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Court : Allahabad

Decided On : Mar-10-1971

Reported in : 1971CriLJ1225

Judge : J.M.L. Sinha, J.

Appellant : Ranjit Singh

Respondent : State

Judgement :

J.M. L. Sinha, J.

1. This is an appeal against the judgment and order dated 16th August 69 passed by IV Additional Sessions Judge -Kanpur convicting the appellant of the offence Under Section 307, IPC and sentencing him to seven years' R.I.

2. The facts leading to this appeal can briefly be stated as under:

Ranjit Singh appellant and Yashpal Singh P.W. 2 were on friendly terms since sometime before the occurrence. Both of them used to visit the shop of Smt. Shanti who ran a betel shop in the locality in which the appellant and Yashpal Singh P.W. resided. On 12th May 1968 the appellant went to the house of Yashpal Singh (P.W. 2) near about 8.30 p, m. and then both of them went to the shop of Smt. Shanti. Near about 9 p.m. Inder Singh P.W. 1 father of Yashpal Singh P.W.

received information that a scuffle was taking place between the appellant and Yashpal Singh at the shop of Smt. Shanti. Inder Singh accompanied by his son Gurtek therefore went to the shop of Smt. Shanti and, finding the appellant and Yashpal quarrelling with each other, separated them. Inder Singh then asked Yashpal Singh to accompany him to his house. Yashpal Singh however said that he would first get some betels prepared from Smt. Shanti and then proceed for the house. When Yashpal was at the shop of Smt. Shanti getting betels prepared, the appellant returned from his house armed with a knife and gave two blows to Yashpal Singh with the same. Having inflicted the blows the appellant 'an away. He was chased by Inder Singh and others for some distance but could not be apprehended.

3. After the incident was over Inder Singh P.W. 1 and Gurtek Singh took Yashpal Singh to Medical College Hospital which was situate nearby and got him admitted there. Since the condition of Yashpal Singh was grave, Inder Singh went to Police Station from the Hospital and lodged a 'report there the same day viz. 12th May 1968 at 11.30 p.m. A distance of two miles intervened between the place of occurrence and the Police Station.

4. Dr. S.C. Gupta (P.W. 8) of Lala Lajpat Rai Hospital Kanpur medically examined Yashpal Singh on 12th May 1968 at 10 p. m. He found the following injuries on his body.

1. Incised wound 3'x1/2' depth under observation starting from the posterior axillary line downwards and Medially reaching the mid axillary line approximately in 6th intercostal space on the left side of chest, fresh bleeding was present and omantum was protruding outside.

2. Incised wound 1'x1/4'x1/4' between the angle of 1st and 2nd metacarpal at the back of left thumb.

At 10.35 p. m. the dying declaration of Yashpal Singh was recorded as his condition continued to be grave.

5. At 11.15 p. m. the same day, viz., 12th May 1968. Yashpal was operated upon and the note prepared at the time of operation revealed the following further facts:

1. A stab wound entering through the skin and subjacent structures at the highest level entered pleural cavity through the intercostal space.

2. Lower lobe of the lung was found wounded.

3. There was an incised wound in the diaphragm through and through. The pleural cavity was communicating with abdominal cavity.

4. Spleen, stomach, and greater omentum had been pierced.

5. Spleen was found partially sliced.

6. The investigation of the case was taken over by Sri Virendra Singh S. I., P.W. 9. After completing the investigation he submitted a charge sheet for the prosecution of the appellant.

7. The appellant in his statement in the trial court denied the prosecution case in toto and further said that negotiation for the marriage of Yashpal Singh was taking place but he and his father Nanak told the father of the girl, on his enquiry, that Yashpal Singh did not bear a good moral character and was a drunkard, and thereupon, the marriage negotiations fell through. The appellant added that Inder Singh and other members of his family therefore bore enmity against him and got him falsely implicated in this case. '

7-A. The trial court on a consideration of the evidence on record concluded that the prosecution case was made out beyond reasonable doubt against the appellant and, in the result, convicted and sentenced him as mentioned earlier. Feeling aggrieved against it he has come up in appeal before this Court.

