

# Sheo Shanker And Anr. vs The State on 23 December, 1952

**Equivalent citations: AIR1953ALL652, AIR 1953 ALLAHABAD 652**

**Author: Raghubar Dayal**

**Bench: Raghubar Dayal**

## JUDGMENT

Raghubar Dayal, J.

1. Sheo Shanker alias Tanu and Sheo Shankar alias Bachchu appeal against their conviction and sentence of death under Section 302, I. P.C. for having committed the murder of Girdhari and Ram Singli on the morning of 4-1-1951, near Achalganj railway station.

2. The prosecution story is that these two accused appellants and one unknown person lay in ambush in the grove of Sheo Ram Brahman about three furlongs by the passage from the railway station and, shot at Girdhari and Ram Singh and their companions when they had passed this grove on their way from village Bethar to the railway station. Two shots were fired. It is said that the second shot hit Girdhari on the legs. Girdhari and Ram Singh ran towards the station. Their companions also ran in the same direction but along the sides of the passage. The accused's party pursued them and the men with guns kept on firing. Ram Singh was hit with shots just in front of the quarters of Abdul Ghani, signal inspector. He fell down there. Girdhari kept on running and was hit again after he had run about 328 paces from where Ram Singh had fallen down. Girdhari fell down on being hit at that spot. This place is about 40 paces from the station platform. Tanu accused then shot at Girdhari's chest, twice. Bachchu on returning to Ram Singh fired at his chest. The result was that Girdhari and Tanu died immediately.

3. This incident is said to have taken place at about 8-30 a.m. The departure time of the train leaving for Unnao was 8-47 a. m. Badlu, brother of Girdhari went to police station Achalganj about four to six furlongs away and lodged a report there which purports to be taken down at 9-30 a.m. The main difference between the version given in this report and that narrated in Court is with respect to Baehchu's shooting at Ram Singh after he had fallen down. No such allegation was made in the first information report. We shall deal with its contents later.

4. Puttu Lal, Sub-inspector, proceeded at once to the spot, found the dead bodies near the railway station, prepared the inquest reports and sent, the bodies for post mortem examination. According to him he reached there at about 11 o'clock. Station officer, Sheo Narain Singh, reached the spot shortly after his arrival. Station officer Sheo Narain Singh found four spent cartridges and one buckshot near the dead body of Ram Singh and five empty cartridges, five buckshot and three wads

near the dead body of Girdhari. The five buckshot found near Girdhari's body and the one found near Ram Singh's body appear to be similar to one another and also to one pellet recovered from the body of Girdhari at the post mortem examination. The station officer also found two empty cartridges in the grove of Sheo Ram.

5. He examined Badlu, Hari Shankar and Lallu prosecution witnesses on the 4th January, Lalli alias Raghunath and Ram Bharosey on the 7th and Raja Ram, Bansidhar and Ram Charan on 9-2-1951. He reported for the recording of the statements of Badlu, Hari Shankar, Lallu and Raja, Ram under Section 164, Cr. P.C. on 10-2-1951. Their statements were so recorded on the same day.

6. Both the accused denied the prosecution allegations in their statements before the Committing Magistrate and did not say anything further about the incident or about their defence. They simply stated, that the prosecution witnesses deposed against them as they were their enemies and were friends of Girdhari. In the Sessions Court Tanu alleged alibi stating that he was proceeding to Unnao that day for the hearing of his case and that learning there at the station about the arrest of his two brothers in connection with these murders, he continued his journey to Lucknow. He also suggested that the deceased had many enemies thereby suggesting that they might have been killed by others. Bachchu also alleged his alibi stating that he had gone to Lucknow that day and had lodged a report there about the loss of his box and that he had lodged a complaint in the complaint book about his being made over a wrong ticket at Kanpur with the result that he was charged excess fare at Lucknow.

7. Tanu examined no witness in support of his alibi. Bachchu examined some witnesses. The defence also examined two witnesses to show that the two accused were not the persons who had actually shot at the deceased Girdhari and Ram Singh. These two witnesses are railway employees, Mewa Lal and Makhdoom D. W. 1 and D. W. 2.

