Supreme Court of India
Shanker vs State Of U.P. on 29 January, 1975
Equivalent citations: AIR 1975 SC 757, (1975) 3 SCC 851, 1975 (7) UJ 406 SC
Author: R Sarkaria
Bench: R Sarkaria, V K Iyer
JUDGMENT R.S. Sarkaria, J.

1. The appellant, Shanker s/o Prem Raj, aged 35 years, and two others, namely, Persoti son of Megha and Uttam son of Lallu were tried and convicted by the Additional Sessions Judge, Moradabad on charges (under Sections 148, 302 read with 149 and 323/149. Indian Penal Code in respect of the murders of two brothers, Shanker and Keshri. All the three were convicted under Section 302 read with 149, Penal Code. The appellant was sentenced to death, and each of the other-two imprisonment for life. They were also Convicted on the minor charges and sentenced to various terms of imprisonment. On appeal, the Allahabad High Court confirmed the conviction and sentence of the appellant but acquitted Persoti and Uttam. Shanker has come to this Court in appeal after obtaining special leave under Article 136 of the Constitution.

2. Prem Raj had three sons, namely, Shanker appellant. Pitam and Megha. Pitam was murdered on 21-6-1970. F.I.R. with regard to that incident was lodged by Megha, in which, Basant son of Hardayal was named as one of the culprits. On 23-6-1970 Megha made another report to the police alleging that Keshri, the deceased person in the present case, had committed an offence under Section 452, Indian Penal Code. On 6-10-1970, the police initiated proceedings under Sections 107/117, Criminal P.C. against both the parties. Megha, his brother Shanker, Piarey and Chhotey were arrayed on one side, while Basanta s/o Har Dayal, Keshri deceased and four, others were proceeded against as the Other party. On 2-5-1971, a written complaint was filed by the said Basanta against Megha, Shanker-appellant and three other under Sections 147, 148/307, Penal Code at Police Station Mogul-Pura. On 30-6-1971, Keshri laid a report under Sections 323/506/504, Indian Penal Code at the Police Station complaining that Megha, Persoti and Shanker sons or Prem Raj and Uttam s/o Lallu had beaten him and threatened to murder On 2-9-1971 a clash between the parties' took place in Moradabad. This is apparent from the General Diary Entry, Exh. Kha 16, which was recorded in the police station. On 29-9-1971, Megha reported to, the police that the said Basanta and Piarey s/o Baldeo had attempted to murder him. Shanker v. State of U.P. (Sarkaria J.) A.I.R. visitors went away saying that they deal with the supporters of Basanta.

3. Towards the end of September, 1971, Megha was murdered and Basanta and Piare aforesaid were prosecuted therefore. The deceased persons used to look after the defence of Basanta and Piare.

4. On account of these past events the accused bore hostility against the deceased persons.

5. On 27-10-1971, Keshri and Shanker deceased were hoeing their potato field situated at a short distance from the Abadi of village Baldeopuri. They used to reside in a hamlet. At about noon, their mother, Smt. Rani, P.W. 2 and Keshri's wife, Smt. Bhagwati, P.W. 4 reached there and served the deceased with meal. The deceased rested for sometime and thereafter resumed their work. The women also stayed there.

6. At about 1 or 1.30 a.m., the appellant armed with a pistol, Persoti s/o Megha and Uttam armed with knives, Hetram armed with a tabal and one stranger armed with a saria (iron rod) appeared on the scene. They caught hold of the deceased persons and forcibly took them to the adjoining field of Hulasi. The two women raised an alarm. Smt. Rani went ahead to the rescue of her sons, but was stopped and given saria blows by the stranger. The appellant fired his pistol at Keshri from close range, and Hetram assaulted him with the tabal. Simultaneously, Persoti and Uttam stabbed Shanker deceased with their knives. Both Keshri and Shanker died at the spot.

7. The culprits then went away. Smt. Rani called her husband Ram Swarup, P.W. 1, to the spot through the village Chowkidar. Ram Swarup came and she apprised him all about the occurrence. Ram Swarup then accompanied by the village Chowkidar went to Police Station Moghal Pura and lodged the First Information Report, Ex. Ka 3, at 2-30 p.m., the same day.

8. On 28-10-1971 at 3-30 a. m. Smt. Ishwari, mother of Basanta (who was being tried for the murder of Megha made the report Ex. Kha 2, to the police that on 27-10-1971 at "about noon, Shanker (appellant) and three or four unknown persons forcibly entered her house and enquired regarding the whereabouts of her son, Cheta. Cheta who was then on the roof escaped by jumping into the lane at the backside of the house. When Cheta was not found, the intruders assaulted Smt. Ishwari with a sariya. Thereafter, the various visitors went sying that they deal with the supporters of basanta.

9. The first contention of Mr. Pramod Swarup; learned Counsel for the appellant is that the High Court had committed an error of law in Using the F.I.R. Kha 2, for the purpose of corroborating the evidence of P. Ws. 2, 3 and 4, against the appellant, although its author Smt. Ishwari was not examined as a witness in this case. If the evidence of these witnesses, proceeds the argument, was not safe enough without corroboration from Ex. Kha 2, for sustaining the conviction of Persoti and Uttam, it was, equally so qua the appellant.

10. Mr. Uniyal, learned Counsel for the State, while conceding that Ex. Kha 2 could not be used to corroborate or contradict witnesses other than its author, maintains that the evidence of the three eyewitnesses was fully trustworthy so as to constitute a safe basis for conviction of the appellant.

