1953

May 15.

DALIP SINGH AND OTHERS

v.

STATE OF PUNJAB.

[MEHR CHAND MAHAJAN, VIVIAN BOSE and JAGANNADHA DAS JJ.]

Indian Penal Code (XLV of 1860), ss. 149, 302—Conviction under s. 149—Conviction of less than five persons—When proper—Sentence for transportation—Enhancement to sentence of death, on appeal—Interference with discretion of trial judge—Propriety—Evidence—Relationship of witness to deceased.

Before s. 149 of the Indian Penal Code can be applied, the court must find with *certainty* that there were at least five persons sharing the common object.

This does not, however, mean that five persons must always be convicted before s. 149 can be applied. If the judge concludes that five persons were unquestionably present and shared the common object, though the identity of some of them is in doubt, the conviction of the rest would be good; but if this is his conclusion, it behoves him, particularly in a murder case where heavy sentences have been imposed, to say so with certainty.

Rameshwar v. *The State of Rajasthan* ([1952] S.C.R. 377) referred to.

The power to enhance a sentence from transportation to death should very rarely be exercised and only for the strongest reasons. It is not enough for the appellate court to say or think that if left to itself it would have awarded the greater penalty because the discretion does not belong to the appellate court but to the trial judge, and the only ground on which the appellate court can interfere is that the discretion has been improperly exercised, as for instance where no reasons have been given and none can be inferred from the circumstances of the case or where the facts are so gross that no normal judicial mind would have awarded the lesser penalty.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 22 of 1953.

Appeal by special leave from the Judgment and Order dated the 19th November, 1952, of the High Court of Judicature of Punjab at Simla in Criminal Appeal No. 102 of 1952 and Criminal Revision Nos. 423

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and 499 of 1952 of the Court of the Sessions Judge, Jullundur, in Sessions Case No. 30 of 1951 and Sessions Trial No. 5 of 1951.

Jai Gopal Sethi (*R. L. Kohli* and *Deva Singh*, with him) for the appellants.

Gopal Singh for the respondent.

1953. May 15. The Judgment of the Court was delivered by

BOSE J.—Four persons appeal against sentences of death passed upon them in convictions for a double murder, the victims being two brothers, Rattan Singh and Bawa Singh. The learned Sessions Judge convicted three others also but sentenced all, including the four appellants, to transportation for life. The High Court acquitted three of the seven but sustained the convictions of the four appellants and enhanced their sentences in each case to death.

The prosecution story is simple. All seven accused belong to the same village and belong to the same faction or "party", as Mst. Punnan (P.W. 2) calls it. Of the seven, the appellants Dalip Singh and Battan Singh are brothers. Jarnail Singh who was acquitted is a son of Battan Singh. The remaining four, including the appellants Sadhu Singh and Kundan Singh, are not related to the other three and, except for the evidence that they belong to the same party, are not shown to have any common interest with the other three.

The appellants Dalip Singh and Battan Singh are said to have assaulted the two dead men Rattan and Bawa about twenty years before the occurrence. They were prosecuted and convicted and served short terms of imprisonment. Dalip Singh and Battan Singh are also said to be dacoits and it is said that they believed that the two dead men used to furnish information against them to the police. This is said to be the motive for the murders. Why the others should have joined in, except on the basis that they belong to the same "party", is not disclosed.

The prosecution case is as follows:—On 16th June, 1951, Rattan Singh was taking some food out to a well a short distance from his house for himself and his son. This was about 2 p.m. Just as he left the house, his wife Mst. Punnan (P.W. 2) heard cries of alarm and on rushing out with her daughter Mst. Charni (P.W. 11) saw all seven accused assaulting her husband. They beat him up till he fell to the ground.

As soon as Rattan Singh fell down, they left him and rushed to his (Rattan Singh's) Haveli where the other brother Bawa Singh was lying on a cot, shouting that they would also make short work of him. All seven belaboured him on the cot, then they dragged him out and beat him up some more.

After this they returned to where Rattan Singh was still lying on the ground and gave him some more blows. Then they ran away.

Bawa Singh died very shortly after the assault. The other brother survived a little longer but he also died not long after.

According to Mst. Punnan (P.W. 2) the accused were armed as follows: The appellants Dalip Singh and Sadhu Singh with *barchhas*; the appellant Battan Singh and two of the accused who have been acquitted with lathis; the appellant Kundan Singh had a *takwa* —a hatchet with a long handle, and the accused Kehar Singh, who has been acquitted, had a *khunda*—a hefty stick with a curved iron end.

The medical evidence discloses that Rattan Singh had nineteen injuries on his person. Of these, only two, on the head, would have been fatal in themselves. The rest were on non-vital parts like the foot, ankle, leg, knee, thigh, buttock, forearm and wrist, but of these six were grievous. The doctor says death was caused by shock produced by the multiple injuries aided by haemorrhage in the brain due to injury No. 14.

