
(1968) 02 RAJ CK 0007
In the Rajasthan High Court
Case No : Criminal Appeal No. 3 of 1968

Bhopal Singh and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 22-02-1968

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 423
Penal Code, 1860 (IPC) — Section 149, 304, 323

Citation : AIR 1968 Raj 305 : (1968) CriLJ 1572

Hon'ble Judges : C.M. Lodha, J

Bench : Single Bench

Advocate : O.C. Chatterjee, for the Appellant; M.L. Shrimal, Deputy Govt. Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

C.M. Lodha, J.—This appeal has been tiled by eight accused -- Bhopalsingh, Kalyansingh, Richpal Singh, Bhanwarsingh, Roopsingh, Ratansingh, Chander Singh and Mal Singh who have been convicted u/s 304 Part II read with Sections 149 and 148 Indian Penal Code and sentenced to 7 years" and two years" rigorous imprisonment respectively, by the Additional Sessions Judge, Sikar by his judgment dated 23rd December, 1967. The sentences under both the counts have been made to run concurrently.

2. All the eight accused are related to each other though the distinct relationship among them has not been brought out on the record. They have got their houses in the same Gowadi in village Hirna, Police Station Fatehpur, District Sikar. Deceased Bhoorsingh has also his house in this very Gowadi. There is a "chowk" in this "Gowadi" regarding the use of which there was a dispute between Bhoorsingh and the accused. Deceased Bhoorsingh was a cousin of the accused Bhopalsingh and, it appears, that the accused Bhanwarsingh who is a nephew of the accused Bhopalsingh claimed the "chowk" to be exclusively his, whereas Bhoorsingh deceased wanted to use the "chowk" as a common passage. The

prosecution case is that some altercation had taken place between Bhoorsingh and the accused Bhanwarsingh 20 or 25 days before the occurrence, and a day before the occurrence which took place on 8-7-1965 there was verbal altercation between Bhoor Singh and accused Bhanwarsingh about this very "chowk" and at that time the accused Bhanwarsingh save a challenge to Bhoorsingh that he would be suitably dealt with next day.

3. On 8-7-1965 Bhoorsingh went to the village Post Office, Hirna to make a complaint against the local postman to the Inspector, Post Offices, Mandawa, who happened to be in the village Hirna on that day P. W. 11 Chhatu Singh, resident of Athwas. also came that day to the village Hirna to settle the dispute between the accused Bhanwarsingh and the deceased Bhoorsingh by his intervention Inderstngh, second son of Bhoorsingh, was asked by Chhatusingh to bring Bhoorsingh from the post office so that he may mediate between the parties and bring about a compromise between Bhoorsingh and Bhanwarsingh. Meanwhile Chhatu-singh sat down in the Kotari of Bhanwar Singh. The prosecution case is that at that time all the eight accused were sitting with lathis in their hands in the Kotari of Bhanwar Singh. At about 10 a. m. Bhoorsingh passed in front of Bhanwarsingh's Kotari and there was an exchange of hot words between Bhoor-singh and the accused, who were sitting in the Kotari.

According to the prosecution that accused Richapalsingh was the first to strike a blow with a lathi on the right hand of Bhopalsingh which resulted in a compound fracture of right radius bone. Bhanwarsingh accused thereafter hit Bhoorsingh on the latter's right leg as a result of which Bhoorsingh fell to the ground. Thereafter accused Kalyansingh is reported to have given a kick on the chest of Bhoorsingh. The prosecution case is that thereafter all the eight accused gave a beating to Bhoorsingh who was rescued by son Sanwat Singh (P. W. 4), Narana (P. W. 10) and Chhatusingh (P. W. 11). Richpalsingh is also said to have inflicted a lathi blow on the right leg of P. W. 4 Sanwatsingh. All the eight accused then went away from the scene of occurrence. Bhoor Singh soon after became unconscious and was taken on a cart by Sanwatsingh and Narana to Police Station, Fatehpur, which is at a distance of about 10 miles from village Hirna. P. W. 4 Sanwat Singh lodged a first information report of the occurrence at the Police Station, Fatehpur the same day at about 4.30 p.m. which has been put on the record and marked Ex. P. 1. Since the Sub-Inspector of Police, In-charge of the Police Station, Fatehpur was away, two police constables accompanied Sanwat Singh and came to the place where his father was lying and brought Bhoorsingh to Kedia Hospital, Fatehpur where he was examined by P. W. 1 Dr. Niyamat Rai Bhatiya, who noted the injuries on the person of Bhoorsingh and prepared an injury report marked Ex P. 6.

