

Bhoor Singh and Another

Vs

State of Punjab

Criminal Appeals Nos. 105 and 106 of 1973

(Y. V. Chandrachud, R. S. Sarkaria JJ)

28.02.1974

JUDGMENT

SARKARIA, J. -

1. The three appellants, who are brothers, were tried by the learned Sessions Judge, Patiala for the murders of Sardara Singh, Gain Singh and Harnek Singh and the appellants own brother, Baldev Singh.
2. Ajit Singh was convicted under Section 302 Penal Code, for the murders of Baldev Singh and Sardara Singh and under Section 302 read with Section 34, Penal Code, for the murders of Harnek Singh and Gian Singh, and sentenced to death on each count.
3. Bhoor Singh was convicted under Section 302, Penal Code, for the murder of Harnek Singh and Gian Singh and under Section 302, read with Section 34, Penal Code for the murders of Sardara Singh and Baldev Singh and sentenced to death on each count. He was further convicted under Section 307 Penal Code, and sentenced to 7 years rigorous imprisonment.
4. Kewal Singh was convicted under section 302 read with Section 34, Penal Code, for the murders of Harnek Singh, Gian Singh and Baldev Sing and sentenced to death. He was further convicted under section 326, Penal Code, for causing grievous hurt to Sardara Singh and Chhota Singh and sentenced to seven years' rigorous imprisonment.
5. On appeal, the High Court of Punjab and Haryana upheld the convictions of all the accused on all the counts. The capital sentences awarded by the trial Court to Ajit Singh and Bhoor Singh were confirmed, Kewal Singh's death sentence, however, was commuted to that of life imprisonment.
6. The convicts have come up to this Court in appeal by special leave granted under Article 136 of the Constitution.
7. Four or five years before the occurrence in question, Sardara Singh and Ishar Singh deceased had purchased, in the names of their sons, land from one Balbir Singh a collateral of the appellants. The vendees, however, were unable to get possession of the land which was the appellants. The vendees instituted a suit against the appellants for possession of the land and obtained a decree. The appellants, went up in appeal against that decree. The appeal was pending when the occurrence in question took place.
8. On Diwali day, October 29, 1970, Chhota Singh (P.W. 6), his brother, Ishar Singh deceased, and

their nephew, Harnek Singh deceased, were present at their tubewell. Kehar Singh (P.W. 4), a residence of the neighbour village, Mirpur, also came there to purchase a she-buffalo. The visitor wanted to milk the animal which was present there. At about 5 p.m. Sardara Singh deceased, another brother Chhota Singh, came and reported that on his way from Chanarthal Kalan, he was taunted by Baldev Singh and there was a sharp exchange of hot words between them with reference to the deceased's attempt to recover possession of the land. In the meanwhile, appellants Ajit Singh and Bhoor Singh, armed with guns, Kewal Singh appellant, Baldev Singh, deceased and two unknown persons, carrying gandasas, approached the tubewell. Bhoor Singh shouted that they would settle the scores once for all. Thereupon Sardara Singh, Ishar Singh and Harnek Singh deceased got hold of a Takwa gandasi and lathi, respectively P.W. Chhota was unarmed. Then, Bhoor Singh fired his gun towards the complaint party. The Shot did not find its marks. Sardara Singh said that they could not stand against guns. Realising that discretion was the better part of valour, the complaint party ran towards the tubewell of Balwant Singh hotly pursued and fired upon from the appellants side. At this juncture, Gian Singh, deceased and his son, Jaswinder Singh (P.W. 5) who were at their tubewell about 80 karams away, also reached there. They were unarmed. They, in association with Kehar Singh P.W., tried to dissuade the appellant. Ajit Singh shouted that they should stay away if they wanted to be alive. The appellants encircled the complainant party. Ajit Singh fired a shot dropping Sardara Singh to the ground. Kewal Singh then inflicted gandasa blows on Sardara Singh. Harnek Singh deceased surged ahead to rescue his father when a shot fired by Bhoor Singh felled him to the ground. At the same time, Baldev Singh belaboured Ishar Singh deceased with a gandasa. Ishar Singh unsuccessfully tried to ward off the blows with the weapon he was carrying. Ajit Singh fired his gun towards Ishar Singh, whereupon both Baldev Singh and Ishar Singh dropped dead. Chhota Singh (P.W. 6) took cover behind Gian Singh deceased, when the pellets from a shot fired by Bhoor Singh hit Gian Singh Kewal Singh and Jaswinder Singh Gian fell down and expired. Kewal Singh inflicted injuries with a gandasa on Chhota Singh. The appellants and their two unknown companions then ran away leaving Sardara Singh, Ishar Singh, Gian Singh and Baldev Singh dead at the spot. Harnek Singh died when he was being removed by Chhota Singh to the Hospital at Chanarthal Kalan. Kehar Singh and Jaswinder Singh stayed behind to guard the dead bodies.

