Supreme Court of India
Banwari Ram Ors vs State Of Up on 10 December, 1997
Author: Pattanaik
Bench: G.T. Nanavati, G.B. Pattanaik

PETITIONER:
BANWARI RAM ORS.

Vs.

RESPONDENT:
STATE OF UP

DATE OF JUDGMENT: 10/12/1997

BENCH:
G.T. NANAVATI, G.B. PATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

WITH CRIMINAL APPEAL NO.579 OF 1980 J U D G M E N T PATTANAIK,J.

These two appeals arise out of the same Sessions Trial being Sessions Trial No. 332 of 1973 in the Court of Vth Additional and District Judge, Varanasi. The appellants are the members of Pradeshik Armed Constabulary belonging to the 5th batallion and their Headquarter was at Ramnagar. An unfortunate and unsavoury incident occurred on account of the decision of the State Government that the Army should take over charge of the armoury and magzines of the Provincial Pradeshik Armed Constabulary throughout Uttar Pradesh. It is on account of the aforesaid direction the forces belonging to the Personnel from taking charge of the armoury and in furtherance of which 12 personnel from taking charge of the Army were killed and 32 were injured. On account of the firing form the Army 4 persons belonging to the Pradeshik Armed Constabulary were killed and some were injured. Ultimately, however, the direction of the State was implemented and the Army took charge of the armoury and other weapons. The incident occurred during the night of 21.5.1973 and continued for a fairly long period till 4.30 p.m. of 22.5.1973. On the basis of First Information Report given on 22nd May, 1973, at 7.30 p.m. a criminal case was instituted and a chargesheet was submitted against 44 accused persons including the appellants in these two appeals under Sections 147, 148, 302/149, 307/149, 324/149, 326/149, 395/397, 120B and 427 IPC and Rule 43(5) of the Defence of India Rules as well as under Sections 6(b) and 7(c) U.P. Pradeshik Armed Constabulary

Act. Accused Banwari Ram, Ram Kirat Yadav, Hira Shanker Singh, Sheo Bahadur Yadav, Lal Babu Singh, Ramayan Singh, Indradeo Ram, Ramashanker Singh, Ram Nath Sharma, Lok Nath Singh and Tara Prasad Tewari were also charge sheeted under Section 409 IPC. The case was committed to the Court of Sessions Judge by the Chief Judicial Magistrate, Varanasi and ultimately the accused persons were tried by the Vth Additional and District Judge, Varanasi.

The prosecution case in nutshell is that the members of the Armed Constabulary formed an Association which was not recognised by the State of U.P. The forces belonging to the Armed Constabulary who had been posted in the Lucknow University Campus became indisciplined and some untoward incidents happened there which compelled the State Government to take a decision to disarm the Armed Constabulary and give charge of the armoury and magzines hitherto under the charge of the Armed Constabulary to the Army in the entire State. When this decision was communicated by the I.G. of Police to the DIG of Police Varanasi range the said DIG had a telephonic talk with the Commissioner Shri A.K. Mustaf as the situation was going out of control and in accordance with the decision taken by the State Government to hand over the arms and ammunitions belonging to the Armed Constabulary to Army the local Administration at Varanasi requested the Army Commandant Lt. Col. S.K. Verma to provide military assistance to take over the charge of the Armed Constabulary Quarter Guard and the Magzine at Ramnagar. The Army personnel discussed the matter with the civillian authorities chalked out a scheme of action and finally a contingent of army was sent to the Armed Constabulary Headquarter at Ramnagar under the leadership of Major C.S. Chima accompanied by a Magistrate First Class. They started the operation at 2.15 a.m. on 22nd May, 1973, and reached at the Try Junction of the road at Rambagh. The Magistrate then proceeded towards the Quarter Guard Building accompanied by the Company Commanders of the Armed Constabulary leaving their vehicles away on the road at a distance of 50 to 60 yards from Quarter Guards on duty there were 40 to 50 persons belonging to the Armed Constabulary and when the Commanders directed those people to hand over charge of the armoury to the Military, the Guards on duty as well as those who were present there became agitated and openly refused to hand over the charge to the Military. Those Guards also openly declared that if anybody proceeds to take over the charge of Quarter Guard then they should be taught a lesson. The Magistrate present there also tried to persuade the members of the Armed Constabulary not a resist Army from taking over the charge inasmuch as it was the decision of the State Government but those persons did not pay any attention to the advise of the Magistrate. These Armed Constabulary personnel seeing that Army is marching towards the Quarter Guard sounded the bugle and then breaking open the locks of the armoury armed themselves to fight out. The Magistrate on duty declared the Assembly of the Armed Constabulary at the Quarter Guard Building as unlawful and ordered their dispersal but instead of dispersing from the place they opened fire from the Quarter Guard Building towards the Military force. The officers of the Military forces marching towards Quarter Guard Building thereupon returned back and Major Cheema, who was the commanding officer of the Army sought for permission of the Magistrate the Army personnel took their position and opened fire and a regular battle started between the personnel of the Armed Constabulary and the Army. The Magistrate then had a telephonic discussion with the District Magistrate and sought for reinforcement of the Army personnel. Lt. Col. S.K. Verma reached the place of incident with the reinforcement of Military personnel accompanied by Major N.N. Jolly. Under the orders of Col. Verma a group lead by Major Jolly started approaching the Quarter Guard Building from one

