

(2008) 03 MP CK 0038

Madhya Pradesh High Court (Gwalior Bench)

Case No: None

Gangaprasad and Others and
Beniprasad

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision: March 14, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 157, 161, 374
- Evidence Act, 1872 - Section 32
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 302

Citation: (2008) ILR (MP) 1774 : (2008) 3 MPHT 371

Hon'ble Judges: Abhay M. Naik, J; A.K. Gohil, J

Bench: Division Bench

Final Decision: Allowed

Judgement

A.K. Gohil, J.

This judgment shall govern the disposal of Criminal Appeal Nos. 384/1996 and 28/1997.

2. Vide judgment dated 18-11-1996 in Sessions Trial No. 1/94 all the appellants of both the appeals were tried and convicted by First Additional Sessions Judge, Camp Sironj, District Vidisha under Sections 302, 149 and sentenced to life imprisonment. Appellant Deewan Singh has also been convicted additionally u/s 148, IPC and sentenced to six months R.I. All the appellants except appellant-Deewan Singh have also been convicted u/s 147, IPC and sentenced to three months R.I. each, against which they have filed these appeals u/s 374, Cr.PC and have challenged their aforesaid conviction and sentence.

3. Brief facts of the case are that one Balak Das Bairagi was resident of Village Rusiya. He was having enmity with the appellants. On 4-8-1993 in the evening the complainant Balak Das came back to his house and after sometime when he was

going away, Deewan Singh carrying Ballam in his hand and his brothers Ramcharan and Raghuveer carrying lathis came and surrounded him. Deewan Singh abused him and said-- be killed. Deewan Singh gave one Ballam blow in the right fore-arm which started bleeding. When Balak Das tried to run away from the spot, all other accused persons gave lathi blows on his legs. He fell down and thereafter he was beaten by all of them by lathis. Hearing noise Ramvati, wife of Balak Das and his brothers Bhaiyalal, Ratan Das etc. came on spot. Seeing them all the appellants ran away from the spot. On the same day at about 21.00 hrs. in the night Balak Das reported the matter to police and "Dehati Nalishi" was written by Mr. K.K. Bhargava, In-charge Police Station, Murwas. Injured Balak Das was referred to Sironj Hospital for treatment, where his dying declaration was recorded by Basantlal Malviya, Naib Tehsildar. Next day Balak Das succumbed to the injuries. Crime was registered, matter was investigated and charge-sheet was filed. After considering the prosecution evidence, Trial Court convicted the appellants and sentenced them as aforesaid, against which they have preferred these appeals.

4. We have heard the learned Counsel for the parties. Learned Counsel for the appellants vehemently argued and submitted that the conviction of the appellants under the aforesaid Section is bad in law. The independent witnesses have not supported the prosecution story. The conviction is simply based on the evidence of the wife, daughter and brothers of the deceased. The so-called eye-witnesses were not present on the spot. In the dying declaration (Exh. P-12) name of Parasram Patel alone was mentioned as an assailant and name of Hemraj was mentioned as present but both the persons Parasram Patel and Hemraj have not been made as accused in the case. Therefore, it is clear that Dehati Nalishi has been recorded by the Investigating Officer without any basis and he has falsely implicated the appellants due to enmity. It was further argued that as per prosecution story there were eight assailants but the deceased was having only six injuries. As per the evidence of eye-witnesses, they reached the spot after receiving information from one Kallu Chamar, but prosecution has not examined Kallu as eye-witness and he was examined as DW 1. Therefore, it was argued that the evidence of Bhaiyalal (P.W. 1) and Ratan Das (P.W. 2) is not at all reliable and it was also argued that even Ramwati (P.W. 6), wife of the deceased is also cooked up witness. In the statement of Ramwati and Ratan Das recorded u/s 161, Cr.PC, the names of the appellants have not been mentioned but they have made improvement in their Court statement and Trial Court has wrongly placed reliance thereon. It was further argued that prosecution itself has proved the dying declaration (Exh. P-12) by producing Basantlal Malviya, Naib Tehsildar as P.W. 14. It is supported by Mr. K.K. Bhargava (P.W. 17) and from this dying declaration the prosecution story is totally false and the Trial Court has overlooked the dying declaration and material contradictions in the prosecution case and has wrongly convicted the appellants. It was further argued that the Trial Court has deliberately discarded the evidence of Kallu (D.W. 1), who was the natural witness of the incident. All the eye-witnesses are

interested eye-witnesses, their evidence is not corroborated by medical evidence. No ballam injury was found on the body of the deceased. He submitted that all the appellants have been implicated falsely on the basis of concocted evidence on account of enmity. Therefore, it was argued that the appellants are entitled for acquittal, as no clinching evidence is available against them to uphold the conviction.

