Dharma Rama Bhagare vs The State Of Maharashtra on 13 December, 1972

Equivalent citations: 1973 AIR 476, 1973 SCR (3) 92, AIR 1973 SUPREME COURT 476, (1973) 1 SCC 537, 1974 2 SCJ 349, 1973 SCC(CRI) 421, 1973 3 SCR 92, 1974 MADLJ(CRI) 549

Author: A. Alagiriswami

Bench: A. Alagiriswami

PETITIONER:
DHARMA RAMA BHAGARE

Vs.

RESPONDENT:
THE STATE OF MAHARASHTRA

DATE OF JUDGMENT13/12/1972

BENCH:
DUA, I.D.
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DUA, I.D.
ALAGIRISWAMI, A.
VAIDYIALINGAM, C.A.

CITATION:
1973 AIR 476 1973 SCR (3) 92
1973 SCC (1) 537

ACT:
Criminal Trial-Evidence-Alleged discrepancy between medical evidence and testimony of eye-witnesses whether justifies acquittal F.I.R. whether can be used to contradict statements of witnesses other than the marker thereof-Sentence of death-No leniency when only reason for killing is difference of religion.

HEADNOTE:
The appellant v.-as convicted by the Sessions Judge of offences under ss. 148,323 and 302 I.P.C. The High Court maintained his conviction and confirmed the sentence to death. in appeal by special leave to this Court it was contended that (i) the evidence of the eye-witnesses went

against the medical evidence and thereof the former was wrongly relied on by the courts below; (ii) the evidence of the three eye-witnesses on which the conviction of the appellant was based was contradicted by the F.I.R. lodged by S, one of the victims of the incident and therefore should not have been relied on; and (iii) the sentence of death passed against the appellant was excessive.

Dismissing the appeal,

HELD:(i) The fact remained that an arrow was actually found ,underneath A's dead body and according to the doctor the injury on the ,deceased could be caused by that arrow. The mere fact, therefore that in the opinion of the doctor the arrow with the hook, unless skillfully pulled out of the wound was likely to cause more damage was not a sufficiently strong factor to reject the testimony of the three eye-witnesses believed by the courts below and about whose trustworthiness there could 'be no reasonable doubt.

(ii)The F.I.R. could only discredit the testimony of S whose evidence had not been relied upon to support the appellant's conviction. The F.I.R. could by no means be utilised for contradicting or discrediting the other witnesses who obviously could not have any desire to spare the real culprit and to falsely implicate the appellant. The evidence of the eye-witnewes believed by the two courts appeared to be free from any serious infirmity justifying its rejection. The case was obviously not one in which any reasonable doubt could be cast on the testimony of the eye-witnesses on the mere ground that S who apparently in his attempt to save himself from the fierce indiscriminate assault by the assailants was not able carefully to see and remember as to in what manner and 'by what weapon his parents and eldest brother had been killed.

(iii)The relevant considerations in determining the sentence, broadly stated, include the Motive for, and the magnitude of, the offence and the manner of its commission. In this case the victims of the assault had given no offence to the appellant or his associates. They were actually runni
ng in panic on seeing the mob, to save themselves.

The commission of offences motivated only by the fact that the victim professes a different religious faith could not be treated with leniency.

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JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 281 of 1971.

Appeal by special leave from the Judgment and order dated May 18, 1971 of the Bombay High Court in Cr. A. No. 262 of 1971 and confirmation case No. 57of 1971.

S. K. Dholakia and R.C. Bhatia, for the appellant. H. R. Khanna and B. D. Sharma, for the respondent. DUA, J. The appellant in this appeal by special leave (accused no. 1 in the trial court) was convicted by the Second Additional Sessions Judge of Thana of offences under ss. 148, 323 and 302, I.P.C. and was sentenced to death under S. 302 and to various terms of rigorous imprisonment under ss. 148 and 323 of the said Code. The High Court maintained his conviction and confirmed the sentence of death. He has now appealed to this Court and Shri Dholakia, learned counsel appearing in support of this appeal, has addressed lengthy arguments challenging both the conviction and the sentence.

