

(1992) 07 AHC CK 0072
In the Allahabad High Court
Case No : Government Appeal No. 551 of 1979

State of U.P.

APPELLANT

Vs

Raj Bahadur and Others

RESPONDENT

Date of Decision : 14-07-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 117, 161, 313, 378
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (1992) 3 AWC 1629

Hon'ble Judges : Palok Basu, J;G.S.N. Tripathi, J

Bench : Division Bench

Advocate : G.S. Chaturvedi, P.K. Tiwari and P.N. Misra, for the Respondent

Final Decision : Dismissed

Judgement

G.S.N. Tripathi, J.—This is an appeal u/s 378, Code of Criminal Procedure filed by the State of Uttar Pradesh against the judgment and order dated 30-9-1978 passed by the 111 Additional Sessions Judge, Banda whereby the learned Court has "acquitted accused Raj Bahadur, Ram Autar, Ram Sajiwan and Ram Kishore of a charge u/s 302 read with Section 34, Indian Penal Code.

2. The prosecution case started on the basis of written First Information Report lodged by Shiv Kanth Prasad. PW 1 at Police Station Tindwari, district Banda. He has alleged that on 29-6-1975 around 7.30 A.M., deceased Shiv Prasad was talking with Kalpu Harijan, PW 2 near his cattle-shed. Accused Raj Bahadur armed with a gun and accused Ram Autar Singh armed with a Barchi appeared all of a sudden from the north. Accused Ram Sajiwan Singh armed with a gun and accused Ram Kishore armed with a spear appeared from the south. Accused Ram Autar and Ram Kishore exhorted the other two accused to kill Shiv Prasad and he should not be allowed to go away. Hearing the alarm raised by Shiv Prasad, the complainant, his brother Shiv Narain and Har Prasad also came out of their houses. Thereupon Raj Bahadur and Ram Sajiwan fired at Shiv Prasad as a result of which he fell on the ground. The witnesses raised further alarm which

invited the attention of the neighbours whereupon the accused ran away. Shiv Prasad received injuries on his hands, wrist and other parts of his body as a result of fire shots. His condition was precarious and he was admitted in District Hospital Banda through the intervention of Police Station Kotwali, Banda. Jagdish alias Manav was murdered in March 1973. In that case, complainant's brother Shiv Dutt, the deceased, his cousin Raja Ram and Durga Prasad were arrayed as accused. On 30-5-1975 Shiv Dutt was awarded life sentence in that case. Remaining brothers of the complainant were acquitted by the Sessions Judge. On account of this enmity, the accused had caused almost fatal injuries to the deceased.

3. On the basis of the written Check-report was prepared at police station Tindwari on 29-6-1975 at 15.05 P.M. The distance of the police station is 6 Kilometers from the place of occurrence. The case was registered in the General Diary extract of which is on record.

4. The Investigation Officer Sri T.N. Pandey reached the spot on 30-6-1975. He recovered blood stained and ordinary earth from the spot. Tikulli and Charras were also recovered. He sealed them and prepared memos for them. He searched for the accused who later on surrendered in the Court. After usual investigation, he submitted charge sheet against the accused.

5. There is another episode of this case. The complainant, his brother Shiv Narain and others brought the injured Shiv Prasad upto the Bus-station. There the complainant met Har Prasad, his real Bhanja, PW 30 and made a request with him to get Shiv Prasad admitted in Banda Hospital through the medium of Police Station Kotwali, Banda, and thereafter the complainant left for Police Station Tindwari. After crossing several rivulets, he reached Police Station Tindwari.

6. Meanwhile Shiv Prasad was admitted in the District Hospital, Banda where he was examined by Dr. Jain on 29-6-75 at 11.55 A.M. The following injuries were found on his person:

1. 5 (five) Gunshot wounds of entry, each measuring 1 cm ? 1 cm muscle deep over an area of 10 cm ? 10 cm on right side back lumber region. Margins of all wounds are lacerated, contused and inverted, abraded Colour present all around the wounds. Direction inwards to the left; bleeding.

