

Mohd. Ekramul and Another

Vs

State of Bihar

Criminal Appeal No. 253 of 1969

(S. M. Sikri, A. N. Ray, I. D. Dua JJ)

19.09.1972

JUDGMENT

SIKRI C.J. -

1. In this appeal by special leave the only question that arises is whether on the facts of this case the conviction of the appellants should have been maintained on the basis of the dying declaration alone. In order to detrained this question it is necessary to state the relevant facts.

2. The two appellants, Mohd. Ekramul and Jethan Mahato, were tried alongwith six others before the learned Additional Sessions Judge, First Court, Monghyr, on charges under Section 148 and 302, read with Section 149, I.P.C. for the murder of one Doman Mahato of village Lohara within Jamui Police Station. Mohd. Ekramul, along with two others, were further charged under Section 302 read with Section 34, I.P.C. The Trial Court acquitted the six co-accused in respect of all the charges against them and also acquitted Ekramul in respect of the charge under Section 302 read with Section 34, I.P.C. The Trial Court, however, convicted the two appellants under Sections 148 and 302, read with Section 149, I.P.C., and each of them has been sentenced to undergo rigorous imprisonment for life.

3. The occurrence took place at 4 a.m. on October 17, 1964, at a lane outside the darwaza of the deceased, Doman Mahto. The prosecution story, in brief, was that Doman, deceased, was sleeping in his house and the two appellants, along with the six co-accused, came to the darwaza of Doman, and Ekramul called out Doman from outside and the latter came out following by his son Sarjug (P.W. 5) and wife Kapurba (P.W. 3); at the instigation of Ekramul, Amrit (since acquitted) pulled Doman by his leg and as Doman fell down, Ekramul struck Doman on his neck with a sword while Zubeir and Wohab (since acquitted) inflicted bhala blows on the chest of Doman; Kapurba (P.W. 3) and Sarjug (P.W. 5) raised alarm and the prosecution witnesses arrived from the neighbourhood; Sarjug reported the occurrence on the same day at 7 a.m. at Jamui Police Station, which is five miles away from the place of occurrence, P.W. 10, the officer incharge arrived at village Lohara at 8.30 a.m. and found Doman lying injured to the west of his darwaza; P.W. 10 found injuries on the deceased, which will be described later; he sent Doman to Jamui hospital for treatment; he also sent a requisition to the Sub-Divisional Magistrate, Jamui, for getting the dying declaration of the injured recorded.

4. The injured was examined on October 17, 1964 at 11 a.m. Jamui hospital by the Civil Assistant Surgeon, Dr. A. Kabir, and he found the following injuries :

(1) Transverse incised wound on the front of the neck extending to both side 6" x 2"

traches deep with cutting of traches into two parts at the level of the thyroid cartilage with blood oozing out and few blood clots.

(2) Incised wound on the right side of the chest penetrating below the clavicle 2 1/2" x 3/4" chest cavity deep with emphysema.

(3) Incised penetrating wound on the left side of the chest in the second intercostal space vertical in direction 1 1/2" x 1/2" chest cavity with emphysema.

According to the doctor, injury No. 1 appeared to have been caused with a sword while the two other injuries with bhala. He also stated that the victim, with injury No. 1, could not have been able to make audible speech. The Magistrate, U. S. Singh, therefore, could not record any dying declaration of Doman at that time. Later on when the injury was repaired by the doctor, U. S. Singh Magistrate, P.W. 6, went on the same day at 3.30 p.m. and purported to record the following dying declaration :

"Question. - I am a Magistrate. Please let me know who has assaulted you ?

Answer. - 3-4-5-men have together assaulted me. Dhano Mahto, Jethan Mahto, Rohan Mahato, Ekraman Mian and others.

Question. - When the assault took place ?

Answer. - The assault took place in the morning. I was assaulted in that. The assault took place this morning.

Question. - With what weapons you are assaulted ?

Answer. - I was assaulted with Saif. At first Dhano used the weapon.

At all the three places I was assaulted by weapon.

