

Kori and anr. Vs. the State

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Court : Kolkata

Decided On : Mar-26-1958

Reported in : AIR1960Cal509,1960CriLJ1075

Judge : J.P. Mitter and ;Debabrata Mookerjee, JJ.

Acts : [Evidence Act, 1872](#) - Section 32; ;[Code of Criminal Procedure \(CrPC\) , 1898](#) - Section 367

Appeal No. : Criminal Appeal No. 208 of 1957

Appellant : Kori and anr.

Respondent : The State

Advocate for Def. : Amaresh Chandra Ray, Adv.

Advocate for Pet/Ap. : H.N. Rai Choudhury and ;Shib Kumar Mujumdar, Adv. for No. 2, ;J.M. Banerjee and ;Naresh Chandra Ganguly, Adv. for No. 1

Judgement :

Mitter, J.

1. Appellant Kori alias Kora Ghuniya was tried upon a charge of murder and appellant Upendra Nath Mandal was tried upon a charge of abetment of murder by the learned Sessions Judge of Purulia without the aid of a Jury. The learned Judge

found each appellant guilty of the relative offence and sentenced each to life imprisonment.

2. The prosecution case against the appellants was briefly as follows :

3. The deceased Aswini Kumar Banerjee was a resident of Ramkanali. At the material time he was employed as a postman attached to Neturia Sub-Post Office. At about 8 a.m. on 19-10-1956, Aswini left home on a bicycle to report himself for duty at the sub-post office. He carried with him some postal articles, including certain undelivered registered letters, money orders forms and bearing letters. He proceeded along the Barakar-Purulia Road and when he came near mile post No. 10 he found the two appellants hiding themselves near a culvert not far off. As there was enmity between him and his relations, on the one hand, and the appellants and their men, on the other, Aswini became afraid and took a turn to the left along a village road instead of proceeding along the Barakar-Purulia Road. At this, the two appellants started chasing him along the village Road. Realising that he would be overtaken if he proceeded on the bicycle, Aswini jettisoned it and started running. After a little while Aswini was overtaken by appellant Upendra Nath Mandal who caught hold of him and pushed him down. Appellant Kori who reached the place by this time, struck Aswini on the head with a tangi. This was followed by other tangi blows causing multiple injuries on the person of Aswini. Thereafter both the appellants made good their escape. Some time after, Dhanu Bauri, a Chowkidar of Madandih, got information that a man was lying injured on the village road near mile post No. 10. Dhanu Bauri went to the place along with Helu Oraon who had given the information. They found Aswini Banerjee lying in an injured condition. On being questioned, Aswini told Dhanu Bauri that he had been injured by Kori and Upen. Thereafter one Fakir Goala came to the place. Fakir also enquired of Aswini as to how he had been injured. Aswini told Fakir that he had been injured by Kori and Upen. Helu Oraon had in the mean time left the place. Dhanu Bauri then went away to get a doctor, leaving Fakir Goala there. Shortly afterwards Dhanu Bauri returned with a compounder of a dispensary belonging to the Equitable Coal Co. Ltd. The compounder saw the injured from a distance and went away. Thereafter Dhanu Bauri went to Madandir village and there informed Trilok Bauri about the occurrence and asked him to go to the Police

Station at Neturia and lodgean information about it. Neturia was at a distance of about 4 miles from Madandih. Trilok Bauri went there and lodged an information about the incident at about 11-30 a.m. In consequence of this information, Inspector Tej Narain Singh reached the place of occurrence by noon. He found Aswini lying injured. Sub-Inspector Tej Narain Singh then recorded the statement of Aswini Kumar Banerjee who affixed his left thumb impression upon the document in token of being satisfied that the statement had been correctly recorded. Fakir Goala attested the said document as an attesting witness. The Sub-Inspector of Police took into custody the bicycle, some blood-stained earth and other alamats which were lying scattered there. A rough sketch of the locality was also prepared by the Sub-Inspector. A younger brother of Aswini,. named Golak Banerjee, had in the meantime reached the place of occurrence. He had brought Dr. Jaikrishna Mandal to render first aid to Aswini. Golak enquired of his brother as to who had assaulted him, whereupon Aswini mentioned the names of Kori and Upen as his assailants. Aswini was thereafter sent to Purulia Sadar Hospital for treatment with a request to the Doctor to take down a dying declaration of the injured. Dr. B. N. Dwivedi, the then Civil Assistant Surgeon of the Sadar Hospital, recorded a dying declaration of Aswini at about 5-30 p.m. on the same day. This dying declaration was recorded in Hindi script. Sub-Inspector Tej Narain Singh searched the houses of the two accused but found nothing incriminating there. Kodi alias Kara could not be found, but appellant Upendra Nath Mandal was arrested at his own house between 3 and 4 p.m. the same day. Aswini died at 2-30 p.m. the next day, i.e. 20-10-1956. Accused Kori was produced under arrest on 4-12-1956. Both the appellants pleaded not guilty to the charges. The defence was that Aswini Kumar Banerjee had not named them and that they had been falsely implicated. Appellant Kori took a plea of alibi when examined under Section 342, Cr. P. C. As to the crime, the only evidence in the case was the dying declaration of the deceased. That Aswini had been murderously assaulted and in consequence died could not be questioned on the evidence adduced by the prosecution. In our view, the learned Judge rightly held that Aswini had been murdered. It is not necessary to discuss this aspect of the matter any further. The real question in this case was whether appellant Kori had struck the deceased with a tangi, while the other appellant held the deceased down. As to this, there was

