MAINA SINGH

v.

STATE OF RAJASTHAN

March 17, 1976

[R. S. SARKARIA AND P. N. SHINGHAL, JJ.]

Penal Code—Murder—Co-accused acquitted—Appellant alone convicted—s. 149 or s. 34—If applicable.

The appellant and four others were charged with offences under ss. 302/149 I.P.C., the appellant with having shot at the deceased and the other accused with giving blows to the deceased with a sharp-edged weapon. The trial court acquitted the four accused but convicted the appellant under s. 302 read with s. 34, I.P.C. The High Court dismissed the appeal of the State against acquittal as also the appellant's appeal against conviction.

In appeal to this Court, it was contended for the appellant that it was not permissible to take the view that a criminal act was done by the appellant in furtherance of the common intention of the other accused when those accused who had been named had all been acquitted and that all that was permissible for the High Court was to convict the appellant of an offence which he might have committed in his individual capacity.

Allowing the appeal in part,

HELD : It was not permissible for the High Court to invoke s. 149 or s. 34. I.P.C. [659D—E]

(1) In a given case even if the charge disclosed only the named persons as co-accused and the prosecution witnesses confined their testimony to them, it would be permissible to conclude that others, named or unnamed, acted conjointly with one of the charged accused if there was other evidence to lead to that conclusion, but not otherwise. [657D]

The charge in the present case related to the commission of the offence of unlawful assembly by the appellant along with four named co-accused, and with no other person. The trial in fact went on that basis throughout. There was also no direct or circumstantial evidence to show that the offence was committed by the appellant along with any other unnamed person. So when the other four co-accused had been given the benefit of doubt and acquitted, it would not be permissible to take the view that there must have been some other person along with the appellant in causing injuries to the deceased. The appellant would accordingly be responsible for the offence, if any, which could be shown to have been committed by him without regard to the participation of others. [659C—E]

Dharam Pal v. *The State of U.P.*, A.I.R. 1975 S.C. 1917 explained and followed.

The King v. *Plummer*, [1902] 2 K.B. 339; *Topandas* v. *The State of Bombay*, [1955] 2 S.C.R. 881; *Mohan Singh* v. *State of Punjab*, [1962] Supp. 3 S.C.R. 848; *Krishna Govind Patil* v. *State of Maharashtra*, [1964] 1 S.C.R. 678; *Ram Bilas Singh* v. *State of Bihar*, [1964] 1 S.C.R. 775 and *Yeswant* v. *State of Maharashtra*, [1973] 1 S.C.R. 291 referred to.

(2) The appellant was guilty of voluntarily causing grievous hurt to the deceased by means of an instrument for shooting and was, therefore, guilty of an offence under s. 326 I.P.C. From the medical evidence, it is not possible to say that the death of the deceased was caused by gun shot or by blunt weapon injuries. It however proved that the appellant inflicted gun shot injuries on the deceased, one of the injuries being grievous. [659H]

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 242 of 1971.

Appeal by Special Leave from the Judgment and Order dated 21-4-1971 of the Rajasthan High Court at Jodhpur in D. B. Criminal Appeal No. 343 of 1969.

Harbans Singh for the Appellant.

B *S. M. Jain* for Respondent.

The Judgment of the Court was delivered by

SHINGHAL, J.—This appeal of Maina Singh arises out of the judgment of the Rajasthan High Court dated April 21, 1971 upholding the trial court's judgment convicting him of an offence under s. 302 C read with s. 34 I.P.C. for causing the death of Amar Singh and of an offence under s. 326 I.P.C. for causing grievous injuries to Amar Singh's son Ajeet Singh (P.W. 2), and sentencing him to imprisonment for life for the offence of murder and to rigorous imprisonment for three years and a fine of Rs. 100/- for the other offence.

