

**Munwa Vs. the State**

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**Court :** Allahabad

**Decided On :** Jan-08-1957

**Reported in :** AIR1957All466; 1957CriLJ808

**Judge :** Roy and ;Sahai, JJ.

**Acts :** [Evidence Act, 1872](#) - Sections 32; [Indian Penal Code \(IPC\), 1860](#) - Sections 300

**Appeal No. :** Criminal Appeal No. 1487 of 1956, Referred No. 137 of 1956

**Appellant :** Munwa

**Respondent :** The State

**Advocate for Def. :** Shri Rama, Dy. Govt. Adv.

**Advocate for Pet/Ap. :** S.N. Mulla, ;R.K. Shanglo and ;Saran Behari Lal, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**Roy, J.**

1. This is an appeal by Shiam Kishore alias Munwa aged 18 years, son of Chhunnu Pande alias Yagdutt, a resident of Maksudabad, within police circle Kailanpur, District Kanpur, who has been convicted by the Additional Sessions

Judge, Kanpur, for an offence under Section 302, I. P. C., for having committed the murder of one Chhotelal, on the 18th November 1955, at about 11 a.m. near Gumti No. 10 on Grant Trunk Road, by inflicting injuries on him with a knife as a result of which Chhotelal died on the same day at 11-45 p.m. The learned Sessions Judge gave the appellant a sentence of death. Along with the appeal there is the usual reference for the confirmation of the death sentence.

2. Chhotelal lived at Maksudabad along with his father Dharmu. He had 3 other brothers, Putti-lal, Sanehilal, and Sundar. The prosecution contended that village Maksudabad was torn into two factions, one headed by the father of the appellant who was once a big Zamindar and is even now an influential man of the village, and the other party was headed by another person.

The prosecution further contended that Sanehi Lal separated from the other members of the family and began to live in a house provided by the appellant's father and used to work for him as an agricultural labourer; that about 3 or 4 years before the present occurrence the appellant's father by certain device took away the wife of Sunder (P.W. 4) who is the brother of Chhotelal, and forced her into the keeping of Sanehi Lal, that Sunder made an effort to take away his wife but she was prevented by Yagdutt and Sanehi Lal from going back; that about 2 years later the appellant's father complained to Dharmu that the deceased Chhotelal had misbehaved with his daughter and had spread a rumour to that effect in the village; that on account of these disputes Yagdutt got the house of Dharmu looted and took forcible possession of his cultivation; that a case was started under Section 395, I. P. C., but the accused persons were acquitted on 7th November 1955, and that during the pendency of that case the appellant and his father had been threatening Sundar that since the criminal case was falsely launched dire consequences would follow; that on the 30th October 1955, Sundar had been beaten by the accused and one Sheo Balak on the canal distributary near the village and that all these incidents finally culminated into the occurrence of the 18th November 1955, at 11 a.m. when Chhotelal had been assaulted by the appellant with a knife as a result of which he expired.

It was contended on behalf of the prosecution that on the 18th November 1955, Har Prasad Saxena (P.W. 13), who is the manager of the Kalianpur Dairy Farm where Chhotelal had been working, had commissioned Chhotelal to go to the flour mill in order to have certain quantity of wheat turned into flour. Chhotelal then proceeded on foot with the wheat. The accused Munwa was also seen leaving the village on his cycle at 9-30 or 10 a.m. When he had reached Gumti No. 10 on the Grand Trunk Road at about 11 a.m. the appellant, it is alleged, attacked him with a knife causing him an injury in the abdomen, and after doing so he escaped on his cycle.

A number of persons who were on the road, some on foot and others on cycles, gave a chase to him but they could not apprehend him. Ultimately after a few minutes Lalua Singh (P.W. 1) happened to proceed that side on a rickshaw. He found Chhotelal lying on the side of the road groaning, with a fresh injury on his abdomen which he was pressing with both his hands. On enquiry he was told by Chhotelal that just 5 minutes before he had been attacked by Munwa, son of Chhunnu Pandey of his village.

