1962

March 9

DHARAM SINGH AND OTHERS

v.

THE STATE OF UTTAR PRADESH

(J. L. KAPUR, K. C. DAS GUPTA and RAGHUBAR DAYAL, JJ.)

Criminal Trial—Conviction by Sessions Judge—Appeal to High Court—Difference between Judges hearing appeal—Reference to third Judge—Duty of third Judge—If must treat opinion of acquitting Judge as judgment of acquittal—Code of Criminal Procedure, 1898 (Act V of 1898) s. 429.

The appellants were convicted of offences under s. 302 read with s. 34 and s. 201 read with s. 34 Indian Penal Code by the Sessions Judge. On appeal to the High Court there was a difference of opinion between the two Judges who heard it and the case was referred under s. 429 Code of Criminal Procedure to a third Judge. The third Judge upheld the convictions. The appellants contended that where a case was referred under s. 429, the opinion of the Judge acquitting the accused had to be treated as a judgment of acquittal and that the third Judge must consider all the reasons given by the acquitting judge and his judgment should indicate the reasons for disagreeing with the opinion of the acquitting Judge. The appellants further contended that there were certain circumstances proved by the evidence on the record which showed that the eye-witnesses could not be relied upon.

Held, that there was nothing in s. 429 which required the third Judge to whom the reference was made to act as though he was sitting in appeal against acquittal. He had to consider the opinion of the two differing Judges and to give his own opinion.

Held, further (*per* Kapur and Das Gupta JJ. Dayal J. contra) that the judgment of the High Court suffered from such infirmities as placing the onus of proof of certain facts on the appellants and using of inadmissible evidence. The case was full of so many inconsistencies and improbilities and peculiarities that it made it difficult to rely upon the testimony of the eye-witnesses and to hold that the case against the appellants was established beyond reasonable doubt.

Per Dayal J. The circumstances urged by the appellant did not make out a case for interference with the findings of facts of the High Court.

1962

Dharam Singh
v.
The State of Uttar Pradesh

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 224 of 1959.

Appeal by special leave from the judgment and order dated 1959. May 5 of the Allahabad High Court in Criminal Appeal No. 1049 of 1958 and Government Appeal No. 1766 of 1958.

Jai Gopal Sethi, C. L. Sareen and *R. L. Kohli* for the Appellants.

G. C. Mathur and *C. P. Lal* for the Respondent.

1962. March 9. The Judgment of Kapur and Das Gupta, JJ. was delivered by Kapur, J. Dayal, J., delivered a separate Judgment.

Kapur J.

KAPUR, J.—The appellants and Prithviraj Singh were tried by the Sessions Judge, Hamirpur, the former for offences under s. 302 read with s. 149 and s. 201 read with s. 149 and of them some under s. 147 and others under s. 148 and the latter under s. 201 read with s. 149 of the Indian Penal Code. From amongst the accused persons Nathu Singh was acquitted and so was Prithviraj Singh but ten others were convicted under s. 302 read with s. 149 and s. 201 read with s. 149 and two of them were convicted under s. 147 and others under s. 148. The Sessions Judge sentenced the convicted persons to imprisonment for life under s. 302 read with s. 149, to three years' rigorous imprisonment under s. 201 read with s. 149, two of them to two years' rigorous imprisonment under s. 147 and others to three years' rigorous imprisonment under s. 148 but all the sentences were concurrent. Against that order the convicted persons took an appeal to the High Court at Allahabad and the State appealed against the acquittal of Nathu Singh and also applied for enhancement of sentences against the convicted persons. The High Court dismissed the appeal of the convicted persons and allowed the appeal against Nathu Singh. Thus 11 persons were convicted and sentenced to imprisonment for life

and to other concurrent sentences and they have appealed to this court by special leave.

The appellants and Prithviraj Singh are residents of village Kharela and they were on terms of enmity with the deceased Raja Ram Singh. On July 28, 1957, at about 3-30 p.m. the appellants collected in front of the house of Kali Charan appellant, two of them armed with lathis, two with *pharsas* and seven of them had spears. Dharam Singh appellant asked Raja Ram Singh as to why he had been abusing him to which the reply given by Rajaram Singh was that he was not in the habit of abusing any body at his back and if he felt like abusing any body he would do so to his face and he fixed his spear in the ground and stood there. Appellant Dharam Singh threw away the spear, rushed towards Rajaram Singh, caught hold of him by the waist and asked his ten companions to beat the enemy. Rajaram Singh was thereupon attacked with various weapons as a result or which he fell down severely injured. He was still alive when appellants Sheo Rattan Singh and Gulab Singh struck on his neck with pharsas and partially severed it. At the instance of Dharam Singh, his cart was brought by others and Prithviraj Singh also arrived at the spot. Dharam Singh asked him to go home and bring his (Dharam Singh's) gun which Prithviraj Singh did and handed over the gun and the bandolier of cartridges to Dharam Singh who loaded the gun, put the dead body of the deceased on the bullock cart and the ten accused persons then took away the dead body from the village and it is alleged that they left it in a nullah near village Jataura.

