

A

SAHDEO AND ORS.

v.

STATE OF U.P.

APRIL 30, 2004

B

[K.G. BALAKRISHNAN AND B.N. SRIKRISHNA, JJ.]

C

D

E

F

G

Penal Code, 1860—Sections 302, 149, 148 and 452—Evidence Act, 1872—Sections 3 and 27—Accused persons armed with weapons intercepting a bus—Indiscriminate firing at deceased persons resulting in their death—Two of the deceased chased and killed thereafter and two persons managed to escape—FIR lodged—Investigation conducted—Post mortem report showing only gun shot injuries on the bodies of deceased person—Deposition about the incident by those who managed to escape—Conviction of accused persons armed with fire arms and imposition of death penalty—Order upheld by High Court—Acquittal of accused persons who were allegedly armed with lathis by trial court—However, High Court setting aside acquittal of accused S, convicted him and imposed death sentence—On appeal, held: Even though investigation conducted not satisfactory, evidence of those who managed to escape was clear and convincing with regard to the incident—FIR genuine and Investigating Officer not given opportunity to explain delay in sending FIR to the Magistrate—Common object of unlawful assembly clear from evidence— However, no evidence with regard to the overt acts by individual accused—Possibility of some armed with firearms but not had the occasion to use it though shared common object of unlawful assembly —Hence, imposition of death sentence not justified—Conviction upheld on all counts and death sentence commuted to life imprisonment—Furthermore, it cannot be held that death sentence cannot be imposed in absence of various overt acts by individual accused—Recovery of country-made pistol and motor cycle made pursuant to the confessional statement made by accused S not satisfactorily proved since recovery purported to have been made when accused produced in the Court—Order of High Court not justified and accused S acquitted of all charges—Code of Criminal Procedure, 1973—Sections 154 and 366.

There was enmity between two groups—accused persons and the deceased persons though they are the lineal descendents of one common ancestor. On the fateful day—deceased persons and PW-1 and PW-2 were

H

returning to their village by bus. Accused persons came in cars and motorcycle and intercepted the bus. They entered the bus armed with rifles, guns and revolvers and indiscriminately fired as a result of which five deceased persons died on the spot. Accused chased PW-1, PW-2, R and P to the house of H and fired at R and P where they died. PW-1 and PW-2 hid themselves near the house of H and managed to escape. It is also alleged that the accused persons looted the house of H. FIR was lodged the same day. Names of all the accused were mentioned. Investigation was carried out. Postmortem was conducted and series of gun shot injuries were found on the bodies of the deceased persons. On the statement of appellant S, country made pistol and motor cycle were recovered and on the statement of other accused weapons, and car allegedly used by the accused were recovered. Eleven accused were charged under IPC and Arms Act. Sessions Judge convicted accused persons armed with fire arms under Section 302 read with Section 149 IPC, Sections 148 and 452 IPC and under Sections 25 and 27 of Arms Act and imposed death sentence. However, the other accused persons who were allegedly armed with lathis, were acquitted including appellant S. Accused convicted by Sessions Judge filed an appeal. High Court dismissed their appeal and upheld their death sentence. State also filed appeal against acquittal of other accused. High Court convicted appellant S under Section 302 read with Section 149 and imposed death sentence. Hence the present appeals.

Appellant-accused contended that the prosecution could not produce any satisfactory evidence to show that six persons were shot dead inside the bus; that there were no fire marks at any part of the bus and the prosecution suppressed this material evidence; that the bus was not seized nor a proper 'mahzar' was prepared; that the driver and the conductor of the bus were not examined as witnesses, that PW-1 and PW 2 deposed that the accused fired indiscriminately and as such many other occupants of the bus would have sustained injuries; that the Magistrate received FIR six days later and prosecution failed to explain the delay; that FIR must have been concocted later after the inquest and postmortem examinations were over; that either PW 1 or PW 2 could not give evidence as to which appellant caused death of which deceased; that in the absence of clear and convincing evidence regarding the complicity of the accused, death penalty could not be imposed; and that High Court erred in setting aside the acquittal of appellant S.

Respondent State contended that this is a ghastly incident in which

- A** eight persons were done to death, as such death penalty alone is the most appropriate punishment to be imposed.

