Bir Singh and Others

Vs

State of Uttar Pradesh

Criminal Appeal No. 126 of 1971

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

18.08.1977

JUDGMENT

FAZAL ALI, J. -

1. This is an appeal under the Enlargement of Supreme Court Jurisdiction Act read with Section 378 of the Criminal Procedure Code, 1973. Although it was not necessary yet the appellants appear to have moved the High Court of Allahabad for a certificate which was granted by the said Court as an appeal as of right lay to this Court under the aforesaid provisions.

2. The appellants were tried before the Court of the Second Additional Sessions Judge, Unnao for charges under Sections 302/34, 307/34, 302 and 307. The trial Court after considering the evidence led before it came to the conclusion that the prosecution has failed to prove the case against the appellants beyond reasonable doubt and accordingly acquitted the appellants of all the charges framed against them. Thereafter the State of Uttar Pradesh went up in appeal before the High Court against the order of acquittal passed by the Additional Sessions Judge. The High Court however has taken a different view and reserved the order of acquittal passed by the trial Court and held that the prosecution case was amply proved against the appellants and convicted the appellant Bir Singh under Section 302 and sentenced him to imprisonment for life. He was also convicted under Section 307 read with Section 34 and sentenced to 7 years' rigorous imprisonment. The appellant Ram Dularey Singh was convicted under Section 307 and sentenced to 7 years' rigorous imprisonment and also under Section 302 read with Section 34 and sentenced to imprisonment for life. The third appellant Hukum Singh was convicted under Section 302/34 and sentenced to life imprisonment and also under Section 307 read with Section 34 to 7 years' rigorous imprisonment. The appellants have filed the present appeal against the aforesaid order of conviction and sentences passed by the High Court.

3. The facts of the present case lie within a very narrow compass and the occurrence appears to be a result of chronic dispute between two factions in the village. The complainant and the witnesses examined by the prosecution to prove its case bear serious animus against the appellants and were interested. This fact is not disputed by the prosecution. The High Court was of the opinion that even if the evidence of the witnesses be considered with great amount of caution there was no good reason to reject the evidence on their intrinsic merits. The learned Sessions Judge however was of the view that as the prosecution has examined only inimical witnesses and failed to examine two independent witnesses who were named in the F.I.R. as eye-witnesses and who also seemed to have, according to the evidence of the prosecution witnesses, seen the occurrence, their non-examination was sufficient to demolish the entire edifice of the case. One of the important aspects which the High Court appears to have overlooked was whether the finding of the Sessions Judge that in the

absence of available independent evidence an adverse inference against the prosecution should be drawn was justified. Assuming that the High Court on appraisement of the evidence may not have chosen to draw the adverse inference could it be said that if the trial Judge was not satisfied with the interested and inimical evidence and drew an adverse inference against the prosecution for non-examination of witnesses who were available and yet not produced, the view he took was wholly an unreasonable view in the facts and circumstances of the case. In our opinion, if in the present state of the evidence the Sessions Judge refused to accept the prosecution case in the absence of the evidence of Bhikari and Shambhu, who according to the prosecution itself had seen the entire occurrence it could not be said that the view taken by the Sessions Judge was either manifestly wrong, perverse or unreasonable. It would however appear that there were other circumstances which were relied upon by the learned Sessions Judge for discrediting the prosecution case which seem to have been brushed aside by the High Court mostly on conjectural grounds.

4. It might also be noticed that the appellant Bir Singh is a boy of 14 years and so is Hukum Singh. According to the complainant, Bir Singh was studying in a primary school in the 8th Class at the time of the occurrence. The appellant Ram Dularey Singh is the maternal uncle of Bir Singh. The admitted position is that Ram Narain Singh, father of Bir Singh, was employed in the Police Department and was posted at Banda and that he possessed a rifle while the elder brother of Bir Singh. Vidya Vinod Singh had a licensed gun. Against the background of these facts let us now proceed briefly to analyse the case made out by the prosecution against the appellants.

