

Dhania Vs. Paras Ram

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Court : Himachal Pradesh

Decided On : Apr-08-1950

Reported in : AIR1950HP44

Judge : Bannerji, C.J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Section 439

Appeal No. : Criminal Revn. No. 53 of 1949

Appellant : Dhania

Respondent : Paras Ram

Advocate for Def. : Daulat Ram Prem, Adv.

Advocate for Pet/Ap. : Man Mohan Nath and; Sardar Labh Singh, Advs.

Disposition : Application allowed

Judgement :

ORDER

Bannerji, J.

1. This is an application in revision on behalf of the complainant in a criminal case under Sections 302 and 307, read with Section 34, Penal Code. The prayer in the application is that the order, dated 1st July 1949, acquitting Paras Ram alias Palta,

of village Kudral, passed by Shri J.N. Bhagat, Sessions Judge of Mahasu, be set aside and be dealt with according to law.

2. The application arises out of an occurrence, which took place in village Kudral (Pargana Matiana) in Theog, at 10 A. M. on 15th, November 1948. According to the prosecution story, Kharia, along with five others, namely,

(1) Lachhi (P. W. 5), wife of Dhania (P. W. 2), who is a brother of Karam Das, deceased,

(2) Mathu, son of Karam Das, deceased,

(3) Dassi, wife of Ratia (P. W. 11), who is a brother of Karam Das, deceased,

(4) Kharia's mother, Dhungri and

(5) his wife, Mathi, had gone to his Ghasni to cut grass and bring it home. In the adjoining Ghasni, Jit Ram. (D. W. 1), son of appellant Gopal was grazing bullocks and Mathi, his sister and Kaunla, daughter of co-accused, Paras Ram alias Palta, were cutting grass. It is alleged by the prosecution that Jit Ram and Mathi held consultation and Jit Ram left to call his father, the appellant, Gopal, at about noon. Two hours later, Gopal appeared on the scene with a double-barrel gun. No sooner did he appear than Ratio Kalia (P.Ws. 11 and 12), brothers of Karam Das, deceased, who were grazing bullocks nearby and also one Balanand (P. W.

10) shouted at Kharia, who, on seeing Gopal with a gun, dropped the load of grass, which he was carrying and ran into an adjoining field below, where Chaurun and Lagnu (father and son, Kohlis by caste) were cutting grass. It is alleged that Gopal took aim at Kharia and fired, hitting him with shots on the left arm and thigh. He then fired the second barrel and Kharia fell down near Lagnu whose leg he caught to shield himself. Upon this, Chaurun covered both Kharia and Lagnu with his body and offered to take further shots on himself. It is also alleged by the prosecution that Gopal re-filled the gun and called upon Ghaurun to get away and leave Kharia. But Ghaurun would not listen. Paras Ram, alias Palta, was then seen to be going near his brother, Gopal and taking the gun from him. He and Gopal left together. Soon afterwards another shot was fired, the report of which

was heard by the fallen Kharia and also by Chaurun and Lagnu, who were by his side attending to him, near the depression known as Nalli or Nalla. But the other prosecution witnesses saw Paras Ram, alias Palta, firing at and killing Karam Das, who was coming to their direction from his field presumably on hearing the report of two firings. Karam Das dropped down dead and the two brothers left the place at once.

