

(1992) 11 AHC CK 0103**Allahabad High Court****Case No:** Criminal Appeal No. 2627 of 1979

Damber and Another

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Nov. 7, 1992**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 302, 34, 404

Citation: (1993) 17 ACR 1**Hon'ble Judges:** Virendra Saran, J; G.D. Dube, J**Bench:** Division Bench**Advocate:** Amar Saran, for the Appellant;**Judgement**

Virendra Saran, J.

Damber son of Hoti Lal and his wife Smt. Jaiwanti have filed this appeal against judgment and order dated 28-8-1970 of Sri Prem Singh. VI Additional Sessions Judge, Etah, passed in Sessions Trial No. 656 of 1978. The learned Sessions Judge has convicted and sentenced Appellant Damber u/s 302 IPC to Imprisonment for Life and u/s 404 read with Section 34 IPC to one year's RI. Appellant Smt. Jaiwanti has been convicted and sentenced u/s 302 read with Section 34 IPC to Imprisonment for Life and u/s 404 IPC to one year's R.I. Sentences of the Appellants have been ordered to run concurrently By the same judgment the learned Sessions Judge has acquitted Bhoop Singh who happens to be brother of Appellant Damber.

2. The prosecution case is that deceased Hoti Lal was married to Smt. Ram Devi, Appellant Damber and Bhoop Singh, since acquitted, are sons of Hoti Lal from Smt. Ram Devi. He then married Smt. Jaiwanti (deceased) but as luck would have it Smt. Jaiwanti gave birth only to four daughters and no son. Her daughters are Maya, Sheela, Guddo and Omshri, of these Maya and Sheela had been married and at the time of the incident they were residing with their husbands. At the time of the

incident Guddo was about 6 years of age and Omshri was nine years old. The prosecution case is that deceased Hoti Lal owned about 25 to 26 Bighas of land and he had given half of his land to his sons Damber and Bhoop Singh (accused of the present case) for cultivation. Further case of the prosecution is that Damber had some dispute with Hoti Lal and hence Hoti Lal took back land from Damber and Bhoop Singh and started cultivating the same. It is alleged by the prosecution that Hoti Lal and Damber had taken a loan of Rs. 15,000/- from Canara Bank but they failed to repay the loan and there was some dispute between them. Since the loan had not been repaid, Collection Amin came to their village, Adhapura, for recovery of the said loan from Hoti Lal and Damber. Damber slipped away and Hoti Lal sought time from the Amin upto Rakshabandhan to make the payment. In the evening when Damber returned there was some dispute between him and Hoti Lal. The prosecution also alleges that there was also a quarrel (JHAGR) between appellants Smt. Jaiwanti and her step mother-in-law, Smt. Jaiwanti (deceased).

3. According to the prosecution case, the incident took place in the night intervening 6/7-8-1978 at about 12 O' Clock and FIR is said to have been lodged by PW 1 Beni Ram at P.S. Mahehara, district Etch on 7-8-1978 at 10.30 A.M. at a distance of 7 Miles from the spot. The prosecution case, disclosed from the FIR, is that on the fateful night Beniram heard weeping like sound coming from the house of Hoti Lal at about 12 O' Clock in the night. On hearing the said sound he and Chunni Lal and others rushed to the house of deceased Hoti Lal. They saw Appellants Damber and his wife Smt. Jaiwanti coming out of the house and escaping. When he went inside the house of Hoti Lal he found that Hoti Lal and his wife Smt. Jaiwanti were lying dead with their throats cut. It is further stated in the FIR that daughters of the deceased informed that Damber had cut the deceased with "Gandasa" while Damber's wife was catching hold.

4. On the lodging of the FIR Crime No. 189 of 1979 was registered at P.S. Marehara and investigation was taken up by PW 6 S.I. Sukhvir Sharma. He reached the spot and after drawing up the inquest reports he despatched the dead bodies for postmortem examination. After completing the investigation he submitted charge sheet against Appellants and Bhup Singh, brother of Appellant Damber,

5. PW 9 Dr. R.P. Dixit conducted the post-mortem examination on the dead body of Hoti Lal on 8-8-1978 at 12 Noon and he found the following ante-mortem injuries on his person:

Ante-mortem injuries

1. Incised wound 10 cm x 3 cm on the right side of neck, 1" below the angle of mandible transversely placed. Large blood vessels of right head and face are cut in the line of wound. Trachea and esophagus cut completely and transversely. Both ends are exposing.

