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## HARCHAND SINGH &amp; ANR.

v.

## STATE OF HARYANA

August 31, 1973

[H. R. KHANNA AND A. ALAGIRISWAMI, JJ.]

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*Indian Penal Code—Accused convicted under s. 304 II read with s. 34 by the trial court—On cross appeal, High Court substituted conviction u/s. 304 to conviction u/s 302 R.W.S. 34.—Whether conviction possible, when prosecution produces a set of evidence which contradicts and strikes at the other.*

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Six persons were tried in the Court of Addl. Sessions Judge in connection with the death of the victim. The trial Court acquitted 3 but convicted 2 under Sec. 304 Part II read with s. 34 I.P.C. and the other one was convicted under s. 323 I.P.C. and they were sentenced accordingly.

Two cross appeals were, thereafter, filed—one by the convicts challenging their conviction and the other by the State praying that the convictions of the 3 accused be under s. 302 read with s. 34, I.P.C. The High Court acquitted one of them but convicted the other two under s. 302 read with S. 34 I.P.C. and sentenced them to undergo imprisonment for life and hence the appeal before this Court.

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The prosecution, in support of its case, examined two sets of eye witnesses. The evidence of one set consisted of the testimony of three eye witnesses. The trial court, did not place any reliance upon their testimony nor upon the dying declaration. The other eye witness upon whose testimony the prosecution and the trial court placed reliance was P.W. 14, who professed to be working with the deceased at the time of occurrence.

Allowing the appeal,

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**HELD:** The function of the Court in a Criminal Trial is to find whether the person arraigned before it is guilty of the offence with which he is charged. For this purpose, the Court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to convict the accused and to hold that he is guilty of the offence with which he is charged. If in a case, the prosecution leads two sets of evidence, each one of which contradict and strikes at the other and shows it to be unreliable, the conviction cannot be sustained. [587E]

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*Vadivalu Thevar v. The State of Madras*, [1957] S.C.R. 981, referred to and distinguished.

**CRIMINAL APPELLATE JURISDICTION:** Criminal Appeal No. 32 of 1970.

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From the Judgment and order dated the 23rd April, 1969 of the Puniab and Haryana High Court in Criminal Appeal Nos. 320 and 672 of 1967.

*Nuruddin Ahmed* and *D. Goburdhan*, for the appellants.

*H. S. Marwah* and *R. N. Sachthy*, for the respondent

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The Judgment of the Court was delivered by

**KHANNA, J.** Harchand Singh, Jaswant Singh, Jaswinder Singh, Sadhu Singh, Gaijan Singh and Labh Singh were tried in the court of Additional Sessions Judge, Ludhiana in connection with an occurrence

which resulted in the death of Ajaib Singh. The trial court acquitted Sadhu Singh, Gajjan Singh and Labh Singh. Harchand and Jaswant Singh were convicted by the trial court under section 304 part II read with section 34 Indian Penal Code and each of them was sentenced to undergo rigorous imprisonment for a period of seven years. Jaswinder Singh was convicted under section 323 Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of one year. Two cross appeals were thereafter filed in the Punjab & Haryana High Court. One of the appeals was by Harchand Singh, Jaswant Singh and Jaswinder Singh, challenging their conviction. The other appeal was by the State of Punjab wherein it was prayed that the conviction of Harchand Singh, Jaswant Singh and Jaswinder Singh should be under section 302 read with section 34 Indian Penal Code. The High Court acquitted Jaswinder Singh. The appeal by the State against Harchand Singh and Jaswant Singh was accepted and those two accused were convicted under section 302 read with section 34 Indian Penal Code and each of them was sentenced to undergo imprisonment for life. Harchand Singh and Jaswant Singh thereafter came up in appeal to this Court by special leave.

