

CASE NO.:
Appeal (crl.) 870 of 1997

PETITIONER:
Ram Swaroop and others

RESPONDENT:
State of Rajasthan

DATE OF JUDGMENT: 15/03/2004

BENCH:
N. Santosh Hegde & B.P. Singh

JUDGMENT:
JUDGMENT

B.P.SINGH, J.

In this appeal by special leave the appellants are Ram Swaroop and his two sons Ram Kalyan and Hiralal. They alongwith two others namely, - Dakhan, wife of Ram Swaroop and Ram Kanya wife of Ram Kalyan were tried by the Additional District & Sessions Judge, Bundi, in Sessions Case No. 55 of 1986 charged variously of offences under Sections 302, 302/34 and 323 IPC.

It was the case of the prosecution that in the occurrence giving rise to the instant appeal, they had assaulted Bhanwarlal, brother of appellant Ram Swaroop, who succumbed to his injuries, and had assaulted and caused injuries to Ram Kanwari (PW-9), wife of the deceased and Madan Lal (PW-8), son of the deceased. The trial court after an exhaustive consideration of the evidence on record came to the conclusion that the prosecution had failed to prove its case beyond reasonable doubt. The witnesses examined by the prosecution in support of its case were not found to be reliable, their evidence was not consistent with the medical evidence on record, and the version disclosed by them was inconsistent. In view of these findings, the trial court acquitted them of all the charges levelled against them.

On appeal the High Court affirmed the acquittal of the two female accused, but while acquitting the appellants of the offence punishable under Section 302 IPC convicted them under Section 304 Part II and Section 323 IPC. Appellant Ram Swaroop was sentenced to undergo four years' imprisonment and to pay a fine of Rs.100/- under Section 304 Part II IPC and to undergo six months' imprisonment for the offence under Section 323 IPC. Appellants Ram Kalyan and Hiralal were sentenced to undergo four years' imprisonment for committing the offence under Section 304 read with Section 34 IPC and six months' imprisonment for the offence under Section 323 IPC. The sentences were directed to run concurrently.

The occurrence in question is alleged to have taken place at about 6.00 a.m. on 6th June, 1986. A First Information Report was lodged by Madan Lal (PW-8), son of the deceased, at 8.45 a.m. at P.S. Sadar, Bundi. It was reported by the informant that in the morning at about 6.00 a.m. his aunt Dakhan started abusing his mother Ram Kanwari (PW-9) on account of the fact that she had plastered with mud a common

wall between the houses of the accused and the deceased. His father Bhanwarlal, deceased, approached Chaturbhuj (not examined) and Gopal (PW-7), who were sitting on the platform near Shiva Temple requesting them to persuade Dakhan not to abuse his wife. Soon thereafter appellant Ram Swaroop, appellant No.1, and his son Ram Kalyan and Hiralal, appellants 2 and 3 came running from their house to the said platform of Shiva Temple. Ram Swaroop assaulted Bhanwarlal with a 'lathi' several times with a view to killing him. He fell down and became unconscious. When the informant was attempting to run to the place of occurrence and had come in front of the house of appellant Ram Swaroop, Dakhan and Ram Kanya (both since acquitted) caught hold of him and beat him with sticks. In the meantime the appellants came there and Hiralal hit him on his head with a 'lathi' while Ram Kalyan hit him with a 'lathi' on both his elbows and on his right leg. Ram Swaroop assaulted him with a 'lathi' on his back and hands. When his mother came to his rescue, Dakhan and Ram Kanwari beat her with sticks. Seeing the occurrence several persons came running to the place of occurrence which included Chandra Dutt (PW-3), Gopal (PW-7), Mohan Lal (PW-12) and Nanda (PW-13). His father was removed in an unconscious condition to the police station.

On the basis of the above report a crime was registered under Sections 307/148/341/323 IPC but after the death of Bhanwarlal Section 302 IPC was added.

Before advertng to the evidence on record, we may notice that the members of the prosecution party and the defence party belong to the same family, the deceased being the brother of appellant No.1, Ram Swaroop while appellant Nos. 2 and 3 are the sons of Ram Swaroop. It also appears from the record that PW-7 Gopal and PW-10 Kishore are their collaterals. The houses of Ram Swaroop and Bhanwarlal are adjacent to each other. While proceeding towards the platform of Shiva Temple the house of the deceased comes first followed by the house of the appellants and thereafter the house of Kishore (PW-10). The platform of the temple is in-front of the house of Kishore on the other side of the road.

