

Ishwar Singh

Vs

State of U. P.

Ilam Singh and Others

Vs

State of U. P.

Criminal Appeal Nos. 6

(A.C. Gupta, Syed M. Fazal Ali JJ)

04.08.1976

JUDGMENT

GUPTA, J. -

1. These are two appeals from a common judgment of the Allahabad High Court by which the High Court disposed of two appeals substantially affirming the order of conviction and the sentences passed on the appellants by the second Temporary Civil and Sessions Judge, Meerut, for the murder of one Chauhal Singh. Ishwar Singh, appellant in Criminal Appeal 6 of 1975, was convicted under section 302 of the Indian Penal Code and sentenced to death by the Sessions Judge. Each of the four appellants in Criminal Appeal 21 of 1975, namely, Ilam Singh, Harpal, Brahm Singh and Deep Chand was convicted under section 302 read with section 149 of the Indian Penal Code and sentenced to life imprisonment. All the five appellants were further found guilty under Section 323 and 324 read with Section 149 of the Indian Penal Code and each was sentenced to rigorous imprisonment for nine months under the former section and for two years under the latter. Ishwar Singh and Harpal were also found guilty under Section 148 of the Indian Penal Code and were sentenced to rigorous imprisonment for two years each while the other three appellants were convicted under Section 147 of the Indian Penal Code and each sentenced to rigorous imprisonment for one year. The sentences were directed to run concurrently.

2. The High Court dismissed the appeal preferred by Ishwar Singh and accepted the reference for confirmation of the death sentence passed on him. The other appeal preferred by four other accused was also dismissed except for a small variation in that their conviction and sentence under section 302/149 of the Indian Penal Code were set aside, instead they were convicted under section 326/149 of the Indian Penal Code and each of them was sentenced to rigorous imprisonment for seven years. The High Court was of the view that Ishwar Singh was guilty of murder but the other four appellants did not share with him the common object to kill, though they had undoubtedly the common object to kill, though they had undoubtedly the common object to cause grievous hurt.

3. The incident leading to these appeals occurred in village Samarapur, police station Daurala, in district Meerut on February 14, 1973. First information of the crime appears to have been lodged by one Mahabir Singh of that village on the same day at 9.05 a.m. The report says that a dispute had

been going on for several days between the information Mahabir and Ishwar Singh, who owner adjacent lands, over the construction of a drain by Ishwar Singh, and on February 13 Mahabir demolished a portion of the drain with Ishwar Singh's permission. The report proceeds that at about 8 in the morning of February 14, the five accused persons came to Mahabir's house, variously armed, demanding to know why he had demolished the drain, and Ishwar Singh with a ballam, Harpal with a bhala, and the rest with lathis started assaulting Mahabir and those who were present in his house at the time. Ishwar Singh struck Chauhal Singh who was there on the chest with his ballam, as a result of which Chauhal Singh "died then and there". Chauhal Singh was the father-in-law of Mahabir's sister. The report adds that injuries were sustained by sustained by Satyapal who was Mahabir's sister's husband, Dharampal, Pritam and Jaipal who were all related to Mahabir, and one Ghanshyam. According to this report, besides the injured persons, there were three other eyewitness of the occurrence, namely, Ram Rikh, Jait Singh and Nahar Singh.

4. It appears that though Ishwar Singh was convicted under Section 302 simpliciter, the charge on this count framed against Ishwar Singh and Harpal Singh was for an offence punishable under Section 302 read with Section 149. The relevant charge reads :

Fourthly : That you, along with the aforesaid other accused, on the same day, at the same time and place, were members of an unlawful assembly, in prosecution of the common object of which, some of the members did commit murder by intentionally causing the death of Chauhal Singh and you are thereby, under Section 149 I. P. C., guilty of causing the said offence punishable under section 302 of the Indian Penal Code and within the cognizance of the court of session.

In his examination under Section 342 of the Criminal Procedure Code also Ishwar Singh was asked no question to enable him to answer the allegation that he struck Chauhal Singh on the chest with a ballam. The question asked was :

Q. 4. The prosecution evidence is that on the aforesaid day, time and place, in furtherance of the common object of the aforesaid unlawful assembly, you along with other accused persons committed the murder of Chauhal Singh and caused injuries to Mahabir Singh, Ghanshyam, Satyapal, Jaipal, Pritam and Dharam Pal. Have you anything to say about this ?

To this the answer was "It is wrong". Was this an illegality vitiating the trial or was it a curable irregularity having regard to the facts and circumstances of the case ? The F.I.R. mentions that Ishwar Singh "gave a thrust with the ballam" to Chauhal Singh which killed him. The eyewitness repeat this story. Also, no grievance appears to have been made in the High Court that Ishwar Singh was prejudiced in his defence by being convicted of an offence with which he was not charged. The point was raised for the first time here before us. Considering all the relevant circumstances, we do not think it could be said that the accused was prejudiced in his trial.