There is a police post in the village of which Head Constable Shivsewak Singh is incharge and there is also an armed guard there. At 3-45 p.m. Shyam Lal who is the brother-in-law (wife's brother) of Rajaram Singh made a report at the police

1962

Dharam Singh
v.
The State of Uttar Pradesh

Kapur J.

post and at 7·30 p.m. he made a report at the police station Muskara which is 8 miles away from village Kharela. This occurrence was witnessed by five persons P. W. Babu Singh. P. W. Shivnath Singh, P. W. Ram Narain, P. W. Mulain Singh and P. W. Brij Rani. While the corpse was being taken in the bullock cart three witnesses deposed to having seen it being carried in the cart. They are Ram Nath P. W. 21, Tijiwa P. W. 22 and Jurkhan P. W. 23.

In the High Court the appeal was heared in the first instance by Cak and Verma JJ. There was a difference of opinion between the learned judges and the matter was referred under s. 429, Criminal Procedure Code to Desai J., who agreeing with Cak J., upheld the conviction of the ten appellants who were convicted by the Sessions Judge and set aside the acquittal of Nathu Singh. Thus 11 persons were convicted and they have appealed to this court by Special Leave.

It was contended on behalf of the appellants that under s. 429, Criminal procedure Code, where there is difierence of opinion between the judges constituting a Division Bench and the matter is referred to a third judge the opinion of the Judge acquiting the accused has to be treated in the same manner as the judgment of acquittal by the trial court and even though it may not be necessary to find compelling reasons for disagreeing with the opinion of the acquiting judge it is necessary that the judgment should show that all the findings and the reasons given in the opinion of the acquitting judge are mentioned in the opinion of the third judge and the judgment should indicate the reasons for disagreeing with the opinion of the acquitting Judge. We can see no warrant for this contention. Section 429 of the Criminal Procedure Code Provides:

"When the Judges composing the Court of appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion".

All it says is that the opinion of the two judges who disagree shall be laid before another judge who after giving such hearing, if any, as he thinks fit, shall deliver his opinion and the judgment or order should be in accordance with such opinion. Now it is obvious that when the opinions of the two Judges are placed before a third Judge he would consider those two opinions and give his own opinion and the judgment has to follow the opinion of the third judge. Consequently on that opinion is based the judgment of the court. For all practical purposes the third Judge must consider the opinions of his two colleagues and then give his own opinion but to equate the requirements with appeals against acquittals is not justified by provisions of s. 429 or by principle or precedent.

Desai J., was of the opinion that the eye witnesses had seen the occurrence and their evidence must be accepted but there are certain circumstances proved by the evidence on the record which when considered materially affect the force of the finding in regard to oral evidence and which have to be considered in order to adjudicate on the correctness or otherwise of the prosecution case. The first point is whether the murder was committed in the village as is submitted by the prosecution? According to the prosecution the murder was committed in the village at 3-30 p.m. in the month of July in broad daylight on a public road and the number of injuries caused to Rajaram Singh are such that there must

1962

Dharam Singh
v.
The State of Uttar Pradesh

Kapur J.

have been a fair amount of blood spilt at the place. According to the prosecution evidence after the murder was committed Dharam Singh sent for his bullock cart which must necessarily have taken a little time. Meanwhile Babu Singh P.W. went and informed Shyam Lal who went to make a report at the police post in the village. It is stated to be about 4 furlongs away. It is contended by the appellants that if the murder had taken place as stated and there was an armed guard in the village, it would have been difficult for the appellants to have sent for the cart, to put the dead body on it and take it out of the village and that within the time between the commission of the murder and the time of the making of Report at the police post; that there is a considerable doubt about the occurrence having taken place in the village because no blood was found at the place of the murder; at least no evidence has been produced to show that there was any blood there. On behalf of the prosecution it was submitted that the evidence discloses that after the murder the blood was washed away by throwing a good deal of water and plastering the place and thus no blood was found when the place was visited by the investigating Sub-Inspector. It was also submitted that some blood was found on the wall of the chabutra in front of the house of the appellant Kali Charan which was collected in a small tin and was sent to the Chemical Examiner. It may here be pointed out that when the dead body was taken to the place where it was found 6-1/2 miles away from the place of occurrence the neck was cut and taken away and only the headless body was found there. That place was in the dry bed of a nullah. According to the prosecution witness Ram Avtar there was plenty of blood there but P. W. Raziuddin stated that blood was found in drops lying in adjacent places but it was not found in heavy quantities at one place. Blood-stained earth was taken from the

