

Phinder Singh Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Aug-09-1985

Reported in : 1985(2)WLN764

Judge : Kanta Bhatnagar and; Jas Raj Chopra, JJ.

Appeal No. : D.B. Criminal Appeal 474 of 1974

Appellant : Phinder Singh

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Mr. Garg

Judgement :

Kanta Bhatnagar, J.

1. Appellant Phindersingh was tried for the offence under Sections 302 and 449 IPC and Sections 25 and 27 of the Arms Act by the Sessions Judge, Sri Ganganagar by the judgment dated July 31, 1974, he was held guilty for the aforesaid offences and sentenced to imprisonment for life on the first count, 7 years' rigorous imprisonment and a fine of Rs. 500/-in default of payment, to undergo simple imprisonment for 2 months on the second count and rigorous imprisonment for three years' on the third count. All the substantive sentences were ordered to run concurrently. Feeling aggrieved by his conviction and

sentence, he has preferred this appeal in this Court.

2. Briefly stated the facts of the case giving rise to this trial and conviction of the appellant and the present appeal are: In the intervening night on 11-8-1973 and 12-8-1973 deceased Avtarsingh was sleeping in the court yard of his house with his wife and children. At about 3.30 a.m. PW 2 Mst. Balwant Kaur wife of Avtarsingh awoke on hearing the noise of gun fire. She saw somebody on the roof and thereafter, jumping from the back side of the roof. Balwant Kaur called PW 1 Harbans Singh who was sleeping in his Dhani at a distance of about 60 to 70 Pawandas from her house. Harbans Singh also heard the report of the gun shot from his house and on being called by Balwant Kaur rushed to the house of the latter. Balwant Kaur informed him that her husband Avtar Singh had been shot. She asked him to call Thansingh, Guljarsingh and Gurdeosingh. Harbans Singh went out and called all those persons. Harbans Singh and others are said to have seen the foot print on the roof. Thanasingh, Guljarsingh, Jangirsingh and Harbans Singh took Avtarsingh to the Hospital, Sadul Shahr but he succumbed to the injuries received by him at a distance of about 5 Murabbas from the village. Avtarsingh was brought back to his home and his dead body was placed on the cot at the same place where he was sleeping at the time of the incident. Harbans Singh went to Police Station, Sadul Shahr. PW 14 Om Prakash, Head Constable and Incharge of the Police Station at the relevant time recorded the information Ex. P 4 given by Harbans Singh and accompanied him to the site. Om Prakash prepared the Inquest Report and the site plan. He recovered pieces of wood and a pellet lying near the cot of the deceased. He recovered one empty cartridge case Ex. P 12 from the roof of the Kotha. A constable was deputed to have a watch of the foot marks visible on the roof. PW 13 Dr. Bahadur Singh conducted the autopsy over the dead body of Avtar Singh on 12-8-1973 and following external injuries:

(1) Four ante-mortem entrance gunshot wounds were present on the body. Two of them on the chest, one below and middle to left clavical and other one above the lateral and clavical of size 1/2' x 1/4' x obliquely down wards towards the right in the thoracic cavity. On post-mortem the bullet was found in the right thoracic cavity which was full of coagulated blood. The heart was ruptured. Both bullets passed

through the right atrium and entered in the thoracic cavity;

(2) Another wound on the left hand Dorsal surface near the root of thumb of size 1/2' x 1/4' x 1-1/2' obliquely towards the palm.

(3) Another on the right elbow joint 1/2' x 1/4' x deep reached up to surface below the skin.

3. PW 11 Bhagwansingh, ASI, took the investigation in his charge in the same evening. The Doctor took out all the bullets from the wound of Avtarsingh. He prepared the post mortem examination report Ex. P 1. In the opinion of the Doctor, the cause of the death was the rupture of heart leading to haemorrhage due to gun shot. The injuries were found sufficient in the ordinary course of nature to cause death. PW 11 Bhagwansingh, ASI took the investigation in his hands in the same evening and made efforts to trace out Phindersingh. On 14-8-1973 SHO PW 15 of that police station took charge of the investigation. Moulds were taken by Bhagwansingh under the supervision of Bhanwarlal. On 22-8-1973, appellant Phindersingh was arrested by SHO Bhanwarlal vide memo Ex. P 24. Foot marks lifted from the roof of the house of Avtarsingh were sent to Finger Print Expert. On 23-8-1973 Phindersingh furnished information Ex. P 16 for getting recovered one 12 bore pistol from the field. In pursuance of that information, SHO, Bhanwarlal got recovered one 12 bore pistol Ex. P 16 loaded with the 12 bore cartridge case from the field of the appellant vide memo Ex. P 15. On 28-11-1973. the packet containing the empty cartridge the pistol and the live cartridge, the pistol and the pellets were sent for examination to the Ballistic Expert. The report of the Central Forensic Science Laboratory, CBI cum Assistant Chemical Examiner to the Govt. of India, New Delhi, Police Forensic Science Laboratory, Jaipur, Serologist's report are Ex. P. 34, 35, 36 and 46 respectively.