8. There is no doubt that Ram Singh and Girdhari died due to gunshot wounds. It is, however, necessary to note below the injuries observed on their bodies by Dr. Lyall who conducted the post mortem examination.

'In respect of Girdhari'.

1. Entrance gunshot wounds 3/4th inch in diameter with black margins on left axillary posterior fold.

2. Entrance gunshot wound 1 inch in diameter with black margins on left side chest 4 inches below and 1 inch lateral to left nipple.

3. Four entrance gunshot wounds 1/2 inch in diameter in right umbilicus region 1 inch lateral to umbilicus.

4. Two entrance gunshot wounds 1/2 inch in diameter on upper 1/3 and outer aspect right leg.

5. Two entrance gunshot wounds 1/2 inch in diameter on outer and upper 1/3 of right arm.
6. Four exit gunshot wounds 1/2 inch in diameter on right side back above the iliac bone.

'In respect of Ram Singh'.

1. Entrance gunshot wound in 3/4th inch in diameter with black margins 1 inch below and 1/2 inch internal to left nipple.
2. Entrance gunshot wound 1 inch in diameter on uppermost part of right thigh in its medial part.
3. Exit gunshot wound 4 inch in diameter over 6th dorsal vertebra in mid line on back.
9. Dr. Lyall stated in his deposition that Gir-dhari's wounds Nos. 1 & 2 & Ram Singh's wound No. 1 were caused with gunshots by placing the gun on the chest or from within a range of one yard.
10. The prosecution examined, as already, indicated, seven witnesses to prove its case. All of them as noted by the learned Sessions Judge in his judgment belong to the party of Girdhari and Ram Singh between whom and the accused, there had been a lot of litigation. Some of the witnesses namely, Lalli, Raja Ram, Hari Shankar, Lallu and Bansidhar had also personal reasons for being inimical towards the accused. This is not disputed by the learned Government Advocate and it is not necessary to discuss the inimical and partisan character of the prosecution witnesses. It is true that their statements cannot be ignored merely on this basis, but this necessitates a careful scrutiny of their statements. Implicit reliance cannot be placed on them merely on the ground that the first information report appears to have been promptly lodged and because Ram Singh and Girdhari died of gunshot wounds.
11. One main consideration which was urged for the accused appellants to disbelieve the witnesses was the material discrepancy in the statements of some of the witnesses before the investigating officer and the statements made in Court. With respect to Bachchu's shooting at the victims and particularly Bachchu's shooting at Ram Singh after Ram Singh had fallen, it has already been mentioned that Bachchu's shooting at Ram Singh after he had fallen was not mentioned in the first information report. The only way in which this discrepancy is explained by the prosecution is by a complete denial by witnesses of having made a discrepant, statement before the investigating officer and suggesting that the investigating officer had wrongly recorded that part of the statement due to his favouring Bachchu, accused. Several circumstances have been urged in support of this contention which is not usually, put forward for the prosecution when witnesses make statements in Court which are found inconsistent with the statements made before the police investigating officer. One of these circumstances is that the statements are so damaging, to the prosecution story put in Court that the witnesses could not have been expected to have made such statements before the investigating officer. We are of opinion that this, is a very wrong approach to the recorded statements. A statement made by a witness to a police investigating officer can be used only in one manner in view of Section 132, Cr. P.C. and that is that it can be used to contradict the statement of the witness if he be examined as a prosecution witness. If the same person be not examined as a

prosecution witness but examined as a defence witness, then that statement cannot be used. Any other use of the statement is forbidden.