5. In reply, learned Public Prosecutor supported the judgment and findings recorded by the Trial Court and argued that the conviction of the appellant is proper and the evidence of the eye-witnesses is fully reliable and prayed for the dismissal of the appeal.

6. After hearing the rival contentions of the learned Counsel for the parties, we have analysed the evidence on record.

7. Ishaq (P.W. 4), Badan Singh (P.W. 5), Sehjad Khan (P.W. 8), Mohammad Ali (P.W. 11), Lallu (P.W. 15) and Chhaganlal (P.W. 16), who were cited as independent eye witnesses, have not supported the prosecution story and were declared hostile. Kumari Sobha Bai (P.W. 7) and Saroj (P. W. 13) both are minor daughters of the deceased. Bhaiyalal (P.W. 1) is brother and Ramwati (P.W. 6) is widow of the deceased.

8. Dr. S.S. Thakur (P.W. 10) had performed the autopsy of the deceased and found following injuries on the body of the deceased:

(1) Incised wound size 2" x 1" x 11 over right upper arm and lat. Aspect, margin clean cut, clotted blood present.

(2) Bruise size 3" x 2" over right side of chest, axillary region in direction, bony crepitation present. Subcutaneous emphysema present. Reddish in colour.

(3) Incised wound size 2" x 1" x 1" over left leg lower 1/3, margin clean cut, clotted blood + bony deformity present.

(4) Bruise size 4" x 2" over right leg anterior aspect, swelling and tenderness present, bony deformity present. Reddish in colour.

(5) Bruise size 3" x 2" over left leg anterior aspect, swelling and tenderness + bony deformity present. Reddish in colour.

(6) Incised wound size 1" x 1" x 1" over right leg ant. Aspect, just below the injury No. 4, margin clear cut.

9. As per the evidence all the injuries were ante-mortem in nature. Injuries No. 1, 3 & 6 were caused by sharp aged weapon and remaining injuries were caused by hard and blunt object. Injury No. 1 was simple and injury No. 2 was fatal. Rest of the injuries were of grievous nature. Duration of the death was 24 hours. On internal examination, fractures were found in the 5th & 6th ribs. Pleura was ruptured, there

was laceration in the middle lob of right lung. Undigested food was also found in the stomach. Fractures were also found in both the right and left tibia and fibula bones. Cause of death was shock due to internal hemorrhage.

10. The pertinent question for consideration in this appeal is whether the evidence of Naib Tehsildar (P.W. 14) who recorded dying declaration, is reliable and more weighty in comparison to the eye-witness account of the daughters, brothers and wife, as the evidence of dying declaration is contradictory to them. Admittedly dying declaration Exh. P-12 was recorded by Basantlal Malaviya, Naib Tehsildar after taking certificate of fitness from the doctor. The dying declaration was recorded on the same day at about 11.45 p.m. whereas "Dehati Nalishi" was recorded at about 9.00 p.m. (21.00 hours) and on both the documents thumb impression of Balak Das was obtained. Basantlal Malaviya, Naib Tehsildar is also an independent witness and being independent witness the evidence of Naib Tehsildar, normally is being relied and in this case he has clearly deposed that on the written instructions of the S.D.O. he had recorded the dying declaration of the deceased in the hospital and before recording the statement he had also obtained certificate from the doctor about the fitness and he had also obtained thumb impression of the deceased thereon and after recording the statement again certificate of fitness was obtained that he remained fully conscious during recording of his statement, therefore, the evidence of Basantlal Malaviya, Naib Tehsildar (P.W. 14) is fully reliable.

