

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 65 of 2008

Hiralal Pandey and Ors.

..... Appellants

Versus

State of U.P.
Respondent

.....

J U D G M E N T

A. K. PATNAIK, J.

This is an appeal by way of special leave under Article 136 of the Constitution of India against the judgment and order dated 06.02.2007 of the Allahabad High Court in Criminal Appeal No.178 of 1981.

2. The facts very briefly are that on 22.09.1979 at 8.05 p.m. Balbir Singh, the complainant, lodged an FIR with Police Chowki Dhata, P.S. Khakhreru in District Fatehpur. The prosecution story as stated in the FIR was that on 22.09.1979 the complainant was

returning home after purchasing crude oil from Khaga and Raja Ram Singh (his father) and Kunj Behari Singh were waiting for him at Dhata and he left the oil at Dhata and the three sat on the Motorcycle No.UTY 3213. Kunj Behari Singh drove the motorcycle and when they reached near bamboo clumps ahead of Kanya Pathshala on Dhata-Hinauta Road at about 6.00 P.M., Hira Pandey, Subhash Pandey @ Bodhan and Surendra Nath Pandey, the three appellants herein, who were waiting with single barrel gun, double barrel gun and rifle respectively and cartridge belts, started firing at them. As soon as Kunj Behari was shot, the Motorcycle lost balance and he and his father jumped off from the bike and while his father ran towards the west into the paddy fields, he ran towards Harijan Basti. From Dhata end, Sunder Lal Singh, Hari Prasad Singh, Lakhpat Sonar and Shisuvir Narain were coming and many other persons were coming from Kabraha side and on their exhortation, the appellants ran away to hide in the fields. Raja Ram and Kunj Behari died at the spot as a result of

the firing. He had lodged a case against two of the appellants, Subhash and Surendra under Sections 323, 325 and 147 of the Indian Penal Code (for short 'IPC') and they had asked him to compromise several times but he had not compromised and to take revenge they had fired upon them. The complainant has also stated in the FIR that his pant got torn while running to save his life.

3. The FIR was registered. The investigation was entrusted to Pyare Lal Sharma, S.I. (for short 'the IO'). The IO reached the place of occurrence at 7.30 A.M. on 23.09.1979 where the complainant was present. He recorded the statement of the complainant and wrote the *Panchnamas* of the deceased Raja Ram and the deceased Kunj Behari in the presence of the witnesses and seized the bodies of the two deceased persons and sent them for *post mortem* to the District Hospital through Constable Jamil Ahmad. He also collected blood-stained earth and sealed them in containers. He recorded the statements of Raghupat Singh, Sunder Lal Singh, Hari Prasad Singh and a few other persons

of the Harijan Basti. The remaining investigation was completed by S.O. Ram Mohan Ram and a charge-sheet was filed against the appellants under Section 302 read with 34, IPC.

4. At the trial, the complainant was examined as PW-1, who fully supported the prosecution case as alleged in the FIR. Hari Prasad Singh was examined as PW-2 and he also supported the prosecution case as alleged in the FIR. Dr. Anand Swarup of the District Hospital, who carried out the *post mortem*, was examined as PW-3. He described in details the *ante-mortem* gun shot injuries in the chest and abdominal cavity and the thighs of the deceased Raja Ram and opined that the cause of his death was due to shock and hemorrhage as a result of the injuries sustained by him. PW-3 also described the *ante-mortem* gun shot injuries on left side of the chin and below the left ear and the left side of the neck of the deceased Kunj Behari Singh and opined that the cause of his death was due to shock and hemorrhage. Ram Prakash, the constable who received the complaint at Dhata Chowki of P.S.

Khakheru, was examined as PW-4. The IO was examined as PW-5 and Jamil Ahmad, the constable, who carried the dead body for the *post mortem*, was examined as PW-6. In defence, the appellants examined a resident of the Harijan Basti of village Dhata, Shiv Balak, as DW-1 who stated that he had heard some voice coming from the road in the south of his house asking for help and when he walked ahead in the direction of the voice he saw 6-7 miscreants who fired twice, but he could not recognise the miscreants and the appellants were not amongst the miscreants. The trial court, however, relied upon the evidence of PW-1 and PW-2 and convicted the appellants under Section 302 read with Section 34, IPC and after hearing the parties on the question of sentence, sentenced them for life imprisonment. The appellants carried an appeal to the High Court, but the High Court has affirmed the conviction and the sentence and has dismissed the appeal.

