

Dal Chand Vs. State

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Court : Delhi

Decided On : Oct-04-1988

Reported in : 36(1988)DLT282; 1989(16)DRJ44

Judge : Charanjit Talwar and; M.K. Chawla, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 313

Appeal No. : Criminal Appeal No. 12 of 1985

Appellant : Dal Chand

Respondent : State

Advocate for Pet/Ap. : Usha Kumari and; S.T. Singh, Advs

Judgement :

Charanjit Talwar, J.

(1) This case has an eventful history. This is the second time that Dal Chand, the appellant has challenged his conviction and sentence punishable for the offence of murder which, it is alleged, he committed on April 21, 1975. At the time of commission of offence, the appellant was stated to be a little over 17 years of age. He was found guilty after trial by an Additional Sessions Judge, Delhi vide judgment dated the 22nd February, 1977. The appeal filed by him (Criminal Appeal No. 132/77) was allowed by this court on October 23, 1981 and the case

was remanded for re-trial to the Court of Sessions.

(2) The Division Bench comprising D.K. Kapur, J. (as his lordship then was) and J.D. Jain, J. found that as the substantive charge for the offence of murder had not been framed, the conviction and sentence awarded for the offence punishable under Section 302 of the Indian Penal Code read with Section 149, Indian Penal Code was not sustainable.

(3) The facts of the case have been noticed in detail in the earlier judgment, by this Court. Briefly those are as under :

(4) Public Witness I Gopi Ram, resident of Prasad Nagar 16/573, Bapa Nagar, New Delhi was friendly with one Ami Chand, an Army personnel. They were both, it is stated, worshippers of 'Vaishno Mata'. A few days prior to the occurrence they had, with their families visited the holy shrine. Ami Chand Along with some of his colleagues off and on used to visit Gopi Ram. It seems that Dal Chand (the appellant), Inderjit and Dalip, who were also residing in the same mohalla, had objected to the visits of the Army personnel and asked Gopi Ram not to invite them any more. On the day of occurrence, i.e., 21st April, 1975, Ami Chand accompanied by his friends K.J. John, Lakhi Ram, Bhajan Singh, Gurmit Singh, Balwant Singh and Bhim Singh while on their way to military camp situate at Anand Parbat, after making some purchases from Karol Bagh, visited the house of Gopi Ram. After taking tea there, they left for their destination. They had hardly covered a distance of 20-25 paces towards Arya Samaj Road when the assailants viz., Dal Chand, Inderjit, Dalip, Sunil and Jagdish appeared at the spot. Three of the accused had open knives in their hand. They attacked Ami Chand and his companions with those knives. The accused shouted that since the military personnel had not desisted from visiting their mohalla, they would teach them a lesson. Dal Chand gave a dagger blow in the abdomen of Balwant Singh while Inderjit Singh attacked Bhim Singh and Dalip attacked Ami Chand. Another accused also gave beating to them. After inflicting injuries, the accused ran away towards Arya Samaj Road. One of the injured Balwant Singh, who had received serious injuries, was removed to the Military Base Hospital at Delhi Cantt, where he succumbed to the injuries. The other injured were removed to the military camp

at Anand Parbat. At first a case against the accused was registered for offences under Sections 147/148/149 and 307 of the Indian Penal Code. After receipt of the information that Balwant Singh had expired, a case under Section 302, Indian Penal Code was also registered.

(5) On remand of the case, the learned trial court framed fresh charges on June 7, 1982. The first charge reads :

'FIRST on April 21, 1975 at about 8.30 p.m. at Arya Samaj Road, you Dal Chand along with Inderjit Singh, Dalip and Jagdish in furtherance of common intention of you all attacked Balwant Singh and you committed murder by causing the death of Balwant Singh by stabbing him and thereby you committed an offence of murder under Section 302 Indian Penal Code and within the cognizance of this Court.'

(6) After framing of the charge against the appellant for the substantive offence of murder, the evidence of the prosecution witnesses ought to have been recorded afresh, as directed by this Court, but on a concession made by counsel for the parties, the trial court directed that examination-in-chief already recorded by its predecessor, of all the prosecution witnesses be read in evidence subject, however, to the condition that the accused would have the right to cross-examine those witnesses. The order is contained in the minutes of proceedings of January 10, 1983 of the trial court.

