Supreme Court of India
Sunil Kumar & Ors vs State Of Madhya Pradesh on 28 January, 1997
Bench: M.K. Mukherjee, B.N. Kirpal

PETITIONER:
SUNIL KUMAR & ORS.

Vs.

RESPONDENT:
STATE OF MADHYA PRADESH.

DATE OF JUDGMENT: 28/01/1997

BENCH:
M.K. MUKHERJEE, B.N. KIRPAL

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T M.K. MUKHERJEE This appeal under Section 379 of the code of criminal procedure is directed against the judgment and order dated September 12, 1985 of the Madhya Pradesh High Court in Criminal Appeal no. 1217 of 1982 whereby it set aside the acquittal of the five appellants of the offences under Sections 147, 302/149 and 307/149 of the Indian Penal Code recorded in their favour by the Additional Sessions Judge, Narsinghpur and convicted them thereunder.

The appellants Sunil Kumar and his father Hargovind are residents of village Chichli within the Police State of Gotetoriya in the District of Narsinghpur where they own a rolling mill and the other three appellants are their casual employees. The deceased Dayashankar and his brother Ramesh Chandra (P.W.I.) also hailed from the same village and they earned their living from cultivation.

According to the prosecution case the appellant Hargovind was trying to frocibly take over the land of the deceased and P.W.I. and threatening them that he would cut their hands and legs. Sometime before the incident with which we are concerned in this appeal the cattle of Sunil Kumar and Hargovind had damaged the standing crops of the deceased and P.W.I. When P.W.I. protested a quarrel ensued in course of which he was beaten up with shes by Hargovind and appellant Rafu & Rafiq. On January 15, 1981 Hargovind and appellant Rafu made an attempt to kill the deceased and P.W.I but failed. Over that incident P.W.I lodged a complaint with police station. Again on May 30,

1981 P.W.I found that Hargovind had brought the other three appellants, who were all residents of Uttar Pradesh, to their village and apprehending that Hargovind might get them killed, the two brothers lodged a written report before the Superintendent of Police, Narsinghpur on June 13, 1981 (Ext.P.I.) seeking protection of their lives and properties. The police however turned a Bear bar to their complaints.

The further prosecution case is that on July 30, 1981 at or about 9 A.M. the deceased and P.W.I went to their field for measuring the work done by their labourers as that was the day for payment to them. After the measurements, at or about 10.30 A.M. when they were returning home to fetch money for payment to those laborers and on the way had reached the lane in between the fields of Chhotelal Sahu and Dalchand the five appellants came from behind. Of them, Sunil Kumar and Suresh were carrying lathis, Hargovind a hockey stick and Nazim and Rafiq axes. Hargovind first gave a lathi blow on the head of P.W.I and he fell down. Thereafter Rafu and Nazim hacked him with their axes severing his left arm and left foot. All or them then attacked the deceased with their respective weapons in a similar fashion severing his right hand and right foot. Then they fled away.

On hearing the cries of the victime, the laborers, who were working in the field of P.W.I came to the spot and seeing their condition rushed to their house to inform Imratibai (P.W.2), mother of P.W.I and the deceased. On getting the information P.W.2 hurried to the spot and heard about the incident from P.W.I Dayashankar had, in the meantime, succumbed to his injuries. Yogendra kumar (P.W.3), a nephew of the deceased and P.W.I and some others of the village also roached there and to them also P.W.1 narrated the incident. P.W.3 then rushed for medical held but the doctors expressed their unwillingness to attend to the victims on the plea that as it was a medico legal case they could not do so without requisition from the police. P.W.3 then went to the village Post Office and reported the incident to the police over telephone.

On getting the information inspector V.K. Saxena (P.W.6) came to the site of the incident accompanied by Sub Inspector Mithilesh Tiwari (PW 8) and other police personnel. Reaching there he recorded the complaint of P.W.1 (Ext. P.2) and after forwarding it to the police station for registering a case thereupon sent P.W.1 to Gadarwara Hospital for treatment. He then held inquest upon the dead body of Dayashankar and despatched it for post-mortem examination. From the spot he seized the severed limbs of the two victims, some blood stained earth and the metal portion and the handle of an axe in presence of the witnesses.

Dr. P.K. Budhisagar (P.W. 13), Asstt. Surgeon of Gadarwara Hospital, examined P.W.1 and finding his condition critical sent an information to the police for recording his dying declaration. On receipt of such message the police requisitioned the services of the local magistrate who came to the hospital and recorded his statement (Ext.D.2).