2. Abrasion 6 cm ? 5 cm on left side back lower part to the left of 5th lumbar spine.

3. Two punctured wounds measuring each 1 cm ? 4 cm muscle deep, 5 cm apart on back of right fore arm. Upper 1/3rd 4 cm below the right elbow joint. Margins lacerated and inverted, direction upward, bleeding.

4. A punctured wound 5 cm ? 5 cm muscle deep on left side leg, medial surface upper 1/3rd 12 cm below the left knee joint. Margins lacerated. Bleeding Direction upward.

5. Lacerated wound 12 cm ? 8 cm ? joint cavity deep on the back of left elbow. Whole of posterior half of elbow joint has been laid upon and the particularly boney ends have been fractured into fragments.

6. Abrasion 1 cm ? 1 cm on front surface of left knee joint.

7. In the opinion of Dr. Jain, all the injuries were fresh. Injury No. 1 was caused by fire arm. Injuries No. 3 and 4 were kept under observation. AH other injuries were caused by blunt weapon. Injury No. 1 was grievous in nature. Injury Nos. 1, 3 and 4 were kept under observation while injury Nos. 2 and 6 were found simple in nature. He advised for recording dying-declaration of the injured person.

8. The dying-declaration, Exhibit Ka-4 was recorded at 1.50 P.M on 29-6-1975 in the district Hospital by the Magistrate after obtaining the requisite certificate regarding the mental state of the deceased from Dr. Pillai.

9. Despite best possible medical treatment available, Shiv Prasad died on 4-7-1975 at 5.25 P.M. in the district Hospital Banda. After receiving the information, the Sub-Inspector attached to police station Kotwali, Banda, took the dead-body in his possession; prepared the Panchayatnama and other documents; got the dead-body sealed and sent the same for post mortem examination.

10. Dr. K.L. Pillai, the then Medical Officer, district Hospital, Banda conducted post mortem examination on the dead body on the same day at 5.45 P.M. Dr. Pillai collected the following data;

It was a male muscular body of good health. The abdomen was slightly distended. The following ante-mortem injuries were found on the dead body:

1. Five gun shot injuries of entry each measuring 1 cm ? 0.75 cm. ? cavity deep and on the right side back lumber region over an area of 10 cm ? 12 cm. The margin of all wounds are lacerated contused and inverted. All are surrounded by the posterior abd. by abraded collar direction inwards and to the left. The wounds are covered by greenish discharge of faecal matter.

2. Abrasion 5 cm ? 0.5 cm (seabed) on the left side of back lumber region to the left of Vth lumber spine place horizontally.

3. Gunshot injury of entry 1 cm ? 0.75 cm ? muscle deep on the outer side of right fore arm 4 cm below the right elbow. Margins lacerated, contused and inverted, direction inwards

4. Gun shot injury of exit 1 cm ? 1.5 cm on the back of right forearm 5 cm inner to injury No. 3 Injuries 3 and 4 communicated freely.

5. Punctured wound 05 cm ? 0.5 cm ? muscle deep on the right leg medial surface upper 1/3rd. 12 cm. below the left knee joint Margins lacerated, contused and inverted. Direction outwards covered by dried clotted blood.

