

**Shital Singh Vs. State**

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**Court :** Allahabad

**Decided On :** Aug-09-1974

**Reported in :** 1975CriLJ699

**Judge :** K.N. Seth and; H.N. Kapoor, JJ.

**Appellant :** Shital Singh

**Respondent :** State

**Judgement :**

**H.N. Kapoor, J.**

1. Shital Singh appellant has been convicted by the Sessions Judge of Basti by his order and judgment dated 27-10-1970 under Section 302, I.P.C. and sentenced to life imprisonment for committing the murder of Jha-kri Singh at about 6 a. m. on 31-7-1969 near village Bhitrightat One Bhawani Singh too was prosecuted along with the appellant for the same offence but he was acquitted by the trial Court.

2. The first information report of this case was lodged by Ramnain (P. W. 1) on 31-7-1969 at P. S. Captan-ganj at 9.5 a, m. He claimed to be an eye-witness of the occurrence along with Prahlad Singh (P. W. 2). The allegations in the first information report were that there was enmity between Jhakri Singh deceased and Shital Singh and others on account of litigation. Another case between Jhakri Singh and one Ganpat was pending on 31-7-1969 the date fixed in the case for

compromise. Ramnain and Prahlad Singh along with Jhakri Singh were going to Court in connection with that case. As the figure '3' was considered to be inauspicious, Jhakri Singh left the house first and the other two followed him after two or four minutes. When Jhakri Singh was on the path leading to Bhitrihat with standing sugarcane crop, two witnesses heard his cries. They went there and saw that Shital Singh was assaulting him with a pharsa while Bhawani Singh was assaulting him with a spear. After the witnesses arrived there, both the accused persons went away with their respective weapons. Jhakri Singh died on the spot as a result of those injuries. A case was registered against the accused persons and the chik report (Ext. Ka-4) was drawn up on the basis of this report (Ext. Ka-1) which was written by Ramnain himself.

3. S. I. Juthan Singh (P.W. 12) took up the investigation of the case. He reached the spot at 10.30 a. ra. He prepared the inquest report on the dead body and sent the same for post-mortem examination to the mortuary, along with other relevant papers. The investigating officer interrogated the two eye-witnesses. He took sample of blood from the spot. He inspected the site and prepared the site plan (Ext. Ka-74).

4. Post-mortem examination on the dead body of Jhakri Singh was conducted by Dr. S. S. Srivastava on 1-8-1969 at 2 p.m. He found the following antemortem external injuries on his person.

1. Incised wound 4 1/2' X 1 1/4' X 2 3/4' on the middle of the fracture cutting the bone and soft-tissues underneath. The brain was also lacerated underneath and was coming out from the wound, direction backwards.

2. Incised wound 9' X 1 1/2' X brain deep slightly on the left side of the head, 1/2' behind the injury No. 1 and going upto occipital region cutting the bone and soft-tissues and brain underneath directed downwards.

3. Incised wound 3 1/2' X li' X bone deep on the right cheek obliquely from the fore-head to the upper lips and cutting the upper jaw on the right side and disconnecting the teeth.

4. Incised wound 8' X 1 1/2' X bone deep on the right side of neck cutting the lower jaw obliquely.
5. Incised wound 8' X 2' X bone deep on the right side face 8' above injury No. 4 cutting the line underneath.
6. Incised wound 3' X 1/2' X bone deep on the right corner of the mouth.
7. Incised wound 5' X 1' X bone deep on the left side face obliquely cutting the line underneath.
8. Incised wound 3' X 3/4' X 1 1/2' deep on front of the left shoulder cutting the soft tissue underneath.
9. Abrasion 1' X 1/2' on the front of the left knee.
10. Abrasion 1' X 1/2' on the back of the left hand.

5. On internal examination it was found that the membranes were cut under the external injuries. The brain was lacerated under the external injuries. In the opinion of the doctor death was caused due to shock and haemorrhage as a result of the above injuries which were sufficient in the ordinary course of nature to cause death. The injuries could have been caused by a sharp cutting weapon like pharsa. In cross-examination he stated that the injuries could have been caused by a spear also.