The other brother Bawa had sixteen injuries but except for two the rest were on non-vital parts. One of the two was on the head and the other ruptured the

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spleen. The rest were on the ankle, leg, knee, thigh, elbow, thumb and wrist, but eleven of them were grievous. In his case the doctor put the death down to rupture of the spleen.

In Rattan Singh's case, only one of the injuries was inflicted by a sharp-edged pointed weapon and all the rest by blunt weapons. The two on the head were inflicted by blunt weapons.

In Bawa Singh's case, four wounds were caused by a sharp-edged or pointed sharp-edged weapon. The others were all inflicted by blunt weapons. Here again, the fatal injury which ruptured the spleen was caused by a blunt weapon.

This analysis would appear to indicate that neither of the appellants Dalip Singh and Sadhu Singh, who carried spears, nor the appellant Kundan Singh, who carried a hatchet, aimed at any vital part; and of those who had blunt weapons, the appellant Battan Singh who had a lathi has alone been convicted while Indar Singh and Jarnail Singh, who also had lathis, and Kehar Singh, who had a *khunda*, have all been acquitted; and yet Battan Singh alone could hardly have been responsible for eighteen injuries on Rattan Singh and nine on Bawa Singh.

The appellant Dalip Singh was arrested on the 17th June and the other three on the 18th. Each was wearing blood-stained clothes.

The learned Sessions Judge did not attach much importance to the bloodstained clothes, nor did he regard the recovery of certain weapons, some of which were blood-stained, as of much consequence. But he was impressed with the evidence of the two eye-witnesses Mst. Punnan (P.W. 2) and Mst. Charni (P. W. 11) and believing them convicted each of the seven accused under section 302 read with section 149, Indian Penal Code. He said that as the fatal injuries could not be attributed to any one of the accused he refrained from passing the sentence of death. All the assessors considered all seven accused guilty.

The learned High Court Judges did not attach any importance to the recovery of the weapons because

for one thing they were not recovered till the 30th, that is to say, not until fourteen days after the murders, and when found, one set pointed out by Jarnail Singh, who has been acquitted, was found in Dalip Singh's field and another set, pointed out by Sadhu Singh, was found in Kehar Singh's field. But they considered the blood-stained clothes an important factor. They were not prepared to believe the two eye-witnesses all the way, partly because they were of opinion that a part of their story was doubtful and seemed to have been introduced at the instance of the police and partly because they considered that when the fate of seven men hangs on the testimony of two women "ordinary prudence" requires corroboration. They found corroboration in the case of the four appellants because of the blood-stained clothes and none in the case of the others. Accordingly, they convicted the four appellants and acquitted the others.

Now this has led the learned Judges into an inconsistency and it is that which led to the granting of special leave to appeal. The learned Judges say that their conclusion is that

(1) "generally the story related by Mst. Punnan and Mst. Charni is true;

(2) that certainly not less than five persons took part in the beating of the two deceased; and

(3) that the corroboration required by prudence is afforded by the presence of the blood-stained clothes found on the persons of the four appellants who have been convicted."

As regards the three accused whom they acquitted the learned Judges say—

"The other three accused may or may not have taken part in the affair."

Now it is clear from the above that it is impossible to ascribe any particular injury to any particular person. Therefore, it is impossible to convict any one of the accused of murder simpliciter under section 302,

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nor do the learned Judges attempt to do that. They convict under section 302 read with section 149. But section 149 requires the presence of five persons who share the common object. It is true that in one place the learned Judges say that there were certainly not less than five present but in the very next breath they say that the three whom they acquit "may or may not have taken part in the affair". If those three are eliminated, then we are left with only four and that militates against their previous finding that they were at least five.

Before section 149 can be called in aid, the court must find with *certainty* that there were at least five persons sharing the common object. A finding that three of them "may or may not have been there" betrays uncertainty on this vital point and it consequently becomes impossible to allow the conviction to rest on this uncertain foundation.

This is not to say that five persons must always be convicted before section 149 can be applied. There are cases and cases. It is possible in some cases for Judges to conclude that though five were unquestionably there the identity of one or more is in doubt. In that case, a conviction of the rest with the aid of section 149 would be good. But if that is the conclusion it behoves a court, particularly in a murder case where sentences of transportation in no less than four cases have been enhanced to death, to say so with unerring certainty. Men cannot be hanged on vacillating and vaguely uncertain conclusions.

In fairness to the learned Judges we have examined the evidence with care to see whether, if that was in their minds, such a conclusion could be reached in this particular case on the evidence here. That it might be reached in other cases on other facts is undoubted, but we are concerned here with the evidence in this case.

