Mohar Rai & Bharath Rai

Vs

The State of Bihar

Criminal Appeals Nos. 159 and 160 of 1965

(R. S. Bachawat, K. S. Hegde JJ)

22.03.1968

JUDGMENT

HEGDE, J.-

In these connected appeals by special leave the legality of the convictions of the appellants-appellant Mohar Rai under s. 324 of the Indian Penal Code and appellant Bharath Rai under s. 324/109 of the Indian Penal Code-is challenged. In the trial court the former was convicted under s. 307 of the Indian Penal Code and the latter under s. 307/109 of the Indian Penal Code. The High Court of Patna, in appeal, altered their convictions as set out above.

In order to appreciate the contentions advanced on behalf of the appellants, it is necessary to state briefly the prosecution as well as the defence version. The case made out by the prosecution is that because of previous enmity Mohar Rai shot and injured P.W. 1 Balli Ahir, at the instigation of Bharath Rai, on the evening of October 8, 1961, in Natwar Bazar. The existence of enmity between the appellants and most of the prosecution witnesses who speak to the occurrence, is satisfactorily established. Many of the prosecution witnesses appear to have been proceeded again under s. 107 of the Code of Criminal Procedure at the instance of the appellants. The plea of the appellants was that on the day of incident when they were returning to their house in the evening they were way-laid by P.W. 1 and several others; one of those persons fired shots at Mohar Rai, but it missed him; to save himself he (Mohar Rai) ran away from the sense, subsequently two more shots were fired; meanwhile he got into the house of Lal Bahadur Mistri (P.W. 9), but his assailants pursued him, thereafter with a view to foist a false case against him forcibly thrust into his hands the revolver (Ex. III) and then handed him over with Ex. III to Janardan Singh (P.W. 15), the police constable. The plea of Bharath Rai was that during the incident mentioned by Mohar Rai, he was caught hold of and assaulted by some of the prosecution witnesses. The High Court and the trial court have rejected the plea of the appellants and relying on the prosecution evidence convicted the appellants as mentioned earlier. This Court being a Court of special jurisdiction does not re-assess the evidence in a case except under exceptional circumstances. It was urged on behalf of the appellants that they did not have a fair trial, the High Court as well as the trial court on an erroneous view of the law refused to take into consideration their defence, they ignored important circumstances appearing in their favour and further some of the conclusions reached by them are unsupported by any evidence on record. We have to see how far these submissions are well-founded.

Out of the incident mentioned above, the State came to initiate as many as three prosecutions. G.R. Case 1370/TR-20 of 61/63 in the Court of the Munsif - Magistrate I Class, Sasaram was instituted on the basis of the complaint lodged by Mohar Rai. G.R. 506 of 1962 on the file of the Munsif-Magistrate I Class, Sasaram was a case under s. 19(f) of the Indian Arms Act against Mohar Rai for

being armed with a revolver at the time of the incident mentioned earlier. The third case is the one with which we are concerned in these appeals. The case instituted on the basic of the complaint made by Mohar Rai was acquitted on February 1, 1963. The Arms-Act case ended in acquittal on May 13, 1964. The appeal against that order was dismissed by the High Court of Patna on September 5, 1966. A copy of the judgment in that appeal was produced at the hearing of these appeals and received as additional evidence with our permission.

The trial court as well as the High Court refused to examine the defence of the appellants solely on the ground that the case pleaded by them had been rejected by the learned Munsif - Magistrate I Class, Sasaram in the prosecution commenced at the instance of Mohar Rai.

