State of Rajasthan Vs Bhawani and Another

Criminal Appeal No. 421 of 1996

Court: Supreme Court of India

Date of Decision: July 31, 2003

Acts Referred:
Arms Act, 1959 â€" Section 25, 3#Constitution of India, 1950 â€" Article 136#Criminal Procedure Code, 1973 (CrPC) â€" Section 162, 385, 385(2), 386#Penal Code, 1860 (IPC) â€" Section 148, 302, 307, 448

Citation: AIR 2003 SC 4230 : (2003) AIRSCW 3953 : (2003) 2 ALD(Cri) 490 : (2003) 2 ALT(Cri) 187 : (2003) CriLJ 3857 : (2003) 4 RLW 551 : (2003) 5 SCALE 595 : (2003) 7 SCC 291 : (2003) 1 SCR 996 Supp : (2003) 5 Supreme 287 : (2003) 2 UC 1233 : (2003) 2 UJ 1417

Hon'ble Judges: S. Rajendra Babu, J; K. G. Balakrishnan, J; G. P. Mathur, J

Bench: Full Bench

Advocate: Manish Singhvi, K.V. Bharati Upadhyaya, Ranji Thomas and V.N. Raghupathy, for the Appellant; Yunus Malik, Vani Singh and Gopal Singh and L.P. Aggawalla and Co. Advs. (NP), for the Respondent

Final Decision: Allowed

Judgement

G.P. Mathur, J.
State of Rajasthan has preferred this appeal by special leave against the judgment and order dated 31.1.1991 of Jaipur

Bench of High Court of Rajasthan by which the appeal preferred by the respondents against their conviction and sentence was allowed and they

were acquitted. The learned Additional Sessions Judge, Kishangarh (Alwar) had convicted the respondents under Sections 148, 307, 302 and

448 IPC and had sentenced them to one year RI, 7 years RI and a fine of Rs.1000/-, imprisonment for life and a fine of Rs. 100/- and one month

RI respectively under each count. The respondent No. 1 Bhawani had been further convicted u/s 3/25 of the Arms Act and had been sentenced to

one year RI and a fine of Rs. 500/-.

2. According to the prosecution, the incident took place at about 5.30 p.m. on 21.12.1985 in village Bhajna was when PW1 Daya Ram was

cutting fodder in his Nohara. The respondents Bhawani armed with gun, Hari Singh armed with country-made pistol and three others namely

Kishanlal armed with gun, Ramjilal armed with pistol and Amilal armed with country-made pistol suddenly came there and after giving abuses,

started firing from their respective weapons. It is said that some other persons who were armed with lathis and farcies were standing outside the

Nohara, As a result of firing, two persons, namely, Deshraj and Hoshiar died on the spot and several others received gunshot injuries. An FIR of

the incident was lodged by PW1 Daya Ram, brother of Deshraj, deceased, at 8.00 p.m. on 21.12.1985 at P.S. Mundawar, which is 17

kilometers from the place of occurrence in which 16 persons were named as accused. The motive for the assault is said to be a litigation regarding

the Nohara which was pending between the parties in the Court of SDM, Kishangarh. On the basis of the FIR, a case was registered and usual

investigation followed. Three accused, namely Kishanlal, Ramjilal and Amilal were not prosecuted as they had absconded. The prosecution,

however, submitted charge-sheet against 35 accused. The learned Additional Sessions Judge held that from the evidence on record it was proved

beyond doubt that Bhawani, Hari Singh, Kishanlal, Ramjilal and Amilal had formed an unlawful assembly and in prosecution of their common

object they had trespassed into the Nohara and had caused death of Deshraj and Hoshiar and gunshot injuries to others by firing at them. The

remaining accused who were alleged to have been standing outside the Nohara and were alleged to have been armed with lathis and farcies and

had not been assigned any specific role of causing any injury to anyone, wore acquitted. The respondents Bhawani and Hari Singh preferred an

appeal against their conviction and sentence which has been allowed by the High Court by the judgment and order which is under challenge in the

present appeal.

