RAGHUNANDAN

v.

STATE OF U.P.

January 10, 1974

[M. H. BEG AND Y. V. CHANDRACHUD, JJ.]

Murder—Criminal Procedure Code—Ss. 162, 428 and 540—Duty of court to put essential questions—Evidence Act, s. 165—Scope of.

All the appellants were tried for various offences under the Penal Code. The first appellant (Cr. A. 10 of 1973) was held guilty of the offence of murder of the deceased by shooting him with a gun while the other appellants were held guilty of offences under Ss. 147 and 148, I. P. C. All the appellants were held guilty of offences punishable under Ss. 307 and 323 read with s. 149. The first appellant was sentenced to death while the others to imprisonment for life. The High Court confirmed the sentences.

Allowing the appeals in part and remitting the cases to the High Court for disposal,

HELD : Several material points escaped consideration by the High Court. In a case of death sentence one would have expected a closer and a more critical scrutiny and a fuller discussion by the High Court of the evidence in the case and of the material questions arising for decision before it together with its decisions supported by more than what could appear as perfunctory reasoning. [99E;100B]

(1) The more important questions emerging from a reading of the post-mortem report regarding the contents of the stomach of the deceased, considered in the context of the alleged time of the murder have not been discussed at all by the High Court. It is precisely questions of this kind which, even if the prosecution or the defence counsel omitted to put, the trial court could and should have put to the doctor who conducted the post mortem to clear up the position. If the trial Court had failed to consider their importance, the High Court itself could and should have taken furher expert medical evidence under Ss. 540 and 428, Cr. P. C. on this question. [9F]

(2) It is true that the ban imposed by s. 162, Cr. P. C. against the use of a statement of a witness recorded by the police during investigation, appears sweeping and wide. But at the same time, the powers of the court under s. 165 of the Evidence Act to put any questions to a witness are also couched in very wide terms authorising the judge "in order to discover or to obtain proper proof of relevant facts" to "ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant". The first proviso to s. 165, Evidence Act, enacting that, despite the powers of the court to put any question to a witness, the judgment must be based upon facts declared by the Act to be relevant, only serves to emphasise the width of the power of the court to question a witness.

The second proviso in this section preserves the privileges of witnesses to refuse to answer certain questions and prohibits only questions which would be considered improper under Ss. 148 and 149, Evidence Act. Statements of witnesses made to the police during the investigation do not fall under any prohibited category mentioned in s. 165, Evidence Act. If s. 162 Cr. P. C. was meant to be so wide in its sweep it could make a further inroad upon the powers of the judge to put questions under s. 165, Evidence Act. If that was the correct position at least s. 162, Cr. P. C. would have said so explicitly. Section 165, Evidence Act was already on the statute book when s. 162, Cr. P. C. was enacted.

It is certainly quite arguable that s. 162, Cr. P. C. does amount to a prohibition against the use even by the court of statements mentioned there. Nevertheless, the purpose of the prohibition of s. 162, Cr. P. C. being to prevent unfair use by the prosecution of statements made by witnesses to the police during the course of investigation, while the proviso is intended for the benefit of the defence, it could be

A urged that, in order to secure the ends of justice, the prohibition, by taking into account its purpose and the mischief it was designed to prevent as well as its context, must be confined in its scope to the use by parties only to a proceeding of statements mentioned therein.

The language of s. 162, Cr. P. C., though wide, is not explicit or specific enough to extend the prohibition to the use of the wide and special powers of the court to question a witness, expressly and explicitly given by s. 165, Evidence Act in order to secure the ends of justice. A narrow and restrictive construction put upon the pro-
B hibition in s. 162 Cr. P. C. so as to confine the ambit of it to the use of statements by witnesses, by parties only to a proceeding before the court, would reconcile or harmonize the two provisions and also serve the ends of justice. Therefore s. 162, Cr. P. C. does not impair the special powers of the court under s. 165 Evidence Act. [98A–H]

In the instant case a person who was said to be an eye witness was not examined by the prosecution. But this witness was considered so important that the trial court examined him as a court witness. While some of the prosecution witnesses stated
C that this witness was present at the time and place of occurrence, the witness himself stated to the police that he was not an eye witness to the occurrence but came there later. This witness ought to have been confronted by the trial court itself with his previous statement to the police and that statement could have been proved by the investigating officer. After that, a better appraisal of the other evidence in the case than was possible now could take place. The High Court, without considering or discussing the significance of the presence or absence of this witness at the house at the time of the occurrence, had merely observed that he also supported the prosecu-
D tion. If this witness was not really present the evidence of witnesses who were prepared to state that he was present, though not necessarily false about the occurrence has to be appraised less uncritically.

