REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2180 OF 2009

HARI SHANKERS ...APPELLANT

:VERSUS:

STATE OF UTTAR PRADESH ...RESPONDENT

JUDGMENT

Pinaki Chandra Ghose, J.

1. This criminal appeal arises from the final order and judgment dated 20.07.2007 of the Allahabad High Court in Criminal Appeal No.2511 of 1985. By the impugned judgment the High Court while allowing the appeal qua three accused persons and acquitting them, confirmed the conviction of the present appellant. The Additional Sessions Judge, after trial, had convicted the four accused persons, namely, Hari Shanker, Vijay Shanker, Man Mohan and Ram Bharosey for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 ('IPC' for short) and sentenced them to rigorous imprisonment for life.

FACTS

2. The case of the prosecution as per the complaint is that on 28.09.1983 at about 6:30 am, Shiv Shanker (the deceased) along with Uma Shanker (PW2) and Ram Asrey had gone to the pond near Village Bhijauli, to attend nature's call. When they were returning home after easing themselves, four accused persons, namely Hari Shanker, Vijay Shanker, Man Mohan and Ram Bharosey confronted them and threatened to kill Shiv Shanker. Hari Shanker was carrying a licensed pistol while the other three were carrying country-made pistols. Hari Shanker, who is the appellant in the present case, fired first shot from his pistol which hit Shiv Shanker on his right hand's wrist. Shiv Shanker tried to run away but Ram Bharosey caught hold of him by his waist. Vijay Shanker asked Ram Bharosey to release him and as soon as Ram Bharosey released the deceased, Vijay Shanker shot at the deceased and he fell down. Thereafter, the Ram Bharosey and Man Mohan also fired at the deceased. On hearing the sound of fire shots the complainant Amar Nath Mishra, father of the deceased, Girija Shanker, brother of the deceased and one Ram Ratan Yadav rushed to the place of occurrence. They saw the accused persons

running away from the place of occurrence and shouting "we have taken the revenge". The complainant noticed that Shiv Shanker had died due to the gun shot injuries. Thereafter, Uma Shankar and Ram Ashrey gave details of the incident to the Complainant, father of the deceased, who thereafter went to the police station and lodged the report.

3. The motive as alleged in the present case is that about one year prior to the incident, there was a dacoity at the house of the Vijay Shanker in which Kripa Shanker, brother of Vijay Shanker was killed and Shiv Shanker, Amar Nath Mishra and three other persons were arrayed as accused persons in that incident and trial was pending against them. It is alleged that the appellant Hari Shanker along with other accused persons, committed murder of Shiv Shanker to take revenge of the earlier incident of dacoity and murder.

EVIDENCE

4. During the trial, the prosecution produced Amar Nath Mishra (PW1), Uma Shanker (PW2), Dr. D.N. Giri (PW3 - who proved the post mortem report), Head Constable Vidya Sagar Mishra (PW4), S.I. Surya

Kunwar Singh (PW5 - first investigating officer) and S.I. Rangnath Shukla (PW6 - second investigating officer). However, the defence did not produce any witness.

5. PW1, who is the father of the deceased, agreed that he did not witness the incident but saw the accused persons running away with the weapons while the deceased lay on the ground with wounds and injuries. It has come out on record that he had reached the police station for lodging FIR at around 8:30 am on the day of the incident, but the FIR was registered at 11:45 am. To this, PW1 has explained that he had gone to the police station with a written FIR but the police made him wait for 3 hours before registering the FIR. Also, there is a GD Entry No. 17 in the General Diary of the concerned Police Station at 8:55 am according to which the complainant along with the Village Pradhan and other villagers had come to the police station and informed that at around 6:00-6:30 am, his son Shiv Shanker had been murdered by Hari Shanker and Ram Bharosey. This GD Entry No. 17 does not name the other two accused persons. PW2, who was an eye witness, has deposed that he and Ram Asrey were walking behind the deceased going back home from the pond after easing

themselves in the morning. It is at that time the four accused persons came, of whom present appellant Hari Shanker was armed with a licensed pistol while the other three carried country-made pistols. He further deposed that appellant fired shot from his pistol at the deceased which hit at his right hand wrist and deceased tried to run away. Ram Bharosey caught hold of him to stop him from running. On Vijay Shanker's insistence, Ram Bharosey released the accused at which Vijay Shanker shot the deceased at the abdomen from very close range. PW2 further deposed that he did not see whether the shots fired by other two accused hit the deceased or not. He further explained in his deposition that he was scared on seeing the accused carrying weapons and, therefore, did not come for help of the deceased. The statement of PW2 was recorded by the police after 23 days of the incident. However, this delay is explained by the prosecution by giving reason that soon after the incident, PW2 had gone out of station and was not available to give the statement.

