STATE OF H.P.
V.
NAZAR SINGH AND ANR.
Criminal Appeal No. 1403 of 2003

MAY 6, 2009

[S.B. SINHA AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860 – s.304 Part II r/w s.34 – Culpable homicide not amounting to murder – Common intention – Death due to armed assault – Four accused viz. 'S', 'J' and the two respondents – Allegation that 'S' inflicted two injuries on deceased's head with a 'gandasi' whereas the other accused inflicted 'lathi' blows – Held: On facts, there was no intention on part of any accused to cause death – Common intention, if any, assuming there was one, was to cause simple hurt as all ten injuries were found to be simple except one injury which the deceased suffered on his forearm – If common intention was formed merely to cause simple hurt, only accused 'S' was guilty of offence under s.304 Part II and not the respondents.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1403 of 2003

From the Judgment and Order dated 03.06.2002 of the Hon'ble High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 41 of 1994

Naresh K. Sharma, for the Appellant.

I.B. Gaur, S.S. Nehra, Neeraj Dutt Gaur, for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J.

1. The State is before us aggrieved by and dissatisfied with a judgment of acquittal passed by a Division Bench of the High Court of Himachal Pradesh, Shimla in Criminal Appeal No. 41 of 1994.

A 2. Sarwan Singh (since deceased), Jagtar Singh (since deceased) as well as Nazar Singh and Baldev Singh, respondents herein were prosecuted for commission of an offence under Section 302 read with Section 34 and Section 323 read with Section 34 of the Indian Penal Code (for short, B "the Code") for causing death of one Lamber Singh and simple hurt to one Avtar Singh.

3. The occurrence took place at about 9.30 p.m. on 30.03.1993 in the field of the deceased Lamber Singh. Lamber Singh had gone to tie his dog therein. PW-1 Bakshish Singh, C brother of the deceased, after some time heard him shouting whereupon he ran towards the field and found that Sarwan Singh armed with gandasi and others armed with lathis had been assaulting the deceased. Sarwan Singh is said to have inflicted two injuries with a gandasi on his head whereas the others were D said to have inflicted lathi blows on him.

4. Avtar Singh alias Bittu (PW-2) also reached there. Both these witnesses attempted to save him but were attacked by them. Avtar Singh allegedly was hit by Sarwan Singh with the handle of broken gandasi on his right arm. Further, the E prosecution case is that all the convicts went towards cattle shed using abusive language threatening to kill them. The motive for the said incident is said to be a quarrel which had taken place 20 days prior thereto at the time of solemnization of the marriage of two nieces of PW-1.

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5. Lamber Singh was brought to a hospital in an injured condition. His medical history was recorded. He put his left thumb impression. He, however, did not name any person responsible for inflicting those injuries on him. He died at about G 3.40 a.m.

6. All the accused persons were arrested on 1.04.1993. They were taken into custody on 1.04.1993. +9They were, however, for reasons best known to the investigating officer shown to have been formally arrested on 2.04.1993.

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7. Relying on or on the basis of the evidence of the aforementioned Avtar Singh, who is said to be an injured witness, the learned Trial Judge opined that the accused are guilty of commission of an offence under Section 304 Part II of the Indian Penal Code read with Section 34 thereof. They were sentenced to undergo seven years' rigorous imprisonment. A fine of Rs. 5000/- was also imposed on them. They were also sentenced to undergo rigorous imprisonment for six months each under Section 323 read with Section 34 of the Indian Penal Code.

8. Three appeals were preferred thereagainst, viz.,

(i) Respondents preferred Criminal Appeal No. 41 of 1994 against their conviction and sentence imposed by the Trial Court.

(ii) The State preferred an appeal for enhancement of their sentence which was marked as Criminal Appeal No. 270 of 1994.

(iii) The State filed another appeal being Criminal Appeal No. 92 of 1995 questioning the judgment of acquittal against Sarwan Singh and others under Section 302 read with Section 34 of the Indian Penal Code.

9. By reason of the impugned judgment, the High Court has allowed the appeal preferred by the respondents and passed a judgment of acquittal.

10. The State did not prefer any appeal against the dismissal of its appeals in Criminal Appeal Nos. 270 of 1994 and 92 of 1995. An appeal has been preferred only against the judgment passed in Criminal Appeal No. 41 of 1994.

