Ramakant Rai vs Madan Rai And Ors on 26 September, 2003

Author: Arijit Pasayat

Bench: Doraiswamy Raju, Arijit Pasayat

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           CASE NO.:
Appeal (crl.)  2032-33 of 1996

PETITIONER:
Ramakant Rai

RESPONDENT:
Madan Rai and Ors.

DATE OF JUDGMENT: 26/09/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
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J U D G M E N T WITH CRIMINAL APPEAL NOS. 611-612/1997 ARIJIT PASAYAT,J One Jairam (hereinafter referred to as the 'deceased') was in his early teens when he lost his life in an unfortunate dispute where his relatives were the warring parties. There were originally 4 accused persons namely, Madan Rai (A-1), Rasbehari (A-2), Sachidanand Rai (A-3) and Janardan Rai (A-4). Accused-Madan Rai is the father of Sachidanand and Rasbehari. Accused-Madan Rai was charged for commission of offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') for committing the murder of deceased and other three were charged by application of Section 302 read with Section 34 of IPC. All the four accused persons were also charged in terms of Section 440 IPC for committing mischief having made preparation to cause hurt.

The date of occurrence is 11.5.1984. The dispute arose over fixing a door by Ramakant (appellant in Crl.A.Nos.2032-33/96). By infliction of a gunshot injury the deceased breathed his last on 12.5.1984. According to Siyaram (PW-1) the informant, the incident which took life of the deceased was the result of long-standing dispute over properties. There was a private partition between the deceased's father and his offsprings and accused-Madan Rai a few years before the occurrence. Madan Rai wanted to take northern room out of the rooms in which cattles were tethered and which was falling to share of Siyaram, the informant. Though the door of this room had been removed earlier, the informant wanted to close the door by constructing a mud wall. On the date of occurrence at about 6.30 p.m. the accused-Madan Rai came with his licensed gun to the spot of occurrence with his sons Sachidanand, Rasbehari and Janardan. Three of them were armed with lathis. They started demolishing the walls. The present appellant-Ramakant Rai and Siyaram and deceased requested them not to do so. Madan Rai took out his gun and fired one shot. Sound of such gun fire attracted notice of many including Bashisht Pandey (PW2), Bhimnath Rai (PW5)and many other villagers who came to his house, particularly, to the room to find out what has happened. The

informant, the deceased and others came to the room where informant's cattles were tethered. Accused-Madan Rai climbed on the roof to the western corner of the house with his gun. Deceased was at the door of the room which was towards north-west of his house. Madan Rai fired one gun shot which resulted in injuries on the face of the deceased who fell down. According to the informant the ghastly incident was witnessed by Bashisht Pandey (PW2), Bhimnath Rai (PW5) and the neighbourers. As the condition of the deceased deteriorated, he was taken in a tractor to the hospital at Mohammadbad, information was lodged at the police station, and investigation was undertaken. On completion of the investigation, charge sheet was placed.

Considering the evidence on record the Trial Court found accused- Madan Rai guilty and sentenced him to imprisonment for life for the offence relatable to under Section 302 IPC and for the offence punishable under Section 440 IPC imprisonment for term of two years with a fine of Rs.500/- was imposed. Other three accused were acquitted of charges under Section 302 read with Section 34 IPC. However, they were held guilty in relation to Section 440 IPC. The convicted accused persons filed an appeal before the Allahabad High Court which by the impugned judgment found the prosecution version to be wanting incredibility and adequacy and directed acquittal. State's appeal against acquittal of three was rejected.

According to the High Court, there was manipulation so far as the time of occurrence in the FIR is concerned. Originally, the same appears to have been written at 7.30 p.m. and subsequently corrected to 6.30 p.m., obviously, with a view to make visibility and identification possible. There was no motive to kill the young boy, as the accepted position seemed to be that notwithstanding the difference there was no sufficient reason as to why the innocent boy should be killed. It was also concluded that since there was only one gunshot, the question of so-called eyewitnesses rushing to the spot on hearing the sound appeared incredible. The distance from which the bullet was fired appeared to be differently stated and there was apparent contradiction in the evidence of doctor who conducted the post mortem and the doctor who examined the deceased immediately after he had suffered the injuries. While Dr. Chander Bhan Tripathi (PW-4) who conducted the post-mortem examination indicated the distance to be greater, doctor (PW-3) who examined the deceased noticed some blackening and tattooing which indicated that the gun shot was fired from a very close range. After making casual reference to the evidence it was concluded that on the overall appreciation of evidence contradictory statement of affairs about the injuries and the ocular testimonies, time of lodging of FIR throws grave doubt in the prosecution case. It was, therefore, concluded that place of occurrence as said to have taken place and stated in Court is not correct version of the incident and the prosecution has not come with clean and correct case. With these findings, the judgment of conviction and sentence was set aside and one of acquittal was put in its place.

