

Nanhau Ram and Another

Vs

State of Madhya Pradesh

Criminal Appeal No. 760 of 1980

(A. P. Sen, B. C. Ray JJ)

24.02.1988

JUDGMENT

RAY, J. –

1. This is an appeal on special leave against the judgment and order passed on February 16, 1919 by the High Court, Madhya Pradesh maintaining the conviction and sentence made by the Additional Sessions Judge in Sessions Trial No. 5/77.

2. The prosecution case in brief is that on the night intervening July 14 and 15, 1976 when Dwarka Prasad was sleeping outside his house in village Godha and his wife and two sons Premshankar and Ramashankar were sleeping inside the courtyard, dacoits numbering more than five entered the house and started beating his wife and sons. Accused Subhakaran jumped into the courtyard and he was identified by Phulkali (PW 8), wife of Dwarka Prasad and his son Premshankar (PW 9). Phulkali and Premshanker while running away from the house saw Nanhau Ram standing with a gun and another dacoit grappling with Dwarka Prasad. Nanhau Ram fired a shot from his gun and it struck the dacoit who fell down dead. Then Subhakaran grappled with Dwarka Prasad and dragged him towards the angan. Nanhau Ram fired another shot which hit Dwarka Prasad who fell down. On alarm being raised by Phulkali and her sons, people from nearby villages came and the dacoits fled away. Dwarka Prasad in presence of the people gathered told Lavkushprasad (PW 2) to take down his statement that he recognised the two accused appellants amongst the dacoits. Lavkushprasad scribed the dying declaration made by Dwarka Prasad who put his thumb impression thereon. Lavkushprasad signed it and the same was signed by several villagers present. Dwarka Prasad was then taken to a boat for his treatment in the hospital. But he breathed his last in the boat. Tikamprasad (PW 5) who was present when the statement was made by Dwarka Prasad went to the police station and lodged FIR (Ex. P-4) on July 15, 1976 at about 12.05 p.m.

3. The Investigating Officer held inquest over the dead body of Dwarka Prasad as per inquest report Ex. P-5. Another inquest was held on dead body of an unknown dacoit as per inquest report Ex. P-6.

4. On July 17, 1976, Dr. A. R. Singh (PW 6) performed autopsy on the dead body of Dwarka Prasad and he found a gun shot wound on his body as per post mortem report Ex. P-5. In the post mortem report Dr. A. R. Singh had stated that "death of Dwarka Prasad is due to haemorrhage shock resulted in after fire arm wound on the right side abdomen enter rite".

5. The defence was that the accused had nothing to do with the dacoity and they had been falsely implicated on account of enmity.

6. The trial court relying upon the dying declaration (Ex. P-2) as well as on an appreciation of the evidences came to the conclusion that the two accused persons were present in the dacoity which resulted in death of two persons and accordingly convicted them under Section 395 read with Section 397 of the Indian Penal Code and sentenced them to rigorous imprisonment for seven years. The accused persons were further convicted under Section 302 read with Section 396 of the Indian Penal Code and sentenced to undergo life imprisonment. All the sentences were to run concurrently.

7. Against this judgment and order, accused persons preferred an appeal being Criminal Appeal No. 608 of 1977. The said appeal was dismissed by the Madhya Pradesh High Court and the judgment and order of conviction and sentence were upheld.

8. It is against this judgment and order the instant appeal on special leave has been filed. It has been submitted on behalf of the prosecution (sic defence) that the dying declaration Ex. P-2 could not be relied upon as the same was not referred to at all in the FIR Ex. P-4 lodged by PW 5 Tikamprasad on July 15, 1976 even though Tikamprasad was one of the signatories to the same and he came to lodge the FIR after hearing the statements of PWs 8 and 9, the wife and son of the deceased, Dwarka Prasad about recognition of the two appellants amongst the dacoits. In the FIR Ex. P-4 Tikamprasad specifically mentioned the statement of Dwarka Prasad before the villagers that he recognised the two accused persons amongst the dacoits. It was also stated therein that these two accused miscreants got him killed by firing. It is thus clear that Dwarka Prasad, since deceased, made a statement before the villagers present that he recognised Nanhau Ram and Subhakaran of Koni village who got him killed. Moreover Phulkali, wife of the deceased (PW 8) and his son Premshankar (PW 9) also stated in their evidences that they saw these two accused persons amongst the dacoits. The appellate court on consideration of these evidences had held :

The above prosecution evidence conclusively established that the widow and sons of the deceased had correctly identified the two appellants as being amongst the dacoits, because they were previously known to them. Appellant Nanhau Ram had a grudge against the deceased and that provided motive for him to come with the dacoits at the house of the deceased, though the attempted dacoity was foiled because of the shouts raised and the arrival of the village people. We feel further convinced not only with the oral dying declaration, but also with the written dying declaration made by the deceased and written by Lavkushprasad (PW 2).

