns, appellant Karnesh with a pistol, Rain Kumar and Jugal Kishore with spears, appellants Kaushal and Mahendra with banks and the rest with lathis. As soon as Lal Singh came out, appellants Krishna, Chhetrapal and Karnesh simultaneously fired at him whereupon Lal Singh fell on the ground. On being threatened that the witnesses would also be shot, they ran away and stood at some distance. Five of these appellants, namely, Chhetrapal, Kaushal, Mahendra, Kailash and Jugal Kishore then ran to Harihar's house where appellant Jugal Kishore struck Harihar with a spear in his face and then appellants Kaushal and Jugal Kishore dragged him to where Lal Singh had fallen. Chhetrapal then fired at Harihar with his gun; Jugal Kishore gave another blow with his spear in the chest and the rest beat him with bankas and lathis. Harihar also died on the spot. Appellants Kailash, Jugal Kishore, Kaushal and Mahendra followed by Chhetrapal with his gun, lifted Harihar's body to the field of one Sita Ram where they set fire to it. The other five appellants took Lal Singh's body to the Bathis of P.W. 4, Abdul Bari, and burnt it there on a heal) of

cowdung cakes. Having thus tried to do away with the dead bodies, appellants Kaushal and Mahendra scraped the blood.stained earth where Lal Singh had fallen as also the drops of blood which had fallen on the way.

P. W. 1, Jitendra, started on cycle to the Kotwali six miles away and lodged the F.I.R. at about 6-45 P.M. Inspector Jaswant Singh, P. W. 17, started for the scene of offence reaching there at about 7-45 P.M. The fires were put out but Lal Singh's body had practically been burnt out with the result that the Inspector could collect only his bones and ashes. But he was able to recover the half burnt body. of Harihar. That night he recorded the statements of P. Ws. 1, 6, 7, 8, 14 and of certain other persons. On the 7th and 8th he recorded further statements. On June 20, he recorded the statements of Raghubar, P. W. 9 and Gopali, P. W. 12. It appears that statements of these witnesses were recorded late as these and other residents, presumably on account of fear of reprisals or to avoid having to figure as witnesses, had fled from the village.

The evidence on which the prosecution mainly relied was that of the four eye witnesses. of these, Jitendra, P. W. 1, the son and brother of Harihar and Lal Singh respectively, Virendra, P. W. 6, his cousin, and Girendra, P. W. 8, a boy of 14 years of age and the younger brother of Lal Singh deposed to the assault by the appellants on both the deceased. Santosh Kumari, P. W. 7, the daughter of Harihar, deposed only to the assault on Harihar in the house. Besides this evidence, the prosecution examined Raghubar, Jeet, Gopali and Surat Singh, P. Ws. 9, 11, 12 and 14, the neighbours of the deceased, who in one part or the other corroborated the eye witnesses. Gopali's evidence was, however, the only direct evidence as to the scrapping of the blood-stained earth by two of the appellants but that evidence was not relied upon by the High Court on the ground that his name was not mentioned in the F.I.R. and his statement was recorded late. There was, however, the evidence of the eye witnesses that blood had dropped where Lal Singh had fallen and of the Investigating Officer that when he inspected the site that night, though he found no blood marks, he noticed that the earth at that place had been scrapped. It is clear that, no one except the assailants, who had burnt of the dead bodies of Harihar and Lal Singh to do, away with evidence as to the two murders, would be interested also in doing away with an equally important evidence as to the place where Lal Singh had been killed by scrapping off the blood where he had fallen. Scrapping of blood from that place was thus in line with and part of the stratagem of burning the bodies of the victims so as not to leave any evidence of the killing of the two men. This part of the evidence lends support to Jitendra's case that Lal Singh was fired at and fell at or near the intersection of the roads just outside his house. It is true that only these four members of the family figured as eye-witnesses. But that fact alone cannot mean that P. W. 1 or the investigating agency excluded other available independent witnesses. This is clear from the fact that the F.I.R. mentions a number of persons whom P. W.

