

CHANDRAWATI

v.

RAMJI TIWARI & ANR. ETC.

(Criminal appeal Nos. 1098-1099 of 2003)

JANUARY 14, 2010

[HARJIT SINGH BEDI AND J.M. PANCHAL, JJ.]

PENAL CODE, 1860:

ss. 302 and 302 r/w 109 – Multiple murders – Accused who fired at victims, convicted by trial court u/s 302 and sentenced to death – Other four convicted u/s 302/109 and sentenced to life imprisonment – High Court declining death reference and also acquitting the others – Appeals by State and complainant – HELD: On facts, there was no charge for the offence u/s 109 – It must, therefore, be held that as two of the accused had claimed the right of private defence and had also produced defence evidence in accordance with the plea, non-framing of a charge u/s 109 against the four acquitted accused had clearly caused prejudice to them – However, in the circumstances of the case, it would not be in the interest of justice to remand the case, more particularly, as it is the admitted position that the only role attributed to the four accused who have been acquitted by High Court is exhorting the other accused to kill the enemy – Appeals dismissed.

Wakil Yadav vs. State of Bihar 2001 SCC (Crl.) 149; Joseph Kurian Philip Jose .Vs. State Of Kerala 1994 (4) Suppl. SCR 122 =1994 (6) SCC 535 – relied on.

Sohan Lal @ Sohan Singh & Ors. Vs State of Punjab 2003 (4) Suppl. SCR 676 = 2003 (11) SCC 534; Dalbir Singh vs. State of U.P. 2004(5) SCC 334; Radha Mohan Sigh vs. State of U.P. 2006 (2) SCC 450, referred to.

* Judgment Recd. on 07.10.2010.

A *Willie (William) Slaney vs. State of M.P. (1955)*
SCR 1140 =1956 AIR 116 – distinguished.

Case Law Reference:

B	2001 SCC (Crl.) 149	relied on	para 4
	(1955) SCR 1140	distinguished	para 5
	2004(5) SCC 334	referred to.	Para 5
	2006 (2) SCC 450	referred to	para 5
C	2003 (4) Suppl. SCR 676	referred to	para 6
	1994 (4) Suppl. SCR 122	relied on	para 6

D **CRIMINAL APPELLATE JURISDICTION : Criminal Appeal**
Nos. 1098-1099 of 2003.

From the Judgment & Order dated 26.8.2002 of the High Court of Judicature at Allahabad in Criminal Appeal Nos. 2130 & 1992 of 2000.

E **WITH**

Crl. Appeal No. 1100-1101 of 2003.

F R.K. Dash, S.K. Dwivedi, Manoj Kr. Dwivedi, Vandana, G.V. Rao, P.K. Jain, Gunnam Venkateswara Rao for the Appellant.

G A. Marlarputham, R.K. Dash, S.R. Setia, Praveen Swarup, P.K. Deyfor, T.A. Khan, R.K. Tanwar, A.K. Sharma, P.K. Jain, S.K. Dwivedi, Manoj Kr. Dwivedi, Vandana, G.V. Rao for the Respondents.

The following order of the Court was delivered

ORDER

H 1. This order will dispose of Criminal Appeal Nos. 1100-

1101 of 2003 titled *State of U.P. Vs. Ramji Tiwari & Ors.* and Criminal Appeal Nos. 1098-1099 of 2003 titled *Chandrawati Vs. Ramji Tiwari & Anr. Etc.* A

2. The facts have been taken from the appeals filed by Chandrawati Devi, the complainant in Criminal Appeal Nos.1098-1099 of 2003. B

