

A

STATE OF U.P.

vs.

SUKHPAL SINGH & OTHERS

Criminal Appeal No.1285-1287 of 2001

FEBRUARY 12, 2009

B

(DALVEER BHANDARI AND HARJIT SINGH BEDI, JJ.)

Penal Code, 1860 :

C *s.396 – Dacoity and murder – Conviction by trial court –
D Acquittal by High Court – Held: Evidence on record clearly
reveals that accused committed dacoity, killed two persons,
and injured two others – High Court erred in discarding evi-
dence of injured eye-witnesses, whose statements were con-
sistent and corroborated by other evidence – It also gravely
D erred in ignoring dying declarations recorded by Magistrate –
Test identification parade was not required as accused were
known to witnesses – Judgment of High Court set aside and
that of the trial court restored – Dying declaration – Test Identi-
fication Parade.*

E

**The respondents were prosecuted for commission
of offence punishable u/s 396 IPC. The prosecution case
was that on 1.9.1979 at about 7.45 P.M., the respondents-
accused along with some others, armed with fire arms
and other weapons, entered the house of the complain-
F ant with a view to commit dacoity, and started indiscrimi-
nate firing as a result of which four persons received fire
arm injuries. Two of them succumbed to their injuries in
the hospital after having made dying declarations. The
accused were also stated to have looted a licensed gun
G and some other items. The accused were named in the
FIR as also in the dying declarations as they were known
to the victims and were identified in the moonlight and
lantern light. The trial court convicted and sentenced the**

H

accused u/s 396 IPC. The High Court having acquitted the accused, the State filed the appeal. A

Allowing the appeals, the Court

HELD: 1.1 The judgment of the High Court is based on total misreading of the evidence of injured eye-witnesses PW3 and PW5. The High Court erred in discarding the evidence of the injured eye-witnesses whose statement is consistent and corroborated by other evidence on record. (Para 30) [36-E ; 37-B] B

1.2 The findings of the High Court that neither the accused intended to commit dacoity nor dacoity took place, that the chief intention of accused was not to commit robbery, theft or extortion but to commit murder and it was subsequent to the murder that they removed certain property dishonestly, and that the prosecution could not prove that dacoity took place and two deceased were murdered during commission of dacoity, are contrary to the evidence on record. The High Court has not correctly construed and analysed the evidence. All the witnesses have categorically stated that the accused persons committed dacoity, taken away the licenced gun and other items and killed two persons, injured two others in the incident. (Paras 20-24 and 26) [34-E, F, G, H; 35-A, B, C, D; 35-F] C D E

2. The High Court failed to appreciate that in the instant case, the test identification parade was not required since the accused were known to the witnesses. All the witnesses have stated that they had otherwise known the accused persons and were clearly identified in the moonlight and lantern light. (Para 30 and 25) [36-E, F; 35-C] F

3. The High Court has gravely erred in totally ignoring the dying declarations of both the deceased and has altogether failed to deal with them. (Para 30 and 26) [36-H; 37-A; 35-E, F] G

4. The application filed before the trial court that the H

A accused persons ought to have been charged u/s 302 IPC instead of section 396 IPC was rejected by the trial court on the ground that the accused persons were justifiably charged u/s 396 IPC. In the facts and circumstances, the trial court was justified in arriving at the correct conclusion that the accused were correctly charged u/s 396 IPC and on the basis of clear evidence on record, were held guilty of the offence charged. The High Court erroneously set aside a well reasoned judgment of the trial court which is based on correct evaluation of evidence of injured eye-witnesses and other witnesses, and dying declarations on record. The judgment of the High Court is contrary to the well settled legal principles which have been crystallized by a series of decisions of this court. (Para 28, 27 and 31) [36-A, B; 35-G, H; 37-C]

D *Ghure Lal v. State of U.P.* (2008) 10 SCC 450 – relied on.

5. Ordinarily, this Court would have been very reluctant to interfere with the judgment of acquittal, but in the instant case, for very substantial and compelling reasons, this Court is constraint to set aside the judgment of the High Court because it totally misread the entire evidence on record. On consideration of the totality of facts and circumstances, particularly, the evidence on record, the judgment of the High Court cannot be sustained and is set aside and that of the trial court restored. (Para 33-34) [38-C, D, E]

Case Law Reference

(2008) 10 SCC 450 relied on Para - 31

G CRIMINALAPPELLATE JURISDICTION : Criminal Appeal No.1285-1287 of 2001

H From the final Judgment and Order dated 3.7.2000 of the High Court of Judicature at Allahabad in Criminal Appeal Nos. 2311, 2234 & 2243 of 1980

Pramod Swarup, Fuzail Khan, Pareena Swarup and A
Anuvrat Sharma, for the Appellant.

