

(1985) 08 AHC CK 0036
In the Allahabad High Court
Case No : Criminal Appeal No. 49 of 1979

Dasrath and Another

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 14-08-1985

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 34

Citation : (1986) 10 ACR 58

Hon'ble Judges : V.P. Mathur, J

Bench : Single Bench

Advocate : Virendra Saran, for the Appellant;

Final Decision : Dismissed

Judgement

V.P. Mathur, J.—The two Appellants have been convicted u/s 307 read with 34 IPC and sentenced to four years rigorous imprisonment each by Mr. B.N. Mohilay, the then II Additional Sessions Judge, Mirzapur by his order dated 23-12-1978. Feeling aggrieved of this order they have now come up in appeal.

2. The case proceeded against five persons namely the present Appellants and Sitaram, Ram Murat alias Murat and Banshi and it was under Sections 148, 147, 307 and 307/149 IPC. Benefit of doubt was granted to Sitaram, Ram Murat alias Murat and Banshi, and they were acquitted. But the case against the present Appellants was found by the learned Judge to have been proved beyond doubt and hence the order of conviction and sentence was passed.

3. The prosecution case was that Bansnarain had gone for bath to the village pond on 26-4-1976 at about 5 p.m. while he was returning from there at about 5.30 p.m. this occurrence took place. Near a banyan tree not very far away from the village-pond, the five accused persons named in the first information report including the present Appellants were waiting for him. They surrounded him. He was caught by his wrist and thrown on the ground and then Dasrath who was armed with a ballam, at the exhortation of some others pierced his ballam into

his abdomen. Then the culprits all fled away. The victim who was a young boy started raising an alarm and ran up to some distance but ultimately fell down in the field of Khichari. Some of the witnesses arranged for a cot and brought him to Jamalpur hospital where he was medically examined in the Primary Health Centre and then advised to be taken to Varanasi District Hospital. He was brought to Varanasi District Hospital and was admitted in the emergency ward. He was operated upon and when he recovered, he was discharged, but later on he developed some complications, got himself re-admitted in the same hospital, was operated again and succumbed to his injury on 5-7-1977.

4. Meanwhile after the occurrence Ambika brother of the injured lodged first information report at police-station Adahlat on 24-4-1976 at about 10.15 P.M. and named all the five culprits including the present Appellants. According to him Chandrama Singh alias Gokar Singh, Bittan and Ram Harak had seen the occurrence. The case was registered and after investigation charge sheet was submitted. In the trial court, all the accused persons pleaded not guilty. Their defence in short was that they have been falsely implicated on account of enmity which was coming on for the last many years. On 26-4-1976 according to their version at about 7 P.M. the occurrence took place not at the village pond but at the house of Sahtoo father of accused Dasrath. Mahendra and his party people including Kanta, Dasmi, Ambika, Bansnarain (injured) and Chandrama armed with ballams and lathis assaulted Sahtu father of Dasrath and looted his properties by entering inside his house. Kanta was armed with a ballam and when he tried to attack Sahtu with it, the ballam hit Bansnarain and injured him. In other words, the defence case is that another occurrence had taken place at 7 p.m. at the house of Sahtu and the ballam injuries, sustained by Bansnarain, were accidentally caused by a member of his own party, namely his brother Kanta.

5. On the prosecution side Ambika complainant, Narrottam, Bittan, Ramharak and Chandrama Singh alias Goker Singh entered the witness-box as P Ws 1 to 5. The other witnesses were all formal including the Magistrate who recorded the dying declaration of Bansnarain and the doctors who examined his injuries at the Primary Health Centre and again in the District Hospital at Varanasi and operated upon him.

6. On the defence side Dr. V.P. Gupta was examined to prove the injuries of Sahtu.

7. The first point to be considered is how the statements of Bansnarain recorded by an Executive Magistrate and which in this case was treated to be a Dying Declaration, should be considered. The contention of the learned Counsel for the Appellant is that it is not a dying declaration because the death in this case has not been directly related to the injuries sustained, and therefore, it should be simply a previous statement and will have no evidentiary value. Before we come to any conclusion on this legal point, the facts have to be well understood. First of all the injured Bansnarain was taken to the Medical Officer Incharge Primary