Question. - Have you anything more to say ?

Answer. - I have not say to anything."

Damno died at the Patna Medical College hospital on October 30, 1964. The learned Additional Sessions Judge, as already stated, convicted the two appellants.

5. The High Court, on appeal, has confirmed the conviction but it has based it solely on the dying declaration, reproduced above. Regarding Mst. Kapurba, P.W. 3, the High Court held that "it is rather difficult to hold on her evidence that she had seen the actual assault on her husband, and it is probable that she arrived at the place, where her husband was lying injured, must after the assault on Doman." Regarding Sarjug (P.W. 5), the High Court held his evidence to be unsatisfactory and undependable. The High Court observed that "the witness made contradictory statements in the committing court and in the Court of Sessions and tried to suppress facts. The dying declaration of Doman was recorded by a Magistrate on the same day at Jamui hospital, but this witness evidently on being tutored tried to suppress the fact that his father had made a dying declaration before the Magistrate and stated that his father remained unconscious all the time and till his death he was unable to speak." The High Court further observed that this witness failed even to identify the

signatures of his father, and he also tried to suppress the fact that his father had fought out a series of litigations since long with Ramcharitar Bhagat and others.

6. The High Court came to the conclusion that the two eye-witnesses had not really seen the actual assault on Doman and it was just possible that the assault having taken place in the very early hours of October 17, 1964, when it was still dark, and since Doman was sleeping on the verandah while P.Ws. 3 and 5 were sleeping inside the two different rooms of the house, they did not wake up when Doman on being called out came outside and was assaulted in the lane and these witnesses found Doman lying injured sometime afterwards when the assailants had actually fled away, and the names of the assailants were mentioned in the F.I.R. evidently on suspicion.

7. The High Court also did not place reliance on Anandi Singh, P.W. 1, and Baleshwar Mahto, P.W. 2, who stated that they heard the names of the assailants from Sarjug. Evidence of Baleshwar Mahto, P.W. 2, was also discredited on other grounds.

8. The High Court, regarding the dying declaration, observed :

"I am satisfied from the evidence of Dr. Kabir and of the Magistrate Shri U. S. Singh and from the nature of the statement of the injured recorded by the Magistrate that it was correct and truthful version of the occurrence correctly recorded by the Magistrate and it suffers from no infirmity and can form the sole basis of the conviction in the case even though it does not find a satisfactory corroboration from any other quarter particularly when I have noticed that the evidence of the two eye-witnesses, namely P.Ws. 3 and 5 and of the two supporting witnesses P.Ws. 1 and 2 cannot be depended upon for fixing the participation of the appellants in the occurrence."

9. We are unable to sustain this finding of the High Court. If the dying declaration is analysed carefully it will be noticed that the only weapon which is said to have been used against the deceased was a saif, and according to the deceased himself it was Dhano who first used the weapon. There is not mention of bhallas in the dying declaration and there is also no mention that the two appellants used any other weapon. The deceased attributed all the three injuries to this very weapon.

10. It is remarkable that Dhano whose part was described specifically in the dying declaration was not prosecuted. It also appears that the prosecution itself tried to discredit the dying declaration in the evidence led by it. (See the evidence of Sarjug, P.W. 5.)

11. In the first information report a completely different version was given by the son, Sarjug. The assault was described thus :

"Pointing out my father Ekramul asked Amrit as to what he was looking at, he should slaughter the rascal, since he was the main root (cause). Amrit Mahto pulled my father by his leg. My father fell down. Ekramul Mian gave a sword blow on the front portion of the neck of my father and began to rasp. Bleeding started. My Mother and I raised alarm loudly. Juber Mian and Wahab Mian hurled Bhala."

12. We find that on this evidence it is not safe to convict the appellants. This dying declaration is not of a type on which a conviction can be based solely on its basis, especially in view of the other circumstances of the case.

13. In the result the appeal is allowed, the judgments of the High Court and the Additional Sessions Judge set aside and the appellants acquitted. They shall be released forthwith.

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