6. The prosecution case further is that Shital Singh went to court straightway on the same day and at 11.30 a. m. he approached constable Tulsi Singh (P W. 13) to produce him before the District Judge. He accordingly produced the accused before the District Judge, Basti, saying that he wanted to make a confession of his guilt. The District Judge then directed the Court moharrir to take him to the A. D. M. (J). Tulsi Singh then took him to that Court. He produced him before Shri Brahma Swarup A. D. M. (J)(P. W. 11) at 12 a. m. It is said that the accused made, a confession before him and handed over a register (Ext. Ka-8) stating that all the reasons for doing so were given in that register. The A. D. M. (J) made an endorsement on that register and wrote out an order (Ext. Ka-65) to the effect that

he had made some confession and produced a register and that he should be taken into custody. It is said that he had made some confession before Shri Shanker Singh Advocate (P. W. 8) also while he was being taken to the Court of the A. D. M. (J). This witness, however, stated that he had not made any confession before him but he was insisting before the A. D. M. (J) to make a confession. He had then told him that he should consider it well before making a confession, otherwise he could, be hanged. He had also requested the Magistrate to send the accused to jail to give him an opportunity to think over it.

7. The register was sent to the handwriting expert for opinion. He gave the opinion that it was in the handwriting of the accused. It may be stated here that the accused also admitted that it was in his handwriting.

8. On 1-8-1969 the investigating officer learnt that Shital Singh had surrendered in Court before the A. D. M. (J) Basti. He made a report for police remand. He was then sent to the police station on 2-8-1969. The investigating officer interrogated him on 3-8-1969. Pharsa (Ext. 6) was said to have been recovered from the Manorama Nadi at the pointing out of the accused Shital Singh. On the same day at about 1 p.m. pyjama (Ext. 10) was recovered from the house of the accused Shital Singh at his pointing out. Blood-stains appeared to have been washed. Both these articles were sent to the Chemical Examiner. No blood was found on the pyjama. Some bloodstains were found on the pharsa but they were disintegrated and the origin could not be determined by the Serologist. The report of the Chemical Examiner is Ext. Ka-84 and that of the Serologist is Ext. Ka-85.

9. The investigation was subsequently taken over by S. I. Ramesh Chandra Yadav (P. W. 14), who submitted the charge-sheet on 4-11-1969 against both the accused persons.

10. Bhawani Singh had denied the prosecution allegations. Shital Singh admitted that, he was very much harassed by Jhakri Singh and that he was intending to commit his murder. He had written about his intention in the register (Ext. Ka-8) but he denied that he himself committed the murder. On learning about the murder, he had gone to the police station and enquired from the police officer as to who had committed the murder. The police officer directed him to produce himself

before the District Judge and state that he himself had committed the murder in case he wanted to earn name (shohrat). He was then sent with the police constable to Court and he then made a statement before the A. D. M. (J). He, however, stated in the same breath that he had not committed the murder and had made the confession at the instance of the police. In this case there is no doubt about the factum of death of Jhakri Singh. The medical report shows that his murder had been committed and pharsa had been used.

11. The prosecution has adduced evidence of motive against Bhawani Singh and Shital Singh both. The murder of Parasram, brother of Jhakri Singh, had been committed about two years back. Bhawani Singh was prosecuted in that case but was acquitted. Evidence has been led to the effect that there was litigation about the land between Jhakri Singh and Rambali, father of Shital Singh. That matter went up to the High Court and Jhakri Singh finally won that case. Jhakri Singh had even put hut on that land but Shital Singh and others had demolished the same and had beaten Jhakri Singh. A case under Section 323, I. P. C, was pending against Shital Singh and others on the date of the occurrence in respect of that incident. Shital Singh felt much aggrieved against Jhakri Singh as he thought that he would be ruined in case he was ousted from the land of his ancestors. He had noted all these facts in the register (Ext. Ka-8), which shows that he was contemplating to murder Jhakri Singh. He was mentally upset as his brother was lying ill in the hospital and his condition was serious. He had no funds to meet the expenses. In case he lost possession of his ancestral land, he would have no place even to tether his cattle. The motive is thus proved against Shital Singh. The register (Ext. Ka-8) can be used for the purpose of corroborating other evidence about the motive.