Disposing of the appeals, the Court

- B** **HELD: 1.1.** In the instant case, though the investigation conducted by the prosecution was highly unsatisfactory, there is clear and convincing evidence of PW-1 and PW-2 to prove that the appellants were responsible for causing the death of eight persons. PW-1 and PW-2 deposed that all the deceased persons were inside the bus when the accused persons armed with weapons got into the bus and fired at them and also with regard to the incident that happened in the house of H. Appellants closely knew the deceased persons, PW-1 and PW-2. Some of the appellants entered the bus from the front door while the others from the rear door as such they could successfully prevent the deceased persons from getting out of the bus. Since the victims were unarmed, it was easy for the appellants to overpower and shoot the deceased and the other passengers must have been allowed to go out of the bus either at the time of incident or immediately after the incident. Furthermore, the medical evidence shows that all the deceased persons had been fired at from a very close range.
- D**
- [924-G-H; 925-A-B]

- E** **1.2.** The F.I.R. Statement contains only a brief statement of events. If the F.I.R. had been prepared later after the inquest and post-mortem were over, many more matters could have been incorporated in the F.I.R. The absence of any further details in the F.I.R. shows its genuineness and the delay probably would have happened due to some other reason, and the Investigating Officer was not given any opportunity to explain.

[925-F-H]

- F**
- 1.3.** The accused persons knowing fully well that the deceased persons were travelling in that bus came in a group by using cars and motorcycle and intercepted the bus. They entered the bus and without giving any opportunity to the deceased persons to escape from the bus, killed them on the spot. The common object of the unlawful assembly to kill the deceased persons is clearly spelt out from the nature and circumstances of the evidence. However, there is no clear evidence that by the use of whose fire arm all the six deceased persons died. Investigating agency failed to produce clear and distinct evidence to prove the actual overt acts of each of the accused. There was failure to examine the driver and
- G**
- H** conductor of the bus, failure to seize the bus and absence of proper

‘mahzar’. The Doctor who gave evidence, was not properly cross-examined regarding the nature of the injuries. Some more details could have been collected as to how the incident might have happened inside the bus. These facts show that the firing may have been caused by assailants even while they were still standing on the footboard of the bus and some of the appellants may not, in fact, have had an occasion to use the fire-arm, though they fully shared the common object of the unlawful assembly. Under such circumstances imposition of the death penalty on each of the five appellants may not be justified. Conviction of A-1, A-4, A-5, A-7 and A-10 is upheld on all counts but the death sentence is commuted to life imprisonment. Furthermore, in the absence of various overt acts by individual accused persons, it cannot be held that the accused persons are not to be convicted under Section 302 read with Section 149 and death penalty cannot be imposed. [928-B-C; 927-A-B]

1.4. When the prosecution relied on the recovery of country-made pistol and motorcycle pursuant to confessional statement made by appellant S, it should have produced satisfactory evidence to prove these recoveries for holding him guilty. The failure to prove the confessional statement allegedly made by appellant S and the fact that on that particular day there could not have been any recovery of these items at his instance since he was produced in the court that day, throws serious doubt on the prosecution case. Sessions Judge had taken a reasonable view of the matter by acquitting S. High Court should not have set aside the acquittal and convicted appellant S. Therefore, the conviction and sentence of appellant S for the offence under Section 302 read with Section 149 IPC is set aside and he is acquitted of all the charges. [927-F-H; 928-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 11-13 of 2004.

From the Judgment and Order dated 25.11.2003 of the High Court of Judicature at Allahabad in Crl. Appeal. Nos. 1780, 1805 & 1810 of 2002 with Reference No. 2/2002 and Govt. Appeal No. 4026/2002.

WITH

Criminal Appeal No. 1 of 2004.

Sushil Kumar, S. Muralidhar (A.C), Y.P. Singh, C. Siddharth, Mukesh K. Sharma, Sandeep Singh, S.S. Pahwa, K.P. Singh, Deo Raj Pawar, Debasis Misra, Mohit Mathur, Sagar Dawar, Vivek Kumar and P.N. Puri for the

A Appellants.

‘ Pramod Swarup, Ms. Pareena Swarup and Praveen Swarup for the Respondent.

The Judgment of the Court was delivered by

B

K.G. BALAKRISHNAN, J. Even accused were tried by the court of sessions, Muzaffarnagar, for offences punishable under Sections 147, 148, 395, 397, 452 and 302 read with Section 149, IPC. There were also charges against some of the accused under Sections 25 and 27 of Arms Act. After the trial, the Sessions Judge convicted five accused for the offences punishable

C

under Section 302 read with Section 149, IPC. They were also convicted under Sections 148 and 452, IPC and under Sections 25 and 27 of the Arms Act. Six accused were acquitted by the Sessions Court. The five accused, who were found guilty, were sentenced to death by the Sessions Court. These accused filed an appeal before the High Court of Allahabad and the State also

D

filed an appeal against the acquittal of the other five accused. The appeal preferred by the convicted accused was dismissed. However, the State appeal filed against the acquittal of the five accused persons was partly allowed and appellant Satyendra was found guilty of the offences punishable under Section 302 read with Section 149 and he was also sentenced to death by the High Court. As regards the other five accused who were convicted by the Sessions

E

Court, their sentence of death was confirmed by the High Court.

