Kusa and Others

Vs

State of Orissa

Criminal Appeal No. 53 of 1974

(Syed M. Fazal, A. D. Koshal JJ)

17.01.1980

JUDGMENT

FAZAL ALI, J. -

1.This appeal under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 is directed against the judgment of all High Court of Orissa dated November 2, 1973 convicting the appellants under Section 302/149 of Indian Penal Code and sentencing them to imprisonment for life.

2. The appellants along with other accused persons were tried before the Sessions Judge under Section 302/149 for causing murder of two persons, namely, Ghansham and his brother Antarjami, The trial Court after considering the evidence acquitted all the accused of the charges framed against them. Thereafter the State of Orissa filed an appeal before the High Court against the order of acquittal passed by the Sessions Judge and in the said appeal the High Court reversed the judgment of the Sessions Judge so far as the appellants were concerned and convicted and sentenced them as indicated above. Hence this appeal before us.

3. The facts of the case are detailed in the judgment of the High Court and it is not necessary for us to repeat them. It appears that shortly before the date of occurrence, there was a partition suit between the parties in respect of certain properties enjoyed by accused Banshi and Ghana. On December 2, 1968, according to the prosecution, the accused persons armed with lathis, bhusas and valies came to the house of the deceased Ghansham and called him out. When Ghansham opened the door, the accused Banshi stabbed Ghansham on the chest as a result of which Ghansham fell down and died. On hearing the alarm, the other deceased Antarjami who was brother of Ghansham went to the spot and he was also asaulted by the accused persons. This occurrence had taken place near about 7.00 a.m. FIR was sent to Bramhagiri Police Station where it was lodged and a case was registered. After the usual investigation, police submitted charge-sheet against all the accused persons who were tried by the Sessions Judge with the result mentioned above.

4. It appears that the trial Court after considering the evidence of the eyewitnesses examined before it came to clear finding that none of the eyewitnesses were reliable and hence the accused could not be convicted on the basis of the testimony. One of the main consideration which swayed with the trial Court in coming to this conclusion was that in view of the dying declaration - Ex. 9 made by Antarjami, the evidence of the eyewitnesses becomes improbable, and is in fact falsified. The learned Sessions Judge also disbelieved the dying declaration as it was inconsistent with the oral evidence. We might mention here that the Sessions Judge committed an error of law in rejecting the dying declaration because if the evidence of the eyewitnesses was to be rejected on the ground that

it was consistent with the dying declaration then it would in the circumstances not necessarily follow that the dying declaration was also unreliable and unworthy of credence.

5. The High Court while endorsing the findings of the trial Court that no reliance could be placed on the eyewitnesses appears to have founded the conviction of the appellants mainly on the basis of the dying declaration - Ex. 9 recorded by Dr. Mohanty on December 3, 1968 at the hospital. The High Court has given cogent reasons for holding that the dying declaration is absolutely true and reliable and was sufficient to establish the prosecution case against the appellants. We have also gone through the entire dying declaration - Ex. 9 very carefully and we find that the statement made by Antarjami is straightforward, rational, consistent and absolutely coherent. There appears to be ring of truth in the statement made by Antarjami. Counsel for the appellant has fairly conceded that there is no evidence whatsoever to indicate that there was any possibility of prompting the deceased to make a tainted statement. The dying declaration was attacked by the counsel of the appellant on three grounds. In the first place, it was submitted that as the deceased Antarjami was in a state of shock, it was unsafe to rely on the dying declaration; secondly, it was contended that as the dying declaration was incomplete, it should not be acted upon and thirdly it was pointed out that Antarjami had implicated some persons other than the accused also in the assault on him and his brother, therefore the dying declaration could not be said to be true.

6. So far as the first contention is concerned; namely whether the deceased was in a state of shock, it is true that the doctor who had recorded the dying declaration had stated that the deceased was in a state of shock because he had received a serious injury in the abdomen which had to be stitched. The doctor was however not cross-examined as to the facts whether or not despite the shock, the deceased had retained his mental faculties. On the other hand, a bare perusal of the dying declaration and the coherent and consistent statement made by Antarjami clearly reveals the fact that the deceased was fully conscious and was not suffering from any confession or hallucination. The deceased had clearly stated the motive for the occurrence namely dispute about the partition. He has also named the four appellants and stated that he and his brother were assaulted by valies and lathis and it is not disputed by the prosecution that the appellants were armed with these weapons. It is true that while naming the appellants, the deceased has also named some other persons but the mere fact that those persons were not challaned does not detract from the value of the dying declaration because it may well be that what the deceased was saying was true and the persons who were left out from the category of accused in the FIR or the challan may be due to ulterior motives.

7. Dr. Chitale however relied on a passage in Taylor's 'Principles and Practice of Medical Jurisprudence' (twelfth edition) particularly on the following passage :

Assess very carefully the mental condition of the patient. When shock ensues upon violence, especially when severe loss of blood or some grievous head injury is leading to death, the intellect of the dying person becomes confused. If the doctor observes any wandering or want of clearness in the mind of the patient, he must mention it in connection with his evidence; but this does not absolve him from his duty, although it should make him particularly careful when interpreting his notes.

8. We are unable to place any reliance on these observations in absence of any questions put to the doctor by the accused in his cross-examination regarding the view expressed by the author regarding the state of mind of the deceased. It has been held by this Court in several cases that whenever a particular view taken by authors of medical jurisprudence is adumbrated, the same must be put to the doctor to assess how far the views taken by the experts apply to the facts of the particular case.

