

Bhamar Singh Vs. the State

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Court : Kolkata

Decided On : Jun-22-1967

Reported in : AIR1968Cal327

Judge : Amaresh Roy and ;A.N. Chakrabarti, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 297 and 403; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 302, 304 and 326; ;[Arms Act, 1959](#) - Section 25(1)

Appeal No. : Criminal Appeal No. 6 of 1964

Appellant : Bhamar Singh

Respondent : The State

Advocate for Def. : Ajoy Bose and ;Ananga Kumar Dhar, Advs.

Advocate for Pet/Ap. : Bejoy Bhose and ;Rajesh Chandra Ghose, Advs.

Disposition : Appeal allowed

Judgement :

Chakrabarti, J.

1. This is an appeal under Clauses (b) and (c) of Section 411A (1) of the Code of Criminal Procedure. The appellant has been convicted under Section 302 of the

Indian Penal Code and sentenced to undergo rigorous imprisonment for life upon a trial held by the High Court with the aid of jury in the exercise of its original criminal jurisdiction.

2. The facts that led to the trial are, briefly stated as follows: The appellant Bhamer Singh was the head durwan in the office of Sahu Jain and Co. at 11, Clive Row, Calcutta, the other durwans of the establishment being Bhagwan Singh, Swai Singh and the deceased Jaswant Singh. The company had a D.B.B.L. gun for being displayed by the durwans when on duty during day time. The retainer licence of the gun was in the name of Swai Singh alone, so, as a matter of fact, the gun used to be displayed during his turn of duty only. The gun and a belt of cartridges when not required for being displayed used to be kept in the accounts room on the second floor of the building. The head durwan Bhamar Singh also used to sleep at night on the second floor. Mr. K. P. Vaid, the caretaker of the building, had his quarters on the top floor, that is to say the fifth floor of the building. Some of the menial staff also used to live there. On the ground floor as one enters the building from Clive Row through the main door one would come to an entrance hall, and find on his right hand side a wooden counter. Beyond this hall there is another room at the northern end of which there are two lifts. The two rooms are separated by a glass panelled swing door.

3. On the 1st of December 1962 there was a quarrel between the appellant Bhamar Singh and the deceased Jaswant Singh. In the course of this quarrel Bhamar Singh tried to assault Jaswant Singh with an iron rod. There was departmental enquiry by the security officer of the company over this matter and Bhamar Singh was found guilty of misconduct. Thereupon Bhamar Singh resigned his job but subsequently on his apologising he was taken back to his post by the company.

4. On the 31st of January, 1963 which was the day of occurrence Bhagwan Singh's duty ended at 10 p.m. he being relieved by Swai Singh. Bhagwan Singh then went out of the office building to see off a friend who was to board a tram at Strand Road. The deceased Jaswant Singh was to relieve Swai Singh at 2 A.M. When Swai Singh came to take up his duty he found Jaswant Singh lying down on

his bed on the counter in the entrance shall. Swai Singh took his seat on a chair near the bed of Jaswant Singh and began to chat with him. The appellant Bhamar Singh also came there and sat for about five minutes smoking a bidi. Then he went upstairs taking the lift. Swai Singh asked him not to take the lift upstairs as Mr. Vaid, the caretaker of the building, who had gone out to attend a wedding ceremony was expected to return at any moment. The appellant replied that he would be bringing down the lift shortly. When, however, he did not come down within 15 minutes Swai Singh went up using the stair case for the purpose of bringing down the lift. While going up he heard the sound of the lift coming down. So he also came down by the same staircase and when he reached the ground floor he heard the report of a gun fire. He then went towards the main gate and found Bhamar Singh lying there in injured condition and the appellant standing close by with a gun in his hand. Being very much frightened by this sight Swai Singh rushed out of the building but came back presently when he found some people collected near the gate. He found the gun lying on his bedding which was kept on a bench near the lift. He picked up the gun and deposited it in a neighbouring grocer's shop. He then informed one Kedar Pandey, an employee of Sahu Jain & Co. living on the premises of the company about the occurrence and requested him to ring up Mr. Vaid, the care-taker. Mr. Vaid who was attending a wedding ceremony hurried to the spot along with Mr. Gupta, the Security officer and Mr. H. K. Chowdhury, the personnel officer, of the company, on receiving the telephone message from Kedar Pandey. Bhagwan Singh who had gone to see off his friend also heard the report of the gun fire while coming back to Sahu Jain building and was about 10 cubits away from it. Looking towards that building he found the appellant standing on the pavement in front of the building with a gun in his hand. On seeing this he went straight to the Burrabazar P. S. and reported there at 11.15 p. m. that Bhamar Singh who was on duty at the office gate with a fire arm had fired a shot being drunk at about 10.30 p. m. Two Sub-Inspectors of Police and a constable then came to the Sahu Jain building along with Bhagwan Singh

5. In the meantime a police party headed by a police sergeant who were on patrol duty in a wirelessvan had also arrived at the spot on receipt of some wireless message. The people of the grocer's shop withwhom Swai Singh had deposited

the gun made it over to the police party.

