
(2004) 04 AHC CK 0169

Allahabad High Court

Case No: Criminal Appeal No. 2132 of 1981

Binda (In Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: April 27, 2004

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 302, 307, 34

Citation: (2004) 3 ACR 2104

Hon'ble Judges: M.C. Jain, J; K.K. Misra, J

Bench: Division Bench

Advocate: S.K. Chaturvedi, N.K. Rastogi and L.K. Pathak, for the Appellant; A.K. Bhatt, A.G.A., for the Respondent

Final Decision: Allowed

Judgement

M.C. Jain, J.

Four persons, namely Chhatrapal, Binda, Vijai Singh and Mohan Lal were charge-sheeted in Case Crime No. 151 of 1980, police station Baberu, district Banda to face trial u/s 302, I.P.C. However, Chhatrapal came to be murdered and only the remaining three were tried u/s 302, I.P.C. read with Section 34, I.P.C. for the murder of one Raja Bhaiya son of Indrajeet Singh P.W. 1 in S.T. No. 17 of 1980, before the Ist Additional Sessions Judge, Banda. Out of them, Vijai Singh and Mohan Lal were acquitted as no role was assigned to them. The accused-Appellant Binda was convicted u/s 302, I.P.C. read with Section 34, I.P.C. and sentenced to life imprisonment by judgment dated 11.9.1981 which is impugned in this appeal.

2. The accused-Appellant absconded and non-bailable warrant was issued against him by this appellate court. Consequently, he came to be produced before this Court on 1.4.2004 and directed to be lodged in jail.

3. We have heard Sri L.K. Pathak, learned Counsel for the accused-Appellant Binda and Sri A.K. Bhatt, learned A.G.A. from the side of the State in opposition of the appeal.

4. The incident took place on 23.9.1977 at about 7.00 a.m. in village Tarayan, police station Baberu, district Banda and the F.I.R. was lodged the same day at 10.30 a.m. at the concerned police station by Indrajeet Singh P.W. 1 (father of the deceased). The distance of the police station from the place of occurrence was about 8 miles. The prosecution case was that the Appellant Binda along with three others, namely, Vijai Singh, Mohan Lal and Chhatrapal Singh armed with guns reached the "baithaka" where the deceased Raja Bhaiya was sleeping. At the exhortation of Vijai Singh and Mohan Lal, the accused-Appellant Binda and late Chhatrapal fired shots. Raja Bhaiya was seriously injured. He was taken to the Police Station Baberu where written report of the incident was lodged by his father Indrajeet Singh. The chick F.I.R. was prepared by Head Constable Siddheshwar Awasthi P.W. 5 and the case was registered. The injured Raja Bhaiya was sent to the Primary Health Centre, Baberu through constable Jan Mohammad whereafter he was sent for treatment to District Hospital Banda. At P.H.C. Baberu, Dr. D. N. Dwivedi P.W. 3 examined his injuries on 23.9.1977 at 11.50 a.m., preparing injury report Ext. Ka-2. His dying-declaration was also recorded in District Hospital Banda, the same day, i.e., 23.9.1977 at 5.45 p.m. by H.D. Dubey P.W. 7, the then S.D.M., Banda. He, thereafter, died on 5.10.1977 itself and autopsy of his dead body was performed on 6.10.1977 at 4.20 p.m. in District Hospital, Banda by Dr. K. L. Pillay P.W. 6. Initially the case was registered u/s 307, I.P.C., but was subsequently converted u/s 302, I.P.C. consequent upon the death of the victim.

5. Investigation was conducted by Sher Singh P.W. 4, S.O., Police Station Baberu in whose presence the F.I.R. was lodged and the case was registered. He even professed to record the statement of the victim u/s 161, Cr. P.C. before dispatching him to P.H.C. It was Dr. R.K. Mehrotra P.W. 8 who had certified the fit mental condition of the victim at the time of his dying declaration. It would be relevant to note down below the ante-mortem injuries found on the person of the deceased:

(1) Gunshot injury of entry 3 cm. ? 2 cm. ? full thickness of right forearm, 10 cm. below the elbow. Margins lacerated and inverted. Direction forward. Granulation tissue present over the wound base.

