

Abda and ors. Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Mar-23-1987

Reported in : 1987WLN(UC)411

Judge : Shyam Sunder Byas and; Ashok Kumar Mathur, JJ.

Appeal No. : D.B. Criminal Appeal No. 711 of 1976

Appellant : Abda and ors.

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Mr. Singhvi

Disposition : Appeal allowed

Judgement :

Ashok Kumar Mathur, J.

1. This appeal is directed against the conviction and sentence of the accused appellants by the learned Additional Sessions Judge, Hanumangarh 31-7-1976 whereby he has convicted all the three accused appellants under Section 302 and 14.8 IPC and sentenced them to life imprisonment under Section 302 IPC and under Section 148 two year's rigorous imprisonment. He has however, acquitted the accused appellants under 379 IPC and Section 25(1)(a) of the Arms Act.

2. The facts giving rise to this case are that an oral report was filed by one Keshar Singh PW 2 on 8-6-1973 at about 6.30 p.m. at Police Station, Tibi stating that at 3.30 p.m. Balbirsingh son of Sadhu Singh came to him and informed him that in Talwara Jheel he was assistant to Vaid Jarnail Singh and at about 10.30 a.m. Dheer Singh and Gurubachan Singh both came with an engine loaded in a bullock cart. They placed their cart before the shop of Jarnail Singh and came inside the shop. Dheer Singh asked him to bring two glasses of Lassi. When he brought the two glasses of Lassi Dheer Singh was sitting out-side the shop in the verandah on a chair and Gurubachan Singh was standing in the verandah. He gave one glass of Lassi to each one of them and they were drinking the same. At about 11 a.m. Ashiq, who was armed with a 12 bore double barrel gun came at the shop and he fired a shot at Dheer Singh who was sitting on a chair. Dheer Singh was also armed with a gun and in order to save himself he also fired at Ashiq. The fire of Dheer Singh hit Ashiq on his head and he fell down on the ground & died. Ashiq was accompanied by Saida, who was armed with 12 bore gun, Saida who was also armed with a 12 bore gun and two more persons were with him who were armed with guns. All of them fired at Dheer Singh and Dheer Singh fell down from the chair and died. Thereafter, all these persons took away the guns of deceased Dheer Singh and deceased Ashiq and left the place leaving behind both the dead bodies. This incident was witnessed by Jarnail Singh and Gurubachan Singh. This oral information was recorded and on that basis a case under Sections 302, 149, 379, 147, IPC and Sections 25 and 27 of the Arms Act was registered against the accused persons. The police took up the investigation, the dead bodies were taken into custody and sent for post mortem and the necessary site inspection memo was prepared. The Investigating Officer, PW 14 Sujjan Singh collected the pellets from the shop of Jarnail Singh and he also found some pellets in the shop of Ramkishan. All the guns including of the deceased which were recovered at the instance of the accused persons were sent to ballistic expert along with empties recovered from the scene. Accused Maida and Saida were arrested on 7-3-1974 and accused Abda was arrested on 7-8-1973. The police after investigation filed the challan against all the three accused appellants and the case was ultimately committed to the court of Sessions for trial and the learned Additional Sessions Judge charged all the three accused persons under Sections 302, 147, 148, 379,

IPC and Section 25(1)(a) of the Arms Act. The prosecution examined as many as 14 witnesses and got 30 documents exhibited. The learned Additional Sessions Judge after due trial convicted and sentenced all the three accused persons as aforesaid.

3. We have heard counsel for the appellant as well as the learned Public Prosecutor and have also gone through the record.

4 Mr. Singhvi, learned Counsel for the appellants has urged that the testimony of all the three eye-witnesses namely, PW 1 Jarnel Singh, PW 4 Gurubachan Singh and PW 11 Balbir Singh was not a reliable one Learned Counsel also submitted that in fact deceased Dheer Singh was the assailant and he fired the shot first and thereafter in retaliation the accused party fired a shot Learned Counsel also laid great stress on the injuries and submitted that number of injuries are ante mortem; Learned Counsel has also invited our attention to the pellets recovered from the shop of Ramkishan for propounding the theory that as a matter of fact the first shot was fired by Dheer Singh and pellets of which were recovered from the shop of Ramkishan. Learned Counsel has also submitted that accused Abda was arrested on 7-8 1973 and his name was not mentioned in the First Information Report he was not identified by Gurubachan Singh PW 4 but he was only identified by Balbir Singh PW 11. But no person identical to that of Abda was mixed up in the identification parade before the Tehsildar.

5. We have perused the statements of PW 1 Jarnail Singh, PW 4 Gurubachan Singh and PW 11 Balbirsingh. PW 1 Jarnailsingh Vaid has deposed that deceased Dheersingh was sitting in the verandah out-side of his shop. He has deposed that accused persons along with deceased Ashiq came before the shop and fired the first shot at deceased Dheersingh and thereafter deceased Dheersingh who was also having a gun with him fired a shot which hit Ashiq on his head. He fell down on the ground. Thereafter, accused persons who were accompanying Ashiq fired at deceased Dheersingh in quick succession and as a result of which deceased Dheersingh died. To the same effect is the testimony of PW 4 Gurubachansingh and PW 11 Balbirsingh. PW 4 Gurubachansingh has deposed that accused Saida and Maida and Ashiq were brothers and there was an old enmity between the

accused persons and the deceased and his family. This was said to be the motive behind this murder. Mr. Singhvi, learned Counsel submitted that the statement of Jarnail Singh was recorded after 4-5 days. So far as the testimony of Gurubachan Singh is concerned, learned Counsel submitted that he is the brother-in-law of deceased Dheersingh. So far as the testimony of Balbirsingh is concerned, it is said that he has not witnessed the incident and was not present at the time of firing. Even if he was present he has hidden himself so as to escape being hit ff m the pellets of the fire arms.

