

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.898 OF 2004

Bheru Lal & Ors.

.... Appellants

Versus

State of Rajasthan

.... Respondent

WITH

SPECIAL LEAVE PETITION (CRIMINAL) NO. 169 of 2005

State of Rajasthan

.....Appellant

Versus

Girraj

.....Respondent

JUDGMENT

V.S. SIRPURKAR, J.

1. This judgment will dispose of the Criminal Appeal No. 898 of 2004 filed by three appellants as also the Special Leave Petition filed by the State of Rajasthan against the acquittal of one of the accused who was convicted by the Trial Court but was acquitted by the High Court. The three accused persons, namely, original accused No. 1 Bheru Lal, original accused No.3, Kailash Chandra and original accused No. 5, Purushottam have come up before us challenging their conviction for various offences including offences under Sections 147, 148, 302 read with Section 149, Indian Penal Code (for short “IPC”), 436 read with Section 149, IPC and confirmed

by the High Court. Originally, as many as seven accused persons were tried for all these offences. However, the Sessions Judge convicted in all five accused persons including the present three appellants and two others, namely, Girraj, original accused No. 6 and Gopal, original accused No.4. The High Court allowed the appeal of accused Girraj and acquitted him. It confirmed the conviction and sentence of the remaining four accused persons. In that, the Court convicted Bheru Lal for the offence under Section 302, IPC simpliciter and for offence under Section 436 read with Section 34, IPC. The remaining three accused were also convicted for the offence under Section 302 and Section 436 read with Section 34, IPC.

2. In short, the High Court rejected the offences having been committed by the unlawful assembly and set aside their convictions ordered by the Trial Court which were in the aid of Section 149, IPC and held that the offences were committed in furtherance of the common intention of the accused persons. Out of the four accused persons so convicted, only three have come up before us. Originally, the appeal seems to have been filed on behalf of all the four accused including Gopal but the name of Gopal was thereafter removed from the array of appellants. We enquired from the Registry as to whether Gopal had filed any appeal but we were informed that there was no appeal filed by him. We are, therefore, left with the appeal filed by the three appellants named above.

3. Shortly stated the prosecution case is that one Basanti Bai, PW-7 lodged a report with police station Raipur, District Jhalawar on 26.10.1997 at about 4:30 p.m. to the effect that her sons, Shayam Lal and Balkishan were belaboured by the seven accused persons. It was further stated that the appellant Bheru Lal and Kailash Chandra had inflicted sword blows on the left and right hand and neck of Shayam Lal while appellant Purushottam and Gopal gave sword and spear blows, respectively, on the back and head of Balkishan. Thus all the appellants had indiscriminately inflicted injuries on the person of deceased Shayam Lal and Balkishan, while appellant Girraj and Bheru Lal crushed their heads with stones. It was further alleged that after this ghastly incident, the appellants had set at fire the tractor trolley, stack of onion and

groundnut. Offence was registered on these basis and after due investigation as many as seven persons came to be charged of offences under Section 147, 148, 341, 302, IPC and in the alternative Section 302 read with Sections 149, 436, IPC substantively as well as Section 436 read with Section 149, IPC as also Section 435 and 435 read with Section 149, IPC and Section 427 and in the alternative Section 427 read with Section 149, IPC. As has been stated earlier two of the accused persons were acquitted by the Trial Court and now we are left with this appeal at the instance of the three accused.

