

State of Rajasthan Vs. Bhera

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SooperKanoon Citation : sooperkanoon.com/756444

Court : Rajasthan

Decided On : Oct-09-1996

Reported in : 1997CriLJ1237; 1997(1)WLC745; 1996(2)WLN371

Judge : Amaresh Kumar Singh D.C. Dalela, J.

Acts : Indian Penal Code (IPC) - Sections 302; Code of Criminal Procedure (CrPC) - Sections 39, 41, 41(1), 58, 157, 161, 162, 313, 428 and 540; Evidence Act - Sections 3, 45, 114, 148, 149 and 165; Children Act - Sections 19; [Constitution of India](#) - Article 141

Appeal No. : Criminal Appeal No. 70 of 1978

Appellant : State of Rajasthan

Respondent : Bhera

Advocate for Pet/Ap. : D.R. Bohra and; S.R. Singh, Adv.

Disposition : Appeal allowed

Judgement :

Amaresh Kumar Singh D.C. Dalela, J.

1. Heard the learned Public Prosecutor for the State and the learned counsel for the respondent.

2. Respondent accused Bhera was tried by the learned Additional Sessions Judge, Sirohi on the charge under S. 302, I.P.C. After conducting the trial, the learned Additional Sessions Judge acquitted the respondent. The State feeling aggrieved by the judgment of acquittal passed by the learned Additional Sessions Judge, Sirohi has filed this appeal.

3. The facts of the case may be briefly summarised as below:

On 28-2-1976 at about 9 a.m. Bhura Ram reported at the Police Station, Abu Road that on the previous day i.e. 27-2-1976 a gathering has been arranged at the house of Bhana and he too attended that gathering. Several persons including Bhera (respondent) and Surma (deceased) attended that gathering. At about 8.30 p.m. Bhera told Bhura Ram that Surma was liable to pay Rs. 100/- to him but for the last 3 years he was not paying that amount. Bhera, therefore, requested Bhura Ram that the amount of Rs. 100/- should be repaid to him otherwise a quarrel might take place. When Bhura Ram enquired from Surma the later denied having taken any loan from Bhera. After this Bhera (respondent) and Surma (deceased) started quarrelling with each other and while they were exchanging words they departed from the house of Bhana. Chopra and Heera also departed from the house of Bhana soon after the departure of Bhera and Surma. At about 9 p.m. human cry was heard coming from Bala and on hearing that Bhura Ram, Kala and Shanker went to the Bala. When they reached there they found that the dead body of Surma was lying on the ground and blood was coming out of his chest and Bhera was at that time running towards the road which leads to Dairy and Chopra and Heera were trying to apprehend him. Chopra and Heera ran after Bhera but they could not apprehend him, as Bhera succeeded in running away towards his house. Thereafter Chopra and Heera returned towards the place where the dead body of Surma was lying and both of them told Bhura Ram that on account of demand of money a quarrel took place between Bhera and Surma and Bhera took out a dagger and saying that since Surma was not paying the money he would kill him and inflicted a dagger blow in the chest of Surma and thereafter Bhera ran away with the dagger in his hand. On the basis of the information lodged by Bhura Ram the police registered a case, under S. 302, I.P.C. and commenced the investigation.

4. After investigation a challan was presented in the Court of learned Munsif and Judicial Magistrate, Abu Road who committed the case to the Court of learned Additional District and Sessions Judge, Sirohi. Charge under S. 302, I.P.C. was framed against the respondent and he pleaded not guilty to the charge.

5. The prosecution examined as many as 13 witnesses to prove its case. The accused respondent was examined under Sec. 313, Cr.P.C. and also examined Bhana D.W. 1, Munpla D.W. 2 and Kala D.W. 3 in his defence.

6. The prosecution evidence consists of Bhura Ram P.W. 1 who lodged the first Information Report Ex. P. 1, two eye-witnesses, namely, Chopra P.W. 2 and Heera P.W. 3 and 3 persons who reached the place of occurrence soon after the alleged occurrence. These witnesses are Kala P.W. 4, Sakra P.W. 5 and Jiva P.W. 6 and Nana P.W. 7. was examined for the purpose of proving the prosecution story but he was declared hostile as he did not support the prosecution story on material particulars. Bulchand P.W. 8 is a motbir witness in whose presence the dagger was produced by the respondent from his house. Ambaram P.W. 9 is the Investigating Officer. Bhikam Chand P.W. 10 is the Police Officer who recorded the First Information Report in the Roznamcha. Mangal Singh P.W. 11 is the Police Official who delivered the four sealed packets in the S.P. Office, Sirohi. Hansmukh Lal P.W. 12 is the Police Constable who carried the four sealed packets to the Forensic Science Laboratory, Jaipur. Dr. S. K. Kulshrestha P.W. 13 conducted the post mortem examination of the dead body of Surma. The evidence against the respondent consisted of evidence given by eye-witnesses Chopra P.W. 2 and Heera P.W. 3 and the recovery of the dagger at the instance of the accused from his house.

