

State of U.P. Vs. Nawab Singh

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Court : Allahabad

Decided On : Mar-14-1995

Reported in : 1996CriLJ934

Judge : S.N. Sahay and ;Kundan Singh, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302 and 307; Code of Criminal Procedure (CrPC) - Sections 154 and 161; [Evidence Act, 1872](#) - Sections 32

Appeal No. : Govt. Criminal Appeal No. 1351 of 1979

Appellant : State of U.P.

Respondent : Nawab Singh

Advocate for Def. : G.P. Dikshit, Adv.

Advocate for Pet/Ap. : A.G.A.

Disposition : Appeal allowed

Judgement :

Kundan Singh, J

1. This appeal is directed against the judgment and order dated 18-12-1978. passed by Sri R. P. Jain, the then Sessions Judge, Etawah, whereby he has acquitted the accused-respondent of the charge under Section 302, IPC in

2. Briefly stated, the prosecution case is that deceased Sunder Singh was resident of village Ashanandpur, Police Station Basrehar, district Etawah. Accused-respondent is the son of the maternal uncle of Sunder Singh. Amar Singh, aged about 19 or 20 years, is son of Sunder Singh. Prior to the present incident he had passed High School and he wanted to prosecute his studies further to which his father Sunder Singh was not agreeable. On that account there was a quarrel between Amar Singh on one hand and his father Sunder Singh on the other. In frustration Amar Singh had left the house of Sunder Singh about 6 months prior to the incident and started living with Nawab Singh in village Mugaria within Police Station Sahail, district Etawah. Amar Singh complained to Nawab Singh about all that had happened with him and hence Nawab Singh along with Amar Singh came to village Ashanandpur at the house of Sunder Singh. Owing to the issue of studies of Amar Singh there was a quarrel between the accused and the deceased and Nawab Singh left village Ashanandpur holding out threat of life to Sunder Singh, On. 13-12-1977 Sunder Singh along with his wife Smt. Moti Kunwar (PW 2) and his elder brother Narain Singh (PW 7) was returning from his field at about 6.00 p.m. At that time he was carrying a bundle of Arher-stalks on his head and a burning lantern in the hand. The wife and brother were following him. All of a sudden Nawab Singh and one unknown person emerged out of a sugarcane field and asked Sunder Singh to stop. Nawab Singh remarked that he will not spare him that day and fired a shot with a country made pistol. The shot hit Sunder Singh at his back, as a result of which he fell down on the ground. His wife and brother raised alarm which attracted the villagers and thereafter the accused had run away. Narain Singh put Sunder Singh on his back and brought him home where Sunder Singh dictated FIR to Netrapal (PW 1). Thereafter Sunder Singh was taken on a cot to Police Station Basrehar at a distance of three furlongs where the written report was lodged at 7.00 p.m. on the same day. Sunder Singh was referred to hospital for treatment. Dr. Chandra Prakash (PW 8) medically examined Sunder Singh at 8.00 p.m. on 13-12-1977 and he found a gun shot wound of entry on his back. His condition was serious and the pulse ineffable. A dying declaration of Sunder Singh was recorded in the hospital at 11.40 p.m. on 13-12-1977 by Sri Hargovind Sahai Mathur, Executive Magistrate. Next day he

was taken to Kanpur by Smt. Moti Kunwar, Narain Singh, Netrapal Singh, Devi Dayal, Atbal Singh and Rajvir by a train but on reaching the Railway Station Kanpur he died at about 6.00 p.m. and the dead body was cremated at the Ghat of Ganga in Kanpur.

3. The investigation of the case was entrusted to Sub-Inspector Jagdamba Lal Srivastava (PW 11). He visited the place of incident on 13-12-1977 and recorded statements of Smt. Moti Kunwar and 'Narain Singh under Section 161, Cr.P.C., inspected the lantern and gave it in the Supurdgi of Narain Singh after preparing the Supurdginama. Statements of Netrapal, Devi Dayal, Amar Singh and others were also recorded by him under S. 161, site plan was prepared and blood stained and unstained earth as well as sugarcane leaves stained with blood were taken into custody and their recovery memos were prepared. In the meantime the Investigating Officer received information about the death of Sunder Singh and consequently the case was converted into one under Section 302, I.P.C. and after completion of the investigation a charge-sheet was submitted against the accused-respondent in court.

4. The prosecution examined 12 witnesses in all to prove its case. Out of them Smt. Mod Kunwar(PW 2) and Narain Singh (PW 7) are the only eye-witnesses of the incident, while others are, more or less, formal witnesses.

