

State of U.P. Vs. Girja and ors.

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Court : Allahabad

Decided On : May-01-2002

Reported in : 2002CriLJ3582

Judge : J.C. Gupta and ;U.S. Tripathi, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302 and 307

Appeal No. : Government Appeal No. 1714 of 1979

Appellant : State of U.P.

Respondent : Girja and ors.

Advocate for Def. : S.C. Rai, ;A.D. Giri, ;S.B. Singh and ;G.P. Dixit, Advs.

Advocate for Pet/Ap. : A.G.A.

Disposition : Appeal dismissed

Judgement :

U.S. Tripathi, J.

1. This appeal has been preferred by the State of U.P. against the judgment and order dated 28-2-1979 passed by Sri D.R. Singh, the then learned IIIrd Additional Sessions Judge, Ballia in Sessions Trial No. 178 of 1978 acquitting the accused opposite parties of the charges under Section 302 read with Section 34, I.P.C.

2. The prosecution story, briefly stated, was that respondent Girija was the nephew of Ram Adhar (accused died before trial) and accused Subhas Yati is nephew of accused Nandu. All the accused respondents and Ram Adhar were of the same party and were the residents of village Narni Ki Mathia, P.S. Rasra, district Ballia, Sarju Bharti deceased, resident of same village, had initiated a criminal case of theft against Ram Adhar, in which he was convicted and conviction was maintained up to this Court. On account of it Ram Adhar was having enmity with the deceased.

3. Sarju Bharti deceased had his hut (Palani) towards east of his house. On the night of 16/17-3-1978 Sarju Bharti deceased was sleeping in his above hut on a charpai. Besides him, his sons Rajendra Kumar (P.W. 1) and Jitendra were also sleeping on different charpai in the said hut. A lighted lantern was placed in the hut. At about 1.30 a.m. accused Ram Adhar, Girija and Nandu all armed with Gandasa and Subhash Yati armed with 'Dao' came to the said hut and started inflicting injuries upon Sarju Bharti by their respective weapons. Sarju Bharti deceased raised alarm. On his alarm Rajendra Kumar Bharti (P.W. 1) and Virendra woke up and observed accused respondents and Ram Adhar causing injuries on the deceased. They also raised alarm. Hearing their alarm Sakaldeep (P.W. 2), Triveni (P.W. 3) and Kailash rushed to the hut flashing their torches. On reaching near the hut they also saw the occurrence. On challenge the accused respondents and Ram Adhar ran away. The witnesses chased them, but they could not be apprehended.

4. Sarju deceased was taken by Rajendra Kumar (P.W. 1) and others to Government Dispensary Sarai Bharti. The doctor was not available there and therefore, he was taken to Rasra. Rajendra Kumar (P.W. 1) prepared report of the occurrence (Ext. Ka-1) and lodged the same at P.S. Rasra on the same night at 3.05 a.m. Chik F.I.R. (Ext. Ka-2) was prepared by Constable Clerk Izhar Ahmad (P.W. 4), who made an endorsement of the same at G.D. report (Ext. Ka-3) and registered a case against the accused respondents and Ram Adhar under Section 307, I.P.C. and sent the deceased to Government Hospital, Rasra for medical examination.

5. The condition of deceased was serious and therefore, he was referred to District Hospital, Ballia. He was taken to District Hospital, Ballia, where he was medically examined by Dr. A.K. Goswami (P.W. 7) at 5 a.m. on 17-3-1978, who found 7 incised wounds on fore head and right cheek of the deceased and prepared injury report (Ext. Ka-17). He was admitted in the hospital.

6. The investigation of the case was taken up by Sri Madan Gopal Mishra, I.O. (P.W. 6). He came to District Hospital, Ballia, where he interrogated Rajendra Prasad (P.W. 1) and Virendra. The condition of deceased was serious and therefore, he could not be interrogated. The I.O. then reached the spot and interrogated Triveni Bharti (P.W. 3), inspected torches of witnesses, found them in working order and gave them in supurdagi of their respective owners. Thereafter, he interrogated Sakaldeep (P.W. 2). He inspected place of occurrence and prepared site plan (Ext. Ka-12). He took into possession the blood stained beddings lying on the charpai of the deceased and prepared recovery memo. He also inspected lantern emitting light in the night of occurrence, found it in working order and gave it in supurdagi of the complainant.

