

(2000) 07 SHI CK 0009

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No. 253 of 1997

State of Himachal Pradesh

APPELLANT

Vs

Jeet Ram and Others

RESPONDENT

Date of Decision : 13-07-2000

Acts Referred:

Penal Code, 1860 (IPC) — Section 120B, 149, 323, 325, 34

Citation : (2001) 1 ShimLC 60

Hon'ble Judges : C.K. Thakker, C.J

Bench : Single Bench

Advocate : M.L. Chauhan, Dy. Advocate General, for the Appellant; M.S. Chandel, for the Respondent

Judgement

C.K. Thakker, C.J.—This appeal is filed by the State against an order of acquittal recorded by the Sessions Judge, Hamirpur, on January 17, 1997 in criminal appeal No. 4 of 1996. By the said judgment and order, the learned Sessions Judge set aside an order of conviction recorded by the Additional Chief Judicial Magistrate, Hamirpur, on March 29, 1996, in case No. 79-I of 1993/125-II of 1994.

2. The case of the prosecution was that on June 11, 1993 at about 8 p.m., PW-1 Duni Chand was in his house. Along with his family members, he was taking dinner in the courtyard of his house. At that time, Jeet Ram, accused No. 1, came there and started abusing the complainant. He also picked up cow dung (Gobar) and threw it at the house of the complainant. When the complainant resisted such move, the enraged accused Jeet Ram gave a lathi blow on his head and other parts of the body. Duni Chand sustained several injuries. He raised shouts, but meanwhile other accused also reached the spot, switched off the light of the house of the complainant and joined accused No. 1 in beating the complainant. It was further case of the prosecution that during the incident, complainant's wife Banto Devi, PW-2 also received injuries. Accused No. 2 Pritam Singh gave a stick blow on her left leg which resulted in fracture. She was

beaten by other accused also. PW-3 Banshi Ram (real brother of complainant Duni Chand) was present at the time of occurrence and he was thus an eye witness to the incident.

3. The complainant Duni Chand, thereafter, reported the matter to police vide a report Ex. PW-5/A, on the basis of which FIR Ex. PW-5/B was registered against the accused. Usual investigation was made. Both the injured were sent to Civil Health Centre, Barsar and then to the District Hospital for medical treatment and x-ray examination. Investigating Officer, PW-6 Krishan Gopal visited the spot and prepared a site plan, which is produced at Ex. PW-6/A. He also recovered weapons of offence, namely, "Dandas" vide recovery memos. Ex. PW-4/A, Ex. PW-4/B as well as Ex. PW-6/C. PW-2 injured Banto Devi produced blood stained clothes before the Investigating Officer, which are at Ex. PW-6/B. After necessary formalities, the accused were charged for committing offences punishable under Sections 325, 323 read with Section 34 of the Indian Penal Code.

4. None of the accused pleaded guilty to the charge and all of them claimed to be tried. Their case was of total denial.

5. The learned Magistrate, after appreciating the evidence on record, held that it was proved by the prosecution beyond reasonable doubt that all the accused persons in furtherance of common intention, voluntarily caused simple as well as grievous hurt to complainant Duni Chand and his wife Banto Devi by means of hard and blunt weapon on the date of the occurrence and thus they had committed an offence punishable u/s 325 read with Section 34 of the Indian Penal Code. The learned Magistrate, therefore, by an order dated March 14, 1996 convicted all the accused.

6. On the question of sentence, however, the learned Magistrate called for the report of Probation Officer, which was received on March 29, 1996. As per report, the record of all the accused was clean. There was no previous conviction against any of them. They also prayed for mercy. The learned Magistrate, in the light of the report of Probation Officer, as also "the modern trend of reformatory theory" instead of sending the accused to jail and allow them to mix up with hardened criminals, thought it fit to give the accused a chance to reform. Taking liberal and lenient view of the matter, the learned Magistrate observed that the ends of justice would be fully met with if benefit under the provisions of Probation of Offenders Act would be extended in favour of the accused. He, therefore, did not impose substantive sentence on the accused, but granted probation for a period of six months on their furnishing personal bonds of good behaviour and maintaining peace in the sum of Rs. 2,000/- each with one surety of like amount. They were, however, directed to pay compensation of Rs. 1,200/- (Rs. 300/- each) to injured complainant Duni Chand and his wife Banto Devi to defray medical expenses.

