

Devi Lal and Another

Vs

The State of Rajasthan

Criminal Appeal No. 28 of 1969

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

08.04.1971

### JUDGEMENT

RAY, J. -

1. This is an appeal by special leave from the judgement, dated May 6, 1968, of the High Court of Rajasthan convicting the appellants Devi Lal and Bihari under Section 302, read with Section 34 of the Indian Penal Code and sentencing them to imprisonment for life.
2. There were seven accused in the case. The accused were Devi Lal, Brijlal, Jagram, Bihari, Mukhtiar Singh, Bahadur and Nathu. The Sessions Court tried the accused for offences under Sections 148, 307/149 and 302/149 of the Indian Penal Code. The Sessions Court convicted Devi Lal, Jagram and Bihari under Section 302, read with Section 34 of the Indian Penal Code, and sentenced each of them to imprisonment for life. The other accused were acquitted.
3. The State of Rajasthan preferred an appeal against the acquittal. The High Court dismissed the appeal of the State against accused Brijlal and Nathu and admitted the appeal as against the other accused.

The High Court maintained the conviction of the appellants Devi Lal and Bihari under Section 302, read with Section 34 of the Indian Penal Code and their sentence to imprisonment for life. The conviction of Jagram under Section 302/34 of the Indian Penal Code sentencing him to imprisonment for life was set aside. The appeal of the State was dismissed.

4. The prosecution case was this. Around midnight of June 11, 1966, Dhannaram and Sultan went to a liquor shop at village Dhaulapura. Dhannaram is the nephew of Motaram and Sultan is Motaram's son. There were two groups. One was Motaram's and the other was of Binjaram and Nathuram. There was enmity between the two groups. When they reached near the house of Surja, accused Brijlal and his brother Ladu met them. Brijlal and Ladu are sons of Binjaram. There were exchanges of verbal abuses between the two groups. Ladu gave a blow with the but end of the gun on the eye of Dhannaram. Dhannaram had an axe with which he gave a blow to Ladu. Ladu fired his gun. Ladu was carried to Government Hospital at Ganganagar and was admitted there on the following day June 12, 1966, at about 7 a.m. Motaram, his son Brijlal, P.W. 1 and Dhanna, P.W. 3 nephew of Motaram all went to the bus stand to make a report at the police station Hindumalkote. All the seven accused formed an unlawful assembly. Accused Brijlal and Nathu carried guns, while the other accused carried lathis. Nathu shouted that enemies were standing that they should be attacked. Thereafter Nathu fired his gun. Brijlal also fired his gun. None was hit. Motaram, his son Brijlal and his nephew Dhanna ran to save their lives. Brijlal and Dhanna managed to jump away. Motaram was

encircled by the accused. Devi Lal gave a lathi blow on his head. The other accused beat him. Motaram received 14 injuries. His condition became precarious. All the accused ran away. Brijlal and Dhannaram afterwards came to Motaram. They found Motaram in a serious condition. They took him to the hospital at Ganganagar. On the way Motaram expired.

5. Among the accused Brijlal, Jagram and the appellant Bihari are sons of Binjaram. There was enmity between Motaram on the one hand and Binjaram and accused Nathu on the other.

6. There were four prosecution eye-witnesses of the alleged occurrence. They were Brijlal, P.W. 1, Dhannaram P.W. 3, Birbal, P. W. 2 and Hariram, P.W. 4. Witness Brijlal is the son of Motaram. He is described as witness, Brijlal to avoid confusion with accused Brijlal son of Binjaram. Dhannaram is the nephew of Motaram. Witness Brijlal's father Motaram deceased had appeared as a witness for the prosecution in a case against the accused Bihari and Brijlal son of Binjaram. The case was under Section 307 of the Indian Penal Code. Witness Brijlal further said that Motaram had appeared as a prosecution witness in another case under Section 307 of the Indian Penal Code against the appellant Devi Lal. Witness Brijlal's evidence in short was this. Mukhtiar Singh was convicted for causing injuries to witness Brijlal and was sentenced to one year's rigorous imprisonment. Motaram had given evidence in a murder case against the accused Brijlal and Bihari. Motaram had also been convicted but the witness could not say in which case it was. Witness Brijlal had also been convicted in a criminal case where accused Mukhtiar Singh and Devi Lal had given evidence against Brijlal.

7. The evidence of Dhannaram, P.W. 3, was that a criminal case was pending against him and witness Brijlal with regard to injury caused to Ladu on the night previous to the date of incident. The High Court therefore held that the evidence of Brijlal and Dhannaram showed that there was old enmity between the deceased Motaram on the one hand and the accused Bihari and Brijlal sons of Binjaram on the other. The evidence of Brijlal and Dhannaram was therefore found by the High Court to be of a highly interested and inimical nature.