only the dying declaration of the man. Before we deal with the evidence we should mention that the learned Sessions Judge took the view that although it was unsafe to convict a man on a dying declaration without corroboration, he was satisfied that the declaration in the case naming the two appellants was a truthful one. The learned Judge referred to the decision of their Lordships of the Supreme Court in *Ram Nath Madhoprasad v. State of Madhya Pradesh*, : AIR 1953 SC420 . In fact an excerpt from the judgment was quoted by the learned Judge.

4. We have examined the entire evidence in the case and have been a little oppressed by certain circumstances, which lead us to view the dying declaration with a certain amount of caution. It is clear from the narrative of the prosecution case that the first person to have seen the injured lying on the village road near mile post No. 10 was Helu Oraon. He it was who informed Dhanu Bauri about the injured lying on the village road. Thereafter Helu Oraon took Dhanu Bauri to the place and it was in the presence of Helu Oraon that Dhanu Bauri is said to have asked Aswini Kumar Banerjee as to how he had been injured. Aswini is said to have then named the appellants as his assailants. In this state of the evidence, it was, in our view, incumbent upon the prosecution to call Helu Oraon who undoubtedly was a material witness in the case. This was not done. Helu Oraon might have thrown some light as to the precise question put to Aswini by Dhanu Bauri and the precise answer given by Aswini. It appears from the evidence of Dhanu Bauri that after some time he called a compounder to render first aid to Aswini, but the compounder went away after looking at the injured from a distance. It was then that Dhanu Bauri went to village Madandih and asked Trilok Bauri to go to the police station to lodge an information regarding the occurrence. According to Dhanu Bauri, Aswini Kumar Banerjee had already named his assailants who were known in the locality. It was, therefore, only natural that Dhanu Bauri should have mentioned that fact to Trilok Bauri before asking the latter to make a report about the occurrence to the Police Station some four miles away. We find from the information lodged at the thana that the injured 'was also naming the assailants.' If Trilok Bauri had been told that the injured had named his assailants, it is surprising that the names were not divulged to Trilok although he was being commissioned to report the matter to the police. In Ex. 3, being the relative entry in the Station Diary, the following information appeared :

'I, Trilok Bauri on coming to the police station lodge this information to the effect that today at about 10-30 a.m. while I was at my home Dhanu Bauri, Chaukidar of Madandih, came and said, 'A man has been severely assaulted near about the 10 mile post and he is also naming the assailants.'

5. In the foregoing circumstances, it is doubtful if the injured person gave the names of his assailants at the first opportunity he had of meeting anybody. We have already said that Helu Oraon was a material witness and should have been called. He was not called.

6. The first statement of any importance made by the injured was to the Sub-Inspector of Police at about noon, that is, some two hours after the occurrence. According to the defence, Aswini's younger brother Golak had arrived at the place before the policeman arrived. If that is so, the two brothers must have had a talk about the incident. Dhanu Bauri's evidence as to all this was most unsatisfactory. At first, he said that the investigating officer had arrived before Golak. Later on, when questioned further in cross-examination, the witness stated that Golak had come to the place about half an hour before the arrival of the investigating officer. The investigating officer was not in a position to deny this fact. Golak admitted that he had not been questioned by the Daroga as to whether his brother had named his assailants to him. It was disclosed in evidence that after his meeting with his brother Golak went off to call a Doctor and that when he returned, he found the policeman recording his brother's statement. If Golak had come earlier, as Dhanu Bauri was obliged to admit, the value to be attached to the dying declaration of the man would be considerably diminished. Moreover, as we have already stated, Helu Oraon was not called and Dhanu Bauri did not think fit to disclose the names of the assailants to Trilok Bauri when the latter was asked to go to a distance of 4 miles to report the matter to the police. The statement made to the doctor was long afterwards, viz., at 5-30 in the afternoon by which time the condition of the patient had deteriorated.