4. Shri Sushil Kumar Jain, learned counsel appearing for the appellants firstly urged that the evidence of the eye witness, namely, PW-7, Basanti Bai and the other eye witnesses, namely, Ram Prasad (PW-3), Kanwar Lal (PW-5) and Puri Lal (PW-6) was wrongly relied upon by the Trial Court as well as the High Court. It was pointed out that barring Basanti Bai (PW-7), all these witnesses had turned hostile and, therefore, the prosecution was left with the evidence of Basanti Bai alone. Learned counsel urged that Basanti Bai was the mother of the deceased persons and there was enmity between the accused persons and her family which had emanated from the property dispute. Learned counsel pointed out that both the deceased as well as the accused were relatives of each other and there was a property feud amongst the two sides which had caused this ghastly incident. Learned counsel dubbed the evidence of Basanti Bai as being untrustworthy and unnatural. He further pointed out that other witnesses, namely, Ram Prasad (PW-3), Kanwar Lal (PW-5) and Puri Lal (PW-6) who were the occupants of the nearby places of the incident had refused to support the prosecution as the accused persons had no hand in the incident complained of. It was further suggested that Basanti Bai had claimed to have seen the incident from a distance of about 200-250 steps and on that count also she was not in a position to see the incident. However, she had given the graphic description of the role played by each accused which makes her evidence suspicious.

5. Learned counsel also urged that a gun and *Katta* (country made pistol) were found near the body of the deceased which suggested that the deceased Shayam Lal and Balkishan had gone

to the place of incident prepared and with intention to cause grievous hurt or death of the appellant Kailash Chandra. However, since the gun did not fire (on account of development of dampness) they did not succeed in their object and, therefore, the villagers, being angry killed the deceased on the place of the incident itself. It was also pointed out that the appellant Kailash Chandra had 11 injuries on the various parts of the body which remained unexplained by the prosecution and thus it was obvious that the prosecution had not unfolded its case properly and had suppressed the genesis of the incident. Alternatively, the argument proceeds on the basis that there was a right of private defence of body as well as the property. It was also urged by the learned counsel that the so-called discoveries of the weapons were farcical and further since the blood group of the blood allegedly found on the weapons could not be decided that evidence was also of no consequence. In short, learned counsel urged that the whole prosecution story was unbelievable and, therefore, the appellants were entitled to be acquitted.

6. As against this the learned counsel appearing on behalf of the State, Shri Manish Singhvi, Additional Advocate General for the State of Rajasthan wholly supported the judgments and urged that the prosecution had fully proved its version and the Courts below had rightly convicted the accused-appellants. Shri Singhvi also pressed in service the appeal filed on behalf of the State of Rajasthan against the acquittal of accused Girraj, and pointed out that the accused Girraj could not have been acquitted as he was present throughout and had taken active part in the whole affair. Shri Singhvi severally criticized the High Court judgment in so far as it pertained to the acquittal of accused Girraj.

7. Basanti Bai, PW-7, undoubtedly, was an interested witness being mother of the deceased persons. Some evidence has come on record that everything was not well between the two families of the deceased and the accused. Her evidence was, therefore, dubbed as the "evidence of an interested witness". Her evidence was criticized as untrustworthy and unnatural. The other witnesses, namely, Ram Prasad (PW-3), Kanwar Lal (PW-5) and Puri Lal (PW-6) have not chosen to support the prosecution and they were rightly declared hostile. We have, therefore,

gone through the evidence of Basanti Bai very closely. There can be no dispute that in her evidence, she has also roped in Girraj (original accused No. 6), Badam Bai (co-accused) and Tara Bai (co-accused) and that was an exaggeration on her part. She claimed to have seen the incident from some distance, but has graphically described the role played by accused Bheru Lal, Kailash Chandra and Purushottam, the appellants herein. According to her, Bheru Lal had given a sword blow on the neck of Shayam Lal and Kailash Chandra gave a sword blow on the hand of Shayam Lal, while Gopal gave a blow with a sword on the neck of Balkishan and Purushottam hit Balkishan with *Ballam* (spear like weapon). She has not stopped here, but has assigned a role specifically to Girraj, Badam Bai and Tara Bai, as also her daughters-in-law, saying that they also gave blows with the sticks. She then described that Bheru Lal pelted stones on them and the other accused persons also stoned them, as a result of which their heads were crushed. She has thereafter said that even she was followed up to the house and thereafter, the accused persons set articles in her house and tractor on fire. There could hardly be any doubt regarding the presence of this witness on the spot. She candidly admitted that when her sons Balkishan and Shayam Lal had left the house, they might have taken gun and a *katta* (country made revolver) with them. She, however, denied that the said gun and the *katta* were lying near the bodies of her sons. She naturally refuted the suggestions made to her that her sons had gone armed only to give beating to Kailash Chandra and Purushottam. She also refuted the suggestion that village persons had given beating to her sons. She asserted that she did not see any injury on Kailash Chandra at the place of occurrence and no such injury was caused to Kailash Chandra by any sharp edged weapon.