7. Being aggrieved by the order of conviction and payment of compensation as well as execution of bonds for good behaviour, the accused preferred an appeal

before the Sessions Court. The learned Sessions Judge, by an order impugned in the present appeal by the State, set aside conviction of the accused recorded by the trial Court and held that it was not proved beyond reasonable doubt that the accused had committed the offence with which they were charged. Accordingly, the appeal was allowed and the accused were ordered to be acquitted. Their bail bonds were cancelled and the amount of compensation was ordered to be refunded to them.

8. It is that order, which is challenged by the State in the present appeal.

9. I have heard Mr. M.L. Chauhan, learned Deputy Advocate General on behalf of the State and Mr. M.S. Chandel, learned Counsel on behalf of the Respondents-accused.

10. Mr. Chauhan submitted that the Sessions Court has committed an error of fact and of law in allowing the appeal and in setting aside the order of conviction passed by the trial Court. He submitted that from the evidence on record, it was clearly established that the accused had committed the offences, with which they were charged and the trial Court was fully justified in convicting them. The lower appellate Court ought not to have interfered with the conviction and the findings recorded by the trial Court. He submitted that the incident was clearly proved. The presence of the accused was fully established. The Trial Court rightly held that the accused persons went to the house of the complainant, and caused injuries to PW-1 Duni Chand and PW-2 Banto Devi. Those injuries were proved by medical evidence. The relevant medical evidence along with the certificates and x-ray plates have already been brought on record. It is also in evidence, submitted Mr. Chauhan, that complainant and accused were near relatives. PW-1 complainant Duni Chand, PW-3 Banshi Ram and accused No. 1 Jeet Ram, were real brothers. Accused No. 4 Sunil Kumar was the son of Jeet Ram, accused No. 1. One Roshan Lal, who participated in beating the complainant side was real brother of PW-1 complainant Duni Chand, PW-3 Banshi Ram and accused No. 1 Jeet Ram. During the pendency of the proceedings, however, he died.

11. Mr. Chauhan, submitted that the reasons recorded by the learned Sessions Judge for acquittal of the accused were contrary to law and could not be sustained. Firstly, the learned Sessions Judge observed that the case appeared to be of free fight. It was submitted that in case of free fight, as per settled law, both the parties must be held liable for their acts and should be convicted. By not doing so, the Sessions Judge has committed an error of law.

12. The Sessions Court, submitted Mr. Chauhan, has also erred in observing that in the facts and circumstances of the case, Section 34 of the Code could not be invoked and none of the accused could be convicted. It was urged that in the case on hand, there was common intention on the part of all accused to beat the complainant and his wife and hence, Section 34 was rightly invoked by the prosecution. But even where Section 34 has no application, the matter cannot be said to be over. If an individual role attributable and attributed to a particular

accused is proved, the said accused can always be convicted on the basis of individual act committed by him irrespective of applicability or otherwise of Section 34 of the Code. Non-examination of Nanak Chand, according to Mr. Chauhan, will not adversely affect the prosecution inasmuch as what was required of the prosecution was to examine those witnesses, who were necessary to unfold the case of the prosecution so as to enable the Court to know how the incident took place and what was the role of the accused in the incident. He further argued that the Sessions Court was not right in observing that only interested witnesses were examined. According to the learned Counsel, when the persons whose presence was very much in the house and who had sustained injuries were examined, there was no necessity to examine other witnesses. According to Mr. Chauhan, PW-1, PW-2 and PW-3 cannot be termed as "interested" witnesses. He, therefore, urged that it was incumbent on the Court to test their testimony and decide the case. He emphasized that ordinarily an injured person would not falsely implicate an innocent person and allow the real culprit to escape. Finally, Mr. Chauhan, submitted that there was a dispute between the complainant and accused. Hence, there was every reason for the accused to attack the complainant side and accordingly PW-1 Duni Chand and PW-2 Banto Devi were beaten by them. He, therefore, submitted that on the basis of the entire evidence, the conviction recorded by the trial Court deserves to be restored by setting aside the order of acquittal passed by the Sessions Court.

