

KAILASH NATH

v.

STATE OF U.P.

(Criminal Appeal No. 1416 of 2008)

DECEMBER 10, 2009*

[HARJIT SINGH BEDI AND J.M. PANCHAL, JJ.]

Penal Code, 1860:

ss. 302/149 and 307/149 – Eight persons involved in causing death of one of the victims and injuring the other by gunshots – Conviction by trial court – High Court convicting only one accused who fired the shots and acquitting others giving them benefit of doubt – Plea that since the High Court itself had opined false implication of other persons who had not caused injuries, accused should also be acquitted – HELD: Merely because some of the accused who had not caused any injuries to the deceased or the witnesses have been given benefit of doubt would not mean that they were not present – It is only as a matter of abundant caution that the benefit has been given to them – Further, the manner and time of attack indicate that it could not be made by one or two persons – In any case, the High Court has, by way of abundant caution, given the benefit of doubt to those who had not caused any injury, but the appellant who is stated to have caused gun shot wounds to the deceased and to PW-1 cannot be treated in the same manner – PW-1, the injured witness is also the wife of the deceased – She gave a long description of the incident and despite her cross-examination she stood by story of shots fired by appellant – Statement of PW-5, the scribe of FIR, who had been sleeping on the ground floor of the house a very short distance away, also merits acceptance – Besides, the time and place of incident and the weapon used have not been controverted by the defence – Even

* Jud Recd. on 22.4.2010

A *otherwise, medical evidence clearly supports the prosecution version – As regards motive, the evidence reveals the extent of animosity between the parties with murders and counter murders and litigations going back to the 1960s – Further, in a case of direct evidence, any uncertainty as to the motive*
B *could not be said to be fatal to the prosecution story – Appeal dismissed – Criminal Law – Motive. [Para 5,8,9 and 11]*

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 1416 of 2008.

C From the Judgment & Order dated 24.8.2007 of the High Court of Judicature at Allahabad Lucknow Bench, Lucknow in Criminal Appeal No. 628 of 1981.

D K.V. Vishwanathan, Rishad Murtaza, M. Shoeb Alam, Anup Kumar, Neha, Abhishek, M. Sahu, B. Sunita Rao for the Appellant.

E Ratnakar Dash, Shail Kumar Dwivedi, Manoj Dwivedi, Gunnam Venkateswara Rao, Vandana Mishra for the Respondent.

The following Order of the Court was delivered

ORDER

F 1. The prosecution story is as under:-

G 1.1. Chhoti - P.W. 1, the complainant in the case was earlier married to Kallu Singh of village Tendwar, P.S. Maholi, District Sitapur and had three sons from him namely, Virendra, Surendra and Mahendra. Kallu Singh aforesaid had an uncle named Ram Singh and Ram Singh had a son named Lallu Singh. Kallu Singh owned a house in village Tendwar. A short distance therefrom was the residential house of Vikram Singh -P.W. 5 nephew of Kallu Singh. Kallu Singh aforesaid was murdered about 12 years before the date of the present incident
H and as per the prosecution story a partition had been effected

between Kallu Singh and Lallu Singh with regard to the mango grove in Khasra No. 165 which jointly belonged to them. The story further goes that Lallu Singh sold his portion of the grove to Kailash, the appellant herein, in the year 1970 as he was living with him at that time. It also appears that Lallu Singh did not pay any amount to Chhoti or the sons of Kallu Singh though they claimed a share in this property as well. It further appears that two years after the murder of Kallu Singh, Chhoti - P.W. started living with Deep Singh in her house as her second husband and it was Deep Singh who continued to look after the properties of Kallu Singh and his sons born from Chhoti. Deep Singh, who also happened to be a distant cousin of Kallu Singh, had two brothers Vikram Singh and Lakhan Singh. In the year 1976, Kallu Singh's sons from Chhoti i.e. Virender, Surender and Mahender had filed a suit claiming the land covered by Khasra No. 165 which Lallu Singh had sold to Kailash Nath appellant and it was Deep Singh who had pursued the matter in court on behalf of the plaintiffs. A few days before the incident negotiations took place between the appellant and Lallu Singh about the proposed sale of yet another mango grove covered by Khasra No. 243 in which Kallu Singh's family also claimed a share. Deep Singh, on receiving this information, and in deep consternation went to the appellant and protested against the proposed sale. This fact annoyed the appellant and he told Deep Singh that he would one day kill him as he had been an obstacle in all his transactions. It appears that this latest incident was the fall out of some earlier incidents where the parties had quarrelled over property or other matters and Deep Singh in fact had moved applications before the DIG and the Superintendent of Police apprehending danger from Kailash and his associates.