6. PW3 being the doctor who conducted the autopsy, proved the post-mortem report wherein two gunshot injuries were found on the body of the deceased; one on the right hand wrist and other on the thoracic

abdominal cavity. PW4 is a constable who has stated that the complainant Amar Nath Mishra had come to the police station at 8:35 am soon after the incident and had told that Hari Shanker and Ram Bharosey killed his son. But allegedly, the complainant refused to lodge a complaint at that time because his nephew was taking an advice from an advocate and only thereafter, he would lodge a complaint with the police. This statement of the complainant was sought to be proved by the GD Entry No.17 dated 28-09-1983 of the police station.

JUDGMENT OF SESSIONS JUDGE

7. The learned Sessions Judge after appreciating the evidence found that the motive was not properly explained by the prosecution since the trial of an earlier incident of dacoity and murder of Kripa Shanker, in which the deceased and the present complainant were accused, was pending. So it was not probable that pending the trial, the accused would take the revenge. However, the learned Session Judge held that lack of motive is of no consequence in this case as there is direct evidence of PW2. The learned Sessions Judge found that merely because the relations between the accused and PW2 were inimical, the testimony of PW2 cannot

be discarded. Further, the learned Sessions Judge accepted the explanation for delay in recording the statement of PW2 by the Police that PW2 was out of station and thus, not available to give the statement. He also found that the GD entry No.17 of 28-09-1983 was not proved by the author himself and thus was not considered as 'good evidence'. Thus, the learned Sessions Judge accepted the complainant's version that he had reached the police station at around 8.30 am but was kept waiting by the police there for three hours before the FIR was registered. On these findings, the learned Sessions Judge found all the four accused guilty of the offence under Section 302 read with Section 34 of IPC.

IMPUGNED JUDGMENT (HIGH COURT)

8. The High Court analysed the evidence and relied on the GD entry No. 17 of 28-09-1983 wherein the complainant had named only appellant Hari Shanker and Ram Bharosey. This statement further supported by the fact that only two gunshot wounds were found on the body of the deceased, shows that there were two persons only. However, the High

Court noted that the second gunshot wound as per PW2 was struck by Vijay Shanker and not by Ram Bharosey. Relying on these circumstances, the High Court acquitted Vijay Shanker, Man Mohan and Ram Bharosey, giving them the benefit of doubt. But at the same time it found that the evidence against the present appellant Hari Shanker was clinching as the gunshot fired by him hit the wrist of the deceased, as has been categorically stated by PW2 and also corroborated by medical evidence. Thus, the High Court maintained the conviction and sentence of the present appellant under Section 302 read with Section 34 of IPC.

9. This appeal has been preferred by Hari Shanker against the impugned judgment of the High Court upholding his conviction. The State has not filed any appeal against the acquittal of the other three accused. Therefore, we will limit ourselves to the conviction of the appellant only.

SUBMISSIONS

10. We have heard the learned counsel appearing for both the parties. The appellant has raised following grounds in the appeal:

(i) The High Court found contradiction in the FIR and the GD Entry No.17 and disbelieved material evidence of the prosecution, yet it upheld conviction of the appellant.

(ii) The statement of PW2 cannot be relied on as his testimony was recorded 23 days after the incident. The prosecution has failed to give proper explanation for this delay as no proof of PW2 being out of station or date of his leaving the village and date of returning have been brought on record. Including PW2 as a witness, clearly seems to be an afterthought as he would have supported the case of prosecution due to enmity against the appellant.

(iii) No independent witness was brought forward by the prosecution. Even though Ram Asrey is allegedly another eye witness, he is not examined. Similarly Girija Shanker and Ram Ratan Yadav, who came running along with the complainant Amar Nath, were not examined although they were material witnesses in the present case. Moreover, the incident allegedly occurred near Harijan Basti from where other independent

witnesses could have been produced.

(iv) There has been no recovery of the weapons which have been alleged to have been used by the accused.

(v) That when all other co-accused have been acquitted, the conviction of the appellant under Section 302 read with Section 34 of IPC, is unsustainable as there seems to be nobody to share the common intention with the appellant. Further, even as per the case of the prosecution, the alleged gunshot fired by the appellant hit only the right hand wrist of the deceased and he could not have died due to that injury.

11. The appellant also relied on the following judicial precedents:

(a) ***Krishna Govind Patil v. State of Maharashtra****,* 1964 (1) SCR 678 - In this case out of four accused persons convicted under Section 302 read with Section 34, three were acquitted by the High Court giving them benefit of doubt while the conviction of one acccused was maintained. This Court found it to be a mutually destructive finding and held that the appellant could not have been convicted with the aid of Section 34 without

anybody else to share intention with.

(b) ***Baul and Anr. v. State of Uttar Pradesh***, 1968 (2) SCR 450 - In this case three accused persons were convicted under Section 302 read with Section 34 by the Trial Court. On appeal, the High Court acquitted one person, altered the conviction of other to Section 325 and Section 109 and for third accused, his conviction was altered to Section 302 simplicitor. This Court found that where the common intention has not been proved, each injury must be proved and attributed to the particular accused. On this reasoning the Court found that the injury of appellant accused who was convicted by High Court for murder simplicitor could not have caused the death of the deceased but only a grievous hurt. Thus, the Court altered the conviction from Section 302 to Section 325.