13. Mr. Chandel, learned Counsel for the Respondents-accused, on the other hand, supported the order of the Sessions Court acquitting the accused. According to the learned Counsel, due to enmity, the accused were falsely involved in the case. He further submitted that though PW-1 Duni Chand and PW-3 Bansi Ram were real brothers of accused No. 1, their evidence could not be relied upon as they were "interested" witnesses. Even according to the prosecution, disputes were going on between the parties. Because of strain relations and property disputes, there were all chances of false involvement of the accused by the complainant. Such possibility, therefore, cannot be overlooked by a Court while appreciating the evidence on record. Mr. Chandel also submitted that looking to the First Information Report filed by PW-1 Duni Chand, his substantive evidence before the Court on oath and testimony of PW-2 Banto Devi and PW-3 Bansi Ram, there were several contradictions, omissions and exaggerations and no conviction could have been recorded by the trial Court. When the contradictions were material and substantial, it would be hazardous for a Court of law to rely on the evidence of such witnesses and to record conviction. The counsel also submitted that it was no doubt the case of PW-1 Duni Chand, that he was beaten by accused No. 1 Jeet Ram, PW-2 Banto Devi, wife of PW-1 Duni Chand, had admitted that she did not know who had beaten her husband. She had also stated that other ladies were present at the time of incident and they also participated in beating. The said fact, however, was neither in the First Information Report nor those ladies were made accused. Reliance was also

placed on the circumstance that though independent witnesses were present and available and some of them had even intervened, they were neither cited as witnesses nor were examined by the prosecution. No reason and/or ground whatsoever, much less convincing ground, has been made out by the prosecution for non-examination of material and important witnesses. In the submission of the counsel, in these circumstances, it would be unsafe to rely on testimony of interested witnesses. Regarding presence of accused at the scene of occurrence, the counsel stated that it must be appreciated that the houses of the accused persons are also near the place of incident. Their presence at the place of offence, therefore, cannot be said to be unnatural. According to the counsel, when the presence of the accused persons at their residence was natural, it cannot assist the prosecution. Regarding injury to prosecution witnesses and their testimony, it was submitted that PW-3 Bansi Ram though very much present, was not injured. It was, therefore, submitted that the evidence of PW-1 and PW-2 cannot be taken at their face value. On all these grounds, it was submitted by the learned Counsel that the order of conviction and sentence recorded by the trial Court was rightly set aside by the appellate Court and this is not a fit case in which the order of appellate Court deserves to be interfered with. He, therefore, prayed that the appeal filed by the State may be dismissed.

14. Having regard to the facts and circumstances of the case, in my opinion, the Sessions Judge has committed an error of law in allowing the appeal and in setting aside the order of conviction recorded by the Additional Chief Judicial Magistrate, Hamirpur. The order of appellate Court, therefore, deserves to be interfered with.

15. One of the grounds, which weighed with the learned Sessions Judge was that the case appeared to be of free fight and hence, no conviction can be recorded.

16. In my opinion, the law on free fight is very well settled. Before about seven decades in *Ahmad Sher v. Emperor* AIR 1931 Lah. 513, Harrison, J. defined, free fight as one "when both sides mean to fight from the start, go out to fight and there is a pitched battle".

The learned Judges, then stated:

The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders.

(Emphasis supplied)

17. The ration *Ahmad Sher* was quoted with approval by the Supreme Court in *Gajanand and Others Vs. State of Uttar Pradesh*, . It was also observed by the Court that there cannot be free fight where one side is aggressor. If one side is aggressor, the other side is a defender. In such cases, right of private defence is available to the latter. In case of free fight, however, none is aggressor and none is defender. Both the sides mean to fight a pitched battle, and, hence members of both the sides are equally guilty of their respective acts. *Gajanand* was also

referred to in several subsequent cases and the ratio is reiterated.