1. thought to be eye-witnesses. There is evidence that the incident had created panic in the village and a number of residents had fled and had stayed away possibly with a view to avoid having to figure as witnesses. It is, therefore hardly surprising that only the members of the family came forward as eye-witnesses. But as they were interested witnesses both by reason of their being members of the family and their sharing the hostility of the two victims towards the appellants, their evidence had to be examined with care and caution. But there was circumstantial evidence to lend support to their account of the incident. That evidence established the following facts (1) the Ion

standing enmity between the parties, (2) the incident having taken place at about 5-30 P.m., (3) the burning of the two bodies by the appel-

lants, (4) the scrapping of the earth to wipe out the blood- stains (5) P. Ws. 6 and 8 having run to the house of Surat Singh, P. W. 14, the village Pradhan and having informed him of the incident, (6) P.W. 1 lodging the F.I.R. without any delay and giving therein the details of the incident, the names of the appellants and of witnesses whom he thought to be eye witnesses and (7) the injuries on Harihar's body which could still be seen by Dr. Srivastava though it had been burnt, indicating three types of weapons having been deployed against him, namely, a fire-arm, a spear and a sharp cutting instrument.

The trial court and the High Court found from this evidence that the account of the incident given by the witnesses was acceptable despite certain discrepancies therein, that it occurred at about 5-30 P.m., that Lal Singh was shot at and killed just outside his house, that Harihar was first attacked inside his house and then dragged to where Lal Singhs body lay and was there killed, that the appellants were responsible for the assault and the consequent deaths of the two victims, that in order to leave no trace of the, two assaults they burnt the bodies of the victims and scrapped the earth where blood had fallen, that they formed an unlawful assembly of which the common object was to murder the father and the, son and that they attacked and killed both in furtherance of that common object and then tried to do away with the evidence of their acts and burnt the two bodies. These being concurrent findings ,of fact, we would not normally proceed to review the evidence unless it is shown that the trial is vitiated by some illegality or irregularity of procedure or that it was held in a manner contrary to rules of natural justice or the judgment under appeal has resulted in gross miscarriage of justice : (cf. Kirpal Singh v. State of U.P.) Counsel for the appellants, however, contended that such a miscarriage, of justice has resulted in the present case. He argued that the trial court and the High Court failed to appreciate from the evidence on record that the prosecution had deliberately tried to shift the time of the incident at 5-30 that evening though the incident must have taken place subsequently, in order to enable the four witnesses to pose as eye witnesses. The evidence of Jitendra and the Investigating Officer was that the F.I.R. was lodged at 6-45 P.m. and that Jitendra had started from the village at 6 P.m. on cycle for the police station. The evidence of the Investigating. Officer also is that he reached the spot soon thereafter, that the body of Harihar was not fully burnt out, and that he could manage to extract the half burnt body from the fire. The evidence of Dr. Srivastava supports this evidence in a large measure. It is manifest that if the incident took place at night and P. W. 1 bad (1) [1964] 3 S.C.R. 992, 996.

not seen it, he could not have reported it to the police officer in time to enable the police officer to arrive at the scene and extract the half burnt body of Harihar from the fire. This fact clearly supports the prosecution that the incident took place that evening and not at night. But reliance was placed on the fact that postmortem examination on Harihar's body was made by Dr. Srivastava at 5 P.m. on June 6, 1966. The argument was that if the body had been dispatched to the mortuary soon after it was recovered by the police officer, it would have reached the mortuary earlier and the postmortem examination would have been carried out earlier. But the evidence of Maqbool Khan, P. W. 15, shows that the body was given to him, at 10 that night, that, he carried it in a bullock cart, that he started at about 1 A.m. but on the way he feared that the body might be taken away from him and,

therefore, he stopped at an intervening village till sunrise and reached the mortuaryat 6-30A.M. It is true that the doctor said that he performed the post-mortem examination at 5 P.m. and not at 1 p.m. as the constable deposed. Obviously, the constable appears to have delayed in his mission and there was a gap of time between the body reaching the mortuary and the time when the postmortem examination was performed. But the delay in the postmortem examination does not mean that the Investigating Officer had not handed over the body to the constable that night or that the incident did not take place in the evening of the 5th of June or that the F.I.R. was not lodged at 6-45 P.m. as testified by P. W. 1. Reliance was next placed on the evidence of the Magistrate at Hardoi that he received the special report about the incident on June 6, 1966. The contention was that if the Investigating Officer had sent the special report before he started for the scene of the offence, as stated by him, the Magistrate was bound to receive it on the night of the 5th and not on the 6th of June. But the Magistrate admitted that he had not noted the time when he received it on the 6th. He also admitted that he could not say whether he was in Hardoi on the 5th of June, it being a, Sunday, and that it was possible that his peon might have received it in the evening of the 5th and placed it before him on the 6th of June when he noted the date of its receipt. There is also evidence of the Reader to the Superintendent of Police, Hardoi that his office had received the General Diary of the 5th on the 6th and of the 6th on the 7th June. This controversy is set at rest by the evidence of the Head Constable, P.W. 13, that he had sent constable Abdul Hafir at 7-30 P.m. on the 5th June to the Magistrate with the special report and that Abdul Hafiz had returned to the police station at 9-3O that night after delivering it and that this fact was noted by him in Ext. ka-6. This evidence establishes that the Investigating Officer had sent the special report on the 5th of June and that report was carried to Hardoi that very night. Consequently, it must be held that the incident took place in the evening of the 5th of June, and that P. W. 1. was right when he claimed that he had given the F.I.R. at 6- 45 P.M.

