
(1967) 02 AHC CK 0013

Allahabad High Court

Case No: Govt. Appeal No. 1069 of 1964

State of U.P.

APPELLANT

Vs

Moti Lal and Others

RESPONDENT

Date of Decision: Feb. 24, 1967

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 161, 162
- Evidence Act, 1872 - Section 32

Citation: AIR 1968 All 83

Hon'ble Judges: D.P. Uniyal, J; A.K. Kirty, J

Bench: Division Bench

Advocate: Government Advocate, for the Appellant; B.L. Yadava, for the Respondent

Final Decision: Allowed

Judgement

Uniyal, J.

This is a Government Appeal against the order of the Civil and Sessions Judge, Deoria acquitting the accused-respondents Moti, Shyam Dutt, Kanhai and Bhardul of the offence u/s 302/34. I. P. C.

2. The prosecution story as disclosed in the first information report lodged by Sukhari deceased was as follows: One Smt. Bilari, alleged that she was the sister of Sukhari's father and asserted her title to cultivatory holdings inherited by Sukhari from his father. It was alleged that Shyam Dutt accused was doing pairvi in that suit on behalf of Smt. Bilari as against Sukhari. Shyam Dutt had also appeared as a witness for Smt Bilari in that case. It was alleged that the remaining three accused Moti, Kanhai and Bhardul were helpers and supporters of Shyam Dutt who was the Pradhan of the village. Shyam Dutt had threatened Sukhari with dire consequences several times. On the night between the 25th and 26th September 1963 Sukhari was sleeping outside his house on a cot. At a short distance from him his son Mahatam P. W. 1 and Ghoor P W 2 were also sleeping on the ground. At about 2 a.m. Sukhari was suddenly attacked with spear on the

abdomen and was instantaneously awakened from his sleep. On the alarm raised by him his son Mahatam and Ghoor got awakened. They were equipped with torches which they flashed and in that light saw the three accused surrounding Sukhari while Moti inflicted a spear blow on his abdomen. The alarm raised by the victim attracted three other persons who were returning from a dance in village Kanchanpur and they are said to have seen the accused persons running away from the spot. These witnesses are said to have chased the accused for some distance but were unable to apprehend them. After about an hour and a half of the occurrence a report of the incident was got scribed by Sukhari deceased by Ram Bachan P. W. 4. Mahatam, in the company of his mother, took Sukhari in the rickshaw of Samtullah P. W. 7 to Police Station Tarkulwa and there lodged the report at 3.30 a.m. on the morning of 26-9-63 the police station having been at a distance of 2 miles from the village of occurrence. The Station Officer was not present at the police station, he having gone to another village in connection with the investigation of some other case. After recording the report the Head Moharrir sent information to the Station Officer through a constable about the crime and it was on the basis of that information that the Station Officer repaired to the village of occurrence, and reached there on the morning of the 26th September 1963. Meanwhile the Head Moharrir sent the injured to the Civil Hospital at Deoria for medical examination and treatment. Dr. A. R. Nagrath, Medical Officer, sub-charge Civil Hospital, Deoria examined the injured Sukhari on 26-9-63 and found the following injury on his person:

Punctured wound 1" x 1/2" x abdominal cavity, towards the left side of abdomen 4" from the umbilicus and 3" above the anterior and superior iliac spine.

Finding the condition of the patient deteriorating the doctor sent information to the magistrate for recording the dying declaration of Sukhari. Accordingly on the 27th September 1963 Sri S. K. Srivastava, Magistrate. 1st Class recorded the dying declaration of the deceased at 1 p.m. Dr. B. K. Varma, attending the patient, appended a certificate to the dying declaration that the patient was in a fit mental state to give his statement. The version of the occurrence given by the deceased in the dying declaration made before the Magistrate is in all material respects consistent and in accord with the statement made by him in the first information report.

3. Sukhari died in hospital on the morning of the 1st October 1963. The post-mortem examination on his dead body was conducted by Dr G. D. Agarwal, Civil Surgeon Deoria the same day at 4.30 p.m. The Civil Surgeon found the following ante-mortem injury on the dead body:

Stab wound 1" x 1/2" x abdominal cavity deep on the left side of the abdomen in the middle The wound was spindle-shaped with clean cut margin.

On internal examination he found the membrane of the peritoneum punctured and inflamed. The small intestines were punctured at two places and were inflamed. The large intestines were also punctured at one place. The cause of death, according to the doctor,

was shock and excessive bleeding and toxemia as a result of injury caused by sharp pointed weapon. In cross-examination he stated that the deceased had no injury marks on his palm and fingers. He however, added that he had not taken down healed up marks on the body of the deceased.