5. Mr. Vijay Hansaria, learned Senior Counsel appearing for the appellants, submitted that the trial court and the

High Court should not have relied on the evidence of PW-1 as admittedly he had previous enmity with the appellants. He submitted that if PW-1 was the prime target of the appellants, he would have received some injury as according to PW-1 all the appellants were armed with fire arms and cartridges, but as a matter of fact PW-1 has not received a single injury and this would go to show that PW-1 has falsely implicated the appellants. He further submitted that according to the evidence of PW-1, as soon as the motorcycle lost balance he jumped off from the motorcycle and ran away from the place of occurrence towards the Harijan Basti and therefore he could not have seen the appellant firing on the two deceased persons.

6. Mr. Hansaria submitted that the trial court and the High Court should not have relied on PW-2, who was a mere chance witness and was also a witness cited by PW-1 in support of his complaint against the appellants under Sections 323, 325 and 147 IPC pending in the Court. He argued that PW-2 therefore was an interested witness and his evidence should have been discarded. He submitted that PW-2 has made material improvements over his

statement made to the police under Section 161 of the Cr.P.C. He has stated that Hira and Surendra fired at the deceased Raja Ram in which case Raja Ram would have had injuries from at least two gun shots, but according to PW-3, the Doctor, who carried out the *post mortem* on the dead body of Raja Ram, all the injuries on his dead body were caused by a single gun shot.

7. Mr. Hansaria next submitted that in the FIR, PW-1 has stated that when the appellants were firing on the deceased persons from the Dhata end besides Hari Prasad Singh (PW-2) Sunder Lal Singh, Lakhpat Sonar and Shisuvir Narain were coming and many other persons were coming from Kabraha side, but the prosecution has examined only PW-1 and has not examined the other witnesses. He submitted that the I.O. (PW-5) has admitted that he had recorded the statement of Sunder Lal Singh and yet Sunder Lal Singh has been withheld from the witness box and there is no explanation whatsoever as to why Sunder Lal Singh was not examined. He submitted that independent witnesses have therefore not been examined in support of the prosecution case though these witnesses were named in

the FIR. He cited *Hem Raj and Others v. State of Haryana* [(2005) 10 SCC 614] in which this Court has held that when the evidence of alleged eyewitnesses raises serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the relevant witnesses would assume significance.

8. Mr. Hansaria also pointed out the following lapses in the prosecution case:

- (i) The time of recording of FIR at Dhata Police Chowki is doubtful, since at the time of writing the report it was made by pencil which was erased and again overwritten as per the evidence of PW-4 (Constable Ram Prakash).
- (ii) There is no recovery of empty cartridges from the place of occurrence, even though both the eyewitnesses have stated that several gun shots were fired.
- (iii) Injuries on the bodies of the two deceased persons were not correlated with weapons allegedly possessed by accused persons.

- (iv) The fire arms allegedly used have not been recovered nor is there any mention of efforts made to recover the same.
- (v) Though blood stained earth was collected and sealed near the dead body of Kunj Behari; no serological report has been produced to match the blood with that of the deceased Kunj Behari.
- (vi) As per PW-4, though Darogaji from Police Station, Khakeru came to the outpost in the night after the report of the incident has been sent from Chowki, yet investigation was started only in the morning.

9. Mr. R.K. Das, learned Senior Counsel appearing for the State, submitted that the presence of PW-1 at the spot of occurrence is supported by three circumstances: (a) that his motorcycle was found lying at the spot; (b) that his pant was torn and (c) DW-1 admitted to have seen the motorcycle lying on the western side of the road. He submitted that PW-1 therefore was present at the place of occurrence and was an eyewitness to the firing. He submitted that PW-2 could not be treated as a chance witness as the incident took place on the road and only passers-by on the road

would be witnesses to any such incident which took place on the road and their evidence could not be brushed aside on the ground that they are chance witnesses. He cited *Thangaiya v. State of T.N.* [(2005) 9 SCC 650] in which this Court has held that if a murder is committed in a street, only passers-by will be the witnesses and their evidence could not be brushed aside or viewed with suspicion on the ground that they were mere chance witnesses.

10. Mr. Das also cited the decision of this Court in *State of U.P. v. Anil Singh* (1988 Supp. (2) SCR 611) for the proposition that the prosecution version could not be rejected only on the ground that all the witnesses to the occurrence have not been examined. He submitted that the prosecution story thus cannot be discarded merely because all the witnesses named in the FIR including Sunder Lal Singh were not examined before the court.

