Brij Mohan And Others vs State Of Rajasthan on 16 December, 1993

Equivalent citations: AIR1994SC739, 1994CRILJ922, 1994(1)CRIMES288(SC), 1993(4)SCALE661, (1994)1SCC413, [1993]SUPP3SCR979, 1994(1)UJ87(SC), AIR 1994 SUPREME COURT 739, 1994 (1) SCC 413, 1994 AIR SCW 578, 1993 JT (SUPP) 203, (1994) IJR 94 (SC), (1994) 1 CURCRIR 773, 1994 SCC(CRI) 527, 1994 (1) UJ (SC) 87, 1994 UJ(SC) 1 87, (1994) 2 EASTCRIC 599, (1994) 1 CHANDCRIC 65, (1994) 2 CRICJ 89, (1994) 1 CURCRIR 84, (1994) 1 CRIMES 288

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Bench: N.P. Singh

ORDER

N.P. Singh, J.

1. The three appellants, Brij Mohan, Gulla and Barchia, were convicted under Sections 396, 397, 450 and 397/149 of the Penal Code by the learned Additional Sessions Judge, who passed sentence of death under Section 398 against each of the appellants and various terms of imprisonment under the remaining sections. The High Court confirmed the conviction and the sentence against each of the three appellants, including the death sentence. On basis of leave granted by this Court the appellants have questioned, the legality of their conviction and sentence.

2. The prosecution case is that Chiranji Lal (PW-7) and the inmates of his family were sleeping in their house in the night between 11th and 12th October, 1983 in village Baswa. At about 1.00 A.M. Chiranji Lal heard the ladies of his family weeping and crying. He came in his courtyard and saw two or three persons giving blows to Smt. Gora (PW-6) and Smt. Gulab (deceased). The culprits also gave blows to Chiranji Lal (PW-&). In the meantime his brother's wife Smt. Saroj (PW-8) came to help them and she was also given blows. Some of the culprits were standing outside the house. One of them fired a gun shot. Hearing the gun shot, Mool Chand (deceased) rushed to the house of Chiranji lal (PW-7). The culprits assaulted him with Pharsies and Lathies. Panna Lal (deceased) whose house was also near the house of Chiranji Lal also rushed to the spot and he was shot dead by the persons, who were standing outside the house, Smt, Shakuntla (PW- 4) was also assaulted and beaten when she tried to resist the culprits. Bheru Lal (deceased) whose house is also situated nearby came near the house of Chiranji Lal and one of the culprits shot at him causing his death on

the spot. The culprits thereafter decamped with tin boxes, suitcases, containing clothes, silver and gold ornaments, utensils and currency notes.

3. Ram Swroop (PW-1), the brother of Chiranji Lal, who had also rushed to the spot hearing the gun shots, saw six or seven persons going towards the Nallah with bags, boxes and guns in their hands. He found Mool Chand, Panna Lal, Bheru Lal, Smt. Gulab, Smt. Gora(PW-6), Chiranji Lal (PW-7), and Smt. Saroj (PW- 8) lying injured. He immediately rushed to the police outpost and lodged a report (Ex.P-I) at about 2.15 A.M. The police Bandikui registered a case on the basis of the said statement, Jai Singh (PW-34) arrived at the spot and inspected the site. The injured persons were sent to the Government Hospital, Mool Chand, Panna Lal, Bheru Lal and Smt. Gulab were declared to be dead. The post mortem examination on the dead bodies of Panna Lal and Bheru Lal was conducted by Dr. B.S. Thakuria (PW-15), who was of the opinion that the death was cause due to gun shot injuries. The post mortem examination of Smt. Gulab and Mool Chand was conducted by Dr. P.S. Agrawal (PW-19). He noticed multiple ante mortem injuries on the dead bodies and according to him, the cause of death was the fracture of skulls. The investigating officer found six fired 12 bore cartridges lying scattered. He also noticed foot impressions around the place of incident, on basis of which he got prepared moulds of the footprints. Smt. Shakuntla (PW-14) filed the list of looted properties, Chiranji Lal (PW-7) also gave the list of the stolen properties. The investigation continued but no clue could be found.

