

Dakhi Singh vs The State on 3 February, 1955

Equivalent citations: AIR1955ALL379, 1955CRILJ905, AIR 1955 ALLAHABAD 379

JUDGMENT

Roy, J.

1. This is an appeal by Dukhi Singh who has been convicted by the learned Temporary Civil and Sessions Judge of Allahabad under Section 302, I. P. C. and has been sentenced to death. Along with the appeal there is the usual reference by the learned I Temporary Civil and Sessions Judge for the confirmation of the sentence of death.

2. On the night between the 28th and 29th of July, 1953, a mixed train, designated as Up Train No. 375, while going from Banaras Cantt. Station to Allahabad, stopped at Handia Khas railway station at 10.59 p.m. On that train there was the Railway Protection Police consisting of Kashi Singh Havildar Guard and three constables, Chingan Ram, Deomani Singh and Dukhi Singh the appellant. Deomani got down at Katka station for taking water and he had left his rifle together with the cartridges in the compartment which was meant for the R. P. P. The train left Katka station and Deomani could not catch it, with the result that he was left behind there.

3. At Handia Khas Station Dukhi Singh noticed that a person by name Nanka, who was the servant of Karamat thekedar, was standing near a goods wagon under suspicious circumstances. Karamat thekedar held a contract for the collection of burning cinders, which he was to remove through the aid of his men from the railway track so that the sleepers on the railway track may not get burnt. There existed previous complaints of theft at Handia Khas station and there was information at the Thana that sugar bags were being tampered with from time to time at that station and in that connection one of the railway employees had been suspended. It was in that background that Dukhi Singh the appellant thought that the man whom he had found near the goods wagon was a thief. He arrested him and he took him to his compartment. In that process Rawil, the engine driver, and one fireman Ram Manohar pleaded before him that the man was not a thief but was the agent of the thekedar and he should be let off. Dukhi Singh, however, did not agree and he took him to his compartment.

The train started from Handia Khas station at 12 minutes past 11 in the night and when it had moved a few steps the arrested man jumped down from the train from its off side, namely, the left side. As soon as he escaped Dukhi Singh followed him with the rifle. Kashi Singh, the Havildar Guard, fired a shot from a Very-light Pistol which he had with him. It produced temporarily a flood of light. Dukhi Singh chased the man. The man came from the front of the engine to the right side of the train. It was alleged that Dukhi Singh also came from the same direction and demanded as to

where was the driver who had concealed the thief and he further held out that he would shoot him. Ram Manohar fireman got down from the train and was standing near the footboard of the engine. He is said to have asked Dukhi Singh as to why he would shoot the driver. It was contended that thereupon the appellant shot Ram Manohar with his rifle and Ram Manohar fell by the side of the foot-board wounded. It was further alleged that Dukhi Singh aimed the rifle at the driver and the other fireman, but meanwhile Havildar Kashi Singh came there, caught hold of the rifle and disarmed him. The Assistant Station Master and the Railway Guard meanwhile arrived. It was contended that Ram Manohar told the Guard that the R. P. P. constable had shot him and, on enquiry by the railway guard, the appellant told him that the driver had harboured the thief and had allowed him to escape and so he shot at Ram Manohar fireman.

4. The Assistant Station Master gave information to the police at police station at Handia as well as to the doctor. The Circle Inspector, who was staying at Handia police station, came along with the sub-inspector of police and some constables and he took the dying declaration of Ram Manohar at 1.15 in the night, -- Ram Manohar's condition having been taken to be serious. The Tehsildar of Handia was also informed and he too arrived a little later. After his arrival, he took down another dying declaration by Ram Manohar at 1.30 in the night. On the basis of the dying declaration taken by the Circle Inspector Sri Fida Husain, a first information report was lodged at police station Handia the same night. Ram Manohar was given first aid in the train itself and he was later on removed to the Colvin Hospital at Allahabad where he died on 29-7-1953. An inquest was held. The dead body was sent for post-mortem examination.

5. The post-mortem examination was conducted on 29-7-1953, at 4 p.m. It disclosed that he had a gun-shot wound of entry, circular in diameter $1\frac{1}{4}$ " x abdominal deep, blackened on the margin at the right side, $2\frac{1}{2}$ " above the umbilicus. There was also a lacerated wound of exit 2" x 1" x abdomen deep at the back just to the left of third and fourth lumbar vertebrae. The third and fourth lumbar vertebrae were fractured. The peritoneum was punctured. The transverse colon was also punctured at 2 places. In the opinion of the doctor who conducted the post-mortem examination death was due to shock and haemorrhage on account of the injuries noted above. In his evidence in court the doctor was further of opinion that the bullet must have been fired from a distance of about 10 or 12 feet or at the most from a distance of within 40 or 50 steps.

