

Ghurphekan and Others

Vs

State of Uttar Pradesh

Criminal Appeal No. 110 Of 1969

H. R. Khanna, P. Jagmohan Reddy, J, M Shelat JJ)

10.03.1972

JUDGMENT

SHELAT, J. -

1. The appellants are Chamars by caste, three of whom, appellants Ghurphekan, Mahangu and Musafir, are related to each other. The other two, Sarju and Raj Kumar, though not related to Ghurphekan, have in the past been involved with him in one litigation or the other.
2. Upnet Rai and his brother, the deceased Hirday Rai, were bhumidhars. There was a long standing enmity between Upnet Rai and Hirday Rai on the one hand, and Ghurphekan and his adherents, on the other, fed intermittently by litigation, both civil and criminal. On December 14, 1962, a judgment was to be delivered in a civil appeal to hear which Upnet Rai had gone to the Court as his son, Sarab Chand was a party. A case under Section 110 of the Code of Criminal Procedure against Ghurphekan was also fixed for hearing on that day. It was said that Ghurphekan assaulted Upnet Rai as he was returning from the court on that day, causing him as many as 27 injuries. For that assault, Ghurphekan was convicted under Section 325 of the Penal Code. He had, however, filed an appeal against the said conviction, pending the hearing of which he was enlarged on bail. Such was the state of relations between the appellants on the one hand, and Upnet Rai, the deceased Hirday Rai and their family members on the other.
3. In the afternoon of January 19, 1964, Hirday Rai, his son Subhash Chandra, his nephew Sarab Chand, and his cousin Kuber Rai were in Hirday Rai's field scraping grass. The field was next to the houses of the appellants. After Hirday Rai had scraped some grass and tied it into a bundle and was carrying it home, the five appellants came to the field, Ghurphekan armed with a spear and the rest with lathis, and attacked Hirday Rai. Sarab Chand, Subhash Chandra and Kuber Rai were at that time at some distance from Hirday Rai in another part of the field. When they rushed at the spot, where Hirday Rai was, to release him, the appellants attacked them also. In the course of that attack Hirday Rai was also given a spear blow in his abdomen by appellant Ghurphekan which caused him to fall down. A number of persons, hearing the cries raised by the victims, arrived at the spot whereupon the appellants retired to their houses. Hirday Rai was then removed to Ghazipur hospital from where Subhash Chandra sent his report to the nearest police station. That report was made the basis of the first information. Since Hirday Rai's condition got worsened, a magistrate was called who recorded his dying declaration. Hirday Rai succumbed to the spear injury he had received and died the next day. On these facts, the five appellants were charged under Sections 302 and 323, read with Section 149 of the Penal Code.
4. The appellants denied the charges against them, three of whom, namely, Sarju, Mahangu and

Musafir denied their presence at the time of the incident. Ghurphekan and Raj Kumar, however, spelt out an alternative case alleging that the prosecution party had come to Ghurphekan's house and had attacked him with lathis and a spear. One Ram Cheese, a relation of Ghurphekan happened to be there at the time. In rescuing Ghurphekan, Ram Cheese first wielded a lathi with which he disarmed Sarab Chand who had a spear in his hand. He then wielded the spear which possibly hit Hirday Rai. They alleged that in the attack upon them Ghurphekan and Raj Kumar received certain injuries. Later on, they lodged a report at 11.30 that night.

5. The medical evidence revealed that Hirday Rai had five injuries, one of which was a spear injury in his abdomen. Kuber Rai, Sarab Chand and Subhash Chandra had four, three and four contused wounds respectively. On the side of the appellants, Ghurphekan and Raj Kumar had nine and two injuries respectively, all simple in nature, caused with blunt weapons. Four of the injuries received by Ghurphekan were, however, on his head.