(c) ***Maina Singh v. State of Rajasthan,*** 1976 (2) SCC 827 - In this case as well this Court found that when all other co-accused had been acquitted, the conviction of appellant could not be maintained under Section 34. His role has to be ascertained individually in such a case and his guilt would be accordingly determined.

(d) ***Subran alias Subramanian and Ors. v. State of Kerala,*** 1993 (3) SCC 32 - In this case question raised was whether the accused when not charged for a substantive offence, can he be convicted under the same? It was not a case where the appellant was convicted under Section 34 alone. Also the case was one of unlawful assembly in this case. Thus, the controversy in this case is not same as the one at hand.

(d) ***Noor alias Nooruddin v. State of Karnataka,*** 2007 (12) SCC 84 - In this case as well, the Supreme Court found that where co accused persons are acquitted, conviction under Section 34 is not sustainable. However, if by evidence the individual role of the appellant is proved, he could be convicted for a substantive offence.

12. The learned counsel for the State has submitted following two judgments for our consideration:

(a) ***Harshadsingh Pehelvansingh Thakore v. State of Gujarat,*** 1976 (4) SCC 640 - This Court held that in a case where a brutal and fatal assault is

made by multiple persons on the deceased with many injuries, it is not permissible to dissect the serious injuries with the non serious ones. In this case as well, the co-accused were acquitted by Sessions Court or the High Court. This Court rejected the argument that Section 34 cannot be invoked to convict a single person. While doing so this Court noted:

> "Counsel also argued that since three out of four accused have secured acquittal the invocation of Section 34 is impermissible. The flaw in this submission is obvious. The Courts have given the benefit of the doubt of identity but have not held that there was only one assailant in the criminal attack. The proposition is plain that even if some out of several accused are acquitted but the participating presence of a plurality of assailants is proved, the conjoint culpability for the crime is inescapable."

However, the difference between the cited case and the present case is that the role of the appellant accused is determined in the present case while it was a question of fact unanswered in Harshadsingh Thakore's case.

(b) ***Brathi alias Sukhdev Singh v. State of Punjab,*** (1991) 1 SCC 519 - In this case, the Court found that the principle of vicarious liability does not depend on the necessity to convict requisite number of accesed persons; a

wrong and erroneous acquittal of co-accused, even though irreversible if no appeal is preferred, will not operate as a bar in recording constructive liability of the co-accused when the concerted action stands proved. However, the Court was prompt to distinguish other judicial precedent where conviction of a lone person under Section 34 is held unsustainable as in those cases, there was no finding of an erroneous acquittal of co-accused persons.

REASONING AND CONCLUSION

13. In the present case, there is concurrent findings of conviction of the appellant by the Sessions Court and the High Court on the basis of the statement of eye witness (PW2) and its corroboration by the medical evidence. In view of the submissions made by the learned counsels for both the parties, we find that since the acquittal of all co-accused has become final, the conviction of the appellant under Section 34 becomes unsustainable. This is the established law as has been elucidated in various judicial precedents discussed above. The two cases cited by the counsel for the State have been distinguished above already. However, in view of the authorities cited, we have to determine the individual role of

the present appellant and accordingly find out if he is guilty of any offence. In doing so, we find there is sufficient ocular evidence to the fact that the present appellant had fired the first shot which landed on the wrist of the deceased. This fact is further corroborated by the medical evidence as per which a gunshot injury is found at the right hand wrist. The submission of the learned counsel for the appellant that the evidence of PW2 is not acceptable as Section 161 Cr.P.C. statement was recorded very late and is not worthy enough. PW2 has given a reason that he was out of station for days after the incident. There has neither been any effective cross examination of PW2 by the defence on this point. Further, the contradiction between FIR and the GD entry was not in relation to the role of the appellant and thus, he may not get any benefit out of it. Also, although the weapon attributed to the appellant by which he made the shot has not been recovered; this should not be fatal to the case of the prosecution. The only contention of the appellant left to be addressed is that there was no independent witness brought forth by the prosecution. We find this alone cannot be a ground for acquittal in view of the evidence available.

14. Thus, the role attributed to the appellant becomes proved. He made a gunshot which caused an injury on the right hand wrist of the deceased. Without doubt, this injury could not have caused the death of the deceased, Therefore, we are of the opinion that the High Court was misplaced in maintaining the conviction of the present appellant under Section 302 of IPC. We therefore, alter the conviction of the appellant to one under Section 326 of the Indian Penal Code, 1860. We accordingly sentence him to 10 years rigorous imprisonment under Section 326 of the Indian Penal Code. The impugned judgments passed by the High Court as also by the Sessions Court are accordingly modified qua the appellant herein and this appeal is allowed to the above extent.

.....J
(Pinaki Chandra Ghose)

.....J
(R.K. Agrawal)

New Delhi;
April 28, 2015.