Brathi alias Sukhdev Singh

Vs

State of Punjab

Criminal Appeal No. 332 of 1979

(Kuldip Singh, Smt. M.S. Fathima Beevi JJ)

31.10.1990

JUDGMENT

FATHIMA BEEVI J

1. Sukhdev Singh, the appellant, and his uncle Teja Singh were tried on the charge under S. 302/34, I.P.C., for the murder of one Sucha Singh. The trial court acquitted Teja Singh and convicted Sukhdev Singh for the offence under S. 302 I.P.C., and sentenced him to undergo imprisonment for life and to pay a fine of Rs. 1000/-. The State did not file any appeal against the order of acquittal. Sukhdev Singh, appealed against his conviction. The High Court altered the conviction of Sukhdev Singh to one under S. 302 read with S .34, I.P.C., and maintained the sentence. This appeal by special leave is directed against the judgment of the High Court.

2. The occurrence that resulted in the death of Sucha Singh happened on January 1, 1975 at 3.30 p. m. The prosecution alleged that Sukhdev Singh and Teja Singh in furtherance of their common intention attacked Sucha Singh with kirpans while he was returning home from his field along the street in the village accompanied by his son Gurdev Singh and married daughter Gurdev Kaur. The eyewitness account of the incident was that. Sukhdev Singh first attacked Sucha Singh with the kirpan, the blow was warded off receiving an injury in the thumb, Teja Singh then delivered a blow with kirpan on his head, Sucha Singh fell down wounded and against Sukhdev Singh and Teja Singh dealt one blow each causing injuries on the left side of the ear and below the mandible, and escaped from the scene when the witnesses made an alarm, The motive alleged was enmity since Mangal Singh, the father of Sukhdev Singh and brother of Teja Singh was murdered by Sucha Singh, who was later on acquitted of the charge. Sucha Singh died at the hospital and the first information report was lodged at 8.15 p.m., the same day. The medical evidence disclosed that the deceased had four ante-mortem injuries of which the incised wound on the head cutting the parietal bones and the brain was fatal and that he died on account of shock and haemorrhage as a result of the injuries. The fatal injury was attributed to Teja Singh and he was charged under S. 302, I.P.C., and the appellant who was alleged to have caused the minor injuries on the hand and the scalp was charged under Section 302/34, I.P.C.

3. The two accused persons denied their charges. Teja Singh further pleaded alibi and tendered evidence by examining Uggar Singh, DW-1, and Mukand Singh, DW-2. The two, eye-witnesses, Gurdev Singh (PW-8) and. Gurdev Kaur (PW-9), narrated the prosecution version implicating both Sukhdev Singh and Teja Singh. The learned Sessions Judge in the light of the defence evidence held the view that Teja Singh was falsely implicated, gave him the benefit of doubt and acquitted him of

the charge. However, believing the testimony of the two eye-witnesses, corroborated by medical evidence, the learned Judge found Sukhdev Singh guilty and convicted and sentenced him under S. 302, I.P.C.

4. The order of acquittal of Teja Singh has become final as no appeal had been filed by the State challenging the same. In the appeal filed by Sukhdev Singh against the conviction, it was contended before the' High Court that when the learned Sessions Judge had rejected the prosecution evidence against Teja Singh, the conviction of Sukhdev Singh on the same evidence was unsustainable. It was also contended that on the charge the conviction under S. 302, I.P.C., simpliciter was bad in law, and in view of the acquittal of Teja Singh who was alleged to have delivered the fatal blow, the appellant could not be convicted with the aid of S. 34 and at the most he could be found guilty for an offence under S.326, I.PC.