5. The accused pleaded not guilty to the charge and stated that Sunder Singh was a man of bad character. He wanted to have illicit connection with his son's wife.

6. The learned Sessions Judge after going through the entire evidence on record found the charge not proved against the accused and accordingly he acquitted him of the charge levelled against him. Against that verdict of acquittal, State of U.P. has now come up in the above appeal to this Court.

7. The learned Sessions Judge has mainly acquitted the respondent on the grounds firstly that the motive set up by the prosecution on the very face of it was improbable; secondly that the presence of the eye-witnesses on the spot was doubtful; thirdly that there was no sufficient visibility on the spot; and lastly that the dying declaration in the F.I.R. and in Ext. Ka2 could not be relied upon as there

was no light on the spot for the deceased to recognize the assailant.

8. We have carefully read the judgment under appeal, examined the entire evidence on record and heard learned counsel for the parties.

9. The learned Sessions Judge has very much stressed on the motive. He has observed that there was no reason earthly for the accused to have held out threats to Sunder Singh to kill him and then to translate that threat into action especially when there was no direct enmity with the deceased. It seems that the learned Sessions Judge was ignorant of the well established rule of law that where there is direct evidence about commission of offence, the motive loses its importance. In that connection we may refer to the following observations of the Supreme Court in the case *Jarnail Singh. v. State of Haryana* reported in : 1993 CriLJ1656 :-

'It is true that normally there is a motive behind every criminal act and that is why the Investigating Agency as well as the Courts while examining the complicity of an accused should first try to ascertain as to what was the driving force which compelled the accused to commit the crime in question. But with complex growth of society and which has also produced complex character the actions and reactions of the persons either on the accused side or on the - prosecution are not very easy to ascertain and judge. It is common experience that even a small or trifle incident has different reaction on different persons. That is why it is not always easy for the Court to weigh and judge as to whether under the circumstances brought on record by the prosecution, in normal course and the accused concerned could have acted as alleged by the prosecution.

That is why this Court has repeatedly expressed the view that where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance.'

10. In the present case, according to the prosecution Amar Singh wanted to continue his studies but his father Sunder Singh asked him to stop the same. Amar Singh approached Nawab Singh about six months prior to the incident and complained to him about the attitude of his father. Thereupon Nawab Singh taking Amar Singh in his company came to village Ashanandpur and pressurised Sunder

Singh to let Amar Singh continue with his studies but that proposal of Nawab Singh was turned down which led to a quarrel between Nawab Singh on one hand and Sunder Singh on the other. Undisputedly, the respondent is son of the maternal uncle of the deceased and Smt. Moti Kunwar is the step-mother of Amar Singh. In such a state of affair the accused respondent would have naturally gone to village Ashanandpur with Amar Singh to cause reconciliation between the father and son but as the Phoopha did not relent and was not agreeable to the proposal of Nawab Singh that would have offended the latter and he may have extended threat to the deceased during the course of quarrel which has been deposed to by Amar Singh also who was real son of the deceased. In the background of these facts and circumstances, it cannot be said that the accused had no motive to commit the offence. If the respondent had no animus against Sunder Singh and he did not commit the offence, we are at loss to understand why Sunder Singh and his family members chose to falsely implicate the accused respondent who was directly related to the deceased and his family. We, therefore, hold that the accused-respondent had sufficient motive to commit the present crime.

11. Turning to the second reasoning of the learned Sessions Judge for recording acquittal of the respondent, the learned Sessions Judge expressed great doubt on the presence of the witnesses at the place of incident when the assault was made on Sunder Singh. He had rejected the testimony of Smt. Moti Kunwar (PW 2) on the grounds that she had not disclosed to the Investigating Officer in her statement recorded under Section 161, Cr.P.C. that at the time of assault the deceased was carrying a bundle of stalks of Arhar on head; secondly that during her statement in court she could not tell from what direction the accused had come and what apparel he was putting on; thirdly that she had deposed in her statement that when the lantern fell down, its glass had broken into pieces and the oil had spread on the ground but the Investigating Officer did not find any broken piece of glass at the venue and the lantern was found in working order; and lastly that she deposed that after receiving gun shot injury her husband fell down unconscious and he regained consciousness after medicine was administered to him and if that was so there was no question of his dictating the F.I.R. to Netrapal.

