SUKH RAM

v.

STATE OF U. P.

November 28, 1973

[S. N. DWIVEDI AND Y. V. CHANDRACHUD, JJ.]

Penal Code—S. 302 read with s. 34—Two of the three named accused acquitted—Whether the third could be convicted with the aid of s. 34.

The appellant, along with two others, was tried for an offence under s. 302, I. P. C. read with s. 34, I. P. C. The Sessions Judge acquitted one of the accused, while the High Court acquitted another but the appellant was convicted and sentenced. The charge specifically mentioned that the murder was committed by the three accused named therein.

In appeal to this Court it was contended that after the acquittal of two of the three accused by the two courts below, the appellant could not be convicted with the aid of s. 34, I. P. C.

Dismissing the appeal,

HELD: In view of the unambiguous evidence tendered by the prosecution in the Sessions Court no prejudice can be said to have been caused to the appellant by reason of his conviction under s. 302 read with s. 34, I. P. C. even though the two other accused specifically named in the charge had been acquitted. The defence adopted by the appellant disclosed an awareness on his part of the substance and true nature of the allegations levelled against him. Though the charge confined participation in the crime to three named individuals evidence was led to show that the murder was committed by the appellant and two other persons, the fatal shot having been fired by one of the two. While examining him under s. 342, Cr. P. C. the Sessions Judge questioned him in regard to his participation in the crime along with his companions not along with the two named co-accused. The High Court was certain that there were three culprits and the appellant was one of them. It is clear that notwithstanding the charge, the acquittal of the two accused raised no bar to the conviction of the appellant under s. 302 read with s. 34, I. P. C. A possible prejudice to the accused, on a reasonable view of the course the trial had taken, was the true touchstone of such matters. [519G-H; 520B&E]

Dalip Singh v. *State of Punjab*, [1954] S. C. R. 145; *Bharwad Mepa Dana* v. *State of Bombay*, [1960] 2 S. C. R. 172; *Kartar Singh* v. *State of Punjab*, [1962] 2 S.C.R. 395, relied on

Mohan Singh v. *State of Punjab*, [1962] Suppl. 3 S. C.R. 848, and *Krishna Govind Patil* v. *State of Maharashtra*, [1964] 1 S. C. R. 678, distinguished.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 99 of 1970.

Appeal by Special Leave from the Judgment and Order dated the 28th January 1970 of the Allahabad High Court in Criminal Appeal No. 1888 of 1967.

D. Mukherjee, A. T. M. Sampath and *E. C. Agrawala*, for the appellant.

D. P. Uniyal and *O. P. Rana*, for the respondent.

The Judgment of the Court was delivered by

DWIVEDI J.—Three persons, Mahendra Singh, Lakhan Singh and the appellant Sukh Ram, were tried for the murder of one Chunni Lal under s. 302 read with s. 34. I. P. C. by the Sessions Judge, Aligarh. The Sessions Judge acquitted Mahendra Singh, and convicted and sentenced the remaining two to imprisonment for life. On appeal the

A High Court of Allahabad acquitted Lakhan Singh and affirmed the conviction and sentence of the appellant. Hence this appeal.

The deceased Chunni Lal has a tea stall near the Bus Stand in Sasni. He was shot dead on 9-3-1967 at about 10-30 p.m. The First Information Report of the incident was lodged by Sunder Lal, a relation of the deceased. The prosecution examined Sunder Lal, B Radhey Shyam, Puran Mal and Devi Prasad to prove its case against the aforesaid accused. The Sessions Judge believed all the witnesses. In a careful and sifting analysis of the entire evidence, the learned Judges of the High Court (S. D. Khare and Jagmohan Lal Sinha JJ.) have winnowed out all evidence which could legitimately be objected to by the appellant and have held that the remaining evidence clearly C brought home the guilt to him. Counsel for the appellant could not point out any infirmity in their opinion. We have read the entire evidence, and we are satisfied that they have rightly found the appellant guilty of the murder of Chunni Lal.

Counsel for the appellant has, however, strenuously urged before us that after the acquittal of Mahendra Singh and Lakhan Singh, D the appellant could not be convicted with the aid of s. 34 I.P.C. The charge framed by the Sessions Judge reads:

> "I,.....Sessions Judge, Aligarh, hereby charge you Sukh Ram S/o Hari Ram, Lakhan Singh s/o Biri Singh and Mahendra Singh s/o Gulab Chand as follows:
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> E That you on the 9th day of March, 1967, at about 10.30 p.m. in the town of Sasni near the bus stand at the shop of Chunni Lal in furtherance of your common intention which was to commit the murder of Chunni Lal, did commit the murder of Chunni Lal, did commit his murder by one of you firing at him with a pistol, as a result of which Chunni Lal immediately fell down dead, and thereby committed an offence punishable under s. 302 read F with s. 34 I.P.C. and within the cognisance of this Court."

