

State of Jammu & Kashmir

Vs

Hazara Singh and Another

Hazara Singh

Vs

State of Jammu & Kashmir

Criminal Appeal No. 151 of 1975 and 185 of 1976

(O Chinnappa Reddy, R. S. Sarkaria JJ)

24.09.1980

JUDGMENT

SARKARIA, J. –

1. The facts leading to these Criminal Appeals 151 of 1975 and 185 of 1976 are as follows :

2. In the General Elections held to the Legislative Assembly of the State of Jammu & Kashmir in 1972, two candidates, namely, Rangil Singh (Congress) and Lala Sain Dass (Independent) contested from Ranbirsinghpura constituency. Two years earlier, in the election to the office of the Lambardar of village Bahu, two factions came into existence. One of them was led by Pritam Singh, complainant, while the other was led by Piyara Singh and Hazara Singh, respondents in Criminal Appeal 151 of 1975. Pritam Singh's faction supported Sant Singh candidate, while Piyara Singh's faction canvassed for Gulab Singh, the rival candidate. The relations between Pritam Singh, complainant and his brother on one side and Piyara Singh and Hazara Singh on the other, which were already bitter became further strained due to this rivalry in the elections.

3. On February 28, 1972 in the evening, a public meeting in connection with the elections to the Legislative Assembly was held in the compound of the Cooperative Stores in village Bahu to canvass support for the Congress candidate, Rangil Singh, who was pitched against Lala Sain Dass, an Independent candidate. PW Pritam Singh was the Chairman of this meeting, while Rangil Singh, Janak Raj, M.L.C., Harbans Singh, deceased PWs Kapoor Singh, Nihal Singh, Amar Singh, Thakur Raj Singh and Suchet Singh attend this meeting. At about 6.30 p.m., when the public gathering was being addressed by Rangil Singh, Piyara Singh respondent drove past the place of meeting on a motor cycle on the pillion of which was seated a non-Sikh gentleman. The meeting terminated at about 7 p.m. At the conclusion of the meeting, tea was served to Rangil Singh, Janak Raj, Suchet Singh and other distinguished persons who had attended the meeting. Thereafter, Rangil Singh and Janak Raj departed for Jammu. The other persons, excepting Pritam Singh, complainant and his son Harbans Singh deceased. PWs Kapoor Singh, Nihal Singh, Amar Singh and some others stayed behind to settle the tea accounts of the caterer, Gandhu Shah. On the way, when the complainant and his companions reached a culvert between the havelies of Thakur Singh and the respondents at about 8 p.m., Hazara Singh was seen standing in the compound of his haveli along with his brother,

Piyara Singh, respondent. On seeing the complainant and his companions, Piyara Singh accosted Harban Singh deceased that he had got the deceased employed as a teacher, yet he (deceased) was opposing him by participating in the meeting organized by the Congress Party. The deceased retorted that it was the Government which had given him the employment and the appellant had done him no favour. On hearing this reply, Piyara Singh exhorted to his brother, Hazara Singh to let the deceased have a taste of it. Thereupon, Hazara Singh fired his gun hitting the deceased in the abdomen. One of the pellets of the same shot hit the left hand of PW Kapoor Singh who was standing close to the deceased. At this juncture, Pritam Singh shouted to his companions to save themselves. Pritam Singh took shelter in a shop situated nearby. On receiving the injury, the deceased walked a few steps to take cover in the dilapidated haveli of Thakkar Singh, which was situated at a distance of 3 or 4 steps from him. He had hardly taken a step or two in that direction when Piyara Singh snatched the gun from Hazara Singh, sarcastically remarking that the latter was even not able to kill the deceased. Piyara Singh then fired a shot at the deceased hitting him in the region of the eye and cheek. As a result of this gunshot, the deceased dropped dead. Pritam Singh, complainant and his companions raised an alarm whereupon both the respondents, Piyara Singh and Hazara Singh got on their tractor and drove off. Piyara Singh was holding & gun and shouting at the top of his voice that whosoever would dare to approach the tractor, would be done to death. Piyara Singh and his companions then lifted the dead body of Harban Singh and put it in the trailer of the tractor of one Tara and took it to the Hospital, Ranbirsinghpura. After leaving the dead body in the hospital, Pritam Singh, accompanied by Amar Singh and Nihal Singh, went to Police Station, Ranbirsinghpura and lodged the first information report (Ex. PA) there at 10 p.m. The Station Houses Officer registered a case of murder under Section 302, RPC, and went in search of the accused. He arrested Hazara Singh at 1.45 a.m., the same night, from near a haystack in the area of village Bahu. A few hours thereafter, the Inspector of Police, Shanti Swaroop interrogated Hazara Singh and recorded his statement (Ex. PO) to the effect, that he along with Piyara Singh had concealed his country-made single-barrel 12-bore gun in the house of Piyara Singh at Ranbirsinghpura. Hazara Singh then led the police to the residential office of Piyara Singh and produced, in the presence of the witness, the 12-bore gun (Ex. P-1) from underneath some quilts lying in a room on the ground floor. This gun was a licensed weapon of Hazara Singh.