The next contention was that the place of attack on Lal Singh was not on the road but in Harihar's house. We find no basis for this contention. The evidence of witnesses on the other hand, is clear and there is no reason to disbelieve it. That evidence is supported by the evidence of the Police Officer that he found signs of scrapping of the earth at the place where, according to the prosecution, Lal Singh had fallen.

The next contention was that witnesses Jitendra and Santosh Kumari had tried to make improvements in their evidence, the former by stating that the three accused who were armed with firearms had shot simultaneously at Lal Singh though in the F.I.R. he had only said that three shots were fired without stating who had fired them, and the latter by stating that Jugal Kishore had struck his spew in the eye of Harihar, which allegation was not borne out by the medical testimony. These infirmities, no doubt, are in their evidence. But they were considered by the High Court and yet on an examination of the entire evidence, it accepted their evidence as reliable. That three shots were fired was stated by witness Jitendra both in the F.I.R. and in evidence. It may be that from that fact coupled with the fact that the three appellants were armed with fire-arms, he might have inferred that all the three had fired. For a witness like him, it was possible not to be able to distinguish between a fact seen by him and an inference drawn by him. Failure to appreciate such a distinction cannot mean that he was deliberately improving upon his original version. As regards Santosh Kumari, a spear injury was inflicted on Harihar's face and that injury must have covered his

face with blood. It is possible that she mistook that injury to be one in the eye, especially as it in her evidence that appellant Jugal Kishore had at that time said that Harihar should be struck in his eyes. These infirmities, even if they can rightly be so termed, cannot discredit their testimony so as to render it unacceptable. Counsel then argued that though P. Ws. 9 and 11 were referred to in the F.I.R. as eye witnesses, they did not come out in their evidence as eye witnesses and that fact showed that P. W. 1 had tried to introduce them falsely as eye- witnesses. He forgets, however, that there are two distinct alternatives, (1) that he saw them at the scene of the offence after the incident and believed they had seen it and (2) that though the witnesses had seen it, like the other neighbours, they preferred not to figure as eye witnesses and circumscribed the scope of their evidence to what they had seen after the assault. In either event, P. W. 1 cannot be said to have falsely tried to usher them in the F.I.R. as eyewitnesses.

The argument which counsel strenuously urged was that though independent eye witnesses were available, they were pur- posely excluded and only the family members were examined as eye witnesses. In this connection he relied on the F.I.R. where P. Ws. 9 and 11, one Chhuta Bhurji, Alha Singh, Lakhan Singh, Paragu, Parsadi, Sishupal, Girdhari Kachhi and "some other men" were said to be witnesses. In his evidence also P. W. 1 has mentioned that these persons and a few others were present at the time of the incident. And yet these persons were not examined. The prosecution, however, did explain that these persons were not examined either because they had been won over by the opposite side or because some of them had failed to identify the appellants from the identification parades held for them, which, according to the prosecution, indicated that they had been won over. The explanation, however, does not- apply to two persons, viz., Parsadi and Paragu, for whose non-examination the only explanation given was that they were not necessary witnesses. The High Court does not appear to have been satisfied with this explanation and, therefore, has observed that it would have been better if these two persons had been examined. At the same time it refused to draw from their non-examination- an adverse inference under s. 114(g) of the Evidence Act.