Emperor v. *Lal Mian* A. I. R. 1943 Cal. 521, approved.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 10 & 11 of 1973.

E Appeals by special leave from the judgment and order dated the 28th October, 1971 of the Allahabad High Court in Criminal Appeal No. 351 of 1971 and Referred No. 31 of 1971.

Frank Anthony, E. C. Agrawala, M. M. L. Srivastava and *A.T.M. Sampath*, for the appellants.

O. P. Rana, for the respondent.

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The Judgment of the Court was delivered by

BEG. J.—The appellants Raghunandan, Ganga Sahai, Ghalendra, Khem Singh, and Sohan Singh, in the two Criminal Appeals now before us by special leave, were tried by a Civil & Sessions Judge of Moradabad for various offences punishable under Sections 147,
G 148, 302, 307, 323 and 452 read with section 149 Indian Penal Code. Raghunandan was held guilty of the offence of murder by shooting one Sriram with a gun on 12-12-1969, at about 1 p. m., while the deceased was sitting in front of his cattle shed in his outer court yard and talking to Hari Singh, a neighbour, who was also injured by gun shots. The appellants Ganga Sahai and Sohan Singh were held guilty of Offences punishable under section 148 Indian Penal Code
H while Khem Singh and Ghalendra were found guilty punishable under Section 147 Indian Penal Code. All the appellants were held guilty of Offences punishable under Section 307 and 323 read with Section 149 Indian Penal Code and Section 452 Indian Penal Code.

But, no separate sentences were passed against any of the accused persons for these Offences as Raghunandan was sentenced to death under section 302 Indian Penal Code and the other four appellants were sentenced to life imprisonment under section 302 read with section 149 Indian Penal Court. The High Court of Allahabad had accepted the death reference, and, dismissing the appeals of all the appellants, had confirmed their sentences.

The Trial Court as well as the High Court had recorded concurrent findings of fact that the appellants formed themselves into an unlawful assembly armed with a gun, ballams, and lathis, and shot Sriram and Hari Singh, and, also injured Smt. Brahma, P. W. 2, the wife of Hari Singh, who is said to have covered her husband Hari Singh during the attack, and, Durga Prasad, P.W.6, the brother of murdered man. The prosecution case is also supported by Bhai Singh, P.W.1, a brother of Raghunandan, and by Rameshwar, P.W. 5, a resident of Village Karimpur, who was said to be passing by at the time of the occurrence.

The appellants pleaded that they had been falsely implicated due to enmity. They produced Gokul, D. W. 1, who deposed about an occurrence which was alleged to have taken place at the house of Hari Singh in the early hours of the morning presumably of 12th of December, 1969. He stated that the cause of the occurrence was that Rohan, the brother of Hari Singh, had abducted Smt. Rukia of Naurangabad and brought her to village Karimpur where she was living. He asserted that her husband and other residents of Naurangabad forming a party of ten to twelve, had come to take her away. Its members were said to have been armed with a Gun, Ballams, and Lathis, which they were alleged to have used against Hari Singh and the deceased Srirams and Durga Prasad. He deposed that Sriram, Hari Singh, and Durga Prasad were fired at. He stated that the Naurangabad party caught hold of Smt. Brahma and that her husband, Hari Singh, had tried to save her. Gokul alleged that Sriram was struck by gun shots. He suggested that Hari Singh may also have been similarly injured. He stated that Durga Prasad was not hit.

The Trial Court, which had the advantage of seeing the witnesses depose, accepted the evidence of the four eye witnesses, who included two injured persons. It rejected the story put forward by Gokul in defence as incredible. Apart from the fact that the defence version did not clearly explain the Ballam injury on Durga Prasad, the explanation for the gun shot wounds on the chest, stomach, and forearm of Sriram, which had resulted in his death, suggesting that he was the principal target of the attack, did not quite fit in with the defence version. The Trial Court had also observed that the accused had reserved their defence up to the last stage and had not revealed it earlier either in the Committing Magistrate's Court or at the time of applying for bail.

