

Inder Deo and anr. Vs. State

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Court : Allahabad

Decided On : Sep-24-1958

Reported in : AIR1959All238; 1959CriLJ415

Judge : B. Mukerji and ;S.K. Varma, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 288; [Evidence Act, 1872](#) - Sections 145

Appeal No. : Criminal Appeal No. 1320 of 1958 and Referred No. 107 of 1958

Appellant : Inder Deo and anr.

Respondent : State

Advocate for Def. : S.C. Asthana, Brief Holder

Advocate for Pet/Ap. : P.C. Chaturvedi, Adv.

Disposition : Appeal allowed

Judgement :

B. Mukerji, J.

1. This is an appeal by Inder Deo and Sheodas alias Phakkar against their convictions under Section 302/34 and Section 201/34 of the Indian Penal Code. Both the appellants have been sentenced to death for their conviction under

Section 302/34 I.P.C. and to four years' rigorous imprisonment for their latter conviction. Along with the appeal there is the usual reference by the learned Judge for the confirmation of the sentences of death.

2. The facts giving rise to this appeal may be briefly stated thus: Sometime on the night between the 26th and the 27th of August, 1957, one Kali Prasad war, alleged to have been murdered by the two appellants and his body was alleged to have been thrown in the Pandhar of a well near the Mastwani Pokhra. According to the prosecution case, the motive for the crime was that Kali Prasad had, some two and a half or three years earlier, eloped with the widowed sister, Srimati Dulari, of Sheodas alias Phakkar (we shall henceforward refer to him as Phakkar).

It further appears that Srimati Dulari was originally married to one Dasrath who was an employee of the Railway and while in such employment died at Calcutta. He had to his account a sum of Rs. 2,800/- in the Provident Fund. This amount was, after Dasrath's death, paid to his widow, Dulari. Dulari at that time was staying with her brother Phakkar and, therefore, Phakkar got Dulari to put in half of this amount, namely, Rs. 1,400/- in her own name and the balance Rs. 1,400/- in the name of her minor son Ram Nain in the Post Office Savings Bank Account.

The elopement of Dulari took place subsequent to this opening of the two Savings Bank Accounts. Phakkar feared that now that Dulari had eloped with Kali Prasad she might under Kali Pra-sad's influence take out the money which stood in her name in the Post Office Savings Bank to the detriment of the minor Ram Nain, who according to the view of Phakkar, was entitled to the entire money. A civil suit was filed on the 1st of October, 1955, on behalf of Rarn Nain by Phakkar restraining Dulari from withdrawing the sum of money that stood in her name in the Post Office Savings Bank.

This suit was compromised on the 25th of July, 1957, and the compromise that v/as effected was to the effect that Dulari was to get a sum of Rs. 400/- out of Rs. 1,400/- and the balance, Rs. 1,000/-, was to be put in the name of Rant Nain minor, and that he was to get this money on his attaining majority. According to the prosecution case, Phakkar greatly resented the elopement of his sister with Kali Prasad, who was his brother-in-law, namely, Sala.

The attempts of Kali Prasad and Dulari to get the money out of the Savings Bank further appear to have incensed Phakkar. Therefore, it was suggested on the prosecution case that Phakkar decided to put an end to Kali Prasad. Towards this end Phakkar is alleged to have gone to Kali Prasad, who lived in village Chirkihit, and asked him to come along to village Kerakat where the Post Office Savings Bank Accounts stood in order that the money could be taken out from Dulari's account and Rs. 400/- paid to her and the balance put in the minor's account.

Kali Prasad is therefore alleged to have left his village Chirkihit and thereafter Kali Prasad's dead body was discovered on the morning of the 27th of August, 1957. The alleged visit of Phakkar to village Chirkihit appears to have been made on the 23rd or 24th August 1957, although there is no witness who has specifically given these dates. The dead body of Kali Prasad was, as we have said, discovered on the morning of the 27th of August, 1957, in the Paudar of a well near Mastwani Pokhra by Raja. Ram Pradhan when he went to ease there.

The body was identified as the body of Kali Prasad. Three; other persons, namely, Sadho, Sab-deo and Narotam, also recognised the body as that of Kali Prasad. According to the prosecution case, Raja Ram went to Phakkar's house) to convey this information but he found nobody there. So Raja Ram sent a report to the police station through the village Chowkidar.