18. In my opinion, therefore, the ground weighed with the learned Sessions Judge about free fight cannot be said to be in accordance with well settled principle of law and cannot be upheld.

19. The Sessions Court also observed that in the facts and circumstances of the case, Section 34 of the Code had no application. The learned Sessions Judge had observed that according to the prosecution, initially accused No. 1 Jeet Ram came all alone in the courtyard of the complainant, started hurling abuses, threw a cow dung (Gobar) and inflicted a "danda" blow on the head of the complainant Duni Chand. Thereafter, on hearing shouts by PW-2 Banto Devi, the remaining accused came there. The learned Sessions Judge, therefore, observed, "when such is the origin of the incident, it is not safe to attract Section 34 of the Indian Penal Code."

20. Now, it was not the prosecution case that the first part of the quarrel was over when accused No. 1 abused PW-1 Duni Chand, and inflicted a "danda" blow on his head and other accused came there subsequently and there was no common intention on their part in giving blows to PW-1 and PW-2. Looking to the evidence of prosecution witnesses as a whole, it is clear that the accused persons had decided to teach a lesson to the complainant side and in furtherance of that common intention injuries were caused to PW-1 and PW-2.

21. But, in my view, even otherwise, the learned Sessions Judge has committed an error of law even if the finding recorded by him regarding non-applicability of Section 34 can be said to be in accordance with law. It cannot be disputed that whenever provisions relating to constructive liability have been pressed in service by the prosecution, such as, Section 34, Section 120B and Section 149 IPC, etc., and a competent Court comes to the conclusion that in the facts and circumstances of the case, it is not possible to come to a positive finding regarding constructive or vicarious liability of other accused by invoking the above provisions, the Court may not convict all the accused for an act committed by an individual accused. But then the Court cannot ignore a specific and positive role played and act done by a particular accused if such act is established from the evidence on record. Hence, even if it is assumed that in the light of the evidence before the Court, Section 34 could not be invoked, once the Court holds that accused No. 1 Jeet Ram had administered a "danda" blow on the head of PW-1 Duni Chand, that independent act committed by accused No. 1 cannot be ignored. Applicability or otherwise of Section 34 is wholly immaterial and accused No. 1 ought to have been convicted for his individual act.

22. Heavy reliance was placed on non-examination of Nanak Chand, whose house was in the nearby vicinity, who had seen the incident and who had intervened. Now the map of the scene of offence is on record. From the map, it is clear that the house of the accused and complainant are in the same vicinity. Between their houses, there is a courtyard (Angan). From the map, it also

appears that the houses of other persons including Nanak Chand are not adjoining. There is no evidence on record whether there is any fencing or wall in the courtyard but the case of the prosecution was that complainant Duni Chand PW-1 was in his courtyard and was taking his dinner. PW-2 Banto Devi and PW-3 Bansi Ram were also there.. Accused No. 1 came in the courtyard of the complainant. Though PW-1 Duni Chand has stated that other persons were not there and they did not come at the scene of occurrence. PW-2 Banto Devi had stated that houses of other persons, namely, Om Parkash, Dharam Singh, Nanak Chand, etc. are situated in the nearby area and they were also present. The contention of the learned Counsel for the defence is that PW-2 Banto Devi had admitted that all those persons were present at the scene of offence. Argument on behalf of the prosecution, on the other hand, was that what was stated by PW-2 Banto Devi was that all those persons were at their residence. Looking to the evidence, in my opinion, it is clear that the say of PW-2 Banto Devi was that those persons were in their houses. This is clear from the next sentence wherein she had stated that their children were also there. Moreover, the witness further stated that Nanak Chand had come and intervened in the quarrel. Reading the evidence as a whole, there is no doubt in my mind that other persons were in their houses and one of them, namely, Nanak Chand had come at the place of occurrence and intervened in the quarrel.

