

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 306 OF 2013

[Arising out of Special Leave Petition (Crl.) No.9359 of 2010]

ROHTASH KUMAR

...

APPELLANT

Versus

STATE OF HARYANA

Through the Home Secretary,
Government of Haryana,
Civil Secretariat,
Chandigarh & Ors.

...

RESPONDENTS

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. Leave granted.
2. In this appeal, by special leave, judgment and order dated 13/9/2010 of the Punjab and Haryana High Court

dismissing Criminal Misc. No.M-2063 of 2009 filed under Section 482 of the Criminal Procedure Code ("**the Code**") is challenged. In the petition before the High Court, the prayer was for issuing directions to respondents 1 to 4 for registration of FIR under Sections 302 and 201 of the Indian Penal Code ("**the IPC**") against respondents 5 to 9, who were policemen attached to Police Station Bawal, District Rewari (Haryana), at the relevant time, for committing the murder of Sunil, son of the appellant in a fake encounter in the night intervening 12/10/2008 and 13/10/2008 at Rewari Road, Narnaul and for further direction to the Central Bureau of Investigation ("**CBI**") to investigate the said FIR.

3. Brief facts of the case need to be stated:

According to the appellant, in the night intervening 12/10/2008 and 13/10/2008, his son - Sunil was killed in a fake encounter by the officials of Police Station Bawal, District Rewari. It is alleged that on 13/10/2008, the SHO of Police Station City Narnaul came to the appellant and asked him to accompany him to identify an injured person

suspecting him to be his son at Civil Hospital, Narnaul. The appellant found his son lying dead in the mortuary and on hearing the news from SHO that his son has been killed in an encounter by a team of Bawal police headed by respondent 5, he became unconscious. The post-mortem of the deceased had already been conducted. On persuasion of SHO Sadhu Singh, the dead body of Sunil was consigned to flames. According to the appellant, he observed 13 days mourning for the death of his son. During this period, he collected copies of post-mortem report and FIR No.351 dated 13/10/2008 registered at Police Station City Narnaul. He came to know that respondents 5 to 9 had murdered his son with ulterior motive and had given shape of encounter to the murder. The encounter never took place. It is the appellant's case that FIR No.351 and the post-mortem notes themselves prove that the story of encounter is a concocted story, rather it is a clear case of murder by respondents 5 to 9. According to the appellant, the truth will come out only if this court directs registration of FIR under Section 302 and

201 of the IPC against respondents 5 to 9 and directs its investigation by CBI.

4. The other version which also needs to be stated is disclosed from FIR No.351 dated 13/10/2008 lodged at Police Station City Narnaul by ASI Ram Sarup. It is stated in the FIR that ASI Ram Sarup of Police Station Bawal along with others was sent for the search of accused Parveen @ Sunil s/o. Rohtash, r/o. Mohalla Jamalpur, Narnaul, named in FIR No.52 dated 19/4/2008. When they were at Narnaul Bus Stand, they received a secret information at 12:15 a.m. in the midnight that the said Praveen @ Sunil, who is the most wanted criminal in the districts of Rewari and Mahindergarh will be crossing Narnaul. The officials of Bawal Police Station started checking the motor cycles passing through Narnaul. At about 12:25 a.m., a pulsor motor cycle driven by Umesh was seen approaching. Sunil was the pillion rider. Constable Gulab Singh knew Sunil personally. He identified Sunil in street light. The motor cycle rider was signaled to stop but he did not stop and, instead increased its speed and hit one

constable. The constable fell down. Sunil brandished firearms with both hands. The motor cycle was turned towards Rewari Road. The police vehicle chased the motor cycle. In the chase, the police vehicle hit the motor cycle. Due to imbalance, firearm held by Sunil in his left hand fell down. The motor cycle, Sunil and his companion also fell down. Sunil stood up and fired at the police with the intention to kill them. The police managed to save themselves. Sunil took out another cartridge from his pant pocket and tried to load it in his firearm to kill the policemen. ASI Ram Sarup ordered the policemen to fire in self defence. Constable Keshav Kumar opened burst fire on Sunil in self defence. Bullets hit on the chest and stomach of Sunil. Sunil died on the spot. If the police had not opened fire, Sunil would have killed policemen. ASI Ram Sarup informed about this incident to Police Station City Narnaul through wireless set. Umesh, the driver of the motor cycle, taking advantage of darkness, fled away towards Rewari Road by leaving the motor cycle behind. Umesh was chased and arrested. On receiving information from ASI Ram Sarup, Police Station

Bawal, FIR No.351 dated 13/10/2008 was registered under Sections 332, 353, 307, 34 of the IPC at Police Station City Narnaul.