3. This first information report was recorded at police station Chandwak at 6-30 on the morning' of the 27th of August, 1957.

4. On receipt of the information the investigating Officer reached the place of occurrence at 7-35 a.m. and found Kali Prasad's dead body lying in the Paudar of a well near Mastwani Pokhra. He drew up an inquest report and then sent the body for post-mortem examination. At the time when the investigating Officer examined the body he found that a spear and a knife were stuck in the body. These two weapons were also taken-out and a proper memorandum prepared in respect of these.

The investigating Officer then examined some witnesses and thereafter went to the house of Phakkar accused who was found absent. The Investigating Officer

discovered that the front portion of the house of Phakkar had been freshly cleaned with a broom and he further found some-Suran plants clipped to ground level, the clipped-leaves thrown away, and some blood also there.

He recovered stained and unstained earth from that place, packed and sealed them in two containers. The house of the accused was also searched but nothing incriminating was found. The accused was brought under arrest soon after by Constables Suraj Nath and Bikrama Singh. On his person were a blood-stained shirt and a lungi, which were taken off his person and sealed. Inder Deo, the other accused, also was arrested and his shirt, dhoti and undervest were also taken possession of and sealed.

5. The alleged blood-stained clothes of the accused, the spear and the knife were sent to the chemical examiner for discovering whether these articles had blood on them and thereafter to the serologist to discover whether or not these articles had blood of human origin. The report of the serologist indicates that the spear, the shirt, the lungi and the dhoti were stained with human blood, while the stains on the knife and another shirt were found so disintegrated as not to enable its origin being determined.

6. Phakkar was medically examined on the 28th of August, 1957, and he was found to have as many as 22 injuries. Out of these several were incised wounds and at least one incised punctured wound. On behalf of the prosecution an explanation was offered for these injuries on the person of Phakkar. It was said that at the time of his arrest Phakkar resisted and therefore he was beaten with lathis.

It may be mentioned that on the prosecution evidence there is no explanation as to how Phakkar got injuries from a sharp cutting or a sharp pointed weapon. We may at this stage mention that the learned Judge invented an explanation for the unexplained injuries by saying that the accused Phakkar might have got these injuries by inflicted upon him 'in order to make out his defence.'

We may mention that this was, in our opinion, unjustified, for we find no suggestion on behalf of the prosecution to support this in the evidence. The

accused was not asked as to whether or not the incised wounds or the incised punctured wound had been created by the accused on his body to assist his own defence. Therefore, in our opinion, it was further wrong of the learned Judge to have invented, if we may use that word, an explanation to explain an apparently unexplained circumstance.

7. A post-mortem was performed on the body of Kali Prasad on the 28th of August, 1957, at 1-30 p.m. At the time of post-mortem the body was found to have commenced decomposing; even blisters had started forming at some places and the superficial skin also had started peeling off at places. Maggots were found present in the nasal orifices and the eye.

The maggots were also found all over the wounds. No less than 11 injuries, namely, incised punctured wounds, were found on the body. The left lung, peritoneum, liver, pleura and the kidneys had also suffered damage. Death was due to syn-cope resulting from haemorrhage and shock on account of multiple incised wounds particularly of the chest and the abdomen.

8. The prosecution attempted to bring home the charge against the accused by first attempting to give eye-witness account of the actual killing and then to support their eye-witness account by furnishing evidence of motive and opportunity, and lastly, by producing evidence, though of a solitary witness, of the accused having been seen carrying something at the dead of night near about the place where the dead body was found the next morning by Raja Ram.

The witnesses, who were 'supposed to give eye-witness testimony of the killing, were P.W. 3 Lautu and P.W. 4 Swami Nath. These two witnesses purported to be eye-witnesses of the occurrence in the Court of the Committing Magistrate but in the Court of Session they did not depose to that effect. P.W. 3, Lautu stated that he did not know who had committed Kali Pra'sad's murder. He was asked if he had made a statement before the Committing Magistrate's Court, the whole of his statement was read out to him and he stated that he could not say whether the statement was correct or wrong.

