Bhubneshwar Mandal And Ors. vs The State Of Bihar on 6 December, 1972

Equivalent citations: AIR1973SC399, 1973CRILJ337, (1973)1SCC303, AIR 1973 SUPREME COURT 399, 1973 (1) SCC 303, 1973 SCC(CRI) 323, 1973 SCD 253, 1973 PATLJR 260

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Bench: A. Alagiriswami

JUDGMENT

A. Alagiriswami, J.

1. This is an appeal by special leave against the judgment of the High Court of Patna which allowed an appeal against the acquittal of the appellants and convicted them to life imprisonment for an offence under Section 302 read with Section 149 of the Indian Penal Code.

2. Nineteen persons were committed by the Munsif Magistrate of Banka, District Bhagalpur to take their trial before the Sessions Court of offences under Section 148 and Section 302 read with Section 149 of the Indian Penal Code. One of them, Jyotish Mandal was murdered before the Sessions trial. The other 18 were acquitted by the learned Sessions Judge of Bhagalpur. On an appeal by the State against this acquittal the four appellants were sentenced as above mentioned;

3. It appears to us that the learned Judges of the High Court have ignored very important points in the evidence in the case and allowed the appeal against acquittal and convicted the present appellants. It is not necessary to set out at great length the various decisions regarding the powers of the High Court in an appeal against acquittal. The classic statement is found in the decision of the Privy Council in Sheo Swarup v. King Emperor to the following effect:

> Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; the right of

> the accused to the bene fit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.
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> In Sanwat Singh v. State of Rajasthan Rao, J. (as he then was) reviewed all decisions rendered by this Court on this subject and expressed the conclusions that can be drawn from those decisions about the powers of the High Court in an appeal against acquittal in the following words:
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> (1) an appellate court has full powers to review the evidence upon which the order of acquittal is founded: (2) the principles laid down in Sheo Swarup's case, afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" art not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its owr conclusion; but in doing so it should no; only consider every matter on record having a bearing on the question : fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion or those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified.

4. We do not consider it necessary to refer to all the later decisions on this subject except the latest one in State of Uttar Pradesh v. Samman Dass Cri. A. No. 17 of 1971 D/- 11-1-1972 : to the following effect:

> This Court in an appeal under Article 136 of the Constitution does not normally re-appraise the evidence and interfere with the assessment of that evidence by the High Court. Where, however, this Court finds that grave injustice has been done by the High Court in interfering with the decision of the trial court on grounds which are plainly untenable and the view taken by the High Court is clearly unreasonable on the evidence on record, this Court would not stay its hand. There are, however, certain cardinal rules which have always to be kept in view in appeals against acquittal. Firstly, there is a presumption of innocence in favour of the accused which has to be kept in mind, especially when the accused has been acquitted by the court: below; secondly, if two views of the matter are possible, a view favourable to the accused should be taken; thirdly; in case of acquittal by the trial Judge, the appellate court should take into account the fact that the trial Judge had the advantage of looking at the demean our of witnesses; and fourthly, the act caused is entitled to the benefit of doubt The doubt should, however, be reason able and as observed recently by this Court, the doubt should be such which rational thinking men will reasonably honestly and conscientiously entertain and not the doubt of a timid mind which fights shy though unwittingly it may be or is "afraid of the logical con sequences, if that benefit was not given. To put it differently, it is "not the doult of a vacillating mind that has

not themoral courage to decide but shelters it self in a vain and ideal scepticism.

