

SHRI GOPAL AND ANR.

v.

SUBHASH AND ORS.

JANUARY 23, 2004

[DORAISWAMY RAJU AND S.B. SINHA, JJ.]

*Criminal Law:*

*Penal Code, 1860—Sections 34; 141; 148; 149 and 302—5 persons convicted by trial court for offences under Section 302/149—Discrepancies in the prosecution case raising a doubt as regard formation of common object by the accused persons—High Court convicting two accused under Section 302/34 and acquitting the remaining three of all the charges—Appeal by complainant against acquittal—Held, there is nothing on records to show that the respondents herein had any motive or common intention to commit the crime—View taken by High Court as regard doubtful participation of the respondents is a possible view—No interference called for in an appeal of acquittal when the view taken by Court below is one of the possible views—Practice and Procedure—Code of Criminal Procedure, 1973—Section 162(2), Explanation.*

*Indian Penal Code, 1860—Section 149—Offence under—Constitution of—Principles, discussed.*

*Code of Criminal Procedure, 1973/Evidence Act, 1872—Section 162(2), Explanation/Section 145—'omission'—Amounting to contradiction—Concept of, explained.*

There were two groups in a village; one headed by the accused RN and the other by the deceased RK. The election to the Dairy Society prior to the incident and some other criminal cases launched against members of one of the groups were stated to be the reasons of rivalry between the two groups. According to the prosecution, on the day of incident, RN exhorted the others to kill RK whereupon SL fired a shot that hit the deceased. Another shot was fired by MR at the deceased but the same missed the target and hit the wall. As a result of multiple injuries, the deceased died on the spot.

**A** The Trial Court convicted all the five accused both under Sections 148 and 302 read with Section 149 of the Indian Penal Code, 1860 and sentenced them to life imprisonment. SL and MR were also convicted of an offence under section 27 of the Arms Act. On appeal, the High Court acquitted the respondents herein of the charge both under Section 148 of the Penal code and as also Section 302/149 thereof. The High Court further

**B** acquitted SL and MR of the charges under Section 27 of the Arms Act and converted the sentence under Section 302/149 IPC passed against them to one under Section 302/34 IPC. The sentence imposed on SL and MR, however, remained unaltered. Hence, the present appeal by the first informant.

**C** On behalf of the appellant, it was contended that the High Court committed a serious error in passing the impugned judgment in as much as the accused after having assembled, proceeded to the house of the deceased with a common object of committing the crime; that in the facts and circumstances of this case, the respondents must be said to have

**D** formed a common object to do away with the deceased and, thus, the conviction under Section 302/149 IPC as also Section 148 IPC was sustainable.

**E** On behalf of the respondents it was contended that there was no formation of common object and a case under Section 149 I.P.C. could not be said to have been made out as SL and MR had been found guilty under Section 302/34; that PW 1, PW5 and PW 10 did not make any allegation about exhortation by all the accused persons; whereas PW 3, PW 4 and PW 8 did not make any such statement before the police; that such 'omissions' on the part of PW-3, 4 & 8 amounted to contradiction

**F** having regard to explanation to Section 162(2) of the Code of Criminal Procedure.

**Dismissing the appeal, the Court**

**G** HELD: 1.1. The essence of the offence under Section 149 of the Indian Penal Code would be common object of the persons forming the assembly. It is necessary for constitution of the offence that the object should be common to the persons who compose the assembly, that is, that they should all be aware of it and concur in it. Furthermore, there must be some present and immediate purpose of carrying into effect the common object. A common object is different from a common intention

**H** insofar as in the former no prior consent is required, nor a prior meeting

of minds before the attack would be required whereas an unlawful object can develop after the people get there and there need not be a prior meeting of minds. [1091-H; 1092-A-B] A

1.2. The High Court in its judgment while noticing the principles governing commission of an offence under Section 149 of the Indian Penal Code found that the allegation against the respondents herein are *omnibus* in nature. The High Court on examining the materials on records was of the opinion that only MR and SL indulged in the acts of committing murder of the deceased and, thus, the respondents herein were not guilty of commission of any offence. [1090-A-C] B