3. On 31st October, 1997 the accused were removing hay from the land in front of the house of Nazir, a neighbour of Chandrawati. Nazir objected to this action and started abusing them and tried to assault them as well. On hearing the altercation Chandrawati's husband Bindeshwari and son Raj Kumar came out to intervene on which Godavari-accused brought a double barrel (DBBL) gun and cartridges and gave them to accused Ramji Tiwari and exhorted him to kill Nazir and the others to settle the dispute for all times to come. Ramji Tiwari first fired a shot at Nazir and a second shot at Smt. Kunna (PW-4) wife of Hazrat Ali. On hearing the sound of the firing, the other accused namely Virendra Tiwari, Chandreshwar Tiwari and Laxmi further exhorted Ramji Tiwari and shouted that Bindeshwari was also coming from a side lane and he too should not be spared. On this Ramji Tiwari fired a shot at Noor Jahan, Bindeshwari and his son Raj Kumar. Nazir and Bindeshwari died at the spot whereas Raj Kumar, Smt. Kunna and Noor Jahan were seriously injured. The incident was witnessed by Nawwa, Narad, Laxmi and others. Chandrawati lodged a FIR at about 10.40 a.m. on 31st October, 1997. The bodies of the deceased, and the injured who were in serious condition, were removed to the Primary Health Centre at Etwa but Raj Kumar succumbed to his injuries on the way and Noor Jahan too succumbed to her injuries a little later. On the completion of the investigation, the case was committed to the Court of Sessions. The Court of Sessions framed charges inter alia under Sections 302/149, 307/149, 147, 148 and 307 of the Indian Penal Code. Relying on the evidence of the injured witnesses and that of the doctor and keeping in view H

A all the circumstances, the Sessions Judge vide his judgment dated 8th August, 2000 convicted Ramji Tiwari under Section 302 and sentenced him to death. The other accused were convicted under Sections 302 read with 109 of the Indian Penal Code and were sentenced to imprisonment for life.

B 4. The matter was thereafter taken to the High Court in appeal by the accused and was also referred on the question of the death sentence under Section 366 of the Code of Criminal Procedure. The High Court declined the murder reference but dismissed the appeal filed by Ramji Tiwari. The
C High Court also acquitted the other four appellants relying on the Judgment of this Court in *Wakil Yaqub Versus State of Bihar* [2001 SCC (Cri.) 149] held :

D “The appellant having faced trial for being a member of an unlawful assembly which achieved the common object of killing the deceased, could in no event be substantively convicted for offence under Section 302 I.P.C with the aid of Section 109 I.P.C. There was obviously thus not only a legal flaw but also a great prejudice to the appellant in
E projecting his defence. He, on such error committed by the High Court, has rightly earned his acquittal.”

5. Two appeals have been filed in this Court, one by Chandrawati, the complainant, challenging the acquittal of the four accused as also seeking a death sentence for Ramji
F Tiwari, and the other by the State of U.P. making the same prayer. We also see from the record that the SLP filed by Ramji Tiwari has been dismissed at the initial stage.

6. Mr. Das, the learned Senior Counsel for the appellant-
G State of U.P. in Criminal Appeal Nos.1100-1101 of 2003 at the very initial stage argued that the High Court had taken a very hyper technical view in the matter and had placed reliance on the judgment in *Wakil Yadav's* case (supra) but the judgment
H aforesaid had ignored the provisions of Section 464 of the Code of Criminal Procedure whereby in order to vitiate a trial

and a conviction on the ground of the non framing or incorrect framing of the charge, prejudice had to be shown by the accused. It has further been highlighted that this court in AIR 1956 SCC 116 [*William Slaney Vs. State of M.P.*], 2004 (5) SCC 334 [*Dalbir Singh Vs. State of U.P.*] and 2006 SCC (2) 450 [*Radha Mohan Singh Vs. State of U.P.*] had held that a conviction could be recorded even if a charge had not been framed until and unless the accused could show prejudice and as in this matter the facts of the case clearly revealed no prejudice whatsoever as the accused were fully aware of the case that was being put against them, the High Court was not justified in making an order of acquittal. He alternatively prayed that if this Court was of the view that prejudice had indeed been occasioned the matter should be remitted to the Trial court for fresh trial from the stage of the framing of the charge. The learned counsel for the respondents has however cited 2003 (11) SCC 534 [*Sohan Lal @ Sohan Singh & Ors. Versus State of Punjab*] and 1994 (6) SCC 535 [*Joseph Kurian Philip Jose Versus State of Kerala*] to contend that prejudice was implicit as a charge under Section 109 of the IPC had not been framed.

7. We have heard learned counsel for the parties at length and gone through the record. We find that the matter is covered in favour of respondent accused by several judgments including *Wakil Yadav's* case (supra).