11. What is material in this case is that in the dying declaration names of all the appellants have not been mentioned. Only two names of Parasram Patel, who assaulted by Farsa and Hemraj, son of Tulsiram, who was present, have been mentioned and both these persons have not been made as accused in the case, which is a very serious contradiction in the prosecution case. Mr. K.K. Bhargava (P.W. 17), Investigation Officer has admitted that Naib Tehsildar had recorded dying declaration, which shows that the aforesaid evidence of dying declaration recorded by Naib Tehsildar is very material and cannot be discarded. Prosecution has also placed reliance thereon and Mr. K.K. Bhargava (P.W. 17) was not declared hostile.

12. We have also considered the evidence of eye-witnesses. Bhaiyalal (P.W. 1) has admitted in the cross-examination that he has received information from Kallua Chamar and he has also narrated the names of these persons to the police, who had gone on spot with him but why the police has not written those names in his case diary statement Exh. D-1, he cannot give any reason. Though in the police statement, it is written that Sobhabai had informed him about the incident, but Sobhabai says that she had not informed him.

13. Ratandas (P.W. 2) is the brother of deceased. In the cross-examination he has stated that his brother has told him about the incident and when he reached the spot, at that time Chaganlal, Shahjad Miyan and Bali Mohammad were present and he had not seen Tulsu, Ramlal, Sunderlal and Virendra on spot. Kallua had narrated the incident to him. Shobha had not informed about the incident but it was written

in his case diary statement Exh. D-2. He had stated to the police that the accused persons have committed the incident but if it is not mentioned, he cannot give any reason and other suggestions he has denied.

14. Gopilal (P.W. 3) has stated that he himself he had not seen the incident but the doctor and Tehsildar had recorded the statement of the deceased. Ramwati (P.W. 6), wife of deceased Balak Das, has stated that Kalua had informed her about the incident. When she reached the spot, she had seen all the appellants beating her husband. In the cross-examination she has stated that Deewan Singh was having ballam and all remaining other persons were carrying lathi. She had narrated the names of all the assailants to the police but if the names are not mentioned in her case diary statement Exh. D-3, she cannot give any reason. Ishaq was also present on spot. Shobha Bai (P.W. 7), who is child witness of aged 15 years and daughter of deceased, has stated that when she was present in the house along with" other family members, Kalua Chamar had informed that her father is being beaten by the appellants and when she went on the spot, had seen that all the persons were beating her father. In the cross-examination she has admitted that when Kallu gave information, Tau Bhaiyalal alone was present. When she reached the spot, Gopi Chowkidar, Shahjad, Mohd. Ali and Chhagan were also present there and darkness was increasing. The police had not recorded her statement; she has given statement first time in the Court. She has admitted that her father was working as a driver and used to drink. She had seen that Deewan Singh was carrying ballam and rest of the accused were carrying lathis and there was no enmity with the assailants. Another child witness Saroj (P.W. 13), aged 13 years, has also narrated the same story. In cross-examination she has admitted that Shobha had informed her that her father is being beaten by the appellants. Kallu had not directly informed her. Police had not recorded her statement. She was not aware whether Chhagan, Shahjad Miyan, Ishaq and Gopilal were present. She has admitted that when she reached the spot, at the same time Thanedar had also come on spot.

15. From the aforesaid statements it is clear that two child witnesses (P.W. 7 and P.W. 13) were not the eye witnesses of the incident; their statements u/s 161, Cr.PC were not recorded by police and they had not seen the assailants. So far as the evidence of Bhaiyalal (P.W. 1) and Ratandas (P.W. 2) is concerned, that is not of clinching nature and is not sufficient to maintain the conviction for following reasons--firstly, that they received information from Kalua Chamar, who has not supported the prosecution case and who was examined by defence as D.W. 1. In defence he has stated that the deceased was lying unconscious at the door of Parasram Patel. Chhaganlal, Mohd. Ali and Ishaq were standing there. Chhaganlal told him to inform the family members that Balak Das is lying here and he had intimated to Shobha. At that time wife of the deceased was also present and it was raining. He has denied the suggestion that he is telling lie or is not supporting the prosecution. Secondly, that all the eye-witnesses have stated that Deewan Singh was carrying ballam and all others were carrying lathis in their hands. From the injuries