This case is an off-shoot of the unfortunate communal riots which occurred on May 7, 1970 in the town of Bhiwandi in Thana District in the State of Maharashtra. Though the trouble originally-started in the town of Bhiwandi it spread to the neighboring towns and villages. In the Thakurpada of Tansa village there lived one Abdul Khalil aged about 55 years along with his family members. This was the only Muslim family in Thakurpada. He and his wife Sahebi had ten children. Their names and ages in the order of seniority are : Shaukat (son) about '2'3 years, Shamsuddin (son, who has appeared as P.W. 1) about 19 years, Kasam (son) about 17, Hanif (son) about 15, Jubeda (daughter) about 13, Nizam (son) about 11, Fatma (daughter) about 9, Hamshera (daughter) about 4, Salim (son) about 3 and Nazar (son about 4 or 5 months). Abdul Khalil, Shaukat and Shamsuddin, all three used to work in Nevigation Company at Mohilla about 2- 21 miles away from Tansa. Abdul Khalil was a truck driver and Shaukat, a clearner. As communal trouble spread to other places in the district, some danger to the Muslim families in Tans a-'village was also apprehended. In that village there were perhaps about 5 or 6 Muslim families. On the outskirts of this village there is the great Tansa lake which supplies water to Bombay city. Mr. Khatkhate, a Hydraulic Engineer is in charge of that lake. He has an office on the site with several employees of the Municipal Corporation of Bombay working under him living on the site. Mr. Khatkhate met Abdul Khalil on May 12, 1970 and warned him that there was a likelihood that he and the members of his family might be attacked and that they should leave Tansa village and go to a safer place. As a result of this warning, Abdul Khalil and the members of his family abandoned their home and left Tansa village at about 6 p.m. on May 12, 1970. They went into the forest area surrounding the great Tansa lake and encamped on a hilock known as Maholi hillock about 2 1/2 miles away from the village. They spent the night at the hillock but having run short of water in the morning they shifted at about 10 a.m. on May 13, 1970 to the Nursery area of Tansa lake which is near the water's edge. This spot was about three or four furlongs away from Tansa village. They spent most of the day there. In the evening at .about 6 or 6.30 Shamsuddin, the. second son, went a little distance away from the family members to ease himself when he saw a mob of about 30 or 35 persons armed with axes, spears and sticks coming from the side of the Tansa lake towards the place where Abdul Khalil and his family were staying. Seeing the mob approaching them Shamsuddin ran back to his parents and informed them about what he had seen. The mob was raising shouts. The members of Abdul Khalil's family feeling frieghtened started running in different directions. They roughly formed themselves into three groups. One group consisted of Kasam, Hanif, Nizam, Salim and Hashma, the other consisted of' Jubeda, Fatma and their mother Sahebi who was also carrying in her arms the baby Nazir and the third group which was the last to leave the spot consisted of Khalil and Shaukat. As these two persons were the last to leave the spot the mob had in the meantime come close to them. They thus became the first target ,of the attack by the mob. The appellant Dharina Rama

Bhagare, who was armed with a bow and arrows shot an arrow at Khalil which pierced him in the back. Khalil fell down and was surrounded by other assailants, who started belabouring him. Abdul Khalil's eldest son Shaukat seeing his father being attacked went to rescue him but he had hardly gone a few paces when another arrow discharged by the appellant struck him at his back near his right shoulder. Shaukat also fell down as a result of the injury caused by the arrow about two or three paces away from his father. He was also assaulted by some members of the mob., On seeing her husband and her eldest son being thus assaulted Sahebi raised alarm but she was also attacked by the appellant who shot the third arrow at her. This struck her on the left side above the waist with the 'result that she also fell down with her infant child in her arms. She died instantaneously. Some of the other members of Khalil's family hid themselves behind the trees or Karvandi bushes round about the spot whereas some of them were still running away to save themselves. Jubeda, the young daughter on seeing her father, mother and brother being shot at with arrows, shouted. This apparently annoyed the appellant who picked up a stone and flung it at her, thereby causing an injury on hear head. Budhya, one of the accused, also struck a blow at her with an iron bar thereby injuring her right hand. Shamsuddin who was hiding himself behind a tree was noticed by some of the accused persons. Budhya accused ran towards him and assaulted him with the butt end of-an-axe. Some of the other accused persons also assaulted him with the result that Shamsuddin lost consciousness. Thereafter the assailants left the scene, of occurrence and went away. As a result of this occurrence three members of this family died on the spot whereas two members suffered injuries. After regaining consciousness Shamsuddin and the surviving members of the family seeing their parents and eldest brother dead, were so terrified that they left the dead bodies at the scene of the occurrence and picking up their belongings proceeded on foot towards Shahpur town in the Taluk headquarters where one Gafoor, a brother-in-law of Shamsuddin lived. Sending Kasam, Hanif and Nazir to the house of Gafoor, Shamsuddin himself along with others went to the police station. At the police Station there was only a head constable by name Bendhari (P.W. 4) who found Shamsuddin not in a fit condition to make a statement. Shamsuddin, who had sustained many injuries, was soaked in blood. The headconstable, therefore, after making an entry to this effect in the Station Dairy, sent Shamsuddin and Jubeda to Shahpur dispensary for treatment. At about 10 O'clock in the morning of May 14, 1970 the police Sub- Inspector in charge of the police station, Dattatreya Potdar (P. W. 13), came to the police station and on being apprised of Shamsuddin and Jubeda having gone to Shahpur for treatment he sent for Shamsuddin from the dispensary and recorded the first information report, Ex. 4. After registering the offence he took up investigation. He sent for Kasam from Gafoor's house and proceeded with him to the scene of the occurrence, reaching there at about 2 p.m. They remained there till about 5 p.m. The Sub-Inspector prepared panchanamas of the dead bodies and of the scene of the offence. The scene of the offence was about 400 ft. away on the southern side of Tansa lake in the area known as Nursery. Underneath the dead body of Abdul Khalil was found an arrow which had blood-stains on it. The exact words of the panchanama relating ,to the recovery of this arrow are :