On the other hand, the last certificate given by the doctor towards the end of the dying declaration that the patient became semi-unconscious clearly shows that the deceased was fully conscious when he started making the dying declaration before the doctor. For these reasons, therefore, the first ground taken by the appellant fails and is not tenable. As to the second ground, namely that the dying declaration was incomplete, we are unable to accept this contention because we find that the deceased Antarjami could not answer the last question which was "what more you want to say" because he became semi-unconscious and was unable to answer any further question. A perusal of the entire dying declaration would clearly show that the doctor had asked all the necessary questions that could be asked from the deceased and the last question was merely in the nature of a formality. It is obvious that having narrated the full story there was nothing more that the deceased could add. We are therefore unable to hold that the present dying declaration is an incomplete one. Reliance was placed by the counsel for the appellant in the case of Cyril Waugh v. King (54 CWN 503(PC) (Appeal from Jamaica) wherein it was held that no reliance could be placed where a dying declaration was incomplete. Reference to the facts of the case would show that the statement made by the deceased was really incomplete inasmuch as the deceased was unable to complete the main sentence where he was trying to describe the genesis and motive of the occurrence. The deceased in that case stated as "when he fired the shot, he missed the other man. The man has an old grudge for me simply because ...". It is clear from the statement of the deceased in that case that the deceased wanted to give the motive for the occurrence and other relevant facts which he could not say before the dying declaration was closed. This case therefore would have no application to the facts of the case.

9. As regards the last contention that the deceased had implicated some other persons also show that it was not true, we have already pointed out that merely because some other persons were named and not challaned would not by itself prove the falsity of the dying declaration. Finally on the question of law, it was argued that a dying declaration unless corroborated should not be acted upon. Reliance was placed on a decision of this Court in Ram Nath Madhoprasad v. State of M. P. (AIR 1953 SC 420, 423 : 1953 Cri LJ 1772). This decision, no doubt, supports the contention of the appellant but since then this Court has departed from the view taken in the case referred to above and has held that if the dying declaration is believed, it can be relied upon for convicting the accused even if there is no corroboration.

10. In Khushal Rao v. State of Bombay (1958 SCR 552, 563-564 : AIR 1958 SC 22 : 1958 Cri LJ 106), it was pointed out that Section 32(1) of the Evidence Act attaches special sanctity to a dying declaration and unless such a dying declaration can be shown to be unreliable, it will not affect its admissibility. It was further held that although a dying declaration has to be closely scrutinised, once the court comes to the conclusion that it is true, no question of corroboration arises. In this connection, the Court made the following observations :

> The legislature in its wisdom has enacted in Section 32(1) of the Evidence Act that "when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person death comes into question" such a statement written or verbal made by a person who is dead (omitting the unnecessary words) is itself, a relevant fact. This provision has been made by the legislature, advisedly, as a matter of sheer necessity by way of an exception to the general rule that hearsay is not evidence and that evidence which has not been tested by cross-examination, in not admissible. The purpose of cross-examination is to test the veracity of the statements made by a witness. In the view of the legislature, that test is supplied by the solemn occasion

> when it was made, namely, at a time when the person making the statement was in danger of losing his life. At such a serious and solemn moment, that person is not expected to tell lies; and secondly, the test of cross-examination would not bed available. In such a case, the necessity of oath also has been dispensed with for the same reasons. Thus, a statement made by a dying person as to the cause of death has been accorded by the legislature a special sanctity which should, on first principles, be respected.

But in our opinion, there is no absolute rule of law, or even rule of prudence which has ripened into a rule of law, that a dying declaration unless corroborated by other independent evidence, is not fit to be acted upon, and made the basis of a conviction.

11. In this case this Court did not approve of the law laid down in the earlier decision which is reported in Ram Nath Madhoprasad v. State of M. P. (AIR 1953 SC 420, 423 : 1953 Cri LJ 1772). To the same effect is a later decision of the Court in the case of Tarachand Damu Sutar v. State of Maharashtra ((1962) 2 SCR 775 : AIR 1962 SC 130 : (1962) 1 Cri LJ 196) which is a decision rendered by five judges of this Court which has also taken the view that once a dying declaration is found to be true, it can be acted upon without any corroboration. Thus, the view taken by this Court by the three judges in Ram Nath Madhoprasad v. State of M. P. (1953 SC 420, 423 : 1953 Cri LJ 1772) stands overruled by this decision. Same view was taken by this Court in the case of Munna Raja v. State of M. P. ((1976) 3 SCC 104 : 1976 SCC (Cri) 376) which has been relied upon by Mr. D. Mookerjee, counsel for the State.

There are a number of later decisions of this Court also to the same effect but it is unnecessary to multiply authorities. It is thus manifest that a person on the verge of death is most unlikely to make an untrue statement unless prompted or tutored by his friends or relatives. In fact the shadow of immediate death is the best guarantee of the truth of the statement made by a dying person regarding the causes or circumstances leading to his death which are absolutely fresh in his mind and is untainted or discoloured by any other consideration except speaking the truth. It is for these reasons that the statute the Evidence Act) attaches a special sanctity to a dying declaration. Thus, if the statement of a dying person passes the test of careful scrutiny applied by the courts, it becomes a most reliable piece of evidence which does not require any corroboration. Suffice it to say that it is now well established by a long course of decisions of this Court that although a dying declaration should be carefully scrutinised but if after perusal of the same, the Court is satisfied that the dying declaration is true and is free from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment in founding the conviction of such a dying declaration even if there is no legal impediment in founding the conviction of such a dying declaration even if there is no corroboration.

13. For these reasons, therefore, we find ourselves in complete agreement with the opinion of the High Court that even excluding the evidence of the eyewitnesses, the dying declaration is true and reliable and sufficient to found the conviction of the appellant.

14. For these reasons, therefore the appeal fails and is accordingly dismissed.

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