Balbir vs State Of Haryana And Anr on 26 October, 1999

Equivalent citations: AIR 2000 SUPREME COURT 11, 1999 AIR SCW 4124, 1999 CRILR(SC MAH GUJ) 750, (1999) 3 KER LT 101, 1999 CRILR(SC&MP) 750, 2000 (2) LRI 607, 2000 ALL MR(CRI) 127, 2000 CRIAPPR(SC) 41, 2000 (1) SCC 285, 2000 SCC(CRI) 160, 1999 (9) ADSC 253, 1999 (6) SCALE 600, (1999) 8 JT 403 (SC), (2000) 1 RAJ LW 28, (2000) 1 EASTCRIC 54, (2000) 1 MADLW(CRI) 211, (1999) 17 OCR 656, (1999) 4 RECCRIR 839, (2000) 1 SCJ 1, (1999) 4 CURCRIR 209, (1999) 9 SUPREME 13, (1999) 26 ALLCRIR 2490, (1999) 6 SCALE 600, (2000) 40 ALLCRIC 149, (2000) 1 BLJ 665, (1999) 3 CHANDCRIC 160, (1999) 4 ALLCRILR 674, (1999) 4 CRIMES 289, (2000) SC CR R 59

Bench: K.T. Thomas, Syed Shah Mohammed Quadri

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           CASE NO.:
Appeal (crl.)  333 of 1987

PETITIONER:
BALBIR

RESPONDENT:
STATE OF HARYANA AND ANR.

DATE OF JUDGMENT: 26/10/1999

BENCH:
K.T. THOMAS & A.P. MISHRA & SYED SHAH MOHAMMED QUADRI

JUDGMENT:
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JUDGMENT 1999 Supp(4) SCR 120 The Judgment of the Court was delivered by THOMAS, J. Seldom would the courts have come across such a weird scenario as the present case has presented. In respect of one victim in one murder episode two diametrically divergent stories were put to test in two different trials before the same Sessions Court and both were prosecuted by the same Public Prosecutor. The Sessions Court rejected the story, which the police had propounded, after a full-fledged investigation, as untrue but the same trial court approved the other divergent version as the true story. Resultantly, the man whom the investigating agency found to be the real murderer was shown his escape route while the man whom the other side dubbed as the culprit stands convicted and sentenced to imprisonment for life.

The convicted person did not succeed in getting himself extricated from the murder charge even in appeal as the High Court confirmed his conviction and sentence. This court has once dismissed the appeal filed by the appellant by special leave (on 17.2.1997) but on a legal point, pertaining to the

procedure to be followed in such two cases, this court reopened it and annulled the said judgment of this court and put the appeal back for disposal afresh. The said legal point has been formulated by this court as follows:

> "The question of law which has arisen for determination rests in discovering the course to be steered by a Court of Session when two commitments are made before it pertaining to the same offence and pertaining to the same victim, one giving one version against one accused, and the other giving another against a different accused. In what manner should the Court of Session proceed when taking cognisance of the offence is the subject matter of debate in this appeal. Added thereto is the quest for fairness of trial and avoidance of prejudice to the accused."

For dealing with the aforesaid legal point a brief sketch of the facts has to be stated. The backdrop of the murder (the subject matter of this case) is the following: The name of the person murdered in this case is Om Prakash. His father Harpat and appellant's father Bagravat were primogenitors of the two different families which engaged in annihilating each other. In 1972 the said Harpat was murdered for which Bagravat (father of appellant) was, indicted by the police, and in 1978 Bagravat was murdered for which Harpat's son Manphool was challaned by the police. Normally the retaliating cycle should have completed one circle of its rotation, but it seems to have continued to rotate.

On the afternoon of 11.1.1983 Om Prakash son of Harpat was shot dead at the bus stand of Bhuna (Fathehabad). He was removed in the injured condition to the hospital by his nephew (PW-4 Jagdish) and his uncle (PW-5 Laxmi Narain). The doctor (PW-1) examined him and pronounced him dead. PW-4 Jagdish then proceeded to the police station and lodged the complaint accusing the present appellant Balbir and his brother Rajinder as the persons who shot the deceased. The police registered FIR on the strength of that complaint against the above two persons as accused. PW-7 Assistant Sub-Inspector of Police held the inquest on the dead body of Om Prakash on the same day.

