

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL No. 1176/2004

Bachan Singh & Anr.

.....Appellants

Vs.

State of Bihar

.....Respondent

**WITH CrI.A.No.408/2005 and CrI.A.No. 1459/2008 @ SLP
(CrI.)No.599/2007**

J U D G M E N T

HARJIT SINGH BEDI,J.

1. Leave granted.
2. These appeals by special leave arise out of the following facts:
3. On the morning of 3rd December 1975, one Shekhar Singh, resident of Village Moory was assaulted by some of the

accused. Later on information was conveyed to Bhagwati Devi that her sons-in-law, Lakshman Singh and Bacha Singh and her son Nathuni Singh had been surrounded by the accused in the Khalihan of one Marua Singh with a view to commit their murder. Bhagwati Devi, accompanied by her daughter and son, went to the Khalihan of Marua Singh and when she reached there, she saw the accused persons, 13 in all, armed with guns, spears, pharsas and lathis etc. standing on the road outside the Khalihan whereas her two sons-in-law and her son were inside. She also heard accused Chirkut Singh asking them to come out of the Khalihan and he also opened fire hitting Bacha Singh on which, he fell down. Lakshman Singh thereafter opened fire with a country-made gun in self defence hitting Kishore Singh, as a result of which, he too fell down on the ground. Thereafter, accused Jang Bahadur Singh fired a shot with his weapon hitting Lakshman Singh, and accused Bashishta Singh also fired his weapon hitting Nathuni Singh and they both fell on the ground. The other accused thereafter gave blows with lathis to Nathuni Singh. In the meanwhile Sachmucha Devi, the father's sister of

Nathuni Singh covered his body with her own and received gun butt/lathi blows given allegedly by accused Jang Bahadur Singh. It further appears that the accused persons started dragging Lakshman Singh and Bacha Singh in a southerly direction and also assaulted them which resulted in their deaths on the spot. On hearing the alarm raised by Bhagwati Devi, her co-villagers namely Bajranghi Singh and Chariter Singh reached the place and also witnessed the incident. The accused then ran away carrying Nand Kishore Singh with them. Bhagwati Devi then rushed to the Police Station, Chainpur on which an FIR was registered for offences punishable under Sections 147,148,149,302,307 and 325 of IPC and under Section 25(a) of the Arms Act against all the thirteen accused and on completion of the investigation, they were charged under the aforesaid offences and as they pleaded innocence, they were brought to trial. The trial court relying on the statements of PW5 Bhagwati Devi, PW4 Jai Prakash, PW6 Binda Devi, PW7 Sachmucha Devi and PW8 Nathuni Singh held that the case stood proved against nine of

the thirteen accused and accordingly convicted them as under:-

“All the remaining nine accused persons are held guilty of the offence u/s 302/149 IPC because they committed murders of deceased Lakshman Singh and Bacha Singh in furtherance of their common object for which they had formed an unlawful assembly and as such they are convicted thereunder. Then, accused Chirkut Singh and Jang Bahadur Singh are held guilty for the substantive charge u/s 302 and 148 IPC and 27 of the Arms Act for which they are convicted thereunder. Then, there is a charge u/s 307 IPC against accused Bashistha Singh, but the Doctor, who is said to have examined injured Nathuni Singh, has not been examined by the prosecution. Therefore, charge u/s 307 IPC fails on this score alone. Accused Badri Singh, Sobhu Singh, Kailash Singh, Kumar Singh, Bashistha Singh and Bacha Singh have been charged for the offence u/s 148 IPC whereas accused Briksh Singh has been charged for the offence u/s 147 IPC. Therefore they are held guilty for the respective charges levelled against them and they are convicted thereunder.”

4. Accused Nirmal Singh, Muni Singh, Durga Singh and Bramha Singh were acquitted. The High Court in appeal, acquitted Bashistha Singh of all charges. The appeals filed by

the other accused were dismissed with some cosmetic changes in the nature of the offence.

5. Before we embark on a discussion of the arguments raised, the details or otherwise of the appeals filed in this Court need to be reproduced. It may be mentioned that Chirkut Singh, Badri Singh and Briksh Singh did not file any appeal in this Court. Jang Bahadur Singh has filed Criminal Appeal No.408/2005 whereas Bachan Singh and Sobhu Singh have filed Criminal Appeal No.1176/2004 and Kailash Singh and Kumar Singh have filed SLP No.599/2007.