Several witnesses were examined by the prosecution in support of its case and out of them, the alleged eye witnesses were Chandra Dutt (PW-3), Gopal (PW-7), Madan Lal (PW-8), Ram Kanwari (PW-9), Kishore (PW-10), Mohan Lal (PW-12), and Nanda (PW-13). PWs, 3, 7, 10 & 12 were declared hostile by the prosecution. However, the High Court has relied upon the testimony of PWs. 7, 8, 9 and 10 to record the order of conviction against the appellants.

We shall confine our discussion to the evidence of these witnesses since the other witnesses are not relevant for the disposal of this appeal.

Gopal PW-7 deposed that on the date of occurrence he alongwith Kishore (PW-10) was sitting on the platform outside the house of Kishore. At that time Bhanwarlal approached them. In the meantime the three appellants came and fought with deceased Bhanwarlal. According to this witness Ram Swaroop assaulted Bhanwarlal on his head with a 'lathi' while Ram Kalyan assaulted him with a 'lathi' on his head and chest. Hiralal struck the deceased on his chest with his 'lathi'. As a result of the injuries caused to him Bhanwarlal became unconscious. According to this witness, after injuries had been caused to Bhanwarlal other members of his family came there. No female had accompanied the three appellants who had

assaulted Bhanwarlal. He also stated that nothing happened to Madan Lal (PW-8) and Ram Kanwari (PW-9). The evidence of this witness discloses they were the only eye witnesses to the occurrence. PWs. 8 and 9 came after the occurrence, as such, they were not eye witnesses. Further they were not assaulted in the course of the occurrence by anyone. This witness was declared hostile and was cross-examined at length by reference to the earlier statement made by him in the course of investigation. As to the manner of occurrence he stated that Ram Swaroop had struck Bhanwarlal 4 or 5 times with his 'lathi' while Ram Kalyan also assaulted him 4-5 times on the head and 4-5 times on his chest. Similarly Hiralal also struck on the chest of Bhanwarlal 4-5 times. When confronted with his statement made in the course of investigation, he stated that he named Ram Kalyan and Hiralal as the assailants of Bhanwarlal but he could not explain why their names were not found mentioned in his statement. He also admitted that a criminal case had been lodged against him of assaulting appellant Ram Swaroop and his wife.

PW-10, Kishore deposed that on the date of occurrence he was sitting on the platform of Shiva Temple and some others were also present whom he could not name. He witnessed Ram Kalyan and Ram Swaroop giving 'lathi' blows on the head of Bhanwarlal while Hira Lal gave 'lathi' blow on the chest and legs of Bhanwarlal. No woman had assaulted Bhanwarlal in his presence nor did he see any female causing injury either to Madan Lal (PW-8) or his mother Ram Kanwari (PW-9). He further asserted that apart from him, Kanha and his son-in-law, no one else had witnessed the occurrence. This witness was also declared hostile since he did not support the case of the prosecution. In the course of his cross-examination he was confronted with his statement made in the course of investigation where he had not stated that Ram Kalyan had assaulted Bhanwarlal. He further stated that Bhanwarlal deceased had been given several injuries on his head.

PW-8 is the son of the deceased who had lodged the first information report. Contrary to the statement made in his earliest report he stated that when his father was talking to Kishore (PW-10) and Gopal (PW-7) the three appellants appeared with 'lathies' and all of them assaulted his father. They assaulted him on his head as well as his chest. His father fell down after receiving injuries. Later Dakhan and Ram Kanya also came to the place of occurrence and assaulted him and his mother. Appellant Ram Kalyan had also caused injury on his forehead with his 'lathi' and thereafter all the three appellants assaulted him on his head and thigh with 'lathies'

According to this witness Ram Swaroop struck only once on the head of his father, apart from assaulting him on his chest only once. However, Ram Kalyan assaulted on the chest of his father several times and he could not count the number of blows given by him. He also struck 2 to 5 times on the legs of his father but he could not say with certainty as to how many injuries were caused on his legs. Hiralal assaulted his father while he was lying down and caused 10 - 20 injuries on his chest and legs. When confronted with his statement made in the first information report where assault by Ram Kalyan and Hirallal on his father was not mentioned, he could not explain why it was not so recorded. Contrary to the statement in the first information report he stated that he had come to the platform of Shiva Temple alongwith his father. He further asserted that he had mentioned about the presence of Kishore (PW-10) in his report and he could not say why his name was

not mentioned in the report and it was stated that Chaturbhuj and Gopal were sitting on the platform whom his father approached. He further asserted that since he was standing at the place of occurrence it was wrong to say that he had come later after hearing about the occurrence. But on being further cross-examined he admitted that when he came out of his house he was stopped in-front of the house of the appellants by the ladies and later the appellants also came there and assaulted him. The appellants had come there after assaulting his father Bhanwarlal.

