

APPELLATE CRIMINAL

Before Mr. Justice Radha Krishna Srivastava

WARIS KHAN AND OTHERS (APPELLANTS) *v.* KING-EMPEROR
(RESPONDENT)*

1940
January, 11

*Criminal Procedure Code (Act V of 1898), section 509(1)—
Dying declaration recorded by doctor—Doctor not produced
to prove it—Declaration, whether admissible in evidence—
Statement of witness taken during police investigation—
Thumb mark of witness taken to statement by sub-inspector
—Statement, if admissible.*

Section 509(1) of the Code of Criminal Procedure confines itself to expert evidence tendered by a medical witness as such. It has no application to evidence relating to facts tendered by a person who also happens to be a medical man.

Where, therefore, a dying declaration is recorded by the medical officer of a hospital and is produced in evidence in court, it is necessary to prove it by producing the doctor who recorded it and is not admissible in evidence if it is not so proved.

Where the sub-inspector takes the thumb-mark of a witness to the statement taken during the police investigation the statement of the witness is not admissible in evidence. *Bhuneshwari Pershad v. King-Emperor* (1), followed.

Messrs. *H. G. Walford* and *R. N. Shanglu*, for the appellant.

Mr. H. K. Ghosh, Assistant Government Advocate, for the Crown.

RADHA KRISHNA, J.:—The appellants in these appeals, Waris Khan, Janab Khan and Inamullah Khan, were charged before the learned Sessions Judge of Fyzabad for an offence under section 302 of the Indian Penal Code for the murder of one Nagai dhobi at midnight between the 4th and 5th May, 1939, at his house in Dih Bhayun. All of them were found guilty of an offence under section 304 of the Indian Penal Code and sentenced to ten years' rigorous imprisonment each.

*Criminal Appeals Nos. 484, 485 and 486 of 1939, against the order of B. N. Hukku, Esq., Sessions Judge of Fyzabad, dated the 18th September, 1939.

(1) (1931) I.L.R., 6 Luck., 668.

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The prosecution case was that there was a criminal case pending between Aulad Ali on one side and the three accused on the other, in which Nagai was a witness for Aulad Ali. Nagai attended the court where in the case was pending but the case was put off. Since then the appellants had been threatening to put him to death if he gave evidence against them. On the date of the occurrence the appellants went to the house of the deceased Nagai, who was out, and told his wife to stop him from giving evidence for Aulad Ali otherwise he would be murdered. The same day, it was alleged, the appellants came at midnight armed with spears and *lathis* and assaulted Nagai. Nagai died at 3.30 a.m. on the 7th May, 1939, in the hospital at Jamalpur as an effect of injuries received by him. Nagai made a report at the thana at 8 a.m. on the 5th May, 1939. It is Ex. 2, and the police station is situated at a distance of six miles from the place of occurrence. In this information report the names of P. Ws. 1 to 4 were mentioned and the accused were implicated.

The accused persons set up a counter story in defence to the effect that Nagai's daughter Sugri's marriage had been settled with the son of one Sheo Darshan of village Tanda, that Nagai broke off this engagement and settled the marriage with the son of another dhobi of Azamgarh, which was to come off on the day following the occurrence. In order to have his revenge and to frustrate the completion of alliance with the Azamgarh dhobi, Sheo Darshan assaulted Nagai either singly or with the help of others. On hearing this assault the accused went to the house of Nagai in the early morning where Nagai was freely mentioning the name of Sheo Darshan as his assailant. Soon after this, Aulad Ali, who has great influence in the village, reached the spot and took Nagai away to the police station and there to nurse his own grudge with the appellants induced Nagai to implicate them. Aulad Ali used to attend the deceased while he was at the hospital at Jamalpur. It may be mentioned that out of the three

appellants the first two are own brothers and the third is their nephew. They are cousins of Aulad Ali, who is their pattidar. It is admitted that great enmity existed between the appellants on one side and Aulad Ali on the other side.

