

(1999) 05 RAJ CK 0030
In the Rajasthan High Court
Case No : Criminal Appeal No. 358 of 1983

Bherulal and Another	Vs	APPELLANT
State of Rajasthan		RESPONDENT

Date of Decision : 05-05-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 315
Penal Code, 1860 (IPC) — Section 34, 435, 436

Citation : (1999) CriLJ 4257 : (2000) 1 RCR(Criminal) 283

Hon'ble Judges : Mohd. Yamin, J

Bench : Single Bench

Advocate : N.P. Gupta, for the Appellant; S.S. Sharma, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Mohd. Yamin, J.—By his judgment dated 14-9-1993 learned Sessions Judge, Bhilwara convicted appellant Bherulal u/s 436, IPC and sentenced him to four years" rigorous imprisonment with a fine of Rs. 100/- and in default to undergo one month"s rigorous imprisonment. Shankarlal appellant was convicted u/s 436/34, IPC and sentenced to four years" rigorous imprisonment with a fine of Rs. 100/-and in default to undergo one month"s rigorous imprisonment. Appellants have assailed this finding of guilt and sentence.

2. Briefly stated, on 28-2-1983 Ratanlal submitted a type written report to the S.P. Bhilwara which was forwarded by him to the Station House Officer, Kotwali to register a case. Then the same was presented at 3.15 p.m. to the Circle Officer, who was present at Kotwali. The report stated that Ratanlal owned a house in Radha Krishan Colony. House of Daulat Ram was also situated there and before this house there was a wooden cabin where Mahoharlal used to sell different items like pan, bidi, cigarette, confectionary etc. The cabin cost Rs. 1000/- and the property kept therein was of the value of Rs. 1500/-. It was further stated in the FIR that Bheru who was a neighbour of cabin used to fight with the informant

time and again. They were on inimical terms. On an earlier occasion this Bheru Lal had assaulted the wife of complainant. Bherulal along with other 4-5 persons removed the cabin which belongs to the complainant. The cabin was taken to some distance and was burnt. It was Babu Singh who witnessed incident, objected to appellant but no heed was paid. It was further stated that the accused appellants were armed with knives. Case u/s 436, IPC was registered, investigated and ultimately Bherulal was tried for offence u/s 436, IPC while Shankarlal u/s 436/34, IPC. During trial quite a good number of witnesses were produced. Accused appellants were examined u/s 313, Cr.P.C. Bal Kishan examined himself on oath u/s 315, Cr.P.C. in defence. Learned Sessions Judge, after hearing both the parties as stated above, convicted and sentenced the appellants.

3. I have heard the learned counsel for the appellant as well as learned Public Prosecutor at length and have gone through the record.

4. Learned counsel for the appellants first submitted that the cabin does not come within the definition of "building" as the word used u/s 436, IPC means "building" and nothing more nothing less. He submitted that the cabin was a movable property. He further submitted that the occurrence took place in night, there was no eye witness and if there is any he is a cooked up witness. There existed previous enmity between the parties because of which appellants have been involved. His contention is that appellants deserve acquittal.

5. On the other hand, learned PP has tried to support the judgment of learned Sessions Judge.

6. Let us first examine whether a wooden cabin, as it was in the present case, comes within the definition of "building"? The word "build" in its ordinary dictionary meaning means to erect as a house or bridge, to form or construct. So "building" would necessarily mean a structure. Even a "kachcha" "Jhumpa" with a thatched roof closed by doors and shutters in which the grain and other articles were stored comes within the meaning of "building". (See Rajoo and Others Vs. State of Rajasthan, Learned counsel submitted that a wooden cabin like the one alleged to have been burnt in this case was a structure which was removable but the word "building" connotes such a structure which is not removable. My view is that a cabin which is removable which might be made of wood will not be covered under the meaning "building" which necessarily means the structure or any erection which is of permanent nature and is erected on the earth and some portion of it is embedded in earth. When the cabin burnt does not come within the definition of "building", accused appellants could not have been convicted for offence u/s 436, IPC. Its burning might be a lesser offence i.e. 435, IPC. Even for that, learned counsel for the appellants raised a number of arguments.

7. He submitted that it was on the occasion of Holi that such an incident is said to have taken place. He submitted that the witnesses Manoharlal, Ratanlal and Kan Das who are said to be eye-witnesses could not have seen the occurrence.

