

Sheo Dularey Vs. State

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Court : Allahabad

Decided On : Apr-26-1996

Reported in : 1997CriLJ269

Judge : K.C. Bhargava and ; J.C. Gupta, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300, 302, 324, 326; ;Code of Criminal Procedure (CrPC) - Sections 161; Criminal Law

Appeal No. : Crl. Appeal No. 127 of 1980

Appellant : Sheo Dularey

Respondent : State

Advocate for Def. : G.A. Adv.

Advocate for Pet/Ap. : L.R. Acharya, ;R.R. Acharya and ;Imtiaz Murtaza, Adv.

Disposition : Appeal dismissed

Judgement :

J.C. Gupta, J.

1. By the judgment and order dated 29-2-80 passed by Shri R.M.R. Khanna the then 1st Addl. Sessions Judge. Unnao, appellant Sheo Dularey has been convicted under Section 302 of the Indian Penal Code and sentenced to

imprisonment for life for committing the murder of Smt. Prem Kumari, sister-in-law of the appellant., on 31 -7-78, at about 6.00 p. m. at the door of the house of the deceased situate in village Dandamau under Police Station Bighapur, district Unnao. Appellant has- further been convicted under Section 326, I.P.C. and sentenced to undergo rigorous imprisonment for 4 years for causing injuries to another sister-in-law Smt. Raj Kumari by axe on the same date, time and place. Both the sentences have been ordered to run concurrently. Through this appeal the appellant has challenged his conviction and sentence.

2. Briefly stated the prosecution story was that the appellant Sheo Dularey has 4 brothers. The eldest brother used to live with his in-laws in village Karam. Surya Prasad another brother of appellant Sheo Dularey, whose wife was Smt. Raj Kumari, P. W. 2, used to live in Kanpur where he was serving in a Dal Mill. Shri Devi Prasad, the third brother was serving in Army in Nizamabad. His wife was Smt. Prem Kumari, the deceased. Smt. Prem Kumari with her children used to reside in village Dadamau. Only two brothers namely Sheo Dularey appellant and Bhagwati used to live in the same village. It is said that Smt. Raj Kumari had been visiting the village occasionally. It is alleged that several years ago Debi Prasad had married Smt. Prem Kumari deceased at Hyderabad itself. Sheo Dularey and Bhagwati did not like the said marriage and they used to scandalize Smt. Prem Kumari by making wildallegations touching her character and used to assault her by saying that it was not known to which caste she belonged and she was a blot to their family. They wanted Smt. Prem Kumari to leave the house and go away so that they could exclusively enjoy the house and the land belonging to the share of Debi Prasad.

3. It is said that a day prior to the present occurrence Smt. Raj Kumari, P. W. 2, had come to her husband's parental house in village Dada Ynau and was staying with the deceased Smt. Prem Kumari. On 31-7-78, she had gone with the deceased Smt. Prem Kumari to see the fields and grove. There they found Sheo Dularey appellant grazing his cattle in the grove of Smt. Prem Kumari to which the latter protested and both had exchange of abuses. On the same evening at about 6.00 when Smt. Prem Kumari and Smt. Raj Kumari were present at the door of the house, Sheo Dularey appellant came there with an axe in his hand. Seeing Sheo

Dularey, Prem Kumari said why he got her grove grazed by cattle. Appellant abused her and then abuses were exchanged between Sheo Dularey and Smt. Prem Kumari. This attracted neighbours Srinath, Keshav, Sushil and others who tried to reconcile the matter, however, Sheo Dularey rushed up with the axe and started assaulting Smt. Prem Kumari saying that he would finish her. When Smt. Raj Kumari, P. W. 2, made an attempt to save Smt. Prem Kumari she too was assaulted by the appellant who gave an axe blow upon her back. She also fell down on the ground. Sheo Dularey continued to assault Prem Kumari with the axe till she died and then the appellant ran away from the scene of occurrence along with the weapon of assault i. e. axe. Leaving the dead body of Smt. Prem Kumari at the scene of occurrence, Smt. Raj Kumari went to the police station Bighapur in a bullock-cart with Sita Ram Pasi and dictated an oral report Exhibit Ka.-1 which was recorded by Head Constable Abdul Rasheed Khan, P. W. 5, at 8.15 p.m. A case under Section 302/326, I.P.C. was registered and Smt. Raj Kumari was interrogated by the Investigating Officer. She was then sent for her medical examination with Constable Amrit Lal Shukla. Dr. S. C. Mishra, P. W. 6 medically examined Smt. Raj Kumari at 11.45 p. m. on the same night and found the following injuries on her person.

