

Vinod Kumar Vaidh and Another Vs. State

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Court : Delhi

Decided On : May-27-1992

Reported in : 1992CriLJ3674; 1992(23)DRJ247

Judge : Mohd. Shamim and; P.K. Bahri, JJ.

Appeal No. : Criminal Appeals Nos. 16, 19 of 88

Appellant : Vinod Kumar Vaidh and Another

Respondent : State

Advocate for Def. : R.K. Bahri, Adv.

Advocate for Pet/Ap. : D.R. Sethi,; K.K. Luthra and; O.P. Malviya, Advs

Judgement :

P.K. Bahri, J.

1. Vinod Kumar aged 23 years, Suresh Kumar aged 21 years and Sushil Kumar @ Dabli aged 22 years, have been convicted of an offence punishable under section 302 read with Section 34 of the Indian Penal Code for having committed the murder of one Raj Kumar aged 26 years vide judgment dated January 6, 1988 and vide order of the even date have been sentenced to undergo life imprisonment and to pay a fine of Rs. 500/- each and in default to further undergo simple imprisonment for two months each. They have filed these appeals challenging

their conviction and sentences.

2. In Lajpat Nagar area there are some hillocks and on one of the hillocks Sant Kabir Ashram is located and in that Ashram there is installed an idol of Sant Kabir on the western side and opposite to it a temple of Shiva is located. On the western and southern sides of Ashram on the slopes, cluster of huts have come up wherein people from low strata of life are residing. Some distance away from the said Ashram on the slope towards the southern side in one of the huts bearing No. 61, Ram Chander PW 7 along with his family members had been residing whereas his son Ram Kumar (since deceased), who was of 26 years of age at the relevant time, was residing in the adjacent hut No. 60 with his family. Appellant-Suresh along with his family members including his mother Santro and sister Sharda were residing in hut No. 59 located opposite to the hut of Ram Chander.

3. At 9.55 p.m. on July 1, 1986, Santro came to the Police Station Lajpat Nagar and lodged a report which was recorded in Daily Diary No. 9A, copy of which is Ex. PW 1/Da, in which she alleged that at 9.30 p.m. when her daughter Sharda aged about 15 years was returning from the temple and was in the lane that Raj Kumar and Babu resident of Sitaram Bazar along with two more persons had given beating to her daughter and she was struck with something on her right temple which led to a bleeding wound and as soon as her husband's brother Banwari intervened he was also given injuries. Copy of this report was handed over to Shri Bhagan Singh, police officer, for inquiry and report.

4. At 10.05 p.m. on the same day Raj Kumar was got admitted in All India Institute of Medical Sciences by Om Prakash (sister's husband of Raj Kumar) with the alleged history of his being stabbed at Lajpat Nagar at 9.30 p.m. at his house with immediate loss of consciousness. Medico Legal Certificate Ex. PW 11/A was prepared in that respect. Raj Kumar was in a very bad shape and immediate resuscitation was started and he was operated upon but his life could not be saved and he died at about midnight.

5. At 10.10 p.m. a duty constable from the said hospital had given the information to Police Station Lajpat Nagar which was recorded in Daily Diary No. 10A, copy of which is Ex. PW 1/DB, regarding admission of injured Raj Kumar in the hospital by

Om Prakash. Copy of this report was handed over to SI Surya Prakash PW 12 who along with Constable Govind Ram reached the hospital and obtained the Medico Legal Certificate and as Raj Kumar was not found to be in any condition to make the statement as per endorsement of the doctor marked A on Ex. PW 12/A the Sub-Inspector met Ram Chander at the hospital and recorded his statement Ex. PW 7/A on the basis of which the case was registered under section 307 read with Section 34 of the Indian Penal Code. Statement of Om Prakash is stated to have been recorded after the registration of the case in which he was shown to be an eye-witness of the occurrence but unfortunately for the prosecution Om Prakash did not support the prosecution case at all while coming in witness box. He was declared hostile witness but he despite being cross-examined by the prosecution kept to his resolve not to implicate the appellant for the murder of Raj Kumar.

6. The learned Additional Sessions Judge had brought home the offence to the appellants on the statement of PW 7 who is stated to have heard the dying declaration of Raj Kumar implicating the three appellants. No other evidence has been brought on the record by the prosecution for implicating the appellants in the said offence. The short question which arises for decision in these appeals is whether the prosecution has been able to prove or not beyond reasonable doubt that Raj Kumar deceased had made a dying declaration to his father while being taken to the hospital in a scooter rickshaw implicating the three appellants. It is well settled position of law that if a dying declaration is proved to have been made and is shown to be true then conviction can be based on said evidence alone without seeking any corroboration. See *State of Uttar Pradesh v. Ram Sagar Yadav*, : 1986 CriLJ836 . The apex Court had clearly held that there is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the Court has to be to find out whether the dying declaration is true. If it is so, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the Court may, for its assurance, look for corroboration to the dying declaration.

