

PETITIONER:
ANWAR AND OTHERS

Vs.

RESPONDENT:
STATE OF HARYANA

DATE OF JUDGMENT: 24/02/1997

BENCH:
M.K. MUKHERJEE, S.P. KURDUKAR

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

S.P.KURDUKAR, J.

The six appellants alongwith five other accused persons (since acquitted) were put up for trial before the Addl. Sessions Judge, Gurgaon for offences punishable under Sections 148, 302/179, 323/149 and 120-B of the Indian Penal Code for conspiracy, rioting, committing the murders of Chao Khan and Baddal and causing injuries to Isrile (PW 11). The learned trial judge by his judgment and order dated 29th January, 1993 acquitted all the accused persons of the offence punishable under Section 120-B of the Indian Penal Code, but, convicted Anwar (A-1), Dalmar (A-2), Idu (A-5), Udai Singh (A-6), Sattar (A-7), Gaffer (A-8) and Rashid (A-9) for offences punishable under Sections 302/149 of the Indian Penal Code and sentenced each one of them to undergo imprisonment for life and to pay a fine of Rs. 500/- each; in default of payment of fine to undergo further RI for five months. They were also convicted under Sections 148 and 323 read with Section 149 of the Indian Penal Code and each one of them was sentenced to suffer RI for six months. The substantive sentences were ordered to run concurrently. Jai Singh (A-11) came to be acquitted of all the charges. The seven convicts preferred an appeal to the Punjab & Haryana High Court at Chandigarh and the learned Division Bench vide its judgment and order dated November 22, 1993 upheld the convictions and sentences of the appellants but, acquitted Gaffar (A-8) of all the charges. Aggrieved by the judgment and order passed by the High Court, the appellants, after obtaining Special Leave, have filed this appeal in this Court.

2. The prosecution story as disclosed at the trial is as under :-

Chao Khan and Baddal (the two deceased) were residents of village Siraswal and owned agricultural land in the said Village. A-1 and A-2 also owned agricultural land in the adjoining village called Luhinga Khurd. There was a long drawn enmity between the deceased and the accused. Asru, brother of A-1 and A-2, was killed about eight months prior to the incident in question which took place on 5th January, 1990, Chao Khan and Baddal alongwith their other brothers

were charge sheeted for committing the murder of Asru and at the relevant time, trial was pending before the Sessions Court., We are now informed that Jharmal, Abdul and Risal have been convicted for committing the murder of Asru. Trial against Chao Khan and Baddal (since deceased) abated.

3. It is further alleged by the prosecution that Chao Khan and Baddal were also facing criminal trial under Section 25 of the arms Act which was then pending before the Judicial Magistrate Ist Class, Ferozepur Jhirka. The Judicial Magistrate Ist Class, Ferozepur Jhirka had fixed the case on 5th January, 1990 for trial and in that connection, both Chao Khan and Baddal alongwith Saheed son of Baddal, Rial and Isrile (PW 11) were going to the said court for attending the criminal proceedings, At about 7.00 a.m. on 5th January, 1990, they left their village in a four wheeler and got down at the bye-pass of Ferozepur Jhirka at about 9.30 a.m. When they were proceeding towards the court and reached near the bus stand of Ferozepur Jhirka, A-1 to A-4 and A-10, who were armed with country made pistols, encircled them and in the meantime A-5, A-6, A-7, A-8 and A-9 who were armed with lathis came running at the place of occurrence by the side of the bus stand. A-1 then fired from his pistol hitting Chao Khan on the head whereas A-2 fired from his pistol at Baddal. Both Chao Khan and Baddal sustained fire arm injuries on their heads and as a result thereof they fell down. The other accused persons thereafter started hitting both the injured with the lathis. When Isrile (PW 11) tried to intervene, A-8 and A-9 gave him lathi blows causing bleeding injuries to him. A-3, A-4 and A-10 who were having pistols then fired in the air. All the accused thereafter fled away but while doing so, A-1 had left his pistol behind at the place of incident. Chao Khan and Baddal died on the spot. Risal and Isrile (PW 11) were made to wait near the dead bodies whereas Saheed (PW 10) proceeded towards police station at Ferozepur Jhirka to lodge the complaint. When he reached near Lal Kuan Chowk, he met SI Dharam Singh to whom he narrated the incident who recorded the complaint in writing and forwarded the same with his endorsement to the police station at Ferozepur Jhirka, On the basis of this report, the First Information Report came to be recorded. SI Dharam Singh (PW 14) reached the place of occurrence and started the investigation. After holding the inquest on the dead bodies. he sent Isrile (PW 11) to Civil Hospital, Ferozepur Jhirka for treatment. During spot Panchnama, he recovered certain articles including a country made pistol of .12 bore with one live cartridge and one bullet (metal). All these articles were kept in the sealed packet. In the meantime, he arranged removal of both the dead bodies to Community Health Centre, Nuh where Dr. Jai Kishan (PW 9) conducted the post mortem examination on 6th January, 1990 at about 9.30 a.m. During the course of investigation, the accused came to be arrested on different dates i.e. 9th January, 1990. During their interrogation, they made statements which led to the recovery of pistols which came to be seized under the various panchnamas. After completing the investigating, a charge sheet came to be filed against eleven accused persons for the aforesaid offences.