The deceased Amar Singh and accused Maina Singh and his three D sons Hardeep Singh, Jeet Singh and Puran Singh used to live in 'chak' No. 77 GB, in Ganganagar district of Rajasthan while Narain Singh used to live in another 'chak'. It was alleged that the relations between Amar Singh and Maina Singh were strained, as Maina Singh suspected that Amar Singh was giving information about his smuggling activities. Amar Singh was having some construction work done in his house and had engaged Isar Ram (P.W. 3) as a mason. On E June 29, 1967, at about sun set, the deceased Amar Singh, his son Ajeet Singh (P.W. 2) and Isar Ram (P.W. 3) went to the 'diggi' in 'murabba' 35 for bath. Ajeet Singh took his bath, and was changing his clothes and Isar Ram was nearby. Amar Singh was cleaning his 'lota' after attending the call of nature. It is alleged that at that time Maina Singh and his three sons Hardeep Singh, Jeet Singh and Puran Singh came to the 'diggi' along with Narain Singh. Maina Singh was F armed with a .12 bore gun, Puran Singh with a 'takua' and the other three with 'gandasis'. Maina Singh fired at Amar Singh, but could not hit him. The gun shots however hit Ajeet Singh (P.W. 2) on his legs and he jumped into a dry water course which was nearby to take cover. Maina Singh fired again, but without success. Amar Singh ran towards the sugarcane field crying for help but was chased by the accused. Ajeet Singh thereupon ran towards 'chak' No. 78 GB and G ultimately went and lodged a report at Police Station Anoopgarh at 10 p.m. after covering a distance of about six miles. The five accused however followed Amar Singh. Maina Singh fired his gun at Amar Singh and he fell down. The other accused went near him and gave 'gandasi' blows, and Maina Singh gave a blow or two with the butt end of his gun which broke and the broken pieces fell down. Amar Singh succumbed to his injuries on the spot, and the accused H ran away.

On the report of Ajeet Singh about the incident which took place by the time he left for the police station, the police registered a case

for an offence under s. 307 read with s. 149 I.P.C. and started investigation. The body of Amar Singh was sent for post-mortem examination. The report Ex. P. 9 of Dr. Shanker Lal (P.W. 5) is on the record. The injuries of Ajeet Singh (P.W. 2) were also examined by Dr. Shanker Lal and his report in that connection is Ex. P.10. It was found that there were several gun shot injuries, incised wounds and lacerated wounds on the body of the deceased, and there were as many as 12 gun shot wounds on the person of Ajeet Singh (P.W. 2). All the five accused were found absconding and could be taken into custody after proceedings were started against them under ss. 87 and 88 Cr. P. C. Maina Singh held a licence for gun Ex. 23 and led to its recovery during the course of the investigation vide memorandum Ex. P.43. At that time, its butt was found to be missing. Its broken pieces had however been recovered by the investigating officer earlier, along with the empty cartridges.

The prosecution examined Ajeet Singh (P.W. 2), Isar Ram (P.W. 3) and Smt. Jangir Kaur (P.W. 7) the wife of the deceased as eye witnesses of the incident. The accused denied the allegation of the prosecution altogether, but Maina Singh admitted that the gun belonged to him and he held a licence for it. The Sessions Judge disbelieved the evidence of Smt. Jangir Kaur (P.W. 7) mainly for the reason that her name had not been mentioned in the first information report. He took the view that the statements of Ajeet Singh (P.W. 2) and Isar Ram (P.W. 3) were inconsistent regarding the part played by Hardeep Singh, Jeet Singh, Narain Singh and Puran Singh accused, and although he held that one or more of the accused persons, besides Maina Singh, might be responsible for causing injuries to the deceased, along with Maina Singh, he held further that it could not be ascertained which one of the accused was with him. He also took the view that "some one else might have been with him" and he therefore gave the benefit of doubt to accused Hardeep Singh, Jeet Singh, Puran Singh and Narain Singh and acquitted them. As the statements of Ajeet Singh (P.W. 2) and Isar Ram (P.W. 3) were found to be consistent against appellant Maina Singh, and as there was circumstantial evidence in the shape of the recovery of empty cartridges near the dead body, and gun Ex. 23, as well as the medical evidence, and the fact that the accused had absconded, the learned Sessions Judge convicted and sentenced him as aforesaid.