4. Upon completion of necessary investigation, charge sheet against the appellant was filed in the Court of Munsif Magistrate, Hanumangarh who committed the appellant to stand his trial in the Court of Sessions Judge Sri Ganganagar. The learned Sessions Judge chargesheeted the appellant for the aforesaid offences and recorded his plea. He denied the charges and claimed to be tried. The prosecution examined 19 witnesses to substantiate its case. The appellant in his

statement under Section 313 Cr.P.C. totally denied the allegations and stated that Avtarsingh was his near relative. A false case has been concocted against him because Avtarsingh's brother-in-law was Head Constable. No defence witness was examined. The learned trial Judge held the prosecution case established and passed the judgment under appeal.

5. We have heard Mr. M.L. Garg, learned counsel for the accused-appellant and Mr. L.S. Udawat, learned Public Prosecutor for the State.

6. The prosecution has led direct as well as circumstantial evidence in the case. The direct evidence is that of Balwant Kaur. The circumstances brought on record against the appellant are recovery of empty cartridge case from the scene of occurrence, recovery of the pistol at the instance of the accused; motive; accused remaining absconding for a few days; extra-judicial confession and the moulds lifted from the roof of the house of deceased Avtar Singh tallying with the specimen foot mark of the appellant taken in the presence of the Magistrate and sent to Foot Print Expert and the report of the Foot Print Expert to the effect that foot prints were of the same person.

7. Baiwant Kaur is the wife of the deceased Avtar Singh. There is no dispute on the point that she was living in the same house in which deceased Avtar Singh on the fateful night was sleeping. The pertinent question is whether she had identified Phinder Singh as the assailant. The version given by Baiwant Kaur is that on hearing the report of the gun fire, she awoke and at once threw a glance towards the roof and saw a person there who appeared to her to be like Phinder Singh. The words used by her are: 'CHHAT PAR ADMI MUJE PHINDER JESA LAGA'.

8. Learned counsel for the appellant strenuously contended that Phinder Singh was residing in the neighbourhood of Avtar Singh and if, he would have been the assailant, there could not be any difficulty for Baiwant Kaur to identify him. According to the learned counsel, the version of the witness that the man on roof was like Phinder Singh clearly indicates that she could not recognise the person on the roof. Learned Public Prosecutor, on the other hand, contended that just on Harbans Singh reaching the site Baiwant Kaur mentioned that the assailant appeared to her like Phinder & so the learned trial Judge has rightly believed the

prosecution case that Baiwant Kaur identified the assailant correctly and what meant by the term 'PHINDER JESA LAGA' is that he was Phinder.

9. We have carefully examined the statement of Baiwant Kaur. She has repeatedly stated that the man on the roof appeared to her like Phinder. She has nowhere stated that it was Phinder, whom she had seen on the roof of her house and retraced from there when she looked towards the roof. The checks available on record are the statements of PW 1 Harbans Singh and PW 4 Thana Singh. Harbans Singh is the first person to reach the site at the call of Baiwant Kaur. He is the one who had gone to the Police Station to lodge the report. According to the witness, when he went to the house of Avtar Singh, Baiwant Kaur told him that Avtar Singh has been shot and so he may call people from the locality. In his cross-examination, he has stated that Baiwant Kaur did not tell him the name of any assailant. He further stated that he remained there at the house of the deceased for an hour or one and half hour. According to him, Gurdeo Singh, Guljar Singh and Jangir Singh had also remained with him there and Baiwant Kaur did not name the assailant even in their presence. The witness further stated that at that time, Baiwant Kaur did not name any assailant but when the police came, she named Phinder Singh. It is important to note that the name of Phindersingh does not find place in the FIR and for that reason, the memos prepared in the case bore the title State v. Unknown. Learned Public Prosecutor submitted that Harbans Singh has been declared hostile and therefore, his statement that Baiwantkaur did not name the assailant should not be believed. It is to be noted that Harbans Singh has been disowned by the prosecution on the point of recovery of the empty cartridge from the roof because he has not supported the prosecution on that point. So far as the lodging of the FIR by this witness is concerned, no question was asked in cross-examination by the learned Public Prosecutor regarding Baiwant Kaur's disclosing the name of the assailant prior to his leaving for the police station to lodge the report.