4. The accused pleaded not guilty and alleged their implication due to enmity, Moti accused stated that he was not the pattidar of Shyam Dutt accused and was not helping him in any manner in the litigation of Bilari. He further stated that his brother had given evidence against P. W. Lalji's son and it was Lalji who had got him implicated. Kanhai also denied the prosecution allegation and contended that he was the uncle of accused Moti. He said that he had nothing to do with the litigation of Smt. Bilari. He alleged his implication due to enmity with the witness. Shyam Dutt and Bhardul denied the prosecution allegations. Shyam Dutt admitted that he was Gram Sabhapati of the village. He, however, denied that he was doing pairvi for Smt. Bilari. He alleged enmity with the prosecution witnesses on account of election rivalry. Bhardul, who is a Gond, denied that he was in any way associated with Shyam Dutt or the other accused. He stated that he had enmity with P. W. Ghoor on account of civil litigation and that it was Ghoor who was responsible for his implication in this crime. No evidence was produced by the accused in support of their defence.

5. The prosecution case against the accused respondents rests on three pieces of evidence; first, on the report made by the deceased at the police station within about an hour of the occurrence, which has to be treated as a dying declaration made by the deceased to the police; secondly, on the dying declaration made by the deceased on the 27th September 1963 before a Magistrate 1st Class; and thirdly, on the eye-witness account of the occurrence given by Mahatam P. W. 1 and Ghoor P W 2 The prosecution has also sought to rely on the testimony of P. Ws. Rajbali, Lalji and Samatullah to show that soon after the actual assault on the deceased the accused persons were seen fleeing from the spot by them. It is the prosecution case and is not disputed by the defence, that there was civil litigation going on between Sukhari deceased on the one hand and Smt. Bilari on the other. It is further proved that Shyam Dutt accused was doing pairvi in that case on behalf of Smt. Bilari. According to the prosecution the motive for the crime was the enmity between the deceased and Shyam Dutt over the litigation of Smt. Bilari.

6. The most important evidence in support of the prosecution case is that of the two dying declarations of Sukhari deceased. It, therefore, remains to consider whether these dying declarations are such as can be Implicitly relied upon so as to fasten the guilt on the accused without any reasonable doubt. It will be seen that the report lodged by the deceased at the police station was got scribed by him and was written out at his dictation. In that report he stated that he along "with his son Mahatam and Ghoor was sleeping outside his house. Some time after midnight he was awakened from his sleep by the heavy impact of the blow administered on his abdomen with a ballam by Moti accused. On his shrieks his son Mahatam and Ghoor were aroused from their sleep and

immediately flashed their torches in the light of which the deceased as well as the two witnesses saw and recognised the assailants. The report went on to say that while Moti was armed with a spear the other three accused were carrying lathis. At the time when the attack with the bhala was made on the deceased the three accused had surrounded him. Soon after the assailants left the scene of occurrence, four persons of the village, namely, Ram Bali P. W. 5, Lalji P.W.6, Samatullah P.W.7 and one Bhonda Teli arrived there and informed the deceased that they had seen the accused persons running away in the light of torches which they had with them. The second dying declaration which was made by the deceased before the Magistrate also ascribed the bhala blow to Moti accused. The deceased also stated in that declaration that the other three accused had surrounded him from three sides when the assault was committed by Moti. The motive for the crime was stated to be enmity with Shyam Dutt Sabhapati. It was further made clear in this dying declaration that the deceased had seen the faces of the culprits in the light of the torch flashed by his son Mahatam.

7. Considerable criticism was directed against the two dying declarations made by the deceased. In the first place it was contended that the report was not scribed in the village as deposed to by Mahatam P. W. 1 but was written at the police station and that it was done in consultation with the Station Officer. In this connection reference was made to the statement of Ghoor P. W. 2 wherein he had stated that the report was written at the chhaoni of Bacha Baba which was at a distance of one bigha from the scene of occurrence. Reliance was also placed on the statement of Rajbali P. W. 5 who said that the report was written in his presence at the chhaoni of Bacha Baba. It was not suggested that Bacha Baba was in any way interested in getting the accused implicated. The evidence of the witnesses thus clearly established that the report was scribed in the village and not at the police station. The Station Officer repudiated the suggestion that the report was written at the police station in his presence. The statement of the Head Moharrir who recorded the first information report at the police station was to the effect that the Station Officer was not present at the police station and had gone out in connection with the investigation of some other case. The above statement stands corroborated from the chitthi mazrui written by the Head Constable to the doctor immediately on the arrival of the injured at the police station. That letter further shows that the Head Constable was holding charge of the police station in the absence of the Station Officer. It is thus clearly established that the report could not have been written at the police station in the presence of the Station Officer.