5. Let us now consider the case on hand. On 13-7-65, Ram Prasad Mandal and Dasrath Mandal had gone to Sambhuganj in order to collect the "salary of Dasrath Mandal. P.W. 2, Bhagwan Mandal was also: alleged to have accompanied them. Their brother, Sheonandan Mandajl, P.W. 1, lodged a complaint at 2 a.m. on 14-7-65 at the Sambhuganj police station to the following effect: His brothers and Bhubneshwar Mandal did not return even after one hour of night fall, he and his relations Davendra Mandal and Mahendra Mandarand Bibekanand Mandal were waiting for them in their 'bathan'. At about. 8.30 p. m. he heard a hulla in the 'Bahiyar' in the western side "Dauro ho jangailo" twice and recognised the voice to be that of his brother Ram Prasad Mandal. He then took a torch, lathi, bhala and along with Davendra Mandal and Bibekanand Mandal and Ambika Mandal ran towards west raising hulla. When they had gone to a distance of 500 yards they saw the four appellants, the deceased Jyotish Mandal, and four others namely. Rameshwar Mandal, Khokhai Mandal, Chamaklal Mandal and Anup Mandal fleeing away, and the weapons in the hands of these persons. He and his companions identified all the accused persons already mentioned and there were 4 or 5 more persons who could not be identified. He proceeded westwards and at some distance saw his two brothers, Ram Prasad Mandal and Dasrath Mandal lying down besmeared with blood. He then started searching for Bhagwan Mandal and the villagers of Karharia, who had collected there, told him that Bhagwan Mandal had reached their village and was not injured. Later on, a constable and a chowkidar came to the place of occurrence and he proceeded to village Karharia and met Bhagwan Mandal. Bhagwan Mandal informed him that when they were returning home some 14 or 15 persons were concealing by the side of the 'adda' and as soon as they reached near the place these persons surrounded all the three of them. He said he identified the deceased Jyotish Mandal and the four appellants and that he himself escaped and became senseless and fell down in the house of a ha jam and told everything to the people collected there. In the F.I.R. it, has also been stated that the appellant Bhubneshwar Mandal and the deceased Jyotish Mandal had enmity with the brother of the informant and they were always in search of an opportunity to kill him. In the election of the Mukhia of the Gram Panchayat, his brother had worked against Bhubneshwar Mandal. There was also a dispute with Bhagwan Mandal for land.

6. The defence of the accused was that Gaibi Mandal, father of Jyotish Mandal (who was himself murdered after the committal and before the Sessions trial) had been murdered in the month of January 1965 and in that case the two deceased persons, Ram Prasad Mandal and Dasrath Mandal as also P.W. 3 Mahendra Mandal, and P.W. 4 Ambika Mandal were standing their trial for that murder. Some of the accused persons in this case, including two of the appellants Jagdish Mandal and Bhubneshwar Mandal were the prosecution witnesses in the Gaibi murder case and they have, therefore, been falsely implicated by the informant, the brother of Ram Prasad Mandal and Dasrath Mandal. They were not related to Jyotish Mandal (deceased) and were not interested in taking revenge for the murder of Gaibi Mandal and kill the accused Ram Prasad Mandal and Dasrath Mandal.

7. Gaibi Mandal was murdered in January 1965. The two deceased in this case as also P.Ws. 3 and 4 were accused in that murder case and that case was pending when this murder took place. Jyotish Mandal, son of Gaibi Mandal who was the complainant in that murder case was himself murdered

after the committal proceedings and before the Sessions trial in this case. In the Gaibi Mandal murder case two of the appellants Jagdish Mandal and Bhubneshwar Mandal and four other accused in the case, Jamun Hajra, Bhupat Hajra, Guni Paswan and Rameshwar Mandal were prosecution witnesses. Accused Khakhru Mandal and Chamakr Lal Mandal are the brothers and Khokhai Mandal is the father of Shyam Sundar Mandal and accused Rambilas Mandal and Ramdeck Mandal and Charendra Mandal are uncle and nephew. Incidentally Chamaklal Mandal is covered by an alibi in this case on the evidence given by P.W. 9. Binode Mandal and others are said to have canvassed against P.W. 22, for whom Ram Prasad Mandal (deceased) and his family members were working in the election of Mukhia. This enumeration of the series of given tragedies in this case and how the accused are arrayed is a sufficient background to the case.

