

Hari Singh and Another

Vs

State of Rajasthan

Criminal Appeal No. 599 of 1986

(G. N. Ray, G. T. Nanavati JJ)

01.10.1996

JUDGMENT

NANAVATI, J. –

1. This is an appeal by special leave against the judgment and order passed by the High Court of Rajasthan in Criminal Appeals Nos. 239 of 1983 and 388 of 1985. Cr. A. No. 239 was filed by the four convicted accused whereas Cr. A. No. 388 was filed by the State against the acquittal of the 17 remaining accused and also against the acquittal of accused Ramphool under Section 302 IPC.

2. Briefly stated, the prosecution case was that there was enmity between the family of the accused and the family of Babu Singh. Since 3 or 4 days before 29-7-1981 the accused were threatening to kill members of the family of Babu Singh and his brother PW 1 Harbhajan. On 29-7-1981 at about 6.00 o'clock in the morning while Buddha, son of Harbhajan was returning from the hillside with milk all the 21 accused assaulted him and tried to kill him. Hearing his cries Harbhajan and his brother Babu Singh ran to his rescue. When they reached near the house of one Amar Singh, the accused who were coming from the opposite side encircled Babu and started beating him. Accused Hari Singh gave 2-3 blows with his 'lathi' (stick) on the head of Babu. Accused Heera Singh gave one or two lathi blows on his legs. Accused Brijendra also gave 3 or 4 'lathi' blows on the person of Babu. So Babu fell down and thereafter all the accused except Shrawan and Mohar Singh gave further 'lathi' blows to him. At that time accused Shrawan and Mohar Singh were saying that Babu Singh should be killed and they would bear the expenses for defending them. Meanwhile hearing shouts raised by Harbhajan, PW 2 Mathalli and PW 3 Bharosey came there. Believing that Babu was dead the accused left that place and went to the house of Babu. Accused Gopal, Benai Singh, Bhanwar and Dharam Singh entered the house and took away the gun and belt of cartridges belonging to Babu. While his wife protested accused Gopal and Dharam Singh gave 'lathi' blows and accused Benai Singh and Bhanwar gave fist blows to her. Harbhajan took Babu to Bayana Hospital. By that time his son Buddha was also removed to that hospital. Harbhajan then went to the house of one Chandra Shekar, got a complaint regarding the incident prepared and went with it to the police station. He reached there at 6.45 a.m. and gave the complaint. On its basis the FIR (Exh. P-1) was prepared by PW 15 SHO Kailash Bhagwati. The police officer then went to the hospital and recorded the complaint of Buddha (Exh. D-5) with respect to the assault on him. After completing the investigation the police charge-sheeted all the 21 accused. They were thereafter tried in the Court of Additional Sessions Judge, Bharatpur for the offences punishable under Sections 147, 148, 307 and 302 IPC. Those accused who had entered the house of Babu and removed his gun and belt of cartridges were also charged for the offences punishable under Sections 454 and 380 IPC. Accused Shrawan and Mohar Singh who had not taken any part in beating Babu Singh were charged for the offences punishable under Sections 147, 307 read with Section 149 and Section 302

read with Section 149 IPC.

3. In order to prove the assault on Babu the prosecution relied mainly upon the evidence of PW 5 Buddha, his dying declaration and PW 9 Jai Singh. Jai Singh did not support the prosecution and was declared hostile. The learned Additional Sessions Judge found the evidence of PW 5 Buddha suffering from some major contradictions and infirmities and, therefore, believed his evidence only with respect to accused Hari Singh, Heera Singh and Ramphool. As regards the fatal assault on Babu the prosecution relied upon the evidence of PW 1 Harbhajan, PW 2 Mathalli, PW 3 Bharosey and PW 4 Bishni. In view of the admission made by Bishni in her evidence that she had not seen the killing of her husband the learned Additional Judge held that she was not an eyewitness. The learned Judge found the evidence of the remaining three eyewitnesses believable as regards accused Hari Singh, Heera Singh and Brijendra but in view of contradictions and inconsistencies in their evidence as regards the remaining 17 accused he did not think it safe to accept it and, therefore, gave benefit of doubt to them. As 24 injuries were caused to Buddha out of which 3 were grievous the learned trial Judge convicted accused Ramphool, Hari Singh and Heera Singh under Section 307 IPC. He also convicted accused Hari Singh, Heera Singh and Brijendra under Section 302 IPC for causing death of Babu. Thus, accused Hari Singh and Heera Singh were convicted for the offences punishable under Sections 302 and 307 IPC, accused Brijendra under Section 302 IPC and Ramphool under Section 307 IPC. These convicted accused were acquitted of all the other charges.