4. Incised wound present over right side of back measuring 6 cm x 1.5 cm x muscle deep situated 5 cm below the inner angle of right shoulder blade. The direction of wound was slightly oblique (medio lateral), tailing present, upward, margins of wound were clean cut, medial margin present on the vertebral column. Margins were red and slightly swollen, fresh bleeding was present. Depth was not probed, condition of the patient was low due to severe bleeding. Duration was about 6 hours. In the opinion of the doctor injury was caused by sharp cutting dangerous weapon like axe and the same was kept under observation for finding out the nature of injury. X-ray of right scapula and vertebral column was advised.

5. The investigation of the case was done by S.I.H.N. Mishra, P. W. 7 who recorded the statements of other witnesses, collected blood from the scene of occurrence, prepared site plan and after completing investigation submitted charge-sheet against the appellant. ?

6. It may be mentioned that the post mortem examination on the dead body of Smt. Prem Kumari was conducted by Dr. S. M. Tripathi, P. W. 3 on 2-8-1973 at 3.30 p.m. The deceased was aged about 22 years and a period of two days had elapsed since her death, the following ante-mortem injuries were found on her body :-

1. Linear incised wound left side in scapular region 4'.

2. Incised wound 4' x 1 1/2' x bone deep on the back of neck and left side back upper part, fracture of 5th cervical vertebrae. Muscles and blood vessels, cervical 5th vertebrae cut.

3. Incised wound 4' x 2' x bone deep on front of neck and left side of neck, lower part muscle deep. Trachea was cut at the level of 5th cervical vertebrae.

4. Incised wound 1' x 1/2' muscle deep on the front of neck upper part below the jaw 1 1/2' below the chin.

5. Incised wound 2 1/2' x 1' on the left side back upper part just below injury no. 2.

7. On the internal examination it was found that the trachea was cut at the level of 5th cervical vertebrae under injury No. 3. Stomach was empty so also small intestines while the large intestines were loaded with faecal matter.

8. In the opinion of Dr. Tripathi the death had been caused due to shock and haemorrhage as a result of ante-mortem injuries.

9. In the trial Court, as many as 7 witnesses were examined on behalf of the prosecution. Out of whom P. W. 1, Keshav Prasad and P. W. 2, Smt. Raj Kumari the injured were witnesses of fact. The case of the appellant was of total denial. Appellant produced no witness in defence.

10. On a consideration of evidence and material on record the learned Sessions Judge found the appellant guilty and accordingly he convicted and sentenced the appellant as aforesaid.

11. We have heard the learned counsel for the appellant at length so also the learned Additional Government Advocate appearing on behalf of the State. Record has also been perused.

12. Learned counsel for the appellant argued before us that the trial Court has erred in basing conviction on the sole testimony of Smt. Raj Kumari, P. W. 2 who was highly interested in the deceased. On examining the evidence of Smt. Raj Kumari and considering the attending circumstances, we do not find any weight in this submissions of the learned counsel. Raj Kumari is the wife of Shri Surya Prasad, while the deceased Prem Kumari was the wife of Debi Prasad. Debi Prasad, Surya Prasad and appellant Sheo Dularey are real brothers. Therefore Smt. Raj Kumari, P. W. 2 is not only related to the deceased but is very closely related to the appellant Sheo Dularey. There is nothing on record to indicate that she had any axe to grind against the appellant. We are unable to find out any acceptable cause of false implication of the appellant at the instance of Smt. Raj Kumari, P. W. 2. She was nursing no ill-will against the appellant, who is her own brother-in-law, and to us it does not seem reasonable that she would have falsely nominated the appellant as the sole assailant responsible to cause fatal blows on the deceased and injury on her own person.