> "There is seen an arrow and a bow pressed in the stomach between both the legs of the deceased. On taking the arrow out it is found that its length is 5" and is of iron". On examination by the Chemical Analyser the stains on this arrow were found to be of human blood. Thereafter the three dead bodies were sent through constable Mahadik to the Medical Officer at Shahpur for postmortem examination. After

proceeding to Tansa village the Sub-Inspector arrested the appellant along with eight other persons at about 8 p.m. They were accused nos. 1 to 9 in the trail court. The following morning, that is, May 15, 1970 the P.S.I. recorded the statements of Kassam and Jubeda. Hanif was also called but as he was crying all the time he was not able to make any statement. On May 16, 1970 the appellant made a statement leading to the recovery of a bow and four arrows from a spot in Karvandi shrubs about 85 paces away from his house. The recovered bow and four arrows were exhibited as 11, 11a, 12a, 12c and 12d. These articles were hidden under dry leaves. One of the arrows had, blood gains on it but on examination the stains being disintegrated it could not be said if they were of human blood. The statement of Hanif was recorded by Vishwanath, Police Inspector in July, 1970 after he had taken over the investigation.

The Additional Sessions Judge, Thana, who tried the case relied on the evidence of Kasam (P.W. 2), Jubeda (P.W. 3) and Hanif (P.W. 5). These witnesses, according to the trail court, had not displayed any tendency to introduce falsehood in their statement though it felt that the evidence of Hanif (P.W. 5) should be read with a certain degree of care and caution because of his statement having been. recorded by the investigating authorities more than two months after the occurrence. For accepting Hanif's evidence, therefore, the trail court required corroboration. With respect to the evidence of Shamsuddin (P.W. 1), however, the trail court felt that it was not safe to rely on his testimony because his statement in court was at variance with the statement in the information lodged by him with the police. On the basis of the testimony of P.Ws. 2, 3 and 5 the trail court came to the conclusion that the appellant was definitely present at the scene of occurrence with bow and arrows and was a member of the unlawful assembly and further that he had shot the arrows at Abdul Khalil, his eldest son Shaukat and his wife Sahebi, the three deceased victims of the unfortunate occurrence. In that court's opinion the three witnesses had no reason to screen the real offenders and to falsely implicate the appellant.

The appellant (Dharma Rama Bhagare, accused no. 1 in the trial court) and Budhya Dhaklya Valvi (accused no 7 in the trial court) appealed to the High Court. It may be recalled that during the investigation one arrow had been found underneath the dead body of Khalil and four arrows were recovered at the instance of appellant. As already observed, the arrow recovered at the scene of occurrence had blood-stains on it which were on examination found to be of human origin whereas one of the four arrows recovered at the instance of the appellant was found on examination to have on it blood-stains but being disintegrated it could not be said if they were of human origin. It appears that there was some confusion in putting the exhibit marks on the arrows and the bow produced in evidence. The High Court, in the circumstances, considered it necessary to have the matter clarified by taking additional evidence. By means of an order dated April 27, 1971 the High Court required the trial court to recall the investigating officer (P.W. 13) and the two witnesses P.Ws 6 and 10 and have the matter clarified. The counsel- for the accused appearing in the High Court also expressed a desire to ask some more questions from Dr. Deshpande (P.W. 12). This

request was granted. The High Court thus disposed of the appeal and the murder reference after taking into consideration the additional evidence received under s. 428, Cr. P.C. The High Court, after appraising the evidence on the record did not see any cogent reason for not accepting the evidence of the three eye witnesses believed by the trial court. That court was also unable to find any reason why these witnesses should falsely implicate the accused persons. From the nature of the occurrence and its surrounding circumstances, in its opinion, there could not be any independent eye witnesses present and in a position to depose about the complicity of the accused persons. The locality where the occurrence had taken place being uninhabited and the only persons present being the assailants and their victims it was not possible normally to expect any independent eye witness. The recovery of a bow and four arrows received at the instance of the appellant were also held to support the prosecution version as these arrows were similar to the one recovered from the scene of the occurrence. The High Court further took into consideration the circumstance that the bow and four arrows were found concealed in a place where they are normally not kept. The appeal was accordingly dismissed.

