

## Daya Shankar Vs State of U.P.

**Court:** Allahabad High Court

**Date of Decision:** July 13, 2007

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) â€” Section 161, 313  
Penal Code, 1860 (IPC) â€” Section 147, 149, 302

**Hon'ble Judges:** R.N. Misra, J; Poonam Srivastav, J

**Bench:** Division Bench

**Final Decision:** Dismissed

### Judgement

Poonam Srivastav, J.

These are two connected appeals on behalf of the appellant. The accused Daya Shankar preferred Criminal Appeal

No. 1305 of 1982 and accused Radhey Shyam, Kallu, Ram Kishore and Bhola had preferred Criminal Appeal No. 1336 of 1982 challenging the

judgement and order dated 17.5.1982 passed by Sri L.S. Shukla, 17th Addition Session Judge, Fatehpur in Session Trial No. 318 of 1981. The

accused Radhey Shyam and Bhola in Criminal Appeal No. 1336 of 1982 died during pendency of this appeal. We proceed to hear these appeals

on behalf of accused Daya Shankar, Kallu and Ram Kishore.

2. All the appellants have been convicted u/s 302/149 I.P.C. and sentenced to undergo life imprisonment and one year R.I. each u/s 147 I.P.C.

Both the sentences are directed to run concurrently.

3. According to the prosecution, the occurrence is alleged to have taken place on 14.2.1981 at 4.00 P.M. In village Perethi. Smt. Kamla Devi,

wife of deceased Surajdin lodged a first information report against the accused/appellant including two appellants namely Radhey Shyam and

Bhola who died during pendency of this appeal, at Police Station Lalnali on the same day i.e. 14.2.1981 at 8.45 P.M. The prosecution story as

unfolded in the first information report is that an offence of dacoity was committed in the house of one Bhagwan Saran Kalar of the village. The

appellant Daya Shankar was an accused in the said dacoity and deceased Surajdin was one of the prosecution witness which resulted in bad blood

between the accused Daya Shankar and deceased Surajdin. The other accused are close associate of accused Daya Shankar. Bhola Chamar of

the village took Surajdin in the afternoon on the pretext to show Dhanni. On the date and time of occurrence when the complainant Smt. Kamla

Devi arrived in the fields towards Bare Bagaha, she heard cries of her husband and both mother and son ran towards the direction from where the

shrieks were heard. A number of other witnesses including the wife of elder brother of husband of Kamla Devi (Jethani), who were working in

nearby fields rushed to the place of the incident after hearing hue and cry and they saw the accused tying the legs and hands and finally strangled

the deceased with a muffler by tying it round his neck. The accused Radhey Shyam was sitting on the chest of her husband and held his hands

tightly. Accused Kallu and Daya Shankar tighten the muffler round the neck of the deceased. The accused Ram Kishore took two or three sticks

of Arhar plant and penetrated in the anus of the deceased which resulted in the death of Surajdin. The accused threatened the witnesses including

the complainant and her son with dire consequences if they tried to intervene and ran away towards South-east of Arhar field.

4. The first information report was lodged by Smt. Kamla Devi at the police station which was situated at a distance of 16 kilometers. According

to the statement of the complainant, she went to the police station half way by cycle and remaining distance was covered by a truck.

5. Autopsy was performed on the body of the deceased on 15.2.1981 at 3.00 P.M. by Dr. V.K. Tripathi. According to Post Mortem Report,

following ante mortem injuries were found on the body of the deceased.

(1) Multiple Abraded contusion in area of 5" x 8" on the front & lateral side of neck & chin clotted blood in the subcutaneous tissue, muscles and

other structure present underneath, Hyoid bone fractured.

(2) Abrasion 3" x 1/2" on the Rt. side back middle third part.

(3) Abrasion 5" x 3" on the Lt. side back middle third part.

(4) Abrasion Multiple in area of 5" x 5" on the left lip.

