

Sukhram S/O Ramratan, Vs

State of M. P.

Criminal Appeal No. 491 of 1984

(S. Natarajan, A. M. Ahmadi JJ)

13.01.1989

JUDGMENT

NATARAJAN, J. –

1. The appellant Sukhram and his cousin one Gokul were convicted by the Sessions Judge, Ratlam under Section 302 read with Section 34 IPC and under Section 436 read with Section 34 IPC and sentenced to imprisonment for life and concurrently to undergo rigorous imprisonment for 7 years for the respective convictions. On appeal, the High Court confirmed the convictions and sentences awarded to the appellant but gave the benefit of doubt to accused Gokul and acquitted him of both the charges. The appellant has preferred this appeal by special leave against the judgment of the High Court confirming the conviction and sentences awarded to him.

2. The prosecution case, briefly stated, was that Gokul and the appellant bore a grudge against PW 1 Gendalal because of his refusal to return a sum of Rs. 400 collected as fine from Gokul by the caste panchayatdars and left in deposit with PW 1 Gendalal. I would appear that about four years before the incident which took place on the night of May 1/2, 1979, the panchayatdars chastised Gokul for having illicit intimacy with his daughter-in-law and imposed on him a fine of Rs. 400. The fine amount was entrusted to PW 1 Gendalal with instructions to retain the amount till such time the panchayatdars asked to him to return the amount to Gokul. On some occasions before the incident, Gokul and the appellant demanded return of the fine amount but PW 1 Gendalal told them that without all the panchayatdars collectively directing him to return the amount, he cannot hand over the money. Enraged by the stand taken by PW 1 Gendalal, the two accused persons are said to have set fire to the residential shed belonging to PW 1 Gendalal and his brother PW 3 Chhoteram at about midnight on the night of May 1/2, 1979. The fire spread from the shed of PW 1 Gendalal to 13 other sheds standing nearby and all the sheds and the articles kept in them were completely burnt. Besides the loss of properties, two human beings also lost their lives viz. Gangabai, the 70 year old mother of PW 1 Gendalal and PW 3 Chhoteram and Mukesh, a 7 or 8 year old son of PW 3 Chhoteram. Report was given by PW 1 Gendalal at the Police Station Khategaon on the morning of May 2, 1979 and a case was registered against the two accused persons and after investigation, the police laid charge-sheet against them for the offences of murder and arson.

3. Charges were framed against Gokul and the appellant individually under Section 302 and 436 IPC and alternatively under Sections 302 read with 34 IPC and Sections 436 read with 34 IPC. The Sessions Judge convicted both the accused under Section 302 read with Section 34 IPC and Section 436 read with Section 34 IPC and awarded sentences to them as set out earlier. The High Court, however, set aside the conviction of Gokul and acquitted him of both the charges but maintained the conviction of the appellant under Section 302 read with Section 34 IPC and Section 436 read with Section 34 IPC and the sentences imposed therefor. Two questions fall for consideration in the appeal viz. whether the evidence warrants the conviction of the appellant under the two charges and

secondly whether the conviction of the appellant under the two charges can be sustained in view of the acquittal by the High Court of Gokul, a named accused.

4. Mr C. C. S. Rao, advocate appearing as amicus curiae for the appellant and Mr Umanath Singh, counsel for the State of Madhya Pradesh took us through the relevant portions of the evidence of the prosecution witnesses and also the judgments of the Sessions Judge and the High Court in the course of their respective arguments. To prove the case against the two accused persons, the prosecution relied upon the evidence of PW 1 Gendalal, PW 3 Chhoteram, PW 4 Shriram, PW 5 Nannu, PW 6 Badrilal and PW 7 Nandu. According to the prosecution PW 3 Chhoteram was the first person to have woken up and noticed their shed being on fire. He claims to have noticed the appellant and one other person running away from the scene. Thereupon he raised alarm that the appellant had set fire and was running away and gave chase to the appellant and actually caught hold of him near the house of one Nathmaharaj. However, on the intervention of PW 5 Nannu and one Badri, he let go the appellant and returned to his shed in order to extinguish the fire along with others. While trying to extinguish the fire also, he told the people assembled there that the appellant had set fire to the sheds and run away. PW 1 Gendalal has deposed that on hearing the alarm raised by PW 3 Chhoteram, he woke up and saw accused Gokul running away from the scene. In spite of the attempts to extinguish the fire, all the sheds got burnt completely together with the articles kept inside them because all the sheds were built with wooden thatti walls and roofed with tiles. While Gangabai, the mother of PW 1 Gendalal, had sustained extensive burns, there was no trace of Mukesh, the son of PW 3 Chhoteram. His burnt bones were seen only in the morning. PW 1 Gendalal took his mother in a cart to the hospital but enroute she died and hence he went to the police station and gave a report. The defence of both the accused in the trial was one of complete denial of their complicity in the offences complained of.

