

Awadhesh And Another

Vs

State of Madhya Pradesh

Criminal Appeal No. 537 of 1986

(K.N. Singh, M.H. Kania JJ)

12.04.1988

JUDGMENT

SINGH, J. –

1. This appeal is directed against the judgment of the Madhya Pradesh High Court dated September 3, 1986 setting aside the trial court's order acquitting the appellants herein and convicting them for offence under Section 302 read with Section 34 of the Indian Penal Code and sentencing each of them to undergo imprisonment for life.

2. The prosecution case in brief is that on January 4, 1982 Ram Pratap Singh deceased resident of village Kharoni, P. S. Ajaigarh, District Panna had gone to Collectorate Panna to file reply to a show cause notice issued to him for the cancellation of his gun licence. While he was at the Collectorate he noticed Om Prakash and Raghvendra who were inimical to him, were shadowing him in the Collectorate. He requested Rajendra Singh PW 14, Chottey Bhaiya PW 15, and Mohd. Tohid PW 16 to accompany him on his return journey as he sensed danger to his life. Ram Pratap Singh the deceased sent Tohid to purchase tickets for bus with a direction that he should meet him at the octroi toll barrier on the Ajaigarh Road from where he proposed to take the bus; thereafter the deceased along with Rajendra Singh, PW 14, and Chottey Bhaiya PW 15 proceeded on foot to Chungi Chowki (Octroi Post) situate at about two furlongs away from the Collectorate on the Ajaigarh Road. While the deceased, Rajendra Singh and Chottey Bhaiya were waiting for Tohid near the Octroi Post one bus arrived, but the deceased told Rajendra Singh and Chhotey Bhaiya not to travel by that bus as he had apprehension that Raghvendra and his associates may be inside the bus. While they were waiting for Tohid, the deceased went for drinking water from a well which was near the road at the Octroi Post. After drawing the water from the well while the deceased was in the process of drinking water at that precise moment gun shots were fired towards him from the northern side from the Bari boundary, causing injuries to him in his chest and hand. On receipt of injuries the deceased ran towards his associates and fell on a takhat near Rajendra Singh and Chhotey Bhaiya. The prosecution further alleged that Rajendra Singh and Chhotey Bhaiya on hearing the gun shots saw the appellant Brajendra armed with a .315 rifle and Awadesh armed with a 12 bore gun running away along with another person named Kailash who was also armed with a gun. Rajendra Singh PW 14 who was armed with a .275 rifle and Chhotey Bhaiya was armed with a 12 bore gun fired shots towards the assailants. The assailants also fired towards them, but they escaped. On hearing the gun shot fire V. P. Pathak, Sub-Inspector of Police PW 20 accompanied by Constable Lakhan Singh PW 12 rushed to the spot. Rajendra Singh PW 14 gave him information about the incident which was recorded by Pathak, (Dehati Nalishi Ex. P-12 at 3.10 p.m.). V. P. Pathak, the Sub-Inspector sent the Dehati Nalishi to Kotwali Panna through Lakhan Singh, Constable, for recording the first information report. After holding inquest, Pathak, the Sub-Inspector prepared panchnama

and sent requisition for post-mortem examination of the dead body and he also prepared the spot map Ex. P-17 on the same day. After completion of investigation a charge-sheet was submitted against five accused persons including the two appellants Brajendra and Awadhesh for trial for offences under Section 302 read with Section 34 IPC and under Section 307 read with Section 34 of the Indian Penal Code. Kailash one of the accused was shown absconding. Before the trial court Rajendra Singh PW 14 and Chhotey Bhaiya PW 15 supported the prosecution case as eye-witnesses; they claimed to have witnessed the assault, they further claimed that they had recognised the accused persons. The learned Sessions Judge disbelieved the testimony of these two eye-witnesses; he referred to a number of circumstances which made the prosecution story doubtful; therefore he acquitted the accused. On appeal by the State Government the High Court disagreed with the reasons recorded by the trial court and placing reliance on the testimony of the eye-witnesses, i.e., Rajendra Singh and Chhotey Bhaiya, it allowed the State's appeal and set aside the acquittal of the appellants and convicted them under Section 302 read with Section 34 of the Indian Penal Code and awarded sentence of imprisonment for life to each of them.