(5) Lacerated of the Anal canal with abrasion all round.

6. According to the opinion of doctor, cause of death was due to asphyxia" on account of strangulation. According to the doctor death was

caused on the date and time of occurrence as shown in the first information report and the injuries were sufficient to cause death. The post mortem

report is Exhibit Ka 3. On internal examination, Dr. Tiwari found brain larynx, Trachea, bronchi of the deceased congested containing frothy,

blood mucus. Both the lungs were also congested. Right side of the heart was full whereas left was empty. Clotted blood was found in the

abdomen underneath rectum, the tongue was swollen and bruised. Contents of stomach contained 1 pound semi digested food, large intestine was

empty. Small intestine contains digested food. Ractum was lacerated. Liver, spleen and kidney was congested and bladder was empty.

7. Prosecution examined complainant Smt. Kamla Devi as PW-1. Ramesh Babu, nephew of Smt. Kamla Devi as PW-2. These two witnesses are

witnesses of fact. Dr. V.K. Tiwari who had conducted autopsy, was examined as PW-3 and Sree Nath Pathak, who had investigated the case,

was examined as PW-4. Two witnesses were examined by the defence. Dr. S.N. Mishra as DW-1 and Sri Ram Pathak, B.S.A.

8. The accused were examined u/s 313 Cr.P.C. Accused Daya Shankar denied the incident and also the fact that he had any association with

accused Kallu and Radhey Shyam. He had no enmity with the deceased Surajdin but he had once caught Bhagwan Saran with a woman in the

field. On account of this reason Daya Shankar was implicated in the dacoity case. All the witnesses had filed their affidavits in the aforesaid case

and Daya Shankar was acquired. The other accused also denied their involvement in the occurrence and they stated that they have been implicated

falsely due to enmity on account of castism prevalent in the village. The accused Ram Kishore also stated that he has no enmity with any one in the

village but only with one Vishnukant who was a close associate of constable Tiwariji. The accused Ram Kishore is Dhobi by caste. His enmity was

on account of washing clothes at the tank of Vishnukant.

9. Accused Bhola stated in his statement u/s 313 Cr.P.C. that there was some quarrel with the co-accused Kallu, Radhey Shyam and Daya

Shankar. He has been implicated on account of Brahmin community of his village Since the accused refused to work without any payment in the

fields of the brahmins and he spoke openly against them. Accused Kallu stated that he is a handicapped person. His hands do not function

normally and he is not able to lift his hands. He has also been implicated on account of enmity.

10. Heard Sri P.N. Mishra, Senior Advocate assisted by Sri Apul Mishra Advocate for the accused/appellant. The first argument advanced on

behalf of the appellants is lack of motive. It is submitted that the motive assigned in the first information report as well as by the prosecution

witnesses is very weak and non existent. PW-1 has stated that here is one Bhagwan Saran Kalar of the same village who had lodged a report

against the accused Daya Shankar regarding dacoity committed in his house 1½ year before the murder, Daya Shankar bore grudge against the

deceased as he believed that the report of dacoity was lodged at his instance. The other accused are close associates of accused Daya Shankar

and it was to vindicate the old grudge, murder was committed. It is argued and pointed out that PW-1, in her cross examination has denied any

knowledge about the fact when and where the report was lodged. She has also denied whether the deceased Surajdin, Shiv Nandan and Sidh

Gopal were present at that time or not. She also denied whether any affidavit was filed by her husband (deceased) and other witnesses of the

dacoity case and also she was unaware about the final report submitted by the police against Daya Shankar in the dacoity case.