11. Indisputably, Sarwan Singh and Jagtar Singh died on 5.02.2002 and 4.11.2000 respectively, i.e., during pendency of the appeal.

12. Mr. Naresh K. Sharma, learned counsel appearing on behalf of the State, would contend:

A (i) Respondents having gone to the field of the deceased variously armed must be held to have formed a common intention to cause death of the deceased Lamber Singh.

B (ii) PW-2 being an injured witness, the High Court should not have disbelieved his evidence particularly when implicit reliance thereupon had been placed by the learned Trial Judge.

C (iii) There was furthermore no reason as to why the evidence of PW-1 also could not have been relied upon.

(iv) As the medical report shows that the deceased had suffered as many as 10 injuries, the High Court should have presumed participation of more than one D accused.

(v) Only because no incised wound was found, the same, by itself, could not have been the conclusive proof of innocence of the respondents herein particularly in view of the defence raised by them before the learned E Trial Judge only to the effect that they had no common intention.

13. Dr. I.B. Gaur, learned counsel appearing on behalf of the respondents, however, would support the impugned F judgment.

14. Before adverting to the contentions raised by Mr. Sharma, we may notice the medical evidence.

The injury report which was prepared at about 1.40 a.m. G inter alia reads, thus:

"1. There was present swelling and tenderness over left elbow. The swelling was reddish bluish in colour. There was present rail track contusion just above the elbow. The contusion was horizontal and was 4 cm x 5 cm in size with H reddish in center and bluish at the periphery.

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6. There was present a wound over the left side of the scalp 2 cm lateral to midline. The wound was vertical in direction. The size of the wound was 8 cm x 1 cm x 1 cm. The hair around the wound were matted with blood and were not chopped. Clotted blood was present in the wound. The margins of the wound were irregular and ragged. B

7. There was present a wound over right side of the scalp 4 cm lateral to midline. The wound was oblique in direction. The size of the wound was 6 cm x 1 cm x 1 cm. The hair around the wound were matted with blood. The hair were not chopped. The margins of the wound were irregular and ragged." C

According to the doctor, Injury No. 1 was grievous and all other injuries being Injury Nos. 2 to 10 were simple in nature. D The doctor did not reserve his opinion for any of the injuries and any X-ray or any other test was not prescribed.

Dr. R.K. Jaswal, autopsy surgeon, however, observed the following injuries on the body of the deceased: E

"1. Diffuse swelling and echymosis of the left elbow.

2. There was long bruise 15 cm x 4 cm with healthy center on the left arm.

3. Diffuse swelling and ecchimosis on the right arm. F

4. Rail road contusion on the back 12 cm x 5 cm

5. There was stitched wound on left side of the scalp 2 cm lateral to the midline. The wound was vertical in direction. On removing the stitches the wound measured 8 cm x 1 cm x 1 cm. G

6. Bluish ecchimosis of the left ankle.

7. Oblique wound on the right side of the scalp about 1.1/2 inch lateral to the midline. Stitched 6 cm in H

A length and had blood underneath it with fracture of the underlying skull.

8. Multiple bruises over the whole of the body."

The autopsy surgeon was of the opinion that Injury Nos. 6 B and 7 and the injury on the parietal region were sufficient to cause death in the ordinary course of nature.

No incised wound was found. Sarwan Singh is said to have used gandasi. He, according to PWs 1 and 2, the so-called eye-witnesses, caused injuries on the parietal region which, C according to Mr. Sharma, were sufficient to cause death.

15. Indisputably, Sarwan Singh is dead. We would proceed on the assumption that he could have been found guilty for commission of an offence under Section 304 Part II of the Indian D Penal Code for causing death of the deceased Lamber Singh.

16. From the evidence brought on record, it appears that the deceased went to his field on hearing the barking of his dog at 9.30 p.m. It was a dark night. There is nothing to show that all the accused persons were waiting for him or had come to assault E him with any common intention. According to the prosecution, a dispute arose with regard to laying down of a pipeline three months prior to the date of occurrence. It, however, appears that the matter was settled through the intervention of the panchayat. Allegedly, as noticed hereinbefore, the accused had F abused PW-1 at the time of marriage of his nieces in his village. Nothing has been brought on record to show that there existed any enmity between the deceased and the accused. We have noticed hereinbefore that cause of his injuries was disclosed by the deceased himself. He put his left thumb impression. He G did not name the respondents therein. As he had put his left thumb impression, it may be presumed that he was conscious at that time.