11 Mr. Das submitted that it is true that the fired cartridges have not been recovered from the place of occurrence and this may be because the paddy fields had water and paddy stand up to knee height and it

was impossible to search and collect the fired cartridges, but the fact remains that the deceased have died of fire arm injuries. He contended that the trial court and the High Court have rightly believed the two eyewitnesses PW-1 and PW-2 considering the fact that the motive of the appellant was to take revenge against the complainant and his father for not agreeing to compromise the complaint case under Sections 323, 325 and 147 of the IPC pending before the court.

12. We may first examine the contention of Mr. Hansaria that the trial court and the High Court should not have relied on the evidence of PW-1 and PW-2 who were interested witnesses and that the prosecution should have examined the independent witnesses cited in the FIR, namely, Sunder Lal Singh, Lakhpat Sonar and Shisuvir Narain, who as per the FIR shouted at the appellants when they were firing at the deceased. We have perused the decision of this Court in *Hem Raj and Others v. State of Haryana* (supra) cited by Mr. Hansaria and we find that in the aforesaid decision this Court has held that non-

examination of independent witnesses by itself may not give rise to adverse inference against the prosecution, but when the evidence of the alleged eyewitnesses raises serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witnesses would assume significance. Hence, we will have to first consider whether the evidence of the two eyewitnesses PW-1 and PW-2 raises serious doubts on the point of their presence at the time of actual occurrence.

13. When we examine the evidence of PW-1 in this light, we find that he has stated that he had a motorcycle and a diesel pump set and on the day of the incident he purchased crude oil from Khaga, which is entered in his card and he came back to Dhata taking crude oil at 5.30 P.M. in the evening where he met his father and Kunj Behari and he kept the oil in a shop there and Kunj Behari drove the motorcycle from Dhata and his father and he sat behind him and when they started from Dhata for their village on the

motorcycle the incident took place at about 5-10 minutes before 6.00 p.m. He has stated:

“When we reached ahead of Kanya Pathshala Dhata near bamboo clumps, these three accused came out bamboo clumps. At that time accused Subhash was holding a double barrel gun with cartridge belt on shoulder. Hira Lal Pandey was having single barrel gun with cartridge belt on shoulder. Surendra had rifle and also cartridge belt. When these people came on the road and saw us going, then the three accused exhorted that today let them not escape. It was combined voice of the three. On exhortation all the three fired almost same time. First Subhash fired, I do not know whether it hit any body or not. But Kunj Behari Singh was scared by firing and Motor Cycle got dis-balanced and came on western strip of the road. Me and my father jumped from Motorcycle and ran. But Kunj Behari fell down along with Motorcycle. Accused persons were firing continuously. My father went ran towards paddy field towards west and I ran towards Harijan Basti in north. Hearing the fire, Sunder Lal Singh and Hari Prasad Singh of village Sonari coming on cycles from Dhata reached there. Lakpat Sonar also reached there. These people stopped there and shouted at the accused. I was running and hearing the fire. I was clearly hearing the sound of fire. Accused persons ran away on exhortation-lalkara of witnesses. When I jumped from the motorcycle and ran, I could not see whether my father or Kunj Behari was hurt or not because I was running to save myself. I ran towards village through Harijan Basti and Canal Side. I shouted reaching near the village. I returned back at the spot along with several persons collected there, and found that Kunj Behari was lying dead by gun shot on the road and my father was lying

dead by gun shot in paddy field, while running my trouser got torned. We people remained for about an hour at the place of occurrence. From there I came to Dhata and wrote the report in my hand writing sitting near the shop of Uma Shankar and gave that in Data Chowki.”

14. From the aforesaid narration of the incident by PW-1, it is very clear that he was present at the time of the occurrence and has seen the appellants with double barrel gun, single barrel gun and a rifle with cartridges. He has stated that when the appellants fired, Kunj Behari, who was driving the motorcycle, got scared by the firing and the motorcycle got dis-balanced and came on the western strip of the road and he and his father jumped from the motorcycle and ran but Kunj Behari fell down along with motorcycle. He has also stated that the appellants were firing continuously and his father ran towards paddy field towards west and he ran towards Harijan Basti towards north. He has also said that after he returned to the spot he found that Kunj Behari was lying dead by gun shot on the road and his father was lying dead by gun shot in paddy field. Moreover,

PW-1 has clearly disclosed that hearing the firing, Sunder Lal Singh and Hari Prasad Singh (PW-2), who were coming on cycles from Dhata, reached there and Lakhpat Sonar also reached there. He has not said that only Hari Prasad Singh (PW-2) from Dhata reached there. If PW-1 was really interested in falsely implicating the appellants in the case with the help of PW-2, he could have also said that he also saw the appellants firing at his father and at Kunj Behari and that only Hari Prasad Singh (PW-2) was coming on cycle from Dhata and shouted at the appellants and that Sunder Lal Singh and Lakhpat Sonar, whom he had named in the FIR, did not reach the spot in time to be able to witness the incidence. We are, thus, of the view that the evidence of PW-1 could not have been doubted by either the trial court or the High Court.