5. The High Court agreed that when the fatal blow was attributed to Teja Singh and Sukhdev Singh was charged only under S, 302 read with S. 34, I P C., he could not be convicted for murder, simpliciter under S. 302, I.P.C. The High Court was, however, of the view that Gurdev Singh and Gurdev Kaur, the two eye-witnesses have given the truthful account of the occurrence and Teja Singh had participated in the crime along with the appellant and they had acted in furtherance of their common intention. In assessing the credibility of the prosecution evidence, the High Court incidentally considered the case against Teja Singh and after reviewing the evidence recorded the finding that the order acquitting Teja Singh was erroneously arrived at. The High Court recorded such a finding relying on the decision of this Court in Sunder Singh v. State of Punjab, AIR 1962 SC 1211. This is what the High Court has said on re-examination of the whole evidence:-

> "We are, therefore, inclined to hold that Teja Singh had participated in the occurrence along with appellant Sukhdev Singh and he (Teja Singh) having given the fatal blow, the appellant was rightly charged for the offence under S. 302 of the Indian Penal Code, read with S. 34 of the Indian Penal Code and thus his conviction has to be recorded under the said offence. As, is clear from the prosecution case, the appellant along with Teja Singh attacked the deceased sharing common intention in a planned manner with deadly weapons like kirpans and the injuries given on his person were on the vital part. It is thus obvious that from what has been stated above that we are unable to agree with the finding recorded by the learned Trial Judge that Teja Singh was falsely implicated in the case."

On the basis of these findings, the High Court altered the conviction to one under S. 302 read with S. 34, I.P.C., and maintained the sentence.

6. In this appeal by special leave the judgment of the High Court is attacked on several grounds thus: the High Court has grievously erred in recording the conviction under S. 302, I.P.C., with the aid of S. 34, Penal Code. On the acquittal of Teja Singh, the element of sharing the common intention, disappeared and there was no scope for invoking against the appellant any constructive liability under S. 34, I. P. C. The approach of the High Court on the premise that the acquitted person also participated in the offence without giving the benefit of the principle of issue estoppel has introduced serious infirmities regarding the findings against the appellant. The High Court has misdirected itself in appreciating the evidence in the case and was not justified in substituting its own view of the entire evidence for that of the trial court even if two views were possible. The individual acts of the appellant would constitute only a minor offence and in the absence of independent evidence, the highly interested testimony of the two eyewitnesses was insufficient to

warrant a conviction even for such an offence.

7. We have heard learned counsel on both sides at length. The High Court has maintained the conviction of the appellant for murder with the aid of S. 34, I.P.C., holding that the testimony of the two eye-witnesses, Gurdev Singh (PW-8) and Gurdev Kaur (PW-9), was truthful and that Teja Singh participated in the crime. The trial court as well as the High Court had believed the eyewitnesses in their version that the appellant attacked the deceased with a kirpan. No serious infirmity in the evidence was pointed out even before the High Court nor did the learned counsel contend before us that the participation of the appellant in the incident is not proved on the evidence on record. The fact that the two eye-witnesses are the near relations of the deceased is no reason to discard their testimony which, according to the High Court, is natural and truthful. There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are closely related to the deceased, it has to be very careful in evaluating such evidence but the mechanical rejection of the evidence on the sole ground that it is interested would invariably lead to failure of justice. For cogent reasons, the High Court has rejected the defence evidence that Teja Singh was with the Sarpanch Uggar Singh from 1.00 p.m. till 5.00 p.m., and has shown how the reasoning of the trial court in dealing with the case of Teja Singh was faulty. We find that the High Court in appreciating the evidence as a whole has kept in mind the well accepted principles and while recording a contrary finding has taken care to dispel the reasons given by the Sessions Judge effectively. Therefore we hold that the findings of the High Court that both Sukhdev Singh and Teja Singh participated in the crime sharing the common intention does not suffer from any infirmity.

8. We shall now examine whether the approach made by the High Court in judging the guilt of the appellant on the premise that the acquitted person also participated in the offence has introduced any error. The powers of the appellate court in dealing with an appeal against an order of conviction are defined under S. 386(1)(b) of the Code of Criminal Procedure, 1973 corresponding to S . 423(1)(b) of the Code of 1898. In the matter of appreciation of the evidence the powers of the appellate court are as wide as that of the trial court. It has full power to review the whole evidence. It is entitled to go into the entire evidence and all relevant circumstances to arrive at its own conclusion about the guilt or innocence of the accused. In Sunder Singh's case (AIR 1962 SC 1211) (supra), this Court has held that the provisions of S. 423(1)(a) do not create a bar against the appellate court considering indirectly and incidentally a case against the person who was acquitted, if that becomes necessary when dealing with the case in the appeal presented on behalf of the other accused who are convicted. In considering the evidence as a whole, the appellate court may come to the conclusion that the evidence against the person acquitted was also good and need not have been discarded. When several persons are alleged to have committed an offence in furtherance of the common intention and all except one are acquitted, it is open to the appellate court to find out on a reappraisal of the evidence that some of the accused persons have been wrongly acquitted, although it could not interfere with such acquittal in the absence of an appeal by the State Government. The effect of such a finding-is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality.