4. On 15.11.1983, Shashi Kant (PW-16), the then Station House Officer (hereinafter referred to as the 'SHO'), Kherli, Alwar, had in encounter during the night near a hillock with some dacoits and after exchange of gun shots he arrested six persons - four men and two women. The four men, who were arrested after an encounter, were the appellants Brij Mohan, Gulla, Barchia and Nahar Singh who died during trial). After the arrest, on search, country made pistol, some fired and live cartridges, one barrel of 12 bore gun, apart from clothes and silver ornaments were found in possession of the appellants. For that a separate case was registered and investigation proceeded. However, as the modus operandi of the dacoities committed in the instant case at Baswa and in the case pending at Police Station, Kherli, was common, the SHO. Shashi Kant (PW-16) addressed a letter (Ex.P- 36) on 27.11.1983 to the SHO, Police Station, Bandikui and sent under sealed packet the articles recovered from the accused persons at the encounter by police Kherli, Ram Kripal (PW-37), the SHO, Police Station Bandikui, who had taken up the investigation in respect of the instant case went to District Jail, Alwar, on 12.1.1984 and arrested the appellants and Nahar Singh aforesaid and bought them to Bandikui Sub Jail on 13.1.1984. The test identification of these appellants along with Nahar Singh (deceased) was arranged on 13.1.1984 itself. The test identification was conducted by the Judicial Magistrate, Shri O.P. Gupta (PW-17). At the said test identification, eleven witnesses correctly identified these appellants.

5. Consequence to information furnished by the accused persons, while they were in police custody, on 19.1.1984, some clothes, utensils and gold and silver ornaments looted in the dacoity at Baswa were recovered which had been kept hidden and concealed in the house of the appellant Barchia. The specimen moulds of the footprints of the appellants were taken, were sent along with the footprints lifted from the place near the occurrence, for examination to the finger Print Bureau, Jaipur. On examination, it transpired that both the footprints tallied with each other. The six empty

cartridges lifted from the place of occurrence at village Baswa were found to have been fired from the pistol and barrel of the S.B.B.L. gun recovered from the appellants in the encounter on 15.11.1983. The Trial Court convicted the appellants under different sections of the Penal Code referred to above and sentenced the appellants to death, as already mentioned, for offence under Section 396. The conviction and sentence of the appellants were confirmed by the High Court, which is being questioned, in the present appeals.

6. Mr. Garg, appearing amicus curiae for the appellant, first challenged the claim made by the witnesses, that they had identified the appellants, during the occurrence as well as at the test identification. According to him, as the dacoity was committed during the night in a house, unless it is established on basis of reliable evidence that there was some source of light in which the witnesses could have identified the culprits, any claim of identification of the culprits by the witnesses should not be accepted, especially, when in the first information report as well as in the statements recorded during the investigation, no source of light was disclosed. It cannot be disputed that in cases relating to dacoity, the identification by the witnesses is the main evidence, as such the prosecution has to satisfy, that the witnesses were in a position to identify the culprits, during the commission of the dacoity. This claim is later tested at the test identification, which although not a substantive evidence but is a made to verify the claim of the witnesses before they identify the accused persons in Court. Any such claim that the witnesses identified the culprits during the commission of the crime, has to be examined by the Court with reference to the circumstances of the particular case. The Court has to be satisfied that there was not only ample opportunity for the witnesses to identify the culprits but they had identified them with the help of some light either in the house or outside.