It is true that what seems to be the principal motive set up by the prosecution helps the defence more than it assists the prosecution case. This was that there was rivalry for election to the office of the Pradhan of the Gram Sabha between Sriram deceased and Ganga Sahai,

A appellant, who was Pradhan of the village at the time of the murder. According to the prosecution version, Sriram, who had been a Pradhan of the village for about 8 to 10 years, was threatened with dire consequences by Ganga Sahai if he stood again for the office. Bhai Singh, P. W. 1, had stated that, out of fear, Sriram did not stand for election so that Ganga Sahai won an uncontested election and became the Pradhan. If that was so, Ganga Sahai should have felt obliged to
B Sriram for not contesting the election. There was no suggestion that another election was near at the time of the occurrence or that Sriram was conspiring to get Ganga Sahai unseated.

Other motives were also set up. Ganga Sahai and other accused persons were said to have demolished the mend of Bhai Singh's field
C and taken his land under cultivation so that Bhai Singh had complained about it to people of his own village and other villages. It was alleged that the accused persons formed one set and used to threaten the family of Bhai Singh and Sriram and Durga Prasad who were said to be joint in cultivation and mess. It was also alleged that Sriram had gone with a friend of his, named Sahi Ram, to Police Station Bejoi to lodge a report relating to the beating up of Sahi Ram by Sohan
D Singh and Raghunandan appellants. Furthermore, Brahma, P. W. 2, had deposed that her husband Hari Singh, who had sustained gun shot injuries at the occurrence under consideration but had survived was threatened by the accused persons that, if he gave evidence against them, he would be killed. Hari Singh had actually been murdered about 7 months before Smt. Brahma gave evidence in Court on 11.11.70. The prosecution, therefore, suggested that the appellants formed
E a set of bullies and thought that they could do what they liked to the family of Sriram, deceased, and its property. Enmity, as it has been often observed, is a double edged weapon. We, therefore, refrain from saying more than that there should be an attempt to determine, in such a case, the direction in which enmities set up were more likely to operate.

F If the eye witnesses could be believed it was really not necessary to support the prosecution case by giving satisfactory evidence of the motive to murder. The real and more important question to decide here was whether the four alleged eye witnesses produced, out of whom two were brothers of the deceased Sriram, one a chance witness, and the fourth, the injured wife of a close friend of the deceased, who was also injured, were sufficiently reliable. The alleged eye witnesses
G no doubt seem to have impressed the Trial Court which had the advantage of seeing them depose. There are, however, atleast two features of this case which could provide serious grounds for suspecting the prosecution version. We now proceed to examine these two features.

It was repeatedly emphasised by the learned counsel for the appel-
H lant that the post-mortem examination report disclosed that the small intestine as well as the large intestine of the deceased contained faecal matter and were distended with gas whereas the stomach was found empty. It was submitted before us that it was quite unnatural

that a healthy villager, even though his age was estimated by the Doctor as 60 years (found erroneously mentioned as 80 in the judgment of the High Court before us), would not eat until 1 p.m. during the day, or, in any case, that he would not defecate until that time during the day when there was nothing in evidence to show that he was suffering from constipation. It was contended that the Trial Court had uncritically and too easily accepted the explanation given by the prosecution witnesses that the deceased alone had not eaten up to 1 p.m. as he had a stream of visitors that morning. It is apparent from the testimony of Durga Prasad that he and his brother-in-law Jailal, C.W. 1, who was not produced by the prosecution (although examined as a Court witness), was also said to be staying) at the house, and to have taken his food with Durga Prasad before 1 p.m.

We find that although Dr. J. P. Chaturvedi, P. W. 8, who performed the post-mortem examination, and Dr. D. P. Manchanda, who had admitted Hari Singh into the hospital on 13-12-1969 at 11-40 a.m., were examined at the Trial, no question was put by either side to elicidate whether the contents of the small intestine and the large intestine could remain in that condition until 1 p.m. during the day assuming that Sriram was quite healthy. The post-mortem examination took place at 2-40 p.m. on 13-12-1969, and the intestines were then found distended with gas. We do not know whether this could be their condition at 1 p.m. on 12-12-1969 or its effect. It is precisely questions of this kind which, even it the prosecution or the defence counsel omit to put them, the Trial Court could and should have put to doctors to clear up the position. If the Trial Court had failed to consider their importance, the High Court could have and should have taken further evidence on this matter under Section 540 Criminal Procedure Code. In a criminal case, the fate of the proceeding cannot always be left entirely in the hands of the parties. The Court has also a duty to see that essential questions are not, so far as reasonably possible, left unanswered. We are surprised to find, from the judgment of the High Court, that the questions mentioned above, arising out of the post-mortem report, were not, for some reason, even mentioned there. We find it very difficult to believe that, in a case with a death sentence a matter of such significance, which was noticed by the Trial Court, was not raised at all by Counsel for the appellants. In any event, it ought to have been dealt with by the High Court after taking appropriate additional expert medical evidence under Section 540 read with Section 428 Criminal Procedure Code if that was considered necessary before deciding it.