9. The general principle of the criminal liability is that it primarily attaches to the person who actually commits an offence and it is only such person that can be held guilty and punished for the offence. Ss. 34 and. 149 of the Penal Code deal with the liability for constructive criminality. Section 149 creates a specific offence and postulates an assembly of five or more persons having a common object. Section 34 has enacted a rule of coextensive culpability when offence is committed with common intention by more than one accused. The offence of criminal conspiracy punishable

under Section 120-B.I.P.C., consists in the very agreement between two or more persons to commit a criminal offence. Before these Sections can be applied, the court must find with certainty that there were at least two persons sharing the common intention of five persons sharing the common object of two persons entering into an agreement. The principle of vicarious liability does not depend upon the necessity to convict a requisite number of persons; it depends upon proof of facts. beyond reasonable doubt which makes such a principle applicable. As observed by Krishna Iyer, J., in Harshadsingh v. State of Gujarat, AIR 1977 SC 710, "if some out of several accused are acquitted but the participating presence of plurality of assailants is proved, the conjoint culpability of the crime is inescapable." When more persons than one are prosecuted and one of them is convicted and others are acquitted, the order of acquittal cannot be set aside unless an, appeal has been duly preferred in that behalf against the said order. But there is no bar to the appellate court acting under S. 386 of the Code of Criminal Procedure to appreciate the whole evidence in a given case for the purpose of accepting or rejecting the appeal before it. The evidence examined as a whole may show that the appellant is guilty under S. 34 of the Indian Penal Code having shared a common intention with the other accused who are acquitted and the acquittal of these persons was bad. There is nothing in law to prevent the appellate court from expressing that view and recording that finding. The conviction of the appellant in such a case could be maintained on the basis of that finding. This is the correct legal approach to prevent miscarriage of justice. A wrong and erroneous 'order of acquittal though irreversible in the absence of an appeal by the State would not operate as a bar in recording constructive liability of the co-accused when concerted action with common intention stands proved. In Sunder Singh's case (AIR 1962 SC 1211) (supra), four persons were tried for offence under Ss. 302/ 34, I.P.C. The Sessions Judge gave the benefit of doubt to Rachpal Singh and acquitted him but convicted the other three of the offences charged. No appeal was preferred against the acquittal of Rachpal Singh. But the three convicted persons appealed to the High Court. The High Court was of the view that the Sessions Judge was wrong in giving the benefit of doubt to Rachpal Singh that Rachpal Singh was present at the scene of occurrence and all the four accused had the common intention alleged by the prosecution. The appellants in that case contended before the Supreme Court that the High Court had no jurisdiction or authority to embark upon an enquiry into the propriety or validity of the acquittal of Rachpal Singh and that its finding that Rachpal Singh had taken part in the offence as alleged by the prosecution had introduced serious infirmity in the judgment of the High Court. Gajendragadkar, J., as he then was, speaking for the Bench of three judges observed at pages 1215-16 as under:-

> "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 Rachpal Singh had not been accepted by the trial 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 Rachpal 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 Rachpal 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 Rachpal 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 Rachpal 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."

It was pointed out that when the High Court considered the criticism against the prosecution evidence based on the assumption that the said evidence was found to be unreliable in so far as Rachpal Singh is concerned, it was not appreciating that evidence with a view to reverse the order of acquittal passed in favour of Rachpal Singh; it was appreciating only with a view to decide whether the said evidence should be believed against the appellants before it and observed thus at page 1216:-

"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 appeals 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 sometimes records its indirect conclusion that the evidence against the acquitted persons was not weak or unsatisfactory and that acquittal may in that sense be regarded as unjustified."

