Sunder Singh and Others

Vs

The State of Punjab

Criminal Appeal No. 100 of 1961

(K.C. Das Gupta, Raghuvar Dayal, P. B. Gajendragadkar JJ)

19.01.1962

JUDGMENT

GAJENDRAGADKAR, J.-

The three appellants, Sunder Singh and his sons Lal Singh and Gurmukh Singh along with one Rachhpal Singh were tried before the learned Additional Sessions Judge, Karnal with having committed the offence of murdering Malook Singh, Anup Singh and Darbara Singh on January 13, 1960, at about 11 A.M. in the Abadi of village Habri. The prosecution case, was that these three murders were committed by the four accused persons in furtherance of their common intention; at the time when the offence was committed, Sunder Singh and Gurmukh Singh were armed with 'Lathis' and Lal Singh and Rachhpal Singh were armed with guns. According to the charge farmed against the accused persons, Lal Singh fired upon Malook Singh and Darbara Singh and thereby killed them, while Rachhpal Singh fired upon Anup Singh and killed him. This firing took place in pursuance of the common intention of all the accused persons. That is how Lal Singh and Rachhpal Singh were charged under s. 302 read with s. 34 of the Indian Penal Code. The learned trial Judge took the view that the evidence adduced against Rachhpal Singh left room for doubt and so, giving Rachhpal Singh the benefit of doubt, he acquitted him. The remaining three accused persons were, however, convicted by him under s. 302 read with s. 34 because he held that the prosecution case had been proved against them beyond a reasonable doubt. The three convicts were ordered by him to suffer the sentence of death. This order was submitted for confirmation to the Punjab High Court and it was also challenged by the three convicts by their separate appeal. The two matters were heard together by the Punjab High Court and in the result, the conviction of the three appellants was confirmed; in regard to the sentence, however, the High Court took the view that the ends of justice would be met if the sentence of death imposed on Sunder Singh and Lal Singh was confirmed but that imposed on Gurmukh Singh was reduced to one of life imprisonment. In the result, the appeals preferred by the three accused persons substantially failed and the order of sentence was confirmed in regard to two of them. It is against the order of conviction and sentence thus passed by the High Court that Sunder Singh, Lal Singh and Gurmukh Singh have come to this Court by special leave.

Before dealing with the points raised before us by Mr. Sethi on behalf of the appellants, it would be convenient to set out broadly the material facts leading to the prosecution. Darbra Singh and the deceased Malook Singh were the sons of one Phula. It appears that prior to the partition of India these brothers lived in a village Butran which is now a part of West Pakistan. The appellants also resided in the same village. Sunder Singh, a brother of Phula Singh had mortgaged 20 killas of agricultural land with possession for Rs. 2,500/- with the appellant Sunder Singh and his brothers, in

about 1943. In lieu of this mortgage, the appellant Sunder Singh and his co-mortgagees, had been allotted 40 killas of land in the village Habri in the District of Karnal. The mortgagor Sunder Singh later died without leaving an issue or a widow. Phula Singh, his brother, claimed to be the heir of the said mortgagor and as such, he asked for redemption of the land on payment of Rs. 2,500/-. The appellant Sunder Singh did not recognise Phula Singh as the heir of the mortgagor and so, Phula Singh had to make an application in that behalf on November 29, 1959. By this application made to the Assistant Collector, Kaithal, Phula Singh claimed to redeem the mortgage. This claim was strongly resisted by the appellant Sunder Singh and his co-mortgagees. They disputed the title of Phula Singh and in the alternative, they alleged that they could not be deprived of the possession of the land expect on payment of Rs. 25,000/-. The proceeding continued for some time but it appears the Phula Singh was not able to place satisfactory evidence about his title before the Assistant Collector. In the result, his application was dismissed for default. Thereafter, the deceased Malook Singh applied for a passport to Pakistan; the prosecution case is that he wanted to go to Pakistan to obtain copies of the original mortgage deed and a pedigree-table from the revenue records kept in Pakistan which would have supported the claim of Phula Singh to the heirship of the mortgagor Sunder Singh. An enquiry was made into the antecedents of the deceased Malook Singh by the authorities concerned and on January 11, 1960, his application for passport was recommended by the S.D.O., Kaithal, to the Punjab Government. On January 13, 1960, however, the incident giving rise to the present prosecution occurred and Malook Singh along with his brother Darbara Singh and his relation, Anup Singh were murdered. The prosecution case is that these murders were committed by the appellants in furtherance of the common intention because they wanted to thwart Malook Singh's efforts to bring satisfactory evidence about the heirship of his father, Phula Singh to the mortgagor Sunder Singh. That, in substance, is the motive alleged by the prosecution for the commission of the three murders.