4. The defence of the accused is that of total denial. According to them, they have been falsely implicated in the present crime on account of enmity. Chao Khan, Baddal and their close relatives were being tried for committing the murder of Asru and the said trial was pending at the relevant time. They pleaded that they are innocent and they be acquitted.

5. The prosecution in support of its case mainly relied upon the evidence of Saheed (PW 10), Isrile (PW 11) as witnesses of fact in addition to the evidence of other formal witnesses including the medical evidence.

6. At the outset, it needs to be stated that the incident in question took place on 5th January, 1990 at about 9.30 a.m. and the FIR was registered immediately at about 10.40 a.m. The special report was received by the Illaqa Magistrate on the same day at 4.40 p.m. It is also not seriously disputed that Chao Khan and Baddal met with homicidal deaths. Dr. Jai Kishan (PW 9) conducted the post mortem examination on the dead bodies of Chao Khan and Baddal. As regards Chao Khan, he noticed as many as nine ante mortem injuries which were as under :-

1. Compound fracture of left forearm involving both the bones.
2. Fracture of right arm which was a compound fracture.
3. Abrasion 2 a.m. x 1/2 c.m. on left wrist joint.
4. Multiple abrasions of various sizes on the back.
5. Red bruise on right side of chest of the size 13 c.m. x 3 c.m.
6. Red bruise almost parallel to injury No. 5 of the size 20 cm long and about 3 cm wide.
7. Incised wound on the occipital with region of the size 7 c.m. long and 2 c.m. wide associated with fracture of underlying bone. Brain tissue was visible.
8. Lacerated wound above the right eye on the fronto temporal region. Its size was 3 c.m. x 3 c.m. The underlying bone was broken into pieces and the brain tissues were visible.
9. Multiple punctured wounds on right side of neck and face. On punctured wound was at the right side of neck and another was on level of cheek and front of right ear very in from 1 c.m. x 1/2 c.m. in diameter.

He opined that the injuries to the vital organs which resulted in shock and haemorrhage, were sufficient to cause death in the ordinary course of nature.

7. The injuries noticed on the dead body of Baddal were as under:-

1. An incised wound extending from right tempo parietal region to occipital region of the size 20 c.m. x 2 c.m. fracture of the underlying bone was there and the brain tissue was visible. The hairs had got cut by the injury.
- 1A. Lacerated wounds on the neck of right ear of the size 1 c.m. x 1/2 c.m. There was fracture of the underlying bone. It was deep and extending to brain tissue.
2. Bruise of red colour on the right side of chest. The size was 25 c.m. x 3.5 c.m.

3. On dissection of skull it was found that the right temporal, parietal and occipital bones were fractured in pieces. The brain tissue was badly damaged.

4. Right side of thorax contained blood which was associated with laceration of right lung of the size 3 c.m. x 1.5 c.m. Blood was present in the right side of thoracic cavity. Ribs of right side from No. 4 to 9 were fractured.