6. There were thus two alternative cases put forward by the parties before the Trial Judge. The main question was whether the incident took place in the manner alleged by the prosecution. The Trial Judge rejected the prosecution version holding that the prosecution had failed to establish the immediate cause for the alleged attack. He also rejected the evidence of the eye-witnesses, but he had nothing to say about the dying declaration of Hirday Rai and practically ignored it. What appears to have weighed with him was that the three appellants, namely, Mahangu, Musafir and sarju, had not received any injury and that it was Ghurphekan who alone received all the injuries, the two injuries no Raj Kumar being slight injuries only. On these facts he thought that Ghurphekan was the main target upon whom the deceased Hirday Rai and the members of his family had concentrated their attack. As regards the account of the eye-witnesses, the Trial Judge declined to accept their evidence as he felt that of the five eye-witnesses, three were chance witnesses and the remaining two were highly interested parties. On an appeal to the High Court, the High Court held that the principal item of evidence was the dying statement of Hirday Rai, that since it was recorded by a magistrate and no substantial flaw therein was pointed out, there could be no valid ground upon which it could be ignored or rejected, particularly when it was corroborated by the ocular evidence of witnesses, the presence of some of whom at any rate could not be denied as they had themselves received injuries and their presence was admitted even by the defence. There was also circumstantial evidence which supported Hirday Rai's case in his dying declaration that the appellants were the aggressors and had entered into his field to attack him. Besides, there was ample evidence showing the appellants' resentment against him and his family, particularly on the part of appellant Ghurphekan which constituted a strong motive for him to lead the attack. The defence taken by Ghurphekan and Raj Kumar could not be accepted as against the evidence adduced by the prosecution for the simple reason that if the incident had taken place at or near Ghurphekan's door there was bound to be some blood there and not in the field of Hirday Rai and if it was Ram Cheese, a relation of Ghurphekan at whose hands Hirday Rai received the spear injury, it was highly inconceivable that neither Hirday Rai nor any of the witnesses would not mention his name and see that he was also made an accused in the case. On this reasoning, the High Court refused to accept the grounds given by the Trial Judge for disbelieving the prosecution case and setting aside his order of acquittal held that the appellants were the aggressors, that the incident took place inside the field of Hirday Rai, that Ghurphekan struck the spear and caused him the fatal injury and that the other appellants attacked him and the witnesses with lathis without however sharing Ghurphekan's intention to kill Hirday Rai. On this basis, the High Court convicted Ghurphekan under Section 302 and imposed upon him the life sentence and convicted the other appellants under Section 326 and 323, read with Section 149, and also under Section 148 of the Penal Code and imposed on them various sentences directing them, however, to run concurrently, the maximum sentence under

Section 326, read with Section 149 being two years' rigorous imprisonment.

7. The dying statement of Hirday Rai set out the incident and its sequence. According to that statement, Hirday Rai, accompanied by his cousin Kuber Rai, and his nephew Sarab Chand, had gone to his field to scrape grass. The words 'cutting' grass were wrongly used by the translator, for the Hindi word in the original was 'cheelna', which means scraping and which would not need any sharp cutting instrument. It was, therefore, wrong to assume, as the Trial Judge did, that Hirday Rai was either suppressing the fact that he had a sharp cutting instrument with him, or that the fact he did not say that he had one such implement to cut the grass meant that he had not gone to the field at all. As we shall presently point reasoning was negated by the fact that the investigating officer, when he visited the spot, found near the place where there was blood a bundle of grass tied in a piece of cloth. If the omission to mention a cutting implement was the reason for ignoring the dying statement, it was demonstrably an incorrect one, for the bundle of grass near the place where blood was found clearly proved that Hirday Rai was in the field when he was attacked. According to the dying statement, Ghurphekan and the other appellants came to the deceased's field to attack him whereupon he cried out and Kuber Rai and Sarab Chand ran up to rescue him from another part of the field where they also were scraping grass. Ghurphekan struck him with a spear with which he had come armed and the others with him assaulted him and his cousin and nephew with lathis.

