

Dharam Pal and Others

Vs

The State of U. P.

Criminal Appeal No. 108 Of 1971

(M.H. Beg P.N. Bhagwati, R.S. Sarkaria JJ)

01.09.1975

JUDGMENT

BEG, J. –

1. The four appellants Daryao Singh, aged 46 years, Birbal aged 50 years, Dharam Pal aged 29 years and Om Pal, aged 15 years, were tried. Along with 14 others, for the offence of rioting in the course of which two murders were committed, on June 7, 1967, at about 6.30 a.m., on a path adjoining the field of the appellant Daryao Singh leading to village Parsoli from village Nirpura, in police station Doghat, in the district of Meerut. The trial Court acquitted eleven accused persons giving them the benefit of doubt and convicted seven including the four appellants. Each of the accused persons was charged and convicted under Section 302, read with Section 149, Indian Penal Code and sentenced to life imprisonment, in addition to charges and convictions under Sections 149/324 and 149/34, I.P.C. and either under Section 147 or Section 148, I.P.C. depending upon the weapon alleged to have been used by an accused person.

2. The prosecution case revealed a longstanding enmity between two groups of village Nirpura : one to which the appellants belonged and another to which Mukhtara and Raghubira, the murdered men, and the four other injured persons belonged. As is not unusual, the origin of the hostility between the two sides seems to have been a dispute over cultivable land between collaterals who had some joint khata. Asa Ram, PW 1, claimed to be in separate possession of some plots with his two brothers, including Raghubira (murdered), and his uncle Mukhtara (murdered). It was alleged by Asa Ram (PW 1) that Daryao Singh appellant wanted to take forcibly possession of some land cultivated by him. Daryao Singh and others had already filed a partition suit which was pending at the time of the occurrence. It appears that Hargyan, the father of the appellant Daryao, a first cousin of Mukhtara, the murdered man, had also been murdered in 1953 over a similar dispute. Asa Ram (PW 1), and Raghubira (deceased), Bijai (PW 10) and Asghar (PW 4) had been convicted and sentenced to life imprisonment. They had been released on parole after five years' imprisonment.

3. On the date of occurrence, Mukhtara, the murdered man, was said to be proceeding with Raghubira, who was also murdered, and Asa Ram, PW 1, and Bijai, PW 10, all sitting in a buggy driven by Asghar, PW 2, and Smt. Jahani, PW 3, the wife of Asa Ram, PW 1, was said to be following the buggy at a short distance with some food for the party. When this buggy reached the field of Daryao Singh, where a number of persons, said to be eighteen altogether. Whose names are mentioned in the first information report lodged at police station Doghat at a distance of three miles from village Nirpura at 8.30 a.m., were sitting on the boundary. These persons are alleged to have surrounded the buggy and attacked its occupants with balams and lathis shouting that the whole party in the buggy should be killed. Five occupants of the buggy, and after that, Smt. Jahani, who

soon joined them, were injured. Two of them, Mukhtara and Raghubira, died very soon after the attack. It was alleged that Dharam Pal, Birbal, and Daryao, appellants, and Nahar, Ajab Singh, and Ram Kishan acquitted persons, were armed with balams, one Salek Chand was armed with a spade, and the rest with lathis. A number of witnesses are said to have arrived in response to the shouts of the injured occupants of the buggi. The following injuries are shown to have been sustained by the victims of the attack :

1. MUKHTARA :

1. Vertical abrasion, 1 1/2" x 1/2" on the head, 4" above the middle of the left eyebrow.
2. Transverse abrasion, 1 3/4" x 3/4" on the head 5" above the right eyebrow.
3. Round swelling 2" x 2" on the right side of the head, 1/2" above the ear, there was a depressed fracture 2" x 2" underneath on the bone.
4. Transverse incised wound 1 1/2" x 1/2" x bone and brain deep on the head 1" behind the middle of the right ear. Brain matter was coming out of the wound.
5. Transverse increased wound 1 1/4" x 1/2" x bone deep on the head 3" behind the upper part of the right ear. The margins of injuries Nos. 4 and 5 were clear cut, smooth and well defined and angles on both the ends were acute.
6. Round blue mark 2" x 2" on the right shoulder portion. There was swelling all over the head. There was no reference of injuries Nos. 1 and 6 in the inquest report.