1.2. At about 1:00a.m. on the 17th June, 1980, Deep Singh and Chhoti were sleeping on the roof of the Baithak in their house in village Tendwar on one cot, on which a quilt had been spread out. A lantern was also kept burning on the railing of the roof of the baithak. Kallu Singh's sons Virender and

- A Surrender were sleeping on their cots in a part of the baithak adjoining the main residential house whereas the other ladies of the family were sleeping inside and Vikram Singh in his home a short distance away, Chhoti was, however, rudely awakened on hearing the sound of a gun shot and she saw Deep Singh
- B lying besides her with a gun shot injury and bleeding profusely. She immediately got up and noticed that accused Balwant Singh (since dead) was present near the cot and re-loading his weapon whereas Kailash Nath, Rampal and five others were standing close by. Chhoti, thereupon, fell to her knees and
- C pleaded with the appellant not to harm her husband but he nevertheless fired a shot killing him at the spot and also caused injuries to Chhoti. The noise which came about attracted P.W.'s 4 and 5 to the place of incident on which the accused ran away but before they did so they were identified by the witnesses in the light of the torch which they were carrying. Vikram, P.W.
- D thereupon wrote (on the dictation of Chhoti) a report Exhibit Ka-1 at about 5:00a.m. and reached the Police Station, Maholi at about 7:15a.m. on which a formal FIR was lodged at that time. After recording the FIR, Kesho Prasad Rai, P.W. 8, Inspector
- E of Police and the SHO, reached the place of incident and sent Chhoti for her medical examination to the Primary Health Centre, Maholi. He also made the necessary spot investigation, recovered one spent .12 bore cartridge, a blood stained lathi, a blood stained quilt and also a portion of the blood stained
- F cot, which were duly sealed and deposited in the Malkhana in the police station. Dr. Habib Ahmad, P.W. 3, also examined Chhoti at 10:30 a.m. on the 17 th June, 1980 and detected 2 gun shot injuries with blackening and charring thereon and on an x-ray examination found some pellets embedded in her body as well. On the completion of the investigation, all the accused,
- G 8 in number, were charged for offences punishable under Sections 302/147/148/149 of the IPC. It appears that accused Balwant died before commencement of the trial. The trial was, accordingly, held with respect to the remaining 7 accused, who were convicted for offences punishable under Sections 302/149
- H of the IPC and sentenced to life imprisonment and under

Section 307/149 IPC to three years rigorous imprisonment. An appeal was thereafter filed in the High Court. During its pendency, appellant Ratnu also died. The High Court went into the matter with respect to five of the appellants and observed that as four out of them had caused no injuries to the deceased and as there was a long history of animosity between the parties it could be a case of false implication of some of them. The High Court, accordingly, gave the benefit of doubt to four but dismissed the appeal of the appellant herein, Kailash Nath, who is now the only person left in the fray.

2. Mr. K.V. Vishwanathan, the learned senior counsel for the appellant has raised three basic arguments during the course of hearing. He has first pointed out that in the light of the fact that Chhoti P.W. 1 had not seen the shot being fired by Balwant as she had been asleep at that time and had woken up in alarm and seen that Deep Singh had already been injured and as only one injury had been suffered by the deceased as per the prosecution, the story of a second shot by the appellant was not believable. Elaborating this argument, Mr. Vishwanathan has pointed out that the fact whether one shot or two shots had been fired had to be determined from the pellet holes in the clothes that the deceased and the injured had been wearing but as the clothes had not been taken into possession, a presumption should be drawn against the prosecution and it must be held that one and not two shots had been fired which would clear the appellant. It has also been pleaded that there appeared to be no apparent motive for the incident and the suggestion with regard to the animosity on account of the various land transactions etc. which had been spelt out by the prosecution, had been found by the High Court to be unacceptable and the High Court had accepted the story given in Ex Ka. 5 to K. 7. He has also pointed out that as the complaints allegedly made by Deep Singh long before his death that he apprehended danger at the hands of the appellant and his associates had seen the light of the day for the first time in court, their veracity was doubtful. It has finally been pleaded by