5. Mr. Frank Anthony appearing for appellant Ishwar Singh submitted that in affirming the judgments of the trial Court, the High Court also overlooked certain important aspects of the case that the Sessions Judge had failed to consider. He pointed out that the F.I.R. which is stated to have been lodged at 9.05 a. m. on February 14, 1973 was sent out from the police station the next day, February 15; the time when it was despatched is not stated, but it appears from the record that the magistrate was nearby, which makes it difficult to understand why the report was sent to him about

two days after its stated hour of receipt at the police station. Section 157 of the Code of Criminal Procedure, 1898 as well as of 1973 both require the first information report to be sent "forthwith" to the magistrate competent to take cognizance of the offence. No explanation is offered for this extraordinary delay in sending the report to the magistrate. This is a circumstance which provides a legitimate basis for suspecting, as Mr. Anthony suggested, that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. In this case the suspicion hardens into a definite possibility when one finds that the case made in court differs at least in two very important particulars from that narrated in the F.I.R. Mahabir Singh, who lodged the first information report, stated in court that he had invited some people to his house to effect a settlement between him and Ishwar Singh, and that he had also sent Ghanshyam to call Ishwar Singh there. The F.I.R. does not mention anything like this. From the F.I.R. it appears as if the accused persons came uninvited to his house, demanded why he had demolished the drain, and started assaulting him and the other persons who were present there. It is also difficult to understand why Mahabir should invite anyone to his house for a settlement, if really Ishwar Singh had permitted him to demolish the drain as he claimed. Further, the F.I.R. does not mention that Mahabir and Satyapal wielded lathis in their defence when attacked and that this resulted in some of the accused getting injured; but that is what both Mahabir (PW 1) and Satyapal (PW 2) stated in their evidence in court. These variations relate to vital parts of the prosecution case, and cannot be dismissed as minor discrepancies. In such a case the evidence of the eye-witnesses "cannot be accepted at its face value", as observed by this Court in *Mitter Sen v. State of U. P.* ((1976) 1 SCC 723 : 1976 SCC (Cri) 190)

6. The High Court accepted the evidence of the prosecution witnesses who claim to have seen the incident except the testimony of Jait Singh (PW 7). Jait Singh and Ram Rikh (PW 6) both claim to have seen the assault together from Ram Rikh's house and both have said that they hurried to the place of occurrence. The High Court thought that Jait Singh's presence at the time of the incident was doubtful and excluded his testimony from consideration. If Jait Singh was not a truthful witness, we do not see how Ram Rikh (PW 6) and the other two eyewitnesses examined. Mahabir (PW 1) and Satyapal (PW 2), could be relied on, because they have also said that Jait Singh was present at the place of occurrence. As stated already, the F.I.R. also mentions Jait Singh as an eyewitness. The F.I.R. names 9 persons as witnesses to the occurrence : Mahabir Singh, Ram Rikh, Jait Singh, Nahar Singh, Satyapal, Dharampal, Pritam, Jaipal and Ghanshyam. Of them only Mahabir, Satyapal, Ram Rikh and Jait Singh have been examined as PW 1, PW 2, PW 6 and PW 7 respectively. There is no explanation why the others were not examined. Of course, non-examination of some witness would not matter if the witnesses examined unfolded the prosecution case fully. But it is well established that witness essential to the unfolding of the narrative on which the prosecution is based must be examined. Mahabir's evidence is that on the morning of the date of occurrence he had invited Satyapal, Dharampal, Jaipal, Pritam, Ghanshyam and Chauhal Singh to settle the dispute between him and Ishwar Singh and that he had also sent Ghanshyam to call Ishwar Singh and his brothers for a settlement. Ghanshyam is also one of the persons assaulted. Ghanshyam thus appears to be an important witness for the unfolding of the prosecution case, but he has not been examined. There is no explanation why he was withheld though named in the F.I.R. Another witness named in the F.I.R., Nahar Singh, who seems to be an independent witness, not related to Mahabir, was also kept back. Non-examination of these witnesses acquires a special significance in view of the material discrepancy between the F.I.R. and the version of the occurrence given by the prosecution in court. But the High Court does not appear to have taken into account these circumstances in considering the probabilities of the case.