10. PW 4 Thanasingh is another important witness who has reached the site at the call of Harbans Singh. This witness has stated that wife of Avtarsingh told him that the person who had fired shot at her husband appeared like Phinder. In cross-examination, the witness has stated that Harbans Singh called him from his house.

He only informed him that Avtarsingh has been injured so he may go there and that he did not name Phindersingh at that time. The witness stated that when he himself asked Balwant Kaur as to who had killed Avtarsingh she replied that he appeared to be man like Phinder Thana Singh has stated that when Balwant Kaur has stated so, Jangirsingh, Gurdeo Singh and Guljarsingh were present there. He could not say whether Harbans Singh went to lodge the report with the police or not. The witness nowhere states that Balwant Kaur has told before Harbansingh that the assailant appeared to be like Phinder. It is relevant to note that Gurdeosingh and Guljarsingh before whom, according to Thanasingh, Balwant Kaur had stated [that the assailant appeared to be like Phinder had accompanied Harbans Singh to police station. Those two persons have not been examined by the prosecution. If Gurdeosingh and Guljarsingh would have been examined they would have thrown light on the point as to whether Balwant Kaur had really told before Harbans, Singh and others that the assailant appeared to be like Phinder. It is important to note that Thanasingh has also not stated that Balwant Kaur has named the assailant. He has only deposed that she told that the assailant appeared to be a man like Phinder. Thanasingh has also been declared hostile by the prosecution for the reasons that he did not support the prosecution story regarding the recovery of empty cartridge from the roof.

11. In order to fasten the guilt on the culprit on the basis of the identification, it is necessary that the person identifying the assailant & naming him should be certain that the assailant was the man in the dock and none else. In other words, the statement must be exact and precise on the question of identification. House of Phinder was at a distance of a few Pawandas from the house of Avtar Singh. He was not an unknown person to Balwant Kaur. If Balwant Kaur had an idea that the assailant appeared to be like Phinder, there should not have been any difficulty for her to tell with certainty that the person firing the shot was Phindersingh and she had identified him. If Balwant Kaur did not tell with certainty that the assailant was Phinder, it was the duty of the prosecution to arrange identification parade which has not been done in this case. There must be identification parade for unknown suspects. The reason is that a person claiming to have seen the culprit may recollect his figure and features. The test of re-collection is whether that person is able to pick up the culprit from amongst a number of persons. Assuming for the

sake of argument that because a witness has stated that the man appeared to be like Phinder, the prosecution did not consider it necessary to put him in a parade, still the necessity of identification of the accused in the court cannot be done away with it. Balwant Kaur in her statement in the Court deposed that the assailant appeared to be like Phinder. She did not even at the trial point out Phinder to be the assailant of her husband. The prosecution also did not care to bring forth from her statement that she identified Phinder accused as the assailant of her husband.

12. This being the position of the statement of Balwant Kaur. We do not consider it necessary to probe into the question as to whether it could be possible for a person to identify the person at the height of 10' at mid night especially when the identifying person suddenly awakes from sound sleep.

13. From the above discussion, we are inclined to hold that Balwant Kaur could not exactly identify the assailant and even if her statement is taken on its face value, all that can be said is that she saw the person who resembled the appellant. That, however, would not mean that she could tell with certainty that the assailant was Phinder and none else. We are of the opinion that had she been certain about the assailant being Phinder, she would have told so to Harbans Singh and the latter in his turn would have mentioned it in the FIR. Another important factor throwing doubt on the statement of Balwant Kaur regarding the identification of the assailant is that the Investigating Officer did not care to correct the title of the case till 14th August, 1973. The name of the accused did not appear in the list of names prepared. Ex. P. 14 is the memo for lifting the moulds of footprints. The title of the case is State v. Unknown.