direction and another group lead by Col. Verma proceeded from another direction. Both the groups faced stiff resistance from the personnel belonging to the Armed Constabulary and ultimately Armed Constabulary personnel surrendered and the Military took over the charge of the armoury in the Quarter Guard Building. As already stated, on the basis of First Information Report lodged on 22.5.1973 at 7.30 p.m. a Criminal case was registered and after necessary investigation charge sheet was filed against 44 persons including the appellants in these two appeals. The learned Additional Sessions Judge Acquitted 9 accused persons of all the charges levelled against them and convicted accused Banwari Ram. Ram Kirat Singh Yadav, Ganesh Prasad, Sheo Bahadur Ram, Hira Shankar Singh, Lok Nath Singh, Rama Shanker Singh, Lal Babu Singh, Ram Nath Sharma, Indradeo Ram and Tara Prasad Tewari of the offence under Sections 302/149,127,148,302/149.427/149 IPC and Rule 43(5) of the Defence of India Rules as well as under Sections 6(b) and 7(c) of the UP Pradeshik Armed Constabulary Act. They were, however, acquitted of the charges under Sections 324/149,326/149,325/149 and 120B IPC. One Chhabinath Singh was convicted only of the offence under Section 7(c) of the UP Pradeshik Armed Constabulary Act and was acquitted of the remaining charges. Accused Bansh Narain Singh, Ghulam Sarvar, Purshottam Singh, Virendra Singh Bhadauria, Indra Ssingh Rai and Kesh Nath Singh were acquitted of the charges under Sections 302/149,307/149,324/149,326/149,395/397 IPC and 120B IPC but were convicted for the offence under Sections 147, 148, 427/149 IPC and 43(5) of the Defence of India Rules and Sections 6(b) and 7(c) of the UP Provincial Armed Constabulary Act. Accused Shambhu Singh, Jagdish Rai, Hira Lal Tripathi, Nand Kumar Yadav, Banshidhar Tripathi, Shamim Ahmad, Markandey Singh, Mushtaq Ahmad, Ram Kewal Singh, Satya Narain Prasad Singh, Anil Kumar Dass, Jagdish Singh Prasad Mishra were convicted under Sections 147,427/149 IPC 43(5) of the Defence of India Rules and 7(c) of the UP Provincial Armed Constabulary Act. They were, however, acquitted of the charges under Sections 148.302/149.307/149.324/149,326/149,395/397 and 120B IPC and Section 6(b) of the UP Provincial Armed Constabulary Act.

19 of the convicted accused persons filed a Criminal Appeal No.2478 of 1976. Accused Banwari Ram and 11 others filed a Criminal Appeal No. 2587 of 1976 challenging their conviction and sentence passed against them. Accused Chhabinath filed a Criminal Appeal No. 2823 of 1976 assailing his conviction under Section 7(c) of the Provincial Armed Constabulary Act. Three of the accused persons Mushtaq Ahmad, Anil Kumar and Jagdish Prasad Mishra did not prefer any appeal and suffered the sentences awarded against them. The State also filed an appeal against total acquittal of the 11 accused persons as already indicated as well as against the acquittal of other persons of different charges. All these appeals were disposed of by a common judgment dated 26th of September, 1979 by the Division Bench of the Allahabad High Court out of which the present two appeals have been preferred.