The actual incidents leading to the triple murder lie within a narrow compass. January 13, 1960, was 'Lohri' day. A couple of days earlier Malook Singh had arranged for an 'Akhandpath' (Non-stop recitation of the holy Granth Sahib). The Path came to a clause on the forenoon of January 12, 1960, and the closing function was attended by several persons, including Shahbeg Singh who is a relation of Malook Singh. Between 10 and 11 A.M. on January 13, 1960, Malook Singh, accompanied by his wife Amar Kaur, her brother Anup Singh and Shahbeg Singh went to the local Gurdwara to pay their homage on the auspicious day. Darbara Singh, Balkar Singh and Mohinder Singh had preceded them. All of them halted in the Gurdwara for a few minutes and then came out. Malook Singh was carrying a spear because he intended to go to his fields after visiting the Gurdwara. As the party reached the 'baithak' of Tara Singh which was a few paces away from the Gurdwara, Malook Singh and his companions saw the three appellants coming towards them accompanied by Rachhpal Singh. They also noticed that all of them were armed. The appellant Sunder Singh immediately raised a shout at Malook Singh and said that he would despatch him to Pakistan where he intended to go in order to collect proof for the mortgage and heirship of his father to the mortgagor. So saying, he aimed a lathi blow at Malook Singh, but Anup Singh intervened and entreated Sunder Singh not to assault Malook Singh. As a result, Anup Singh was hit on the head by the lathi of Sunder Singh. The three companions of the appellant Sunder Singh then rushed forward. Gurmukh Singh gave a lathi blow on one of the hands of Anup Singh. Malook Singh then stepped forward to save Anup Singh's life and gave a spear below to Sunder Singh. This blow caused injuries on his chest. Thereupon, Sunder Singh shouted to his companions not to allow Malook Singh and his friends to escape. At that stage, Lal Singh and Rachhpal Singh used their double-barrelled guns and fired; Lal Singh hit Malook Singh and Rachhpal Singh injured one of the knees of Anup Singh Rachhpal Singh then shot at Anup Singh again and Anup Singh fell down. All the

companions of Malook Singh, except for his wife Amar Kaur, were frightened and ran for their lives. Lal Singh then gave a chase to Darbara Singh, overtook him at a short distance and shot him dead. Mohinder Singh and Shahbeg Singh, however, managed to find the shelter and thus protected themselves. After shooting Darbara Singh dead, Lal Singh returned to the spot and shot at Malook Singh and Anup Singh again when he found that they were still alive. Having thus committed three murders, the assailants ran away with their respective weapons. That, in brief, is the prosecution case.

As we have already pointed out, the learned trial Judge gave the benefit of doubt to Rachhpal Singh and convicted the three appellants of the offence of murder. Before the High Court, it was urged on behalf of the appellants that Gurmukh Singh and Rachhpal Singh had been falsely implicated by the prosecution witnesses and it was argued that the appellant, Sunder Singh himself was a victim of aggression at the hands of the deceased Malook Singh and his companions and Lal Singh had shot at the assailants in order to save his father. In other words, the contention was that Sunder Singh and Gurmukh Singh were not guilty of any offence at all and that Lal Singh would at the worst be guilty of having exceeded the right of private defence. The case for the defence being based on the assumption that Malook Singh and his friends assaulted Sunder Singh and were themselves the aggressors, the High Court considered the oral evidence given by the four eyewitnesses, Shahbeg Singh, Balkar Singh, Mohinder Singh and Amar Kaur, the injuries inflicted on the three deceased persons, and examined the several points raised before it by the defence and came to the conclusion that the appellants and Rachhpal Singh were actuated by the common intention as alleged by the prosecution. In its opinion, Sunder Singh and his companions were the aggressors and Malook Singh and his friends were the victims and so, the learned trial Judge was right in holding the appellants guilty of murder under section 302 read with section 34, I.P.C. It appears that the High Court was inclined to take the view that the trial Judge was not right in giving the benefit of doubt to Rachhpal Singh, In the alternative, the High Court came to the conclusion that even if the meeting between the two parties was in the nature of a chance meeting, the circumstances of the case clearly indicate that the common intention to kill the three deceased persons developed in the minds of the appellants and Rachhpal Singh on the spot. Their conduct leading to the three murders, though the High Court, irresistibly led to the inference that even if they did not start with the common intention of killing the three victims, that intention developed in their minds as soon as they met the opposite party by chance. On these findings, the High Court confirmed the conviction of the three appellants, upheld the sentence of death against Sunder Singh and Lal Singh and reduced the sentence of death passed on Gurmukh Singh to one of imprisonment for life. It is the correctness of the findings recorded by the High Court that is challenged before us by Mr. Sethi on behalf of the appellants.