6. Lacerated wounds 10 cm ? 5 cm ? joint cavity deep on the back of left elbow. The joint cavity is exposed, the body ends forming the joint are fractured
7. Abrasion 1 cm ? 1 cm scabbed on the joint of left.
8. Multiple tiny abrasions over the outer side of right thigh and outer aspect of the right upper extremity.
11. The peritoneum was lacerated In the opinion of Dr. Pillai death was caused as a result of ante mortem injuries which were sufficient in the ordinary course to cause death.
12. The prosecution has examined PW 1 Shiv Kanth, the complainant. He has narrated the entire prosecution story as contained in the First Information Report. PW 2 Kalpoo Harijan is also alleged as an eye witness of the occurrence, PW 3 Har Prasad is said to be another eye witness of the occurrence.
13. PW 4 Raj Kumar is Bhanja of the complainant. He met the complainant at the bus station and was entrusted to take the injured to the district hospital for medical aid through the intervention of police station Kotwali Banda. He informed the Police Kotwali simply in the way that the injured had been assaulted by his enemies and thereafter the police helped him in getting the injured admitted in the hospital.
14. PW 5 is Sri Jai Pal Singh, who was the sub-Divisional Magistrate, Baberoo, Banda. Ha recorded the dying declaration of the deceased.
15. Further evidence consists of Dr. Jain and Dr. Pillai who respectively conducted the medical and post mortem examinations, Thereafter we have the statement of the constable who conducted the dead body, registered the check report and prepared G.D. We have also the statement of Sri T.N. Pandey, Investigating Officer. He has proved the investigation process from the beginning till end and the documents prepared by him in that connection
16. The accused in their statement u/s 313, Code of Criminal Procedure have denied the allegations against them and have alleged that they have been falsely implicated on account of enmity. The accused have also led evidence in their defence.
17. Another pillar of the prosecution story is the dying-declaration.
18. After hearing learned Counsel for the parties and perusing the record, the learned Sessions Judge concluded that the prosecution story was false. He accordingly acquitted the accused.
- 19 Feeling aggrieved, the State of Uttar Pradesh has filed this appeal. We have heard learned Counsel for the State as well as for the Respondents and have perused the record. We find that there is no merit in this appeal and it deserves dismissal.
20. The most glaring feature of the prosecution case is that the First Information

Report in this case was lodged after considerable delay. The incident is alleged to have taken place on 29-6-1975 at about 7.30 A.M. The report was lodged at Police station Tindwari on the same day at 15.05 P.M. after negotiating a distance of six miles. The major part of the journey was done by bus. Even if one walked, he could have covered this distance within 2-3 hours. But the complainant took nearly eight hours in covering this distance. He stated that it had rained and the rivulets were full of water and the bus was delayed. He had to carry the injured in a make shift arrangement and all these reasons were responsible for the delay in registration of the case. But unfortunately, these reasons were not stated in the First Information Report. They were also not specified in statement u/s 161 Code of Civil Procedure. So we refuse to believe the explanation for the inordinate delay in lodging the report.

21. Not only this, the complainant along with the injured came to Banda bus station. There he met his Bhanja Raj Kumar, PW 4 and entrusted the injured to be taken to the hospital for medical aid via police station Kotwali, Banda. It was about 9.30 A.M. It means that the journey upto Banda hardly took 2 hours. The complainant simply told Raj Kumar that Shiv Prasad had received fire arm injuries. He did not inform him as to who were the assailants; what was the date, time and place of the incident etc. Raj Kumar left the deceased with Shiv Narain and Shiv Kanth, the real brothers of the injured, and went to police station Banda where he gave a report Exhibit Ka-2. This document simply shows that his maternal uncle Shiv Prasad had been injured by some fire arm by his enemies in the village. His conditions as serious. He should be sent to the hospital without delay for medical aid. Meanwhile, the brother of the injured Shiv Kanth had also left for Tindwari. This information, Exhibit Ka-2 does not state the date, time and place of the occurrence, names of the assailants, names of the witnesses etc. All these things were kept a confidential secret for reasons best known to the prosecution.

22. In the cross-examination, in paragraph 2 the witness admits that Shiv Kanth is the real brother of his real maternal aunt, meaning thereby that relationship is admitted. He is a chance witness also. In paragraph 4 he admits that he was waiting for the bus for going to Fatehpur when he met the complainant all of a sudden. He was concerned as to why he did not enquire from the complainant or Shiv Narain, who through out accompanied him upto the hospital, as to who were the assailants, what was the date, time and place of the occurrence and what was the cause for this assault. His lame excuse is that he lost his sense after seeing Shiv Narain in a badly injured state. Supposing he is believed that he lost his senses, then it would be difficult to believe that he will do other responsible acts like taking injured to the hospital. Admittedly, he did all these things. Further it will be difficult to believe that Shiv Kant would leave his injured brother in supervision of a person who had lost this senses immediately after seeing Shiv Prasad in an injured state. Therefore, the explanation for not disclosing these relevant things to Raj Kumar by the complainant as well as Shiv Narain are of very much significance in this case.