11. It is well settled that unless a First' Information Report can be tendered in evidence under any provision contained in Chapter II of the Evidence Act, such as a dying declaration falling under Section 32(1) as to the cause of the informant's death, or as part of the informant's conduct under Section 8, it can ordinarily be used only for the purpose of corroborating, contradicting or discrediting (under Sections 157, 145 and 155, Evidence Act) its author, if examined, and not any other witness. As already noticed, in the present case, Smt. Ishwari the informant was not examined as a witness. It is admittedly not a statement falling under any provision in Chapter II of the Evidence Act. The High Court was thus in error in using Ex. Kha 2, as they did. The High Court did not record a positive finding that Persoti and Uttam were falsely implicated. It merely h'eld that the case against these two accused was "not free from reasonable doubt" because the possibility of "their being falsely implicated in the case on account of enmity cannot be excluded.

12. Be that as it may, the fact remains that the evidence of the three eye-witnesses has been believed and relied upon, concurrently by the two courts below against the appellant, and no good reason has been shown for us to take a different view of the evidence.

13. Mr. Swarup next contended that Hulasi, Ram Swarup son of Hulasi and Bansi who were originally cited as other eye-witnesses by the prosecution, were withheld without any reason, and consequently, an adverse inference should be drawn that these independent witnesses, if produced, would have falsified the account given by P. Ws. 2, 3 and 4.

14. This contention also does not appear to be well-founded. It is on record that on 16-9-1972, the Public Prosecutor submitted an application to the trial court, for discharge of these witnesses on the ground that they had been won over by the defence, and consequently the prosecution did not went to examine them as their witnesses. The defence Counsel disputed this assertion of the Prosecutor. But he did not make any request for their examination as court witnesses under Section 540, Criminal P.C. so that the defence might get an opportunity to cross-examine them, although it seems that the witnesses were then in attendance. On the contrary, the court's order recorded on that application gives the impression that the defence informed the court that it did not want to examine them. It is thus too late in the day to argue that these witnesses were withheld by the prosecution for any ulterior motive. This contention was not raised before the High Court. It was no doubt agitated in the trial court and was rightly rejected.

15. We find force in the contention of Shri Uniyal that these witnesses were "won over" by the accused, in the sense that they were not prepared to give evidence in the case for fear of their lives, or otherwise. Keshri and Shanker were not concerned in or prosecuted for the murders of Pitam and Megha. They became victims of the wrath of Shanker appellant simply because they were on friendly terms with Basanta and were looking after the latter's defence when he was being tried for the murder of Megha. Naturally, therefore, Hulasi, Bansi etc. would be mortally afraid of giving evidence in court, and of being caught in this vicious chain of murders. We therefore repel the argument that Hulasi etc. were withheld with an oblique motive.

16. True, that Smt. Rani and Smt Bhagwati are interested witnesses. But that was no ground to disbelieve their evidence. Being relations of the deceased persons, they would be the least disposed to substitute the appellant for the real culprit. Smt. Rani had received injuries which were the hall-mark of her presence at the scene.

17. It was contended that the medical evidence did not confirm the assertion of Smt. Rani that the injuries to her had been caused with sariya. The argument is stated only to be rejected. It was raised in the courts below and was rightly rejected. There is no real conflict between the medical evidence and her testimony on this point.

18. Mr. Swarup also contended that according to Smt. Rani, Roti was served to the deceased persons, while the autopsy revealed rice and dal in the stomachs of the deceased. There is no merit in this contention. "Roti" is generally used to connote "meals." Mst. Rani herself at another place referred to it as "khana." Presence of undigested rice and dal in the stomachs of the deceased

persons, rather lends assurance to the evidence of the mother that she had shortly before the occurrence served meals to her sons. She was not asked as to whether that meal consisted of rice and dal.

19. Counsel then pointed out minor discrepancies in the evidence of the eyewitnesses regarding die relative position of the assailants and the assailed. These have also been considered by the courts below and we do not think it necessary to go over the same field again.

20. As regards Bhagwati, P.W. 4, it was urgued that she did not make any attempt to intervene and save her husband. This contention is utterly devoid of merit. She was in a state of pregnancy. She had seen her mother-in-law being beaten by the culprits. It was therefore natural for her to remain at a safe distance from the scene.

21. The criticism leveled against the evidence of Sri Ram (P.W. 2) is that he was a chance witness. His version that he remained smoking bidis on his way for an hour or so was the focus of this castigation. P.W. 2 is a village rustic, having a very vague sense of time. He had no animus to depose falsely against die appellant. The mere fact that after the occurrence he did not proceed to another place for purchasing wheat on that very ay, was not a ground to discredit him.

22. To sum up, nothing palpably erroneous in the assessment of evidence made by the courts below has been pointed out to us which would warrant our interference with that assessment.

23. The only question that remains to be considered is about the capital sentence imposed on the appellant. In this connection two commiserative circumstances- have been pointed out by the learned Counsel for the appellant. First, that the death penalty has been hovering over the appellant for the last 13 months, secondly, that two brothers of the appellant, have been murdered by the opposite party. The appellant is the only surviving brother. He has children and a family.

24. It Is true that lapse of a long period between the award of death penalty and hearing of the appeal by this Court is a factor which in the context of a particular case, may-, in conjunction with other circumstances, justify the commutation of the capital sentence by the court. But this is no an absolute rule justifying interference with the discretion of the trial court in the matter of sentence in every case. Similarly, that the execution of the death sentence will render extinct the immediate progeny of Prem Raj and will throw the Family of the condemned prisoner orphaned and resourceless on the-scrap heap of society, are matters extraneous to the judicial computer. Nevertheless these are compassionate matters which can be and we the sure, will be considered by the Executive Government while exercising its powers of clemency.

25. The appeal fails and is dismissed.