8. Significantly enough, there is not even an iota of cross-examination in respect of the incident and her version about the assault by the accused on her sons and the same has totally gone unchallenged. There can be no dispute about her being an interested witness, as also her having exaggerated her version. There can also be no dispute that she has specifically denied there being any injuries on Kailash Chandra, which injuries were ultimately proved. However, that by itself, will not make her evidence unbelievable. We have taken into consideration that here was a mother, who was deposing about the assault on her sons and she certainly would not

be interested in allowing the real culprits to go unpunished. The task of the Courts is to separate the chaff from the grain and that is exactly what has been done by the Trial Court, as well as, the Appellate Court. About the gun and the *katta* being found near the body, the witness has specifically refuted the suggestion that the deceased persons had gone there with an idea to assault the accused persons. We are not much impressed by the argument of the Learned Counsel for the appellants that this witness had tried to mislead the Court on the genesis of the case and, therefore, her whole version becomes suspicious. There is a definite ring of truth. There can be no doubt that the witness has exaggerated, but as has been stated earlier, those exaggerations would have to be ignored and have been rightly ignored. In fact, there were as many as 7 accused persons. Accused Girraj and accused Tara Bai have already been acquitted by the Courts below. However, merely because a witness exaggerates or is an interested witness, the evidence cannot be thrown, where it is found that there is a ring of truth to the version of the witness. The Court of facts, which appreciates the evidence, should show that they were aware of the fact that the witness is an interested witness. Once that realization comes from the evidence, then there is nothing wrong if the evidence of such person is believed.

9. It was suggested by Shri Jain that Basanti Bai had not admitted or deposed about the injury suffered by the accused. Our attention was invited to the evidence of DW-1, Dr. Chandra Kishore Srivastava and DW-2, Kailash Chandra. Dr. Chandra Kishore Srivastava in his evidence has established that he had examined Kailash Chandra and found that he had suffered as many as 11 injuries. Kailash Chandra himself also, when he entered the witness box, established his own injuries. There can be no dispute that Kailash Chandra had suffered injuries on that day. The evidence of the doctor shows that he had suffered 10 incised wounds. Most of the injuries were on the left side of the body, one of them on the left hand, one on left wrist, one on left palm and one on the scapular region. The other injuries were on the right upper arm on the lower side. The other injuries include two injuries on the right upper arm on the lower side while one appears to be on left frontal part of the head 3 inch above the left eyebrow. The doctor has certified that all these injuries including even the contusion suffered was a simple injury, that is clear from the

report Ex. B-2. In his cross-examination, the doctor very specifically admitted that none of the injury was serious in nature nor was any one of them sufficient to cause death in the ordinary course of nature and they were simple. It is true that Kailash Chandra had also given a report on which case No. 190 of 1997 was registered. On the basis of this, the learned counsel pointed out that if PW-7 Basanti Bai had not mentioned or denied these injuries in her evidence then it was clear that she was lying in the most significant point and thus was trying to hide the genesis of the incident and the prosecution story, therefore, was shrouded in suspicion. Shri Jain, for this proposition, has relied on a number of decisions like *State of Rajasthan v. Madho & Anr.* [1991 Suppl.(2) SCC 396], *State of Bihar v. Mohammad Khursheed* [1971 (3) SCC 423]. We, therefore, examined her evidence from this angle also. On the other hand, learned counsel appearing on behalf of the State relied on the judgment reported in *Jagdish v. State of Rajasthan* [(1979) 2 SCC 178]. There can be no dispute that this evidence was scanned by the trial Court and the Appellate Court which held that the injuries, even if they were established to have been suffered by Kailash Chandra, were extremely insignificant injuries and, therefore, those injuries did not need any explanation on the part of the prosecution. The witness undoubtedly states in her cross examination, “*I did not see any injury to the Kailash Chandra on spot. Kailash Chandra was not injured with sharp weapon*”. In the judgment of *Jagdish v. State of Rajasthan* [(1979) 2 SCC 178] this Court has specifically observed that:

“there is an obligation on the prosecution to explain the injuries so as to satisfy the Court as to the circumstances under which the occurrence originated. Before this obligation is placed on the prosecution, two conditions must be satisfied:

- (1) that the injuries on the person of the accused must be very serious and severe and not superficial;
- (2) that it must be shown that these injuries must have been caused at the time of the occurrence in question.”

10. Thus it is very doubtful as to whether the injuries had been caused at the time of

occurrence as such.

11. Shri Sushil Kumar Jain, appearing on behalf of the Learned Counsel for the appellants spoke about the right of private defence on the basis of the fact that Balkishan was armed with 12 Bore Gun and there was a *katta* being carried by the other deceased. Kailash Chandra, undoubtedly, has suffered some injuries, but all those injuries are simple in nature. We have seen the Injury Report (Exhibit D-2), which suggests that they were very insignificant injuries, which were placed not on the vital portions of the body. We are in agreement with the High Court and the Trial Court that the non-explanation of those injuries cannot be advantageous to the defence nor can it be said that the prosecution, in not explaining those injuries, had suppressed the genesis of the incident. We have very carefully seen the cross-examination of Basanti Bai, who was not even asked about the deceased being armed with any sharp edged weapon, so as to cause injuries to Kailash Chandra, who sustained about 10 incised wounds, attributable only to the assault by a sharp weapon. There was no recovery of any sharp edged weapon from the place of incident or even from the person of the deceased and even the Investigating Officer was not asked anything about any sharp edged weapon being used by the deceased. The accused persons had shown the courage to enter the witness box. We have seen their evidence carefully. However, we are of the opinion that their evidence does not take us too far nor is their evidence reliable in view of the *inter se* contradictions in the evidence of Kailash Chandra and Bheru Lal regarding the presence of Gopal and Girraj. Nothing has come out in the prosecution case, suggesting that the appellants were put under the situation, where they could reasonably had apprehended any grievous hurt to even one of them. On the other hand, the defence came out with a fantastic theory that the deceased persons were killed by the villagers.

12. The law is now well settled that where there is a failure on the part of the prosecution witness to explain injuries on the accused caused in the same incident, implicit reliance cannot be placed on the prosecution which suppressed part of the incident. The two rulings cited by Shri Jain do support this proposition. The question is, however, whether the injuries suffered by

Kailash Chandra were actually caused during the incident and they were substantial enough so as to attract the attention of the witness and whether the witness had any opportunity to see the injuries as such. When Kailash Chandra stepped into the witness box, he deposed that deceased Shayam Lal had a spear in his hand and a loaded *Katta* in his pocket. He further evidenced that Balkishan and Shayam Lal abused his sister and mother and pointed out the gun at them and when Balkishan's gun failed to fire, he attacked with sword on his right hand at several places. He further asserted that had he not taken sword in his hand, he would have died. In his examination-in-chief also he had suggested that Balkishan had a sword besides a 12 bore loaded gun. In his cross examination, he claimed complete ignorance as to what had happened with Balkishan and Shayam Lal. He also went to the extent of suggesting that he did not know as to how they died. The evidence of this witness has been disbelieved totally by both the Courts below. It is very significant to see that the evidence of DW-2 Bherulal also is to the same effect that Balkishan was beating Kailash Chandra with the sword and he also had a gun with him. Bherulal was at least candid enough to admit that Shayam Lal and Balkishan had died in the same incident, however, both these witnesses brought about a fantastic theory that villagers had attacked Balkishan and Shayam Lal and they were killed in the same incident. What is most significant is that Kailash Chandra and Bherulal, after the incident, chose to go to Sunair after five hours of the incident and did not go to Raipur police station under which jurisdiction all this had taken place. It is after reaching Sunair that Kailash Chandra chose to go to the hospital at Sunair. All this has been considered by the Trial Court as also the Appellate Court and both the Courts have come to the conclusion that both these witnesses were unreliable witnesses. There can be no doubt that they claimed to have been injured in the same incident but that by itself would not be sufficient because there does not appear to be any sword seized by the police on the spot. If Balkishan and Shayam Lal had carried a sword for injuring this witness and if both of them died on the spot, surely the sword could not have disappeared.