23. The matter did not end here. When the injured was taken to the police station, the constable concerned, who had noted down the fact in the general diary, specifically enquired as to who were the persons who had assaulted Shiv Prasad, and the date time and place of the occurrence, but he did not tell these things even to the constable. He stated that he did not tell it because he did not deem it essential as he himself was not an eye witness. Shiv Narain, real brother of the injured was all along with him. Even he did not venture any statement on this point. Specific allegation was made and a question was put to him as to whether it was a fact that the names of the assailants and the actual time, place and date of the occurrence had not been known by that time, therefore, all these things were kept as confidential secrets? I find that this allegation on behalf of the accused has substance. The entire conduct of this witness Raj Kumar shows that he was not behaving like a normal man. Even Shiv Narain's presence did not improve the things. Nothing prevented him from telling the relevant things to the constable or even to this witness Raj Kumar. But he too kept silent throughout and remained a mute spectator. This circumstance equally shows that upto the time of medical examination of the injured, names and actual time as well as place of the occurrence were not known to the prosecution side.

24. Here we may mention one statement of Dr. Jain, who conducted the medical examination of the injured. He has clearly stated in paragraph 7 that the injuries of Shiv Prasad could be caused even around 4 A.M. Once we believe this statement that the incident could have taken place around 4 A.M., it was not possible for the other witnesses to be present there or to have seen the occurrence with their own eyes or to have identified the actual assailants, hence the entire basis of the prosecution case is to fail.

25. In this background, we may revert to the statement of the complainant Shiv Kanth, who has been examined as PW 1. He is a witness who has been giving evasive replies and explanations to all relevant matters and has been trying to eschew the truth. In paragraph-4 he admits that Durga Prasad and Raja Ram were his real cousins. They along with Shiv Prasad had been implicated in the murder case of Bhan alias Jagdish Singh. That case started on the basis of First Information Report lodged by the present accused Ram Autar Singh. He evades reply by saying that he does not know as to whether Raj Bahadur and Ram Autar Singh were also accused or witnesses In that case He further admits that all his brothers have a common mess and joint family and, therefore, ignorance regarding these facts is very relevant. In paragraph 5 he admits that entire litigations expenses were borne by the joint family. In paragraph 6 he states that till that date, i.e. 7-11-1977, when his statement was recorded, he did not know the name of his maternal grand father.

26. In paragraph 8 he admits that in a case u/s 307 IPC he along with Shiv Prasad and Shiv Dutt had been arrayed as accused. That case was launched by accused Ram Autar. In this way, existence of deep enmity is proved. The complainant side as well as the accused has admitted this fact. The accused have

alleged that on account of enmity, they have been implicated. This probability cannot be ruled out. Therefore, we have to be extra cautious In examining the prosecution case because on account of enmity innocent persons, who are in no way involved in an incident, are falsely implicated.

27. On the point of information to Raj Kumar, PW 4 in paragraph 9 of his statement, he admits that he brought the injured in a tonga upto the bus station. Thereafter he entrusted the injured to Raj Kumar. Shiv Narain also accompanied Raj Kumar. But neither he nor Shiv Narain stated the names of the accused, date, time and place of occurrence or the cause of assault to Raj Kumar. He was asked as to why he concealed these relevant facts to which he replied that he could not give any reason for that.

28. He himself had written the First Information Report at the bus-station where he waited upto 12 P.M. It means that right from 9 A.M. to 12 P.M. he remained at the bus station but he did not go either to the police station Kotwali or even to the hospital to enquire about the actual state of the health of the injured Shiv Prasad. This does not appear to be the conduct of a normal and prudent man. Specific question was put to him as to whether he was forwarding lame excuses on the basis of legal opinion obtained by him in Banda Of course, he denied it. He was again asked as to why he did not mention the cause of the delay in his report at police station Tindwari. He gives no reason or explanation for the same. He did not tell the reason as to why in statement u/s 161 Code of Criminal Procedure he did not disclose this vital fact. Therefore, we find that the First Information Report in this case is extremely delayed. It is also clear that the names of the actual assailants were not known to the complainant right upto 12 noon on that fateful day. The complainant spent three useful hours at the district headquarter, Banda allegedly waiting for the bus. There appears substance in the argument of the accused side that he obtained legal advice in between and thereafter he proceeded to formalize the launch of the prosecution case against the present accused by reporting the matter at Police Station Tindwari.

