A

STATE OF WEST BENGAL

v.

SHEW MANGAL SINGH & ORS.

August 25, 1981

B

[Y.V. CHANDRACHUD, C.J AND V. BALAKRISHNA ERADI, J.]

Constitution of India, 1950, Art. 136—Special Leave to appeal—Criminal Trial—Conviction by trial court—Acquittal by High Court—Interference by Supreme Court—When arises.

C

Indian Penal Code 1860 (Act 45 of 1860) S. 76—Scope of—Command of superior officer to open fire—Subordinate Officer in execution of command causes death—Subordinate Officer's belief that command was lawful—Enquiry into—When arises.

Criminal Trial—Duty of Courts—To ensure that innocents are not convicted and guilty are not acquitted.

D

The respondents were police officers. The prosecution alleged that when the deceased and his brother were sitting outside the house three police vehicles carrying the respondents and other police officers suddenly stopped in front of their house and that a police officer rushed towards them and when the deceased disclosed his identity the officer fired at point blank range. The shot having missed him, he rushed in the house. Pursuing him respondents 2 and 4 dragged him out of the house, whereupon respondent 4 fired a shot at him. In the meanwhile, the other brother, who was trying to get into the house was caught hold of by some of the respondents and respondent 1 fired at him.

E

The two brothers were thereafter dumped into a police jeep, and the convoy of police officers departed from the scene of the occurrence. Both the brothers were taken to the hospital where the deceased was declared dead on the spot and his brother died, before any medical assistance could be given to him.

F

The defence of the respondents was as follows: that while they were on patrol duty led by one of the officers, they were attacked by some persons, as a result of which respondent 1 was injured and was removed to the hospital. When fire was opened under orders of the officer the two deceased received injuries, and that respondents 1 and 2 were falsely implicated after an attempt to pressurise them into deposing against the officer had failed.

G

Prosecution was initiated on the basis of a private complaint filed by the third brother of the deceased implicating the respondents and two officers. No action was taken against the two officers for want of section 197 of the Code of Criminal Procedure.

H

While the trial judge convicted and sentenced the respondents, the High Court acquitted them. Before the High Court it was contended on behalf of the

State that this was a case in which the protectors of law and order had become predators and in the circumstances the Court should not, insist upon the same standard of proof as in other criminal cases, and as the witnesses were desposing nearly nine years after the date of the incident there was bound to be discrepancies in their evidence. Taking note of the unsettled political conditions prevailing in Calcutta during the time, and on an analysis of the prosecution evidence, the High Court found it impossible to believe that the incident had happened in the manner alleged by the prosecution. Believing the defence version that there was mob violence which resulted in injuries to Respondent 1 and that in the circumstances the respondents were bound to obey the orders given by their officer, the High Court acquitted them.

Dismissing the Special Leave Petition of the State,

HELD : 1. If the order to open fire was justified as found by the High Court and is therefore lawful, no further question can arise whether the respondents, who acted in obedience to that order, believed or did not believe it to be lawful. [365 F-G]

In the instant case since the situation prevailing at the scene of the offence was such as to justify the order given by the officer to open fire, the respondents could plead in defence that they acted in obedience to that order and therefore they could not be held guilty of the offence of which they were charged. [366 C]

2. A miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent and that if unmerited acquittal become general, they tend to lead to a cynical disregard of the law. Courts must take equal care to ensure that the innocent are not convicted and the guilty are not acquitted. [367 A-B]

In the instant case, what the High Court has done is to acquit the innocent. [367 B]

S.S. Bobade v. *State of Maharastra* [1974] 1 S.C.R. 489 referred to.