5. It is said that on November 9, 1967 at about 4 p.m. Bir Singh and Hukum Singh came to the place of occurrence which is near a tank and started digging the earth from the sahan of Man Singh, brother of the deceased Bans Gopal. Shrimati Rampati, widow of Man Singh and PW 3 Vidya Devi objected to the action of the appellants but they paid no heed to the protests of these persons. PW 1 Surajpal Singh the son of the deceased was cutting fodder on the Chabutra in front of his door. Meanwhile Bans Gopal arrived at the scene of occurrence and asked Bir Singh and Hukum Singh not to dig earth and this led to an altercation. Bans Gopal snatched the spade from the hands of Bir Singh and threw it away. This appears to have given serious provocation to the appellants who after giving threats went to their houses and returned to the spot variously armed. Bir Singh was armed with a double barrelled gun, Hukum Singh with a rifle and Ram Dularey Singh with a country made pistol. Hukum Singh gave the orders for assault. Bans Gopal then moved towards the house of Man Singh when Bir Singh fired at him with the gun as a result of which Bans Gopal fell down. PW Sughar who was also there intervened and protested against the highhanded action of the appellants on which the appellant Ram Dularey Singh is said to have fired at him with the pistol which hit him on the leg. The witness also fell down and was injured. Roshan Singh and others who were watching the incident raised an alarm on which the accused fled away from the place of occurrence. Thereafter Surajpal Singh immediately left for the police station where he lodged the first information report narrating what had happened and the circumstances resulting in the death of his father. PW 5 Umesh Chandra, the Investigating Officer, started the investigation, prepared the sketch map and after the usual investigation submitted a charge-sheet against the appellants who were tried by the Additional Sessions Judge but ultimately acquitted as indicated above.

6. The defence of the appellants was that they had absolutely nothing to do with the occurrence and had been falsely implicated due to enmity. A few admitted facts may be mentioned before we proceed to discuss the judgment of the two Courts. The witness Surajpal Singh clearly admits that Ram Narain Singh, father of the appellant Bir Singh, had a licensed rifle and Vidya Vinod Singh the other son of Ram Narain Singh had a licensed gun. One of the extraordinary features of this case is that no attempt was made by the Investigating Officer at any time to ask Ram Narain Singh or

Vidya Vinod Singh to produce their weapons so as to exclude the possibility of these weapons having been used by the appellants. On the other hand, when these weapons were available it is difficult to believe that Bir Singh a boy of 14 years would get a double barrelled gun unless it was easily or readily available. The Investigating Officer clearly admits that he never searched the house of Ram Dularey Singh at all and the excuse given by him was that because he was informed that accused were not in the house therefore he did not search the house. Another remarkable feature of this case is as the Sessions Judge has clearly pointed out that there is a serious interpolation in the general diary maintained by the police and there was a good deal of delay in forwarding the general diary to the higher officers. The learned Sessions Judge who had the original diary before him had found that there were interpolations and overwriting where the name of Ram Dularey Singh was written. The Sessions Judge after inspecting the diary found that the possibility of Ram Narain having been converted to Ram Dularey could not be excluded. Thus the defence seems to suggest that the prosecution had first decided to implicate Ram Narain Singh but when it found that at the time of the occurrence Ram Narain Singh was posted at Banda and could furnish a cast iron alibi which would have destroyed the prosecution case, the name of Ram Dularey Singh was substituted. He was therefore given the role of shooting with a country made pistol. If this is true then all the prosecution witnesses who lent themselves to support this false version cannot be believed at all. The High Court has not reversed this finding of the Sessions Judge and has in fact found that the over-writing was undoubtedly there where the name of Ram Dularey Singh was mentioned. We shall advert to this aspect of the matter when we deal with the general diary which has been the subject-matter of serious comment by the Sessions Judge and we find that the High Court has not been able to dislodge the criticism levelled against the prosecution on this score by the learned trial Judge.