Since the patient was completely unconscious and required better treatment, he was referred by Dr. Niyamat Rai to P. W. 2 Dr. Chatur Beharilal, Medical Officer in-charge, Seth Bhartiya Hospital, Fatehpur. Bhoorsingh's condition in Bhartiya Hospital became more serious and therefore Dr. Chatur Beharilal informed the

Station House Officer, Fatehpur vide his letter Ex. P. 9 that Bhoorsingh had multiple injuries over his body and his general condition was very poor. Bhoorsingh, however, died in Bhartiya Hospital on 9-7-1965 at about 1.15 a.m. of which information was sent to the police by Dr. Chaturbehari by his letter Ex. P. 10. The dead body of Bhoorsingh was later on sent to S. K. Hospital, Sikar for autopsy. P. W. 3 Dr. Kesar Dev Sharma, Medical Officer In-Charge, S. K. Hospital, Sikar conducted the post-mortem examination of deceased Bhoorsingh and found that there were nine injuries on the person of Bhoorsingh.

The post-mortem report is Ex. P. 20. The cause of death, according to Dr. Kesardev Sharma, was oedema of lungs due to peripheral circulatory failure as a result of primary shock caused by injuries sustained by the person particularly on head and left temporal region. After receiving information about the death of Bhoor Singh the police registered the case against the accused under station 302, Indian Penal Code, and after carrying out the necessary investigation challaned them in the Court of Sub-Divisional Magistrate, Fatehpur, who committed the accused to the Court of Additional Sessions Judge, Sikar for trial.

4. The prosecution examined in all 15 witnesses. All the accused pleaded not guilty to the charges framed against them and examined three witnesses in defence. The learned Additional Sessions Judge came to the conclusion that the deceased received nine injuries at the hands of the accused out of which there was one transverse contusion on left parietal and temporal region and there was also another contusion on mid occipital and vertex region as found by P. W. 3 Dr. Kesardev Sharma, who performed the post-mortem examination of the dead body of Bhoorsingh. The learned Judge accepted the evidence of the direct witnesses to the occurrence viz. that of P. W. 4 Sanwatsingh, P. W. 10 Narana and P. W. 11 Chhatu Singh and came to the conclusion that all the accused were members of an unlawful assembly whose object was to give a beating to Bhoorsingh and were therefore constructively liable u/s 149, Indian Penal Code for an offence u/s 304 Part II, Indian Penal Code, as the death of Bhoorsingh was caused by the accused with the intention of causing such bodily injury as was within their knowledge likely to cause death. In this view of the case the learned Additional Sessions Judge convicted all the eight accused and sentenced them as already stated above.

5. Aggrieved by their conviction and sentences all the eight accused have filed a joint appeal and I have heard the learned counsel for the appellants as well as the learned Deputy Government Advocate at some length.

6. Mr. Chatterjee learned counsel for the appellants has, in the first instance, argued that there were only three injuries on the person of Bhoorsingh caused in this incident and the post-mortem report prepared by P. W. 3 Dr. Kesardev showing nine injuries does not represent the true state of affairs. In this connection he has relied in the first instance on the version given by P. W. 4 Sanwat Singh in the first information report Ex. P. 1 wherein it has been specifically stated that Richapalsingh accused struck a lathi blow on the right

hand of Bhoorsingh, which broke his hand and Bhanwarsingh hit him on the knee and thereafter Kalyan Singh gave a kick on Bhoorsingh's chest. No specific part has been assigned to the rest of the five accused nor there is reference to any injury on any other part of the body. Mr. Chatterjee goes on to argue that soon after the lodging of the first information report P. W. 5 Lilaram examined the injuries on Bhoorsingh and prepared a memo of injuries marked Ex. D. 4. In Ex. D. 4 also only three injuries have been mentioned, viz. on the right hand, on the knee and, on the chest- Lilaram has also stated that he did not observe any other injury on the person of Bhoorsingh. Not only that P. W. 1 Dr. Niyamat Rai Bhatia who was the first person to examine the injured Bhoorsingh found only three injuries which were described by him as below :