8. Coming now to the prosecution witnesses 1, 3, 6 and 10 are members of the family of the deceased. P.W. 11 is their Gotia. P.W. 2 does not seem to be an independent or dis-interested witness. That he was not a disinterested witness is also seen from the fact that Bhubneshwar Mandal and, Eknath Mandal are according to him, said to have talked with him about a compromise of the proceedings under Section 144 Cr.P.C. when he had gone to Sambhugani to show the 'Kobala' etc. to the Sub-Inspector in the case under Section 144 Cr.P.C. Even in the F.I.R. P.W. 1 had stated that P.W. 2 had disputes with the accused regarding land. There were proceedings under Section 144 Cr.P.C. between him and Eknath Mandal and also enmity between them. Kamini Devi, whose name finds a place in the records, is apparently one on whose behalf Eknath was fighting. That Bhagwan Mandal has been used in this case to bolster up the prosecution case is obvious from the fact that while according to P.W. 1, Bhagwan Mandal used to accompany Ram Prasad Mandal to Sambhugani on previous occasions, Bhagwan Mandal himself stated that he never went to Sambhugani with Ram Prasad Mandal and Dasrath Mandal prior to this.

9. According to P.W. 2, he saw the four appellants, the deceased Jyotish Mandal and five of the other accused. He has also given the names of weapons in their hands. According to one version given by P.W. 2 all the three of them, himself and the two deceased, were surrounded and he escaped. According to another version he sat down to urinate and the other two who had gone ahead were surrounded and he ran away. It is difficult to imagine that if he ran away and went to the village of Karharia he would have fallen down unconscious or that it would have taken him so long to regain consciousness. He is even said to have informed the villagers that the two deceased persons were in danger. There was nothing to prevent him from going, to the police station and reporting what he had seen.

10. As P.W. 1 claims to have seen some of the accused armed with weapons and fleeing away he could have straightway gone to the police station. He need not have gone in search of P.W. 2 and lodged a report after hearing from him what had happened. Between the time of P.W. 2 fleeing away after the two deceased persons were surrounded and P.W. 1 hearing the hulla and rushing to the place of occurrence and seeing the accused fleeing away with various weapons in their hands, the interval could not have been very much, if not next to "nothing, because the deceased had been surrounded when P.W. 2 ran away and P.W. 1 claims to have seen the accused 30 or 40 yards away. The murder could not have taken much time and the murderers would not have stayed on the spot for more than the minimum time necessary. It is difficult to understand why 5 1/2 hours passed

between the occurrence at 8.30 p.m. and the F.I.R. at 2 a.m. the next day It is obvious that the story of P.W. 1 going in search of P.W. 2 and lodging the complaint thereafter after an interval of 5 1/2 hours has been put forward not merely to explain the delay, but has been used to rope in as many of his enemies as possible.

11. P.W. 8, Hitlal Paswan, the Chowkidar, heard hulla and saw Bhagwan Mandal lying in the door of Jagiosta. Then he went to Karharia Bahiar. Bhagwan Mandal did not tell him the names of any of the assailants. He also gave evidence that he met the constable and the chowkidar Netlal and also P.W. 1. He, however, did not say that any of these persons named the assailants.

12. P.W. 19, the constable, happened to be in the village of Narahuan on 13-7-65. At about 7.30 p.m. he heard hulla "Bachao, bachao, douro, douro".He made enquiries about the hulla and the villagers told him that there was a function of Gaon Bhandana. Apart from the words he heard being dif ferent from the words alleged to have been heard by the other prosecution witnesses, what he was informed does, not seem to show that anything serious had happened. Indeed his evidence gives the impression that he should have reached the place of occurrence immediately after P.W. 1 and others tell him about the identification of the accused persons fleeing away after the occurrence.

