

BARATI
V.
STATE OF U. P.
March 12, 1974

[H. R. KHANNA AND V. R. KRISHNA IYER, JJ.]

Penal Code—S. 302

Code of Criminal Procedure—s. 417—Power of appellate Court to review at large evidence on which order of acquittal by trial court founded—No limitation on power—Evidence of close relations—If could be believed—Dying declaration—Effect of.

The appellant and his companions were charged with an offence under s. 302 I.P.C. for causing the death of the deceased by pouring acid on him when he was sleeping on his cot on the night of the occurrence. After recording the first information report the police sub-inspector recorded the statement of the deceased and at the dispensary the doctor recorded the statement of the deceased, in both of which he stated that the appellant poured acid over his body and caused injuries to him. The deceased succumbed to his injuries. Disbelieving the prosecution evidence the trial court acquitted him. The High Court on the other hand accepted the evidence of all the prosecution witnesses and convicted and sentenced the appellant to life imprisonment but acquitted the remaining two accused.

In appeal to this Court it was contended that the High Court should not have reversed the judgment of the trial court and the evidence relied upon by the High Court was not satisfactory.

Dismissing the appeal.

HELD : that the approach of the trial court was clearly unreasonable and the High Court was fully justified in setting aside the acquittal of the appellant. It is well settled that in an appeal under s. 417 of the Code of Criminal Procedure the Court has full power to review at large the evidence on which the order of acquittal was founded and to reach the conclusion that upon the evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless it be found expressly stated in the Code, but in exercising the power conferred by the Code before reaching its conclusion upon facts the High Court should give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any real and reasonable doubt and (4) the slowness of an appellate court in disturbing the finding of fact arrived at by a judge who had the advantage of seeing the witnesses. [576 D-F]

In the instant case there was no doubt that the deceased died as a result of acid burns. There was no cogent reason to disbelieve the evidence of the prosecution witnesses. The trial court was wrong in rejecting evidence of these witnesses on the ground that they were related to the deceased. Close relatives of the deceased would normally be most reluctant to spare the real assailant and falsely mention the name of another person as the one responsible for causing injuries to the deceased. The deceased would not spare his real assailant and falsely mention the name of the appellant as one who poured acid over his body. There was no reason to discard the dying declaration made by the appellant to the police sub-inspector. The trial Court was wrong in rejecting the dying declaration to the police (F.I.R.) on the ground that the deceased had stated to the doctor that he had become unconscious after the occurrence. There was nothing in the statement recorded by the doctor to indicate that the deceased remained unconscious for a long time and as such was not in position to lodge the F.I.R. The fact that the language used in the dying declaration made to the doctor was rather chaste would not go to show that the said statement could not have been made by the deceased. As to the language used in the dying declaration there is nothing abnormal or unusual in the same person using colloquial language while talking to one person and using refined language while talking to another person. [574 E-F ; 575D; 576A]

A CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 226 of 1970.

Appeal by special leave from the judgment and order dated the 14th April, 1970, of the Allahabad High Court (Lucknow Bench) at Lucknow in Criminal appeal no. 260 of 1968.

B *A. N. Mulla* and *O. N. Mohindroo*, for the appellant.

O. P. Rana, for the respondent.

The Judgment of the Court was delivered by

C KHANNA, J. Barati (26) was tried in the court of Sessions Judge Sitapur for an offence under section 302 Indian Penal Code for causing the death of Lekhai (45). Prabhu (24) and Ram Lal (24) were also tried along with Barati for offence under section 302 read with section 109 Indian Penal Code for having abetted the commission of the offence of murder. Learned Sessions Judge acquitted all the three accused. On appeal filed by the State the Allahabad High Court convicted Barati under section 302 Indian Penal Code and sentenced him to undergo imprisonment for life. The appeal against Prabhu and Ram Lal was dismissed. Barati then came up in appeal to this Court by special leave.

D The prosecution case is that the relations between Lekhai deceased and his younger brother Pancham (PW 3) on the one side and Barati accused on the other were strained. All three of them belong to village Nasirapur in district Sitapur. Dispute had been going on between them regarding the construction of a wall. About a couple of months before the present occurrence, Barati effected an opening in the western wall of his house which gave rise to an apprehension that he intended to encroach upon the land belonging to Lekhai and Pancham. Pancham made complaint dated May 27, 1967 to the Judicial Panchayat in that connection. The said complaint was still pending when the present occurrence took place. About three days prior to the present occurrence Barati and Prabhu accused after arming themselves with lathis went to the door of Lekhai and threatened to assault him. Mainku PW intervened and persuaded Barati and Prabhu to go away.