1. Compound fracture of right radius bone, 2 1/2" above the wrist with contused wound 1" x 1/2" deep to the bone. Abrasion 1/2" x 1/2" on the back of right wrist swelling of the right hand and fore-arm.

2. Ecchymosis 4" x 1" obliquely from left to right on the right costal margin from the sternum.

3. Contusion of right ankle with swelling on the outer side 3" x 3".

7. The next doctor who examined the injuries of Bhoorsingh was Dr. Chatur-behari Lal (P. W. 2), who also found only the injuries described by Dr. Niyamat Rai and none other. After Bhoorsingh had died, P. W. 15 Durga Prasad In-charge Circle Officer, Fatehpur prepared a memo of the dead body Ex. P. 2 and did not note any head injury. It has been further urged by Mr. Chatterjee that P. W. 4 Sanwat Singh who is the best witness for the prosecution and who cannot be expected to have any soft corner for the accused has specifically stated that his father before becoming unconscious had told him that he was feeling too much pain in his hand and asked for bandaging of the injuries on his hand. This witness also admits to have pointed out the injuries of his father to the witnesses Chatur Singh and Narana and also to the doctors of Kedia Hospital and Bhartiya Hospital at Fatehpur. He has also stated that his father did not bleed from any injury except the injury on his right wrist.

In this state of evidence the learned counsel has argued that no reliance can be placed on the statement of Dr. Kesar Dev when he says that there were two injuries on the temporal region and also on the occipital region of Bhoorsingh and the learned Additional Sessions Judge was not justified in brushing aside the evidence of Dr. Niyamat Rai, and Dr. Chatur Beharilal corroborated by the statement of P. W. 4 Sanwat Singh and the condition of the injuries noted by the police officials Lilaram and Durga Prasad in Ex. D. 4 and Ex. D. 2 respectively. It is indeed unfortunate that the medical evidence with respect to the injuries on the person of Bhoorsingh should have been so discrepant. It is surprising how these two injuries on the head of the deceased Bhoorsingh were not noted by Dr. Niyamat Rai and Dr. Chatur-behari Lal and at any rate how they escaped the notice of the police officials Lilaram and Durga Prasad. But what is still more

intriguing is how Sanwat-singh, son of Bhoorsingh, could not notice these injuries which according to Dr. Kesardev Sharma materially contributed to the death of Bhoorsingh on account of excessive bleeding particularly from these injuries.

The learned Deputy Government Advocate seeks to explain this discrepancy in the medical evidence by submitting that Dr. Chatur Behari Lal had examined the injuries very cursorily and the injuries on the head may not have been noted by Dr. Niyamat Rai and Sanwat Singh and so also by the police officials. According to him greater credence should be given to the evidence of Dr. Kesardev Sharma. This line of reasoning has been adopted by the lower court also. However, I find it difficult to agree with the learned trial Judge in this respect and am not prepared to believe that the injuries on the head of Bhoorsingh escaped the notice of not only his son Sanwat Singh but also that of the two doctors and the police officials.

The omnibus statements of the eye witnesses Sanwatsingh, Narana and Ch-hatu Singh that all the eight accused gave a beating to Bhoorsingh when he had fallen to the ground fails to convince me that any injury was inflicted on the head of Bhoorsingh for the simple reason that if there had been one it would not have been described so late as only after the death of the man. I am therefore of opinion that the prosecution has been able to prove only those injuries which have been described by Dr. Niyamat Rai in his injury report Ex. P. 6.