8. In *Sohan Lal's* case (supra), similar observations had been made. In this case a charge under Section 304 (b) of the Indian Penal Code simplicitor had been framed and the Trial Court had not framed any charge under Section 302 or 109 of the Indian Penal Code. It was held that in the absence of a charge under Section 302 or Section 109 of the Indian Penal Code, it would cause prejudice to the accused if he was convicted for either of those offences at the end of the trial.

In para 7 it was observed as under:-

“Section 211 of the Code of Criminal Procedure requires

A that the charge against the accused be precisely stated. Sub-section (4) of Section 211 of the Code of Criminal Procedure specifically requires that the law and section of the law against which the offence is said to have been committed shall be mentioned in the charge. The learned

B counsel for the respondent State, relying on Section 464 of the Code of Criminal Procedure, urged that failure to specify Section 109 in the charge-sheet against Sohan Lal was a mere irregularity which would not vitiate the trial without proof of prejudice to the accused. We cannot

C agree. The learned counsel for the accused is fully justified in his submission that failure to frame a charge with regard to the substantive offence of Section 109 IPC has certainly prejudiced the accused in the trial court. The accused

D Sohan Lal @ Sohan Singh was called upon to face trial only for the charge under Section 304-B IPC. Neither a charge under Section 302 IPC nor under Section 109 IPC, was levelled against him in the charge-sheet. In the absence of a charge being framed against the accused

E Sohan Lal under Section 302 or 109 IPC, it would certainly cause prejudice to him, if he is convicted under either of these offences at the end of the trial. In our view, it was not permissible for the trial court to convict the first accused

F Sohan Lal for the offence under Section 302 read with Section 109 IPC. His conviction under Section 302 read with Section 109 IPC is, therefore, illegal and is liable to be set aside. The High Court erred in upholding the conviction of Sohan Lal @ Sohan Singh under Section 302 read with Section 109 IPC and dismissing his appeal."

G 9. *Wakil Yadav's case and Sohan Lal's case* have their basis in the judgment of this Court in *Joseph Kurian case* (supra). In this case the basic premise that an accused who had not been charged for the substantive offence could not be convicted thereunder and if the direct involvement of an accused in a crime could not be established, it was difficult to

H hold that such an accused could be convicted of an abetment

of that offence in the absence of a charge and to do so would cause a grave miscarriage of justice. A

10. Mr. Das has, however, referred us to the judgment of this Court in *William Slaney's* case (supra) to submit that in the absence of a charge under Sections 302/109, there was no prejudice and the conviction could be recorded in the absence of a specific charge. B

11. In *William Slaney's* case (supra), the two accused had been charged under Section 302/34 of the Indian Penal Code. There was no charge under Section 302 simplicitor against any of the two accused. One of the accused having been acquitted, the question arose as to whether the conviction of the other accused under Section 302 was legally tenable. The Constitution Bench of this Court observed that merely because a charge had not been framed would not mean that conviction could not be recorded unless prejudice could be shown by the accused and this was a factor which would depend on the facts of each case. It must be noted that in *Williams Slaney's* case, a charge under Section 302/34 had been framed and that Section 34 of the Indian Penal Code does not constitute an offence. In the present matter, there was no charge for the offence under Section 109 of the Indian Penal Code. This principle was reiterated in *Radha Mohan Singh's and Dalbir Singh's* Cases (supra). C D E

12. It must therefore be held that as two of the accused, Ramji Tiwari and Virendra Prasad Tiwari, had claimed the right of private defence and had also produced defence evidence in accordance with this plea, the non-framing of a charge under Section 109 of the Indian Penal Code against the four acquitted accused had clearly caused prejudice to them. F G

13. Mr. Das has made an alternative submission that if this court was of the opinion that a failure of justice had in fact been occasioned, the matter should be remitted to the trial court under Section 464 of the Criminal Procedure Code for fresh H

- A trial from the point of the framing of the charge in the light of the fact that the incident pertained to four murders. We are unable to accept this submission for the reason that the incident happened in the year 1997, the trial court rendered its Judgment in August, 2000 and the High Court two years later.
- B It would, therefore, not be in the interest of justice to remand the case more particularly as⁷ it is the admitted position that the only role attributed to the four is exhorting Ramji Tiwari to kill the enemy.

- C 14. In the light of the above facts, the appeals are dismissed.

R.P.

Appeals dismissed.