10. These observations indicate that the High Court is entitled to evaluate the prosecution evidence and arrived at its own conclusion. Such assessment is for the limited purpose of determining whether the infirmity which led to the acquittal of one of the accused persons could be availed of by the other accused who had been convicted. On re-examination of the evidence the appellate court is free to reach its own conclusion which may be contrary to the one reached by the trial court while acquitting the co-accused. It can certainly come to an independent finding that evidence against the acquitted accused was satisfactory and would not have been discarded. On the basis of such a finding, the appellate court does not proceed to disturb the order of acquittal which has become final. It can certainly consider the impact of its conclusion on the case of the appellant before it. If on the evidence, the High Court can unmistakably arrive at the conclusion that the appellant and acquitted person had acted in furtherance of their common intention, the conviction of the appellant with the aid of S.34 is legal. It would be a travesty of justice if no conviction can be founded with the aid of S. 34 notwithstanding the finding that the acquitted person was in fact one of the participants in the offence. It may well be remembered that the English rule of repugnancy on the face of record for annulling the conviction of co-conspirator on the other conspirator being acquitted is not applicable in this country, since such cases are governed by statutory law which does not recognise any such rule vide I. G. Singleton v. King Emperor, AIR 1925 Cal 501.

11. The question whether conviction under S. 120-B is maintainable in view of the fact that the alleged co-conspirators have been acquitted was considered in Bimbadhar Pradhan v. State of Orissa, 1956 SCR 206 : (AIR 1956 SC 4,69). In that case, the appellant and his four companions were charged with criminal conspiracy under S. 120-B, I.P.C. All the four co-accused were acquitted, but the appellant alone was convicted. The Court found that the conviction can be supported as the approver was one of the co-conspirators. It was argued that the approver was not. named in the charge and, therefore, the appellant was entitled to acquittal. This Court held as under (at p. 474 of AIR):-

"Learned counsel for the appellant pressed upon us the consideration that

> notwithstanding the state of affairs as disclosed in the evidence, the appellant was entitled to an acquittal because in the charge as framed against him there was no reference to the approver. He contended that the rule upon which the accused was entitled to an acquittal was not a matter of practice but of principle. In the instant case we are not sure that the acquittal of the co-accused by the trial court was well founded in law or justified by the evidence in the case. The trial court has not disbelieved the evidence led on behalf of the prosecution. It has only given the benefit of the doubt to the accused whom it acquitted on grounds which may not bear scrutiny. But as the case against those acquitted persons is not before us, we need not go any further into the matter."

The Court in dealing with the contention that the other accused having been acquitted by the trial court the appellant should not have been convicted because the evidence against all of them was the same, proceeded to state thus:-

> There would have been a great deal of force in this argument, not as a question of, principle but as a matter of prudence, if we were satisfied that the acquittal of the other four accused persons was entirely correct. It is not essential that more than one person should be convicted of the offence of criminal conspiracy. It is enough if the court is in a position to find that two or more persons were " actually concerned in the criminal conspiracy. If the courts below had come to the distinct finding that the evidence led on behalf of the prosecution was unreliable, then certainly no conviction could have been based on such evidence and all the accused would have been equally entitled to acquittal. But that is not the position in this case as we read the judgments of the courts below."

Thereupon the conviction of the appellant was maintained.

12. In Kapil deo Singh v. The King, AIR 1950 FC 80, the court pointed out that the identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and even when it is possible to convict less than five persons, S. 147 still applies if upon the evidence in the case the Court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified.

13. In Dalip Singh v. State of Punjab 1954 SCR 145: (AIR 1953 SC 364), this Court has held that before S. 149 can be applied, the court must be satisfied that there were at least five persons sharing the common object. It has also been held that this does not mean that five persons must always be convicted before S. 149 can be applied. If the judge concludes that five persons were unquestionably present and shared the common object, though the identity of some of them is in doubt, the conviction of the rest would be good.

14. In Marachalil Pakku v. State of Madras, AIR 1954 SC 648, two appellants were charged and convicted along with five others for having constituted an unlawful assembly and committed murder under S. 302 read with S. 149, I.P.C. In appeal before the High Court, five accused were given the benefit of doubt and acquitted. Before this Court in appeal, it was contended that the said five accused having been acquitted and in the absence of a charge that five other unknown persons constituted an unlawful assembly, the two appellants could not be held members of the unlawful assembly which had the common object. This Court after reviewing the evidence and weighing the

judgment of the High Court held that there was no scope left for introducing into the case the theory of benefit of doubt, and the High Court was in error in acquitting accused 3 to 7, and that though the acquittal stands, that circumstance could not have affected the conviction of the appellants under S. 302 read with S. 149. Where in very firm language a finding has been given that seven persons took part in the crime, the conviction of the two appellants for murder under S. 302/ 149 was held fully justified.