13. Therefore, both the Courts were right in disbelieving the story put forth by these two accused-witnesses. However, the question still remains that there were injuries which have been

seen by the doctor much after the incident. As per the evidence, the report was made in the police station Sunair which was about 15 KM from the village Himmatgarh. There can be no dispute about the proposition that the injuries on the person of the accused must be explained. However, considering the overall evidence of the two defence witnesses, it is extremely doubtful whether the injuries were caused during the incident. This is apart from the fact that Basanti Bai who had seen the incident from a distance could not have been in a position to even notice any injury on the body of Kailash Chandra. She had afterall seen her two sons being assaulted mercilessly and being dealt with by the accused. She, therefore, asserted that she did not see any injury at that time on the person of Kailash Chandra.

14. In order to reap the benefit of the proposition laid down by this Court, there must be an opportunity to the witness to watch and there must be deliberate refusal on the part of the witness to explain the injuries if the witness is not in a position to note the injuries or if the Court comes to the conclusion that it was not possible for the witness to see any injuries or that the injuries were not actually caused during the incident itself then the defence will not be able to reap any benefit. We are, therefore, of the opinion that Basanti Bai's evidence cannot be rejected on this point and that the Trial and the Appellate Courts are right in relying on her evidence. Once Basanti Bai's evidence is believed then there would be no question of going to any other piece of evidence as her evidence by itself is sufficient to convict the accused as was rightly done by the Trial Court and the Appellate Court.

15. This is apart from the fact that the recovery memo Ex.P-11, P-12, P-13 and P-14 through which blood stained spear, blood stained lathi, blood stained sword were recovered from Bheru Lal, Kailash Chandra, Purushottam and Gopal as also Ex. 15, the recovery memo of the blood stained clothes which were recovered from Bherulal as also Ex. C-1, the Forensic Science Laboratory (FSL) report provide enough corroboration to the evidence of Basanti Bai. We are, therefore, of the considered opinion that:

“firstly, it is completely established that the appellants as also the other accused who has

not filed appeal had caused the murder of Shayam Lal and Balkishan;

secondly, the theory propounded by the defence that it was done in the exercise of right to private defence is baseless and has been rightly rejected;

thirdly, that the evidence led on behalf of the prosecution, the eye witness account by Basanti Bai PW-7 and the other substantial evidence of recovery of the blood stained articles and clothes is fully established.”

16. Further it is fully established that the accused persons not only murdered Balkishan and Shayam Lal but also committed the offence under Section 439 read with Section 34, IPC by setting at fire the tractor and household articles of the complainant.

17. No other point was urged before us. The appeal has no merits, it is accordingly dismissed.

18. At this stage, Shri Manish Singhvi, Learned Counsel for the State pressed the petition filed by the State against the acquittal of Girraj (original accused No. 6). We have seen the judgment of the High Court carefully. We do not find any substantial material against original accused No. 6 Girraj. The High Court has given good reasons for his acquittal. The High Court has taken a possible view of the matter. It is trite that when a possible view is taken, then there cannot be an interference in an appeal against acquittal unless it is shown that the acquittal is unsustainable or perverse. Such is not the position here. In that view of the matter, we dismiss the Special Leave Petition (Criminal) No. 169 of 2005 filed by the State.

.....J.

[V.S.SIRPURKAR]

.....J.

[J.M.PANCHAL]

NEW DELHI

August 10, 2009



SUPREME COURT OF INDIA



JUDGMENT