7. Now, what is the value to be attached to what was properly regarded as the dying declaration of Aswini Kumar Banerjee? It is too well-settled to be doubted that it is unsafe to found a conviction solely upon a dying declaration. Unlike the

evidence of an accomplice, a dying declaration is not tainted. Nevertheless, it is a rule of prudence that to found a conviction upon it, a dying declaration should be corroborated in material particulars. This rule of prudence, however, does not affect the law of the matter, namely, that a dying declaration may well be the sole basis of a conviction. In my view, a dying declaration can be as good or as bad as any other piece of evidence and the value to be attached to it must necessarily depend upon the facts and circumstances of each case. Naturally, the Court cannot ignore that a dying declaration is not upon oath, is not made in the presence of the person affected, and is not tested by cross-examination. Again, the Court must consider whether the declaration was made at the earliest opportunity and to a proper person and whether it was recorded in a manner which reflected what the declarant had in fact said. The Court must also bear in mind the declarant's powers of observation and such opportunity as he had of seeing his assailants and whether his capacity to remember the facts stated remained unimpaired at the time of the declaration. These and other considerations must be present in the mind of the Court in assessing the value of any dying declaration. If the Court, after taking everything into consideration, is convinced that the declaration is true, it is its duty to convict, notwithstanding that there is no corroboration.

8. In this case, there was positive evidence of enmity between the deceased and his men, on the one side, and the appellants and their men, on the other. Indeed, at the time of the occurrence litigation between the parties was in progress. This evidence of enmity might furnish a motive for the crime as well as a motive for falsely implicating the appellants. We would, therefore, require corroboration as to the identity of the assailants before convicting the appellants solely upon the dying declaration. The houses of the appellants were searched the same afternoon, but nothing was found to connect either of them with the crime. The search of the locality did not produce any incriminating object. As already observed, Upendra Nath Mondal was found at his house between 3 and 4 the same afternoon when he was arrested. The other appellant Kori was found absent from his home. At the trial Kori sought to explain his absence from home and pleaded an alibi. True, he called no evidence in support of it, but the mere absence from home on the day in question or the fact that he did not on his own surrender in Court could not be

used against him as evidence of his complicity in the crime or as evidence of corroboration of the dying declaration. There was not only no corroboration of the dying declaration as to the identity of the assailants, but the circumstances alluded to above raise a doubt in our minds as to the guilt of the appellants. We have already observed that the prosecution failed to call Helu Oraon, who was a material witness in the case, that the prosecution failed to explain why Dhanu Bauri should have omitted to disclose the names of the assailants when he asked Trilok Bauri to proceed to the thana to report about the occurrence and that Dhanu Bauri's evidence, wrested from him in cross-examination, that the deceased's brother Golak had arrived half an hour before the arrival of the police officer who recorded the dying declaration of Aswini, left no room for doubt that the two brothers must have talked about the incident before the dying declaration was recorded.

9. Having given this matter our serious consideration, we cannot say that the case for the prosecution against the appellants was established beyond all reasonable doubt. We, would, in the circumstances, set aside the conviction of each of the appellants and the sentence imposed upon him and allow the appeal.

10. The appellants must be set free at once.

Debabrata Mookerjee, J.

11-12. I agree and wish to add a few words of my own.

13. Section 32 of the Evidence Act provides that statements written or verbal made by a person who is dead are relevant in cases in which the cause of that person's death comes into question when the statement relates to the cause of his death or as to any of the circumstances of the transaction which resulted in his death; such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death.

14. The general rule which excludes hearsay is thus abrogated and a dying statement becomes admissible on the obvious ground of necessity. But the Indian Law departs from the English practice which admits such statement only, if it is

made in expectation of imminent death. In view however, of the very nature of such evidence, several considerations have prevailed with the Courts in determining the weight to be attached to it; that it is not made on oath, not tested by cross-examination, usually made in the absence of the accused and made at a time of mental and physical exhaustion have been some of the elements in the consideration.

