

STATE OF UTTAR PRADESH

v.

RAM KISHAN & OTHERS

February 13, 1976

[P. N. BHAGWATI AND P. K. GOSWAMI, JJ.]

Appeal by State against acquittal—Interference with the decision of the High Court by the Supreme Court under Art. 136 of the Constitution—If the High Court reads the prosecution evidence by introducing an extraneous gloss for the purpose of its conclusion, resulting in failure of justice, this Court should interfere.

“Material prejudice” to the accused—Alteration of the conviction to section 326/34 in appeal when the original charge and conviction were under s. 302/149 is not a “material prejudice”—Criminal Procedure Code (Act V of 1898—Sections 222, 223 and 225)

The accused and the deceased are close relatives, as per the following pedigree :—

Ramcharan (1)				
:				
:				
Ram Khelawan (2)	Balram (3)		Khuddi (4)	
:	:	:	:	:
Vishwanath	Shankar	Kanker	Channu	Shivnath
(PW)SI	S2	S3	S4	(PW2)
:	:	:	(Deceased)	Jagannath
:				
Sheo Murat	Ram Kishan	Shobha	Moti Lal	Bhagwantia
(Accl) SI	(Accl) S2	(Accl) S3	(Accl) S4	(Sister) DI
:				
Shyam Lal				
(Accl)				

Vishwanath, Kanker, deceased Channu, Jagannath, accused Ram Kishan along with his mother and sister Bhagwantia were living in the ancestral house at village Bhiwanipur, while the rest lived in a nearby separate house. On March 18, 1969, Vishwanath tried to pacify the quarrel between his brother Kanker's wife and Bhagwantia his cousin-sister and when she refused to heed to his words, he gave one or two slaps to Bhagwantia. The real brothers of Bhagwantia viz., Ram Kishan, Shobha, Moti Lal and Shyamlal s/o Ram Krishan—all accused, went the next day to Vishwanath's house and demanded an explanation for beating Bhagwantia and wanted a settlement. Since Vishwanath said there was nothing in fact to be settled, Ram Kishan instigated the rest to beat Vishwanath. Shobha caught hold of Vishwanath while Sheo Murat dealt knife blows which resulted in two grievous incised injuries. Channu who came to the rescue was caught hold of by Shyam Lal and Moti and Sheo Murat dealt knife blows causing five fatal incised wounds and two abrasions to which he succumbed. On the above version of the incident by the injured Vishwanath, PW 1 in the complaint and in evidence at the trial, which was unerringly corroborated by PWs 9, 10, 13 and unshaken in the cross-examination, the Sessions Court convicted Sheo Murat under s. 302/149 I.P.C. for causing the death of Channu and under s. 307/149 I.P.C. for attempting to murder Vishwanath, though the charges were under s. 302, 307 and 148, I.P.C., and sentenced him to death under s. 302, I.P.C., seven years' rigorous imprisonment under s. 307 I.P.C. and to two years' rigorous imprisonment under s. 148, I.P.C. Accused Ram Kishan, Shobha, Moti Lal and Shyamlal, the respondents in this Court were convicted under s. 302/149 I.P.C., under s. 307 read with s. 149 I.P.C. and s. 147 I.P.C. They were sentenced to one year's rigorous imprisonment under s. 147 I.P.C. to seven years' rigorous imprisonment under s. 307/149 I.P.C. and to imprisonment for life under s. 307/149. The accused appealed to the High Court and there was a reference under s. 374 Cr. P.C. for the confirmation of death sentence. By a common judgment, the High Court (i) set aside the conviction and sentences

- A of all the present respondents and also that of Sheo Murat under s. 148, I.P.C.; (ii) maintained the convictions under s. 307 I.P.C. and also under s. 302 I.P.C. but altered the death sentence to one of life imprisonment and rejected the reference.

This Court rejected the State's special leave petition against the alteration of the death sentence but granted special leave against the acquittal of the respondents alone and issued non-bailable warrants.