3. The first information report was laid at 11.15 P. M. (night) at Theog, the nearest police station, at a distance of about eleven and a half miles, by one Dhanu (D. W. 2), brother of Karam Das, deceased and the police commenced investigation at dawn, the next day, 16th November 1948. At about 7-30 P.m., on 16th November 1948, the appellant, Gopal, appeared at the police station at Sanjauli at a distance of about twenty-seven miles from his Village, Kudral, with two swords and made a statement, which, Bishan Singh, D. W. 2, officer-in-charge, wrote down in the station diary and at the foot of which, the appellant, Gopal, signed his name. A copy of this statement (Ex. DF/1) was forwarded by Bishan Singh to the Investigation Officer. From this statement, it appears that his daughter, Mathi, half way from the house shouted at him that twenty or twenty-two persons were cutting grass in the Ghasni and carrying it away. He proceeded with the gun first to the field to scare away the monkeys and from there touched the scene of occurrence, where he saw his son surrounded by Kharia and Karam Das with swords in their hands and also by other persons, including lumbardar, Hari Singh. When he shouted at them and enquired why his son was surrounded, Kharia and Karam Das let go his son and tried to besot him. He felt that his life was in danger and therefore, fired at them, one at Kharia and the other at Karam Das. They fell down and their swords flew out of their hands, which he picked up. He returned home and took rest and at about midnight set out to make a report at Junjga Thana via Sanjauli, a distance of about forty miles from his village. When he reached Sanjauli he came to know that there was no Thana at Junga and consequently, he came to Sanjauli Thana to make a report and surrender the swords to the police.

4. Upon investigation, this report or statement of Gopal at Sanjauli was found false and the police at Theog sent the charge-sheet against the appellant, Gopal, and

also his brother, Paras Ram, alias Palta.

5. The prosecution examined twenty-two witnesses, of whom, Kharia, P. W. 1, Lachhi, P. W. 5, Chaurun, P. W. 7 and his son, Lagnu, P. W. 9 and Balanand, P. W. 10, Ratia, P. W. 11 and Kalia, P. W. 12, are eye-witnesses to the shooting at Kharia and excepting Kharia, Chaurun and Lagnu, they also witnessed the shooting and killing of Karam Das. The direct testimony of these witnesses prove that neither Kharia nor Karam Das carried any weapon.

6. The learned Sessions Judge has written a judgment, which can be divided into two separate portions. He begins by setting out the hostile relationship between the parties. He proceeds to set out the prosecution and defence versions of the story, He next gives the names of the prosecution witnesses and their relationship in a dozen lines and at once laments that 'there is hardly any independent evidence', though he admits that the complainant and the defence witnesses are all related to the accused persons. He then goes over two further pages to compare the two versions and in effect, to show that he is quite satisfied that the prosecution version was correct and the defence version incorrect. He concludes this portion of the judgment by remarking:

'There is also no proof that the swords belonged to Kharia and Karam Das. The allegation that Kharia and Karam Das were armed with a sword each is made by the defence witnesses, who have been referred to and whose testimony cannot be implicitly relied on. In fact, I do not believe that Kharia or Karam Das was armed with a sword.'

7. He then proceeds to examine the evidence against Paras Ram, alias Palta. About this evidence he says :

'The most important question in the case is whether Paras Bam alias Palta accused did or did not take part in the crime. I have already noticed that the prosecution evidence relating to the occurrence is not given by 'independent' witnesses. Like the defence, the testimony of the prosecution witnesses, who posed as eye-witnesses, can also not be implicitly relied on. In the versions of both the parties there are some discrepancies and exaggerations. I am not impressed

with the evidence of Dr. Durga Daas (D. W. 8) formerly Medical Officer of Junga and now a private practitioner at Rohru, who sought to make out that Paras Ram was an indoor patient under his treatment in the Junga hospital from 13th November 1948 to 20th November 1948. The important evidence in this connection was the indoor register, which has been produced, but in the same there is an over-writing over the name of the patient and probably there was some other name first written below, over which the name of Paras Bam was written. It is also worthy of note that In his statement made before the committing Magistrate, while Paras Ram accused stated that he was at Junga, he did not mention that he was an indoor patient in the hospital. I am inclined to believe the statement of the Court witness Dwarka Das that on 16th November 1948 Paras Ram accused made a payment to him of Rs. 23 at Simla. This witness produced his account books also.'