Now mistaken identity has never been suggested. The accused are all men of the same village and the eye-witnesses know them by name. The murder took

place in daylight and within a few feet of the two eye-witnesses. If the witnesses had said, "I know there were five assailants and I am certain of A, B and C. I am not certain of the other two but think they were D and E", a conviction of A, B and C, provided the witnesses are believed, would be proper. But when the witnesses are in no doubt either about the number or the identity and there is no suggestion about mistaken identity and when further, the circumstances shut out any reasonable possibility of that, then hesitation on the part of the Judge can only be ascribed, not to any doubt about identity but to doubt about the number taking part. The doubt is not whether D and E have been mistaken for somebody else but whether D and E have been wrongly included to swell the number to five.

Again, it is possible for a witness to say that "A, B, C, D, E and others, some ten or fifteen in number, were the assailants". In that event, assuming always that the evidence is otherwise accepted, it is possible to drop out D and E and still convict A, B and C with the aid of section 149. But that again is not the case here. No one suggests that there were more than seven; no one suggests that the seven, or any of them, were, or could be, other than the seven named.

Nor is it possible in this case to have recourse to section 34 because the appellants have not been charged with that even in the alternative, and the common intention required by section 34 and the common object required by section 149 are far from being the same thing. In the circumstances, we find ourselves unable to allow the conviction to rest on the insecure foundations laid by the High Court. We have accordingly reviewed the evidence for ourselves. Mr. Sethi took us elaborately through it. In our opinion, the learned Sessions Judge's conclusions are right.

We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation

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for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this court endeavoured to dispel in *Rameshwar* v. *The State of Rajasthan*(1). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel.

A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

This is not to say that in a given case a Judge for reasons special to that case and to that witness cannot say that he is not prepared to believe the witness because of his general unreliability, or for other reasons, unless he is corroborated. Of course, that can be done. But the basis for such a conclusion must rest on facts special to the particular instance and cannot be grounded on a supposedly general rule of prudence enjoined by law as in the case of accomplices.

(1) [1952] S.C.R. 377 at 390.

Now what is the ground for suspecting the testimony of these two witnesses? The only other reason given by the learned High Court Judges is that they have introduced a false element into their story at the instigation of the police in order to save the "face" of the lambardars. But if that is so, it throws a cloak of unreliability over the whole of their testimony and, therefore, though it may be safe to accept their story where the corroborative element of the blood-stained clothes is to be found, it would be as unsafe to believe, on the strength of their testimony, that at least five persons were present as it would be to accept that the ones who have been acquitted were present; and once we reach that conclusion section 149 drops out of the case.

We have carefully weighed the evidence of these women in the light of the criticisms advanced against them by Mr. Sethi, most of which are to be found in the judgments of the lower courts, and we are impressed by the fact that the learned Sessions Judge who saw them in the witness box was impressed with their demeanour and by the way they stood up to the cross-examination, and also by the fact that the learned High Court Judges appear to believe them to the extent that at least five persons were concerned.

Some of the accused have made general and sweeping statements to the effect that the prosecution witnesses are inimical to them but no one has suggested why. In the long cross-examination of these witnesses not a single question has been addressed to them to indicate any cause of enmity against any of the accused other than the appellants Dalip Singh and Battan Singh. A general question was asked, and it was suggested that there was some boundary dispute between Mst. Punnan's husband and the accused Indar Singh and Kundan Singh but that was not followed up by other evidence and neither Kundan Singh nor Indar Singh suggests that there was any such dispute in their examinations under section 342, Criminal Procedure Code. Kehar Singh says vaguely that he has inherited land which will pass to the line

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of Rattan and Bawa if he dies without heirs but he has made no effort to substantiate this. The questions put in cross-examination therefore remain just shots in the dark and leave the testimony of the two women unimpaired.

The first information report was made by Mst. Punnan (P.W. 2) herself. It was made very promptly though this was attacked by Mr. Sethi. It was made at 8-30 p.m. within 6½ hours of the occurrence at a place 12 miles from the police station. The victims did not die at once and it was only natural that Mst. Punnan's first thoughts should have been to tend them. Next, she had to walk part of the distance and the rest she covered in a lorry, and above all she has not been cross-examined regarding delay. We consider that a report made within 6½ hours in such circumstances is prompt.

Now the important thing about this report is that it names the seven accused, no less and no more, and from start to finish Mst. Punnan has adhered to that story without breaking down in cross-examination and without any attempt to embellish it by adding more names; and in this she is supported by Mst. Charni (P.W. 11).

Next, the blood-stained clothes found on the persons of the four appellants afford strong corroboration as against them, and as two courts have believed the witnesses to that extent all we need do is to concentrate on the other three accused who have been acquitted in order to see whether there were seven persons as Mst. Punnan says and to see whether the conclusion of the High Court that there were at least five present is sound.