6. When the police arrived they found Jaswant Singh seated at the main entrance to the Sahu Jain building and his face was covered with blood. He told Mr. Vaid, the caretaker, Mr. Gupta, the security officer, Mr. H. K. Chowdhury, the personnel officer, Bhagwan Singh and others who happened to come after the occurrence that he was shot by Bhamar Singh.

7. The police then arrested Bhamar Singh and seized his clothes which had blood stains. They recovered one fired cartridge shell and another live cartridge from the pit of the lift shaft. The injured person was then sent to the Medical College Hospital where his dying declaration was recorded the same night. In the dying declaration also Jaswant Singh stated that Bhamar Singh had fired at him out of previous grudge. He died at the hospital about 18 days after the recording of his dying declaration.

8. Upon these facts the appellant was tried twice. The first trial was on two counts: (1) committing murder by intentionally or knowingly causing the death of Jaswant Singh by shooting him with a gun and thereby committing an offence punishable under S 302 T P. C. (2) Having in his possession or carried a fire arm without any licence and thereby committing an offence punishable under Section 25(1)(a) of the [Arms Act, 1959](#). The jury unanimously found the accused not guilty on the second charge. As regards the first charge they found him not guilty by a majority of 6 to 2. They also found him not guilty under part I of Section 304 of the Indian Penal Code by a majority of 7 to 1. not guilty under part II of Section 304 of the Indian Penal Code unanimously and not guilty under Section 326 of the Indian Penal Code by a majority of 7 to 1.

9. The learned Judge presiding over the trial acquitted the accused of the charges on which the jury returned a unanimous verdict of not guilty, that is to say, under Sections 25(1)(a) of the [Arms Act, 1959](#) and 304 Part II of the Indian Penal Code. He did not however accept the majority verdict of not guilty under the other sections and directed the accused to be retried on a charge under Section 302 of the Indian Penal Code.

10. Accordingly a second trial was held and the only charge against the accused in this trial was one under Section 302 of the Indian Penal Code. This charge reads as follows:

'That he the said Bhamar Singh alias Bhawar Singh, on or about the 31st day of January, 1963, at or about 10 p.m. in or around 11, Dive Row, Calcutta, committed murder by intentionally or knowingly causing the death of one Jaswant Singh by shooting him with a gun, to wit. a D.B.B.L. gun No. A. N. 762 and thereby be the said Bhamar Singh alias Bhawar Singh committed an offence punishable under Section 302 of the Indian Penal Code.'

11. At the second trial the jury found the appellant guilty under Section 302 of the Indian Penal Code by a majority of 8 to 1 and he has been convicted under that section and sentenced to undergo rigorous imprisonment for life.

12. One of the grounds taken in the appeal is that the appellant having been found not guilty, in the previous trial, of the charge under Section 25(1)(a) of the Arms Act, 1956 the learned Judge should have told the jury that the prosecution story of the murder being committed with a gun should not be accepted.

13. In support of this contention Mr. Bejoy Bhowse appearing for the appellant relies upon the Supreme Court decision in *Pritam Singh v. State of Punjab*. : 1956 CriLJ805 . In that case the accused made a statement leading to the recovery of a fire arm with which he was alleged to have shot one of the victims. He was prosecuted for possession of the fire arm and was acquitted, but the evidence of the possession of the fire arm was used in the murder charge in a subsequent trial. This was held to be not permissible. The acquittal under the Arms Act being prior, affected the evidence of possession in the murder case.

14. *Pritam Singh's case*, : 1956 CriLJ805 was based wholly on the decision of Privy Council in *Samba Sivan v. Public Prosecutor Federation of Malaya*, (1950) 54 Cal WN 695 (PC). The accused in that case was prosecuted under the Emergency (Criminal Trials) Regulation, 1948 of the Federated Malaya States. There were two charges against him; (a) carrying a fire arm and (b) possessing ammunition. He was acquitted on the second charge and on appeal a retrial was

ordered on the first charge. At the second trial a statement made by him to the police inspector admitting possession of both the fire arm and the ammunitions was sought to be used. The alleged statement was an admission by him of the guilt in respect of both the offences he was originally charged with. The Privy Council held that the acquittal on the second charge in the earlier trial involved a verdict of which the correctness ought to have been accepted in the second trial and that the statement was not admissible because it was impossible to sever the statement about the ammunition from that about the firearm. Lord Macdermott delivering the judgment stated the effect of acquittal as follows:

'The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim '*Res judicata pro veritate accipitur*' is no less applicable to criminal than to civil proceedings'.

15. In *Manipur Administration v. Bira Singh*, 0065/1964 : [1964]7SCR123 the Supreme Court while reaffirming the principle laid down by it in *Pritam Singh's case*. : 1956 CriLJ805 pointed out that the rule of issue estoppel does not prevent the trial of any offence as does *autre fois acquit*, but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial before a court of competent jurisdiction.