He insisted on saying that the statement that he made in the Court of Session was the true statement. He further stated that what he had stated in the Court of the Committing Magistrate, he had at the threatening of the Investigating Officer. The learned Judge made no order at the time when Lautu was being examined that he was going to treat Lautu's statement made in the Court of the Committing Magistrate as evidence before him under the provision of Section 288 of the Code of Criminal Procedure.

It is also important to notice the fact that the conflicts, which were noticed in the statement of Lautu made in the Court of the Committing Magistrate and his statement made in the Court of Session, were not specifically put to Lautu and his explanation in regard to these conflicting statements sought, as was contemplated by the provisions of Section 145 of the Indian Evidence Act. The position of Swami Nath, P.W. 4, was precisely the same as that of Lautu, for he also stated in the Court of Session that he had not seen the commission of the murder.

He admitted that he had been examined in the Court of the Committing Magistrate but he said that he had made that statement under coercion of the police. His entire statement in the Court of the Committing Magistrate was read out to him and he said that he could not remember whether he had made that statement. He further stated that he could not even say whether the statement which he made before the Court of the Committing Magistrate was true or not.

In his case too the Judge did not make a note to the effect, or an order to the effect, that he was inclined to bring on record his statement in the Committing Magistrate's Court under the provisions of Section 288 of the Code of Criminal Procedure. The position further was that this witness was also not specifically put the contradictions that were there between his statement in the Court of the Committing Magistrate and his statement made in the Court of Session in accordance with the provisions of Section 145 of the Indian Evidence Act.

The accused, therefore had, no notice in the case of either Lautu or Swami Nath that the learned Judge was going to use the statements of these witnesses made in the Court of the Committing Magistrate as evidence in the Sessions Court under the provisions of Section 288 Cr. P.C. So that, the accused did not get a fair

chance of cross-examining these witnesses in order to show that the statements which these witnesses made in the Court of the Committing Magistrate were untrue or unreliable. We find that the learned Judge in his judgment says that the statements of these two witnesses, namely Exs. Ka-3, and Ka-4 were 'tendered under Section 288 Cr. P.C.' and that he admitted these statements in evidence because he had reason to believe that these witnesses were departing from that evidence in his Court.

Learned Counsel for the parties, namely, Counsel appearing for the accused as also Mr. S. G. Asthana, appearing on behalf of the State, searched the record to discover whether there was any record of any oral application or whether there was any written application on behalf of the prosecution asking permission to tender the aforementioned pieces of evidence, and further whether there was any order by the Judge directing the statements to be taken on record, but no such record was found: the position therefore is that we must hold that there was no tender of this evidence on behalf of the prosecution, nor did the learned Judge at the time when the witnesses were in the witness-box express his opinion or give a direction to the effect that the evidence given by these witnesses in the Court of the Committing Magistrate was to be brought on the record under the provisions of Section 288, Cr. P. C.

This omission on the part of the learned Judge, in our opinion, was in a sense vital, for it deprived the accused of an opportunity to tackle the witnesses in cross-examination in regard to their previous statements in order to show that those statements were either false or unreliable.

9. Section 288 of the Code of Criminal Procedure is in these words :--

'The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act of 1872.'

The actual words of the section do not make it obligatory for the prosecution to tender the statements or for the Judge to say that he was going to treat that

evidence as evidence in the case at the very time when the witness was being faced with those statements in the witness-box, but the necessity for doing so is so vital in the interest of not only fairplay but for giving the accused a proper and real opportunity to meet those statements, which otherwise were of no consequence to him in the Court of Session, that we were of the view that it was but proper that the trial Judge should indicate by an order that he was going to treat the evidence which had been recorded in the Committing Magistrate's Court as evidence at the trial in order to enable the accused to meet that evidence. This was so held in Criminal Appeal No. 976 of 1952 *Sunder Lal v. The State* by a Bench of which one of us was a member. The same view appears to have found favour with another Bench of this Court in Criminal Appeal No. 898 of 1955.

10. There is, in the present case, yet another difficulty which we have found in the way of pro-perly treating the statements of the two witnesses mentioned above as admissible, if we may use that expression, under Section 288 Cr. P.C. and the difficulty we find is that in respect of these statements compliance had not been made of the provisions of Section 145 of the Indian Evidence Act. : Section 288 itself states that that evidence was subject for all purposes to the provisions of the Indian Evidence Act.