1.3. From the records, it appears that PW 5 and PW 10 did not make any allegation as regard the alleged exhortation on the part of all the accused. It further appears that PW 3, PW 4 and PW 8 stated before the police that there had been such exhortations by the respondents herein. Such omission on the part of PW 3, PW 4 and PW 8, in the facts and circumstances of the case, being very material would amount to contradiction. There are contradictions in the statements of the witnesses as regard the nature of weapon held by one of the accused. Further, it is unlikely that for commission of an offence like culpable homicide amounting to murder, the accused persons would go in a procession and all of them would shout together, as alleged. Accused RN was standing at a distance of about 120 ft. away from the place of occurrence when the deceased was hit. He was said to have been armed with a gun but did not use the same. Accused S had merely a lathi in his hand and also did not use it. This also raises a doubt as regard formation of common object by the accused persons. [1090-B-C; 1092-G-H; 1093-B, F] C D E

*Tahsildar Singh and Anr. v. State of U.P.*, AIR (1959) SC 1012, referred to. F

2.1. While considering an appeal of acquittal, this Court may not interfere when two reasonable views are possible to be taken and the view taken by the Court below is one of such possible views. If the findings of the High Court arrived at by the judges can be supported in the circumstances of the case, it would not be prudent to disturb the said judgment. [1094-C-F] G

*State of Rajasthan v. Raja Ram*, [2003] 8 SCC 180; *Chanakya Dhibar (Dead) v. State of West Bengal*, (2003) 10 Scale 883 *Bachhu Narain Singh v. Naresh Yadav and Ors.*, (2003) 10 Scale 932 and *State of U.P. v. Babu Khan* H

A *and Ors.*, (2004) 1 Scale 11, referred to.

B 2.2. There are many discrepancies in the prosecution case. The view taken by the High Court as regard doubtful participation of the respondents herein is a possible view. Once it is held that the prosecution case as regard material aspects relating to implication of certain accused persons is doubtful, it would not be proper for this Court to interfere with the judgment of the High Court even if a different view is possible to be taken. The High Court had held only two persons guilty of commission of an offence under Section 302/34 IPC. There is nothing on records to show that the respondents herein had any motive or common intention to commit the crime. While considering a judgment of acquittal, this Court will not evolve a new case. [1094-D-F]

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 961 of 1997.

D From the Judgment and Order dated 15.5.97 of the Rajasthan High Court in D.B. CrI.A. No. 320 of 1987.

Sushil Kumar Jain, Ms. Ruchi Kohli and H.D. Thanvi for the Appellants.

E Uma Datta, Tara Chandra Sharma, Ms. Neelam Sharma, Ms. Sandhya Goswami and Ms. N. Annapoorani for the Respondents.

The Judgment of the Court was delivered by

F S.B. SINHA, J. This appeal is directed against the judgment dated 15th May, 1997 passed by the Rajasthan High Court in DB Criminal No. 320/87 whereby and whereunder the respondents herein were acquitted of the charges of commission of an offence under Sections 148 and 302 read with 149 of the Indian Penal Code.

G The respondents herein together with Shankerlal and Maniram were charged under Sections 148 and 302 read with Section 149 of the Indian Penal Code and were sentenced to life imprisonment for alleged commission of an offence under Section 302 read with Section 149. They were further sentenced to undergo one year's rigorous imprisonment with fine of Rs. 500/- for commission of an alleged offence under Section 148 of the Indian Penal Code. Two accused persons Shankerlal and Maniram were also convicted under Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment of six months and a fine of Rs. 400.