wall of the chabutra of Kali Charan. Unstained earth was also taken from the same place which was also put in a small tin. Blood stained earth was also taken from the place in the bed of the nullah where the dead body was found. All these tins were sent to the Chemical Examiner. It is not quite clear what exactly was his finding but he found that the earth in two tins was blood-stained but blood has not been shown to be of human origin. It is not clearly shown as to what was the extent of the blood on the wall of the chabutra of Kali Charan. Desai J., was of the opinion that a lot of blood must have been spilt at the place where the murder was stated to have been committed but Kali Charan poured water over the spot, therefore no blood was visible at the spot and the Investigating Officer found the place wet when he examined it at night and that no explanation was given by the appellants as to how blood came to be on the wall of the chabutra. It does not appear from the examination of the appellants under s. 342 that any question was put to Kali Charan in ragard to the finding of the blood on the wall of his chabutra nor was any of the other appellants asked this question. The High Court should not have used this fact against the appellants.

Another circumstance which has been pressed at great length on behalf of the appellants is that no attempt was made to take any earth from the place and no investigation was made as to whether there was any blood at the spot or not. If a man's neck is cut and he is caused the number of injuries that the deceased had, the amount of blood spilt there must have been in a fairly large quantity and it is difficult to imagine that just by pouring water over the spot and plastering it no blood was visible and even if it was not visible no blood could be found if any effort was made. No attempt seems to have been made to take the earth from there and send it to the Chemical Examiner for the purpose

1962

Dhiram Singh
v.
The State of Uttar Pradesh

Kapur J.

of examination. Desai J., has observed that the Investigating Officer found the ground to be wet. The Investigating Officer came there at 11 p.m. on the night of occurrence which was a dark night and if he found the place to be wet it is not clear whether it was wet because of water or because of blood. It was the month of July when any water poured at 3-30 p.m. should have dried up by 11 p.m. Another point which has been pressed on behalf of the appellants is that no trail of blood was discovered from the place where the murder is alleged to have been committed to the place where the dead body was ultimately found in the dry bed of the nullah. Although the evidence is conflicting there was some amount of blood at the place where the dead body was found. The head had been completely severed and taken away. In the cart also there was some blood and a blood stained axe was also found there. Therefore if the head was cut at the place where the dead body was found and there was blood oozing out at that time it is difficult to imagine that there would not be any blood oozing all the time and there would be no trail of blood. But none has been found. It may be pointed out that there was blood on the planks of the cart on which the dead body is alleged to have been taken. According to the books on Medical Jurisprudence blood does not coagulate till after four hours. Therefore the submission of the appellants that there should have been some trail of blood from the place where the murder was committed to the place where the dead body was taken has considerable force.

The judgement of Desai, J., seems to indicate that the onus of certain matters was placed on the appellants which is unwarranted by law. For instance, the learned Judge said that the appellants were asked in the Magistrate's court about the

evidence that they had killed Rajaram Singh at 3-30 p.m. in the abadi and had then carried away his dead body in the cart of Dharam Singh, and they contented themselves by denying all the allegations and none of them had said that the deceased was not murdered in the abadi and in the day time. The learned Judge then observed:—

> "If he was not murdered in the adadi and in day time they must have heard when and where he was murdered. Their statements were not evidence governed by the Evidence Act and they could say that they had heard. Yet when they refrained from saying anything about it, it just shows that they had not heard that Raja Ram Singh was murdered elsewhere and at another time".

This, in our opinion, was an erroneous approach to the question.

At another place in his judgment the learned Judge again seems to have placed the onus on the appellants and that was concerning the ownership of the cart in which the dead body was taken. The finding of the bloodstained bullock cart was relied upon by the prosecution in support of their case. That evidence was attacked on the ground that there was no identification parade of the cart and the bullocks. The learned Judge said in regard to this matter that there was no necessity for any identification proceedings because if the Investigating Officer believed the witness who stated that the cart belonged to Dharam Singh then he was not required to cross-examine the prosecution witnesses by asking them to identify the cart and the bullocks. He then observed:—

> "Dharam Singh, Babu Singh and Prithviraj Singh appellants denied that the cart and the bullock produced were theirs but did not say to whom they belonged and how they were obtained by the police. They also did

1962

Dharam Singh
v.
The State of Uttar Pradesh

Kapur J.

not produce any evidence to rebut the evidence of the prosecution witnesses about their ownership".

