

Bansilal

Vs

The State of Rajasthan

Criminal Appeal No. 254 of 1968

(C. A. Vaidialingam, A. N. Ray JJ)

18.03.1971

JUDGMENT

VAIDIALINGAM, J. -

1. This appeal by the accused, by special leave, is directed against the judgment and order of the Rajasthan High Court, dated August 7, 1968 in D.B. Criminal Appeal No. 394 of 1964.
2. The appellant was tried in Sessions Case No. 4 of 1963 by the Additional Sessions Judge, Ajmer for an offence under Section 302, I.P.C. for causing the death of his brother Bajranglal on July 15, 1962. The Sessions Judge acquitted the appellant by his judgment and order, dated January 4, 1964. The State filed an appeal before the High Court against the decision of the Sessions Judge. The High Court has set aside the order of acquittal and in turn has convicted the appellant for the offence under Section 302, I.P.C. and has sentenced him to undergo imprisonment for life. The case of the prosecution was as follows :

The appellant and his three brothers Bhanwarlal, Ucchablal and Bajranglal owned jointly 14 bighas of land as joint family property. Bhanwarlal had died some 15 or 16 years before the occurrence. There was a dispute between the appellant and his two brothers Ucchablal and Bajranglal and the heirs of his deceased brother Bhanwarlal on the question of effecting partition of the land. About three or four years prior to the occurrence Ucchablal and his brother Bajranglal along with one Hiralal son of their brother Bhanwarlal had filed a suit against the appellant for partition of the land. About two or three days prior to the occurrence, deceased Bajranglal and Ucchablal had commenced putting up the Doli enclosing that portion of the land which, according to them, represented their shares. On the day of the occurrence, i.e., July 15, 1962, at about 3 p.m. the deceased and Ucchablal as usual went to the field to complete the work of putting up the Doli. When they were at their work, the appellant came to the field at about 6 p.m. armed with a gun and after threatening them fired a shot against Bajranglal. The shot hit Bajranglal on his chest and he fell down dead. When Ucchablal tried to snatch the gun from the appellant, the latter gave him some blows on his knee and back with the barrel of the gun. During this scuffle the Genti which Ucchablal had in his hand hit the head of the accused. Ucchablal on the same evening at about 6.45 p.m. gave a complaint Ex. P-1 before the police. The accused was arrested the next day and the gun Ex. 13 was recovered from him.

3. P.W. 15, Dr. Umed Singh Rathore, who performed the post-mortem on the body of the deceased found the following external and internal injuries, described in the post-mortem certificate :

(a) External injuries : (1) A punched circular wound of the size of 1/2" x 1/2" x 5"

depth with inverted ecchymosed edges placed on the chest left side between 3 and 4 ribs 2" from the midsternal line directed towards back.

(2) An oval oblique wound of the size of 1/4" x 2/3" with everted and irregular edges on back left side 3" from the middle at the level of the 7th spine.

(b) Internal injuries : (1) 8th rib fractured on left side back with irregular rough and crushed fractured ends. A few pieces of bones weeded in the wound.

(2) Pleura on left side torn with a circular wound.

(3) A circular wound hold in the left lung upper lobe anterior aspect with direction behind. Diameter of the hole 1".

4. P.W. 15 has given evidence to the effect that the cause of death was syncope due to injury to the left lung by a fire arm. The appellant was also examined by P.W. 15 on the same evening. The appellant had a lacerated wound with irregular and contused borders and bleeding on touching placed vertically on the back of the hand on the occipital region, right side 3 inches from the right mastoid. The size of the injury was stated to be 1 3/4" x 1/5" x 1/3". Ucchablal was also examined on the same day by P.W. 15. He had two contusions, three abrasions and a linear scratch. One abrasion and one contusion was on the back and one abrasion was on the left scapular region and one abrasion was on the left knee.

5. The prosecution mainly relied on the evidence of Ucchablal, P.W. 1 and Narain P.W. 2 regarding the incident. The appellant when he was examined under Section 342, Code of Criminal Procedure pleaded that the land had been given by his father as his share as he had taken over the liability to discharge the entire debts of his father. He further stated that he had gone to the jungle with his gun for hunting and was returning home on the evening on the day in question. His land was on his way to his house from the jungle. When he came near the land he found his two brothers, the deceased and P.W. 1, constructing the Doli on his field. He questioned them as to why they were doing an illegal act, when the matter was before the Court. But his two brothers protested against his interference and P.W. 1 caught hold of him with the gun. The deceased then gave a blow with the Genti on his head. The deceased also caught hold of the barrel of the gun which was in his hand and tried to snatch it away. During this attempt made by the deceased, the appellant pulled the gun towards him and the gun went off and hit the deceased on his chest and the latter fell down and died on the spot. The appellant admitted that the police recovered the gun Ex. 13 from him and also the shirt and Bandi. He also examined two witnesses to prove that there was no enmity between him and the deceased. Therefore, it will be noted that the plea of the accused was that he did not shoot the deceased, but, on the other hand Bajranglal died receiving a gun shot injury by the gun going off accidentally. As the presence of the appellant near the field at the time of the incident, as also the fact that Bajranglal died as a result of the injuries sustained by him by the gun shot, are admitted by the appellant, it is not necessary to refer to the various items of evidence led by the prosecution in this regard.