The prosecution case was that immediately after the occurrence, Mohar Rai was chased and caught and at that time he had in his hands the revolver (Ex. III). Very soon thereafter he was produced before Audeshwar Prasad Singh (P.W. 19) with the revolver in question. The further case of the prosecution was that P.W. 19 seized that revolver; later during investigation he seized the three cartridges said to have been fired by Mohar Rai as well as well as a misfired cartridge; the revolver as well as the seized cartridges were sent to the ballistic expert for examination. These facts were spoken to by the prosecution witnesses, in particular by P.W. Janardhan Singh, the constable to whom Mohar Rai was handed over immediately after the occurrence and P.W. 19 the investigating officer. P.W. 19 deposed that the number of the revolver seized is 545465. He is positive that the revolver seized from Mohar Rai is Ex. III, though in his report to the ballistic expert he had given the number of the revolver sent for examination as 545466, but in that report itself he had added a note to say that the last two digits were not clear. The prosecution proceeded on the basic - there is no ambiguity about it - that Ex. III was the weapon that was used in the commission of the offence. The ballistic expert who was examined as D.W. 1 was positive that the seized empties as well as the misfired cartridge could not have been fired from Ex. III. The evidence of this witness has been accepted both by the trial court as well as by the High Court. From that it follows that the prosecution case that Mohar Rai fired three shots from Ex. III cannot be accepted as true. If this part of the prosecution case fails then very little remains in the prosecution case. The trial court and the High Court have brushed aside this important aspect on a wholly untenable basis. They opined that by some mistake a revolver different from that seized from Mohar Rai Might have been sent to the ballistic expert. The conclusion has no basis on the material on record. It is just a speculation - a process not open to courts. Evidently overwhelmed by the evidence of the large number of witnesses who deposed in favour of the prosecution case, forgetting the fact that most of them belong to the faction opposed to the appellants, the trial court and the High Court ignored the probabilities and lost sight of the evidence afforded by the circumstances appearing in the case. Both those courts failed to realise that the fact that Ex. III was not the revolver that was used during the incident went to probablise the plea taken by Mohar Rai. At this stage we may recall the fact that both the trial Magistrate as well as the High Court rejected the prosecution case and acquitted Mohar Rai in the case against him under s. 19(f) of the Arms Act. It is true that the decision of the trial court in that case was rendered after the Assistant Sessions Judge, Sasaram, convicted the appellants in the present case and therefore it may be that the appellants cannot take the benefit of the rule laid down by this Court in Pritam Singh v. The State of Punjab [A.I.R. 1956 S.C. 415.] and affirmed in Manipur Administration v. Thokchom, Bira Singh [[1964] 7 S.C.R. 123.]. But even without the assistance of that rule, on the basic of the prosecution evidence itself the prosecution version stands discredited. Once it is proved that the empties recovered from the scene could not have been fired from Ex. III the prosecution case that those empties were fired from Ex. III by Mohar Rai stands falsified.

The trial court as well as the High Court wholly ignored the significance of the injuries found on the appellants. Mohar Rai had sustained as many as 13 injuries and Bharath Rai 14. We get it from the evidence of P.W. 15 that he noticed injuries on the person of Mohar Rai when he was produced before him immediately after the occurrence. Therefore the version of the appellants that they sustained injuries at the time of the occurrence is highly probabilised. Under these circumstances the prosecution had a duty to explain those injuries. The evidence of Dr. Bishun Prasad Sinha (P.W. 18) clearly shows that those injuries could not have been self-inflicted and further, according to him, it was most unlikely that they would have been caused at the instance of the appellants themselves. Under these circumstances we are unable to agree with the High Court that the prosecution had no duty to offer any explanation as regards those injuries. In our judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants.

Both the trial court as well as the High Court refused to take into consideration the plea of the appellants on the ground that that plea did not commend itself to the trial Magistrate in the case instituted on the complaint of Mohar Rai. They were erroneously of the view that the plea in question was barred by the rule laid down by this Court in Pritam Singh's case [A.I.R. 1956 S.C. 415.]. In that case, this Court accepted as correct the following statement of the law made by the Judicial Committee in Sambasivam v. Public Prosecutor, Federation of Malaya [[1950] A.C. 458.] :

> "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim 'res judicata pro vetitate accipitur' is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trail."

Dixon J., of the Australian High Court in the King v. Wilkes [(77) C.L.R. 511, at pp. 518-519.] explained the legal position in these words :

> "Whilst there is not a great deal of authority upon the subject, it appears to me that there is nothing wrong in the view that there is an issue-estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner. That seems to be implied in the language used by Wright, J. in R. v. Ollis [1960] II Q.B. 758, at p. 769 which in effect I have adapted in the foregoing statement..... There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue-estoppel should not apply. Such rules are not to be confused with those of res judicata, which in criminal proceedings are expressed in the pleas of autrefois acquit and autrefois convict. They are pleas which are concerned with the judicial determination of an alleged criminal

> liability and in the case of conviction with the substitution of a new liability. Issue-estoppel is concerned with the judicial establishment of a proposition of a law or fact between parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation."