The first point which Mr. Sethi has strenuously urged before us is that the High Court was in error in recording a finding that Rachhpal Singh was present at the scene of the offence, shared the common intention of the three other appellants and, in fact, fired at Anup Singh as alleged by the prosecution. Mr. Sethi contends that the trial Court had acquitted Rachhpal Singh of the offence charged and there was no appeal by the State against the said order of acquittal. Under s. 423(1)(a) of the Code of Criminal Procedure, it is only where an appeal from an order of acquittal has been preferred that the High Court can reverse the said order if it is satisfied that the acquittal was not justified on the evidence adduced in the case. He, therefore, contends that the High Court should not have considered the propriety or the validity of the order of acquittal in favour of Rachhpal Singh. Indeed, according to him, the high Court had no authority or jurisdiction to embark upon that enquiry and since the High Court has, in terms, recorded the conclusion that Rachhpal Singh had taken part in the offence as alleged by the prosecution, that has introduced a serious infirmity in the

judgment of the High Court.

In support of his argument, Mr. Sethi has placed strong reliance on the decision in The King v. Plummer [(1902) 2 K.B.D. 339]. In that case, three persons were jointly tried with conspiring together. One of them pleaded guilty and judgment was passed against him on his plea. The other two pleaded not guilty. They were tried and acquitted. It was held that the judgment passed against the one who had pleaded guilty was bad and could not stand. It would be noticed that the indictment in that case contained five counts charging the obtaining of money by false pretences and also a sixth count alleging a conspiracy between the three accused to defraud the prosecutors. The sixth count did not allege that there were any other or unknown parties to the conspiracy and all the three defendants were included in one arraignment. All of them pleaded not guilty to the five counts. Only one pleaded guilty to the sixth count, the others pleaded not guilty even to that count. It was on these facts that the conviction of the one who had pleaded guilty to one charge was set aside and the decision setting aside the said conviction was based on two grounds. It appears that at a later stage of the trail the defendant who had pleaded guilty to the sixth charge wanted to withdraw his plead and the Court did not allow him to withdraw that plea on the ground that it had no jurisdiction to do so. The King's Bench Division for whose opinion the relevant questions were referred held that the trial Court had no doubt a discretion in the matter, but since it had acted upon the erroneous opinion that it had no power to allow the withdrawal of the plea, it had, in fact, not exercised any discretion. Therefore, if the discretion had been properly exercised and the plea of guilty had been allowed to be withdrawn, then clearly the defendant pleading guilty would have been acquitted. That is one reason for the order of acquittal passed by the King's Bench Division. The other reason was that where the indictment charges that A, B and C combined, confederated and agreed together to do a certain thing, and A and B are acquitted by the verdict of the jury from the charge, it is inconsistent with that finding that there could have been any combination, confederation, and agreement between them and C; and unless they combined, confederated, and agreed together with C, C could not be found guilty of the charge. It is on these two grounds that the conviction recorded against one defendant for the sixth count to which he had pleaded guilty was set aside.

It is difficult to see how this decision can assist Mr. Sethi in the present case. It is not suggested by him that the order passed by the trial Court convicting the three appellants even after acquitting Rachhpal Singh was itself invalid. Logically, if the decision in the case of Plumber was applicable to the present case, Mr. Sethi would have been able to attack the validity of the conviction of the three appellants in the trial Court itself. His argument is that the Appeal Court should not have considered the propriety and the validity of the acquittal of Rachhpal Singh. That is a question with which we will presently deal; but in deciding that question, the case of Plummer does not appear to afford any material assistance.