3. The trial court held that the prosecution had failed to prove its case beyond all reasonable doubt and no reliance could be placed on the testimony of Rajendra Singh PW 14 and Chhotey Bhaiya PW 15. The trial court referred to a number of circumstances creating doubt on the credibility of the prosecution story but the High Court differed from those findings and on appraisal of evidence it came to the conclusion that the prosecution had proved its case beyond all reasonable doubt. The High Court referred to a number of decisions of this Court in considering the scope of its jurisdiction in interfering with an order of acquittal passed by the trial court but while applying the principles it failed to appreciate that the view taken by the trial court was reasonable and plausible. Even the High Court has not held that the view taken by the trial court was not a possible view. The High Court reappraised the evidence and took a different view and it explained the infirmities of the prosecution pointed out by the Sessions Judge. In *G. B. Patel v. State of Maharashtra* ((1979) 2 SCR 94 : (1978) 4 SCC 371 : 1979 SCC (Cri) 1 : AIR 1979 SC 135) this Court quoted with approval the principles laid down by Privy Council in *Sheo Swarup v. King Emperor* (AIR 1934 PC 227 (2) : 1934 All LJ 905 : 151 IC 322), wherein it was held that although the power of the High Court to reassess the evidence and reach its own conclusion, are as extensive as in an appeal against the order of conviction, yet, as a rule of prudence, the High Court should always give proper weight and consideration to matters e.g.

- (i) the views of the trial judge as to the credibility of the witnesses;
- (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial;
- (iii) the right of the accused to the benefit of any doubt; and
- (iv) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Sarkaria, J. speaking for the court observed : [SCC p. 376 : SCC (Cri) p. 5, para 13]

Where two reasonable conclusions can be drawn on the evidence on record, the High Court should, as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the court below. In other words, if the main grounds on which the court below has based its order acquitting the accused, are reasonable and

plausible, and cannot be entirely and effectively dislodged or demolished, the High Court should not disturb the acquittal.

While considering an appeal against acquittal the High Court must keep in mind these principles in appreciating the evidence of witnesses. If on appraisal of the evidence and on considering relevant attending circumstances it is found that two views are possible, one as held by the trial court for acquitting the accused, and the other for convicting the accused in such a situation the rule of prudence should guide the High Court not to disturb the order of acquittal made by the trial court. Unless the conclusions of the trial court drawn on the evidence on record are found to be unreasonable, perverse or unsustainable, the High Court should not interfere with the order of acquittal. The High Court has in the instant case made an attempt to explain away the infirmities in the testimony of eye-witnesses in setting aside the order of acquittal. The High Court has in our opinion disregarded the rule of judicial prudence in converting the order of acquittal to conviction.

4. The trial court held that the cumulative effect of the following circumstances made the prosecution case doubtful, these are : (i) first information report was not recorded or lodged at the time it purports to have been lodged, (ii) Rajendra Singh PW 14 and Chhotey Bhaiya PW 15, the two eye-witnesses did not give the names of assailants to Tohid, (iii) recovery of two cartridges on January 5, 1982 one day after the occurrence, (iv) nature and position of injuries on the body of the deceased were not consistent with the testimony of eye-witnesses having regard to the local site, (v) empty cartridges of .315 rifle which were alleged to have been fired by Brijesh and 12 bore cartridge was alleged to have been fired by Awadhesh accused causing injuries to the deceased, but the same were not sent to ballistic expert for his opinion nor he was examined to support the prosecution case, (vi) unnatural and inconsistent testimony of eyewitnesses Rajendra Singh PW 14 and Chhotey Bhaiya PW 15, (vii) a large number of persons were available at the scene of occurrence at the Octroi Toll barrier but no independent witness, either employee of the toll barrier or of Home Guards or any other Persons was examined to support the prosecution. The High Court made an attempt to explain the circumstances in holding that sometimes the memory of the witnesses fail and a broad view of the evidence given by the eye-witnesses clearly indicated that the prosecution had proved its case. We have been taken through the entire evidence and we have also closely and carefully considered the judgments of the trial court and the High Court. We are of opinion that the High Court committed error in interfering with the order of acquittal.