8. This portion of his judgment he concludes as follows:

'The question whether Paras Ram accused was at his village on the day in question is not so important. He may have been there. The important question is whether he went to the spot and took part in the crime. The following considerations weigh on my mind in the matter of determining this question. If the murder of Karam Das was committed by Paras Ram accused, as is alleged by the prosecution, it is difficult to explain why Gopal should take upon himself the responsibility for the murder. It is true that in his statement Gopal does not directly admit having shot Karam Das dead. He says that he fired the other shot on that side. It is not denied that Karam Das fell. Gopal, however, says that he could not say whether his shot hit Karam Das. The defence witnesses including his son and daughter, however, explicitly stated that Gopal fired at Karam Das who thereby fell. So it is very difficult to understand why should Gopal and his own children ascribe the murder to Gopal if it was committed by Paras Ram. On the other hand, there is a reason why the prosecution seeks to exonerate Gopal of the murder and to charge Paras Ram herewith. The wife of Gopal accused is admittedly a younger sister of Lachhi (P. W. 5) the wife of the complainant, Dhania (P. W. 2). While, therefore, the prosecution party cannot altogether save Gopal, because he fired in broad daylight in the presence of so many persons; yet on account of the

aforesaid near relationship, they are anxious to save the neck of Gopal lest he might be hanged for the murder and the younger sister of Lachhi thereby become a widow. The prosecution party have no ground to have a similar soft corner in their heart for Paras Ram. Rather they have got an opportunity to do away with their enemy. As an elder brother, Paras Ram might be taken to be more responsible for the litigation regarding the Ghasni with the prosecution party than the younger brother Gopal.'

9. It is to be noted that in dealing with the accused Paras Ram, the learned Sessions Judge made no attempt whatever to discuss the evidence of the eye-witnesses, Lachhi, Ratia, Kalia and Balanand. Nor did he think it necessary to bring his judicial mind to bear upon the effect of the evidence of Kharia Chaurun and Lagnu and last but not the least Dhania, the complainant, whose evidence prima facie fell within the provisions of Section 6 and illustration (a), Evidence Act. The learned Sessions Judge however, admits

'these witnesses do say that Ratia and Kalia told then immediately afterwards that it was Palta who had shot Karam Das.'

10. The only reason given by the learned Judge is that they are not independent witnesses, though he finds that the

'prosecution witnesses who posed as eye-witnesses can also not be implicitly relied on.'

Yet he convicts co-accused, Gopal, because Gopal made a 'confession' to the police about which the learned Judge says:

'Thus as regards the offence regarding the death of Karam Das, Gopal's conviction is being based practically on his own confession.'

and further,

'in any case, as observed above, if the conviction of the accused is to be based on his own confession, as is being done in the case of Gopal with reference to Karam Das, we have to take his version as a whole,'

finally,

'The guilt of Paras Ram alias Palta has not been brought home to him. He is, therefore, hereby acquitted. He shall be forthwith set at liberty.'

11. The learned Sessions Judge regrets the absence of independent witnesses. As they alleged enmity, it was impossible that they would tell the truth. He does not seem to have considered that enmity is a double-edged weapon and that if there was a motive for the complainants to name these accused falsely, there must almost necessarily be a motive for these accused to take part in an attack on the deceased. 12. According to the learned Sessions Judge, the 'alibi' of Paras Ram completely broke down. His observations regarding the alibi have been stated above.

13. If Paras Ram was at Simla, when the police arrived in his village, and he was arrested at Sanjauli on 20th November 1948, the learned Judge ought to have considered the evidence of Hari Singh lambardar, P. W. 18, Paras Ram's own statement and the evidence of the defence witness, Bishan Singh, and of the investigating officer, P. W. 21, regarding the recovery of the breech-loading gun used in the commission of the crime at the instance of Paras Ram. The learned Sessions Judge failed to discuss the effect of the concealment of the gun.

14. Illustration (i) of Section 8, Evidence Act, is as follows :

'A is accused of a crime. The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.'

