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**(2006) 09 RAJ CK 0013**  
**In the Rajasthan High Court**

Chandrabhan and Another

APPELLANT

Vs

State of Rajasthan

RESPONDENT

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**Date of Decision :** 13-09-2006

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 311, 313, 439

Evidence Act, 1872 — Section 165

Penal Code, 1860 (IPC) — Section 118, 120B, 147, 148, 149

**Citation :** (2007) 1 RLW 98

**Hon'ble Judges :** Shiv Kumar Sharma, J; Chatra Ram Jat, J

**Bench :** Division Bench

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## Judgement

Shiv Kumar Sharma, J.—In an unfortunate incident, in which six persons lost their lives, 38 persons were nabbed out of which 36 were acquitted and two were convicted. The convicted accused preferred appeal against the finding of conviction, whereas brother of one of the deceased filed revision petition against the judgment of acquittal. Serious question that requires our consideration in the matters is - Should the law be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope?

2. In a nut shell, the facts which led to filing of instant appeal and revision are as follows:

On May 20, 2000 at 10.45 p.m. Babu Lal Sarpanch of village Panchayat Hudiya Kala along with 8-10 persons visited Police Station Mandhan and lodged an oral report Ex. P/130 and stated that at the house of Gopi Ram Yadav dead body of Gopirak and 3-4 other persons of his family are lying. It was further stated that certain persons who were in 2-3 jeeps and who were unknown persons had killed these persons. On this report the Onkar Mai, SHO (PW-31) proceeded for village Hudiya Kala along with informant and inspected the house of Gopi Ram and found that dead body of Sri Ram Ahead and his wife Shanti were lying in the chowk. Dead body of Gopi Ram and one unknown person was lying about 1/2 kms. away from the house in the field, towards southern side of the corner of

road of Kathuwas found dead body of Ram Bhagat and Savita. As per the material collected during investigation the police made enquiry from Kumari Sanoj (PW-1) daughter of Savita, who was 10 years of age at the time of incident. Parcha Bayan of Kumari Sanoj was recorded which has been marked as Ex.P-1 and on the basis of which a regular FIR was registered. Sanoj stated in the she and her family members were residing in the house of Gopi Ram for the last 3-4 months. A day before in the evening while her family members were sitting in the chowk of the plot, certain persons came in tractor and on foot and entered their house, they were duly armed with lathi, iron rod, bricks stones etc. and started giving beating to her family members. They killed certain persons of the family. She also alleged that amongst the villagers there were Sheriya, Krishniya, Lashiya, Budharam, Jagdish son of Badami, one old man, certain other persons to whom she did not know by name but could identify by face. Various other allegations were also levelled. On the basis of parcha bayan, Onkar Mai (PW-31) sent Ramotar Constable to the Police Station Mandhan for registering a report where FIR No. 83/2000 was registered for offence under Sections 147, 148, 149, 302, 452, 379 and 120-B IPC and investigation commenced. After completion of investigation the police submitted charge-sheet against as many as 38 accused persons. In due course the case came up for trial before the learned Additional Sessions Judge Behror District Alwar. Charges under Sections 148, 120-B, 452, 302/ 302/149, 118 and 379 IPC were framed against the accused persons, who denied the charges and claimed to be tried. The prosecution had examined as many as 34 witnesses and got exhibited as many as 174 documents. The statements of the accused were recorded u/s 313 Cr.P.C. in which they denied their complicity.

3. The learned trial Court heard the arguments and held that during trial the prosecution has failed to prove the motive behind the incident and held that in this case the site plan of recovery was not prepared by the police, all material witnesses have been declared hostile and even the eye-witnesses have not supported the prosecution story, and held that there is no evidence on record which may connect the accused with crime, convicted and sentenced accused Chandrabhan and Bahadur Singh but acquitted all other 36 co-accused persons.

4. Against the order of acquittal the State of Rajasthan did not choose to prefer the petition seeking leave to appeal for the reasons best known to it. However, Sarjeet, the brother of Gopi Ram filed revision petition No. 148/2002. The convicted accused Chandrabhan and Bahadur Singh challenged their conviction by filing appeal No. 69/2002.