In that very connection the learned Judge has also relied on the fact that the bullock cart was brought from the bara of Ram Adhin Singh and the site plan prepared by S.H.O. showed that there were signs of fresh removal of the bullock cart from the bara. Now this again is not admissible evidence because nothing shown on the plan unless deposed to by witnesses is evidence against the appellants. It was so held in *Santa Singh* v. *State of Punjab* (1) and *Tori Singh* v. *State of Uttar Pradesh* (2). There is another significant fact in regard to this cart According to prosecution witness Babu Singh, the bullock which were yoked in the cart belonged to Ram Adhin Singh when he was asked to identify he said one of them was the same but the second one was not the same which was yoked in the cart at the time when the dead body was being taken. It is an extraordinary circumstance that the bullocks which are alleged to have belonged to Ram Adhin Singh, and which were yoked to the cart carrying the dead body, which all the time remained in police custody got changed so that one of the bullocks is not the same. Another circumstance which is equally significant is the finding of the yoke of prosecution witness Tijiwa with the cart. It is stated that Tijiwa met the appellants when they were driving the cart away from the village. At the time Tijiwa was returning home bringing his employer's cart. Tijiwa's yoke was borrowed because the yoke of the cart driven by the appellants got broken and Tijiwa's yoke was found at the place where the cart was subsequently discovered. What happened to the broken yoke is not shown, how Tijiwa took his own cart back without the yoke to the village is not shown. This circum-

(1) A.I.R. 1956 S.C. 526. (2) [1962] 3 S.C.R.

stance does not seem to have received the attention of the High Court which it deserved.

The appellants have vigorously pressed before us another argument which deals with the First Information Report and investigation by the police. According to the prosecution the occurrence was at about 3-30 p.m. and an information was given at the police post at 3-45 p.m. and according to the evidence of the prosecution witness Raziuddin, the Head Constable and two constables of the armed guard proceeded to recover the dead body and follow the murderers by following the track of the cart. They left the police post of Kharela at 3-45 p.m., and from there they went to the house of the appellant Kali Charan and then they followed the track of the bullock cart. At a distance of four or five paces from the place of occurrence they met Pancham Singh who does not seem to be a witness; so what he stated to the constable is not evidence. They then followed the track of the bullock cart and found the dead body lying in the nullah about three furlongs away from the abadi of village Jataura. The dead body was headless. They left the two armed guards at the place and proceeding a little further they found the bullock cart with the two bullocks and there was no one near the bullock cart. Head Constable Shivsewak Singh had gone at 12 noon to Balatal for appearing as a witness. There are no entries in the Police Duty Register at the Police Post as to his return nor as to his going with Raziuddin and others following the track of the cart.

Leaving the armed guard at the place where the dead body was found Head Constable Shivsewak Singh went to Jataura and called Chowkidar Sumera. At about 10 or 11 in the night he sent Chowkidar Sumera to Thana Charkhari to give information and it is stated that as a result of the

1962

Dharam Singh
v.
The State of Uttar Pradesh

Kapur J.

information given by Chowkidar Sumera the Sub-Inspector in-charge of Charkhari Police Station came to the place where the dead body was found and he started the investigation on the morning of July 29, 1957. He took the dead body into possession, held the inquest report and took blood-stained earth and the cart into possession. There is no reason why the Head Constable should have sent Sumera to the police station Charkhari when the offence was committed in the village in the jurisdiction of police station Muskara.

It is next stated that the Officer-in-Charge of Muskara Police Station, Sub-Inspector Basu Deo came to village Kharela at 11 p.m. There is no entry in the Register at the Police Post showing his coming to the place of the occurrence. He has deposed that he went to the place of occurrence and noticed that outside the house "some water appeared to be lying and at places it appeared that the ground had been washed with hand and water". How in the middle of a dark night he could have seen all that has been explained and the appellants rightly challenge his very coming to the village at that time. From these circumstances the appellants submit that there is a great deal of doubt as to the time of the making of the First Information Report and the time and place of murder. We have these facts which cast a good deal of doubt as to the authenticity of the report or the investigation by the police of Muskara into the alleged occurrence.

(1) if the information was given at the police post soon after the occurrence, as is alleged, there is no reason why the police should not have reached the place and prevented the removal of the dead body which was after all being carried on a bullock cart.

(2) It is not shown by the entries of the Duty Register that the Head Constable returned from Balatal at 4 O'Clock and came back to the village

(Kharela) and then proceeded to follow the track of the bullock cart in which the dead body was alleged to have been carried.