5. The first information report Ex. P-12 shows that the occurrence took place at 14.15 hours while the report was lodged at 15.10 hours that is to say within 55 minutes of the occurrence. The evidence on record and the attending circumstances indicate that the first information report was not lodged at 15.10 hours instead it was lodged at about 17.00 hours. Rajendra Singh, PW 14 stated before the trial court that from the place of occurrence he had accompanied the police to Panna Kotwali where he lodged the report and signed the Ex. P-12. In cross-examination he stated that he had gone to the Kotwali for lodging report in a police van. He further stated that the report had been written by the police clerk on his dictation and that the police arrived at the scene of occurrence after an hour of his lodging the first information report. At an earlier stage he had stated that the police had arrived at the place of occurrence at about 3.30 p.m. and thereafter he had accompanied the police to Kotwali for lodging the report. His testimony regarding lodging of the first information report is contradictory. V. P. Pathak, PW 20 Sub-Inspector of Police, the investigating officer, stated that it was wrong to say that the first information report Ex. P-12 was made by Rajendra Singh at Kotwali. According to him he was on duty at Collectorate and there he got the news at about 2.30 or 3.00 p.m. that gun shots were fired at Toll barrier on the Ajaigarh Road; he reached there within few minutes along with Lakhan Singh, Constable. On reaching the spot he wrote Marg intimation, drew

up panchanama of the dead body and sent the dead body for post-mortem examination and thereafter he recorded Dehati Nalishi Ex. P-12. He asserted that first information report had been recorded at the place of occurrence. He further stated that Dehati Nalishi was recorded by him after the dead body of the deceased had been sent by him for post-mortem examination which according to the document (Ex. P-8) was sent at 5.00 p.m. His statement clearly indicates that the first information report was written after 17.00 hours and it was not recorded at the time it purports to have been lodged. There are material contradictions in the testimony of Rajendra Singh PW 14 and the investigating officer. Since the Sub-Inspector, the District Magistrate and the Superintendent of Police had reached the place of occurrence within few minutes of the incident, the delay in lodging the first information report is highly suspicious. Why this delay when all officers were present, and eye-witnesses were present at the spot and the police station was at a distance of two furlongs ? The obvious reason appears to be that the names of the assailants were not known as most likely the alleged two eye-witnesses had not seen the assailants and they were not present at the scene of occurrence, at the time the shooting took place; in all likelihood, they like others arrived at the scene after the incident. Since names of the assailants was not known the FIR was lodged with delay after deliberation.

