

SUPREME COURT OF INDIA

Bastiram

Vs.

State of Rajasthan

C.A.No.403of2014

(Ranjana Prakash Desai,J. Madan B. Lokur,JJ.)

13.02.2014

JUDGMENT

Madan B. Lokur, J.

1. Leave granted in S.L.P. (Crl.) No.5240 of 2004.
2. The question for our consideration is whether there is any evidence that would warrant setting aside the conviction of the appellants by the Trial Court and affirmed by the High Court. In our opinion, the answer is in the negative and we uphold the conviction of the appellants for an offence punishable under Section 302 of the Indian Penal Code read with Section 34 thereof.
3. The facts:
4. On 20th May, 1995 at about 7.15 p.m. Tara Chand, Station House Officer in Police Station Nokha, District Bikaner in Rajasthan received a cryptic telephonic message. The message was from an unknown person and was to the effect that in Ward No.2 in village Nokha, Ram Pratap and Sohan Lal (PW-4) who are real brothers were involved in a fight. Several others had joined in and firearms, lathis, barchis and other weapons were used in the fight. It was also informed that two persons had died in the incident.
5. Tara Chand reduced the information in writing in a *roznamcha* and then reached the place of occurrence along with some other police officers. At the place of occurrence, Sohan Lal gave a *parcha bayan* to Tara Chand at about 8.30 p.m. Sohan Lal stated that his brother Genaram (PW-1) had installed a *dharam kanta* or a weighbridge on Roda Road and about five years later Ram Pratap also installed a weighbridge on the same road. As a result of the installation of the second weighbridge, the relationship between Genaram and Ram Pratap was not cordial.
6. Sohan Lal further stated that sometime between 6.30 p.m. and 6.45 p.m., he and Om Prakash (PW-3 - son of Genaram) were sitting in a temple near his (Sohan Lal's) house. At that time his two sons, namely, Ram Narain (hereafter referred to as deceased Ram Narain) and Mohanlal (hereafter referred to as deceased Mohanlal) came out of his house and went towards Ram Pratap's house. When they were near his house, they were attacked by the four appellants, that is, Bastiram, Mohan Lal, Ramnarayan and Banwari. These four appellants were armed with pistols. Also participating in the attack were Mangilal, Ramjus, Hariram, Ram Pratap, Bhagwanaram and Maniram who were armed with either a *barchi* or a *jayee* or a *sela*.

7. Sohan Lal further stated that his two sons, deceased Ram Narain and deceased Mohanlal, were surrounded by the ten persons aforesaid who made a hue and cry that they should be killed. Thereupon Om Prakash and Sohan Lal's two other sons, namely, Rameshwarlal (hereafter referred to as deceased Rameshwarlal) and Rajaram (PW- 10) rushed towards the site. It was further stated by Sohan Lal that appellant Banwarifired at CrI. Appeal No. 758 of 2004 et deceased Mohanlal; appellant Bastiram fired at deceased Rameshwarlal; appellant Ramnarayan fired at injured Rajaram and appellant Mohan Lal fired at deceased Ram Narain.

8. Sohan Lal also stated that deceased Mohanlal died on the spot while injured Rajaram, Ram Narain and Rameshwarlal were taken to a hospital. Ram Narain and Rameshwarlal later succumbed to their injuries.

Before his death on 22nd May, 1995 deceased Rameshwarlal gave a dying declaration on 21st May, 1995. In his dying declaration deceased Rameshwarlal stated that appellant Bastiram had fired at deceased Ram Narain who died on the spot. He stated that appellant Bastiram also fired at deceased Mohanlal and appellant Mohan Lal fired at him (deceased Rameshwarlal). Deceased Rameshwarlal also stated that appellant Banwari fired at Maniram and that his brother Goverdhan also arrived at the scene and Maniram Patwari fired at him. The dying declaration is clearly at variance with the *parcha bayan* of Sohan Lal. That Maniram (from Ram Pratap's group) died on the spot is not in dispute. In this regard, we were given a copy of the judgment and order dated 7th September, 2001 in Sessions Case No. 21 of 2001 wherein the State had accused Sohan Lal and members of his group of having murdered Maniram and causing injuries to others. In the decision, Sohan Lal and all the members of his group were acquitted by giving them the benefit of doubt. That decision seems to have attained finality. Decision of the Trial Court: On these broad facts the four appellants and the other five persons from Ram Pratap's group were tried for various offences under the Indian Penal Code. The Additional Sessions Judge (Fast Track) Bikaner delivered his judgment in Sessions Case No.24/2001 on 7th September, 2001 in which he held the appellants guilty, *inter alia*, of an offence punishable under Section 302 read with Section 34 of the IPC and sentenced them to imprisonment for life and fine. They were also convicted of an offence punishable under Section 307 read with Section 34 of the IPC and sentenced to rigorous imprisonment for five years and fine. The remaining accused were acquitted.