- B Allowing the appeal, and convicting the accused and sentencing them to different terms with the benefit of set off under s. 428, Cr.P.C. (Act 2 of 1973), the Court,

HELD : (1) It is well-established that in an appeal against acquittal, this Court is slow to interfere under Art. 136 of the Constitution with the decision of the High Court. The possibility that it may just be reasonably feasible for the Court to take a different view of the evidence from that of the High Court is not the test in an appeal against acquittal. [383-D-E]

- C (2) In the instant case, the injuries on the two victims are "*res ipso loquitur*" and tell-tale. The prosecution case that Vishwanath was caught by Shobha and Channu was caught hold of by Motilal and Shyamlal is corroborated by the medical evidence. None of the stab wounds are on any part of the hands or arms which would have necessarily been caused, if the victims were not caught hold of by a person or persons, while they were attacked with a knife. It would be unnatural to expect that the victims would not have exercised their natural instinct of self preservation by trying to stave off the stab injuries by raising their hands. And in that process if they were not caught hold of by some person or persons, there would have been one or two injuries on the hands or arms. The High Court completely ignored this most relevant and important aspect in the prosecution, when it observed :

"It is not at all clear from the prosecution evidence whether Shobha kept on holding Vishwanath till the very end *i.e.* till both the knife injuries had been caused to him, or whether he let go his hold as soon as Sheo Murat started the attack".

- E "There is nothing in the prosecution evidence to indicate what order those injuries were caused to Channu and whether or not the injuries on the back were caused first".

This erroneous view taken by the High Court of the prosecution evidence adduced in this case and the introduction by the High Court of an extraneous gloss for the purpose of its conclusion *viz.*,

- F "After reaching the house of Vishwanath they (the accused persons) entered into a conversation which became heated and ultimately ended in exchange of abuses",

resulted in failure of justice. [383G-H, 384C-E]

(3) No prejudice is caused in the instant case to the accused by alteration of the conviction to sections 326/34 although they had been originally charged under s. 302/149 and ss. 307/149, I.P.C. on the particular facts of the prosecution case which clearly pointed to participation by the respective accused with the two attacks and which they had to meet in the trial. [385F-G]

- G CRIMINAL APPELLATE JURISDICTION : CRIMINAL APPEAL No. 253 of 1971.

Appeal by Special leave from the Judgment and Order dated 11.2.1971 of the Allahabad High Court in Criminal Appeal No. 1285/70.

- H O. P. Rana, for the appellant
Shiv Pujan Singh, for the respondent

The Judgment of the Court was delivered by

GOSWAMI, J.—This appeal by special leave at the instance of the State of Uttar Pradesh is against the judgment of acquittal of the High Court of Allahabad.

Balram, Ram Khelawan and Rhuddi are three sons of one Ram Charan. The injured Vishwanath (PWI), Shankar, Kankar and deceased Chhannu are sons of Balram. Accused Sheo Murat, Ram Kishan, Shobha and Moti Lal are sons of Ram Khelawan. Accused Shyam Lal is the son of accused Ram Kishan. Shiv Nath (PW 2) and Jagan Nath are sons of Bhuddi. Thus all of them have branched off from Ram Charan and all the members have got share in their ancestral house at village Bhiwanipur. In this ancestral house Vishwanath, Kankar, Chhannu, Jagan Nath and accused Ram Kishan along with his mother and married younger sister Bhagwantia resided. All others along with the rest of the four accused lived in a nearby separate house.

On March 18, 1969, certain quarrel ensued between Bhagwantia and Kankar's wife Patia. Vishwanath tried to pacify both the quarrelling women. Since Bhagwantia did not heed to Vishwanath's words, the latter gave her one or two slaps. Ram Kishan and his brothers were not in the village on that day but learning about this incident on the following day accused Sheo Murat, Ram Kishan, Shobha, Moti Lal and Shyam Lal went to Vishwanath's place at about 7.00 or 8.00 P.M. What followed may be described in the words of the injured Vishwanath :

