

SUPREME COURT OF INDIA

Pawan Kumar

Vs.

State of Haryana

Crl.A.No.62 of 2003

(B. N. Agrawal and B. N. Srikrishna, JJ.)

23.07.2003

ORDER

1. Heard learned counsel for the parties.

2. The sole appellant along with accused Balwinder Singh alias Binder was convicted by the trial Court under Section 302 read with Section 34 of the Indian Penal Code and sentenced to undergo imprisonment for life. On appeal being preferred by the convicted persons, the High Court of Punjab and Haryana has confirmed their conviction and sentence.

3. The prosecution case, in short, is that on 9th July, 1994, the accused persons approached one Satish Kumar (P.W. 10), in charge of the Golden Taxi Stand, Amritsar for hiring a taxi from that place for going to Bhatinda and they boarded the taxi which was driven by one Shamsheer Singh alias Shera and they were having with them an unknown girl. On the next day, i.e., on 10th July, 1994, around 8.00/8.30 a.m., when Mahavir Singh (P. W. 6), owner of Saharan Hotel situated at Dabwali, came to his hotel, the waiter-Vijay Kumar is said to have told him that on that day at about 1.15 a.m., three customers came to the hotel in a Maruti car and they were allotted room No.5 and at

about 4.30 a.m., two of them went away saying to Vijay that their uncle, i.e., the driver was sleeping inside the room and in case he required anything, the hotel staff should supply him the same and they will be returning after some time but never returned. At about 11.00 or 11.30 a.m., due to failure of power supply, Mahavir Singh (P.W. 6) asked Vijay Kumar to get the door of room No. 5 opened as it was hot. Vijay Kumar knocked at the door of room No. 5 but nobody responded from inside. Then he again knocked but still there was no answer whereafter Vijay Kumar saw through a hole of the cooler that one person was lying on the double bed. He brought a duplicate key, original of which was taken away by two of the occupants referred to above, opened the door and found the person, lying on the bed in injured condition, dead. On the same day, i.e., on 10th July, 1994 at about 2.55 p.m., Mahavir Singh (P.W. 6) lodged the first information report against unknown persons.

4. Police after registering the case took up investigation during the course of which certain incriminating materials were recovered from the place of occurrence on the basis of which two accused persons including the appellant were made accused in the case. Upon completion of investigation, the police submitted charge sheet against both the accused persons on receipt whereof the learned Magistrate took cognizance and committed the accused persons to the Court of Session to face trial. During trial, the prosecution examined several witnesses and got exhibited various documents to prove the circumstances against the accused persons as it was not a case of direct evidence and upon conclusion of trial, both the accused persons were convicted by the trial Court and their appeal having been dismissed by the High Court as stated above, the present appeal by special leave by one of them.

5. The first circumstance alleged against the accused persons is that they hired a Taxi driven by Shamsher Singh, at the Taxi Stand and boarded the same. The evidence of P.W. 10, whose testimony has been found to be credible by the courts below, has proved this circumstance and no infirmity could be pointed out therein. But the same alone does not take us anywhere to show complicity of the accused persons with the crime.

6. The other circumstance is that after boarding the taxi, the accused persons had gone to the hotel in question, stayed there during night in a room along with driver of the vehicle, in the early morning both the accused left the hotel asking the waiter Vijay Kumar to take care of their uncle i.e., the driver who was in the room and they would be returning soon, but never returned and thereafter on opening of the room, the driver was found dead. According to the statement of Mahavir Singh (P.W. 6), owner of the hotel, the waiter-Vijay Kumar told him that "the three persons, namely, two accused persons and the deceased went to the hotel, stayed there during night and the accused persons left the hotel leaving the driver in the room." Vijay Kumar, who was the solitary witness to prove this circumstance, has not been examined for reasons best known to the prosecution as even according to the prosecution case and evidence there was no other witness on this point. Owner of the hotel has simply stated that he learnt all these facts from Vijay Kumar. The presence of accused persons in the hotel on the fateful night could have been established by examination of Vijay Kumar, who could have been the only competent witness to prove the same, but he has been withheld for which no explanation is forthcoming. So far as evidence of the owner