23. The question was whether non-examination of Nanak Chand would vitiate the trial. In my opinion, what was expected of the prosecution was to examine witnesses, who would unfold the genesis of the prosecution. In the case on hand, the genesis started with the entry of accused No. 1 in the courtyard of PW-1 Duni Chand, giving of abuse to him, throwing of cow dung and administering a "danda" blow on his head. A Court may or may not believe PW-1, but for unfolding the case of the prosecution as to how the incident happened and how he was beaten, evidence of PW-1 was sufficient. His version was fully supported by another injured witness PW-2 Banto Devi. PW-3 Bansi Ram did not sustain any injury but he had clearly admitted in his deposition that he was an old man of about 60 years and he did not intervene in the quarrel because of his old age. May be because of that the accused did not cause any injury to him. In my opinion, therefore, failure to examine Nanak Chand would not adversely affect the case of the prosecution. The learned Magistrate considered the evidence of the prosecution witnesses as reliable and believable and he accordingly believed them. There was no reason for the appellate Court without there being any cogent and concrete reason to disbelieve them and to set aside the order of conviction recorded by the trial Court. In my opinion, therefore, the appellate Court has committed an error of fact as well as of law.

24. Regarding contradictions and omissions, it is well settled that the Court has to see the evidence as a whole keeping in mind that it is not possible for a witness to remember each and every fact that had taken place at the time of incident. Human memory has its own limitations and that hard reality cannot be ignored. The question, therefore, has to be considered and decided in the light of

facts and circumstances of the case on hand applying the theory of "separation of grain from chaff". In the instant case, initially it was accused No. 1, who came in the courtyard of PW-1, abused him, threw cow dung and then gave him a "danda" blow. There is no contrary version so far as that part is concerned. Mr. Chandel, no doubt, drew my attention to that part of the cross-examination of PW-2 Banto Devi wherein she has stated that she could not say as to who had beaten her husband. But, in my view, the said statement should be construed in the background in which it was made. According to her, accused No. 1 came there and gave a "danda" blow to her husband. She was also beaten. She further stated that other family members of the accused also came there. Then she stated that she could not say as to who had beaten her husband. As on the person of PW-1, there were more than one injuries, she had stated that she was not in a position to state about those injuries. Looking to medical evidence, it is clear that there were four injuries on the person of PW-1 Duni Chand. In my judgment, therefore, head injury on PW-1 Duni Chand was proved beyond reasonable doubt. It was corroborated by PW-2-Banto Devi and PW 3 Bansi Ram and further corroborated by medical evidence.

25. It was also submitted that all the witnesses were "interested" and the learned Magistrate ought not to have relied upon them. Now, PW-1 Duni Chand and PW-2 Banto Devi were injured witnesses. PW-3 was real brother of PW-1 but he was also real brother of accused No. 1. It is settled law, that evidence of an injured person should not be disbelieved unless there are inherent improbabilities. The reason being that ordinarily a person injured in an incident will not allow a real culprit to escape by falsely implicating an innocent one.

26. It was strenuously argued that there was enmity between the complainant and the accused and civil as well as criminal cases were pending between the parties. It was, therefore, quite possible that with a view to harass accused persons, the complainant had falsely implicated them. Firstly, the evidence of PWs 1, 2 and 3 was relied upon by the learned Magistrate and conviction was recorded on that basis. Secondly, out of three eye witnesses, two were injured. Their injuries were duly proved. So far as enmity is concerned, it has been rightly described as a "double edged weapon". It is possible that because of enmity, a person may be falsely implicated, but it is equally possible that because of enmity, a person may be attacked. Ultimately, it is for the Court to appreciate the evidence on record and to come to its own conclusion. In the instant case, considering the way in which PWs 1, 2 and 3 had deposed, the learned Magistrate was satisfied that their evidence was trustworthy and, hence, relying on their evidence, he recorded conviction. In the facts and circumstances of the case in my opinion, the appellate Court ought not to have disturbed the said finding.