K.B. Sinha, Siddharth Bhatnagar, Pawan Kumar Bansal,
Ruby Singh Ahuja, P.D. Sharma and Himanshu Munshi, with him
for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J.

1. These appeals are directed against the judgment dated
03.07.2000 passed by the High Court of judicature at Allahabad C
in Criminal Appeals Nos. 2311, 2234 and 2243 of 1980, by
which the High Court has set aside the judgment of conviction
of accused (respondents herein) passed by the Additional Ses-
sions Judge, Aligarh, U.P.

2. Brief facts which are necessary to dispose of these ap- D
peals are recapitulated as under :

The prosecution version, as set up in the first information
report by Shri Bhagwant Singh, PW2 is that on 1.9.1979 at about
7.45 p.m. in the evening, Hiralal Yadav, the elder brother of the E
complainant, Kundan Singh, Chhabi Nath Singh, Tikam Singh
and Chandan Giri were sitting in the open area of the house of
Bhagwant Singh. Aidal Singh, the younger brother of Hiralal and
the ladies of the family were inside the house. At that time, about
10 to 15 persons armed with country-made pistols, guns and F
other weapons entered the house of the complainant. They came
for committing dacoity as mentioned in the FIR. They started
indiscriminate firing and in the process they killed Hiralal and
Aidal Singh and injured Smt. Longshree and Chandan Giri. It is
further disclosed in the FIR that the miscreants inquired about G
the property articles from Smt. Longshree and looted licensed
single barrel gun of Aidal Singh and some other articles, the
details of which were not given in the FIR. There was moonlight
and lantern light at the spot where the incident had taken place.
Amongst the miscreants, accused Sukhpal, Harpal, two broth- H

A ers, sons of Rabti Singh, Ajanti, resident of village Sikanderpur and Munna Giri, resident of Sitapur have been identified in the moonlight and the lantern light. According to the prosecution, they remained on the spot with other miscreants for about half an hour.

B 3. It is stated that the incident had taken place on 1.9.1979 at 7.45 am and the FIR was lodged at 9.15 p.m. on the same night. The case against the accused persons was registered and investigated.

C 4. The injured eye witnesses were medically examined on the same night at the Primary Health Centre, Sikandrarao by Dr. S.K. Jha. The condition of Hiralal and Aidal Singh was precarious and their dying declarations were recorded at Sikandrarao by Shri Ram Autar Saxena, Tehsildar Magistrate, PW9. Later on, both Hira Lal and Aidal Singh succumbed to their injuries.

E 5. Aidal Singh in his dying declaration specifically named Sukhpal Singh as assailant who had fired at him and Hiralal named Sukhpal, Harpal and Ajanti whom he had identified and who had fired shots at him. He also stated that there were 10/15 persons armed with double barrel guns. They had given beatings. In the instant case, according to the prosecution version, two persons namely Hira Lal and Aidal Singh were killed and Chandan Giri, PW3 and Smt. Longshree PW5 wife of Hira Lal were injured. The accused persons were recognized in the light of lantern and moonlight. The accused persons were otherwise known to the witnesses. The complainant has stated that Sukhpal and Harpal were his cousins and Ajanti was accused's sarhu (brother-in-law – husband of the sister of the wife of accused Sukhpal). Accused Munna Giri was also known to him as the sister of Munna Giri was married in his village and in that connection Munna Giri used to visit this village off and on. Both the accused and Sukhpal were friends.

H 6. Chandan Giri, PW3 had executed a sale deed of some of his abadi land in his favour and in favour of his two brothers

on 20.7.1979 for which agreement has been executed on 6.6.1979 and Chandan Giri after the execution of the sale deed parted with the possession of that land. Before the execution of the said sale deed, accused Sukhpal got a sale deed of the same land executed in his favour from Chhauhtan Giri and Jamuna Giri and for that matter proceedings under sections 107 and 145 of Cr.P.C. were started and when there was much tension on that account, Hira Lal had reported the matter to the police and, consequently, FIRs were lodged. A B

7. W3 Chandan Giri stated that on 1.9.1979 at about 7.45 in the evening, while he was returning from the temple after worshipping the deity, Chhabi Nath, a close relation of Hiralal who was sitting in front of the door of the house of Hiralal called him and he accordingly went to him where besides him Tikam Singh, Hiralal and Kundan Singh were also present. While they were sitting there, some miscreants came on the spot armed with guns and other weapons. Out of the miscreants, he could identify accused Harpal, Sukhpal, Ajanti and Munna Giri who were otherwise known to him held fire arms in their possession. The miscreants also entered the house of Hiralal and caused injuries to Aidal Singh and others who were inside the house. He stated that the accused persons had also removed the licensed gun from the house of Hiralal. C D E