of the hotel, Mahavir Singh (P.W. 6), is concerned, that is a hearsay evidence as he learnt everything from the waiter and had otherwise no personal knowledge of the same. Evidence of this witness could have been used to corroborate substantive evidence. In the absence of examination of Vijay Kumar in Court, to prove this circumstance, there is no substantive evidence which could have been corroborated by the evidence of P.W. 6. Thus evidence of P.W. 6 cannot be of any avail to the prosecution to prove this circumstance.

7. Now, the question is as to whether there is any documentary evidence to prove this circumstance. The accused persons are said to have made an entry in the register, duly maintained by the hotel, in their own pen and signed the same showing their stay on the fateful night in the hotel in question. So far as this entry is concerned, the same has been exhibited on the basis of statement of P.W. 6, though, he has nowhere stated that he knew either the writings or signatures of any of the accused persons. Indisputably, the accused never made the entry in presence of P.W. 6, but the same is claimed to have been made in presence of Vijay Kumar alone. Thus entry in the register having not been legally proved is not admissible in evidence. There is no other evidence in relation to stay of the accused persons in the hotel on the night of occurrence and there being no substantive evidence in relation to this very circumstance, we are of the view that the same cannot be proved by the statement of P.W. 6, owner of the hotel, which could have been used only by way of corroborative evidence and thus the prosecution has failed to prove this circumstance which was the most important one to hold the accused persons guilty.

8. The next circumstance which has been alleged against the accused is letter written by the appellant to his mother, reliance whereupon has been placed in the impugned judgments. So far as this letter is concerned, it has been admitted into evidence to show that the appellant had confessed his guilt. We have been taken through the letter said to have been written by the appellant, but we do not find any admission whatsoever, muchless confession, in relation to the complicity of the appellant with the crime. That apart, P.W. 10 who has proved this letter, was suggested that the same was forged and fabricated in which eventuality it was incumbent upon the prosecution to prove the handwriting and signature of the appellant thereon by sending it to the handwriting expert, but no such step was taken for reasons best known to the prosecution. Thus, we are of the view that this circumstance also could not be proved.

9. The other circumstance, relied upon, is the recovery of gold chain and ring belonging to the deceased from the accused persons upon the disclosure statements made by them before the police. It may be stated that these are articles of common use and can be found out in any house. That apart, no family member of the deceased has identified these articles or claimed that the same belonged to the deceased and/or he was wearing the same at the time of the occurrence. The only person who has identified the same is Baldev Raj (P.W. 11) owner of a shop but it is not possible to place reliance upon his evidence, firstly because identification by him cannot be of any avail to the prosecution as he had no special reason to know about the identity of these articles more so when he admits in evidence that his house is at a distance of 5/6 kilometres from that of the deceased and nowhere it has been stated that he ever met the deceased and secondly, because no test identification parade was held for its identification.

10. In this view of the matter, we are of the opinion that the prosecution has failed to prove circumstances alleged against the accused persons, excepting that they hired a taxi, which alone cannot form the basis of conviction, and the High Court has committed an error in upholding conviction of both the accused persons.

11. It may be stated that accused Balwinder Singh alias Binder whose conviction was also upheld by the High Court did not prefer any appeal to this Court as such the same attained finality. We find that cases of both the accused stand on the same footing. Question arises whether powers conferred upon this Court under Article 136 of the Constitution can be exercised suo motu to meet the ends of justice in favour of the non-appealing accused as he is entitled to be granted relief in this appeal. This question is no longer res integra as the same has been answered by this Court in catena of decisions. A Constitution Bench in the case of Durga Shankar Mehta v. Raghuraj Singh and others, AIR 1954 SC 520 laid down the scope of powers of this Court under Article 136 of the Constitution wherein Bijan Kumar Mukherjea, J. speaking for the Court, with whom Mahajan, C.J., Bose, Bhagwati and Venkatarama Ayyar, JJ. concurred, observed that "The powers given by Article 136 of the Constitution, however, are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land. The Article itself is worded in the widest terms possible..... The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this Article in any way.... This overriding power, which has been vested in the Supreme Court under Article 136 of the Constitution, is in a sense wider than the prerogative right of entertaining an appeal exercised by the Judicial Committee of the Privy Council in England."