Another question raised by the learned Counsel for the appellant relates to the testimony of Jailal, the brother-in-law of Sriram. He was said to be an eye witness. But, he was neither mentioned in the F. I. R., although he was said to be present at the Police Station when the F. I. R. was lodged at 5 p.m., nor was he produced by the prosecution. Indeed, Rameshwar, P. W. 5. had stated that he had not seen Jailal at all there. Jailal was considered so important a witness by the Trial Court that he was examined as a Court witness. He denied having made any statement to the Police although it is in evidence that he did make a statement to the Police. The Trial

A Court had not permitted the contents of that statement, which indicated that Jailal was not an eye witness but came there at a time when the Corpse of Sriram was being removed, to be used to contradict his version as a Court witness. Smt. Brahma, P. W. 2, as well as Duiga Prasad, P. W. 6, the injured eye witnesses, as well as Bhai Singh, P. W. 1, stated that Jailal was present at the time of the occurrence.

B Learned Counsel for the appellant submitted that Jailal's statement before the Police suggested that he had come in the morning, long before 1 p.m., and had found that Sriram had already been murdered. This, it is urged indicates that Sriram must have been murdered either by Naurangabad people or by unknown persons during the night. We do not find material on record to support the suggestion that Jailal must have reached the house in the morning at a time when Sriram's C murder had been already committed. The Trial Court had discussed the evidence of Jailal at some length and had opined that his name was not mentioned in the F.I.R. as he was related to the accused persons also. That may be the reason why Jailal was distrusted. If, however, Rameshwar, P.W.5, a chance witness, who claimed to be present at the time of the alleged occurrence and to have seen it, is to be believed, Jailal was not to be seen at all at that time at the house. If Jailal was D really not present, the evidence of witnesses who were prepared to state, for some oblique reason, that he was present, though not necessarily false about the whole occurrence, has to be appraised less uncritically. The High Court, without considering or discussing the significance of the presence or absence of Jailal at the house at the time of the occurrence, had merely observed that Jailal, C.W. 1, also supported the prosecution version.

E Learned counsel for the appellant submitted that the testimony of Jailal could not have been accepted by the High Court because Jailal had not been confronted with his previous statement before the police. He urged, relying upon *Emperor* v. *Lal Mian* (1), that, even if the statement of a witness, recorded by the Police during the investigation, cannot be used for "any purpose" other than the ones mentioned in F Section 162 Criminal Procedure Code, yet this prohobition applies only to the parties to the proceedings and does not operate against the powers of the Court itself when it considers the testimony of a witness to be necessary. Although, the Trial Court considered Jailal's evidence important enough to examine him under Section 540 Criminal Procedure Code, yet it disabled itself from testing its worth by putting an alleged contradiction to the witness on a matter of some G importance in the case.

It is urged by learned counsel for the appellants that the powers of the Court to question a witness are regulated by the special provisions of Section 165 of the Evidence Act exclusively, so that a previous statement of the witness, who is called as a Court witness, can be used by the Court to contradict him even if it was made to the police during the H investigation. This, it is submitted, is the effect of the special powers of the Court under Section 165 Evidence Act.

(1) A.I.R. 1943 Cal. 521.

It is true that the ban, imposed by section 162 Criminal Procedure Code, against the use of a statement of a witness recorded by the Police during investigation, appears sweeping and wide. But, at the same time, we and that the powers of the Court, under section 165 of the Evidence Act, to put any question to a witness, are also couched in very wide terms authorising the Judge "in order to discover or to obtain proper proof of relevant facts" to "ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant". The first proviso to section 165 Evidence Act, enacting that, despite the powers of the Court to put any question to a witness, the judgment must be based upon facts declared by the Act to be relevant, only serves to emphasize the width of the power of the Court to question a witness. The second proviso is this section preserves the privileges of witnesses to refuse to answer certain questions and prohibits only questions which would be considered improper under section 148 and 149 of the Evidence Act. Statements of witnesses made to the police during the investigation do not fall under any prohibited category mentioned in Section 165 Evidence Act. If Section 162 Criminal Procedure Code was meant to be so wide in its sweep as the Trial Court thought it to be, it would make a further inroad upon the powers of the Judge to put questions under Section 165 Evidence Act. If that was the correct position, atleast Section 162 Criminal Procedure Code would have said so explicitly. Section 165 of the Evidence Act was already there when section 162 Criminal Procedure Code was enacted.

