

Ram Kumar and anr. Vs. State

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Court : Allahabad

Decided On : May-24-2004

Reported in : 2005CriLJ2015

Judge : Khem Karan and ;M.A. Khan, JJ.

Acts : [Evidence Act, 1872](#) - Sections 32; Code of Criminal Procedure (CrPC) - Sections 161; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 34 and 302

Appeal No. : Cri. A. No. 318 of 1981

Appellant : Ram Kumar and anr.

Respondent : State

Advocate for Def. : G.A.

Advocate for Pet/Ap. : Shankar Sharma and ;Jai Pal Singh, Advs.

Judgement :

1. These two appellants have been convicted under Section 302/34 of I.P.C. and sentenced to imprisonment for life, for committing murder of Kanhaiya Lal Rastogi on 20-5-1978 at about 9.15 p.m. within the limits of Mohalla Peerbukhara, Police Station Chowk, District Lucknow.

2. In brief, the case was that on 20-5-1978 at 9.15 p.m. while the deceased Kanhaiya Lal Rastogi accompanied by his wife Savitri Devi (P.W. 1) was on way

back to his house, that these two appellants, namely, Ram Kumar and Ram Chandra and one Sohan Lal assaulted him near the house of Triloki Nath. It was stated that accused Ram Chandra caught hold of Kanhaiya Lal and accused Ram Kumar and Sohan Lal gave knife blows to him, as a result of which he sustained serious injuries. His wife Smt. Savitri Devi, with the help of others, shifted the injured to the Medical college, Lucknow, where he was admitted in emergency surgical ward at about 10.00 p.m. Dr. N.R. Singh (P.W.2), who examined him, found as many as 11 injuries on his person, including 4 lacerated wounds. It was claimed that Dr. J. Rathi (P. W. 9) got recorded dying declaration of Kanhaiya Lal Rastogi by his associate Dr. Ashtosh Bajpai (P. W. 4), immediately after the patient was admitted in the hospital. Second dying declaration was allegedly recorded by O.P. Sharma (P. W.7), the then Additional City Magistrate, Lucknow on 21-5-1978 at 7.30 in the morning. It is said that the Investigating Officer Sri K.D. Dixit (P. W. 6) also recorded statement of the victim under Section 161 of Cr. P.C. on the same date i.e. 21-5-1978 at 8.30 in the morning. The victim could not be saved even after surgical operation and he succumbed to the injuries on 22-5-1978. The post-mortem examination was conducted on 23-5-1978 by Dr. Y.S. Das (P. W. 5), who opined that death was due to shock and haemorrhage resulting from anti-mortem injuries. After usual investigation, the case came to the Court.

3. Out of nine witnesses so examined by the prosecution, only Savitri Devi (P. W. 1) was the alleged eye-witness and the rest were formal witnesses. The defence also examined one Dhani Ram (D. W.1), who tried to say that Kanhaiya Lal Rastogi received injuries at the hands of some unknown assailants who robbed him at the said time and place. He denied the presence of these appellants at the time Kanhaiya Lal Rastogi received such injuries.

4. The learned Sessions Judge has doubted the presence of Savitri Devi (P. W. 1) at any such time when her husband Kanhaiya Lal was injured. He has excluded her evidence from consideration. The learned Judge believed the three dying declarations, namely Exts. Ka. 18, Ka. 15 and Ka.20. He was of the view that these three dying declarations respectively recorded by Dr. Astosh Bajpai (P. W. 4) on the dictation of Dr. Rathi (P. W. 9) on 20-5-1978 at about 10.00 a.m. by Additional City Magistrate O.P. Sharma (P. W. 7) on 21 -5-1978 at 7.30 in the

morning and by S. I. Sri K.D. Dixit (P. W.6) on 21-5-1978 at about 8.30 in the morning (in the shape of statement under Section 161 of Cr. P.C.) were truthful and reliable and so he concluded on the basis of those dying declarations that the accused Ram chandra caught hold of the victim and his two companions, namely, Sohan Lal and Ram Kumar gave knife blows to him on the said date and at the said time and place, as a result of which he sustained fatal injuries to which he succumbed subsequently on 23-5-1978.

5. We have heard Sri Jai Pal Singh, the learned counsel appearing for the two appellants, Sri Rana M.P. Singh, the learned counsel for the State and have also perused the record received from the trial Court.

6. We are informed that third accused Sohanlal had also filed Criminal appeal No. 317 of 1981 against his conviction and sentence but the same abated, on his death.

7. Sri Jai Pal Singh, the learned counsel for the appellants has not disputed the date and time of the occurrence when Kanhaiya Lal Rastogi received the fatal injuries. The learned Sessions Judge has also concluded on the basis of evidence of Ram Dhani (D. W. 1) and also on the basis of evidence led by the prosecution that Kanhaiya Lal Rastogi was assaulted on 20-5-1978 at about 9.15 p.m. near the house of Triloki Nath, within the limits of Mohalla Peerbukhara. It is never the contention of Shri Singh, that this conclusion of the learned Additional Sessions Judge is wrong. Even Ram Dhani (D. W.1), states that occurrence took place on 20-5-1978 at about 9.00 or 9.15 p.m., near his house. Triloki Nath is son of D. W. 1. We find no need to enter into the discussions as to whether date, time and place of occurrence are established.