(2) Gunshot injury of exit 10 cm. ? 5 cm. on the middle third of the front of right forearm. Injury Nos. 1 and 2 communicated freely.

(3) Eight gunshot injuries of entry each measuring 1 cm. ? 1 cm. ? abdomen cavity deep over an area of 11 cm. ? 10 cm. on the right side wall of abdomen upper half, 24 cm. below the right axilla. Margins lacerated, infected and inverted. Direction backward from right to the left. Wound bases covered with slough.

(4) Abrasion 2 cm. ? 1.5 cm. on the side back above the right iliac crest.

(5) Five gunshot injuries of exit each measuring 1.5 cm. ? 1.5 cm. over an area of 10 cm. ? 10 cm. on the right side back lumber region. Wound edges inverted. Wound covered with slough.

(6) Two incised wounds each measuring 1.5 cm. ? 1 cm. ? muscle deep at 0.25 cm. apart on the left side back outer to 2nd and 3rd lumber vertebrae.

(7) Incised wound 1.5 cm. ? 1 cm. ? muscle deep on the right side back on the renal angle. Injury No. 3 communicated with injuries 5, 6 and 7.

(8) Linear opened wound stitched 21 cm. in length on the right front of abdomen-paramedial region.

6. He was aged about 22 years and about one day had passed since he died. The cause of death was shock, haemorrhage and toximia resulting from ante-mortem injuries.

7. The defence was of denial.

8. Indrajeet Singh P.W. 1 father of the deceased and Lal Ji P.W. 2 brother of the deceased were produced as alleged eye-witnesses of the incident. As mentioned above, the Investigating Officer also claimed to have recorded the statement of the victim at the police station Baberu before he was dispatched to P.H.C. It was in tune of the statements of the eye-witnesses. There was a dying declaration of the deceased recorded by S.D.M., also whereupon there was certificate of Doctor about his fit mental condition as we have indicated above.

9. The trial Judge, on scrutiny, rejected the oral testimony of so-called eye-witnesses as also the statement of the victim claimed to have been recorded by the Investigating Officer u/s 161, Cr. P.C. but relying upon the dying declaration of the deceased recorded by the S.D.M., he convicted the accused-Appellant Binda while acquitting the other two Vijai Singh and Mohan Lal. Naturally, Binda is aggrieved by the impugned judgment and has come up in the appeal.

10. The argument of learned Counsel for the accused-Appellant is that there being conflict between the testimony of so-called eye-witnesses taken together with the statement of the victim purportedly recorded by the Investigating Officer u/s 161, Cr. P.C. on the one hand and the dying-declaration recorded by the Magistrate on the other, the latter could not safely be accepted to be sufficient to warrant the conviction of the accused-Appellant Binda. He further stressed that the dying-declaration of the deceased, relied upon by the court below, could not be accepted for this reason too that there were incised wounds also on the person of the deceased which went unexplained completely. On going through the evidence carefully and examining the dying declaration as also the post-mortem report, we find substantial force in the submission of the learned Counsel for the accused Appellant.

11. Obviously, there came on record two versions of the prosecution as to the place of occurrence. According to the F.I.R. and the eye-witness account of Indrajeet P.W. 1 and Lalji P.W. 2, the fire was made while deceased Raja Bhaiya was sleeping in the "baithaka". The same was the statement purported to have been made by the deceased u/s 161, Cr. P.C. to the Investigating Officer at the police station. It was clearly at variance from the dying declaration of the deceased recorded by the Magistrate on 23.9.1977 at 5.45 p.m. in District Hospital, Banda. Therein the victim stated that the incident took place at the roof of his house where he was sleeping. The time of the incident was also given by him as about 4.00 O'clock in the morning whereas according to the F.I.R. and eye-witness account the incident had taken place at about 7.00 a.m. The lower court concluded that the place of incident was concocted by Indrajeet P.W. 1 and Lalji P.W. 2 in order to prove themselves to be the eye-witnesses of the incident and that the Investigating Officer also became party to their design, toeing the line suggested by them. It was for this reason that the statement of the deceased purported to have been recorded u/s 161, Cr. P.C. also carried the same story as given out in the F.I.R. by Indrajeet.