A Mr. Vishwanathan that animosity between the parties was admitted and in the light of the observations of the High Court, the appellant too was entitled to the benefit of doubt which had been given to the other accused.

B 3. Mr. Ratnakar Dash, the learned senior counsel representing the State of Uttar Pradesh has, however, controverted the arguments raised by Mr. Vishwanathan. He has pointed out that though the motive had been proved beyond doubt but in the face of the direct evidence in the person of
 C Chhoti, P.W. 1 who was also an injured eye witness, the absence of motive would have no effect on the prosecution story. He has pleaded in elaboration that the place of incident, the time of the incident and the weapons used in the crime have not been disputed by the defence and in the light of the fact that the FIR had been recorded by 7:15a.m. at the Police
 D Station which was situated 12 miles away from the place of the incident, supported the prosecution story in its entirety. He has also pointed out that as per the doctor's evidence the injuries had been caused with a shotgun.

E 4. We have heard the learned counsel for the parties at great length and gone through the record very carefully.

F 5. It would be relevant that Chhoti, P.W. 1, is an injured witness. She is also the wife of the deceased. We see from the record that in the course of her extensive cross examination
 G Chhoti was not in any way, fazed. She gave a long description of the incident and despite her cross-examination she stood by the story of the shot fired by the appellant. We also observe that the time and place of incident and the weapon used have not been controverted by the defence. Even otherwise, we
 H notice that the medical evidence clearly supports the prosecution version. Dr. M.M. Gupta - P.W. 6 found the following injuries on the dead body:

H "1. Injury No. 1 firearm entry wound 8cms from up to downward X 5cms side to side on the head towards front

side of forehead in the central line above the root of the nose. Around this injury up to the neck in the area of 29 cms up to down and 18 cms side to side blackening signs and tatoeing were present. A

2. Fire arm exit wound measuring 2cms X 2cms on the head 7 cms above the ear 11 cms above the outer portion of the eye brow and on the backside. B

On dissection I found that frontal bone had got fractured below the injury No. 1 in which a hole measuring 5 cms side to side X 4.5 cms upto downward was available. Fracture of size 3 cms X 2.5 cms. Was found in the parietal bone which was apparent below the Injury No. 2. A fracture measuring 9cms. Long X linear was found in parietal bone which was commencing from the entry wound. Fracture in the — — bone measuring 6 cms X linear was available which was radiating from the exist wound. C D

3. Entry shadow of four pellets on the shoulder at deltoid region just below the shoulder lip in the area of 9 cms X 8 cms an size measuring 0.4 cm X 0.4 cm X ski deep. No tattooing or blackening signs were available. The distance of two wounds was 1.5 cms to 1.09 cms. E

4. Abrasion in the area of 2 cms X 0.2 cm. Towards hair backside on the upper portion of the arm 7.5 cms above the tip of the elbow. F

5. Abrasions in the area of 0.5 cm X 0.5 cm. On the left forearm outside portion 6 cms. Below the tip of the elbow.

6. Abrasion in the area of 1 cm XC 0.5 cm on the backside of the left forearm 6.5 cms. above the ankle on the radial side. G

7. On the backside of index finger and left thumb blackening and tatoeing was available in the area of 13 cms X 7.5. cms 3 cms from the ankle. H

A On internal examination I found that upper membranes of
the brain had burst and the brain was in liquid in
connection. From here I found 5 Tiklis and 20 small pellets
and having taken them out, it had been sent to S.P. Sitapur
in sealed condition. About 6 ozs semi-digested food
B material has been found in his abdomen. Excrement had
been filled here and there in the small intestine. Excrement
in the upper portion of the large intestine had been filed
and Readini was lying empty.”