8. The dying statement has, as pointed out by the appellant's counsel, however, two weaknesses. The first is that it did not mention Subhash Chandra, the son of Hirday Rai. The second is that it did not account for the injuries on appellants Ghurphekan and Raj Kumar. But the reason for these two omissions might well be that Hirday Rai knew that the two appellants had received injuries and did not mention them, or the presence of his son for fear that Kuber Rai, Subhash Chandra and Sarab Chand might get involved in a counter case which might be filed at the instance of the appellants. The dying declaration, therefore, cannot be rejected out of hand for those omissions only if it could be shown to be true in other respects by other satisfactory evidence on record.

9. The dying statement in the first place was recorded at 9.15 p.m., on the same day in the hospital where Hirday Rai had been taken, that is to say, within a few hours after the incident. It bore the endorsement of Dr. D. S. Rai that Hirday Rai was at that time "in proper senses" to be able to give the statement. In the second place, the evidence of witness A.M. Singh, the recording magistrate, showed no flaw in taking it down. Except for the two omissions pointed out by counsel, there was no other reason for ignoring the dying statement. It specifically mentioned that appellant Ghurphekan came to the field armed with a spear and struck him with it in his abdomen, a fact amply corroborated not only by the eye-witnesses but also by the injuries which the doctor found on him when he examined him. There were also in recent past a number of cases filed at the instance of Upnet Rai, the brother of Hirday Rai, the more conspicuous of them being proceedings under Section 110 of the Code of Criminal procedure, a case of theft under Section 379 of the Penal Code and another case under Section 325 which ended in a conviction of Ghurphekan for causing a number of injuries to Upnet Rai. These facts furnished a sufficient cause for appellant Ghurphekan to take revenge on the members of family of Upnet Rai. The High Court was, therefore, justified in rejecting the view of the Trial Judge that the prosecution had failed to prove any immediate motive for the appellants to mount an attack on the deceased and his relations.

10. The dying statement containing the deceased's case that the appellants were the aggressors and that they had trespassed into his field to attack him is also supported by two other facts amply established by the prosecution. The evidence of the investigating officer, who visited the spot in the course of his investigation disclosed that there was blood in the field and near the spot where it was,

there was lying a bundle of grass tied in a piece of cloth. This circumstance bore out the statement of Hirday Rai and the evidence of the eye-witnesses that it was after the deceased had scraped the grass and after tying it in bundle, he was carrying it on his head that the appellants rushed there and started attacking him. Obviously, this circumstantial evidence negated the alternative case put up by Ghurphekan and Raj Kumar that the deceased and his relations had come to Ghurphekan's house and attacked him and Raj Kumar in consequence of which both of them received injuries and that seeing the attack, the said Ram Cheese first wielded a lathi with which he felled down the spear which Sarab Chand had with him and then began to wield that very spear, which action probably caused the fatal injury to Hirday Rai. If that version had any truth in it, stands to reason that the blood found by the investigating officer would be at or near the house of Ghurphekan and not inside the field of Hirday Rai. The evidence of the investigating officer further showed that apart from the blood and the bundle of grass which he found in the field he also noticed the trampling of crop in a portion of the field, indicating that the incident had taken place inside the field as stated by Hirday Rai and the witnesses and negated the defence of Ram Cheese having wielded the spear in rescuing Ghurphekan and Raj Kumar. If Ram Cheese was the person who caused the abdominal injury to Hirday Rai, it was inconceivable that he and the witnesses would omit his name and allow him to go scot free.

11. A rough plan of the site on the incident, prepared by the investigating officer, also supports the prosecution case that the incident occurred in the manner set out in the dying statement of Hirday Rai. Although rough and not according to scale, the plan shows that the houses of the appellants were almost contiguous on one side to Hirday Rai's field. The appellants from their houses could very well observe Hirday Rai and his family members scraping grass and could decide among themselves to attack the deceased especially at the moment when he had on his head the bundle of grass, which would impeded any resistance to them on his part.