Chhotelal had further expressed to him that he might not survive and he asked him to carry him to the hospital. Lalua Singh, it is said, made him sit in a rickshaw plied by Abdul Shakoor (P.W. 2) and sent him to the hospital and he himself went to police station Kalianpur where he lodged the first information report at 12-5 in the day mentioning the facts stated above. Chhotelal was admitted to the hospital at 11-30 a.m. His condition was found serious.

Dr. J.N. Tiwari took down his statement in the nature of a dying declaration. That statement is Ex. P-13 on the record in which Chhotelal is said to have stated that on the morning of the 18th November 1955, he was going from Maksudabad to Gutayya to get the grain ground into flour; that Munwa, son of Chhunnu Pande caught hold of him at the Gumti and struck him with a Karauli; that there was enmity between him and his brother from before; that there was a litigation in which his brother had been unsuccessful; that Munwa met him while, he was cycling on the road; that on seeing Munwa, Chhotelal apprehended danger and he made an attempt to get back and he did so, that Munwa returned from the way

and struck him with a Karauli in the abdomen and that some persons who were carrying planks along the Railway patri, whom Chhotelal did not know, saw the occurrence.

When Chhotelal was admitted into the hospital he was, as has been stated by Dr. J.N. Tiwari, attended by some police men and 4 or 5 other attendants. Dr. Tiwari found one perforating injury in the abdomen in the epigastric region. The cut was transverse, 1-1/2 inches long, and it was an incised wound. The omentum was protruding out. The patient was immediately sent for operation in the general operation theatre after noting the injury in the accident register and after noting in that register that police men came with the patient and that the patient had been brought to the hospital by one Abdul Patool in his rickshaw.

Dr. Tiwari made it clear that as the condition of the patient was serious he started recording his dying declaration after sending a note to the Tahsildar to come up in order to take down his dying declaration. He further made it clear that the dying declaration (Ex. P-13) recorded by him was noted down word for word to the dictation of Chhotelal, that the injured was then in proper senses; that no outsider was present at that time except the staff of the operation theatre and that before recording that statement he had to turn out the attendants of the injured who had come along with him and were talking to him.

Dr. Tiwari further stated that after the operation the condition of the patient was such that he was incapable of making a detailed statement and that he could only reply to questions put to him in 'yes' or 'no', and that also in a faltering voice. This condition, according to him, continued upto 1. p.m. Dr. Tiwari was unable to say as to what was the condition of the patient at 3-30 p.m. as he was not on duty at that time.

On the same day at 3-30 p.m. another dying declaration of Chhotelal is said to have been recorded at the hospital by the Sub-Divisional Magistrate, Ghatampur, which is Ex. P-14 on the record. This dying declaration is in the form of questions and answers. In reply to the question as to who had struck him the declarant is said to have stated that it was Munwa, son of Ghunnu who had struck him near the Bargadwali Gumti near the Railway Patri.

In reply to another question as to who else were with Munwa he said that Sarju Lohar and Sheobalak were also with him. In reply to a third question he said that some persons who were there had seen the occurrence but he did not know their names. Sri J. O. G. Russel who had recorded this dying declaration stated that it had been made voluntarily by him, that before recording it he had satisfied himself that the deceased was in proper senses and was fit to make a dying declaration and there was no outsider near him except the nurses and the medical staff.

The condition of the patient was certified by Dr. C.M. Agarwal who had noted on the dying declaration that the patient was in a fit condition to make a statement. Mr. Russel stated that he finished recording the dying declaration at 3-30 p.m. that it took him about half an hour to record it, that the deceased was not replying in a faltering voice and that his replies were coherent and firm.

Looking into the length of the statement (Ex. P-14) it is, however, clear that the deceased must have given his replies slowly and at intervals so that it took the Magistrate nearly half an hour to record it. the statement (Ex. P-14) introduces the presence of two other persons namely Sarju Lohar and Sheobalak along with the appellant at the place of the occurrence, whose names were not mentioned by Chhotelal in the earlier dying declaration (Ex. P-13) recorded by Dr. Tiwari.