The deposition of Ram Kanwari (PW-9) is quite different. According to her when her husband was talking to Kishore and Gopal, she alongwith her son Madan Lal had followed her husband. When her husband was talking to those persons, appellant Ram Kalyan came with a 'lathi' and caused injury on the head of her husband. Thereafter Hiralal and Ram Swaroop came there with 'lathies' and then all the three appellants assaulted her husband on different parts of his body. She was categorical that the injury on the head of her husband was inflicted by Hiralal, and Ram Swaroop wounded the knees and hands of her husband. She also categorically stated that Ram Swaroop had not assaulted her husband on his head. She also stated that Dakhan and Ram Kanya assaulted her and her son Madan with sticks and this occurrence took place after the assault on her husband. She was confronted with her statement made in the course of investigation and she denied that having heard the commotion she had come out of the house. She asserted that she had in fact followed her husband and the statement to the contrary recorded in her statement under Section 161 of the Code of Criminal Procedure was not stated by her.

At the outset we may notice the injuries found on the person of the deceased. He had suffered two incised injuries on his head and one bruised spot on the chest on the left side. The doctor who performed the post-mortem examination on the body of the deceased found only the following injuries :-

- "1. Incised injury 1 x = x = inch on the left side of the head at the parietal region.
2. Incised injury 1 x = inch on the right side of the head in the oxipetal region.
3. One bruised spot of 3 c = inch on the chest in the left side."

According to the doctor injury No.1 was sufficient to cause death in the ordinary course of nature and injuries No. 1 and 3 jointly were sufficient to cause death of the deceased in the ordinary course.

The trial court considered the evidence of the eye witnesses and did not find them to be reliable. So far as PW-9, Ram Kanwari is concerned her presence as an eye witness was doubted by the trial court. According to her it was Ram Kalyan who hit Bhanwarlal (deceased) on his head and not Ram Swaroop as deposed to by some of the other witnesses. In fact she was categorical that Ram Swaroop did not assault Bhanwarlal on his head. It was also found that though she alleged that Bhanwarlal deceased was assaulted on his legs and hands by Ram Kalyan, the medical evidence did not support these allegations as no injury was found on the hands and legs of the

deceased. It also appeared from the evidence of PW-13 that PW-9 was not present at the place of occurrence when Bhanwarlal was injured and she came only later. Even the evidence of PWs. 10 and 12 was to the same effect. Even the evidence of PW-8, her son, indicated that she could not be an eye witness because according to PW-8, when he was being assaulted by the appellants after they had assaulted his father, his mother, PW-9, came running to protect him. Obviously, therefore, she could not be an eye witness to the occurrence which had taken place earlier. Similarly Gopal (PW-7) clearly stated that other members of the family of Bhanwarlal came only after the occurrence. The trial court, therefore, concluded that Ram Kanwari (PW-9) cannot be said to be an eye witness and, therefore, her evidence cannot be relied upon.