9. The Trial Court found that there were four eye witnesses to the occurrence, namely, Om Prakash (PW-3), Sohan Lal (PW-4), Jagdish (PW-9) and Rajaram (PW-10). This was not questioned before the High Court and was not disputed before us also.

10. The Trial Judge held that appellant Banwari had caused a firearm injury to deceased Mohanlal resulting in his death; appellant Ramnarayan had caused a firearm injury to Rajaram and appellant Bastiram had caused a firearm injury to deceased Rameshwarlal resulting in his death. It was found that amongst other injuries, deceased Ram Narain had received a gun fire injury on his thigh. It was held that the gun fire injury was inflicted by appellant Mohan Lal. The Trial Judge noted that the post-mortem report of deceased Ram Narain revealed that there was no firearm injury on his body, but he preferred to rely on the eye witness evidence rather than on the medical report.

11. The Trial Judge did not place any reliance on the dying declaration given by deceased Rameshwarlal, since it did not bear a certificate of fitness given by the doctor at the time of its recording. The Trial Judge noted that the contents of the dying declaration were at variance with the contents of the *parcha bayan* given by Sohan Lal and that there were some discrepancies in the dying declaration which could, therefore, not be depended upon for its truthfulness. However, the Trial Judge noted that the dying declaration was evidence for the presence of the appellants at the place of occurrence.

12. The appellants produced their defence evidence. Appellant Bastiram produced evidence to the effect that on the fateful day, he had gone to Bikaner in his capacity as Patwari in Nokha village at about 11 a.m. He reached Bikaner at about 1 p.m. and met several people not only in connection with his official work but also in connection with a State level conference of Patwar Sangh to be held on 8-9 June, 1995 at Alwar. He left Bikaner at about 7.30 p.m. and returned to Nokha at about 9.30 p.m. As such, he was not present when the incident took place. Some of the persons whom appellant Bastiram met at Bikaner were produced as defence witnesses including Phoola Ram (DW-1) who stated that after meeting him, appellant Bastiram left for the house of Gopal Krishan at about 5.45 p.m.; Mangi Lal (DW-2) stated that appellant Bastiram was with him and at about 5.30 p.m. he went away with Phoola Ram. Gopal Krishan (DW-3) stated that appellant Bastiram had come to his house at about 6 p.m. on 20th May, 1995 and left at about 6.30 p.m. Inder Chand (DW-7) stated that between 5.30 and 6 p.m. appellant Bastiram met Hanuman Singh, Sub Divisional Magistrate, South Bikaner. Hanuman Singh (DW-9) stated that appellant Bastiram had come to his chamber with Inder Chand at about 5.15 or 5.30 p.m. in regard to organizing a farewell party on his (Hanuman Singh's) transfer. Jagdish (DW-10) is the son of Gopal Krishan and he stated that appellant Bastiram had come to his father's house at about 6 p.m. on 20th May, 1995 and he stayed there for about half an hour. Jagdish also stated that he had gone to see off appellant Bastiram at Ambedkar Circle.

13. Rajender Kumar Sharma appeared in the witness box as DW-11. He was working as Civil Judge (Junior Division) and Judicial Magistrate at Bikaner. He stated that he had recorded the dying declaration of deceased Rameshwarlal on 21st May, 1995. He also stated that before recording the dying declaration a Fitness Certificate was obtained from the doctor on duty which is mentioned at 'E' to 'F' in the dying declaration. In his cross-examination this witness stated that deceased Rameshwarlal was fit to make a statement.

14. Umesh Joshi (DW-12) was working as Additional Superintendent of Police, CID (CB) in Jaipur. He had conducted investigations in the case and had sent a Factual Report to the Superintendent of Police of CID (CB) Rajasthan, Jaipur in which he opined that the involvement of appellant Bastiram in the occurrence had not been established.