An appeal was preferred by the State against the acquittal of the remaining four accused; and Maina Singh also filed an appeal against his conviction. The High Court dismissed both the appeals and maintained the conviction and sentence of Maina Singh as aforesaid.

Mr. Harbans Singh appearing on behalf of appellant Maina Singh has not been able to challenge the evidence on which appellant Maina Singh has been convicted, but he has raised the substantial argument that he could not have been convicted of the offence of murder under s. 302 read with s. 34 I.P.C. when the four co-accused had been acquitted and the Sessions Judge had found that it was not possible to record a conviction under s. 302 read with s. 149 I.P.C. or s. 148 I.P.C. It has been argued that when the other four accused were given

A the benefit of doubt and were acquitted, it could not be held, in law, that they formed an unlawful assembly or that any offence was committed by appellant Maina Singh in prosecution of the common object of that assembly. It has been argued further that, *a fortiori,* it was not permissible for the Court of Sessions or the High Court to take the view that a criminal act was done by appellant Maina Singh in furtherance of the common intention of the "other accused" when those accused had been named to be no other than Hardeep Singh, Puran Singh, Jeet Singh and Narain Singh who had all been acquitted. It has therefore been argued that all that was permissible for the High Court was to convict appellant Maina Singh of any offence which he might have committed in his individual capacity, without reference to the participation of any other person in the crime. On the other hand, it has been argued by Mr. S. M. Jain that as the learned Sessions Judge had acquitted the remaining four accused by giving them the benefit of doubt, and had recorded the finding that one or more of the accused persons or some other person might have participated in the crime along with Maina Singh, the High Court was quite justified in upholding the conviction of the appellant Maina Singh of an offence under s. 302/34 I.P.C.

The relevant portion of the judgment of the trial court, which bears on the controversy and has been extracted with approval in the impunged judgment of the High Court, is as follows,—

> "The injuries found on the person of the deceased Amar Singh were with fire arm, blunt as well as sharp weapon. fire arm injuries and the blunt weapon injuries have been assigned to Maina Singh and so there must have been other person also along with Maina Singh in causing injuries to the deceased. It can be so inferred from the statements of Isar Ram and Ajeet Singh also. These facts could no doubt create a strong suspicion that one or more of the accused persons might be responsible along with Maina Singh in causing injuries to the deceased. In view of the statement of Isar Ram and Ajeet Singh it cannot however be ascertained which one of the accused was with Maina Singh and it was also possible that some one else might have been with him. In such a case the prosecution version against these four accused persons are not proved beyond doubt. They are therefore not guilty of the offence with which they have been charged."

It would thus appear that the view which has found favour with the High Court is that as there were injuries with fire arm and with blunt and sharp-edged weapons, and as the fire arm and the blunt weapon injuries had been ascribed to Maina Singh, there must have been one other person with him in causing the injuries to the deceased. At the same time, it has been held further that these facts could only create a strong suspicion "that one or more of the accused persons might be responsible along with Maina Singh in causing the injuries to the deceased", but it could not be ascertained which one of the accused was with him and that it was also possible that "some one else might have been with him." The finding therefore is that the other person

might have been one of the other accused or some one else, and not that the other associate in the crime was a person other than the accused. Thus the finding is not categorical and does not exclude the possibility of infliction of the injuries in furtherance of the common intention of one of the acquitted accused and the appellant.