The father of the deceased, Ramakant Rai has filed Criminal Appeals Nos. 2032-33/96. The State of Uttar Pradesh has filed Criminal Appeal Nos.611-612/1997 restricting the challenge to the acquittal of Rasbehari, Sachidanand and Janardan but there is no challenge to the acquittal of Madan Rai, the prime accused according to the prosecution.

Learned counsel for the appellant Ramakant Rai submitted that the conclusions of the High Court are without any basis and the judgment is practically un-reasoned and conclusions cannot be

substitute for reasons. Referring to the number of shots it is submitted that the evidence of the witnesses clearly spoke of two gunshots. This was also noticed by the trial Court. Unfortunately, the High Court proceeded on the presumption as if there was only one gunshot. In reality there was one gunshot, which hit the deceased. But the clear and cogent evidence was to the effect that one shot was fired first and after some time the second shot was fired which proved to be fatal. The High Court has attached unnecessary importance to the correction made in the FIR about the time of occurrence. There was no material and no finding has been recorded that initially some timing was given which was subsequently changed. It is not the case of the defence that at first 7.30 p.m. which was written in the FIR was subsequently changed to 6.30 p.m. in another document. As has been explained by the informant the correction was made before the first FIR was handed over. To say that the timing was changed after deliberation would not be a proper approach. According to the informant by tremor of hand it was so written and immediately corrected and to discard the prosecution case on the conjectures and surmises that the timing was changed after deliberation is indefensible. Even if it is conceded that there was a correction made that was obviously made before the FIR was handed over and mere correction cannot be viewed with suspicion as has been done by the High Court.

Dr. Sudhakar Dube (PW-3) has clarified as to why he had stated about blackening. The evidence was to the effect that when he examined the injured there was no electric light and he had to make the examination with the help of lantern and, therefore, the confusion arose. In view of this specific clarification, it was not appropriate for the High Court to conclude that the post mortem report was to be discarded. The trial Court had dealt with such pleas of the accused persons elaborately and had indicated the reasons as to why they were not acceptable. The High Court without even discussing the evidence elaborately concluded to the contrary. Evidence of PWs 2 and 5 who are independent witnesses has been discarded even without analyzing of their evidence.

In response, learned counsel for the acquitted accused persons submitted that the special leave petition at the instance of the father of the deceased was not competent. Though he claimed to be eyewitness, he was not examined by the prosecution. The reasoning indicated by the Trial Court that he may have shown compassion to his close relative having lost the son is contradicted by the very fact that he has chosen to file Special leave petition.

With reference to evidence of doctors it was submitted that nature of gunshots wounds shows that the firing was from a close range. Had the situation been otherwise, the injuries could not have been of oval shape, when the prosecution version is that the accused was firing from a height. The nature of the injuries sustained clearly rule out any gun being fired by the accused Madan Rai. Neither any gun nor any bullet was produced which dents the prosecution version irretrievably. The absence of ballistic expert's report corrodes credibility of prosecution version.

Considering the distance from which PWs 2 and 5 claimed to have come, it is highly improbable that they would have seen the occurrence as claimed. The timing of incident was first correctly reflected and probably in the course of writing down the first FIR it was noticed that visibility would be poor and identification improbable and that is why the change was made. Even if it was done before the report was lodged it throws great doubt about the correct presentation of the factual scenario.

Though the High Court has not spelt out the reasons to buttress the conclusions that is not fatal to the ultimate conclusions as the material on record would justify the conclusions and the correctness thereof.

Learned counsel for the State of U.P. submitted that though the State has not specifically challenged the acquittal of Madan Rai, on a bare reading of the High Court's judgment it is clear that the same cannot be maintained. Additionally, it is submitted that both the trial Court and the High Court have erroneously concluded that Section 440 IPC was not made out against accused 2, 3 and 4.

