

**Dhan Bahadur Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/700324](http://sooperkanoon.com/700324)

**Court :** Delhi

**Decided On :** Apr-28-2008

**Reported in :** 2008CriLJ4795; 2008(103)DRJ398

**Judge :** P.K. Bhasin, J.

**Acts :** Indian Penal Code (IPC) - Sections 34, 304 and 308

**Appeal No. :** Criminal Appeal No. 236 of 1999

**Appellant :** Dhan Bahadur

**Respondent :** State

**Advocate for Def. :** Sanjay Lao, APP in Criminal Appeal No. 236 of 1999 and ;  
Sanjay Lao, APP in Criminal Appeal No. 244 of

**Advocate for Pet/Ap. :** Rajender Kumar and; S.P. Pandey, Advs. in Criminal  
Appeal No. 236 of 1999 and;

**Disposition :** Appeal allowed

**Judgement :**

**P.K. Bhasin, J.**

1. The appellants have assailed the judgment dated 16.04.1999 and order dated 20.04.1999 rendered by the learned Additional Sessions Judge, Delhi in Sessions

Case No. 20/96 whereby they were convicted for the offence punishable under Section 304(Part I) read with Section 34 of the Indian Penal Code and were awarded sentence of five years rigorous imprisonment and a fine of Rs. 5000/- each with a default clause of six months rigorous imprisonment in case of non-payment of fine. Since these two appeals arose out of the same judgment they were heard together and will now be disposed of by this common judgment.

2. The relevant facts leading to the trial and conviction of the appellants for causing the death of one Mahender Singh have been noticed by the learned trial Court in para nos. 1 and 2 of the impugned judgment and are reproduced as under:

Destiny was cruel to Mahender Singh on ill-fated night of 25.5.95 at about 11/12 pm when he was coming from Bangla Sahib Gurudwara Along with his wife and other family members in Maruti van No. DBV 8026. When they reached near Nova Steel Mills, Mandoli Road, a truck No. UP 80C 9607 was standing on the road. Thus the road was blocked due to improper parking of the truck and the van could not pass. The house of Mahender Singh was nearby. Kaka Singh was the driver of the van. He stopped the van and got down and went to the truck and asked the driver to park the truck aside leaving the road. Dhan Bahadur was the driver of the truck and Lal Singh was the cleaner. There was an altercation between Dhan Bahadur and Lal Singh, occupant of the truck with Kaka Singh, driver of the van and Kaka Singh was assaulted on his face by Dhan Bahadur. Since there was commotion, Mahender Singh got down from the van to rescue Kaka Singh the driver. Mahender Singh was badly assaulted by Dhan Bahadur by an iron rod on his head. Lal Singh caught hold of Mahender Singh. Due to repeated blows of iron rod on the head of Mahender Singh, he received serious injuries and became unconscious and fell down on the ground and was immediately removed in Maruti Van to GTB Hospital. Since there was no Cat Scan facility available at GTB Hospital, as such Mahender Singh was removed to St. Stephans Hospital and was got admitted there where he expired on 27.5.95.

2. DD No. 69B dated 25.5.95 was recorded at P.S. Man Sarovar Park on the basis of telephonic information given by Bittoo at 12.25 a.m. (night) that near Nova Steel

Mills a truckman had assaulted a man who is lying unconscious. HC Charan Pal Along with constable Ram Pal Singh of Homeguard went to the spot and from there to GTB Hospital since he came to know from the spot that injured Mahender Singh has been removed to hospital. He collected the MLC of Mahender Singh who was unfit for his statement. From the Hospital, he returned to the spot and found SI Har Pal Singh Along with his staff. HC Charan Pal gave DD No. 69B to SI Har Pal Singh who on this DD prepared a rukka and the same was sent to the police station on the basis of which case FIR Under Section 308 IPC bearing FIR No. 86/95 was registered. IO later on arrested Dhan Bahadur. Accused Lal Singh was subsequently arrested by SI Fateh Singh. During the course of investigation, accused Dhan Bahadur in pursuance of his disclosure statement got recovered an iron rod. After completion of investigation the challan was filed against accused persons in the court of Metropolitan Magistrate Under Section 304/34 IPC from where it was committed to the sessions court for trial.

3. The trial Court charged and tried the appellants-accused under Section 304(I) read with Section 34 IPC and relying upon the evidence of PW-1, PW-5 and PW-6, who were examined as the eye-witnesses to the incident, found both the accused guilty and convicted and sentenced them as noticed already. Feeling aggrieved, both the convicted accused have challenged their conviction by filing these appeals.