7. The prosecution had examined PW 1 Surajpal Singh, PW 2 Sughar, PW 3 Vidya Devi and PW 4 Roshan Singh as eye-witnesses to the occurrence. It is not disputed that all these witnesses were highly interested. PW 1 has clearly stated at page 11 of the paper book as follows :

I have enmity with Ram Narain Singh and the members of his family.

He admitted that about a year back Sughar's son Ram Kishan had started a Section 307 I.P.C. case against Ram Narain Singh and others in which the police submitted a final report. He further admitted that Rameshwar Singh the son of his uncle was a witness in that case and that he also used to come along with Ram Kishan at the time of filing the complaint. PW Sughar at page 22 of the paper book has admitted that in the aforesaid Section 307 case the complainant Surajpal Singh used to do pairvi on behalf of Ram Kishan the son of Sughar Singh. Thus the evidence of PW 2 Sughar clearly establishes that there was a serious enmity between him and the family of the accused. PW 2 Sughar was the father of Ram Kishan who had lodged a case under Section 307 against Ram Narain Singh. The complaint was however rejected. This prima facie shows that the case instituted by Ram Kishan was not proved. Thus PW 2 Sughar also has got enmity with the family of the accused.

8. PW Vidya Devi is the daughter of the own uncle of Surajpal Singh and deeply interested. PW 4 Roshan Singh is the own brother of Hira Singh who was an accused in a case under Section 307 which was started against him for shooting Sheo Shankar Singh Bhanja a nephew of Ramoo Singh. PW Sughar was also a co-accused along with Hira Singh the brother of this witness. It would thus appear that all the eye-witnesses are interested, inimical and belonging to the faction of the deceased and have taken sides with them and against the accused in earlier litigations. The learned Additional Sessions Judge, therefore, rightly thought that it was not safe to rely on the evidence of these witnesses unless their evidence was corroborated by independent witnesses. In this connection it

may be noted that in the F.I.R. It is clearly mentioned that while the altercation between Bans Gopal and the accused was taking place Shambhu Bhujwa and Bhikari apart from Roshan Singh had come to the scene of occurrence. Both Shambhu Bhujwa and Bhikari were independent witnesses and bore no animus against the accused. Even from the evidence it would appear that these two persons had seen the entire occurrence.

9. PW 2 Sughar has clearly stated that at the time of altercation Roshan and Bhikari were present at that place. Similarly, PW 3 Vidya Devi has stated at page 29 of the paper book that while the altercation was going on Roshan and Bhikari came to the scene of occurrence. Similar is the evidence of PW 4 Roshan Singh at page 35 of the paper book where he says that when the altercation was going on Shambhu Bhujwa and Bhikari Khatic were at that time present there. It would thus appear from the evidence of eye-witness that Shambhu and Bhikari were exactly in the same position as the eye-witness and yet no reasonable explanation has been given by the prosecution for not examining them. It is true that it was not incumbent on the prosecution to examine each and every witness so as to multiply witnesses and burden the record. This rule however does not apply where the evidence of the eye-witnesses suffers from various infirmities and could be relied upon only if properly corroborated. In the instant case all the eye-witnesses had serious animus against the accused and they were interested in implicating the accused. The substitution of Ram Dularey Singh in the general diary was a suspicious circumstance. The fact that the police was not able to recover any weapon or to explain how the appellants got hold of the guns was yet another circumstance that required a reasonable explanation from the prosecution. According to the finding of the learned Sessions Judge even the F.I.R. was ante-timed and although the High Court has not accepted this finding we feel that the High Court on this aspect has entered into the domain of speculation. In view of these special circumstances it was incumbent on the prosecution to examine the two witnesses at least to corroborate the evidence and if they were not examined the Sessions Judge was justified in drawing an adverse inference against the prosecution. At any rate it cannot be said that if under these circumstances the Sessions Judge was not prepared to accept the evidence of these witnesses his judgment was wrong or unreasonable. It may be that the High Court could have taken a different view but that by itself as held by this court is not a sufficient ground for reversing an order of acquittal.

