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January, 23.

MOTI SINGH AND ANOTHER

v.

STATE OF UTTAR PRADESH

(S. J. IMAM, K. SUBBA RAO, RAGHUBAR DAYAL,
and J. R. MUDHOLKAR, JJ.)

Criminal Trial—Dying Declaration—Admissibility of—Cause of death of declarant not established—Indian Evidence Act, 1872 (1 of 1872), s. 32 (1).

Seven persons including the appellants were convicted for murder. Relying upon the dying declaration of one G, the High Court acquitted five of the accused but convicted the appellants. G had been injured during the occurrence and had been taken to the hospital where his dying declaration was recorded. He left the hospital and died 20 days later. Before any post-mortem examination could be held, his body was cremated. The appellants contended that the dying declaration was inadmissible and that they were entitled to an acquittal.

Held, that the dying declaration was inadmissible in evidence. There was no evidence on the record as to what caused the death of G. The mere fact that G had received two gun shot injuries during the occurrence which in the opinion of the doctor were dangerous to life was not sufficient for holding that G must have died on account of these injuries. Under s. 32 (1) of the Evidence Act the Statement of a person who has died is relevant only when it relates to the cause of his death or to any of the circumstances of the transaction which resulted in his death. When it was not established that G had died as a result of the injuries received at the incident, his statement did not relate to the cause of his death or to the circumstances of the transaction which resulted in his death and did not fall within s. 32 (1).

CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 146 and 147 of 1962.

Appeals by special leave from the judgment and order dated February 2, 1962, of the Allahabad High Court in Criminal Appeals Nos. 157 and 158 of 1961 and Criminal Revision No. 384 of 1961.

A. S. R. Chari, Ravinder Narain, J. B. Dadachanji and O. C. Mathur, for the appellants.

G. C. Mathur and C. P. Lal, for the respondent.

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1963. January 23. The Judgment of the Court was delivered by

RAGHUBAR DAYAL, J.—Moti Singh and Jagdamba Prasad, appellants, together with five other persons, were convicted by the Sessions Judge of Unnao of offences under s. 148, 302 read with 149 and 307 read with 149 I. P. C. Each of them was sentenced to life imprisonment under s. 302 read with s. 149 I. P. C.

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On appeal, the High Court acquitted the other five persons of the various offences. The conviction of the appellants under s. 148 I. P. C., was also set aside, but their conviction for the offences under ss. 302 and 307 read with s. 149 were altered to conviction for offences under ss. 302 and 307 read with s. 34 I. P. C. On the application of Krishna Kumar, brother of one of the persons who had been murdered, the High Court enhanced the sentence of the appellants for the offence of murder to death. Moti Singh and Jagdamba Prasad have preferred these appeals respectively, after obtaining special leave from this Court.

It is not necessary to detail the facts of the incident in which several persons lost their lives and for participation in which incident the appellants were convicted, as we are of opinion that the conviction cannot be maintained on the basis of the evidence on record as appreciated by the High Court.

All the eye witnesses of the incident deposed in practically identical terms about the progress of the incident in which it was alleged that the members of

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the accused party fired with guns and pistols both from inside and outside the room on one side of the passage and also from the *seori* (cattle shed) on the other side of the passage when the victim party passed along the passage. The High Court felt doubtful about the firing of the shots from the cattle shed, and consequently acquitted Sheo Shankar, Jagjiwan and Shankar Dayal who were said to be mainly the persons who had fired from that place.

The High Court, however, believed the prosecution version of the firing from the room and later from the platform. It appears that the High Court believed this version because the prosecution witnesses stated so and because the statements exhibits Kha 5, Kha 8 and Kha 75 mentioned about the shots being fired from those places. Statement ex. Kha 75 does not say so. It says that firing took place from the front and that these people fired shots with guns. Statements exs. Kha 5 and Kha 8 were made by Ram Shankar and Jageshwar, who were examined as Court-witnesses 1 and 2 respectively. Ram Shankar and Jageshwar have been disbelieved by the Sessions Judge and it appears that the High Court did not take any more favourable view of their deposition in Court. It however seems to have relied on their statements exs. Kha 5 and Kha 8 respectively, recorded by a Magistrate at the hospital. In this it was in error. Those statements could have been used only in either corroborating or contradicting the statements of these witnesses in Court. If those witnesses were not to be believed, their previous statements could not be used as independent evidence in support of the other prosecution evidence.