6. Mr. R. Sundervardhan, the learned senior counsel appearing for the accused appellants has raised several arguments before us. He has first submitted that the genesis of the occurrence was uncertain and as both sides appeared to have come prepared and determined to fight, injuries had been suffered by members of both groups on this account. It has also been pleaded that the trial court had adopted an extra ordinary procedure inasmuch as it had looked into the case diary to find corroboration for the prosecution evidence as the investigating officer had not cared to record the

statements of the prosecution witness and that this procedure was unknown to law and therefore unacceptable in the light of the judgments reported as **Habeeb Mohammad vs. State of Hyderabad 1954 SCR 475, Sakal Ahir & Ors. vs. Palakdhari Ahir AIR 1931 Patna 96 and Queens Empress vs. Mannu 1897 ILR (19) Allahabad 390.** As against this, it has been contended by the learned counsel for the respondent-State that the facts of the case clearly showed that the accused were the aggressors and in the light of the fact that the incident pertaining to Shekhar Singh had taken place two or three hours before the present incident, the question of a free fight did not arise. It has also been pleaded that the animosity between the parties stood admitted and that in the light of the fact that several injured witnesses had come to depose in favour of the prosecution, some discrepancies were bound to occur in the ocular evidence recorded after 7 years as noted in the judgment of the Supreme Court in **Leela Ram (Dead) through Duli Chand vs. State of Haryana & Anr. (1999) 9 SCC 525.**

7. We have considered the arguments advanced by the learned counsel for the parties. Mr. Sundarvardhan's argument is based on the observation of the trial Judge that he had looked at the case diary in terms of Section 172 (2) of the Code of Criminal Procedure. A bare perusal of this provision would reveal that a criminal court can send for the police diaries of a case under trial in such court, and may use such diaries, not as evidence of the case, but to aid it in such inquiry or trial. The facts of the case reveal that the I.O. could not be examined, as in the meanwhile he had migrated to Pakistan and had died there and it is in this situation that the trial Judge feeling handicapped on account of the non-examination of the I.O. (though the witnesses had been confronted with their previous statements) had a look into the case diary as an additional factor to test the veracity of the witnesses. The cited cases only lay down the principle that statements in a case diary cannot be utilized as evidence to corroborate the statement of the prosecution witness. This is what the trial court had to say on this aspect:

“The learned advocate for the defense has contended that the I.O. of the case has not been examined by the prosecution for which the defense of the accused persons has been highly prejudiced. It is true that the I.O. of the case has not been examined but for that the prosecution is not to be blamed because I have been told during the course of argument by the learned Addl.P.P. that in spite of his best efforts the I.O. could not turn up for his evidence and it was reported that the I.O. Shri M.Mallik Khan, who was a Muslim gentlemen left the country for Pakistan after his retirement and he died over there and besides that, on perusal of the statements of prosecution witnesses I find that the attention of PW3 was drawn towards his previous statement before the I.O. in Para 15 of his cross-examination. And similarly the attention of PW4 was drawn towards his earlier statement made before the police in Para 12 of his cross-examination. But no such attention was drawn to the first informant, who is PW5. Likewise the attention of PW6 was drawn toward her earlier statement made before the police in Paras 2 and 9 of her cross-examination. The attention of PW7 was drawn towards her earlier statement in Para 4 of her cross-examination and that of PW8 was drawn towards his earlier statement in Paras 12 and 14 of his cross-examination. And I have also perused the case diary in order to appreciate the evidence u/s 172 (2)

Cr.P.C. and found that even if the I.O. would have been examined no material contradiction could have come out in the statements of the witnesses examined on behalf of the prosecution because on material points all the witnesses examined before the police have stated that accused Chirkut Singh gave a fatal shot to deceased Bacha Singh, whereas accused Jang Bahadur gave a fatal shot to deceased Lakshman Singh. And while describing the alleged P.O. the I.O. has fully corroborated this fact that he had found the trail of dragging of deceased Lakshman Singh and Bacha Singh from the Khalian of one Marua Singh. Therefore, I feel that non-examination of the I.O. has never prejudiced the defence of the accused persons.”

It will be clear from a perusal of the aforequoted paragraph that the prosecution witnesses had been confronted with their previous statements and even if we assume that the trial court was not justified in looking into the case diary, it could not be said to be prejudicial to the accused in the peculiar facts of the case.

8. It appears to be the admitted case that the deceased and some members of the accused party were closely related to each other and that the incident had occurred as Gati

Kunwar, the widow of Ram Lakhan Singh had executed a deed of relinquishment in respect of her landed property in favour of the father of PW8 Nathuni Singh, though a part of that land was being cultivated by the accused. The trial court also found that PW5 Bhagwati Devi had admitted in her statement that her husband Ram Dev Singh had sent for the deceased Lakshman Singh and Bacha Singh, their sons-in-law before the alleged occurrence, and that Lakshman Singh had also come to the place armed with a country made weapon. The court has also observed that that it was equally true that the accused Muni Singh, Brahma Singh and Durga Singh belonged to village Bakurahan, accused Bashishta Singh to village Fakrabad and accused Badri Singh to village Bhadayee whereas accused Muni Singh and Brahma Singh had admitted in the statement u/s 313 Cr.P.C. that they were relations of Nand Kishore Singh deceased, whereas accused Bashistha Singh was the brother-in-law of Chirkut Singh and Jang Bahadur Singh and Durga Singh accused was also related to accused Bachan Singh. The Court has accordingly drawn an inference that both sides had collected their relatives and

supporters from several villages before the alleged occurrence and had clashed with each other and that in the exchange of fire, two persons from the complainant's side and one from the side of the accused had been killed. It is in this background and the findings of the trial court that we have chosen to examine the arguments raised.