2. RAGHUBIRA :

1. Transverse abrasion 1/4" x 1/2" on the left ankle inner side.
2. Vertical punctured wound 1/2" x 1/3" x 1/4" on the back side of the elbow, margins clean cut, smooth and well defined and angles were acute.
3. Transverse lacerated wound on the head 1 1/2" x 1/2" bone deep on the right side 3" above the ear.
4. Round wound on the head 4 1/2" above the middle of the right eyebrow with margins clean cut.

3. ASA :

1. Punctured wound 1/2" x 1/4" x 1/2" on the left side of the chest with abrasions on the margins 6 1/4" below the axilla.
2. Abrasion 1/2" x 1/4" on the left shoulder.
3. Abrasion 1 1/4" x 1/8" oblique, on the right side of the chest extending towards right shoulder from epigastrium.
4. Abrasion 1/4" x 1/8" on the inner side of the left hand 1" above the wrist.
5. Abrasion 1/4" x 1/6" on the right arm back side 3" above the elbow.

6. Contusion 1/4" x 1/2" on the right side 3 1/2" below the edge of the iliac crest.

7. Incised wound 1/2" x 1/10" x skin deep 1/2" below the left eye.

4. SMT. JAHANI :

1. Lacerated wound 1 3/4" x 1/2" bone deep from front to backward 3 1/2" above the left ear.

2. Contusion 4 1/2" x 1" on the left scapular region, 2 1/2" below the shoulder.

3. Contusion 1 1/2" x 3/4" parallel to the earth extending from the upper and inner end of injury No.

2. These injuries were simple and had been caused by some blunt weapon, like lathi and were about 6 hours old (fresh). I had prepared the injury report Ex. Ka-16 at the time of examination. It bears my signature and is correct.

5. ASGHAR :

1. Contusion 2" x 1/4" x 1/4" going from front to back 3 1/2" above the nose.

2. Punctured wound 1/8" x 1/8" x 1/4" on the left hand, outer side 2" below the elbow.

6. BIJAI SINGH :

1. Contused wound 1/2" x 1/8" x skin deep at the part above the nail of the thumb of right hand with contusion 1 1/4" x 1/2" in the inner part of the nail.

2. Contusion 2 1/2" x 3/3" extending from the palm on the 1st and 2nd knuckles. Where blood had clotted in an area of 1/2" x 1/4" on the palmer side.

3. Abrasion 1/2" x 1/4" on the back and anterior side of right and, 3 1/2" above the wrist.

4. Injuries were found on the side of the accused on 3 appellants only. They were as follows :

1. OM PAL :

1. Lacerated wound 1/2" x 4/10" x 2/10" on the inner side of left forearm, 3 1/2" above the left wrist.

2. Lacerated wound 2/10" x 2/10" x 6/10" on the inner side of left forearm.

3. Abrasion 3/10" x 2/10" on the upper side of the left forearm, 3 1/2" above the wrist.

2. DARYAO :

1. Abrasion 1/2" x 3/10" on the left shoulder in front side.

2. Wound with scab 4/10" x 2/10" on the left arm, outer side, 6" below left shoulder.

3. BIRBAL :

1. Lacerated wound 2" x 3/10 bone deep on the front side of head.

2. Abraded contusion 1" x 2/10" on the left side of head, 3" above the left ear.
3. Contusion 1/2" x 4/10" on the right side of head, 2" above the right ear.
4. Abrasion 1/4" x 1/4" on the index finger of the right hand upper side on the middle phalux.
5. Abrasion 1/4" x 1/4" on the upper side at the root of the middle finger of right hand.
6. Abrasion 1/2" x 1/10" on the inner side of the lower portion of left forearm, 3/4" above the wrist.
7. Abrasion 3/10" x 1/10" on the inner side of left wrist.
8. Lacerated wound 3/10" x 1/10" x 3/10" on the right at a distance of 3 1/2" from side of thigh, anterior iliac spine.

5. It is significant that in answer to the last question put to Daryao Singh, appellant, in the committing Magistrate's Court, under Section 342 Criminal Procedure Code, whether he had nothing else to say, the first thing that came to his mind was that Asa Ram, PW 1, and Bijai, PW 10, and Raghubira (deceased) had killed his father about 15 years ago.

