Ramdeo Rai Yadav

Vs

State of Bihar

Criminal Appeal No. 399 of 1988

(S. R. Pandian, K. Jayachandra Reddy JJ)

01.03.1990

JUDGMENT

S. RATNAVEL PANDIAN, J. -

1. This appeal is preferred by the appellant, Ramdeo Rai Yadav, who was accused 1 in the Sessions Trial Case No. 9 of 1984 in the court of 2nd Additional Sessions Judge, Darbhanga, challenging his conviction under Section 302 IPC and the sentence of imprisonment for life imposed therefor.

2. Adumbrated in brief, the facts of the prosecution case are as follows :

> This appellant and four other accused who all were arrayed as accused 1-5 took their trial under Section 396 of the Indian Penal Code, alternatively under Section 302 IPC on the allegations that on May 6, 1983 at about 8.00 p.m. they all while attempting to commit dacoity in the house of one Santosh Kumar Pansari (PW 8) in Mohalla Senapat of Darbhanga caused the death of PW 8's brother J. Prakash Pansari.

3. On the night of the fateful day, PW 8 was in his house. His brother, the deceased herein, Munshi Dashrath Sah (PW 2) and another Munshi Arjun Sah (not examined) were also present in a room abutting the outer verandah and were checking the account books of their family firm. At the point of time, PW 8 saw two miscreants entering the verandah and taking position near the door of the outer room. One of them was having a revolver. PW 8 saw two more persons standing behind those two miscreants. The two miscreants (assailants) who first entered the verandah threatened PW 8, decreased and others to be silent. PW 8 and the deceased suddenly pounced upon the two assailants and started jostling. One of the assailants assaulted PW 8 with the butt of the revolver hitting his nose and forehead when the latter attempted to throw a table fan on the assailants. In the meanwhile, the deceased and the assailant who was armed with a revolver, grappled with each other, moved out of the verandah and in the course of the combat fell down in the garden. All the while the deceased was shouting 'dacoit - dacoit'. At this juncture, PW 8 heard sound of shooting and fell down. One of the assailants searched PW 8's pockets and then they all left without accomplishing dacoity. PW 8 moved to the garden and found his brother dead. Nonetheless, the deceased was removed to the hospital where he was declared dead. According to PW 8, there was a fluorescent lamp being operated by battery cells shedding sufficient light in the scene locality which enabled PW 8 and others to identify the assailants. The assailants were seven in number and they all fled away in an Ambassador car parked near the scene house.

4. PW 12 who was the then Station House Officer of Town Thana Police Station on getting a telephonic message that there was a commission of dacoity in the house of PW 8 proceeded to the

place of occurrence after recording the message, accompanied by his party consisting of a Sub-Inspector and two Assistant Sub-Inspectors. He proceeded on his motorcycle accompanied by his colleagues in some other vehicles in search of the dacoits, but they could not trace them. Thereafter PW 12 returned by 9.00 p.m. to the house of PW 8 and recorded the statement (Ex 9) from PW 8 and registered it as a case in town P.S. Case No. 165/83 under Section 398 and Section 302 IPC. AT about 10.00 p.m. he inspected the scene and seized one live cartridge bearing inscription 'K.F. Special' which was lying on the eastern side of the verandah. There were also 5 small articles like crackers wrapped by jute thread in the courtyard by the side of the verandah. All these articles were seized under seizure memo (Ex 2). Bloodstains were found in the garden wherefrom the crackers were seized. He held inquest, recorded the statements of the witnesses and gave a requisition to the Medical Officer (PW 6) to conduct necropsy on the dead body of the deceased.