4. The four convicted accused filed Criminal Appeal No. 239 of 1983 challenging their conviction. The State filed an acquittal appeal against the 17 accused who were completely acquitted and also against the acquittal of accused Ramphool under Section 302 IPC. Leave to appeal was granted only against some of them but it is not necessary now to refer to that aspect as the acquittal appeal was dismissed by the High Court and that order has become final. The High Court after reappreciating the evidence confirmed the conviction of Hari Singh and Brijendra under Section 302 IPC for causing death of Babu as it found that the evidence against them was quite consistent and sufficient. The High Court acquitted Heera Singh as it found that his name was not mentioned in the FIR and he was falsely implicated as one of the persons who had given lathi blows to the deceased. With respect to the assault on Buddha the High Court held that his evidence suffered from material improvements and, therefore, it was not at all safe to rely upon his evidence for convicting any accused. The High Court, therefore, acquitted all the three accused who were convicted by the trial court under Section 307 IPC. The High Court also disbelieved the evidence with respect to the third incident, namely, the accused going to the house of Babu and taking away his gun and belt of cartridges after causing some injuries to his wife Bishni.

5. The learned counsel appearing for the two appellants, whose conviction under Section 302 has been confirmed by the High Court, submitted that the High Court failed to appreciate that the FIR (Exh. P-1) could not have been recorded at 6.45 a.m. in view of certain admissions made by PW 1 Harbhajan and that in all probability the complaint against the accused was recorded after a complaint was given by accused Gopal against Babu, Harbhajan, Buddha and others at the Bayana Police Station with respect to the same incident. He also submitted that the courts below failed to appreciate that Exh. D-5 was the first information in point of time and the investigation should be deemed to have started on the basis of the said information and, therefore, Exh. P-1 could not have been treated as FIR. It was also contended that PW 3 Bharosey was not an independent witness and, therefore, it was not proper to convict the appellants relying upon the evidence of two interested witnesses only. It was also contended that the courts below committed an error in not believing the defence of the appellants that injuries were caused by them in exercise of their right of private defence, particularly when it was proved that accused Hari Singh had received two injuries on his

person during that incident and one of them was a fracture. Lastly, it was contended that the evidence does not justify their conviction under Section 302 IPC and, therefore, their conviction under that section is improper and illegal.

6. After going through the evidence we find that there is no substance in any of the contentions raised on behalf of the appellants. The first incident, that is, the assault on Babu took place at about 6 a.m. according to the prosecution evidence. Even in the cross-complaint filed by accused Gopal time of the incident was mentioned as 6 a.m. though his version about the incident was different. It was submitted that PW 1 Harbhajan in his evidence has stated that after the accused left he took his brother Babu to the hospital, then went to the house of Chandra Shekar, got a complaint regarding the incident prepared and then went to the police station and therefore considering the time that would have been taken in doing all these things and the distance, Harbhajan could not have reached the police station at 6.45 a.m. The evidence discloses that the police station was only two furlongs away in the eastern direction from the place of the incident. The hospital to which Babu was taken by Harbhajan was on the way to the police station. Though it was brought out in his cross-examination that house of Chandra Shekar was about 500 to 600 yards away from the hospital no attempt was made to elicit in which direction it was situated. If the hospital and the house of Chandra Shekar were on the way to the police station it is difficult to appreciate how more than 45 minutes would have been taken in lodging the complaint. There was absolutely no reason for the investigating officer at that stage to put incorrect time in the Fir. Another fact which appears from the FIR is that it was registered as Crime No. 230 of 1981. The complaint which accused Gopal gave was registered as Crime No. 231 of 1981. Thus the complaint of Harbhajan was registered earlier. The complaint Exh. D-5 was taken down by the investigating officer after going to the hospital. For all these reasons, it cannot be said that FIR Exh. P-1, was not first in point of time. The courts below, therefore, rightly treated Exh. P-1 as the FIR and committed no error in relying upon the same for the purpose of corroboration.