E On the evening of July 30, 1967, it is stated, Lekhai deceased after taking his meals was lying on a cot in an open space near his baithak. Lekhai's son Nagai (PW 1) and brother Pancham (PW 3) slept nearby on another cot. A lighted lantern was hanging nearby. At about 10-30 p.m. the three accused came there. On hearing some sound, Lekhai opened his eyes. Lekhai saw the three accused standing near the cot. Ram Lal accused is the brother-in-law of Barati accused. At the instigation of Ram Lal and Prabhu, it is stated, Barati accused, who was holding a bottle, poured acid over Lekhai. Lekhai cried aloud and shouted that he was being killed. On hearing the cries of Lekhai, his son Nagai and brother Pancham got up from their cot and saw the three accused standing there. Barati accused was holding a bottle in his hand. Nagai and Pancham too raised alarm whereupon

Bhallu (PW 2) and Jeorakhan (PW 4), whose houses are nearby, also arrived there with lighted torches and lathis in their hands. On seeing them, the three accused ran into the house of Barati and closed the door from inside. Nagai and others chased the accused and knocked at the door of the house but the accused did not open the door. Nagai, Pancham, Bhallu and Jeorakhan were told by Lekhai that Barati accused had poured acid over him. Badri Pradhan (PW 6) also came there and on his enquiry he too was told by Lekhai that Barati accused had poured acid over him. Nagai, Pancham, Bhallu, Jeorakhan and Badri Pradhan PWs saw acid present all over the body of Lekhai deceased. His clothes too were stained with acid. At the suggestion of Badri, Lekhai was then taken in a bullock cart by Nagai and Pancham PWs to police station Sandhana at a distance of two miles from the place of occurrence. Report Ka 1 was lodged at the police station at 2.30 a.m. by Lekhai. In that report Lekhai stated that Barati accused had poured acid over his body. The names of Nagai, Pancham, Bhallu and Jeorakhan were also mentioned in the first information report and it was stated that they had seen the accused present near his cot when Lekhai had raised alarm. The motive for the assault, as given earlier, was also given.

After recording the first information report, Sub Inspector Asrarul Haq (PW 18) recorded statement Ka 22 of Lekhai. In that statement Lekhai reiterated what he had stated in the first information report. The Sub Inspector thereafter recorded the statements of Nagai and Bhallu PWs. Lekhai was then sent to Misrikh dispensary at a distance of about 12 miles from the place of occurrence. The party arrived at the dispensary at about 3 p.m. on July 31, 1967. Soon thereafter Dr. Bisht (PW 5) recorded statement Ka 11 at 3 p.m. of Lekhai deceased. Lekhai was at that time in a fit condition to make statement. In that statement also Lekhai stated that Barati accused had poured acid over his body and as such had caused him injuries. The injuries of Lekhai were examined by Dr. Bisht at 3.15 p.m.

As the condition of Lekhai was serious, Dr. Bisht referred the case of Lekhai to District Hospital Sitapur. Lekhai was then taken to the District Hospital Sitapur. The party arrived in the hospital at about 4.45 p.m. the same day but about an hour thereafter at 5.45 p.m. Lekhai succumbed to the injuries. Post mortem examination on the body of Lekhai was performed by Dr. N. Verma on the following day, i.e. August 1, 1967, at 4 p.m.

Barati accused absconded after the occurrence. Proceedings under sections, 87 and 88 of the Code of Criminal Procedure were initiated against him. Barati surrendered in court on August 17, 1967. He was thereafter put under arrest.

At the trial the plea of Barati accused, with whom we are concerned was denial simpliciter. No evidence was produced in defence.

The trial court did not place reliance upon the evidence of Nagai, Pancham, Bhallu and Jeorakhan PWs. The reason which weighed

A with the trial court was that the witnesses were related to the deceased. The evidence with regard to the dying declarations of the deceased was not accepted by the trial court. The deceased, in the opinion of the trial court, became unconscious and as such was not in a position to lodge first information report Ka 1 or to make statement Ka 22. The trial court also rejected dying declaration Ka 11 recorded by B Dr. Bisht as it found the language of the same to be chaste and the same, in the opinion of the trial court, was not expected of a rustic living in a village. In the result the accused were acquitted.