7. The learned Additional Sessions Judge after hearing both the parties came to the conclusion that the testimony given by Chopra P.W. 2 and Heera P.W. 3, who are the alleged eye-witnesses of the incident, is not reliable. The dagger which was alleged to have been used for the purpose of causing stab wound in the chest of the deceased was sent to the Forensic Science Laboratory but the report of the Forensic Science Laboratory was not produced before the learned Additional Sessions Judge during the trial. Hence the recovery of the dagger from the house

of the accused respondent was not held to be sufficiently proved the offence against the accused respondent.

8. We have carefully gone through the judgment delivered by the learned lower Court and the evidence produced by the prosecution as well as the defence. In an appeal against acquittal unless the reasons given by the learned lower Court for discharging the evidence produced by the prosecution can be said to be perverse or unreasonable, it is not proper to disturb the findings given by the learned lower Court merely because different view may be taken by the appellate Court, does not justify the reversal of the finding of acquittal into a verdict of conviction.

9. In this case the prosecution case depended on the evidence of Chopra P.W. 2 and Heera P.W. 3. The learned Additional District and Sessions Judge has dealt with their evidence in detail and came to the conclusion that their evidence is not reliable.

10. One of the reasons given by the learned Additional Sessions Judge for discarding the prosecution version is that the accused respondent was not arrested soon after the lodging of the first information report. The learned Additional Sessions Judge appears to be labouring under the impression that as soon as the information about the commission of an offence is given to the police the accused persons must be arrested. We feel that it is necessary to clarify the legal position.

11. Section 114 of the Evidence Act empowers the Court to presume existence of certain facts. It provides that the Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. The term 'common course' qualifies not only natural events but it also qualifies human conduct and public and private business as used in S. 114 of the Evidence Act. All inferences except those which have been drawn under any other provisions have to be drawn by the Court under S. 114 read with S. 3 of the Evidence Act. Since the Court trying the case does not have any personal knowledge about the facts in dispute all that it can do is either to act upon the account of disputed facts given by a person who had the personal

knowledge about the same or to act upon the expert evidence relevant under S. 45 of the Evidence Act or to draw a presumption under S. 114 of the Evidence Act. Where the account of the disputed facts given by a witness who has personal knowledge about that fact is acted upon by the Court, the Court need not to draw the inference under Sec. 114 of the Evidence Act. It may act on the testimony of the witness who has personal knowledge about the fact in issue. Where the Court acts upon the evidence given by an expert it is the opinion given by the expert which may be made the basis of the judgment to be delivered by the Court, subject, of course, to the condition that the evidence of the witness who gives evidence about the disputed facts and the evidence of the expert is otherwise trust-worthy. The third mode of arriving at a finding is to draw an inference under S. 114 of the Evidence Act and for the application of the third mode of arriving at a decision as provided under S. 114 of the Evidence Act it is necessary that the common course of natural events, human conduct and public and private business in so far as it is relevant to the facts in issue in a particular case must be established. The common course of natural events, human conduct and public and private business has its origin in the habit of man or other beings irrespective of the fact whether such habit is on account of the operation of law of nature or on account of the operation of law made by man or it is a habit developed on account of tradition or convention or is a result of volitional act of the individual. The characteristic of such common course is that in a given set of circumstances if certain event occurs or certain act or omission is performed by the individual or by large group of persons. In human society some times the common course of human conduct is determined by the manner in which an individual or group of individuals is treated by the State and its various functionaries or by the fellow beings or by the manner in which a certain conduct is rewarded or is punished or otherwise treated, indifferently. Under S. 114 of the Evidence Act the Court is not supposed to legislate as to the manner in which the human beings should conduct themselves in a given set of circumstances because the power given by S. 114 of the Evidence Act is only in respect of inferences which has to be drawn by the Court. Section 114 of the Evidence Act does not authorise the Court to legislate in any manner. If this limitation of the power given by S. 114 of the Evidence Act is kept in view, before a common course of conduct is used for the purpose of

arriving at a decision, it is necessary that such common course of conduct must be established. The alleged course of conduct unless established cannot be made use of by the Court for the purpose of arriving at decision under S. 114 of the Evidence Act.

12. The learned Additional District and Sessions Judge has assumed that as soon as the information is given to the police of commission of an offence by an offence whose identity is disclosed in the formation, the police must ordinarily arrest that person. Having assumed the above conduct of the police to be a common course of conduct of the police in the matter of arrest of the offender the learned Additional District and Sessions Judge has proceeded to infer that since the respondent Bhera was not arrested soon after the giving of information to the police, it should be inferred that his name was not told to the police officer. We are afraid that the assumption of the learned Additional District and Sessions Judge that the police officer should ordinarily arrest the offender as soon as the first information report is lodged in the police station is not well founded. The power to make arrest is given by the Criminal Procedure Code. Section 41, Cr.P.C. empowers the police to make arrest of any person without an order from a Magistrate and without a warrant in cases provided in clauses(a) to (i) of sub-sec. (1) of S. 41. Clause (a) of S. 41, Cr.P.C. reads as under :-