This is not disputed by the learned Government Advocate. His contention is that the recorded statement is not really a statement of the witnesses and therefore is not a statement contemplated by Section 162, Cr. P.C. We are of opinion that the statement recorded in the police diary cannot be assailed for the purposes of the case under investigation as otherwise the whole use of Section 162, Cr.P.C. will vanish. The contradiction will come into existence only when, a witness makes a different statement in Court and it is not expected that he would ordinarily admit having made a contrary statement before the police. He must deny having made a contrary statement. The prosecution can always say that in view of the witness's statement, the police Sub-Inspector did not write the statement correctly & may then make allegations which may necessitate rather a detailed inquiry about the bona fides of the investigating officer. This could not have been contemplated. The only way to prove that a witness made a certain statement before the: police is to confront the witness with that statement and in case he denies it, to get it proved from the investigating officer who made a note of that statement. The truth of the statements recorded in the police diary is certainly not accepted or presumed but the correctness of the record is presumed for the purposes of Section 162, Cr. P.C. We are, therefore, of opinion that for this particular case we have to accept that what is recorded in the case diary was the statement made by that particular witness before the investigating officer and that a mere denial of a witness or the extreme improbability of a witness having made such a statement cannot be a factor in determining whether the police Sub-Inspector was acting bona fide or not at the time when he recorded the statement.

12. The 'mala fide' conduct of the investigating officer could certainly be urged on behalf of the State & the Court can consider it on the basis of circumstances other than the mere discrepant language of the recorded statement of the witness. Such other circumstances urged in the present case are that the Sub-Inspector did not arrest the two accused till they themselves had surrendered in Court, that he did not take any steps to treat them as absconders, that he did not come to know about the hearing of their case at Unnao that day and that he made a statement that he had asked the second officer to search the houses of the two accused, a fact which did not appear to be correct in view of the second officer not deposing about it. So far as the last point is concerned, we find mention about it in the case diary. Of course, we do not find any search list there. It is, however, to be expected that a wrong note would not be made there and if a wrong note had been made, the superior officers would have made a check about it. The Sub-Inspector not taking action against the accused as absconders, does not necessarily mean that he was favouring them. He might have been trying to get at them or just securing information about their movements. It may have been also possible though he does not say so that he was hesitant about making arrests just on the basis of statements of witnesses he knew to be of the party of the complainant and especially if he had got scent of the accused suggesting alibi. We, therefore, do not find these circumstances to be such as to lead to the conclusion that the Sub-Inspector was favouring the accused.

13-14. In addition to these circumstances, there is the statement of Ram Bharosey, brother of Girdhari that he had seen the relations of Bachchu approaching the station officer and that he had complained about his conduct to his superior officers. Carbon copies of the complaints sent have

been filed. They do not mention any complaint with respect to the Sub-Inspector being approached on behalf of Bachchu though they contain other allegations. Ram Bharosey's statement according to the statement of the station officer was recorded on the 7th January. Ram Bharosey would like to make us believe that it was taken down on the 9th January. We see no reason to disbelieve the station officer especially when we find that in the lease diary of the 7th January the statement of some other witnesses had also been recorded.

15. (Their Lordships then considered the statement and other circumstances and proceeded as follows:) We are, therefore, in agreement with the learned Sessions Judge that it has not been established that Sheo Narain Singh, station officer had been favourable towards Bachchu and therefore, had not been conducting the investigation properly.

16-18. (Their Lordships then discussed other prosecution evidence and the circumstances connected with the first information report and concluded as follows:--) It is in view of these circumstances that we are inclined to think that the first information report is not a report which was lodged so promptly as it alleges to be and that, therefore, the prosecution story cannot be given sufficient corroboration from the contents of the first information report.

19. The observations of the doctor in our mind do not fully support the prosecution story. Anyway, they show that the prosecution witnesses either failed to observe all what happened or have not deposed to all that they had seen.

20. (After discussing the prosecution evidence regarding pursuit and gun wounds, the judgment proceeds as follows:--) The nature of the wounds said to have been inflicted on account of the gun being placed on the chest and fired does not fit in with the allegation. It is true that the doctor was not questioned about it. In fact the doctor made the statement that these wounds were due to the gun being fired by being placed on the chest or from within a range of one yard. We are of opinion that in this the doctor was wrong and probably got misguided on account of the black margins of the wounds. The black margins of a wound are never due to the firing of the gun from very close range but are due to something different. Taylor says at page 430 of his Principles and Practice of Medical Jurisprudence, Volume I, 10th Edition: --

"The edges of the wound commonly show a narrow ring of discoloration due to the removal of a layer of epithelium by the passage of the bullet. The surrounding skin may be scorched or not, and there may be a zone of blackening, or peppering with grains of powder, according to the distance from which the weapon was fired."