"On the next day at 7 or 8 P.M. I was sitting at the door of my osara. My younger brothers, Kankar and Chhannu, were sitting at a short distance from me at the well. Sheonath, my cousin, was also sitting near Kankar and Chhannu. A burning lantern was hanging from a bamboo pole outside the osara; and there was sufficient light from it. Ram Kishan, Shobha, Sheo Murat, Shyam Lal and Moti, accused present in the court, came there, Ram Kishan asked from me as to why I had slapped Bhagwantia and that I should come out and settle up. I stood up and said, "Brother, what will you settle up". At this Ram Kishan instigated his companions saying, "Beat the salas". At once Shobha caught hold of my hand and Sheo Murat dealt knife-blows to me. Chhannu, my younger brother, came to save me, whereupon Shyam Lal and Moti caught hold of him and Sheo Murat started giving knife-blows to him. On hearing their instigation, Mohan, Phool Chand, Budhi and others came over there and began to forbid them. Chhannu and I fell down on sustaining injuries. Then all the five accused persons ran away with the knife."

What has been stated above by Vishwanath has been repeated by Shiv Nath (PW 2), Hansla Prasad (PW 9), Phool Chand (PW 10) and Sohan (PW 13). The story given by these witnesses remains absolutely unshaken in the scanty cross-examination by the defence. Indeed there was little or no cross-examination with regard to the incident itself.

A Deceased Chhannu had the following external injuries on his person as stated by Dr. U. P. Singh who held the autopsy :

- (1) Incised stab wound $\frac{1}{2} \times 1\frac{1}{3}$ ", on right side chest, 1" medical to right nipple going into the chest cavity.
- (2) Incised stab wound $\frac{1}{2}'' \times \frac{1}{4}'' \times 1''$ to the right of left nipple and 1" below it, going into the chest cavity.
- B (3) Incised stab wound $\frac{1}{2}'' \times \frac{1}{4}''$ abdominal cavity deep, on lower part of right side abdomen.
- (4) Incised stab wound $\frac{1}{2}'' \times \frac{1}{4}''$ on lower part of abdomen, 3" above the joint of hip-bones.
- (5) Incised stab wound $\frac{1}{2}'' \times \frac{1}{4}'' \times 1\frac{1}{2}''$ deep, on left hip.
- C (6) Incised stab wound $\frac{1}{2}'' \times \frac{1}{4}''$ chest cavity deep, on left side back, 6" below scapula.
- (7) Abrasion $\frac{1}{2}'' \times \frac{1}{2}''$ on lateral aspect of right elbow.
- (8) Abrasion $\frac{1}{2}'' \times \frac{1}{2}''$ on lateral aspect of right hand.

D Internal examination revealed that the cartilage of fifth rib had been cut under injury No. (3). There were punctured wounds in the chest cavity in relation to injury Nos. (1), (2) and (6). Right vertical of heart had a punctured wound $\frac{1}{4}'' \times \frac{1}{4}''$ and the pericardial cavity contained blood. The upper lobe of left lung had a punctured wound $\frac{1}{2}'' \times \frac{1}{4}''$ in relation to injury No. 2. In the opinion of the Doctor death was due to shock and haemorrhage resulting from injuries to heart and lungs.

E Another Doctor Siddiqui (PW 5) found the following injuries on the person of Vishwanath :—

- (1) Incised wound $\frac{1}{4}'' \times \frac{1}{8}'' \times 1\frac{1}{2}''$ deep, on front side of lower part of neck, directed downwards, backwards and leftwards. The wound was in the middle of the neck and 1" above the bone. On coughing air passed through the wound.
- F (2) Incised wound $\frac{1}{2}'' \times \frac{1}{8}'' \times 3''$ or more than this, abdominal cavity deep, $1\frac{1}{2}''$ above and to the left of umbilicus. Direction of wound was backwards, slightly upwards and towards centre of abdomen.

The injuries were fresh and described by the Doctor as dangerous.