3. Before we deal with the submissions made by learned counsel for the parties, it will be advantageous to briefly take note of the evidence which

has been adduced by the prosecution. PW1 Daya Ram has stated that a litigation regarding Nohara was going on with Kishanlal (absconding

accused) in the Court of SDM, Kishangarh, due to which the accused bore enmity with him. At about 5.30 p.m. on the date of the incident, he

was cutting fodder in the Nohara, when Bhawani and Kishanlal armed with guns, Hari Singh and Amilal armed with country-made pistols, Ramjilal

armed with pistol and 11 other accused armed with lathis and farcies came there. Kishanlal gave abuses and thereafter all the five accused armed

with fire arms started firing from their respective weapons. Deshraj, Leela, Daulat, Ratan, Makhan and Babulal who were sitting in the Baithak

came outside, after hearing the abuses and sound of gunfire. The accused also fired upon them due to which they received gunshot injuries. The

sound of gunfire also attracted Bholu, his wife Santosh and Hoshiar to the Nohara, but they also fell victim to the shots fired by the accused and fell

down after receiving injuries. The remaining 11 accused who were armed with lathis and farcies had surrounded the Nohara and did not allow

anyone to escape. Deshraj and Hoshiar died on the spot as a result of the injuries received by them. He has further stated that thereafter he went to

the Police Station Mundawar on the jeep of Babulal Vaidya, where he lodged a written report of the incident at 8.00 p.m. Similar statements have

been given by PW5 Bholu Ram (brother of Hoshiar, deceased), PW6 Leela Ram, PW10 Babulal, PW11 Dhanni, PW12 Lali, PW13 Sajana,

PW14 Sarwan, PW15 Patori, PW16 Santosh and PW17 Bharpai. Out of these 11 eye witnesses PW1, PW5, PW6, PW10 and PW16 had

received gunshot injuries and are, therefore, injured witnesses. PW26 Dr. Srichand Sharma, who was posted at Public Health center, Mundawar,

conducted post-mortem examination on the bodies of deceased Deshraj and Hoshiar Singh on 22.12.1985. Deshraj had received 22 gunshot

wounds on chest in 7"" diameter, 10 gunshot wounds on abdomen, epigastric and umbilical region besides number of gunshot wounds on left

forearm, right arm and face. The internal examination showed that sternum and third, fourth, fifth and sixth ribs of both sides were punctured and

plura was perforated. Hoshiar Singh had sustained 12 gunshot wounds on chest central part in 6"" diameter, two gunshot wounds on epigastric

region, two gunshot wounds on right and left forearms. Sternum and third, fourth and fifth ribs of both sides were fractured and plura was

perforated. In the opinion of the Doctor, the ante-mortem injuries sustained by both the deceased were sufficient in the ordinary course of nature to

cause death. PW21 Dr. P.N. Aggarwal, who was posted in General Hospital, Alwar on 22.12.1985, medically examined PW1 Daya Ram and

found gunshot injuries on his jaw, left side of neck, chest, shoulder and left arm. He also examined PW10 Babulal and found gunshot injuries on his

right hip, thigh and left hand, PW23 Dr. Gopal Maheshwari, who was posted as Medical Officer at Government Hospital, Kot Putli on

22.12.1985, medically examined PW5 Bholu Ram, PW6 Leela Ram, PW7 Makhan Ram, PW8 Daulat Ram, PW9 Ratan Lal and PW16 Santosh

on that day and found gunshot injuries on their person. Leela Ram had sustained pellet injuries on chest, abdomen, chin and below right eye. Bholu

Ram had sustained multiple pellet injuries on chest, abdomen, arms and thighs and Smt. Santosh had sustained pellet injuries on abdomen and right

auxilliary fold. PW22 Mahesh Chand Dube was posted as Station House Officer at P.S. Mundawar on 21.12.1985. In his deposition, he has

given details of the various steps taken by him during the course of investigation of the case,

4. PW2 Raja Ram, PW3 Babulal, PW4 Ram Singh alias Radheyshyam, PW7 Makhan, PW8 Daulat Ram and PW9 Ratan did not support the

case of the prosecution and were accordingly declared hostile.