8. As to other two witnesses Birbal and Hariram the High Court said that though Birbal was not related to Motaram in any manner, Birbal's evidence was "to be treated with caution" and was "not to be believed in toto". As to Hariram, P.W. 4, the High Court said that the witness did not say anything as to what took place at the bus stand and Hariram had not been believed by the trial Court and the prosecution did not place much reliance on his evidence. The result is that there is no eye-witness on whose testimony and reliance can be placed.

9. At this stage it may be noticed that the trial Court did not accept the evidence of the prosecution witnesses and rejected the prosecution case that Brijlal and Nathu had gone to the bus stand with guns. The result was that of the seven accused the presence of two was totally disbelieved by the trial Court. The Sessions Court acquitted Brijlal, Mukhtiar Singh, Bahadur and Nathu but convicted Devi Lal, Jagram and Bihari. The High Court found that the prosecution evidence was totally false in regard to the version of Brijlal and Nathu going to the bus stand with guns as also the version that Nathu incited the other accused to open the attack. As to Devi Lal, Bihari and Jagram the High Court said that though Brijlal and Dhannaram were highly interested witnesses who bore enmity against some of the accused yet all the witnesses stated that the attack was opened by the appellants Devi Lal and Bihari and therefore the conviction of Devi Lal and Bihari was upheld by the High Court. The High Court set aside the conviction of Jagram on the ground that in view of the finding of the Sessions Court that the evidence of the prosecution witnesses was not reliable in regard to the accused Mukhtiar Singh and Bahadur, the same result should follow with regard to Jagram.

10. Apart from the four eye-witnesses the other three witnesses were the doctor and two police officers. None of them could speak of the occurrence. The High Court having found two of the witnesses to be interested and inimical, another witness not believable in toto and another witness who was not present at the occurrence fell into the error of relying on the self same witnesses to hold that the appellants were present at the occurrence. The High Court should not have proceeded without evidence aliunde of the presence of the appellants at the occurrence and their participation in the offence.

11. In the present case, it appears that the core of the prosecution case that Brijlal and Nathu carried guns and were present at the bus stand and that Nathu shouted that the enemies should be attacked and that Nathu fired the gun was disbelieved. A new prosecution case could not be reconstructed in the manner suggested in the judgment of the High Court. The High Court disbelieved that among the seven accused one was armed with rifle and the other a gun, that Nathu was present and instigated and on his instigation accused Brijlal fired. It could not therefore be believed that on account of firing the witness and Motaram ran away to save their lives. The High Court also disbelieved that accused Brijlal and Nathu the two gun-men stood there and threatened the witnesses not to approach the accused, that the five accused caused 14 injuries. The Sessions Court held that the three accused caused the injuries. The High Court held that two of the accused caused the injuries. It was not noticed by the High Court that the improvement of the individual part ascribed to the two appellants was not in the first information report and was a subsequent improvement.

12. Counsel for the appellants was correct in raising the principal contention in the fore-front that the accused did never know that this was the prosecution case. It would rightly be said that if the bedrock of the prosecution case that Brijlal and Nathu came armed with guns to throw a challenge to Motaram and his sons could not prove as a fact, the whole prosecution case would fall like a pack of cards. In criminal trials it is of prime importance for the accused to know as to what the exact prosecution case is. If the pivot of the prosecution case is not accepted a new prosecution case can not be made to imperil defence. In the present case, two of the accused are held both by Trial Court and by the High Court not to have been any where near the scene of occurrence. The entire prosecution case was that these two persons pointed to the enemies, namely, Motaram and his son and nephew. The further prosecution case was those two persons gave the order to the accused to attack them. Those two person opened the gun fire. Therefore when those two persons are found both by the Sessions Court and the High Court not to have been present the whole prosecution case changed colour and becomes unworthy of belief.

13. The distinction between Sections 34 and 149 of the Indian Penal Code was not clearly noticed by the Sessions Court and the High Court did not deal with this point at all. Under Section 34, when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The words "in furtherance of the common intention of all" are a most essential part of Section 34 of the Indian Penal code. It is common intention to commit the crime actually committed. This common intention is anterior in time to the commission of the crime. Common intention means a pre-arranged plan. On the other hand, Section 149 of the Indian Penal Code speaks of an offence being committed by any member of an unlawful assembly in prosecution of the common object of that assembly. The distinction between "common intention" under Section 34 and "common object" under Section 149 is of vital importance. The Sessions Court fell into the error of convicting the appellants under Section 302, read with Section 34 of the Indian Penal Code by holding that "if a number of persons assault another with a stick mercilessly their intention can only be to murder that manor at least they should know that the are likely to cause death of the person concerned". This aspect of their being

likely to cause death would be relevant under Section 149 and not under Section 34 of the Indian Penal Code for the obvious reason that under Section 34 it has to be established that there was the common intention before the participation by the accused.

14. For these reasons, the appeal is accepted. The judgment of the High Court is set aside. The accused are set at liberty.

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