7. In the present case, all the witnesses have asserted that electric light was there in the house, as well as on the road, when the dacoity was committed. The Trial Court as well the High Court had dealt with this aspect of the matter in detail. The factum of there being electric connection in house and on the road was not challenged on behalf of the appellants before the Trial Court. Only a suggestion was given that during the commission of the dacoity there was no supply of the electricity. Apart from a suggestion, there is nothing on the record on the basis of which it can be held that although the village had electric connection and electric light was in the house, but just at the time of commission of the dacoity there was a power failure. The claim of the witnesses regarding identification of the culprits in the electric light, cannot be rejected merely on the ground that this fact was no mentioned in the first information report or in the statements made during investigation. It appears that as the village had electricity in the houses and on roads, the informant as well as the witnesses proceeded on the assumption that they were not required to disclose the means of identification by them because that was not at all a relevant fact, necessary to be mentioned, in the first information report or in their statements before the police. In villages where there is no electricity and a claim is made regarding identification of the culprits during commission of dacoity, witnesses are expected to disclose the source of light by which they have identified the culprits during the night.

8. It was then urged that the SHO, Kherli, Alwar, who arrested these appellants in an encounter on 15.11.1983, got them falsely implicated even in the present case, by writing the aforesaid letter dated

27.11.1983 to SHO, Police Station Bandikui. It was also suggested that before the test identification was held on 13.1.1984, the appellants were shown to the witnesses. Reference was made to suggestions given to the witnesses that they were made to identify the appellants, before they were put up for the test identification. This has been always a group in dacoity cases to challenge the identification by witnesses at a test identification by claiming that the police officer had shown the suspects to the witness before they were put up for test identification. Before accepting the identification by the witnesses at a text identification, the Court has to first consider the objection to such identification. Although, this task is not very easy, but the Court has to examine on the basis of the materials on record as to whether actually the suspects, who were to be put up for test identification, had already been shown to the witnesses. In the instant case, it is an admitted position that SHO, Police Station, Bandikui, went to District Jail, Alwar, on 12.1.1984 and took custody of the appellants in connection with the present case and brought them to Bandikui and lodged them in Sub-Jail on 13.1.1984. Same day, the test identification was held in the presence of the Judicial Magistrate, Shri O.P. Gupta (PW-17), in which as many as 11 person from Baswa participated and they correctly identified the appellants, although they had been mixed up with 11 others at the time of the test identification. If the SHO (PW-37) wanted to first get the appellants identified by the witnesses, in normal course, it was not expected that he would have held the test identification on 13.1.1984 itself, the day the appellants were brought to Bandikui. There was no difficulty in fixing the test identification on any later date and in the meantime, the appellants could have been shown to the witnesses. But the promptness with which the test identification was held, after the appellants were taken into custody in connection with the present case, is a circumstance, which satisfies the conscious of the Court about the genuineness and fairness of the test identification. When the appellants were produced before the Magistrate on 13.1.1984 for being remanded to custody, it was specifically mentioned in order sheet that they had been produced BAPARDA i.e. their faces had been concealed. This precaution was necessary, so that the witnesses may not see the appellants, while being produced for remand before the Magistrate.

9.It was pointed out, on behalf of the appellants, that the aforesaid test identification was held virtually after three months of the occurrence and as such it was not safe to trust such identification. It is true that with lapse of time, the memory of the witnesses, who have seen the culprits at the time of the commission of the dacoity gets dimmer and dimmer, and the earliest the test identification is held, it inspires more faith about the fairness of the test identification. But no time limit can be fixed for holding a test identification, after which the investigating officer will be debarred from putting the suspects for test identification. While accepting the position that such test identifications should be held at the earliest, at the same time it cannot be ignored that it is not always within the reach of the investigating officer or upto him to hold such test identification. Any test identification can be held only if some persons are arrested, who are suspected to have participated in the dacoity in question. The position will be different where in spite of such suspects being in custody, the test identification is postponed, there being no reasonable cause for the same. Once the investigating officer suspects that persons arrested are accused in connection with a particular dacoity, they should be put up for test identification at the earliest. It is imperative duty on the part of the investigating officer to put up such suspects at test identification without any delay. That gives sanctity to the test identification.

10. So far the present case is concerned, as the appellants were put on test identification within 24 hours of their arrest in connection with the present case, the identification made by the witnesses cannot be rejected merely on the ground that it was not possible for them to identify after lapse of a period of three months. This was not ordinary case of dacoity; for commission therefore, four person were killed, one of them being a lady. The gruesome and callous manner, in which the dacoity was committed by the culprits must have left a deep impression on the mind of the witnesses, who had occassion to see such culprits in the electric light during the course of commission of assault, firing and removal of the articles from the house in question. This deep impression will also include the facial impression of the culprits, which in normal course must not have been erased only within a period of three months.