5. Learned counsel for the appellant has submitted that the High Court has not properly appreciated the evidence adduced by the eye-witnesses

and has completely ignored their testimony which fully established the prosecution case. He has urged that out of 11 eye-witnesses who supported

the prosecution case in their statement in Court, 5 were injured witnesses who had all received serious gunshot injuries and as such there could not

even be slightest doubt regarding their presence on the site. The remaining 6 eye witnesses were also resident of the same place and their houses

were nearby and, therefore, they were the best witnesses of the incident. However, the High Court chose to place reliance upon the testimony of

some of the witnesses who had been won over and had turned hostile and on the basis of their statements has discarded the prosecution case.

Learned counsel has further submitted that the High Court has discarded the testimony of the eye-witnesses relying upon inadmissible evidence and

as such the judgment of acquittal recorded in favour of the respondents is wholly illegal and deserves to be set aside. Learned counsel for the

accused-respondents has, on the other hand, submitted that the FIR of the incident was actually not lodged at 8.00 p.m. on 21.12.1985 but was

lodged much later and the same has been ante-timed. He has further submitted that the eye-witnesses examined by the prosecution were all related

to the deceased and were, therefore, interested witnesses whose testimony could not be relied upon. He has also assailed the evidence adduced

by the prosecution regarding recovery of gun from the possession of Bhawani accused which actually belonged to one of the accused himself.

Lastly, he has urged that on the evidence available on record two views were possible and since the High Court had, on appraisal of evidence,

found the prosecution case to be doubtful, this Court should not interfere in an appeal against acquittal. In support of this submission, learned

counsel has placed reliance on Ashok Kumar v. State of Rajasthan AIR 1990 SC 2134, Arun Kumar & Anr. v. State of U.P. 1989 Supp. (2)

SCC 322 and Bharwad Jakshibhai Nagjibhai & Ors. v. State of Gujarat 1995 (5) SCC 602.

6. We have considered the submissions made by the learned counsel for the parties and have gone through the entire evidence which is available

on record. The judgment of the High Court, with all respects, is most cryptic and highly unsatisfactory. In a murder case based upon direct eye-

witness account it is absolutely necessary to thoroughly examine the testimony of the eye-witnesses in order to ascertain whether they had really

seen the occurrence and whether the statement given by them appears to be natural and truthful and finds corroboration from the medical evidence

on record. In the present case 11 eye-witnesses have fully supported the prosecution case. Out of these 11 witnesses 5 were injured witnesses

who had received serious gunshot injuries. Their presence on the spot, therefore, cannot be doubted in any manner. These witnesses have

consistently stated that 5 persons, namely, Bhawani, Hari Singh, Kishanlal, Ramjilal and Amilal came inside Nohara and repeatedly fired from the

weapons which they were carrying. According to the eye-witness account Deshraj and Hoshiar received gunshot injuries and died on the spot. The

injuries sustained by these persons have been proved by the statement of PW26 Dr. Srichand Sharma, who conducted post-mortem examination

on their bodies. Amongst the non-injured witnesses PW11 Dhanni is wife and PW12 Lali is daughter of Hoahiar deceased and there is no reason

to doubt their presence on the spot. Similarly, PW1.3 Sajana is daughter and PW 14 Sarwan is wife of Badlu and their presence on the place of

occurrence cannot be doubted as their house is situate at the corner of Nohara. Their testimony finds complete corroboration from the medical

evidence. In fact, the testimony of five injured witnesses is more than sufficient to establish the charge against the accused-respondents. However,

the High Court did not at all advert to this important piece of evidence and has chosen to rely upon some trifling and insignificant circumstances to

discard the prosecution case.