And again at page 431: --

"All entrance wounds, if examined, will be found, to have a zone of denuded epithelium immediately surrounding the orifice. This is caused by the spin of the bullet and the imagination of the skin by the bullet and tends to dry and become discoloured shortly after death. It should not be confused with the marks due to powder for it gives no indication of range."

And again at page 441: --

"The bruised and dark appearance which a gunshot wound sometimes presents, even when the weapon is discharged at a distance from the body has led to the supposition that this effect was due to a burn and that the bullet burnt the parts which it touched, but this idea is not correct. The projectile never becomes sufficiently heated to acquire the power of burning."

21. Of course no scorching of the wounds could have been possible in this case when the victims had several clothes on, even if the firing had been from very close range. And that again shows that the doctor's opinion was due to the existence of black, margins and not due to any scorching of the surrounding skin. Again Taylor says at page 430: --"We must distinguish between near wounds and far wounds. Usually when a weapon is discharged in contact with or within an inch or so of the body the gases which pass out with the bullet enter the tissues and thereafter expand causing tearing of the skin or clothes very often, in the form of a cross or a split. Most of the powder is found inside the tissues, but there may be traces of blackening, burning and tattooing around the entrance hole .....

if the weapon is discharged at a shot distance from the skin the effect of the gases is lost and the entrance wound looks like a hole which might be caused by pressing a lead pencil into the tissues; it is rounded with inverted edges, and surrounded by a zone of singeing, blackening from the smoke and tattooing from the impaction of small particles of powder in the skin."

The clothes did not show such tearing or splitting. It is, therefore, clear from the condition of the clothes which the victims were wearing, that the gun does not appear to have been fired by its being placed on the chest or very close to the chest after the victims had fallen down. The position of the two first wounds on Girdhari is also not very consistent with the position of the gun. It is not expected that he would be lying on the left side when the gun would be so fired.

22. Lastly, it was argued for the State that the alibi evidence of Bachchu was not to be believed and if alibi is not believed the prosecution case should be taken to be proved. In support of this contention we were referred to two cases reported in --'Sarat Chandar v. Emperor', AIR 1934 Cal 719 (A) and in -- 'Suraj Bakhsh Singh v. Emperor', AIR 1933 Oudh 369 (B). With all respect we are not prepared to agree with the observation made in those cases. In 'AIR 1933 Oudh 369 (B)', Smith J. observed:

"The reason for not believing the alibis of these three men is that there is convincing evidence that they took part in the crime; it need hardly be said where there is satisfactory evidence that a man committed a crime at a certain place and at a certain time a Court will never find any difficulty in rejecting an alibi he may seek to establish, even if that alibi is supported by what on the surface would appear to be satisfactory evidence."

We do not take this to mean that if the alibi evidence be good and no weakness is detected by the Court in it, it must be given a go by if the Court comes to know of no weakness in the prosecution

evidence. The two cannot be true and the weakness must be found somewhere, however, difficult it might be. If the Court fails to find any weakness in either, we are of the view that the benefit of such a failure must go to the accused and not to the prosecution because a well-established alibi must be sufficient to show that the prosecution witnesses were not speaking the truth or at least to throw doubt upon their truthfulness. What was observed in A. I. R, 1934 Cal 719 (A) is that whenever a defence of alibi is set up and that defence utterly breaks down it is a strong inference that if the prisoner was not in fact where he says he was, then in all probability he was where the prosecution say he was. The drawing of certain inferences does not mean that that thing is proved and here again such inference is to be drawn, according to the Calcutta case, when the defence alibi breaks down and not when it is disbelieved. The utmost that can be said about the alibi set up by Bachchu is that it has not been established to the satisfaction of the Court. The alibi of Bachchu consists in producing the order sheets of the criminal case which was for hearing on the 4th January in the Court of Bench Magistrate at, Unnao. The order sheet shows his presence and purports to be signed by him. It shows the absence of Tanu. We find no difficulty in believing the genuineness of the order sheet and see no good reason why the reader of the Court should fabricate the order sheet with respect to one of the persons concerned in this case and not with respect to the other, namely, Tanu. Of course the reader has not been examined to depose that it was Bachchu accused who was present and we do not find it impossible that after commission of the offence, Bachchu could have reached Unnao and be present in Court. As already indicated, a railway train was to leave for Unnao at 8.47 A. M. It was really to catch this train that Girdhari and Ram Singh were proceeding to the station, as Ram Singh, was the complainant in that case. Bachchu, if he was one of the assailants, could have caught that train and reached Unnao at about 9 A. M. and thus be present in Court.