2. Incised wound 8 cm x 2 cm on the Rt. side of neck I below and parallel to Inj. No. 1. It is muscle deep. External vessels cut in the line of wound.

3. Left index fingers completely cut obliquely in the terminal phalanx by sharp edge-incised wound, clean cut margins. Part absent as marked by (see) Area in circumference 2 cm x 1 cm.

On internal examination, the Doctor found that stomach was empty, small intestines were full of digested food material and gases and large intestines were full of faecal matter. According to the Doctor the death was due to shock and hemorrhage as a result of injuries.

6. PW 10 D.R.P.K. Jain conducted the post-mortem examination on the dead body of Smt. Jaiwanti on 8-8-1978 at 1 P.M. The doctor noted the following ante-mortem Injuries on the person of Smt. Jaiwanti.

Ante-mortem injuries

1. Incised wound over the left side of neck 10 x 5 cm, Extending on the front of neck. Large blood vessels, trachea and esophagus cut. In the line of wound Margins clean cut, 5 cm below the angle of mandible, transversely placed.

2. Incised wound over the left side of neck 9 cm x 3 cm, margins clean cut. 3 cm below and parallel to injury No. 1. It is skin deep.

On internal examination, the Doctor found stomach empty, small intestines contain gases and food material and large intestines were full of gases and faecal matter. According to the doctor the death was due to shock and hemorrhage on account of injuries.

7. The case was committed to the court of Sessions. The Appellants as well as Bhoop Singh pleaded not guilty. The accused pleaded that their relations with their father Hoti Lal were cordial and they Damber and Bhoop Singh further pleaded that in their Nanibal in village Nagla. Aghat there is no one to look after the cultivation so they stay there. Smt. Jaiwanti pleaded that she had gone to her "Maika" on the occasion of the festival of "Teej".

8. In support of its case, the prosecution has examined ten witnesses. PW 1 Beniram is the first informant of the case. However, he has been declared hostile. PW 3 Ajuddhi is another witness of fact but he has not supported the prosecution case. PW 4 Km. Oimhri and PW 5 Km. Guddo are the two eye-witnesses. PW 2 Ganpat is Lekhpal of the village PW 6 S.I. Sukhvir Sharma is the Investigating Officer of the case PW 7 Kalyan Singh is constable clerk who had taken down the FIR and registered the case. PW 8 Bhajan Lal is a formal witness who had taken the dead body to the mortuary.

9. On appraisal of the evidence, the learned Sessions Judge found that the prosecution has failed to prove its case so far as accused Bhoop Singh was

concerned. The learned Sessions Judge, however, convicted and sentenced Appellants as mentioned above they have now come up in appeal.