12. No doubt, Smt. Moti Kunwar did not speak to the Investigating Officer during her statement under Section 161, Cr.P.C. that the deceased was carrying the bundle of stalks of Arhar on his head when the assault was made on him but during her statement in court she deposed that the deceased was carrying the bundle of wood on his head and that statement of the lady has been corroborated by Narain Singh who was also following the deceased at the time of incident. Moreover, that omission in her statement under Section 161, Cr.P.C. was not so material which deserved rejection of her testimony in wholesale on that account when the deceased in the F.I.R. as well as in the dying declaration made to the Magistrate has mentioned that she was also following him at the time of incident. She has categorically deposed in her statement that she made in court that while returning from the field the deceased was carrying a Gattar of stalks of Arhar on his head and a burning lantern in one hand and she and her Jaith Narain Singh were following the deceased and when they reached near the sugarcane field of Bharat the accused-respondent and one unknown person emerged out from that sugarcane field. Nawab Singh remarked that he would not spare him (Sunder Singh) that day and thereafter fired a shot from a country made pistol, which hit the deceased, as a result of which her husband fell down. This statement of Smt. Moti Kunwar is in line with the dying declaration and the statement of Narain Singh. She is an illiterate rustic lady and if out of her illiteracy or lack of knowledge she could not tell the direction from which side the accused had come that would not justify rejection of the testimony of such a simpleton witness on the flimsy ground that she could not tell the direction.

13. As regards her statement in court that the glass of the lantern had broken into pieces and its oil had spread on the ground, it is worthwhile to mention that it was dark when the incident took place. After the murderous assault on her husband, rather ascertaining the fate of lantern both Narain Singh and Smt. Moti Kunwar would have become nervous and tried to rush the victim to home and then to Hospital for providing him medical aid at the earliest possible opportunity and in that state of affair she was not expected to examine the lantern to ascertain whether its glass had broken and the oil spread on the ground. All that statement she had made in court by sheer imagination.

14. The learned Sessions Judge has also rejected the prosecution version of dictating the F.I.R. by Sunder Singh to Netrapal on the ground that Smt. Moti Kunwar had deposed that after receiving the injury he fell down unconscious and regained consciousness after medicine was administered to him. It is possible that immediately on receiving the injury Sunder Singh might have become unconscious but that does not mean that once a man becomes unconscious he cannot regain consciousness subsequently. May be due to injury on his back Sunder Singh had stopped speaking out of pain and Smt. Moti Kunwar thought that her husband had become unconscious. Be that as it may, there is consistent evidence that on reaching home several persons visited Sunder Singh to know his condition and he responded to their queries how the incident occurred and who was his assailant. It is possible that any local quack suggested some prescription and after that was administered to the victim he started speaking and that may be the reason for making a statement by Smt. Moti Kunwar that Sunder Singh regained consciousness when medicine was administered to him. Either he was unconscious or did not speak immediately after receiving the injury is immaterial since there is consistent evidence of Netrapal (PW 1), Smt. Moti Kunwar (PW 2), Devi Dayal (PW 3) and Narain Singh (PW 7) that on reaching home he talked to his visitors and dictated F.I.R. to Netrapal naming Nawab Singh as assailant. If for a moment it is accepted that Moti Kunwar and Narain Singh had some animus against Nawab Singh because of a quarrel in the matter of Amar Singh, there is nothing against Devi Dayal and Netrapal, who had confirmed the F.I.R. version in which deceased had named Nawab Singh as the assailant. They are independent witnesses and no enmity of the accused-respondent with them was either suggested or proved. Netrapal Singh was scribe of the F.I.R. He has deposed that on the dictation of the deceased he had taken down the report in which he had named Nawab Singh accused as assailant. Devi Dayal is the person who had gone to visit and know the welfare of Sunder Singh at his house immediately after the incident. He had fully corroborated the statement of Netrapal Singh that the F.I.R. was taken down by the latter at the dictation of Sunder Singh in which he had named Nawab Singh accused as assailant. He had also deposed that when he went to see Sunder Singh he was speaking and talking to his visitors and had talked to him. Even in the G.D. there is no mention about unconsciousness of

Sunder Singh, who had personally handed over the written report at the police station within an hour of the incident. The Doctor who medically examined the injury also did not mention in the injury report that at the time of his examination Sunder Singh was unconscious. In our opinion, the inference of the learned Session Judge that since Sunder Singh became unconscious, as deposed by Smt. Mod Kunwar, he could not dictate the F.I.R. not borne out from the evidence on record.