12. The course which we propose to adopt is supported by a three Judge Bench AIR 1982 SC 849 : 1982 Cri LJ 795 presided over by the then Chief Justice of India Shri Y. V. Chandrachud in the case of Harbans Singh v. State of Uttar Pradesh and others, (1982) 2 SCC 101 wherein death penalty of one of the accused was confirmed by the High Court as well as this Court by dismissal of the special leave petition as also the review petition and his petition for clemency was also rejected by the President. When other accused whose sentence of death was also confirmed by the High Court moved this Court, his sentence of death was commuted to life imprisonment. Question had arisen before this Court as to whether in these circumstances the same benefit could be extended to the accused whose death sentence was confirmed by this Court by dismissal of the special leave petition as also review petition and this Court answered the same in the affirmative but it was of the view that in the interest of comity between the powers of this Court and the powers of President of India, it will be more in the fitness of things if the Court were to recommend that the President may be so good as to exercise his power under Article 72 of the Constitution to commute the death sentence imposed upon the accused into life imprisonment as he had already considered the mercy petition of that particular accused once and rejected the same. This Court, accordingly, made the recommendations. But, while doing so, in relation to powers of this Court it was observed thus in paragraphs 19 and 20 of the Judgment :

"19. In the circumstances hereinabove stated, I am of the opinion that it will be manifestly unjust to allow the death sentence imposed on the petitioner to be executed. The question that, however,

troubles me is whether this Court retains any power and jurisdiction to entertain and pass any appropriate orders on the question of sentence imposed on the petitioner in view of the fact that not only his special leave petition and review petition have been dismissed by this Court but also the further fact that his petition for clemency has also been rejected by the President.

20. Very wide powers have been conferred on this Court for due and proper administration of justice. Apart from the jurisdiction and powers conferred on this Court under Articles 32 and 136 of the Constitution, I am of the opinion that this Court retains and must retain, an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done. This power must necessarily be sparingly used only in exceptional circumstances for furthering the ends of justice. Having regard to the facts and circumstances of this case, I am of the opinion that this is a fit case where this Court should entertain the present petition of Harbans Singh and this Court should interfere."

13. In the case of Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra, JT 2002 (2) SC 158, a special leave petition filed by an accused, challenging his conviction upheld by the High Court, was dismissed by this Court and prayer for review refused, but when appeal was preferred by another accused, the Court altered his conviction from Section 302 of the Penal Code to Section 304 Part I of the Penal Code. The question had arisen whether the same benefit could be extended to the accused whose special leave petition as well as review petition had already been dismissed. Speaking for the Court, Thomas, J. while observing that "Article 21 of the Constitution would not permit us to deny the same benefit to the second accused, notwithstanding the fact that the SLP and the review application filed by him have been dismissed by this Court" extended the same benefit to the other accused.

14. Likewise in the case of Anil Rai v. State of Bihar (2001) 7 SCC 318, while considering appeal of another accused, having altered his conviction and sentence the Court extended same benefit to the non-appealing accused whose case was AIR 2001 SC 3178 : 2001 AIR SCW 2833 : 2001 Cri LJ 3969 : 2001 AIR - Jhar HCR 367 identical in spite of the fact that his application for grant of special leave to appeal was dismissed, though, not on merits but on account of his failure to produce the proof of surrender.

15. In the case of Raja Ram and others v. State of M. P. (1994) 2 SCC 568, while altering conviction of an accused in appeal preferred by him, this Court extended the same benefit to non appealing accused whose conviction was upheld by the High Court and the same attained finality no appeal having been preferred against the same.