S.I. A.K. Bhandari (P.W.12), who took up the investigation of the case from P.W.6 arrested the appellants and pursuant to their respective statements seized a lathi and bush shirt which were blood stained from Nazim, one blood stained axe from the house of Hargovind, a hockey stick and a Hungi, both blood stained, from Suresh, blood stained Kurta and paijama from Hargovind and blood stained trousers, bush-shirt and baniyan from Sunil. P.W.12 prepared separate sealed packets

in respect of those articles and went them to forensic Science Laboratory (F.S.L) for chemical examination. After receipt of the reports of F.S.L. and of the autopsy held on the dead body of Dayashankar by Dr. Dhan Singh (P.W.4), and on completion or investigation he submitted charge-sheet against the five appellants.

The appellants pleaded not quilty to the charged and stated that they were falsely implicated. The appellant Rafiq took a plea of alibi also. In support of their respective cases the prosecution examined thirteen witnesses and defence one.

That Dayashankar (deceased) was brutally murdered and P.W.I was mercilessly beaten up, stand proved by overwhelming evidence on record, Inspector V.K. Saxena (P.W.6) testified that when he reached the site of the incident the found the dead body of Dayashankar in a bullock-cart and Ramesh (P.W.1) lying on the ground nearby, with both of them having one of their legs and hands amputated. Under his directions S.I. Mithilesh Tiwari (P.W.8) seized those severed parts, besides other articles found there P.W.6. Dr. Dhan Singh (P.W.4), who held autopsy on the dead body of Dayashankar on July 31, 1981, stated that he found the following injuries on his person:

> "1. Lecerated would 1" * 1/2 bone deep in the right parieto occipital region;
>
> 2. Lacerated wound 3/4"* 1/3" * 1/3" on the parietal region;
>
> 3. Incished wound 3" * 1/2" * bone deep just left of the med line;
>
> 4. Lacerated wound 2" * 1/2" * bone deep on the frontal region just right of mid line;
>
> 5. Bruise 2 1/2"* 1/2" just lateral of right eye brow with swelling in right temple 4" * 3";
>
> 6. Abrasion 1 1/4" * 1/2" over the right shoulder;
>
> 7. Abrasion 1/2" * 1/2" on top of the right shoulder;
>
> 8. Bruise 4 1/2" * 1/2" on left forearm, close to olbow joint;
>
> 9. Incised would cutting whole thickness of the right forearm separating the hand from rest of the body. Ulna and radius cut in one plane slightly oblique-just above the wrist joint;
>
> 10. Bruise 3" * 2" on the right thigh;
>
> 11. Incised wound involving the whole thickness of the right leg just above ankle joint with skin flap cut in different directions suggesting more that one blows with sharp weighty object - chopping the right foot off from rest of the body. fibia and fibula bones cut in two different planes; and

12. Incised wound 1 3/4" * 1" * bone deep on anterior aspect of left leg 3" above the ankle joint. Tibia cut 1/3rd deep".

He opined that all the injuries were antemortem and injury Nos. 1,2,4,5,6,7,8 and 10 were caused by hard and blunt object while injuries no. 3,9,11 and 12 were caused by sharp and heavy object. According to P.W.4 injuries No. 3,4,5,9 and 11 were individually and collectively sufficient to cause death. He further opined that the incised wounds seen by him could be caused by a heavy sharp object like axe.

Dr. P.K. Budhisagar (P.W. 13) who examined P.W. 1 on July 30,1981 at or about 5 P.M. testified that he found the following injuries on his person:

"1. Lacerated wound 3" 1/2" * bone deep over scalp, 3" behind mastoid;

2. Lacerated wound 1" * 1/4"* bone deep, 1 1/2" above injury No.1;

3. Lacerated wound 2" * 1/4 * bone deep on the left side of midline and 1" above injury No.1;

4. Lacerated wound 2"*1/4"* bone deep on mid line 1" above injury No.3;

5. Lacerated wound 2"*1/4 * bone deep 1 1/2" above injury No. 4;

6. Lacerated wound 4" x 1/4" x bone deep over mid line joining both traqus of the ears;

7. Lacerated wound 4" x 1/4" x bone deep, 1 1/2" above injury No.6;

8. Left arm fully cut, below elbow muscles, nerves bone cut in oblique line form lateral to medial side;

9. left leg cut at ankle joint lean cut 13" below tibial tuberosity; oblique medical to lateral side. Tibial fibula and a tendons cut;

10. Incised wound 1 1/2" x 1/2" x 1/2" x 4" above right wrist on the antero lateral aspect;

11. Incised wound 2" x 1" x bone deep 1" above right wrist. Bone cut in the depth of wound. Gap is 3" deep including bone thickness;

12. Incised wound 3" x 2" x 2" x 2" above injury No. 11 muscle tendons cut and bone fractured; and

13. Incised wound 2" x 1 1/2" x 2", 1 1/2" above injury No. 12, muscle cut and bone fractured."

He opined that the injuries found by him on the right arm, left log and left arm were caused by a heavy and sharp instrument like axe and wounds on scalp were caused by hard and blunt object like hockey stick. He further opined that all the injuries collectively were sufficient to cause death if the patient was not treated in time.

