

Court No. 43**Case :-** CRIMINAL APPEAL No. - 1216 of 1984**Appellant :-** Prem And Another**Respondent :-** State of U.P.**Counsel for Appellant :-** Nitansh Kumar Roy**Counsel for Respondent :-** D.G.A.**Hon'ble Vivek Kumar Birla,J.****Hon'ble Jitendra Kumar Sinha,J.**

1. Heard Sri Nitansh Kumar Roy, learned counsel for the appellants and Sri O.P. Dwivedi, learned Additional Government Advocate for the State respondents.

2. This criminal appeal has been preferred assailing the judgement and order dated 25.4.1984 passed by Officiating Sessions Judge, Saharanpur, in Criminal Sessions Trial No. 205 of 1982 convicting and sentencing the appellants to undergo imprisonment for life under Section 302 read with Section 34 of the Indian Penal Code. The appellants are further convicted and sentenced to undergo five years' R.I. under Section 328 read with Section 34 of the Indian Penal code, both the sentence shall run concurrently.

3. Vide order of this Court dated 2.2.2024, the appeal stood abated in respect of appellant no. 2-Genda son of Baroo. Now, the appeal is surviving only in respect of appellant no. 1-Prem son of Genda.

4. The prosecution story, in brief is that on 2nd of May 1981 at about 10 AM, three children, namely, Raj Kumar (aged about 2 year), Chandra Kiran (aged about 3 years)

and Vishwas (aged about 6 years) were returning home after playing. When they reached near the house of accused Prem and Genda, they gave Laddu of white colour to each of the children. This incident was seen by two persons, namely, Nanu and Giana, whose house is near the accused's house. When the children reached home, they fell and become unconscious. They were rushed to Primary Health Centre, Nanauta, where doctor after examining declared Chandra Kiran brought dead and found a case of suspected poisoning. He referred Raj Kumar and Vishwas to S.B.D. Hospital, Saharanpur and dead body of Chandra Kiran was sent for Post Mortem. Raj Kumar after being conscious returned to home with father Dharampal on whose information F.I.R. was registered.

5. On the basis of written report of the informant Dharampal, a first information report was registered on 2.5.1981 against the accused persons, as Case Crime no. 7 of 1981, under Section 302/34 and 334/34 IPC and investigation was started by the Investigating Officer, who investigated the matter and after concluding investigation submitted a chargesheet on 23.2.1982 against the accused persons. On being committed to the Court of Sessions, the accused were charged as above. The accused denied the charges framed against them and claimed to be tried.

6. In order to establish the prosecution case, PW-1 Dharampal, PW-2 Nanu, PW-3 Bhanwar Singh, PW-4 Hiram Singh, PW-5 Munna Singh, PW-6 Ram Prakash, PW-7 Gyana, PW-8 Vishwas, PW-9 Pritam Singh, PW-10 Naipal Singh, PW-11 Dr. A.L. Dheegra, PW-12 Dr. M.L. Ansari and PW-13 Dr. Anil Bhatnagar were examined and certain documents were exhibited before the Court concerned. In

addition to this, the prosecution produced certain documents, which were exhibited during the trial as under:

(i) First information report as Ext. Ka-2, (ii) Written report as Ex. Ka-1, (iii) Injury report as Ex. Ka-15, (iv) Letter to Station Officer as Ext. Ka-17 and 18, (v) Post-mortem report as Ext. Ka-16, (vi) Chemical examination report as Ext. Ka-19 and 20, (vii) Panchayatnama as Ext. Ka-7, and (viii) Chargesheet as Ext. Ka-14.

