

SUPREME COURT OF INDIA

Bholaprasad

Vs.

State of Maharashtra

(M Mukharji and K Thomas JJ.)

21.08.1997

ORDER

1. The appellant and seven others were placed on trial before an Additional Sessions Judge of Chandrapur on the allegations that on 2-1 -1990 at or about 8.00 a.m. they committed rioting on Chandrapur Tadoba Road and, in course thereof, the murder of Alakh Niranjan. On conclusion of the trial the learned Judge convicted the appellant under Section 302 IPC (simpliciter), while acquitting the other seven. As the appeal preferred by the appellant in the High Court proved abortive he has filed the instant appeal after obtaining special leave.

2. To bring home the charges leveled against the appellant and, for that matter, the other accused persons, the prosecution rested its case upon the testimonies of, besides the doctor who held the post-mortem examination and other formal witnesses, Brijendra Pande (PW 3), brother of the deceased, who gave an ocular version of the incident and upon the dying declaration of Alakh Niranjan (Ex. 62) recorded by the Investigating Officer in the hospital in presence of a doctor. In describing the role played by the appellant, PW 3 specifically stated that he gave two knife blows on the left side of the chest of Alakh Niranjan which resulted in his death. In the dying declaration, however, the version of the incident as given out by the deceased was that at the material time two persons were present, one of whom was a "Madrasi" and the other from Bihar, and of them the "Madrasi" took out a knife wrapped in paper and delivered a blow with it upon him (the deceased). In other words, while PW 3 claimed that the appellant, who is a Bihari, was the assailant, the deceased described the assailant as a "Madrasi", without naming him.

3. When the above material discrepancy regarding the assailant was brought to the notice of the trial court, it observed as under:

"It is true that in the dying declaration (Ex. 62) it is mentioned by deceased Alakh Niranjana that the assailant was Madrasi. However, the defence has not brought anything on record as to whom deceased Alakh Niranjana used to refer as Madrasi. As against this, there is direct evidence of Brijendra Pande including the report (Ex.20) lodged by him immediately after the incident, which clearly shows that it was Accused 1 (the appellant) who assaulted deceased Alakh Niranjana with a knife/dagger. In view of such direct evidence by the prosecution the contention of Shri Urade. Advocate for Accused 1 to the effect that some other person might have assaulted Alakh Niranjana and Accused 1 is entitled for benefit of such possibility, cannot be accepted."

4. In repelling the same contention when raised before the High Court, it went to the extent of observing that considering the nature of injury the deceased suffered, it could not be said that even after two hours of the infliction of the injury (when the dying declaration was made) he was mentally alert to give the correct description of the incident.

5. In our considered opinion neither of the courts below was justified in ignoring the material contradiction that appeared between the evidence of PW 3 and the dying declaration as regards the identity of the person who committed the murder. When the prosecution itself was relying upon the dying declaration to prove its case the courts below ought to have considered whether in the context of the dying declaration, the evidence of PW 3 could be safely relied upon. As regards the observations made by the trial court about the identity of the person who assaulted the deceased, it is pertinent to point out that PW 3 categorically stated that his brother knew Bholaprasad (the appellant before us) from before. It was, therefore, expected that if really the appellant was the assailant the deceased would have certainly named him. That apart, as already noticed, it is the specific case of the prosecution (as narrated by PW 3) that there were some "South Indians" among the miscreants. Therefore, when the deceased specifically stated that of the two persons, one from Bihar and the other "Madrasi", the latter assaulted him it could not refer to the appellant. As regards the ground canvassed by the High Court to ignore the dying declaration we are constrained to say that when the prosecution relied upon the dying declaration and gave evidence in support thereof, the defence was legitimately entitled to demonstrate that it belied the evidence of PW 3. In any view of the matter, the appellant is entitled to the benefit of reasonable doubt on the above score.

6. On the conclusions as above we allow this appeal, set aside the impugned order of conviction and sentence recorded against the appellant and acquit him. The appellant, who is in jail, be released forthwith unless wanted in connection with some other case.