13. The place of incident has neither been challenged in the trial Court nor before us. The place of incident is also otherwise fully established from the evidence on record. As per the prosecution story the incident in question occurred at the door of the house of the deceased. The dead body of Smt. Prem Kumari was found lying at that place by the Investigating Officer and blood was also collected from there. Smt. Prem Kumari the deceased and Smt. Raj Kumari, P. W. 2 being women, in the normal circumstances were expected to be present at their house in evening hours. Though Smt. Raj Kumari, P. W. 2 used to live in Kanpur with her husband Surya Prasad but according to her she had come to the village a day prior to the date of incident. She herself received a severe blow of axe on her back, which was medically examined on the same night at 11.45 p. m. by Dr. S. C. Mishra, P. W. 6. By no stretch of imagination the injury found on the person of Smt. Raj Kumari could be said to be self inflicted or self suffered. It was also not a superficial injury. Having regard to the nature of injuries found during postmortem

examination on the body of Smt. Prem Kumari and considering the statement of Smt. Raj Kumari, P. W. 2 and the kind of injury suffered by her. we have no hesitation in holding that Smt. Raj Kumari, P. W. 2 received injury on her back by the same weapon i. e. axe in the course of the same occurrence in which Smt. Prem Kumari was given axe blows. In this view of the matter, the presence of Smt. Raj Kumari, P. W. 2 at the time of the incident could not be doubted. The evidence of Smt. Raj Kumari, P. W. 2 is fully consistent and corroborated by medical evidence and supported by the surrounding facts and-circumstances prevailing at or about the time of occurrence. Had the appellant been innocent, she would have been the last person to falsely nominate him as the sole assailant leaving out the real culprits. To us, her evidence appears to be wholly reliable and is of such a quality that it can be treated to be a safe and sufficient foundation for conviction and we could find no material on record which may compel us to take a different view.

14. It was next contended by the learned counsel for the appellant that as per the First Information Report Shri Nath, Keshav, P. W. 1, Sushil and few others from the neighbourhood had collected at the scene of occurrence. Out of them only P. W. 1, Keshav was produced who too did not support the prosecution story and turned hostile. The learned counsel argued that the non-production of the aforesaid witnesses is sufficient to doubt the prosecution story. We are not at all impressed with this submission of the learned counsel. It is true that P. W. 1, Keshav who was produced at the trial did not support the prosecution story by stating that he did not witness the incident, though in his statement recorded under Section 161, Cr.P.C. he stated to have seen the appellant inflicting axe blows on Prem Kumari and Smt. Raj Kumari, P. W. 2. His evidence is therefore neither helpful to the prosecution nor to the defence. Other witnesses were not produced during trial as most likely they were won over by the defence. There was undoubtedly a pressure by the family members of the appellant on the witnesses not to depose against the appellant and in that connection it may be useful to refer to the statement of Smt. Raj Kumari, P. W. 2 wherein she stated that after the murder of Smt. Prem Kumari she was pressurised by her husband to move an application in favour of the accused so that he could be acquitted but she refused to do so with the result that he became annoyed with her. This shows the courage

which Smt. Raj Kumari, P. W. 2 possessed as despite pressure exerted by her own husband she did not succumb and was bold enough to put forth the truth before the Court. In the circumstances, it is easy to visualise that the other witnesses, who were not concerned with the deceased might have liked to keep away from the proceedings before the Court and from inviting wrath of the family members of the deceased. In any view of the matter, the evidence of P. W. 2 Smt. Raj Kumari will not be affected by the non-production of the aforesaid witnesses because the real question for determination is not as to what is the effect of non-examination of the said witnesses and the only question for consideration is whether the statement of P. W. 2 Smt. Raj Kumari is believable or not. Once her statement has been found acceptable by us and it is further found that she withstood the test of cross-examination, we feel that the non- production of neighbours would pale into insignificance and will not affect the credibility of P. W. 2 Smt. Raj Kumari. To us the evidence of Smt. Raj Kumari P. W. 2 inspires full confidence and is of such a quality that conviction can safely be based upon her sole testimony.

15. On behalf of the appellant it was next argued that the evidence on record indicates that the incident occurred late in the night. Learned counsel urged that if in fact the incident had occurred at about 8.00 p.m. as alleged by the prosecution, the medical examination of Smt. Raj Kumari would have been done much earlier than 11.45 p.m. This submission is also devoid of any force, Smt, Raj Kumari had herself received a severe axe blow on her back. She first went to the police station and lodged an oral report at 8.15 p.m. As per the statement of the Investigating Officer P. W. 7, statement of Smt. Raj Kumari under Section 161, Cr.P.C. was then recorded at the police station and thereafter Smt. Raj Kumari was sent for medical examination with Constable Amrit Lal along with 'Chitthi Mazrubi'. It has also come in the statement of Smt. Raj Kumari that she stayed for about an hour at the police station. She was not asked as to how much time it took her to reach the district Hospital from the police station. It is also well known that often doctor is not available in hospital and there could be various reasons of the late medical examination of Smt. Raj Kumari. From the mere fact that the medical examination of Smt. Raj Kumari was done at 11.45 p.m., it cannot be inferred that the incident did not occur at about 6.00 pm. as alleged by the prosecution or that the same