C On appeal the learned Judges of the High Court accepted the evidence of Nagai, Pancham, Bhallu and Jeorakhan PWs as well as the evidence about the dying declarations made by the deceased. The High Court also took note of the fact that Barati accused had a motive to assault the deceased and that when witnesses knocked at his door, he instead of professing his innocence, did not open the door. Reference was also made to the fact that Barati accused had absconded after the occurrence. In the result the appeal against Barati accused was accepted, and he was convicted and sentenced as above. So far as Ram Lal and Prabhu accused were concerned, the D High Court gave them the benefit of doubt and as such acquitted them.

E In appeal before us Mr. Mulla on behalf of the appellant has urged that the High Court should not have reversed the judgment of acquittal of the trial court in respect of the appellant. According to the learned counsel, the evidence relied upon by the High Court is not satisfactory and as such the conviction of the appellant cannot be based upon it. In reply Mr. Rana has canvassed for the correctness of the view of the High Court.

F It cannot be disputed that acid was poured on Lekhai deceased on the night of July 30, 1967 as a result of which he died. Dr. Bisht, who examined Lekhai deceased on July 31, 1967 at 3-15 p.m., found the following injuries on his person :

"Burnt area of black colour on the left side of the face, on both sides of the neck, on the front part of the whole chest, on the right arm, right fore-arm, and back part of right palm on the front and back part of both shoulders."

G Dr. Bisht also found black marks caused by running down of fluid on the front and outer part of abdomen and on the vertebral column. Burnt areas of black colour were found by the doctor on the front and inner part of right thigh, inner and upper part of right leg and inner part of the left thigh in the middle. The injuries, in the opinion of the doctor, were grievous and were caused by acid in liquid form. The injuries were about 12 to 24 hours old.

H Lekhai died at 5-45 p.m. on July 31, 1967. Dr N. Verma who performed the post mortem examination on the body of Lekhai on August 1, 1967 at 4 p.m. found the following injuries on the body :

"1. Corrosive burns area. There were marks of acid, on the left side of the face, in front and both sides of the neck, in front of the chest and in front, up and back side of the shoulders ; upper side and in front of the right arm and in front and in several places of the other arm. In front and outer side of right thigh and in front inside of left shoulder, in front and down part of the right leg and both sides of the back. The marks on account of pouring of acid existed on the left side of the face, and also existed on both sides of the chest, abdomen and shoulders, the inner part of the skin and flesh of front of the chest, neck, side and several places became discoloured by the action of acid. Injuries were on account of corrosion burns which were upto III, IV, V degree."

On internal inspection the brain and thin skin cover were found to be congested. The same was the condition of the lungs, larynx, trachea and bones. The heart was full of blood, while the stomach was empty. Death, in the opinion of the doctor, was due to shock as a result of the pouring of acid. The injuries were sufficient to cause death in the ordinary course of nature.

The case of the prosecution is that it was Barati accused who poured acid over Lekhai deceased as a result of which Lekhai died. In support of this allegation, the prosecution has relied, in the first instance, upon the four dying declarations of Lekhai deceased. The first dying declaration of the deceased was the one made by him to Nagai, Pancham, Bhallu and Jeorakhan immediately after the occurrence. It is in the evidence of these witnesses that they were told immediately after the occurrence that it was Barati accused who had poured acid over him. There appears to be no cogent reason to disbelieve the above evidence of the witnesses. The trial court, in our opinion, was wholly in error in rejecting the evidence of these witnesses on the ground that they were related to the deceased. Close relatives of the deceased would normally be most reluctant to spare the real assailant and falsely mention the name of another person as the one responsible for causing injuries to the deceased. Lekhai deceased also told Badri Pradhan (PW 6) who arrived at the place of occurrence on hearing alarm that Barati accused had poured acid over him. No cogent ground has been shown as to why the above evidence of Badri Pradhan be not accepted. All that was suggested on behalf of the accused was that Badri was inimical to Prabhu accused. If that was so, no reason has been shown as to why Badri should attribute the major part in the assault on the deceased to Barati accused and not to Prabhu.