5. During the course of investigation, PW 12 arrested all the accused including this appellant and put them on for a test identification parade. The appellant was identified by PWs 8 and 11. After completing the investigation, PW 12 filed the charge-sheet on August 1, 1983 as against the appellant and four others, showing two more accused as absconding. To substantiate the allegations, the prosecution examined 13 witnesses of whom PW 2, one of the employees of the Pansari Trading Company, i.e. the family firm, PW 8, the brother of the deceased and PW 11, the father of PW 8 and the deceased speak about the occurrence. PW 6, the Medical Officer who conducted necropsy on the dead body of the deceased on May 7, 1983 has testified that he found a wound of entry with 1/2" diameter at the post-lateral aspect on the upper part of the left arm surrounded with burnt gunpowder. The track through which the bullet had passed was disorganised and lacerated. In the opinion of PW 6, the said injury was due to firing of a bullet from a fire-arm in a close range. Ex 5 is the post-mortem report. The Medical Officer has also produced the bullet removed from the body of the deceased.

6. On the side of the defence, 10 witnesses were examined and certain documents were marked. The case of the appellant is one of complete denial. The learned trial Judge for the reasons assigned in his judgment convicted the appellant (A-1), Harikishan Yadav (A-2), Gurcharan Rai (A-3) and Maheshwar Rai (A-4) under Section 396 IPC and sentenced each of them to undergo imprisonment for life and acquitted accused 5 Opendra Sahni. Aggrieved by the judgment of the trial court, all the convicted accused preferred Criminal Appeal No. 108 of 1985 before the High Court of Patna. It transpires from the judgment of the High Court that accused 4 Maheshwar Rai who was released on bail had absconded. The High Court by its judgment found the appellant alone guilty of the offence punishable under Section 302 IPC and not under Section 396 IPC and consequently altered the conviction into one Section 302 IPC and retained the sentence of life imprisonment. The other two appellants (accused 2 and 3) were acquitted. Hence this present appeal.

7. Mr. Tapas Chandra Ray, the learned counsel appearing on behalf of the appellant contended that as the name of PW 11 is not mentioned in Ex 9, as having been present in the scene house at the time of the occurrence, no conviction can be rested on the evidence of PW 11. The further submission of the defence counsel is that the evidence of PW 8 is not creditworthy inasmuch as he is now making embellishment over and above the averments made in Ex 9 and that the High Court has erroneously relied upon the evidence of PWs 8 and 11 with regard to the identification of the appellant both in the test identification parade as well in the trial court disregarding the fact that the witnesses could not have correctly identified the appellant at the scene place as the occurrence took place during night hours. Finally it has been urged that the alternation of the conviction into one under Section 302 IPC from Section 396 IPC cannot be sustained in the absence of an appeal against acquittal under Section 302 IPC by the State.

8. As we are now concerned only with the conviction of the appellant, we will confine ourselves only with that part of the evidence incriminating the appellant with the offence in question. The fact that the deceased was shot dead in the garden by the side of the outer verandah of the scene house at 8.30 p.m. on May 6, 1983 cannot be denied, indeed there is no denial. Therefore, the only question that arises for consideration is whether it was the appellant and appellant alone who was responsible for causing the death of the deceased. It transpires from the evidence of PW 8 that while he along with his employees, PW 2 and his elder brother, i.e. the deceased were checking the account books two assailants of whom one was the appellant armed with a revolver was found standing at the entrance of the room unleashing a threat not to raise any alarm lest they would be shot. Two other assailants also joined with them. PWs 2, 8 and 11 have testified that a fluorescent lamp was burning shedding sufficient light besides an emergency light which was fitted at a height of 5-6 ft. on the wall just in front of the door. It is but natural and probable that there should have been sufficient light as PWs 2 and 8 and the deceased were checking the accounts. PW 11 has deposed that he was also having a torch in his hand.