Cases sometimes arise where persons are charged with being members of an unlawful assembly and other charges are framed against them in respect of offence committed by such an unlawful assembly. In such cases, if the names of persons constituting the unlawful assembly are specifically and clearly recited in the charge and it is not suggested that the any other persons known or unknown also were members of the unlawful assembly, it may be that if one or more persons specifically charged are acquitted, that may introduce a serious infirmity in the charge in respect of the others against whom the prosecution case may be proved. It is in this class of cases, for instance, that the principle laid down in the case of Plummer may have some relevance. If out of the six persons charged under section 149 of the Indian Penal Code along with other offences, two persons are acquitted, the remaining four may not be convicted because the essential requirement of an unlawful assembly might be lacking. In the present case, however, the failure of the prosecution to

prove that Rachhpal Singh took part in the commission of the offence does not introduce an infirmity in its case against the appellant at all. Even if Rachhpal Singh is held not to be present at the scene of the offence, that, in law, cannot prevent the prosecution from presenting its case against the three appellants if the evidence adduced by it is otherwise satisfactory and cogent. Therefore, we are satisfied that the case of Plummer does not make the conviction of the appellants either unreasonable or illegal.

Reverting then to the argument based on the provisions of s. 423(1)(a) of the Criminal Procedure Code, it is obvious that the order of acquittal passed in favour of Rachhpal Singh cannot be set aside unless an appeal had been duly preferred in that behalf against the said order. But do the provisions of s. 423(1)(a) create a bar against the High Court incidentally considering the question about Rachhpal Singh's presence and conduct at the relevant time while it is dealing with the prosecution case against the three appellants before it ? When the High Court in appeal considered the case against the three appellants, it had inevitably to examine the comment made by Mr. Sethi against the reliability of the witnesses on the ground that their evidence against Rachhpal Singh had not been accepted by the trail Court and that necessarily meant that the High Court had to apply its mind to that problem as well. If in dealing with the case presented before it on behalf of the appellants it became necessary for the High Court to deal indirectly or incidentally with the case against Rachhpal Singh, there is no legal bar at all. It may be that in considering the evidence as a whole the High Court may have come to the conclusion that the evidence against Rachhpal Singh was unsatisfactory and if it had come to such a conclusion, it would have examined the said evidence in the light of this infirmity. On the other hand, after considering the evidence, the High Court may well have come to the conclusion, as it has, in fact, done in the present case, that the evidence against Rachhpal Singh is also good and need not have been discarded. In our opinion, there is no doubt that if in appreciating the points made by the appellants before it the High Court had to consider the whole of the evidence, in respect of the accused persons, it was free to come to one conclusion or the other in respect of the said evidence, so far as it related to Rachhpal Singh. That is why we think that the point made by Mr. Sethi that s. 423(1)(a) precluded the High Court from considering the merits of the order of acquittal even incidentally or indirectly cannot be upheld.

Mr. Sethi, however, sought to derive assistance from the decision of this Court in the case of Pritam Singh v. State of Punjab [A.I.R. [1956] S.C.R. 415]. In that case, this Court has observed "that the effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim 'res judicata pro veritate accipitur' is no less applicable to criminals than to civil proceedings." These observations were made when despite the order of acquittal passed against a person under section 19(f) of the Arms Act in an earlier proceeding, the same allegation was made against him in a subsequent case where he was charged with murder. In other words, the decision of this court in the case of Pritam Singh merely shows that if a person is acquitted of an offence on a charge framed against him which had been tried in a court of competent jurisdiction, the acquittal is conclusive between the said person and the prosecution and it can be challenged or reopened only by an appeal against the said acquittal, not otherwise. This proposition has no relevance to the present case. When the High Court considered Mr. Sethi's criticism against the prosecution evidence based on the assumption that the said evidence was found to be unreliable in so far as Rachhpal Singh is concerned, it was not appreciating that evidence with a view to reverse the order of acquittal passed in favour of Rachhpal Singh; it was appreciating that evidence only with a view to decide whether the said evidence should be believed against the appellants before it. That is why we think no assistance can be legitimately claimed by