5. Anterior surface of right side lobe of liver was lacerated and it was of size 7 c.m. x 2 c.m. Abdomen contained blood, Right side of the heart also contained blood.

He opined that the injuries to the vital organs resulted in shock and haemorrhage and were sufficient in the ordinary course of nature to cause death. He further opined that injury No.9 on the person of Chao Khan could be the result of gun shot. Injury No.1 on the person of Baddal was not the result of gun shot and could be caused by farsa/lathi. We have gone through the evidence of Dr. Jai Kishan (PW 9) very carefully and we affirm the findings of the courts below that both Chao Khan and Baddal met with homicidal deaths.

8. Mr. Sushil Kumar, learned Senior Counsel appearing in support of this appeal urged that the evidence of two eye witnesses, namely, Saheed (PW 10) and Isrile (PW 11) is totally unreliable and infact they might not have seen the assault caused by the appellants on the person of Chao Khan and Baddal. To discredit their evidence, he drew our attention to the evidence of Dr. Jai Kishan (PW 9) who held the autopsy on the dead body of Baddal and submitted his post mortem examination report thereof. Dr. Jai Kishan (PW 9) while giving evidence in court has bifurcated injury Nos. 1. and 1A and testified that injury no. 1A could be caused by fire arm whereas no such bifurcation was found in the post mortem examination report. Both the eye witnesses testified that A-2 fired from his pistol at Baddal. He urged that the eye witnesses did not speak of an assault caused by the appellants by a sharp edged weapon. Injury No.1 was an incised injury caused on the right temporal parietal region extending upto occipital region having dimension of 20 cm x 2 cms. and causing fracture of the underline bone. The medical evidence is, therefore, in conflict with the account given by the eye witnesses. He further urged that in order to lend corroboration to the evidence of these two eye witnesses, Dr. Jai Kishan (PW 9) sought to bifurcate injury No.1 into injury No.1 and 1A and testified that injury No.1A could be caused by the fire arm. This was an afterthought attempt the part of the prosecution to seek corroboration to the evidence of eye witnesses from the evidence of Dr. Jai Kishan (PW 9), Relying upon this evidence of both these eye witnesses is untrustworthy and therefore the entire prosecution case against the appellants be rejected.

9. We have given our anxious thought to the above contentions raised on behalf of the appellants and we may examine as to whether the submissions are well founded and could demolish the evidence of eye witnesses even as regards the assault on Chao Khan, Saheed (PW 10) is the son of Baddal. The incident in question took place on 5th January, 1990 at 9.30 a.m. and he

lodged the First Information Report at the police station at 10.40 a.m. The special report reached the Illaqa Magistrate on the same day at 4.40 p.m. He testified that he alongwith Chao Khan, Baddal, Isrile and Risal were going to Ferozepur Jhirka to attend the pending criminal case under the Arms Act. After getting down from the four wheeler at the bye-pass, they reached at about 9.30 a.m. near the bus stand and at that time, A-1 to A-4 and A-10 who were armed with country made pistols encircled them and in the meantime other accused persons who were armed with lathis came running towards them. A-1 then fired a shot from his piston which hit Chao Khan on his head. A-2 fired a shot from his pistol which hit his father Baddal on his head. Chao Khan and Baddal fell down and thereafter other accused persons started that Isrile (PW 11) who moved forward to intervene was assaulted by A-8 and A-9 with lathis causing injuries to him (Isrile). He then stated that he lodged the First Information Report at about 10.40 a.m. The said report in all material particulars corroborated his evidence in the court. Isrile (PW 11) an another injured eye witness the son-in-law of Baddal. The injuries sustained by this witness were proved by Dr. Som Dev Gupta (PW 8) who examined him on 5th January, 1990 at about 2.30 p.m. This medical evidence lends corroboration to the evidence of Isrile (PW 11) when he asserted that he was present at the time of incident. Isrile (PW 11) narrated by Saheed (PW 10). Both these witnesses were searchingly cross-examined on behalf of the defence we see no reason to discard their evidence. The evidence of these two eye witnesses find corroboration from the person of Chao Khan. Both the courts below have accepted their evidence as credible one and we see no reason to take a different view as regards the assault by the appellants on Chao Khan. Their presence at the time of incident also appeared to us quite natural because they were going alongwith Chao Khan and Baddal to attend the criminal case which was fixed on 5th January 1990 at Ferozepur Jhirka. It is common premise that chao Khan and Baddal were the accused in the criminal case relating to committing the murder of Asru and, Therefore, it would be quite reasonable to expect that Chao Khan and Baddal would take their close relatives with them while going to the court at Ferozepur Jhirka. On reading their evidence in proper perspective, we are of the opinion that the courts below have committed no error in accepting their evidence as credible one and convicting the appellants for the offences punishable under Sections 302/149 of the Indian Penal Code for committing the murder of Chao Khan. Suffers from no infirmity. The conviction of the appellants under Section 148 of the Indian Penal Code also calls for no interference because the appellants who were more than five in number were armed with deadly weapons formed an unlawful assembly and assaulted Chao Khan which had resulted into his death. The result, therefore, is that the appellants were rightly convicted for the offences punishable under Sections 302/149, 323/149 and 148 of the Indian Penal Code.