15. So far as the statement of Narain Singh (PW 7) is concerned, we are not prepared to accept his testimony only to the extent that he had recognized the assailant. He has admitted in his cross-examination that he was following his brother Sunder Singh. He heard report of shot and then rushed to Sunder Singh but by the time he reached there, the assailant had run away and the deceased had fallen down. It was a night incident and on the own showing of Narain Singh he reached the place of incident on hearing the report of shot by which time the assailant had already fled away. In such a situation there was no possibility of his recognizing the assailant. However, to the extent that in the fateful night he was returning from the field with Sunder Singh and Smt. Mod Kunwar his statement inspires confidence as it was he who brought him on his back to home in the injured state.

16. Adverting to the third and fourth grounds that weighed with the learned Sessions Judge for refuting the prosecution version, the learned Trial Judge was of the view that there was no light on the spot and the dying declaration contained in Exts. Ka 1 and Ka 2 were not reliable. He had rejected the theory of burning lantern with the deceased at the time of incident on the ground that there was inconsistency in the statement of Narain Singh (PW 7) and the Supurdginama Ext. Ka 4 about description of the lantern taken into custody from the spot inasmuch as Narain Singh had deposed that the lantern which the deceased was carrying was of a small size while in the Supurdginama it was mentioned 'a big lantern'. Further he observed that Narain Singh could not tell whether a round or long shape chimney was used in the lantern. So far as the statement of Narain Singh is ' concerned, a look on his statement shows that the lantern was shown to him in court while making the statement but curiously enough even after seeing the

lantern he could not tell what kind of chimney whether round or long shape could be used in it. If after seeing the lantern he could not reconcile his statement with the description contained in the Supurdginama, that needs no comment except that he is a rustic person and a man of poor understanding. These contradictions about Hulia of the lantern have in all probability occasioned due to simplicity of the witness and on that ground we cannot disbelieve the presence of lantern with the deceased at the time of incident. Therefore, we conclude that there was source of light on the spot for recognizing the assailant by the deceased and his wife.

17. Coming to the dying declarations, we do not want to reiterate our reasonings for accepting the dying declaration of the deceased contained in the F.I.R. Ext. Ka 1 because we have believed the statement of Netrapal Singh (PW 1) that he had scribed the report at the dictation of the deceased in which he had named the accused-respondent as assailant. Regarding second dying declaration contained in Ext. Ka 2, it may be mentioned that it was recorded by the Executive Magistrate in the Hospital. This dying declaration has been rejected by the learned Sessions Judge on two counts - firstly that there was no sufficient light on the spot for enabling the deceased to recognize his assailant and secondly that it was inadmissible in evidence as Sri Har Govind Sahai Mathur, who recorded that dying declaration, was neither a Metropolitan Magistrate nor a Judicial Magistrate on that date as the State Counsel could not produce any evidence to show that the circular dated 24-4-1974 of the High Court conferring power of Judicial Magistrate on Sri Mathur to record statements under Section 154, Cr.P.C. confession and dying declaration was further extended. So far as the first limb of this argument, is concerned, we have held that there was sufficient visibility on the spot for enabling the deceased to recognize his assailant. Secondly, if the light of lantern was not much sufficient so as to recognize the assailant, we cannot lose sight of the fact that the assailant was already known to the deceased. He was a relation of the deceased, being son of his maternal uncle. Before resorting to firing he challenged the deceased not to spare him that day and then fired a shot from a close range which is evident from the presence of blackening around the wound as noted by the doctor in the injury report. If the assailant was known to the deceased by face, voice and gait, he could easily recognize the shooter who had challenged him in advance before firing. In such a situation in the case of Hazari Parida v. State of

Orissa, 1974 Cri LJ 1212, the Orissa High Court has held that even in dark night one can also recognize known person from a short distance by the light of stars. Similarly in another case, Heera Lal v. State of M.P., 1970 SC Cri R 530, it has been held by the Apex Court that there was no proof that there was total darkness and that the visibility was completely obscured by the drizzle, the witness, who was also assaulted after the assault on the deceased, could identify the assailants who were known to him. Yet there is one more case of the Supreme Court, Kripal Singh v. State of U.P., : 1965 CriLJ636 , where it has been held that the assailant could be recognized by gait and voice. The relevant observations are quoted below (Para 4) :-

'It is true that the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the overtones when the person recognizing is not familiar with the person recognized may be somewhat risky in a criminal trial. But appellant was intimately known to Rakkha Singh and for more than a fortnight before the date of the offence he had met the appellant on several occasions in connection with the dispute about the sugarcane crop. Rakkha Singh had heard the appellant and his brothers calling Karam Singh to come out of the hut and had also heard the appellant, as a prelude to the shooting referring to the dispute about sugarcane. In examination-in-chief Rakkha Singh has deposed as if he had seen the actual assault by the appellant, but in cross-examination he stated that he had not seen the face of the assailant of Karam Singh. He asserted, however, that he was able to recognize the appellant and his two brothers from their gait and voice. It cannot be said that identification of the assailant by Rakkha Singh from what he heard and observed was so improbable that we would be justified in disagreeing with the opinion of the Court which saw the witness and formed its opinion as to his credibility and of the High Court which considered the evidence against the appellant and accepted the testimony.'