6. The defence case seemed quit absurd. It was that, Asa Ram and Bijai and Asghar, after having killed Mukhtara and Raghubira, and come and attacked the three injured appellants at the time and place given by the prosecution. Their defence witness, however, in an obvious attempt to explain the injuries of the three appellants, put forward the entirely new version that, when Asa, Bijai, and Asghar were killing Mukhtara and Raghubira, the three injured appellants had attempted to save the murdered men and were injured as a consequence. The accused had even filed a first information report on these lines. They unsuccessfully tried to prosecute Asa and Bijai and Asghar who could not, as the trial Court and the High Court had rightly observed, be expected to run berserk suddenly and attack persons on their own side for no explicable reason.

7. The prosecution had, in addition to examining injured witnesses mentioned above, produced Rattan Singh, PW 2, Kalu, PW 9, and Lakhi, PW 7, whose testimony was discarded by it on two grounds : firstly, because each one was shown to have some enmity with some accused person; and, secondly, because they were said to have been standing at a Harat nearly 400 paces away from where, according to the High Court, they could not have seen the occurrence. If there was no obstruction could at least make out the number of assailants from this distance as sunlight was there.

8. The prosecution evidence suffered from some quite obvious infirmities. Each of the four injured eyewitnesses, while naming each of the eighteen accused persons as participants in the occurrence and specifying their weapons, without any contradiction, had failed to assign any particular part to any of them. Each injured witness said that all the eighteen accused persons, named in the first information report, were assaulting the injured. This was hardly consistent with either the medical evidence or the very short time the whole occurrence was said to have lasted. It was physically impossible for all the eighteen accused persons to attack simultaneously each of the five victims. However, we cannot interpret the impressions of rustic witnesses, sought to be conveyed through their statements, as though they were made in carefully drawn up documents calling for a literal interpretation. It was likely that each of them had seen some acts of some assailants, but due to natural discrepancies in their accounts, as each could only depose the part he had observed, each had been instructed to omit this part of his testimony. That may explain how each consistently stated that all the accused persons were attacking his or her party although he or she could not specify which

accused attacked which victim. From the manner in which each witness could, without making any mistake, name each of the eighteen accused persons, almost in the same order, and specify the weapon each carried, without any discrepancy, some tutoring could be suspected. Nevertheless, both the trial Court and the High Court had reached the definite conclusion that the party of assailants consisted of more than five persons. It also found that this party was sitting on the boundary of the field of Daryao, apparently waiting with their weapons for the buggi, carrying Raghubira and Mukhtara and others. To reach the spot where they surrounded it and attacked. It was clear, from the nature and number of injuries of both sides, which we have set out above in extenso, that the attacking party must have consisted of more persons than the party of the male victims who were five in numbers. Even if these five victims were sitting in the buggi they were not all emptyhanded. Some of them had lathis which they plied in self-defence. The number and location of injuries on both sides also indicated an attack by a group of persons which must have surrounded the party travelling in the buggi. Even if two persons are engaged in stopping the buggi and there are two on each of the two sides of the buggi their numbers would be six. Again, even if at least one person is assumed to be the assailant of each of the victims, in a simultaneous attack upon them, the number of such assailants alone would come to at least six. It is, however, clear from the injuries of Mukhtara and Raghubira that each was attacked by more than one person because each had injuries with sharp-edged weapons and lathis. These facts were enough to come to the conclusion that the total number of assailants could not conceivably have been less than five. The High Court, however, after giving the benefit of doubt to four of the accused persons, on the ground that their cases did not differ from those of the others acquitted, came to the obviously correct conclusion that at least the four appellants before us must have taken part in the attack because they admitted their participation in the occurrence which took place at the time and place of the incident in which Raghubira and Mukhtara had lost their lives. Three of the accused persons, as already indicated had received injuries. On their own version, these injuries were sustained in the same occurrence. If, therefore, the prosecution version about the broad character of the incident is correct, the only question which remained was : Against which accused person was the case of participation in the attack established beyond reasonable doubt ?