10. We now come to the second ground on which the learned Sessions Judge has rejected the prosecution case. According to the learned Sessions Judge the F.I.R. does not appear to have been lodged at 7.30 p.m. as indicated in the report. In order to come to this conclusion that learned Judge relied on the following circumstances.

10A. That although the F.I.R. has been lodged at 7.30 p.m. at Kotwali Police Station at Unnao yet according to the Investigating Officer the seal of the S.P. Office dated November 9, 1967 was given by mistake as the F.I.R. could have been received on the next date i.e. November 10, 1967 because the office of the S.P. closed at 5 p.m. on November 9, 1967. There does not appear to be any room for such a clerical mistake unless it be held that the F.I.R. must have been actually prepared on November 10, 1967 so that it was not in existence on November 9, 1967. On this point the High Court has disagreed with the Sessions Judge on a purely speculative ground. Before the trial Court the Public Prosecutor did not challenge the statement of the Investigating Officer that the seal was dated November 10, 1967 which indicated that the F.I.R. was received by the S.P. Office on that date. The theory of mistake put forward by the Investigating Officer seems to have been accepted by the prosecution. No application was make to the Sessions Judge to call for the records of the S.P. Office or any witness from there to find out as to when actually the F.I.R. was received. It is, therefore, manifest that the case itself was that the F.I.R. was received in the S.P. Office on

November 10, 1967 which lent intrinsic support to the suggestion of the defence that the F.I.R. was lodged on November 10, 1967 and was not lodged on November 9, 1967 when it was purported to have been lodged. The High Court brushed aside the finding of the Investigating Officer on the ground that the explanation given by him was wrong because he may not have been in the know of things. This process of reasoning is purely speculative. PW 5 Umesh Chandra Varma the Investigating Officer was attached to the Kotwali Police Station in the town of Unnao where the office of the S.P. was situated. He had every day dealings with the S.P. Office and he must be presumed to know the exact state of affairs. The Investigating Officer's evidence that the office of the S.P. closes at 5.00 p.m. had not been challenged by the prosecution before the Sessions Judge nor any attempt was made to put further questions in re-examination to clarify the matter. The High Court however on its own examined one Ejaz Hussain from the office of the S.P. to prove that the F.I.R. was itself received in the S.P. Office on November 9, 1967, and therefore, the explanation given by the Investigating Officer was wrong. It is well settled that though an Appellate Court has power to take additional evidence in a suitable case yet the discretion should not be exercised to fill up gaps or lacunae in the prosecution evidence. If the prosecution was serious about this matter there was no reason why Ejaz Hussain could not be examined before the Sessions Court. The prosecution, therefore, appears to have accepted the plea of the Investigating Officer and left it at that. In these circumstances the High Court was not correct in exercising its discretion in examining Ejaz Hussain in its appellate jurisdiction. We have carefully perused the evidence of Ejaz Hussain given before the High Court and we are of the opinion that Ejaz Hussain is an utterly unreliable witness on whom no reliance can be placed at all. This witness has clearly stated that the office hours of the S.P. are from 10 a.m. to 5.30 p.m. and 30 to 35 persons work in the said office. He, however, states that while the officials leave at office at 7.00 p.m. and after he closes his room no one sits in that room. The witness further admits that the seal is not kept in his room but is kept in another room in the said office which is closed at 5.30 p.m. In these circumstances therefore even if the witness states that he received the copy of the F.I.R. he would not be in a position to put any seal on the F.I.R. which was in the room which was locked at 5.30 p.m. On a direct question being put to him as to when he went to the office again after closing on November 9, 1967 the witness stated "I did not go to the office after 7 p.m. nor did my clerk constable go to the office after 7 p.m. that day". It is obvious that the F.I.R. could not have reached the office at 7 p.m. because it was itself lodged at 7.30 p.m. If the witnesses had left at 7 p.m. there could be no question of his receiving the F I.R. after 7.30 p.m. The witness is unable to decipher the initial of the person who had initialled the endorsement. Later on he in his statement states that he usually left the office at 7 p.m. but sometimes he left at 7, 8 or 9 p.m. according to the volume of work. The witness further says that no register is kept in the Police Office in which the timings of arrival and departure of the witness are recorded which does not appear to be true because an office like that of the S.P. where as may as 30 to 35 persons work daily it is difficult to believe that the office would not have any attendance register showing the time of arrival and departure of the officials. It seems to us that this witness has tried to support the prosecution case by showing his presence on November 9, 1967 till 9 p.m. although in his previous statement before the same Court he categorically stated that on November 9, 1967 he had left the office at 7 p.m. In these circumstances we place no reliance on the evidence of this witness. The High Court indulged in another conjecture that the F.I.R. must have been sent to the P.P. and to the Elaqa Magistrate. This was not however a matter of which judicial notice could be taken but had to be proved like any other fact. There was absolutely no evidence led by the prosecution to show when the F.I.R. was sent to the Elaqa Magistrate or to the P.P's office and in the absence of any evidence on this point the High Court was not justified in drawing an inference in order to demolish the positive and categorical statement of PW 5 Umesh Chandra Verma the Investigating Officer.