5. While the Sessions Judge accepted the evidence of PW 1 Gendalal and PW 3 Chhoteram that the former had seen accused Gokul running away and the latter had seen the appellant running away from the scene and convicted both the accused under Sections 302 and 436, both read with Section 34 IPC, the High Court has given the benefit of doubt to accused Gokul and acquitted him because there was no corroboration for the evidence of PW 1 Gendalal that he had seen accused Gokul running away from the scene on that night. The High Court has observed that there was suspicion about the complicity of accused Gokul in the Commission of the offences because of his name being mentioned in the first information report, but it would not be safe to convict him on the evidence of PW 1 Gendalal alone. Insofar as the appellant is concerned, the High Court has held that there was no room for any doubt as regards his guilt because PW 3 Chhoteram had not only seen him running away from the scene but had actually given chase to him and caught hold of him before PW 5 Nannu and Badri intervened and got him released.

6. Though the Sessions Judge and the High Court have accepted the prosecution evidence in full so far as the appellant is concerned and have convicted him of the charges framed against him, we find that several factors of a vital nature have not been noticed and evaluated by the Sessions Judge and the High Court. The prosecution case is that PW 3 Chhoteram was the first to wake up and notice the fire set to his shed. At that time he is said to have seen the appellant running away from the scene and one other person running ahead of him. He is then said to have raised alarm that the appellant was running away after setting fire to the shed. Strangely enough, PW 3 Chhoteram has not mentioned in his statement under Section 161(3) CrPC that he had raised alarm to the effect that the appellant had set fire to the shed and was running away. Then again it is at known as to why PW 5 Nannu and Badri should have intervened and asked PW 3 Chhoteram to release the appellant and go back to his shed to put put the fire. If PW 33 Chhoteram had specifically told them that the

appellant had set fire to his shed and was running away those two persons would not have asked PW 3 Chhoteram to let go his hold on the appellant. Besides these infirmities in the evidence of PW 1 Gendalal, we find that this version does not fit in with that of PW 3 Chhoteram. PW 1 Gendalal has stated that when he woke up on hearing the alarm of PW 3 Chhoteram, he saw accused Gokul running away from the scene. It is not understandable how he would have been able to see accused Gokul when PW 3 Chhoteram had not seen him and when PW 3 Chhoteram say that the other culprit was running ahead of the appellant. If at all PW 1 Gendalal had been able to see the persons running away, he would have been able to see only the appellant and not accused Gokul who was running ahead of him. Curiously, PW 1 Gendalal does not speak anything about his seeing the appellant running away from the scene but only speaks about his noticing accused Gokul running away from the scene. It is therefore seen that the versions given by PW 3 Chhoteram and PW 1 Gendalal conflict with each other regarding their perception of the flight of the culprits who had set fire.

7. PW 4 Shriram who is a nephew of the appellant and who was staying with PW 1 Gendalal at the time of the occurrence has stated that when the fire became severe he woke up and started running and at that time he did not hear anyone raising an alarm. According to him all the villagers gathered near the house of one Ramratan after a short while and it was at that time he heard PW 3 Chhoteram telling the people that he had seen the appellant running away. His evidence therefore runs counter to the evidence of PW 3 Chhoteram that even at the beginning he had raised alarm setting fire to the shed. Even this statement of PW 4 Shriram is rendered doubtful because in his statement under Section 161(3) CrPC he has not stated that PW 3 Chhoteram told the villagers that he had seen the appellant running away from the scene.