4. On the following morning, Pritam Singh, complainant and Rangil Singh met the Chief Minister at Jammu and after obtaining some money from him for performing the obsequies of the deceased, returned to Ranbirsinghpura at 9.30 a.m.

5. The post-mortem examination of the dead body was performed by Dr. Baldev Singh. The doctor prepared the post-mortem examination report. Since the attendance of Dr. Baldev Singh, who had since gone to a foreign country, could not be procured, the trial Court allowed the post-mortem examination report (Ex. PY) to be proved by the Compounder who was acquainted with the handwriting of the doctor. As stated in the post-mortem examination report, the doctor found that 2 cms of the upper lid of left eye of deceased was missing, the contents of the left eye were completely destroyed and were bulging out. The roof of orbit was found shattered into pieces. On opening the skull, the doctor found congestion in the left frontal region of the brain. The left frontal lobe of the brain substance was found damaged and a metallic shot was found in the brain substance, 5 cms above the roof of the orbit. The doctor also found a wound of entrance on the left side of the face, 4 cms lateral to left ext. Alaenasa in horizontal line. The wound was irregularly circular and measured 1 cm x 1 cm. The shot had travelled through the muscles and was found in sub-mastoid region, lodged in blood clot. Dr. Baldev Singh further found two gunshot wounds of entrance and two corresponding gunshot wounds of exit on the front of the abdomen. The first entrance wound was in the right lumbar region, 11 cms above the ante sup-iliac supine and 4.5 cms

lateral to the umbilicus. The wound was irregularly circular, the margin was found inverted and measured 1 cm x 1 cm. It had a corresponding wound of exit situate on the right lid region in the middle auxiliary line 9.5 cms away from the wound of entrance. The second wound of entrance on the abdomen was in the lumber region 14 cms above the ante sup-iliac supine and 5 cms laterally. The wound was irregularly circular, margins were inverted and measured 1 cm x 1 cm. According to the doctor, the causes of the death of the deceased was damage to the brain substance caused by the gunshot which entered at No. 1 on the left eye. The doctor extracted two pellets (Ex. p-6 and Ex. P-7) from the dead body and sent it in a sealed phial to the police who took it into possession, vide Ex. PG-1.

6. On February 29, 1972 at about 3 p.m., Inspector Shanti Swaroop inspected the scene of occurrence, prepared the site plan (Ex. PZB) and seized two empty cartridges (Ex. P-9 and Ex. P-10) from a dunghill. These empties were lying at a distance of about 50 or 51 feet from the mill room of piyara Singh, respondent. The seizure memo (Ex. PJ) was prepared in this behalf. The Investigating Police Officer also found a Pellet (Ex. P-12) lying near the wall of Thakur Singh's haveli and seized the same under the Memo (Ex. PL). The 12-bore gun and the empty cartridges seized by the police, were sent to the Forensic Science Laboratory, Chandigarh, on March 24, 1972, where they were received on April 10, 1972. Dr. J. K. Sinha, Forensic Expert examined these articles and reported that the 12-bore SBB gun (Ex. P-1) had been fired through; that the firing pin of the said gun appeared to have been tampered with; and that no other characteristic marking was observed to identify or connect the empty cartridges with the 12-bore gun (Ex. P-1).