A doubt has been raised about the competence of a private party as distinguished from the State, to invoke the jurisdiction of this Court under Article 136 of the Constitution of India, 1950 (in short the 'Constitution') against a judgment of acquittal by the High Court. We do not see any substance in the doubt. Appellate power vested in this Court under Article 136 of the Constitution is not to be confused with ordinary appellate power exercised by appellate courts and appellate tribunals under specific statutes. It is a plenary power, 'exercisable outside the purview of ordinary law' to meet the pressing demands of justice (See Durga Shankar Mehta v. Thakur Raghuraj Singh (AIR 1954 SC

520). Article 136 of the Constitution neither confers on anyone the right to invoke the jurisdiction of this Court nor inhibits anyone from invoking the Court's jurisdiction. The power is vested in this Court but the right to invoke the Court's jurisdiction is vested in no one. The exercise of the power of this Court is not circumscribed by any limitation as to who may invoke it. Where a judgment of acquittal by the High Court has led to a serious miscarriage of justice this Court cannot refrain from doing its duty and abstain from interfering on the ground that a private party and not the State has invoked the Court's jurisdiction. We do not have slightest doubt that we can entertain appeals against judgments of acquittal by the High Court at the instance of interested private parties also. The circumstance that the Criminal Procedure Code, 1973 (in short the "Code") does not provide for an appeal to the High Court against an order of acquittal by a subordinate Court, at the instance of a private party, has no relevance to the question of the power of this Court under Article 136. We may mention that in Mohan Lal v. Ajit Singh (1978 (3) SCC 279) this Court interfered with a judgment of acquittal by the High Court at the instance of a private party. An apprehension was expressed that if appeals against judgments of acquittal at the instance of private parties are permitted there may be a flood of appeals. We do not share the apprehension. Appeals under Article 136 of the Constitution are entertained by special leave granted by this Court, whether it is the State or a private party that invokes the jurisdiction of this Court, and special leave is not granted as a matter of course but only for good and sufficient reasons, on well established by the practice of this Court.

Above was the view expressed by this Court in Arunachalam v. P.S.R. Sadhanantham and Anr. (1979 (2) SCC 279). The view has again been reiterated by the Constitution Bench in P.S.R. Sadhanantham v. Arunachalam and Anr. (1980 (3) SCC 141).

It is to be seen whether the broad spectrum spread out of Article 136 fills the bill from the point of view of "procedure established by law". In express terms, Article 136 does not confer a right of appeal on a party as such but it confers a wide discretionary power on this Court to interfere in suitable cases. The discretionary dimension is considerable but that relates to the power of the

Court. Article 136 is a special jurisdiction. It is residuary power; it is extraordinary in its amplitude, its limits, when it chases injustice, is the sky itself. This Court functionally fulfils itself by reaching out to injustice wherever it is and this power is largely derived in the common run of cases from Article 136. Is it merely a power in the court to be exercised in any manner it fancies? Is there no procedural limitation in the manner of exercise and the occasion for exercise? Is there no duty to act fairly while hearing a case under Article 136, either in the matter of grant of leave or, after such grant, in the final disposal of the appeal? There cannot be even a shadow of doubt that there is a procedure necessarily implicit in the power vested in this Court. The founding fathers unarguably intended in the very terms of Article 136 that it shall be exercised by the judges of the highest Court of the land with scrupulous adherence to settled judicial principles, well established by precedents in our jurisprudence. Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'. Wide enough in all conscience is the field of discretion that remains".

It is manifest that Article 136 is of composite structure, is power-cum-procedure - power in that it vests jurisdiction in this Court and procedure in that it spells a mode of hearing. It obligates the exercise of judicial discretion and the mode of hearing so characteristic of the court process.

Coming to the appeals before us we find that State has not challenged the acquittal of accused Madan Rai. That being the position and in view of what has been stated in Arunachalam's case (supra) and Sadhanantham's case (supra) the special leave petition filed by Ramakant Rai is clearly maintainable.

