

GODHU & ANR.

v.

STATE OF RAJASTHAN

August 27, 1974

[H. R. KHANNA, Y. V. CHANDRACHUD, AND P. K. GOSWAMI, JJ.]

*Penal Code—Ss. 302 and 364—Acquittal under s. 364.**Dying declaration—One part believed and another part disbelieved—Whether whole should be rejected.*

The appellants B and G were charged with offences under ss. 302 and 364 I.P.C. but were acquitted for an offence under s. 364 IPC. The deceased had made a dying declaration that he was taken forcibly into B's *baithak* and was shot at. At the trial B stated that he had fired at the deceased in self-defence because the deceased entered his *baithak* in a drunken state with a deadly weapon in his hand and attempted to attack him. Rejecting the plea of self defence and believing one part of the dying declaration and disbelieving another, the trial Court convicted the appellants under s. 302. The High Court affirmed the conclusions of the trial court.

Dismissing the appeal of B and allowing that of G, this Court

HELD : (1) The effect of the acquittal of the accused under s. 364 IPC in the instant case would only be that for the charge of murder, the prosecution cannot rely upon the evidence that the deceased was dragged inside the *baithak* by the two accused. The prosecution would have to bring the charge of murder home to the accused independently of the allegation that the accused had forcibly taken the deceased inside the *baithak*. If, that is done there would no legal infirmity in the conviction of the accused. [911 B-D]

(2) If a part of the dying declaration has not been proved to be correct it does not necessarily result in the rejection of the whole of the dying declaration. The rejection of a part of the dying declaration would put the court on the guard and induce it to apply a rule of caution. There may be cases wherein the part of the dying declaration which is not found to be correct is so indissolubly linked with the other part of the dying declaration that it is not possible to sever the two parts. In such an event the court would be justified in rejecting the whole of the dying declaration. There may, however, be other cases wherein the two parts of the dying declaration may be severable and the correctness of one part does not depend upon the correctness of the other. In the last mentioned cases the court would not normally act upon a part of the dying declaration, the other part of which has not been found to be true, unless the part relied upon is corroborated in material particulars by the other evidence on record. If such other evidence shows that part of the dying declaration relied upon is correct and trustworthy the court can act upon that part of the dying declaration despite the fact that another part of the dying declaration has not been proved to be correct. [911 E-H]

In the instant case the part of the statement in the dying declaration that the appellant had shot him was corroborated by the statement of the appellant himself because he admitted having injured the deceased by firing at him. That part of the dying declaration is separable from the other part regarding the deceased having been forcibly taken inside the *baithak* and the truth of the former part does not depend upon the truth of the latter part. [911 H-912 B]

The case against G is not free from reasonable doubt and he is entitled to the benefit thereto. [913 A]

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 307 of 1971.

Appeal by Special Leave from the Judgment & Order dated 3rd September, 1971 of the Rajasthan High Court in D. B. Criminal Appeal No. 656 of 1970.

A. N. Mulla, Ganpat Rai and S. K. Subarwal, for the appellants.

B *Sobhagmal Jain and S. K. Jain*, for the respondent.

The Judgment of the Court was delivered by

C KHANNA, J.—Godhu (25) and Banwari (45) were convicted by learned Additional Sessions Judge Sri Ganganagar under section 302 Indian Penal Code for causing the death of Gheru (30) and were sentenced to undergo imprisonment for life. Conviction was also recorded against Godhu under section 25(1)(a) of the Arms Act and against Banwari under section 27 of that Act. Each of the two accused was sentenced for the offence under the Arms Act to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs. 100/- or in default to undergo imprisonment for a further period of one month. The sentences were ordered to run concurrently. Charge was also framed against the two accused for an offence under section 364 Indian Penal Code but they were acquitted on that count. On appeal the Rajasthan High Court affirmed the judgment of the trial court. The two accused thereafter came up in appeal to this Court by special leave.

E Godhu and Banwari accused are cousins, being sons of two sisters. The two accused and Gheru deceased belonged to village Jhamber in district Sri Ganganagar. The prosecution case is that the relations of Banwari accused with Gheru deceased were strained as there had taken place a quarrel between them about 15 days before the present occurrence. On September 21, 1969 at about 2 p.m., it is stated, Gheru deceased while returning from the fields passed in front of the house of Banwari accused. The two accused then caught hold of the arms of Gheru and forcibly took him to Banwari's baithak. Godhu was at that time armed with a single-barrel gun, while Banwari had a double-barrel gun. After taking Gheru inside the baithak, the two accused bolted the door of the baithak from inside. Gordhan (PW 1), who is elder brother of Gheru deceased, was at a distance of about 50 yards when he saw the two accused taking Gheru inside Banwari's baithak. Gordhan raised alarm and also rushed towards the baithak. Just then two gunshots were heard in quick succession from inside the baithak. Cry of Gheru too was heard that he was being killed. G Gordhan PW then rushed towards his house and narrated the incident to his mother Sardari (PW 3) and brother Udmi (PW 4). After informing Sardari and Udmi, Gordhan went to the fields to inform Sarpanch Premaram (PW 2) about the incident.