11. Learned Counsel for the appellant has pointed out that PW-1 has clearly admitted that there was no other enmity with the accused Daya

Shankar of the deceased but for the dacoity case. Cross examination of PW-2 Ramesh Babu has also been placed before us to show that he was

also not aware about the fact whether accused Daya Shankar was a rested in the dacoity case or not or he was beaten by the police and on the

basis of denial expressed by PW-2 regarding dacoity case, it is emphatically argued by Sri P.N. Mishra that the motive shown by the prosecution

neither did exist nor was established. In absence of any motive, the accused will not go to the extent of murdering the deceased Surajdin. It is also

emphatically stated by the learned Counsel that the prosecution has failed to bring anything on record such as the first information report, affidavits

filed by witnesses and the order passed in the dacoity case and also Bhagwan Saran Kalar in whose house dacoity was committed has not been

produced. Since the deceased himself had also filed an affidavit in favour of the accused Daya Shankar, there was no reason why he should bear a

grudge whatsoever against the deceased and commit the crime.

12. The next argument advanced by the learned Counsel is that the presence of eye witnesses namely PW-I and PW-2 stands completely ruled

out, specially for the reason that she has admitted her son Sukesh to be present at the time of occurrence but he has not been produced by

prosecution. There was no purpose for the lady (PW-1) to be present in the field at the time when her son Sukesh was in the school, therefore, the

presence of PW-1 stands ruled out. The presence of PW-2 is also disputed for the reason that he was teacher in the school and since the school

was opened on that date and PW-2 was present in the school, there was no occasion for him to reach at the place of occurrence. At most he can

be said to be a chance witness. The presence of two witnesses is also disputed that the independent witnesses namely Smt. Kewla, Johara Bibi

Shyam Lal and Raja Ram shown in the first information report have not been produced. The statement of the prosecution witnesses have

deliberately been withheld by the prosecution. PW-1 has, specifically stated that there are fields of other persons also in the adjoining area where

the occurrence had taken place who had arrived at the place of occurrence on hearing shrieks but they have deliberately been withheld, by the

prosecution for obvious reason and therefore, the presence of the witnesses appears to be highly doubtful. Besides, the first information report is

also challenged on several counts; the first argument is that the first information report is prompt one and the complainant who is the wife of the

deceased, was not in a position to give such a graphic version as given out in the first information report. She would not be in a position to dictate

the F.I.R. and narrate the incident in such a detail as it is shown in the first information report. Ramesh Babu is scribe of the first information report

but it is signed by PW-1 Smt. Kamla wife of the deceased. It is further submitted that perusal of the, written report shows that its recital is not

spontaneous. The manner of occurrence, the specific act of individual accused are in such details which is difficult to be accepted whereas PW-1

has specifically stated that at the relevant time she was in a state of shock. All these circumstances put together, it is argued that the first information

report can not be relied upon and was not written on the dictation of PW-1. It is evident that certain interested persons of the village were

instrumental in involving the accused. No one had seen the occurrence and the first information report is challenged on this count. The presence of

PW-2 is also disputed by the learned Counsel for the appellant. Ramesh Babu is teacher and he is nephew of the deceased. He claims to have

returned from the school at 4.30 P.M. at the time of occurrence and claims to have witnessed the accused tying the legs and hands of the deceased

and throttling him. Learned Counsel has tried to point out certain contradictions between the statement of two eye witnesses and also from the

statements recorded u/s 161 Cr.P.C. However PW-2 has very categorically stated to have reached at the place of occurrence while he was

coming back from the school by canal minor track which is at a distance of 40-50 steps from the fields of Maniya. This field is adjacent to Bare

Bagaha, the place of occurrence. He had heard cries while he was passing Maniya's field and ran in the direction from where the shrieks were

coming and had witnessed the occurrence. He had also stated that PW-1 and his cousin Sukesh had also arrived and were shouting for help. The

other villagers including her mother, who were working in the fields, have also arrived at the scene of occurrence. Learned Counsel has also

pointed out that PW-2 is also a witness of inquest and, therefore, his evidence is liable to be ignored.