9. Assistant Sub-Inspector, Gurdev Singh S.H.C. Police Station, Mulepur was in village Chanarthal Kalan where he learnt that a fight had taken place at Chinarthal Khurd. He hastened to Chinarthal Khurd and recorded the Statement of Chhota Singh Between 7.30 and 8.30 p.m. He then sent the statement to the police station where, on its basis a case was registered same day at 9.35 p.m.

10. In their examination under section 342, Criminal Procedure Code, Bhoor Singh and Kewal Singh appellants plainly denied the prosecution case and pleaded alibi. Ajit Singh, while admitting his arrest on October 30, 1970, along with the gun minus the cartridges, at the Rajendra Hospital, Patiala wherein he was lying as an indoor patient in an injured condition, set up this counter version at the trial :

My mother was ill and I had gone to village to enquire about her health on Diwali day. I had called Kewal accused to my house at Khaudebad where I am posted. He was to remain with my family and look after my she buffalo. He had an injury and could recover as I had sufficient milk for him. On Diwali day I and Baldev Singh were going to place Divas on our tubewell. On the way there are some graves and nirkhana. We placed a persons a Diva there and were going towards our tubewell. On that that way, 10 or 12 persons attacked us. One of them caused two injuries on my head. I was given one blow with Neja-like rod in my abdomen. I fell fell down semi

conscious. Then they attack Baldev Singh. I heard two or three gun fires. When I got up none was present. Baldev Singh was lying dead. A gun was lying beside him. I got hold of that gun and came home as I was afraid of others. I requested Mihan Singh son of Narain Singh to report the matter to the police as Baldev Singh had been killed. Jathedar Jaswant Singh had influence with the police and the report was not recorded. My brother in-law brought to Patiala.

11. The mainstay of the prosecution case was the testimony of the three eye witnesses Kehar Singh (P.W. 4) Jaswinder Singh (P.W. 5) and Chhota Singh (P.W. 6).

12. Learned Counsel for Ajit Singh appellant raised two legal objections.

13. The first is that the appellants were charged in respect of offences under Sections 148 and 302 read with Section 149, Penal Code, but they have been convicted under Section 302 read with Section 34, Penal Code though there was no specific charge under Section 34, Penal Code against them. This irregularity amounts to an illegality and vitiates the trial. Reliance has been placed on the decision of this Court in Nanak Chand v. State of Punjab ((1955) 1 SCR 1201 : AIR 1955 SC 274 : 1955 Cri LJ 721).

14. The second is that Ajit Singh was simultaneously but separately tried by the Sessions Judge for an offence under section 27, Arms Act, relating to the possession of this very gun, and was acquitted. No appeal was filed by the State against that order of acquittal, which, in consequences, became final, and on the principle of issue estoppel, the Court was precluded in the murder case from holding that Ajit Singh was in possession of this gun. In support of this argument, reference has been made to Pritam Singh v. State of Punjab (AIR 1955 SC 415); State of Andhra Pradesh v. Meerayya and Another ((1969) 2 SCR 1004 : (1969) 1 SCC 161). He has also cited Manipur Administration v. Thockom Bira Singh ((1964) 7 SCR 123 : AIR 1965 SC 87 1965(1) Cri LJ 120).

15. On merits, Messrs. Nuruddin and Sandhu, learned Counsel for appellants have addressed lengthy arguments, and taken us through the record. It is urged that the account given by P.Ws. 4, 5 and 6 was wholly unreliable for these reasons :

(a) Their evidence was contradicted by medical testimony and thus demonstrated to be false in regard to the role assigned to Kewal Singh in the assault, and the cause of Baldev Singhs death.

(b) They failed to give any explanation as how Ajit Singh appellant received serious injuries on vital parts of his person.

(c) The story of firing while chasing and then encircling the deceased persons and the use two guns by Ajit Singh and Bhoor Singh appellants was inherently improbable because for reloading the guns the gun-man had to halt and break the chase for some moments, during which the chased could elude the pursuit and run away beyond the range of the guns. Moreover, the circumstance that most of gun shot injuries were located on the front side of the victims, the non-recovery of any gun from Bhoor Singh, the recovered double barrelled gun being a licensed weapon of Baldev Singh, the participation of Baldev Singh and his death in the encounter, the recovery of only three 12 bore empties from the scene of occurrence, the certainty of on and the possibility of the other two of which having been fired through the 12 bore gun of

Baldev Singh had been established by the evidence of Mr. J. K. Sinha, Ballistic Expert (C.W. 1), the gun shot injuries on all the five persons, namely Gian Singh, Sardara Singh, Harnek Singh deceased, Kehar-Singh P.W. 4, Jaswinder Singh P.W. 5 (according to the own showing of the prosecution) being the result of three gun fires - all, are telltale circumstances pointing to the conclusion that only one gun had been used.