Another significant fact which bears on the argument of Mr. Harbans Singh is that while in the original charge sheet the Sessions Judge specifically named appellant Maina Singh and the other accused Hardeep Singh, Puran Singh, Jeet Singh and Narain Singh as forming an unlawful assembly and for causing the death of Amar Singh in furtherance of the common object of that assembly, he altered that charge but retained, at the same time, the charge that Maina Singh formed an unlawful assembly along with the "other accused" with the common object of murdering Amar Singh and intentionally caused injuries to him along with the "other accused" in prosecution of that common object. In this case therefore Maina Singh and the other four accused were alleged, all along, to have participated in the crime and were named in the charge sheet as the perpetrators of the crime without there being an allegation that some other person (besides the accused) took part in it in any manner whatsoever. It was in fact the case from the very beginning, including the first information report, that the offence was committed by all the five named accused, and even the evidence of the prosecution was confined to them all through and to no other person. The question is whether the High Court was right in upholding the conviction of the appellant with reference to s. 34 I.P.C. in these circumstances ?

Such a question came up for consideration in this Court on earlier occasions, and we shall refer to some of those decisions in order to appreciate the argument of Mr. Jain that the decision in *Dharam Pal* v. *The State of U.P.*(1) expresses the latest view of this Court and would justify the appellant's conviction by invoking s. 34 I.P.C.

We may start by making a reference to *The King* v. *Plummer*(2) which, as we shall show, has been cited with approval by this Court in some of its decisions. That was a case where there was a trial of an indictment charging three persons jointly with conspiring together. One of them pleaded guilty, and a judgment was passed against him, and the other two were acquitted. It was alleged that the judgment passed against the one who pleaded guilty was bad and could not stand. Lord Justice Wright held that there was much authority to the effect that if there was acquittal of the only alleged co-conspirators, no judgment could have been passed on the appellant, if he had not pleaded guilty, because the verdict must have been regarded as repugnant in finding that there was a criminal agreement between the appellant and the others and none between them and him. In taking that view he made a reference to *Harrison* v. *Errison*(3) where upon an indictment of three for riot two were found not guilty and one guilty, and upon error brought it was held a "void verdict". Bruce J., who was the other judge in the case made a reference to the following

(1) A.I.R. 1975 S.C. 1917. (2) [1902] 2. K.B. 339.
(3) [1365] Popham 202.

A statement in Chitty's Criminal Law while agreeing with the view taken by Wright J.,—

> "And it is holden that if all the defendants mentioned in the indictment, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can
B be passed upon him."

This Court approved *Plummer's* case (supra) in its decision in *Topandas* v. *The State of Bombay*(1). That was a case where four named individuals were charged with having committed an offence under s. 120-B I.P.C. and three out of those four were acquitted. This Court held that the remaining accused could not be convicted of the
C offence as his alleged co-participators had been acquitted, for that would be clearly illegal.

A similar point came up for consideration in *Mohan Singh* v. *State of Punjab*(2). There two of the five persons who were tried together were acquitted while two were convicted under s. 302 read with s. 149 and s. 147 I.P.C. In the charge those five accused persons and none
D others were mentioned as forming the unlawful assembly and the evidence led in the case was confined to them. The proved facts showed that the two appellants and the other convicted person, who inflicted the fatal blow, were actuated by common intention of fatally assaulting the deceased. While examining the question of their liability, it was observed as follows,—

> E "Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried, then s. 149 cannot be invoked. Even in such cases, it is
> F possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge
> G and tried will not necessarily displace the charge under section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under section 149 because on the evidence the court of facts is liable to reach the conclusion that the persons composing
> H the unlawful assembly nevertheless were five or more than five."

(1) [1955] 2 S.C.R. 881. (2) [1962] Supp 3 S.C.R. 848.