7. The Sessions Judge, by his judgment dated June 10, 1974, convicted both the accused under Section 302, RPC and sentenced them to death for causing the death of Harbans Singh. He also made a reference to the High Court of Jammu & Kashmir for confirmation of the death sentences imposed on the accused respondents. The respondents, also prepared an appeal against their conviction and sentences to the High Court. By its judgment dated November 20, 1974, the High Court declined the reference. It allowed the appeal of Piyara Singh and acquitted him. The High Court further altered the conviction of Hazara Singh, respondent 1, from one under Sections 902 read with Section 34 to that under Section 326, RPC and sentenced him to ten years' rigorous imprisonment.

8. Aggrieved by the judgment of the High Court, the State of Jammu & Kashmir has preferred Criminal Appeal 151 of 1975 against the judgment of the High Court, whereby Piyara Singh was acquitted of all the charges, and the conviction of Hazara Singh was converted to one under Section 326, RPC. The connected appeal (Criminal Appeal 185 of 1976) has been filed after obtaining the special leave by Hazara Singh against his conviction and sentence. Both the appeals will be disposed of by this common judgment.

9. First we will take up the appeal by the State against the acquittal of Piyara Singh.

10. It is well settled that in an appeal by special leave under Article 136 of the Constitution, against an order of acquittal passed by the High Court, this Court does not normally interfere with a finding of fact based on appreciation of evidence, unless the approach of the High Court is clearly erroneous, perverse or improper or there has been a grave miscarriage of justice. Judged by this yardstick, the reasons or the finding of fact recorded by the High Court leading to the acquitted of Piyara Singh, are not such which, on the face of it, can be said to be unsound or wrong. The High Court has held that the presence of Piyara Singh at the scene of occurrence and his participation in the commission of the crime was highly doubtful. In reaching this conclusion, the High Court was

prompted by these factors :

(1) Non-production without sufficient cause of these material witnesses raises a strong doubt about the visit of Piyara Singh to Bahu on the evening of February 28, 1972 : (a) Sham Lal who was cited as a prosecution witness in the charge-sheet submitted by the police in the court of the Committing Magistrate to prove that he accompanied Piyara Singh to village Bahu on the fateful evening. (b) Non-production of Rangil Singh and Janak Raj, M.L.C., who were respectable and independent witnesses and were present in the meeting when, according to the prosecution, Piyara Singh had driven past that meeting on a motor cycle.

(2) Non-mention in the 'FIR of the threat held out by Piyara Singh and Hazara Singh in the deceased prior to the date of occurrence and of the important "melodramatic words" alleged to have been uttered by Piyara Singh while snatching the gun from Hazara Singh after the latter had fired the first shot.

(3) It was highly unlikely that after the first shot the prosecution witnesses who claim to have been present on the spot and witnessed the occurrence, would have observed the second shot being fired. This inference is reinforced by the admission of the prosecution witnesses that they did not see any of the accused persons ejecting or taking out the fired cartridges from the single-barrel gun or reloading it.

(4) The prosecution story that the second shot was fired at the deceased by Piyara Singh stands negated by the evidence of Dr. J. K. Sinha, Ballistic Expert. According to the complainant and other eyewitnesses, the second shot was fired at the deceased by Piyara Singh from a distance of about 24 yards, while the first shot had been fired from 18 to 20 yards. According to the Ballistic Expert, the dispersion of the pellets which hit the eye and face was much smaller as compared to the dispersion of the pellets causing injuries at the abdomen. According to the Ballistic Expert, the possibility of all the gunshot injuries found on the deceased, having been caused by one gun-fire, could not be excluded.