Mr. Sethi from the decision in the case of Pritam Singh in support of his argument that the High Court has acted illegally or improperly in expressing its opinion that the prosecution evidence against Rachhpal Singh was not unsatisfactory. Indeed, as an appellate Court, the High Court has to consider indirectly and incidentally the evidence adduced against an accused person who had been acquitted by a trial Court in several cases where it is dealing with the appeal before it by the co-accused persons who had been convicted at the same trial and in doing so, the High Court and even this court some times records its indirect conclusion that the evidence against the acquitted persons was not weak or unsatisfactory and that the acquittal may in that sense be regard as unjustified, vide Bimbadhar Pradhan v. The State of Orissa [[1956] S.C.R. 206, 219]. Therefore, we do not think that there is any substance in the point made by Mr. Sethi that the judgment of the High Court suffers from a serious infirmity in that it examined the evidence against Rachhpal Singh and came to the conclusion that the said evidence was not unsatisfactory. In this connection, we may incidentally point out that even the trial Court which acquitted Rachhpal Singh has expressly observed that it did not say that the eyewitnesses were false in their claim that Rachhpal Singh also took part in the furtherance of the aforesaid common intention, but it thought that the case against him was not proved beyond all reasonable doubt. In other words, even the finding of the trial Court was not that the prosecution evidence against Rachhpal Singh was false; it only was to the effect that it left room for reasonable doubt. That is about all.

That takes us to the merits of the case. On the merits, Mr. Sethi has raised some general considerations affecting the credibility of the oral evidence adduced by the prosecution in support of its case. It appears that in the trial Court the prosecution case was that shooting had taken place from a short distance of 9 to 12 inches between the assailants and their victims. This case appears to receive support from the evidence of Dr. (Mrs.) Iqbal Shukla who had conducted post mortem examination of the three dead bodies. While giving the details of various gun-shot injuries, she noted that in most cases the wounds had burnt irregular edges and signs of burning were also found in some of the internal organs, such as lungs and heart, through which the bullet or the pellets passed. It is true that she does not appears to have been seriously cross-examined at the trial on this part of the evidence; but it was pointed out to the High Court that if the culprits were alleged to have fired from the licensed guns, the burning of the edges could take place only if the distance between the muzzle of the guns and the body was not more than nine inches, but since the wounds on the dead bodies clearly showed that the pellets had not entered the body en masse but had dispersed, it would be obvious that the deceased persons were shot from a distance of not less than 20 or 25 feet. The High Court was impressed by this argument and so examined Dr. (Mrs.) Shukla and Dr. K. S. Rai who is a Professor of Forensic Medicines. Dr. (Mrs.) Iqbal Shukla adhered to the opinion already given by her but Dr. Rai's evidence completely destroyed the evidence given by Dr. (Mrs.) Shukla. Besides, the clothes of the deceased which were examined by Dr. Rai should that there were no marks of burning on them. In the result, the High Court came to the conclusion that it was difficult to accept Dr. (Mrs.) Shukla's evidence that the gun-shot injuries on the deceased had burnt edges and it also held that the shooting must have taken place from a distance of 20 to 25 feet. This finding of the high Court is not disputed before us by Mr. Chari who appeared for the State.

Mr. Sethi contends that the finding as to the distance from which shooting took place introduces a serious infirmity in the prosecution evidence in as such as the eye-witnesses supported the prosecution case as originally set out about the distance; they said that the firing took place from a distance of 9". The High Court thought that this infirmity was true only in the case of Shahbeg Singh. That, however, is clearly erroneous. That infirmity is present even in the case of Balkar Singh and Amar Kaur, though Amar Kaur put the distance at 2 to 4 feet. The High Court does not appear to have noticed the fact that even Balkar Singh like Shahbeg Singh described the distance

from which firing took place as being 9 inches. It is true that Mohinder Singh does not give any evidence about this distance.

Therefore, Mr. Sethi is right in contending that the three eyewitnesses have deposed to the distance from which firing took place which is demonstrated to be wholly inaccurate. Incidentally, we would like to add that in dealing with the evidence of Amar Kaur, the High Court has referred to her statement in the committal court and erroneously treated it as substantial evidence in the present case. Thus, it may be conceded in favour of the defence that three out of the four eye-witnesses have deposed to the distance in terms of the theory propounded by Dr. (Mrs.) Iqbal Shukla and that, no doubt, is an infirmity in the evidence.