3. It is a self-rigteous assumption to argue that the respondents are "undoubtedly guilty of murder" or that they have been acquitted by the High Court "light-heartedly". Respondents are undoubtedly *not* guilty of murder. The High Court's judgment reflects its serious concern for justice. Judgments of acquittal are not to be condemned as "light-hearted" for the reason that the Government considers that it has a stake in the conviction of the accused. [367 C-D]

In the instant case the particular night on which the incident took place was cloudy and it was drizzling. It is very difficult to take the witnesses at their word when their evidence suffers from various contradictions. The witnesses were deposing to the incident nearly nine years later. Their evidence is insufficient to establish the complicity of the respondents in causing the death of the deceased. The surviving brother lodged the complaint more than a month after the incident. The name of PW. 2 an important witness who was in the company of P.W. 1 from the beginning of the incident was not mentioned in the complaint. [366 E-H]

A CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Criminal) No. 3459 of 1980.

From the judgment and order dated the 1st August, 1980 of the High Court of Calcutta in Criminal Appeal No. 18 of 1980.

B *A. P. Chatterjee, A. K. Ganguly* and *B. K. Chatterjee* for the Petitioner.

A. K. Sen, D. N. Mukherjee and *N. R. Choudhury* for Respondent Nos. 1-4

C The Judgment of the Court was delivered by

CHANDRACHUD, C. .J : This Special Leave Petition is filed by the State of West Bengal against the judgn.ent of acquittal dated August 1, 1980 passed by the High Court of Calcutta in Criminal Appeal No. 18 of 1980.

D

The respondents, who are all Police Officers, were tried by the learned Judge, City Sessions Court, Calcutta, under section 302 read with section 34 of the Penal Code, on the charge that at about 10.00 p.m. on November 11, 1970 they, along with Bibhuti Chakraborty, the then Deputy Commissioner of Police (North Division), P. R. E Dey, the then Assistant Commissioner of Police (N. S.) and some others, caused the death of Ranjit Chakraborty and Samir Chakraborty by causing them gunshot injuries.

The case of the prosecution is that the deceased Ranjit and his F brother Samir were sitting outside their house when three police vehicles carrying the respondents and other Police Officers, numbering about 15 or 20 in all, suddenly stopped in front of the house. The Police Officers, led by Bibhuti Chakraborty, rushed towards them and their elder brother Benoy, with revolvers in their hands. Ranjit disclosed that he was a constable of the Calcutta Police and Samir G said that he was an N. V. F. cadet. Bibhuti Chakraborty then fired a shot from his revolver at Ranjit from a point-blank range. Respondent 2, Chitta Ranjan Ganguly, and respondent 4, Bimal Thakur, pursued Ranjit who had in the meanwhile rushed into his house. They dragged him out of the house, whereupon respondent 4 fired a H shot at him. The other Police Officers, including some of the respondents, also fired at Ranjit. In the meantime, the other brother Samir, who was trying to get into the house, was caught hold of by

some of the respondents and respondent 1, Shew Mangal Singh, fired a shot at him. Samir and Ranjit were thereafter dumped in to a Police jeep and the convoy of the Police Officers went to a place near Rajarghat on the bank of the river Hooghly. Samir was crying in agony. Some of the Police Officers who were sitting in an Ambassador car ordered that Samir's voice should be silenced. Thereupon respondent 3 Anil Maitra: who was sitting in a jeep, fired a shot at him. Ranjit and Samir were then taken to R. G. Kar Hospital, where Ranjit was declared dead. Samir died within a few minutes thereafter, before any medical assistance could be given to him. Their brother Benoy was taken into custody by the Police Officers and was produced before a Magistrate on the following day, when he was released on bail.

The defence of the respondents is that they were on patrol duty led by Bibhuti Chakraborty, the Deputy Commissioner of Police. When the police party entered Shyampukur Street, they were attacked by some persons, as a result of which respondent 1 Shew Mangal Singh was injured. He was immediately removed by respondent 2 and P. R. Dey, the Assistant Commissioner of Police, to the R. G. Kar Hospital. Thereafter the Deputy Commissioner of Police gave firing orders, as a result of which Ranjit and Samir received injuries. The contention of respondents 1 and 2 is that they were implicated falsely in the case after an attempt to pressurise them into deposing against the Deputy Commissioner had failed.