8. I have heard learned Counsel on either side and have also perused the record of the case.

9. In order to prove its case against the appellant the prosecution placed reliance on the direct evidence of Inder Singh P.W. 1, Yashpal Singh P.W. 2, Smt. Shanti

P.W. 3 and Mannoo Lai P.W. 5. The trial court did not feel satisfied with the evidence of Munni Lal P.W. 5. The trial court however found that Inder Singh, Yashpal Singh and Smt. Shanti were reliable witnesses and placed reliance on the evidence of the said three witnesses to record the order of conviction against the appellant.

10. learned Counsel for the appellant in his argument before me urged that Yashpal Singh P.W. 2 is himself the person who had received injuries and Inder Singh is his father. It was argued that in view of the plea set up by the appellant during his examination in the trial court, the uncorroborated testimony of Inder Singh and Yashpal Singh should not have been relied upon. Referring to the evidence of Smt. Shanti P.W. 3 learned Counsel said that it was apparent on an examination of her state- ment that she did not bear good moral character and, further, that her statement was inconsistent with the evidence of Inder Singh on some points and, consequently, her evidence could not be acted upon in corroboration of the testimony given by Inder Singh P.W. 1 and Yashpal Singh P.W. 2.

11. I do not think the evidence of Inder Singh and Yashpal Singh should be rejected merely because they are father and son respectively or because the appellant alleged enmity with them. As for Smt. Shanti P.W. 3 it is no doubt true that while Inder Singh said that 40 6r 50 persons were present when the incident took place, she said that no other person excepting her, Inder Singh, Yashpal Singh, Ranjit Singh, Munnoo Lal and Jwala were present at that time. This inconsistency is however not very material and should not lead to the evidence of Smt. Shanti being rejected. As for the character of Smt. Shanti even assuming that she did not bear a good moral character, her evidence cannot be discredited on that score particularly when it is admitted on both hands that the occurrence took place in front of her shop.

12. learned Counsel for the appellant then contended that according to the material elicited in the cross-examination of Yashpal Singh he was a drunkard and had taken wine on the date of occurrence sometime before the incident. learned Counsel contended that it is quite likely that under the influence of drink Yashpal

Singh was creating some nuisance at the shop of Smt. Shanti, where so many people were collected, and someone out of them stabbed Yashpal Singh and managed to escape without being recognised. In support of his contention learned Counsel referred me to an endorsement on the back of bed-head ticket which inter alia reads:

The relatives of the patient say that the patient was stabbed by somebody today five hours back.

learned Counsel stressed that if the assailant of Yashpal Singh had been seen and recognised, the relatives of Yashpal Singh who accompanied him to the hospital should have mentioned the name of the assailant and that name would have found mention in the bed-head ticket. learned Counsel also urged that presumably the dying declaration of Yashpal Singh recorded in the hospital on 12th May 1968 at 10.30 p.m. also did not mention the name of the assailant and it was for this reason that the dying declaration was withheld despite repeated requests of the appellant's counsel and was not made available to him for cross-examination.

13. Having given my anxious thought to the contention raised I find that there is substance in it. It was not controverted before me that a dying declaration of Yashpal was recorded in the hospital on 12th May 1968 at 10.30 p. m. This fact is conclusively proved by the statement of Dr. S.C. Gupta P.W. 8 and the endorsement existing on the margin of page 11 of the bed-head ticket. Now, since Yashpal Singh survived the injuries the dying declaration could not be made use of as such. It however continued to be a previous statement of a prosecution witness and the appellants could make use 'of that statement to cross-examine and contra? diet Yashpal Singh Under Section 145 of the Indian Evidence Act. A perusal of the record shows that a request was made on behalf of the appellant during the trial of the case for the dying declaration being made available to the appellant for cross-examination and several opportunities were given to the prosecution to place on record that dying declaration but without any purpose. Consequently it cannot be gainsaid that the appellant was handicapped in his defence on account of the non-availability of the dying declaration. The need and