In support of the prosecution the evidence on the record is—

(1) the evidence of eye-witnesses, P. W. 1 Oudhu, the son of Nagai, and P. W. 2 Ram Lal;

(2) the evidence of Jhanghai (P. W. 3), Lokai (P. W. 4) and Balai (P. W. 7) and the statement of one Kalpu (Ex. 7) in the court of the Committing Magistrate. Kalpu had died when the case came up before the Sessions Court;

(3) the first information report (Ex. 2) and the dying declaration (Ex. 10).

The motive for assault is as stated by the prosecution and is borne out by the evidence of P. Ws. 1 and 8.

The learned Sessions Judge disbelieved the statement of P. W. 2 Ram Lal, one of the eye-witnesses, on the ground that he was easily amenable to external influences and could be made to perjure himself. On the first hearing before the Committing Magistrate he stated that he could not identify any of the assailants, but when he came into the witness-box a few days later he readily identified all of them. This witness also admitted that the sub-inspector took his thumb-mark to the statement taken during the police investigation and so his statement was not admissible as held in *Bhuneshwari Pershad v. King-Emperor* (1). The learned Judge also disbelieve the evidence of Jhanghai (P. W. 3), Lokai (P. W. 4), Balai (P. W. 7) and that of Kalpu made in Committing Magistrate's court. These witnesses had stated that they had seen the accused running away immediately after the occurrence. It is not necessary for me to give any detail of their statements and the reason given by the learned Sessions

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Judge for discarding their testimony. The learned Assistant Government Advocate has strenuously maintained before me that the evidence of P. Ws. 3, 4 and 7 as well as the statement of Kalpu should not have been discarded by the learned Sessions Judge. The evidence of P. W. 3 was discarded on the ground that he was not in a position to identify the assailants. Lokai (P. W. 3) was treated by the prosecution as a hostile witness. P. W. 7 Balai and Kalpu were not mentioned in the first information report. The signatures of P. W. 7 were taken by the sub-inspector on his statement made during investigation. I am not prepared to disagree with the view of the learned Sessions Judge in treating the evidence of these witnesses as unreliable. That court had the opportunity of watching the demeanour of these witnesses when they were in the witness-box and its opinion as to their credibility is of great value.

Thus the only evidence upon which the conviction is based is that of P. W. 1 Oudhu, a boy of 14 years of age and the son of the deceased Nagai, Ex. 2 the first information report, which is really not a substantive piece of evidence but can be used only for corroborative purposes, and Ex. 10, the alleged dying declaration of the deceased.

The alleged dying declaration was recorded by the medical officer of Jamalpur hospital. It was produced in the court of the Committing Magistrate and proved by the doctor. This dying declaration and the statement of the doctor in proof of it made in the Committing Magistrate's court were produced before the learned Sessions Judge as Exs. 10 and 9. The learned counsel for the appellants has contended that Ex. 10 is not admissible in evidence as it was not proved in the Sessions Court by producing the doctor, who is alleged to have recorded it. The learned Assistant Government Advocate argued that it was not necessary to examine the doctor for proving Ex. 10 in

the Sessions Court in view of the provisions contained in section 509(1) of the Code of Criminal Procedure. In my opinion the section confines itself to expert evidence tendered by a medical witness as such. It has no application to evidence relating to facts tendered by a person who also happens to be a medical man. In my opinion it was necessary to prove Ex. 10 by producing the doctor who had recorded it: In recording the statement of the deceased the doctor was not acting as a medical man and he was not produced in the Committing Magistrate's court, as a medical witness. Exhibit 10, therefore, goes out of consideration for want of proof.