15. When we examine the evidence of PW-2 Hari Prasad Singh, we find that he has stated:

“Incident occurred about an year ago. Sun was about to set at about 6 P.M. in the evening I

along with fellow Sunder Singh were going from Dhata to Sonari on our separate cycles. Sunder Singh is also resident of Sonari. When I reached near girls school on Dhata-Sonari road, then from our back, deceased Raja Ram, Kunj Behari and Balbir P.W.1 crossed us on motorcycle. Kunj Behari was driving the motorcycle, Raja Ram and then Balbir were sitting behind him.

After crossing the girls school and when we were 30-40 paces away from Bamboo Kothi, all the three accused, Surendra, Heera and Subhash, present in court, came on the road from Bamboo Kothi. Seeing these persons, all the three accused gave a Lalkara that they should not go, and after saying this, three accused fired. At that time, accused Subhash had a double barrel gun, Surendra had a rifle and Hira Pandey had a single barrel gun. Due to fire, motor cycle got disbalanced. I did not see that the fire hit any body riding the motorcycle or its driver but I saw motorcycle getting disbalanced and going towards left strip of the road. Balbir P.W.1 jumped from that disbalanced motorcycle and ran towards north in the side we were going. Raja Ram also got down from motorcycle and ran towards paddy fields in west. But Kunj Behari fell there with motorcycle. As soon as the motorcycle fell, accused Subhash went near Kunj Behari and fired. Raja Ram fell down in water filled paddy fields. As Raja Ram tried to get up, accused Surendra and Hira reached near him and fired. Kunj Behari and Raja Ram died due to fire injuries then and there and Balbir ran away.

I asked accused persons not to fire which could hit us. Apart from me and Sunder Lal, Lakhpatt Sonar also reached on the place of occurrence from south side and he also shouted that do not fire, do not kill (Maaro). Hearing this, accused persons ran away from the spot.

After the incident, I stayed for about 30-45 minutes at the spot. During this, Balbir came on the spot along with 7-8 persons.”

16. The aforesaid testimony of PW-2 supports the evidence of PW-1 in all material respects. He has said that due to the firing by the appellants, the motorcycle got disbalanced and went towards left strip of the road and PW-1 jumped from the motorcycle and ran towards north side while Raja Ram ran towards paddy fields in the west, but Kunj Behari fell there with the motorcycle. PW-2 has further said that that as soon as the motorcycle fell, the appellant Subhash went near Kunj Behari and fired. He has also said that Raja Ram fell down in the water-filled paddy fields and when Raja Ram tried to get up, the appellants Subhash and Hira reached there and fired while PW-1 ran away. He has also disclosed that Sunder Lal and Lakhpat also reached the place of occurrence and shouted along with him not to fire and hearing this, the appellants ran away from the spot. He has also said that after the

incident, PW-1 came on the spot along with 7-8 persons. PW-2 is, therefore, a direct eyewitness to the firing by the appellants on the two deceased persons and in the lengthy cross-examination of PW-2 the defence has not been able to bring to the notice of the court any material to hold that his evidence is not reliable. On the other hand, we find, on a reading of the cross-examination of PW-2, that he has stated that Kunj Behari had fallen flat and his face was towards the sky when he was shot and his head was in the north, one leg in the south and one leg was on the motorcycle. He has stated that the appellant Subhash fired at Kunj Behari from the east from a standing position and at that time the barrel of the gun of the appellant Subhash was downwards on Kunj Behari. PW-2 has also stated that there were four paces distance between the place where Raja Ram fell in the paddy field and the place from where the two appellants entered the field and the two appellants fired on Raja Ram when he tried to get up. Had PW-2 not seen the occurrence, he could not have

given such details of the occurrence in the witness box during the cross-examination. The veracity of PW-2, in our considered opinion, has been tested in the cross-examination and his evidence is, thus, reliable.