5. Having heard the submissions and on scrutinising of material on record we notice that during trial the prosecution eyewitnesses resiled from the statements made during investigation. Faulty and biased investigation as well as perfunctory trial marred the sanctity of the entire exercise undertaken to bring the culprits to book.

6. The submissions made by learned Counsel in support of revision are as under:

(i) Hostility of large number of witnesses raised a reasonable suspicion that the witnesses were being threatened or coerced.

(ii) The Public Prosecutor did not take any step to protect the star witness Kumari Sanoj.

(iii) The Public Prosecutor was not acting in a manner befitting the position held by him. He did not even request the trial Court for holding the trial in camera when a large number of witnesses were resiling from the statements made during investigation.

(iv) The trial Court on noticing that independent eyewitnesses at the temple of Dayal Das Maharaj and the Power House were deliberately left by the Investigating Officer, should have exercised power u/s 311 Cr.P.C.

7. Per contra learned Counsel for the accused who were acquitted, supported the impugned finding of acquittal and urged that the deceased Gopi Ram was history sheeter and he had enmity with many persons who wanted to eliminate him. It is further contended that the accused were falsely implicated in the case.

8. On a close reading of the statement of Onkar Mal, I.O. (P. 31), we find that he did not try to associate with the case the important eye-witnesses, whose evidence was essential to arrive at the truth and a just decision in the case. He depose in his cross-examination thus:

;g lgh gS fd ?kVuk Lfky ds ikl ckck n;ky nkl th egkjkt dk eafnj gS vkSj ogka ij 15&20 egkRek lk/kw ges?kk jgrs gSA ;g lgh gS fd ckck n;ky nkl th ds eafnj ls ? kVuk LFky vPNh rjg fn[kkbZ nsrk gSA ;g lgh gS fd ?kVuk LFky ls 15&20 xt dh nwjh ij fctyh dk ikoj gkml gS ijUrq bldk eq>s /;ku ugha gS fd ogka ij fdrus deZpkjh jgrs gSA eSa x;k ml fnu ml ikoj gkml ij ,d Hkh deZpkjh ugha Fkk dkQh xEHkhj gknlk gks x;k Fkk blfy, ikoj gkml dk jftLVj pSd djus dh eq>s QqlZr ugha feyhA

9. We deem it appropriate at this juncture, to incorporate the following observations made by their Lordships of the Supreme Court in regard to fair trial and judicial system in *Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others*, : (known as Best Bakery case).

30. Right from the inception of the judicial system it has been accepted that discovery, indication and establishment of truth are the main purposes underlying existence of Courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involve a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

33. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing

development process continually adapted to new and changing circumstances, and exigencies of the situation -peculiar at times and related to the nature of crime, persons involved -directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical or comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz., whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an in built right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denied of fair trial."

38. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny.

39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.

40. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its

principles in substance, to find out the truth and prevent miscarriage of justice.

42. Legislative measures to emphasise prohibition against tampering with witness, victim or information have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence of proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance if not more, as the interests of the individual accused. In this courts have a vital role to play.

43. The Courts have to take a participatory role in a trial. They are not expected to the tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 615 of the Evidence act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is an liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

54. Though justice is depicted to be blind-folded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the Court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of Courts and erode in stages faith in built in judicial system ultimately destroying the very justice delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

66. When the ghastly killings take place in the land of Mahatma Gandhi it raises a very pertinent question as to whether some people have become so bankrupt in their ideology that they have deviated from everything which was so dear to him. When large number of people including innocent and helpless children and

women are killed in a diabolic manner it brings disgrace to the entire society. Criminals have no religion. No religion teaches violence and cruelty based religion is no religion at all, but a mere cloak to usurp power by fanning ill feeling and playing on feelings aroused thereby. The golden thread passing through every religion is love and compassion. The fanatics who spread violence in the name of religion are worse than terrorists and more dangerous than an alien enemy.