In Criminal Appeal No.579 of 1980 there are 5 appellants and in Criminal appeal No. 8 of 1980 there were 6 appellant out of whom appellant Banwari Ram and Ganesh Prasad have died during the pendency of the appeal. Thus in all 9 appellants are now before the Court in these two appeals, they being Bans Narain Singh, Shambhu Singh, Satya Narain Prasad, Ramayan Singh, Tara Prasad Tewari, Ram Kirath Singh, Ram Shanker Singh, Lok Nath Singh and Ramnath Sharma. These appellant have assailed their conviction under Sections 303/149.148,307/24 and Section 7(c) of the Provincial Armed Constabulary Act. It may be stated that appellants Bans Narain Singh, Shambhu

Singh and Satya Narain Singh thought were acquitted by the Learned Session Judge of the charge under Sections 303/249,307/149 and 148 IPC but the Government Appeal against their acquittal having been allowed by the High Court of the charges under Sections 302/149,307/149 and 148 IPC. Before this Court two sets of arguments had been advanced by the learned counsel for the appellants in the two appeals. So far as the order of acquittal passed by the Sessions Judge having been set aside and 3 of the appellants, as already stated, having been convicted, it was urged that the High Court committed serious error in not adverting to the reasons advanced by the Sessions Judge in passing an order of acquittal and no reasons having been indicated for setting aside the order or acquittal the impugned order of conviction, so far as those appellants are concerned, is on the face of it erroneous and cannot be sustained. The arguments so far as the appellants whose conviction and sentence has been passed by the learned Sessions Judge and affirmed by the High Court is that the prosecution case must be held not to be proved beyond reasonable doubt, inasmuch as in respect of the 12 Army personnel found dead neither there has been any inquest nor there has been any postmortem report and consequently the fact that homicidal death occurred has not been established. Further argument advanced was that even if it is held that the prosecution has been able to establish the 12 persons belonging to the Army forces died but there is no evidence to indicate that their death occurred on account of the shooting from the appellants' and, therefore, the conviction of the appellants of the charge under Section 302/149 cannot be sustained. It was also contended that so far as appellant Shambhu Singh is concerned, on the admitted prosecution case that he was not there at the Quarter Guard when the firing started and came at a later stage he cannot be held to be a member of the unlawful assembly nor he can be held to be shared a common object particularly when the prosecution evidence is totally silent with regard to the overt Act by the said Shambhu Singh.

So far as the contention that order of acquittal passed by the Sessions Judge has been reversed by the High Court without considering the reasons advanced by the learned Sessions Judge in support of the order of acquittal, we do not ind any force with the same. It is now too well settled that under the Criminal Procedure Code there is no difference so far as the power of the Appellate Court is concerned to deal with an appeal from a conviction and that from an appeal against an order of acquittal excepting that an appeal against a conviction is as of right and lies to Courts of different jurisdictions depending on the nature of sentence and kind of trial and the Court in which the trial was held, whereas an appeal against an order of acquittal can be made only to the High Court with the leave of the Court. The procedure for dealing with two kinds of appeals is identical and the powers of the Appellate Court in disposing of the appeals are in essence the same. The High Court, therefore, has full powers while hearing an appeal against an order of acquittal, to re-appreciate the evidence and to come to a conclusion whether the order of acquittal passed by the Sessions Judge was per se bad or not. If, however, on the evidence two views are reasonably possible, one supporting acquittal and the other indicating conviction then the High Court would not be justified in interfering with an order of acquittal merely because it takes the view that it would have taken the other view sitting as a Trial Court. It would, therefore, be correct to state that the High Court while reversing an order of acquittal must apply its mind to the reasons given by the Trial Court and find out whether such reasons are at all sustainable or not. But on examining the reasons advanced by the Trial Court as well as on re-appreciating the evidence on record if the High Court is satisfied that the Appreciation of evidence made by the Trial Court is per se bad then there would be no limitation

on the power of the High Court to set aside an order of acquittal. If the impugned judgment of the High Court setting aside the acquittal of some of the accused persons by the learned Sessions Judge and convicting them under Section 302/149 IPC is examined from the aforesaid stand point we really do not find any infirmity with the same. The High Court has indicated the fallacy of the reasonings advanced by the learned Sessions Judge in acquitting some of the accused persons by holding that "the Trial Court having held those accused persons were members of an unlawful assembly, they could not be exonerated under Section 302/149 and 307/149." On analysis of the evidence the High Court has come to the conclusion that those accused persons became the members of an unlawful assembly and had seen some of the members of that assembly had equipped themselves with rifles and have been indiscriminately using them against the Army Jawans. Some of the accused persons in fact were injured which establishes the fact of their being present at the place of occurrence and their presence is also otherwise established through the oral testimony of more than two prosecution witnesses. Once it is held that they were also members of unlawful assembly they will be liable for the unlawful activities of the members of the said assembly, even if they might not have actually fired the guns. On the materials on record the High Court has come to the conclusion that not only the persons concerned were members of unlawful assembly but also their presence at the spot constituted sufficient encouragement for other members of the said assembly who indiscriminately started firing at the Army jawans. It is well settled that if offence is committed by some members of an unlawful assembly then the other members of the assembly are also liable for the offence under Section 149 of the Indian Penal Code. We have also carefully scrutinised the judgment of the learned Sessions Judge as well as that of the High Court and we are of the considered opinion that the High Court was wholly justified in reversing an order of acquittal passed by the learned Sessions Judge and we do not find any error of law therein.