In considering the complicity of individual accused in the firing from the room and later from the *chabutra*, the High Court said that Raj Kumar, P. W. 11 and Chandra Kumar, P. W. 15, were partisan witnesses whose evidence had to be examined

with caution, that Shyam Lal, P. W. 12 and Gopi Singh, P. W. 14, were not quite independent witnesses, and that there was nothing particular against Lal Singh, P. W. 17, and Sardar (P. W. 16) who had received gun shot injuries. It further said :

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“While considering the evidence of the prosecution witnesses we have to bear in mind the rule that the evidence has to be examined with caution”.

It also considered it necessary to refer to the statements exs. Kha 5 and Kha 8 which, as already stated, could not be used as substantive evidence, and the statement ex. Kha 75 of Gaya Charan, deceased.

The High Court fully relied on the alleged dying declaration ex. Kha 75 of Gaya Charan and considered it to be a complete account of the occurrence and the assailants as seen by him. The view of the High Court about this statement of Gaya Charan may be quoted :

“The dying declaration Ex. Ka-75 (Kha 75) of Gaya Charan appears to be a complete account of the occurrence and the assailants as seen by him, for he stated : ‘Lallan, Chandu, Raj Narain, Sardar, Sri Prakash were going to the bazar. Shots were fired from front, Jagdamba, Phunnar, Moti and one man whom I know by face fired gunshots on us’. The statement does not show that Gaya Charan did not see all the assailants who fired gunshots. It is therefore not possible to hold that any accused not mentioned in the dying declaration of Gaya Charan had also fired shots. At the same time we see no reason to hold that the dying declaration of Gaya Charan is not true. Jagdishwar identified the accused Jagdamba

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among the assailants. The evidence of the eye-witnesses has therefore to be judged in the light of the statements Exs. Kha 5 and Kha-8 of Ram Shankar and Jageshwar and the dying declaration Ex. Kha 75 of Gaya Charan."

Now, the evidence relied on by the High Court for the conviction of Jagdamba Prasad consists of the statements of the prosecution witnesses, the statement of Jageshwar Ex. Kha 8 and the alleged dying declaration of Gaya Charan Ex. Kha 75. It also took into consideration the fact that he remained absconding till his arrest on September 30, 1960, the incident having taken place on February 9, 1960.

The evidence relied on for the conviction of Moti Singh consists of the dying declaration Ex. Kha 75 of Gaya Charan and, presumably, also of the statements of the prosecution witnesses, as the High Court has not specifically stated so. It has said :

"We have also no doubt about the participation of the accused Moti in the firing of shots from the east of the galiara. He is named in the dying declaration Ex. Kha. 75, of Gaya Charan."

With regard to the criticism for the accused about the indefiniteness of the description of Moti in the dying declaration of Gaya Charan when there were three persons by the name of Moti in the village, the High Court said :

"We have no doubt that he is mentioned in the dying declaration."

How they arrived at that conclusion is not clear from the judgment. The three persons with the name of Moti belonged to different castes. The caste of Moti is not mentioned in the dying declaration

of Gaya Charan. It is therefore not possible to state with any confidence that Gaya Charan must have referred to Moti Singh, the appellant, by the name Moti.

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In acquitting Sheo Darshan Singh, the High Court said that though there were strong circumstances against him, he was not mentioned in the dying declaration of Gaya Charan and that therefore his presence among the assailants became doubtful. In acquitting Avadh Behari it again said that his name was not mentioned in the dying declaration of Gaya Charan.

Again, in fixing the number of persons who had taken part in the firing from the room and the platform, the High Court relied on Exhibit Kha 75, the alleged dying declaration of Gaya Charan as the deciding factor. It said :

“The number of assailants mentioned in the dying declaration Ex. Kha. 75 is only four. It is doubtful if the assailants were more than four in number. No offence under section 148 was therefore committed and section 149 I.P.C. is not applicable.”