9. Moreover PW 2, Lavkushprasad clearly stated in his deposition that he wrote the statement of the deceased Dwarka Prasad at his instance that he recognised the two accused appellants amongst the dacoits. This statement was signed by PW 3, PW 5 and PW 7. PW 3, Maksudan Singh deposed about oral dying declaration made by the deceased Dwarka Prasad and his having identified the two appellants. He also proved Ex. P-2 and stated that Dwarka Prasad was in full senses when he dictated the contents Ex. P-2. He is absolutely an independent witness and has no animus against the appellants. Tikamprasad (PW 5) also stated about the oral dying declaration made by the deceased Dwarka Prasad in which he named the two appellants. He also proved Ex. P-2 which was written according to him at instance of Dwarka Prasad who was in full senses. PWs 7 and 8 also testified to the oral dying declaration made by the deceased and his having identified the two appellants. Considering all these evidences, the conclusion arrived at by the courts below cannot be questioned nor it can be contended that the written dying declaration Ex. P-2 having been not mentioned in the FIR was brought subsequently. It has been contended on behalf of the appellant by referring to the deposition of PW 6, Dr. Abhiraj Singh that a person getting such injuries cannot survive and as such the deceased Dwarka Prasad could not make the dying declaration. PW 6 stated in his deposition that a person suffering from such injuries cannot survive more than 10 to 30 minutes. The High

Court considered the evidences of the prosecution witnesses and observed :

Thus the medical opinion could not wipe out the direct testimony of number of witnesses that Dwarka Prasad chanced to live after receiving the injuries and was in a conscious state to make the oral dying declaration.

10. This finding arrived at on an appreciation of evidences is, in our opinion, quite in accordance with law. Moreover as has been stated hereinbefore the PW 8 and 9, the wife and son of the deceased stated categorically in their depositions that Dwarka Prasad deceased was in his full senses while making the statements which were recorded in writing by PW 2, Lavkushprasad. In the face of the evidences of the witnesses this submission is not sustainable. As regards the delay in recording the statement of PW 2 does not necessarily make the evidence untrustworthy. In the instant case, PW 2 was examined by the Investigating Officer on July 16, 1976. There is no doubt that the witness was present in the night of the dacoity and he scribed the statement made by the deceased who put his thumb impression on it and it was signed by PWs 3 and 5. There is also reference to the statement made by the deceased in the FIR lodged by PW 5 on July 15, 1976. In these circumstances, the mere delay in recording the statement of PW 2 which is undoubtedly a lapse on the part of the Investigating Officer will not render outright rejection of these prosecution evidences. It has already been observed by the Additional Sessions Judge that the conduct of the Investigation Officer was not fair as he did not send the articles seized for chemical examination or for ballistic examination. It is apparent from the evidence of PW 6, Dr. A. R. Singh that the deceased and another stranger got gun shot wounds which caused their deaths. It has been held by the courts below that non-examination of the gun by the ballistic expert cannot negative the evidence of the prosecution witnesses that the deceased Dwarka Prasad died of gun shot injuries. The High Court on a consideration of the evidences have found that the identity of the two appellants as being amongst the dacoits has been amply established the by the evidences of witnesses particularly of widow and son of deceased and this has been reinforced by the oral and written dying declaration of the deceased. It has also been held that even excluding the written dying declaration PW 2 the evidences adduced on behalf of the prosecution clearly established the prosecution case that deceased made an oral dying declaration implicating the two accused appellants as the dacoits recognised by him.

11. Considering the facts and circumstances of the case as well as evidences on record we do not find any infirmity in the judgment and order of the Courts below which according to us are unassailable. We, therefore, dismiss the appeal.

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