16. The trial Judge misconceived the law regarding this evidence because throughout the entire judgment he did not mention these facts proved by those witnesses. The recovery of the gun (Ex. 5) was witnessed by Gian Singh (P. W. 15) and Hari Singh (P. W. 18) and Paras Ram admitted the gun to be his and had applied for a licence giving the number of the gun. His signature was identified by Hari Singh lambardar. There had been two previous searches for this weapon and

it was not found. Paras Ram eventually asked Begmu, wife of Gopal to fetch the gun from the concealed place. Jit Ram, son of Gopal, also admitted that there was only one gun in the house. This evidence has been completely ignored by the Sessions Judge. The effect of the rejection of the plea of alibi and of the recovery of the gun with which the crimes were committed has far-reaching effect not only on the credibility of the witnesses for the parties but also upon the question of the benefit of doubt which the learned Judge conferred on Paras Ram. This aspect of the case, namely, the failure of the plea of alibi, which the learned Judge himself found and the recovery of the gun belonging to Paras Ram is very serious and the trial Court has gone clearly wrong in ignoring them. It appears to me that he has overlooked important pieces of evidence and attached undue importance to insignificant circumstances and has altogether ignored important and significant matters. [16] The learned Judge says :

'Nor would I rely on Kanshi Ram (P. W. 20), nor even on Besro (P. W. 6), a Chamar woman of the village of the prosecution party, who sought to prove the presence of Paras Ram accused at or near his house on the day of the occurrence.'

17. The learned trial Judge does not state any reason why he discards the evidence of Kanahi Ram (P.W. 20) and Mt. Besro.

18. My attention has been drawn to the following lines upon which the learned Sessions Judge thought he could give the benefit of the doubt to Paras Ram.

'Thus as regards the offence regarding the death of Karam Das, Gopal's conviction is being based practically on his own confession.

In any case, as observed above, if the conviction of the accused is to be based on his own confession, as is being done in the case of Gopal with reference to Karam Das, we have to take his version as a whole.'

19. There is no such 'confession' on record. There is a statement made to the police at Sanjauli by Gopal and the value and worth of this statement have been discussed in the judgment delivered by this Court in Gopal v. Crown, A. I. R. (37)

1960 H. P. 18: (51 Cr. L. J. 786). Under no stretch of imagination can this statement come within the definition of 'confession' or within the rules prescribed for recording it (Section 164, Criminal P. C.).

20. This alone has, in my opinion, caused a grave miscarriage of justice. If the learned Judge had not erred in treating this statement to the police as 'confession' he could have avoided a failure of justice as far as Paras Ram was concerned.

21. It seems to me that the learned Judge has given the benefit of the doubt to Paras Ram on a conclusion, which is founded on incorrect premises. This conclusion has been criticised by counsel for the petitioner that from the beginning to the end of this judgment, the learned Judge has not made any attempt to examine and consider, in detail, the evidence of the prosecution witnesses in order to arrive at a sound conclusion as to which, if any, of the persons whose presence was admitted, actually took part in this occurrence. It may be that the whole matter has been exaggerated to the extent that the learned Judge has thought but the learned Judge has attempted a short cut which saved him the trouble of examining and coming to a proper finding on the evidence, On behalf of the applicant, it is contended that by this judgment, the learned Judge has failed to hold the trial of Paras Ram according to law and it is, therefore, urged that the judgment of acquittal should be set aside and the learned Sessions Judge be ordered to hold a retrial of the accused, Paras Ram. Counsel for Paras Ram, opposite party, has referred me to various authorities that have dealt with the interference with an order of acquittal. According to him, the guiding principles are laid down in Emperor v. Rameshwar Ramnath, A. I. R. (16) 1929 Bom. 306 : (30 Cr. L. J. 1062).

22. I have also been referred by counsel for Paras Ram to a number of cases on the question whether this Court will on an application in revision by a private person set aside an order of acquittal and direct a re-trial. Learned counsel treats this application as if it was an application complaining of nothing more than a technical irregularity on the part of the learned Sessions Judge, that is, a failure to comply sufficiently with the law that he should give his reasonings on all points at issue.

23. These remarks are, however, in no way, applicable to the present case where there is no indication of a proper examination of the evidence. Similarly, he referred to *Tippanna v. Emperor*, A.I.R. (19) 1932 Bom. 473 : (33 Cr.L.J. 801), in which the head-note runs as follows :

'The High Court is not invariably bound to interfere in revision, because there is an irregularity in the form of a judgment, unless there is Some reason to believe that there has been a failure of justice.'