23. The other evidence about alibi was Bachchu's lodging complaints with the police and in the complaint book at Lucknow railway station at 7.30 A. M. and 8.10 A. M. on 4-1-1951. Ram Bharosey constable G. R. P. Lucknow Station deposes about a certain written report being handed over there by some one alleging himself to be Bachchu. His statement is interesting. In examination-in-chief he stated that the person who had come to deliver the written note was not Bachchu accused but was some one who limped, had one eye and was thin. We do not find from the record whether this description fits in with the accused Bachchu but we presume that it does not. In cross-examination he stated that the man who had lodged a report had scribed it in his presence. It could have thus been very easily established whether the writer of the report (Ext. 10) was Bachchu accused or not. The accused tried to have the writing sent up to an expert for opinion and later on gave up the request. No adverse inference can be drawn against him on this score. The prosecution had come to know of this report much earlier. In fact Ram Bharosey was examined by the Investigating Officer on the 14th March during the investigation. It was for the prosecution, therefore, to get it clearly established that the writer of the report was not Bachchu accused. Anyway, Bachchu has examined his father to prove his identity of the writings and also his signatures on the complaint about the excess realised from him. In view of all this evidence it may be said that the alibi is not so good that it should be believed, but it is difficult to say that it is false and the alibi set up breaks down.

23a. Apart from the above considerations there are the statements of the two railway employees Mewa Lal and Makhdum, D.Ws. 1 and 2. They were sent up to identify the accused in jail and failed to identify them. Makhdum stated there before the Magistrate that none of the persons who had

fired was among the persons put up in the parade. Both of them now say in Court that Tanu and Bachchu accused were not those persons. The learned Sessions Judge does not rely on their testimony & observed that witnesses like these could not have observed things to such an extent as to come forward to say who exactly the assassins were. We fail to find any logic behind this observation. If these people were on the engine and were watching the incident they were in the best position to notice the assailants. They had a front view of them. Ram Singh fell down at 40 paces from the engine. They were in a position to see them. It was their inability to identify the accused in the identification parade that they were not produced as good identifying witnesses by the prosecution itself. It is different whether their inability to recognise the two accused can be said to be due to the fact that the two accused were not the persons who had fired at Ram Singh and Girdhari or that one may not be inclined to accept their positive statements that the two accused were not the two persons who had fired. It is not necessary to believe them in full on this point. Suffice it to say that for our purposes they failed to identify the two accused persons who are said to have fired at Girdhari and Ram Singh. Their failure to identify has been rightly urged for the appellants to create doubt about the accused being the actual persons who had fired at Girdhari and Ram Singh.

24. In view of the above, we are of opinion that this is not a case in which the statements of the prosecution witnesses who belonged to the party of the deceased and who have reason to bear ill-

will against the accused should be implicitly relied upon & it be held that the prosecution succeeded in establishing beyond reasonable doubt that the two appellants committed the murder of Girdhari and Ram Singh on the 4th January, as alleged.

They are, therefore, given the benefit of doubt.

In view of the above, we reject the reference of the confirmation of the death sentence, allow the appeal, set aside the conviction and sentences passed on the two appellants and acquit them of the offence under Section 302, I. P.C. We direct that they be released from custody forthwith, if not required to be detained under any other process of law.