H Sardari and Udmi on being told of the incident by Gordhan went to Banwari's house and found the two accused present in the courtyard of that house armed with guns. Banwari accused then threatened Sardari and Udmi not to proceed ahead. Udmi thereupon retreated back but Sardari said that even at the risk of her life she would go to Banwari's baithak to see her son. The two accused then told Sardari

that they had made a mistake. They also requested Sardari to take away Gheru. When Sardari entered Banwari's baithak, he saw Gheru lying on a cot with injuries on his abdomen and right hand. On the query of Sardari, Gheru replied that the stomach injury had been caused by Banwari and the hand injury by Godhu with gunshots. In the meantime, Udmi, who had made a retreat, came to Banwari's baithak along with Saudagar Singh (DW 4). Udmi too asked Gheru as to who had injured him. Gheru replied that the stomach injury had been caused by Banwari and the hand injury by Godhu with guns. Udmi and Sardari then carried the cot on which the deceased was lying to their house. Saudagar Singh also accompanied them. On the way Premaram Sarpanch and Gordhan PW met them. On arrival at the house of the deceased, those carrying the cot placed it in front of the door of that house. Premaram Sarpanch then asked Gheru deceased as to who had injured him. The deceased then replied that he had been injured by the two accused by gunshots. The cot of the deceased was then placed on a cart. Sardari, Udmi and Gordhan PWs took that cart to Hanumangarh, at a distance of 8 miles from the place of occurrence. Report about the occurrence was lodged by Gordhan PW at police station Hanumangarh at 6.30 p.m. As the doctor was not available in Hanumangarh hospital, a jeep was arranged and in that jeep Sardari and Udmi took Gheru to Ganganagar. Gheru was admitted in the Ganganagar hospital the same night at 12.20 a.m.

Dr. Momanram (PW 6) examined the injuries of Gheru soon after he was admitted in the Ganganagar hospital. X-ray of the abdominal region of Gheru was then taken to find the presence of pellets. As the condition of Gheru was serious, Dr. Momanram asked Ganganagar police to arrange for the recording of his dying declaration. Dying declaration Ex. P 28 of Gheru deceased was recorded by Shri B. D. Chopra, Sub Divisional Magistrate on the morning of September 22, 1969 after Dr. S. K. Sharma (PW 7) had certified that Gheru was in a fit condition to make statement. The dying declaration was dictated by the Sub Divisional Magistrate to his clerk. Gheru admitted the dying declaration to be correct and thumb-marked it. In that dying declaration Gheru narrated the facts of the occurrence as given above.

An operation was performed for the removal of pellets from the body of Gheru on September 22, 1969 by Dr. Gehlot. Gheru succumbed to his injuries in the hospital on September 24, 1969 at 5.10 a.m.

The two accused were arrested by ASI Mahendra Singh (PW 8) on September 23, 1969. Banwari accused on interrogation by the Assistant Sub Inspector disclosed that day that he had kept his double-barrel gun along with a bag in the kitchen of his house and that he could get the same recovered. Banwari thereafter got recovered gun P-5 and a bag containing three cartridges, two of which were live cartridges and one was an empty cartridge. Licence of the gun of Banwari too was taken into possession. Godhu accused was interrogated by Sub Inspector Hanuman Dutt on September 27, 1969. Godhu then disclosed that he had buried a gun with one empty and one live cartridge in his cotton field and that he could get the same

A recovered. Godhu thereafter got recovered a single-barrel gun along with one live and one empty cartridge from his field.

B At the trial Godhu accused denied his participation in the occurrence. According to him, he heard two gunshots and thereafter went to Banwari's house. Chaitan, Banwari and Chandu were present there, while Gheru was lying wounded on a cot in Banwari's baithak. Banwari then sent Godhu to Gheru's house. Godhu brought Sardari and Udmi and they all carried Gheru on a cot to his house. A Gandasi was also carried on that cot. According further to Godhu, Gheru deceased did not utter any word at that time. Godhu also denied the recovery of any gun or cartridge at his instance