8. In so far as the motive is concerned, there appears to be no dispute that the appellant and the deceased were at daggers drawn owing to the pending litigation relating to some property, so in that sense there was enmity in between the deceased and the appellants. Sri Singh does not dispute that there was long standing enmity in between the appellants and the deceased, but he argues that this enmity is not the cause of crime, but it is the cause of false implication of the appellants. Without wasting any time, we would like to observe that mere proof of

motive will not fasten guilt on the accused and the prosecution will have to establish by reliable evidence that perpetrators of the crime, were the appellants. The real question is as to whether direct evidence of Savitri Devi (P. W. 1) and three dying declarations Exts. Ka. 18, Ka. 15 and Ka. 20 are reliable and adequate enough to sustain the finding of guilt.

9. Evidence of Savitri Devi (P.W.1) has rightly been excluded from consideration. The learned Judge has given cogent reasons for doubting the presence of the lady at the time of assault on her husband. The learned counsel for the State has made no attempt to say that the view taken by the trial Judge in regard to the evidence of Savitri Devi, is not acceptable one. The reasoning of the trial Judge was that in earlier two dying declarations, said to have been recorded by the doctor and the Magistrate, there was no reference to the presence of Savitri Devi, at the time of assault on the maker of those statements. Furthermore, it was stated in second dying declaration Ext. Ka. 15, that wife and son of the declarant came subsequently. So, it cannot be said that the learned Sessions Judge was not right in excluding the evidence of Savitri Devi on the point that she saw the assault of her husband.

10. Sri Singh has contended that Ext. Ka. 20, recorded by S. I. Sri K.D. Dixit (P.W.6) in the shape of statement under Section 161 of Cr. P.C. should not have been acted upon as dying declaration for variety of reasons. His first submission is that though such a statement technically falls within Clause (1) of Section 32 of the Indian evidence Act, 1872, and is so admissible in evidence but normally no evidentiary value is attached to such dying declarations, unless the Court is satisfied that the police officer recording the same had no opportunity to get it recorded as dying declarations in the manner required under para 421 and 422 of Manual of Govt. Orders (According to him, these paras, require that in case a police officer decides to record a statement as dying declaration, he should get the signature of maker and of at least two witnesses. Reference is being made to the view taken by Apex Court, in Dilip Singh v. State of Punjab AIR 1979 SC 1173 : (1979 Cri LJ 700), where their lordships observed that generally such statements should not be acted upon as dying declarations unless the court was fully satisfied about its existence, accuracy etc. Shri Singh also contends that this alleged dying

declaration Ext. Ka. 20 is nothing but reproduction of FIR and it raises a strong suspicion, whether it was really the version of the deceased. The learned counsel has also argued that there is no evidence to show that maker of this statement, namely, Kanhaiya Lal Rastogi was mentally and physically fit to give such a statement and none has come forward to say that such statement was really recorded in his presence. Sri Rana M.P. Singh has tried to say that such statement falling within the definition of dying declaration, has rightly been taken into consideration and acted upon.

11. Recently this Court had to deal with similar statement of the deceased, recorded under Section 161 of Cr. P.C., in capital Reference No. 6 of 2000, State of U. P. v. Lallan and in other connected criminal appeals, decided on 26-9-2003 (Reported in 2004 (48) All Cri C 381) and after referring to Dilip Singh's case (supra) and other cases, this Court thought it proper to exclude such statement from consideration. We are of the view that the dying declaration Ext. Ka. 20 which is in the shape of statement under Section 161 of Cr. P.C. should have been excluded from consideration for the reasons that no witness came to the Court to say that Kanhaiya Lal Rastogi was mentally and physically fit to give any such statement at 8.30 a.m. on 21-5-1978 and no person came to depose that I. O. Sri Dixit recorded this statement or interrogated Kanhaiya Lal in his presence. Thirdly, it appears to be suspicious as it is nothing but reproduction of FIR. So we decide to exclude this evidence from consideration.

12. In so far as dying declaration Ext. Ka. 18 is concerned, it is shrouded in mystery in the sense that Dr. Bajpai (P.W. 4) in whose hand writing, it is said to be, does not speak a word about its coming into existence. In other words, Dr. Bajpai never says that he had taken down Ext. Ka. 18 on the dictation of Dr. Rathi, Secondly, Dr, Bajpai himself says that the condition of patient was serious enough. The claim of Dr. Rathi that dying declaration was taken down by Dr. Bajpai on his dictation, does not appear to be correct in view of his own admission that at the time Dr. Bajpai was recording Ext. Ka. 18, he himself was busy in noting the injuries of the patient. If noting of the injuries by Dr. Rathi as well as recording of dying declaration by Dr. Bajpai were being simultaneously carried on, then how can it be accepted that he himself dictated this dying declaration. So it is for these

reasons, we have observed that existence of this dying declaration is shrouded in mystery. It would not be safe to base a finding of guilt on such suspicious evidence.