There is another dying declaration which is Ex. P-18 on the record and which is said to have been reduced into writing by Sub-Inspector S.B. Tripathi which he recorded on the same date after 3-30 p.m. This statement covers a full printed page of the paperbook of this case and is a very much more detailed statement than what is to be found in any of the earlier dying declarations referred to above. Sri Tripathi, the Station Officer, tried to create a certain amount of confusion in the evidence as to the time when it was recorded; but there is intrinsic evidence in the dying declaration (Ex. P-18) itself which goes to show that it was recorded after the earlier statement (Ex. P-14) which had been recorded by the Sub-Divisional Magistrate at 3-30 p.m.

The dying declaration (Ex. P-18), said to have been made before Sri Tripathi, mentioned that a doctor and a Magistrate had already taken the statement of Chhotelal. This dying declaration (Ex. P-18) besides mentioning the facts relating

to the occurrence goes on to state the motive in sufficient detail. It also mentioned that at the time of the occurrence the accused was accompanied by his companions Sheobalak and Sarju, who are residents of Maksuda-bad and who were standing nearby.

3. There is the evidence of Dr. C. M. Agarwal (P.W. 24) on the record who had appended a certificate about the physical fitness of Chhotelal in the dying declaration (Ex. P-14). Dr. Agarwal mentioned that at the time the general condition of the patient was low, that the pulse was imperceptible and that blood transfusion has started at 3 p.m. He further made it clear in answer to a question to the Court that imperceptible pulses does not mean that the patient was unable to make a statement.

At any rate the medical evidence goes to indicate that the condition of Chhotelal at about 3-30 p.m., when the dying declaration (Ex. P-18) is said to have been recorded by Sub-Inspector Tripathi was not such that he could have made a detailed statement of that nature. Sub-Inspector Tripathi in order to explain as to how that detailed statement of Chhotelal in that state of health was taken mentioned that he had recorded the statement of the injured in detail not in the language of the injured but in his own language.

Whether the statement was recorded in the language of the injured or in the language of Sri Tripathi, we are driven to the conclusion that at about 3-30 p.m. when blood transfusion was being given to Chhotelal, Chhotelal could not have been in a position to make such a detailed statement as if contained in Ex. P-18. Moreover Chhotelal was at that time still in the hospital and it has not been stated by any of the medical attendants that the statement of Chhotelal had been recorded by the Sub-Inspector in such detail in the presence of any medical attendant.

4. In support of the prosecution story a number of witnesses were examined. These witnesses may be classified under several heads. We have already referred to the evidence of Dr. Tiwari, Dr. C.M. Agarwal and also of Sri Russel, the Magistrate. We have also referred to the evidence of the investigating officer bearing upon the dying declaration (Ex. P-18). In the next category of witnesses

we may deal with Lallua Singh, the maker of the first information report, and Abdul Shakoor (P.W. 2), the rickshaw driver who is said to have taken the deceased to Hallet Hospital.

Lallua Singh is a resident of Naramau. He stated that on the 18th November 1955, at about 11 a.m., when he was going from Kalyanpur to Kanpur and was near Gumti No. 10 on the Grand Trunk Road, he saw a person lying injured and groaning on the right side of the road. The injury was in the abdomen. He got the rickshaw stopped and found him pressing the injury with both the hands. He was bleeding and his clothes were saturated with blood. He did not know the injured from before.

On enquiry he was told that the injured was one Chhotlal by caste a Kori and that Chhunnu's son, by name Munwa had run away after having stabbed him with a knife about 5 minutes earlier. The injured told him that he was a resident of Maksuda-bad and that he was going to Gutaiya from Kalyanpur to get the wheat turned into flour. The injured asked him to take him to the hospital as he felt that he would die. Lallua Singh stated that he sent Chhotelal in a rickshaw plied by Abdul Shakoor and he himself went to police station Kalyanpur and lodged the report.