Then, Mr. Sethi contends that the prosecution story as to how the incident occurred is not is not consistent with its case that the appellants came to the scene of the offence pre-determined to assault Malook Singh and his companions. If the common intention of the appellants was to attack Malook Singh and his companions, they would have not allowed the appellant Sunder Singh to go ahead armed with a lathi, particularly when his son, Lal Singh was armed with a gun. Sunder Singh was an old man of 65 and seeking that Malook Singh has a spear in his hands, it is very unlikely that the Sunder Singh's son would have allowed him to go ahead with a lathi to assault Malook Singh and his companions. Therefore, the sequence of events as it is described by the prosecution witnesses, it is urged, is not consistent with the story of a pre-concerted plan on the part of the appellants. In our opinion, this contention cannot be rejected as wholly unreasonable.

On the other hand, it appears to be fairly clear that Sunder Singh attempted to attack Malook Singh before he received the injury himself. As the High Court has pointed out, having regard to the real nature of the injury inflicted on Sunder Singh by Malook Singh, it is very unlikely that Sunder Singh attacked Anup Singh after he himself was assaulted by Malook Singh. Therefore, it can be taken to be established on probabilities that when Sunder Singh and his sons met Malook Singh and his companions, Sunder Singh must have attempted to assault Malook Singh and in the process, injury was caused to Anup Singh.

The fact that Sunder Singh assaulted Malook Singh does not, however, show a pre-concerted plan in the minds of Sunder Singh and his sons. In our opinion, it was a chance encounter which, in all probability, led to an exchange of words and Sunder Singh took the aggressive and wanted to assault Malook Singh. The oral evidence given by the four eyewitnesses describes the incident as though Sunder Singh and his companions came armed determined to attack Malook Singh; but that evidence appears to us to be artificial and as we have just indicated, Sunder Singh could not have been left alone to tackle Malook Singh and his companions if his son and he had decided to attack Malook Singh even before they met.

It is, however, urged that Lal Singh who had deposited the gun with the Police when proceedings had been commenced against his father and the members of his party under s. 107 of the Criminal Procedure Code, took the gun back on January 9, 1960, and the argument is that Lal Singh took the gun back because he had his father had decided to assault Malook Singh. The High Court appears to have attached considerable importance to this circumstance. Unfortunately, this circumstance has not been put to Lal Singh when he was examined under s. 342 of the Code in the trial Court. If it was thought that the conduct of Lal Singh in taking back his gun on January 9, 1960, was an incriminating circumstance, the trial Judge should have given an opportunity to Lal Singh to explain that circumstance. In the absence of any question put to him in that behalf, it would, we think, not be fair to press this circumstance very much against Lal Singh and in support of the theory of the

common intention of Lal Singh, his father and his brother. Besides, even the High Court has observed that going about with a gun in that part of the country and amongst the class to whom the parties belong is not such an unusual circumstance at all. Just as Malook Singh was going about with a spear, so Lal Singh may be going about with a gun for which he had a licence. Therefore, the fact that the Lal Singh was armed with a gun which he had taken back from the Police custody on January 9, would not, in our opinion, support the theory of a pre-concerted plan.

It is also urged that whatever may be said against the evidence of Shahbeg Singh, Balkar Singh and Amar Kaur, Mohinder Singh is an independent witness and since he has given evidence in support of the prosecution case of a pre-concerted plan, there is no reason why that evidence should not be believed. Apart from the fact that the probabilities do not support the prosecution case of a pre-concerted plan, we are not satisfied that Mohinder Singh can claim to be an absolutely independent witness as the High Court seems to have thought. Mohinder Singh was asked in cross-examination whether he was not related to Malook Singh and in order to establish his relationship, it was put to him that Gehna Singh was his grandfather and that Gehna Singh was the cousin of Phula Singh. Mohinder Singh replied that he did not know the name of his grandfather because he had not seen him and he had not enquired from any relation about the name of his grandfather either. The High Court thought that this explanation was genuine. We are not satisfied that the view taken by the High Court is right. In our opinion, the trend of the answers given by Mohinder Singh in his cross-examination clearly suggests that he was evading to give truthful replies in respect of his relationship with Phula Singh. Besides, it appears in evidence that proceedings had been taken against whom Malook Singh and his friends amongst Mohinder Singh was included, under ss. 107 and 150 of the Code of Criminal Procedure. Hazur Singh was the person who had made the complaint in that behalf. The allegations made by Hazur Singh clearly point to the fact that disputes were going on between two groups - one led by the appellant Sunder Singh and the other led by Malook Singh. The High Court thought that there was nothing on the record to show that Sunder Singh or members of his party were witnesses in those proceedings. That, however, is not decisive. What is important is the fact that the disputes were going on between two rival groups to one of which Mohinder Singh belonged and that was the point of the cross-examination to which Mohinder Singh was subjected at the trial. Therefore, we are not inclined to hold that Mohinder Singh is an absolutely independent witness. Like the other eye-witnesses, he also must be characterised as the partisan witness. That is why the argument based on the unimpeachable character of the evidence given by Mohinder Singh in support of the theory of the common intention of the appellants cannot be accepted. We must, therefore, hold that the prosecution evidence fails to establish its case that the appellants case on the scene of the offence determined to attack Malook Singh.