(7) It seems that one of the eye witnesses to the occurrence who had also received injuries, Public Witness 10 Ami Chand, was not made available for cross-examination but his testimony recorded in the first trial has been noticed and relied upon in the impugned judgment dated the 22nd November, 1984.

(8) Learned counsel for the appellant submits that non-recording of the examination-in-chief of the prosecution witnesses and referring to the earlier testimony of Ami Chand, who had not been produced for cross-examination after remand, are illegalities which are not curable. In the view which we are taking, it is not necessary to analyze the evidence in detail. However, we would advert to this infirmity a little later.

(9) It is Further urged that the appellant was required under law to be examined afresh under Section 313 of the Code of Criminal Procedure after recording the testimony of the prosecution witnesses ; instead the learned trial court dispensed with the examination under Section 313 Criminal Procedure Code . In its order dated October 15, 1984, it was directed as follows :

'PRESENT: Accused on bail with counsel App for the State Cross-examination of 1.0. completed. According to P.P. there has appeared no further incriminating evidence than the one put to the accused in Statement under Section 313 Criminal Procedure Code . The counsel of the accused and the accused state that the answers given by the accused to questions already put to him in statement under Section 313 Criminal Procedure Code . be read and he does not want to give any more Explanationn or answers. In view of this, the case be now fixed for October 16, 19S4 turn arguments as She accused does not wan to produce further defense evidence'.

(10) Mrs. Kumar , learned counsel for the appellant submitted that duty is cast on the trial court to mandatorily record the statement under Section 313 of the Criminal Procedure Code of the accused. The concession made by the accused and the counsel for the parties (as recorded the above quoted order) was of no effect and the appellant on that ground alone is entitled to be acquitted. She submitted that the illegality about the non-recording of the examination-in-chief by itself requires that the case I again remanded but under the facts of this case, the second infirmity vitiates the trial.

(11) The further submission on behalf of the appellant is that having been convicted and sentenced on February 22, 1977, the provisions of Section 433-A of the Criminal Procedure Code are not applicable to the present case and, therefore, under the Jaw the appellant was not required to undergo actual rigorous imprisonment of 14 years. Section 433A of the Code came into force with effect from December 18, 1978. Mrs. Usha Kumar, learned counsel for the appellant contended that if the appellant had not filed the earlier appeal challenging the judgment of the February 22, 1977 or his appeal had been dismissed, the appellant, who was admittedly less than 20 years of age at the time

of commission of the offence on April 21 1975, would have been entitled to premature release after completion of years of imprisonment, including the periods of remission earned by him.

(12) In our view, before proceeding further, this submission needs be examined.

(13) Paragraph 516-B of the Punjab Jail Manual lays down the procedure to be followed by the Jail Superintendent for forwarding the cases of the convicts undergoing life imprisonment for premature release. Sub- para (a) of para 516-B of the Jail Manual deals with the cases of convicts undergoing imprisonment for life, who were over the age of 20 years at the time of committing the offence. Sub-para (b) of that para requires action to be taken by the Superintendent Jail on expiry of 10 years in cases of convicts who were under the age of 20 years at the time of committing the offence. Clause (iv) of that provision lays down :-

'A single sentence of more than 20 years shall be submitted through the Inspector General of Prisons, Punjab, for the orders of the State Government when the prisoner has undergone a period of detention in Jail amounting together with remission earned to 10 years'.

(14) It is on record of the present appeal that on January 31, 1985 the appellant had undergone 9 years 11 months and 5 days of imprisonment. This is evident from the chart submitted by the Deputy Superintendent of Tihar Jail. It appears that the chart was furnished on the directions of the Court and it was kept in view by the Court while deciding the bail application filed on behalf of the appellant. Vide order dated February 22, 1985 in Criminal misc. No. 64 of 1984, the appellant was directed to be released on bail on his furnishing a bond in the sum of Rs. 5,000.00 with one surety in the like amount to the satisfaction of the Chief Metropolitan Magistrate, Delhi. We are informed that the appellant was actually released on bail on February 24, 1985 from Central Jail, Tihar. A letter bearing No. 997/CMM/ 85 dated February 27, 1985 to the effect that orders for his release were issued on February 23, 1985, is in Part-B of this file. Thus including a couple of days of remission which the appellant must have earned in the month of February, 1985, he had undergone by then a few days over 10 years of imprisonment, including the periods of remissions.

