

Ashok Kumar Vs. State

Ashok Kumar Vs. State

SooperKanoon Citation : sooperkanoon.com/683115

Court : Delhi

Decided On : Apr-17-1979

Reported in : 1979CriLJ1477; ILR1979Delhi118

Judge : V.D. Misra and; F.S. Gill, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 307; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 311; [Evidence Act, 1872](#) - Sections 3 and 32(1); Punjab Police Rules, 1934 - Rule 25.24

Appeal No. : Criminal Appeal No. 215 of 1976

Appellant : Ashok Kumar

Respondent : State

Advocate for Pet/Ap. : D.R. Sethi and S.K. Aggarwal, Advs

Judgement :

S. Gill, J.

(1) -IN this appeal Ashok Kumar @ Cheena appellant was convicted by Shri Mahesh Chandra, Additional Sessions Judge, Delhi on 14-5-1976 under section 302 of the Indian Penal Code and was sentenced to imprisonment for life.

(2) The prosecution case is that on 11-11-74 at about 6.30 P.M. Yamin (since deceased) was going to his house from the side of Bulbuli Khana, when Ashok Kumar @ Cheena met him. Ashok Kumar challenged him and remarked that he would not allow him to escape as he was able to do the other day. Thereafter he took out a knife from his pocket but seeing this, Yamin started running. The appellant hotly pursued him. While doing so he was brandishing his knife and was proclaiming that he would not spare him. When Yamin reached near the shop of Sindhi tea-vendor, he was overtaken there. Appellant then gave a knife blow in his abdomen. Yamin made another bid to escape but he was not allowed to do so. He was administered another knife below on his back. On its receipt Yamin fell on the ground. It is alleged that thereafter Abdul Salam, Abdul Rahim and Abdul Hamid rushed towards the injured. On seeing them the appellant ran away towards Prem Narain Road. These three persons then took the injured to Irwin Hospital in Kalu's ricksha. After reaching there they left the hospital to inform Yamin's relatives. In their absence Yamin was admitted there by Kalu ricksha puller.

(3) Constable Gurmukh Singh was on duty in the hospital. H? informed Hauz Qazi Police Station on telephone about Yamin's admission. A report in this behalf was recorded in the Daily Diary and S.I. Om Prakash was deputed to proceed in the matter.

(4) The Sub-Inspector reached the hospital and recorded Abdul Salam's statement. It was sent to the police station. On its basis a case under section 307 of the Indian Penal Code . was registered. The Investigating Officer then recorded the statements of a number of witnesses but could not examine the injured till 2-12-74, as earlier on several enquiries, the Doctors had declared him to be unfit for making any statement.

(5) On 2-12-74 S.I. Om Parkash recorded the dying declara- corporation of Yamm in the presence of one Alimuddin. This statement was signed by the maker and was attested by Alimuddin and the Scribe- 5. Yamin died in the Hospital on 28-12-74. The police was informed. The offence was converted from 307 to one under section 302 of the Indian Penal Code .

(6) The post-mortem examination of the deceased was conducted by Dr. A. K. Ghosh Public Witness 13 on 29-12-74. He found the following injuries on the dead body :

1. Transverse stitched wound 3 cm. over the middle of front of right arm. 2. Stitched wound 1.5 cm over the front of right fore-arm 9 cm. below the elbow. 3. Infected wound 2 cm. diameter in right posterior axillary line in 8th. Right intercostal space. Pus was coming out of the wound. 4. Infected wound 2x1 cm. in the left posterior axillary line in left 10th intercostal space. Fistula was formed and pus was coming out of the wound. 5. Laparotomy wound over the middle of abdomen 18 cm, long was present. Upper 6 cm' was completely healed and the lower 12 cm. was partially healed. In the opinion of the Doctor the -above injuries were ante-mortem and death was due to septicaemia and toxemia as a result of the injuries on chest and abdomen.

(7) After the completion of the investigation, Ashok Kumar @ Cheona was challenged in the court of a Magistrate who committed him to Sessions. The learned Additional Sessions Judge convicted and sentenced the appellant as already indicated in para I ibid. The convict has come up in appeal to this Court.

(8) During the course of arguments we were intrigued rather impelled to go through the case diaries for seeking their aid by suggesting means of further elucidation of certain material points in the case. The process was designed to advance the ends of justice. So we invoked the provisions of Section 172 of the Code of Criminal Procedure for this purpose.

(9) In order to use the information derived from these diaries it was essential' to draw the attention of their writer, namely, S.I. Om Parkash Public Witness . We, therefore, exercised our powers under Section 311 of the Code, recalled the Investigating Officer and re-examined him. We also allowed both the sides to cross-examine this witness. How we have used this evidence, will be presently seen at the appropriate place in the discussion.