Considering the nature, number and extent or injuries inflicted on Dayashankar (deceased) and Ramesh (P.W.1) there cannot be any manner of doubt that whoever caused those injuries are guilty of the offences or committing murder and attempting to commit murder respectively. The next and crucial question that falls for our determination is whether the appellants are the authors of the above crimes as alleged by the prosecution.

The main stay of the prosecution to prove this part of its case is, needless to say, Ramesh (P.W.1), who detailed the incident as well as the events leading thereto. To corroborate his evidence the prosecution relied upon the fact that immediately after the assaults took place, he narrated the incident to his mother (P.W.2), and nephew (P.W.3) who reached there. Besides, his statements, one made before Sh. V.K. Saxena, Inspector of Police (P.W.6), which was treated as the F.I.R (Ext. P.2) and the other before the Magistrate, (Ext. D/2), which was then recorded as a dying declaration were pressed into service as corroborative evidence. To prove that the ocular evidence of P.W.1 fitted in the with the injuries sustained by him and his brother the prosecution examined the two doctors referred to earlier.

From the judgment of the trial Court we find that the principal reason which weighed which it for disbelieving the prosecution case altogether was the fact that in the message that Yogendra (P.W.3) gave to the police regarding the incident, after having been apprised of the same by P.W.1 and which was recorded by the police in the station diary book (Ex.P.17), he did no disclose the names of the assailant. According to the trial Court if really P.W.I had disclosed the names of the assailants to P.W.J it was expected, in the fitness of things, that he would disclose those names in his telephonic message to the police. Such non disclose of the names according to the trial Court, completely belied the prosecution story that the appellants were the perpetrators of the crimes in question. The other related observation the trial Court made was that since the telephone message disclosed a cognizable offence and pursuant thereto the police had come to the spot and started investigation, the statement that was made by P.W.I before the inspector of police (P.W.6) was hit by Section 162 Cr.P.C. and consequently, the prosecution's claim that the evidence of P.W.I was corroborated by the said statement, being the FIR, could not be legally entertained. Another reason which weighed with the trial Court in disbelieving the prosecution case was that it did not examine any labourers or any other person who were working the field near the site of the incident to prove the incident and instead thereof relied upon the evidence of only two interested witnesses, namely, P.W.I was also discrepant.

In reversing the judgment of the trial Court, the High Court held that the findings to the trial Court were perverse and against the evidence on record. According to the High Court the cryptic message

that was given by P.W.3 over telephone is the police could not be treated as F.I.R., more particularly, when he testified that owing to disturbance in the telephone line he could not disclose the details of the incident; and the statement given by P.W.I before P.W. (Ext. P.2) was the F.I.R of the case. The High Court next observed that there was no evidence on record to indicate that at the time the incident actually took place anybody was present so as to entitle the trial Court to draw an adverse presumption against the prosecution under Section 114 (illustration `q') of the Evidence Act for non examination of material witnesses. The High Court lastly observed that the evidence of P.W.I, as corroborated by P.W.2 and P.W.3, who came immediately after the occurrence, the F.I.R. and the medical evidence clearly proved the case of the prosecution. In drawing the above conclusions the High Court also took note of the fact that only a few days prior to the incident the deceased and his brother had in their complaint before the police (Ex.P1) categorically expressed their apprehension that their lives and properties were in jeopardy as these accused persons had openly given out that they would kill them after cutting them to pieces.

This being a statutory appeal we have carefully gone through the entire evidence on record had the judgments of the learned Courts below. Our such exercise persuades us to unhesitatingly hold that the finding of the trial Court that the evidence of P.W.I is wholly unreliable is patently perverse. Considering the fact that except the two victims (P.W.I and the deceased) there was nobody else present at the time the assaults actually took place as the evidence on record clearly indicates there could not be any other witness to the incident. The question of presumption under Section 114 of the Evidence Act could have been drawn in the instant case only if the defence could have succeeded in proving that there were other persons present and had seen the incident and inspite thereof the prosecution, without any justifiable reason, withheld such witnesses. Coming now to the evidence led be the prosecution to corroborate P.W.I. who detailed the entire prosecution case, Imarti Bai (P.W.2) stated that on getting the news that Dayashankar was lying dead and Ramesh injured she rushed to the place and gave him some water as he was asking for the same. When she asked Ramesh as to how he sustained those injuries and Dayashankar died, he (P.W.I) detailed the entire incident including the names of the appellants as the assailants. The evidence of P.W.2 was disbelieved by the trial Court on the ground that she was examined by the Investigating Officer after one and a half months. This fact by itself should not, and could not, have been made a ground for disbelieving her for it is expected of a mother who gets information about the assaults on his sons to immediately rush to their help and ascertain the details of the assault. Judged in that context, if the Investigating Officer did not examine P.W.2 immediately after the incident it can only be said that it was a dereliction of duty on his part; but such delayed examination by itself would not make the evidence of P.W.2 suspect, particularly when she was a natural and probable witness and was readily available for examination by the investigating Agency.