It is also plain that Lekhai deceased must have seen as to who was the person who poured acid over his body. The moment the acid first came in contact with his body, the immediate reaction of Lekhai, as of any other person, would be to see as to who was responsible for all that. Even if the assailant took only a few seconds to pour acid over the body of Lekhai, the latter would not have failed to fix the identity of the assailant during that short time. It is significant that Barati was no stranger to Lekhai. They were neighbours and were well known to each other. It is, in our opinion, most difficult

A to believe that Lekhai would spare his real assailant and falsely mention the name of Barati as one who had poured acid over his body.

B Apart from the oral dying declarations made by the deceased to Nagai, Pañcham, Bhallu, Jeorakhan and Badri Pradhan PWs, we have the evidence of Sub Inspector Asrarul Haq that the deceased lodged report Ka 1 at the police station at 2.30 a.m. when the deceased was brought there in a cart. The deceased stated in that report that Barati accused had poured acid over him and thus caused him injuries. Sub-Inspector, Asrarul Haq thereafter recorded statement Ka 22 of Lekhai, deceased. In that statement also the deceased reiterated that it was Barati accused who had poured acid over him and thus caused him injuries. We see no particular reason to disbelieve the evidence adduced by the prosecution regarding the dying declaration of Lekhai deceased contained in report Ka 1 and statement Ka 22. The trial court rejected the above evidence because it was of the view that Lekhai deceased, as mentioned by him in dying declaration Ka 11 made to Dr. Bisht, had become unconscious after the occurrence. There was, however, nothing in that statement to indicate that Lekhai remained unconscious for a long time and as such was not in a position to lodge the first information report at the police station or make statement Ka 22 to Sub Inspector Asrarul Haq. The view taken by the trial court in rejecting the above evidence, in our opinion, was clearly erroneous.

E Another dying declaration upon which prosecution has placed reliance was Ka 11 recorded by Dr. Bisht in Misrikh dispensary. According to Dr. Bisht, Lekhai was in possession of his senses when he made statement Ka 11. Dr. Bisht is a wholly disinterested and respectable witness and there appears no reason as to why his statement regarding the dying declaration Ka 11 be not accepted. Dying declaration Ka 11 is a brief document consisting of about 9 or 10 lines. The statement incorporated in dying declaration Ka 11 is very simple and relates to the pouring of acid by Barati accused on Lekhai deceased. The fact that the language used in it is rather chaste would not go to show that the said statement could not have been made by Lekhai deceased. The statement of Lekhai in Ex. Ka 11 that Barati accused had poured the liquid from a bottle on him clearly establishes the guilt of Barati accused.

G Reference was made on behalf of the accused to the fact that statement Ka 11 was sent by Dr. Bisht to Additional District Magistrate not immediately after recording that statement but on the third day. According to Dr. Bisht, the delay took place because of rush of work. No adverse inference, in our opinion, can be drawn from the fact that the dying declaration was sent by Dr. Bisht on the third day after recording the same. The dying declaration bears the thumb impression of Lekhai deceased. Lekhai was sent from Misrikh dispensary soon after the dying declaration was recorded and his injuries were examined. There could be no possibility of any such dying declaration being prepared subsequently.

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Mr. Mulla has pointed out that the language used in dying declaration Ka11 is chaste while that used in report Ka1 as well as in statement Ka 22 has some words which are spoken by villagers. This fact, in our opinion, is not of much significance because there is nothing abnormal or unusual in the same person using colloquial language while talking to one person and using refined language while talking to another person.

Apart from the dying declarations of the deceased, we have the evidence of Nagai, Pancham, Bhallu and Jeorakhan PWs that they saw Barati accused with a bottle in his hand near the cot of the deceased when those witnesses got up on hearing alarm. The High Court accepted the evidence of these witnesses and we see no particular reason to take a different view. As mentioned earlier, the reason given by the trial court in rejecting the evidence of these witnesses was wholly erroneous.

It is well settled that the High Court in an appeal under section 417 of the Code of Criminal Procedure has full power to review at large the evidence on which the order of acquittal was founded and to reach the conclusion that upon the evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless it be found expressly stated in the Code, but in exercising the power conferred by the Code and before reaching its conclusion upon fact the High Court should give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any real and reasonable doubt and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. Keeping the above principles in view as well as the fact that the approach of the trial court was clearly unreasonable, the High Court, in our opinion, was fully justified in setting aside the acquittal of Barati accused. There is, in our opinion, no force in the appeal which fails and is dismissed.

P.B.R.

Appeal dismissed.