Thus the charge specifically mentions that the murder of Chunni Lal was committed by the three accused named therein, namely, Mahendra Singh, Lakhan Singh and the appellant Sukh Ram. It does not mention that any other persons, known or unknown, were concerned in the commission of the offence. But in view of the unambiguous G evidence tendered by the prosecution in the Sessions Court, no prejudice can be said to have been caused to the appellant by reason of his conviction under section 302 read with section 34, Penal Code, even though the two other accused specifically named in the charge have been acquitted. Indeed, the very line of defence adopted by the appellant, as reflected in the cross-examination of the prosecution H witnesses, discloses an awareness on his part of the substance and true nature of the allegations levelled against him. Though the charge confines participation in the crime to three named individuals, evidence was led to show that Chunni Lal was murdered by the

appellant and two other persons, the fatal shot having been fired by one of these two. At the trial, the heart of the issue therefore was whether there was evidence to prove that the appellant and two others had, in pursuance of their common intention, committed the murder of Chunni Lal. In fact, may be by reason of the variance between the terms of the charge and the trend of the evidence, the learned Sessions Judge while examining the appellant under s. 342 Cr. P. C. questioned him in regard to his participation in the crime along with his "companions", not along with the two named co-accused. On the central issue arising in the case, the Sessions Court found : "This direct evidence taken as a whole proves beyond any reasonable doubt that Sukh Ram along with two other companions had gone to Chunni Lal's shop at that time and one of his companions fired at Chunni Lal with a pistol while Chunni Lal was closing his shop."

The High Court acquitted Lakhan Singh because it thought it unsafe to rely on the sole testimony of Kunwarji in regard to Lakhan Singh's identification. But the learned Judges of the High Court were certain, and we are in agreement with their view, that there were three culprits, appellant being one of those three. This is what the High Court says : "We are, therefore, of the opinion that it is fully established that Sukh Ram was amongst the three assailants of Chunni Lal and that the pistol was fired at Chunni Lal in furtherance of the commom intention of all the three assailants." It is, therefore, clear that notwithstanding the charge, the acquittal of Mahendra Singh and Lakhan Singh raises no bar to the conviction of the appellant under s. 302 read with s. 34. A possible prejudice to the accused, on a reasonable view of the course the trial has taken, is the true touchstone of such matters and we have warned ourselves of that danger before coming to the conclusion that the High Court is right in the view it has taken .

In *Dalip Singh* v. *State of Punjab*(1) four persons were convicted under s. 302 read with s. 149 I. P. C. They were tried along with three other persons but those three persons were acquitted by the High Court. The argument in this Court was similar to the one before us. The First Information Report had specifically named the four appellants and the three acquitted accused. It did not state that any other person or persons had participated in the crime with them. It was, therefore, not a case of mistaken identity. Accordingly the appellants were acquitted by this Court. While acquitting them, Bose J. took care to observe at a page 151 of the Report :

> "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. 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."

(1) [1954] S.C.R. 145.

A In *Bharwad Nepa Dana* v. *State of Bombay*(1), 12 persons were tried by the Sessions Judge for the offence under s. 302 read with s. 149 I. P. C. He acquitted seven of them and convicted the remaining five. The convicted persons appealed to the High Court. The High Court acquitted one of them and affirmed the conviction of the remaining four. On appeal the argument before this Court was similar to the one before us. The High Court had recorded this finding :

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> "From the prosecution evidence, there is no doubt whatsoever that more than five persons were operating at the scene of offence, though the identity of all the persons has not been established except the accused nos. 1, 2, 3 and 11. There is no doubt on the prosecution evidence that more than five persons *i.e.*, as many as ten to thirteen
> C persons took part in this offence."

While maintaining the conviction of the appellants, S. K. Das J. observed at page 181 of the Report :

> "Nothing in law prevented the High Court from
> D finding that the unlawful assembly consisted of the four convicted persons and some unidentified persons, who together numbered more than five. We have advisedly said "Nothing in law etc." for, whether such a finding can be given or not must depend on the facts of each case and on the evidence led. It is really a question of fact to be determined in each case on the evidence given therein. Learned
> E counsel for the appellant argued before us, as though it is a matter of law, that it was not open to the High Court to come to the finding to which it came, because the prosecution case was that thirteen named persons constituted the unlawful assembly. We are unable to accept this argument as correct. We do not think that there was any such legal bar as is suggested by learned counsel, though
> F there may be cases where on the facts proved it will be impossible to reach a finding that the convicted persons, less than five in number, constituted an unlawful assembly with certain unspecified persons not mentioned in the charge."