7. When the condition of the deceased deteriorated further he was referred to Sir Sunderlal Hospital, B.H.U. Varanasi, where he was taken on 18-3-1978 and was admitted there. The deceased ultimately died in the hospital on 21-3-1978 in the night.

8. Information regarding his death was sent to Police out post Lanka, P.S. Bhelupur on 21-3-1978 at 8.30 p.m. The inquest of dead body was conducted on 22-3-1978 by Sub-Inspector Tulsi Ram Yadav (P.W. 5), who prepared inquest report (Ext. Ka-5) and other relevant papers (Ext. Ka. 6) to (Ext. Ka 8). He sealed the dead body and sent it for post mortem.

9. The autopsy on the dead body of deceased was conducted on 23-3-1978 at 2.45 p.m. by Dr. A.K. Dwivedi, who found stitched wounds as ante mortem injuries and cause of death due to coma as a result of head injury. He prepared post mortem report (Ext. Ka-16).

10. On receipt of post mortem report and other relevant papers, the case was altered under Section 302, I.P.C. on 11-4-1978. On completion of investigation the I.O. submitted charge sheet against the accused respondents and Ram Adhar on 14-5-1978.

11. Cognizance of the case was taken up by the Chief Judicial Magistrate, who committed the case to the Court of Session.

12. All the accused respondents and Meghu alias Ram Adhar were charged for the offence punishable under Section 302 read with Section 34, I.P.C. They pleaded not guilty and contended that they were falsely implicated on account of enmity and on suspicion. Meghu alias Ram Adhar died during pendency trial.

13. The prosecution in support of its case examined Rajendra Kumar Bharti (P.W. 1), Sakaldeep (P.W. 2) and Triveni Bharti (P.W. 3) as witnesses of fact besides Sub Inspector Izhar Ahmad (P.W. 4), Tulsi Ram Yadav, Sub-Inspector (P.W. 5), Sri Madan Gopal Mishra, I.O. (P.W. 6), Dr. A.K. Goswami (P.W. 7) and Sub-Inspector Subhash Chandra Srivastava (P.W. 8) as formal witnesses. The accused respondents did not adduce any evidence in their defence.

14. The learned Sessions Judge on appraisal of the evidence of the prosecution held that Rajendra Kumar Bharti (P.W. 1) was not sleeping in the night of occurrence in the hut, where the deceased was sleeping and the other eye witnesses Sakaldeep (P.W. 2) and Triveni Bharti (P.W.3) were not in a position to see the occurrence and therefore, the prosecution could 'not prove the case beyond all reasonable doubt against the accused respondents. With these findings he acquitted the accused respondents.

15. The above order of acquittal has been challenged in this appeal.

16. We have heard the learned A.G.A. for the appellant and Sri S.C. Rai for the accused respondents and have perused the evidence on record.

17. It would be pertinent to mention at the very outset that we are dealing with the appeal against the order of acquittal. The scope of Appellate Court in an appeal against the acquittal was laid down by Apex Court in the case of Shivaji Sahebrao

Bobade v. State of Maharashtra (1973) 2 SCC 793: AIR 1973 SC 2622 as below (Para 7):--

This Court had ever since its inception considered the correct principle to be applied by the Court in an appeal against an order of acquittal and held that the High Court has 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.... 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, (2) 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, (3) the right of the accused to the benefit 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.>

18. The following observation of the Apex Court in the case of Harbans Singh v. State of Punjab, AIR 1962 SC-439 was also reiterated in the said decision. (Para 8)

In many cases, especially the earlier ones the Court has in laying down such principles emphasised the necessity of interference with an order of acquittal being based only on 'compelling and substantial reasons' and has expressed the view that unless such reasons are present an appeal Court should not interfere with an order of acquittal. The use of words 'compelling reasons' embarrassed some of the High Courts in exercising their jurisdiction in appeals against acquittals and difficulties occasionally arose as to what this Court had meant by the words 'compelling reasons'. In later years the Court has often avoided emphasis on 'compelling reasons' but nonetheless adhered to the view expressed earlier that before interfering in appeal with an order of acquittal a Court must examine not only questions of law and fact in all their aspects but must also closely and carefully examine the reasons which impelled the lower courts to acquit the accused 'and should interfere only if satisfied after such examination that the conclusion reached by the lower Court that the guilt of the persons has not been proved is unreasonable.