15. Like S.149, S.34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by S. 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of S. 34.

16. In Sukh Ram v. State of U.P.,(1974) 2 SCR 518 : (AIR 1974 SC 323), this Court held that in view of the unambiguous evidence tendered by the prosecution in the Sessions Court, no prejudice can be said to have been caused to the appellant by reason of his conviction under S. 302 read with S. 34, I.P.C., even though the two other accused specifically named in the charge had been acquitted. The High Court was certain that there were three culprits and the appellant was one of them. It is clear that notwithstanding the charge, the acquittal of the two accused 'raised no bar to the Conviction of the appellant under S. 302 read with S. 34, I.P.C.

17. In Karan Singh v. State of Madhya Pradesh, (1965)2 SCR: (AIR 1965 SC 1037), the view held is that in spite of the acquittal of a person in one case, it is open to the court in another case to proceed on the basis, if the evidence warrants it, that the acquitted person was guilty of the offence of which he had been tried in the other case and to find in the latter case that the person tried in it was guilty of an offence under S. 34 by virtue of having committed the offence along with the acquitted person and there is nothing in principle to prevent this being done.

18. The authorities thus show that it is not essential that more than one person should be convicted of the offence and that S. 34, Indian Penal Code, can be invoked if the Court is in a position to find that two or more persons were actually concerned in the criminal offence sharing a common object. Where the evidence examined by the appellate court unmistakenly proves that the appellant was guilt under S. 34 having shared a common intention with the other accused who were acquitted and that the acquittal was bad, there is nothing to prevent the appellate court from expressing that view and giving the finding and determining the guilt of the appellant before it on the basis of that finding.

19. We have noticed the series of decisions where the view held is that when a definite number of known persons were alleged to have participated in the crime and all except the appellant were acquitted, the appellant alone cannot be convicted under Section 34, I. P. C., and he would be liable only for his individual act of assault, See Probhu Babaji Navle v. State of Bombay, AIR 1956 SC 51; Krishna Govind Patil v. State of Maharashtra, (1964) 1 SCR 678: (AIR 1963 SC 1413); Baul v. State of U.P., (1968) 2 SCR 450 (454): (AIR 1968 SC 728); Maina Singh v. State of Rajasthan, (1976) 3 SCR 651 : (AIR 1976 SC 1084); Karnail Singh v. State of Punjab, AIR 1977 SC 893 and

Piara Singh v. State of Punjab, (1980) 2 SCC 401.

20. These cases are distinguishable on the ground that in none of them the appellate court is shown to have disagreed with the trial court's conclusion on facts, and the appellate court has proceeded on the footing that the .order of acquittal recorded is correct. The doctrine of issue estoppel has also no application in the present case. The appeal before the High Court against the conviction is not a subsequent proceeding against the acquitted person.

21. We are of the opinion that the High Court was fully justified in re-assessing the evidence with a view to determining if the infirmities pointed out by the trial court while acquitting the co-accused existed on record. In doing so, the High Court was not fettered by the conclusions of the trial court. The entire evidence was before it and it was free to reach its own conclusions. It was free to examine the infirmities for the limited purpose of assessing the impact thereof on the case of the appellant. While doing so, it came to the conclusion that Teja Singh was not only present but had given the fatal blow in furtherance of the common intention shared with the appellant. It could not reverse the acquittal of the co-accused in the absence of a State appeal. But the High Court could not refuse to visit the appellant with the consequences notwithstanding the conclusions reached. It could not render the entire exercise nugatory and perpetuate the error committed by the trial court, and resultant miscarriage of justice. We, therefore, hold that the High Court has rightly convicted the appellant with the aid of S. 34, Penal Code. The judgment does not suffer from any infirmity.

22. The appeal is accordingly dismissed. The appellant, who is on bail, shall surrender to undergo the unexpired portion of the sentence.

Appeal dismissed.

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