It is certainly quite arguable that Section 162 Criminal Procedure Code does amount to a prohibition against the use even by the Court of statements mentioned there. Nevertheless, the purpose of the prohibition of Section 162 Criminal Procedure Code being to prevent unfair use by the prosecution of statements made by witnesses to the Police during the course of investigation, while the proviso is intended for the benefit of the defence, it could also be urged that, in order to secure the ends of Justice, which all procedural law is meant to subserve, the prohibition, by taking into account its purpose and the mischief it was designed to prevent as well as its context, must be confined in its scope to the use by parties only to a proceeding of statements mentioned there.

We are inclined to accept the argument of the appellant that the language of Section 162 Criminal Procedure Code, though wide, is not explicit or specific enough to extend the prohibit on to the use of the wide and special powers of the Court to question a witness, expressly and explicitly given by Section 165 of the Indian Evidence Act in order to secure the ends of justice. We think that a narrow and restrictive construction put upon the prohibition in Sect on 162 Criminal Procedure Code, so as to confine the ambit of it to the use of statements by witnesses by parties only to a proceeding before the Court, would reconcile or harmonize the two provisions considered by us and also serve the ends of justice. Therefore, we hold that Section 162 Criminal Procedure Code does not impair the special powers of the Court under Section 165 Indian Evidence Act. Consequently, we think that the Trial Court could and should have itself

A made use of the statement made by Jailal during the course of the investigation. If that had been done, it is possible that it may have affected appraisal of evidence of other prosecution witnesses.

We also find that the Trial Court as well as the High Court had brushed aside the objection that the blood recovered from the place of occurrence was not sent for chemical examination. We think that
B a failure of the police to send the blood for chemical examination in a serious case of murder, such as the one before us, is to be deprecated. In such cases, the place of occurrence is often disputed. In the instant case, it was actually disputed. However, such an omission need not jeopardise the success of the prosecution case where there is other reliable evidence to fix the scene of occurrence.

C The High Court had dealt with the contention that there was some conflict between medical evidence and the evidence about the distances from which shootings are said to have taken place. It held that, if correctly interpreted, medical evidence corroborated the accounts of eye witnesses. But, the High Court had not similarly discussed or dealt with the infirmities in the statements of prosecution witnesses, which were placed before us, such as the denial by Smt. Brahma, P. W. 2
D that she went to the police station to lodge a report in respect of the murder of Hari Singh. It was urged on behalf of the appellants that this deliberately mendacious denial by her was made to conceal the fact that her report was untrue. Matters which may shake the credibility of a witness must be taken into account although they may not be enough to discard the whole statement of a witness.

E We have indicated a number of points on which, in a case of a death sentence, one would have expected a closer and a more critical scrutiny and a fuller discussion by the High Court of the evidence in the case and of the material questions arising for decision before it together with its decisions on these supported by more than what could appear as perfunctory reasoning. We have also indicated the rather important question which was, surprisingly, not discussed
F at all by the High Court, emerging from a reading of the post-mortem report considered in the context of the alleged time of the murder. We think that the High Court itself could and should have taken further expert medical evidence, under Sections 540 and 428 Criminal Procedure Code, on this question. For the reasons already given, we also think that Jailal, C. W. 1, ought to have been confronted by the Court itself with his previous statement before the police and that statement could be proved by the Investigating officer. After that,
G a better appraisal of other evidence in the case than is possible now, on the present state of the record, could take place.

We have anxiously considered the question whether this is a case in which we should consider the merits of the whole case ourselves on the evidence on record or send it back for further consideration and decision in accordance with the law, as laid down above, either
H by the High Court or by the Trial Court. We do not think that in a serious case of murder such as the one before us, persons who were, if the prosecution case is true, acting as utterly irresponsible and callous bullies, should be judged on the evidence as it stands

without the additional evidence mentioned above by us. We must emphasise that, whatever may be the nature of the offence or the actions of the accused, as revealed by evidence, the accused, are entitled to a fair trial which a well considered judgment, dealing satisfactorily with the material points in the case, evidences. For the reasons given above, we think that several material points have escaped consideration by the High Court. A

Consequently, we allow this appeal to the extent that we set aside the judgment and orders of the High Court and sent back the case to it for reconsideration and decision in accordance with law as explained by us. No opinion which may have been expressed unwittingly by us on questions of fact would bind the Court or affect an unfettered consideration of the merits of the respective cases of the two sides by the High Court in accordance with the law as laid down by us. B C

Appeal partly allowed.

P.B.R.