14. Mr. Garg, learned counsel for the appellant in order to substantiate his case that the Investigating Agency was not knowing the name of Phinder for a long time and Balwant Kaur did not inform the police about her identifying the assailant, drew our attention to the fact that the FIR lodged on 12th August 1973 reached the Court on 20th August, 1973. The prosecution has not explained the inordinate delay in sending the FIR to the Court. The delay in sending the FIR may not always prove fatal for the prosecution but in the present case, when there was no material before the police that Phinder was the culprit in the case, this delay

assumes importance. In the facts and circumstances of this case, we find ourselves unable to agree with the learned Sessions Judge that conviction of the appellant may be based on the evidence of identification of Balwant Kaur. While dealing with the circumstantial evidence we may at the very outset observe that foot marks taken from the site was not sealed. The trial court has not placed reliance on the circumstance of foot mark of the assailant being found at the site tallying with the specimen mark of the appellant. We agree with the reasons given by the learned trial Judge on that point.

15. The circumstance of extra-judicial confession has not been attached importance because PW 7 Chand Singh the witness of the extra-judicial confession has not supported the prosecution case.

16. Out of the three remaining circumstances brought on record by the prosecution, most important is the recovery of the empty cartridge on the roof said to have been fired from the pistol recovered in pursuance of the information furnished by the appellant. The empty cartridge was recovered from the roof of the house of Om Prakash H.C. in the morning of 12th August, 1973 vide recovery memo Ex. P. 12.

17. The witnesses of the memo are Harbanssing and Thanaram. Both these witnesses have categorically stated that no empty cartridge was recovered in their presence from the roof of the Kotha of Avtarsingh. Learned counsel for the appellant submitted that if Harbanssing and others had tried to see the foot marks on the Kotha before the arrival of the police, the empty cartridge said to be lying there would not have escaped their notice. The learned Public Prosecutor contended that though the Motbirs have not supported the recovery of the empty cartridge from the Kotha, still this recovery should not be discarded because there is evidence of PW 14 Om Prakash H.C. who was the Investigating Officer at the relevant time. Mr. Udawat urged that Harbans Singh has admitted his signatures on the recovery memo and therefore, his memo saying that the recovery was not made in his presence does not weaken the prosecution case regarding the recovery. There may be cases in which the evidence of the Investigating Officer alone may be believed with regard to any recovery and the Motbirs turning hostile

may not affect the prosecution case. The weight to be attached to solitary testimony of the Investigating Officer for a particular fact would depend on the fact and circumstances of that case. In the present case, when the evidence of the witness is that prior to the lodging of the FIR foot marks on the roof were seen the empty cartridge being there and escaping there notice is not believable. Apart from it, the empty cartridge was kept by the police for a sufficiently long period. There is force in the contention of Mr. Garg that empty cartridge said to be recovered on 12th of August, 1973 was not sent along with other articles until 20th of August, 1973. The pistol was recovered on 23rd of August, 1973. The argument of the learned Prosecutor is that the cartridge must have been retained at the police station with an expectation that the pistol might be recovered. The value to be attached to this recovery of the pistol, we would discuss later on Suffice it to say for the present that in view of the statements of Motbirs Harbans Singh and Thana Singh against whom there is no allegation for siding the accused that no empty cartridge was recovered from the roof cannot be taken lightly. The empty cartridge and the pistol remained with the police till 8-1-1974. There is no explanation from the prosecution side as to why the pistol and the cartridge were not sent to the Ballistic Expert at an early date.

18. The pistol is said to have been recovered on 23rd August, 1973 vide memo Ex. P. 15 in pursuance of the information, furnished by the appellant while in custody. The appellant was arrested on 22nd August, 1973. Learned counsel for the appellant vehemently argued that Harneksingh brother-in-law of deceased Avtarsingh being interested in the prosecution case went to the police station on 23rd and became the witness of the information and as such possibility of the pistol being planted in the field of the appellant cannot be ruled out. It is true that the appellant was arrested on 22nd and did not disclose the whereabouts of the pistol till 23rd. This is also correct that Harneksingh, brother-in-law of deceased Avtarsingh had gone to the police station on 23rd and that, according to him, the accused furnished information for getting recovered the pistol but that in itself would not be sufficient to discard the circumstance of the recovery of pistol, if there is credible evidence to establish the recovery at the instance of the appellant. It is an ordinary 12 bore country made pistol and it has been argued that it not being of high value its planting was not difficult. Another argument advanced is that the

recovery was from the open field belonging to the appellant as well his father and as such, even if recovery is believed, it can be said that the appellant might be having knowledge of its being there without himself placing it there. One of Motbirs to the recovery of the pistol has not supported the recovery but Thanaram another Motbir has supported the recovery and stated that in his presence, appellant Phindersingh dug the earth upto about 6 fingers and took out the pistol with one live cartridge separately then and there. There is no reason to disbelieve this witness to the recovery. The pistol though recovered from the open place was not lying in a position that it may be visible to anyone. The very fact of the appellant digging the earth and taking out the pistol shows that he alone was knowing its whereabouts. In view of the matter, we attach weight to the recovery of the pistol and consider it to be a circumstance against the appellant.