11. The Sessions Judge found that even in the F.I.R. the time of the lodging of the same, namely, 7.30 p.m. was written in different ink. The High Court adverting to this aspect found that the ink might not have been different but it was thicker. Whatever that may be this is also a suspicious circumstance and in the absence of any explanation given by the Investigating Officer it may lead to the inference that the F.I.R. was not lodged at 7.30 p.m. but much later. Having regard therefore to the evidence discussed above we feel that the possibility of the F.I.R. having been ante-timed has not been safely excluded and this circumstance is also sufficient to throw doubt on the prosecution case.

12. Another ground relied upon by the Sessions Judge is that there is over-writing in the original general diary wherever the word "Ram Dularey Singh" had occurred. This is undoubtedly a very serious matter. The original general diary was before the Sessions Judge and on perusal of the same the learned Judge came to the following finding.

The suggestion of the defence is that at first the complainant wanted to implicate Ram Narain Singh, father of accused Bir Singh, and so there was the name of Ram Narain Singh and in doing over-writing the words "Ram" and "Singh" remained as before and the word "Narain" has been converted into the word "Dularey" and as such there was over-writing. This possibility is not ruled over completely.

13. If the possibility of "Narain" having been converted to "Dularey is not excluded this would appear to show that an attempt was made by the prosecution to interpolate the general diary so as to falsely implicate Ram Dularey Singh. Even though the High Court has not agreed with the Sessions Judge about the conversion of 'Narain' into 'Dularey' it has found that there are over-writings in the general diary but has failed to give any explanation for these over-writings and has also omitted to draw an adverse inference against the prosecution. The High Court observed thus :

It is true that some rewriting is there in the general diary at the place where the name of Ram Dularey is there, but it is not know as to what particular word was there at the place where the said name was written.

It would thus follows that there might have been some clerical error in the general diary report and the same was later corrected but it would be incorrect to say that the name of Ram Narain Singh was later substituted by the name of Ram Dularey Singh by effecting the said rewriting.

The High Court thus seems to have brushed aside this manifest defect in the general diary by ascribing it to a mere clerical mistake and has not given any good reason to reverse the finding of the Sessions Judge who on a careful perusal of the general diary had come to the definite opinion that the possibility of Narain having been converted to Dularey cannot be completely excluded. If the prosecution could go to the extent of substituting the name of Ram Dularey Singh for Ram Narain Singh then no reliance can be placed on the evidence of witnesses who support such a false case and the Sessions Judge was therefore, right in insisting on corroboration of the eye-witnesses by independent sources which as found by us were available with the prosecution in the shape of the statement of Shambhu Bhujwa and Bhikari before accepting the evidence of the said witnesses.