In this Court Shri Dholakia the learned counsel appearing in support of the appeal has very strongly challenged the conclusions of the two courts below. He has advanced two principal contentions. According to him the prosecution case that three deaths were caused by arrows like the one found at the scene of occurrence conflicts with the medical testimony because the medical evidence shows that it was not possible to cause by such an arrow the injuries found on the dead persons. The learned counsel complains that neither the trail court nor the High Court examined the medical evidence from this point of view. In the second place, according to learned counsel, the conclusions of the two courts below are irrational and both the courts have not cared to attach proper importance to the first information report which was lodged by Shamsuddin who had also himself appeared as an eye witness in the case. According to learned counsel, Shamsuddin had all along been with the other members of the family with the result that the initial version given by him to 8-L63ISupCII73 the police which constituted the first information report must be considered to have been given by him after knowing all the facts from the other members of the family who claimed to have witnessed the occurrence and appeared as witnesses in court. This version as contained in the first information report must, according to the submission, be held to contradict the evidence given in court by the other eye witnesses as well. On this premise, according to Shri Dholakia, the prosecution evidence must be considered to be unacceptable and it cannot form safe basis for holding the appellant guilty of the offence charged. Indeed, the learned counsel went to the length of submitting that the appellant has been involved not as a result of the observation by the prosecution witnesses of what actually happened at the time of the unfortunate assault on the victims but as a result of calculated deliberation to falsely implicate him.

So far as the first point is concerned main reliance has been placed on the examination of Dr. Vinayak Deshpande (P.W. 12) when he was recalled pursuant to the order of the High Court dated April 27, 1971 under s. 428, Cr. P.C. We have been taken through that evidence which was recorded on May 4 and 5, 1971 along with the evidence originally recorded but we am unable to find anything in the doctor's testimony which would show that the injuries sustained by the three dead persons could not be caused by the kind of arrows recovered from the scene of occurrence and from near the appellant's house at his instance. The real argument is founded on the opinion of P.W. 12 where he states that the Injuries sustained by Abdul Khalil and injuries sustained by Sahebi could be caused by an arrow with or without a hook and that the removal of arrow with the hook from the injury would be likely to cause more damage to the abdominal wall and also to the internal organs. Both in the case of Sahebi and Abdul Khalil the doctor did not notice any injury to the abdominal wall which could have been caused while pulling out the arrow. Relying on this part of the evidence, according to Shri Dholakia, all the recovered arrows which are alleged to have caused the injuries to the deceased persons having been found out of the dead bodies should have, caused severe internal' damage expected by the doctor and since no such damage was discovered by him the injuries, as a result of which the deceased persons died, must have been caused by some weapon other than the arrows with hooks. It has been suggested that the injuries might well have been caused by someone with a spear. The appellant, it has been emphasised, is not stated to have used a spear. We are wholly unable to sustain this sub. mission on the existing record. The doctor also explained in his evidence on which reliance is placed that if the arrow with a hook is removed skilfully out of the injury then it may not cause more damage to the abdominal wall when removed out of the injury though if it is removed forcibly it may do so. It is also noteworthy that all the arrows recovered did not have hooks on them. The circumstances in which and the person by whom the arrow was removed from the body of Abdul Khalil is not known. When the investigating officer went there it had already come out of the wound and was lying underneath the dead body pressed near the stomach between both the legs of the deceased. Any attempt by this Court to determine whether the arrow had come out IV itself as a result of some movement of the injured body after receiving the arrow injury whether before or during Abdul Khalil's last moments of life or whether someone from amongst the party of the accused had attempted to remove it but was for some reason unable to, do so or whether the arrow had come out of the body in some other way, would be mere speculation and it would be unfruitful to hazard a guess. We are not unmindful of the fact that the doctor has stated in his additional evidence that if the arrow with the hook is shot at from a distance with force it would not come out from the injury without being pulled out by someone and also that looking at the injuries of Abdul Khalil and Sahebi the arrows must have been shot at with force. But the fact remains that an arrow was actually found underneath Abdul Khalil's dead body and according to the doctor the injury on the deceased could be caused by that arrow. The mere fact, therefore, that in the opinion of the doctor the arrow with the hook, unless skilfully pulled out of the wound was likely to cause more