7. Submission of Sri Nitansh Kumar Roy, learned counsel for the appellants is that it is a case of circumstantial evidence only and unless the chain of circumstances is so complete that it leaves no scope for any other doubt except the conclusion of the guilt of the accused persons, the accused cannot be convicted. He submits that the first information report was lodged only on the basis of receiving information that the informant was informed by his sister Omwati that the condition of Vishwas, Chandra Karan and Raj Kumar who were at home was not well. It is submitted that in cross-examination, the informant Dharampal (PW-1) has accepted that the information of illness was given by her sister Omwati only and the villagers Nanu son of Chuhada (PW-2) and Gyana son of Ghasi (PW-7) informed about it at around 10:00 am that in front of their house accused persons Prem s/o Genda (the surviving appellant no. 1 herein) and Genda s/o Baroo (now dead) administered poisonous *laddus* to the children. He submits that the informant had no direct information in respect of giving of poisonous *laddus* to the children, out of which one child Chandra Kiran died. It was next submitted that PW-1 Dharampal (informant) in his

cross-examination stated that there was some enmity between the parties wherein Inder, Nanu and Bhulla were involved. He submitted that Omwati was not produced as witness who had given information to Dharampal. He next submitted that PW-7 Gyana, one of the persons who had stated to have informed Dharampal (informant) turned hostile and did not support the prosecution version. He categorically stated that in his presence the accused persons did not give poisonous *laddus* to the children. Insofar as statement of Nanu (PW-2) who claims to be an eyewitness is concerned, he submitted that his house is adjacent to the house of accused persons and had stated that he along with Gyana (PW-7) saw the accused persons giving *laddus* to the children whereas Gyana (PW-7) had turned hostile and about his own presence he said that on 2.5.1981 he had come from his own residence to the residence of Atma Ram s/o Chimman Harijan and that he had no enmity with the accused Prem and Genda. It was further stated that even Nanu (PW-2) had stated that he had seen the accused persons giving *laddus* to the children, however, he had not stated that accused persons had poisoned the *laddus* before giving them to the children and in his cross-examination he has accepted that Bhullu informed about illness of children and Bhullu was never examined by the prosecution. He further submitted that it is important to notice that PW-2 Nanu was in village for two days, however, the Investigating Officer has recorded his statement after 10 to 12 days, which by itself creates suspicion in the truthfulness of his statement. He further submitted that insofar as the statement of child witness Vishwas (PW-8) is concerned, he was aged about 6 years at the time of incident and was aged about 9 years at the

time of recording of his statement. He submitted that extremely simple questions were asked from the child witness Vishwas (PW-8) whereas while answering one question he had stated that he even does not know how many months are there in a year and that he had accepted that he was tutored outside the Court by the prosecution side. He further submitted that chemical examination report are at variance as the presence of organo phosphorus insecticide was found in viscera of the deceased whereas no such poisonous substance was found from the stomach wash of the other surviving children. Submission, therefore, is that if the same *laddus* were administered to all the children, the chemical examination report could not have been at variance. He submits that even the evidence of PW-13 Dr. Anil Bhatnagar is to the effect that poison may or may not dissolve in stomach. Submission, therefore, is that administration of same poisonous substance in the same form i.e. *laddu* at the same point of time draws a suspicion about the cause of death of Chandra Kiran and the prosecution could not prove the story beyond doubt. He also submitted that the statement of Inder (father of the deceased child Chandra Kiran) was not recorded and Dharampal (PW-1) is the uncle of the victim. By drawing attention to the statement of Nepal Singh (PW-10), it is submitted that he has accepted that he was not told about the illness of Nanu (PW-2) who is first cousin of Dharampal and his statement was recorded after 10 to 12 days after the incident, therefore, truthfulness of statement is highly doubtful and the presence of Nanu (PW-2) on the spot seeing the accused persons giving *laddus* is not proved. He further submitted that no motive could be proved in the present