5. Mr. Gagan Gupta, learned counsel for the appellant submitted that the High Court misdirected itself in holding that there was nothing on record to establish that the appellant's son Sunil died in a fake encounter. Counsel submitted that the police version that in the night intervening 12/10/2008 and 13/10/2008, on receipt of secret information that Sunil, who was wanted in several cases was to pass by the bus stand of Narnaul, the officials of Police Station Bawal reached Narnaul bus stand; that they saw a motor cycle approaching the bus stand; that they recognized Sunil who was sitting on the pillion seat; that they asked him to stop the motor cycle, but instead of stopping, Sunil fired at the police and in self defence, the police had to fire back and in that firing Sunil died, is a concocted story. Counsel submitted that this story is belied by the fact that in the post-mortem notes, it is stated that the bullet injuries

received by Sunil were caused from a distance of 3 to 8 feet and there was blackening around the edges of the entry wounds. This proves that Sunil was shot at from close quarters. Sunil had received injuries on his chest which indicates that this is a case of murder. If the police wanted to arrest Sunil, they could have fired on non-vital parts of his body. The post-mortem notes also show that there is one wound of entry on the back of Sunil. This demolishes the police version that Sunil was the aggressor. Besides, not a single policeman was injured in this incident. If there was really cross-firing as alleged, at least one of the policemen would have received some firearm injuries. Counsel submitted that the inquiry conducted by the Tahsildar is an eyewash. Same is the case with the inquiry conducted by Additional Deputy Commissioner. Counsel drew our attention to the advertisement issued in the newspapers and submitted that the photographs of Sunil shown in the advertisements are dissimilar. Counsel submitted that in an encounter death, a separate FIR has to be registered with respect to the encounter, which has not been done in this

case. Counsel submitted that the Magisterial enquiry under Sections 174 to 176 of the Code cannot be a substitute for the obligation of the police to register FIR and conduct investigation into the facts and circumstances under which the person died. Counsel submitted that in such a case, the High Court ought to have directed the CBI to conduct investigation and submit report to this court so that the offenders could be prosecuted. In support of his submissions, counsel relied on **Rubabbuddin Shaikh v. State of Gujarat & Ors.**¹ and **Narmada Bai v. State of Gujarat & Ors.**² Counsel urged that this court may issue necessary instructions to the respondents.

6. Mr. P.N. Misra, learned senior counsel for the respondents drew our attention to the affidavits filed on behalf of the respondents. He submitted that Sunil was a dreaded criminal. He was charge-sheeted in several cases. He was declared a proclaimed offender. Counsel drew our attention to the radiogram dated 10/7/2007 and pamphlets

¹ (2010) 2 SCC 200

² (2011) 5 SCC 79

issued by the police declaring that any person who gives information about Sunil would be rewarded. Counsel pointed out that on 13/10/2008, the FIR was registered. The District Magistrate directed the Tahsildar to conduct an inquiry. The Tahsildar conducted inquiry and submitted a report that Sunil died in a genuine encounter. Counsel pointed out that after notice was issued in the present appeal, even the Additional Deputy Commissioner conducted an independent inquiry and submitted a report that the encounter was genuine. Counsel submitted that this is a clear case of a genuine encounter and, hence, the appeal deserves to be dismissed.

7. Mr. Raju Ramachandran, learned amicus curiae, has filed a detailed note. Counsel submitted that the Tahsildar's inquiry is not satisfactory and no credence could be given to his report because the Tahsildar appears to have been carried away by the fact that Sunil was a dreaded criminal against whom six FIRs were registered. Counsel submitted that though the report notices that there was blackening and

tattooing around the entry wounds, it does not take note of the fact that the blackening and tattooing around the entry wounds are indication of the fact that the shots were fired from a short distance. The police have produced two photographs of two different persons stating that they are of Sunil. Therefore, their case that they identified Sunil using a torch at midnight on the basis of photographs becomes doubtful. No firearms were recovered from the body of the deceased and the police officers have not received any injuries. These facts are not consistent with the theory of encounter. Counsel submitted that the police have not followed the guidelines issued by the National Human Rights Commission, which is violative of the mandate contained in Article 21 of the Constitution of India. No FIR has been registered in this case till date on the complaint filed by the appellant. In law, an FIR is to be mandatorily registered whenever a complaint of a cognizable offence is filed. In support of this submission, counsel relied on **Babubhai v. State of Gujarat**³, and **State of Haryana v. Bhajan Lal**⁴.