(3) There is no reason why when the dead body was found near the nullah at about 6-30 p.m. the Head Constable should have sent the Chowkidar of Jataura to Police Station Charkhari to make a report at that place and why the investigation should have been carried on by the police of that police station and not by the police of Muskara Police Station when the latter had come to know of it about 6-30 p.m. that murder had been committed in their jurisdiction.

(4) There is no reason why the Police Sub-Inspector Kharela Police Post should go at 11 p.m. and in a most casual manner to the place of occurrence, see water lying at the place and that in the hot month of July. Why the next day he did not take any earth from that place is also a very significant question.

(5) There is total absence of blood at the place of the occurrence. It is stated that there was some blood on the wall of chabutra of Kali Charan what was the extent and nature of the blood is not shown. How far the chabutra was from the exact place of murder is not shown.

(6) There is no evidence at all that any earth was stained with human blood.

(7) There is total absence of entries in the Duty Register. Therefore the coming of Sub-Inspector Basu Deo is also doubtful. There is no indication that there was any trail of blood even for a short distance from the place of occurrence.

(8) The evidence in regard to the borrowing of the yoke from prosecution witness Tijiwa is highly suspicious in the circumstances of this case.

1962

Dharam Singh
v.
The State of Uttar Pradesh

Kapur J.

(9) Lastly we find that the approach of the learned Judge to the case is not in accordance with law in that as to two or three matters he has approached the question as if it is for the defence to disprove certain facts. For instance the failure of the defence to produce reliable evidence to contradict eye witnesses; there failure to state that the murder was not committed in the village ; there failure to say as to whom the cart belonged if it did not belong to Dharam Singh.

Desai J., was of the opinion that no blood was found by Raziuddin on the way from the abadi to the nullah and no trail of blood could be expected because the bleeding must have stopped before the cart left the abadi. On what evidence he found that bleeding must have stopped is not clear. The learned Judge also relied upon the fact that Chowkidar Sumera made a report at the police station Charkhari about certain facts which are mentioned there. Sumera is not a witness. Therefore what he stated cannot be evidence in this case.

It appears that the learned Judge also took into consideration the fact that the appellants were absconding and that they gave no explanation as to their absconding but they do not seem to have been asked any question in regard to it. In regard to the witnesses Ram Nath, Tijiwa and Jurkhan who saw the dead body being carried in the cart, the learned Judge said that he found no reason to disbelieve their testimony. At another place in the judgement the learned Judge observed that when witnesses talked about the neck of Rajaram Singh being cut they must have been tutored about it. In this view of the matter and taking other material improbabilities in the testimony of these witnesses which the learned Judge does not seem to have considered it is difficult to place any reliance on their evidence.

1962

Dharam Singh
v.
The State of Uttar Pradesh

Kapur J.

The whole case is full so many inconsistencies and improbabilities and peculiarities that it must be said that the case has not been estabilished against the appellants beyond reasonable doubt. We are opinion that the High Court's failure to consider the important circumstances disclosed by the evidence, and the error in wrongly placing onus on the accused has resulted in miscarriage of justice. The case therefore falls within the rule laid down in *Pritam Singh* v. *State* (1) and calls for our interference.

In these circumstances the conviction of the appellants must be set aside and the appeal must be allowed. The appellants are acquitted & must be released forthwith unless required in some other case.

Raghubar Dayal

RAGHUBAR DAYAL, J.—I have had the advantage of perusing the judgment prepared by my learned brother Kapur, J.

I agree with the interpretation of s. 429, Cr.P.C.

I am, however, of opinion that the circumstances urged for the appellants do not justify interference with the verdict of the High Court on questions of fact. They have all been considered by Desai J., in forming his opinion. He has relied on the statements of the eye-witnesses.

It is argued for the appellants that the circumstances tend to throw doubt on the correctness of the prosecution story that the incident took place inside the village abadi and that therefore the appellants' conviction should be set aside.

The first circumstance is that the incident took place at 3.30 p. m., information about it reached the police outpost four furlongs away at 3.45 p.m., the armed guard at the outpost then proceeded to the spot and yet it is said that the

(1) [1950] S.C.R. 453.

1962

Dharam Singh
v.
The State of Uttar Pradesh

Raghubar Dayal J.

accused could remove the dead body from the spot prior to the arrival of the armed guard. The getting of the bullock cart and the loading of the corpse would have taken sufficient time and the arrival of the armed guard could have been within that time. In this connection, it is to be noticed that Babu Singh, P. W. 1, an eye-witness, left the spot after the body had been removed on the cart. It was he who informed Shyam Lal about the incident. Thereafter, Shyam Lal left for the police outpost. Babu Singh states :

> "After the cart left I ran to the house of Raja Ram Singh. There we met Shyam Lal... I told Shyam Lal all what I witnessed. He went to the police outpost to make a report and I went home."