It was submitted that when two views are possible and the High Court with well-chiselled conclusions has accepted a view it would not be proper to exercise jurisdiction under Article 136 of the Constitution. Arguments are not substitutes for reasoning. More so when the appellate court upsets conclusions of lower court. A party is not permitted to say that the arguments are what the Court intended to accept or to convey. When the appellate Court concurs with the views of the Trial Court the necessity for elaborately dealing with various aspects may not always be necessary. But when a view contrary to that of the lower court is expressed, it is imperative that reasons therefor should be clearly indicated. There is no scope for any departure from this basic requirement. Therefore, the plea of the accused-respondents that even though the judgment of the High Court is not very elaborately reasoned, yet it can be supplemented by arguments is a fallacious one.

It is also noticed that the High Court did not correctly appreciate the facts. First and foremost it proceeded on the basis as if there was only one gunshot. In fact the evidence on record clearly shows that there were two gunshots and only one of them was a fatal one.

The evidence of PWs 2 and 5 have been lightly brushed aside with presumptuous conclusion that they could not probably have come from their houses and since there was only one gunshot. On that score alone the High Court's conclusions suffer from vulnerability. The High Court also proceeded as if the change in timing indicated in the FIR was subsequently done. There is no material to support this conclusion. Here again, High Court acted without any material to support its conclusions. The Investigating officer (PW-6) was also not even asked as to when the change was made. On the contrary, reading of PW-1's evidence shows that it was done before the report was handed over to the police.

The High Court also came to erroneous conclusion that there was variance between the evidence of PWs 3 and 4. It clearly overlooked the explanation offered by PW-3 as to why he had mentioned about blackening. He has stated that examination at the first instance was done in inadequate light with the help of lantern. Therefore, he accepted that there was a possibility of mistake in what he recorded about the blackening. When one compares his evidence with that of PW-4 the position is clear. PW-4 has not really noticed any blackening or tattooing. Without considering the evidence of PW-3 in its proper perspective the High Court should not have abruptly concluded that there was a difference in the evidence of PWs 3 and 4 and accused is to get the benefit therefor. In fact a combined reading of the evidence of PWs 3 and 4 shows that PW-4's version was more authentic and acceptable.

Much emphasis has been laid about the nature of injury. The hypothetical answers given by the doctors cannot corrode credibility of eyewitnesses. Significantly, no question was put to PWs 3 and 4 as to the position from where the accused could have made the gunshot.

It is trite that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance in the witness- box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case. Referring to of probability amounts to 'proof' is an exercise the inter-dependence of evidence and the confirmation of one piece of evidence by another a learned author says: (See "The Mathematics of Proof II": Glanville Williams: Criminal Law Review, 1979, by Sweet and Maxwell, p.340(342).

> "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibit act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other".

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common-sense. It must grow out of the evidence in the case.

The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice. This position was illuminatingly stated by Venkatachalia, J(as His Lordship then was) in State of U.P. v. Krishna Gopal and Anr. (AIR 1988 SC 2154).

As was noted by this Court in Gurcharan Singh and Anr. v. State of Punjab (AIR 1963 SC 340) non-examination of the ballistic report does not render direct evidence improbable.

In view of the unsatisfactory nature of disposal of the appeal and the inherent improbabilities and incongruities in the conclusions, the unreasoned impugned judgment of the High Court warrants reversal. So far as accused-Madan Lal is concerned, his conviction under Section 302 IPC as done by the Trial Court is restored. So far as acquittal of other accused persons under Section 302 read with Section 34 is concerned, the Trial Court had elaborately dealt with the evidence to extend benefit of doubt to them. The High Court did not interfere in the State's appeal so far as their acquittal is concerned. Nothing could be shown to us as to why the conclusions are to be reversed and in what way they are fallacious.

Coming to the appeal filed by the State and the challenge of Ramakant Rai to the acquittal of accused respondents Sachidanand, Rasbehari and Janardan under Section 440 IPC, for which two years imprisonment was imposed, is concerned the High Court's judgment is reversed. The respondents Sachidanand, Rasbehari and Janardan were rightly convicted by the Trial Court under

Section 440 IPC along with accused Madan Rai. The sentence of two years rigorous imprisonment and a fine of Rs.500/- as imposed can be in no way termed to be excessive to warrant a different sentence.

In the ultimate result, the judgment of the Trial Court is restored and that of the High Court is set aside. The respondents shall surrender to custody to serve the remainder of the sentence, if any, to be served.

The appeals are allowed.