'(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

13. A bare reading of clause (a) shows that before arrest can be made by the police officer, the police officer must satisfy himself that the person who has been arrested has been concerned in any cognizable offence or the complaint is reasonable one or the information received is credible or there are reasonable grounds to suspect that such person is concerned with commission of a cognizable offence. Section 157, Cr.P.C. empowers the police officer conducting the investigation to proceed to the spot, to investigate the facts and circumstances of the case and if necessary to take measure for the discovery and arrest of the offender. A bare reading of S. 157, Cr.P.C. shows that discovery and arrest of the

offender is to be made only when it is necessary to do so. The power of the police to make arrest has been considered by the Hon'ble Supreme Court in *Joginder Kumar v. State of U.P.*, 1994 Cri LR (SC) 484 : (1994 Cri LJ 1981). In para 9 of the judgment their Lordships observed that the law of arrest is one of balancing individual rights, liberties and privileges, on the one hand and individual duties, obligations and responsibilities on the other, of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding that is wanted and where to put the weight and the emphasis, of deciding which comes first the criminal or society, the law violator or the law abider, of meeting the challenge which Mr. Justice Cardozo so forth-rightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered. In para 14 their Lordships observed that as on today, arrest with or without warrant depending upon the circumstances of a particular case is governed by the Code of Criminal Procedure. After taking into consideration the provisions of Rule 229 of the Procedure and Conduct of Business in Lok Sabha, S. 58 of the Code of Criminal Procedure, S. 19(a) of the Children Act, Report of a Royal Commission on Criminal Procedure, Command-Papers 8092 19811 and the representation of the Royal Commission as well as the report of National Police Commission prescribing guidelines for making arrest, Their Lordships of the Supreme Court in para 24 of the judgment observed.

'The above guidelines are merely the incidents of personal liberty guaranteed under the [Constitution of India](#). No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock up of a person can cause incalculable harm to the reputation and self-system of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the Interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides

of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the Officer affecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a Police Officer issues notice to person to attend the Station House and not to leave Station without permission would do.'

14. The law laid down by the Apex Court is binding on all courts under Art. 141 of the Constitution. The decision given by the Apex Court in the case of Joginder Kumar (1994 Cri LJ 1981) (supra) leaves no room for doubt that the power of police to make arrest is neither absolute nor it is performed in a mechanical manner. This power must be judiciously exercised so that in cases where the arrest is not necessary the liberty of the alleged offender should not be taken away without a genuine necessity and in the case of offenders who are likely to abscond or commit offences if not arrested or would likely to obstruct the course of justice or whose arrest is necessary having regard to the gravity of crime, the manner in which the crime has been committed and to all other relevant circumstances of the case. The common course of conduct within the meaning of S. 114 of the Evidence Act is more or less mechanical or obligatory conduct which cannot be disputed by the individual in the ordinary set of circumstances. It is an obligation to perform such conduct in a given set of circumstances that entitles it to be called the common course of conduct within the meaning of S. 114 of the Evidence Act. In the case of conduct governed by the law of nature and the law of nature makes it obligatory for the human being to conduct himself or itself in certain manner, where the conduct is governed by law made by the human society. The laws made by the legislature make it obligatory for the individual to conduct himself or herself in a prescribed manner. There the conduct is governed by mores, traditions, conventions, or the like the social pressure makes it obligatory on the individual to conduct himself or herself in the prescribed manner. Where the conduct is governed by habit, it is a habit that makes it obligatory for a man to conduct himself or herself in a certain manner and where the conduct is governed by will of

the man or woman it is his own decision that obliges him to conform to his above conduct. In all these cases the obligation to act in certain manner is common. If there is no obligation on the individual to behave in such a manner and if he is free to act and not to act in the prescribed manner, it will not be possible to say that if he acts in a certain manner it is a common course of his conduct. This is why where there is a discretion/ freedom to act and not to act in a given manner, the acting in a prescribed manner or omission to act in a prescribed manner cannot be described as his common course of conduct. Since the obligation to act in a particular manner is the foundation of a common course of conduct and such obligation makes deviation from the common course of conduct as improbable or illegitimate, the common course of conduct begins more or less mechanical in character as it denies discretion and the freedom to act otherwise.

15. Viewed in above light, keeping in view the provisions of Ss. 41 and 157, Cr.P.C. and the observations of the Apex Court made in the decision given in Joginder Kumar's case (1994 Cri LJ 1981) (supra) it cannot be said that the police officer is under any kind of obligation to arrest the offender by exercising his power of arrest in a mechanical manner. On the other hand, the legal obligation governing the power to make arrest is to the effect that the power of arrest must be judiciously exercised which means that the police officer must be satisfied that the complaint made to him or the information given to him is credible that the person who is to be arrested is concerned with cognizable offence and there is legal justification for making the arrest. Unless the police officer is so satisfied it does not have the authority to make arrest. In view of this position of law it cannot be said that the arrest of an offender should ordinarily be made as soon as the first information report is lodged with the police. The learned Additional District and Sessions Judge has not carefully considered the law relating to arrest by the police for cognizable offence. Therefore, there is supposition on the basis of which he has proceeded to discard the prosecution version must be held to be without any foundation. We, therefore, do not agree with the learned Additional District and Sessions Judge, Sirohi that the prosecution story should be discarded because the police officer did not make the arrest of the respondent soon after the giving of the first information report to the police about the commission of the murder of Surma.