During the investigation conducted by sub-inspector Ganga Ram a Volte-face happened when appellant was found to be not the culprit and instead one 19 year old youngster Guria son of Kirpa Ram was discovered to have shot at the deceased. The said Guria was arrested on 28.1.1983 and on the strength of a statement elicited from him a country made pistol, a used cartridge and a Jive cartridge were recovered from beneath the heap of fodder grain stalked in his house. Guria was finally charge-sheeted by the police and eventually that case was committed to the Court of Sessions, PW-4 Jagdish complained to the Superintendent of Police that the investigation was not directed into the allegation against the appellant and his brother. As he did not get any response he filed a complaint before the magistrate on the allegation that the real culprits of Om Prakash's murder were the appellant and his brother Rajinder, and that the police investigation was totally misdirected at the influence of the real culprits. The magistrate, on receipt of the complaint, proceeded therewith and eventually committed that case also to the Court of Sessions.

The trial against Guria was conducted as Sessions Case No. 7 of 1985 before the court of Additional Sessions Judge (Sri BL Gultai). The trial against the appellant and his brother was held before the

same Court as the Sessions Case No. 54 of 1985. The aforesaid Sessions Judge pronounced separate judgments in both cases on 4.11.1985, acquitting Guria and convicting the appellant under Section 302, IPC (appellant's brother Rajinder was, however, acquitted). No appeal was filed against the acquittal of Guria, and hence the Division Bench of the Punjab and Haryana High Court heard the appeal filed by the appellant alone. The Bench confirmed the conviction and sentence passed on him and dismissed his appeal. Hence, the present appeal by Special Leave.

The first point sought to be considered is whether the two session's cases should have been tried separately (as is done in the present case) or whether they should have been jointly tried. No doubt, it is too late in the day for the appellant to raise a contention that the procedure of the trial should have been different from the one which was followed in this case. Approval of that contention, at this state, whole cause the switch board to be turned fifteen years backwards for a new trial.

It must be pointed out that when the trial in the case began before the Sessions Court the appellant did not make any contention that a joint trial of both cases must be ordered. Having not done so he cannot raise such a contention on that score at any later stage.

Shri D.D. Thakur, leaned senior counsel who argued for the appellants pointed out that appellant and his brother Rajinder were in fact arrayed initially along with Guria in Sessions Case No, 7 of 1985 pursuant to an order passed by the trial court under Section 319 of the Code of Criminal Procedure (for short `the Code'). But later, the appellant and his brother were delinked from that case in order to facilitate the trial in SC 54 of 1985. Appellant did raise objections at that stage and on its basis learned senior counsel contended that such objections should be treated as the objection taken up at the earliest stage. Be that as it may, we would consider whether the procedure adopted by the trial court is proper, if not whether it had resulted in miscarriage of justice.

According to Shri D.D. Thakur the case against the appellant and the case against Guria should have been consolidated together for a joint trial. He made on endeavour to show that two cases in respect of the murder of one person could be brought within the ambit of Section 223 of the Code (which corresponds to Section 239 of the old Code of 1898). As per that provision, all persons falling under any one of the seven categories enumerated therein can be charged and tried together. Out of those seven categories enumerated in the section we need not even advert to those categories indicated with placitum (b), (c), (d), (e), (f) of the Section as they are not relevant in this context. We would, therefore, extract clauses (a) and

(d) in Section 223 as under:

> "The following persons may be charged and tried together, namely:-
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> (a) persons accused of the same offence committed in the course of the same transaction;
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> (d) persons accused of different offences committed in the course of the same transaction."