G All the five accused were charged under section 302/149 IPC for causing the death of Chhannu and also under section 307/149 IPC for attempting to murder Vishwanath. While Sheo Murat was charged under section 149 IPC the other four accused were charged also under section 147 IPC. The Sessions Judge convicted accused Sheo Murat under section 148, 307 and 302 IPC. He was sentenced to death under section 302 IPC, to seven years rigorous imprisonment under section 307 IPC, and to two years rigorous imprisonment under section 148 IPC. Accused Ram Kishan, Shobha, Moti Lal and Shyam Lal (the present respondents) were convicted under section 302/149 IPC, section 307 read with section 149 and section

H

147 IPC. These four accused were sentenced to one year's rigorous imprisonment under section 147 IPC, to seven years' rigorous imprisonment under section 307/149 IPC and to imprisonment for life under section 302/149 IPC. The sentences of all the accused were to run concurrently. The accused appealed to the High Court. There was also a reference under section 374, Criminal Procedure Code, to the High Court for confirmation of the death sentence on Sheo Murat. Both the matters were heard together by the High Court and a common judgment was delivered on February 11, 1971. The High Court maintained conviction and sentence of the accused Sheo Murat under section 307 IPC and also maintained his conviction under section 302 IPC but reduced the sentence to imprisonment for life. The conviction and sentence of Sheo Murat under section 148 IPC were, however, set aside. The conviction and sentence of the four other accused (the present respondents) were set aside.

The State prayed for special leave against the rejection of the reference by reducing the death sentence to imprisonment for life but this Court rejected the same. The State's special leave application with regard to the respondents' acquittal was, however, admitted on October 13, 1971 and non-bailable warrants were issued against them. We are, therefore, not concerned in this appeal with the conviction of accused Sheo Murat, who was the assailant of the deceased as well as of Vishwanath.

We have to consider whether the High Court has committed a grave and palpable error in acquitting the respondents resulting in miscarriage of justice.

It is well-settled that in an appeal against acquittal this Court is slow to interfere with the decision of the High Court, even though it has interfered with the conviction by the trial court, where the same is reached after a proper appreciation of the entire evidence. The possibility that it may just be reasonably feasible for this Court to take a different view of the evidence from that of the High Court is not the test in an appeal against acquittal. Even so, we are unable in this case to sustain the order of the High Court for the reasons which will presently follow.

We have already quoted the evidence of Vishwanath which is unerringly corroborated by all the other eye witnesses. Both the trial court as well as the High Court believed the evidence. Indeed the High Court has observed and, in our opinion, rightly that "there is no infirmity in the prosecution case". We then find that the High Court has read the evidence in a rather unusual way which is at once obvious when we peruse the judgment. We are not told wherefrom the High Court could describe the evidence as follows :—

"After reaching the house of Vishwanath they (the accused persons) entered into a conversation which became heated and ultimately ended in exchange of abuses".

The High Court also observed that—

"it is not at all clear from the prosecution evidence whether Shobha kept on holding Vishwanath till the very end i.e.

A till both the knife injuries had been caused to him, or whether he let go his hold as soon as Sheo Murat started the attack".

The High Court further observed that—

B "there is nothing in the prosecution evidence to indicate in what order those injuries were caused to Chhannu, and whether or not the injuries on the back were caused first".
The High Court further gave unusual importance to the statement of PW 13 when he deposed in cross-examination to the following effects:—

C "I cannot remember whether the two persons who had caught hold of Chhannu had held him from the front or from the back or from the side. Further, I do not remember whether they were holding him each with both his arms or whether each of them held him only with one arm. I do not recollect whether Sheo Murat had caused injuries to Chhannu from the front side or from the back side".

We are unable to appreciate how the evidence of PW 13, who could not remember certain details, could help the court in coming to any conclusion for the purpose of displacing the clear and unambiguous prosecution evidence.

D The injuries on the two victims are *res, ipso loquiter* and tell-tale. Accused Shobha caught hold of Vishwanath's hands and Sheo Murat gave him two stab blows, one on the neck and the other on the abdomen. When deceased Chhannu advanced in order to save Vishwanath he was caught by accused Shyam Lal and Moti Lal and Sheo Murat gave as many as six stab injuries in quick succession. None of these stab wounds are on any part of the hands or arms which would have necessarily been caused if the victims were not caught hold of by a person or persons while they were attacked with a knife. It would be unnatural to expect that the victims would not have exercised their natural instinct of self preservation by trying to stave off the stab injuries by raising their hands. And in that process if they were not caught hold of by some person or persons there would have been one or two injuries on the hands or arms. This would clearly go to show that the story that Vishwanath was caught by Shobha and Chhannu was caught by Moti Lal and Shyam Lal, as deposed to by the PWs, stands corroborated by the medical evidence. The High Court completely ignored this most relevant and important aspect in the prosecution case but felt satisfied to acquit the accused on the sole ground that there was no evidence to show whether Shobha caught Vishwanath all the time when the two blows were given and also whether Moti Lal and Shyam Lal were catching hold of deceased Chhannu during the entire period of the assault. The High Court particularly felt in that direction because PW 13 being an independent witness could not recollect certain things to which we have already referred to above. The injuries would clearly show that the victims were caught hold of by a person or persons when these were inflicted upon them.