16. The second reason given by the learned Additional District and Sessions Judge for doubting the statements of Chopra P.W. 2 and Heera P.W. 3 and other witnesses who reached the spot soon after the occurrence is this that there are two sets of prosecution witnesses one who say that the deceased departed from the house of Bhana at about 5 p.m. and the other who say that the deceased departed from the house of Bhana at 8 p.m. or thereafter and therefore it is doubtful whether the deceased departed from the house of Bhana at 5 p.m. or he departed from the house of Bhana after 8 p.m. and if it is taken that he departed from the house of Bhana at 5 p.m. then it would be unreasonable to infer that he reached the place of occurrence at 9 p.m. and the entire prosecution story would be open to serious doubt. In order to appreciate the reasoning given by the learned Additional District and Sessions Judge, Sirohi, it would be necessary to refer to the first information report and the statements of the witnesses. In the first information report Ex. P. 1 it was stated that Bhera and Surma both started from the house of Bhana after 8.30 p.m. According to the first information report at 8.30 p.m. Bhera (respondent) told Bhura Ram that he was demanding Rs. 100/- from Surma (deceased) and the later was not paying that amount for the last 3 years, and thereafter on being enquired Surma denied having taken any loan of Rs. 100/- from Bhera and then both of them started exchanging words between them. Bhura Ram P.W. 1 in his statement in the Court has stated that Bhera and Surma both started from the house of Bhana at 8.30 p.m. Chopra P.W. 2 who is one of the eye-witnesses of the incident has stated that at 6 to 7 p.m. the crowd which is collected at the house of Bhana started disbursing but he has not given the exact time when Bhera and Surma started from the house of Bhana. Heera P.W. 3 has deposed that at the time sun set people started disbursing but he has also not given the exact time when Bhera and Surma started from the house of Bhana. However the time of incident is stated to be 8 to 9 P.M.

17. Kala P.W. 4, Sakra P.W. 5, Jiva P.W. 6 and Nana P.W. 7 have deposed that the people who had collected at the house of Bhana started disbursing at about 5 p.m. According to Kala Bhera started from the house of Bhana at 5 p.m. A similar statement is given by Sakra P.W. 5. The learned Additional District and Sessions Judge, Sirohi has relied upon the statement of Kala P.W. 4, Sakra P.W. 5, Jiva P.W. 6 and Nana P.W. 7 in spite of the fact that these witnesses have been

declared hostile. Kala P.W. 4 was confronted with his police statement Ex. P. 5. In portion A to B of the police statement Ex. P. 5 Kala P.W. 4 has stated to the police under S. 161, Cr.P.C. that at about 8.30 p.m. Bhera complained to the Sarpanch Bhura Ram that he was demanding Rs. 100/- from Surma for the last 3 years but he was not returning the same and Surma denied this fact and thereafter the two persons started quarrelling. Kala P.W. 4 when confronted with portion A to B of his police statement he denied having given this statement to the police officer. It is obvious that he has changed his version so far as the time at which the quarrel took place between Bhera and Surma at the house of Bhana about the alleged loan of Rs. 100/- is concerned. Before the police he stated that Bhera complained about the non-payment of loan at 8.30 p.m., which means that Bhera and Surma both departed from the house of Bhana some time after 8.30 p.m. The statement of Kala P.W. 4 made in the Court that Bhera started from the house of Bhana at 5 p.m. is therefore contradictory with portion A to B of his police statement Ex. P. 5 and, therefore, the statement of Kala P.W. 4 cannot be relied upon.

18. Sakra P.W. 5 was also declared hostile by the prosecution. A perusal of his statement shows that he was cross-examined by the Public Prosecutor but he was not confronted with his statement made to the police under S. 161, Cr.P.C. It is not known why the learned Public Prosecutor omitted to confront Sakra P.W. 5 with his statement made to the police under S. 161, Cr.P.C. The learned Additional District and Sessions Judge also did not care to confront the witness Sakra P.W. 5 with his statement made to the police under S. 161, Cr.P.C. in exercise of the powers conferred by S. 165 of the Evidence Act. Sakra P.W. 5 has, however, stated that at the house of Bhana no exchange of words took place between Bhera (accused respondent) and Surma (deceased) regarding the refund of loan advanced to Surma. This statement of the witness Sakra P.W. 5 appears to be completely false in view of the statements of the other witnesses. Therefore, it is proper to infer that Sakra P.W. 5 is deliberately concealing the genesis of the crime, which was an altercation took place between the accused and the deceased when the accused respondent demanded the sum of Rs. 100/- which he had advanced to the deceased 3 years before the occurrence. The unreliability of the witness Sakra P.W. 5 is further evident, by the fact that in his examination in chief he categorically denies that any altercation of words occurred between Bhera

and Surma about the money but in his cross-examination he has admitted that outside the house of Bhana, Bhera and Surma exchanged words and that his statement given in the examination-in-chief that no exchange of words took place between them is false. We are, therefore, of the opinion that Sakra P.W. 5 is an unreliable witness and in spite of the fact that he has not been confronted with his statement given to the police under S. 161, Cr.P.C., his act of giving a false statement to the effect that no exchange of words took place between Bhera and Surma at the house of Bhana and then admitting that this statement is false is sufficient to hold him as untrustworthy and bent upon in concealing the genesis of the crime.