In both the aforesaid clauses the primary condition is that persons should have been accused either of the same offence or of different offences "committed in the course of the same transaction". The expression advisedly used is "in the course of the same transaction". That expression is not akin to saying "in respect of the same subject matter" It is pertinent to point out that the same expression is employed in Section 220(1) of the Code also (corresponding to Section 235(1) of the old Code). The meaning of the expression "in the course of the same transaction" used in Section 223 is not materially different from that expression used in Section 223(1). It is so understood by this Court in State of Andhra Pradesh v. Cheemalapati Ganeswara Rao & Anr., [1964] 3 SCR, 297. The following observation in the said judgment is contextually quotable:

> "The series of acts which constitute a transaction must of necessity be connected with one another and if some of them stand out independently, they would not form part the same transaction but would constitute a different transaction or transactions. Therefore, even if the expression "same transaction" alone had been used in S.235 (1) it would have meant a transaction consisting either of a single act or of a series of connected acts. The expression `same transaction' occurring in cls. (a), (c) and (d) of S.239 as well as that occurring in S,235(l) ought to be given the same meaning according to the normal rule of construction of statutes."

For several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is commonality of purpose or design, where there is continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction,"

> But if in one case the accused is alleged to have killed a person without any junction with the accused in the other case, then it cannot be treated as the same offence or even different offences "committed in the course of the same transaction". If such two diametrically opposite versions are put to joint trial the confusion which it can cause in the trial would be incalculable. It would then be a mess and then there would be no scope for a fair trial. Hence the attempt to bring the two cases under the umbrella of Section 223 of the Code has only to be foiled as untenable.
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> In Harjinder Singh v. State of Punjab and Ors., [1985] 1 SCC, 422 a two Judge Bench of this Court has held that clubbing and consolidation of two cases, one instituted on police report and the other instituted on private complaint (when both were triable by the Sessions Court) is impermissible. It was directed that the two cases in such a situation should be tried by the same judge but not consolidated. The following direction was given in that case:
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> "The evidence should be recorded separately in both the cases, one after the other, except to the extent that the witnesses for the prosecution who are common to both the cases must be examined in one case and their evidence be read as evidence in the other. The Sessions Judge should after recording the evidence of the prosecution

> witnesses in one case, withhold his judgment and then proceed to record the evidence of the prosecution in the other case. Thereafter he will proceed to simultaneously dispose of the cases by two separate judgments, taking care mat the judgment in one case is not based on the evidence recorded in the other case,"

Shri D.D. Thakur, learned senior counsel made a plea for reconsideration of the ratio laid down in the aforesaid decision. To meet the said plea we feel it necessary to make a brief reference to the facts of that case. There were 5 deceased who were murdered in that case; police charge-sheeted three accused and the case was committed to the court of sessions. One of the injured filed a private complaint alleging that the murders of 5 persons were committed by 9 persons, including the above 3 accused persons. The details of the occurrence presented in the private complaint were much different from what the police charge-sheet described. The following passage in the judgment shows the reason for disallowing the joint trial as for the aforesaid two cases:

> "We have set out these allegations only for the purpose of showing the nature of the case against the accused in the police challan case. The complaint presents a different picture altogether. The prosecution case as set out in the complaint is at complete variance with that in the police challan. In our judgment, it is not permissible for the Court under Section 223 of the Code to club and consolidate the case on a police challan and the case on a complaint where the prosecution versions in the police challan case and the complaint case are materially different, contradictory and mutually exclusive."

We are afraid, in the present case even that much which was directed in Harjinder Singh's case (supra) cannot be permitted, for, both versions here are diametrically divergent without anything in common except that the murdered person was the same. In such cases the most appropriate procedure to be followed by a Sessions Judge should be the same as followed in the present case, i.e., the two trials were separately conducted one after the other by the same court before the same judge and judgments in both cases were separately pronounced on the same day. No. doubt the Sessions Judge should take care that he would confine his judgment in one case only to the evidence adduced in that particular case. We may add, if more than one Public Prosecutor are available at the same station it is advisable that the Public Prosecutor who prosecuted one case should avoid prosecuting the other case.