It is clear from the above that the High Court mainly relied on the alleged dying declaration of Gaya Charan for determining that Moti Singh and Jagdamba Prasad, appellants, fired from the room and the platform and that if their names had not been mentioned in this statement of Gaya Charan, they too would have got the benefit of doubt just as Sheo Darshan Singh and Avadh Behari have got. There is no other factor for making a distinction between the cases of these two appellants and those two accused as all the prosecution witnesses had named all the accused as assailants of the victim

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party. It follows that if this alleged dying declaration of Gaya Charan be inadmissible in evidence as urged for the appellants, the appeals have to be allowed and the conviction of the appellants set aside.

The incident took place on February 9, 1960. Gaya Charan's injuries were examined by Dr. Bhatnagar the same day. He found two gun shot wounds of entry $\frac{1}{4}$ " x $\frac{1}{4}$ " up to the depth of abdomen and considered those injuries to be caused by gun shot and to be dangerous to life. Gaya Charan left the hospital. He was either discharged on the injuries healing up or he left the hospital before they healed up. There is nothing on record to show in what circumstances he left the hospital. He died on March 1, 1960.

Sub-Inspector Puttu Lal, P.W. 24, has deposed that it was known on March 1, 1960 that Gaya Charan had died in Kanpur and that when he reached the Bhairon Ghat he learnt that the dead body of Gaya Charan had been burnt a couple of hours before. There is no evidence on record as to what caused Gaya Charan's death. In this state of evidence the finding of the Sessions Judge that Gaya Charan must have died on account of the injuries received in the incident cannot be held to be a good finding. What he says in this connection is :

"Gaya Charan had a gunshot wound of entry on the left hypochondrium region and one gunshot wound of entry on the right lumbar region. Both the injuries were dangerous to life, according to the Doctor. Gaya Charan must have died of these injuries and the mere fact, that no post mortem could be conducted on his dead body before his cremation, does not show that we cannot rely on his dying declaration."

The mere fact that the two gun-shot injuries

were dangerous to life is not sufficient for holding that Gaya Charan's death which took place about three weeks after the incident must have been on account of those injuries.

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In this connection our attention was drawn to the fact that Ram Shankar who was also injured in that incident had received one gun shot wound $\frac{1}{4}$ " x $\frac{1}{4}$ " up to the depth of his abdomen $\frac{1}{2}$ " above the right end of upper border of Syihphysis Pubes, and that injury was also considered by the Doctor to be dangerous to life, but fortunately Ram Shankar did not succumb to the injury. The High Court did not refer to this question as it appears the admissibility of the alleged dying declaration of Gaya Charan was not raised before it. That however does not mean that we cannot look into the finding of fact about Gaya Charan having died on account of the injuries received in the incident. It is necessary for proving the charge of murder of Gaya Charan that he had died on account of the injuries received and any finding to that effect, in the absence, of evidence can be looked into by this Court even though the Courts below have confirmed that finding. We find that there is no evidence to support that finding and hold that Gaya Charan is not proved to have died due to the injuries received in the incident.

The effect of this finding is that the alleged dying declaration of Gaya Charan, Ex. Kha 75, cannot be admissible in evidence. Clause (1) of s. 32 of the evidence Act makes a statement of a person who has died relevant only when that 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's death comes into question. When Gaya Charan is not proved to have died as a result of the injuries received in the incident, his statement

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cannot be said to be the statement as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. This is obvious and is not disputed for the respondent State.

The result then is that the statement of Gaya Charan Ex. Kha 75 is inadmissible in evidence. It was the mainstay of the judgment of the High Court upholding the finding of the Sessions Judge that Moti Singh and Jagdamba Prasad, appellants, were among the persons who had fired from the room and the platform. When this evidence is to be ignored as inadmissible, the remaining evidence on the record according to the view of the High Court, was insufficient to establish beyond reasonable doubt that these two persons were among the assailants. The appellants deserve the benefit of that doubt. They would have got it if the High Court had not erroneously relied on the statement Ex. Kha 75.

We therefore hold that Moti Singh and Jagdamba Prasad have not been proved to have taken part in that incident on February 9, 1960, which led to the deaths of Lallan and Matrumal and the causing of hurt to several other persons. We accordingly allow the appeals, set aside the order of the High Court and acquit Moti Singh and Jagdamba Prasad of the offences they were convicted of. We direct that they be released forthwith, if not required to be detained under any other process of law.

Appeal allowed.