19. The Apex Court further held in the case of Ramesh Babu Lal Doshi v. State of Gujarat, (1996) 6 JT (SC) 79: AIR 1996 SC 2635 as below:--

This Court has repeatedly laid down that the mere fact, that a view other than one taken by the, trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate Court is first required to seek an answer to the question whether the findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate Court holds for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions.

20. The above observations were again approved and reiterated in a recent decision of the Apex Court in Jaswant Singh v. State of Haryana, (2000) 4 JT (SC) 114: AIR 2000 SC 1833 and it was held that the principle to be followed by Appellate Courts considering an appeal against an order of acquittal is to interfere only when there are 'compelling and substantial reasons', for doing so. If the order is 'clearly unreasonable' it is a compelling reason for interference.

21. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial Court are sustainable or not.

22. The prosecution examined three witnesses, who claimed to have seen, the accused respondents and Ram Adhar inflicting Gandasa and Dao blows on the deceased and they are Rajendra Kumar Bharti (P.W. 1), Sakaldeep (P.W. 2) and Triveni Bharti (P.W. 3).

23. Rajendra Kumar Bharti (P.W.1) the real son of the deceased, stated that on the night of occurrence, the deceased was sleeping in the hut situate at a distance of 15 paces towards east of his house. He and his brother Virendra were also

sleeping in the same hut on different charpai. A lighted lantern was placed on the table besides charpai of deceased. At about 1.30 a.m. his father cried 'Are Bap Re Jan Gail'. Hearing his cries he and his brother awoke and they also raised alarm. They observed that Ram Adhar, Girija and Nandu were inflicting injuries on his father with Gandas and Subhash with Dao. On their alarm Sakaldeep (P.W. 2), Triveni (P.W. 3) and Kailash reached the hut flashing their torches. They also saw the occurrence. In his cross examination he stated that his cattle were tethered in the night in the eastern verandah of his house. Ram Chandar and Govind, his uncles used to sleep in the veranda to watch the cattle. A lighted lantern always placed in the veranda. On the night of occurrence Ram Chandar and Govind had gone to Varanasi and no one was sleeping in the verandah to watch the cattle, nor there was any lantern in the said verandah. When he awoke some injuries were caused on his father and blood was coming out of injuries. He could not tell as how many injuries were caused prior to his awakening. However, he stated that three to four injuries were caused after his awakening. On observing his father he got down of his charpai and was standing. No attempt was made by him to grapple with the assailants. The witnesses reached the spot within half minute and were standing at a distance of 3 to 4 paces towards north of the hut. The witnesses saw the occurrence from where they were standing. The ladies of his family came to the spot after running of the assailants. He and Virendra came out of the hut after running of the accused.

24. Sakaldeep (P.W. 2) stated that his house was situate at a distance of 15-20 paces from the hut of the deceased and his house faced towards north. On the night of occurrence he was sleeping in the room inside verandah of his house. He heard shrieks of Sarjoo deceased. He rushed towards the hut of the deceased from eastern side of his house. Kailash and Triveni reached few minutes before him. He observed that accused Subhash armed with Dao and Ram Adhar, Girija and Nandu with gandas were causing injuries to Sarju. On the alarm raised by them the accused came out of the palani and ran away towards east. He followed them up to 10 paces. Besides Sarju, Rajendra and Virendra were also inside the palani and they were raising alarm. Rajendra and Sarju were standing near their charpai. In his cross examination he stated that on coming out of his house he went towards east and then turned towards south at the house of Kailash and

reached near the hut of the deceased. He and another witnesses were standing towards south of well. The hut of the deceased was open on northern and eastern side. When he reached inside the hut, ladies of the family of the deceased had also come.