6. This view finds support from testimony of Tohid PW 16 and other circumstances. According to the prosecution the deceased Ram Pratap Singh had sent Tohid to purchase bus tickets and had directed him to meet him at the Chungi Naka on Ajaigarh Road. He had further told Tohid PW 16 that he was apprehending danger from the accused persons so he would get into bus at the Toll barrier. After giving instructions to Tohid he proceeded to Chungi Chowki (Octroi Post) along with Rajendra Singh and Chhotey Bhaiya. The prosecution further alleged that after the occurrence took place Ram Pratap Singh's dead body was lying near Takhat at the octroi barrier when Tohid arrived at the scene. He met Rajendra Singh PW 14 and Chhotey Bhaiya PW 15 who were wailing. Tohid PW 16 testified that when he reached the toll barrier neither Rajendra Singh nor Chhotey Bhaiya disclosed the names of the assailants. Chhotey Bhaiya PW 15 in his testimony stated that when Tohid arrived at the scene of occurrence he did not enquire from him or from Rajendra Singh as to who had killed Ram Pratap Singh. At a later stage in cross-examination he said that Tohid had asked Rajendra Singh PW 14 who had killed Ram Pratap Singh but Rajendra Singh told him that he would tell him later while going to the police station for lodging the first information report. According to Rajendra Singh PW 14 when Tohid reached the spot he directed him to proceed to the Collectorate and give information to the police about the murder having taken place. Tohid proceeded to the Collectorate and from there he contacted the Kotwali on telephone and gave information about the murder having taken place near the toll barrier. Rajendra Singh PW 14 has stated that neither Tohid asked nor he told him the names of the assailants. This conduct is highly improbable and unnatural. Admittedly Tohid, Rajendra, Chhotey Bhaiya and the deceased were friends of each other and Tohid had been sent by the deceased to bring bus tickets and he had also told him about apprehensions to his life and according to Rajendra Singh PW 14 and Chhotey Bhaiya PW 15 when Tohid arrived at the scene he did not enquire about the names of the assailants, although dead body of the deceased was lying at the spot. This is highly unnatural. When Tohid was cross-examined on this question he tried to explain that while he was proceeding to the police station along with Rajendra Singh PW 14 to lodge the first information report the latter had told him the names of the assailants. We have noticed earlier that according to investigating officer first information report was recorded at the scene of occurrence and not at the police station. This indicates that Tohid and Rajendra Singh's story regarding their going together to Kotwali is highly suspicious. In view of the material contradiction in the statement of three witnesses Rajendra Singh PW 14, Chhotey Bhaiya PW 15 and Tohid PW 16 and further in view of the discrepancy regarding the delay in lodging the first information report,

it is apparent that till the first information report was lodged nobody knew who the assailants were and that is why Rajendra Sing could not disclose the names of the assailants to Tohid on his arrival at the scene of occurrence.

7. The prosecution relied upon the recovery of the two empty cartridges one of them. 315 rifle and the other of 12 bore gun. By recovery of these cartridges the prosecution tried to connect the appellants with the commission of the crime as Raghvendra Singh was alleged to have fired from. 315 rifle and Awadhesh with 12 bore gun. The recovery of these empty cartridges were not made on January 4, 1982 instead these cartridges were recovered on January 5, 1982, although spot map of the scene of occurrence was prepared on January 4, 1982 itself. It is interesting to note that the spot where these cartridges were recovered was shown in the spot map prepared on January 4, 1982 although recovery was made on January 5, 1982. The witnesses in whose presence recovery of the cartridges were made have not supported the prosecution. Moreover, it is the admitted case of the prosecution that there was exchange of fire from both sides, by the assailants as well as by Rajendra Singh and Chhotey Bhaiya, but no other cartridges were recovered by the investigating officer. The investigation officer did not take into possession the licensed rifle of Raghvendra Singh appellant and the 12 bore gun of Awadhesh nor any effort was made to secure the evidence of ballistic expert to prove that the empty cartridges had been fired from the respective weapons. These circumstances indicate that empty cartridges were not recovered instead investigation officer planted these cartridges to support the prosecution case.

8. On the evidence on record it is apparent that the Chungi Chowki (Octroi Toll Barrier) was manned by the employees of the Municipal Board and they were present at the spot and in addition to them there was Home Guards office quite adjacent to the Toll Barrier and there were other residential houses near the barrier and the place of occurrence was a busy public place. It has further come into evidence that large number of persons had gathered at the scene of occurrence but surprisingly enough no employee of Toll Barrier, Home Guard or local resident came forward to support the prosecution case. The District Magistrate, Superintendent of Police and other officers had also reached the spot within few minutes of the incident but none of them entered the witness box to support the prosecution case. The prosecution produced Udai Singh PW 17 and Kali Charan PW 19 who deposed that they had seen the appellants running away with weapons and that they had recognised them. It is interesting to note that Udai Singh and Kali Charan are residents of Uttar Pradesh and they are close relatives of the deceased, their presence at the scene of occurrence was highly doubtful and their testimony is not free from doubt, as they are highly interested persons. The trial court rightly discarded their testimony as their statements had been recorded by the police after two months of the occurrence without there being any explanation for the delay.