There remains the only substantive piece of evidence consisting of the evidence of P. W. 1 Oudhu. About this witness it was contended on behalf of the appellants that he is a most unreliable witness because he made conflicting statements on certain matters in the two courts below and further that he admitted that he had covered himself on account of the fear when his father was assaulted and, therefore, he was not in a position to identify the assailants. The learned Sessions Judge has discarded this criticism made by the appellants on the ground that this witness was lying close to his father and could have no difficulty in identifying the accused before he covered himself. In view of the circumstances of the case I am not prepared to put great reliance upon the evidence of this witness. He admitted in the Committing Magistrate's court that Aulad Ali came to his house early morning next after the night of the occurrence. He changed his statement on this point in the Court of Session. The change is in respect of a very material matter. As stated above, the accused had stated in their defence that Aulad Ali was the person responsible for the implication of the accused persons. Aulad Ali was examined in the trial court to prove motive for the assault but when the accused persons disclosed their defence

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Aulad Ali was kept back and not produced in the Court of Session. Then with regard to the story that Nagai had broken off the engagement for the marriage of his daughter with Sheo Darshan's son, this witness made a contradictory statement in the Court of Session. In the Committing Magistrate's court he had admitted that his sister's marriage had first been settled with Sheo Darshan's son and was broken off by his father. This question was also a material fact in support of the defence. I have read the statement of P. W. 1 carefully. He is a boy of 14 years. His statement before the learned Sessions Judge does not appear to me to be reliable. In the Sessions Court he made certain statements contrary to his statements in the Committing Magistrate's court in his anxiety to support the prosecution and to eliminate the proof of facts which must have been considered by the prosecution to be favourable to the accused.

In respect of the counter story it has been made probable by the witnesses for the prosecution themselves. Sheo Darshan must have been greatly annoyed with the deceased for having broken off the engagement for the marriage of his son with Sugri and that he was interested in frustrating the completion of marriage of Sugri with the dhobi of Azamgarh. The marriage party from Azamgarh was to come to the house of the deceased on the 5th May, i.e. next after the night of the assault. The marriage did really taken place in a couple of days after the date of the assault which shows that the deceased was so utterly opposed to the marriage of his daughter with the son of Sheo Darshan that he had it completed in spite of the fact that he was on the brink of death himself with the Azamgarh boy. Further, there is evidence on the record which I believe that Aulad Ali accompanied Nagai to the police station where a report was made by Nagai. He further accompanied Nagai to the hospital at Jamalpur. He was a deadly enemy of the three

appellants. There is nothing improbable in the suggestion made by the appellants that the first information report made by Nagai was made at the instance of this Aulad Ali. The statement of Nagai in the first information report implicating the appellants as the persons who assaulted him is open to great suspicion.

In my opinion the guilt of the appellants is not established by evidence, which can be said to be free from all reasonable doubt. After hearing the learned counsel for the appellants and the Assistant Government Advocate I hold that the case is not free from suspicion. I give the appellants the benefit of doubt and acquit them of the offence of which they have been convicted.

I, therefore, set aside the conviction and sentence passed upon the appellants, acquit them of the offence charged and direct that they be released at once.

All the three appeals are allowed.

Appeals allowed.

APPELLATE CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and Mr. Justice Radha Krishna Srivastava

RAJA SHATRANJE JI (CLAIMANT-APPELLANT) *v.* DEPUTY COMMISSIONER, KHERI, MANAGER, COURT OF WARDS, MAHEWA ESTATE (APPLICANT-RESPONDENT)*

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United Provinces Encumbered Estates Act (XXV of 1934), sections 4, 14 and 49—Application under section 4—Landlord in application under section 4 cannot omit property inherited from another and the debt due from that property—Decree to be passed by Special Judge—Power of special Judge to put conditions in the decree as to how and from what property money is to be realised.

When an application is made under section 4 of the Encumbered Estates Act by a landlord then a claim for all debts due

*First Civil Appeal No. 43 of 1937, against the order of Mr. Mahabir Prasad Verma, Special Judge, First Grade, Kheri, dated the 22nd January, 1937.

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