The first information report was lodged at the thana at 7.30 p.m. It mentions the fact of the dead body being taken away on the cart. In view of this fact it is clear that the armed guard could not have reached the spot in time to prevent the removal of the corpse.

Another fact against the circumstance urged is that the incident did not take place at 3.30 p. m., which was really the time when Babu Singh informed Shyam Lal. Shyam Lal dictated in the first information report :

> "At about 3.30 p.m., Babu Singh... came to my house and informed me as follows...".

The incident therefore must have started much earlier, say at about 3 O'clock and the body must have been removed by about 3.25 p.m.

The other circumstance urged is that no blood-stained earth was found at the spot and that therefore this throws doubt on the incident having taken place at the spot alleged. It is in the prosecution evidence that some of the accused washed the

ground where blood had fallen and plastered it. According to the Sub-Inspector, P. W. 27, blood-stained earth was taken in possession from the door of the accused Kalicharan Singh, which really means, from the front of his house. Siya Ram, P.W. 26, stated that a few places in the Chabutra where blood stains were detected were scraped and that the stains were on the walls of the Chabutra. The recovery list Ex. K-29 mentions :

> "blood stained earth was scraped from in front of the house of Sri Kali Charan, son of Bhan Singh, Thakur, and from the 'Chabutra' (platform), whereon there appeared to be some stains of blood."

Blood stained earth from the place where the dead body was recovered was also taken in possession. The two samples of earth so taken in possession were sent in different packets to the Chemical Examiner who found them stained with blood. The Serologist could not determine the nature of the blood due to disintegration. In view of this evidence, it cannot be said that no blood-stained earth was found at the alleged spot.

Further, Raziuddin, P.W. 17, who went with the armed guard to the spot stated ;

> "When at first I visited the house of Kali Charan I had noted that in front of his house there were indications of the washing of the ground at places. It appeared that somebody had removed things from that place with hands and legs by spreading water at different places."

This supports the statement of the other witnesses about the washing and plastering of the spot.

Sub-Inspector Basudeo, P.W. 27, stated that when he reached the house of Kali Charn at about 11 p.m., he noticed that outside it some water

62

Dharam Singh
v.
The State of Uttar Pradesh

Raghubar Dayal J.

appeared to be lying and at places it appeared that the ground had been washed with hand and water. It is true that the night was dark and he did not carry out the local inspection due to want of a suitable light. But these facts can hardly affect his testimony. He could not have mistaken the nature of the witness and should have been able to distinguish whether it was from water or from blood. The witness of the ground is not to be doubted even though about 8 hours had elapsed since the washing took place.

Raziuddin has deposed that there had been rain-fall two days earlier. The incident had taken place on the 28th of July. The ground could have been wet from before and fresh washing could have wetted it more. In fact, the more the spilling of blood, the more would have been the water used to wash it away.

Another circumstance urged is that no trail of blood was noticed between the village and the actual place where the dead body was recovered, a distance of over six miles. The corpse was laid on the planks of the cart. They got blood-stained. Any dropping of the blood from the cart on the track would have depended on the extent of the flow of blood and on the openings between the planks. It is not expected that blood would have fallen in a continuous stream. Some drops could have fallen down at places. They could be easily pressed upon by the accused's feet, some of whom would have been walking behind the cart. The armed guard and others who followed the cart in pursuit were more concerned with the following of the marks left by the cart than with noticing some minute drops of blood which might have fallen here and there on the track. Absence of blood on the passage, therefore, cannot discredit the prosecution case.

When the cart was produced in Court, it had one of the bullocks used at the time when the corpse was removed and another bullock substituted for the other one. Much has been made of this change in the other bullock. The Sub-Inspector has stated in his evidence.

> "I had entrusted the recovered bullocks and carts to the custody of Binda Lodhi of village Kharedi. One bullock which is white in colour could not be brought here as it is suffering from small-pox."

The questions put to the accused mentioned the allegation about the other bullock suffering from small-pox and in their replies this fact was not denied. The police was not in charge of the cart and the bullock and explanation has been given for not producing the other bullock in Court. This circumstance too cannot therefore affect the correctness of the prosecution case.

It has also been urged that the carts and bullocks found near the dead body were not put up for identification by witnesses. Desai, J., has rightly observed that when witnesses could recognize the cart and bullocks there could be no point in having the cart and bullocks formally identified before a Magistrate. Only such articles and accused are put up for a test identification as are not known to the witnesses. Those known are never put up for identification. The statements of the witnesses who recognized them are judged from other circumstances. Further, the evidence about the ownership of the cart was only by way of corroborating the statements of the prosecution witnesses. Any cart which could be available to the accused could be used for the purpose of transporting the dead body.