7. After going through the evidence of eyewitnesses we find that the courts below have not committed any error in appreciating their evidence which would justify interference by this Court. We find that the names of PW 2 Mathalli and PW 3 Bharosey were mentioned in the FIR (Exh. P-1) which was recorded within a short time. As stated earlier Mathalli did not fully support the prosecution and was declared a hostile witness. He however did depose about the presence of appellants Heera Singh and Brijendra and giving of lathi blows by them to deceased Babu and also about presence of PW 3 Bharosey at the time of the incident. He was in no way connected with deceased Babu or PW 1 Harbhajan nor did he have any enmity with the appellants. PW 3 Bharosey's statement was not recorded on the same day but was recorded on 14-8-1981. According to the investigating officer he could not record his statement earlier because he was not available when he had tried to contact him. Relying upon the statement of PW 3 Bharosey that during all those days he was in Bayana and had not gone out, it was submitted by the learned counsel that the said explanation is false and that Bharosey was falsely put up as an eyewitness. As stated earlier name of PW 3 Bharosey was mentioned in the FIR and therefore, it is not possible to accept the contention that he was a got-up witness. Merely because the witness did not go out of Bayana town it cannot be said that he was available all the time and that the investigating officer was not telling the truth when he stated that he was not available when he had tried to contact him. It was also submitted that PW 3 Bharosey was closely related to deceased Babu and thus was a highly interested witness and, therefore, no reliance should have been placed upon his evidence without independent corroboration. In his cross-examination he denied that father of Harbhajan and Babu was his real uncle. No attempt was made thereafter to establish his relationship with deceased Babu or Harbhajan. The fact that the houses of deceased Babu, PW 1 Harbhajan, PW 3 Bharosey were

situated in the same complex, by itself, cannot lead to an inference that he was a partisan witness. Even Babu and Harbhajan were living in separate houses though in the same complex. It was not even suggested to PW 3 Bharosey that he was staying jointly with Harbhajan or Babu. Therefore, not much weight can be attached to the statement of PW 2 Mathalli that Bharosey was living in the same house in which Babu and Harbhajan resided. What the witness really meant was that he was living in the same complex. Therefore, Bharosey cannot be said to be an interested witness as no other connection has been established between him and deceased Babu and Harbhajan. The courts below were, therefore, right in placing reliance upon the evidence of PW 1 Harbhajan as it was corroborated by the FIR (Exh. P-1) and also by the evidence of PW 2 Mathalli and PW 3 Bharosey for believing the presence of the appellants at the scene of the offence and the role played by them.

8. The accused including the appellants had pleaded right of private defence by alleging that on the date of the incident at about 6 a.m. near the house of one Amar Singh, Babu, Harbhajan and his sons had attacked Gopal with lathis. Babu had a gun with him. While Babu was loading his gun with a cartridge accused Gopal gave a lathi blow to him with the result that the gun fell down. Hearing his shouts Hari Singh, Rattan, Jagga and others had come. Hari Singh tried to save Gopal and while doing so he himself received some lathi blows from Harbhajan and his sons. The High Court and trial court rightly did not believe this defence version in view of large number of injuries on the person of Babu and absence of any material to show that the accused had received injuries during this incident.

9. It was lastly contended by the learned counsel for the appellants that in the absence of any evidence as to who had caused fatal injuries to deceased Babu none of the two appellants could have been convicted substantively for the offence punishable under Section 302 IPC. The evidence of the eyewitnesses is that Appellant 1 Hari Singh had given lathi blows on the head of the deceased. The medical evidence disclose that the skull of Babu was fractured and the internal injuries which he had received in his brain were by themselves sufficient in the ordinary course of nature to cause his death. Appellant 1 was, therefore, rightly convicted for the offence punishable under Section 302 IPC. Appellant 2, according to the evidence of the eyewitnesses, had given stick blows on the legs of the deceased. Though the eyewitnesses have also stated that some more blows were also given by him to Babu after he had fallen down they have not stated on which part of the body those blows were given. Thus, there is no clear evidence on record to show that Appellant 2 had caused a fatal injury. Therefore, conviction of Appellant 2 under Section 302 cannot be sustained. However, his participation in the murderous assault on Babu along with Appellant 1 is proved beyond any doubt and, therefore, he would be guilty under Section 302 read with Section 34 IPC. Therefore, his conviction will have to be altered from Section 302 to Section 302 read with Section 34 IPC. However, the order of sentence imposed upon him is confirmed.

10. In the result the appeal is dismissed subject to the modification stated above. The appellants were ordered to be enlarged on bail by this Court on 23-7-1987. Therefore, they are ordered to surrender immediately to serve out the remaining sentence.