

Mulkh Raj Sikka

Vs

Delhi Administration

Criminal Appeal No. 190 of 1973

(H. R. Khanna, Y. V. Chandrachud JJ)

23.07.1974

JUDGMENT

CHANDRACHUD, J. –

1. This is a case of fratricide in which the appellant Mulkh Raj Sikka was tried by the learned Additional Sessions Judge, Delhi on the charge that he had committed the murder of his brother Satish Chander on the night between May 27 and 28, 1970. The learned Judge sentenced the appellant to death and the order of conviction and sentence was confirmed in appeal by the High Court of Delhi. In this appeal by special leave the appellant challenges the correctness of the judgment of the High Court.
2. One Bhagwan Dass had seven sons, appellant being the eldest and the deceased Satish Chander the youngest. At the relevant time the appellant was working as an Inspector of Police in the Central Bureau of Investigation, Delhi while the deceased had just finished a course in Electrical Engineering and was seeking employment. The deceased used to live with the appellant in Qr. No. 238, Sector XII, R. K. Puram, Delhi.
3. On January 15, 1962 Bhagwan Dass executed a will and divided his property amongst his sons. After the death of Bhagwan Dass the appellant started managing the property left by the father. In 1968 disputes arose between the brothers as regards the division of the property which led to an agreement dated May 14, 1968. The grievance of the deceased was that he had not consented to this agreement and that it was wholly unfair to him.
4. On May 27, 1970 the appellant obtained from his office casual leave for the 27th and the 28th on the ground that he was suffering from cough, cold and fever. Some time on the 27th the appellant along with his wife and daughter went to live with his brother-in-law at Green Park. The deceased Satish Chander was thus alone in the house at R. K. Puram on the night of May 27.
5. The case of the prosecution is that the appellant came to his house at about mid-night and knocked at the door whereupon the deceased let him in. The appellant is alleged to have committed the murder of his brother some time during the night and to have left the house thereafter by locking the rear entrance from outside. Dhan Bahadur, a chowkidar, who was on duty at the relevant time is alleged to have seen the appellant entering the house and to have heard a queer sound shortly thereafter. On the evening of May 28 Dhan Bahadur found that a number of persons had collected outside the appellant's house. At their instance he lodged a report at the police station.
6. Inspector Avtar Singh managed to open the door of the house and when he and the other members

of his team went inside they saw Satish Chander lying dead with as many as 26 incised wounds on his person. A few toe prints were seen in the room near the one in which the dead body was lying as also in a verandah and a latrine.

7. The appellant was arrested on June 8 when he went to his office on the expiry of his extended leave. The attache-case which the appellant was carrying was found to contain three newspapers in which Satish Chander's murder was reported. A few scratches were seen on the shoulders of the appellant. During the course of investigation the appellant refused to participate in the identification parade and to give specimens of his foot-prints.

8. The examination of the appellant under Section 342 of the Criminal Procedure Code lasted for four months and runs into 397 printed pages. The substance thereof is that the appellant denied every material circumstance including his differences with the deceased.

9. The case rests for its success on circumstantial evidence but not often does one come across a case in which the circumstances are as telling as here.

10. Turning first to the question of motive there is strong and cogent evidence showing that the relations between the appellant and the deceased were highly strained. Bhagwan Dass, the father of the appellant and the deceased, had by his will of January 15, 1962 bequeathed his property to his sons in a certain share. The appellant feigned ignorance of the will but it is clear from the evidence of Kishan Lal Sharma (PW 15) that the appellant himself had brought the attesting witnesses. The appellant, though the eldest of the brothers, did not carry out the directions contained in the will of his father and was manoeuvring to appropriate the lion's share for himself. On the occasion of the marriage of one of the brothers, Ramesh Chander, the appellant wrote letters to two of his other brothers, Rajinder Pal and Om Prakash, asking them to attend the wedding without fail, holding out the bait that the accounts relating to the father's property will be settled on that occasion.

Immediately after the marriage an agreement was executed among the brothers on May 14, 1968. This agreement bears the signature of the deceased but it is clear from the evidence that on May 14, 1968 the deceased was doing an electrical course in Kulu and could not have been present in Delhi. The agreement seems to have been signed by the deceased some time later.

11. The agreement was clearly inequitable or so the deceased thought at any rate. On November 8, 1969 he wrote letters to his brothers Om Prakash and Rajinder Pal complaining that the agreement was arrived at in his absence and without his consent. The letter written by Ramesh Chander to Om Prakash on May 14, 1970 refers to a "great quarrel" between the appellant and the deceased over property matters. It would appear from that letter that the appellant was trying to grab the share of Prem who had died in the meanwhile. The deceased was insisting that Prem's share in the property should be equally distributed amongst all the brothers.