As we have pointed out earlier, specific passages or the particular portions on which the prosecution desired to contradict the witnesses were not read out to the witness and they were not afforded an opportunity of explaining those particular or specific passages. The entire statements were read out to the witnesses and they were asked to say what they had to in regard to the entire statements.

In our opinion, this was not compliance with the provisions of Section 145 of the Indian Evidence Act. A proper compliance of these provisions can only be if the particular passages are put to the witnesses. We may here refer to the decision of their Lordships of the Supreme Court in *Tara Singh v. The State*, AIR 1951 SC 441 wherein their Lordships at pages 446-447 said this:

'There is some difference of opinion regarding this matter in the High Courts. Section 288 provides that the evidence recorded by the Committing Magistrate in the presence of the accused may, in the circumstances set out in the section, be

treated as evidence in the case for all purposes subject to the provisions of the Indian [Evidence Act, 1872](#). One line of reasoning is that Section 145, Evidence Act, is not attracted because that section relates to previous statements in writing which are to be used for the purpose of contradiction alone. Statements of that kind do not become substantive evidence and though the evidence given in the trial can be destroyed by a contradiction of that kind, the previous statements cannot be used as substantive evidence and no decision can be grounded on them. But under Section 288, Criminal P.C., the previous statement becomes evidence for all purposes and can form the basis of a conviction. Therefore, according to this line of reasoning Section 145, Evidence Act, is not attracted. Judges who hold that view consider that provisions of the Evidence Act referred to are those relating to hearsay and matters of that kind which touch substantive evidence.

The other line of reasoning is that Section 288 makes no exception of any provision in the Evidence Act and therefore Section 145 cannot be excluded. As that section is one of the provisions of the Act, the statements are subject to its provisions as well. All that Section 288 does is to import into the law of evidence something which is not to be found in the Evidence Act, namely, to make a statement of this kind substantive evidence, but only when all the provisions of the Evidence Act have been duly complied with.

In my opinion the second line of reasoning is to be preferred. I see no reason why Section 145, Evidence Act, should be excluded, when Section 288 states that the previous statements are to be 'subject to the provisions of the Indian Evidence Act.' Section 145 falls fairly and squarely within the plain meaning of these words. More than that. This is a fair and proper provision and is in accord with sense of fairplay to which Courts are accustomed I hold that the evidence in the Committal Court cannot be used in the Sessions Court unless the witness is confronted with his previous statement as required by Section 145, Evidence Act.....but if the prosecution wishes to go further and use the previous testimony to the contrary as substantive evidence, then it must, in my opinion, confront the witness with those parts of it which are to be used for the purpose of contradicting him. Then only can the matter be brought in as substantive evidence under

Section 288.' (The decision of the Supreme Court was given by Rose, J., and Fazl Ali, J., Patanjali Sastri, J., and Das, J., agreed with that decision.)

11-15. In our opinion, therefore, the statements made by Lautu and Swami Nath in the Court of the Committing Magistrate could not in this particular case, for the reasons given by us, be used as substantive evidence. The position therefore is that before the Court of Session there was no evidence of any witness to the effect that he had seen the appellants committing the murder. The prosecution therefore was thrown on the evidence which was furnished by the circumstances alone which appeared on the prosecution case. The circumstances which the prosecution attempted to prove by their evidence were:

(1) that there was motive;

(2; that appellant Phakkar went to the place of residence of the deceased Kali Prasad, namely village Chirkihit, to call him; and lastly,

(3) that Kali Prasad and the accused were seen together in the village where the murder was committed prior to the murder.

We shall now examine to see, first, how far these circumstances have been established on the prosecution evidence, and, secondly, whether these circumstances, even if established, led to the only conclusion, namely, that the accused must have been the murderers of Kali Prasad. (His Lordship after examining the evidence stated):

16. From what we have stated above it would appear that the circumstances on which the prosecution attempted to rely in order to bring the charge home to the appellants remain unestablished to our satisfaction. Further, even if the circumstances had been established, it would be difficult to say that the only conclusion that could flow from those circumstances was that the appellants murdered the deceased.

17. For the reasons given above, we have found it difficult to uphold the convictions of any of the appellants. We accordingly allow their appeal, set aside their convictions and direct that they be set at liberty forthwith unless wanted for some

other offence. The reference made by the learned trial Judge for the confirmation of the sentences of death is rejected.

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