6. The learned Sessions Judge did not believe the evidence of P.W. 2 and it is also seen that even before the High Court the State did not place any reliance on his evidence and it was conceded that P.W. 2, had not actually seen the occurrence. Therefore, the main evidence relating to the actual occurrence was that of P.W. 1. He was examined on April 8, 1963. In his examination-in-chief he supported the prosecution in full and also admitted that the facts mentioned in Ex. P-1 were true. It

may be stated at this stage that P.W. 1's evidence in examination-in-chief relating to the incident was in accordance with the facts mentioned in Ex. P-1. On the same day he was cross-examined for some time. But when the cross-examination continued on the next day, that is, on April 9, 1963, he completely went back upon the evidence given in examination-in-chief. On the other hand, he gave a version to the effect that the appellant did not intentionally shoot Bajranglal and that the latter sustained the injury in consequence of the gun going off by accident. In fact he has also stated that when the accused protested against the Doli being constructed, Bajranglal began to beat the appellant with a Genti and tried to snatch the gun from the appellant. It was when Bajranglal attempted to snatch the gun that went off accidentally causing an injury to the deceased.

7. The learned Sessions Judge was of the opinion that as P. W. 1 in his cross-examination has totally supported the appellant and as there was no other independent evidence against the appellant, it was unsafe to act on the testimony of P.W. 1 and convict the appellant. The learned Sessions Judge was also of the view that the defence story cannot be ruled out as improbable in the circumstances. For these reasons, the learned Sessions Judge acquitted the appellant.

8. On appeal by the State, the High Court set aside the order of acquittal. The High Court in the main has acted on the facts contained in Ex. P-1, evidence given by P.W. 1, before the committal Court Ex. P-7, treating the same as substantive evidence under Section 288 of the Code of Criminal Procedure and the answers given in the chief examination by P.W. 1. The High Court is of the view that P.W. 1, has been won over by the appellant and the answers given in cross-examination with a view to support the appellant are false. In order to act on the answers given by P.W. 1 in his chief examination, it found corroboration in Ex. P-1, Ex. P-7 and Ex. P-28, the report of the ballistic expert. As the report Ex. P-28 was already before the Court, the High Court examined the ballistic expert as Court Witness No. 1, in order to clarify the position whether the gun could have gone off accidentally as pleaded by the appellant and supported by P.W. 1 in his answers given in cross-examination. C.W. 1 was examined in the presence of the appellant and the latter was given a full opportunity to cross-examine him. From the evidence of C.W. 1, read with his report Ex. P-28, the High Court is of the view that the plea of the accused that the deceased sustained the injury by the gun going off accidentally is improbable. Even in respect of treating Ex. P-7 as substantive evidence, the High Court examined P.W. 1 and also provided the appellant an opportunity to cross-examine the said witness again.

9. On a review of the entire evidence on record, the High Court came to the conclusion that the deceased was shot at by the appellant with an intention to kill him and the injury sustained by the appellant was at the hands of P.W. 1 after the shooting incident. The plea of the appellant that the gun went off accidentally, in consequence of which Bajranglal sustained an injury and died was rejected by the High Court. In the end the High Court convicted the appellant of the offence under Section 302 and sentenced him to undergo imprisonment for life.

10. Mr. Naunit Lal, learned counsel for the appellant, has raised in the main three contentions : (1) the High Court was not justified in treating Ex. P-7 as substantive evidence and by doing so the High Court has really filled up the lacuna in the case of the prosecution; (2) the High Court has erred in basing the conviction on the sole testimony of P.W. 1, who had given conflicting versions in his examination-in-chief and cross-examination, especially when there was no independent evidence to corroborate his evidence given in chief examination; and (3) the plea of the appellant regarding the circumstances under which Bajranglal sustained the injury ought to have been accepted.

11. Mr. K. B. Mehta, learned counsel for the State, on the other hand, supported the reasons given

by the High Court in reversing the order of acquittal.