³ (2010) 12 SCC 254

⁴ 1992 Supp. (1) SCC 335

Counsel submitted that the appellant has been effectively denied access to justice and legal remedy, which is violative of Article 21 of the Constitution of India. Counsel submitted that it is true that in such cases, this Court can direct fresh investigation by an independent agency. But, directing an investigation at this distant time would be an exercise in futility. No ocular evidence would be available now. Records of the two police stations involved in this case would also not be available. Counsel submitted that in such a case, where directing a fresh investigation at this stage is not going to be of any use, it would be appropriate to direct the State to pay heavy compensation to the appellant. In this connection, counsel relied on **Nilabati Behera (Smt.) Alias Lalita Behera (through the Supreme Court Legal Aid Committee) v. State of Orissa & Ors.**⁵

8. After carefully perusing the inquiry report dated 17/11/2008 submitted by Tahsildar, Narnaul and the inquiry report dated 7/1/2011 submitted by the Additional Deputy Commissioner and other relevant record, we are inclined to

⁵ (1993) 2 SCC 746

agree with learned counsel for the appellant and learned amicus curiae that Sunil appears to have died in a fake encounter. Post-mortem notes of Sunil state that the bullets were fired from a distance of about 3-8 ft. from the body. They further state that blackening and tattooing were present around the entry wounds caused by the bullets. This indicates that the shots were fired from a very short distance. There was entry wound on the back. Entry wounds are also seen on the chest. The location and nature of wounds are not consistent with the theory of genuine encounter. If the police party wanted to merely prevent Sunil from running away, they could have fired on the non-vital parts of his body. If the police version that Sunil was aggressive, that he and his companion wanted to kill the policemen to deter them from doing their duty and, therefore, Sunil fired at the police party was true, at least one member of the police party would have got injured. Significantly, no one from the police party was injured. There is also no formal record of any recovery of firearms from the body of Sunil. It is significant to note that Umesh who was

riding the motorcycle at the time of encounter, was arrested and tried for offences under Sections 332, 353, 307 read with Section 34 of the IPC inter alia for using criminal force to deter public servants from discharge of their duty. The Sessions Court acquitted Umesh. Acquittal of Umesh makes a dent in the prosecution case that Sunil fired at the police when the police asked him and Umesh to stop. The police claim to have identified Sunil at the time of encounter on the basis of photographs in their possession. Our attention has been drawn to two photographs of Sunil, shown on the pamphlets announcing reward to anyone who gives any information to the police about him. These two photographs appear to be of two different persons. This is tried to be explained by Head Constable Gulab Singh in his affidavit that one of the two photographs was taken from Haryana School Education Board and the other was given to him by a police informer. It is stated that one photograph shows Sunil as a teenager and the other shows him as a young man. Assuming this to be true, it is not understood how the police could have identified Sunil in the midnight in torch light. It is

also not understood as to on the basis of which of the two photographs, at dead of night, they identified him. The assertion that Head Constable - Gulab Singh knew Sunil personally and he identified him in street light does not inspire confidence. Pertinently, there is reference to use of torch in the FIR filed by ASI Ram Sarup.

9. It is the case of the police that Sunil was a dreaded criminal and six FIRs were registered against him. In none of the FIRs, however, the name of Sunil appears. It is true that it is not necessary that the FIR must contain the name of an accused. The involvement of an accused can come to light after the police record statements of witnesses and collect relevant materials. It is possible that Sunil may be really involved in all these six cases. It also appears that he was declared absconder. But merely because a person is a dreaded criminal or a proclaimed offender, he cannot be killed in cold blood. The police must make an effort to arrest such accused. In a given case if a dreaded criminal launches a murderous attack on the police to prevent them from

doing their duty, the police may have to retaliate and, in that retaliation, such a criminal may get killed. That could be a case of genuine encounter. But in the facts of this case, we are unable to draw such a conclusion.

