

Jaswant Vs. State

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Court : Allahabad

Decided On : Jan-29-1971

Reported in : AIR1971All482; 1971CriLJ1562

Judge : Hari Swarup, J.

Acts : [Evidence Act, 1872](#) - Sections 32

Appeal No. : Criminal Appeal No. 658 of 1969

Appellant : Jaswant

Respondent : State

Advocate for Def. : Addl. Govt. Adv.

Advocate for Pet/Ap. : J.S. Gupta, Adv.

Disposition : Appeal allowed

Judgement :

Hari Swarup, J.

1. Jaswant has filed this appeal against the order of the Sessions Judge. Badaun convicting him under Section 325, I. P. C. and sentencing him for one and half years' rigorous imprisonment. The case of the prosecution in brief was that on 6-6-1968 at about 10.30 a. m. in village Para, Police Station Dataganj, Jaswant the

appellant caused injuries to Bhikam on his fore-head with a wooden spade used for scraping cow dung. The first information report of the incident was lodged at the police station Dataganj at about 11:30 a. m. As the report was deemed to be of an offence under Section 323/504, I. P. C. only a memorandum of report was taken down at the police station by the clerk constable Farukh Ahmad. Bhikam was then sent for medical examination to the Data-gani dispensary but as he did not pay the fees and did not consent to get himself medically examined, his injuries were not examined. On the basis of the memo for examination of the injuries sent from the police station, he was, however given treatment as an out-door patient and his injuries were bandaged.

2. On 15th June, 1968 an oral report was lodged by Smt. Ram Kumari, the widow of Bhikam, informing that he had died. Investigation then proceeded on the basis of that report. Sri Brij Raj Singh took up investigation and after making inquest on the body of Bhikam sent it for post-mortem examination. The post-mortem examination was performed by Dr. K. C. Dubey on 16th June, 1968 at 10 a.m. He found the following ante mortem injuries on his body

1. One lacerated wound 1 1/2' x 1/2' on the right side fore-head 2' upwards from the middle of the right eye brow.

2. Contusion 3/4' x 1/2' on the back right side of sacrum.

3. On internal examination a depressed fracture into pieces of right frontal bone in an area of 1' x 1' was found. A big clot 1 1/2' x 2 1/2' in the membrane below the fracture of right frontal bone was found. Stomach was found to be empty while small intestine and large intestine were found to contain gas and faecal matter. The body had decomposed. In the opinion of the Doctor the probable time since death was 3 to 5 days. As to the cause of death he was of the opinion that it was shock and haemorrhage due to head injury.

4. The prosecution examined in the court of committing magistrate Smt. Ram Kumari, the widow of Bhikam and Km. Sharda, Km. Veda the daughters of Bhikam and Komil, the cousin of Bhikam. All these witnesses stated that they had not seen Bhikam being assaulted by Jaswant, the appellant. They were declared hostile

and were not produced in the court of session. The prosecution in the court of session relied only on the memorandum recorded by Faruk Ahmad, the clerk constable in the form of the first information report lodged by Bhikam and on the medical evidence to establish the injuries suffered by Bhikam about the cause of death. The learned Sessions judge relying on the statement of Bhikam made at the police station under Section 32 of the Evidence Act convicted and sentenced Bhikam as mentioned above.

5. Learned counsel for the appellant has contended that the evidence of the prosecution is wholly insufficient to prove that Bhikam had died of the injuries caused on him on 6th June, 1968 and hence the statement of Bhikam recorded by Faruk Ahmad, the clerk constable is not admissible under Section 32 of the Evidence Act. He has further contended that even if it be deemed to be admissible under Section 32 of the Evidence Act, it is insufficient for holding that the injuries were caused by Jaswant, the appellant.

6. Death of Bhikham appears to have occurred in very mysterious circumstances. The body according to the Investigating Officer Brij Raj Singh was found in the house of Bhikam. According to the post-mortem report the body was in a decomposed state and death in the opinion of the Doctor, should have taken place about three or five days prior to 16th June, 1968. It appears highly improbable that the dead body will be kept in the house and allowed to get decomposed by the members of Bhikham's family. His wife could not have kept it as such in the house. It appears that death had occurred at some unknown place and the members of the family of Bhikham learnt about death only on the 15th June and the body was brought into the house and report was made to the police by Smt. Ram Kumari on 15th June, 1968 to the effect that Bhikham had died. It is thus not possible to know how death had occurred. The prosecution has led no evidence to prove the circumstance in which Bhikham died.

7. The inquest report Ext. Ka-6 shows that it was not possible for the Panchas to form any opinion about the cause of death of Bhikham. It is stated therein that it was not possible to ascertain whether the death was caused due to illness or by injuries. Even if it be taken that the injuries were caused on 6th June 1968, it is not

possible to hold positively that they were the cause of Bhikham's death. The time of a week between the injuries and death was quite long and the possibility of intervening circumstances which might have caused the death of Bhikham cannot be ruled out. The opinion of the Doctor about the cause of death can also not be relied upon with any amount of certainty as the body of Bhikham was highly decomposed at the time of autopsy, and even according to the Doctor death may have taken place three or five days earlier. In these circumstances the statement of Bhikham made on 6th June, 1968 before the clerk constable Faruk Ahmad cannot be admitted in evidence under Section 32 of the Evidence Act.

8. Even if alternatively it be taken that the statement recorded by Faruk Ahmad on 6-6-1968 was admissible as dying declaration under Section 32 of the Evidence Act, it is wholly insufficient for upholding the conviction of the appellant. Firstly it was not recorded in the words of Bhikham. It is only in the form of a memorandum prepared by Faruk Ahmad. Secondly this memorandum states that Bhikham had given out that when he was being assaulted, residents of the village had intervened and saved him. No effort was made to produce any of the villagers who might have seen the incident. If the first information report was correct, the incident had been seen by a number of independent persons and independent evidence was thus available to prove the incident. The prosecution has examined no witness to corroborate the statement of Bhikham recorded by Faruk Ahmad. It will not thus be safe to convict the appellant only on the basis of the statement of Bhikham as recorded by Faruk Ahmad. Hence even if the statement recorded in Ext. Ka-2 is taken as admissible in evidence, the appellant should get the benefit of doubt.

9. In the result the appeal is allowed. The order of the Sessions Judge dated 20th March, 1969 convicting Jaswant, the appellant under Section 325, I. P. C. and sentencing him to 18 months' R. I. is set aside and he is acquitted of the charge. The appellant is on bail. He need not surrender. His bail bonds are discharged.

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