10. We have heard Sri Amar Saran, learned Counsel for the Appellants and the learned State counsel at length.

11. The learned Counsel for the Appellants has submitted that the Appellants had no motive to commit the crime and the evidence on the record shows that their relations with their father Hoti Lal were cordial and there was no enmity between the deceased and the accused. We have gone through the evidence on the record. The prosecution has come out with a case that there were disputes about agricultural land between Hoti Lal on one hand and his sons, Damber and his brother Bhoop Singh (since acquitted) on the other hand. The sole witness who has deposed about this motive is Beni Ram PW 1. He has stated that Hoti Lal owned 25 to 26 Bighas land out of which half was cultivated by Appellant Damber and the rest half was cultivated by deceased Hoti Lal. The witness further states that there was enmity between Hoti Lal and Damber and, therefore, Hoti Lal took back that land from Damber and on this account Damber became annoyed with Hoti Lal. PW 1 Beni Ram on his own showing had his own axe to grind against the Appellants. He has admitted that he was litigating with deceased Hoti Lal. In para 14 of his statement he has admitted that he and Hoti Lal were litigating about the land. He further stated that in the consolidation proceedings his land was separated from the land of Hoti Lal but still there was dispute regarding valuation of the land and a case was sought between the two in the court of Deputy Saheb (Assistant Collector). The witness lost the case and he filed an appeal before the Commissioner. After the death of Hoti Lal, Appellant Damber and coaccused Bhoop Singh were impleaded as respondents in the appeal. There is force in the submission made by the learned defence counsel that Beni Ram was inimical towards deceased Hoti Lal as well as his sons Damber and Bhoop Singh because of the long drawn litigation about land. The daughters of the deceased Km. Omshri and Km. Gaddo have not corroborated PW 1 Beni Ram on the point of this motive. Similarly the second motive suggested by Beni Ram that Hoti Lal and Damber had taken a loan of Rs. 1500/- from Bank and regarding this loan there were differences between the two and that a day prior to the incident Amin came for the realisation of the loan amount but Damber slipped away and the Amin left on the assurance of Hoti Lal that the payment would be made very shortly. Thereafter in the evening there was an exchange of abuses between Damber and Hoti Lal. Even this motive set up by Beni Ram is not corroborated by PW 4 Km. Omshri and PW 5 Km. Guddo the daughters of deceased Hoti Lal. On the other hand the evidence on the record shows that not only Appellant Damber, his wife Appellant Smt. Jaiwanti and his brother co-accused Bhoop Singh were living in the same house in different rooms. This is admitted by PW 1 Beni Ram and is also borne out from the site plan prepared by the Investigating Officer. It is also significant to note that in the site plan only one "Rasoe" (kitchen) is shown in the Chappar. It is admitted case of the prosecution that Appellant Damber and coaccused Bhoop

Singh are sons of deceased Hoti Lal. Hoti Lal had married for the second time with Smt. Jaiwanti. The marriage took place long back and two of the daughters of Smt. Jaiwanti were also married Smt. Jaiwanti having not given birth to any male child it was but natural for deceased Hoti Lal not to break away with his sons (Damber and Bhoop Singh) The evidence of this fact finds support from the fact that all of them were presiding jointly. The evidence regarding the loan of Rs. 1500/- does not give strength to the prosecution case and on the other hand it gives strength to the arguments raised by the learned Counsel for the defense. The prosecution has filed Ext. 5, a letter written by the Manager, Canara Bank to the Station Officer In which it is mentioned that on 13-4-1976 Damber as also Hoti Lal were given separate loans of Rs 1500/- each on the pretext of purchasing of cloth by Damber and purchase of sheep by Hoti Lal. The common design of both Damber and Hoti Lal was to take loan on some pretext and it appears that neither of them intended to repay the amount. It is common knowledge that most of such loans are written off and this was the hope of Damber and Hoti Lal as well. However, beside the ipse dixit of PW 1 Beni Ram there is no other evidence which supports the prosecution case regarding any quarrel between Hoti Lal and Damber. The corroboration of this happening is also not forthcoming from the Amin who has been withheld from the witness-box. The circumstances do not go to show that there was any enmity much less such deep rooted enmity between accused and Hoti Lal which may give motive to accused to eliminate Hoti Lal and Smt. Jaiwanti. On the other hand, if Hoti Lal and Smt. Jaiwanti had been murdered, Beni Ram could have taken advantage of the situation and poisoned the minds of the daughters of Hoti Lal to implicate the Appellants. By doing so the daughters would also be benefited by expelling the step brothers from the agricultural land and other property of the deceased. In this regard it is noteworthy that initially Damber and his wife Smt. Jaiwanti were made accused in the FIR but later on even Bhoop Singh brother of Damber, a lad of 15 years of age, was also falsely implicated so that he may not lay a claim over the land. This motive set up by the prosecution has not been established.