Health Centre Jamalpur, Mirzapur on 26-4-1976 at 6.30 P.M. i.e. within one or one and a half hours of the occurrence he was medically examined. The doctor found one stab wound on the abdominal cavity on the left iliac fossa 1 1/2 cm x 3/4 cm. omentum coming out. In his opinion, it was a grievous injury which was fresh and had been caused by some sharp pointed weapon. He advised Xray of the abdomen and referred the matter to the District Hospital, Varanasi and on 26-4-1976 at: 11.50 P.M. Bansnarain was examined by Dr. C.P. Singh in the Shree Sheo Prasad Hospital Varanasi. The injury report Ext. ka 9 shows that the doctor found stab wound 1 1/2 cm x 3/4 cm abdominal cavity deep on the left iliac fossa 7 cm below and outer to the umbilicus and from the wound, loops of omentum were coming out. He also diagnosed the injuries to be grievous and fresh caused by some sharp weapon. The supplementary report Ext ka 11 by the same doctor is dated 1.3-5-1976 and it shows that the wound which was kept under observation was found to be grievous and dangerous to life, as the operation showed that the intestine had been pierced through. The bed head ticket was also summoned and proved on the record and with reference to it Dr. C.P. Singh (PW 8) gave out that operation was made and simultaneously the Magistrate was asked to come and record the dying declaration. The doctor has said that ultimately on 18-5-1976 the victim was discharged after he became alright. But it appears that the view of the doctor in this respect was not correct, because according to Dr. P.K. Tandon CW 2 who was medical officer incharge and who had operated upon the injured, the victim Bansnarain got himself admitted in the hospital on 1-7-1977 and Dr. Tandon who had earlier operated upon him, found dense adhesion present in the intestines and a piece of about 6" of small intestine had become gangrenous. The doctor (as CW 1.) says that this was due to the same injury which he had sustained originally and of which operation had earlier been made. He has made it very clear that the operation that was made on 3-4-1976 was in respect of injury that this man had sustained and on account of that injury gangrene had set in and death had taken place. Exts ka 16 and ka 17 which are the entries in the Bed head Ticket will bear out this fact. It cannot now be disputed after perusal of Exts. ka 16 and ka 17 and the statement of Dr. P.K. Tandon that the death took place on account of injury that Bansnarain had sustained as a result of this occurrence. It is a different matter that he was operated upon and afterwards he had become alright and he was discharged from the hospital, but subsequently the trouble re-occurred and gangrene took place, as a result of which he had to come to the hospital again and was again operated upon, but unsuccessfully and he lost his life. As such it will be futile to argue that the death had not taken place in this case on account of the injury that Bansnarain had sustained on 26-4-1976 at about 5.30 or 6 p.m. This being so, any statement of this injured that had been recorded by the Magistrate, as has been done in this case would after his death amount to dying declaration and can be relied upon subject to the necessary care and caution that such statements require for being relied upon.

8. The learned Counsel has drawn my attention to a case of this Court in the

matter of Chandrabhan Singh and Others Vs. State, . In this case the death took place a fortnight after the attack and in the meanwhile tetanus supervened and the victim died of the same. It was held that the dying declaration was not admissible, as death was not related directly to the injuries. The facts of this case however were completely different. It was proved that the death had been a result of tetanus but it was not admitted that this had occurred on account of injuries that had been sustained in the occurrence in question. The finding of the learned Additional Sessions Judge that tetanus could only be there due to the injuries sustained, was found by this Court to be conjectural. Because the learned Judge thought not only that tetanus germs must have been present on the gandasa used but also held that they were actually there, although the gandasa itself was not produced. Under these circumstances, the Court came to the conclusion that there was no proof on the record to show that the death was due to the injuries and the probability was that the tetanus supervened due to some additional factor not connected with the infliction of the injuries. In this case before us the situation is entirely different, as I have already mentioned above.

9. Another case which is cited is the case of Moti Singh and Another Vs. State of Uttar Pradesh, . It was established in this case that gun shot injuries that were inflicted, were dangerous to life but in the absence of any other evidence on the record it was held that this itself was not sufficient to hold that the death which took place three weeks" later was on account of those injuries and no other account. The mere fact that a certain injury is dangerous to life can not be sufficient in itself to hold that the death which took place after many weeks of the incident must have been on account of those injuries. This case will also not apply to the present circumstances of the case here. There is specified evidence of the doctor and his reports contained in the bed head tickets Exts. ka 16 and ka 17 that the injury which Bansnarin had sustained was directly responsible for his death after many weeks inspire of two operations. Therefore it is now established satisfactorily that the statement of the deceased which was recorded by the Magistrate in the hospital after his death would be relevant and admissible as his dying declaration. Then next it is argued that this dying declaration will have no evidentiary value as in it addresses of the accused persons have not been given. The case of Gopalsingh and Another Vs. State of Madhya Pradesh and Another, is referred. The fact of this case were that the Sessions Judge had rejected the dying declaration because in his opinion the identity of the Appellants had not been sufficiently indicated as neither their father's names nor the places of their residence were mentioned. The deceased was himself quite unpopular in his own village and also in surrounding villages and had created enemies for himself. There were other persons of the names of the accused in the village. One such person bearing the same name (Gopal Singh) had filed a suit against the deceased for having outraged the modesty of his mother and had even obtained a money decree, on the other hand the deceased had admittedly no quarrel with the Appellants, nor there was any other evidence that these

Appellants had any personal contacts with the deceased. In this background it was found that the names of the culprits mentioned in the dying declaration did not necessarily point to the accused of this case. Again the circumstances in the present case are different. In the first information report itself the names of the culprits have been mentioned as " (i) Dasrath son of Sahtu; (ii) Bangur son of Chothi, (iii) Sitaram son of Sukhraj (iv) Ram Murat alias Murat son of Kedar, (v) Bansi son of Raghunath, all residents of village Hardi Sahjani, Police-station Adalhat, district Mirzapur. There can be no mistake as regards the identity. During the course of evidence it has been specifically mentioned by Ambika (PW 1) the first informant that there was some sort of litigation between Dasrath accused and the deceased. There is no suggestion to any of the witnesses examined in this case that the deceased had any enmity with any other persons in the village or outside and that there were other persons of the names of the accused mentioned in the first information report other than the accused themselves. Under these circumstances the argument that the identity of the culprits is not established, cannot be said to be correct argument. We will now consider the value of the dying declaration vis a vis the other evidence on the record.

