SUPREME COURT OF INDIA

Dharam Pal and Ors.

Vs.

State of U.P

Crl.A.No.884 of 2001

(C.K.Thakker and Tarun Chatterjee,JJ.)

04.01.2008

JUDGMENT

Tarun Chatterjee, J.

1. This appeal arises from the judgment and order dated 4th of November, 1999 of the High Court of Judicature at Allahabad whereby the High Court had partly allowed the appeal of the accused/appellants herein thereby setting aside their conviction and sentence of imprisonment for life under Section 302/34 of the Indian Penal Code (for short the IPC) imposed by the VIIIth Additional Sessions Judge, Bareilly, U.P. and instead convicting and sentencing them to 7 years rigorous imprisonment under Section 304 Part II read with Section 34 of the IPC. The accused/appellants (for short the appellants) before us are Mahabir, Najjoo, Dharam Pal and Sheru whose fluctuating fortunes shall be set at rest by us in this appeal.

2. In order to appreciate the controversy involved, we propose to give a brief narrative of the prosecution case relevant for our consideration.

3. The incident took place on 5th of June, 1978 in Village Khalanpur where the deceased Rajpal had come to see a fair. At about 2 p.m., he went to drink water at a hand pipe towards the north of Ram Das Telis House. An altercation took place between Mahabir and Rajpal deceased on drinking of water. There was an exchange of abuses between Dharam Pal and Rajpal. Thereafter, Rajpal left the place and proceeded towards the southern side. Meanwhile, all the four accused came there and assaulted Rajpal with lathis who sustained head injuries and fell down. The accused thereafter fled from the spot. Raghu, father of Rajpal arrived there shortly and took him to Faridpur Police Station on a bullock cart where Rajpal himself dictated a report of occurrence. The report was registered under Section 323 of the IPC against the four accused as a non cognizable report at 21.10 hours on 5th of June, 1978. Rajpal was medically examined at the Primary Health Center, Faridpur at 10.00 p.m. on the same night. He, however, succumbed to his

injuries at about 1.00 p.m. on 7th of June, 1978.

4. After Rajpal died, information was sent to the police station and the case was converted into one under section 304 of the IPC. Thereafter, the case was investigated by Sub- Inspector P.C. Sharma, who submitted the charge sheet against the appellants on 28th of October, 1978. The learned Magistrate took cognizance of the offence and committed the case to the Court of Sessions. The Sessions Judge framed charge under Section 302/34 of the IPC against all the appellants who pleaded not guilty and claimed to be tried. Nine witnesses including three eye-witnesses were examined from the side of the prosecution. Two witnesses were examined by the appellants in their defence. In their statement under Section 313 of the Code of Criminal Procedure (for short the code), the appellants denied the prosecution case and alleged false implication on account of enmity. The Sessions Judge, as noted hereinabove, believed the case of the prosecution and convicted the appellants and sentenced them to imprisonment for life underSection 302/34 of the IPC. Against this decision of the Sessions Judge, an appeal was preferred before the Allahabad High Court by the appellants. It may be kept on record that when the appeal was taken up for hearing before the High Court, the learned counsel for the appellants made a statement that despite repeated letters, the appellants were not responding and therefore he was not in a position to argue the appeal. The High Court, thereafter, scrutinized the entire record with the assistance of Learned Assistant Government Advocate. As noted hereinabove, the appeal was partly allowed and the appellants were convicted and sentenced to rigorous imprisonment of 7 years under Section 304 Part II read with Section 34 of the IPC. It is this judgment of the High Court which is impugned in this appeal.

5. We have heard the learned counsel for the parties and examined the entire materials on record. We shall now deal with each of the questions raised before us by the learned counsel for the parties.