(d) These witness were highly interested in the prosecution. Chhota Singh was, in addition inimical towards the appellant of account of the dispute over land. Kehar Singh was a chance witness and the reason given by him for his presence in the company of the complaint party was hardly convincing. All the three suffered injuries together in the encounter.

(e) In the F.I.R. two unknown person also, were stated as associates of the appellants but at the trial, these unknowns were relegated to a distance as silent spectators. This was deliberately done to implicate, if possible, two more persons of the family of the appellants. An attempt has been made to rope in as many adult brother as possible. Two of them are employed and settled elsewhere, one was killed in this occurrence, and three have been 'bagged' and got convicted.

16. In the alternative, it is contended that there was no reason to disbelieve Ajit Singh's plea of self defence viz., that they were first attacked by the party of Sardara deceased with blunt and sharp-pointed weapons, particularly when the eye witness gave no explanation, whatever, of the injuries of Ajit Singh, and offered a false explanation as to who had killed Baldev Singh. The Sessions Judge and the High Court - proceeds the argument - overlooked the earlier statement of Ajit Singh made in the Committal Court which was more specific, and thus misdirected themselves to hold that the plea of self-defence was vague and groundless. According to the Counsel, another grave error committed by the Courts below was that they completely ignore Dr. Guptas opinion, elicited in cross examination, that the injury to Baldev Singh could be caused with a sua. This omission, it is maintained, led the Court to reach the perverse finding that it was Ajit Singh who had shot dead his own brother, Baldev Singh. The surrounding circumstances including the recovery of Divas from the dead body of Baldev Singh and the place of occurrence being near the grave of the Pir on which Divas are lit by villagers on Diwali Day, says the counsel, had lent assurance to the defence version.

17. It is further urged that Kewal Singh appellant had dislocated his shoulder in a car accident about one month before the occurrence, and he was physically unfit to wild a gandasa. The Courts below have grievously erred in disbelieving the evidence of D.W. 1, Dr. Joginder Singh on this point.

18. Lastly, it is urged that even if the circumstances brought on record, were insufficient to down-grade the offence, they were enough to mitigate the capital sentences.

19. In reply Mr. Kohli, learned Counsel for the State contends that in exercise of its special jurisdiction under Article 136 of the constitution, this court does not, as a rule of practice, reappraise the evidence and disturb concurrent findings of fact recording by the court below, unless those finding are clearly unreasonable or perverse. Present case, according to Counsel, is not of such a kind as would warrant interference, by this Court. The Court below, it is maintained, have rightly believed P. Ws. 4, 5 and 6 who were all injured witnesses, and had rejected the defence version for good reasons. The witness were under no obligation to explain the injuries of Ajit Singh, might have been fabricated or received in any other incident. It is stressed that the defence had not put to any of

these witness, in cross examination, that Baldev Singh had received the fatal injury with a sua consequently, the Court below were not wrong in accepting the prosecution story that Baldev Singh was killed by a shot fired by Ajit Singh appellant.

20. Regarding the legal objections, Mr. Kohli points out that they were not raised in the Court below and should not therefore be entertained. On merits, also, submits the counsel, they are not sustainable. Mr. Kohli further opposes commutation of the death sentences of Ajit Singh and Bhoor Singh, stressing that this is a case in which four deaths were caused.

21. The preliminary objections raised by the learned Counsel for the appellants are untenable. They were not raised in the Courts below and are liable to be rejected on that score alone. Nor do we find any substance in them.

22. Nanak Chands case (Supra) relied on by the appellants was explained by this Court in Willie (William) Slaney v. The State of Madhya Pradesh ((1955) 2 SCR 1140 : AIR 1956 SC 116 : 1956 Cri 291). It was pointed out that the term 'illegality' used in Nanak Chand's case must be read with reference to the facts of that case where the Court found prejudice. The Code does not use the word 'illegality' nor defines 'irregularity' and illegality can only mean an incurable illegality incurable because of prejudice leading to a failure of justice. It was stressed (Per S. R. Das, Acting C.J. and Bose. J) that the object of the charge is to give the accused notice of the matter he is charged with and does not touch jurisdiction. If therefore, the necessary information is conveyed to him in other ways and there is no prejudice, the trial is not invalidated by the mere fact that the charge was not formally reduced to writing. The essential part of this of the law is not any technical formula of words but the reality, whether the matter was explained to the accused and whether he understood what he was being tried for. It was further observed that it is not correct to say that Section 535 of the Code has no application to an accused in which there is no charge at all. Or, that it cannot apply except where Section 237 and 238 apply or that it is governed by Section 233.