7. Normally it would not be expected from a father to falsely implicate some innocent persons for the murder of his son and allowing the real culprits to go scot free. The facts of the case brought on the record in evidence show unmistakably that perhaps no dying declaration had been made by the deceased to the father and the testimony of the father bristles with contradictions and variations and improvements on material aspects of the case. There is possibility of father, on mere suspicion or may be convinced in his mind from some undisclosed source of implication of the appellants in the commission of the murder of his son, having concocted a dying declaration of his son. In that situation it would not be safe to bring home the offence to the appellants only on the ground that father would not implicate innocent persons and allow the real culprits to escape.

8. It is now the stage to examine the case of the prosecution closely in order to determine whether the charges have been brought home to the appellants beyond any reasonable doubt or not. Ram Chander in his statement Ex. PW 7/A which is the basis of the FIR has narrated that on that day the women folk residing in the neighbouring huts in the evening had exchanged abuses and the appellants had come there and started giving filthy abuses and had threatened to set on fire the whole Mohalla on which his son Raj Kumar intervened and objected to appellants giving such threat and abuses but the appellants retorted by giving abuses to Raj Kumar and as soon as his wife came some women folk of the Mohalla including Baby Sharda started beating her and he with great effort pacified them. He went on to narrate that after about 3-4 minutes the three appellants came and called away his son Raj Kumar and after 3-4 minutes again his son Raj Kumar came running in injured condition and fell down in front of his hut bleeding from his wound in the abdomen. He and his son-in-law Om Prakash who is also residing in the nearby hut No. 62 brought Raj Kumar in a scooter to the hospital and while on the way, on query Raj Kumar stated that his right hand was caught hold of by Double and left hand by Vinod and Suresh had stabbed him in his abdomen with a knife and thereafter Raj Kumar asked for some water and he became unconscious and this occurrence took place at about 9.30 p.m.

9. From the bare reading of the above statement of Ram Chander, the basis of the FIR, makes it evident that neither Ram Chander nor Om Prakash have witnessed

the actual stabbing of Raj Kumar. We are highlighting this fact because later on we find that Om Prakash was proffered as an eye-witness by the prosecution. As per the site plan Ex. PW 9/A, the prosecution case is that the occurrence took place just close to the enclosure where the idol of Sant Kabir Dass stands installed and after Raj Kumar was stabbed he had at first fallen near the temple of Shiva and the blood was found on a brick of the wall near that temple. As per the said site plan, the hut of Ram Chander is located at a distance of more than 1800 sq.m. whereas Ram Chander and the Investigating Officer tried to show that the place of occurrence was about 12 yards or 40 paces from the hut of Ram Chander. At any rate, the short question which arises for consideration is whether Om Prakash is an eye-witness of the occurrence or not. In the FIR he has not been shown as an eye-witness but in his statement PW 7 had made a vital improvement from the FIR by deposing that when his son Raj Kumar was called away by the three appellants he suspecting some foul play asked Om Prakash to follow them. Om Prakash unfortunately, although being very close relation of Ram Chander and deceased Raj Kumar, has not thought it fit to toe the line of Ram Chander or of the police and he has categorically deposed that he had not witnessed the occurrence and he had not even heard the alleged dying declaration of Raj Kumar. So, according to Om Prakash's testimony he had heard about Raj Kumar being stabbed by Suresh and he had rushed to the Sant Kabir Ashram and had found Raj Kumar lying injured near the temple situated on the hillock and he and others brought Raj Kumar to the hut of Ram Chander and thereafter he was removed to the hospital after his wound was tied with a bandage. He in cross-examination by the prosecution admitted that Ram Chander was present in his hut at the relevant time but he expressed ignorance about any quarrel having taken place amongst the ladies in the evening prior to the stabbing of Raj Kumar. According to him, he had not seen the appellants coming and giving abuses or quarrelling with Raj Kumar or taking Raj Kumar away. He denied that he had come out with a new fact that he and Ram Chander had brought Raj Kumar in injured condition from near Sant Kabir Dass Ashram to the hut of Ram Chander. According to his statement, Sant Kabir Dass Ashram is located only 40 paces from the hut. He gave a version which is not given by him earlier to the police that when Raj Kumar was being brought to the hospital in a scooter, the scooter had broken down and he alighted

from the scooter and had pushed it for some distance and he did not know whether Raj Kumar had told any facts to Ram Chander while in the scooter. It is obvious that Om Prakash is not a reliable witness. There is no support available in the testimony of Om Prakash to the prosecution to link the appellants with the crime in question.