17. According to PW-2, after assaulting Lamber Singh, the accused persons were standing at some distance and all of H a sudden Sarwan Singh came and assaulted him.

18. Why the accused who were taken to custody on 1.04.1993 but were shown to have been formally arrested on 2.04.1993 is not known. Both the prosecution witnesses stated that the handle of the gandasi had broken down. Why the broken part of the gandasi was not seized was not disclosed.

19. The deceased, as noticed hereinbefore, died after 3 O'clock in the morning. The investigating officer Head Constable Ram Nath (PW-10) had gone to hospital upon receipt of an information. He tried to record the statement of the deceased twice. As he was not in a position to give a statement, he recorded the statement of PW-1. It is in the aforementioned situation difficult to accept that the First Information Report was recorded at 12.45 p.m., i.e., on the said night itself.

20. If Sarwan Singh and others had any intention to cause the death of Lamber Singh, he could have used his gandasi from the sharp end. In the statement before the medical officer by the deceased, assault by gandasi also had not been mentioned.

21. It is wholly unlikely that when a large number of villagers, as stated by PWs 1 and 2 had assembled, other circumstances and in particular assault by Sarwan Singh upon PW-2 would not be testified by any other independent person. In this situation, it is difficult to comprehend as to how a common intention was formed to cause murder of the deceased.

Mr. Sharma would contend that they must have formed a common intention. Such common intention, if any, assuming there was one, was to cause simple hurt as all the ten injuries were found to be simple except Injury No. 1 which was suffered by the deceased on his forearm. We would, however assume that Injury Nos. 6 and 7 were not noticed to be grievous injury by the doctor. It may be so but the nature of injuries inflicted on other parts of the body of the deceased clearly go to show that the others did not come with common intention to cause his death as his presence in the field was wholly unexpected.

22. It is well settled that there exists a distinction between common intention and common object.

In *Mohinder Singh and Ors. v. State of Punjab* [JT 2006(4) SC 96], this Court observed:

"21. In Rabindra Mahto and Ors. v. State of Jharkhand JT 2006 (1) SC 137, this Court has held that under Section 149 IPC, if the accused is a member of an unlawful assembly, the common object of which is to commit a certain crime, and such a crime is committed by one or more of the members of that assembly, every person who happens to be a member of that assembly would be liable for the commission of the crime being a member of it irrespective of the fact whether he has actually committed the criminal act or not. There is a distinction between the common object and common intention. The common object need not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the assembly gathered before the commission of the crime at the spot itself. There need not be prior meeting of the mind. It would be enough that the members of the assembly which constitutes five or more persons, have common object and that they acted as an assembly to achieve that object. In substance, Section 149 makes every member of the common unlawful assembly responsible as a member for the act of each and all merely because he is a member of the unlawful assembly with common object to be achieved by such an unlawful assembly. At the same time, one has to keep in mind that mere presence in the unlawful assembly cannot render a person liable unless there was a common object and that is shared by that person. The common object has to be found and can be gathered from the facts and circumstances of each case."

23. The State having not preferred any special leave against the dismissal of their appeals against the judgment of

acquittal recorded by the Trial Court under Section 302/34 of the Indian Penal Code, they must be held to have accepted the judgment of the Trial Court under Section 304 Part II thereof. A

24. There was, in our opinion, in the facts and circumstances of the case, no intention on the part of any one of the accused to cause death. If there was such intention, it is difficult to form an opinion that they could have formed an intention to cause unintentional death. It is not a case where they had exercised their right of private defence. B

The matter might have been different if they were convicted under Section 302 of the Indian Penal Code. If a common intention was formed merely to cause simple hurt, only Sarwan Singh was guilty of causing an offence under Section 304 Part II of the Indian Penal Code and not others. C

25. Respondents have already been convicted for commission of an offence under Section 323 of the Indian Penal Code and they must have been in custody for some time. We, therefore, do not intend to interfere with the impugned judgment. The appeal is dismissed. D

B.B.B. Appeal dismissed.