(10) Shri Sethi, the learned counsel for the appellant has contended that the eye witnesses in this case are false and made up witnesses. Their evidence,

therefore, deserves to be discarded. Let us examine their evidence.

(11) Abdul Salam, Abdul Hamid and Abdul Rahim are the eye witnesses mentioned in the F.I.R. Out of them Abdul Rahim has not been examined by the prosecution. The other two had, however, been examined in the trial court. Abdul Salam Public Witness 3 has proved his statement Ex. Public Witness 3[A. On its basis F.I.R. Ex. Public Witness II[A was recorded and a case under section 307 of the Indian Penal Code . was registered.

(12) He has admitted that he is the maternal uncle of Yamin deceased. It is true that mere relationship is not sufficient to brush aside the testimony of an otherwise credible witness but in the present case the scrutiny 'of his statement leads us to an inevitable conclusion that he is not a trustworthy witness. He has deposed that he, Abdul Hamid and Abdul Rahim had seen the appellant causing injuries to Yamin and that before they could reach near the injured for rescuing him, the appellant had run away. He has further added that he and his companions had put the injured in Kalu's ricksha and had taken him to the Irwin Hospital, where he was admitted. Even casually, it is hard to believe that the injured and these three persons could be carried in the same rickshaw driven by Kalu. It would have been more natural if Abdul Salam alone or at the most two of them had taken him. If the prosecution version had been true then the clothes of these witnesses must have got blood stains as the injured was profusely bleeding. But according to the evidence on record none of them had any blood stain on their clothes.

(13) Apart from this, their subsequent conduct is also highly unnatural and queer. Both Abdul Salam and Abdul Hamid have stated that they and Abdul Rahim had left the injured in the hospital and had gone to inform the near relatives. They had thus left the injured to the sole care, rather to the mercy of Kalu, ricksh driver. Yamin had been admitted in the hospital by Kalu, who was not in any way connected with the injured.

(14) It is impossible to believe that Abdul Salam, who was the maternal uncle of the injured, would have left him unattended and in the lurk, when the medical aid was yet to be rendered. If all the three had actually gone to the hospital, their natural conduct would have been to make frantic efforts to save the life of the

injured by ' arranging early medical aid. Their unnatural conduct raises grave suspicion about the authenticity of their evidence. We have thus no hesitation in holding them as untruthful witnesses.

(15) Islamuddin Public Witness 7, whose name does not appear in the F.I.R. has also been examined as an eye witness. He has deposed that he had seen the occurrence and that Abdul Hamid, Abdul Salam and Abdul Rahim had taken the injured to the hospital in his presence. He has further added that he had told these persons that he would go and inform Yamin's relations, but when he had actually gone to his house, none was found there. He has further deposed that he lived in the same house in which Yamin resided.

(16) If Islamuddin had undertaken to inform Yamin's relations, where was the necessity for Abdul Salam, Abdul Hamid and Abdul Rahim to leave the hospital for the same purpose. The immediate problem confronting them was the welfare of the injured. That vital object was totally ignored. In that context we do not consider Islamuddin to be a truthful witness.

(17) Kalu has appeared as Public Witness 4, but has given an absolutely different version. He has deposed that the injured was seen by- him reclining against an electric pole. He had put him in the rickshaw and had then taken him to the hospital. He has further added .that Abdul Salam or two/three other persons were not with him when he had taken the injured to the hospital.

(18) On the scrutiny of the statements of Abdul Salam and Abdul Hamid Public Witness s we are convinced that their depositions are unworthy of credence and deserve to be rejected without any demur. In our view the trial court was not at all justified in believing these witnesses on. account of the various infirmities and circumstances reflected above.

(19) Other important piece of evidence in the case is the dying declaration Ex. Public Witness 8/A. It was alleged to have been made by Yamin before the Investigating Officer (S.I. Om Parkash) on 2-12-74 in the presence of Alimuddin. It is amply proved that prior to that date the doctors had been reporting that Yamin was not fit to make any statement. S.I. Om Parkash had recorded the statement

and had also put his signature in token of attestation. Alimuddin Public Witness , who was also present near the injured, too had attested this statement. It is further stated that the maker had also signed-

(20) Alimuddin (Public Witness 8) has deposed that Yamin was the son of his friend and that he had visited him in the hospital on 2-12-74 to enquire B about his welfare. He further stated that this was his second visit. Earlier he had visited Yamin after 15 or 20 days of his admission in the hospital. In the cross-examination Alimuddin has admitted that the visiting hours in the hospital were from 5 P.M. to 6 P.M., but he had gone at 11 A.M. He has also stated that he was with the injured for about an hour and a half before the Investigating Officer had come to examine him. He has gone a step further by saying that a Doctor was also present at the time the statement was recorded and that doctor had also signed, the statement. The witness had categorically stated that he had signed after the doctor. On perusal of statement Ex. Public Witness 8/A we find that there is no endorsement or signature made by any doctor on it. In our view Alimuddin has deliberately made a false statement in a vain effort to help the prosecution.