Coming now to the arguments advanced on behalf of those accused persons whose conviction and sentence passed by the learned Sessions Judge have been upheld in an appeal, it appears to us that the High Court while hearing an appeal against the judgment of the learned Sessions Judge has fully re-appreciated the evidence and has affirmed the conclusion arrived at by the learned Sessions Judge by applying the test of identification by two or more of the prosecution witnesses and also by examining the duty chart of the accused persons which indicates persons who were present at the relevant point of time at the Quarter Guard duty. The arguments of the learned counsel appearing on behalf of the appellants that in the absence of any inquest or post mortem in respect of the deceased Army personnel it has to be held that the prosecution case has not been proved beyond reasonable doubt is an argument which is merely to be mentioned for being rejected. The prosecution evidence unequivocally establishes the fact that the accused persons belonging to the Provincial Constabulary started indiscriminately firing at the Army jawans who had been called upon to take charge of the armoury. On account of such indiscriminate firing by the members of the Provincial Constabulary 12 persons belonging to the Army died whose dead bodies were recovered from the spot itself and the necessary death certificates had been issued by the Medical authority. In such an event non holding of any post mortem examination is immaterial and the contention of the learned counsel appearing for the appellants that the prosecution failed on that score is wholly unsustainable in law and we have, therefore, no hesitation to reject the same. The further argument that the prosecution evidence is not categorical to the face that the death of the Army jawans occurred on account of firing by the appellants is equally unsustainable in view of the charge under

Section 302 read with 149 IPC and in view of the findings that the accused appellants together with several others belonging to the Provincial Armed Constabulary formed an unlawful assembly and in resisting the Army jawans from taking charge of the Armoury and the Quarter Guard indiscriminately fired at them. We have also examined the evidence on record and the conclusion is irresistible that the prosecution case that accused appellants being members of an unlawful assembly indiscriminately started firing at the Army jawans which resulted in the death oaf 12 Army personnel has been proved beyond reasonable doubt, and as such, the High Curt has rightly convicted them under Section 302/149 IPC. We have also considered the argument specifically advanced on behalf of the appellant Shambhu Singh to the effect that Shambhu Singh was not there at the Quarter Guard when the firing started and he came at a later stage and as such cannot beheld to be a member of an unlawful assembly but we do not find any substance in the same.

PW 3 Vishwa Nath Pandey was the senior most Company Commanders in respect of 9 companies constituting the 5th Batallion. He had gone to the place of occurrence several times both in the beginning of the incident as well as after the arrival of the Armed forces and marched with them towards the Quarter Guard. According to him he could see and recognise from amongst the Provincial Constabularies who became unlawful and started firing at Armed jawans, 12 persons including head constable Shambhu Singh. He further indicated that he had seen all of them at the Quarter Guard and 10 of them were firing. In view of the aforesaid positive evidence of PW3 the senior most Company Commander which has been accepted by the two Courts below it is difficult for us to sustain the argument advanced by the learned counsel for the appellant Shambhu Singh that he was not a member of the unlawful assembly from the beginning and even at later point of time he has not done anything so as to convict him by taking recourse to Section 149 IPC. We, therefore, reject the said submission advanced by the learned counsel for Shambhu Singh. Though normally this Court does not re-appreciated and held the evidence reliable, but in view of the fact that large number of appellants were involved and incident itself occurred in a very peculiar situation we have also ourselves scrutinised the evidence and we find the evidence to be reliable and trustworthy and the learned Sessions Judge as well as the High Court rightly relied upon the said testimony in basing conviction against the accused appellants. We do not find any legal infirmity with the conviction and sentence passed by the High Court against the appellants and in our considered opinion prosecution has proved the charges against the accused persons beyond reasonable doubt. In the premises aforesaid both the Criminal appeals are dismissed.

Those accused persons who are on bail their bail bonds stand cancelled and they are directed to surrender to serve the sentences.