23. The ratio of Slaney's case is a complete answer to the first contention of the learned Counsel for the appellants. All the circumstances showing concert and participation in the joint criminal action by all the three appellants were duly put to them in their examination, under Section 342, Cr. P.C. The appellants were fully aware of the matter with which they were charged. No question of prejudice arises. The first objection thus stands overruled.

24. Nor is the doctrine of issue estoppel enunciated by this Court in Pritam Singh's case (supra) applicable to the facts of this case. Firstly, the trial in which the appellants were tried for the murders, was registered as Sessions' Trial No. 55 of 1971, while the one under Section 27, Arms Act was numbered as Sessions Case No. 56 of 1971. The serial order in which the trials were numbered would indicate that the main case was decided first, and that under the Arms Act, subsequently. Secondly, at both the trials, in his examination under Section 342, Cr. P.C., Ajit Singh, appellant had admitted that the gun in question, was recovered from his possession at the Rajendra Hospital, Patiala, Indeed, in the case under the Arms Act, the trial Judge did not record any finding that Ajit Singh was not in possession of the gun. He acquitted him, perhaps erroneously, on the sole ground that the intention to use the gun or allow its use for any unlawful purpose had not been proved, which is an essential ingredient of an offence under Section 27, Arms Act. We would, therefore, negative this legal objection, also.

25. At this stage it will be well to remember that this is an appeal by special leave under Article 136 of the Constitution, and in the exercise of its special jurisdiction under that Article, this Court does

not normally disturb concurrent findings of fact or review the evidence unless grave and exceptional circumstances exist and there has been a failure of justice. So far as the conviction of the appellants for the murders of Sardara Singh, Gian Singh and Harnek Singh is concerned, no circumstances of such gravity exist as would warrant an interference by this Court.

26. We, therefore, do not propose to deal with those contentions which - though noted earlier in this judgment out of judicial courtsey - challenge the propriety of the appellants' conviction for these three murders.

27. Nevertheless, the findings of the Courts below are manifestly vulnerable and unsound in regard to two matters : (i) The conviction of the appellants for the murder of Baldev Singh, and (ii) the award of the capital sentence to Ajit Singh and Bhoor Singh. We will therefore reopen the case and reappraise the evidence only to the extent necessary for an examination of these two matters.

28. Regarding (i), the prosecution story propounded by P. Ws. 4,5 and 6 was that a pellet from a gun-shot fired by Ajit Singh at Ishar Singh deceased, had pierced through the neck of Baldev Singh and caused his death.

29. The plea of Ajit Singh before the Committing Magistrate was : there took place a chance encounter with Sardara Singh party. I was injured grievously and my brother Baldev Singh fired at them, and Baldev Singh was killed by a sua blow.

30. The trial Court seems to have overlooked this statement and confined itself to the less specific statement of Ajit Singh given at the trial. The fact remains that at the earliest, in the Committal Court, the appellant clearly alleged that Baldev Singh had been killed with a sua by the complainant party. This version was put to Dr. H. C. Gupta, who had performed the autopsy of Baldev Singh, in cross-examination, even in the Committal Court. The Doctor replied that he could not rule out the possibility of these injuries having been caused with a sua. This opinion was not discussed by the trial Court. The learned Judges of the High Court also did not advert to it. Although in examination-in-chief, the Doctor had said that these injuries were 'likely to be caused by a fire-arm', the circumstances on record definitely point towards the conclusion that the injury was probably caused with a sharp-pointed weapon conclusion that the injury was probably caused with a sharp-pointed weapon and not with a gun. The injuries were triangular. The dimentions as noted by the Doctor were :

(i) $3/4 \times 1/2 \times 3/4$ ins. on the front of the neck in the mid-line about $1 \frac{1}{2}$ in. below the chin;

(ii) Lacerated wound $1 \times 1/2 \times 1/2$ ins. on the back of the neck about 1 in. below the hair line.