H

Allegedly, there were two groups in Kanwarpura Tehsil; one headed by Shri Ramnarayn accused and the other by the deceased Ram Kumar. Allegedly, a day prior to the date of incidence, an election of dairy society was conducted. At about 7 p.m. on 6.6.1986, Atma Ram PW 1, Brijlal PW 10, Ramnarayan PW 5 and Rajaram were sitting on the chowki in the house belonging to Brijlal. They saw the accused persons coming out from the house of Ramnarayan, Sarpanch. Allegedly, Ramnarayan, Maniram and Shankerlal were armed with guns, Subhash with lathi and Manohar with pistol. They proceeded towards the house of Hansraj. Shankerlal armed with 12-bore gun entered into the house of Hansraj and the other accused persons proceeded in the lane adjacent and towards the west of the said house. Allegedly, Ramnarayan exhorted the others to kill Ramkumar whereupon Shankerlal fired a shot which hit Ramkumar. Another shot was allegedly fired by Maniram at Ramkumar but the same missed the target and hit the wall. Manohar also allegedly tried to fire but he was unsuccessful. Ramkumar, as a result of multiple injuries, died on the spot. The motive for commission of the offence apart from the parties belonging to separate factions and contesting the elections in which allegedly Ramnarayan won, related an incidence which occurred 25 or 26 days prior to the date of occurrence, whence Krishna trespassed into the house of Poosaram Meghwal and a case under Section 376 of Indian Penal Code was registered against Krishna and Ramnarayan, in connection wherewith allegedly Ramratan and deceased Ramkumar helped Poosaram. It was further alleged that Hanuman, brother of Shankerlal, after five days of the said incident, visited Poosaram and abused him whereupon he was apprehended by deceased Ramkumar, Prithvi and Ramratan and handed over to the police.

Before the Trial Court 13 witnesses were examined by the prosecution. The Trial Court convicted all the five accused persons both under Section 148 of the Indian Penal Code and Section 302/149. As noticed hereinbefore. Shankerlal and Maniram were also convicted of an offence under Section 27 of the Arms Act.

On appeal against the said judgment, the High Court acquitted the respondents herein of the charges both under Section 148 of the Indian Penal and as also Section 302/149 thereof. The High Court further acquitted Shankerlal and Maniram of the charges under Section 27 of the Arms Act and converted the sentence under Section 302/149 passed against them to one under Section 302/34 and the sentence imposed on Shankerlal and Maniram further remained unaltered.

A The High Court in its judgment while noticing the principles governing commission of an offence under Section 149 of the Indian Penal Code found that the allegation against the respondents herein are omnibus in nature. The High Court noticed that the allegation to the effect that Manohar also attempted to fire his gun but missed was not correct as the same was not followed by a report of the ballistic expert. The High Court further noticed that the other two respondents did not commit any over-act in assaulting Ramkumar or Ramratan. It was observed that accused Ramnarayan was standing at a distance of about 120 ft. away from the place of occurrence when Ramkumar was hit. He was said to have been armed with a gun but did not use the same. Subhash had merely a lathi in his hand and also did not use it. The High Court on examining the materials on records was of the opinion that only Maniram and Shankerlal indulged in the act of committing murder of Ramkumar and, thus, the respondents herein were not guilty of commission of any offence.

D Aggrieved thereby, the first informant is before us in appeal.

E Mr. Jain, learned counsel appearing on behalf of the appellant would submit that the High Court committed a serious error in passing the impugned judgment inasmuch as from the evidence adduced by Ramratan PW3, Gopal PW 4, Atma Ram PW1, Ramnarayan PW 5, Ramnarayan PW 8 and Brijlal PW 10 it would appear that not only the accused had been armed with guns and lathi and pistol, but also assembled in the house of Ramnarayan and proceeded to the house of the deceased, and after sometime, they divided themselves into two separate groups with a common object of committing the crime.

F The learned counsel would submit that Ramnarayan exhorted the accused persons to commit the offence, while standing near the electric pole whereupon Maniram being armed with a double barrel gun came out of the street and fired twice, one of which had hit the deceased; while Shankerlal fired from his gun which hit Ramkumar on the left side.