8. The learned counsel for the appellants has argued that the version given by the prosecution witnesses that after Richpalsingh, Bhanwarsingh and Kalyansingh had inflicted injuries on the person of Bhoorsingh, all the eight accused started beating Bhoorsingh when he had fallen to the ground, is not correct. If all the eight accused had beaten, argues the learned counsel, there would have been much larger number of injuries on the person of Bhoorsingh than what were found on the examination of his body by P W. 1 Dr. Niyamat Rai. In these circumstances it is contended by him that apart from the three accused Richpalsingh, Bhanwarsingh and Kalvan-singh the prosecution has not been able to prove beyond doubt any part played by the rest of the five accused and therefore these five accused cannot be made constructively liable with the help of Section 149. Indian Penal Code.

It is true that all the accused reside in the same Gowadi and the possibility of their coming to the spot to witness the mediation by Chhatu Singh or to see what had actually happened cannot be ruled out. I have looked into the statements of the eye witnesses P W 4 San-watsingh, P. W. 10 Narana and P. W 11 Chhatu Singh. P. W. 4 Sanwat Singh has stated that after Richpal had inflicted a lathi blow on the right wrist of Bhoorsingh, Bhanwarsingh had given a blow on his knee and Kalyansingh had given a kick on his chest, and then all the eight accused encircled Bhoorsingh and began to inflict lathi blows on him. P. W. 10 Narana and P. W 11 Chhatu Singh, however, do not speak of the eight accused surrounding the deceased after he had fallen to the ground, and have only deposed that all the eight accused began to inflict blows with lathis on

Bhoorsingh when he had fallen to the ground.

Both P. W. 10 Narana and P. W. 11 Chhatu Singh have admitted in their statements that they are unable to state as to which accused struck on which part of Bhoorsingh's body. Narain has also stated that he does not know whether the lathi blows struck by the rest of the accused (meaning thereby 5 accused other than Richpalsingh. Bhanwarsingh and Kalyan Singh) actually fell on Bhoor Singh's body.

In my opinion, it would be most unsafe to go by the general omnibus statements given by these witnesses that all the eight accused had participated in the beating after Bhoor Singh had fallen to the ground especially when the medical evidence on the point does not corroborate the evidence of these witnesses As I have already stated above the greater likelihood is that there were only those injuries present on the person of Bhoorsingh which had been found by Dr. Niyamat Rai. and these injuries show that not more than 3 or 4 blows may have been given to the deceased. In this state of evidence it is not possible to hold the rest of the five accused guilty of the offence of rioting u/s 148, Indian Penal Code, nor is it possible to make them constructively liable for the injuries caused to Bhoorsingh.

These accused have got their houses in the same Gowadi and are related to the accused as well as to the deceased. The learned Deputy Government Advocate has however submitted that the fact that they had lathis in their hands and were sitting in the Kotari of Bhanwarsingh gives an indication that they had formed an unlawful assembly with the common object of beating Bhoorsingh. I, however, find myself unable to accept this contention, for the simple reason that carrying of a lathi in his hands by a villager is a common feature in India. In the second place it is highly doubtful whether all these five accused had lathis in their hands and had at all participated in the incident in any manner. I am, therefore, of opinion that the five accused viz. Bhopal Singh, Roopsingh, Ratan-singh, Chandersingh and Malsingh are entitled to be acquitted of the charges u/s 148 as well as Section 304 Part I read with Section 149. Indian Penal Code.

9. Coming next to the case against Richpalsingh, Kalyansingh and Bhanwarsingh there is no doubt in my mind that these accused had beaten Bhoorsingh. Richpalsingh appears to have struck a lathi blow on the right hand of Bhoorsingh with great force and severity which caused a compound fracture and there appears to have been profuse bleeding from this injury due to which Bhoor-singh's death took place. Learned counsel for the appellants did not challenge the finding of the trial court as to the part played by each of these accused and I think rightly so. He has, however, argued that since it is not proved beyond doubt that an unlawful assembly consisting of 5 or more than 5 persons had been formed with the common object of giving a beating to Bhoor Singh. even these three accused cannot be convicted for any offence with the help of Section 149, Indian Penal Code. They can be held liable, argues the learned counsel, only for the individual acts.

