

Hadi Kirsani Vs. State

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Court : Orissa

Decided On : Apr-27-1965

Reported in : AIR1966Ori21; 1966CriLJ45

Judge : R.K. Das and ;G.K. Misra, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 367 and 509;
Evidence Act - Sections 32, 32(2), 145, 157 and 159

Appeal No. : Criminal Appeal No. 84 of 1964

Appellant : Hadi Kirsani

Respondent : State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : D.C. Mohapatra, Adv.

Disposition : Appeal partly allowed

Judgement :

Misra, J.

1. The appellant has been convicted under Section 302 I.P.C and sentenced to imprisonment for life- He is the eldest son of the deceased and used to slay with him. In the evening of 5-5-63. the deceased was preparing tobacco. The appellant

wanted a little of it Not only the deceased refused to give a portion but he gave him a kick by way of admonition Appellant thereafter went to the house of his uncle (P.W 1). He by then possessed a bow, two arrows and a dart. He narrated the story to P. W. 1 as to how and why he was assaulted by his father. A little later, the deceased came towards them and asked the son to come back home saying that he would not assault him further. At this point of time the appellant shot the father with an arrow which pierced his left fore-arm and the right belly. Hardly had he gone a few steps back he fell down. P. W. 1 came to his help and pulled out the arrow. The deceased made a statement before P. Ws. 1 to 3 as to how he was shot by his son. He was removed to the Hospital where he died at about 5 p.m. on 15-5-1963, ten days after the date of occurrence.

2. Both in the committing court and Sessions Court, the plea of the appellant was that the deceased was drunk with Salap juice while carrying the arrows and bow. He fell down on his own arrow which pierced him in his belly and he died as a result of this accident.

3. On a thorough discussion of the evidence the learned Judge came to conclusion that the prosecution version was fully established and that the defence plea that the deceased died as a result of accident is not true. We have closely examined the evidence of eye-witness (P. W. 1) and the statement made by the deceased before P. Ws. 1 to 3. We are satisfied that the learned Judge reached the correct conclusion, that as a result of the injuries caused by the appellant by shooting an arrow the deceased fell down

4. There was post-mortem examination of the deceased but the post-mortem report has not been brought in evidence and exhibited as the doctor who made the examination had resigned from service and his whereabouts were not traceable. There is no medical evidence before the Court from which the nature of injuries caused by the arrow can be ascertained. The requisition (Ext. 4) made from the Police Station to the Medical Officer on 7-5-1963 does not also show the nature of the injuries The requisition stated thus:

All that is known of the case, at present, is as follows:

1. One injury on the left (right?) side belly.
2. One injury on the left forearm

The injury report given by the Medical Officer on 8-5-1963 has not been exhibited and not brought into record. None of the 3 eye witnesses P Ws. 1 to 3 gives any idea of the nature and dimensions of the injuries. From the materials on record the nature of injuries cannot be ascertained and it cannot be said that death was the result of these injuries. It is difficult, therefore to hold that the injuries inflicted by the appellant caused the death of the deceased. The further questions that the appellant had the intention of causing death or the intention of causing bodily injury which was sufficient in the ordinary course of nature to cause death do not arise for consideration. In the absence of materials regarding the nature and dimensions of the injury, it is difficult to convict the appellant under Section 302, I. P. C.

5. The learned Sessions Judge in para graph 6 of his judgment dealt with post-mortem report and did not admit it into evidence. His reasons may be quoted in full-

"The doctor who held the post-mortem, could not be examined though the case was once adjourned for his examination only. He has left services and his whereabouts are not known and so the learned P. P. contended that the P. M. report may be admitted into evidence under Section 35 Evidence Act. Since P. M. report is not substantive evidence nor it is maintained as contemplated under Section 32 Evidence Act, it cannot go in evidence and more so when the doctor has not been examined in the committing Court.'

This passage evinces that the learned Sessions Judge had no clear conception of law. It is thus necessary to clarify the true legal position. The post-mortem report of the doctor is his previous statement based on his examination of the dead body. It is not substantive evidence. The doctor's statement in court is alone the substantive evidence. The postmortem report can be used only to corroborate his statement under Section 157, or to refresh his memory under Section 159, or to contradict his statement in the witness-box under Section 145, Evidence Act.

Roghuni Singh v. Empress, ILR 9 Cal 455, Bechan Prasad v. Jhuri. AIR 1936 AH 363 and Rangappa Goundan v. Emperor, AIR 1936 Mad 426 are cases in which the doctor was available but was not examined. In all those cases their Lordships held that the post-mortem report or a letter giving opinion of the doctor was not admissible without examination of the doctor.

Those cases must, however, be distinguished from cases where the applicability of Section 32(2) of the Evidence Act is in point

6. Section 32(2) so far as relevant may be quoted

32. Statements, written or verbal of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances, are themselves relevant facts in the following cases. x x x

2. When the statement was made by such person in the ordinary course of business, and in particular xxxxxxxx in the discharge of professional duty x x x x x x ,

Where, therefore, the doctor is dead or cannot be found, the aforesaid decisions have no application. The injury report or the post mortem report of the doctor who is dead or cannot be found, is admissible and relevant under Section 32 of the Evidence Act Mohan Singh v. Emperor, AIR 1925 All 413 dealt with a case where the Civil Surgeon, who conducted the post-mortem examination, had since died. The Bench consisting of Sulaiman and Mukherjee JJ. held that the post-mortem report was admissible under this Section. State v Rakshpal Singh. AIR 1953 All 520 was a case where the attendance of a Medical Officer could not be procured without delay and expense. The injury report, submitted by him, was held to be admissible and relevant after it was proved by his Compounder. The same view has been taken by Division Bench in Ram Balak Singh v. State, AIR 1964 Pat 62 without any discussion of the principle (See para 9). In that case, the doctor, who performed the autopsy over the dead body, was abroad at the time of the trial.