The incident, which has given rise to the present appeals, happened on 12.1.2000 at about 5.P.M. on the outskirts of village Bahadurpur. PW-1 Brijesh Kumar and PW-2 Raj Bahadur along with one Anil Kumar and eight deceased persons had, on the fateful day, gone to attend a case at the sessions court at Muzaffarnagar. That sessions case was in respect of the death of one Anand Pal, who was murdered on 5.3.1999. Deceased Padam Singh, Raj Pal Singh and Sonu were accused in that case. After the sessions case was over, all the now-deceased eight persons, PW-1 and PW-2, and Anil Kumar boarded a bus to reach their village Bahadurpur. When the bus reached near the village Bahadurpur, two Maruti cars and a motorcycle came from behind and stopped in front of the bus to intercept the same. The bus was stopped and all the twelve accused entered the bus. Dharmendra @ Bittu and Subhash were armed with rifles. Sahdeo, Chandraveer and Satyapal were armed with guns. Satyendra and Parvinder were armed with revolvers. As soon as these accused entered the bus, they started firing as a result of which Padam Singh, Jaiveer Singh, Ashok, Paran Pal and Sonu died on the spot. PW-1 Brijesh

F**G****H**

Kumar; PW-2 Raj Bahadur; Rakesh and Prem managed to get down from the bus and they ran for their lives. The accused chased the deceased Rakesh and Prem to the house of Hukum Singh and fired at them. Both Rakesh and Prem died at the house of Hukum Singh. PW-1 and PW-2 hid themselves and managed to escape. Deceased Prem was shot at when he was on the verandah of Hukum Singh's house whereas Rakesh was inside a room of that house and the door of that room was broken and he was killed. The prosecution had alleged that the accused persons looted the house of Hukum Singh and some gold and silver ornaments, silver coins and a double barrel gun were taken away from that house. The accused persons are the sons, grandsons and great grand-sons of one Data Ram and the deceased persons are the children and grand children of Lila Pant. Lila Pant and Data Ram were the children of one Ganga Sahai. It appears that there was a long standing enmity between these two groups of persons, though they are the lineal descendents of one common ancestor.

Based on the information furnished by PW-1, the Station House Officer of Sikhera Police Station recorded the F.I. statement at 7.15 P.M. on 12.1.2000. Names of all the twelve accused persons were mentioned in the F.I. statement. PW-4 Vinod Kumar Tewatia took over the investigation. He visited the place of incident and took necessary photographs. On 12.1.2000 he seized the empty cartridges and two bullets from the bus. From the house of Hukum Singh, one live cartridge of 315 bore and one empty cartridge of 12 bore were also recovered. The inquest over the dead bodies was held by Sub-Inspector of Police, S.P. Tyagi. The bodies were later sent for postmortem examination. PW-3, Dr. V.C. Gupta conducted the postmortem examination. There were series of gun shot injuries on the bodies of the deceased persons. Accused Satyendra surrendered before the court and he was remanded to custody. Based on his information, one country-made pistol and a hero honda motorcycle were recovered from a sugarcane field. The other accused were also arrested and based on the statement of these accused persons, certain weapons of offence were recovered. One of the cars allegedly used by the accused was also recovered.

The conviction and sentence entered against these appellants are strongly assailed by the appellants' counsel on various grounds. Senior counsel, Shri Sushil Kumar, submitted that the prosecution could not produce any satisfactory evidence to show that the incident happened as alleged by the prosecution. It was argued that the prosecution case that six persons were shot dead inside the bus, is highly improbable and that failure of the

A prosecution to produce cogent and convincing evidence to prove that the incident happened in the bus completely falsifies the prosecution case. It was pointed out that neither the driver nor the conductor of the bus was examined as a witness. The bus was not recovered nor a proper 'mahzar' prepared and it was contended that had the incident happened inside the bus, there would have been some fire marks at any part of the bus and that the prosecution suppressed this material evidence. It was also submitted that PW-1 and PW-2 deposed that there was indiscriminate firing when the accused were inside the bus and Shri Sushil Kumar contended that had there been such a firing, many other occupants of the bus would probably have sustained injuries as there were 30-40 other passengers inside the bus at the time of the incident.