25. Triveni (P.W.3) stated that his house was situate towards north west of the house of deceased at a distance of 30-35 paces and faced towards north. On the night of occurrence at about 1.30 a.m. he was sleeping at his house. At about 1.30 a.m. he heard alarm of Rajendra and Virendra coming out from the hut of Sarju deceased. He rushed to the said hut with a lathi and torch. Sakaldeep and Kailash also reached there. When he flashed his torch he saw Ram Adhar, Girija and Nandu inflicting injuries on the deceased with gandasa and Subhash with Dao and Rajendra and Virendra were raising alarm by sitting on their charpai. A lighted lantern was placed in the hut. On their reaching the accused ran away towards east. In his cross examination he stated that Ram Chandar and Govind had gone to Varanasi on the day of occurrence and they came back on next day at 8 a.m. On the night of occurrence he was sleeping in front of his cattle shed, which was adjacent towards east of his residential house. There were no doors planks in the room in which he was sleeping. He awoke on hearing alarm.

26. This was the gist of statements of the witnesses.

27. The learned A.G.A. contended that three eye witnesses named above had seen the occurrence and the learned Sessions Judge wrongly discarded their testimony holding that Rajendra Kumar Bharti (P.W. 1) was not sleeping in the hut, where the deceased was sleeping and the other witnesses Sakaldeep (P.W. 2) and Triveni (P.W. 3) could not reach near the hut till the assailants were inside the hut and therefore all the witnesses were not in a position to observe the incident and recognised the assailants. He further contended that learned Sessions Judge disbelieved the presence of light of lantern in the hut and also wrongly held that the accused respondents had no motive to commit the murder. On the other hand, the learned counsel for respondents/opposite parties contended that the finding of the trial Court is based on evidence on record and no view other than taken by the trial Court could possibly be taken and that there is no sufficient ground for this

Court to interfere with the findings of acquittal recorded by the trial Court.

28. We have, therefore, to consider whether the ocular witnesses were in a position to see the occurrence and recognise the assailants.

29. Rajendra Kumar Bharti (P.W. 1) claimed that he along with his brother Virendra was sleeping in the hut. In his cross examination he admitted that his cattle were tethered in the eastern osara (verandah). Ram Chandra Giri and Govind Giri his uncles used to sleep in the osara to have a watch on the cattle. On the night of occurrence Ram Chandra Giri and Govind Giri were not at the house, but they had gone to Varanasi and none was sleeping in his osara to have a watch on the cattle. It is clear from his evidence that two members of his family used to sleep in the osara to have a watch on the cattle. Cattle are precious things for the villagers and their protection and safety is essential. In case Ram Chandra Giri and Govind Giri were not at his house on the night of occurrence, some male member of the family of the deceased must have been sleeping in the osara to have a watch on the cattle. No doubt, Rajendra Kumar Bharti (P.W. 1) and his brother Virendra were at their house on the night of occurrence. But it could not be presumed that both of them had left the cattle unattended and were sleeping in the hut. It may be reasonable to infer that Rajendra Kumar Bharti (P.W. 1) or he and his brother were sleeping in the verandah to have a watch on cattle, as it was not expected that they would leave the cattle unattended. It also leads to infer that assailants chose the night for the murder of deceased when he was alone in the hut.

30 Rajendra Kumar Bharti (P.W. 1) further stated in his cross examination that when he awoke, his father had sustained some injuries and blood was coming. He could not state as to how many injuries were caused on his father prior to his awaking. That after awaking he did nothing but watched the incident silently. Sakaldeep (P.W. 2) stated that when he reached the spot, he saw complainant Rajendra Kumar Bharti and his brother standing near their charpai. Triveni Bharti (P.W. 3) also stated that he saw the complainant and his brother sitting on their own charpai raising alarm. The above conduct of Rajendra Kumar Bharti is highly improbable. It was not expected from him that he would be silent spectator of the

incident in which his own father was being killed. The assailants were not having any fire arm. They were only having sharp edged weapon and the complainant must have tried to save his father and grapple with the assailants. On his own showing two or three persons of the village had come near his hut. If he would have grappled with any of the assailants, he would have been apprehended with the help of villagers. If in fact, Rajendra Kumar Bharti (P.W. 1) was actually sleeping near the charpai of deceased and awoke by the alarm raised by his father, he would have done some thing to save his father. In his above attempt, he would have sustained some injury. The absence of injury on the person of the witness and the non action stated by him and other witnesses creates grave doubt in his presence in the hut. The above circumstances indicate that the presence of Rajendra Kumar Bharti (P.W. 1) in the hut. where the deceased was sleeping was rightly held doubtful by the learned Sessions Judge.