H We are clearly of opinion that this is a completely erroneous view of the prosecution evidence adduced in this case resulting in failure of justice. We are further satisfied that if the High Court had not read

the evidence by introducing an extraneous gloss for the purpose of its conclusion it could not have acquitted the accused.

It is also evidence that the accused came in a body to challenge Vishwanath for the previous day's incident. Although the four respondents were unarmed, Sheo Murat had a knife with him. There is nothing to show from the evidence that Vishwanath gave any provocation to the accused persons. He only replied to the challenge by saying "Brother, what will you settle up"? At this Ram Kishan instigated the other accused persons saying "beat the salas". At once accused Shobha caught hold of Vishwanath's hands and Sheo Murat stabbed him twice with his knife. Assuming the respondents had no earlier knowledge about Sheo Murat's carrying a knife, from this moment they came to know that Sheo Murat had a knife with which he had already stabbed Vishwanath. What did they then do when deceased Chhannu came to the aid of Vishwanath to save him from further assault? Now Moti Lal and Shyam Lal caught hold of Chhannu and Sheo Murat inflicted several stab blows in quick succession. It is, therefore, clear that Moti Lal and Shyam Lal shared the common intention with Sheo Murat in inflicting stab injuries to Chhannu by participating in the assault.

Sheo Murat has been convicted under section 302 IPC. We may only give these two accused Moti Lal and Shyam Lal benefit of doubt with regard to participation with Sheo Murat in the common intention to cause death of Chhannu. It is, however, absolutely impossible to relieve them of any liability whatsoever in connection with the stab injuries which were facilitated by their catching hold of Chhannu when Sheo Murat was inflicting the stab wounds. There is no escape from the conclusion on this evidence that Moti Lal and Shyam Lal shared at least the common intention with Sheo Murat to cause grievous hurt under section 326 IPC. A clear case has been established against both the accused persons under section 326/34 IPC. They are, therefore, convicted under section 326/34 IPC and sentenced to four years' rigorous imprisonment.

With regard to accused Ram Kishan he merely instigated by saying "beat the salas". He is the person who started the affair by challenging Vishwanath and also instigating the other accused persons to beat. From this alone it is not possible to attribute to him any common intention to cause more than simple assault. He is, therefore, found guilty only under section 323/109 IPC. He is, therefore, convicted under section 323/109 IPC and sentenced to rigorous imprisonment for one year.

Accused Shobha, who caught hold of Vishwanath to facilitate the two stab injuries on him by Sheo Murat, is also guilty under section 326/34 IPC. We are prepared to give him the benefit of doubt only with regard to section 307 IPC but the evidence clearly establishes the case under section 326/34 IPC. He is accordingly convicted under section 326/34 IPC and sentenced to four years' rigorous imprisonment.

A We should observe that no prejudice is caused to the accused by alteration of the conviction to section 326/34 although they had been originally charged under section 302/149 and section 307/149 IPC on the particular facts of the prosecution case which clearly pointed to participation by the respective accused in the two attacks and which they had to meet in the trial.

B Since the respondents are detained in jail in pursuance of the non-bailable warrants issued by this Court on October 13, 1971, at the time of granting special leave, they will be entitled to the benefit of section 438, Criminal Procedure Codes, and that period shall be set off against the sentences which we have passed in this appeal.

C In the result the judgment of the High Court is set aside, the appeal is allowed and the four accused stand convicted and sentenced as aforesaid subject to the observations mentioned above.

S.R.

Appeal allowed.