This Court endorsed that statement in Manipur Administration's case [[1964] 7 S.C.R. 123.]. But the law laid down in those cases has no application to the facts of the present case. In both the prosecution - in the complaint made by Mohar Rai as well as in the complaint made by P.W. 1 - the prosecutor before the court was the State. Therefore, the decision in the former case cannot operate as an issue -estoppel against the appellants in the present case, because they were not parties in the former case. In other words the plea taken by the appellants in this case was never before litigated between them and the State, the opposite party in the present case. All that can be said is that the case put forward by the State in the one case is inconsistent with that put forward by it in the other. In those circumstances it was wrong to hold that the appellants were estoppel from putting forward their defence. That apart, it is doubtful - though for the purpose of this case it is unnecessary to express any final opinion on this point - whether the rule in question could be pressed against an accused, the reason being that while a prosecution cannot succeed unless it proved its case beyond reasonable doubt, the nature of the proof required of an accused in substantiating the plea taken by him is different - it is sufficient if he proves that plea taken by him is reasonable and probable. In that event he is entitled to the benefit of doubt. This aspect was noticed by this Court in Manipur Administration's [[1964] 7 S.C.R. 123.] case, where it was observed :

> "Before parting, we think it proper to make one observation. The question has sometimes been mooted as to whether the same principle of issue-estoppel could be raised against an accused, the argument against its application being that the prosecution cannot succeed unless it proved to the satisfaction of the Court trying the accused by evidence led before it that he is guilty of the offence charged. We prefer to express no opinion on this question since it does not arise for examination."

For the reasons mentioned above, we are satisfied that the trial court as well as the High Court erred in summarily rejecting the defence of the appellants on the sole ground that the version put forward by them having been rejected by the court in G.R. case 1376\TR\20 of 61\63 in the court of the Munsif-Magistrate I Class, Sasaram the same cannot be again considered. We think that the defence of the appellants is highly probablised by three important circumstances, namely - (i) the same was put forward immediately after the occurrence, (ii) it satisfactorily explains the injuries found on the persons of the appellants while the prosecution evidence fails to explain those injuries, and (iii) the prosecution evidence itself shows that Mohar Rai could not have used Ex. III and therefore his version that that weapon was thrust on him is probablised.

The last contention taken by Mr. Garg is that admission of Ex. 4, an inadmissible document, has greatly prejudiced the case of the appellants. According to him, the admission of that document is hit by s. 162 of the Code of Criminal Procedure. In the alternative, he contended that that document could not have been used to discredit the plea taken by Mohar Rai. We have earlier noted the two divergent versions given by P.W. 1 and Mohar Rai in respect of the incident that took place on the evening of October 8, 1961. Quite naturally, both these complaints were investigated simultaneously. The statement given by P.W. 1 was recorded as first information in one case and the statement given by Mohar Rai as first information in the other. Appellant Bharath Rai was questioned during the investigation. His statement is Ex. 4. The trial court came to the conclusion that it was not hit by s. 162 as the same was not recorded in the course of investigation in the case

against Bharath Rai. The High Court justified the admission of that document on the basis of the rule laid down by this Court in Faddi v. State of Madhya Pradesh [A.I.R. 1964 S.C. 1850.], namely - where the person who lodged the first information report regarding one offence is himself subsequently accused of that offence and tried and the report lodged by him is not a confessional first information report but is an admission by him of certain facts which have a bearing on the question to be determined by the Court, viz., how and by whom the offence was committed or whether the statement of the accused in the court denying the correctness of certain statements of the prosecution witnesses is correct or not, the first information report is admissible to prove against him, his admissions which are relevant under s. 21 of the Evidence Act. It was contended on behalf of the appellants that whether that statement is held to have been taken during the investigation of the complaint made by P.W. 1 or during the investigation of the complaint made by Mohar Rai, in either case it is hit by s. 162 of the Code of Criminal Procedure. It was also urged that the rule laid down in Faddi's case [A.I.R. 1964 S.C. 1850.] has no application to the facts of the present case. In the instant case no portion of Ex. 4 was relied on as an admission of Bharath Rai. Hence the rule laid down in Faddi's case [A.I.R. 1964 S.C. 1850.] could not have been called into aid. The trial court and the High Court relied on Bharath Rai's statement that it was Naulakh Rai who fired a pistol to contradict the statement of Mohar Rai in his complaint that a pistol was fired by Dudhnath. No portion of Ex. 4 could have been used for that purpose either under s. 157 or s. 145 of the Evidence Act. As Bharath Rai was not examined as a witness in the present case his previous statement could not have been used either to contradict his evidence or corroborate it even if it is to be held that it is a statement coming under s. 154 of the Code of Criminal Procedure : see Nazir Ali v. State of U.P. [A.I.R. 1957 S.C. 366.].

The circumstances noticed above, in our opinion, not merely affect the value and weight to be attached to the prosecution evidence, but they pursuade us to doubt the prosecution version. In the circumstances, we are unable to resist the conclusion that there has been a miscarriage of justice.

We accordingly allow these appeals and acquit the appellants. Their bail bonds do stand cancelled.

Appeals allowed.##

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