12. All the contentions of Mr. Naunit Lal can be dealt with together. In our opinion, the High Court was justified in treating Ex. P-7 as substantive evidence under Section 288, Cr.P.C. and in doing so there was no question of the Court trying to fill up any lacuna in the case of the prosecution. P.W. 1, in the complaint Ex. P-1, given immediately after the incident, had categorically stated that on the day in question he and the deceased were putting up the Doli when the accused came armed with a gun and found fault with them and said "beware I am giving you the share of the land". So saying he fired the gun shot at Bajranglal from a distance of about 10 or 12 feet. Bajranglal on receiving the gun shot on his chest fell down dead. The witness ran to snatch the gun from the appellant when the latter gave him some blows with the barrel of the gun. The Genti in the hand of the witness slipped at that time and fell on the head of the accused. From this it is clear that the deceased never grappled with the appellant and he was the victim of the shooting of the appellant. The injury received on the head of the appellant was sustained by the Genti of P.W. 1 falling on the head of the appellant and this happened after Bajranglal had been shot dead. The same version was spoken to by P.W. 1, before the committal Court, which had been marked as Ex. P-7. P.W. 1 had admitted that Ex. P-1 was given by him voluntarily and that he signed it after it was read over to him by the police and there was no compulsion exercised by the police at that stage. Regarding Ex. P-7, in his chief examination he had stated that he had given such a statement before the committal Court, but in cross-examination he explained it by saying that he was compelled to give such a statement by the police. In the chief-examination before the Court, when he was examined on April 8, 1963, he gave the same version as that contained in Ex. P-1 and Ex. P-7, but when his cross-examination took place, on the next day, he began to give answers in favour of the appellant making it appear that the appellant was not aggressive and that in the scuffle that took place, between the deceased and the appellant, the gun went off accidentally. In fact he has also stated that when the appellant protested against the putting up of the Doli, the deceased hit the appellant on his head with the Genti.

13. Ex. P-7 was already in evidence before the Magistrate and normally that statement should have been treated even by that Court as substantive evidence under Section 288, Cr.P.C. In fact he has been examined and cross-examined about Ex. P-7 even during the trial. Therefore, the High Court did not do anything to fill up any lacuna in the prosecution case. On the other hand, to complete the record and to enable it to act on Ex. P-7 by treating it as substantive evidence, it passed orders to that effect and examined P.W. 1 and gave an opportunity to the appellant to cross-examine the said witness. Therefore, there is nothing illegal or irregular in the High Court taking action under Section 288, Cr.P.C. and treating Ex. P-7 as substantive evidence.

14. The report of the ballistic expert Ex. 28 was already before the Court and the High Court was justified in examining the ballistic expert as Court witness No. 1. The object of examining him was to ascertain whether it was probable for the gun to have gone off accidentally as pleaded by the appellant. The ballistic expert was examined in the presence of the appellant and an opportunity was given to him to cross-examine the said witness. In fact if that evidence had in any manner supported the plea of the appellant, we dare say the High Court would have given due consideration regarding the plea raised by the appellant in that regard. On the other hand, the evidence of C.W. 1 was that the gun could not have gone off accidentally and he has given very good reasons for his opinion. It is also in evidence that there was no blackening and charring near the wound sustained by the deceased. From all these circumstances, C.W. 1 has stated that the gun should have been fired from a distance of more than 5 or 6 feet, which makes the plea of tussle between the appellant and the deceased, as highly improbable. In fact the evidence that the gun must have been fired more than four or five feet from the target is also supported by the statement of P.W. 1 in Ex. P-1, Ex. P-7 and

in his chief examination that the appellant fired the gun at Bajranglal when he was about 10 feet away from him.

15. The injuries sustained by P.W. 1 and the nature of injury sustained by the appellant also corroborate the original version given by P.W. 1 in Ex. P-7. That he had turned hostile to the prosecution with an attempt to support his brother is evident from the fact that he completely resiled from the statement made in Ex. P-1 and Ex. P-7 and in his chief examination. It is no doubt true that the evidence of such a witness like P.W. 1 has to be treated with caution, but it is not as if that the High Court has merely acted on the answers given by him in his chief examination. On the other hand, the High Court has taken care to see whether there is other independent corroboration to enable the Court to act on the answers given by P.W. 1 in his chief examination. Such corroboration, the High Court found in Ex. P-1, Ex. P-7 and Ex. P. 28, as well as the evidence of the ballistic expert, C.W. 1. If those items of evidence are accepted, it is clear that the shooting by the appellant was intentional and that he had no right of private defence as the injury in his head had been sustained by him not at the hands of the deceased but at the hands of his other brother P.W. 1, after the said incident was over. It follows that the plea of the appellant regarding the deceased having sustained the injury by the gun going off accidentally, is absolutely false. We do not see any error in the approach made by the High Court in setting aside the order of acquittal.

16. The appeal fails and is dismissed.

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