6. The learned counsel for the appellants, at the first instance, submitted that since the appellants were not served with a notice of appeal in the High Court, the appeal was disposed of by the High Court ex-parte without affording any opportunity of hearing to the appellants. Our attention was drawn to the decision of this court in *Bani Singh Vs. State of U.P*[1].to drive home the point that the High Court was duty bound to ensure proper compliance with Sections 385 and 386 of the Code in disposing of criminal appeals when the accused did not appear and that the Appellate Court must dispose of the appeal on merits after perusal and scrutiny of the record. Relying on the decision of this court in the case of Bani Singh [supra], the learned counsel for the appellants sought to argue that the High Court was not justified in deciding the appeal on merits without giving any opportunity of hearing to the appellants. He submitted that a further date for hearing the appeal ought to have been fixed by the High Court and not having done so, it had acted illegally and with material irregularity in deciding the appeal on merits. This submission of the learned counsel for the appellants was, however, contested by the learned counsel appearing on

behalf of the respondent. The learned counsel for the respondent submitted that the High Court was fully justified in deciding the appeal on merits even in the absence of the learned counsel for the appellants as from the record, it would be clear that the notice of appeal was duly served on the appellants and inspite of such service of notice and also in view of the fact that a learned advocate had appeared for the appellants, it would not be justified to say that a further date ought to have been fixed by the High Court for hearing of the appeal. The learned counsel for the respondent further contended that the High Court had followed the principles laid down by this court in Bani Singhs case [supra] and disposed of the appeal on merits in the absence of the appellants or their learned counsel. In Bani Singhs case [supra], this court observed in paragraph 10 as under: -

> "10. In Shyam Deo case , this Court ruled that the Appellate Court must peruse the record before disposing of the appeal; the appeal has to be disposed of on merits even if it is being disposed of in the absence of the appellant or his pleader. Interpreting Section 423 of the Old Code (the corresponding provisions are Sections 385-386 of the present Code), this Court in paragraph 19 of the judgment held as under (SCC p. 861, Para 19) The consideration of the appeal on merits at the stage of final hearing and to arrive at a decision on merits and to pass final orders will not be possible unless the reasoning and findings recorded in the judgment under appeal are tested in the light of the record of the case. After the records are before the court and the appeal is set down for hearing, it is essential that the Appellate Court should (a) peruse such record, (b) hear the appellant or his pleader, if he appears, and (c) hear the public prosecutor, if he appears. After complying with these requirements, the Appellate Court has full power to pass any of the orders mentioned in the section. It is to be noted that if the appellant or his pleader is not present or if the public prosecutor is not present, it is not obligatory on the Appellate Court to postpone the hearing of the appeal. If the appellant or his counsel or the public prosecutor, or both, are not present, the Appellate Court has jurisdiction to proceed with the disposal of the appeal; but that disposal must be after the Appellate Court has considered the appeal on merits. It is clear that the appeal must be considered and disposed of on merits irrespective of the fact that whether the appellant or his counsel or the public prosecutor is present or not. Even if the appeal is disposed of in their absence, the decision must be after consideration on merits.
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> (emphasis added)
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> 11. In our view, the above-stated position is in consonance with the spirit and language of Section 386 and, being a correct interpretation of the law, must be followed."

7. Before we proceed further, we keep it on record that in the present case, the appellants were granted bail and in fact, at the time of hearing of the appeal, they were already enlarged on bail. Only after the judgment was delivered by the High Court, the bail was cancelled and they were

directed to surrender before the appropriate authority. At this stage, we may note the relevant provisions under the Code of Criminal Procedure (for short the Code). Chapter XXIX of the Code deals with appeals under the Code. Sections 385 and 386 of the Code, which are the most important provisions for dealing with the case in hand, are reproduced as under: -

> "385. Procedure for hearing appeals not dismissed summarily (1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given
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> (i) to the appellant or his pleader:
> (ii) ...
> (iii) ...
> (iv) ...
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> (2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties: Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.
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> (3) 386. Powers of the Appellate Court - After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal underSection 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may –
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> xxx xxx xxx xxx Having examined the provisions under Sections 385 and 386 of the Code, as noted hereinabove, and applying the principles laid down by this court in the case of Bani Singh [supra], we are not in agreement with the argument advanced by the learned counsel for the appellants that the High Court ought not to have decided the appeal on merits in the absence of the appellants as the High Court had no power or jurisdiction under Sections 385 or 386 of the Code to do so. So far as the service of notice of the appeal on the appellants by the High Court is concerned, we are unable to agree with the learned counsel for the appellants that the notice of appeal was not served upon them and therefore, without a proper service of notice of appeal on the appellants and without giving them any opportunity of hearing to proceed with the appeal, the High Court erred in proceeding with the appeal and deciding the same on merits. Even if we assume that the notice of appeal was not served on the appellants, then also, it was an admitted position that the learned counsel for the appellants appeared for them to prosecute the appeal and therefore, after appearance of the learned counsel for the appellants, it must be held that the notice of appeal was duly served. At the risk of repetition, we may note that the learned counsel for the appellants submitted before the

High Court that despite repeated reminders to the appellants, the appellants were not responding and therefore, the learned counsel for the appellants expressed his inability to argue the case before the High Court."