7. We therefore find it difficult to accept that the trouble started in the way suggested by the prosecution witnesses. The defence case is that on February 13, Mahabir had demolished the drain constructed by Ishwar Singh and February 14 Satyapal, Dharampal, Jaipal, Pritam, Mahabir Singh, Ghanshyam and two other persons came in a body and attacked Brahm Singh and Harpal. The defence version, which was sought to be proved by DW 4 Gangan, adds that the incident took place on the vacant land in front of Mahabir's house. According to this witness, Satyapal had a ballam. Mahabir had a bhala, and the rest had lathis. The witness also says that Chauhal Singh was not present there and no one died at that spot. Dr. R. K. Jain who was on emergency duty in P. L. Sharma Hospital, Meerut, on February 14, 1973 was examined as DW 1. His evidence is that he medically examined Brahm Singh on February 14 and found ten injuries on his person like contusions, abrasions, lacerated wound, and a swelling 10 cms. x 8 cms. on front side of the right knee. Dr. R. C. Bhatia (DW 2) Radiologist in P. L. Sharma Hospital who took X-ray photograph of Brahm Singh's right knee, says that the X-ray plates showed that Brahm Singh's "right patella bone fractured into several pieces". Dr. V. P. Aggarwal (DW 3), Medical Officer in the same hospital, examined Harpal on February 14 and found 11 injuries on different parts of his body including contused wounds on the top and the left side of his head. Harpal was admitted to hospital and his head injuries were kept under observation. The prosecution witnesses who were injured are PW 1 Mahabir and PW 2 Satyapal. Mahabir had a contusion on the left thigh and a skin deep lacerated wound on his right thumb. Satyapal had six injuries on his person including contusions, abrasions, a lacerated wound and a skin deep incised wound on the left side of his forehead caused by some sharp edged weapon. As already stated, the other witnesses named in the F.I.R. who had also received injuries were not produced. Post-mortem examination of Chauhal Singh, deceased, revealed one "sharp punctured wound 2 cm. x 1 cm. x chest cavity on the left side of chest", and several abrasions, one lacerated wound 2 cm. x 1/2 cm. bone deep and traumatic swelling 13 cms. x 11 cms. on the left side of the head. According to the doctor the punctured wound was caused by some sharp and piercing weapon and the lacerated wound and the swelling were caused by some blunt weapon. The infirmities in the prosecution case make it difficult to believe that the trouble originated in the manner alleged by the prosecution. Having regard to the injuries sustained by some of the prosecution witnesses and also by two of the accused, it seems that there was a free fight between the two sides. The defence version of the occurrence may not also be quite true, but considering all the circumstances we do not think it is possible to say with any certainty that the accused were the aggressors though undoubtedly the prosecution side got the worse of it after the fight was started. If really the accused were not the aggressors, no case either under Section 147 or Section 148 of the Penal Code can be maintained against them, and then it is for the prosecution to prove the individual assaults of which there is no evidence. The conviction of appellants Ilam Singh, Harpal, Brahm Singh and Deep Chand under Section 326, Section 324 and Section 323 of the Penal Code, founded against each of them on the basis of Section 149 of the Code is not therefore sustainable.

8. Appellant Ishwar Singh was however found guilty under Section 302 simpliciter of the Indian Penal Code for the murder of Chauhal Singh. He died of shock and haemorrhage due to the sharp punctured wound on his chest caused, according to Dr. A. P. Mathur, Additional Civil Surgeon, Meerut, who conducted the Post-mortem examination, by "some sharp edged pointed weapon". He added that the sound "might have been caused with a ballam". But whose hand was it that dealt this fatal blow with a "sharp edged pointed weapon" ? PW 1 Mahabir, PW 2 Satyapal, PW 6 Ram Rikh and PW 7 Jait Singh have all repeated that it was Ishwar Singh who struck Chauhal Singh with a ballam. But, for the reasons we have already given, implicit acceptance of their evidence is not possible and one must look for independent corroboration of the fact. The evidence of Sub-Inspector

Karam Chand (PW 8) is that a ballam was recovered from Ishwar Singh's house, and a bhala from Harpal's. Dr. Mathur who said that the fatal injury "might have been" caused by a ballam, admitted on cross-examination that he did not know the difference between ballam and a bhala. By ballam he meant "such weapon as is sharp edged on both sides, pointed, and less than 2 cm. in width" and he added that "if a bhala is of this very shape this injury is possible". It is not disputed that ballam and bhala are weapons of a similar type. Had the doctor seen the weapons seized from the houses of Ishwar Singh and Harpal, it might have been possible for him to say which of them caused the injury. But the weapons seized were not shown to the doctor. In *Kartarey v. State of U. P.* ((1976) 1 SCC 172, 177 : 1975 SCC (Cri) 803, 808 (para 26) this Court emphasized the importance of eliciting the opinion of the medical witness who had examined the injuries of the victim :

It is the duty of the prosecution, and no less of the Court to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may sometimes, cause aberration in the course of justice.

In this case it is impossible to say with certainty whether the injury was caused by the ballam or the bhala that were seized and therefore, whether it was Ishwar Singh or Harpal who was responsible for it, even if one believed that on the day of the occurrence the former carried a ballam and the latter a bhala. Ishwar Singh's conviction under Section 302 of the Indian Penal Code cannot also be sustained in these circumstances.

9. We have pointed out that the trial Court in convicting the appellants overlooked certain significant features of the case, namely, the inordinate and unexplained delay in dispatching the first information report to the magistrate; the difference in the account given by the prosecution witnesses and as appearing from the first information report of the occurrence; the absence of any statement in the first information report as to the injuries received by some of the accused, and the non-examination of material witnesses. The High Court in affirming the judgment of the trial Court also failed to advert to these circumstances. We do not therefore think that the case against the appellants has been proved beyond reasonable doubt. The appeals are accordingly allowed and the order of conviction and the sentences passed on the appellants are set aside. We direct that the appellants be set at liberty forthwith.

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