C 6. Injury No. 1 is the wound of entry with charring and
blackening and injury no. 2 of the exit of injury no. 1. Injury Nos.
3-7 appear to be by an independent shot as they are placed
far apart from injury no. 1 which is from point blank range. It is
also clear from the evidence that 12 small pellets and 5 wads
were found embedded in the head of the deceased. Further in
D his cross examination, the Doctor has stated that even injury
Nos. 3,4,5 and 6 could be caused with a fire arm. If that be so,
the spread of the injuries would clearly reveal that not one but
two shots had hit Deep Singh as he lay on the bed. The
statement of the doctor also reveals the presence of two gun
E shot injuries on the person of Chhoti and after a radiological
examination radio opaque shadows were seen on her person
confirming the prosecution story that these too had been
caused by a shot gun.

F 7. The fact that the incident happened on the roof of the
baithak is also borne out from the statement of the Investigating
Officer, P.W. 8, Kesha Prasad Rai. He deposed that on
reaching the place of incident he had picked up an empty
cartridge, various weapons and other items already referred to
above from near the dead body on the roof itself. As a matter
G of fact the defence has not challenged the fact that incident had
happened in the house but it has been argued that the injuries
had been sustained by Chhoti in the house though not on the
roof. We find no basis for this suggestion which needs to be
H rejected straightaway.

8. We are also of the opinion that statement of P.W. 5 Vikram Singh, the scribe of the FIR, also merits acceptance. Undoubtedly he had not been injured but it has come in evidence that he had been sleeping on the ground floor of his house a very short distance away.

9. Mr. Vishwanathan has, however, dwelt very extensively on the lack of motive and on the contrary the motive for false implication. He has pointed out that there was no categorical evidence to show (apart from the mere ipse dixit of the Pws') that the relations between the parties prior to the incident were strained and on the contrary it appears that some quarrel between the groups had taken place and as the deceased belonged to the opposite group it had been thought proper to sort him out once and for all and Chhoti had been used as a willing tool. It has been pointed out that the High Court itself had not believed the story of the mango groves and had per force fallen back on the documents Ex. Ka, 5 to K. 7 to show motive but as these documents had been produced in the court for the first time during trial, their veracity was clearly in doubt. It is true that the High Court has given a finding showing an absence of motive. The fact, however, remains that de hors these documents the other evidence reveals the extent of animosity between the parties with murders and counter murders and litigations going back to the 1960s. It has also come in evidence that Kallu Singh, the first husband of Chhoti had been murdered and one of the P.W. was Vikram Singh who also testified that on account of various issues there was much animosity between the parties. We are further of the opinion that in a case of direct evidence, any uncertainty as to the motive could not be said to be fatal to the prosecution story.

10. Mr. Vishwanathan has also submitted that as the High Court had itself opined on the possibility of false implication of several persons who had not caused any injuries, the same yard stick should apply to the appellant as well as the evidence against him was much to the same effect.

A 11. It is true that some of the observations made by the High Court do appear to suggest that the prosecution story was not categorical and could have been concocted. We are of the opinion that these observations are way beyond the record and merely because some of the accused who had not caused any

B injuries to the deceased or the witnesses would not mean that they were not present and it is only as a matter of abundant caution that the benefit has been given to those accused. Further, it cannot be ignored that an attack made at dead night in a residential house, where several inmates are present and

C a possibility of a swift counter attack by the inmates cannot be ruled out, the entire incident had to be well arranged and organised and could not be made by one or two persons. It has come in the evidence that Chhoti's house was being used by three of her grown up sons as well. In any case, the High Court

D has, by way of abundant caution, given the benefit of doubt to those who had not caused any injury and on the same yard stick, the appellant who is stated to have caused a gun shot wound to the deceased and to Chhoti P.W., cannot be treated in the same manner.

E 12. We, accordingly, dismiss the appeal.

R.P.

Appeal dismissed.