7. Chapter XXIX of the Code of Criminal Procedure deals with appeals and Section 385 deals with procedure for hearing appeals not dismissed

summarily and Section 386 deals with power of the appellate Court. The content and scope of these provisions was recently explained by a Bench

to which two of us were parties in Amar Singh v. Balwinder Singh & Ors. JT 2003 (2) SC 1 and relevant part of para 7 reads as under :

7. ..... Section 385 Cr.P.C. lays down the procedure for hearing appeal not dismissed summarily and Sub-section (2) thereof casts an obligation

to send for the records of the case and to hear the parties. Section 386 Cr.P.C. lays down that after perusing such record and hearing the

appellant or his pleader and the Public Prosecutor, the Appellate Court may, in an appeal from conviction, reverse the finding and sentence and

acquit or discharge the accused or order him to be re-tried by a Court of competent jurisdiction. It is, therefore, mandatory for the Appellate

Court to peruse the record which will necessarily mean the statement of the witnesses. In a case based upon direct eye-witness account the

testimony of the eye-witnesses is of paramount importance and if the Appellate Court reverses the finding recorded by the Trial Court and acquits

the accused without considering or examining the testimony of the eyewitnesses, it will be a clear infraction of Section 386 Cr.P.C. In Biswanath

Ghosh v. State of West Bengal & Ors. AIR 1987 SC 1155 it was held that where the High Court acquitted the accused in appeal against

conviction without waiting for arrival of records from the Sessions Court and without perusing evidence adduced by prosecution, there was a

flagrant miscarriage of justice and the order of acquittal was liable to be set aside. It was further held that the fact that the Public Prosecutor

conceded that there was no evidence, was not enough and the High Court had to satisfy itself upon perusal of the records that there was no

reliable and credible evidence to warrant the conviction of the accused. In State of UP v. Sahai & Ors. AIR 1981 SC 1442 it was observed that

where the High Court has not cared to examine the details of the intrinsic merits of the evidence of the eye-witnesses and has rejected their

evidence on the general grounds, the order of acquittal passed by the High Court resulted in a gross and substantial miscarriage of justice so as to

invoke extra-ordinary jurisdiction of Supreme Court under Article 136 of the Constitution."""

Since in the present case, the High Court has reversed the finding recorded by the trial Court without considering and taking into account the

testimony of eye-witnesses, there is a clear infraction of Section 386 Cr.P.C. and the order of acquittal passed by it is likely to be set aside on

account of this serious error.

8. Relying upon the testimony of PW4 Ram Singh, PW8 Daulat Ram and PW9 Ratan, the High Court has held that there was cross firing. These

witnesses had not supported the prosecution case and had been declared hostile. PW4 has stated that there was exchange of brickbats in which he

also received some injury and accordingly he took shelter inside a "chappar" and thereafter he heard two or three loud sounds like that of

crackers. He further stated that he did not see any person firing from gun or pistol. The High Court has misread his testimony while observing that

the witness has stated that there was cross firing. PW8 Daulat Ram is resident of village Kalyanpur, Tehsil Behrod. He says that he had gone to

village Bhajna was to purchase a bullock. Similarly, PW9 Ram Ratan is resident of village Barod, Tehsil Behrod. Both of them do not belong to

village Bhajna was and have clearly stated that they do not know or identify the accused-respondents Bhawani and Hari Singh and also the three

absconding accused. These witnesses having stated that they do not know or identify the five accused who are alleged to have been armed with

fire arms and are alleged to have caused injuries to the injured and deceased, their testimony to the effect that there was a cross firing is absolutely

meaningless. Such a statement that there was a cross firing can only be given by a person who knows and identifies both the parties namely the

accused and also the complainant party (the injured and the deceased). The High Court has placed great reliance upon the circumstance of cross

firing for doubting the prosecution case. The other reason given for acquitting the accused has, therefore, no basis at all.