9. In this testimony Dr. Jain who carried out the post-mortem examination of the dead body of deceased Ram Pratap Singh, stated that he found following gun shot wounds :

Gunshot wound No. 1 :

(a) Wound of entrance. - One circular wound 5 mm in diameter present two and a half inch below the left axilla and half inch posterior to left axillary line.

In the way the bullet had perforated the following organs of the body - The bullet had passed through the lateral side of left fifth rib. There was a fracture of lateral side of left fifth rib. After that the bullet passed through the lower third of left pleura and entered in the left lung and perforated through the lung parindiana. There was through and through (complete) perforation of lower third

of left pleura and lung. After exit from the lung, it crossed through the past side of right ventricle of heart. Posterior side of right ventricle of heart was completely lacerated. After exit from the posterior side of right ventricle of heart the bullet passed through the upper border of liver and the whole upper border of liver was completely lacerated.

(b) Wound of Exit. - One circular wound in diameter present over posterior and right side of chest at the level of seventh dorsal spine three and a half inch right lateral in the vertebral column. The margins of the wound were slightly lacerated. There was fracture of ninth and tenth ribs of right posterior side. The direction of passage of bullet of gun shot in wound No. 1 was antero-posteriorly.

Gunshot wound No. 2 :

(a) Wound of entrance. - 4 mm diameter circular wound present over left sixth intercostal space two inches lateral to left sternal border. After passing from the left sixth intercostal space the bullet perforated the upper part of stomach. After escaping from medial side of stomach it came out from side of chest at the level of seventh dorsal spine from the eighth intercostal space of right posterior side.

(b) Wound of exist. - One circular wound 5 mm in diameter present at the level of seventh dorsal spine two and half inch right lateral to spinal column. The direction of bullet of gun shot in wound No. 2 was ante posteriorly. Thoracic cavity was hugely filled with dark coloured blood.

Gunshot wound No. 3 :

(a) Wound of entrance. - 3 mm diameter circular wound present on inch above postre-lateral aspect of right wrist. The bullet had passed through the right radius have and the wound of exit was over antro-lateral aspect one inch above the right wrist joint. Wound of exit was circular 5 mm in diameter.

10. These injuries could not be caused in the manner and from the place where assailants were alleged to be present at the time of firing the gun shots, and the same are inconsistent with the testimony of the eye-witnesses and the site plan. We do not think it necessary to discuss it in detail as the trial court has discussed this question at length and we agree with those findings. According to the testimony of Rajendra Singh and Chhotey Bhaiya PWs, when the deceased got gun shot injuries, he was at a higher level at the well whereas the assailants fired the shots from Bari, which was at lower level by one foot from the road and the well was higher than the road by two or two and a half feet. In this view if shots were fired from Bari, at the deceased who was drinking water in a sitting posture, the injuries in all likelihood would have been from lower part to upper part but Dr. Jain deposed that direction of the injuries caused by bullet was from upper part to lower part and the bullet was ante-posteriorly. In the opinion of the doctor, the person who caused injuries to the deceased was at higher level than the deceased; this is wholly inconsistent with the testimony of eye-witnesses. Though medical expert's opinion is not always final and binding, but in the instant case it corroborates other circumstances which indicate that the eye-witnesses had not seen the actual occurrence.

11. In view of the aforesaid facts and circumstances we are satisfied that the prosecution has failed to prove its case beyond all reasonable doubt, and the High Court committed error in interfering

with the trial court's order of acquittal. We accordingly allow the appeal, set aside the order of the High Court and the appellants' conviction and restore the order of the trial court and acquit the appellants. The appellants are in jail, they shall be set forth to liberty forthwith.

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