C The counsel for the State who supported the judgments of the sessions court as well as the High Court, contended that the incident happened inside the bus.

D At the outset we must observe that the investigation of this case was hopelessly conducted. The Investigating Officer did not prepare a proper scene 'mahzar' and as the occurrence happened inside the bus, the bus itself should have been seized by the police to prove the prosecution case. Some of the witnesses were questioned by the police after a long lapse of time. Many of the relevant facts were not noted by the Investigating Officer. We are also surprised to note that the first information that is said to have been recorded on 12.1.2000, reached the Magistrate only on 18.1.2000. PW-2, the eyewitness Raj Bahadur was questioned on 27.1.2000. So also, Hukum Singh, in whose house two murders took place, was questioned either on 26th or 27th January, 2000. The Investigating Officer has not given reasonable explanation for this delay in questioning the material witnesses. The prosecution also failed to produce all material witnesses. Only seven witnesses were examined on the side of the prosecution. In a case of this serious nature, failure of the police to produce the best evidence before the court, casts serious reflection on the system itself that is followed in investigation of criminal cases in the State. A case of this serious nature which resulted in the death of eight persons and the death sentence of six persons, should have been conducted with more circumspection and seriousness.

H Though the investigation conducted by the prosecution was highly unsatisfactory, there is convincing evidence to prove that these appellants were responsible for causing the death of eight persons. PW-1 and PW-2 deposed that all the deceased persons were inside the bus when the accused

persons armed with weapons got into the bus. Three of the deceased persons were sitting on the seat just behind the driver's seat and the other three persons were sitting 2-3 seats behind the front seat. The deceased persons were closely known to the appellants. Some of the appellants entered the bus through the front door while the others entered through the rear door. The appellants, thus, could successfully prevent the deceased persons from getting out of the bus. The medical evidence shows that all the deceased persons had been fired at from a very close range. Since the victims were unarmed and the appellants were fully armed with fire-arms, it was easy for the appellants to overpower and shoot the deceased and the other passengers must have been allowed to go out of the bus either at the time of incident or immediately after the incident. The evidence of PW-1 and PW-2 in this regard is clear and convincing. It is pertinent to note that PW-2 Raj Bahadur was not even cross-examined in detail to challenge the veracity of his evidence. He deposed in clear terms that the accused persons entered the bus and started firing and that all the six persons received injuries in the bus. As regards the incident that happened in the house of Hukum Singh in which the deaths of Rakesh and Prem were caused, the evidence of PW-1 and PW-2 is satisfactory and convincing. These two witnesses deposed that they were chased by the accused and they managed to escape by hiding themselves in a house nearer to the house of Hukum Singh and there was no dispute regarding the identity of these appellants. PW-1 and PW-2 were known to them for a long period and they are distantly related also.

The counsel for the appellants seriously contended that the First Information Report was received by the Magistrate only on 18.1.2000 and the prosecution did not explain the six days delay in sending the F.I.R. to the court. It is important to note that the Investigating Officer was not asked to explain how the delay occurred in sending the F.I.R. to the Magistrate. The counsel further contended that the F.I.R. must have been concocted later after the inquest and postmortem examinations were over. It was submitted that the delay in sending the F.I.R. to the Magistrate enabled the prosecution to cook up a false case against the appellants. We are not inclined to accept this contention for the reason that the F.I. Statement contains only a brief statement of events. If the F.I.R. had been prepared later after the inquest and postmortem were over, many more matters could have been incorporated in the F.I.R. The absence of any further details in the F.I.R. shows its genuineness and the delay probably would have happened due to some other reason, which the Investigating Officer was not given any opportunity to explain. Lastly, the counsel for the appellants submitted that either PW-1 or PW-2 could not give

A any evidence as to which appellant caused the death of which deceased and the absence of evidence regarding the overt acts allegedly made by these appellants showed that many of these appellants were not party to the unlawful assembly. This plea also cannot be accepted. The trial court as well as the High Court convicted those accused persons who were armed with fire-arms. There were no other injuries found on the dead bodies of the deceased person having either been caused by a 'Lathi' or other blunt weapon. Therefore, those who were allegedly armed with 'Lathis', were acquitted by the sessions court and their acquittal was confirmed by the High Court. As regards the nature of the unlawful assembly, there is clear evidence to the effect that all of them came in a group by using cars and a motorcycle and intercepted the bus. Knowing fully well that the deceased persons were travelling in that bus, the appellants entered the bus and without giving any opportunity to the deceased persons to escape from the bus, killed them on the spot. The common object of the unlawful assembly is clearly spelt out from the nature and circumstances of the evidence.