received by the deceased it is clear that the deceased had not received any penetrating wound. He was having three injuries by sharp edged weapon but the eye-witnesses have not assigned any sharp edged weapon in the hand of any of the appellants, from which it is clear that they had not seen the incident and their evidence is not much reliable and if seven persons had assaulted by lathi, the deceased was having only three contusions-- one on the right chest, second on right leg and third on left leg. In the opinion of the doctor, contusion on right chest was dangerous and other injuries were grievous hurt and the doctor has not opined that which injury or cumulative effect of all injuries was sufficient to cause death in the ordinary course of nature. Therefore, it is clear that the eye-witness account is not tallying from the injuries received by the deceased and in the light of the dying declaration, which has been found proved, the evidence of eye witnesses having omissions and contradictions is not at all reliable, as it is not clinching in nature. Thirdly, as per prosecution story and the case diary statement of Bhaiyalal (P.W. 1), Ratandas (P.W. 2) and Ramwati (P.W. 6), they had not seen the incident and they were not the eye-witnesses. They had given statement only on the basis of information given to them by Kallu (D.W. 1), but in the Court they have made improvements in their statements and became eye-witnesses, therefore, it is true that the evidence of all three eye-witnesses is full of contradictions, omissions and is not reliable at all. Thus, in our considered opinion, it is clear from the evidence that the Trial Court has committed illegality in convicting the appellants.

16. It is settled position under the law that the evidence of relatives cannot be discarded simply on the ground that they are interested witnesses but in this case their evidence is not reliable, as according to case-diary statements they were not the eye-witnesses and in the Court they have improved their version and became the eye-witnesses of the incident. The other independent witnesses those who were present on spot as per the eye-witnesses, have also not supported the prosecution case. This improvement in the statement of Ramwati (P.W. 6) that all the appellants were beating Balakdas by farsa is also contrary to the evidence of other witnesses and medical evidence.

17. In the matter of dying declaration it is the settled position under the law that the same is admissible in evidence. Even the corroboration is not necessary unless suffers from any kind of infirmity. In case of Munnu Raja v. State of Madhya Pradesh reported in 1976 JLJ 599 (SC), Supreme Court has held as under:

It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subjected to cross-examination. There is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be accepted upon unless it is corroborated. Thus, Court must not look out for corroboration unless it comes to the conclusion that the dying declaration suffered from any infirmity by reason of which it was necessary to look out for corroboration.

and followed the view taken by the Constitutional Bench of the Hon"ble Supreme Court in case of [Tarachand Damu Sutar Vs. The State of Maharashtra](#), . In this case, sufficient time was available to call the Magistrate for recording the dying declaration, as held in the case of [Keshav Gangaram Navge and Another Vs. State of Maharashtra](#), . If the medical opinion was sought from the doctor about the mental condition of the deceased then the evidence of dying declaration is fully reliable and conviction can be based thereon. Provision of Section 32(1) of Evidence Act, 1872 is an exception to rule against admissibility of hearsay rule and if the dying declaration is reliable, conviction can be based thereon. [See : Narain Singh and Anr. v. State of Haryana (2004) 13 SCC 264]. In the case in hand what we found that the evidence of dying declaration is available, the same is admissible and acceptable. Therefore, the other story put forth by the eye-witnesses is not reliable and cannot be the basis for conviction.

18. Admittedly, in this case the prosecution has come with two contradictory stories-- one as per the dying declaration and other as per eye-witnesses, because the dying declaration was recorded by Naib Tehsildar, who is the independent witness on the certificate of doctor, therefore the dying declaration is more reliable in comparison to the eye-witness account and in the light of the aforesaid evidence, this argument of the learned Counsel for the appellants carries weight that "Dehati Nalishi" was not recorded timely and it is an after thought document and there is no proof that it was forwarded to the Court immediately as required u/s 157 of the Code of Criminal Procedure. Therefore, it appears that the eye-witness account is cooked up. In such circumstances, it is clear that the prosecution has failed to prove the charges and allegations by producing the evidence beyond reasonable doubt. Thus, it is also clear that the Trial Court has not properly appreciated the evidence. There is no clinching evidence against the appellants on record to connect them with the incident.

19. Thus, both the appeals (Criminal Appeal Nos. 384/96 and 28/97) deserve to be allowed and are hereby allowed.

20. Judgment of conviction and sentence of the appellants is set aside and the appellants are acquitted from the charges after giving them benefit of doubt. The appellants are on bail, their bail bonds be discharged.