29. Once the prosecution case becomes shaky at the very basis, it becomes difficult to believe it otherwise.

30. The type of witnesses examined by the prosecution is equally relevant in this case. A look at the site-plan also shows that other independent witnesses of the locality namely, Mata Prasad Ganesh Gopal, Raj Naratn Shukla etc. have not been examined and only inimical and chance witnesses have been produced. PW 1 Shiv Kanth is admittedly real brother of the deceased. It is admitted that there was enmity between the parties. So he cannot be said to be an independent witness. PW 2 Kalpoo Harijan is totally a chance witness. He has no house of his own in that locality. He admits that for about an hour or so, he had been talking with the deceased. There was no important topic to be discussed. The complainant wanted him to do same labour at his field He had no hesitation in doing so because by profession he is a labourer Then why was he talking for such a long time is not know. In our opinion, this prolongation of talks is meaningful in

the circumstances of the present case, i.e. just to make him present at the date, time and place of the occurrence. In a case u/s 107/117 Code of Criminal Procedure he was arrayed as co-accused along with Shiv Dutt, Shiv Kanth and others on one side and the accused on the other. He further admits that he had appeared as a witness on behalf of the complainant's side and against the accused. Further he admits that he is labourer. He has no plot of his own. Therefore, he can be branded as a man of very low status. Apart from that he says that he was returning after casting-out when he met the deceased who was standing at his house. He called him to repair the mends of his plots. He readily agreed to do that. Therefore, instead of the deceased coming to call him for labour, which would have been the normal conduct, the witness arrived there all of a sudden. So he is branded as a chance witness. Apart from that, his statement regarding actual happening is contained in paragraphs 5 and 6 which also shows that he did not see the occurrence with his own eyes. When asked as to in what direction the deceased faced after receiving injuries, he says that he could not recollect. He could not tell the distance from which Mata Prasad fired at the deceased. He did not see Tikulis and Charras on the spot. Therefore on these relevant points he has maintained a poetic silence.

31. PW 3 Har Prasad is related to the complainant, one is inimical to the accused. His statement was recorded about 3 or 4 days after the occurrence by the Investigating Officer which is a suspicious circumstance. Not only this, he stated before the Investigating Officer that he, Shiv Kanth and Shiv Narain etc scolded the accused and challenged them not to assault Shiv Prasad, but the accused did not relent. But when this statement was put to him in the last paragraph of his statement, he has totally disowned it. In paragraph 3 he was asked about his relationship with the prosecution side either he has been evasive or non-committal. He is married with the daughter of Bechan Lai, but does not know whether Bechan Lai is son of Ram Prasad. He does not know whether his father-in-law's brother's daughter is married with the father of deceased Shiv Prasad. He had very cordial relations with the deceased. This way he is also an interested witness so far as the prosecution side is concerned. He is equally inimical with the accused side. Therefore, by no stretch of imagination he can be said to be an independent witness.

32. The law is that conviction can be based upon testimony of even interested witnesses provided it is proved that there were no other independent witness available. Just as, if an incident of murder takes place in a bed-room, the husband or the wife alone shall be the most natural rather solitary witness in such a case. When other independent witnesses could be available, examination of only inimical and interested witnesses tells a lot of untold story as regards the prosecution version. The Courts are normally inclined to reject testimony of such witnesses.

33. Even otherwise, from the testimony of these three witnesses the so-called eye witnesses it appears that they had not seen the occurrence with their own

eyes. In fact they could not see the occurrence because the incident took place in the dark hours of the unfortunate morning of 29-6-1975. So the very foundation of the prosecution case is shaky. The result is that the learned lower court acted rightly in rejecting the testimony of these three witnesses.

34. Now we are left with the evidence of dying declaration. The Hon^{ble} Supreme Court has laid down the law that conviction can be based on dying declaration if it is found to be untutored and worthy of belief. As observed earlier, the incident appears to have taken place in the dark hours of the day. There is no evidence of any light. So clearly the witnesses could not identify the actual culprits. In this case, fire-arms have been used. There was no scorching or blackening in and around the wounds. Therefore, the shots were fired from a distance of more than six feet. In such a circumstance, the assailants would have caused injuries and thereafter they would have run away leaving very little rather no opportunity to either the injured or the other witnesses to correctly identify the assailants. This is the most fundamental hurdle in accepting the veracity of the dying declaration.