11. So far the recovery of the articles on basis of the information given by three appellants from the residence of the appellant Barchia is concerned, the investigating officer as well as the witnesses, who witnessed the recovery have fully supported the prosecution case. The Trial Court as well as the High Court have examined the different aspects relating to the said recovery and have come to the conclusion that the articles removed during the dacoity had been concealed in the different parts of the residence of the appellant Barchia and were recovered pursuant to the information given by the three appellants to the investigating officer. The only objection taken on behalf of the appellants before this Court is that it looked unnatural that stolen articles would have been kept at different places by the three appellants but within the same compound i.e. the residence of the appellant Barchia. It is very difficult for Court to say as to how a set of culprits, would have behaved after commission of the dacoity, in respect of disposal or concealment of the booty. According to us, there is nothing unnatural or improbable on the part of the appellant's in keeping their share of the stolen articles, concealed in the residence of one of the appellants.

12. In the present case, the moulds of the footprints which had been compared with the moulds prepared of the footprints of the appellants after their arrest was an important piece of evidence. Unfortunately, such moulds were not produced before the Trial Court and only the expert proved his opinion. The Trial Court accepted that circumstance, but the High Court has rejected the same on the ground that prosecution should have produced the moulds of the footprints, before the Trial Court. The same is the position in respect of the cartridges found on the spot of the occurrence. That has also been discarded by the High Court on the ground that they were not produced before the Trial Court. We have doubt about the correctness of the approach of both the courts. But, even if the two circumstances, referred to above, are not taken into consideration, the identification of the appellants by 11 witnesses, coupled with the recovery made of the stolen articles, pursuance to the information given by the appellants, prove the prosecution case beyond all reasonable doubt, that these appellants along with others entered into the house of Chiranji Lal (PW-7) and while committing dacoity caused the death of Mool Chand, Panna Lal, Bheru Lal and Smt. Gulab.

13. The facts of the present case present a very tragic situation in which for removal of certain ornaments and other household articles, the appellants have taken the lives of four persons which depicts the cruel and callous personalities of the appellants. But the question which still remains for consideration is as to whether it will be just and proper to affirm even the sentences of death passed against the three appellants, after a lapse of 10 years since the offence was committed. A

Constitution Bench of this Court in the case of Bachan Singh v. State of Punjab , held that the death penalty as an alternative punishment is not unreasonable and it is in public interest, but at the same time it was pointed out that legislative policy outlined in Section 254(3) was that for person convicted for an offence, where it is open to the Court concerned to impose a sentence of death as well as imprisonment for life, "life imprisonment is the rule and death sentence an exception. A real and abiding concerned for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare case when the alternative option is unquestionably foreclosed."

14. Indeed, the appellants caused death of four persons and that too for greed. The question, however, is, should they be awarded the extreme penalty of death? Keeping in view the facts and circumstances of the case, and particularly the accepted prosecution case that both Brij Mohan and Barchia, who are alleged to be armed with fire arms, did not enter the house to commit the dacoity and remained outside the house and cause the death of two person outside the house, it was only the other accused persons who went inside the house differently armed, the number of injuries inflicted by them on the deceased inside the house and the weapons used in causing those injuries, while committing dacoity and not keeping or using the firm arms, which were otherwise available, it is not possible to say that it is the "rarest of the rare cases" which may warrant the imposition of the sentence of death for the occurrence which occurred more than a decade ago. In our opinion, it will meet the ends of justice, keeping in view the peculiar facts and circumstances of the case, if we substitute the sentence of death with that of sentence for imprisonment for life on all the appellants while maintaining their conviction as recorded by the courts below.

15. Accordingly, the appeals are allowed to a limited extent, that the sentence of death passed against the three appellants are substituted by life imprisonment. With this modification in sentence, the appeals are dismissed.