6. We have considered the criticism levelled by Mr. Singhvi and we are of the opinion that after reading the testimony of these three witnesses it appears that the presence of these three witnesses cannot be doubted. PW 1 Jarnailsingh who was a Vaid and the incident has taken place before his shop though in order to escape from the assailants, he managed to escape from that place and remained hidden for some time because of fear of accused persons, therefore, his statement was recorded by the police late. His testimony has been supported by the testimony of Gurubachansingh as well as Balbir singh Assistant of PW 1 Jarnailsingh Thus, in view of consistency and corroboration of eye witnesses among each other, the belated recording of statement of this witness does not render the testimony of witness unreliable. Similarly, testimony of Gurubachansingh who happened to be the real brother-in-law of the deceased Dheersingh, this testimony cannot be discarded on account of relationship when he is otherwise reliable witness. Simply because Jarnailsingh has some how escaped from the place and Gurubachan Singh and Balbirsingh tried to hid themselves from being hit from the pellets of the fire arms it cannot be said that there witnesses cannot see the whole incident. The presence of these witnesses at the scene of occurrence is very well established and it cannot be doubted. Thus, a minor contradiction in the testimony of these witnesses cannot render them unreliable. We are of the view that the testimony of these witnesses is reliable and trust-worthy.

7. Mr. Singhvi, learned Counsel for the appellants, submitted strenuously that the deceased Dheersingh fired the first shot which is apparent from the pellets recovered by the Investigating Officer from the shop of Ramakishan which is in

front of the shop of Jarnailsingh Thus, learned Counsel tried to build up the theory that deceased Dheersingh was the assailant. He also tried to seek a support from the injuries of the deceased Dheersingh. Learned Counsel submitted that if the prosecution story is accepted then Dheersingh is not in a position to fire on Ashiq after receiving the first shot. We have given our utmost consideration to the contentions raised by the learned Counsel and we are of the opinion that the first shot was fired by Ashiq as deposed by the eye-witnesses and that hit the deceased Dheersingh on his left illiac fossa injury No. 11 as deposed by (he witnesses. This injury was not such which could totally knock out deceased Dheersingh from firing. The prosecution story appears to be correct and it has a ring of truth that the first shot was fired by deceased Ashiq which hit on the left illiac fossa of deceased Dheersingh and that injury was not so fatal to immediately cause the death of deceased Dheer Singh as per the eye-witnesses' account. Thereafter deceased Dheersingh fired a shot from a very close range which hit the deceased Ashiq on head and he fell down After that accused accompanying Ashiq fired the shots on the deceased Dheersingh from a very close range which is apparent from the injuries found on the body of the deceased. Thus, this version of the prosecution is more according to the nature of injuries received by deceased Ashiq and deceased Dheersingh. Simply because some stray pellets were recovered from Ramkishan's shop will not lend any countenance to the story constructed by Mr. Singhvi Mr. Singhvi also suggested that though the plea of right of private' defence of person has not been taken but if such plea emerges from the facts, of the case then the court should give the benefit to the accused persons. If is true that even if the plea of right of private defence was not taken by the accused and the situation warrants that a plea of right of private is available to the accused person then the court will certainly give the benefit to the accused But in the present facts and circumstances of this case as the story narrated by the prosecution and which we found to be true the plea of right of private defence to the person in the present case does not appear to be probable.

8. Mr. Singhvi has also placed before us that the post-mortem report of Ashiq was not placed on the record. But that will not help the defence in any respect as it is admitted that Ashiq received the injury on his head and he died on the spot.

9 Learned Counsel has further submitted that as accused Abda is concerned his identity was not established as his name was not mentioned in the First Information Report and during the identification parade also Gurubachan Singh brother-in-law of the deceased has not recognised him. That apart in the identification parade persons identical to the face of Abda who happens to have some small pox marks were not mixed up. Thus, the learned Counsel submits that so far as the identity of accused Abda is concerned the same cannot be established. This submission of Mr. Singhvi appears to be well founded. It is true that as per the prosecution witnesses that the remaining accused who were not named in the First Information Report is solid to be in muffled faces Therefore the name of Abda does not find mention in the First Information Report and he was arrested on 7-8-1973 and not to the identification parade on 10-8-1973. In that identification parade Gurubachan Singh has not been able to identify the accused Abda. However, Balbir Singh did identify the accused Abda but during the identification parade the persons similar to the bearing of Abda were not mixed up. Thus, so far as the identity of accused Abda as one of the assailants is concerned it creates a doubt. The accused Abda is entitled to the benefit of doubt.

10. In the result, the appeal of the accused appellants is allowed in part. The appeal of accused Abda is accepted and his conviction and sentence is set aside and he is acquitted of all the charges. However, the appeal of accused appellants Saida and Maida is dismissed and they are on bail their bail-bonds are cancelled. They should surrender themselves within a period of one month before the learned Additional Sessions Judge, Hanuman Garh, failing which the learned Additional Sessions Judge, Hanumangarh shall get them arrested to serve out the remaining sentence.