12. On May 24, 1970 the appellant and the deceased went to Chandigarh for settling their disputes through the intervention of one Dilbagh Rai Malhotra. The appellant, however, balked the settlement on the pretext that he would have to check the records which were not available at that moment. The appellant was greatly agitated over the insistent demands made by the deceased and a few days before the incident in question happened he said to a person called Som Nath (PW 25) that he had become notorious in the locality due to his quarrels with the deceased. The appellant made a futile attempt to produce additional evidence in the High Court in order to establish that he had great affection and solicitude for the deceased but the High Court after permitting the production of that evidence has rightly characterised that evidence as fabricated. This, incidentally, is not the only

fabrication to the credit of this officer in the Central Bureau of Investigation.

13. We will now proceed to consider the other circumstances bearing on the guilt of the appellant. On the morning of May 27 the appellant went to live with his brother-in-law at Green Park along with his wife and daughter leaving the deceased alone in the house at R. K. Puram. The reason given by the appellant for this migration is that his brother-in-law's daughter was down with an attack of appendicitis but that assertion rests on his bare word and he has told far too many lies. At about 7-30 a.m. on the 27th the appellant sent an application to his office asking for casual leave for two days on the ground that he was suffering from cough, cold and fever. On May 28 the appellant sent an application by registered post from Gurgaon asking for extension of leave from May 29 to June 4. It seems to us patent that the appellant had pre-planned the murder of his brother and was trying to build up an alibi right from the morning of the 27th. Otherwise, it is difficult to understand that for no apparent reason he should go to Gurgaon on the morning of the 28th, almost immediately after the murder of his brother.

14. It is undisputed and the appellant has in terms admitted that he had gone to his house in R. K. Puram on the morning of the 28th. It is surprising that even on finding that the house was unusually locked on the rear side neither his curiosity nor his suspicion was aroused. When on the morning of the 29th the police officers asked the appellant's wife to give the key of the house she said that the key was with the appellant. If the appellant did not suspect any foul play it is surprising that on the 29th he should have sent a telegram from Chandigarh to the Station House Officer, R. K. Puram Police Station, with a copy to the Lt. Governor, demanding a "probe into sudden and mysterious disappearance" of his brother. The telegram leaves no doubt that the appellant was striving his best to establish his alibi and his innocence. But at the same time the telegram is clear proof that the appellant knew that something serious had happened to his brother. In face of that knowledge he was moving from place to place but made no inquiries at all about his brother. The simplest thing for him to do was to go to his own house and find out what has happened to his brother. A guilty conscience prevented him from taking that simple step.

15. On June 1, 1970 the appellant applied from Katni, Jabalpur, for three months' leave but on June 5 he asked for casual leave for a day and intimated to his office that he would join duty from the 6th. On June 8 he sent an application from Meerut with a copy to the Lt. Governor that he would join duty on June 9 but that he should be afforded protection against the use of third-degree methods, torture and fabrication of evidence by the police.

16. The appellant resumed his duty on the morning of June 8 when he was put under arrest by Inspector Avtar Singh. The attache-case which he was carrying contained issues of the Statesman dated June 1, 1970 and of Sunday Standard and Pratap dated May 31, 1970. These newspapers contained reports of the murder of Satish Chander. It is clear that the appellant was aware all along that his youngest brother who was living with him was murdered in his own house. And yet the appellant neither made inquiries about the circumstance leading to the tragedy nor did he indeed go to his house to find out for himself as to what was the real truth. In this background the appellant's refusal to participate in the identification parade or to give specimens of his foot-prints is not difficult to gauge.

17. The Investigating Officer wanted to obtain specimens of the appellant's foot-prints because when the house was opened on the 29th morning foot-prints were noticed in a part thereof. The reason why it was thought important to hold an identification parade was that Dhan Bahadur, the chowkidar, claimed to have seen the appellant entering the house on the particular night. Dhan

Bahadur is an important witness but before considering his evidence it is necessary to deal with an objection raised to its admissibility by Mr. Rana who has assisted us as an amicus curiae.

18. Dhan Bahadur was examined as a prosecution witness before the committing Magistrate on March 10, 1971. During the Sessions Trial the Public Prosecutor stated before the Court that Dhan Bahadur could not be traced and therefore the evidence which he gave in the committing Court should be taken on record of the trial under Section 33 of the Evidence Act. Counsel for the appellant objected to this course but the trial Court overruled the objection and took on record the evidence given by Dhan Bahadur in the committing Court.

19. It is contended by the learned counsel for the appellant that the evidence given by Dhan Bahadur in the committing Court is not admissible firstly because there is no evidence to show that the witness could not be found and secondly because the appellant had no opportunity to cross-examine the witness in the committing Court.

20. Section 33 of the Evidence Act provides to the extent material that evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a later stage of the same judicial proceeding the truth of the facts which it states when the witness cannot be found, provided that the adverse party in the first proceeding had the right and opportunity to cross-examine.

