**SUPREME COURT OF INDIA**

Mer Dhana Sida

Vs.

State of Gujarat

Crl.A.Nos.46 and 102 of 1975

(D. A. Desai and Ranganath Misra, JJ.)

29.11.1984

**JUDGEMENT**

**DESAI, J.:-**

1. One Jaman Malde had his hair-cutting saloon in Village Kalyanpur in Jamnagar District. As usual he in company of his son, P. W. 15 Popat Jaman and his sister's son P. W. 16, Arvind Jhina were serving the customers on August 11, 1973. Around 3.55 P.M. on that day 6 persons entered his shop. Amongst them were 5 accused who were put up for trial and the sixth person was subsequently suggested to be Lakhamshi Natha who is absconding. Accused No. 3 Mer Dhana Sida was armed with a gun and the remaining 4 accused namely, accused 1 Mer Ram Sida, accused 2 Mer Arjan Sida, accused 4 Mer Kana Giga and accused 5 Mer Keshav Giga were armed with sticks. On entering the shop the four accused armed with sticks started inflicting blows on Jaman Malde, Popat Jaman and Arvind Jhina. At about that time one Ramshi Ram had come to the shop for his shave. He intervened and attempted to persuade the accused not to beat Jaman and others. Accused No. 3 fired his gun at Ramshi Ram and caused injuries to him. Karsan Malde, the brother of Jaman Malde who was in the neighbouring shop came running to that place and attempted to intervene when accused No. 3 Mer Dhana Sida fired his gun at him. Simultaneously, the other 4 accused inflicted stick blows on him. Karsan Malde fell down at the spot. Jaman Malde went to Kalyanpur Police

Station and lodged an information of the offence. Ramshi Ram and Karsan Malde succumbed to their injuries within a short time after the occurrence. Officer-in-charge of the Police Station, Kalyanpur registered an offence and commenced investigation. On completion of investigation a challan was sent up against 5 accused to the learned Magistrate having jurisdiction in the area. Lakhamshi Natha was shown to be absconding. The learned Magistrate committed the accused to the Court of Session. The case came up for trial before the learned Sessions Judge, Jamnagar, who framed various charges against the accused but the principal charge was under S. 302 read with S. 149 of the Indian Penal Code or in the alternative charge under S. 302 read with S. 34 of the Indian Penal Code as also under Ss. 326 and 325 read with. S. 149 or in the alternative charge under S. 34 of the Indian Penal Code and Ss. 147 and 148 of the Indian Penal Code.

2. The prosecution examined 28 witnesses including P. W. 12 Jaman Malde who gave the information of the offence, P. W. 15 Popat Jaman and P. W. 16 Arvind Jhina, all the three injured witnesses, 3 doctors, P. W. 1 Dr. B. B. Shah, P. W. 2 Dr. H. D. Gaglani, P. W. 3 Dr. J. A. Joshi and the ballistic expert P. W. 6 Vinayak Balkrishana Gokhle. The accused did not examine any witness in their defence.

3. The learned Sessions Judge held that the prosecution has failed to bring home the charge against any of the accused under S. 302 read with S. 149 or S.302 read with S. 34 for committing murder of Ramshi Ram. He also held that the prosecution has failed to prove the participation of accused No. 1 Mer Ram Sida in the occurrence. For injuries caused to deceased Karsan Malde the learned Sessions Judge convicted accused Nos. 2, 3, 4 and 5 under S. 324 read with S. 34 of the Indian Penal Code and for the same offence for causing injuries to P. W. 12 Jaman Malde, P. W. 15 Popat Jaman and P. W. 16 Arvind Jhina and imposed various terms of imprisonment as also a sentence of fine.

4. Original accused Nos. 2, 3, 4 and 5 preferred Criminal Appeal No. 356 of 1974 against their conviction and sentence imposed upon them. The State of Gujarat preferred Criminal Appeal No. 424 of 1974 against all the 5 accused questioning the acquittal of accused No. 1 Mer Ram Sida as also the acquittal of all the 5 accused on the charge of committing murder of Ramshi Ram. A Division Bench of the High Court heard both the appeals together and disposed them of by a common judgment. The High Court concurred with the learned Sessions Judge about the failure of the prosecution to prove the participation of accused No. 1 Mer Ram Sida in the occurrence and confirmed his acquittal. Disagreeing with the learned Sessions Judge the High Court held that there was good and reliable evidence to come to the conclusion that accused No. 3 Mer Dhana Sida did fire his gun at Ramshi Ram and caused injuries which proved fatal and the charge for an offence under S. 302 of the Indian Penal Code is brought home to accused No. 3. The High Court held that the accused Nos. 2, 3, 4 and 5 were not vicariously liable for committing murder of Ramshi Ram. The High Court disagreed with the learned Sessions Judge about the nature of the offence committed by accused Nos. 2, 3,4 and 5 while causing injuries to Karsan Malde and held that the medical evidence shows that Karsan Malde died mainly on account of fracture of the 10th and 11th ribs and therefore, accused Nos. 2, 3, 4 and 5 would be guilty of committing an offence under S. 304 Part II read with S. 34 of the Indian Penal Code for committing culpable homicide not amounting to murder of Kansan Malde and accordingly sentenced each of them to suffer rigorous

imprisonment for 5 years. The rest of the order of conviction and acquittal recorded by the learned Sessions Judge was confirmed