damage is, in our opinion, not a sufficiently strong factor which should persuade us on the existing record to reject the testimony of the three eye witnesses believed by the courts below and about whose trust worthiness we do not entertain any reasonable doubt. It is noteworthy that this contention was not raised either in the trail court or in the High Court. Indeed, during the cross- examination of Dr. Deshpande (P.W. 12) even when he was recalled no straight and direct question was put to him, if keeping in view the nature of the injuries on Abdul Khalil and Sahebi and the recovered arrows and assuming that the arrows causing the injury had not been taken out skilfully, he could confidently depose that the injuries in question were not possible to be caused by these arrows. It is also pertinent to point out that from the order dated April 27, 1971, it does not appear that the counsel for the appellant specifically desired to clarify this point from the doctor. The submission now forcefully advanced by Shri Dholakia appears to us to be an afterthought and in any event is clearly not supportable on the medical evidence. We are, therefore, unable to reject the testimony of the eye- witnesses merely on the medical evidence to which our attention has been drawn.

In so far as the information lodged with the police by Shamsuddin is concerned both the courts below have not considered it proper to reject the testimony of the other three eyewitnesses on the ground of variance between their statements in court and the contents of the said information. The first information report, it may be pointed out, is never treated as a substantive piece of evidence. It can only be used for "corroborating or contradicting its maker when he appears in court as a witness. Its value must always depend on the facts and circumstances of a given case. In the present case its value has not been considered to be of much significant because of the nature and circumstances of the occurrence and the extent and nature of the injuries suffered by Shamsuddin who quite naturally must have been subjected to a very severe shock. The surviving members of the family could not go back to their home even after the occurrence and felt compelled to trek the whole night on foot to find shelter in the house of Gafoor at Shahpur where they reached the following morning. In these circumstances the contents of the F.I.R. made by Shamsuddin have rightly not been given any importance by the trail court and by the High Court. The F.I.R. can only discredit the testimony of Shanisuddin whose evidence has not been relied upon for supporting_ the appellant's conviction. The F.I.R. can by no means be utilised for contradicting, or discrediting the other witnesses who obviously could not have any desire to spare the real culprit and to falsely implicate the appellant. The evidence of the eye-witnesses believed by the two courts appears to us to be free from any serious infirmity justifying its rejection. The case is obviously not one in which any reasonable doubt can be cast on the testimony of the eye-witnesses on the mere ground that Shamsuddin who apparently in his attempt to save himself from the fierce indiscriminate assault by the assailants was not able carefully to see and remember as to in what manner and by what weapon his parents and eldest brother had been killed. That they were actually killed during the occurrence in question is undisputed., Equally undisputed is the nature of injuries found on their bodies. We

are, therefore, unable to agree with Shri Dholakia that the prosecution case should be thrown out on the mere ground that in the first information report an altogether different version was given by Shamsuddin. The evidence of Shamsuddin as given in court, it may be recalled, has not been relied upon for sustaining the appellant's conviction. We accordingly feel little hesitation in agreeing with the concurrent conclusion of the trial court and the High Court that the appellant was responsible for killing the three deceased persons.

The last contention by Shri Dholakia relates to the question of sentence. According to him the present is not a case for extreme penalty. We are unable to agree. The question of sentence is a matter of judicial discretion. The relevant considerations in determining the sentence broadly stated, include the motive for, and the magnitude of, the offence and the manner of its commission. In this case the victims of the assault had given no offence to the appellant or his associates. Indeed the unarmed innocent members of this family had to leave their heath and home and were actually at the moment of the offence running in panic, on seeing the mob, to save themselves, when the three senior most members were shot with arrows from behind and killed. One of the victims was a woman with a baby in her arms. The only reason for these murders is the profession of different religious faith by the victims. According to the investigating officer, P.W. 13, Abdul Khalils residential house had also been set on fire on May 12 at 8.30 p.m. In our country where the Constitution guarantees to all individuals freedom of religious faith, though, belief and expression and where no particular religion is accorded a superior status and non subjected to hostile discrimination the commission of offences motivated only by the fact that the victim professes a different religious faith cannot be treated with leniency. They are no only destructive of our basic traditional social order founded on toleration in recognition of the dignity of the individual and of other cherished human values, but have also a tendency to mar our national solidarity. We are, therefore, wholly unable to find any cogent reason for reducing the sentences imposed by the trial court and confirmed by the High Court. The appeal accordingly fails and is dismissed.

G.C. Appeal dismissed.