16. In the instant appeal, the case of non-appealing accused Balwinder Singh, who never moved this Court, stands on a much better footing than the cases of accused persons in the decisions referred to above whose applications for grant of special leave to appeal had been dismissed by this Court. In

the case on hand, we have come to the conclusion that prosecution failed to establish its case beyond reasonable doubt against both the accused persons which means that conviction of none of the accused was possible. This Court has repeatedly observed that while hearing appeal of other accused, in case Court comes to the conclusion that no conviction of any accused is possible meaning thereby non-appealing accused as well whose conviction had attained finality, no appeal having been preferred against the High Court judgment, the benefit of that decision must be extended to non-appealing accused in spite of the fact that he has not challenged judgment of the High Court upholding his conviction as this Court has set up a judicious precedent for the purpose of averting miscarriage of justice in similar situations. Reference in this connection may be made to the cases of Chellappan Mohandas and others v. State of Kerala, AIR 1995 SC 90, Dandu Lakshmi Reddy v. State of A. P. (1999) 7 SCC 69, Bijoy Singh and another v. State of Bihar, (2002) 9 SCC 147, Gurucharan Kumar and another v. State of Rajasthan, JT 2003 (1) SC 60 and Suresh Chaudhary v. State of Bihar (2003) 4 SCC 128 wherein while hearing appeal of another accused against the judgment of High Court confirming the conviction, this Court set aside the same as it was found that the prosecution failed to prove its case against all the accused persons, including non-appealing one, and directed that the same benefit shall be extended to the non-appealing accused also though he did not prefer any appeal before this Court against his conviction.

1994 AIR SCW 4107, AIR 1999 SC 3255 : 1999 AIR SCW 3235 : 1999 Cri LJ 4287, AIR 2002 SC 1949 : 2002 AIR SCW 1873 : 2002 Cri LJ 2623, AIR 2003 SC 992 : 2003 AIR SCW 490 : 2003 Cri LJ 1234, AIR 2003 SC 1981 : 2003 AIR SCW 1483 : 2003 Cri LJ 1717 ; 2003 AIR - Jhar HCR 555

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17. Apart from the salutary powers exercisable by this Court under Article 142 of the Constitution for doing complete justice to the parties, the powers under Article 136 of the Constitution can be exercised by it in favour of a party even suo motu when the Court is satisfied that compelling grounds for its exercise exist but it should be used very sparingly with caution and circumspection inasmuch as only in rarest of rare cases. One of such grounds may be, as it exists like the present case, where this Court while considering appeal of one of the accused comes to the conclusion that conviction of appealing as well as non-appealing accused both was unwarranted. Upon the aforesaid conclusion arrived at by the Apex Court of the land, further detention of non-appealing accused, by virtue of judgment rendered by the High Court upholding his conviction, being without any authority of law, infringes upon right to personal liberty guaranteed to the citizen as enshrined under Article 21 of the Constitution. In our view, in cases, akin to the present one, where there is either a flagrant violation of mandatory provision of any statute or any provision of the Constitution, it is not that this Court has a discretion to exercise its suo motu power but a duty is enjoined upon it to exercise the same by setting right the illegality in the judgment of the High Court as it is well settled that illegality should not be allowed to be perpetuated and failure by this Court to interfere with the same would amount to allowing the illegality to be perpetuated. In view of the foregoing discussion, we are of the opinion that accused Balwinder Singh alias Binder is also entitled to be extended the same benefit which we are granting in favour of the appellant.

18. Accordingly, the appeal is allowed and the conviction and sentence of the appellant Pawan Kumar and accused Balwinder Singh alias Binder are set aside and they are acquitted of the charge. The appellant who is in custody is directed to be released forthwith, if not required in any other case. Accused Balwinder Singh alias Binder, if in custody, is also directed to be released forthwith,

if not required in any other case.