8. When we come to the testimony of PW 6 Badrilal, his evidence is completely destructive of the evidence of PW 3 Chhoteram and PW 1 Gendalal. He has stated even in chief examination as under :

I did not see Gokul. I saw Sukhram. He was extinguishing fire with water. There was a scuffle between Chhoteram who is Gendalal's brother, and Sukhram. This took place in the pathway. My house was burning and the scuffle was then going on. When this scuffle was going on I was fetching water. I did not say anything. I continued to fetch water. Chhoteram was saying that "after setting fire, you have now come to extinguish the fire".

This witness has not been treated hostile by the prosecution and therefore his evidence has also to be taken as part of the prosecution version. The resultant position would then be that while PW 3 Chhoteram would say that the appellant ran away from the scene after setting fire to the shed and he had caught hold of him after a chase and then released him, PW 6 Badrilal would say that the appellant also joined the group of people who were extinguishing the fire and at that time there was a scuffle between the appellant and PW 3 Chhoteram and PW 3 Chhoteram accused him of trying to extinguish the fire after first having set fire to the shed. If indeed the appellant had set fire to the shed and run away, it is inconceivable he would have come back to the scene and joined the villagers in trying to extinguish the fire. Thus we find that the evidence of PW 6 Badrilal, who had not been declared a hostile witness militates against the acceptance of the testimony of PW 3 Chhoteram and PW 1 Gendalal.

9. If the inconsistencies noticed in the evidence of PW 3 Chhoteram and PW 1 Gendalal and the totally different version given by PW 6 Badrilal are taken note of, there is considerable room for

doubt regarding the appellant being one of the two miscreants who had set fire to the hut belonging to PW 1 Gendalal and PW 3 Chhoteram and about the appellant rendering himself liable for conviction for having committed the offences in question in pursuance of a common intention between him and the other accused. Even if the appellant was seen running away from the scene by PW 3 Chhoteram it may be that the fire had been set by the other miscreant and the appellant had not shared any common intention with him to commit the offences and had run away from the scene out of fear. In such circumstances, the conviction of the appellant under the two charges cannot be sustained.

10. There is another aspect of the matter which has also escaped the notice of the High Court when it sustained the conviction of the appellant under Section 302 read with Section 34 and Section 436 read with Section 34 IPC while acquitting accused Gokul of those charges. Through the accused Gokul and the appellant were individually charged under Section 302 and 436 IPC they were convicted only under the alternative charges under Section 302 read with Section 34 and Section 436 read with Section 34 IPC by the Sessions Judge. Consequently, the appellant's convictions can be sustained only if the High Court had sustained the convictions awarded to accused Gokul also. Inasmuch as the High Court has given the benefit of doubt to accused Gokul and acquitted him, it follows that the appellant's convictions for the two substantive offences read with Section 34 IPC cannot be sustained because this is a case where the co-accused is a named person and he has been acquitted and by reason of it the appellant cannot be held to have acted conjointly with anyone in the commission of the offences. This position of law is well settled by this Court and we may only refer to a few decisions in this behalf vide *Prabhu Babaji v. State of Bombay*, *Krishna Govind Patil v. State of Maharashtra* and *Baul v. State of U. P.*

11. It therefore, follows that even if the evidence of the prosecution witnesses did not suffer from any infirmity, the acquittal of the other named accused Gokul would stand in the way of the appellant being convicted constructively under Section 34 IPC for the substantive offences under Section 302 and Section 436 IPC.

12. It is no doubt true that on account of the fire 14 sheds had been burnt and an old woman Gangabai and Mukesh a young boy of seven years had lost their lives. However, on account of the infirmities and contradictions noticed in the prosecution evidence and the legal impediment resulting from the acquittal of Gokul, who was a named accused person, the convictions and sentences awarded to the appellant cannot be sustained.

13. The appeal is, therefore, allowed and the convictions and sentences are set aside and the appellant will stand acquitted of both the charges and he is ordered to be released from jail.

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