Lallua Singh was once under police surveillance and he was bound down under Section 110, Criminal Procedure Code. Lallua Singh also admitted that there was party faction in the village and he had got litigation with Mahadeo Shukul who is a friend of Chhunnu Pandey, the father of the accused. The statement of Lallua Singh is not free from reasonable doubt because when we come to the evidence of Abdul Shakoor in whose rickshaw the deceased is said to have been taken to Hallet Hospital, we find that Abdul Shakoor had no licence for plying his rickshaw on the relevant date.

Abdul Shakoor said that he had been plying his rickshaw for the last 7 or 8 years and that on the relevant date he was near Gumti No. 10 when he heard the cries of Chhotelal and that when he was found injured he took him to the hospital. Abdul Shakoor's statement was recorded by the Sessions Judge on the 6th August 1956; but his statement was not completed on that date. On that date he was directed to

produce his rickshaw plying licence for 1955-56.

On the 7th August 1956, when his statement was resumed he produced a licence which was in respect of the period from the 1st April 1955, to the 31st March 1956 in which his photograph was also appended. It was, however, discovered that that licence had been issued on the 18th January 1956 and the photograph bore the signature and attestation of the 17th January 1956. Obviously the licence was applied for and obtained after the present occurrence. No explanation was offered on behalf of the prosecution as to why this was so.

If Abdul Shakoor had been plying his rickshaw for the last 7 or 8 years there was no reason why a licence should have been applied for near about 2 months after the present event. There is another very suspicious circumstance about this matter. At the hospital Dr. Tiwari had entered in the Accident Register that it was one Abdul Patool, rickshaw-driver who had taken the injured to that place. It was in the statement of Abdul Shakoor (P.W. 2) that Pa-tool alias Maqbool is his own brother.

If Abdul Shakoor was the person who had conveyed the injured to the hospital there was no satisfactory explanation as to why in the Accident Register maintained at the hospital the name of Patool was entered. It seems, therefore, that Abdul Shakoor and Lallua Singh were procured as witnesses by the police in order to give strength to the prosecution story.

5. In the next category of witnesses may be classed 5 witnesses who claimed themselves to be eye-witnesses of the occurrence. They are Kashiram (P.W. 5), Baburam (P.W. 6), Chandra Bahadur (P.W. 7), Babulal (P.W. 8) and Udai Narain (P.W. 9). None of them happened to be a witness belonging to the place of occurrence. They come from distant places and their contention was that they were coming along the road when they saw this occurrence taking place. Two of them viz., Kashiram and Baburam claimed that they were on foot and the other three viz., Chandra Bahadur, Babulal and Udai Narain claimed to have been on cycles. Babulal who is not a cyclist himself claimed to have been on the carrier of the cycle driven by Udai Narain. All these witnesses said that they gave a chase to the appellant but they could not apprehend him. Out of these witnesses Chandra

Bahadur and Babulal were not relied upon by the learned Sessions Judge and then testimony had been rejected. Babulal was treated as a hostile witness by the prosecution. We have been taken through the evidence of Kashiram, Baburam and Udai Narain and we are not in a position to place implicit reliance upon their testimony,

Kashiram is a resident of Kikhanpur which is at a distance of about 2 miles from the place of occurrence. Although he claimed that he had seen the occurrence and that he knew the accused from before, he had to admit that when he was examined before the committing Magistrate he did not name him. When he was questioned as to how he got acquainted with the appellant he gave an absurd story. He started with the contention that it was 5 or 6 years ago that he became acquainted with him in an election contest between Smt. Vijay Lakshmi Pandit and Sri Venkatesh Narain Tiwari, in which contest he was himself working for the Congress candidate.

He further stated that the accused's father was also working for the same candidate and that it was in that connection that the accused's father had introduced the accused to him. Realising subsequently that that election took place about 20 years back he had to admit that it was so and he had to coin the story that it was at that time that the accused had been introduced to him only once and that the accused's age was then 8 or 10 years.

The witness gave out his age as about 30 years on the date of his evidence in the Court. Evidently he himself was 10 or 12 years of age when the election aforesaid took place. Evidently also he could not have been an election agent at such an early age. It is also evident that Munwa appellant who is now 18 years of age was not even born then. Consequently Kashiram cannot at all be relied upon.