12. The prosecution had relied on several pieces of evidence. One Hari Ram (P. W. 5) was examined to state that he had seen Shital Singh and Bhawani Singh standing together with a pharsa and a ballam respectively near the sugarcane field at about sunrise and when he returned in the evening he learnt that Jhakri Singh had been murdered. His evidence has been rightly disbelieved by the learned Sessions Judge as he had no business to be present there.

13. The prosecution relied on the recovery of the pharsa (Ext, 6) from the Nadi on the pointing out by Shital Singh and the recovery of the blood-stained pyjama (Ext. 10) at his pointing out, by the investigating officer S, I, Juthan Singh (P. W. 12) in the presence of Rams-amujh Singh (P.W. 3). As already stated the pyjama was not found stained with blood and the blood on the pharsa was found to be disintegrated. The learned Sessions Judge has not placed reliance on this piece of evidence. In our opinion, he has rightly not placed reliance. The prosecution then placed reliance on the evidence of confession made by the accused Shital Singh before Shri Brahma Swarup A. D. M. (J)(P. W. 11) on which he had made a note and passed orders (Ext. Ka-65). The learned Sessions Judge has held this evidence to be inadmissible as the confession was not recorded by the A. D. M. (J) according to the provisions of Section 164, Cr.P.C. The learned Addl. Govt. Advocate has, however, argued that this evidence is admissible. We shall deal with it at the appropriate stage.

14. Lastly the prosecution relied on the statement of Ramnain (P. W. 1) cousin of Jhakri Singh and Prahlad Singh (P. W. 2} brother-in-law (sala) of Parasram who was the brother of Jhakri Singh. They are eye-witnesses of the occurrence. The learned Sessions Judge has considered these witnesses to be reliable so far as Shital Singh was concerned and has based his conviction on their statements. He, however, disbelieved them as against Bhawani Singh and gave him the benefit of doubt. In our opinion both the witnesses are thoroughly unreliable. P.W. 1 (Ramnain) is a cousin of the deceased while (P. W. 2)(Prahlad Singh) is the sala of Parasram, brother of the deceased who had already been murdered. He is a resident of a different village which was about two miles from the village of occurrence. He stated that he arrived on the evening of 28-7-1969 and had then arranged for a compromise in the case of Jhakri Singh v. Ganpat by calling one Lale who was also a party along with Ganpat. According to him, it was then decided to file a compromise on 29-7-1969 but then he was informed on 29-7-1969 that they had to go again, to Court on 31-7-1969 for that compromise. So he stayed at the house of Jhakri Singh during this period. No doubt, it appears that something was to be done in respect of that compromise on 31-7-1969. On this date permission was given for filing the compromise on behalf of the minor. Verification by one party was also done as is evident from the order-sheet which is

on the record but it appears from the compromise (Ext. Kha-6) that it was prepared on 15-7-1969. It was signed by the counsel for the parties on 22-7-1969. Prahlad Singh has made a false statement that he was instrumental in bringing about the compromise and got this compromise effected on 28-7-1969 and then it was to be filed on 29-7-1969. He has made this statement obviously in order to explain his presence at the time of the occurrence. He had no business to be present there. He stated that he had seen Bhawani Singh striking with his spear but there was no typical spear injury on the person of Jhakri Singh. He was obviously against Bhawani Singh because Bhawani Singh was prosecuted for committing the murder of Parasram, brother of Jhakri Singh. Parasram was the husband of the sister of Prahlad Singh (P. W. 2). His brother Dasrath was a witness in the murder case of Parasram. He has admitted that Dasrath resides with him. He was thus a highly interested witness. It is difficult to believe that he stayed at the house of Jhakri Singh from 28-7-1969 which was only two miles from his village simply because he had to go again to Court on 31-7-1969. Ramnain (P. W. 1) also made a similar statement about the compromise stating that he himself and Prahlad were responsible for bringing about the compromise. He is a cousin of the deceased. He was a prosecution witness in the murder case of Parasram against Bhawani Singh. He was also a witness for Jhakri Singh in the case under Section 323, I.P.C. against Shital Singh and others. The accused persons in both these cases were acquitted and the evidence of this witness was disbelieved. It was too much of a co-incidence that he could be available as a witness for Jhakri Singh and his family members whenever there was a necessity. He has wrongly stated that the compromise was prepared on 29-7-1969 and was then filed. He denied this suggestion that it was prepared on the 15th of July, 1969 and was filed on 22-7-1969. Obviously, he had nothing to do with the case of Jhakri Singh v. Ganpat. He was not a witness in that case. There is nothing to show that he was the paiokar. The very circumstance that the compromise was prepared on 15-7-1969 shows that he and Prahlad had nothing to do with getting the matter compromised on 28-7-1969 or on 29-7-1969. He has stated that he went to lodge the report and left Prahlad Singh near the dead body. Prahlad Singh thus remained near the dead body. But Ramsamujh (P. W. 3) who was examined in connection with the recovery of pharsa stated that he had reached the place of occurrence at about