(5) There is variance between the statements of PWs as regards the place where the deceased was when he got the second shot.

(6) There was divergence between the statements of PWs regarding the time-lag between the first and the second shot.

(7) There was inordinate delay in receipt of the occurrence report contemplated by Section 157, CrPC by the magistrate. Although the distance between the police station and the magistrate's court is hardly 200 yards, it is surprising that the occurrence report reached the magistrate on March 2, 1972.

11. We have gone through the evidence of the material witnesses. By any standard, the approach adopted, the findings of fact recorded and the conclusion drawn from the totality of the factors enumerated above, by the High Court could not (sic) be said to be unreasonable. We have, therefore, no hesitation in dismissing the appeal (Criminal Appeal 151 of 1975) against the acquittal of Piyara Singh.

12. Now, remains the case of Hazara Singh.

13. Hazara Singh accused when examined at the trial, set up this counter-version :

The party of Pritam Singh complainant has enmity with me and Gurbachan Singh is a person of that party. Before this, Gurbachan Singh had inflicted on me a grievous hurt, case whereof is in progress. On the day of occurrence, I had a meet with Gurbachan Singh on the culvert, the place of occurrence, and said that they had disgraced him (Hazara Singh) by holding the meeting of Congress Party in the village. I said to him that he could do whatever he like but should not argue with me. On this, Gurbachan Singh abused me and said that "we will let you know the taste of it today" and he went towards the Cooperative Store of Village Bahu when I was going my home. I met Smt. Mangoo, mother of Gurbachan in the way, and complained that Gurbachan had abused me. I asked her to advise her son not to do so. Smt. Mangoo abused my children. I could not control myself and slapped her. She went towards the Cooperative Store crying and saying : "I will get you killed today". I got frightened and therefrom I brought the key of my machine room so that I could go on the tractor to report in the Police Station Ranbirsinghpura. I brought out the tractor from the machine room... In the meantime 40 or 50 persons came shouting from the Store side. They started pelting stones upon me by which I sustained injuries. My turban fell down. A stone hit me on the head and caused an injury. Taking advantage of the darkness, I took cover behind the tractor. When I made sure that these people would not leave me that day, I escaped on foot towards the fields. I had hardly covered some distances, when I heard a sound of gunshot. I went to Nawa Shahar on foot to lodge a report. I had hardly reached the bus stand when the police arrested me, I could not lodge my report, although the wound on my head was got dressed by the police.

14. Hazzra Singh denied having fired a shot at the deceased. He also denied that after giving the information (Ex. PO) he got the gun (P-1) recovered from the house of his brother, Piyara Singh. He admitted that the gun (Ex. P-1) and the licence (Ex. P-13) belonged to him. He also denied that any empties had been thrown away by him or his brother at the time and place of occurrence. He asserted that PWs Nihal Singh, Balbir Singh, Pritam Singh, Ranjit Singh and Raj Singh were proceeded against at the insurance of the police, under Section 107, CrPC and that these persons were close relations of Pritam Singh complainant and were inimically disposed towards him.

15. In defence, Hazara Singh examined four witnesses. Out of these, Om Prakash, Clerk of the Munsif Magistrate was examined to establish that on February 29, 1972, an application for medical examination of Hazara Singh accused was presented to the magistrate. After getting the necessary endorsement of the magistrate, the application was personally taken by DW Baun Bachan Lal Vakil to the police station.

16. DW Bachan Lal Vakil testified that in the morning of February 29, 1972, Hazara Singh accused came to his house in an injured condition, that he had presented an application to the Munsif Magistrate who directed the Station House Officer, Ranbirsinghpura to get Hazara Singh medically examined. The witness personally delivered that application bearing the direction of the magistrate, at the police station and obtained receipt (Ex. PD-5), that on the following day he interviewed Hazara Singh in the police station and found his head bandaged. The Police Inspector confirmed that Hazara Singh had been got medically examined.