D As regards the sentence of death imposed on five accused persons by the sessions court, which was confirmed by the appellate court, the counsel for the appellants, Shri Sushil Kumar, submitted that in the absence of clear and convincing evidence regarding the complicity of the accused, these appellants could not be visited with the death penalty, while the counsel for the State submitted that this is a ghastly incident in which eight persons were done to death and the death penalty alone is the most appropriate punishment to be imposed. Though it is proved that there was an unlawful assembly and the common object of that unlawful assembly was to kill the deceased persons, there is another aspect of the matter inasmuch as there is no clear evidence by the use of whose fire-arm all the six deceased persons died as a result of firing in the bus. It is also pertinent to note that the investigating agency failed to produce clear and distinct evidence to prove the actual overt acts of each of the accused. The failure to examine the driver and conductor of bus, the failure to seize the bus and the absence of a proper 'mahzar', are all lapses on the part of investigating agency. Moreover, the doctor who gave evidence before the court, was not properly cross-examined regarding the nature of the injuries. Some more details could have been collected as to how the incident might have happened inside the bus. These facts are pointed out to show that the firing may have been caused by the assailants even while they were still standing on the footboard of the bus and some of the appellants may not, in fact, have had an occasion to use the fire-arm, though they fully shared the common object of the unlawful assembly. Imposition of the death

penalty on each of the five appellants may not be justified under such circumstances. We take this view in view of the peculiar circumstances of the case and it should not be understood to mean that the accused persons are not to be convicted under Section 302 read with Section 149 and the death penalty cannot be imposed in the absence of various overt acts by individual accused persons. In view of the nature and circumstances of the case, we commute the death sentence imposed on A-1 Sahdeo, A-4 Subhash, A-5 Chandraveer, A-7 Satyapal and A-10 Parvinder to imprisonment for life.

Criminal Appeal No. 1 of 2004 is filed by accused Satyendra who was acquitted by the sessions court, but subsequently convicted by the High Court and found guilty of the offence punishable under Section 302 read with Section 149, IPC and also Sections 148 and 452, IPC and sentenced to death. Shri S. Muralidhar, Advocate, appearing on behalf of this appellant, submitted that the High Court seriously erred in reversing his acquittal. The acquittal of this appellant by the sessions court was based on the reason that the recovery of a country-made pistol and a motor-cycle pursuant to his alleged confession was not satisfactorily proved. The Sessions Judge found that the recovery of the motorcycle and the country-made pistol was purported to have been done on 22.1.2000. The Sessions Judge had noticed that on 22.1.2000, appellant Satyendra was produced in the court and that there could not have been any recovery as alleged by the prosecution. The prosecution could not prove that appellant Satyendra had made any confessional statement. This aspect was considered at length in paragraph 54 of the sessions court judgment. The High Court did not attach any importance to this aspect of the case and reversed the acquittal on the ground that the prosecution evidence showed that appellant Satyendra also was armed with a weapon and he came on the motorcycle along with Parvinder and since Parvinder was found guilty and convicted, appellant Satyendra should also have been found guilty of the offence under Section 302 read with Section 149, IPC.

When the prosecution relied on the recovery of two important items, namely, the country-made pistol and the motorcycle, it should have produced satisfactory evidence to prove these recoveries. The failure to produce the confessional statement allegedly made by appellant Satyendra and the fact that on that particular day there could not have been any recovery of these items at his instance, are important circumstances which throw serious doubt on the prosecution case. The Sessions Judge had taken a reasonable view of the matter. The High Court should not have reversed the acquittal and convicted

A appellant Satyendra for the offence punishable under Section 302 read with Section 149. Therefore, we set aside the conviction and sentence of the appellant, Satyendra, for the offence under Section 302 read with Section 149, IPC and Sections 148, and 452, IPC. He is acquitted of all the charges.

B In the result, the appeals preferred by A-1 Sahdeo, A-4 Subhash, A-5 Chandraveer, A-7 Satyapal and A-10 Parvinder are partly allowed and their conviction on all the counts is confirmed. However, the sentence of death penalty imposed on them for the offence punishable under Section 302 read with Section 149 is commuted to imprisonment for life. The Criminal Appeal No. 1 of 2004 filed by Satyendra is allowed and he is acquitted of all the charges framed against him and the sentence imposed on him is set aside. He is directed to be released forthwith, if not required in any other case.

C

N.J.

Appeals disposed of.