13. The last submission on behalf of the appellant is that the wife who was present at the scene of occurrence, has not received a single scratch

whereas the normal behaviour of a wife would be to intervene and try to save her husband and not just continue to witness as a mute bystander

and shout for help. The unnatural behaviour of the wife as projected by the prosecution is sufficient to create doubt of her presence at the time of

occurrence.

14. We have heard the learned Counsel for the appellant, learned A.G.A for the State and also gone through the evidence and entire record. The

occurrence has taken place in broad day light in a Arhar field which is at a short distance from the house of the deceased. The occurrence had

taken place in the month of February when the presence of the witness PW-1 can not be ruled but as she has stated that she had gone to the field

to take out Hariyali from the field. Her son had also returned from his school in the recess and was present. There is nothing to disbelieve her

statement. The cross examination of PW-1 was quite extensive and the defence has not been able to point out any glaring discrepancy in her

Statement. The testimony of PW-1 corroborates the medical evidence. The fact that she has not made any effort to save her husband is not very

material since the number of accused were five and she being a single lady specially when her minor son was present with her, the most natural

behaviour was to seek outside help but not expose her son also along with herself to the onslaught of the accused. Therefore, the argument that her

presence in the field is doubtful, is without substance. Her testimony can not be discarded only because it is not likely that she would be present in

the field at the time of occurrence and not try to save him. The argument that the natural behaviour would be the wife should have thrown herself

over him and shield her husband is not very appealing, as we have already said she was all alone with her minor son and it is difficult to visualise

that a mother would not weigh the pros and cons before she would intervene. The next argument that the complainant had given birth to a child

some times before the date of occurrence and she would not be out in the fields till Pasani of the child is performed, does not also carry weight.

PW-1 has given detailed version of the manner of occurrence. She has also endorsed her signature in the first information report and, therefore, the

argument that she would not be able to give graphic detail about the incident, is not acceptable. So far her presence of PW-1 in the field on

account of birth of a child before the time of occurrence, is also not acceptable. A woman in the village, who are used to do hard work in the

fields, start working and carrying out the daily chores shortly after delivering a child. The evidence given out by the complainant is very categorical.

Nothing was pointed out in the cross examination which could discard her testimony.

15. The argument of the learned Counsel for the appellant that the prosecution has not been able to establish the motive for committing crime and

in absence of any motive, entire prosecution story loses its very foundation, is not acceptable. The first information report was prompt in time and

was lodged by eye witness. The motive that Daya Shankar was implicated in the dacoity case that had taken place 1½ hours before in the house

of Bhagwan Saran Kalar finds place in the first information report itself and thereafter witness was also very categorical in her statement before the

court. She has also admitted in her cross examination that the accused Daya Shankar was looking for an opportunity to vindicate the old grudge

merely because the prosecution failed to examine Bhagwan Saran Kalar and bring on record the affidavits filed by the witnesses. This alone will not

render the entire prosecution case doubtful, specially when the two eye witnesses have supported the prosecution case. Nothing has been pointed

out in the cross examination and, merely because the details of the dacoity case and its first information report etc. was not brought on record it is

not sufficient to disbelieve the motive assigned by the prosecution. Assuming that the motive was not good enough to eliminate Surajdin, even then

absence of motive would not be alone a decisive factor and can not merit acquittal since eye witnesses have supported the case and the incident is

in broad day light as well as the report was lodged promptly which discloses the prosecution case in detail. The evidence on record establishes,

that the accused have in fact committed the offence, it is settled principle of law that where there is complete absence of motive, the prosecution

evidence is to be scrutinized thoroughly and with caution, whereas this is not situation in the present case. The motive has been given out by two

eye witnesses right from the time of lodging of the first information report. Besides the occurrence is broad day light and the eye witness account

fully corroborates ante mortem injuries found on the body of the deceased. The manner of occurrence and specific role and participation by

individual accused has been detailed graphically by PW-1 and also by PW-2 who had arrived at the scene of occurrence.