17. DW Vipper Singh, Assistant Clerk of the Police Station testified that he had received a written communication addressed to the Station House Officer and had issued Ex. PD-1, acknowledging the receipt thereof.

18. PW Paras Ram, Compounder of the Primary Health Centre, Ranbirsinghpura testified that on

February 29, 1972 or March 1, 1971, pursuant to an order of the Munsif Magistrate, Ranbirsinghpura, he went to the police station dressed an injury on the head of Hazara Singh. In cross-examination, the witness stated that it was an ordinary wound and he could not say whether it was a grievous or simple injury or a self-inflicted wound, as he was not an expert. Nor could he say exactly on what part of the head the wound was located or "whether it was in the shape of scratching which may be 1/2 inch".

19. Both the investigating police officers categorically denied that Hazara Singh accused had any injury at the time of his arrest. The prosecution also failed, despite requests by the defence, to produce that application which had been made through DW Bachan Lal Vakil and bore direction of the magistrate that the Station House Officer should get Hazara Singh medically examined.

20. The High Court has not accepted all this evidence which was brought on the record to establish that at the time of his arrest on February 29, 1972, Hazara Singh had a wound on his head. In its opinion, the theory suggested by Hazara Singh as to how he received this injury "is an afterthought" and is not worthy of credence, as this fact relating to the manner of the receipt of this injury was not, according to Bachan Lal Vakil's own admission, incorporated in the application submitted by him to the magistrate for getting the accused medically examined. The High Court also observed that "it has not been proved that the injury was not self-inflicted but was caused as the time and in the manner alleged by the appellant (Hazara Singh)".

21. According to the evidence of the eyewitnesses, the first shot from the gun (Ex. P-1) which only was fired by Hazara Singh, had caused injuries to the deceased in the abdomen. The medical officer, who conducted the post-mortem examination, did not opine that these injuries on the abdomen had caused the death of Harbans Singh deceased. According to him, it was Injury 1 involving damage to the brain substance, was the cause of the death of the deceased. In the post-mortem examination report, the doctor had not stated that the injuries found on the abdomen were likely or sufficient to cause the death of the deceased. The medical officer, who had conducted the autopsy, could not be examined. No other medico-legal expert was examined to opine as to whether on the basis of the data available from the post-mortem examination report, the abdominal injuries were sufficient or likely to cause death. In this state of the evidence, all that can be said was that the abdominal wounds found on the deceased were grievous injuries.

22. The injury which cause the death of the deceased was attributed to Piyara Singh. Hazara Singh was sought to be made vicariously liable for that injury by the operation of Section 34, Penal Code. Assuming that the substance of the prosecution case against Hazara Singh was true, then also, as a result of the acquittal of Piyara Singh, Section 34 became inapplicable and Hazara Singh would be liable only under Section 326, RPC for causing grievous hurt to the deceased.

23. On behalf of Hazara Singh, it is contended by Mr. Frank Anthony that the prosecution evidence on the record was not believable even against Hazara Singh for these reasons :

- (i) The evidence of all the eyewitnesses was of an interested, inimical and partisan character.
- (ii) The eyewitnesses had the temerity to falsely rope in Piyara Singh.
- (iii) The investigation was dishonest and biased. The two empties were "planted" at the spot. The investigating police officers had denied in a brazen fashion that Hazara

Singh had at the time of his arrest a wound on his head - a fact which stood cogently established by the facts elicited from PW Paras Ram, Compounder in cross-examination, and the testimony of respectable defence witness, including that of a lawyer, Bachan Lal.

(iv) The prosecution witnesses give no explanation of this head injury of Hazara Singh; they have suppressed this vital fact, and should be disbelieved on that score. The failure of the prosecution to explain the injury of Piyara Singh, probabalises the version of Hazra Singh that he was first attacked and subject to a fusillade of stone-throwing by the deceased and his companions and it was thereafter that 'somebody' fired a gun.