31. A gun-shot wound of entry caused by a single pellet or ball is ordinarily circular or oval in shape. If these injuries were the result of a gun-shot fired from close range, with all the pellets piercing en masse through the neck, there should have been scorching, blackening and tattooing in and around the wound of entry. The wadding, or round cardboard pieces or pellets should have been found inside or outside the wound near the body. Nothing of this kind was found. Furthermore, the very story of Ajit Singh firing at Ishar Singh, but instead hitting his own brother was improbable. According to the prosecution, Ishar Singh was then interlocked in a struggle with Baldev Singh. If that was so, there should have been some gum-shot injury on Ishar Singh. But the Doctor did not

find any such injury on him.

32. The above negative and positive circumstances are tell-tale. Taken in conjunction with the Doctors' opinion given in cross-examination they probabilise the defence version that the injuries to Baldev Singh were caused with a sharp pointed weapon - and not with a fire-arm - by the complainant party.

33. We have therefore, no hesitation in holding that the learned Judges of the High Court were in error in upholding the conviction of the appellants for the murder of Baldev Singh, merely, on the basis, of what they termed "plausible explanation" rather than positive and convincing proof given by the prosecution. We would therefore, set aside that conviction.

34. We now take up matter No. (ii). It will bear repetition that from a combined reading of the statements of Ajit Singh - one made in the Committal Court and the other at the trial - it was clear that the plea set up by him was one of self-defence. In substance, his version was that he and Baldev Singh were innocently going to light Divas on the grave of Muslim Pir when a chance encounter took place with Sardara Singh and party. 'Sardara Singh party' attacked and inflicted injuries to Ajit Singh with a neza like iron rod that is, a sharp-pointed weapon. Baldev Singh thereupon, fired three shots with his 12-bore licensed gun at the complainant party before he was killed by a member of that party with a sua. This defence version was substantially put to P.Ws. 4,5 and 6 in cross-examination. They denied it flatly. But there was other evidence, circumstantial and direct, which shows that the occurrence was not a one-sided affair. Indeed, Chhota Singh P.W. and his companion witnesses admitted that Sardara Singh deceased was carrying a takava, Ishar Singh, a gandasa, and Harnek Singh a stick. The investigating officer (P.W. 13) found two blood-stained gandasas lying near the corpse of Ishar Singh, and a Kulhari and a Dahi near the dead body of Sardara Singh.

35. Dr. Gurpratap Singh, P.W. 3, examined Ajit Singh appellant in the Rajendra Hospital Patiala at 6 a.m. on October 30, 1970 and found these in his person.

1. A stab wound 1.5 cm. x 1.2 cm. on the front of the chest along side the right sternal margin 13 cm. below the superior sternal notch. The shirt and banian were found thrust into the wound and could not be pulled out by ordinary pressure. Consequently, the margins of the wound could not be exactly defined.

2. A lacerated longitudinal wound on the scalp 3 cm. x 0.5 cm. almost in its middle.

Injury No. 1, in the opinion of the Doctor, had been caused with a sharp pointed weapon and injury No. 2 with a blunt weapon.

36. We are not prepared to believe that these serious injuries, located as they were on vital parts of the body, could be fabricated or self-suffered. The fact that certain Divas (earthen lamps) were found with Baldev Singh deceased and the occurrence took place near the grave of a Muslim Pir does lend some support to the argument that the occurrence might not have been pre-planned. Possibly, it was a "chance-encounter" or a sudden development.

37. It is noteworthy that the prosecution has not given any explanation, whatever, of the injuries of Ajit Singh. The conclusion is therefore unescapable that there was a fight between two armed parties - the three appellants on one side and the numerically superior party of Sardara Singh on the other. It was in that combat that Ajit Singh appellant was injured and Baldev Singh killed by the complainant party, and the other deceased persons by the opposite party (the appellants). Though the

appellants had failed to show that the party of Sardara Singh deceased were the aggressors, yet, on the basis of the material on record, every possibility of the gun fire having been opened after Ajit Singh and Baldev Singh had been assaulted, could not be ruled out. Inter alia, Sardara Singh's exhortation to his armed companions that they could not stand against guns, was a pointer towards such a possibility.

38. The above circumstances, although insufficient to make out a plea of private defence or to palliate the offence, could legitimately be taken into account in choosing between the sentence of life or of death. Yet another supervening factor which by the sheer weight of compassion tilts the scales of justice in favour of life rather than extinguishing it, is that the dread of impending execution has been brooding over the head of these condemned prisoners for an excruciatingly long period. They were sentenced to death in 1971. We are now in 1974.

39. In the light of the above discussion, we would partly allow these appeals, set aside the conviction of the appellants for the murder of Baldev Singh, and while maintaining their convictions on the remaining counts, commute the death sentences of Ajit Singh and Bhoor Singh appellants on the capital charges, to that of imprisonment for life, each. The sentences on all the counts shall run concurrently.

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