19. Jiva P.W. 6 was not declared hostile by the prosecution and it appears that the learned Public Prosecutor did not care to confront this witness with his police statement. The learned Public Prosecutor who was conducting the case must be presumed to be acquainted with the fact that according to the first information report Bhera and Surma started from the house of Bhana sometime after 8.30 p.m. and that the statement of Jiva P.W. 6 that the crowd started disbursing at 4 to 5 p.m. was either not compatible with the prosecution version or it needed a clarification from the witness as to the time when Bhera and Surma started from the house of Bhana and that in case of contradiction between the statement given in the court and the statement given to the police it is necessary to confront the witness so as to give him an opportunity to explain the contradiction. The learned Public Prosecutor has, in our opinion, failed in his duty inasmuch as he did not ask the witness Jiva P.W. 6 that at what time Bhera and Surma started from the house of Bhana and he further failed to confront the witness with his, police statement recorded under S. 161, Cr.P.C. To a Court question Jiva P.W. 6 replied that he does not know at what point of time the clock strikes at 5 O'clock. This statement shows that Jiva P.W. 6 does not know the measures of time. Therefore, his statement that the crowd collected at the house of Bhana started disbursing at 4 to 5 p.m. is not reliable.

20. Nana P.W. 7 has deposed that at about 5 p.m. he started from the house of Bhana and that in his presence Bhera did not demand any money from Surma and that Bhera started from the house of Bhana at 5 p.m. The Public Prosecutor has

not confronted the witness with his police statement. Since Nana P.W. 7 has deposed that he himself started from the house of Bhana at 5 p.m. and some time after his departure Heera, Chopra, Bhura and Surma departed from the house of Bhana. It is obvious that this witness could not have seen the departure of Bhera and Surma from the house of Bhana for the simple reason that he departed from the house of Bhana before the others departed. It is, therefore, obvious that this witness had no personal knowledge about the time when Surma and Bhera departed from the house of Bhana or he is deliberately concealing the truth. We, therefore, hold that the statement of Nana P.W. 7 about the time of his departure and the departure of Bhera and Surma from the house of Bhana is not reliable.

21. Having carefully considered the statements of Kala P.W. 4, Sakra P.W. 5, Jiva P.W. 6 and Nana P.W. 7 we are of the opinion that none of these witnesses can be relied upon for the purpose of ascertaining the time at which Bhera and Surma started from the house of Bhana. The learned Additional District and Sessions Judge was, therefore, not justified in relying upon the statements of these witnesses for the purpose of holding that Bhera and Surma started from the house of Bhana at or about 5 p.m. The prosecution case as given in the first information report Ex. P. 1 is that Bhera and Surma started from the house of Bhana at or about 8.30 p.m. and this version is stated by Bhura Ram P.W. 1 who has categorically stated that even though the crowd started disbursing at 5 p.m. it was at 8.30 p.m. that Bhera complained to him that Surma was not paying Rs. 100/- which he had taken as loan 3 years ago and then Surma denied having taken any loan and thereafter the two started exchanging words between them and thereafter they started for their houses. In our opinion the time of departure mentioned in the first information report Ex. P. 1 and in the statement of Bhura Ram P.W. 1 and supported by Chopra P.W. 2 Heera P.W. 3 is reliable and no doubt can be said to be created by the statements of Kala P.W. 4, Sakra P.W. 5, Jiva P.W. 6 and Nana P.W. 7 who for the reasons stated above are not reliable witnesses. It is true that the evidence of the witnesses does not make it untrustworthy merely because the witness was declared hostile by the prosecution but it is equally true that enunciation of above rule does not make the statement of hostile witness trustworthy if the intrinsic quality of the statement given by the hostile witness is so poor that it cannot be relied upon. The evidence given by a

witness who has been declared hostile deserves to be scrutinised carefully not only at the time of writing the judgment but even at the time when the witness is in the witness-box and being examined. It is the duty of the prosecution to put questions to the hostile witness which are relevant for the purpose of ascertaining whether he is speaking the truth or for upholding the prosecution version and in case where the statement given by the witness in the court is contradictory with the statement given by the witness to the police under S. 161, Cr.P.C. It is the duty of the prosecution to bring contradiction on record by confronting the witness with his previous statement made to the police and if the prosecutor fails to perform his duty then it is the duty of the Court before whom the witness is being examined to put such questions as are necessary for ascertainment of truth to the witness under S. 165 of the Evidence Act. Under Section 165 of the Evidence Act, the Court can confront the witness with his statement made to the police under S. 161, Cr.P.C. In *Raghunandan v. State of U.P.*, AIR 1974 SC 463 : (1974 Cri LJ 453) the Supreme Court observed that 'In a criminal case, the fate of the proceeding cannot always be left entirely in the hands of the parties. The Court has also a duty to see that essential questions are not so far as reasonably possible, left unanswered. We are surprised to find, from the judgment of the High Court, that the questions mentioned above, arising out of the post-mortem report, were not, for some reason, even mentioned there. We find it very difficult to believe that, in a case with a death sentence a matter of such significance, which was noticed by the Trial Court, was not raised at all by the Counsel for the appellants. In any event, it ought to have been dealt with by the High Court after taking appropriate additional expert medical evidence under S. 540 read with S. 428, Criminal Procedure Code if that was considered necessary before deciding it.