6. Coming now to the testimony of Baburam (P.W. 6), his evidence suffers under the same improbabilities and inconsistencies as the evidence of Kashiram. He too did not state before the committing Magistrate that he knew the accused from before; nor did he name the accused in that Court. He was not made to identify the accused in any identification proceeding. How he came to know the accused is rather a mystery because, according to him he had never had any talk with the

accused except once about 6 years back, and that too only casually. Baburam stated that when the chase was given to the assailant two persons from Gumti No. 9 who were on foot had also joined in the chase. That part of his statement is not corroborated by the investigating officer who stated that during the course of investigation he contacted the people at Gumti No. 9 and he could not get any clue from those persons that anyone from Gumti No. 9 had given a chase to the assailant.

The evidence of Udai Narain (P.W. 9) does not also carry conviction. He is a resident of Mandhana-Bahlolpur and according to him he was going from his village to Kanpur on the 18th November 1955 and when he reached Gumti No. 10 on his cycle he saw a man going towards Kanpur, on foot with a load on his head and he also saw the accused Munwa standing on the right side of the road with his cycle standing on a stand nearby. He further stated that he saw Munwa giving the knife blow in the abdomen of Chhotelal when the injured cried out and he gave a chase to the assailant but could not apprehend him. Babulal, witness, who is said to have been carried by Udai Narain on his carrier had not been believed by the Sessions Judge.

That circumstance takes away a lot of the probative value of the evidence of Udai Narain, Moreover Udai Narain said that he did not state in the Court of the committing Magistrate that he had taken Babulal on the carrier, of his cycle. Nor did he relate to anyone about the present occurrence on the date the occurrence took place. He confessed that he never had any talk with Munwa and he stated that Munwa never came to his shop nor did he visit him anytime at his house. He further confessed that when the occurrence took place he was at a distance of 50 or 60 paces from Munwa. In answer to a question by the Court he said that he did not recollect if he saw the face of the assailant when the assailant had actually stabbed Chhotelal.

In this state of evidence it would not at all be safe to rely upon the testimony of Udai Narain when he said that it was the appellant who had stabbed Chhotelal. Moreover the question is entirely shrouded in mystery as to how the investigating officer came to know that these were the persons who had seen the occurrence.

Sub-Inspector Tripathi who investigated the case stated that it was from two persons, namely, Babulal (not Babulal, witness produced in Court) and Abdul Khaliq, that he got a clue regarding the eye-witnesses of the occurrence. Babulal and Abdul Khaliq have not been produced.

In answer to a question put to the Sub-Inspector he said that he was unable to say from what source he got a clue about the names of Babulal and Abdul Khaliq during the enquiry which he made in that neighbourhood. We have, therefore, not been able to get any assistance from the record as to how the Sub-Inspector caught hold of Kashiram, Baburam and Udai Narain, witnesses on whom the learned Sessions Judge has relied in registering the conviction of the appellant.

7. Another witness, Ham Autar, was produced on behalf of the prosecution to furnish some circumstantial evidence of the matter. This witness was also treated as hostile by the prosecution and his evidence was not believed by the Sessions Judge.

8. There were two other witnesses, viz., Har Prasad (P.W. 13) and Sunder (P.W. 4), Har Prasad is the manager of Kalyanpur Dairy Farm and he deposed that on the day of incident he had sent the deceased to get certain quantity of wheat converted into flour. Sunder (P.W. 4) who is the brother of the deceased stated about the motive. The learned Sessions Judge did not very much rely upon the evidence of motive by observing that when in a case of this nature the matter depends upon the testimony of the eye-witnesses the motive recedes to the background.

9. The question which has, therefore, got to be determined in the present appeal is whether upon the evidence, as it is, it would be safe to maintain the conviction of the appellant under Section 302, I. P. C. If we reject the evidence of the alleged eye-witnesses as not being sufficiently reliable, and if we come to the conclusion that the investigation of the case was not above board, we would be left only with the dying declarations of Chhotelal. We have already said that these dying declarations were alleged to have been made at four different stages. The first stage was the stage when he is stated to have convey-ed the information to Lallua Singh, on the basis of which Lallua Singh made the first information report.