The prosecution was initiated on the basis of a private complaint filed on December 22, 1970 by Benoy Chakraborty (P. W. 1). In addition to the four respondents, Deputy Commissioner Bibhuti Chakraborty and Assistant Commissioner P. R. Dey were also included in the array of the accused. The learned Additional Chief Metropolitan Magistrate, Calcutta, issued process against the respondent but refused to do so against the two other officers on the ground of want of sanction for their prosecution under section 197 of the Code of Criminal Procedure.

The complainant applied for sanction under section 197 Cr. P. C., for the prosecution of the two officers but his application was rejected. In July 1977, after the change of Government, the complainant filed another application for sanction, which was granted on August 4, 1977. But the officers filed a petition in the High Court under Article 226 of the Constitution challenging the order of sanction. A learned single Judge dismissed that petition but in

A appeal, a Divison Bench of the High Court set aside the order sanctioning prosecution on the ground of *mala fides* on the part of the State Government and on the ground of violation of the rules of natural justice. There the matter rested in so far as those two officers are concerned.

B The learned trial Judge convicted the respondents under section 302 read with section 34 of the Penal Code and sentenced them to life imprisonment.

In an appeal by the respondents, the High Court has acquitted them, against which the State of West Bengal has filed this Special C Leave Petition under Article 136 of the Constitution.

The learned Advocate General of the State of West Bengal, who appeared to defend the appeal in the High Court, contended there that this is not a normal case of murder but a rather unique D one in which the protectors of law and order had themselves become predators and, in the circumstances, there were bound to be loopholes in the prosecution case. It was urged in the High Court that one should not, therefore, expect or insist upon the same standard of proof as in other criminal cases. In regard to the discrepancies in the evidence of the prosecution witnesses, it was urged by the E learned Advocate General in the High Court, that the witnesses were deposing nearly nine years after the date of the incident, as a result of which there were bound to be discrepancies in their evidence. On the question of application of section 34, it was urged in the High Court on behalf of the State Government that even if it may not be possible to apportion the guilt amongst the accused, their F mere presence at the spot would establish their involvement in the offences with which they were charged.

The judgment of the High Court shows that in the year 1970-71 certain parts of the State of West Bengal, including the City of Calcutta, were passing through a critical period of lawlessness on G account of the "Naxal Movement". A sitting Judge of the High Court and a member of the Higher Judicial Service were killed in Calcutta during that period. Political leaders, businessmen and members of the Police Force also met with their death during that period of turbulence. Benoy Chakraborty (P. W. 1) admitted in his H evidence to have stated in the committal Court that newspapers had reported seven or eight murders between August 1970 and April 1971. Manicklal Ghose (P. W. 2) stated in his evidence that many

murders were committed during 1970-71 within the jurisdiction of the Shyampukur Thana. On an analysis of the prosecution evidence, the High Court found it impossible to hold that the incident in question had happened in the manner alleged by the prosecution. According to the High Court, the police, while on patrol duty, were compelled to open fire after respondent 1, Shew Singh, received injuries as a result of the mob violence. Since the orders given by the Deputy Commissioner to open fire were justified, respondents were bound to obey the lawful orders of their superior officer. On this ground alone, according to the High Court, the accused were entitled to be acquitted.

Learned counsel who appears for the State of West Bengal argued this Special Leave Petition for quite some time and in addition, at our direction, he filed written submissions in support of the petition. We adjourned the matter to enable us to go through those submissions. Having done so we are unable to hold that this is a fit case for granting leave to the State Government to appeal against the judgment of the High Court.