G Mr. Jain would contend that having regard to the provisions contained in Section 141 of the Indian Penal Code, in the facts and circumstances of this case, the respondents must be said to have formed a common object to do away with Ramkumar and, thus, the conviction under Section 302/149 as also Section 148 was sustainable. It was argued that the very fact that all the accused persons, according to Ramratan PW3, Gopal PW 4, Atma Ram PW1, H Ramnarayan PW 5, Ramnarayan PW 8 and Brijlal PW 10 gave 'lalkara' and

they not only participated but also played their roles would also go to show that they are guilty of commission of the aforementioned offence. A

Mr. Uma Datta, learned counsel appearing on behalf of the respondents *per contra* would submit that a case under Section 149 of the Indian Penal Code cannot be said to have been made out as Maniram and Shankerlal had been found guilty under Section 302/34. It was contended that Maniram had also died and Shankerlal has served out his sentence. Mr. Datta would submit that from the records, it would appear that PW 1, PW 5 and PW 10 did not make any allegation about exhortation by all the accused persons; whereas PW 3, PW 4 and PW 8 did not make any such statement before the police in relation whereto their attention has been drawn. Mr. Datta would urge that having regard to the amendment carried out in Section 162(2) of the Code of Criminal Procedure by inserting an explanation in terms whereof 'omission' may amount to 'contradiction' in certain situations. It was contended that the attention of PW 3, PW 4 or PW 8 in the aforementioned situation has been drawn to 'omissions' in their statements under Section 161 of the Code of Criminal Procedure. B C D

The learned counsel would submit that the prosecution story was wholly unbelievable inasmuch as even from the evidence of PW 1 it would appear that they had allegedly seen the occurrence from a distance. The learned counsel has drawn our attention to the fact that houses of both the parties are adjoining each other. It was further contended that it was impossible for the witnesses to see actual firing by Shankerlal who allegedly went inside the house as the wall of the house was six-seven ft. high. E

The principles relating to applicability of Section 149 of the Indian Penal Code is not in dispute. For the purpose of attracting the said provision, it is not necessary that an over-act must be committed by all the accused persons. What is necessary is formation of an unlawful assembly and knowledge of the persons thereof about consequences arising from doing an act which amounts to offence. F

Section 141 of the Indian Penal Code defines 'Unlawful assembly', as an assembly of five or more persons, if the common object of the persons composing the same, *inter alia*, is to commit any mischief or criminal trespass, or other offences. G

The essence of the offence under Section 149 of the Indian Penal Code would be common object of the persons forming the assembly. It is necessary H

A for constitution of the offence that the object should be common to the persons who compose the assembly, that is, that they should all be aware of it and concur in it. Furthermore, there must be some present and immediate purpose of carrying into effect the common object. A common object is different from a common intention insofar as in the former no prior consent is required, nor a prior meeting of minds before the attack would be required whereas an unlawful object can develop after the people get there and there need not be a prior meeting of minds.

C The High Court has arrived at a finding that Shankerlal and Maniram were guilty of commission of an offence under Section 302/34 IPC and not under Section 302/149 IPC.

Keeping in the aforementioned principles, the question is required to be considered for arriving at a conclusion as to whether there had been a common object on the part of the respondents in committing the alleged offence.

D In *Tahsildar Singh and anr v. State of U.P.*, AIR (1959) SC 1012, this Court held that in terms of Section 145 of the Indian Evidence Act attention of witnesses can be drawn to such statements which would amount to contradiction. It was held: "The right of both accused and the prosecution is limited to contradictions." It was, thus, held that omission to make a statement in terms of Section 161 of the Code of Criminal Procedure would not attract the provisions of Section 145 of the Indian Evidence Act. However, by reason of Code of Criminal Procedure explanation has been inserted to Sub-Section (2) of Section 162 which is in the following terms:

F "An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

G From the records, it appears that PW 1, PW 5 and PW 10 did not make any allegation as regard the alleged exhortation on the part of all the accused. It further appears that PW 3, PW 4 and PW 8 stated before the police that there had been such exhortations by the respondents herein. Such omission on the part of PW 3, PW 4 and PW 8, in the facts and circumstances of the case, being very material would amount to contradiction.