(15) There is considerable force in the argument of Mrs. Usha Kumar that in case his earlier appeal had not been allowed or he had not filed it, under the provisions of Paragraph 516-B of the Punjab Jail Manual, which provisions we have held to be mandatory in various cases following the principles enunciated in Maru Ram v. Union of India, : 1980 CriLJ1440 , the appellant in all probability would have been pre-maturely released. Her plea that the remand of the case for re-trial would result in failure of justice, can- not be ignored. We are of the view that in the facts and circumstances of the case, the interests of justice require that re-trial or remand of the case ought not to be directed and further proceedings be stopped.

(16) Her main argument, however, is that the effect of non-compliance of Section 313 of the Code by the trial court is that the accused is entitled to be acquitted. In support of the submission she relies on Machander v. The State of Hyderabad, : 1955 CriLJ1644 .

(17) In the said case the accused who had been convicted for the offence of murder, was not questioned by the trial court under Section 342 of the Criminal Procedure Code . (old) about his confession which was not recorded after six days of his arrest. It appears from the reported judgment that in appeal the High Court excluded the confession made by the appellant from its consideration. However, it maintained the conviction. The Supreme Court negated the contention of the State for re-trial and held that error in not examining the accused properly and fairly was not a mere technicality. The appellant was acquitted. While warning the Judges and Magistrates to realise the importance of the examination under Section 342, Criminal Procedure Code, it was held :-

'THE error here is not a mere technicality. The appellant appears to have been ready to disclose all on the 29th and make a clean breast of everything and yet the police waited six days before getting a confession judicially recorded. That may be capable of Explanationn but the difficulty of asking an accused person to establish facts of this kind in his favor four and a half years later is obvious. Without thereforee attempting to lay down any general rule, we are not prepared to order a re-trial in this case because of the facts that appear here.'

(18) Mr. Sodhi, learned counsel for the State, in reply to the arguments, pointed out that Public Witness Ami Chand, an eye witness to the occurrence could not be produced by the prosecution as repeated efforts to produce him were unsuccessful. He submitted that the earlier statement of this Public Witness made before the Court could have been transferred and read in evidence. He, however, conceded that no application to that effect was moved by the prosecution. His argument is that this Court while sitting in appeal can ignore from consideration the statement made by that witness in the first trial, conducted prior to the remand.

(19) Mr. Sodhi further stated that it would have been appropriate for the trial court to have recorded the statement of the accused afresh, yet the course adopted, according to him, cannot be now challenged by the appellant as he had specifically agreed that his examination be dispensed with. In the earlier examination, which has been adopted in the present trial, the facts and circumstances brought out by Ami Chand, Public Witness, had been specifically put to the accused (appellant herein). Mr. Sodhi's plea is that those questions which are based on the testimony of Public Witness Ami Chand, can be ignored by us. His submission is that we may call for the appellant and record his statement under Section 313 of the Code of Criminal Procedure. Alternatively he urged that the case be remanded for re-trial.

(20) In fact what Mr. Sodhi wants us to do is to convert ourselves into a trial court by examining the accused under Section 313 of the Code, which examination we may note, Mr. Sodhi agrees was mandatorily to be recorded. We are of the view that the expedient course adopted by the trial court by dispensing with the recording of the statement of the accused is not permissible. The accused and/or the counsel even if agree that the statement under Section 313 of the Criminal Procedure Code be not recorded, the trial court is bound under law to record that statement. The Supreme Court has held that the Criminal Procedure Code is a procedural law designed to further the ends of justice. In *Willie (William) Slaney v. State of Madhya Pradesh*, : 1956 CriLJ291, it has been held :

'THE object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well understood lines that accord with our

notions of natural justice.'

(21) We hold that non-examination of the accused under Section 313 of the Code of Criminal Procedure is not a mere technicality. We are not persuaded to agree with Mr. Sodhi that the present case, which has already resulted in the appellant's undergoing over 10 years of rigorous imprisonment, be re-opened or re-remanded, in the facts and circumstances of the case, we allow the appeal. The conviction and sentence are set aside and the appellant is acquitted. The appellant is on bail. His bail bonds are discharged.

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