69. Those who are responsible for protecting life and properties and ensuring that investigation is fair and proper seem to have shown no real anxiety. Large number of people had lost their lives. Whether the accused persons were really assailants or not could have been established by a fair and impartial investigation. The modern day "Neros" were looking elsewhere when Best Bakery and innocent children and helpless women were burning, and were probably deliberating how the perpetrators of the crime can be saved or protected. Law and justice become flies in the hands of these "wanton boys". When fences start to swallow the crops, no scope will be left for survival of law and order or truth and justice. Public order as well as public interest become martyrs and monuments.

10. In the background of principles underlying Section 311 Cr.P.C. and Section 165 Evidence act, it has to be adjudged as to whether the trial court's approach is correct and whether it had acted justly, reasonably and fairly in placing premiums on the serious lapses of grave magnitude by the prosecution agencies. There are several infirmities which are telltale even to the naked eye of even an ordinary common.

11. A close look at the material on record demonstrates that the prosecution has left inherent weakness in the case, it was not only expected but incumbent on the trial Judge to invoke his power u/s 311 Cr.P.C. and summon the witnesses who present at the time of incident at the temple of Dayal Dasji Maharaj as well as the power house. But the trial Court has failed to discharge its duty to hold a fair trial to discover the truth.

12. In K. Chinnaswamy Reddy Vs. State of Andhra Pradesh, the Hon'ble Supreme Court indicated thus:

That it was open to a High Court in revision and at the instance of a private party to set aside an order of acquittal though the State might not have appealed. But such jurisdiction should be exercised only in exceptional cases, as where a glaring defect in the procedure or a manifest error of law leading to a flagrant miscarriage of justice has taken place. When Section 439(4) of the Code forbids the High Court from converting a finding of acquittal into one of conviction, it is not proper that the High Court should do the same indirectly by ordering a retrial. It was not possible to lay down the criteria for by which to judge such exceptional cases. It was, however, clear that the High Court would be justified in interfering in cases such as (1) where the trial Court had wrongly shut out

evidence sought to be adduced by the prosecution (2) where the appeal Court had wrongly held evidence admitted by the trial Court to be inadmissible (3) where material evidence has been overlooked either by the trial Court or the Court of appeal or, (4) where the acquittal was based on compounding of the offence not permitted by law and cases similar to the above.

13. In the instant matter the State of Rajasthan did not choose to assail acquittal of 36 accused persons. Since we have noticed manifest error of law leading to a flagrant miscarriage of justice in the instant matter, we deem it appropriate to order for retrial in the matter.

14. Considering the case *Zahira Habibulla Sheikh v. State of Gujarat* (supra), their Lordships of the Supreme Court in *Satyajit Banerjee v. State of Bengal* 2005 (1) RCR 723, recorded note of caution thus:

24. Since strong reliance has been placed on the *Best Bakery case* (Gujarat Riots case-supra) it is necessary to record a note of caution. That was an extraordinary case in which this Court was convinced that the entire prosecution machinery was trying to shield the accused i.e. the rioters. It was also found that the entire trial was a farce. The witnesses were terrified and intimidated to keep them away from the court. It is in the aforesaid extraordinary circumstances that the court not only directed to de-novo trial of the whole case but. made further directions for appointment of the new prosecutor with due consultation of the victims. Retrial was directed to be held out of the State of Gujarat.

25. The law laid down in the "*Best Bakery case*" in the aforesaid extraordinary circumstances, cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence. In *Best Bakery case*, the First trial was found to be a farce and is described as "mock trial. Therefore, the direction for retrial was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by this Court in the *Best Bakery case* (supra).

15. Since in the instant matter, as already noticed, the witnesses were terrified and intimidated, in these extraordinary circumstances, we are of the view that retrial of the whole case out side the District of Alwar appointment of Special Public Prosecutor is required.

16. So far as the position of law is concerned, in the retrial the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case. Learned trial judge has to decide the case on the basis of evidence already on record and the additional evidence which would be recorded on retrial. In exercise of powers u/s 311 Cr.P.C, the learned trial Court can recall the eye-witnesses already examined as well as other witnesses whose evidence is essential to arrive at the truth and just decision of the case.