8. Dr. K.A. Singh, PW4, on next day i.e. on 2.9.1979 at 4.45 p.m. conducted the post mortem of Aidal Singh and he found the following injuries: F

1. One gun shot wound of entrance 1-1/3" x 3/4" x chest and abdominal cavity deep on left side front of chest, 4 1/2" below the left nipple. No tattooing, no blackening was found in the injuries. G
2. One gun shot wound of exit 3/4" x 1/2" cavity deep on right side on posterior axillary line.
3. Multiple abrasions in area of 6 1/2" x 3 1/2" around injury no.1. H

- A 4. One triangular abrasion $2\frac{1}{2}$ " x $1\frac{1}{2}$ " x on the left of the back on the lower part.
5. Abrasion 3" x $\frac{1}{2}$ " just below left buttock.
6. Abrasion $\frac{1}{2}$ " x $\frac{1}{4}$ ", $2\frac{1}{2}$ " below injury no.2.
- B 7. Upon internal examination, 8th, 9th and 10th ribs were fractured and the pleura of the left lung was also found torn in which clotted blood was also found. In the cavity of the stomach, about half pint clotted blood was also found wherein about 3 oz. of food mixed with blood could be detected. Injury no.1 could be caused by some firearm like gun and which was the cause of the death which occurred on account of shock and hemorrhage. The witness proved his report Ex.Ka.6."
- C

D 9. Dr. B.N. Gupta, PW7 conducted the post mortem examination of Hiralal and he found the following injuries on his person:

- E "1. Stitched wound 12 cm in length containing six stitched on the middle of the stomach. The injury was found 1 cm in width and was cavity deep.
2. Stitched wound 7.5 cm in length and oblique in nature. It contained seven stitched and it was also found to be 1 cm in width and it was also cavity deep. One end of the injury was 6 cm away from injury no.1 towards left while the other end of the injury was in the middle of injury no.1.
- F 3. Incised wound 1.5 cm x 5 cm x stomach cavity deep on the right side of the stomach, 10 cm away from the middle on the outer aspect.
- G 4. Incised wound 1.5 cm x 1 cm x stomach cavity deep on the left side of the stomach, 10 cm away from the midline towards outer aspect.

5. Abraded abrasion 5 cm x 1.5 cm on the left elbow on the outer side. A
6. Abraded abrasion 1.5 cm x 1 cm on the left elbow on the front.
7. Abraded abrasion 6 cm x 3 cm on the left side of the back on 1/3rd lower part of the back and one cm below the shoulder bone. B
8. Abraded abrasion 10 cm x 5 cm on the left hip on the upper part. C
9. Abraded abrasion 1/5 cm x 5 cm on the right elbow in the front.
10. Abraded abrasion 1 cm x 5 cm on the right wrist in the front. Pus was found inside the stomach. One pellet was also recovered from the stomach which was found empty. The cause of death was peritonitis due to gun-shot injury. According to the doctor, injuries no.1 to 4 were surgical injuries. The witness proved his postmortem examination report Ext. Ka.7." D

10. Dr. S.K. Jha, posted as Medical Officer Primary Health Centre, Sikandra Rao on 1.9.1979 examined Smt. Longshree and found the following injuries on person: E

- "1. Contusion 4 cm x 1/5 cm on the left shoulder. F
2. Contusion 3 cm x 1.5 cm on the left shoulder.
3. Contusion 5 cm x 2 cm on the outer and middle part of right arm on upper side.
4. Contusion 6 cm x 2 m on the right scapular region. G
5. Contusion 10 cm x 2 cm on the right side of the back, 7 cm below lower angle of scapula.
6. Contusion 6 cm x 1 cm on the left side of back. H

- A All the injuries were caused by some hard blunt object and were found to be fresh at the time of examination."

11. Dr. Jha also examined Chandan Giri and found the following one injury on his person:-

- B "Lacerated wound 1 cm x 0.2 cm x muscle deep on the back of left hand."

12. According to the doctor, the injuries to Hiralal, Aidal Singh and Chandan Giri could be caused by gun shots while injuries to Smt. Longshree could be caused by some lathi or danda. The doctor further stated that he had written a letter to Tehsildar Magistrate, Sikandrarao for recording the dying declarations of Aidal Singh and Hiralal and their statements were recorded. The injured were in fit condition to make statements for which he appended his certificates Exs. Ka.13 and Ka.14.
- C
- D The Tehsildar Magistrate also obtained the thumb impression of Aidal Singh and signature of Hiralal on the statements before him.