C Banwari accused gave a counter version of the occurrence. According to him, he helped the first wife of Gheru in securing maintenance allowance from him (Gheru). Gheru consequently became inimical towards Banwari. On the day of occurrence at about 2 p.m., it is stated, Banwari was lying on a cot in his baithak. His loaded gun was also lying on the cot. Just then Gheru came inside the baithak with a Gandasi in his hand. Gheru was in a drunken state at that time and started abusing Banwari. When Banwari told Gheru not to abuse, Gheru stepped forward and raised his Gandasi to attack Banwari. Banwari then took his gun and fired two shots at Gheru in self-defence. Gheru fell down and was laid on his cot by Banwari. Chaitan, Saudagar Singh DWs and Godhu accused along with others then came there and were told about the incident by Banwari. Godhu was thereafter sent to Gheru's house and he called Sardari and Udmi. Gheru was taken on the cot from Banwari's baithak to his (Gheru's) house. Jeep of one Sheonarain was then sent for and on that jeep Gheru was taken first to Hanumangarh and thereafter to Ganganagar. Banwari also went in that jeep to Hanumangarh and wanted to lodge a report but he was told by Premaram Sarpanch that he and Gordhan would lodge the report. Banwari consequently came back to his village Jhamber. As regards his gun and cartridges, Banwari stated that on the day following the occurrence he gave his gun and two empty cartridges to the police when the same were demanded by the Sub Inspector.

F Banwari also made a statement on oath in support of his version by coming into the witness box as DW 1. Sheonarain (DW 2), Chaitan (DW 3) and Saudagar Singh (DW 4) deposed that they had been given the version of the occurrence as given above by Banwari accused.

G The learned Additional Sessions Judge did not place any reliance upon the evidence of Gordhan PW that the deceased had been forcibly taken by the two accused inside the baithak of Banwari. Likewise, the trial judge rejected the prosecution evidence that the two accused had told Sardari immediately after the occurrence that they had made a mistake. The learned Judge, however, placed reliance upon the evidence regarding the deceased having made dying declarations in the presence of Sardari, Udmi, Premaram and Gordhan PWs. Reliance was also placed upon dying declaration Ex. P 28 of the deceased

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recorded by Shri Chopra, Sub Divisional Magistrate. It was, however, observed that only that part of dying declaration Ex. P 28 was worthy of credence as related to the two accused having fired at Gheru deceased. The other part of the dying declaration regarding the forcible taking of Gheru to the baithak of Banwari was not considered to be trustworthy. Evidence about the recovery of the guns and cartridges at the instance of the accused was also accepted. The version contained in the statement of Banwari that he had caused injuries to Gheru in exercise of the right of private defence was rejected. Likewise, the defence evidence was rejected. In the result the two accused were convicted and sentenced as above.

On appeal the learned Judges of the High Court substantially affirmed the conclusions of the trial judge. It was also observed that no motive for the assault on the deceased had been proved but that fact was held to be not very material.

It is the common case of the parties that Gheru deceased died as a result of injuries received by gunshots. According to Dr. Momanram who examined Gheru deceased before his death as well as performed post mortem examination on his dead body, there were 8 injuries consisting of punctured wounds and two injuries consisting of lacerated wounds on the body of Gheru. The punctured wounds were in the abdominal cavity, while the lacerated wounds were on the antero-lateral aspect of the right wrist joint and the medical side of palmer aspect of right hand. Stomach, mesentery, small intestines, large intestines and left kidney were found to be punctured at a number of places. Death was due to haemorrhage and shock resulting from gunshot injuries. The case for the prosecution is that it were the two accused who fired shots on the deceased as a result of which he died. As against that, Godhu accused has denied his participation in the occurrence, while the plea of Banwari is that it was he alone who fired both the shots on the deceased, though, according to him, he did so in exercise of the right of private defence.

We may first take the case of Banwari accused. So far as this accused is concerned, the prosecution has led evidence to show that the deceased made a series of dying declarations in the course of which he stated that Banwari accused had fired at him and thus caused him injuries. The first dying declaration was made to Sardari and the second one to Udmi. The third dying declaration was made to Premaram and the fourth one to Shri B. D. Chopra, Sub Divisional Magistrate. These witnesses have deposed about the deceased having made the dying declaration before them. Both the trial court and the High Court have accepted the evidence of these witnesses in this respect. We see no sufficient ground to interfere with the appraisalment of that evidence by the trial court and the High Court.

Mr. Mulla on behalf of the appellants has argued that no reliance should be placed upon the dying declarations of the deceased as the deceased in the course of his dying declaration Ex. P 28 stated that he had been forcibly taken inside the baithak of Banwari by the two accused.

A It is pointed out that the two accused were acquitted for the offence under section 364 Indian Penal Code and as such the part of the statement of Gheru deceased in dying declaration Ex. P 28 that he had been forcibly taken inside the baiethak of Banwari by the two accused should be held to be false. It is further urged that once a part of the dying declaration has been found to be not correct, the whole of the dying declaration should be rejected.