7.30 a. Many persons had collected there but it could not be known as to who had killed Jhakri Singh. In case Ramnain and Prah-lad Singh were the eye-witnesses of the occurrence, they must have told others who had gathered there as to who had killed Jhakri Singh. This statement of Ramsamujh shows that Jhakri Singh was killed when he was all alone and as such the real assailants of Jhakri Singh could not be known. In, the first information report lodged by Ramnain, two persons were obviously nominated on the basis of suspicion only. As already stated above, the learned Sessions Judge did not believe their evidence against Bhawani Singh accused. In our opinion, the evidence of these witnesses does not inspire confidence and no reliance can be placed on their testimony.

15. We are now left with the evidence of the alleged confession made by the accused Shital Singh said to have been made before Shri Brahma Swarup, A. D. M. (J)(P. W. 11). He admitted that he did not record any statement of the accused under Section 164, Cr.P.C. and only made a note about whatever the accused stated in his order Ext. Ka-65 in order to justify taking him in custody. The learned Addl. Govt. Advocate has argued that whatever the accused stated before the A. D. M. (J) can be said to be admissible under Section 21 of the Indian Evidence Act. Sri Brahma Swarup A. D. M. (J)(P. W. 11) has been examined and he has given oral evidence about whatever had been stated before him by the accused. He has argued that the statement of Sri Sheoshanker (P. W. 8) is also relevant inasmuch as he stated that the accused was insisting on making a confession. According to him the evidence of Sri Sheoshanker shows that the accused himself had presented himself before the District Judge to make a statement and then he was sent to the A. D. M. (J). He has laid great stress on the fact that the accused had deposited the register (Ext. Ka-8) giving reasons why he wanted to commit the murder and this fact corroborates the testimony of Sri Brahma Swarup (P. W. 11) that the accused had made a confession. Lastly, he has also drawn our attention to the admission of the accused in his statement under Section 342, Cr.P.C. that he had replied in the affirmative to the question of the A. D. M. (J) whether he had committed the murder. As already stated, he had stated in the very next breath that he had not committed any murder and that he had made a confession at the instance of the police. This admission of the accused in his statement under Section 342, Cr.P.C. is, therefore, not very relevant. Similarly the register (Ext. Ka-

8) which was admittedly written in his hand only proves motive, which allegation cannot be sufficient for the purpose of his conviction.

16. The main point to be decided is whether the confession alleged to have been made by him before the A. D. M. (J) has been duly proved in this case as a piece of evidence. The Privy Council in the case of Nazir Ahmad v. King Emperor held as follows:

A memorandum prepared by the First Class Magistrate of certain statement made by an accused before him which was not according to the procedure prescribed under Section 164, Cr.P.C. would not be admissible in evidence at all.

Their Lordships of the Privy Council observed as follows:

Where a power is given to do a certain, thing in a certain way the thing must be done in that way or not at all.' Their Lordships were also of the view that otherwise the range of Magisterial confessions would be so enlarged by this process that the provisions of Section 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in that case.