15. Similarly, appellant Mohan Lal also produced defence witnesses to prove that he was not at the place of occurrence on the fateful day. The evidence led by both these appellants was considered by the Trial Judge but rejected.

16. Decision of the High Court:

17. Feeling aggrieved by their conviction and sentence, the appellants preferred Criminal Appeal No.798 of 2001 in the Rajasthan High Court while the State of Rajasthan preferred Criminal Appeal No.528 of 2002 against the acquittal of the other five accused.

18. By a judgment and order dated 9th September, 2003 the High Court upheld the conviction of the four appellants and dismissed the appeal filed by the State of Rajasthan against the acquittal of the remaining five accused persons.

19. The High Court confirmed the conclusions of the Trial Judge. It was held that appellant Bastiram had caused a firearm injury leading to the death of Rameshwarlal; appellant Banwari had also caused a firearm injury leading to the death of Mohanlal; appellant Mohan Lal had caused a firearm injury on the thigh of deceased Ram Narain and appellant Ramnarayan had caused a firearm injury on Rajaram.

20. The High Court was of the view that even though the medical evidence showed that deceased Ram Narain had not received a firearm injury, the ocular evidence to the contrary was to be preferred since that was reliable. Reliance was placed on *Suraj Pal v. State of U.P.* Alternatively, it was held that even if deceased Ram Narain had not received any gunshot injury, the fact is that appellant Mohan Lal was armed with a pistol and it could safely be concluded that he shared a common intention with the other accused persons thereby attracting Section 34 of the IPC for the purposes of confirming his conviction for an offence punishable under Section 302 of the IPC.

21. The four appellants filed three appeals in this Court being Criminal Appeal No.758 of 2004, Criminal Appeal No.759 of 2004 and Criminal Appeal arising out of S.L.P. (Crl.) No. 5240 of 2004.

22. Presence of appellant Bastiram:

23. Insofar as the appeal filed by appellant Bastiram is concerned, the principal submission before us was to the effect that there is a reasonable doubt whether he was at all involved in the incident. Several factors were brought to our notice in this regard. Firstly, it was submitted that the evidence given by the four eye witnesses suggests that appellant Bastiram shot deceased Rameshwarlal. However, in his dying declaration deceased Rameshwarlal does not say that he was shot by appellant Bastiram. According to the dying declaration, deceased Ram Narain was shot by appellant Bastiram and he (deceased Rameshwarlal) received a gunshot injury from appellant Mohan Lal.

24. The Trial Judge partially rejected deceased Rameshwarlal's dying declaration because it was too much at variance with the eye witness account and it was doubtful whether he was fit to make a statement. The dying declaration was accepted only for the purpose that it confirmed the presence of the appellants including appellant Bastiram at the place of occurrence. We do not see any perversity in this conclusion of the Trial Judge, confirmed by the High Court.

25. Secondly, it was submitted that during the investigation, a fact finding report was tendered by Umesh Joshi (DW-12) to the Superintendent of Police of CID (CB) Rajasthan, Jaipur and it was marked as Exhibit 'D-51'. The report concludes that the involvement of appellant Bastiram in the incident was not proved. It was submitted that this exhibit was not considered either by the Trial Court or by the High Court while convicting appellant Bastiram.

26. The fact finding report is only another piece of evidence and it has to be read along with the statement of the defence witnesses which clearly brings out, and this has not been doubted, that appellant Bastiram had in fact gone to Bikaner on that day for some official work. The only question was about the approximate time when he left Bikaner to return to Nokha.

27. On the basis of the statements made by the defence witnesses it is not possible to accurately state when appellant Bastiram left Bikaner, but he was certainly there till about 5.00 or 5.15 p.m. if not a little later. Information about the incident at Nokha was received by Tara Chand in Police Station Nokha at about 7.15 p.m. meaning thereby that the incident had taken place a short while before that. As per the *parcha bayan* given by Sohan Lal the incident took place between 6.30 and 6.45 p.m. There is therefore a window of about one hour and thirty or forty-five minutes between the time of appellant Bastiram's departure from Bikaner and his arrival at Nokha. It is, therefore, quite possible, given the flexibility of time and a lack of exactitude that appellant Bastiram was present when the incident took place and as testified by the eye witnesses.