(21) It is well settled that a dying declaration stands on the same footing as any other evidence, although it is not tested by cross-examination. It is also well established rule of law that an accused can be convicted on its sole basis provided on its strictest scrutiny and closest circumspection, the court is satisfied about its reliability and truthfulness.

(22) Section 32(1) of the Indian Evidence Act is the relevant provision to govern the dying declarations ; while *Khushal Rao v. State of Bombay*, : 1958 CriLJ106 is the basic authority in which the various tests, as are required to be applied, have been laid down.

(23) In a recent decision of this Court pronounced on 11-4-1979, in Criminal Appeal No- 16 of 1978 (*Om Parkash alias BilUu Bhatia v. State*) (2), a Division Bench (to which F. S. Gill, J.) was a party enumerated the circumstances in which a dying declaration can be made the sole basis for a conviction and also when it is unsafe to do so without securing independent corroboration on material points from the remaining evidence. They were considered and highlighted with specific

reference to section 32(1) of the Evidence Act and the various decisions of the Supreme Court. In a nutshell the most redeeming and determining factor to appraise the intrinsic value and efficacy of a dying declaration is high authentic character. A dying declaration in a given case requires to be tested by keeping in view all these facts in the forefront.

(24) Before we apply the various tests, it may be pointed out that the dying declaration in this case was recorded by S. 1. Om Parkash on 2-12-74, but interestingly after this date neither the investigating officer nor any other police officer had visited the hospital even once till the death of Yamin on 28-12-74. This was not normal human conduct. We, therefore, treat this as a circumstance against the prosecution.

(25) We find that on 2-12-74 Yamin was gradually recovering. There is no evidence of any Doctor to indicate that there was imminent or even remote possibility of Yamin's death. How it occurred to S.I. Om Parkash to record the dying declaration on that day is a vexed question, regarding which no plausible Explanation has been brought on record. This casts a serious doubt about the genuineness of the document itself.

(26) If the Sub-Inspector had anticipated Yamin's death, he should have followed the procedure as laid down in Rule 25.21 of the Punjab Police Rules (Vol. III) as applied mutatis mutandis to Delhi territory. This Rule reads as under :

25.21. (1) A dying declaration shall, whenever possible, be recorded by a Magistrate. (2) 'The person making the declaration shall, if possible be examined by a medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement. (3) If no magistrate can be obtained, the declaration shall, when a gazetted police officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case. (4) If no such witnesses can be obtained without risk of the injured person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers. (5) A dying declaration made to a police officer should, under section 162, Code of Criminal Procedure, be signed by the person making it.'

According to the above rule the Sub-Inspector should have, in the first instance, made a request to a Magistrate for recording such a statement. In sub-rule (3) it is also explicitly mentioned that in case the dying declaration is not recorded by a Magistrate or by a gazetted police officer, two or more reliable witnesses not connected with the police department be present at the time of the examination and that the said witnesses should attest the statement- In the present case only Alimuddin, a family friend, had attested the statement. But according to the rule at least two reliable witnesses were required to attest the statement. There could be no difficulty in procuring such witnesses in the hospital, where doctors, nurses and other persons are always present and readily available. Non-attestation by any such witnesses flings out an important handle to question the genuineness of the document.

(27) With a view to have authentic assurance about the dying declaration we perused the police diaries. Therein we found that the printed upper portions showing the number of the book and that of the Serial number had been removed. So, for using the said diaries, we recalled Sub-Inspector Om Parkash and examined him. He has admitted that the upper printed portions of the case diaries had been removed- His Explanationn is that while tearing the sheets from the book with the aid of a footrule, the upper portions containing the printed numbers had been torn from the remaining parts. This Explanationn looks to us highly unsatisfactory when considered in the light of his other evidence. The following questions and answers, reproduced verbatim from S.I. Om Parkash's statement, are quite significant and starting as they show how the case diaries are prepared and maintained :

Question : Why did you use the diary which did not bear any number Answer : Because of rush of work, I did not check the sheet of the diary which was handed over to me. Question : See page No. 25 (which is written in ink in hand). Can you see a; part of the printed heading from which it can be gathered that there was some number printed thereon Answer : It is correct. Question : In other words this sheet contained printed number and if it was taken out from the book containing the numbers, other pages would also have the numbers. Answer : That is true. Question : See the case diary relating to investigation conducted on 2-12-74 and

state whether the opening sheet as well as the 'Indruni Diary' bear any book number and Serial number. Answer : The opening sheet does not bear any printed number. The 'Indruni Diary' does not bear the printed top containing the book number and Serial number. It seems they have been torn while I was removing it from the case diary as explained earlier.