17. We do not also think that the evidence of PW-2 could have been discarded on the ground that he was only a chance witness. The incident took place when the deceased were traveling on a motorcycle on the road and PW-2 was also coming on the same road on his cycle when he saw the incident. This Court has held in *Thangaiya v. State of T.N.* (supra) that if a murder is committed in a street, only passers-by will be witnesses and their evidence cannot be brushed aside or viewed with suspicion on the ground that they were mere chance witnesses. Moreover, PW-2 has been named in the FIR as one of the persons who were coming on a cycle from Dhata side and as one of the persons who shouted at the appellants not to fire. In *State of U.P. v. Anil Singh* (supra), this Court has held that when a witness figures as an eyewitness in

the FIR, he cannot be categorized as a chance witness. Once we accept that PW-1 and PW-2 were present at the place of occurrence and their evidence was reliable, the fact that other independent witnesses named in the FIR, such as Sunder Lal Singh, have not been examined before the Court, cannot be a ground for not believing the prosecution case. In *State of U.P. v. Anil Singh* (supra), this Court has held that the prosecution case cannot be doubted for not examining the witnesses after taking note of the fact that the public are generally reluctant to come forward to depose before the Court. We, therefore, do not find any merit in the submission made by the learned counsel for the appellants that the prosecution story should not be believed because the independent witnesses have not been examined.

18. We have also considered the contention of Mr. Hansaria that the time of recording of FIR at Dhata Police Chowki is doubtful as the FIR was first written by pencil which was erased and again overwritten as per the evidence of PW-4. We find from the evidence

of PW-4 that although a suggestion was made to him in cross-examination by the defence that the time of incident in the chik register as the time of incident was first written in pencil and thereafter erased and again written, PW-4 has said that the suggestion is incorrect. There is no definite evidence before the Court to come to the conclusion that the time of incident in the FIR was first written in pencil and was thereafter erased and again written and that the time of incident as recorded in the FIR was doubtful.

19. Regarding the contention of Mr. Hansaria that there was no recovery of empty cartridges, we find that the IO (PW-5) has admitted during cross-examination by the defence that no empty cartridge was found from the passage on which PW-1 ran away from the spot and he did not find any empty pellet, tikli or cartridge from the spot where the motorcycle was lying and where the deceased Kunj Behari was shot. PW-5 has also not stated that any empty cartridge was recovered from the paddy field where Raja Ram was shot, but the fact remains that the deceased Kunj

Behari and Raja Ram were killed by gun shots. Dr. Anand Swarup (PW-3), who carried out the *post mortem*, has described the gun shot wounds of the deceased Raja Ram as *ante mortem* injuries in the chest and abdominal cavity and has opined that the cause of his death is shock and hemorrhage as a result of the injuries sustained by him. Mr. Hansaria is right that according to PW-3 all the injuries on the deceased Raja Ram were caused by one gun shot, whereas PW-2 has deposed that both Surendra and Hira fired at Raja Ram, but it appears only one of them was able to hit Raja Ram with a bullet because of which Raja Ram died. PW-3 has similarly described the injuries on the body of the deceased Kunj Behari as gun shot injuries in his oval cavity on the left side of the chin and neck and left shoulder and has opined that the injuries were sufficient to normally cause death. Thus, the medical evidence supports the eyewitness accounts of PW-1 and PW-2.

20. The submission of Mr. Hansaria that injuries on the body of deceased were not correlated with the

weapons allegedly possessed by the appellants would have been relevant if the fire arms were recovered from the appellants and the bullets were also recovered from the body of the deceased or from the place of occurrence. Regarding his contention that serological report has not been produced although the blood-stained earth was collected and that the investigation was started not on 22.09.1979 but only next day in the morning, these are defects in investigation but such defects cannot be a ground to disbelieve the prosecution story which has been proved beyond reasonable doubt through the evidence of the two eyewitnesses as supported by the medical evidence. In *State of Uttar Pradesh v. Bhagwant Kishore Joshi* (AIR 1964 SC 221), Subba Rao, J., as he then was, has held that it was necessary for the accused to throw a reasonable doubt that the prosecution evidence is such that it must have been manipulated or shaped by reason of the irregularity in the matter of investigation, or that he was prevented by reason of such irregularity from

putting forward his defence or adducing evidence in support thereof, but where the prosecution evidence has been held to be true and where the accused had full say in the matter, the conviction cannot obviously be set aside on the ground of every irregularity or illegality in the matter of investigation. In other words, unless the lapses on the part of the investigation are such as to cast reasonable doubt about the prosecution story or seriously prejudice the defence of the accused, the Court will not set aside the conviction.

21. We, therefore, do not find any merit in this appeal and we accordingly dismiss the appeal.

JUDGMENT

.....J.
(A. K. Patnaik)

.....J.
(Swatanter

Kumar)
New Delhi,
17 April, 2012.