21. As regard the first part of the objection that there is no evidence to show that Dhan Bahadur could not be found, on August 23, 1971 a summons was issued for being served on Dhan Bahadur. ASI Balbir Singh (PW 31) says that he made a search for the witness at R. K. Puram, Vasant Vihar, Anand Niketan, Shanti Niketan and in the surrounding areas but he could not find him. The only information which Balbir Singh could gather was that Dhan Bahadur had left R. K. Puram about three months ago. Balbir Singh then made inquiries from Ram Bahadur, a resident of Nepal, but he was unable to furnish any information.

22. The High Court rightly decided to make one more attempt, during the hearing of the appeal, to trace Dhan Bahadur. By an order dated December 7, 1972 the High Court directed that a high police official should be deputed for going to Nepal to persuade Dhan Bahadur to present himself before the High Court for giving evidence, if at all he could be traced. The High Court took care to issue a summons also for securing the attendance of the witness in case there was a reciprocal arrangement between India and Nepal for service of processes on witnesses in criminal cases. In pursuance of the High Court's order Vishwa Nath, the deputy Superintendent of Police, went to Nepal and made inquiries about the whereabouts of Dhan Bahadur. Vishwa Nath who was examined in the High Court says that Dhan Bahadur could not be found in the village of Dhanuvas to which he belonged and that his brother Padam Bahadur told that Dhan Bahadur's whereabouts were not known. Thereafter an Inspector of Police Ram Lubhaya who also was examined by the High Court as a court witness made further inquiries to trace Dhan Bahadur but could not succeed. It is clear from these facts that all reasonable steps were taken to secure the presence of Dhan Bahadur but he could not be found.

23. Regarding the second limb of the argument the record of the committing Magistrate shows that the appellant who was represented by a counsel declined to cross-examine Dhan Bahadur in the committing Court and stated that he would reserve the cross-examination of the witness for Sessions Court. We see no substance in the appellant's contention that it was the committing Magistrate who had reserved the cross-examination of the witness for the Court of Sessions and that thereby the appellant was deprived of an opportunity to cross-examine the witness. The decision in State of

Assam v. Ramani Mohan Chanda is distinguishable because in that case the High Court found after referring to the record that the accused was not given an opportunity to cross-examine a witness whose evidence before the committing Court was sought to be brought on the record of the Sessions trial.

24. Counsel is right that as stated in Dal Bahadur Singh v. Bijai Bahadur Singh, the true reading of Section 33 of the Evidence Act is that the adverse party must have had both the right and the opportunity of cross-examining. Mere opportunity without the right of cross-examination cannot bring the case within the terms of section 33. But Sections 207 and 207A of the Criminal Procedure Code show that the accused has the right to cross-examine the witnesses examined by the prosecution in the committing Court. Section 207(a) provides that in every inquiry before a Magistrate where the case is triable exclusively by a Court of Sessions etc. the Magistrate shall in any proceeding instituted on a police report, follow the procedure specified in Section 207A. Section 207A(4) provides that the Magistrate shall take the evidence of such persons as may be produced by the prosecution as witnesses to the actual commission of the offence alleged. Sub-section (5) of Section 207A provides : "The accused shall be at liberty to cross-examine the witnesses examined under sub-section (4) . . .". Thus the appellant had the right to cross-examine Dhan Bahadur but his counsel, as is usually done, preferred not to cross-examine the witness at that stage and reserved the cross-examination for the Sessions Court.

25. Dhan Bahadur has stated in his evidence that while he was on his beat he saw the appellant coming from the Moti Bagh side at about mid-night, that the appellant knocked at the door of his house whereupon a light was switched on inside the house and the appellant's brother opened the door. The appellant then entered the house and the lights were switched off about 15 minutes thereafter. At about 2 a.m. Dhan Bahadur heard the sound of groaning. Mr. Rana challenged the truthfulness of Dhan Bahadur but that argument leaves us unimpressed. The Sessions Court and the High Court have considered Dhan Bahadur's evidence with care and we see no reason to take a different view of that evidence. There is one unfailing guarantee of the truthfulness of Dhan Bahadur. The daily diary of the R. K. Puram police station shows that on the night between the 28th and 29th May Dhan Bahadur had lodged a report stating that on the previous night he had seen the appellant coming from the Moti Bagh side at about mid-night, that the appellant knocked at the door of his house, that the younger brother switched on the light and opened the door and thereupon the appellant entered the house. Dhan Bahadur has also stated in that report that at about 2 a.m. he had heard some shrieks. The importance of this report consists in the fact that it was made before the murder was discovered and before even anyone had suspected that the appellant had a hand in the crime. The appellant was a police officer and a chowkidar like Dhan Bahadur would have no reason to invent such an important detail, especially when no one had any clue to the murder. The evidence of Dhan Bahadur establishes the presence of the appellant in the house at the time of Satish Chander's murder. Apart from the two brothers no one else was in the house and the mysterious disappearance of the appellant after the murder shows that it is he who committed the murder.

26. Accordingly we dismiss the appeal and confirm the order of conviction and the sentence of death.

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