27. My attention was invited by the learned Counsel for the defence to the following decisions:

1. Bir Singh and Others Vs. State of Uttar Pradesh,

2. Gulam Mahmood A. Malek Vs. State of Gujarat,

3. Lakshman Prasad Vs. State of Bihar, and

4. Har Bharosey Lal Vs. State of U.P.,

28. Mr. Chauhan, on the other hand, drew my attention to the following cases;

1. Mst. Dalbir Kaur and Others Vs. State of Punjab,

2. Sarwan Singh and Others Vs. State of Punjab,

3. Paresh Kalyandas Bhavsar Vs. Sadiq Yakubbbhai Jamadar and Others,

4. Tarjinder Singh Vs. State of Haryana, and

5. The State of Rajasthan Vs. Major Singh and Others,

29. To me, the law appears to be well settled, and it is that, in criminal cases, it is the quality of evidence and not quantity, which is important and material. No decision has laid down that the prosecution should examine all witnesses. It is, however, equally well established that the prosecution is expected to examine all those witnesses whose evidence is necessary to unfold the genesis of prosecution. Whether in a given case material witnesses are or are not examined is a question of fact. If the Court is not satisfied on the evidence adduced, it will grant benefit of doubt to the accused. If, on the other hand, the Court is convinced on evidence on record, it is not incumbent on the prosecution to repeat the same version by examining witnesses one after the other getting the same story reiterated and repeated. Ultimately, it is the satisfaction of the Court which is important. In the instant case, in my opinion, for unfolding the prosecution case, three witnesses were material and essential. They were PW-1, Duni Chand, PW-2, Smt. Banto Devi and PW-3, Bansi Ram. All of them were examined. Out of three, two were injured and their injuries were duly corroborated by medical evidence. The learned Magistrate relied upon their testimony and recorded a finding of guilt against the accused. On non-germane and unconvincing grounds, the appellate Court interfered with the finding of the trial Court. The order of acquittal recorded by the appellate Court, therefore, deserves to be quashed and set-aside.

30. For the foregoing reasons, the order passed by the Sessions Court on January 17, 1997, in Criminal Appeal No. 4 of 1996 is hereby quashed and set aside by restoring the order of conviction recorded by the Additional Chief Judicial Magistrate on March 14, 1996, in Case No. 79-1/93/125-II/94.

31. The next question is of sentence. The trial Court, after conviction, afforded them hearing on quantum of sentence. The learned Magistrate also called for a report of Probation Officer. In the report, it was mentioned that there were no past antecedents against the accused and their record was clean. The learned Magistrate, therefore, keeping in mind reformatory theory, observed that it would be in the interest of justice if a chance should be given to them to reform. Hence,

instead of imposing substantive sentence, he released the accused on probation for six months on their furnishing personal bonds of good behaviour and maintaining peace in the sum of Rs. 2,000/- each with one surety in the like amount. They were also directed to pay compensation of Rs. 1,200/- (Rs. 300/- each), to injured complainant Duni Chand and his wife Banto Devi towards medical expenses.

32. As on today, it is all the more necessary. Firstly, after the accused were convicted in March, 1996, they preferred an appeal before the Sessions Court, which was allowed and the accused were acquitted in January, 1997. More than three years have passed thereafter. Moreover, one of the facts, which is not in dispute is that the complainant and accused are near relatives. As observed in earlier part of the judgment. PW-1 Duni Chand and accused No. 1 Jeet Ram are real brothers. Accused Nos. 2, 3 and 4 are near relatives of accused No. 1. Thus, they are also relatives of PW-1, Duni Chand. It is due to some property disputes between two families that an unfortunate incident took place before more than seven years from today. This is also a relevant fact.

33. Taking into account totality of facts and circumstances, in my opinion, ends of justice would be met if the order passed by the Additional Chief Judicial Magistrate, Hamirpur, is restored.

For the foregoing reasons, the order passed by the learned Sessions Judge, in Criminal Appeal No. 4 of 1996 on January 17, 1997, is set aside and the order passed by the learned Additional Chief Judicial Magistrate, Hamirpur, in case No. 79-I/93/125-II/94 on March 14, 1996 is restored. The appeal is, accordingly, disposed of.