A very interesting and important question was raised in the High Court as to whether the command of a superior officer to open fire affords a complete defence to a subordinate officer if, while acting in the execution of that command he causes injury or death. The High Court has referred in its judgment to passages from Cross and Jones' "Introduction of Criminal Law" (8th edition, page 371); Granville William's Text Book of Criminal Law (1978 edition, page 408); Smith & Hogan's Criminal Law (1978 edition, page 209); Colin Howard's Criminal Law (page 424) and to a South African Case. It is unnecessary for us to go into that question for the simple reason that we are of the view that the High Court was justified in coming to the conclusion that the particular situation warranted and justified the order issued by the Deputy Commissioner of Police to open fire. If that order was justified and is therefore lawful, no further question can arise as to whether the respondents, who acted in obedience to that order, believed or did not believe that order to be lawful. Such an enquiry becomes necessary only when the order of the superior officer, which is pleaded as a defence, is found not to be in conformity with the commands of the law.

Section 76 of the Penal Code provides that nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith

A believes himself to be, bound by law, to do it. The illustration to that section says that if a soldier fires on a mob by the order of his superior officer, in conformity with the commands of the law, he commits no offience. The occasion to apply the provisions of the section does not arise in the instant case since the question as to whether the accused believed in good faith on account of a mistake
B of fact that he was bound by law to do the act which is alleged to constitute an offence, would arise only if, to the extent relevant in this case, the order or command of the superior officer is not justified or is otherwise unlawful. Since the situation prevailing at the scene of the offence was such as to justify the order given by the Deputy Commissioner of Police to open fire, the respondents can
C seek the protection of that order and plead in defence that they acted in obedience to that order and therefore they cannot be held guilty of the offence of which they are charged. That is the purport of the illustration to section 76.

D But considering that a little politics appears to have got mixed up with the trial of this case, it would be more satisfactory not to rest our judgment on this aspect of the matter and to consider whether the evidence led by the prosecution is such on which a conviction can safely be founded.

E The particular night on which the incident took place was cloudy and it was drizzling. On the question whether the witnesses were able to identify the respondents, it is very difficult to take them at their word when their evidence suffers from the various contradictions to which the High Court has referred. The witnesses were deposing to the incident nearly nine years later and it appears that
F they made good the lapses of memory by giving a free play to their imagination. Their evidence leaves much to be desired and is insufficient to establish the complicity of the respondents in causing the death of Ranjit and Samir Chakraborty. Benoy lodged his complaint (Ext. 2) more than a month after the incident and yet there are material discrepancies between what he stated in the complaint and what he said in his evidence. Manick is an important witness from
G the point of view of the prosecution because he was in the company of Benoy from the beginning of the incident until they were released on bail the next day. It is surprising that in the list of witnesses filed by Benoy along with his complaint, Manick's name does not figure at all.

H Towards the end of his written submissions, learned counsel for the State of West Bengal has extracted passages from a judgment

of this Court in *S. S. Bobade* v. *State of Maharashtra*[1] to the effect that a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent and that if unmerited acquittals become general, they tend to lead to a cynical disregard of the law. With respect, we share this opinion but do not appreciate its relevance here. Courts must take equal care to ensure that the innocent are not convicted and the guilty are not acquitted but, what the High Court has done is to acquit the innocent. Relying upon the observations in *S. S. Bobade*, the learned counsel has stated further that the judicial instrument has a public accountablity and that the history will never forgive "us" if police officers, undoubtedly guilty of murder, are acquitted "lightheartedly". We cannot agree more. But the snag lies in the self-righteous assumption that respondents are "undoubtedly guilty of murder" or that they have been acquitted by the High Court "lightheartedly". Respondents are undoubtedly *not* guilty of murder and the High Court's judgment reflects its serious concern for justice. Judgments of acquittal are not to be condemned as "lighthearted" for the reason that the Government considers that it has a stake in the conviction of the accused.

A B C D

For these reasons, we dismiss the Special Leave Petition.

N. V. K. *Petition dismissed.*

(1) [1974] 1 SCR 489, 493.