case as the same was specifically denied from the other side. He submitted that the motive due to enmity between the accused persons and Nanu, Inder and Bhulla was incorrectly presumed by the trial Court and no such motive can be presumed in a case of death. Submission, therefore, is that the prosecution has clearly failed to prove all the charges against the accused persons beyond any reasonable doubt. Submission is that insofar as the factum of administration of poison by the accused persons is concerned, in a case of circumstantial evidence that too when poisonous substance is administered, the motive must be proved and the chain of circumstances must be complete and must be proved beyond any shadow of doubt. In support of his submissions, he has placed reliance on the judgements of Hon'ble Apex Court in **Sharad Birdhichand Sarda vs. State of Maharashtra**, (1984) 4 SCC 116; **Bhagwan Singn and Another vs. State of M.P.**, AIR 2003 SC 1088; **Hari Prashad @ Kishan Sahu vs. State of Chhatisgarh**, (2024) 2 SCC 557 and the judgement of Coordinate Bench of this Court (wherein one of us, Justice Vivek Kumar Birla, is a member) rendered in **State of U.P. vs. Brijesh and another**, 2022 (119) ACRC 574.

8. *Per contra*, Sri O.P. Dwivedi, learned AGA appearing for the State respondents has contended that PW-1 Dharampal acted immediately after receiving the information and it is a case of prompt FIR. It is submitted that the delay, if any has been explained properly as the victims were small children and the informant was attending the children, which was quite natural in the circumstances. It is submitted that information of illness of children was received by him from his sister Omwati and

he moved forward towards his home and he was told by villagers Nanu and Gyana that accused persons administered the poisonous *laddus* to the children. He submitted that both the accused persons are real brothers. It was next submitted that even though PW-7 Gyana had turned hostile, however, this will not affect the case of the prosecution, inasmuch as it is the quality of evidence that is to be seen and not the quantity and that as per law, even the evidence of the hostile witness can be looked into if needed to corroborate other facts. It was submitted that PW-2 Nanu was eyewitness who has seen the accused persons giving poisonous *laddus* to the children and immediately thereafter they, while eating them were approaching their home and soon after eating such *laddus* they fell seriously ill. He next submitted that it is proved beyond doubt that Chandra Kiran died because of administration of poisonous substance, which was also proved from the medical evidence. It is submitted that the medical opinion in respect of presence and absence of poisonous substance may not be categorical in nature, however, in view of the ocular evidence and that of one child, out of three children, does not give any benefit to appellant. He submitted that PW-11 Dr. A.L. Dheegra, who had examined Vishwas aged about 6 years at that point of time, had clearly stated that when he examined Vishwas, he was having symptoms of poison. He submitted that the death of Chandra Kiran took place because of administration of poisonous substance i.e. organo phosphorus insecticide and it could not be disputed that all the children have eaten same *laddus*. It is submitted that in the present case PW-2 Nanu is the eyewitness and his testimony could not be dislodged by the defence and

therefore, the prosecution has proved its case beyond any shadow of doubt.

9. We have considered the rival submissions and perused the paper book.

10. Before proceeding further, it would be appropriate to take note of the fact that it is a case of circumstantial evidence and no one has seen the incident although PW-2 Nanu has stated that he had seen the accused persons administering *laddus* to all the three children, however, administration of poisonous *laddus* to children was not seen by any of the witnesses.

11. Before proceeding further, it would be appropriate to quote paragraphs 153, 154, 159, 163, 164 and 165 of the judgement of Hon'ble Apex Court rendered in ***Sharad Birdichand Sarada*** (supra):

“**153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrL LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say,

they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier viz. before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

163. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. In *Kali Ram v. State of Himachal Pradesh* [(1973) 2 SCC 808 : 1973 SCC (Cri) 1048 : AIR 1973 SC 2773 : (1974) 1 SCR 722 : 1974 Cri LJ 1] this Court made the following observations: [SCC para 25, p. 820: SCC (Cri) p. 1060]

“Another golden thread which runs through the web of the administration of justice in criminal cases, is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should

be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.”