Equally important in the instant case is the evidence of P.W.3, who testified that when he came to the spot and talked to Ramesh who was lying injured he told him about the incident as also the names of the assailants. As already noticed it was P.W.3 who gave information to the police about the incident over telephone. In his testimony he said that when he contacted the police from the sub post office over telephone he get a reply that they could not been properly. However he could succeed only in communicating that there was a fight in which hands and legs of two persons were cut. In cross examination he admitted that he did not toll the names of the accused persons over

phone; but explained that owing to some disturbance on the telephone line he could not properly communicate. To disprove the above explanation of P.W.3 the defence examined Harishankar Dubey (D.W.1), the then Assistant Postmaster of the sub post office. He testified that on July 13, 1981 on Yogendra came to the post office and asked him to book a telephone call to Gotetoriya Police Station. He (D.W.1) asked him as to why he wanted to book a phone and in reply to its query told that he wanted to give a message that a person was murdered and another seriously injured. When he asked him as to who were the assailant Yogendra told him that he did not know their names. Relying upon the above evidence of D.W.1 the trial Court held that the prosecution version that the appellants were the assailants could not be accepted. In disbelieving D.W.1 the High Court, however, pointed out that he figured as a witness for the prosecution and only when he was given up as hostile to it, that the defence examined him. According to the High Court even though in his examination in chief he stated that he could hear all that was being conveyed by Yogendra over telephone, in cross-examination he admitted that he could not hear anything. Besides the above grounds, the other reason which persuades us to hold that he was an unreliable witness is , that it being no part of his duty to ascertain why P.W.3 wanted to book a call or what message he wanted to convey, his claim that he was present at the time P.W.3 talked over the phone is not tenable. We hasten to add that even if we proceed on the assumption that Yogendra did not disclose the names of the assailants over the phone it would not in any way affect the testimony of P.W.1 of corroboration or such testimony by P.W.3, for P.W.1 not only stated that he disclosed the names of the assailant to P.W.3 but P.W.3 also asserted that P.W.1 did tell the names of the assailants to him. In other words, the evidence of P.W.1 that at the earliest opportunity he disclosed the names of the appellants as his assailants to P.W.3 was corroborated by P.W.3.

While on this point we wish to mention however that the High Court erred in not treating the telephonic information that P.W.3 gave to the police station as the F.I.R. It is not disputed that P.W.3 did give an information to the police station wherein he stated that one person had been killed and another person had been dismembered and it was recorded accordingly in the daily diary book (Ex.P/17). The same entry discloses, notwithstanding the absence of the names of the assailants therein, a cognizable offence an indeed it is on the basis thereof that P.W.6 initially started their investigation. Ext.P/17 will therefore be the F.I.R and the statement of Ramesh (Ext.P.2) which was recorded by him in course of the investigation is to treated as one recorded under Section 161 Cr.P.C. This conclusion of ours, however, does not in any way affect the merits of the prosecution case for we find that immediately after P.W.1 was taken to the hospital his statement was recorded by a recorded as a dying declaration which, consequent upon his survival, is to be treated only as a statement recorded under Section 164 Cr.P.C. and can be used for corroboration or contradiction. This statement recorded by the Magistrate at the earliest available opportunity clearly discloses the substratum of the prosecution case including the names of the appellants as the assailants and there is not an iota of materials on record to show that this was the upshot of his tutoring. On the contrary, this statement was made at a point of time when P.W.1 was in a critical condition and it is difficult to believe that he would falsely implicate the appellants leaving aside the real culprits. In view of the observation of the trial Court that his evidence was discrepant we carefully looked into the same and found that there was only some minor inconsequential contradictions which did not at all impair his evidence. Then again, as already noticed, the evidence of the doctors fully supports his version of the incident. Another related aspect of the matter is the

lodging of the complaint by P.W.I and his brother before the Superintendent of Police (Ex.P.1) (which we have earlier referred to) wherein they sought for police action against the threat meted out by the appellant that they would cut them to pieces a threat which was brutally (and literally) translated into action.

As from the evidence on record we are satisfied that the appellants committed rioting and in course thereof they killed Dayashankar and attempted to kill Ramesh we uphold the judgment of the High Court and dismiss the appeal. The appellant, who are on bail, shall now surrender to their bail bounds to serve out the sentence imposed upon them by the High Court.