9. The High Court came to the conclusion that the admissions of the four accused, corroborated by the injuries on the bodies of three of them, left no doubt whatsoever that they were, in any case, among the assailants. The others had merely been given the benefit of doubt lest some injustice is done by relying implicitly on partisan witnesses appearing in a type of case in which the innocent are not infrequently sought to be roped in with the guilty who are, of course, not spared. This did not mean that the total number of assailants was actually less than five as the learned Counsel for the appellants asked us to presume from the fact that fourteen out of the eighteen accused persons were actually acquitted.

10. It is true that the acquittal of an accused person does raise, in the eye of law, a presumption that he is innocent even if he was actually guilty. But, it is only the acquitted accused person and not the convicted accused persons who can, as a rule, get the benefit of such a presumption. The effect of findings on questions of fact depends upon the nature of those findings. If, for example, only five known persons are alleged to have participated in an attack but the courts find that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participants were less than five in number. On the other hand, if the Court holds that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants, and, therefore, acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding, based on good evidence and sound reasoning, that the participants were five or more in number. Such a case is one of doubt only as to identify of some

participants and not as to the total number of participants. It may be that a definite conclusion that the number of participants was at least five may be very difficult to reach where the allegation of participation is confined to five known persons and there is doubt about the identity of even one. But, where a large number of known persons (such as eighteen, as is the case before us), are alleged to have participated and the Court acts on the principle that it is better to err on the side of safety, so that no injustice is done to a possibly wrongly implicated accused, and benefit of doubt is reaped by a large number, with the result that their acquittal, out of abundant caution, reduces the number of those about whose participation there can be no doubt to less than five, it may not be really difficult at all, as it is not in the case before us, to reach the conclusion that, having regard to undeniable facts, the number of participants could not possibly be less than five. We have, for the reasons given above, also reached the same conclusion as the learned Judges of the Allahabad High Court. We wish that the High Court had itself given such reasons, which are not at all difficult to find in this case, so that its conclusion on the number of participants may not have appeared rather abrupt. Justice has not only to be done, but, as has been often said, must manifestly appear to be done.

11. Even if the number of assailants could have been less than five in the instant case (which, we think, on the facts stated above, was really not possible), we think that the fact that the attacking party was clearly shown to have waited for the buggy to reach near the field of Daryao in the early hours of June 7, 1967, shows, pre-planning. Some of the assailants had sharpened weapons. They were obviously lying in wait for the buggy to arrive. They surrounded and attacked the occupants shouting that the occupants will be killed. We do not think that more convincing evidence of a pre-concert was necessary. Therefore, if we had thought it necessary, we would not have hesitated to apply Section 34, I.P.C. also to this case. The principle of vicarious liability does not depend upon proof of facts, beyond reasonable doubt, which makes such a principle applicable. (see : *Yeshwant v. State of Maharashtra* ((1973) 1 SCR 291, 302, 303 : (1972) 3 SCC 639 : 1972 SCC (Cri) 684); and *Sukh Ram v. State of U. P.* ((1974) 2 SCR 518 : (1974) 3 SCC 656 : 1974 SCC (Cri) 186)). The most general and basic rule, on a question such as the one we are considering, is that there is no uniform, inflexible, or invariable rule applicable for arriving at what is really an inference from the totality of facts and circumstances which varies from case to case. We have to examine the effect of facts given in each case on this totality. It is rarely exactly identical with that in another case. Other rules are really subsidiary to this basic verity and depend for their correct application on the peculiar facts and circumstances in the context of which they are enunciated.

12. In *Yeshwant's case* (supra), the question was whether the acquittal of an alleged participant, said to be *Brahmanand Tiwari*, for the murder of a man called *Sukal*, could make it impossible to apply the principle of vicarious liability to convict, under Section 302/34, I.P.C., *Yeshwant*, the only other participant in murder. This Court observed (at p. 303) : [SCC p. 651 : SCC (CRI) p. 695, para 28]

The benefit of this doubt can only go to the appellant *Brahmanand Tiwari* and not to the other accused persons who were known well to each eyewitness.