13. Smt. Longshree, PW5, wife of Hiralal deceased, is an injured eye-witness. In her testimony, she clearly stated that at about 7.30 p.m. in the night, she was inside her house with the wife of Aidal Singh and along with the children of her family. At that time, she was busy cooking food while her husband Hiralal was sitting in the chowk along with Chandan Giri and some others. About 8 or 10 miscreants had entered her house armed with guns, lathis and kattas etc. and started firing as a result of which her husband Hiralal and Chandan Giri were injured. Inside the house, the miscreants injured her and Aidal Singh as well. The miscreants uttered that they would destroy the family of Hiralal and they in fact took away the gun and some other articles. She also stated that there was moonlight and lantern light and she could identify accused Ajanti, Munna Giri, Sukhpal and Harpal who were otherwise known to her. The miscreants made their escape good from the spot. She was also medically examined and the doctor found number of injuries as enumerated in the preceding paragraphs.
- E
- F
- G
- H

14. Shri Ram Autar Saxena PW9, Tehsildar (Executive Magistrate), Sikandra Rao stated that on 1.9.1979, he had recorded the dying declarations Ex.Ka15 and Ex.Ka16 of Hiralal and Aidal Singh. He also stated that whatever was stated before him by the abovementioned two persons, he had reduced the same in writing as contained in the two documents mentioned above and before recording their statements had satisfied himself that the deponents had obtained the certificates of the doctor as well Exs.Ka.13 and Ka.14. He had obtained the thumb impression and signature of the deponents (under their signatures) after having recorded their statements which were read over to them. The accused persons in their statements under section 313 Cr.P.C. pleaded not guilty and consequently they were charged under section 396 IPC.

15. The prosecution has based its case primarily on the evidence of the injured witnesses Smt. Longshree PW5 and Chandan Giri PW3 respectively. Smt. Longshree PW5, injured eyewitness clearly stated in her statement that she had recognized accused persons in the moonlight and the light of the lantern. She also stated that she had otherwise known the accused persons. She also stated that the accused persons had injured her. The relevant portion of her statement reads thus :

"The criminals had asked me about the goods kept in the house. I had told them about the goods and that the entire kothi is open, search the goods. All the criminals were open faced. They had tied cloth on their heads. The criminals remained in my house for half an hour. After firing, the criminals searched for articles in the house for half an hour."

16. Chandan Giri, PW3 also supported the entire prosecution version.

17. The trial court found the testimony of Bhagwant Singh, PW2 brother of deceased Hiralal and Aidal Singh and PW5 injured eye-witness Smt. Longshree, wife of Hiralal and another injured PW3 Chandan Giri credible and trustworthy.

A 18. The appellants were not strangers to the witnesses.
They had known each other. There was adequate moonlight and
the light of the burning lantern. The trial court analyzed the prosecution version and the defence version and came to the clear
B conclusion that the prosecution has succeeded in establishing
its case beyond shadow of doubt.

19. The trial court found the accused persons guilty under
section 396 IPC and sentenced them to life imprisonment. The
accused aggrieved by their conviction by the trial court preferred
appeal before the High Court. The High Court by the impugned
C judgment allowed the appeal. The State of U.P. aggrieved by
the impugned judgment has preferred these appeals.

20. We have carefully analyzed the impugned judgment of
the High Court and also the judgment of the trial court and have
D also carefully perused the entire evidence on record. Certain
findings in the impugned judgment of the High Court are based
on no evidence, such as:

E "Thus, it is clear from the evidence on record that neither
the appellants intended to commit dacoity nor dacoity took
place. But all the appellants were charged for the offence
of dacoity with murder."

21. This is quite contrary to the evidence on record. The
eye-witnesses have specifically stated that the accused persons
had committed dacoity. The accused had also taken away
F the licensed gun and other articles. So the aforesaid findings of
the High Court are not based on evidence on record.

22. The High Court in the impugned judgment also erroneously observed that-

G "... the chief intention of accused was not to commit
robbery, theft or extortion but to commit murder and it was
subsequent to the murder that they removed certain
property dishonestly."

H 23. This finding cannot be supported by evidence on record.