17. The aforesaid view has been consistently followed by the Supreme Court in subsequent cases. In the case of State of U.P. v. Singhara Singh : [1964]4SCR485 their Lordships of the Supreme Court took a similar view in the case of a confession recorded under Section 164, Cr.P.C. by a Second Class Magistrate who was not authorised to record it. According to the Supreme Court, that statement could not be admissible under Sections 74 and 80 of the Indian Evidence Act as the statement was recorded by a Magistrate who was not competent to do so; it was, therefore, not possible for that Magistrate to give oral evidence of that confession. The Supreme Court distinguished the case of Emperor v. Ram Naresh : AIR1939 All242 in which the statements of the accused persons contained in the written applications signed by them were held to be admissible under Section 21 of the Evidence Act. In the present case the learned A. D. M. (J) did not obtain any written application of the accused surrendering himself in Court. In case he had made some admission in that application, that might have been admissible in evidence under Section 21 of the Evidence Act. So

far as the learned Magistrate is concerned, he was bound to record, the statement under Section 164, Cr.P.C. only and not in any other manner. The statement made by the accused before him cannot be treated as extra judicial confession because at that time he could act as Magistrate First Class only and not in any other manner.

18. Learned Addl. Govt. Advocate has next argued that the accused Shital Singh had made the statement before the A. D. M. (J) independent of the investigation and the A. D. M. (J) also did not know at that time that the investigation had already started and as such the provisions of Section 164, Cr.P.C. were not attracted. In support of this contention, he has placed reliance on the case of Har Singh v. State, 1969 All LJ 1078. The facts of that case were distinguishable as the report was lodged in that case after the statement had been recorded by the Magistrate and the investigation had also started afterwards. On the other hand, learned counsel for the appellant has placed reliance on the case of Nooruddin v. State : AIR1965 All40 . The facts of that case were similar to the facts of the present case. In that case the report had already been lodged and the investigation had started but the confession was recorded by the Magistrate independent of that investigation. It was held in that case that even under those circumstances it was necessary that the confession should have been recorded according to the provisions of Section 164, Cr.P.C. otherwise it could not be used in evidence. The phrase 'in the course of investigation' in the opinion of the Bench appeared to refer to the period of time when the investigation had started and was still going on and did not mean that the accused was to be produced before the Magistrate by the police.

19. Learned counsel for the appellant also referred to a recent decision by the Supreme Court in the case of Nika Ram v. State of Himachal Pradesh : 1972 CriLJ1317 . In that case the accused went straight to the residence of the Naib Tehsildar at 10.30 p.m. to make a confession. The Naib Tehsildar sent information to the police outpost through his peon where an entry was made in the G. D. at 10.45 p.m. The officer-in-charge of the police outpost then went to the residence of the Naib Tehsildar and reached there at 10.50 p.m. The Naib Tehsildar then recorded the statement of the accused at 11 p.m. He had only Second Class

Magisterial powers and there was nothing to show that he was specially authorised to record a statement under Section 164 Cr.P.C. The confession recorded by him under those circumstances was regarded as having been hit by the provisions of Section 164, Cr.P.C. and was not admissible in evidence, Their Lordships of the Supreme Court observed as follows:

It is well established that the discovery and arrest of the suspected offender is one of the essential steps in the course of investigation.

The statement under those circumstances was deemed to have been recorded during the course of investigation. It was held not to be admissible because the Second Class Magistrate was not authorised to record the statement under Section 164, Cr.P.C.

20. In the light of the above discussion, In our opinion, the oral evidence given by Sri Brahma Swarup A. D M. (J)(P. W. 11) of the alleged confession made by Shital Singh accused before him is not admissible in evidence and cannot be the basis of conviction.

21. The learned Addl. Govt. Advocate has next argued that the admission made by the accused Shital Singh in the Court of Session that he had made a confession before the A. D. M. (J) that he had killed Jhakri Singh, can be used against him. As already stated above, in the very next breath the accused Shital Singh had stated that he himself did not commit the murder and had made the confession at the instance of the police. The admission has to be read as a whole. This admission certainly cannot be the basis of conviction.

22. There is thus no legal evidence proving the guilt of the appellant. He is, therefore, entitled to be given the benefit of doubt.

23. In the result, the appeal is allowed and the conviction and sentence of the appellant Shital Singh are get aside. He is on bail. He need not surrender to his bail bonds which are hereby discharged.