15. This rule of caution received an extension in a decision of this Court in *Emperor v. Premananda Dutt* : AIR1925 Cal876 , in which not only an absolute guarantee of the accuracy of the record was insisted upon, but the entire statement was held liable to be condemned even if a part of it was found unreliable. The Bombay High Court however in *Emperor v. Akbarali Karimbhai*, ILR 58 Bom 31: (AIR 1933 Bom 479 (2)), doubted the correctness of this rule and held that it was not possible to accede to the view that because something in a dying declaration was false, the whole-declaration was liable to be rejected.

16. The position was soon reviewed by this Court in the case of *Niamuddin Biswas v. Emperor* : AIR1936 Cal793 , which held that if a statement was found admissible under Section 32, it stood on the same footing as any other evidence as to its value and credibility. The learned Judges saw no reason to introduce an artificial rule such as was suggested in *Premananda Dutt's* case : AIR1925 Cal876 , that if a dying statement was found to contain an untrue assertion, the whole of the statement was to be discarded. The Bombay view taken earlier in *Karimbhai's* case ILR 58 Bom 31 : (AIR 1933 Bom 479) was approvingly referred to.

17. Then the question presented itself in a slightly different form before the Madras High Court. A Full Bench of that Court held in *In re, Guruswami Tewar*, ILR (1940) Mad 158 : (AIR 1940 Mad 196), that the weight to be attached to a dying statement always depended on the facts and surrounding circumstances of each case; but if after taking into account the pertinent considerations, the court was convinced that a dying statement was true, it then became plainly its duty to convict, notwithstanding that there was no corroboration in the true sense. The Madras view was in fact anticipated in a Rangoon decision, *King v. Maung Po. Thi*, AIR 1938 Rang 282, and was followed by the Nagpur High Court in *Gulabrao*

Krishnajee v. Emperor, AIR 1945 Nag 153. The position that emerged was that if the court was satisfied of the essential truth of a dying declaration, it could not refuse to convict merely because there was no corroboration properly so called. In fact this court also subscribed to the view as will appear from a decision of Das Gupta, J., in the case of Hussain Sk. v. The State, : AIR1953 Cal383 , in which it was held that if in spite of the caution that a dying statement was not made on oath, not tested by cross-examination and that there was no opportunity of observing the demeanour of the maker, the jury still chose to convict on the statement alone, the verdict could not be interfered with.

18. This position appeared however to have been questioned by an observation made by the Supreme Court in a decision reported in : AIR 1953 SC420 . It was said that the law was settled that it would not be safe to convict merely on the evidence furnished by a dying declaration without further corroboration, because such statement was not made on oath, was not subject to cross-examination and the maker of it being physically and mentally in a state of confusion might well be drawing upon imagination while making the declaration. But the Supreme Court itself reviewed this decision in Khushal Rao v. State of Bombay, : 1958 CriLJ106 , that the observations just referred to were in the nature of obiter dicta. The Full Bench decision of the Madras High Court was approved and it was held that there was no absolute rule of law that a dying declaration could not form the sole basis of conviction unless it was corroborated, or that it could not be laid down as a general proposition that a dying statement was weaker than other kinds of evidence; rather it stood on the same footing as any other type of evidence and had to be judged in the light of surrounding circumstances and with reference to principles governing assessment of evidence generally.

19. While laying down the principle that a conviction could be had on a dying statement alone without corroboration, the Supreme Court did not however dispense with the necessity of subjecting the statement to close scrutiny. In fact, it expressly ruled that a dying declaration has to pass the initial test of reliability before it can be made the basis of conviction. The test has to be carried out keeping in view the fact that the statement has been made in the absence of the accused who has had no opportunity of testing its veracity by cross-examination. It

would therefore not be right to think that the vigilance which the courts have hitherto maintained in scrutinising such statements has now been required or permitted to be relaxed. A dying statement has therefore still to pass the test of reliability and none of its rigour abated by reason of the pronouncements of the Supreme Court.

20. For the reasons already, given the dying statements in the present case do not pass the initial test. The enmity between the appellant and the deceased and his people, of which there is abundant evidence in the case, furnishes an additional ground for careful scrutiny. The motive to falsely implicate might well have been overpowering in a case of this kind.

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