8. That apart, the decision of this court in Bani Singhs case [supra] would clearly show that when the accused does not appear, it is the bounden duty of the High Court to look into the records and the other materials on record, including the judgment of the trial court and thereafter, decide the appeal on merits which would be due compliance with Sections 385 and 386 of the Code in disposing of criminal appeals. While dealing with the procedure for disposing of a criminal appeal, this court in Bani Singhs case [supra] has clearly laid down that the dismissal of an appeal for default or non-prosecution without going into the merits of the case is clearly illegal and that the Appellate Court must dispose of the appeal on merits after perusal and scrutiny of record and after giving a hearing to the parties, if present, before disposal of the appeal on merits. This court, in that decision, further held that the Appellate Court must dispose of the appeal after perusal of the record and judgment of the trial court even if the appellant or his counsel was not present at the time of hearing of the appeal. The only exception, as we find from the aforesaid decision of this court, is that if the appellant is in jail and his counsel is not present, the court should adjourn the case to facilitate the appearance of the appellant. There is yet another exception to this rule, namely, that in an appropriate case, the court can appoint a lawyer at the State expense to assist the court. Therefore, the High Court, in our view, was justified in taking the assistance of the Assistant Government Advocate and after taking such assistance and considering the entire evidence on record, the High Court passed the judgment under appeal before us holding that the appellants were guilty of the offence, not under Section 302/34 of the IPC but under Section 304Part II of the IPC and directed them to undergo 7 years rigorous imprisonment. In doing so, the High Court affirmed the findings of the trial court but differed on the point of the offence committed by the appellants and the corresponding punishment to be awarded to them. After a thorough appreciation of the evidence on record, the High Court recorded the following findings: -

1. Both the eye-witnesses PW 2 Dannu and PW 3 Om Prakash had stated that they were present in the fair and had seen the occurrence. In spite of lengthy cross-examination of these witnesses, their testimony that they had seen the occurrence could not been shattered in any manner.

2. PW2 Dannu and PW3 Om Prakash had stated in their testimony that all the four accused assaulted Rajpal with dandas near the pakar tree who fell down after receiving injuries on his head.

3. The medical evidence corroborated the testimony of the eye-witnesses that the assault was made upon Rajpal by danda, which is a blunt weapon.

4. The names of PW2 Dannu and PW4 Satyapal were mentioned in the N.C.R. lodged by Rajpal.

There is no reason to doubt the presence of PW2 Dannu and PW4 Satyapal on the spot, who saw the occurrence. PW2 Dannu and PW4 Satyapal were truthful and reliable witnesses and implicit reliance could be placed on their testimonies.

5. The FIR of the occurrence was lodged by the deceased Rajpal himself. The report dictated by Rajpal was initially taken down as a non-cognizable report under Section 323 of the IPC. Therefore, there was no occasion for either falsely implicating any one as accused or exaggerating the role-played by any accused.

6. The testimony of PW6 Ram Swaroop Mishra, Head Constable showed that after the report had been dictated by Rajpal, the same was read over to him and thereafter he had put his thumb impression over the same. This act found mention in the report itself.

7. The report was admissible under Section 32 of the Evidence Act as a dying declaration of the deceased Rajpal. The names of the accused and the important features of the case had been mentioned therein. The report contained a truthful version of the incident as narrated by Rajpal as to the cause of his death.

8. The version given in the FIR found complete corroboration from the testimony of eye-witnesses and the medical evidence on record.

> "9. The evidence did not show that the deceased was not in a position to speak at the time when he dictated the report of the occurrence.
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> 10. The testimony of defence witnesses did not inspire confidence and was not worthy of belief.
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> 11. It cannot be said that the accused had any intention of causing the death of Rajpal nor were the injuries caused with the intention of causing such bodily injuries as the accused knew were likely to cause death.
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> 12. The knowledge that death is likely to be caused could be inferred as they gave the blow on the head. The accused had therefore committed offence under Section 304 part II of the IPC."