13. The other dying declaration Ext. Ka. 15 said to have been recorded by Shri O.P. Sharma (P.W. 7) the then Additional City Magistrate on 21-5-1978 at 7.20 a.m. also does not appear to be one which can be acted upon without corroboration from independent sources. Even if it is accepted for a moment that the patient was in a position to give statement in regard to the circumstances in which injuries were caused to him, the same does not appear to be sufficient enough.

14. Right from famous Khusal Rao's case AIR 1958 SC 22, to this day, the Apex Court has consistently maintained that :

(i) there is no law or rule of prudence that it cannot be acted upon without corroboration (Muni Raz v. State of M.P. (1976) 2 SCR 764 : 1976 Cri. LJ 178 : AIR 1976 SC 2199.

(ii) if it is true and voluntary, no corroboration is needed (state of U. P. v. Ram Sagar Yadav AIR 1985 SC 416 and Ramawati v. State of Bihar AIR 1983 SC 164 : 1983 Cri LJ 221

(iii) it must not be the result of tutoring, prompting imagination and the declarant must have an opportunity to identify assailants (Ram Chander Reddy v. Public Prosecutor AIR 1976 SC 1994 : 1976 Cri LJ 1548)

(iv) if the dying declaration is suspicious it should not be accepted without corroboration (Rasheed Beg v. State of M.P. (1974) 4 SCC 264) : (AIR 1974 SC 332) : (1974 Cri LJ 361)

(v) absence of details of occurrence does not render it unacceptable (State of Maharashtra v. Krishn Murty Laxmi Pati Nandan AIR 1981 SC 617 : (1981 Cri LJ 9)

(vi) when prosecution version differs from one given in dying declaration, it cannot be acted upon (State of U. P. v. Madan Mohan AIR 1989 SC 1519) : (1989 Cri LJ 1485)

(vii) though certificate of a doctor about mental fitness of the maker of declaration is not the legal requirement but the person recording such declaration must be satisfied on that point and the same should be proved by testimony of the person (see Constitution Bench decision of the Apex Court in Laxman v. State of Maharashtra (2002 (6) JT (SC) 313) : (AIR 2002 SC 2973) : (2002 Cri LJ 4095)

(viii) it need not necessarily be in question and answer form (State of Karnataka v. Sharill 2003 AIR SCW 600 : (AIR 2003 SC 1074)

(ix) it requires a little rigorous scrutiny, for the simple reason that its veracity was not tested by process of cross-examination.

15. The occurrence took place at about 9.00 or 9.15 in the night. No source of artificial light has been disclosed in the FIR and in statement under Section 161 of Cr. P.C. It was for the first time that the prosecution tried to fill in this lacuna by bringing it in the statement of Savitri Devi (P. W. 1) that there was moon light and the light of electricity. Her presence has already been disbelieved so it does not appear to be safe to conclude on the basis of her evidence that there was any such light. There was no other evidence from the side of the prosecution to establish any artificial light at the time of occurrence. The victim himself did not mention any artificial light in his alleged dying declaration Exta. Ka.18, Ka. 15 and Ka 20. In absence of proof of the light at the time of occurrence, it is difficult to conclude that the victim himself had opportunity to identify the assailant. This doubt is reinforced by the discrepancy in between medical evidence and the two dying declarations Exts. Ka. 15 and Ka. 18. Dr. N.R. Singh (P. W. 2) has clearly stated that the victim had four lacerated wounds, besides 11 incised wounds. In dying declarations, none of the assailant has been assigned the role of causing injuries with blunt object like lathi. The only allegation is that Sohan Lal and Ram Kumar gave knife blows. So, these dying declarations do not find full corroboration from medical evidence. The presence of lacerated wounds creates a serious doubt as to whether victim could identify the assailant and their weapons.

16. In the circumstances, it does not appear to be safe to act upon uncorroborated alleged dying declaration of the deceased. No good reasons have been disclosed as to why the prosecution kept away the other probable witnesses of the locality, whose names were disclosed in the FIR. The occurrence took place close to the abadi and close to the house of Triloki Nath. Some independent witnesses of the locality ought to have been examined to support the prosecution story.

17. In the result, we are of the view that the prosecution was unsuccessful in establishing its case beyond all reasonable doubts against the two appellants before this Court. The appeal is allowed. Their conviction and sentences are hereby set-aside and they are acquitted of the charges framed against them. Their bail bonds are cancelled and sureties discharged.

18. Let the record received from the trial Court be sent back to it along with a copy of this judgment.

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