If Lallua Singh cannot be believed for reasons already stated above, the dying declaration alleged to have been made to him by Chhotelal cannot be depended upon. The dying declaration made by Chhotelal at three subsequent stages, viz., before Dr. Tiwari, and then before the Sub-Divisional Magistrate, Ghatampur, and finally before Sub-Inspector Shiam Bihari Tripathi, have been closely scrutinised by us and we are of opinion that they cannot be safely depended upon. We are of opinion that at all stages of the statements ascribed to Chhotelal, extraneous influences were brought to bear upon him in order to make these statements. It was in the statement of Dr. Tiwari that when Chhotelal was brought to the hospital he was accompanied by the police and by 5 or 6 other attendants. Who those police officers and attendants had been was not made clear by any evidence on the prosecution side.

Dr. Tiwari stated that he had to make efforts to clear those persons out before he recorded the dying declaration. He further stated that Chhotelal was talking to those attendants before the dying declaration was recorded. The possibility of the name of his assailant having been given to him by any of these persons cannot, therefore, be excluded. In *Kunwarpal Singh v. Emperor* : AIR1948 All170 , this Court held that the conviction on a mere dying declaration without any corroboration is good in law if the Court is satisfied that it is true.

In the present case we have not that satisfaction; and this conclusion is based upon the view that the deceased made varying statements at different stages and in two of the statements ascribed to him he tried to introduce the names of Sarju Lohar and Sheobalak as the persons who had accompanied the appellant when this crime was committed.

10. The Supreme Court, in *Ram Nath v. State of Madhya Pradesh* : AIR 1953 SC420 , observed that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination and because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration,

This case came to be considered by the same Court in the subsequent case of Abdul Sattar v. State of Mysore, (S) AIR 1956 SC 168 (C), and it has been explained there. In that case a dying declaration was recorded in an incomplete form and it was held that under the circumstances of the case the dying declaration though incomplete otherwise was complete so far as the accused having shot the deceased was concerned and could certainly be relied upon by the prosecution. Further in that case the corroboration of the dying declaration invested it with a stamp of truth which went a long way towards inculcating the accused.

11. We might in this connection refer to a passage at p. 1283 in Corpus Juris Secundum, Vol. XL, which is as follows:--

'The credibility of dying declarations is to be determined largely by the same rules as are applied in weighing other testimony. Their value depends on their intrinsic probability, and the candor and truthfulness of the person who made them..... In weighing dying declaration, the jury may consider the circumstances under which they were made, as, whether they were due to outside influence or were made in a spirit of revenge, or when declarant was unable or unwilling to state the facts, the inconsistent or contradictory character of the declarations, and the fact that deceased has not appeared and accused has been deprived of the opportunity to cross-examine him, and may give to them the credit and weight to which they believe, under all the circumstances, they are fairly and reasonably entitled.'

12. It has been strenuously urged on behalf of the State that the dying declaration (Ex. P-13) recorded by Dr. Tiwari is entitled to be believed inasmuch as it was recorded at the earliest possible opportunity and Dr. Tiwari had had no motive to twist the statement of the declarant or to record it in a fashion other than what had been dictated by the declarant. We should not for a moment be understood to mean that Dr. Tiwari recorded a twisted version of the statement of the declarant; but we are, at the same time, inclined to think that the statement of the declarant had the stamp of outside influence and had been made in a spirit of revenge, and the declarant was unwilling to state the facts in a consistent and coherent manner.

There is enough material on the record to show that the different declarations made by Chhotelal had inconsistencies and contradictions in them. There was also sufficient material on the record to show that outside influences were also at work. Under the circumstances we are not in a position to base the conviction of the appellant merely upon the dying declaration of Chhotelal.

13. After having given the matter our earnest and careful consideration we are of opinion that the appellant is entitled to the benefit of doubt and to an acquittal. Accordingly we allow the appeal, set aside the conviction and sentence of the appellant and direct that he should be set at liberty at once unless wanted in some other matter.

14. The reference is rejected.

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