the relevance of the dying declaration for the purpose of cross-examination is highlighted by the fact that, according to the bed-head ticket, when Yashpal Singh was taken to the hospital his relatives, in all probability did not mention the name of the assailant but only said that Yashpal Singh had been stabbed by somebody. Further, those relatives told the hospital authorities that the incident had taken place about five hours before the time Yashpal Singh was admitted in the hospital. According to the bed-head ticket Yashpal Singh was admitted on 12th May 1968 at 10.30 p. m. It would therefore mean that according to the statement made by the relatives of Yashpal Singh at the hospital the incident took place near about 5 p. m. The prosecution case as presented in trial court however was that the occurrence took place at about 9 p. m. Now, if the statement contained in the bed-head ticket is to be accepted as true it very much damages the prosecution case. It cannot be ignored that this statement was the earliest in point of time having been made at about 10 p. m. The dying declaration was recorded at 10.35 p. m. and possibility of that dying declaration containing identical statements cannot be ruled out. Under the circumstances if the dying declaration had been made available to the appellant it would have afforded him very valuable material for cross-examining prosecution witnesses, particularly Yash- pal who made the dying declaration. It cannot therefore be gainsaid that the appellant was very much handicapped in his defence on account of dying declaration not having been made available to the appellant. In case Noor Khan v. State of Rajasthan : 1964 CriLJ167 the Supreme Court while dealing with the omission to supply the copies of statements recorded Under Section 162 of the Criminal P.C. observed:

We may repeat that the provisions of Section 162, Code of Criminal Procedure provide a valuable safeguard to the accused and denial thereof may be justified only in exceptional circumstances. The provisions relating to the record of the statements of the witnesses and the supply of copies to the accused so that they may be utilised at the trial for effectively defending himself cannot normally be permitted to be whittled down, and where the circumstances are such that the court may reasonably infer that the prejudice has resulted to the accused from the failure to supply the statements recorded Under Section 161, the court would be justified in directing that the conviction be set aside and in a proper case to direct that the defect be rectified in such manner as the circumstances may warrant.

14. In another case Gurbachan Singh v. State of Punjab : 1957 CriLJ1009 the statements of the prosecution witnesses in a connected case (not in the case out of which the appeal had arisen) were not supplied to the accused and it was argued before the Supreme Court that on account of the statements made by the prosecution witnesses. in the connected case not having been made available to the appellant for cross-examination, the appellant was handicapped in his defence. The Supreme Court observed:

There is no provision in the Code of Criminal Procedure that copies of statements recorded Under Section 161 in a connected case should be made available to the defence though there is not anything prohibiting it and in the instant case it would have been better to have done so specially since the statements of these witnesses were not recorded by the Sub-Inspector of Muktesar apart from what they had stated before the Sub-Inspector of Jalalabad, copies of which would have been given to the defence.

15. In the above case however the conviction recorded against the appellant was not set aside by the Supreme Court merely because it was found that no request had been made on behalf of the appellant for obtaining the copies of the statements and the court having perused the statements found that the statements made in the connected case were identical to the statements made in the case out of which the appeal had arisen.

16. The observations made by the Supreme Court in regard to the statements recorded Under Section 162 should apply with equal force to the statement of prosecution witnesses recorded Under Section 164, Criminal P.C. by a Magistrate or to a statement of a prosecution witness recorded by a Doctor as a dying declaration, for, they are previous statements of the prosecution witnesses and an accused has a right, Under Section 145 of the Evidence Act to cross-examine the prosecution witnesses with regard to those statements.