14. Another important circumstance relied upon by the learned Sessions Judge was the manner in which PW Sughar is said to have received the injuries. According to the prosecution version the assault on the deceased Bans Gopal and PW 2 Sughar was a part of the same transaction and if that story is disbelieved then the fabric of the entire case collapses. So far as PW 2 Sughar is concerned

Ram Dularey Singh is said to have fired at him. In view of the interpolation in the general diary the allegation that Ram Dularey Singh participated in the occurrence itself becomes doubtful. Secondly, the medical evidence in the case does not appear to be consistent with the evidence of the eye-witnesses so far as assault on Sughar is concerned. According to the medical evidence PW 2 had sustained four injuries whereas only two are mentioned in the F.I.R. The fourth injury found by the Doctor is a lacerated wound 1" X 1/6" muscle on upper part of the left first great toe. No explanation seems to have been given by the eye-witnesses as to how the witness sustained this particular injury. At the trial however a case has been made out by the eye-witness that PW 2 Sughar on receiving the pistol shot fell down on a piece of wood as a result of which he sustained two injuries on the leg and the toe. Although the F.I.R. was lodged by an eye-witness who had seen the entire incident there was absolutely no mention of this incident in the F.I.R. nor the presence of the wound as indicated there.

15. PW 1 Surajpal Singh has clearly admitted that he did not record this fact in the F.I.R. nor in his statement before the Committing Magistrate. The witness stated thus :

In my report I had not got this point recorded that Sughar had fallen down on pieces of wood; nor I had got this fact recorded in the Court of the Committing Magistrate, namely, that Sughar had fallen down on pieces of wood.

In spite of this clear statement the High Court seems to have brushed aside this material omission on the ground that it was not put to the witness as to why he did not mention this fact in the F.I.R. or before the Committing Magistrate. When the witness himself admitted that he had not mentioned this fact in his evidence there was nothing further which the accused could have done. On the other hand, the most extra-ordinary thing is that PW 2 who was injured and who is said to have fallen on the wood and sustained injuries on the leg and elbow thereby does not say a single word about the presence of wood on the ground or about his having sustained injury in the elbow because of that wood.

16. PW 4 Roshan Singh is another witness who says that PW 2 Sughar had fallen down on the wood. This witness also made a statement for the first time in the Court of the Session and in this connection he had admitted as follows :

Today for the first time I have stated this thing in the Court of Session that on sustaining the injury Sughar had fallen down on the wood. It is not correct that on being tortured I have stated this thing that on sustaining injury Sughar fell down on the wood.

Thus the theory of the witness having fallen down on wood appears to have been introduced for the first time in the Sessions Court and appears to us to be a pure embellishment. According to the Doctor injury No. 4 could be caused by dashing against some substance if that portion of the great toe on which the injury is sustained, dashed with force against any hard substance. There is absolutely no evidence that PW 2 had dashed his toe particularly against the wood and that too with great force. Furthermore, the learned Sessions Judge rightly pointed out that if he had fallen on the wood on his face then one would expect other injuries also on the front part of the body, the face, chest, etc.

17. Finally, if the witnesses examined by the prosecution had mentioned the fact that PW 2 Sughar had sustained injuries 2 and 4 by falling on the wood before the Investigating Officer, then one would have expected him to locate this spot in the sketch map prepared by him at the spot where

neither blood marks nor the presence of wood nor even the place where PW 2 fell down are indicated. These circumstances therefore clearly show that PW 2 was not assaulted at the place of occurrence as alleged but elsewhere. If that is so then it would be difficult to accept the prosecution case that the deceased also was assaulted at the place of the occurrence. In this connection, the Sessions Judge relies on the fact that there is no evidence to show as to how the body of the deceased was found at the Chaupal of his house. No witness says that any one of the people who had assembled or any member of the family had removed the dead body to the place of the Chaupal. Even Surajpal Singh PW 1 the son of the deceased has categorically stated at page 19 of the paper book that he did not lift his father but only touched the body to find out whether he was dead or alive. Thus how the body of the deceased reached the Chaupal is a mystery which the prosecution has failed to explain. It was contended by Counsel for the appellants that it would appear from the sketch man that it does not show that the place of occurrence contained any blood marks as the blood stained earth taken by the Investigating Officer does not reveal that it contained human blood. This also supports the suggestion of the defence that the occurrence did not take place in the manner as alleged. In our opinion there is some substance in the argument of the learned Counsel and though not a very important circumstance, this is one of the circumstances which cumulatively discredits the prosecution case.