24. In this connection, counsel for Paras Bam argued that there could not be any question of failure of justice. I do not desire to go at all deeply into that point in order to prejudice the Court or the accused. The reliance of the learned Sessions Judge on the alleged 'confession' is itself sufficient for the purpose that a miscarriage of justice has occurred.

25. I am in full agreement with the general proposition that in all cases of application for setting aside an order of acquittal, the power is one to be exercised only in exceptional cases and with caution.

26. The cases cited at the Bar are undoubtedly correct determinations upon the special facts to which each relates, but I am unable to deduce from them a general rule that this Court must never interfere in revision with a judgment of acquittal which has been occasioned by a failure to judicially examine and appreciate evidence. (See *Satis Chandra v. Chinta Haran*, 43 C. W. N. 25 : (A. I. R. (25) 1938 Cal. 613 : 39 Cr. L. J. 938), *Faujdar Thakur v. Kashi*, 42 Cal. 612: (A.I.R. (2) 1915 Cal. 388: 16 Cr. L. J. 122).

27. It is the practice of this Court not to interfere with the orders of acquittal in revision on the ground that the State Government can be moved to file an appeal against the acquittal under Section 417, Criminal P. C.

28. In this instance, the State Government ,was moved on 6th August 1949. But it has declined to take action. In such cases, in my judgment, the discretion of this Court cannot be allowed to be fettered in any way, and where there has been an error of law, I shall be prepared to interfere in order to prevent a miscarriage of

justice. The learned Judge seems to have given the benefit of the doubt to Paras Ram because Gopal 'confessed' to the police that he might have killed Karam Das.

29. As a matter of fact, High Courts have not interfered except in cases in which the lower Court has 'obstinately blundered' or has 'through incompetence, stupidity or perversity' reached such 'distorted conclusions as to produce a positive miscarriage of justice' or has in some other way so conducted or misconducted itself as to produce a glaring miscarriage of justice.

30. This had been good law till their Lordships of the Privy Council in Sheo Swarup v. Emperor, A. I. R. (21) 1934 P. C. 227 : (36 Cr. L. J. 786), declared, 'there is in their opinion, no foundation for the above view of the law,' Their Lordships held :

"Sections 417, 418 and 423, Criminal P. C., give to the High Court full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence, the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code.'

31. In Sheo Swarup v. King-Emperor, (A. I. R. (21) 1934 P. C. 227 : 36 Cr. L. J. 786), their Lordships of the Privy Council were considering the powers of the High Court as a Court of Appeal, Section 439 (1) of the Code provides that while exercising the revisional powers, the Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 423 etc.

32. In Nur Mohammad v. Emperor, A.I.R. (32) 1945 P. C. 151 : (47 Cr. L. J. 1), their Lordships again considered powers of the High Court and observed as follows :

'Their Lordships do not think it necessary to read it (Sheo Swarup v. King Emperor, A.I.R. (21) 1934 P.C. 227 : (36 Cr. L. J. 786) all again, but would like to observe that there really is only one principle, in the strict use of the word, laid down there; that is, that the High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the

conclusion that upon that evidence the order of acquittal should be reversed.'

33. The correct principle, as laid down by their Lordships of the Privy Council, is to review at large the evidence upon which the order of acquittal is founded and to reach the conclusion that upon that evidence, the order of acquittal deserves to be reversed. This is a much simpler and clearer proposition than to define 'obstinate blunder, stupidity or perversity and incompetency', 'distorted conclusion resulting failure of justice', 'glaring miscarriage of justice and exceptional circumstances.'

34. In my opinion, the learned Sessions Judge did not exercise a proper judicial mind and came to a decision without a proper review of the evidence. Upon the evidence, the order of acquittal ought to be reversed.

35. I, accordingly, allow the application, set aside the order of acquittal of Paras Ram, alias, Palta and direct his re-trial in the Court of Session in accordance with law. The learned Sessions Judge will take necessary action to have the accused Paras Ram brought before his Court and proceed with the trial without any unnecessary delay. Paras Ram must surrender to his bail.

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