The only decision, which appears to have taken a contrary view, is a Bench decision of this Court consisting of P. Balakrishnarao and G. C. Das JJ., reported in *Krushna v. State*, 24 Cut LT 494. In that case, the doctor, who gave the injury report and the post-mortem report was at the time of the trial in England. His evidence in the Committing Court was discarded on the grounds which are not relevant for the purpose of this case and need not be considered. Their Lordships however, reject-ed the injury and the post-mortem reports as inadmissible in evidence on the reasoning which may be quoted in full (see para 6):

It is the accepted law and the learned Standing Counsel fairly concedes that the post mortem report and the injury report are not admissible in evidence unless the Medical Officer giving the reports is examined (Vide ILR 9 Cal 455; *Queen Empress v. Jadub Das*, 4 Cal WN 129 and *In re Ramaswami*, 40 Cri LJ 596: AIR 1938 Mad 336). Therefore they are not clearly admissible in evidence and cannot be relied upon to show the injuries on the deceased or the injuries on the appellant.

It would be manifest from the passage quoted above that their Lordships did not discuss the law on the point and the learned Standing Counsel made wrong concession. The decisions on which reliance had been placed were cases in which the doctor was available but was not examined. Those decisions were correctly decided and had no application to the facts and circumstances of the case before their Lordships. Their Lordships' attention was not invited to Section 32(2) of the Evidence Act. The dictum of their Lordships in the aforesaid passage is not binding on us as the true legal position was not brought to their Lordships' notice nor was it discussed. The distinction pointed out by us between the two lines of cases was not kept in view. We are aware of the position that a subsequent Division Bench cannot declare wrong the view of law expressed by an earlier Division Bench, and normally the question should have been referred to a Full Bench. We do not, however, think it necessary to adopt that course as the earlier Division Bench did not discuss the law and its attention was not invited to Section 32(2) of the Evidence Act and the observations, quoted above, were based merely on the concession of the learned Standing Counsel.

7. The position of law may, therefore be summarised thus--if the doctor is available for examination in court, the injury report or the post-mortem report given by him is not substantive evidence and is inadmissible unless he is examined. It can be used for corroboration or refreshing memory or for contradiction of his evidence in court, If, however, the doctor is dead or is not available for examination in court under the circumstances mentioned in Section 32, the injury report or the postmortem report is admissible and relevant. What weight it would carry with a court of fact is altogether a different question. Its probative value would depend on the facts and circumstances of each case.

8. The learned Public Prosecutor failed in his duty in not getting the injury report and the post-mortem report proved through persons who knew the hand-writing of the doctor who was untraceable. If the documents had been marked as exhibits after formal proof through such witnesses, we could have accepted them as admissible in evidence and would have taken them into consideration for determination of the nature and dimensions of the injury. As the documents had not been formally proved, the only alternative course open to us was to take additional evidence under Section 428, Cr. P. C. In the facts and circumstances of this case, we do not think it necessary to further protract the trial by giving opportunity to the prosecution to prove the documents by way of additional evidence.

9. The learned Public Prosecutor also failed in his duty in not eliciting from P. Ws. 1 to 3 and the I. O., who held the inquest, about the nature and dimensions of the injury. It is well known that the Court can come to an independent conclusion as to whether the murder had been committed or not from other evidence on record regarding injuries de hors medical evidence. In *Brij Bhukhan v. State of Uttar Pradesh*. AIR 1957 SC 474. their Lordships observed as follows:

It is true that the doctor has not said any one of the injuries was sufficient to cause death in the ordinary course of nature. We have, however, looked into the nature of the injuries found on the body of Ramprasad and can only infer from them that the assailant intended to cause death of Ramprasad Singh.

In Anant Chintaman Lagu v. State of Bombay, AIR 1960 SC 500. their Lordships said -

To rely upon the findings of the medical man who conducted the post-mortem and of the chemical analyser as decisive of the matter is to render other evidence entirely fruitless. While the circumstance often speaks with unerring certainty, the autopsy and the chemical analysis taken by themselves may be most misleading. No doubt due weight must be given to the negative findings at such examination. But bearing in mind the difficult task which the man of medicine performs and the limitations under which he works, his failure should not be taken as the end of the case, for on good and probative circumstances an irresistible inference of guilt can be drawn.

If the learned Public Prosecutor had kept the law in view and conducted the case carefully, he could have put questions to P. Ws. 1 to 3 and the police officer who held the inquest regarding the nature and dimensions of the injury

10. Section 324, I. P. C. lays down that whoever voluntarily causes hurt by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence, is likely to cause death . . . shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both. Prosecution evidence fully establishes that the appellant voluntarily caused hurt by means of an instrument of the aforesaid category. He is therefore liable to be convicted under Section 324, I. P. C.

11. We accordingly set aside the conviction and sentence under Section 302, I. P. C. and convict the accused under Section 324, I. P. C. and sentence him to undergo rigorous imprisonment for three years.

The appeal is allowed in part as indicated above.

Das, J.

12. I agree.