12. Anyway, the point of the matter is that the version of the F.I.R. and the eye-witness account given by Indrajeet P.W. 1 and Lalji P.W. 2 did not reconcile with the dying declaration of the deceased recorded by the Magistrate. It enjoined a duty to analyse the dying declaration with utmost care to arrive at a conclusion whether the same alone could be accepted as the basis for recording conviction. True, great sanctity is attached to a dying declaration because it is a statement of a dying person. It is expected that a dying man would not meet his maker with a lie in his mouth. It also does not brook any debate that dying declaration alone can form basis of conviction provided the surrounding circumstances do not make a dent in it. Each case must be determined on its own facts keeping in view all the circumstances in which the dying declaration was made.

13. Supreme Court in the case of [Khushal Rao Vs. The State of Bombay](#), held that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence. A dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence.

14. In the instant case, even on ignoring the conflict between the F.I.R. version taken together with eye-witness account on the one hand and the dying declaration of the deceased recorded by the Magistrate on the other, it (dying declaration) recorded by the Magistrate suffers from another serious infirmity. That infirmity is that as per the post-mortem report, the deceased had sustained incised wounds also being ante-mortem injury Nos. 6 and 7:

(6) Two incised wounds each measuring 1.5 cm. x 1 cm. x muscle deep at 0.25 cm. apart on the left side back outer to 2nd and 3rd lumbar vertebrae.

(7) Incised wound 1.5 cm. ? 1 cm. ? muscle deep on the right side back on the renal angle. Injury No. 3 communicated with injury Nos. 5, 6 and 7.

15. Dr. K. L. Pillay, who conducted the autopsy on the dead body of the deceased categorically stated that the ante-mortem injury No. 7 had been caused by some sharp edged weapon. Obviously, there is no explanation for sharp edged injuries sustained by the deceased. The deceased himself also did not say anything in this regard in his dying declaration. This aspect of the matter was completely ignored and not examined by the trial court. In his dying declaration recorded by the Magistrate, the deceased stated that he awoke on receiving the shot and raised shout. He saw Chhatrapal and Binda accused Appellants running on a turn with their faces towards him. He saw both of them scaling down the roof. He got up and saw Mohan Lal son of Ram Lal and Vijai Singh son of Jaddu standing down the roof in the street and they joined Chhatrapal and Binda in running after, they (Chhatrapal and Binda) had scaled down the roof. According to him, Chhatrapal had a double barrel gun in his hand whereas Binda had a single barrel gun with him. They were adjusting their guns when he first saw them. They refilled the guns and scaled down the roof. They had no enmity with them, but they were outlaws. He fell down on the roof and became unconscious. What we wish to emphasise is that there is not even a whisper about the use of any sharp edged weapon and it is wholly unexplained as to how did he sustain the incised wounds. As per his own statement in the dying declaration, he awoke on receiving the shot, meaning thereby that he did not see the actual shooting. It is doubtful that in a moment of crisis, awaking from his slumber abruptly on receiving the shot, he could correctly identify the persons whom he named. The dying declaration of the deceased recorded by the Magistrate thus suffers from serious infirmity even with regard to the nature of injuries sustained by him. It would, therefore, not be safe to sustain the conviction of the accused-Appellant Binda on the basis of uncorroborated dying declaration of the deceased which as we have found, itself suffers from serious infirmities.

16. In view of the above discussion, we allow this appeal and set aside the conviction and sentence recorded against accused Appellant Binda by the court below. The Appellant is in jail consequent upon issuance of non-bailable warrant by this Court. He shall be set at liberty forthwith, if not wanted in any other connection.

Let a copy of this judgment along with record of the case be immediately sent to court below for necessary entries in the relevant register under intimation of compliance to this Court within two months.