The prosecution case is that Gulab Kaur widow of Jwala Singh made a will of land measuring about fifty bighas in favour of Ajaib Singh deceased and his brother Tej Singh. Gulab Singh died about two years before the present occurrence. After her death, the land of Gulab Kaur was under the cultivating possession of Ajaib Singh and Teja Singh. The accused are collaterals of Jwala Singh, husband of Gulab Kaur and felt aggrieved because of the execution of the will by Gulab Kaur in favour of Ajaib Singh and Teja Singh. On June 12, 1966 at about 10 or 11 a.m., it is stated, Ajaib Singh went to work his well known as "nawa Khu" in the area of village Jaipura. The six accused, who were present at their well close to the well of Ajaib Singh, then came there. Sadhu Singh and Harchand Singh at that time were armed with barchhas. Jaswinder Singh, Gajjan Singh and Labh Singh had gandasas, Jaswant Singh had takwa. On arrival there, the accused stated that they would not allow Ajaib Singh to take water from the well. The accused also started inflicting injuries upon Ajaib Singh with their respective weapons. The occurrence, it is stated, was witnessed by Ajaib Singh's two sons Amarjit Singh and Mal Singh as well as by his brother Teja Singh. Amarjit Singh, Mal Singh and Teja Singh were stated to be present in a nearby field at that time. They rushed to the spot where Ajaib Singh was being assaulted. The accused then ran away. Ajaib Singh was put on a cart was taken first to Duraha and thereafter to Payal. As the doctor was not available either in the Duraha Hospital or Payal hospital, Ajaib Singh was taken in a taxi to Khanna. The party arrived at Khanna hospital at about 6.30 p.m. Dr. Shamsher Singh incharge of the hospital then sent an intimation to police station Khanna stating that Ajaib Singh's condition was serious and his statement might be recorded. ASI Harbhajan Singh then went to the hospital and recorded statement PK of Ajaib Singh at 7.30 p.m. In the said statement, Ajaib Singh gave the version of the occurrence as given above. Ajaib Singh died in the hospital soon thereafter at 8.45 p.m.

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A Intimation about the recording of the dying declaration of Ajaib Singh was sent to police station Payal. A case was thereupon registered at that police station and a formal first information report was prepared on the basis of the dying declaration of Ajaib Singh.

B Sub Inspector Hoshiar Singh took over the investigation of this case. He arrested the accused on June 16, 1966 when they were found to be hiding at Duraha power-house. The different accused were thereafter interrogated. Harchand Singh then got recovered a blood-stained baichha. Jaswant Singh got recovered a blood-stained takwa, while Jaswinder Singh got recovered a blood-stained gandasa.

C Post mortem examination on the body of Ajaib Singh deceased was performed by Dr. Gurcharan Singh Randhrawa on June 13, 1966 at 1 p.m.

D At the trial the accused the prosecution allegations and stated that they had been falsely involved in the case. The trial court did not place any reliance upon the testimony of Amarjit Singh (PW2), Mal Singh (PW 3), and Teja Singh (PW4) who were examined as eye witnesses of the occurrence and who had supported the prosecution case as given above. The trial court did not also place any reliance upon the dying declaration of Ajaib Singh. Reliance was, however, placed by the trial court upon the evidence of Ram Asra (PW 14) who professed to be working with the deceased at the time of occurrence. Ram Asra's statement, it would appear from the record, was recorded by the police on June 13, 1966 during the investigation of the case. According to Ram Asra, only three of the accused, namely, Harchand Singh, Jaswant Singh and Jaswinder Singh were present at the time of the occurrence, while the other three accused were not present. It was further stated by Ram Asra that injuries to Ajaib Singh deceased had been caused by Harchand Singh with a drat (sickle) and by Jaswant Singh with a kirpan. Relying upon the evidence of Ram Asra, the trial court convicted Harchand Singh and Jaswant Singh for offence under section 304 part II read with section 34 Indian Penal Code. Jaswinder Singh, who was stated to be empty-handed, was convicted under section 323 Indian Penal Code.

G When the matter was taken up in appeal to the High Court, the learned Judges took the view that the trial court was not justified in throwing over-board the testimony of Amarjit Singh, Mal Singh and Teja Singh. The High Court after taking into consideration the evidence of those three witnesses as well the evidence of Ram Asra PW came to the conclusion that the complicity of Harchand Singh and Jaswant Singh was established beyond any reasonable doubt. So far as Jaswinder Singh was concerned, the High Court held that no case has been proved against them. The High Court was further of the opinion that the case against Harchand Singh and Jaswant H Singh fell under section 302 read with section 34 and not under section 304 part II read with section 34 Indian Penal Code. Harchand Singh and Jaswant Singh were accordingly convicted and sentenced as above.

We have heard Mr. Nuruddin on behalf of the appellants and Mr. Marwah on behalf of the State and are of the opinion that the conviction of the appellants cannot be sustained.