31. As already mentioned Rajendra Kumar (P.W. 1) stated that after awakening he and his brother Virendra remained in the hut through out the incident raising alarm. Had it been so the assailants would not have spared the witness and Virendra Singh and in that circumstance they would have received injuries. This aspect of the prosecution story again creates doubt in the presence of Rajendra Kumar (P.W. 1.) in the hut in question at the time of occurrence.

32. The other witness of the occurrence was Sakaldeep (P.W. 2). The house of Sakaldeep (P.W. 2) was situate at a distance of about 20 paces from the hut where the occurrence took place. But admittedly, his house opened towards north. According to evidence of Sakaldeep he awoke on hearing alarm and thereafter got up, came out of his house and reached the spot through eastern wall of the house of Kailash Giri. Thus for reaching to the spot he had to run towards east up to the eastern wall of house of Kailash Giri and then turn towards south and after travelling some distance he would have reached near the hut. In this way he had to travel a distance of about 100 paces. As stated by Rajendra Kumar Bharti (P.W. 1) the assailants had caused some injuries on the deceased prior to his awaking and the witnesses came to the spot hearing his alarm. In this way, some time would have been taken by Sakaldeep (P.W. 2) to reach the spot. By that time in all probabilities the assailants would have run away, as they were taking all

precautions not to be seen by any one by choosing odd hours of night to commit the murder of the deceased.

33. Similar was position with Triveni Bharti (P.W.3). His house was situate near the house of Sakaldeep (P.W. 2). He stated that his house was situate at a distance of 30-35 paces north west of the house of the deceased. His house also faced towards north. For reaching the spot, he had to travel some distance, which Sakaldeep (P.W. 2) had travelled i.e. he had to reach the spot through eastern wall of the house of Kailash. He further stated that in the night of occurrence, he was sleeping in front of his cattle shed adjacent to his residential house. He awoke hearing alarm, therefore, like Sakaldeep he was also not in a position to reach the spot, see the occurrence and recognised the assailants. In this way, the presence of Sakaldeep (P.W. 2) and Triveni (P.W. 3) on the spot till the assailants were inside the hut also appears doubtful.

34. Nearest house from the spot was the house of complainant and lady members of the house of tiomplainant would have reached the spot first. But all the ocular witnesses stated that lady members of the family of the deceased came after running of the assailants.

35. Rajendra Kumar Bharti (P.W. 1) stated that a lighted lantern was placed on a table near the Charpai of the deceased. He stated that a lighted lantern was kept inside the eastern verandah, where cattle were tethered. No useful purpose for keeping lighted lantern besides the charpai of the deceased had been shown. As such the presence of lighted lantern in the hut also appears doubtful.

36. The motive alleged by the prosecution was that Sarju Bharti deceased had initiated a criminal case of theft against Ram Adhar (since dead) and in the said case he was convicted and sentenced, His conviction and sentence was maintained by this court and therefore, he was having enmity. Complainant Rajendra Kumar Bharti admitted that the case against Ram Adhar ended 8 years ago and thereafter no other case or any other untoward incident took place between Ram Adhar or any other accused and his father. Thus, the accused persons had no immediate motive. Contrary to it, it was admitted to Rajendra Kumar Bharti (P. W. 1) that the deceased had enmity from his own kith and kin, as

his father had obtained a decree of the share of Srinivas, whose son Babu Ram was also claiming his heir in the ancestral property of the deceased.

37. Assuming that absence of motive is not very much material for the murder of the deceased by the accused, but the discrepancies pointed out above are clear enough to indicate that the ocular witnesses Rajendra Kumar Bharti, Sakaldeep and Triveni had not seen the occurrence. It appears that it was a case of hit and run and the assailants after causing injuries ran away without being noticed by any one. Thus, the inference and conclusion drawn by the Trial Court cannot be said unreasonable and finding of the Trial Court cannot be said palpably wrong, manifestly erroneous and demonstrably unsustainable. Therefore, we find no compelling and substantial reason to interfere with the finding of acquittal recorded by the Trial Court.

38. Therefore, we find no force in the appeal.

39. The appeal is, accordingly, dismissed. The accused respondents are on bail. Their bail bonds are cancelled and sureties are discharged. They need not surrender.