So far as Madan Lal (PW-8) is concerned, the trial court noticed that in the first information report he had mentioned about Ram Swaroop causing an injury on the head of his father. There was no allegation in the first information report that Ram Kalyan or Hiralal assaulted his father, though it was stated that they had come running with Ram Swaroop. In the course of his deposition he wanted the court to believe that all the three appellants had assaulted his father. As to his presence at the place of occurrence the version given by him in the course of his deposition is quite different from what he stated in the first information report. In the first information report he stated that when he came out of his house he was stopped by Dakhan and Ram Kanya in front of the house of Ram Swaroop and they started assaulting him there. Soon thereafter the appellants also came there and assaulted him and his mother. In court he deposed that he had followed his father Ram Swaroop and was present when the appellants assaulted his father near the platform. Later Dakhan and Ram Kanya came and assaulted him and his mother. The appellants also assaulted him on his head and thigh. The trial court found that there was a conspicuous change of version by this witness relating to the manner of occurrence. From his deposition it appeared that he was with his father when he was assaulted and, therefore, witnessed the entire occurrence. Later in his cross-examination he again supported the version earlier given in the first information report that he was intercepted by Dakhan and Ram Kanya in-front of the house of Ram Swaroop and that the appellants came there and assaulted him. The trial court suspected that the witness was not a truthful witness and that the version given by him in the course of his deposition was quite at variance with what he stated in the first information report. Apart from the fact that he implicated Ram Kalyan and Hiralal as well in the assault on Bhanwarlal, even the nature of assault described by him in the course of his deposition was quite different and not consistent with the medical evidence on record. According to this witness all the three appellants had assaulted Bhanwarlal with 'lathies' on his chest. According to him appellant Ram Swaroop had inflicted injuries on the head about 5 times. Ram Kalyan had inflicted several injuries on the chest of his father which he could not count while Hiralal had struck several times, about 10 to 12 on the chest and legs of his father. This was quite different from what was stated in the first information report, namely that Bhanwarlal had been assaulted on his head by Ram Swaroop only whereafter he fell down and became unconscious. The witness was confronted with the statement made by him in the course of investigation and it appears that the version disclosed by him in court was quite different from the version stated in the course of his investigation. Contrary to the manner of occurrence deposed to by this witness, only three injuries were found on the person of

the deceased. The trial court also discussed the evidence of other witnesses such as PWs. 3, 7, 10, 12 and 13 and did not find them to be reliable. As noticed earlier PWs. 3, 7 10 & 12 were declared hostile by the prosecution itself.

The High Court in appeal re-appreciated the evidence for itself. It no doubt noticed the decisions of this Court which lay down the limitation on the powers of appellate court in reversing an order of acquittal. The High Court observed that the finding of the trial court could be reversed if the same was either perverse or contrary to the evidence on record. We have perused the judgment of the High Court. Though the High Court has referred very briefly to the findings of the trial court, it does not appear from a perusal of the judgment that the High Court has really applied its mind to the various reasons recorded by the trial court for not relying upon the testimony of the eye witnesses. The High Court has referred to the evidence of PWs. 7, 8, 9 and 10 only and relying upon their evidence reversed the finding of acquittal recorded by the trial court. So far as evidence of PWs. 7 and 10 is concerned, they were declared hostile by the prosecution. It is no doubt true that merely because a witness is declared hostile his evidence cannot be discarded. The fact that a witness has resiled from the earlier statement made in the course of investigation puts the court on guard and cautions the court against acceptance of such evidence without satisfactory corroboration. We have gone through the evidence of these two witnesses and we find that their evidence is wholly unreliable. Moreover if their evidence is to be accepted, it must be held that PWs. 8 and 9 were not eye witnesses at all. In any event PWs. 7 and 10 having been declared hostile by the prosecution and the trial court having found their evidence to be unreliable, there was really no justifiable reason for the High Court to take a different view, particularly in an appeal against acquittal.

We are then left with the evidence of PW. 9, Ram Kanwari and PW-8, Madan Lal. So far as the evidence of PW-9 is concerned, having critically scrutinized her evidence we find that she is not worthy of credit. According to her, it was Ram Kalyan who assaulted the deceased on his head. This is contrary to the evidence of other witnesses who stated that it was Ram Swaroop who assaulted the deceased on his head. In fact in the first information report lodged by her son PW-8 there is no mention of Ram Kalyan having caused any injury to Bhanwarlal. Moreover the number and nature of injuries caused by the appellants, as deposed to by this witness, is wholly inconsistent with the medical evidence on record. There were only three injuries found on the person of the deceased whereas according to her evidence as also the evidence of PW-8, there should have been many more injuries on the person of the deceased and on different parts of the body, which is not the case. In fact the High Court has not even believed her version with regard to the assault on her by Dakhan and Ram Kanya who have been acquitted by the High Court. In these circumstances we find it unsafe to rely upon the testimony of such a witness, particularly when the trial court after a careful consideration of her evidence, and for good reasons, disbelieved her.