'22. In the same judgment at page 467 it was observed that 'It is true that the ban, imposed by S. 162, Criminal Procedure Code, against the use of a statement of a witness recorded by the Police during investigation, appears sweeping and wide. But, at the same time, we find that the powers of the Court, under S. 165 of the Evidence Act, to put any question to a witness, are also couched in very wide terms authorising the Judge 'in order to discover or to obtain proper proof of relevant facts' to 'ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant'. The first proviso to

S. 165, Evidence Act enacting that, despite the powers of the Court to put any question to a witness, the judgment must be based upon facts declared by the Act to be relevant, only serves to emphasize the width of the power of the Court to question a Witness. The second proviso in this Section preserves the privileges of witnesses to refuse to answer certain question and prohibits only questions which would be considered improper under Ss. 148 and 149 of the Evidences Act. Statements of witnesses made to the police during the investigation do not fall under any prohibited category mentioned in S. 165, Evidence Act. If Section 162, Criminal Procedure Code was meant to be so wide in its sweep as the Trial Court thought it to be, it would make a further inroad upon the powers of the Judge to put questions under Section 165, Evidence Act. If that was the correct position at least S. 162, Criminal Procedure Code would have said so explicitly. Section 165 of the Evidence Act was already there when S. 162, Criminal Procedure Code was enacted.

'..... We are inclined to accept the argument of the appellant that the language of S. 162, Criminal Procedure Code, though wide, is not explicit or specific enough to extend the prohibition to the use of the wide and special powers of the Court to question a witness, expressly and explicitly given by S. 165 of the Indian Evidence Act in order to secure the ends of justice. We think that a narrow and restrictive construction put upon the prohibition in S. 162, Criminal Procedure Code, so as to confine the ambit of it to the use of statements by witnesses by parties only to a proceeding before the Court, would reconcile or harmonize the two provisions considered by us and also serve the ends of justice. Therefore, we hold that S. 162, Criminal Procedure Code does not impair the special powers of the Court under S. 165, Indian Evidence Act. Consequently, we think that the Trial Court could and should have itself made use of the statement made by Jailal during the course of the investigation.

'In this case the Public Prosecutor as well as the learned Additional District and Sessions Judge have failed to confront the witnesses, namely, Sakra P.W. 5, Jiva P.W. 6 and Nana P.W. 7 with their statements made to the police. Since on the basis of the statements made in the court by these witnesses we have come to the conclusion that their evidence is not reliable and deserves to be discarded, it is not

necessary for us to remand the case to the lower court for re-examination of the above named witnesses. Suffice it to say that the evidence given by Kala P.W. 4, Sakra P.W. 5, Jiva P.W. 6 and Nana P.W. 7 as to the time when the accused respondent and the deceased started from the house of Bhana is unreliable. The learned Additional District and Sessions Judge was not justified in placing reliance on their evidence for the purpose of holding that the accused respondent and the deceased started from the house of Bhana at 5 p.m. At the cost of repetition we hold that the prosecution version as unfolded by the first information report Ex. P. 1 and proved by the statement of Bhura Ram P.W. 1 as to the time when the accused respondent and the deceased started from the house of Bhana stands proved beyond all reasonable doubt.

23. The learned Additional Sessions Judge has come to the conclusion that the statement given by Bhura Ram P.W. 1 which is to the effect that on hearing hue and cry he reached the spot and saw the accused respondent running away and at that time Chopra and Heera were chasing him was not reliable because the distance between the house of Bhana and the place of occurrence is half a mile and Bhura Ram P.W. 1 could not have reached the place of occurrence soon after the occurrence and therefore, he had no occasion to see the accused running away from the place of occurrence. According to Bhura Ram P.W. 1 about 10 to 20 minutes after the departure of Bhera, Surma, Chopra and Heera from the house of Bhana he heard the hue and cry coming from the side of river and then he went to the river with Jiva, Nana, Sakra and Kala and at that time Heera and Chopra were running after the accused but they could not be able to apprehend him. When Heera and Chopra returned he enquired from them as to what happened and they told him that Bhura had inflicted a blow to Surma with a dagger and went away. In his cross-examination Bhura Ram P.W. 1 has stated that he reached the place of occurrence in 15 to 20 minutes and he had seen the accused, Heera and Chopra running at a distance of 200 passages.

24. After carefully considering the statement of Bhura Ram P.W. 1 we are of the opinion that the learned Additional Sessions Judge was justified in coming to the conclusion that Bhura Ram P.W. 1 reached the spot after 15 to 20 minutes of the incident and that it was not possible for him to have seen the accused running