This finding also runs contrary to the earlier finding of the High Court and is contrary to the evidence on record. A

24. The following findings of the High Court are also contrary to the evidence on record :

"But prosecution could not prove that dacoity took place and two deceased were murdered during commission of dacoity." B

25. In the instant case, all the witnesses have stated that they had otherwise known the accused persons and they were not strangers to them. In the moonlight and lantern light they clearly identified them. Therefore, the test identification parade was really not necessary in this case. Whether test identification parade is necessary or not would depend on the facts and circumstances of each case. This court in a series of cases has taken the view that the test identification parade under section 9 of the Evidence Act is to test the veracity of the witness and his capacity to identify the unknown persons whom the witness must have seen only once but in the instant case the witnesses were otherwise known to accused persons, therefore, the test identification parade has no great relevance in the facts and circumstances of this case. C D E

26. The High Court has altogether failed to deal with the dying declarations of both the deceased Hiralal and Aidal Singh. The High Court has not correctly construed and analysed the evidence on record. In this case, all the witnesses have categorically stated that the accused persons committed dacoity and killed Hiralal and Aidal Singh and injured Smt. Longshree and Chandan Giri in the incident. There was adequate light in which they had recognized these accused persons who were otherwise known to them. F G

27. The High Court erroneously set aside a well reasoned judgment of the trial court which is based on correct evaluation of evidence of injured eye-witnesses and other witnesses and dying declarations on record. H

A 28. In the instant case, before the trial court an application
was filed that the accused persons ought to have been charged
under section 302 IPC instead of section 396 IPC which was
rejected by the trial court on the ground that the accused persons
were justifiably charged under section 396 IPC. In these
B facts and circumstances, the Trial Court was justified in arriving
at the correct conclusion that the accused were correctly
charged under section 396 IPC and on the basis of clear evidence
on record, the accused persons were held guilty of the
offence under section 396 IPC.

C 29. The evidence on record clearly reveals that the accused
persons entered the premises of the deceased Hiralal
for committing dacoity. They had looted a licensed gun and other
articles and in the process they had also killed Hiralal and Aidal
Singh and injured Smt. Longshree and Chandan Gir.

D 30. On careful consideration of the entire evidence on
record, the following conclusions are inescapable:

E 1. The impugned judgment of the High Court is based
on total misreading of the evidence of the injured
eye-witnesses PW3 Chandan Giri and PW5 Smt.
Longshree;

F 2. The High Court failed to appreciate that in this case,
the test identification parade was not required since
the accused were otherwise known to the witnesses.
The conducting of test identification parade depends
on the facts and circumstances of each case.

G 3. In the impugned judgment, the High Court ought to
have considered the entire case in correct
perspective of the small rural village background
where most of the people know each other. They live
in the vicinity. The test which may be relevant for
metros or big cities cannot always be applied to
small rural village settings.

H 4. The High Court in the impugned judgment has gravely

[DALVEER BHANDARI, J.]

erred in totally ignoring the dying declarations of Hiralal and Aidal Singh, particularly when the dying declarations were recorded by the Magistrate.

5. The High Court erred in discarding the evidence of the injured eye-witnesses whose statement is consistent and corroborated by other evidence on record.

31. The impugned judgment of the High Court is contrary to the well settled legal principles which have been crystallized by a series of decisions of this court. In the latest pronouncement of this court in **Ghure Lal v. State of U.P.** (2008) 10 SCC 450, this court comprehensively dealt with series of cases and clearly came to the conclusion as under:

"A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when: I) The trial court's conclusion with regard to the facts is palpably wrong; II) The trial court's decision was based on an erroneous view of law; III) The trial court's judgment is likely to result in "grave miscarriage of justice"; IV) The entire approach of the trial court in dealing with the evidence was patently illegal; V) The trial court's judgment was manifestly unjust and unreasonable; VI) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc. (VII) This list is intended to be illustrative, not exhaustive."

32. In **Ghure Lal (supra)**, the court clearly observed that unless there are compelling reasons, the High Court should not set aside the judgment of the trial court. The High Court must always keep in view that the trial court had advantage of seeing the demeanour of the witnesses and, therefore, the conclusion of the trial court should not be set aside in the light hearted

A manner. The court dealt with various cases and observed as under:

B "The appellate court is given wide powers to review the evidence to come to its own conclusions. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law. But this power must be exercised with great care and caution."

D 33. Ordinarily this court would have been very reluctant to interfere with the judgment of acquittal but in this case for very substantially and compelling reasons we are constrained to set aside the impugned judgment of the High Court because the High Court totally misread the entire evidence on record.

E 34. On consideration of the totality of facts and circumstances particularly evidence on record, the impugned judgment cannot be sustained and is, consequently, set aside and the judgment of the trial court is restored. Accordingly, the appeals are allowed.

F 35. The bail bonds of the respondents are cancelled. They are directed to surrender forthwith to serve out the remaining sentence and if the accused-respondents do not surrender, in that event, the State is directed to arrest the respondents and lodge them before the concerned jail to serve out the sentence.

R.P.

Appeals allowed.