8. It was then suggested that the report was drawn up after consultation with the witnesses who were hostile to Shyam Dutt accused. Had this been so, one would have expected the deceased to ascribe a prominent part to Shyam Dutt in the occurrence. As we have noticed above, Shyam Dutt was not assigned any overt act in the actual assault on the deceased. On the other hand, it was Moti accused who belonged to another village and was not a direct relation of Shyam Dutt, who was said to have given the fatal spear blow to the deceased. These facts, in our opinion, go to indicate that what was stated in

the report were the actual events witnessed by the deceased and his sons in the course of the occurrence. The learned judge below was, in our opinion, wrong in assuming that the report must have been written at the police station. He was influenced in his conclusion by the statement of Mahatam that the daroga was present at the police station and that he had been interrogated by him there. Mahatam is an illiterate villager. The only police officer then present at the police station was the Head Constable, that there was nothing extraordinary if he thought that the person concerned was a daroga. In fact, the Head Constable was holding charge of the police station in the absence of the Station Officer and strictly speaking was a daroga for the time being. It was, therefore, wrong for the trial judge to draw an adverse inference against the prosecution and to proceed to hold that the report was made in consultation with the Station Officer.

9. The trial judge fell into another error in holding that the report made by the deceased was hit by Section 161 Cr. P. C. inasmuch as it was made after the investigation had commenced. The above observation is inconsistent with the finding of the learned judge that the report was made at the police station in the presence of the daroga. If the investigation had already commenced and the Station Officer had reached the village of occurrence then the report could not have been made in his presence at the thana. On the other hand, if the report was made in the presence of the Station Officer at the thana then that report would not be hit by Section 161. There is yet another reason why Section 161 was not applicable to the case. The report being a dying declaration could have been made at any time and would still be substantive evidence in the case. However, the question is purely academic and does not affect the merits of the case.

10. As to the value of the two dying declarations made by the deceased we are of the opinion that they are consistent with each other and have a ring of truth about them. Several criticisms were made by the learned counsel with respect to these dying declarations. One of the arguments advanced by the learned counsel was that in the first dying declaration the deceased had stated that he recognised the accused in the light of two torches which were flashed by his son Mahatam and Ghoor, whereas in his second dying declaration made to the Magistrate the deceased ascribed the torch only with Mahatam P. W. 1. It must be remembered that the only question relevant was whether there was sufficient light for the deceased to recognise his assailants. This fact was brought out in the statement of the deceased when he said that there was a torchlight which was flashed at the time of the occurrence. Whether the light available was of one torch or two torches was of no consequence. Moreover, at the time of the second statement the deceased must have been in considerable pain and if he did not give out all the minor details with respect to torches in the hands of witnesses that would not affect the validity or merits of the two dying declarations.

11. Yet another criticism levelled against the two dying declarations was that there was no mention in them about the scuffle between the deceased and the accused Moti in regard to the snatching of the spear which was wielded against the deceased. So far as the two dying declarations are concerned, they do not speak of any such struggle, and,

therefore, it is wholly incorrect to say that the dying declarations suffer from infirmity in this respect. Our attention was, however, invited to the statements of P, Ws. Mahatam and Ghooor that the deceased was snatching the spear towards his side and Moti accused was snatching it on his side. From this it was sought to be contended that the omission of this fact in the dying declarations indicated that the deceased was not able to recognise his assailants. It is trite that a dying declaration cannot be contradicted by reference to extraneous evidence of witnesses. It has to stand by itself or not at all. The witnesses may exaggerate the facts or introduce fresh matter in evidence in order to aggravate the offence. However, that would not in any way militate against the reliability of the dying declaration of the deceased. The learned judge fell into the error of thinking that this was an important circumstance affecting the validity of the dying declaration. In this he was not right for the dying declaration cannot be tested on the crucible of evidence of witnesses. No such rule of law has been placed before us; indeed such a doctrine would violate the fundamental principle of criminal jurisprudence, which is that the evidence in the nature of the dying declaration or otherwise has to be judged on its own in the light of the surrounding circumstances.

12. It was then said that the recognition of the assailants by the deceased as also by the witnesses was not possible as the night was a dark one and the deceased was given a single blow with a spear which would not take much time. It seems to us that this contention ignores the fundamental fact that a severe blow with a spear on the abdomen causing puncture of the peritoneum and injury to the intestines would require time to inflict, particularly because the spear after it had entered the body of the victim was bound to get entangled in the coils of intestines and considerable force and time would have to be used to pull it out. This, in our opinion, was an additional factor indicating that the deceased had enough opportunity to recognise his assailants. It is equally clear that while the attack was in progress the shrieks of the victim would attract persons sleeping near his cot. And witnesses having torches were likely to flash the same and recognise the assailants of the deceased. For all these reasons we are of opinion that the dying declarations made by the deceased furnish a strong and reliable piece of evidence to establish the charge against the respondents.

13. It is unnecessary to advert to the criticisms levelled against the testimony of those witnesses who claim to have seen the accused running away from the spot after the attack. Even if their testimony were ignored, there is still other cogent and reliable evidence on the record to prove the charge. After having given our anxious thought to the whole matter we have reached the conclusion that the finding of acquittal recorded by the learned judge below is wholly erroneous and deserves to be set aside.

14. We accordingly allow this appeal, set aside the acquittal of the respondents and convict them u/s 302/34 I. P. C. and sentence each of them to imprisonment for life. The respondents shall be taken into custody to serve out the sentences awarded to them.