Counsel argued that the High Court erred in declining to do so and relied on Habeeb Mohammed V. State of Hyderabad(1), where it has been observed that it is the bounded duty of the prosecution to examine a material witness particularly when no allegation has been made that, if produced, he would not speak the truth. The decision further observes that not only does an adverse inference arise against the prosecution case from his nonproduction as a witness in view of illustration (g) to section 114, but that the circumstance of his being withheld from the court would cast a serious reflection on the fairness of the trial. In Darya Singh v. State of Punjab(1) also this Court has observed that a prosecutor should never adopt the device of keeping back eye witnesses only because their evidence is likely to go against the prosecution and that the duty of the prosecutor is to assist the Court in reaching a proper conclusion. It is open, however, to the prosecutor not to examine witnesses who in his opinion have not witnessed the incident, but normally, he ought to examine all 'the eye witnesses in support of his case. But in a case where a ,large number of persons have witnessed the incident, it is open to him to make a selection. The selection must, however, be fair and honest and not with a view to suppress inconvenient witnesses. Therefore, if it is shown that persons who had witnessed the incident have been deliberately kept back, the- court may draw an

(1) A. I. R. 1954 S.C. 51.

(2) [1964] 3 S.C.R. 397, 408, adverse inference and in a proper case record such failure as constituting a serious infirmity in the proof of the prosecution case.

As stated earlier, it appears that the persons mentioned by P. W. 1 were not examined either because the prosecution believed that they had been won over by the opposite side or because in the parades held for them they had not identified the appellants or committed errors. If that was so, it is manifest that no useful purpose would have been served by examining the persons who had failed to identify the appellants. But then neither Parsad nor Paragu falls in this category of persons for the explanation given in regard to them was that they were not necessary. For one reason or the other the defence seems to have remained content with that explanation, for they asked no question either to P.W. 1 or to the Investigating Officer to elicit why these two persons were considered unnecessary witnesses. , It may be that if a clarification had been demanded, they would have given some explanation. Besides, there is nothing in the evidence to suggest that they were not produced because they would have turned out to be inconvenient witnesses. The High Court on an examination of the evidence held that it was not possible to say that the prosecution had deliberately withheld these two persons for any oblique motive. In these circumstances it is difficult to persuade ourselves to take the view pressed upon us by counsel that the High Court ought to have drawn an adverse inference. For the reasons aforesaid, the contentions of Mr. Garg cannot be sustained. Consequently, we do not find any reason to interfere with the concurrent findings of the trial court and the High Court that the appellants were responsible for the deaths of Lal Singh and Harihar and were guilty of the offences charged against them. As regards the sentence of death imposed on appellants Karnesh, Krishna, Kaushal and Chhetrapal, it is difficult for us to agree with that order passed by the trial court and confirmed by the High Court. In imposing the sentence of death on these four appellants, the trial court made a distinction between them on the one hand and the rest of the appellants on the other. The distinction was made on the ground that three of them were armed with fire-arms and that they all fired at Lal Singh simultaneously, that appellant Chhetrapal had shot at Harihar also and finally, that appellant Kaushal had given a hatchet blow to Harihar. In our view, the evidence on which this distinction was made cannot be said to be fully satisfactory. It is true that P. W. 1 while giving evidence stated that the three appellants had fired simultaneously at Lal Singh, that Chhetrapal had also fired at Harihar and that Kaushal had given a hatchet blow to him. But the F.I.R. merely states that three shots were fired at Lal Singh but does not state that they were fired by the three appellants simultaneously, nor does it state that Chhetrapal had fired at Harihar after he had been dragged out on the road. It is hardly conceivable that if P. W. 1 had seen these appellants firing either at Lal Singh or at Harihar, he would have forgotten to make a positive statement about it in the F.I.R. In view of this omission, it is difficult to build the conclusion with any certainty on his subsequent statement that the three appellants had simultaneously fired at Lal Singh and that Chhetrapal had shot at Harihar after he had been brought out of the house. The possibility of any one or two of them having fired the three shots in quick succession cannot, therefore, be ruled out. In that case the distinction made on the basis that all the three of them had fired at Lal Singh cannot be sustained. Therefore, the reason given by the trial judge for imposing the extreme penalty on these four appellants as against the rest becomes difficult to sustain. It is true that these four appellants were armed with firearms and a hatchet. But the others also were armed with equally dangerous weapons, such as spears and bankas. The said distinction being not sustainable, the proper punishment that should have been awarded to the four

appellants in the absence of clear evidence, as to who inflicted the fatal blows, should have been the same punishment as imposed on the rest. , We have,; therefore, to set aside the sentence of death imposed on the aforesaid four appellants and impose on them the sentence of rigorous imprisonment for life. Except for this modification the appeal fails and is dismissed,.

R.K.P.S. Appeal dismissed.