9. Mr R. Sundarvardhan's primary argument has been that the incident was the outcome of a free fight between the two groups after they had made preparations to settle scores. We have examined the statement of PW5 Bhagwati Devi, the first informant, who deposed that 5 or 6 days before the occurrence, Chirkut Singh's crop had been burnt on which a complaint had been lodged against her sons-in-law (the deceased), her son and her husband and that Chirkut Singh had threatened her sons-in-law that they would be beaten. She also stated that Lakshman Singh often carried a country-made gun though he had no licence for it. It is apparent from her evidence that a free fight between the parties had taken place during the course of which several shots had been fired resulting in three deaths from both groups. The stand taken

by Bhagwati Devi has been supported on material points by the other prosecution witnesses. We are of the opinion in the facts stated above, that both the parties appeared to be itching for a fight and had collected their relatives and supporters from far and between to augment their strength. In this view of the matter, we are disinclined to go into the other arguments raised by the learned counsel for the appellants.

10. In the light of what has been discussed above, we find that both groups must share equal responsibility for this incident. Accused Chirkut Singh who has been attributed the gun shot injury on Bacha Singh and Jang Bahadur Singh who had likewise given a fatal injury to Lakshman Singh must be held liable for offences punishable under section 302 IPC and section 27 of the Arms Act. The trial court acquitted Bashistha Singh charged under section 307 for having caused a gun shot injury to Nathuni Singh but convicted him for the offence under section 148 of the IPC. In appeal, however, he was acquitted of this charge as well. We accordingly dismiss Criminal Appeal No.408 of 2005 filed by Jang Bahadur Singh, and as Chirkut Singh has filed no appeal in this Court, we

maintain his conviction as well. Criminal Appeal No. 1176/2004 filed by Bachan Singh and Sobhu Singh are allowed whereas we grant leave in SLP No.599/2007 and order the acquittal of Kailash Singh and Kumar Singh as well.

11. We have seen from the record that Badri Singh and Briksh Singh have not filed any appeal in this Court. In the light of the judgments reported in **Raja Ram and others vs. State of M.P. (1994) 2 SCC 568**, **Arokia Thomas vs. State of T.N. (2006) 10 SCC 542** and **Suresh Chaudhary etc. vs. State of Bihar (2003) 4 SCC 128**, the benefit of this judgment must also flow to these accused. In para 3 of the judgment in Arokia's case, it was observed:

“So far, as accused Dhanasekaran is concerned, it is true that he has not preferred any appeal, but in view of our finding aforementioned that the prosecution case is highly doubtful and there is no ground for distinguishing the case of the accused Dhanasekaran from that of the appellant, we are of the view that he is also entitled to acquittal irrespective of the fact that he has not moved this court.”

In **Suresh Chaudhary's case (supra)**, this is what the court had to say:

“This leaves us to consider the case the one another accused namely Sona @ Sonwa Chaudhary who was one of the accused before learned Sessions Judge who came to be convicted by him vide his judgment in Sessions Trial No. 417/1993. He along with other appellants herein had preferred the criminal appeal before the High Court of Patna which is Crl. A. No. 88/1995 which came to be dismissed by the impugned judgment. For some reason or the other he has not preferred any appeal and has accepted the judgments of courts below. We, in these appeals, have come to the conclusion that the prosecution has failed to establish its case against the appellants which finding is applicable to all the accused. The question then arises whether the benefit of this judgment of ours should be extended to the non-appealing accused namely Sona @ Sonwa Choudhary or not. This Court in a catena of cases has held where on the evaluation of a case this Court reaches the conclusion that no conviction of any accused is possible, the benefit of doubt must be extended to the co-accused similarly situated though he has not challenged the order of conviction by way of an appeal. [See: Bijoy Singh v. State of Bihar, (2002) 9 SCC 147]. This Court while rendering the above judgment has placed reliance on some other judgments

of this Court in *Raja Ram v. State of M.P.*, (1994) 2 SCC 568, *Dandu Lakshmi Reddy v. State of A.P.*, (1999) 7 SCC 69 and *Anil Rai v. State of Bihar*, (2001) 7 SCC 318, wherein this Court had taken a similar view. Following the above dictum of this Court in the judgments noticed by us hereinabove, we are of the opinion since we have come to the conclusion that no conviction of any accused is possible based on the prosecution case as presented, it becomes our duty to extend the benefit of acquittal in these appeals also to a non-appealing accused, therefore, Sona @ Sonwa Choudhary who is the first accused before the Sessions Court in Sessions Trial No. 417/93 and who was the first appellant before the High Court in Crl. A. No. 88 of 1995 will also be acquitted of all the charges of which he is found guilty by the two courts below.”

A similar order had been made by this Court in *Raja Ram’s* case (supra) in the light of Article 142 of the Constitution of India. Be that as it may, in this background, *Badri Singh* and *Briksh Singh* who had both filed Criminal Appeal No.501/1987 in the High Court and were unsuccessful are also entitled to acquittal. The appeals are accordingly disposed of.

.....J.
(S.B. SINHA)

.....J.
(HARJIT SINGH BEDI)

New Delhi,
Dated: September 11, 2008