His contention, however, is that none of these three accused have been charged for any individual acts and have only been charged for offences under Sections 302 and 323 read with Section 149, Indian Penal Code. He submits that when a charge has been framed only under Sections 302 and 323 read with Section 149, Indian Penal Code, there cannot be conviction u/s 304 Part II or 326, Indian Penal Code. Reliance in this connection has been placed on *Lakhan Mahto and Others Vs. State of Bihar*. In this case Lakhan Mahto was charged u/s 302, Indian Penal Code, besides other offences including Section 302/149, Indian Penal Code along with 13 others. He was acquitted for the offence u/s 302, but was convicted u/s 302 read with Section 149, Indian Penal Code and sentenced to imprisonment for life. The State did not file an appeal from his acquittal u/s 302, Indian Penal Code, but in the appeal filed by the accused Lakhan Mahto from his conviction u/s 302 read with Section 149, Indian Penal Code the High Court altered his conviction u/s 302 read with Section 149 into one u/s 326, Indian Penal Code but maintained the sentence of life imprisonment though u/s 326, Indian Penal Code.

The appeal was brought before the Supreme Court by Special Leave and their Lordships of the Supreme Court were pleased to hold that since there had been an acquittal u/s 302 by the trial court and the Government did not prefer an appeal from such acquittal the High Court was not justified in altering the conviction u/s 302 read with Section 149 into one u/s 326, Indian Penal Code, in exercise of its powers u/s 423, Criminal Procedure Code. Learned Deputy Government Advocate has therefore contended that it was on account of the provisions of Section 423, Criminal Procedure Code that their Lordships were pleased to disagree with the view taken by the High Court.

This argument is however only partially correct. As it appears from the judgment of their Lordships specially paragraph No. 8 that apart from the argument based on Section 423, Criminal Procedure Code, their Lordships also held that Section 149, Indian Penal Code was not only an enabling section for imposition of vicarious liability but it constituted a substantive offence. Their Lordships quoted with approval the observations of Lord Sumner contained in 11 Beng. LR 347 (FB) and further referred to two earlier cases of the Supreme Court: *Nanak Chand Vs. The State of Punjab*, and *Suraj Pal Vs. The State of Uttar Pradesh*, in which it was pointed out that by framing a charge u/s 302 read with Section 149, Indian Penal Code against an accused, the Court was not charging the accused with the offence of murder and to convict him for murder and sentence him u/s 302 of the Indian Penal Code was to convict him of an offence with which the accused had not been charged. In this view of the matter their Lordships set aside the conviction and sentence imposed by the High Court on Lakhan Mahto u/s 326, Indian Penal Code. Thus there appears to be force in the contention of the learned counsel for the appellants that these three accused Richpalsingh, Bhanwar Singh and Kalyan Singh cannot be convicted u/s 304 Part II and Section 323, Indian Penal Code respectively since they have been charged only u/s 304 Part II read with Section 149, Indian Penal Code.

Faced with this situation the learned Deputy Government Advocate submitted that even if Section 149, Indian Penal Code, is not applicable he was entitled to press into service Section 34, Indian Penal Code, and all these three accused may be convicted u/s 325 read with Section 34, Indian Penal Code. In the alternative he has also submitted that the case against the three accused may be sent back for framing proper charges and for retrial. Mr. Chatterjee, learned counsel for the appellants has submitted that even though there may be no legal bar for convicting these three accused with the help of Section 34, Indian Penal Code, it is not proved that they had a common intention to beat Bhoorsingh. In this connection he has placed reliance on the following observations of their Lordships of the Supreme Court in Pandurang, Tukia and Bhillia Vs. The State of Hyderabad,

"Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan, because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all :-- AIR 1945 118 (Privy Council) Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: Barendra Kumar v. Emperor and AIR 1945 118 (Privy Council) As their Lordships say in the latter case, the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice." "

10. However in this very case their Lordships have been further pleased to observe that the plan need not be elaborate, nor is a long interval of time required It could arise and be formed suddenly, and all that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or incriminating facts must be incompatible with the innocence of the accused and Incapable of explanation on any other reasonable hypothesis.