164. We now come to the mode and manner of proof of cases of murder by administration of poison. In Ramgopal case [(1972) 4 SCC 625 : AIR 1972 SC 656] this Court held thus: (SCC p. 629, para 15)

“Three questions arise in such cases, namely (firstly), did the deceased die of the poison in question? (secondly), had the accused the poison in question in his possession? and (thirdly), had the accused an opportunity to administer the poison in question to the deceased? It is only when the motive is there and these facts are all proved that the court may be able to draw the inference, that the poison was administered by the accused to the deceased resulting in his death.”

165. So far as this matter is concerned, in such cases the court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction:

(1) there is a clear motive for an accused to administer poison to the deceased,

(2) that the deceased died of poison said to have been administered,

(3) that the accused had the poison in his possession,

(4) that he had an opportunity to administer the poison to the deceased.”

12. Following the aforesaid proposition of law, the same view has been reiterated by Hon’ble Apex court in a recent judgement rendered in **Hari Prashad alias Kishan Sahu vs. State of Chhatisgarh**, (2024) 2 SCC 557, paragraph 27 whereof are quoted as under:

“27. Having regard to such scanty evidence, it is difficult to hold that the prosecution had proved the four important propositions laid down by this Court in case of allegation of murder by poisoning, namely, (1) the accused had a clear motive to administer poison to the deceased; (2) the deceased died of poison said to have been administered; (3) the accused had the poison in his possession; and that (4) the accused had an opportunity to administer the poison to the deceased. It is also pertinent to note that the chemical

examination report (Ext. P-14) though was an incriminating piece of evidence, was not brought to the notice of the appellant during the course of his examination under Section 313CrPC. All these circumstances put together, have made the case of prosecution very vulnerable.”

(Emphasis Supplied)

13. On perusal of record and re-appreciation of evidence, We find substance in the arguments of learned counsel for the appellants to the effect that the informant was firstly informed by his sister Omwati about the illness of three children who were at home and he has stated that he subsequently received information from PW-2 Nanu and PW-7 Gyana that the accused persons have given all the three children *laddus* in front of them at about 10 AM, therefore, clearly PW-1 Dharampal is not having personal knowledge of children being given *laddus* by the accused persons, moreso, administration of poisonous substance to the children. Applying the principles in ***Sharad Birdhichand Sarda*** (supra) as quoted above, it is clear that no one has seen the accused persons having given poison in their presence or mixing the poison with *laddus* that they have given to the children. A faint suggestion of enmity between the parties has also been given by the informant Dharampal to the effect that he was having old enmity with Genda, however, the same could not be proved to the hilt and in any case enmity cuts both the ways and in case of absence of direct evidence, the motive becomes important and must be proved by cogent evidence, which, in our opinion, is lacking in the present case. One of the alleged eyewitnesses PW-7 Gyana has clearly turned hostile and nothing could be extracted from his cross-examination in favour of the prosecution.

14. Perusal of the chemical examiner report clearly indicates that in stomach wash of the surviving children no poisonous substance was found. Under these circumstances, when one of the alleged eyewitnesses, namely, PW-7 Gyana has turned hostile and statement of PW-2 Nanu was recorded by the police after 10 to 12 days although he was available in the village, the statement child witness Vishwas becomes important and needs close scrutiny. We have closely scrutinized the statement of child witness Vishwas who was aged about 9 years at the time of recording of his statement and was six years old when the incident had taken place. From his statement we find that extremely simple questions were put to him while ascertaining as to whether he understood the questions. Be that as it may, in his examination-in-chief he had stated that accused Prem stopped them and asked them to have *Prashad* and they were handed over *Prashad* in the shape of white *laddus* and that accused Prem had given laddu to him and Chandra Kiran whereas Genda had given *laddu* to Raj Kumar and while eating *laddus* they had proceeded to their home and fell unconscious. However, in his cross-examination he had stated that PW-2 Nanu and PW-7 Gyana have told him that he is 9 years old and that he does not know how many months are there in a year. He had come with Dharampal (PW-1) and he stated that prior to this date, he had not told anything about the incident to anyone. In paragraph 6 of the cross-examination he had stated that he has come to this place since morning and was sitting under a tree and was taken to big room of tile roof (*khaprail*) wherein he was told as to what is to be stated before the Court and thus he had stated in the same manner. This clearly reflects that this child witness

was tutored before producing before the Court. Relevant extract of the statement of PW-8 Vishwas (child witness) is quoted as under:

"6- आज से सुबह मैं आया फिर पेड़ के नीचे बैठा व खपड़ेल वाले कमरे में मैं गया वहाँ मुझे बताया गया कि हमें क्या -2 बात कहना है। उसी तरह से हमने यह बात यहाँ कह दी।"

15. In the case of **Bhagwan Singh** (supra), it has been held that a child of six years was not found worth belief as because of immaturity of understanding. The ratio of the case is that the evidence of the child is required to be evaluated carefully because he is an easy prey of tutoring, paragraphs 19 and 22 of the said judgement is quoted as under:

"19. The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the Court to be a witness whose sole testimony can be relied without other corroborative evidence. The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. There-fore, always the Court looks for adequate corroboration from other evidence to his testimony. See Panchhi and others v. State of U.P., (1998) 7 SCC 177.

22. It is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incident and before there were any possibility of coaching and tutoring him. See Paras 14-15 of State of Assam v. Mafzuddin Ahmed (1983) 2 SCC 14. In that case evidence of child witness is appreciated and held unreliable thus :

"14. The other direct evidence is the deposition of PW 7, the son of the deceased, a lad of 7 years. The High Court has observed in its Judgment :-

.....the evidence of a child witness is always dangerous unless it is available immediately after the

occurrence and before there were any possibility of coaching and tutoring.

15. A bare perusal of the deposition of PW-7 convinces us that he was vacillating throughout and has deposed as he was asked to depose either by his Nana or by his own uncle. It is true that we cannot expect much consistency in the deposition of this witness who was only a lad of 7 years. But from the tenor of his deposition it is evident that he was not a free agent and has been tutored at all stages by someone or the other".”

(Emphasis Supplied)

16. We, therefore, find that it is a case of circumstantial evidence and there is no direct ocular evidence available to prove the guilt of the accused persons. The chain of circumstances is not so complete in the present case to prove the guilt of the accused with reasonable definiteness as per the law discussed hereinabove. On re-appreciation of evidence, we, therefore, find that the prosecution has failed to prove the charges levelled against the accused persons beyond any reasonable doubt particularly in respect of factum of administration of poison and even mixing or adulteration of poison in *laddus* that were given to the children as per law laid down in ***Sharad Birdhichand Sarda*** (supra) and ***Hari Prashad*** (supra) as noted above. In any case administration of poisonous substance to three children though only one child Chandra Kiran, out of three children died because of poisonous substance and chemical examiner report is not categorical to the effect that any poisonous substance that was found in stomach wash of the other two children. On the contrary, it records that no poisonous substance was found in their stomach wash (at page 9 of the paper book).

17. Thus, in the present case, as laid down by Hon'ble Apex Court in the case of ***Sharad Birdhichand Sarda*** (supra) and ***Hari Prashad*** (supra), the circumstances from which the conclusion of guilt is to be drawn have not been fully established. In other words, prosecution has failed to establish the act of administration of poisonous substance to the deceased, which must have been proved beyond any shadow of doubt even though there may be a strong suspicion, as one child, out of three children died. We find that in the present case the chain of evidence and circumstances is not complete and it could not be approved by the prosecution that in all human probability the act must have been done by the accused persons.

18. Consequently, the present appeal is accordingly **allowed**. The impugned judgement and order dated 25.4.1984 convicting and sentencing appellants is hereby set aside and the appellants are acquitted of all the charges levelled against them. Bail bonds are cancelled and sureties are discharged. The surviving appellant no. 1- Prem son of Genda need not surrender.

19. Copy of this judgement be sent to the court concerned for necessary compliance.

Order Date :- 29.4.2025
Abhishek