It cannot be disputed that a murderous assault was made on Ajaib Singh on the day of occurrence as a result of which he died. The evidence of Dr. Shamsher Singh, who examined Ajaib Singh when he was taken to Khanna hospital as well as the evidence of Dr. Gurcharan Singh Randhawa who performed post mortem examination on the dead body, shows that as many as eighteen injuries were inflicted upon Ajaib Singh deceased. Out of them, seven had been caused by sharp-edged weapons. Death, in the opinion of Dr. Randhawa, was due to shock and haemorrhage as a result of the cumulative effect of the injuries. According to the case of the prosecution, the two appellants joined in the assault on the deceased as a result of which the latter died. The prosecution in support of its case examined two sets of eye witnesses. The evidence of one set consists of the testimony of Amarjit Singh, Mal Singh and Teja Singh. So far as these witnesses are concerned, the trial court came to the conclusion that they were not present near the scene of occurrence and had not witnessed the occurrence. The trial court in support of this conclusion gave reasons which appear to be cogent and weighty and find no particular ground to take a different view. The evidence of Ram Asra, who according to the prosecution case was with Ajaib Singh deceased at the time of the occurrence, shows that Amarjit Singh, Mal Singh and Teja Singh were not present at the time of occurrence. If Amarjit Singh, Mal Singh and Teja Singh had been present at or about the place of occurrence and had actually seen the occurrence, it is difficult to believe that Ram Asra would have remained unaware of their presence. According to Amarjit Singh, Mal Singh and Teja Singh, they saw the occurrence while they were coming from their house. They were at a distance of about 60 karams from the place of occurrence when they heard alarm being raised and on coming nearer they saw the six accused inflicting injuries upon Ajaib Singh deceased. As against that, the version of Ajaib Singh deceased in the dying declaration was that the above mentioned three witnesses were working in the field nearby when he was assaulted by the accused. Amarjit Singh, Mal Singh and Teja Singh claimed that they were proceeding from their house to the well with *Tokras* and *Kahis* for the purpose of consolidating the new channel with earth filling. If that was the purpose for which they were going to the well, they would have gone there before and in any case not after Ajaib Singh deceased so that they might prepare the channel before Ajaib Singh started operation of the persian wheel at the well. We thus find that not only the explanation given by Amarjit Singh, Mal Singh and Teja Singh regarding their arrival at that time is not convincing, there is material discrepancy in the version of Ajaib Singh deceased in his dying declaration and the testimony of Amarjit Singh, Mal Singh and Teja Singh PWs regarding the presence of these witnesses at or about the place of occurrence. On the top of all this we find that the evidence of Ram Asra, upon which reliance has been placed by the prosecution shows that Amarjit Singh, Mal Singh and Teja Singh were not there and had not witnessed the occurrence.

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A The other eye witness, upon whose testimony reliance has been placed by the prosecution is Ram Asra (PW 14). So far as this witness is concerned, we find that his presence at the scene of occurrence was not mentioned by Ajaib Singh deceased in the dying declaration which was recorded by ASI Harbhajan Singh at Khanna hospital. According to Ram Asra, he was working with the deceased at the well when the three accused came there and assaulted the deceased. If Ram Asra was, in fact, present and working with Ajaib Singh deceased at the time of the occurrence, it is not clear as to why the deceased should fail to mention that fact in the dying declaration. The evidence of Amarjit Singh, Mal Singh and Teja Singh upon which also the prosecution placed reliance goes to show that Ram Asra had not witnessed the occurrence. The name of Ram Asra in the very nature of things not mentioned in the first information report, because the said report was based upon the dying declaration of Ajaib Singh. It would thus appear that the eye witness upon whose testimony the prosecution wants to sustain the conviction of the appellants is shown to be an unreliable witness by the other evidence produced by the prosecution. The present is a case wherein one set of prosecution evidence condemns the other set of evidence produced by the prosecution. In the above state of affairs, we find it difficult to secure a firm ground upon which to base the conviction of the accused appellants.

E The function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which he is charged. If in a case the prosecution leads two sets of evidence, each one of which contradict and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

G Mr. Marwah has cited before us the case of *Vadivalu Thevar v. The State of Madras*<sup>(1)</sup> wherein it was laid down that the court can base the conviction of the accused on a charge of murder upon the testimony of a single witness if the same was found to be convincing and reliable. There can, in our opinion, be no dispute with the above proposition, but that proposition can be of no avail in the present case. As already mentioned earlier, the prosecution evidence itself

(1) [1957] S.C.R. 981.

creates doubt about the veracity of the testimony of Ram Asra, upon which testimony reliance is now sought to be placed by Mr. Marwah. Had the testimony of Ram Asra been of a convincing character and the prosecution evidence had not itself created doubt regarding the correctness of his testimony, this Court might have sustained the conviction of appellants upon the testimony of Ram Asra. As the things are, prosecution itself has led evidence to show that the testimony of Ram Asra is not reliable.

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We, therefore, accept the appeal, set aside the judgment of the High Court and acquit the appellants.

S.C.

*Appeal allowed.*