Delving into the facts of this case, the trial court and the High Court seem to have been satisfied with the evidence of PW-4 Jagdish and PW-5 Laxmi Narain. It is unfortunate that the two courts did not consider the impact of the non-examination of certain material witnesses in this case. It must be remembered that the case was investigated by officers enjoined by the Code to conduct such investigation and the final report was laid before the court in accordance with the procedure prescribed under the Code itself. If the Sessions Court is to repeal the conclusion arrived at by such investigating agency (which alone conducted the investigation as law conferred on them such responsibility) the prosecution should have examined the investigating officers. With the permission of the court the Public Prosecutor could have put such questions to them as are needed to elicit answers to support the allegation that the investigation had gone away and wrong persons have

been deliberately booked and arrayed at accused.

We make note of the fact that in the police challan three persons (Mange Ram, Hanuman, and Kheru) were cited as eye witnesses to the occurrence. If prosecution had deliberately avoided to examine such important witnesses, the court should have exercised its powers under Section 311 of the Code to know what their version is regarding the occurrence. Evidence of PW-4 and PW-5 could never have been evaluated or appraised without the aid of the evidence of those whom the investigating agency cited as the real eye witnesses. The very approach for considering the truth of the testimony of PW-4 Jagdish and PW5-Laxmi Narain cannot be divorced totally from the broad reality that the statutory investigating agency had found their version unfounded as well as concocted, and in stead the agency found mat the real culprit has Guria.

In this connection another significant feature cannot be gainsaid. In June 1977 Curia's brother was murdered for which Om Prakash's brother Manphool Singh was challaned by the police. The court finally acquitted Manphool Singh before the occurrence in this case. If that be so the possibility of Guria thirsting for the blood of the killers of his brother looms large.

Further again, prosecution in this case did not attempt to prove that appellant had a firearm with him for shooting the deceased except the ipse dixit of PW-4 and PW-5. On the contrary the police version was that a country made pistol, an empty cartridge and a live cartridge were disinterred from the heap of fodder grain stalked in the house of Guria and that recovery was facilitated by the confessional statement elicited from Guria. In this connection, it is important to note that the ballistic expert examined the pellets collected from the body of Om Prakash and found them to have been fired from the said empty cartridge by using said country made pistol, In this case prosecution has deliberately avoided placing evidence relating to the said ballistic tests and thus the court is deprived of the opportunity to examine whether the deceased could possibly have suffered the gunshot injury from a different firearm.

That apart, the incident happened at the bus stand. Prosecution did not cite at least one of the shop-keepers of such a busy area to speak as to what really happened. In this context we may point out that according to the police version the incident was witnessed by three persons (Mange Ram, Hanuman and Kheru), There is no explanation whatsoever for not examining any one of them.

We cannot forget that PW4- Jagdish and PW5- Laxmi Narain belong to the family whose members had much scores to settle with appellant's family. While it may be true that the said enmity could have provided the motive for the murder, it is as well capable of making false implication if PW4 and PW5 did not know at the first instance as to who would have shot Om Prakash.

Thus, to support the police version names of independent witnesses were cited in the challan but to support the private complainant's version we have only the evidence of those who are admittedly ill disposed to the appellant's family. If the police version is the true story then it would be disastrous to convict the appellant for the murder of Om Prakash. The court should have been absolutely certain that the police version was false, fabricated and accentuated by sinister motive in order to dumb a thoroughly innocent teenager (Guria) to the very serious criminal charge of murder. At any

rate, the court should have been absolutely certain that the police officials and the real culprits have entered into a criminal conspiracy to rescue the real murderer. Unless the court reaches such a degree of satisfaction a criminal court cannot afford to conclude that the prosecution instituted on private complaint has succeeded in proving beyond all reasonable doubt that it was this accused who had committed the murder of Om Prakash.

For the aforesaid reasons we decline to confirm the conviction passed on the appellant. We allow this appeal and set aside the judgment under challenge. We acquit the appellant and order that the bail-bond executed by him will stand cancelled.