17. In this connection reference can be made to the case Shankar Lal v. State : AIR1954 All779 . In this case what happened was that the statements of the prosecution witnesses were recorded Under Section 164 of the Code of Criminal Procedure but those statements could not be made available to the accused for

cross-examination as they were not traceable. When the matter came up before this Court an argument was raised to the effect that on account of non-availability of the statements recorded Under Section 164 of Criminal P.C. the appellant was handicapped in his defence.' this Court observed:

In our opinion the learned Counsel for the appellant is perfectly correct in contending that he had a right to cross-examine the witnesses with reference to those previous statements. Section 145, Evidence Act gives a party a right to cross-examine a witness with reference to his previous statements made by him in writing or reduced to writing and impose a duty on the cross-examiner, in case he intends to contradict him with such previous statement, to draw the attention of the witness to such portions thereof as are to be used for the purpose of contradiction. Section 155 (3) permits a cross-examiner to impeach the credit of a witness by proving a former statement inconsistent with any part of his evidence. Thus it is apparent that it was a legitimate right of the appellants to defend themselves by proving, if they could, that the prosecution witnesses, on the basis of whose statements the charge of murder was sought to be proved against them had made different statements on previous occasions. By denying the copies of the previous statements this previous right has been taken away from them. They have thus, to a great extent, been handicapped in their defence.

18. After making reference to a couple of decisions this Court further observed;

In the present case also the statements were never supplied at all and the accused was, in our opinion, certainly prejudiced. It is not possible to speculate what discrepancy, if any, those statements contained, but the mere fact that an opportunity of cross-examining the witnesses with reference to those previous statements and contradicting them, if possible, has been denied to the appellants, in an unmistakable proof of prejudice to them.

In the case before me it is not known whether the dying declaration was recorded by some Magistrate or by some Doctor. It should not however make any difference. If the dying declaration was recorded by a Magistrate, it should have been recorded Under Section 164 of the Criminal P.C. and Section 164 directs that the statements recorded thereunder must be forwarded to the Magistrate by

whom the case is to be enquired into or tried. In the case of dying declarations recorded by Doctors, identical provision is to be found in para 489 of the Manual of Government Orders. Para 489 (2) reads as follows:

Where a dying declaration is recorded by a Police or Medical Officer. it should be recorded in full detail in the actual words of the declarant in the form of question and answer, in the presence of responsible witnesses. It, should then be read over to the declarant who should affix his signature or mark to it. The accused or his Pleader, if present. should be allowed to put questions to the declarant. The declaration when concluded should be signed by the Police or Medical Officer recording it. who should also obtain the signatures of responsible witnesses. It should then be forwarded in a sealed envelope direct to the Magistrate who would ordinarily enquire into the case. If it can be avoided, no Police Officer who is engaged in the investigation into the case should be present when the dying declaration is recorded.

Provision regarding dying declarations is also contained in Para 432 of the Medical Manual which states that if in the opinion of Civil Surgeon or subordinate Medical Officer there is not time to call any Magistrate he may himself record the declaration and should inform the District Magistrate or the senior Magistrate of the actions taken.

19. Obviously, the aforesaid provisions in Para 489 (2) of the Manual of Government Orders and Para 432 of the Medical Manual have been incorporated in order to ensure that the dying dec- laration is made available to the accused and the court concerned to be made use of in such manner' as may be found necessary during the trial of the case.

20. In view of the decisions and other provisions referred above I feel no hesitation in coming to the conclusion that the appellant in the instant case was handicapped in his defence on account of the non-availability of the dying declaration.

21. If there were evidence to show that dying declaration can still be made available to the appellant for the purpose of cross-examination I may well have considered to remand the case to the court below for fresh trial after making the

dying declaration available to the appellant. A perusal of the record however shows that there is no hope of the dying declaration being found. In the case of : AIR1954 All779 (supra) also similar situation had arisen and this Court said:

It will serve no useful purpose to send back the case for retrial because circumstances are such that even now those statements cannot be found. A search was made for them while the case was pending in the Sessions Court but all attempts to trace them proved futile. In the circumstances any further search will lead to no useful result.

With the above observation this Court allowed the appeal and set aside the conviction recorded against the appellant in that case.

22. To sum up I find that the appellant in the instant case was greatly handicapped in his defence on account of the non-availability of the dying declaration. Consequently the conviction and sentence recorded against the appellant cannot be maintained.

23. This appeal is therefore allowed. The conviction and sentence recorded against the appellant are set aside. The appellant is on bail. H need not surrender. His bail bonds are discharged.

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