9. From the above findings of the High Court, it is abundantly clear that the High Court had arrived at a well-merited judgment after a careful consideration of the materials on record. The position, of course, would have been different if the High Court had simply dismissed the appeal without going into the merits. However, nothing of this sort has been done in the present case. The judgment of the High Court clearly shows that evidence before the trial court has been carefully deliberated upon and weighed and it is only then that the conclusions have been arrived

at. Therefore, relying on the aforesaid principles and in view of the discussions made hereinabove, we are afraid that the decision of this court in Bani Singhs case [supra] is of no help to the appellants but on the other hand, the High Court, while dealing with the appeal ex parte had followed the guidelines laid down in that case. That being the position, it cannot be said that the High Court had ignored the basic principles of criminal justice while disposing of the appeal ex parte. In our view, there has been substantial compliance with the guidelines made in Bani Singhs Case [supra]. Accordingly, we are unable to agree with the learned counsel for the appellants that the matter should be remitted back to the High Court for decision afresh after giving opportunity of hearing to the appellants.

10. The learned Counsel for the appellants further argued before us that the alleged dying declaration which was given the shape of an FIR could not be made the basis of conviction when the original document signed by the deceased was not brought on record. The learned counsel for the appellants tried to prove before us that the deceased was not in a position to speak and which becomes apparent from the testimony of his father. However, it would not be correct to say so. The evidence of PW 7 Dr. R.P. Goel shows that the condition of the deceased was good and that he was in a position to speak. It would not be appropriate for us to read between the lines by giving unnecessary meanings to the testimony of Raghu. It cannot be left out of sight that Raghu also said that the deceased dictated the FIR to the police. In any view of the matter, the report of occurrence was dictated by the deceased himself and the same was read over to him after which he had put his thumb impression on the same. This report is admissible under Section 32 of the Evidence Act as a dying declaration. It is true that the original document signed by the deceased was not brought on record, but in our view, the FIR has rightly been admitted as a dying declaration. There appears no reason for the police to falsely implicate any one of the accused inasmuch as, initially, the report dictated by the deceased was taken down as a non- cognizable report under section 323 of the IPC. If the police were to implicate the accused, they would have not taken down the report as a non-cognizable report in the very first place itself.

11. That apart, the report dictated by the deceased fully satisfied all the ingredients for being made admissible as a dying declaration. To ascertain this aspect, we may refer to some of the general propositions relating to a dying declaration. Section 32(1) of the Indian Evidence Act deals with dying declaration and lays down that when a 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, such a statement is relevant in every case or proceeding in which the cause of the persons death comes into question. Further, such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of the proceedings in which the cause of his death comes into question. The principle on which a dying declaration is admissible in evidence is indicated in the Maxim Nemo Moriturus Praesumitur Mentire, which means that a man will not meet his maker with a lie in his mouth. Thus it is clear that a dying declaration may be relating to:-

"a) as to the cause of death of the deceased.

b) as to any of the circumstances of the transactionwhich resulted in the death of the deceased. It is also clear that it is not necessary that the declarant should be under expectation of death at the time of making the statement. If we look at the report dictated by the deceased in the light of the aforesaid propositions, it emerges that the names of the accused and the important features of the case have been clearly mentioned in the report. It contains a narrative by the deceased as to the cause of his death, which finds complete corroboration from the testimony of eye-witnesses and the medical evidence on record. There is nothing on record to show that the deceased was not in a position to speak at the time when he dictated the report of occurrence. On the other hand, the materials and the other evidence on record would conclusively show, as rightly held by the High Court, that the deceased was in a position to speak when he dictated the report of occurrence. Therefore, in our view, the High Court was fully justified in holding that the deceased was in a fit state of mind at the time of making the statement. In the present case, as noted hereinabove, the dying declaration was fully corroborated by the other evidence on record. That apart, in our view, the submission of the learned counsel for the appellants that the dying declaration which was given the shape of an FIR could not be made the basis of conviction when the original document signed by the deceased was not brought on record is not acceptable. It is an admitted position that despite best efforts, the original FIR could not be produced as the registers relating to non -cognizable offences were destroyed after a lapse of two years. For this reason, the Sessions Court had duly considered this aspect of the matter and found that the loss of the original FIR was duly proved by PW 6 and accordingly, the secondary evidence adduced by the prosecution was accepted. We do not find any infirmity in the said finding when, admittedly, the original register was destroyed after a lapse of two years. Therefore, no adverse inference could be drawn against the prosecution for non-production of the original FIR. That being the position and in view of our discussions, we are not inclined to accept the argument of the learned counsel for the appellant that the deceased was not in a position to speak when he dictated the report or that the alleged dying declaration could not be admissible in evidence because of the other infirmities, as noted hereinabove."