They are unreliable. He submitted that the accused appellants could not have been identified at the time of occurrence and they have been falsely implicated because of enmity. He also submitted that the FIR was lodged with the S.P. to direct the Station House Officer to record FIR and it means something against the complainant himself who could have directly gone to the police station.

8. PW-1 Ratanlal stated that at about 11.30 p.m. on 27-2-1983 he heard noise and woke up. Then he went upstairs. He saw the appellants alongwith 4-5 persons. He saw that the cabin was being removed and was taken to the chauraha which was about 20 feet away. Bheru poured kerosene oil. It was Bheru who burnt it. He admitted that about a year ago Bheru had assaulted his wife and inflicted injuries resulting into seven stitches on her head. Criminal case of that incident was pending on the date when occurrence took place. The witness further admitted that next day he went to the residence of S.P. at about 10.00 or 11.00 p.m. but the S.P. was out and he waited for about two hours. Then S.P. ordered on Ex.P/1 to register case. The witness took the FIR to Kotwali where case was registered. He has not stated anything as to why did he go directly to the S.P. when he could have very well gone to the Kotwali itself if not immediately after the occurrence, then in the early morning. Then it is found from the FIR Ex.P/1 that Shankarlal was not named in it. The witness has no reasonable explanation to offer for the omission neither did he name Ratanlal Nai and Daulat Ram as eye-witnesses of the occurrence. He has no reasonable explanation to offer either about this lapse. In these circumstances his own statement to the effect that he saw from the roof the occurrence of removal of cabin in the night from a distance of about 70 feet, is such which does not inspire confidence in the circumstances because he had previous enmity with accused Bheru. The burning of cabin is said to be at the chauraha which is again about 20 feet away. It means that the place where it was burnt was about 90-100 feet away and as such this witness could not have identified Bheru from such a distance.

9. PW-3 Manoharlal is the brother of PW-1 Ratanlal and he is so much interested in conviction of the appellants that he noted down the date of occurrence on his palm which was found when he was deposing in Court. When learned PP examined him in Court he first saw the date written on his palm and then told the date. This is found in the very first lines of his examination in chief to which the counsel for accused persons had objected. However, this shows the interestedness of the witness. His interestedness is very natural as the case of the prosecution itself is that his real brother's wife was assaulted on an earlier occasion by appellant Bherulal, its case was pending. The witness was asleep and on hearing noise he woke up. He did not come out. He peeped through a window of his house. He stated that Shankarlal along with 5-7 persons removed cabin. He was living in the house of Daulat Ram as tenant which according to him was at a distance of about 25-30 feet. According to him the cabin was removed and taken to a distance of 20-25 feet and was put ablaze by Bheru who first sprinkled kerosene oil over it. He has further stated that quite a good number of

neighbours had collected but he is not in a position to name anyone of them. It is strange that he could identify only Bheru and none else. The conduct of the witness is very strange. He was a young boy of 20-25 years of age. He himself used to do business sitting in the cabin and even then he remained spectator from the window of his house. He has given an explanation that he did not come out because Bheru was waving a knife in the air and saying that he would kill if anybody comes to put hindrance. He was cross examined at length. His interestedness is proved from his statement because he had not only written the date of incident on his palm when he appeared in the Court but even certain other dates including the one on which the earlier occurrence of assault on his brother's wife took place. He stated that appellant Bheru threatened him that in case he came near, he would be killed. When he was peeping through window from inside, Bheru could not have seen him from outside. But in his police statement Ex.D/2 he stated that Bheru had threatened everybody as if Bheru as a don of some film was threatening the whole mohalla. He is a liar. He stated that Bheru and Shankar both set fire to the cabin but when he was asked by the trial Court itself to clarify, he stated that Shankarlal was merely standing. The occurrence is said to have taken place on the occasion of Holi when it was a full moon lit night. The witness says that it was a pitch dark night and he could see the occurrence because a bulb was burning on the upper side of his house. It means he had not at all seen the occurrence and he was a cooked up witness. Learned trial Judge should not have believed him. It was a moon lit night and the same has been verified from Shatabdi panchang edited by Ishwar Dutt Sharma published by Venkateshwar Press, Bombay (1962 edition).