12. Adverting to the evidence regarding participation of the Appellants, it will be noticed that there are four witnesses who have been produced by the prosecution. PW 1 Beni Ram who lodged the FIR is not an eye witness. In the FIR he stated that he saw the two Appellants coming" out and escaping from the house at night shortly after he had heard sound of weeping. As mentioned earlier, the witness was having litigation with the deceased and after the death of Hoti Lal with Damber and co-accused Bhoop Singh. PW 1 Beni Ram did not support the prosecution case in line with the allegations made in the FIR. In para 5 of his examination-in-chief he stated that when he reached on the path way he simply saw a woman going away whom he could not recognise as it was a dark night. He specifically denied that he had seen Bhup Singh, Damber or Appellant Smt. Jaiwanti coming out of the said house. He even denied he was then in the way. This witness was declared hostile and was cross-examined by the Public Prosecutor. He again denied that he saw

Bhup Singh coming out with a lantern from the house of the deceased, He also denied that he saw Appellants coming out of the house. He disowned the allegations made in the FIR and his statement u/s 161 Code of Criminal Procedure. Thus the evidence of PW 1 Beni Ram in court does not incriminate the Appellants in any manner.

13. The next witness is PW 3 Ajudhi. This witness also did not support the prosecution case. He stated that he was sleeping at his own house. He goes on to state that he woke up at 4 A.M. and he did not see anything. Daughters of Hoti Lal were raising alarm. When he went to the house of deceased he found them dead. He subsequently stated that he did not see anyone coming out from the said house or going on the way. The witness was declared hostile but nothing has come out in his cross-examination which may go to corroborate the prosecution case.

14. PW 4 Omshri and PW 5 Guddo are child witnesses. At the time of the incident their age would be about 9 years and 6 years respectively. They were not even administered oath. It does not appear that the learned Sessions Judge has put any question to these child witnesses to test whether they understood the need of telling the truth or whether they were under the evil influence of any tutoring. In the case of *Ram Hazoor v. State* 1959 ALJ 239 this Court observed.

...Although It is not necessary to have a preliminary examination, namely, *Voire dire*, of a child witness in order to make his testimony admissible, nevertheless, we are of the opinion that such a course is desirable and should be resorted to, for it offers an opportunity to the Court to assess the mental capacity of a child witness. The difficulty with child witnesses often is that they can be made to believe in things which they themselves have not seen and this belief, when once it gets hold of a child witness, is difficult to shake. It is also well known that child witnesses can be tutored much better than adults and further that when once a child witness has been properly tutored then such a child witness cannot easily be shaken in cross-examination. A preliminary examination has the merit of leaving the child witness in the hands of the Court for it to discover by asking questions which have no relevance or connection with the facts about which that witness was expected to give evidence, so that the evil effects of tutoring could mar the assessment of the mental capacity of the witness by the Court.

It was further observed in *Ram Hazoor's* case (supra) that the trial Judge should preserve on the record the questions which have been put to test the child witness. The Division Bench also relied upon the case of *Rameshwar s/o Kalyan Singh v. The State of Rajasthan* 1952 SC 54, wherein the apex court has gone to the extent that failure to record the evidence of any child witness, the duty of speaking the truth, it will seriously affect the credibility of the witness so much so that in some cases it may be necessary to reject the evidence altogether.

15. We have given our anxious consideration to evidence of PW 4 Omshri and PW 5 Km. Guddo and are of the opinion that neither of them was in a position to recognise the assailants and further these witnesses are not truthful witnesses. Even the learned Sessions Judge has acquitted co-accused Bhup Singh to whom these two witnesses gave a positive role of showing lantern and of having uttered words that in case ear rings of Smt. Jaiwanti were not coming out of her, ears may be cut. These witnesses have been found to have falsely roped in an innocent lad of 15 years of age who happened to be their own step brother and they assigned him the role of showing lantern and asking Appellant Oamber to cut the ear of Smt. Jaiwanti if the ear-rings were not coming out.

16. The conduct of PW 4 Omshri and PW 5 Km. Guddo in implicating their Innocent young brother Bhoop Singh in a serious crime which could have been meted even with capital punishment goes to show that these two witnesses have absolutely no regard for truth. Surely some one was master minding the false implication of Bhoop Singh and putting perjured statements in the mouths of these two young girls. If Bhup Singh could be falsely Implicated his brother Damber and Damber's wife Smt Jaiwanti could also likewise be falsely implicated.