B We have given the matter our consideration and are of the opinion that the effect of the acquittal of the two accused for the offence under section 364 Indian Penal Code is that in arriving at the conclusion whether the accused are guilty of the offence of murder or not, we should proceed upon the assumption that the prosecution allegation that the accused had forcibly taken Gheru inside Banwari's baiethak has not been substantiated. The prosecution would have to bring the charge home to the accused independently of that allegation. If, however, the prosecution establishes the charge against the accused independently of that allegation, there would be no legal impediment or infirmity in the conviction of the accused. It needs also to be emphasised that the fact that an allegation has not been substantiated does not necessarily go to show that the allegation is false. An allegation may be correct and still it may not be substantiated at the trial. The effect of the acquittal of the accused under section 364 Indian Penal Code would only be, as already mentioned earlier, that for the charge of murder the prosecution cannot rely upon the evidence that the deceased was dragged inside Banwari's baiethak by the two accused.

E We are also unable to subscribe to the view that if a part of the dying declaration has not been proved to be correct, it must necessarily result in the rejection of the whole of the dying declaration. The rejection of a part of the dying declaration would put the court on the guard and induce it to apply a rule of caution. There may be cases wherein the part of the dying declaration which is not found to be correct is so indissolubly linked with the other part of the dying declaration that it is not possible to sever the two parts. In such an event the court would well be justified in rejecting the whole of the dying declaration. There may, however, be other cases wherein the two parts of a dying declaration may be severable and the correctness of one part does not depend upon the correctness of the other part. In the last mentioned cases the court would not normally act upon a part of the dying declaration, the other part of which has not been found to be true, unless the part relied upon is corroborated in material particulars by the other evidence on record. If such other evidence shows that part of the dying declaration relied upon is correct and trustworthy, the court can act upon that part of the dying declaration despite the fact that another part of the dying declaration has not been proved to be correct.

H So far as Banwari accused is concerned, we find that the part of the statement of Gheru deceased in his dying declarations that Banwari accused had shot at him is corroborated by the statement of Banwari himself because this accused admits having injured Gheru

deceased by firing at him. The above part of the dying declaration is separable from the other part regarding the deceased having been forcibly taken inside the baithak of Banwari and the truth of former part does not depend upon the truth of the latter part. We, therefore, find no difficulty in accepting the part of dying declaration of Gheru that Banwari had shot at him and thus caused him injuries. The plea of Banwari that he fired at the deceased in exercise of the right of private defence can plainly be not accepted. Both the trial court and the High Court have discussed the matter at great length and have concurrently come to the conclusion that the version of Banwari in this respect is without any basis. We see no cogent ground to take a different view.

Coming to the case of Godhu accused we find that there is no corroboration of the statement of Gheru deceased in his dying declaration that Godhu too had fired at him. The prosecution sought corroboration against Godhu from the evidence of Sardari and Udmi that when they arrived at the house of Banwari accused, they found Godhu and Banwari accused present in the courtyard of the house armed with guns. It seems difficult, in our view, to place much reliance upon this part of the statement of Sardari and Udmi because it runs counter to the version of the occurrence given in the first information report wherein it was stated that both Banwari and Godhu after shooting at the deceased had run away with their guns. Godhu and Banwari as such could not have been found in the courtyard of the house of Banwari when Sardari and Udmi came there.

The prosecution also led evidence to show recovery of unlicensed gun and two cartridges from the field of Godhu in pursuance of his statement. This evidence does not connect Godhu accused with the crime of murder of Gheru deceased because there is nothing to show that the said gun was used for the murder of the deceased. We thus find that the material on record is bereft of any evidence which may lend corroboration to the dying declaration of Gheru deceased regarding the complicity of Godhu. It is, in our opinion, not safe to base the conviction of Godhu accused upon the uncorroborated dying declaration of Gheru deceased in this case.

There is another aspect of the matter so far as Godhu accused is concerned. As would appear from the resume of facts given above, there are only the statements of Gheru deceased alone that Godhu accused too had fired at him. As against the statements of Gheru, we have the statement of Godhu that he did not cause any injury to Gheru or participate in this occurrence. In addition to that, we have the statement of Banwari accused not only under section 342 of the Code of Criminal Procedure but also one made on oath that the shots on the deceased were fired by Banwari alone. Nothing has been shown to us as to why Banwari should take the entire responsibility over himself and why he should make a statement exculpating Godhu. It is also pertinent to observe in this context that the High Court has found that Godhu accused has not been shown to possess any motive to kill the deceased. We are therefore, of the opinion

A that the case against Godhu for the offence of murdering Gheru deceased is not free from reasonable doubt. He would in the circumstances be entitled to the benefit thereof.

B As regards the conviction of Godhu accused for the offence under section 25 of the Arms Act, the same was not challenged before the High Court. We accordingly uphold his conviction for that offence

In the result the appeal of Banwari accused is dismissed, while that of Godhu is partially allowed. The conviction of Godhu for the offence under section 302 Indian Penal Code is set aside and he is acquitted on that charge. Godhu's conviction and sentence for the offence under section 25 of the Arms Act are maintained.

P.B.R.

Appeal partly allowed.