16. In the present case the appellant is said to have committed the murder by using a particular gun. Possession of the gun was, therefore, a fact in issue which the prosecution was required to prove in order to establish the charge of murder. But that issue had already been decided when the appellant was acquitted of the charge under Section 25(1)(a) of the Arms Act at the previous trial. Acquittal of the charge under the Arms Act necessarily implied that the appellant did not possess the gun. This verdict is conclusive and would be binding upon the prosecution at the second trial. The rule of issue estoppel laid down by the Privy Council in *Samba Sivan's case*, (1950) 54 Cal WN 695 PC) and accepted by the Supreme

Court in Pritam Singh's case, : 1956 CriLJ805 would apply and the prosecution would be precluded from leading evidence that the appellant did in fact use the gun.

17. Mr. Ajay Bose appearing for the State contended that the verdict of not guilty under Section 25(1)(a) of the Arms Act does not necessarily imply that the jury did not believe the appellant was in possession of the gun. It is necessary to prove two facts in order to establish a charge under Section 25(1)(a) of the Arms Act. They are (1) that the accused was in possession of a fire arm or some ammunitions and (2) that such possession was in contravention of the provision of Section 3 of the Arms Act. Mr. Bose's point was that it may very well be that the jury believed that the appellant was in possession of the gun but that they were not satisfied that such possession was in contravention of Section 3 of the Act. He therefore submitted that the verdict of acquittal in respect of the charge under the Arms Act at the first trial did not conclude the issue as to the possession of the gun and that hence it was open to the prosecution to adduce evidence regarding that fact at the second trial.

18. The above contention of Mr. Bose is not, however, tenable, In the first place it is not possible to find out what was actually in the minds of the jury. For all we know they may have found the appellant not guilty as they were not convinced that he was in possession of the gun. It would be nothing but a mere speculation to assume that their verdict was based on the view that there was no contravention of Section 3 of the Arms Act.

19. In the second place it was nobody's case that the appellant had a licence for the gun as required under Section 3 of the Arms Act. According to the prosecution the gun belonged to the company and the licence stood in the name of one of its officers named Nemi Chand Jain while Swai Singh was the retainer. These facts were duly proved by the production of the licence. The defence never claimed that the licence for the gun stood in the name of the appellant. There cannot therefore be any ground for supposing that the jury believed that the appellant had a licence for the gun as required under Section 3 of the Arms Act. There is however a proviso to Section 3 which says that under certain circumstances a person may

temporarily possess a fire arm without holding a licence therefor. The proviso runs as follows:

'Provided that a person may, without himself holding a licence, carry any fire arms or ammunition, in the presence, or under the written authority, of the holder of the licence for repair, renewal of the licence or for use by such holder.' There was no question of any repair of the gun nor of renewal of the licence and nor of the gun being held by the appellant under the authority of the licensee and for his use. The proviso to Section 3 of the Arms Act had, therefore no application whatsoever. The appellants' defence was that he did not use the gun, hence the questions whether he was covered by the proviso to Section 3 was utterly irrelevant. The theory that the jury found that the appellant was in possession of the gun but that such possession was not in contravention of Section 3 of the Arms Act cannot, therefore, be accepted and the contention raised by Mr. Bose must fail.

20. The position, therefore, is that all evidence adduced by the prosecution at the second trial regarding use of the gun by the appellant was entirely inadmissible. The learned judge should have told the jury so. His omission to do so misled the jury into bringing in a verdict inconsistent with the verdict in the previous trial. In the eye of the law the accused had not possessed the gun in question. It would be self-contradictory to say that he committed murder by using a gun which he had never possessed. Such an absurd verdict cannot be allowed to stand. The admission of evidence that was inadmissible was an error of law and it was this error that has resulted in this absurd verdict. The conviction and sentence based on such verdict must therefore be set aside.

21. As the conviction and sentence are liable to be set aside on this ground alone, we do not consider it necessary to discuss the other grounds taken by the appellant. We should, however, like to point out this much only that at the previous trial the appellant was acquitted of the offence under Part II of Section 304 of the Indian Penal Code, but on the same facts he has, at the subsequent trial, been convicted under Section 302 of the Indian Penal Code. This, in other words, means that the appellant is guilty of the major offence of murder though not of the lesser offence of culpable homicide under Part II of Section 304 of the Indian Penal

Code. This is something quite absurd. The appellant did not specifically take this point in his grounds of appeal. Nevertheless the absurdity involved in the order of conviction is pointed out in order to show that the order could not have been supported even if the other ground of issue estoppel had failed.

22. The result, therefore, is that the appeal is allowed. The conviction of the appellant under Section 302 I.P.C. and the sentence of rigorous imprisonment for life awarded thereunder are set aside. He is acquitted of the charge under Section 302 I.P.C. and he be set at liberty forthwith.

Amaresh Roy, J.

23. I agree.

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