11. Now the circumstances of the present case are that there was a dispute between Bhoorsingh on the one hand and Bhanwarsingh on the other in respect of the use of "chowk" and only a day previous to the occurrence Bhanwarsingh had threatened Bhoorsingh with dire consequences. It is further proved on the record that there was an exchange of hot words and serious verbal altercation preceded the actual beating. It also appears that these three accused had lathis in their hands and had a common grievance against Bhoorsingh regarding the

user of the "chowk". They were also sitting together in the "kotari" of Bhanwarsingh and no sooner Bhoor Singh had fallen to the ground on account of the severe blows given by Richpal Singh Bhanwar Singh gave another lathi blow on his knee and Kalvansingh gave a kick on his chest. These facts are explicable only on one hypothesis viz. that all these three accused had a common intention to give a beating to Bhoor Singh on account of the serious grievance they had regarding the user of the "chowk". Thus, according to me, all these three accused can rightly be held liable constructively u/s 34, Indian Penal Code, and their common intention was to give a beating to Bhoor Singh.

12. Mr. Chatterjee has also argued that no case is made out against any of the accused u/s 304, Part II, Indian Penal Code, inasmuch as it cannot be said that the injury on the hand of Bhoor Singh was caused with the knowledge that it is likely to cause death and the case therefore cannot go beyond Section 325, Indian Penal Code for causing a grievous Injury. There appears to be force in the contention of Mr. Chatterjee. No injury seems to have been caused on any vital part of the body, as I have rejected the evidence furnished by the post-mortem report in this connection. Taking an overall view of the case I consider it safe to convict these accused u/s 325 read with Section 34, Indian Penal Code.

13. The result is that I partially allow this appeal, set aside the conviction of and sentences passed on Bhopal Singh, Roopsingh, Ratnasingh, Chander Singh and Malsingh u/s 148, as well as Section 304 Part II read with Section 149, Indian Penal Code and hereby acquit them. Out of them Ratansingh is on bail and need not surrender. The rest of them i.e. Bhopalsingh, Roopsingh, Chander Singh and Malsingh shall be set at liberty forthwith, if not required in connection with any other case. Mr. Chatterjee has submitted that among the rest of the three accused Richpalsingh, Bhanwar Singh and Kalyansingh, Kalyansingh is less than 21 years old and should be given the benefit of the Probation of Offenders Act. The age of Kalyan Singh is not disputed by the learned Deputy Government Advocate.

Taking into consideration all the facts and circumstances of the case particularly the fact that he had not used his lathi but gave only a kick, probably misguided by his elders, I think it fit and proper that he may be given the benefit of Probation of Offenders Act. Richpalsingh is the author of the serious injury inflicted on the hand of Bhoorsingh, the bleeding of which caused his death. His conviction u/s 304, Part II, read with Section 149, Indian Penal Code is altered into one u/s 325 read with Section 34, Indian Penal Code, and he is sentenced to two years" rigorous imprisonment and a fine of Rs. 300/-; in default of payment of fine three months" further rigorous imprisonment. Bhanwar-singh is also convicted u/s 325 read with Section 34, Indian Penal Code, and sentenced to one year"s rigorous imprisonment and a fine of Rs. 200/-; in default of payment of fine he will further undergo two months" rigorous imprisonment. Since Kalyansingh has been given the benefit of the Probation of Offenders Act he is not sentenced to imprisonment.

14. I further direct that Kalyansingh shall enter into a bond in a sum of Rupees 2000/- (Two Thousand only) with one surety of the like amount to the satisfaction of the Additional Sessions Judge, Sikar to appear and receive the sentence when called upon during one year and in the meantime to keep peace and be of good behaviour. He is granted one month's time to execute the bond and furnish the surety. In case he fails to furnish the personal bond and the surety he will have to undergo rigorous imprisonment for one year.

Let the amended warrants be issued.