Tijwa, P. W. 22, stated that Arjun Singh, accused, stopped the cart about a mile from the village abadi when he was returning home from his

1962

Dharam Singh
v.
The State of Uttar Pradesh

Raghubar Dayal J.

fields and replaced the yoke of the cart with that of Tijwa's as the former had broken. It is urged that the absence of evidence with respect to what happened to the broken yoke and how the cart of Tijwa reached the village, important circumstances, had not been noticed by the High Court in its judgment. These circumstances cannot be said to be important. In fact, they were very remotely relevant to test the veracity of Tijwa. Tijwa was not cross-examined about it. He stated that the broken yoke was also taken away in the cart of Arjun Singh. It should follow that Tijwa's cart remained on the passage till its owner Mahadev Brahmin could have brought it back.

It may be mentioned that the recovery memo, Ex. K. 22, did not mention about the finding of the broken yoke in the cart. The broken yoke is said to have been tied with a towel. It might have been that the accused had removed the towel and thrown away the broken pieces. The police party had no knowledge about the broken yoke when the cart was recovered and could not therefore have looked for the broken parts. It may equally be that the broken yoke was used by Tijwa. His cart had to go a much smaller distance that the cart which took the dead body to the nala. When the accused started with the cart they expected the broken yoke to serve the purpose of driving the cart to the nala and back. It was just accident that they happened to meet Tijwa on the way and borrowed his yoke. However, I consider these matters very insignificant in assessing the correctness of the prosecution case.

Another matter severely commented upon for the appellants is the conduct of Sheo Sewak Singh, P. W. 20, Head Constable, Kharela Police Outpost, and the Investigating Officer, Basudeo, P. W. 27, mainly on account of the absence of entries in the duty register of the outpost about

Sheo Sewak Singh's return there at about 4 p.m., and about the Sub-Inspector's visit to it at about 11 p.m., on 28th July. The Sub-Inspector has stated :

> "It is not necessary to make any arrival and departure (entry) at police out-post Kharela, when I visit that post in the record of that outpost."

The statement is with reference to making an entry about his arrival and departure. He further stated:

> "I did not make any entry of my activities in the night between the 28th and 29th July 1957, in the record of police out-post at Kharela nor it was necessary to note them there."

And again:

> "Entries are made in the record at Kharela outpost about the duties allotted to the staff during duty hours."

Sheo Sewak Singh, P.W.20, deposed:

> "I do make entries in the records at the police out-post Kharela about my arrival there and also about my departure from that post. These entries are made in the general diary by way of allotment of duty."

Sheo Nandan Singh, P.W.19, Constable at that out-post, stated:

> "This (Ex.K-5) is not a general diary in which cases are registered and entered. It is a register in which duties that are allotted and the Amad and Rawangi of the police staff are noted.
>
> When the Sub-Inspector attached to Muskara comes to the police out-post at Kharela

1962

Dharam Singh
v.
The State of
Uttar Pradesh

Raghubar Dayal J.

he notes his arrival and departure in the register kept at police outpost Kharela. No entry of his arrival and departure is made in the register in the night between the 28th and 29th of July 1957."

Police officers do write their arrivals and departures in the general diary at the police station and may also be doing so at the out-post duty registers, if Sheo Nandan Singh's statement is to be preferred to the statements of the Sub-Inspector and the Head Constable. But even then such entries are usually made when the arrival of an outside police officer is in connection with some work at the out-post. A casual visit on his way to another spot may not be required to be noted. Similarly, the return of a member of the police force at the out-post would be noted when he finally returns to duty. His mere return to his quarters at the out-post may not be noted. Any way, any omission to make an entry the duty register at the out-post is not to discredit the entire prosecution evidence about the incident and the course of the investigation.

After the recovery of the dead body, Sumera, Chowkidar, was sent to Police Station Charkhari, in whose jurisdiction the dead body was found. He lodged a report there at 3 a.m., and stated in it what had taken place earlier.

Ram Autar Dixit, P.W.14, the then second officer at Thana Charkhari, went to the spot, took in possession the dead body and the cart, prepared the inquest report and took other necessary steps. Criticism is made of Sumera's being sent to Charkhari police station and of this Sub-Inspector making an investigation in connection with an offence said to have been committed in the jurisdiction of police station Muskara. The criticism is unjustified. The recovery of the corpse had to be

reported to the nearest police station and was properly made at Charkhari Police Station in whose jurisdiction also the dead body was found. It was the duty of the Sub-Inspector to proceed to the spot to prepare the inquest report and to take such other action as was necessary in the circumstances with respect to the recovery of the various articles (s. 174 Cr. P.C.). He was not questioned about his bonafides or about his jurisdiction to do what he stated to have done. The fact that Sumera was sent to report the recovery of the dead body to police station Charkhari can hardly lead to the conclusion that this was done as no incident had taken place in village Kharela as alleged by the prosecution.