H Furthermore, the informant PW 1 stated that the distance between the

house of Ramnarayan Sarpanch is one killa or 1.1/4 killa. 1 killa is equivalent to one acre. A

There are contradictions in the statements of the witnesses as regard the nature of weapon held by Manohar. It further appears from the record that the house of Hansraj and the house of the deceased are almost in front of each other. It is, therefore, unlikely that for commission of an offence like culpable homicide amounting to murder, the accused persons would go in a procession and all of them would shout together. B

It further appears that witnesses are related to each other. PW 5 is uncle of Atma Ram. PW 8 Ramnarayan is brother-in-law of Gopal. Ramratan is also his first cousin. Shanker and Maniram are real brothers. Subhash and Manohar accused are the nephews of Ramnarayan accused. Maniram and Shanker have no relation with Ramnarayan accused. According to PW-8 the house of Ram Narayan accused is towards the east from the house of Hansraj, which is at a distance of three bighas from his house. As regard distance, according to PW-8, the house of deceased Ramkumar was towards south of his house, which is situated at a distance of five bighas. How, thence, could see the occurrence is not explained. C D

It is, therefore, unbelievable that the accused persons would behave in the manner as alleged by the PW 8. Furthermore, from the evidence of PW 3 Ramratan, it appears, that the place behind the wall where Shankerlal was standing and fired at Ramkumar was about 6-7 ft. high. It is, therefore, not possible for any witness to have witnessed actual firing of any shot by Shankerlal. PW 10 Brijlal stated that when Shankerlal entered the house of Hansraj, no suspicion came in his mind and only after he heard the sound of firing, he became suspicious. This also raises a doubt in our mind as regard formation of common object by the accused persons. E F

In the First Information Report, it was alleged that both Ramkumar and Ramratan were coming from the house of Ramratan towards the house of the informant's brother-in-law Ramnarayan, as has been noticed by the learned Trial Judge in his judgment. However, in his evidence, it was stated that Ramratan and Ramkumar were going to the house of Ramkumar which was at a distance. G

Furthermore, three cartridges had been recovered which are said to have been fired from the 12-bore SBBL guns marked as W/1 and W/2. The ballistic experts state that one of them had not been fired by any of the two H

A admitted SBBL guis.

The aforementioned factors are also relevant and required to be taken into consideration along with the findings arrived at by the Division Bench of the High Court acquitting the respondents herein from the charges of Section 148 and Section 302/149 of the Indian Penal Code for the purpose of arriving at a finding as to whether appellants are guilty of commission of the offences under Section 302/149 IPC or not.

While considering an appeal of acquittal, this Court may not interfere when two reasonable views are possible to be taken and the view taken by the Court below is one of such possible views. (See *State of Rajasthan v. Raja Ram*, [2003] 8 SCC 180 and *Chanakya Dhibar (Dead) v. State of West Bengal*, (2003) 10 SCALE 883).

We have highlighted hereinbefore certain discrepancies in the prosecution case only for the purpose of satisfying ourselves that the view taken by the High Court as regard doubtful participation of the respondents herein is a possible view. Once it is held that the prosecution case as regard material aspects relating to implication of certain accused persons is doubtful, we are of the opinion that it would not be proper for this Court to interfere with the judgment of the High Court even if a different view is possible to be taken. The High Court, as noticed, hereinbefore, had held only two persons, Shankerlal and Maniram guilty of commission of an offence under Section 302/34. There is nothing on records to show that the respondents herein had any motive or common intention to commit the crime. While considering a judgment of acquittal, this Court will not evolve a new case.

We, therefore, are of the opinion that the judgment of the High Court does not suffer from any infirmity. If the findings of the High Court arrived at by the learned Judges can be supported in the circumstances of the case, in our opinion, it would not be prudent to disturb the said judgment. (See *Bachhu Narain Singh v. Naresh Yadav and Ors.*, (2003) 10 SCALE 932 and *State of U.P. v. Babu Khan and Ors.*, (2004) 1 SCALE 11).

For the reasons aforementioned, this appeal is dismissed.