35. Another test for judging the reliability of the dying declaration is that it should be unvarnished and untutored version of the declarant, meaning thereby that a second or third man should not have intervened by prompting or suggesting name of some or all of the culprits.

36. It is as admitted fact that right from the village where the incident took place and till the hospital where statement of the deceased was recorded, the deceased was never left alone. His well wishers, brothers and other persons, who were instrumental in launching this prosecution case were always with him.

37. PW 5 is Sri Jai Pal Singh, the then Sub Divisional Magistrate who recorded the statement of the deceased. In paragraph 2 of his cross examination, he has admitted that he asked all those persons present to quit from the place where he recorded the dying declaration. It means that the declarant was surrounded by a host of his well-wishers, friends and relations right till before the arrival of the learned Executive Magistrate. Therefore, it is quite likely that these persons availed every possible opportunity to tutor and brain-wash the deceased. In these circumstances, it has become difficult to hold that the statement Exhibit Ka-4 is an un-tutored version given by the deceased at the time the statement was recorded in anticipation of his death. This is another reason why we feel difficulty in placing reliance upon the dying declaration.

38. As observed earlier, presence of Shiv Kant. PW 1 at Banda for more than three hours has gone unexplained. It is pregnant with meaning in these circumstances. In the normal course of behaviour, he was expected to be by the side of his dying brother. It is equally significant that in the past also he had indulged in litigation and thus, would have utilised or obtained the services of legal brains, and, thus, he has put something of his version through the mouth of the declarant in the shape of dying declaration. Therefore, this probability cannot be ruled out, especially when from the defence evidence It is apparent that some

bungling were made in the general diary of police station Kotwali, Banda on 29-6-1975. Under these circumstances, I find that the dying declaration is not a correct or a purely correct version or the product of the virgin mind of the deceased alone. This makes this document tainted and it cannot form a basis for the conviction of the present accused.

39. Learned lower court has given cogent reasons for rejecting this dying declaration.

40. Apart from these glaring and fatal defects in the dying declaration there is contradiction in the version given in the First Information Report as well as in the dying declaration. The declarant stated that his brother Shiv Narain and Shiv Kanth arrived after hearing the gun shot fires and after that he himself became unconscious. But the complainant tries to make the Court believe that he saw the entire incident including the act of firing shots with his own eyes in presence of Har Prasad, PW 3. Even Har Prasad, PW 3 does not own this part of the prosecution story. Under this circumstance this contradiction, which may by itself not be individually decisive of the matter, becomes very relevant especially when we have to judge the veracity of the dying declaration.

41. Dying declaration is a very weak type of evidence, because the opposite parties, i.e. the accused, do not get an opportunity to cross examine the declarant. Uncrossed version of the declarant is thrust upon the accused and they can be held guilty of the crime alleged in the declaration. Under these circumstances, the courts are expected to be very circumspect and cautious in accepting the dying declaration. They have to examine very cautiously and particularly so a dying declaration of the present type. With this acid test applied to the present dying declaration, we find that it is not worthy reliance.

42. Of course, this Court can reevaluate this evidence and upset the finding of acquittal and convict the accused. But the law is that the accused are presumed to be innocent. This presumption of innocence is doubly re-enforced when a judgment of acquittal has been recorded by the trial court. Trial court's conclusions should not be disturbed easily because it has the additional advantage of watching the demeanour of the witnesses; a privilege not available to the appellate courts.

43. So far as we are concerned, we have examined very carefully the entire evidence and circumstances in the present case. In fact, we find ourselves in total agreement with the conclusions drawn by the learned lower court and, therefore, we do not find any room to up-set the findings recorded by the trial court. The sum total of the entire discussion leads us to the conclusion that there is no force in the appeal and it deserves to be dismissed.

44. The appeal is dismissed. The judgment and order of the III Addl Sessions, Judge, Banda dated 30-9-1978 is upheld.