5. Accused No.3 Mer Dhana Sida was acquitted by the learned Sessions Judge on the charge of committing murder of Ramshi Ram and whose acquittal on this charge has been set aside by the High Court in an appeal at the instance of the State of Gujarat and who has been sentenced to suffer imprisonment for life preferred Criminal Appeal No. 46 of 1975 under S. 2-A of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act. The accused Nos. 2, 4 and 5 preferred Criminal Appeal No. 102 of 1975 by special leave. As both the appeals arise out of a common judgment of the High Court and the Sessions Judge, they were heard together and are being disposed of by this common judgment.

6. We would first take up Criminal Appeal No. 46 of 1975 preferred by original accused No. 3 Mer Dhana Sida who stands convicted for an offence of murder under S. 302 of the Indian Penal Code and has been sentenced to suffer imprisonment for life. Mr. Govind Das, learned counsel for the appellant, Dhand Sida urged that the High Court was in error in interfering with a conclusion reached by the learned Sessions Judge which was both reasonable and was the outcome of permissible view of the evidence, merely on the ground that other view of the evidence was possible. We find it difficult to subscribe to this submission. Some of the broad features of the evidence would show that it was accused No. 3 Dhana Sida who fired a shot at Ramshi Ram and caused injuries one of which proved fatal. To substantiate this charge there is evidence of 3 injured witnesses P. W. 12 Jaman Malde, who had 4 injuries as certified by P. W. 3 Dr. J. A. Joshi, P. W. 15 Popat Jaman who had 2 injuries as certified by P. W. 1 Dr. B. B. Shah and P. W. 16 Arvind Jhina who had suffered 1 injury as certified by P. W. 3 Dr. J. A. Joshi. There are three injured witnesses and we would require very convincing submission to discard the evidence of injured witnesses whose injuries would at least permit a reasonable inference that they were present at the time of occurrence. Undoubtedly, this is subject to the requirement that there must be evidence to show that these witnesses received injuries in the same occurrence. The fact that these three witnesses were injured at the time of and in the same occurrence and almost as a part of the occurrence was not questioned before us. All the three witnesses have consistently deposed that accused No. 3 amongst the accused was armed with a gun. Jaman Malde and Popat Jaman deposed that the accused No. 3 fired his gun at Ramshi Ram. Arvind Jhina stated that accused No. 3 was armed with a gun and that he heard two gun shots but he actually did not see who fired the shots. The learned Sessions Judge discarded this evidence on the ground that the prosecution was guilty of introducing a suggestion of a third gun shot sound and the absence of blood marks in the shop of P. W. 12 Jaman Malde. The High Court elaborately examined these reasons and rejected them as utterly untenable and contrary to the weight of evidence and based on impermissible inferences. We were meticulously taken through the reasons given by the High Court in its elaborate and exhaustive judgment for disagreeing with the view of the learned Sessions Judge about accused No. 3 firing his gun at Ramshi Ram and causing injuries to him and we are in agreement with the view of the High Court. On the evidence it is not possible to accept that anyone else other than accused No. 3 fired the fatal shot at Ramshi Ram. The High Court after a very elaborate discussion of the evidence and the submissions made on behalf of accused No. 3 concluded that it was accused No. 3 alone who fired two shots from his double barrel gun and both of them hit Ramshi Ram, one in his epigastric region and second in his mandible, and there is good evidence to hold that the shot on the mandible proved

fatal. It would be merely adding to the length of this judgment if we re-examine the evidence. In a judgment running over about 122 pages the High Court has examined each and every aspect of the matter and rejected the view taken by the learned Sessions Judge for clear, convincing and unambiguous reasons. The view of the learned Sessions Judge apart from being unconvincing is against the weight of evidence and founded on a conjecture about the third gun shot. We accordingly agree with the High Court that it was accused No. 3 who fired his gun at Ramshi Ram and caused injuries to him which proved fatal. The charge of committing murder of Ramshi Ram as rightly held by the High Court is brought home to accused No. 3 and he has been rightly convicted for the same and his appear must accordingly fail.