On the other hand, it appear to have been a chance meeting which began with an exchange of hot words between Sunder Singh and Malook Singh and the verbal exchange was followed by an attack by Sunder Singh on Malook Singh. That means Sunder Singh was an aggressor and so Lal Singh could claim no right of private defence. Indeed, in the present appeal, Mr. Sethi's arguments were, in substance, confined to the case of Gurmukh Singh. Sunder Singh who had been ordered to be hanged died in jail pending the present appeal, and the case of Lal Singh, as Mr. Sethi himself fairly conceded, is difficult to defend. It is on the case of Gurmukh Singh that Mr. Sethi naturally concentrated, and it is to Gurmukh Singh's case that we must now turn.

If the prosecution case about the pre-concerted plan does not succeed and if it is held that Sunder Singh began to assault against Malook Singh and was followed by Lal Singh who fired at Malook Singh and his companions, there can be no doubt that Sunder Singh and Lal Singh can be held to have been actuated by the common intention of murdering Malook Singh and his companions.

Sunder Singh knew that Lal Singh was armed with a gun and when he deliberately provoked a controversy with Malook Singh and proceeded to assault him, he must have known that Lal Singh was behind him, he would follow up the attack and do the rest of the work. That is why we are inclined to accept the conclusion of the High Court that the common intention to murder Malook Singh and his companions must have developed in the minds of Sunder Singh and Lal Singh soon after they met Malook Singh and his companions and Sunder Singh attacked Malook Singh. But can we reasonably hold that Gurmukh Singh also developed the same common intention ? And that must take us to the evidence which implicates Gurmukh Singh. As we have already pointed out, Gurmukh Singh is alleged to have caused an injury to Anup Singh on his knee and an injury to Amar Kaur. It is, however, significant that none of the prosecution witnesses has referred to Gurmukh Singh attacking Anup Singh until they gave evidence in the Sessions Court. An omission to refer to this part of Gurmukh Singh's conduct, therefore, assumes considerable significance. The detailed manner in which the incident has been described suggests that the omission to refer to Gurmukh Singh's assult on Anup Singh is in the nature of a contradiction and so, it cannot be lightly brushed aside. As to the injury alleged to have been caused by Gurmukh Singh on Amar Kaur, the evidence is not very satisfactory. It is true that Amar Kaur has deposed to this inquiry but the manner in which she has given this evidence does not strike us as reliable. Besides, this injury is outside the scope of the common intention charged and it is not the subject-matter of a separate charge. We have carefully considered the whole of the evidence adduced by the prosecution in this case and we are not satisfied that it would be safe to hold that Gurmukh Singh was present at the scene of the offence and that he took part in attacking either Anup Singh or Amar Kaur from which it would be reasonably inferred that like his father and his brother, he also developed a common intention to attack Malook Singh and his companions. That is why, having examined the probabilities in the case and bearing in mind the infirmities from which the evidence suffers, we are disposed to differ from the High Court when it came to the conclusion that Gurmukh Singh was also guilty under section 302 read with section 34 of the I.P.C. in our opinion, the case against Gurmukh Singh is not established beyond a reasonable doubt and so, he is entitled to the benefit of doubt.

In the result, the order of conviction and sentence passed against Sunder Singh and Lal Singh is confirmed, whereas the order of conviction and sentence passed against Gurmukh Singh is set aside, and he is ordered to be acquitted and discharged.

Appeal partly allowed.

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