17. Once it is held that Bhup Singh did not participate in the crime the story of holding a lantern by Bhup Singh also evaporates in the thin air. There is no mention of any light much less the lantern light in the FIR. Further story regarding the accused Bhoop Singh speaking out at the time of crime and his exhorting to cut the ear of deceased Jaiwanti is nothing but falsehood. The prosecution has also tried to improve upon its case and PW 4 Omshri and PW 5 Km Guddo were made to say that the accused also committed theft by breaking open the lock of the adjoining room. The Investigating Officer contradicted these witnesses and stated that he did not find any lock broken and on the other hand a lock was hanging at the door. PW 4 Omshri and PW 5 Km Guddo were tutored to speak a barrage of lies with a purpose Both of them were admittedly fast asleep. It is the admitted case of the prosecution that it was a dark night and it was also raining. If the lantern was not there it was pitch dark inside the room where Smt. Jaiwanti deceased and PW 4 and PW 5 were sleeping. If some one sneaked in the room under the cover of darkness and after inflicting two quick blows took to heels by the time Omshri and Guddo could be aroused from deep slumber, collect their wits recognition of the assailants was not possible.

18. The story given by PW 4 Omshri and PW 5 Guddo that they were sleeping on the same cot as Smt. Jaiwanti also does not appear to be true. PW 4 Omshri stated that her clothes were smeared with blood of her mother and when the Investigating Officer came on the spots he had seen the blood stained clothes. She further stated that the Investigating Officer took out her clothes as well as the clothes of PW 5 Guddo. PW 5 Guddo stated that her clothes were taken out by Beni on the arrival of the Investigating Officer. The Investigating Officer has given a He to these

statements of PW 4 Omshri and PW 5 Guddo. In para 11 of the cross-examination the Investigating Officer specifically stated that he did not see any such cloth smeared with blood and did not take any such cloth into his possession. It might be that these two girls were sleeping separately and were fast asleep. They could know of the murder subsequently because the blows on the two deceased were given cutting their throats and they could hardly even cry. Hoti Lal's post mortem report shows that his throats was cut through and through below injury No 1 transversely. Similarly Smt. Jalwant's post mortem report shows that her trachea was cut transversely under injury No. 1 through and through. Both the deceased must have been rendered speechless and rendered incapable of raising any cry.

19. The role assigned to Smt. Jaiwanti Appellant is also highly incredible. P.W. 4 Omshri has stated in her examination-in-chief that while co-accused Bhoop Singh (since acquitted) was holding a lantern, Appellant Jaiwanti was catching hold the hands and leg of her mother. Admittedly, deceased Smt. Jaiwanti was fast asleep and there was no necessity of catching hold of Smt. Jaiwanti. In para 15 of the cross-examination Omshri changed her statement and stated that the co-accused Bhoop Singh caught hold the hands of her mother while Appellant Smt. Jaiwanti caught hold the legs. In further cross-examination the witnesses having realised the discrepancy turned round and again said that she has made a wrong statement regarding the catching hold by Bhoop Singh.

20. The conduct of the Investigating Officer in not making a search of the apartments of the Appellants also creates doubts in the prosecution case. It appears that as the Investigating Officer was aware of the hard reality that the Appellants were not involved in the crime and, therefore, he understood the uselessness of making any search of the rooms of Appellants as also of co-accused Bhoop Singh.

21. The conduct of Beni Ram is also highly suspicious. He was litigating with the deceased No wonder he might be involved in the crime On one hand he eliminated Hoti Lal and his wife and on the other hand he lodged a report implicating Hoti Lal's grown up son Oamber as also Smt. Jaiwanti to be put them behind the bars. The other son Bhoop Singh was a child hot even he, too, was later on roped in. After the litigation over the land had ended he again turned round and was declared hostile.

22. In view of the above observations, we are of the opinion that the Appellants are entitled to be acquitted.

23. This appeal is allowed. The conviction and sentence passed against the Appellants are set aside. The Appellants are on bail. They need not surrender. Their bail bonds are discharged.