7. Turning now to Criminal Appeal No. 102 of 1975 preferred by accused Nos. 2, 4 and 5 as also by accused No. 3 questioning the conviction under S. 324 read with S. 34 of the Indian Penal Code for causing injuries to Karsan Malde. The High Court disagreeing with the learned Sessions Judge held that the number of injuries caused, the circumstances in which they came to be caused and the ferocity of the attack would clearly show that accused Nos. 2, 4 and 5 knew that they were likely to cause injuries which were likely to cause death and accused No. 3 shared their common intention and, therefore, would be guilty of an offence under S. 304 Part II read with S. 34 of the Indian Penal Code.

8. It must at once be mentioned that Karsan Malde succumbed to his injuries soon after he received them. He had suffered as many as 10 injuries including fracture of 10th and 11th ribs on the left side of mid axillary line. On internal examination it was found that he had suffered rupture of the spleen. In the opinion of P. W. 1 Dr. B. B. Shah all the injuries were possible by same hard and blunt substance like a stick and the cause of death was shock and haemorrhage mainly due to rupture of the spleen. There is a concurrent finding that accused Nos. 2, 4 and 5 simultaneously attacked Karsan Malde with sticks and caused injuries to him and accused No. 3 shared their common intention. This concurrent finding was not questioned before us. If accused Nos. 2, 4 and 5 simultaneously attacked Karsan Malde with sticks and caused as many as 10 injuries one of them being the fracture of 10th and 11th ribs and rupture of the spleen, one can gauge the ferocity of the attack. All persons participating in such an attack could at least be imputed with the knowledge that they were likely to cause injuries which were likely to cause death. In our opinion the High Court was right in holding that on factual and medical evidence accused Nos. 2,3,4 and 5 were guilty of committing an offence under S. 304 Part II read with S. 34 of the Indian Penal Code. We agree with the High Court and confirm the conviction as also the sentence of 5 years imposed on each of them.

9. Mr. Govind Das next contended that the High Court clearly committed a legal error in denying the accused Nos. 2. 3, 4 and 5 the benefit of a set off of the period of detention undergone by each of them against the sentence of imprisonment awarded to each of them as provided by S. 428 of the Criminal Procedure Code. The High Court held that as the learned Sessions Judge convicted the accused on March 6, 1974 and they preferred the appeal on May 13, 1974 and as the new Code of Criminal Procedure came into force on April 1, 1914 the accused are not entitled to the benefit of S. 428 of the Criminal Procedure Code. The High Court held that in view of its Full Bench decision as the trial had ended in a conviction prior to the coming into force of the Criminal Procedure Code of

1973 the appeal would be governed by the repealed Code of Criminal Procedure of 1898 and, therefore, in such an appeal the benefit of a provision introduced for the first time in the Code of Criminal Procedure, 1973 cannot be extended to the accused because if such a thing is done it would not only give retrospective operation to the Code of Criminal Procedure, 1973 but also it will introduce a dichotomy inasmuch as the appeal would be governed by the repealed statute and the sentence would be governed by the repealing statute. We are spared of in depth examination of this contention in view of the decision of this Court in Boucher Pierre Andre v. Supdt. Central Jai, Tihar, New Delhi, (1975) 1 SCC 192: (AIR 1975 SC 164) in which it was held that where an accused person has been convicted and he is still serving his sentence at the date when the new Code of Criminal Procedure came into force, irrespective of the fact whether the order of conviction was made prior to the introduction of the Code of Criminal Procedure, 1973, S. 428 would apply and he would be entitled to claim that the period of detention undergone by him during the investigation, inquiry or trial of the case should be set off against the term of imprisonment imposed on him and he should be required to undergo only the remainder of the term. This Court in terms rejected the contention that such a construction of S. 428 would give retrospective operation to the Code of Criminal Procedure, 1973 or that it would introduce a dichotomy. This decision was rendered on November 21, 1974, a few months after the High Court disposed of the appeals pending before it from which the present appeals arise. Therefore, the High Court had not had the benefit of the above judgment. In view of the aforesaid decision accused Nos. 2, 4 and 5 and accused No. 3 for his sentence other than the sentence of imprisonment for life would be entitled to the benefit of the provision of S. 428 and to that extent the judgment of the High Court is reversed and set aside.

10. Accordingly, both the Criminal Appeals Nos. 46 and 102 of 1975 fail so far as the conviction and sentence imposed upon the appellants in both the appeals are concerned. Both the appeals are partly allowed and the order of the High Court denying to accused Nos. 2, 3, 4 and 5 the benefit of the provision of S. 428 is set aside and we direct that accused Nos. 2, 3, 4 and 5 would be entitled to. the benefit of the provision of S. 428 of Criminal Procedure Code. We order accordingly.

Order accordingly.