12. This takes us to the next question viz. whether the other lacunae pointed out by the learned counsel for the appellants are fatal to the prosecution case. We agree that the High Court erred in relying on the evidence of PW4, who admittedly was declared a hostile witness. Nevertheless, we feel that in the face of the other evidence of PW2 Dannu, PW3 Om Prakash who were corroborated in all material respects by PW7 Dr. R.P.Goyal and by PW9, Dr. U. Kanchan, the evidence of PW4, even if discarded, is inconsequential. The evidentiary value of a dying declaration and the principles underlying the importance of a dying declaration have already been discussed herein earlier. Simply because PW2 and PW3, in their cross examination, have been shown to be related to the deceased does not mean that their testimony has to be rejected. It

is well settled that evidence of a witness is not to be rejected merely because he happens to be a relative of the deceased. In *State of Himanchal Pradesh Vs. Mast Ram*[2], this Court observed as under :-

> "..The law on the point is well settled that the testimony of the relative witnesses cannot be disbelieved on the ground of relationship. The only main requirement is to examine their testimony with caution. Their testimony was thrown out at the threshold on the ground of animosity and relationship. This is not a requirement of law..
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> In this view of the matter and this being the well-settled law, it is difficult for us to discard the evidence of the witnesses, as discussed hereinabove, only on the ground that they were related to the deceased, in the absence of any infirmity in the said evidence."

13. In the light of the aforesaid discussions, let us now see whether the High Court was justified, in the facts and circumstances of the present case, to convert the offence from Section 302/34 of the IPC to Section 304 Part II of the IPC. In this regard, we may again note the findings recorded by the High Court, as noted herein earlier, in clauses 11and 12. The High Court observed that the accused did not have any intention of causing the death of Rajpal nor were the injuries caused with the intention of causing such bodily injuries as the accused knew were likely to cause death. The High Court further observed that the knowledge that death was likely to be caused could be inferred as the accused gave the blow on the head. Let us now see whether the aforesaid act would warrant a punishment under Section 302 or Section 304 of the IPC. In our view, the facts disclose that there was no premeditation and the fight resulted on drinking of water from the hand pipe after an exchange of abuses. There appeared no intention on the part of the appellants to cause the death of the deceased Rajpal. Therefore, the offence committed by the appellants, in our view, is culpable homicide not amounting to murder because, in our view, it falls within Exception 4 toSection 300 which reads as under: -

Exception 4 Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation It is immaterial in such cases which party offers the provocation or commits the first assault. Section 304 of the IPC lays down the punishment for culpable homicide not amounting to murder and reads as under: -

> "Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is

likely to cause death.We have already gone through the evidence and the other materials on record. From the evidence on record, we cannot find any ground to discard the finding of the High Court that it cannot be said that the accused had any intention of causing the death of Rajpal, the deceased, nor were the injuries caused with the intention of causing such bodily injuries as the accused knew were likely to cause death. Therefore, in the absence of any intention of causing the death of the deceased Rajpal, we are in agreement with the High Court that the accused must be convicted of the offence under Section 304 Part II of the IPC and not under Section 302 of the IPC."

14. For the reasons aforesaid, we do not find any cogent reason to interfere with the judgment of the High Court converting the offence to Section 304 Part II of the IPC from Section 302 of the IPC. Accordingly, the appeal fails and is dismissed with no order as to costs.

Judgment Referred.

[1](1996) 4 SCC 0720
[2](2004) 8 SCC 0660