In taking this view this Court took note of its earlier decisions in *Dalip Singh* v. *State of Punjab*[1], *Bharwad Mena Dana* v. *State of Bombay*[2] and *Kartar Singh* v. *State of Punjab*[3]. A

The other case to which we may make a reference is *Krishna Govind Patil* v. *State of Maharashtra*[4]. It noticed and upheld the earlier decision in *Mohan Singh's* case (supra) and after referring to the portion which we have extracted, it was held as follows,— B

> "It may be that the charge discloses only named persons; it may also be that the prosecution witnesses named only the said accused; but there may be other evidence, such as that given by the court witnesses, defence witnesses or circumstantial pieces of evidence, which may disclose the existence of named or unnamed persons, other than those charged or deposed to by the prosecution witnesses, and the court, on the basis of the said evidence, may come to the conclusion that others, named or unnamed, acted conjointly along with one of the accused charged. But such a conclusion is really based on evidence." C

It would thus appear that even if, in a given case, the charge discloses only the named persons as co-accused and the prosecution witnesses confine their testimony to them, even then it would be permissible to come to the conclusion that others named or unnamed, besides those mentioned in the charge or the evidence of the prosecution witnesses, acted conjointly with one of the charged accused if there was other evidence to lead to that conclusion, but not otherwise. D

The decision in *Krishna Govind Patil's* case (supra) was followed by the decision in *Ram Bilas Singh* v. *State of Bihar*[5]. After noticing and approving the view taken in *Plummer's* case (supra) and the decisions in *Mohan Singh's* case (supra) and *Krishna Govind Patil's* case (supra) this Court stated the law once again as follows,— E

> "The decisions of this Court quoted above thus make it clear that where the prosecution case as set out in the charge and as supported by the evidence is to the effect that the alleged unlawful assembly consists of five or more named persons and no others, and there is no question of any participation by other persons not identified or identifiable it is not open to the court to hold that there was an unlawful assembly unless it comes to the definite conclusion that five or more of the named persons were members thereof. Where, however, the case of the prosecution and the evidence adduced indicates that a number in excess of five persons participated in the incident and some of them could not be identified, it would be open to the court to convict less than five of the offence of being members of the unlawful assembly or convict them of the offence committed by the unlawful assembly with the aid of s. 149 I.P.C. provided it comes to F G H

(1) [1954] S.C. R. 145.
(2) (1960) 2. S.C.R. 172.
(3) [1962] 2 S.C.R. 395.
(4) [1964] 1 S.C.R. 678.
(5) 1964 1 S.C.R. 775

A the conclusion that five or more persons participated in the incident."

The other decision to which our attention has been invited is *Yeswant* v. *State of Maharashtra*(1). The decision in *Krishna Govind Patil* (supra) was cited there on behalf of the appellant and, while referring to the view expressed there, it was observed that in the case B before the court there was evidence that the man who used the axe on Sukal was a man who looked like appellant Brahmanand Tiwari, and could be that accused himself. But as the Court was not satisfied that the identify of the person who used the axe on Sukal was satisfactorily established as that of Brahmanand Tiwari, it took the view that the remaining accused could be convicted with the aid of s. 34 for the offences committed by them. This Court did not therefore C disagree with the view taken in *Krishna Govind Patil's* case (supra) but purported to follow it in its decision and took the aforesaid view in regard to the identity of Brahmanand Tiwari for the purpose of distinguishing it from the case of *Krishna Govind Patil* (supra) where there was not a single observation in the judgment to indicate that persons other than the named accused participated in the offence and there was no evidence also in that regard.

D The matter once again came up for consideration in *Sukh Ram* v. *State of U.P.*(2) The Court referred to its earlier decisions including those in *Mohan Singh's* case (supra) and *Krishna Govind Patil's* case (supra) and, while distinguishing them on facts, it observed that as the prosecution did not put forward a case of the commission of crime by one known person and one or two unknown persons as in E *Sukh Ram's* case (supra), and there was no evidence to the effect that the named accused had committed the crime with one or more other persons, the acquittal of the other two accused raised no bar to the conviction of the appellant under s. 302 read with s. 34 I. P. C. The decision in *Sukh Ram's* case (supra) cannot therefore be said to lay down a contrary view for it has upheld the view taken in the earlier decisions of this Court.