13. Distinguishing *Krishna Govind Patil v. State of Maharashtra* ((1964) 1 SCR 678 : AIR 1963 SC 1413 (1963) 2 Cri LJ 351) this Court said in *Yeshwant's case* (supra) (at p. 302) : [SCC p. 651 : SCC (CRI) p. 695, para 26]

We do not think that this decision which depends upon its own facts, as criminal cases generally do, lays down any general principle that, where the identity of one of the participants is doubtful, the whole case must end in acquittal. Such a question belongs to the realm of facts and not of law.

14. The following cases were also cited before us : Dalip Singh v. State of Punjab (1954 SCR 145 : AIR 1953 SC 364 : 1953 Cri LJ 1465); Bharwad Mepa Dana v. State of Bombay ((1960) 2 SCR 172 : AIR 1960 SC 289 : 1960 Cri LJ 424); Kartar Singh v. State of Punjab ((1962) 2 SCR 395 : AIR 1961 SC 1787 : (1961) 2 Cri LJ 853); Mohan Singh v. State of Punjab (1962) Suppl 3 SCR 848 : AIR 1963 SC 174 : (1963) 1 Cri LJ 100); Ram Bilas Singh v. State of Bihar ((1964) 1 SCR 775).

15. In the case of Ram Bilas Singh (supra) previous decisions of this Court on the question argued before us have been considered at some length and a passage from Krishna Govind Patil's case (supra) was also quoted. In none of these cases was it decided that where, out of abundance of caution, a large number of accused persons obtained an acquittal with the result that the number of those whose participation is established beyond reasonable doubt is reduced to less than five, but, at the same time, it is clear that the total number of assailants could not be less than five, the convicted accused persons must necessarily get the benefit of doubt arising in the cases of the acquitted accused persons. A case like the one before us stands on the same footing as any other case where there is certainty that the number of participants was not less than five but there is doubt only as to the identity of some of the participants. It has to be remembered that doubts may arise with regard to the participation of a particular accused person in circumstances whose benefit can only be reaped by the accused who raises such doubt. Doubts may also arise about the veracity of the whole prosecution version and doubts about participation of individual accused persons may contribute to the emergence of such doubts, which may cover and engulf the whole case. Nevertheless, if, as in the instant case. The court, whose duty is to separate the chaff from the grain, does hold that the convicted persons were certainly members of an unlawful assembly which must have consisted of more than five persons, we do not see any principle of law or justice which could stand in the way of the application of Section 149, I.P.C. for convicting those found indubitably guilty of participation in carrying out of the common object of an unlawful assembly.

16. The only remaining question arises from the age of Om Pal which, at the time of trial, was found by the trial Court to be about 15 years. This means that Section 29 of the Uttar Pradesh Children Act, 1951, was applicable to the case. This section reads as follows :

29. Commitment of child to approved school. - (1) Where a child is found to have committed an offence punishable with transportation for imprisonment, the Court, if satisfied on inquiry that it is expedient so to deal with the child, may order him to be sent to an approved school for such period of stay as will not exceed beyond the time when the child will attain the age of 18 years or for shorter period, the reasons for such period to be recorded in writing.

(2) Where prior to the commencement of this Act a youthful offender has been sentenced to transportation or imprisonment, the State Government may direct that in lieu of undergoing or completing such sentence he shall, if under the age of sixteen years, be sent to an approved school, and thereupon the offender shall be subject to all the provisions of this Act as if he had been originally ordered to be detained in such school.

17. This question was not raised earlier so that the trial Court or the High Court may take the action it was open to the courts to take after due inquiry. Such action, if considered expedient, could only be to send the appellant to an approved school. We may observe that, although the appellant Om Pal was said to be armed with a lathi, no specific part was assigned to him by any prosecution witnesses. He was bound, with the background of hostility between two sides and the events mentioned above, to have been misled by the bad example of his elders. No previous participation in such a case and no previous conviction was shown against him. We, therefore, think that appropriate

action under Section 29 of the Children's Act could have been taken in his case if the question had been raised in time. We hope that the punishment he has already undergone has had a salutary effect in making him conscious of the gravity of the consequence of joining an unlawful assembly. All that we can do now, in the circumstances of Om Pal's case, is to recommend the remission of the remaining period of Om Pal's sentence to the authorities concerned.

18. Subject to the observations made above with regard to Om Pal, we affirm the convictions and sentences and dismiss this appeal.

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