10 Coming to the conviction of the appellants under Sections 302/149 of the Indian Penal Code for committing the murder of Baddal, there appears to be some inconsistency in the evidence of eye witnesses and the medical evidence but this inconsistency is of very insignificant character. Saheed (PW 10) and Isrile (PW 11) who were the eye witnesses to the occurrence although searchingly cross-examined on behalf of make their evidence doubtful. Both the witnesses have testified on oath that A-2 had fired from his pistol on Baddal on his head causing a fire arm injury and thereafter

he fell down. The appellants who were carrying the lathis thereafter assaulted him. It is true that Dr. Jai Kishan (PW 9) who conducted the autopsy in his post mortem examination report described injury No.1 Being incised wound 20 cm x 2 cm causing fracture of the underline bone. He further noticed lacerated wounds on the neck af right ear of the size 1 cm x 1/2 cm causing fracture of the underlying bone. While giving evidence in the court, he described an incised wound as injury No.1 and Iacerated wounds as injury No. 1A. He further testified that it was a bonafide mistake in not describing these two injuries separately. Mr. Sushil Kumar urged that Dr. Jai Kishan (PW 9) has made material improvement in his evidence before the court to suit to the prosecution and to lend support to the evidence of eye witnesses and, therefore, such an improved version which demolishes the evidence of eye witnesses be not accepted. This submission, is an attractive on but having regard to the facts and circumstances of this case, it is not possible to accept the same. The consistent evidence of both these eye witnesses was that A-2 had fired from his pistol on Baddal causing fire arm injuries on his head and this evidence, in our opinion, is quite credible one. Both these witnesses have referred to the fire arm injury on Baddal on his head whereas lacerated wounds were found behind the right ear. In an assault of this nature, exact description as regard to location of the fire arm injury might be not accurate but that by itself would not render their evidence untrustworthy. It needs to be mentioned that the medical evidence is an opinion evidence which is used to lend corroboration to the evidence of eye witnesses. If the medical evidence is found to be totally inconsistent with the ocular evidence on a given sit of facts, it would be permissible for the court to reject the ocular evidence. As far as the facts of the present case are concerned as pointed out earlier, the inconsistency between the ocular evidence and the medical evidence is of a very minor nature and we do not think it proper to reject the evidence of these two eye witnesses on that score. As indicated earlier, the incident in question took place at about 9.30 a.m., the First Information Report was lodged at about 10.30 a.m. and the special report to the Illaqa Magistrate reached at about 4.40 p.m. The First Information Report did state that A-2 had fired from his pistol on Baddal as a result of which he fell down. There was hardly any time for Isrile (PW 11) to concoct any false story. Having regard to these circumstances, we are of the opinion that the courts below have committed no error in convicting the appellants for committing the murder of Baddal under Sections 302/149 of the Indian Penal Code.

11. For the foregoing conclusions, we see no merit in this appeal. The appeal to stand dismissed. The appellants, if on bail, shall surrender to their bailbonds to serve out the remaining period of their respective sentences.