(28) In the cross-examination conducted by Shri S. K. Aggarwal, on behalf of the State, the following question and its answer makes a very interesting and important reading :

Question : Is it a fact that in the Police Station generally no importance is attached to the use of numbered case diary Answer: Yes. To other questions (By the Court) S.I. Om Parkash replies thus : Question : You have just stated that in the Police Stations no importance is attached to the use of numbered case diaries. Do you mean to suggest that provisions of Punjab Police Riles 25.54 are being violated as a matter of routine. Answer: No. Question : Give a complete answer to the question asked from you. Answer : The practice prevalent in the police stations is that for example when I exhaust my case diary I will. borrow the case diary from another officer. No record will be kept of the case diary which the other officer will give to me and which I will use in a case. Question : If this practice is prevalent the result seems to be that nobody can have a check on the investigation carried out by you because pages can be interpolated. Answer : I cannot say anything about it. Question : In the case diary of this case did you borrow any sheets from your brother officers for being used in this case? Answer : I do not remember.

(29) The actual method of investigation adopted by the Investigating Officer and disclosed in his statement, depicts a very sorry state of affairs. It shows flagrant disregard of the statutory rules. No lengthy comments are called for qua this violation. It will be enough to say that it is a convenient mode to circumvent an important check embodied in the Rules to judge whether the investigation as conducted was fair or not.

(30) From the above statement of the Investigating Officer we find that blank case diary registers are being supplied as they have no book number or Serial numbers printed thereon. This is a flagrant abuse of sub-rule (1) of Rule 25.54 of the Punjab

Police Rules (Vol. III). This sub-rule is in these terms :

25.54(1). Case diaries shall ordinarily be submitted in Form 25.54(1) and each sheet shall be numbered and stamped with the station stamp. Two or more copies, as may be ordered, shall be made by the carbon copying process by the officer conducting the investigation. The officer writing a case diary shall enter in such diary a list of the statements, recorded under section 161, Criminal Procedure Code, which are attached to such diary and the number of pages of which each such statement consists.'

Use of the numbered case diaries and their scrutiny in the event of doubt, is the only mode to check the investigation and get assurance that these diaries are not changed or interpolated according to convenience. It cannot be forgotten and slighted that the personal liberty of an individual is involved in such cases where an offence is alleged to have been committed. We have no sympathy for the persons who are the perpetrators of a crime. Wrong-doers must be brought to book and punished. That is the main object, which underlies the investigation by the police and trial before the courts. But at the same time there is a sacred duty cast on all concerned to protect innocent persons. Courts are always very zealous to safeguard such rights of the people.

(31) If an investigating officer can change the case diaries and inculcate innocent persons by interpolations, it will be unfortunate for the entire system of investigation and trial. The Courts and other agencies are under legal obligation to stop such practices, sooner than later.

(32) So the only safeguard lies in supplying the case diaries with printed numbers and not without them. It is, therefore, the bounden duty of the police officers, who supply such books to the investigating officers, to follow the statutory Rules most scrupulously, i.e. both in letter and spirit. The very idea to print and supply the case diaries without book number and Serial numbers cannot be looked with favor as an inherent mischief lies in doing so. Such diaries are important

' documents on which the whole edifice of the prosecution case is built. The statutory rules governing them, therefore, cannot be lightly treated, leaving it to

the discretion of an investigating officer to use the unnumbered sheets as and when he so chooses.

(33) One of the reasons stated before us is that sometimes an investigating officer has a number of cases with him for investigation and that in such a situation he has to use the sheets without printed numbers. We find no justification in doing so as it tends to open an unlimited scope for the commission of unpalatable acts with impunity to suit a particular situation. The rules have an important purpose behind them. They have been made for enforcing and not for breach. The intended purpose cannot be frustrated by any police officer, howsoever, high he may be in the hierarchy.

(34) In the present case the use of unnumbered case diaries casts a serious doubt about the genuineness of the sheet on which document Ex. Public Witness 8/A had been written. We hold that the statement of the deceased dated 2-12-74, which became a dying declaration after Yamin's death, is not an authentic document. No reliance can therefore, be placed on this declaration.

(35) We have earlier held that the evidence of the eye witnesses is unworthy of belief. The other evidence on the basis of which the conviction could be maintained was the dying declaration Ex. Public Witness 8/A. This document too has not been found to be authentic. Consequently, the prosecution has utterly failed to prove the guilt against the appellant.

(36) The result is that this appeal must succeed. We accordingly accept the same, set-aside the conviction and sentence of the appellant and acquit him of the charge-