10. PW-2 Chunnilal is a witness before whom police inspected site and prepared site plan Ex.P/3. Site plan does not show the house in which Manoharlal lives. It does show the house of Ratanlal as well as the place "A" from where cabin was removed and place "B" where it was burnt. These places are at quite a distance from the house of Ratanlal. Ratanlal says he could see from upstairs that the cabin was removed and that same was taken to place "B" where it was burnt. It may be true but it was not possible for him to identify appellant Bheru. He has named appellant Bheru only because there was enmity. Name of Shankarlal does not appear in the FIR and if some credence is given to PW-3 Manohar Lal, it is found that this accused has been falsely roped in.

11. PW-4 Babu Singh stated that Ratanlal Nai came to him in the night and asked to accompany him. He went from his house to the place where cabin was burning. He has stated that he did not identify any of the persons who were burning it. The witness was declared hostile at the request of prosecution and then he named Bheru, who according to him threatened Ratanlal. It may be stated that Ratan has himself said that he had not gone to the place of occurrence. Instead he was beholding from the upstairs of his house. The witness stated in the cross-examination that Shankar and Bheru were present but he has said that the person who burnt the cabin was one Raimal and not the accused appellants. Therefore, the whole case of the prosecution collapses like a house of

cards. He is hostile to the prosecution. But it cannot be a ground to discard his statement as a whole. The hostile witness cannot be discarded in toto as per Supreme Court Judgment in Sat Paul Vs. Delhi Administration, Judge can accept a part of testimony of such a witness which he finds to be creditworthy and act upon it. From his evidence I find that it was some another man Raimal who is alleged to have put ablaze the said cabin. He was not challaned.

12. PW-6 Muraduddin stated that Ex. P/1 was forwarded by Dy. S.P. to him whose signatures are identified by him on Ex.P/1. The check report Ex. P/2 was prepared by Dy. S.P. himself who was present at Kotwali. P.W.-6 Muraduddin stated that on 28-2-1983 he inspected site after investigation was handed over to him. He is doubtful about the time. First he stated that it was about 3.15 p.m. but later on corrected himself by saying that it was handed over to him at 4.30 p.m. He stated that when he went to the site, he found that cabin was burning and flames of fire were oozing out of it. If this statement is taken to be correct then the allegation that cabin was burnt some time at 11.00 or 11.30 p.m. on 27-2-1983 is false. The size of the cabin as per statement of PW-3 Manoharlal was only 2x3 feet. It is impossible to believe that if it was burnt at 11.30 p.m. in the night of 27-3-1981, the flames would ooze out even at 4.30 p.m. on 28-2-1983. Some times witness become so much over confident that whatever they say would be believed by the Court. PW-6 Muraduddin falls in this category. Thus it is clear from his deposition that the investigation was not fair. This version of the witness alone is sufficient to discard his testimony. He on the one hand did not mention the distance of the places where from the witnesses saw the occurrence in site plan Ex.P/3 and on the other hand he considers that whatever he says would be believed as gospel truth. Learned Sessions Judge was not right in acting on the basis of his evidence. The witness has given such a version which has no legs to stand.

13. PW-17 Shivilal Joshi who was Circle Officer and Dy S.P. of Bhilwara stated that on 28-2-1983 when he was present at police station Kotwali, PW-1 Ratanlal brought the FIR Ex. P/1 which contained order of S.P. that a case be registered. He himself registered the case at 3.15 p.m. by making an endorsement on the report itself. This is a formal work which he did. Investigation was handed over to Muraduddin who was material witness. I have already discussed his statement. I have no hesitation in saying that the prosecution has miserably failed to prove its case.

14. Now to defence witness. DW-1 Bal Kishan is a witness who stated that it was a day of Holi and he was present but he did not find Shankar and Bheru. The witness appears to be a simpleton as he did not know that Holi is celebrated in the month of Phalgun. He is a neighbour of PW-1 Ratanlal and PW-3 Manoharlal. He stated that Manoharlal, Chunnilal and Ratanlal all the three persons took part in Holi celebration upto 10.00 p.m. This evidence of the defence witness further fortifies that learned Sessions Judge wrongly held that the case was proved against the appellants.

15. Consequently, the appeal is worth acceptance. The appellants deserve acquittal. Appeal is allowed and the accused appellants are acquitted from the charges levelled against them.