PW-8, Madan Lal, the first informant also does not appear to us to be a reliable witness. The version disclosed by him as a witness is quite different from what he had stated in the first information report lodged by him as also in his statement recorded in the course of investigation. The trial court has considered his evidence in detail and pointed out the

inconsistencies in his evidence. It has also found that the medical evidence does not corroborate his version because if his version is to be believed, the deceased would have received many more injuries and on different parts of the body. In fact on the basis of the material on record it appears probable that this witness did not witness the occurrence and came out of his house after he heard about the occurrence. He falsely pretended to be an eye witness. The High Court found no inconsistency in the evidence of PWs. 7, 8, 9 and 10. We fail to understand how this conclusion can be accepted because if PWs. 7 and 10 are to be believed, PW-8 and 9 were not even present when the occurrence took place, and their claim to be eye witnesses must be discarded. The High Court also found that the prosecution evidence was corroborated by the medical evidence on record since all the injuries found were caused by blunt weapon and were ante mortem in nature. What the High Court failed to appreciate was that if the version of the occurrence as deposed to by the witnesses, namely PWs. 8 and 9, is to be accepted, the deceased would have suffered many more injuries and on different parts of the body. The medical evidence, however, discloses that the deceased suffered only three injuries, two on the head and one on the chest. It is, therefore, not possible to hold that the evidence of eye witnesses is consistent with the medical evidence on record.

While dealing with the statement of Madan Lal under Section 161 of the Code of Criminal Procedure the High Court noticed that neither in the first information report nor in his statement made in the course of investigation, did PW.8 attribute any role to Ram Kalyan and Hiralal in the assault on Bhanwarlal, but in the course of his deposition he clearly implicated them for causing several injuries to Bhanwarlal. The High Court observed :-

"It is true that in his statement u/s. 161 Cr. P.C., no specific injury is attributed to Ram Kalyan and Hiralal, but he clarified the factual aspect in court, merely on the basis of such clarification in the court, his credibility should not be doubted specially considering the fact that his presence is natural, his conduct his natural, his version is corroborated by the medical report."

We cannot approve of this approach of the High Court because the version disclosed in the first information report is so different from the version disclosed in the course of deposition of PW-8 that it cannot be said to be merely clarificatory.

We have also noticed that the High Court has attached undue importance to the statements made in the course of investigation and recorded under Section 161 of the Code of Criminal Procedure. It is well settled that a statement recorded under Section 161 of the Code of Criminal Procedure cannot be treated as evidence in the criminal trial but may be used for the limited purpose of impeaching the credibility of a witness. We find that in paragraph 6 of the judgment, the High Court while dealing with the evidence of PW-7 has clearly treated the statement of PW-7, recorded in the course of investigation, as substantive evidence in this case. The High Court observed :-

"He is consistent in his statement U/s. 161 Cr. P.C. that while he along with Kishore (PW-10) were sitting in front of the house of Kishore, which is

just near the Shiv Temple, Ramswaroop and his sons Ram Kalyan and Hiralal armed with lathies came and gave beating to Bhanwar Lal and specifically head injury is attributed to Ramswaroop. In the statement in court, he only attributed injuries to Hiralal and Ram Kalyan. Even he is consistent on the fact that while Madan Lal and his mother came and tried to save Bhanwar Lal from these persons, they were caught hold by Dakhan and Ram Kanya and Dakhan and Ram Kanya have given beating to Mdan Lal and his mother."

In our view the High Court ought to have considered his deposition rather than his statement recorded under Section 161 of the Code of Criminal Procedure. The inconsistency between the two versions is obvious from the fact that the prosecution had to declare the witness hostile. The approach of the High Court, therefore, is clearly erroneous.

Having regard to the findings recorded by the trial court and having gone through the evidence on record, we are of the view that this was not a case in which the High Court ought to have interfered with the order of acquittal passed by the trial court. It is well settled that if two views are reasonably possible on the basis of the evidence on record, the view which favours the accused must be preferred. Similarly it is well settled that if the view taken by the trial court while acquitting the accused is a possible, reasonable view of the evidence on record, the High Court ought not to interfere with such an order of acquittal merely because it is possible to take the contrary view. It is not as if the power of the High Court in any way is curtailed in appreciating the evidence on record in an appeal against acquittal, but having done so, the High Court ought not to interfere with an order of acquittal if the view taken by the trial court is also a reasonable view of the evidence on record and the findings recorded by the trial court are not manifestly erroneous, contrary to the evidence on record or perverse.

In the result this appeal is allowed and the appellants are acquitted of all the charges levelled against them. They are on bail. The bail bonds furnished by them are discharged.