13. According to P.W. 2 there were only 14 or 15 persons in number. P.W. 1 mentioned only 11 names in his complaint though he gave it after meeting P.W. 2 and hearing the story from him. Not all the prosecution witnesses have named all the accused persons. Although P.W. 2 had stated he knew all the accused persons from his childhood except Eknath Mandal, who was known to him for the last two years and that he had seen faces of all the 15 or 16 persons who came out of the 'adda', he had not stated that he identified any of the others, except five of them. Prosecution witnesses 1, 3, 6 and 10, as already mentioned, are the members of the family of the deceased. They claim to have seen the accused persons fleeing from the scene of occurrence. P.W. 1 says P.W. 2 told him which accused had what weapons. P.W. 2 does not say which accused had what weapon. There is the difference between 14 or 15 persons whom P.W. 2 said he saw, and the 11 persons whom . P.W. 1 said he saw, and the 19 persons, claimed to have been recognised by P.Ws. 3, 6 and 10, who were finally implicated in the case. All these persons knew the accused for a long time. All the same P.W. 4 says P.W. 2 said that the appellants and the deceased Jyotish Mandal assaulted the deceased but P.W. 2 does not say so. P.W. 4 recognised five, P.W. 5 recognised 3. P.W. 11 claims that he heard the hulla and then ran there with a torch and saw 19 to 20 persons fleeing away. But he was able to identify only 4 or 5 of the accused, though he knew all of them from his early age. P.W. 13 has stated that he heard the hulla, went to the Karharia Bahiya'r and saw 15 to 20 persons fleeing away, but he could not identify any one.

14. Thus the impression left by the evidence in this case is overwhelming that this is a case where ample time and opportunity has been taken by P.W. 1 and his relatives to lay a plan against all their known enemies on mere suspicion. It is quite obvious that P.Ws. 1, 3, 4, 6 and 10 could not have been at the scene of occurrence. The evidence of P.Ws. 8, 9 and 19, who are all public servants and who were near about the place of occurrence at about the same time and had reached it immediately thereafter, and have not been told about the names of the accused, make it amply clear that P.W. 1 and others could not have seen any of the accused. The contradiction between the evidence of

various witnesses also make this amply clear.

15. In the circumstances merely because the learned Sessions Judge made some serious criticism about the course of the investigation and held that the place of occurrence was not fully established and the investigating officer did not take the sample of blood stained clothes for comparison by the chemical examiner along with the blood stained earth, which he had seized from the alleged place of occurrence, for ascertaining whether the blood found at the place of occurrence was the same as found in the clothes of the deceased persons, the High Court was not justified in allowing appeal against the acquittal.

16. The learned Judges started with the statement that the finding of the learned Sessions Judge regarding the place of occurrence was unwarranted and unreasonable and set aside his finding. They realised that out of the 8 witnesses for the occurrence and identification, four, P.Ws. 1,3, 6 and 10 were from the family of the deceased. They have also placed P.W. 11 in the category of witnesses belonging to the family of the informant, but they thought P. Ws. 2, 4 and 5 did not belong to the family of the informant. But it has to be noted that P.W. 4 is also an accused in the Gaibi murder case. From the difference in the number identified by the various witnesses, while the learned Sessions Judge thought that the evidence of none of them could be given credence, that the evidence of P.W. 1 who had identified 11 accused and that of P. Ws. 3, 6 and 10 who had accompanied him and had claimed to identify 19 accused, should be discarded, the learned Judges of the High Court thought that P. W 2's story that when P.Ws. 1, 4 and 9 came to him he told them how he had escaped when Ram Prasad and Dasrath were being assaulted, had been wrongly rejected. They thought that no enmity has been established between P.W. 2 and the accused and a suggestion had merely been thrown of his being one way or the other connected with the prosecution party and some facts have been overlooked by the Sessions Judge. But in view of the facts we have already mentioned of his being an interested witness and his story of having told about the assault while in the village of Karharia not being corroborated by other witnesses and the totally unacceptable explanation as to why this witness's story for the first time finds a place through the hands of P.W. 1 in the F.I.R. makes it at least unsafe to accept his evidence.