Lastly, grievance is made of certain observations of Desai, J., generally to the effect that the accused had not stated something or had not led evidence to rebut the prosecution evidence on certain points. It is urged that he therefore wrongly placed on the accused the onus of proving the defence version negativing the prosecution version. I am of opinion that he made references to this as a factor supporting the conclusions he had already arrived at on the consideration of the evidence and circumstances. He did not base his findings on such conduct of the accused. He based his conclusion on more solid grounds. Some of such observations are :

(1) 'That the accused gave no explanation as to how the blood came to be on the wall of the Chabutra'. The accused were not questioned about it and therefore their omission to explain it could not go against them. However, the fact that blood was found on the wall of the platform or in the earth in front of Kali Charan's house was proved from the positive evidence on record.

1962

Dharam Singh
v.
The State of
Uttar Pradesh

Raghubar Dayal J.

(2) After Desai, J. had expressed his opinion about the reliability of the eye-witnesses, he stated :

> "Kharela is a large village and if the murder did not take place inside the abadi and at 3-30 p.m. it would not have been difficult for the appellants to produce reliable evidence to contradict the eye-witnesses, but they did not produce any evidence....None of them said that Raja Ram Singh was not murdered in the abadi and in day time. If he was not murdered in the abadi and in day time they must have heard when and where he was murdered. Their statements were not evidence governed by the Evidence Act and they could say that what they had heard."

I am of opinion that there is nothing wrong in this observation when the incident is alleged to have taken place in broad daylight in the village abadi and yet the accused did not examine any witness to establish that no such incident took place in the village. Of course, a finding that the incident did take place in the village as alleged by the prosecution could not have been based on such consideration alone and the finding to that effect has not been so based.

(3) Similarly, Desai, J., made reference to certain accused not stating as to whom the bullocks belonged and how they were obtained by the police. A finding about the ownership of the cart and bullocks is based on the evidence of Tijwa and other witnesses and not on the omission of the accused to state as to whom they belonged.

Desai, J., was certainly wrong in using a note in the site plan when the subject matter of that note was not deposed to by any witness in Court, but this error with respect to the note that there were fresh marks of a cart in the cart enclosure of Dharam Singh had no significant bearing on the case.

In connection with Sumera's Report at Police Station Charkhari, Desai, J., observed in his judgment :

> "Neither H.C. Sheo Sewak nor P.C. Raziuddin nor the armed guard had any interest in concocting a false case against the appellants on their own. Therefore, when the information was conveyed through Sumera Chaukidar that Kharela police had gone in search of the murderers, it must be accepted that information was received at the out-post at about 3-45 p.m. about the murder in the Abadi and that the out-post police went at once in search of the murderers. In other words the murder must have been committed in the Abadi and in day time as deposed by the prosecution witnesses."

Earlier, Desai, J., had said what Sumera had informed at the Police Station. He said :

> "Sumera reached the police station at 3 a.m., met the second officer and informed him that constables of police circle Muskara went to his house in Jataura and told him that Raja Ram Singh was murdered in Kharela, that the murderers carried away his corpse in a bullock-cart and they and the head-constable of the out-post followed them, that the murderers ran away after throwing the corpse into the nala of Jataura, that the head of the corpse was missing but the bullock cart had been recovered and that he was sent to convey the information at the police station."

I do not consider the evidence about Sumera's making the report and stating certain things there to be inadmissible in evidence. These are matters of record. What he dictated cannot be considered to be substantive evidence of the facts stated, when

1962

Dharam Singh
v.
The State of
Uttar Pradesh

Raghubar Dayal J.

Sumera was not examined as a witness to prove them. But what he actually dictated and the time when he dictated are facts which have been duly proved. They can be considered to determine the probability of what the direct evidence tended to establish. This is what Desai J., did when he used these facts of his making the report and making certain statements in considering that they tend to support the prosecution version. It may be noted that he had earlier considered at length the suggestion that the entire prosecution case was concocted by the police and the villagers and had given his reasons for repelling the suggestion.

Desai J., was in error to refer to the absconding of the accused as a circumstance against them as that had not been put to them when examined under s. 342, Cr. P. C. But as it did not basically affect the finding with respect to the correctness of the prosecution case, that would not justify interference with the findings of fact.

I would therefore dismiss this appeal.

BY COURT. In view of the opinion of the majority, the appeal is allowed. The appellants are acquitted and must be released forthwith unless required in some other case.