We do not think the discovery of the weapons can be lightly excluded. One set was pointed out by Jarnail Singh. In itself that might not mean much but it is unquestionable corroboration as against Jarnail Singh unless the fact of discovery is disbelieved or is considered to be a fraud. But that is not the finding of either court. The first court believes the evidence and the High Court does not disbelieve it but

considers the incident as of small probative value. It may be in itself, but it is a corroborative element in the case of two witnesses who do not require corroboration and that makes it all the more safe to accept their testimony.

Next comes the discovery of another set of weapons by Sadhu Singh. He was already implicated by reason of some blood-stained clothes but the importance of the discovery in his case lies in the fact that the weapons were found in the field of Kehar Singh. It is certainly a circumstance to be taken into consideration that these weapons should be found in the field of a man who was named from the start.

Then comes the fact that Mst. Punnan (P.W. 2) not only named the various assailants in her first information report but stated exactly what sort of weapon each was carrying. Here again she is consistent from start to finish except for an unessential difference in the case of Jarnail. In the first information report she said he had a *dang* while in her evidence she says he had a lathi, but as a *dang* is a big lathi that is not a real discrepancy. This, in our opinion, is impressive consistency, especially as it tallies in general with the post-mortem findings. Now the fact that weapons of this description, four stained with human blood, are discovered at the instance of two persons she has named from the beginning in the fields of others whom she has also named from the start certainly does not tend to weaken her testimony.

The only accused who is not in some way independently linked up with the testimony of these two women is Indar. But when their stories find corroboration on so many important particulars we see no reason why they should be disbelieved as regards Indar, always remembering that these are not witnesses who require corroboration under the law. In our opinion, the High Court was unnecessarily cautious in acquitting the other three accused when the learned Judges were convinced that at least five persons were concerned.

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We have taken into consideration the fact that the High Court considers that the portion of Mst. Punnan's story regarding the lambardars has been falsely introduced by the police, also that both courts have rejected the evidence about the dying declaration. Despite that, we agree with the learned Sessions Judge that Mst. Punnan and Mst. Charni are to be believed regarding the main facts and that they correctly named all seven accused as the assailants. On that finding the conviction under section 302 read with section 149 can be sustained. We accordingly uphold these convictions. The acquittals in the other three cases will of course stand but the mere fact that these persons have, in our opinion, been wrongly acquitted cannot affect the conviction in the other cases.

On the question of sentence, it would have been necessary for us to interfere in any event because a question of principle is involved. In a case of murder, the death sentence should ordinarily be imposed unless the trying Judge for reasons which should normally be recorded considers it proper to award the lesser penalty. But the discretion is his and if he gives reasons on which a judicial mind could properly found, an appellate court should not interfere. The power to enhance a sentence from transportation to death should very rarely be exercised and only for the strongest possible reasons. It is not enough for an appellate court to say, or think, that if left to itself it would have awarded the greater penalty because the discretion does not belong to the appellate court but to the trial Judge and the only ground on which an appellate court can interfere is that the discretion has been improperly exercised, as for example where no reasons are given and none can be inferred from the circumstances of the case, or where the facts are so gross that no normal judicial mind would have awarded the lesser penalty.

None of these elements is present here. This is a case in which no one has been convicted for his own act but is being held vicariously responsible for the act of another or others. In cases where the facts are more

fully known and it is possible to determine who inflicted blows which were fatal and who took a lesser part, it is a sound exercise of judicial discretion to discriminate in the matter of punishment. It is an equally sound exercise of judicial discretion to refrain from sentencing all to death when it is evident that some would not have been if the facts had been more fully known and it had been possible to determine, for example, who hit on the head or who only on a thumb or an ankle; and when there are no means of determining who dealt the fatal blow, a judicial mind can legitimately decide to award the lesser penalty in all the cases. We make it plain that a Judge is not bound to do so, for he has as much right to exercise his discretion one way as the other. It is impossible to lay down a hard and fast rule for each case must depend on its own facts. But if a Judge does do so for reasons such as those indicated above, then it is impossible to hold that there has not been a proper exercise of judicial discretion.

Now the High Court do not consider these facts at all. They give no reasons and dispose of the matter in one sentence as follows:

"I would..... dismiss the appeals of the other four and accepting the revision petitions change their sentences..... from transportation..... to death."

That, in our opinion, is not a proper way to interfere with a judicial discretion when a question of enhancement is concerned. We are unable to hold that the discretion was improperly exercised by the learned Sessions Judge. Whether we ourselves would have acted differently had we been the trial court is not the proper criterion. We accordingly accept the appeals on the question of sentence and reduce the sentence in each case to that of transportation for life. Except for that, the appeal is dismissed.

Sentence reduced.
Appeal dismissed.

Agent for the appellants: *Naunit Lal.*

Agent for the respondents: *G. H. Rajadhyaksha.*