4. Learned Counsel appearing on behalf of the appellants vehemently argued that the prosecution had miserably failed to establish that the appellants- accused Dhan Bahadur and Lal Singh had caused the death of the deceased Mahender Singh. Learned Counsel also contended that there were many infirmities in the prosecution case which had been totally ignored by the learned trial court and the accused have been convicted without there being any reliable evidence against anyone of them. It was also contended that none of the eye witnesses examined by the prosecution could be said to be an eye witness of the incident and their evidence was not reliable at all and consequently their identification of the appellants as the assailants and one iron rod allegedly got recovered by Dhan Bahadur as the weapon of offence was of no value.

5. Learned Additional Public Prosecutor, on the other hand, while fully supporting the impugned judgment of the trial Court contended that there were no infirmities in the impugned judgment and the two appellants having been rightly convicted their appeals deserve to be dismissed by this Court.

6. With the assistance of the learned Counsel for the appellants and the learned prosecutor I have gone through the evidence of material prosecution witnesses and on an independent analysis thereof I have unhesitatingly come to the conclusion that the prosecution case cannot be said have been established beyond reasonable doubt. As noticed already, the prosecution had sought to establish its case on the basis of evidence of three eye-witnesses all of whom are the family members of the deceased and were all sitting in the van in which they had come from the gurudwara up to the place of incident where their van had to be stopped in front of Nova Steel Mills, Mandoli Road, since the appellants' truck was parked there due to which the van could not go further. When the appellant Dhan Bahadur, who was the driver of that truck, was asked to remove his truck from the way by the driver of the van he (the driver of the van, who has not been examined by the prosecution) was assaulted by Dhan Bahadur and when the deceased Mahender Singh came to the spot after getting down from his van to save his driver he was also severely beaten with an iron rod by Dhan Bahadur and appellant-accused Lal Singh, who was the cleaner of that truck, had at that time caught hold of Mahender Singh. This entire incident was allegedly witnessed by PW-1, Tarsem Singh, who is the son of the deceased, PW-5 Gurdayal Kaur, widow of the deceased and PW-6 Jeet Singh, uncle of PW-1, who was also coming in the van from the gurudwara Along with the deceased and PWs 1 and 5. All these witnesses have no doubt deposed that Dhan Bahadur had assaulted the deceased when he had tried to save his driver Kaka when he was assaulted by Dhan Bahadur but there are very serious doubts about their having actually witnessed the incident and that is so for more than one reason. PW-9, HC Charan Pal is the police official who had reached the spot on getting the information on telephone from a stranger that some truck wallah had injured someone and that person was lying unconscious on the road in front of Nova Steel Mills. This witness had stated in his evidence that he had proceeded to the spot opposite Nova Steel Mills on receipt of DD No. 69B but there where he did not find any eye-witness and

the injured had also been removed to GTB Hospital. He then along with Ct. Ram Pal Singh(PW-12) went to GTB Hospital where Mahender Singh, the deceased, was found admitted but was unfit to make a statement and even there he did not come across any eye-witness of the incident. He collected the MLC of Mahender Singh and then again went to the spot where the incident took place and there the appellant Dhan Bahadur was arrested.

7. It is surprising as to how the appellant Dhan Bahadur could be arrested on the night of the incident itself when by that time the police had no information as to how the deceased Mahender Singh had got injured and who had assaulted him. There is no doubt that appellant Dhan Bahadur had admitted that he was the driver and appellant Lal Singh had not denied that he was the cleaner of the truck No. UP-80C-9607 which as per the prosecution case was parked on the road in front of Nova Steel Mills but that fact by itself was not sufficient to infer that they had injured the deceased. None of the so-called eye witnesses of the incident, about which they have deposed in Court, had reported the incident to the police immediately after the incident and in fact none of them had himself approached the police to lodge a complaint. When the police approached them two days after the incident only then they came out with their version of the incident in which they blamed the driver and cleaner of the truck to be responsible for the injuries caused to the deceased. There is no Explanation for the delay in their informing to the police about the incident. So, their conduct after the incident was highly unnatural which makes their claim of being eye witnesses highly doubtful. The doubtful manner of arrest of the appellant Dhan Bahadur also makes the very foundation of the prosecution case highly doubtful and in fact for this reason alone the entire prosecution case was liable to be rejected. As far as other accused Lal Singh is concerned he had surrendered himself in Court on 26/10/95 after Dhan Bahadur had involved him also in the incident in his confessional statement which was allegedly made by him after his arrest.

8. Even otherwise the dock identification of the appellants by the three eye witnesses for the first time without there being any prior test identification parade during the investigation is valueless in the facts and circumstances of this case and in taking this view I am fortified by the two decisions of the Apex Court

reported as 1995 JCC 585, 'Ten Singh v. State' and 1982 SCC (Cri.) 334, 'Mohanlal Gangaram Gehani v. State of Maharashtra' which were cited by the learned Counsel for the appellants. In these judgments the Apex Court has held that the testimony of a witness who identifies the accused for the first time in Court without knowing him before would be valueless in the absence of prior test identification parade. So, in the present case the identification of the appellants by the three eye witnesses for the first time in Court becomes valueless in view of the fact that the witnesses did not know the appellants prior to the date of incident.