18. Another important argument advance by Counsel for the appellants is that there is absolutely no evidence to show that there was any blood at the place where PW 2 fell down. It was contended that according to the Doctor's version having regard to the injury, blood must have been oozing out. If the blood was there then the Investigating Officer could not have failed to notice the same. The fact that blood at that place was not indicated in the sketch map clearly shows that PW 2 did not receive injuries at the place. This is undoubtedly an important aspect which merits serious consideration. The Sessions Judge seems to have commented on the fact that PW 2 did not accompany the dead body but in our opinion nothing much turns on that because PW 1 must have been in a hurry to rush to the Police Station and as PW 2 was seriously injured, he may not have thought it advisable to carry him. But the fact remains that the prosecution has not been able to show that there was any blood at the place where PW 2 fell down which raises a reasonable inference that PW 2 may have been assaulted elsewhere and once that is so then the case regarding the assault of the deceased at the place of occurrence also automatically fails because the two incidents are parts of the same transaction.

19. Another important circumstance which seems to have been over-looked by the High Court is the fact that from the post-mortem report it appears that 33 shots and a piece of wadding which were recovered from the body had been sent to S.P. Unnao under sealed cover. No attempt appears to have been made by the prosecution to prove the weapon from which the shots had been fired. The High Court has come to a clear finding that in view of the admitted evidence that Ram Narain Singh and Vidya Vinod Singh had licensed rifle and gun respectively; the possibility that one of these weapons was used for killing the deceased cannot be ruled out. In this connection the High Court observed as follows :

There is no direct evidence to substantiate that the said arms, licences whereof were with the said persons, had actually been used in the crime in question, yet the probability concerning the use thereof, as suggested by the prosecution cannot be ruled out.

20. PW 1 has clearly admitted in his evidence that both Ram Narain Singh and Vidya Vinod Singh had rifle and gun respectively and used to visit the village. In these circumstances therefore it was incumbent on the prosecution to have called upon Ram Narain Singh and Vidya Vinod Singh to

produce their weapons and send the same to the ballistic expert in order to establish that the shots recovered from the body of the deceased could have been fired from the gun of Vidya Vinod Singh. Otherwise it is impossible to believe where from a boy of 14 years like Bir Singh would get hold of a gun. According to the prosecution, after the altercation Bir Singh and others went into the house and then brought a gun which clearly shows that the gun was present in the house yet no attempt was made by the Investigating Officer to search the house of Ram Narain Singh and Vidya Vinod Singh on the night of the occurrence in order to recover the gun. The excuse given by the Investigating Officer that he had sent a constable to get the accused and as they were not found he could not make a search appears to be a lame one. It is true that the Investigating Officer made the search on the next day and that too in the house of Ram Narain Singh but he did not search the house of Ram Dularey Singh as he clearly admits in the following terms at page 48 of the paper book :

The search of house of Ram Dularey accused was not taken at all, as I did not think it necessary.

21. Thus a very valuable clue which may have clinched the issue was lost because the Investigating Officer was grossly negligent in conducting the investigation.

22. Taking therefore an over-all picture of the entire case it is difficult for us to hold that the view taken by the Sessions Judge on the evidence and circumstances of the present case was not reasonably possible. This being the position the High Court even if it chose to take a different view, was not justified in reversing the order of acquittal passed by the learned Additional Sessions Judge.

23. For the reasons given above, the appeal is allowed and the appellants are acquitted of all the charges framed against them and are directed to be set at liberty forthwith.

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