18. So far as the second part of reasoning of the learned Sessions Judge for rejecting the dying declaration recorded by the Executive Magistrate is concerned, the learned Sessions Judge was of the view that it was inadmissible in evidence and hence no implicit reliance can be placed on it. The reason for holding it inadmissible, as we have noticed above, was that on the date of recording that

dying declaration Sri Mathur did not enjoy the power of Metropolitan Magistrate or Judicial Magistrate and there was no proof that the High Court had conferred on him the power of recording such a dying declaration. We are afraid to disagree with the learned Sessions Judge for rejecting that dying declaration on that ground. Even a dying declaration not recorded by a Judicial Magistrate is admissible in evidence under Section 32 of the Act where every statement given by an individual to any person as to the cause of his death or any circumstances of the transaction which resulted in his death is relevant. In the present case the deceased had given the cause of his death in his statement, recorded by the Magistrate. The learned counsel for the respondent could not point out anything to exclude it from consideration except that no parentage of Nawab Singh is given in the dying declaration so as to connect him with the accused-respondent. Dr. Chandra Prakash (PW 8) has certified on the dying declaration that the deceased was fully conscious at the time when his dying declaration was recorded. It is true that no parentage of the accused-respondent is mentioned in that dying declaration but if we read it in the light of the F.I.R. which also contains dying declaration of the deceased, the identity of the accused-respondent is fully established because in the F.I.R. he had described him as son of his maternal uncle. We are, therefore, of the considered view that both the dying declarations of the deceased contained in Exts. Ka 1 and Ka 2 and the eye-witness account given by Smt. Moti Kunwar and Narain Singh fully connect the respondent with the commission of the offence and the verdict of acquittal recorded by the learned Sessions Judge deserves to be set aside. The prosecution evidence, which contains the statements of own relations of the respondent and that of independent witnesses fully proves the guilt of the respondent.

19. Now the question arises as to what offence the accused-respondent has committed and what sentence is to be awarded to him. The doctor who examined the injury of the deceased has stated that the condition of Sunder Singh was serious and pulse was ineffable but the deceased was taken from District Hospital Etawah to District Hospital Kanpur, who died on the Railway Station at Kanpur before reaching the Hospital. Body of the deceased was not sent for post-mortem examination and was cremated at Ganga Ghat Kanpur. The prosecution has examined PW5 Prem Shanker, Mahapatra of the burning Ghat. That Ghat lies in

the district of Unnao. He has proved that the dead body was cremated on his Ghat. In these circumstances, it cannot definitely be said that the causa mortis was due to gun shot injury. But it was fully established that the respondent made an assault on the life of Sunder Singh with a country made pistol with an intention to cause his death and due to that injury his condition was serious. From those circumstances, therefore, it can safely be inferred that the accused-respondent was responsible for causing the gun shot injury to Sunder Singh with an intention to cause his death and that act of his will fall within the mischief of Section 307 of the Indian Penal Code. Regarding the quantum of sentence, the learned counsel for the respondent submitted that it would not be proper to send the accused behind the bars after a period of 17 years and, therefore, his sentence may be reduced to the period already undergone.

20. We examined the record to find out as to for how much period he has remained in jail, which indicates that he remained in jail for a few months'. We, therefore, regret to accept the above submission of the learned counsel inasmuch as the respondent fired a shot from a country made pistol from a close range. The deceased sustained a serious injury at his hand and he died next day. In the given circumstances we feel that a sentence of five years' rigorous imprisonment would meet the ends of justice.

21. Accordingly, the appeal is allowed and the judgment and order passed by the learned Sessions Judge dated 18-12-1978 acquitting the accused-respondent of the offence under Section 302, I.P.C. is set aside. He is held guilty under Section 307, I.P.C. and is sentenced to five years' rigorous imprisonment. He is on bail. He shall be taken into custody to serve out the sentence as aforesaid.