away and in any case we are of the opinion that he could not have identified the person who was running away. So far as the evidence of Chopra P.W. 2 and Heera P.W. 3 is concerned the learned Additional Sessions Judge has observed that Heera P.W. 3 is the real brother of Bhura Ram P.W. 1 and that Chopra P.W. 2 is the cousin of Bhura Ram and all the three witnesses, namely, Bhura Ram, Chopra and Heera are residents of different village i.e. village Surpagla whereas the murder took place in village Chapri and that witnesses Kala, Sakra and Nana who belong to village Chapri have not supported the prosecution case and defence witnesses Bhana and Mungra who belong to village Chapri have also not supported the prosecution version and, therefore, it is not safe to record a finding of conviction on the testimony of Chopra P.W. 2 and Heera P.W. 3. Assuming that Chopra P.W. 2 is the cousin of Bhura Ram and Heera P.W. 3 is the real brother of Bhura Ram P.W. 1 but all that can be said is that their evidence needs close scrutiny in order to find out whether they are speaking truth or not. The mere fact that these three witnesses are related to one other can justify the discarding of their evidence as unreliable. Kala P.W. 4, Sakra P.W. 5, Jiva P.W. 6 and Nana P.W. 7 are not reliable witnesses for the reason we have given earlier. Therefore, the fact that they have not supported the prosecution version cannot be a ground for discarding the evidence of Chopra P.W. 2 and Heera P.W. 3. It is a well established rule of appreciation of evidence that the fact which has been used for successfully describing the credibility of a witness must be fully established. A false accusation, a false statement or a statement which is not well established or a fact alleged but not proved cannot be used for the purpose of describing the credibility of an otherwise trust worthy witness. It is one of the basic rules governing all prudent actions that only that fact should be acted upon by prudent man which he believes to exist or which a prudent man in the facts and circumstances of the case believes to be existed. A fact which a person does not believe to be existing and which cannot also suppose to believe to be existing when considered from the point of view of a prudent man cannot be acted upon for any purpose and muchless for discrediting the statement of trustworthy witness. Since we have come to the conclusion that the evidence of Kala P.W. 4, Sakra P.W. 5, Jiva P.W. 6 and Nana P.W. 7 is unreliable, their statements cannot be used for the purpose of destroying the credibility of Chopra P.W. 2 and Heera P.W.

3. Therefore, the reasoning given by the learned Additional Sessions Judge that Kala, Sakra, Jiva and Nana who are residents of village Chapri have not supported the prosecution case and, therefore, the prosecution version should not be relied upon is improper.

25. So far as the testimony given by the defence witness is concerned, Bhana D.W. 1 is the person at whose house the accused, the deceased and the prosecution witnesses had gathered during the day time before the occurrence. According to Bhana D.W. 1 the persons who have gathered at his house at taken food at 4 p.m. and they started disbursing at about 5 p.m. Those belonging to village Dairy were first to depart, and those belonging to Surpagla departed after one hour. It is further stated by Bhana D.W. 1 that the villagers belonging to Dairy started from his house accused Bhera and Surma were present at the house and that thereafter about 2 Doras Surma started from his house. A dora corresponds to 45 minutes according to this witness.) It is further stated by Bhana D.W. 1 that from his village different pathways lead to village Dairy and Surpagla. It is also stated by the witness that no altercation took place between Bhera and Surma at his house and that the Nala which is situated in between his house and the field of Kishna is at a distance of 2 furlong from his house and he did not hear the noise or cries coming from the nala and that he came to know about the death of Surma at about 8 to 9 p.m. when Kala told him about it and when he went to the spot he found that Nana, Jiva, Kala, and Bhura were present there and Heera and Chopra came after 2 hours and that no body told him as to who had killed Surma. In his cross-examination the witness admitted that from his village to the field of Kishna a path-way leading to villages Dairy and Surpagla is common and thereafter the path-ways to the villages Dairy and Surpagla are separated. It is further admitted by this witness in his cross-examination that he was attending to feast given at his house and, therefore, he does not know about the talk that took place amongst the persons who had gathered at his house. A perusal of the statement of Bhana D.W. 1 shows that he is not revealing the whole truth, he is not a man of sterling character. In his examination he gave a statement to the effect that the path ways to villages Dairy and Surpagla from his village are different but in his cross-examination he admitted that the two path ways are common up to the field of Kishna and he has not explained as to why he has tried to mislead the Court by

giving the statement that different path-ways are led to villages Dairy and Surpagla.

26. Mun gla D.W. 2 is the father-in-law of deceased Surma. He has deposed that about 12 days before his death Surma came to his house because of a quarrel with Sarpanch Bhura Ram, Heera and Chop a. Mun gla D.W. 2 has further added that he had gone to the house of Bhana to attend the feast and Bhera, Surma, Heera, Kala, Bhoma and some other villagers had attended the fast, that food was taken at about 4 p.m. and at 5 p.m. the villagers started departing. People belonging to village Dairy started from the house of Bhana at 5 p.m. and thereafter Surma and others started. Mun gla D.W. 2 has further stated that he started from the house of Bhana with Surma and went to his house. Jiva, Kala, Sakra and Kishna also started at the same time. It is also stated by this witness that Surma accompanied him to his house and when darkness has set in Bhura called Surma and took him with him and after some time Surma cried and when he reached there Surma was found lying on the ground and at that time he was alive and at that time he asked Surma as to who had assaulted him and he pointed towards Sarpanch Bhura. In his cross-examination Mun gla D.W. 2 has stated that he did not arrest Bhura nor he went to the police station to lodge a report nor he asked any other person to go to the police station to lodge the report.