In *Kartar Singh* v. *State of Punjab* (2), the prosecution case was
G that the appellant along with 12 other persons had committed the offence under s. 302 read with s. 149 I. P. C. 13 persons including the appellant were tried for the offence. The Sessions Judge was not certain of the participation of 10 accused. But he was satisfied that the appellant and two others did participate in the crime. He positively found that those two persons along with at least 9 or 10 persons had committed the crime. But he could not say as to who those
H 9 or 10 persons were. The three convicted persons appealed to the High Court. The High Court dismissed the appeal. It was urged

(1) [1960] 2 S.C.R. 172. (2) [1962] 2 S.C.R. 395.

before this Court that on the acquittal of the 10 co-accused the remaining three accused could not be convicted with the aid of s. 149 I. P. C. Rejecting the argument, Raghubar Dayal J. observed : A

> "It is only when the number of the alleged assailants is definite and all of them are named, and the number of persons found to be proved to have taken part in the incident is less than five, that it cannot be held that the assailants' party must have consisted of five or more persons. The acquittal of the remaining named persons must mean that they were not in the incident. The fact that they were named, excludes the possibility of other persons to be in the appellant's party and especially when there is no occasion to think that the witnesses naming all the accused could have committed mistake in recognising them." B C

The learned Judge added :

> "The witnesses were from village Seel. A good number of the accused were from other villages. Only two of the witnesses had named all the thirteen accused. Other witnesses did not name all of them. None of them named more than seven accused and all of them said that there were thirteen persons in the appellant's party." D

The learned Judge then observed :

> "In this state of evidence, it is not possible to say that the courts below could not have come to the conclusion that there were more than five persons in the appellant's party." E

It may be observed that the facts of this case have a close resemblance with the facts in our case.

Counsel for the appellant has relied on *Mohan Singh* v. *State of Punjab*(1). The appellants along with three others were charged with the offence under s. 302 read with s. 149 I. P. C. They were all named. The Sessions Judge acquitted two of them. He convicted the appellant and one more. On appeal the High Court affirmed their conviction and sentence. The Sessions Judge had taken care to record a finding that the crime must have been committed by more than three or four persons. The High Court affirmed this finding. On appeal in this Court, it was pointed out that the charge and the evidence of the prosecution referred to the five accused as assailants and to no one else. Counsel for the State conceded that it was so. On this concession, the Court said : "If that be so, as soon as two of the five named persons are acquitted, the assembly must be deemed to have been composed of only three persons and that clearly cannot be regarded as an unlawful assembly." Obviously, the facts of this case are distinguishable from the facts of our case. So that appellant can derive no assistance from this case. It may be observed that *Dalip Singh, Bharwad Mepa Dana* and *Kartar Singh* (supra) were noticed in this case and not dissented from. F G H

(1) [1962] Suppl. 3 S.C.R. 848.

A The next case relied on by counsel, for the appellant is *Krishna Govind Patil* v *State of Maharashtra*(1). In this case the appellant was convicted of the offence under s. 302 read with the aid of s. 34 I. P. C. The prosecution case was that the appellant along with three persons had committed the crime. The appellant and those three persons were charged with the offence under s. 302 read with s. 34 I. P. C. The Sessions Judge did not believe the prosecution evidence and acquitted all of them. On appeal the High Court convicted the appellant but maintained the acquittal of the remaining three The appellant challenged his conviction in this Court on a ground identical to the one before us. This Court accepted the argument and acquitted the appellant. But it may be noted that the facts of this case are entirely distinguishable from the facts of our case. There the eye witnesses had deposed that the four accused specifically named had beaten the deceased. None of those witnesses spoke about the participation of any other person. While convicting the appellant, the High Court recorded the finding that he along with one or more of the other accused committed the offence. Obviously, the prosecution did not put forward a case of the commission of crime by one known person and one or two unknown persons as in our case. Nor was here evidence to the effect that the named accused had committed the crime with one or more other persons. In the case before us there is clear evidence to the effect that the appellant along with two unknown persons had committed the crime. For these distinguishing features this case will also not assist the appellant.

In the result, we find no illegality in the conviction of the appellant with the aid of s. 34 I. P. C. There is no force in this appeal and it is hereby dismissed.

Appeal dismissed.

P.B.R.

(1) [1964] 1 S.C.R. 678.