17. As regards the evidence of P.W. 4, who was himself an accused in the Gaibi murder case and had filed a criminal case against accused Rameshwar, the High Court seems to have thought that it could be accepted if it was otherwise found consistent with the evidence of other witnesses and it cannot be a ground for discarding the evidence of P.W. 2 or judging P.W. 4 as a false witness. The High Court is prepared to accept the evidence of P.W. 11 though earlier it had classed him among the family of these witnesses. The High Court seems to have thought that the fact that the informant and some members of his family had reached the place of occurrence soon after finds support from the evidence of P. Ws. 8, 9 and 19. We have already mentioned that the evidence of these witnesses far from lending support to the prosecution case throws considerable doubt against it. The High Court has said that there was no reason to discard the evidence of P.W. I and other prosecution witnesses having gone to the 'bahyiar' and hearing the hulla and having identified the accused armed near the place where the deceased were assaulted. It is only by giving the benefit of doubt that they acquitted the accused other than the appellants. They first acquitted eight of the accused other than the eleven whose names found a place in the first information report. Out of the other 10 accused: six have

been identified by P. Ws. 1 3, 6 and 10 and one of them was governed by an alibi by P.W. 9, and they were, therefore, acquitted. The four appellants were convicted because they had been identified by P. Ws. 2, and 11 and two of them had beer identified by P.W. 5 also They were therefore, convicted by the High Court

18. We have already pointed out how P.W. 2 was not disinterested witness, nor was P.W. 4 he being one of the accused in the Gaibi murder case. We have already discussed the evidence of P. Ws. 5 and 11 and how in the circumstances of this case their evidence also is not acceptable.

19. This case discloses an unfortunate state of affairs. First Gaibi was murdered and then two of the accused in that murder case were murdered. Then one of the accused in the present murder case was murdered. But even so we cannot persuade ourselves to uphold the sentence passed by the High Court on the appellants. There are too many suspicious circumstances in this case. To sum up: The prosecution party has tried to rope in as many as possible in this case. We find it difficult to believe that the P.W. 1 and his family members could have reached the scene of occurrence so soon after the event. If so, they would have straightway gone to the Police Station to lodge the complaint about what had taken place. P. Ws. 8, 9 and 19, who were all public servants, had reached the place of occurrence soon after the event. It is unbelievable they would not have been told about it if the prosecution witnesses had actually seen them. P.W. 2 is not a disinterested witness. It is unbelievable that he would have been unconscious or unconscious for such a long time that P.W. 1 and P.W. 4 went to him and took him to the Police Station. He did not also tell the people of Karharia about the names of any of the accused. He has been made a witness of the events preceding the occurrence only to lend credence to the prosecution story. If he had been a witness, he would also have gone to the Police Station and would have raised a hulla in the village of Karharia to which he ran, The prosecution had ample time and opportunity to manufacture a case against all their enemies. The mutual contradiction among the various prosecution witnesses in respect of the people whom they all knew for a long time and the attempt to identify them, the weapons in the hands of each one of them, the difference between the number given in the F.I.R. and that given by P.W. 2 and other witnesses show an attempt at improving the story from stage to stage.

20. While there can be no doubt that the evidence against the other 14 accused, who had been acquitted, is completely fabricated, there is no doubt that even the evidence against the present appellants would not bear scrutiny. The learned Judges of the High Court have not paid sufficient attention to the background of this case. Once it is realised that P. Ws. 1, 2, 3, 4, 6 and 10 cannot be believed and that they have tried to rope in as many accused as possible the whole prosecution case has to fail, especially because if it were true, P. Ws. 8, 9 and 19, who reached the place of occurrence immediately thereafter, would have been told about it. The evidence of P. Ws. 5 and 11 even if accepted does not improve the prosecution case.

21. We are aware that this Court is considering art appeal under Article 136. Here the High Court has failed to realise the limitations with in which it had to function and the caution that it had to observe in considering an appeal against acquittal. The evidence we have considered above shows that the judgment of the learned Sessions Judge was right. There was no Justification for the High Court to interfere with the order of acquittal passed by the learned Sessions Judge.

22. The appeal is allowed, the appellants are acquitted and the sentence passed on them is set aside. If they are on bail their bail bonds will be cancelled.