19. The pertinent point emerging for determination would be whether the empty cartridge recovered from the roof can be connected with this pistol and if so, whether from the fact it can be said with certainty that it was the appellant and none else who fired the shot. We have already discussed the infirmity regarding the recovery of empty cartridge as, when and from the place of prosecution alleges. The important factor upon which Mr. Garg has emphasised is that the empty cartridge said to have been recovered on 12th of August, 1973 and the pistol recovered on 23rd of that month remained with police up to 8th of January, 1974 when they were sent to the Ballistic Expert for test. The Ballistic Expert has opined that pistol was in working condition and the empty cartridge sent to him could have been fired from that pistol. There is no credible evidence regarding the recovery of empty cartridge from the roof of the Kotha on 12th. The argument of Mr. Garg that the empty cartridge was so recovered still the empty cartridge and the pistol remaining for a long time with the Investigating Agency, it cannot be said with certainty that the empty sent for Ballistic test was the same which was recovered from the Kotha is also not devoid of force.

20. From the above discussion the conclusion we arrive at is that the pistol Ex.P 15 was recovered on 23rd at the instance of the appellant from his field. However, there being no convincing evidence regarding the recovery of empty cartridge from the roof, we are not inclined to believe that the pistol was used for the commission

of the crime.

21 Regarding the motive for commission of the crime, the learned Sessions Judge has taken the evidence of motive as a circumstance against the appellant but for the reason to be given presently we find ourselves unable to agree with the learned Sessions Judge. The only evidence in this regard is that of Balwant Kaur. She has stated that Phinder was having illicit relations with Parmeshwari, daughter of Ganesha and that her husband Avtarsingh also developed illicit relations with the daughter of Ganesha which annoyed Phindersingh. Balwant Kaur has admitted that she had heard this type of rumour at the well. No other witness has been examined to substantiate this contention. If this suspicion or rumour had any substance, Balwant Kaur in the natural course of events would have told this fact to the persons reaching the site immediately after the occurrence.

22. The learned Sessions Judge has taken the circumstances of the appellant remaining absent as a connecting link to the chain of the prosecution case against him. The incident took place on 12th August, 1973. The appellant was arrested from his house on 22nd August. The house of the appellant was in the same village. If a person is not available for 10 days and is then available at his own house in the same village after that period, he cannot be said to be absconding. It is relevant to note that there is no information to the accused that he was absconding nor any warrant for his arrest was obtained from the Court. This circumstance, therefore, cannot be taken help of by the prosecution.

23. From the above discussion, we arrive at the conclusion that the evidence of Balwant Kaur regarding the identification of the assailant is not convincing. Her failure to tell with certainty that the assailant was Phinder Singh coupled with the fact that even in the Court she did not point out the appellant to be the assailant, we decline to attach any importance to her evidence regarding the identification of the appellant.

24. We have not believed the circumstance of absconding of the accused and the motive alleged against him for the commission of the crime. The recovery of the empty cartridge has not been believed by us. Hence, even our reliance for recovery of the pistol at the instance of the appellant would not connect him with

the commission of the crime of murder. This being the position we conclude that prosecution has not succeeded in bringing home evidence or circumstances to hold appellant Phinder guilty for the offence under Sections 302 and 449 IPC.

25. The recovery of the pistol for which he had no licence with him make the appellant guilty for the offence under Section 25 of the Arms Act and his conviction for that offence holds good. In order to substantiate the charge under Section 27 of the Arms Act, the prosecution has to establish that the gun was used for illegal purpose. There being no evidence to that effect, the charge under Section 27 of the Arms Act is not made out.

26. Consequently, the appeal is partly allowed. The conviction of the appellant for the offences under Sections 302 and 449 IPC and Section 27 of the Arms Act and the sentences passed on those count are set aside. The conviction of the appellant for the offence under Section 25 of the Arms Act and the sentence awarded on that count are maintained. The appellant was arrested on 22nd August, 1973. He remained in custody till he was bailed out by the order dated 4-11-1978. He has suffered the sentence awarded to him by this judgment. His bail bonds stand discharged.