17. To put the matter beyond any shadow of doubt further clarify and reiterate

that the learned trial court shall take, a decision on the basis of the entire evidence on record and strictly in accordance with law, without in any manner, being influenced or inhibited by anything said on the evidence in this judgment.

18. In the ultimate analysis we find that acquittal of the accused respondents is unmerited and based on tainted evidence, tailored investigation, unprincipled prosecution, perfunctory trial and evidence of threatened/terrorised witnesses. The eyewitnesses available at the temple of Baba Dayal das Ji Maharaj as well as workers at power house were not joined as eye-witnesses by the investigating officer.

19. We, therefore, dispose of instant matters in the following terms:

(i) We allow the revision petition No. 148/2002 and set aside the impugned judgment of acquittal of accused respondents Budh Ram S/o Jagdish Prasad, Raghuvir, Surat Singh, babu Lal S/o Mahadev, Subey Singh S/o Chandra Singh, Lal Singh, Gopi Ram, Prabhati Lal, Had Singh S/o Nathu Ram, Roshan Lal, Bhuroo Ram, Subey Singh S/o Mangal Ram, Sher Singh S/o Sheo Narayan, Ravi Dutt, Sher Singh S/o Patt Ram, Ami Lal S/o Dil Sukh Ram, Mangtu Ram, Babu Lal S/o Kurda Ram, Jai Dayal, Suresh Kumar S/o Raghuvir Prasad, Khushi Ram, Ajmer Singh, Hari Singh S/o Matadin, Om Prakash, Ranjeet Singh, Suresh Kumar S/o Mamam Singh, Babu Lai S/o Madu Ram, Munni Lal, Mahaveer, Suresh S/o Mohar Singh, Laxman, Rohitash, Sita Ram, Gyan Dutt, Budh Ram S/o Agna Ram and Lachha @ Lachhiya. Since it is an extraordinary case in which six persons lost their lives and looking to the fact that prosecution machinery has not conducted fair investigation and the State became silent spectator, we remand and transfer the case from the Court of Additional Sessions Judge Behror District Alwar to the Court of Sessions Judge, Jaipur District Jaipur for de-novo trial. We also direct the accused respondents to appear before the learned Sessions Judge, Jaipur District, Jaipur and furnish personal bond in the sum of Rs. 50,000/- with one surety of the like amount to the satisfaction of learned Sessions Judge, Jaipur District, Jaipur to ensure their presence on the each date of the trial. Ten days time is granted to accused respondents to furnish the bail bonds.

(ii) In view of the testimony of Onkar Mal, SHO (PW-31) that near the place of incident there were 15-20 Sadhus present at the temple of Baba Dayal Dasji Maharaj and some workers were present at the power house, we direct learned Sessions Judge Jaipur District to summon and record the testimony of witnesses present at the temple of Baba Dayal Das" Ji Maharaj as well as the workers of the power house u/s 311 Cr.P.C.

(iii) As a consequence of setting aside of impugned judgment dated January 10, 2002 qua the accused respondents, the conviction and sentence awarded to appellants in appeal No. 69/2002 also stand quashed and their case is also remanded for de-novo trial. In view of the fact that the appellants Chandrabhan and Bahadur Singh have remained in confinement for a period of more than 6 years and their case is remanded, we grant them bail provided each of the

appellant shall furnish personal bond in the sum of Rs. 50,000/- with one surety of the like amount to the satisfaction of learned Sessions Judge, Jaipur District Jaipur. On furnishing the bail bonds the shall be released forthwith.

(iv) We express our displeasure for the inaction of State Government in not preferring petition seeking leave to appeal against the judgment of acquittal of accused respondents. However, now we direct the State Government to appoint Special Public Prosecutor to conduct the trial of the instant matter before learned Sessions Judge, Jaipur District, Jaipur.

(v) The Deputy Registrar (Judicial) is directed to immediately remit the case file to learned Sessions Judge Jaipur District, Jaipur with information to learned Additional Sessions Judge Behror District Alwar.