10. We find that while inquiring whether the encounter is genuine or not, the Tahsildar, Narnoul is carried away by the fact that six FIRs are registered against Sunil and that he is a proclaimed offender. The inquiring authority must first focus its attention on the circumstances that led to the death of a person in an encounter. If it comes to a conclusion that it was the deceased who had attacked the police to prevent them from arresting him or to prevent them from performing their public duty and, therefore, the police had to retaliate, then the antecedents of the deceased could be taken into consideration as additional material at that stage to support the police version that it was a genuine encounter. But the inquiring authority cannot start the inquiry keeping in mind the antecedents of the deceased. The Tahsildar was in error in doing so. The Tahsildar has placed reliance on the

statements of two chance witnesses, both named Amar Singh, who were allegedly present at the time of encounter. We have already referred to the sessions case in which Umesh, who was said to be driving the motorcycle on which Sunil was sitting, was tried. It is significant to note that in that case, PW-8 Amar Singh s/o. Khem Chand was given up by the prosecution since he turned hostile. So far as PW-7 Amar Singh s/o. Amit Lal is concerned, he appears to have merely referred to some incident. The Sessions Judge has, therefore, merely reproduced his evidence and has not given any weightage to it. Reliance placed by the Tahsildar on the statements of these two chance witnesses weakens his report further.

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11. After notice was issued by this Court, the Additional Deputy Commissioner conducted an inquiry and submitted his report dated 7/1/2011. This report places reliance on the earlier report of the Tahsildar which we have found to be not satisfactory. This report places the burden of proof on the appellant. We find it difficult to accept the report of the

Additional Deputy Commissioner which concurs with the Tahsildar's finding that the encounter was genuine. The High Court has erroneously observed that the appellant has failed to bring on record anything to establish his case of false encounter. All the relevant circumstances were completely overlooked by it. In the circumstances, the High Court's order impugned in this appeal will have to be set aside.

12. What disturbs us is the fact that the police have refused to follow the guidelines dated 2/12/2003 issued by the National Human Rights Commission. The two crucial guidelines which have been completely ignored by the police are that the investigation into the encounter death must be done by an independent investigation agency and that whenever a complaint is made against the police making out a case of culpable homicide, an FIR must be registered. In the instant case, the police have refused to even register the FIR on the complaint made by the appellant alleging that his son Sunil was killed by the police. Section 154 of the Code

mandates that whenever a complaint discloses a cognizable offence, an FIR must be registered. This Court has, in a catena of judgments, laid down that the police must register an FIR if a cognizable offence is disclosed in the complaint. [See: **State of Haryana v. Bhajan Lal**⁶]. Ignoring the mandate of Section 154 of the Code and the law laid down by this Court, the police have merely conducted inquiries which appear to be an eyewash. It is distressing to note that till date, no FIR has been registered on the complaint made by the appellant. The only FIR which was registered is against Umesh under Sections 332, 353, 307 read with Section 34 of the IPC at the instance of ASI Ram Sarup. As already noted, in that case, Umesh has been acquitted.

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13. Once we come to a conclusion that Sunil is killed in an encounter, which appears to be fake, it is necessary to direct an independent investigating agency to conduct the investigation so that those who are found to be involved in the commission of crime can be tried and convicted. But, as

⁶ 1992(supp)1 SCC 335

rightly pointed out by learned amicus curiae directing an investigation, at this distant point of time, will be an exercise in futility. We are informed that witnesses would not be available. It would be difficult to trace the record of the case from the two police stations. Handing over investigation to an independent agency and starting a fresh investigation would be of no use at this stage. Reliance placed by learned counsel for the appellant on **Rubabbuddin Shaikh** and **Narmada Bai** is misplaced. Those cases arose out of different fact situations. No parallel can be drawn from them.

14. We share the pain and anguish of the appellant, who has lost his son in what appears to be a fake encounter. He has conveyed to us that he is not interested in money but he wants a fresh investigation to be conducted. While we respect the feelings of the appellant, we are unable to direct fresh investigation for the reasons which we have already noted. In such situation, we turn to **Nilabati Behera,** wherein the appellant's son had died in custody of the police. While noting that custodial death is a clear violation

of prisoner's rights under Article 21 of the Constitution of India, this Court moulded the relief by granting compensation to the appellant.

15. In the circumstances of the case we set aside the impugned judgment and order dated 13/9/2010 and in light of **Nilabati Behera**, we direct respondent 1 - State of Haryana to pay a sum of Rs.20 lakhs to the appellant as compensation for the pain and suffering undergone by him on account of loss of his son - Sunil. The payment be made by demand draft drawn in favour of the appellant "Rohtash Kumar" within a period of one month from the date of the receipt of this order.

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16. The appeal is disposed of accordingly.

17. Before parting, we record our appreciation of the valuable assistance rendered to us by Mr. Raju Ramachandran, learned amicus curiae.

.....J.
(AFTAB ALAM)

.....J.
(RANJANA PRAKASH DESAI)

NEW DELHI,
FEBRUARY 14, 2013.

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