9. The fact that the witness was declared hostile by the Court at the request of the prosecuting counsel and he was allowed to cross-examine the

witness, no doubt furnishes no justification for rejecting enbloc the evidence of the witness. But the Court has at least to be aware that prima facie,

a witness who makes different statements at different times has no regard for truth. His evidence has to be read and considered as a whole with a

view to find out whether any weight should be attached to the same. The Court should be slow to act on the testimony of such a witness and,

normally, it should look for corroboration to his evidence. The High Court has accepted the testimony of the hostile witnesses as gospel truth for

throwing overboard the prosecution case which had been fully established by the testimony of several eye witnesses, which was of unimpeachable

character. The approach of the High Court in dealing with the case, to say the least, is wholly fallacious.

10. The High Court has extensively relied upon the site plan prepared by the investigating officer for discarding the prosecution case and for this

purpose has referred to the place from where the accused are alleged to have entered the Nohara, the place from where they are alleged to have

fired upon the deceased and also has drawn an inference that the place wherefrom the accused are alleged to have fired upon the deceased, the

shot could not have hit the houses on the eastern side of the Nohara. Many things mentioned in the site plan have been noted by the investigating

officer on the basis of the statements given by the witnesses. Obviously, the place from where the accused entered the Nohara and the place from

where they resorted to firing is based upon the statement of the witnesses. These are clearly hit by Section 162 Cr.P.C. What the investigating

officer personally saw and noted alone would be admissible. This legal position was explained in Tori Singh & Anr. v. State of U.P. AIR 1962 SC

399 in following words :

A rough sketch map prepared by the sub-inspector oh the basis of statements made to him by witnesses during the course of investigation and

showing the place where the deceased was hit and also the places where the witnesses were at the time of the incident would not be admissible in

evidence in view of the provisions of Section 162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the Sub-

Inspector that the eye-witnesses told him that the deceased was at such and such place at the time when he was hit. The sketch-map would be

admissible so far as it indicates all that the Sub-Inspector saw himself at the spot; but any mark put on the sketch-map based on the statements

made by the witnesses to the Sub-Inspector would be inadmissible in view of the clear provisions of Section 162 of the Code of Criminal

Procedure as it will be no more than a statement made to the police during investigation. Therefore, such marks on the map cannot be used to

found any argument as to the improbability of the deceased being hit on that part of the body where he was actually injured, if he was standing at

the spot marked on the sketch-map.

Therefore, the findings recorded by the High Court on the basis of the site plan prepared by the investigating officer whereby it discarded the

prosecution case is clearly illegal being based upon inadmissible evidence and has to be set aside.

11. The High Court has also relied upon some very trifling and insignificant matters like recovery of some live and empty cartridges which the

counsel for the accused before it submitted to be that of a 303 bore rivolver or gun, Relying upon this recovery, it has been held that as according

to the eye-witnesses none of the accused had a 303 rivolver or gun, the prosecution case was rendered doubtful. The eye-witnesses have

consistently deposed that Hari Singh and Amilal, accused wore armed with country-made pistols and in such cases it is difficult to visualize what

was the nature of the cartridges or bullets used. Therefore, even assuming that some empty cartridges of 303 bare were recovered, it could not

affect the prosecution case in any manner.

12. Having given our careful consideration to the material on record, we are clearly of the opinion that the prosecution had succeeded in

establishing its case against the accused-respondents beyond any shadow of doubt and the learned Additional Sessions Judge had rightly convicted

and sentenced them. The judgment of the High Court, in our opinion, is wholly illegal and perverse. It is not a case where two views are possible.

In fact, on the evidence available on record, the only conclusion which can be drawn is that the prosecution had succeeded in establishing its case

beyond any shadow of doubt and accused-respondents are clearly guilty of the charges leveled against them.

13. In the result, the appeal is allowed and the judgment and order dated 31.1.1991 of the High Court is set aside and that of the Additional

Sessions Judge is restored. The accused-respondents shall undergo the sentence imposed upon them. The CJM concerned shall take all steps

available in law to take the accused-respondents in custody.