10. The first witness examined in this case is Ambika. He is the brother of the deceased. His another brother is Kanta. According to his statement Kanta had lodged a criminal case against the accused and since then they were harbouring ill-will against this family. He also stated that Dasrath had started a criminal case against him and his brother and it ended in acquittal. Bansnarain was also co-accused in this case. He also was acquitted for these reasons there was previous enmity between the parties. Then he gave out the entire story. He is not an eye witness of the actual occurrence. He only heard shouts coming from the northern side while he was at his house. He rushed and saw Bansnarain lying in the field of khichari in an injured condition and it was Bansnarain who told him what had happened and how he had received the injury. Bansnarain gave out to him the entire case including the names of the accused. Bansnarain also clearly stated that it was Dasrath who struck him with ballam while Bangur had caught hold of him. Then this witness with the help of Narottam, Pancham Singh, Gokar Singh. Bittan and Ram Harak took the injured to Jamalpur hospital where the first aid was given to the injured and then he was transferred to Varanasi. It is in evidence, that at the time when this occurrence took place, the injured was only putting on Lungi and the upper portion of his body was bare. This also shows that the occurrence took place when the deceased was returning after taking a bath. This Lungi is Ext. 1.

11. The second witness is Narottam Lal. He said that he was sitting at his baithak at about 5 p.m. when he Heard the cries of Bansnarain. He and Pancham Singh reached near the field of Khichari. The injured was lying there and gave out the entire occurrence. It is clear that this witness only saw Bansnarain when he was running back from the temple side and dropped down in the field of Khichari. He has some enmity with Sahtu, but atleast the fact of the time and place of

occurrence is established from this witness. PW 3 Bittan did not support the prosecution case so far as the actual assault is concerned, but he also proved that the occurrence took place near about 5.30 p.m. and he found Bansnarain crying towards the east of the pond and ultimately he fell down in the field of khichari.

12. The 4th witness is Ram Harak who did not see anything. The 5th witness Chandrama Singh came to support the prosecution story in full. He is an accused in the cross case also. In the past also he had been appearing as a witness against the accused and his family members. The learned Court below has come to the conclusion after analysing his evidence that it would not be safe to place complete reliance upon his testimony but of course as regards the time and place of occurrence, even his testimony is to be accepted.

13. So far as the defence version is concerned, is not connected with this occurrence. According to defence story, the occurrence about which the report was lodged by Sahtu took place at about 7 p.m. In the present case medical examination of Bansnarain had already been made at 6.30 p.m. Naturally the occurrence reported to by Sahtu, if at all, was an occurrence which took place much after the present occurrence and further when he knew that Bansnarain had been so seriously injured and was before the Medical Officer at 6.30 p.m. naturally his presence in the occurrence that allegedly took place at 7 p.m. could not have been there. Otherwise also the defence version of the matter appears to be false. The learned Additional Sessions Judge has dealt with that aspect of the matter and I agree with him that the story put forth by the defence is false. Sahtu's injuries could be manufactured and appear to have been manufactured.

14. In the dying declaration Ext. ka 14, which is a relevant document and has to be taken notice of the injured, had given the names of Shyam Bangur and Dasrath as those who took part in this assault. According to him. Shyam and Bangur caught hold of him and Dasrath pierced ballam in his abdomen. Shyam has not stood the trial in this case. To this extent the statement of the deceased Ext. ka 14 is different from the first information report version, as in the dying declaration the names of Sitaram, Ram Murat and Bansi did not find mention. The learned Judge was therefore right in viewing the evidence against three persons with suspicion and giving them to benefit of that doubt.

15. But so far as Dasrath and Bangur are concerned the entire evidence on the record, including the dying declaration undoubtedly proves their participation in this occurrence. Dasrath caused the actual injury. Bangur was responsible for holding the deceased who was a young man and he had not done so, this injury perhaps would not have been caused. Therefore these two persons were clearly guilty u/s 307 read with 34 IPC and their conviction was just and the sentence awarded to them i.e. four years" rigorous imprisonment cannot be said to be harsh.

16. In the result the appeal fails and is hereby dismissed. The conviction and the

sentences of the Appellants stand confirmed. They are on bail. Their bail bonds and surety deeds are cancelled. They shall surrender and be taken into custody to serve out their sentences.

Appeal dismissed.