occurred much later. At this stage it would also be convenient to refer to the statement of Dr. S. C. Mishra P. W. 6 who categorically stated that the injury found on the person of Smt. Raj Kumari could be caused at about 6.00 p.m. and in any case not later than 7.00 p.m. He specifically denied the suggestion of the defence that the said injury could be caused at 8.00 p.m. Having regard to this opinion of Dr. S. C. Mishra P. W. 6 and in the light of other circumstances and evidence, there can be no doubt that the incident did occur at the time as-claimed by the prosecution. Learned counsel for the appellant then urged that the First Information Report of the present case was ante timed because as admitted by the Investigating Officer no copy of the same and of G. D. were sent to the doctor alongwith the dead body for post mortem examination and also that the postmortem examination was not conducted on 1-8-78, and was done on 2-8-78. He argued that this late post-mortem examination raises a suspicion about the lodging of the F. I. R. at the time it is alleged to have been recorded in the police papers. We here carefully examined this aspect of the case also, and find ourselves unable to accept this submission as well. As per the Statement of P. W. 2 Smt. Raj Kumari, after the incident she went to the police station in a bullock cart with one Sita Ram Pasi. She herself had received a bleeding injury on her back and Smt. Prem Kumari was murdered before her eyes. Therefore, it must have taken sometime for her to overcome the shock and grief. Some time must also have been consumed by her to gather courage to report the matter to the police against her own brother-in-law and to get agreed some villager to accompany her to the police station and in arranging cart. The report was lodged at 8.15 p.m. The question of delay has not to be judged on arithmetical calculations divorced of the surrounding facts and circumstances. Some margin has also to be given to normal human traits such as shock, grief, helplessness etc. In the instant case, having regard to the surrounding facts and circumstances, we are of the opinion that there has been no delay in the lodging of the First Information Report. We further find that there are no good reasons to hold that the First Information Report was ante-timed and was not recorded at the time it is said to have been recorded. Mere omission or negligence on the part of Investigating Officer in not despatching the copy of F. I. R. with the dead body, in the peculiar facts and circumstances of the present case, will not be enough to effect the veracity of the prosecution case nor

can it be held that the F. I. R. had not been recorded by the time the inquest was completed. Here it may be relevant to mention that the medical examination of Smt. Raj Kumari had been done at 11.45 p.m. by Dr. Mishra P. W. 6. The medical report Exhibit Ka-5 was prepared by the doctor on the back of the Chitthi Mazrubi (a letter of request which is sent from the police station to the doctor for examining the injuries of the person concerned.) It is thus apparent that Smt. Raj Kumari had reached the police station on that very evening and had reported the matter to the police. The F. I. R. was taken down in the cheek register and case was registered at 8.15 p. m. at Crime Number 120/78 in the General Diary No. 28. The entry in the G. D. No. 28 recites that Smt. Raj Kumari had come to the police station with Sita Ram Pasi and her injury was also noted down therein. It is further mentioned therein that the injured Smt. Raj Kumari was being sent to the hospital for her medical examination with the 'Chhithi Majroobi'. All these facts clearly go to show that the F. I. R. was promptly recorded in the evening of 31st Oct., 1978, which reflected a complete account of what had taken place at the hands of the appellant on that fateful evening at the door of the deceased. Consequently by no means it could be held that the F. I. R. was recorded some time on 1-8-78 simply on the basis of late post mortem examination of the deceased.

16. Lastly Mr. Imtiyaz Hussuin learned counsel for the appellant argued that the present case is covered by Exception I of Section 300, I.P.C. as the appellant appears to have lost control and inflicted fatal blows on Smt. Prem Kumari, under grave and sudden provocation which was caused by Smt. Prem Kumars herself. He submitted that the benefit of the Exception aforesaid cannot be denied to the appellant merely because his defence was of complete denial and the same was not pleaded by him.