28. The Trial Court rejected the evidence of the defence witnesses with regard to the absence of appellant Bastiram on three grounds: Firstly, there was no occasion for him to remain in Bikaner after office hours, that is, after 5.00 p.m. This may not be a good enough reason *per se* for rejecting the testimony of the defence witnesses. But a reasonable conclusion can be drawn on the basis of the material on record that appellant Bastiram was in Bikaner till about 5.00 or 5.15 p.m. but this is of no consequence. Secondly, the Trial Court also noted some discrepancies in the evidence of the defence witnesses with regard to the timings given by the various defence witnesses. These are minor discrepancies and, as rightly noted by the Trial Court, no person keeps an eye on the clock or notes the time of meeting. It is for this reason that some flexibility in the timings must be given. Thirdly, since appellant Bastiram was the President of the Patwar Sangh at Nokha and the defence witnesses were either Patwaris or related to the Revenue Department, appellant Bastiram could have influenced them on account of being a leader. This may be a real possibility considering the fact that though appellant Bastiram was named in the *parcha bayan* as one of those armed with a pistol and who caused the death of deceased Rameshwarlal, he was in fact arrested about two and a half years later on 21st January, 1998. Cumulatively considered, the reasons given by the Trial Judge for rejecting the testimony of the defence witnesses are adequate.

29. In any event, what is perhaps more important is the cogent and consistent eye witness testimony relating to the presence of appellant Bastiram. This cannot be simply discarded on the basis of possible guesswork by the defence witnesses about the timings of the meetings that appellant Bastiram had in Bikaner. In this regard, the conduct of appellant Bastiram is also significant. He produced a copy of his travelling allowance bill and daily diary which showed that he left Bikaner at about 7.30 p.m. The Trial Judge noted that both these documents were prepared after the incident and in the daily diary (Exhibit D-52) it is recorded that appellant Bastiram met Hanuman Singh (DW-9) in connection with a party and left Bikaner at about 7.30 p.m. and arrived at Nokha at 9.30 p.m. None of the defence witnesses support the case of appellant Bastiram that he left Bikaner at 7.30 p.m. It is quite clear that appellant Bastiram manufactured this evidence with a view to cover his tracks when there was no need for him to do so, assuming his witnesses were speaking the truth.

30. Under the circumstances, on a consideration of the evidence on record there is no doubt that appellant Bastiram was present when the incident occurred and, as stated by the eye witnesses, participated in it. We see no reason to upset the concurrent finding of fact in this regard by the Trial Court and the High Court.

31. Other appellants:

32. There is also overwhelming evidence given by the eye witnesses about the use of firearms by appellant Ramnarayan, appellant Mohan Lal and appellant Banwari. The evidence of the eye witnesses in regard to these appellants is consistent and we see no reason to differ with the concurrent findings arrived at by the Trial Court as well as the High Court. Little was said by learned counsel disputing their involvement.

33. It was submitted that Maniram, one of the persons belonging to Ram Pratap's group was also killed in the incident and there is no explanation for the cause of his death. It was submitted that it is necessary for the prosecution to explain any injuries sustained by the accused party. Nothing further need be said on this in view of the benefit of doubt, as mentioned above, given to Sohan Lal's group in Sessions Case No. 21 of 2001. Under the circumstances, we are of the opinion that the appellants cannot take advantage of the death of Maniram or injuries caused to other members of their group in the clash.

34. Gunshot injury on deceased Ram Narain:

35. Finally, it was submitted that according to the post mortem report and the evidence given by the doctor no firearm injury was found on the body of deceased Ram Narain. However, the ocular testimony is to the effect that deceased Ram Narain was shot at by appellant Mohan Lal injuring him and thereby causing his death. It was submitted that the Trial Judge and the High Court erroneously gave primacy to the ocular evidence disregarding the medical evidence.

36. The question before us, therefore, is whether the "medical evidence" should be believed or whether the testimony of the eye witnesses should be preferred. There is no doubt that ocular evidence should be accepted unless it is completely negated by the medical evidence. This principle has more recently been accepted in *Gangabhavani v. Rajapati Venkat Reddy*.