9. As the appellant climbed on the verandah threatening the inmates of the house standing at the entrance, the witnesses should have got sufficient opportunities to identify the appellant. The deceased and PW 8 pounced upon the appellant and other assailants on seeing them. But PW 8 was assaulted by the butt of the gun, as a result of which he let loose his grip and fell down. The deceased who grappled with the appellant moved to the garden by the side of the outer verandah and it was only at this point of time PWs 2, 8 and 11 heard the sound of shooting and when they went near the place wherefrom the shooting noise emanated they found the deceased lying down bleeding profusely. PW 11 has stated that while he was taking his refreshment sitting in the inner verandah of his house, he heard some commotion from outside and came there with a torch in his hand. He found his son (PW 8) being hit and his deceased son scuffling with one person outside the verandah. Suddenly he heard the sound of firing of one shot. He flashed his torchlight and saw six more assailants going towards east. Of the witnesses, PW 2 has not identified any of the assailants in the identification parade. However, PWs 8 and 11 have correctly identified this appellant not only in the test identification parade but also before the trial court as the person who grappled with the deceased and who fired the shot in the course of the combat. It stands to reason that as the deceased was shot while he was grappling with the appellant in the garden, it was the appellant who shot him dead.

10. The entire case depends mainly on the identification of the appellant and this identification is found not only on the test identification parade, but also no the identification before the trial court. PW 4, the Judicial Magistrate who conducted the test identification parade under the orders of the Chief Judicial Magistrate, Darbhanga has stated that PWs and 11 correctly identified the appellant as the person who fired the shot. This Court in Kanta Prashad v. Delhi Administration (1958 SCR 1218 : AIR 1958 SC 350 : 1958 Cri LJ 698), has pointed out that "(t)he weight to be attached to such identification would be a matter for the courts of fact and it is not for this Court to reassess the evidence unless exceptional grounds were established necessitating such a course." in the present case, both the trial court and the appellate court have assessed the evidence in the proper perspective and attached much importance to the evidence in regard to the identification of the appellant in finding him guilty. Before this Court no exceptional ground has been established necessitating to re-assess that evidence. Under these circumstances, we without any reservation confirm the concurrent finding that the appellant is guilty of the offence of murder.

11. Now we have to consider whether the alternation of the conviction under Section 302 IPC from Section 396 IPC can be sustained or not. Before the trial court, the appellant along with others took his trial under Section 396 IPC in the alternative under Section 302 IPC. According to the

prosecution, there was no actual commission of dacoity though there was an attempt for it. The High Court considering the above facts and the evidence proving that it was the appellant who caused the death of the deceased has altered the conviction. Added to that, the High Court has mentioned in paragraph 20 of its judgment that there was a specific allegation in the charge that the appellant had murdered the deceased. In our opinion, the appellant cannot be said to have been prejudiced by the alteration of the conviction in view of the specific alternative charge. The argument advanced by the learned counsel that there was an acquittal of the appellant under Section 302 IPC has no merit. The learned defence counsel placed reliance on the observation made by this Court in Lakhan Mahto v. State of Bihar ((1966) 3 SCR 643 : AIR 1966 SC 1742 : 1966 Cri LJ 1349), in support of his contention. In our view that decision can hardly be availed of because in that case the trial court acquitted one of the appellant of the charge under Section 302 IPC (simpliciter) but convicted him and others under Section 302 IPC read with Section 149 IPC. The State did not prefer an appeal to the High Court against the acquittal under Section 302 IPC. But the High Court on appeal preferred by the convicted appellant altered the conviction from Section 302 IPC read with Section 149 IPC to a minor offence under Section 326 IPC (simpliciter) and maintained the sentence of life imprisonment. It was under those circumstances this Court held that the High Court erred in taking the view that Section 149 IPC did not constitute a substantive offence and that it was only an enabling section for imposition of vicarious liability and that the conviction on vicarious liability could, therefore, be altered by the appellate court to conviction for direct liability even though there was an acquittal by the trial court of the direct liability for the offence, and that there is a legal distinction between a charge under Section 302 IPC and a charge of constructive liability under Section 302 IPC read with Section 149 IPC, i.e. being a member of an unlawful assembly, the common object of which was to kill a person. Coming to the present case there was no acquittal of the alternative charge either expressly or impliedly. Hence the last contention advanced on behalf of the appellant has also to fail.

12. In the result, the conviction and the sentence as recorded by the High Court are confirmed and the appeal is dismissed as devoid of any merit.

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