27. We have carefully considered the evidence given by Mun gla D.W. 2 who according to his version was father-in-law of the deceased. It is inconceivable that a father-in-law on being told by his son-in-law, who was on death bed that the person standing near him had killed him would not report the matter to the police nor take any action to get the culprit apprehended by the police and brought to trial. The entire story given by Mun gla D.W. 2 is unreliable on account of being improbable. Under S. 39, Cr.P.C. every person who comes to know about the commission of an offence enumerated in S. 39, Cr.P.C. is under a legal obligation to report the matter to the Magistrate or to the police without unnecessary delay. The offence punishable under S. 302, I.P.C. was one of the offences mentioned in S. 39, Cr.P.C. If Mun gla D.W. 2 was in fact told by deceased Surma that Bhura Ram (P.W. 1) had assaulted him, there was a legal obligation on this witness to report the matter to the police or to the Magistrate. Apart from his being closely

related to the deceased it was his moral and social obligation to report the matter to the police so that the culprit may be brought to book. The conduct of Mungla D.W. 2 inasmuch as he did not report the matter to the police nor sent any other person to report the matter to the police nor took any steps to start criminal proceedings against Bhura P.W. 1 for the murder of Surma, clearly shows that the conduct of Mungla D.W. 2 is unnatural and, therefore, his testimony is not reliable.

28. Kala D.W. 3 has deposed that at about 5 p.m. Soma (deceased) Bhera son of Bhura, Dhanna, Panna, Prema and others started from the house of Bhana and at that time 2 doras day was left. It is further stated by him that from the house of Bhana he started with Bhera accused and he as well as Bhera went to village Dairy and from village Dairy Bhera went to his house. It is also stated by him that 10 to 15 days before the occurrence Bhura had sent Sopa to collect money which was due to the Panchayat Samiti and when Sopa demanded money from Bhura (Bhera) the later told him that he had given the money to Sarpanch Bhura and threatened to make complaint to the Government if money was demanded again. In his cross-examination, Kala D.W. 3 has deposed that he did not give any money to Sopa and that the accused Bhera was not indebted to the society.

29. In his statement under S. 313, Cr.P.C. the accused-respondent has stated that Chopra, Heera and Bhura had occupied the land of Surma and, therefore, a quarrel had taken place between Surma, Chopra and Heera on the one hand and Surma on the other and Bhura Sarpanch had illicit relations with the wife of Surma and, therefore, Surma might have been killed by Bhura. It is also stated by the accused in his statement under S. 313, Cr.P.C. that the amount which has been due to the society was paid to Bhura Sarpanch but he has misappropriated the same and about 15 days before the death of Surma summons for the recovery of that money were received. He told Chopra that he got the summons and that he had given the money to the Sarpanch and he further told him that the villagers would make a complaint against the Sarpanch and because of this the Sarpanch had falsely implicated him. The accused has not given any evidence to show that he had taken any loan from the Sahakari Samiti and that he had paid the amount to Sarpanch Bhura. No evidence has been produced by the accused to show that Bhura had illicit relations with the wife of Surma nor any evidence has been

produced by the accused to show that Bhura, Chopra and Heera had unlawfully occupied the land of Surma and that the quarrel had taken place between Surma on the one hand and Chopra, Bhura and Heera on the other hand. For want of evidence the statement given by the accused under S. 313, Cr.P.C. cannot be said to be proved to any extent. It is true that the defence version need not be proved beyond reasonable doubt but it does not mean that the defence version need not be proved at all. Every fact which is to be made use of for the purpose of demolishing the otherwise trustworthy evidence must be established in a legal manner or at least its existence must be proved to be so probable that a prudent man in the circumstances of the case can act on the supposition of its existence within the meaning of S. 3 read with S. 114 of the Evidence Act. In the instant case, the statement given by the accused-respondent under S. 313, Cr.P.C. has neither been proved nor it appears to be so probable as to warrant the supposition that it is true. We, therefore, find no ground to infer that there was an enmity between Surma and Bhura P.W. 1 to warrant the inference that Surma might have been killed by Bhura P.W. 1. The statements of the defence witnesses are untrustworthy and they deserve to be discarded for the reasons given above. We, therefore, are of the opinion that the learned Additional Sessions Judge was not justified in relying upon the statements of the defence witnesses and the statement made by the accused under S. 313, Cr.P.C. for the purpose of discarding the sole testimony of Chopra P.W. 2 and Heera P.W. 3 who have stood the test of cross-examination and stated that in their presence accused-respondent Bhera inflicted the stab wound on the chest of the deceased and thereby caused his death. In our opinion, it is one of those cases in which this Court ought to have exercised its power of reversing the judgment of acquittal into a verdict of conviction.

30. For the reasons stated above, this appeal deserves to be allowed. We, therefore, accept this appeal, the judgment of acquittal delivered by the learned Additional Sessions Judge, Sirohi is hereby set aside and the accused-respondent Bhera is hereby convicted under S. 302, I.P.C. and sentenced to imprisonment for life and to pay a fine of Rs. 500/- and to undergo rigorous imprisonment for 3 months in default of payment of fine. The accused is on bail. His bail bonds are hereby cancelled. He shall surrender before the learned District and Sessions Judge, Sirohi within a week failing which the warrant of arrest shall be issued by

the learned District and Sessions Judge, Sirohi to enforce the attendance of the respondent for serving out the sentence awarded to him.

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