F That leaves the case of *Dharam Pal* v. *State of U.P.* (supra) for consideration. In that case four accused were tried with fourteen others for rioting. The trial court gave benefit of doubt to eleven of them and acquitted them. The remaining seven were convicted for the offence under s. 302/149 I.P.C. and other offences. The High Court gave benefit of doubt to four of them, and held that at least G four of the accused participated in the crime because of their admission and the injuries. On appeal this Court found that the attacking party could not conceivably have been of less than five because that was the number of the other party; and it was in that connection that it held that there was no doubt about the number of the participants being not less than five. It was also held that as eighteen accused participated in the crime, and the Court gave the benefit of doubt to be on the side of safety, as a matter of abundant caution, reducing H the number to less than five, it may not be difficult to reach the conclusion, having regard to undeniable facts, that the number of the

(1) [1973] 1 S.C.R. 291. (2) [1974] 2 S.C.R. 518.

participants could not be less than five. That was therefore a case which was decided on its own facts but, even so, it was observed as follows.—

> "It may be that a definite conclusion that the number of participants was at least five may be very difficult to reach where the allegation of participation is confined to five known persons and there is no doubt about the identity of even one."

It cannot therefore be said that the decision in *Dharam Pal's* case (supra) is any different from the earlier decisions of this Court, or that it goes to support the view which has been taken by the High Court in the case before us. The view which has prevailed with this Court all along will therefore apply to the case before us.

As has been stated, the charge in the present case related to the commission of the offence of unlawful assembly by the appellant along with the other named four co-accused, and with no other person. The trial in fact went on that basis throughout. There was also no direct or circumstantial evidence to show that the offence was committed by the appellant along with any other unnamed person. So when the other four co-accused have been given the benefit of doubt and have been acquitted, it would not be permissible to take the view that there must have been some other person along with the appellant Maina Singh in causing the injuries to the deceased. It was as such not permissible to invoke s. 149 or s. 34 I. P. C. Maina Singh would accordingly be responsible for the offence, if any, which could be shown to have been committed by him without regard to the participation of others.

The High Court has held that there could be no room for doubt that the fire arm and the blunt weapon injuries which were found on the person of Amar Singh were caused by appellant Maina Singh, and that finding has not been challenged before us by Mr. Harbans Singh. Dr. Shanker Lal (P. W. 5) who performed the post-mortem examination stated that while all those injuries were collectively sufficient in the ordinary course of nature to cause death, he could not say whether any of them was individually sufficient to cause death in the ordinary course of nature. It is not therefore possible to hold that the death of Amar Singh was caused by the gun shot or the blunt weapon injuries which were inflicted by appellant Maina Singh. Dr. Shanker Lal has stated that the fracture of the frontal bone of the deceased could have been caused by external injuries Nos. 8, 10 and 12, and that he could die of that injury also but, of those three injuries injury No. 12 was inflicted by a sharp-edged weapon and could not possibly be imputed to the appellant. The evidence on record therefore does not go to show that he was responsible for any such injury as could have resulted in Amar Singh's death. The evidence however proves that he inflicted gun shot injuries on the deceased, and Dr. Shanker Lal has stated that one of those injuries (injury No. 26) was grievous. Maina Singh was therefore guilty of voluntarily causing grievous hurt to the deceased by means of an instrument for shooting, and was guilty of an offence under s. 326 I. P. C. In the circumstances of the case, we think it proper to sentence him to rigorous

A imprisonment for 10 years for that offence. As has been stated, he has been held guilty of a similar offence for the injuries inflicted on Ajeet Singh (P. W. 2) and his conviction and sentence for that other offence under s. 326 I. P. C. has not been challenged before us.

The appeal is therefore allowed to the extent that the conviction
B of Maina Singh under s. 302/34 I. P. C. is altered to one under s. 326 I. P. C. and the sentence is reduced to rigorous imprisonment for ten years thereunder. The conviction under s. 326 for causing injuries to Ajeet Singh, and the sentence of rigorous imprisonment for three years and a fine of Rs. 100/- call for no interference and are confirmed. Both the sentences will run concurrently.

P.B.R. *Appeal allowed.*