9. Although the prosecution had not offered any Explanationn for not arranging test identification parade after the arrest of the accused the learned trial Court still proceeded to convict the appellants in the absence of test identification parade on the ground that prosecution had succeeded in establishing that the appellant Dhan Bahadur was arrested at the place of incident itself soon after the incident. In my view the findings of the learned trial Court in this regard are upon a wrong and misreading of the prosecution case set out in the charge-sheet and also its evidence. Admittedly, appellant Dhan Bahadur was arrested at the spot but sometime after the incident and not at the time of the incident by any eye-witness. If any eye witness had apprehended Dhan Bahadur while he was assaulting the two injured or while he was running away the position would have been different. That however is not the prosecution case. Just because this accused was arrested after the incident from the place of incident where, of course admittedly he had parked his truck, that will not be sufficient to say that test identification parade was not necessary. Since I have already held that the very arrest of Dhan Bahadur was not justified when he was arrested because at that time the police had no information that the deceased had been assaulted by the driver and cleaner of truck No. UP-80C-9607. It appears that since somebody had informed the police on phone that some truck driver had assaulted someone outside Nova Steel Mills the investigating officer PW-19 SI Harpal Singh finding the truck of Dhan Bahadur parked outside Nova Steel Mills arrested him just like that and later on a case was made out with the help of the so-called eye-witnesses two days after the incident that it was the driver of the said truck who had assaulted the deceased with the help of its cleaner Lal Singh. The prosecution story does not inspire confidence at all.

10. Regarding the identification of other appellant Lal Singh the trial Court had come to the conclusion that in the disclosure statement of appellant Dhan Bahadur he had also roped in Lal Singh and on that basis he was made an accused and he had also not disputed that he was the cleaner on duty on truck No. 9607 with Dhan Bahadur on the night of the incident. In my view this view taken by the trial Judge was also not correct view which could be taken. Surrender of this accused did not show that he was actually involved in the incident and confessional statement of Dhan Bahadur could not be used against him and for him also test identification was required to be conducted which was not done. So, his identification also in Court by the eye-witnesses for the first time two years after the incident is valueless.

11. It was the submission of the learned prosecutor Mr. Lao that because of the failure of the investigating officer to get test identification parade conducted the accused should not be given any benefit of that lapse and for that reason the wholly reliable evidence of the eye witnesses examined by the prosecution should not be rejected. It was also submitted that all the three eye witnesses of the incident examined by the prosecution were the family members of the deceased within whose sight the deceased was brutally assaulted and as such they cannot be expected to falsely implicate innocent persons. In my view also no accused can be given any benefit because of some lapses committed by the investigating agency during investigation but those lapses can be ignored only in case prosecution adduces reliable evidence regarding the involvement of the accused on trial. In the present case, the prosecution had sought to rely upon the evidence of the three eye witnesses who were the family members of the deceased and I also agree with the submission of the prosecutor that being the close relatives of the deceased they would not normally to falsely implicate someone. However, as noticed already, I have not found any of the three eye witnesses examined by the prosecution to be reliable because of their unnatural conduct in not even reporting the incident to the police either immediately after the incident or even on the next day. In fact, as also noticed already, none of them had actually himself approached the police for making a complaint about the incident and that conduct of theirs has been found to be sufficient not only to view their claim of being eye witnesses with suspicion but also the entire prosecution case. therefore, I am not

inclined to accept this submission of the Additional Public Prosecutor and extend any benefit to the prosecution on the basis of evidence of the three witnesses examined by it as eye witnesses of the incident. Their evidence cannot cure the defect which has crept in the prosecution case because of non holding of a prior test identification parade and the three so called eye witnesses not reporting the incident at the earliest to the police and the police arresting appellant Dhan Bahadur without any reason when he was actually arrested.

12. Since the evidence of the three eye-witnesses regarding the identity of the appellants has been found to be not reliable and acceptable their evidence about the identification of the iron rod allegedly got recovered by Dhan Bahadur as the weapon of offence used in the incident also cannot be accepted.

13. For the foregoing reasons, both these appeals are allowed and consequently judgment dated 16.04.1999 and order dated 20.04.1999 passed by the Additional Sessions Judge in Sessions case No. 20/96 are set aside and both the appellants-accused stand acquitted. During the pendency of the appeal the sentence of imprisonment awarded to the appellants was suspended and now that they have been acquitted their bail bonds would stand cancelled and the sureties furnished by them would stand discharged.