10. As far as the testimony of Ram Chander is concerned, he gave the time of occurrence 10 or 10.30 p.m. which is on the face of it incorrect because by 10.05 p.m. Raj Kumar had been admitted in the hospital and it would have at least taken about 30-40 minutes for bringing Raj Kumar to the hospital from the hut of Ram Chander. In his testimony in Court Ram Chander has come out with a new story preceding the actual occurrence by deposing that one neighbour was beating his wife and the commotion was being raised on that ground and the appellants had come and given abuses. The version given in the FIR was that some women folk were exchanging the abuses. He did not disclose the name of the said neighbour. No witnesses from the neighborhood have been examined to prove as to what sort of occurrence took place prior to the murder of Raj Kumar. According to the version given in the statement, Ram Chander claimed to have along with his wife intervened in the quarrel of husband and wife and appellants came and started giving abuses. He has now not stuck to his version given in the FIR that his wife was given beating by some women folk including baby Sharda (sister of Suresh Kumar appellant).

11. In his statement he has also come out with a new fact deposing that Sushil Kumar and Vinod Kumar had come back after a few minutes and had forcibly taken away his son Raj Kumar. In the FIR he had stated that all the three appellants had come and had just called away Raj Kumar and there is no mention that any force had been used by the appellants in taking away Raj Kumar with them. Now in Court Ram Chander does not say that Suresh had also come with the other two appellants for taking away Raj Kumar. In his examination-in-chief Ram Chander has tried to show himself as eye-witness by deposing that Suresh had stabbed Raj Kumar with a knife while the other accused had held Raj Kumar from his shoulder and neck but in the same breath he deposed that in fact, he had not seen Suresh stabbing Raj Kumar. According to him, when he had reached the

place of occurrence the accused had already run away and he had seen the accused fleeing from the place of occurrence towards the park of Jal Vihar. According to him, he had reached the place of occurrence and had not found Raj Kumar because according to him, Raj Kumar had been brought to his hut by Om Prakash by a shorter route prior to his reaching the spot. He has stated that he returned to his hut and he found his son Raj Kumar, lying in front of his jhuggi, bleeding from his chest. Surprisingly Ram Chander had completely forgotten as to the version given by him to the police when he made his first statement. He had mentioned in that version that Raj Kumar had come running to his hut and had fallen in front of the hut in an injured condition and he was present at his hut when Raj Kumar came running. This version had been given a complete go-by Ram Chander.

12. Not only that he had the gumption to introduce another dying declaration of his son Raj Kumar which does not find mention in the FIR. According to him even while lying in front of his hut Raj Kumar had told that Suresh had stabbed him while other two appellants had held him. It is also the admitted case that at the time Raj Kumar was lying in front of the hut in injured condition the neighbours in a large number had gathered. In case any such dying declaration had been made by Raj Kumar at the spot there would have been a large number of witnesses who would have heard such dying declaration and would not have hesitated to come forward as witnesses. It is impossible to give credence to the testimony of Ram Chander that a dying declaration had been made by Raj Kumar at the spot particularly when we find that in the FIR no such dying declaration made at the spot had been even hinted at.

13. Ram Chander had expressed complete ignorance about any quarrel having taken place between Sharda (sister of Suresh) and his son Raj Kumar and Raj Kumar's companions. He has expressed ignorance about Santro (mother of Suresh) having lodged a report, earlier in time, with the police in that respect. The Investigating Officer was categorically asked as to whether he had made any inquiry with regard to the beating of Sharda by Raj Kumar and his companions and surprisingly the officer stated that he has not probed into this matter. According to the prosecution, Raj Kumar was stabbed at about 9.30 p.m. The occurrence with

Sharda as is evident from the DD report No. 9A also took place at 9.30 p.m. so, it is evident that the prosecution had tried to suppress genesis of the quarrel. It may be that the occurrence which took place with Sharda at the same time and place resulted in stabbing of Raj Kumar. Keeping in view all these deficiencies in the prosecution case, we are to see whether the statement of Ram Chander that Raj Kumar had made a dying declaration while in scooter is true or not

14. Reverting back to M.L.C. Ex. PW 11/A, we find that doctor had recorded most probably on the basis of the information given either by Om Prakash or by Ram Chander that Raj Kumar was allegedly stabbed at 9.30 p.m. at his house with immediate loss of consciousness. If that is so, it would mean that immediately after being stabbed Raj Kumar had lost consciousness. That is why we find that material discrepancies have appeared in the case of the prosecution as to whether Raj Kumar actually had come running to the hut of Ram Chander after receiving the stab injury or he had fallen on the hillock after being stabbed and was brought down to the hut by Om Prakash and Ram Chander. In Court Ram Chander and Om Prakash have not supported the prosecution version that in fact, Raj Kumar had come running to the hut in injured condition but both the witnesses have stated that Raj Kumar was brought from the place of occurrence to the hut of Ram Chander. If that is so, can it not be said that perhaps Raj Kumar was unconscious when he was brought to the hut and the question of his gaining consciousness while being taken to the hospital in a three wheeler scooter was very much remote and on reaching the hospital Raj Kumar was found gasping for life.