37. The expression "medical evidence" compendiously refers to the facts stated by the doctor either in the injury report or in the post mortem report or during his oral testimony plus the opinion expressed by the doctor on the basis of the facts stated. For example, an injury on the skull or the leg is a fact recorded by the doctor. Whether the injury caused the death of the person is the opinion of the doctor. As noted in *State of Haryana v. Bhagirath* on the same set of facts, two doctors may have a different opinion. Therefore, the opinion of a particular doctor is not final or sacrosanct.

38. What about the facts recorded by a doctor - are they sacrosanct? In *Kapildeo Mandal v. State of Bihar* the facts found by the doctor were preferred over the eye witness testimony. The ocular evidence was to the effect that the deceased suffered firearm injuries. However, the doctor conducting the post mortem examination stated that he did not find any indication of any firearm injury on the person of the deceased. No pellets, bullets or any cartridge were found in any of the wounds. Accepting the "medical evidence" on facts, it was observed that,

"[T]he medical evidence is to the effect that there were no firearm injuries on the body of the deceased, whereas the eyewitnesses' version is that the appellant-accused were

carrying firearms and the injuries were caused by the firearms. In such a situation and circumstance, the medical evidence will assume importance while appreciating the evidence led by the prosecution by the court and will have priority over the ocular version and can be used to repel the testimony of the eyewitnesses as it goes to the root of the matter having an effect to repel conclusively the eyewitnesses' version to be true."

39. Similarly, a fact stated by a doctor in a post mortem report could be rejected by a Court relying on eye witness testimony, though this would be quite infrequent. In ***Dayal Singh v. State of Uttaranchal*** the post mortem report and the oral testimony of the doctor who conducted that examination was that no internal or external injuries were found on the body of the deceased. This Court rejected the "medical evidence" and upheld the view of the Trial Court (and the High Court) that the testimony of the eye witnesses supported by other evidence would prevail over the post mortem report and testimony of the doctor. It was held,

40. [T]he trial court has rightly ignored the deliberate lapses of the investigating officer as well as the post-mortem report prepared by Dr C.N. Tewari. The consistent statement of the eyewitnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW 3 [doctor] and PW 6 [investigating officer] are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eyewitness which was reliable and worthy of credence has justifiably been relied upon by the court."

41. An opinion given by a doctor, based on the facts recorded on an examination of a victim of a crime, could be rejected by relying on cogent and trustworthy eye witness testimony. In ***Mange v. State of Haryana*** an eye witness to a rape stated that the offence was committed on a particular day and at a particular time. However, the lady doctor who examined the victim was of the opinion that the offence was committed two days earlier. This Court did not accept the opinion and preferred to rely on the eye witness account holding, *inter alia*, that

"It is difficult for any medical expert to give the exact duration of time when the rape was committed. More particularly when we have the evidence of PW 4 [eye witness] as to the time and date of the occurrence, the medical evidence can hardly be relied upon to falsify the evidence of the eyewitness because the medical evidence is guided by various factors based on guess and certain calculations."

42. This being the position, insofar as the injury to deceased Ram Narain is concerned, Dr. D.K. Purohit (PW-18) stated that he had conducted the post mortem examination on the dead body. He described the injuries on the body and in his cross-examination categorically stated as a matter of fact that "This is correct to suggest that there was no firearm injury on the body of Ram Narain". In the face of this categorical factual assertion, and absent any cogent evidence to the contrary, we cannot accept the conclusion arrived at by the Trial Court and the High Court that deceased Ram Narain suffered a gunshot injury. The ocular evidence undoubtedly shows that deceased Ram Narain was fired at by appellant Mohan Lal, but in view of the unchallenged testimony of the doctor it is quite clear that the gunshot did not hit deceased Ram Narain and the cause of his death was due to the cumulative effect of the

various injuries suffered by him.

43. However, this has no impact on our final conclusion since we are in the agreement with the Trial Court and the High Court that the appellants had the common intention of causing the death of deceased Rameshwarlal, deceased Ram Narain, deceased Mohanlal and injured Rajaram. That Rajaram survived the injuries is fortuitous. We are also in agreement with both the Courts that the appellants were armed with pistols and that they had fired at their victims with the intention of killing them. We have not been shown anything that would suggest the contrary.

44. Conclusion:

45. We uphold the concurrent findings of the Trial Court and the High Court and confirm the conviction and sentence on the appellants. There is no merit in these appeals and they are accordingly dismissed.