6. The police had taken the rifle in question and it was sent to the expert for examination. The expert evidence was to the effect that it had been used at the time alleged by the prosecution. The police recovered blood-stained earth from the place of occurrence, prepared the site-plan and after the necessary inquiry challaned the accused.

7. In defence the appellant pleaded that he had been given orders by Havildar Kashi Singh to shoot at the thief and that he did so in discharge of his duty. He further contended that it was a case of pure accident that instead of hitting the thief he hit the fireman.

8. The prosecution relied upon Ex. P1 recorded by Circle Inspector Fida Husain, and also the dying declaration Ex. P32 recorded by the Tehsildar Magistrate. The prosecution further relied upon the evidence of Rawil P. W. 3 who was the driver of the train, Mohammad Nazir Khan P. W. 4 the

second fireman on the train, Chingen . Ram P. W. 19 a constable of the R. P. P. who was on the train, Bharat Misra P. W. 2 the guard of the train, Sri Fida Husain Circle Inspector P. W. 1, Sri R. N. Roy P. W. 24 the Tehsildar Magistrate and certain other formal witnesses. Kashi Singh the Havildar Guard of the R. P. P. was examined by the learned Temporary Civil and Sessions Judge under Section 540, Criminal P. C. It was in the evidence of sub-inspector Anwar Ahmad P. W. 21, who was then posted as station officer at police station Handia, that in those days there was complaint at the Thana that sugar bags were being tampered with at Handia railway station and that in that connection a railway employee was already under suspension. The anxiety on the part of the appellant to arrest a thief can, therefore, well be imagined. It is not disputed, in fact it was stated by all the principal witnesses for the prosecution, that after the train had stopped at Handia Khas station a man of the contractor was found near a goods wagon. The appellant considered that since he was there under suspicious circumstances he may be a thief. Accordingly he arrested him and while he was taking him to the compartment meant for the R. P. P. on the train, the deceased along with the driver of the train pleaded that the man was not a thief and that he should be let off. The appellant did not agree to it. The arrested man was taken inside the compartment and when the train moved from the station the man jumped down the train from the off side and tried to escape. He was followed by the appellant. Havildar Kashi Singh , fired with the Very-light pistol. The appellant chased that man. The man who had escaped came in front of the train and then turned towards the right side of the train, and so did the appellant.

9. The appellant's contention was that he had been given orders by the Havildar to shoot at the thief. That contention finds some measure of support from the statement of Kashi Singh Havilciar, which was taken by Thakur Ram Pratap Singh, the S. D. H., Handia, in a magisterial inquiry conducted by him. Kashi Singh, however, stated in the Court of Sessions that although in the magisterial inquiry he had stated that he had given orders to shoot, that statement was not a true statement and had been given by him under entreaties by the appellant. Whether that order had been given by him or not does not assume any great importance in the case, because in either event the appellant could not have been entitled to shoot dead the thief or the fireman, In this connection, it would be necessary to refer to Section 46, Criminal P. C. That section lays down that when a police officer arrests a person and such person forcibly resists the endeavour to arrest him or attempts to evade the arrest, such police officer may use all means necessary to effect the arrest; but this does not give a right to cause the death of the person unless he is accused of an offence punishable with death or transportation for life.

In the present case the man who had been arrested was suspected to be a thief. He could not have been accused of an offence punishable with death or with transportation for life. Consequently in effecting his arrest after the escape the police officer had not had the right to cause his death. Reference in this connection may also be made to Sections 76 and 79, penal Code. Section 76 provides that nothing is an offence which is done by a person who is, or who, by reason of a mistake of fact and not by reason of a mistake of law in good faith, believe himself to be bound by law to do it. Section 79 lays down that nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law in doing it. Under these two sections, it was not open to the appellant to plead justification to the extent that he was entitled to shoot the person dead, or by

reason of a mistake to shoot the fireman dead, mistaking him to be a thief,

10. Coming now to evidence, the principal Witnesses in the case are Rawil the engine driver and Mohammad Nazir Khan, the other fireman. Their statement in the court below was that after the arrest of the agent of the thekedar, Ram Manohar and the engine driver were pleading with the appellant that the person arrested was known to them and he was not a thief and that he should be let off. The appellant told them that they had no business to interfere, and he took the arrested man to the railway compartment. The train thereafter started and when it had gone a few steps, there was a shot from the Very-light pistol. The train was then stopped. Both these witnesses stated that thereafter the appellant came from the off-side and turning from the front of the engine came to the right side of the engine; that the appellant said "where is the driver, I shall shoot him"; that thereupon Ram Manohar fireman, who had got down from the engine, asked him as to why he should shoot the driver; that upon the appellant shot at Ram Manohar with his rifle from a distance of about 8 paces and Ram Manohar fell down injured. They further stated that the appellant pointed the rifle towards Rawil driver and fireman Mohammad Nazir Khan and they concealed themselves inside the engine and escaped. This part of the story did not find support from either of the two dying declarations stated above.