17. It is the primary principle of Criminal Law that onus of proving the general issue i.e. everything essential to the establishment of the charge against the accused rests upon the prosecution and the same never shifts. The burden of proving any of the Exceptions, of course, lies on the accused, nevertheless that burden is not so onerous as the unshifting burden which lies on the prosecution to prove the guilt of the accused beyond reasonable doubt, it is well settled law that even if the Exception has not been pleaded or the facts essential to bring the case

within the ambit of the Exception have not been stated by the accused in his statement, he can be relieved of the burden by relying on the prosecution evidence without producing any defence evidence for claiming the benefit of the Exception, if the Court after examining the prosecution evidence comes to the conclusion that the accused is entitled to the Exception, benefit should be extended and that benefit cannot be refused simply on the ground that the case of the accused was of complete denial and the Exception was not claimed by him in his statement before the Court.

18. The law with respect to Exception I is also very clear. The act of the accused can be brought under this Exception only when it is shown that the accused was deprived of the power of self-control by grave and sudden provocation which was caused by a person whose death was caused. The real test of grave and sudden provocation is whether a reasonable man belonging to the same class of society as the accused, placed in the situation in which he was placed would be so provoked as to lose his self-control and the provocation must be such as would upset not merely a hot tempered or highly sensitive person but of ordinary calmness.

19. In the instant case we have carefully examined the prosecution evidence and find absolutely no basis to extend the benefit of Exception I to the appellant. Apart from the fact that no such plea was pleaded by the accused appellant before the trial Court, no foundation in this respect was laid on his behalf in the cross-examination of P. W. 2 Smt. Raj Kumari. She in her examination in chief stated of a hatred feeling which the appellant was having against Smt. Prem Kumari before the present incident. It has also come in her evidence that on the date of occurrence she along with Prem Kumari had gone to see their fields and grove and there Smt. Prem Kumari found that appellant was grazing his cattle in the grove of Prem Kumari and when Prem Kumari protested to this act of the appellant he did not desist and then abuses were exchanged. It is, further, in the statement of Smt. Raj Kumari that soon before the incident when she and Smt. Prem Kumari were sitting at the door of the house appellant came there with an axe in his hands and started questioning Smt. Prem Kumari on the issue of grazing of cattle in her grove and hurled abuses on her. She was not cross-examined further on these

points.

20. From the above facts as stated by Smt. Raj Kumari, it cannot even be inferred remotely that Smt. Prem Kumari had caused any provocation to the appellant which could be sufficient to deprive him of his self-control. The fact that appellant had come there armed with axe also negatives the case of grave and sudden provocation. We find that there is no material on record which may justify applicability of Exception -I to Section 300, I.P.C. As per the opinion of the doctor who conducted the postmortem examination on the body of Prem Kumari, the ante-mortem injuries were sufficient to cause death in the ordinary course. The case is thus squarely covered by clause Thirdly, of Section 300, I.P.C. and as such the conviction of the appellant under Section 302, I.P.C. and sentence of imprisonment for life have to be maintained.

21. As far as conviction under Section 326, I.P.C. for causing injuries on the person of Smt. Raj Kumari P. W. 2 is concerned, we feel that the same should have been recorded under Section 324, I.P.C. in as much as there is absolutely no evidence to indicate that the injury caused on the back of Smt. Raj Kumari was grievous in nature. The said injury was only muscle deep. The injury was kept under observation by Dr. S. C. Mishra P. W. 6 and X-ray was advised. The result of the observation and of the X-ray were not brought on record nor Dr. S. C. Mishra in his statement before the Court stated that the said injury was grievous. In this view of the matter, we are of the opinion that appellant could only be convicted under Section 324, I.P.C. for causing injury to Smt. Raj Kumari P. W. 2 and accordingly we convict him under Section 324 instead of under Section 326, I.P.C. and sentenced him to undergo rigorous imprisonment for three years under that count.

22. For the above reasons and discussions this appeal must fail. The conviction and sentence of imprisonment for life under Section 302, I.P.C. are maintained. However, the conviction and sentence under Section 326, I.P.C. are modified to the extent that the appellant is convicted under Section 324, I.P.C. and is sentenced to undergo 3 years R. I. under that count. Both the sentences shall run concurrently. With this modification the appeal is dismissed.

23. The appellant is on bail. His bail bonds are ?ordered to be cancelled and he shall be taken into custody forthwith and sent to jail to serve out the above sentences. The Chief Judicial Magistrate, Unnao be directed to make immediate compliance of this order.

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