16. We are also not in agreement with the argument of the learned Counsel that PW-2 is a chance witness since he should have been at the school

at the relevant time. It has come in evidence that he used to return from the school near about the same time every day when the occurrence had

taken place and used to take the same route which is adjacent to the place of occurrence and, therefore, the argument that he was chance witness

and is interested one, is of no consequence.

17. Learned Counsel has cited a number of decisions Hemraj and Ors. v. State of Haryana (Lii)2005 ACC 258 . This decision is in support of

argument that independent witnesses though were available, were not examined by prosecution and therefore, it casts serious doubt about the

prosecution case. No doubt non examination of material witnesses can be taken to be serious infirmity if there is a conflict in prosecution evidence

on a number of relevant issues whereas in the instant case, there is no such discrepancies pointed out by the learned Counsel. Non examination of

independent witness by itself can not give rise to adverse inference against the prosecution. Instances are no wanting when people not directly

involved feel shy to depose against another villager. It is only when the eye witnesses examined in the trial raises serious doubts on the point of their

presence at the time of actual occurrence and it is unexplained, it could have some significance. The Apex Court in the case of Takhaji Hiraji Vs.

Thakore Kubersing Chamansing and Others, ruled that if there is overwhelming evidence available and examination of other witnesses would only

be a repetition or duplication of the evidence already adduced non examination of such other witnesses may not be material. In the instant case, the

witnesses already examined are reliable and their testimony is unimpeachable, non examination of other witnesses who had arrived at the scene of

occurrence, will not make much difference. The next decision relied upon by the learned Counsel is Ghurai v. State (xxxii)1995 ACC 270. This

citation is in support of the argument that the behaviour of the wife when her husband was murdered, was very unnatural and she did not make any

attempt to catch hold the accused or save her husband. We have already stated above that this is a case where five persons were assaulting the

deceased, his legs and hands were tied and wife was with her minor son, she was fully conscious of the fact that she can not do anything to save

her husband and obviously the wife was also a mother who could not expose her son before the criminals by trying to interfere and pull the

accused away from her husband. She did which she could do in the given circumstances, i.e. call for help, the manner of occurrence is so

gruesome that the wife could do nothing and only because she did not intervene and try to pull five accused from her husband, will not dislodge her

entire evidence and it can not be said that the act of the PW-1 was very unnatural. In the circumstances, the decisions cited by the learned Counsel

is of no help to the accused.

18. The next decision cited by the learned Counsel is Bisram and Anr. v. State Allahabad Criminal Rulings 227. This is in support of the argument

that the first information report, which was written out on the dictation of the wife is in fact dictated by some one else and not wife as she has

admitted that she was in state of shock immediately after witnessing the murder of her husband. The statement of PW-1 clearly shows that the first

information report was dictated by her and was Written out by PW-2. She does not appear to be an absolutely illiterate lady as she has endorsed

her signature in the first information report and thereafter went to the police station. The contradictions or discrepancies pointed out by the learned



Counsel is not very material or glaring and we do not find any reason to disbelieve her evidence. Learned Counsel has cited a decision in the case

of Suresh Rai and Others Vs. State of Bihar, This was a case where the eye witness was a witness of inquest but nothing was mentioned in the

inquest regarding weapon of assault etc. and therefore, the court was of the view that being an eye witness he was liable to give detailed account

which he failed to do and, therefore, his testimony was discarded, in the instant case, there is no such discrepancy. No doubt PW-2 is one of the

witness of the inquest but nothing has been pointed out by the learned Counsel for the appellant to discredit his testimony.

19. We have closely examined the prosecution evidence and considered each and every argument of Sri P.N. Mishra and we are of the opinion

that the prosecution has been able to establish its case beyond doubt. The manner of occurrence, place and time of occurrence stands completely

corroborated by medical evidence as well as eye witness account. In the result, the appeal fails and it is dismissed. The judgement and order dated

17.5.1982 passed by 14th Additional Session Judge, Fatehpur is confirmed.