In the first dying declaration Ex. P.1, recorded by the Circle Inspector, it was mentioned that the constable of the R. P. P. had told the deceased that he had harboured a thief, whereupon the deceased replied that he had not done so, and that thereafter the appellant told the deceased that he will shoot him down, upon which the deceased retorted that why should he shoot him down, and then the fire was made. The version of the story given by the fireman and by the engine driver was an improvement over the story given in the dying declaration itself. In the second dying declaration Ex. P-32, recorded by the Tehsildar Magistrate, no part of that conversation had been stated. In the second dying declaration it was stated that a constable of the R. P. P. came and told the deceased "You are a thief", and he fired and the bullet hit the deceased on the abdomen. We find considerable difficulty in accepting the story told by the fireman and by the engine driver in court, when they said that it was a deliberate act on the part of the appellant when he shot at the deceased fully knowing that he was the fireman and not the alleged thief. On the contrary, in the dying declaration Ex. P-1 we find it having been stated that the servant of the thekedar was standing near the engine when the shot was made. The second dying declaration Ex. P-32 also gives an indication that when the bullet was discharged the appellant was under the impression that he was shooting at the thief.

11. On the question as to the distance from which the shot was fired, there was some divergence in the evidence. Two of the witnesses said that the shot was fired at from a distance of about 10 or 12 feet. The medical evidence was to the effect that the shooting had been done from a distance of about 10 or 12 feet. The doctor later on modified that statement and stated that it could have been from within a range of 40 or 50 steps. In the site-plan that was prepared by the investigating officer it was mentioned that the place from where the appellant fired the rifle was 40 steps away from the place where the fireman fell down dead. We do not know how this factor was incorporated in the site-plan because we do not find anything in the statement of the witnesses to confirm this. At any rate, the medical evidence gives some support to the suggestion that the firing had been done from a distance of about 40 or 50 steps at the most. If that computation of distance is accepted as correct,

the theory that the appellant aimed at the alleged thief when he was somewhere near the deceased and he missed the aim and hit the deceased cannot completely be ruled out.

12. We have next the statement of Sri Bharat Misra, the guard who was on duty on that train. Sri Bharat Misra refers to an alleged extra-judicial confession made by the appellant before him almost immediately after the occurrence. Bharat Misra stated that the appellant was standing at a distance of 4 or 5 paces from Ram Manohar; that Bharat Misra asked the appellant as to why he had shot at Ram Manohar, and the appellant told him that the driver had harboured a thief and had allowed him to run away and it was on that account that he had shot at Ram Manohar. This statement might give the impression that it was the deliberate act on the part of the appellant when he hit Ram Manohar as a measure of retaliation, thinking that Ram Manohar and the driver of the train had been instrumental in the escape of the alleged thief. That part of the story was not, however, confirmed by any of the other witnesses who were produced in the case. Moreover, that alleged extra-judicial confession was not even put to the appellant when he was examined by the learned Temporary Civil and Sessions Judge. It is of highest importance that, when a certain circumstance appearing in the prosecution evidence is to be raised against an accused and certain inferences are intended to be drawn from it, that circumstance must be specifically put to the accused in order to elicit explanation, if any, from him. In the circumstances stated above we are not inclined to attach any importance to the alleged extra-judicial confession, of which Sri Bharat Misra the guard has given evidence.

13. From a consideration of the totality of circumstances and the evidence in the case we are inclined to think that after the arrested man had escaped from the running train the appellant pursued him with a view to effect his re-arrest and, when he was not in a position to apprehend him, he fired at him and in that process he hit the deceased fireman.

14. The question then would be what offence is made out. We have given our anxious thought to this question and we are of opinion that the case would be covered by Exception 3 to Section 300 of the Indian Penal Code. That Exception provides that culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, thinks to be lawful and necessary for the due discharge of his duty as a public servant without ill-will towards the person whose death he has caused. In the present case there was no ill-will between the appellant and the deceased. The appellant was a public servant and his object was the advancement of public justice. He no doubt exceeded the powers given to him by law, and he caused the death of the fireman by doing an act which he, in good faith, believed to be lawful and necessary for the due discharge of his duty. In such circumstances the offence that was committed was culpable homicide not amounting to murder punishable under Section 304, Part II, Penal Code. Our conclusion, therefore, is that the appellant should have been convicted under Section 304, Part II, instead of under Section 302, I. P. C.

15. For reasons stated above we allow the appeal to this extent that we set aside the conviction and sentence of the appellant under Section 302 and convict him under Section 304, part II of the Indian Penal Code and we sentence him to seven years' rigorous imprisonment which we consider

adequate in the circumstances of the case. The reference is rejected.