(v) That the FIR was, in fact, prepared after a good deal of deliberation to falsely implicate the accused persons and to distort and twist the real facts. This inference is sought to be drawn from the fact that the occurrence report reached the magistrate from the police after an inordinate delay on the following day, although the magistrate's court was hardly 200 yards from the police station.

(vi) Independent witnesses, as pointed out by the High Court, were available, but they have been withheld without good reason. This should give rise to an adverse inference against the prosecution.

24. Almost all these contentions were raised before the High Court and were rejected. We agree with the reasoning and conclusion of the High Court, that the substratum of the evidence of the eyewitnesses could not be rejected so far as Hazara Singh was concerned merely on the ground that their testimony was of an interested and partisan character; nor on the ground that they were not speaking the whole truth. We, however, do not agree with the High Court inasmuch as it has held that Hazara Singh's injury was not sustained at the time of occurrence but might be self-inflicted and fabricated. Hazara Singh was arrested only 4 or 5 hours after the occurrence during the same night. A lawyer made an application to the magistrate soon after Hazara Singh's arrest, praying for medical examination of the injury of Hazara Singh. As a result, Paras Ram Compounder went to the police station and dressed the head injury of Hazara Singh. The eyewitnesses have suppressed the circumstances in which Hazara Singh received his head injury. The injury was not doubt simple, but it could be caused by the hit of a brickbat or stone as stated by Hazara Singh in his statement. It is, therefore, probable that the deceased or some of his companions pelted Hazara Singh with a stone on the head causing this injury. Hazara Singh thereafter, it seems, brought out his licensed gun and fired a shot hitting the deceased in the abdomen. Even so, it cannot be said that the gunshot was fired by Hazara Singh in the exercise of his right of private defence. Firstly, the had caused him a simple injury and could not cause him an apprehension of grievous hurt or death. It is Hazara Singh's own version that there was an interval of between the attack on him with stones and the firing of gun. Hazara Singh did not have the courage to admit that it was he who had fired the gun in self defence.

25. It is thus clear that the gun-firing at the deceased who at the relevant time was not carrying any arm, nor even a stone, was a retaliatory action. It is trite law that the right of private defence is a defensive right. It is neither a right of aggression, nor of reprisal. The gunshot fired by Hazara Singh, therefore, could not be said to be an act done in the exercise of his right of private defence.

26. As against Hazara Singh, the evidence of the eyewitnesses receives assurance from

circumstantial and other independent evidence. The gun (Ex. P-1) which was recovered from him soon after his arrest, was his licensed weapon. According to the opinion of the Forensic Expert, it had been fired through. It is not necessary to burden this judgment with a detailed appraisal of the evidence of the prosecution witnesses. Suffice it to say here, that with the exception of one aspect relating to the simple injury on the head of Hazara Singh and the latter's version of the circumstances in which he received it, we entirely agree with the learned Judges of the High Court that in spite of the infirmities in the evidence of the eyewitnesses, the substratum of their evidence as against Hazara Singh could be safely accepted so as to find him guilty of an offence under Section 326, RPC. Hazara Singh had been hit with a stone on the head. He had thus received some provocation which can be taken into account for mitigation of the sentences.

27. Taking into consideration all the circumstances of the case, we are of opinion that in the interest of justice substantial reduction in the sentence of Hazara Singh is called for.

28. Hazara Singh was arrested on February 29, 1972 and thereafter, throughout remained in jail till he was bailed out under this Court's Order dated September 14, 1976.

29. For the foregoing reasons, we dismiss the State appeal against Piyara Singh and Hazara Singh regarding their acquittal on charges under Section 302 and Section 302/34, RPC, respectively. We partly allow Hazara Singh's appeal, and, while maintaining his conviction under Section 326, RPC, reduce his sentence to imprisonment already undergone.

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