12. Quite apart from these circumstances corroborating the deceased's version in his dying statement, the medical evidence also indicated that the incident occurred in the manner stated by the prosecution. The fact that Ghurphekan had as many as nine injuries, four of which were on or near his head, as against only two very minor injuries on Raj Kumar, would suggest that he was the focal point of attack by Hirday Rai and his companions. Of these injuries, three at least were on his left hand, all of them obviously caused by a blunt weapon such as a lathi. The fact that they were on the left hand of Ghurphekan would support the prosecution case that as soon as the appellants rushed in the field to attack Hirday Rai, he cried out and thereupon Kuber Rai, Sarab Chand and Subhash Chandra ran up to his rescue. Those injuries also supported the witnesses' version that the deceased at first warded off with his stick the blows which Ghurphekan tried to inflict on him, but at last Ghurphekan succeeded in striking with his spear a blow in the deceased's abdomen which blow felled him on the ground. The three injuries on appellant Ghurphekan's left hand would thus seem to suggest that they were given to him with a lathi or lathis to disarm him of that spear either by the deceased or by Kuber Rai, Sarab Chand or Subhash Chandra. Such an explanation is consistent with the dying statement and the circumstantial evidence on record, apart from the ocular account of the eye-witnesses. In our view, the dying statement must be held to possess acceptability in spite of the two weaknesses pointed out by counsel as it is amply corroborated by circumstantial evidence as also by the medical evidence and the situs of the injuries received by appellant Ghurphekan.

13. Upnet Rai, who was the central figure in the criminal cases against Ghurphekan, did not claim to be an eye-witness although there was nothing to stop him from claiming to be so if he had falsely wanted to do so. He only saw his cousin Kuber Rai and the neighbours bringing the injured Hirday Rai on a cot to the house after the incident. Subhash Chandra, the son of the deceased Hirday Rai,

gave an eye-witness account of the incident, during the narration of which, he conceded that after the appellants had started the attack on his father, he, Sarab Chand and Kuber Rai wielded their lathis to rescue his father, which must have caused the injuries found later on appellants Ghurphekan and Raj Kumar. All the three witnesses had injuries caused clearly with lathis, a fact which established their presence. His evidence showed that Hirday Rai had warded off with his lathi the attempts of Ghurphekan to strike him with the spear and in doing so had caused with that lathi some injuries on Ghurphekan. He conceded that in order to rescue his father, all the four of them had wielded their lathis and in the course of the incident they received injuries from the appellant and also inflicted injuries on Ghurphekan. The injuries received by the other appellant Raj Kumar were so slight that they do not appear to have been noticed by him. The evidence of Kuber Rai was of the same pattern as that of Subhash Chandra. Sarab Chand could not be examined as he died a natural death a few days after the incident.

14. The evidence of Subhash Chandra and Kuber Rai was corroborated by three other witnesses Alihar Rai, Bindeshwari Rai and Aliyar Ahir, all of whom explained their presence nearby. Though Kuber Rai and Subhash Chandra could be called interested witnesses, their evidence, supported as it was by circumstantial evidence, could not be justifiably rejected on that ground alone. So far as the other three witnesses were concerned, they could not be characterised as interested witnesses as they were not shown to be either particularly friendly with the deceased and his family or hostile towards the appellants. Their cross-examination did not also disclose any particular ground justifying the rejection of their evidence. The reasons given by them for their presence nearby were not such that they could be condemned as chance witnesses.

15. There was thus ample acceptable evidence justifying the prosecution of the appellants for the attack on Hirday Rai and three of his family members. The Trial Judge, for the reasons stated above, could not validly discard the evidence, the ocular part of which was made safe and acceptable by circumstantial evidence. The dying statement, for the same reasons, also could not be ignored or discarded only because it had the two infirmities pointed out earlier. It is true that appellant Musafir was a fairly aged person and the other two appellants, Sarju and Mahangu were young in age. But the evidence clearly showed that they had run along with Ghurphekan and Raj Kumar to Hirday Rai's field armed with lathis and had participated in the unprovoked attack on Hirday Rai and three of his family members. They must, therefore, accept the consequences of this acts.

16. In our view, the High Court was right in rejecting the order of acquittal passed by the Trial Court and in convicting and sentencing the appellants as stated before. There is thus no validity in the appeal which we must, for the reasons stated above, dismiss.

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