15. PW 11 Dr. N. P. Padmakar, who examined Raj Kumar, had found even the pulse of Raj Kumar very feeble and his throat full of blood and heart sound also very feeble. He had noticed only one incised wound approximately 4 cms x 3 cms on the left sub coastal margin. So, it was quite clear that Raj Kumar was in a pretty bad shape and the stab injuries caused to him proved to be fatal which resulted in lot of loss of blood inasmuch as his throat was found to be flooded with blood within 30 minutes of the occurrence. The prosecution had not cared to take any opinion of the two doctors examined in this case, one PW 11 who initially examined Raj Kumar and the other PW 13 Dr. D. N. Bhardwaj who performed the post mortem to find out whether with such serious injuries inflicted on Raj Kumar,

he was still in a position to speak or not At least mentioning of the fact in the MLC that there was loss of consciousness immediately after receiving the stab injuries makes it very doubtful that Raj Kumar had made any dying declaration to Ram Chander at any time.

16. It is significant to mention that at the time the F.I.R. was recorded the Investigating Officer who had taken the M.L.C. of Raj Kumar before recording statement of Ram Chander was only aware of one stab injury inflicted on the person of Raj Kumar and the dying declaration brought out in the FIR through the mouth of Ram Chander also referred to his being stabbed by Suresh in the abdomen meaning thereby that only one stab injury was referred to in the dying declaration of Raj Kumar but ultimately when the post mortem was performed on the dead body of Raj Kumar by PW 13 he had found one stab wound obliquely placed 10 cms below left nipple and 6 cms left to midline going upwards and medially size 3 cms x 1 cm x cavity deep and second stab wound present on lateral aspect of chest on left side placed obliquely going downwards and medially situated 12 cms below axilla size 2.5 cms x 0.5 cm x cavity deep besides one operational wound and two abrasions. The so-called dying declaration does not mention two stab wounds having been inflicted.

17. It can be said that so-called dying declaration of Raj Kumar referred to by Ram Chander is not in consonance strictly with the medical evidence.

18. It is also to be emphasized that in case any such dying declaration had been made there is no earthly reason why it was not got so recorded in the alleged history given by Om Prakash or Ram Chander which found place in the MLC of Raj Kumar.

19. The learned counsel for the State drew our attention to Babu v. State of U.P., : 1980 CriLJ392 wherein it has been laid down that merely because in a murder case prosecution witnesses were interested and inimical, that by itself is no ground to reject their testimony in toto. The only caution which should be taken by the Court is that evidence of interested witnesses should be scrutinized with care. In the cited case, besides the ocular evidence of the witnesses who were interested there was unimpeachable evidence of dying declaration and Court said that the

Court can rely upon them i.e. the testimony of interested witnesses when the same is corroborated by the dying declaration. But nothing said in this judgment, in our opinion, is of help to the prosecution in the present case. What we find in the present case is that it is highly doubtful that Raj Kumar had made any dying declaration which was the only evidence being relied upon by the learned Additional Sessions Judge for bringing home the offence to the appellants.

20. In the present case we may also point out that in case any dying declaration had been made in the scooter then the scooter driver might have also heard such a dying declaration but the prosecution had not traced the said scooter driver to cite him as a witness. May be the police efforts in that connection did not fructify. Be that as it may, in view of the discussion made above, we are of the firm view that the charge has not been brought home to the appellants beyond reasonable doubts.

21. Before parting with the case, we may highlight the glaring illegality committed by the trial Court in bringing on record inadmissible confessional statement of accused-Suresh and so also pointing out memos. Appellant-Suresh is stated to have made a disclosure statement regarding the weapon of offence and had offered to point out the place where he had concealed the weapon and get it recovered and also point out the place of occurrence. The said disclosure statement has been exhibited, so also the pointing out memos when in fact, no recovery of any weapon has been effected. Under Section 27 of the Evidence Act, only that part of the statement of the accused made to the police could be admissible in evidence which had led to discovery of a particular fact. In the present case, the disclosure statement did not lead to recovery of the weapon. The place of occurrence was already known to the police before recording of the disclosure statement and thus, the pointing out of the place of occurrence by Suresh and the memo prepared in that respect was also not admissible in evidence. So, the trial Court ought not to have allowed the said evidence to be brought on record and should not have exhibited the disclosure statement and the pointing out memos.

22. We allow the appeals and set aside the conviction and sentences of the appellants and direct that the appellants be set at liberty if not required to be detained in any other case and the fines if already paid by the appellants be refunded to them.

23. Appeals allowed.

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