A MANGU KHAN AND ORS.

v.

STATE OF RAJASTHAN

FEBRUARY 24, 2005

B [K.G. BALAKRISHNAN AND B.N. SRIKRISHNA, JJ.]

Penal Code, 1860—Sections 302 read with section 34, section 148, 302/149 and 323/149—Murder of two persons and injury caused to other over a C *dispute—Conviction under sections 148, 302/149 and 323/149—High Court convicting under Section 302 IPC read with Section 34 and under Section 323/34 IPC—Justification of—Held: Evidence showing formation of common intention to commit offence on the spot and the manner in which complainant party was attacked and were done to death, though not possible to identify and ascribe particular injury to particular accused—Hence, conviction under* D *Section 302 IPC read with Section 34 justified—Also no discrepancies and inconsistencies in the evidence—Evidence Act, 1872.*

Constitution of India, 1950—Article 136—Re-appreciation of evidence by Supreme Court—Scope of—Held: When courts below concurrently accept E *the evidence to sustain charges, meticulous analysis of evidence cannot be gone into.*

According to the prosecution, appellants attacked informant, his father and brother with weapons on account of a dispute over construction of a bund. Father and his son died on the spot and the brother, the F **complainant sustained injuries. Complainant lodged FIR. Appellants were convicted and sentenced under section 148, section 302/149 and section 323/149 IPC. High Court convicted and sentenced the appellants under section 302 IPC read with section 34 IPC and also under section 323/34 IPC. Hence, the present appeals.**

G **Appellant - accused contended that since the Sessions Court had acquitted the appellants of the charge under Section 302, High Court could not convict them under Section 302 r/w Section 34; that even if they were guilty they should be convicted only under Section 304 Part I and not under Section 302; that the evidence could not have been accepted at all** H **for convicting the appellants since there are some discrepancies and**

inconsistencies in the evidence; that the injuries sustained by appellant Nos. 1 and 2 had not been explained by prosecution; that High Court erred in not appreciating that the ocular evidence was inconsistent with the medical evidence; and that the right of private defence was available to the accused both in respect of their property and their person. A

Dismissing the appeals, the Court B

HELD : 1. Trial Court and High Court having concurrently accepted the evidence to sustain the charge, meticulous analysis of the evidence cannot be gone into. [372-D]

Harshadsingh Pahelvansingh Thakore v. *State of Gujarat,* [1976] 4 SCC 640, referred to. C

2.1. There is no doubt that father and his son were done to death by inflicting serious injuries to the vital parts of their bodies, namely, the skull. Appellants had a common intention to cause such injuries as they were waiting with arms, early in the morning, in the field. The manner in which the complainant party was attacked and two of them were done to death is borne out by the evidence and the High Court's findings on this issue are justified. From the evidence, it may not be possible to pin point the person who dealt the fatal blow to each of the deceased and as such the appellants were all acquitted of the charge under Section 302 simpliciter. But when the evidence indicates that the three accused had repeatedly given blow with lathi, farsi and tanchia, and it is not possible to identify and ascribe a particular injury to a particular accused, conviction of the accused on the charge under Section 302 with the aid of Section 34 IPC is justified. Furthermore, the situation was not of a free fight and the evidence on record indicates that the intention was to ambush, attack and kill the persons, who were coming to protest about the unlawful construction on the land. Therefore, the situation is covered by Section 302 and not by Section 304. [377-G-H; 378-A-C; 379-E] D E F

B.M. Dana and Anr. v. *State of Bombay,* AIR (1960) SC 289; *Harshadsingh Pahelvansingh Thakore* v. *The State of Gujarat,* [1976] 4 SCC 640; *Sukh Ram* v. *State of U.P.* AIR (1974) SC 323 and *Pipal Singh* v. *State of Punjab,* [2001] 2 SCC 292, referred to. G

2.2. It cannot be said that in every case there is an inexorable burden upon the prosecution to explain the injuries on the body of the accused H

A **failing which the prosecution case must be thrown out lock, stock and barrel. Merely because the appellant - accused persons sustained small abrasions and laceration on non-vital parts of the body and they are not explained by the prosecution, it cannot be said that the evidence, which is otherwise acceptable, becomes suspect or that the prosecution must fail on that score. [374-G; 375-F]**

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Hare Krishna Singh and Ors. **v.** *State of Bihar,* **AIR (1988) SC 863, relied on.**

2.3. The post mortem examination was carried out at 11.00A.M./12 Noon on 11.7.1997 and the report suggests that the death had taken place "within 24 hours prior to post mortem Examination". It might have occurred any time after 11.00/12.00 Noon of 10.7.1997. Developing of rigor mortis depends on various factors such as constitution of the deceased, season of the year, the temperature in the region and the conditions under which the body has been preserved. The record indicates that the body D **was taken from the mortuary. There is no cross-examination, whatsoever, of the Doctor so as to elicit any of the material facts on which a possible argument could have been based. If these are the circumstances, then the presence of rigor mortis all over the body by itself cannot warrant the submission that the death must have occurred during the previous night. Acceptable ocular evidence cannot be dislodged on such hypothetical basis.** E **[376-C-F]**

2.4. The accused did not raise a plea with regard to availability of right of private defence to accused in respect of their property and their person during the trial, nor suggested it during the cross-examination of F **prosecution witnesses. Also there is no evidence on record to suggest that any member of the complainant party had done any act which could have induced a reasonable apprehension in the mind of the accused of danger to their person or to their property, or that they approached the accused party with an intention of causing bodily harm, for they were wholly unarmed. [376-H; 377-A-B]**

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 30 of 2004.

From the Judgment and Order dated 1.7.2003 of the Rajasthan High Court in D.B.Crl.A. No. 809 of 1998.

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WITH

Crl.A. No. 31 of 2004.

S.R. Bajwa, Sushil Kr. Jain, Hemraj Gupta, H.D. Thanvi, S. Singhania, Pratibha Jain and Ajau Choudhary for the Appellants.

Kumar Karti Kat and Ms. Sandhya Goswami for the Respondent.

The Judgment of the Court was delivered by

SRIKRISHNA, J. The appellants were convicted under Section 148, Section 302/149 and Section 323/149 of the Indian Penal Code by the Trial Court and sentences were awarded to them consequently. Having failed in their appeals before the High Court, the appellants are before this Court by way of special leave.

Facts :

Sahab Khan, PW 3, made a written report (Ex. P 6) on 11.7.1997 at 9:00 a.m. in Police Station Sadar, Alwar. According to him, between 7:00 and 7:30 a.m. on that day, he and his father, Dhandhad, and his brother, Isab, went to their field. Mangu Khan, Appellant No. 1, Sirdar Khan, Appellant No. 2, Subedar Khan, Appellant No. 3, (Deen Mohd. and Jamil Khan, since acquitted), who had enmity against them on account of construction of a bund, were sitting on the bund duly armed with lathi, farsi, tanchia and kattas. As soon as the informant, his father and brother approached, all the aforesaid persons attacked them with farsi, lathi and tanchia. Consequently, Dhandhad and his brother, Isab, fell down and died on the spot itself. He also sustained some injuries as a result of the assault. The Police Station, Sadar, Alwar registered a case under Sections 147, 148, 149, 307, 447 and 302 IPC and commenced investigation. As a result of the investigation, five of the accused were tried. They comprised Mangu Khan, Appellant No. 1, Sirdar Khan, Appellant No. 2, Subedar Khan, Appellant No. 3, Deen Mohd. and Jamil Khan. Learned Additional District and Session Judge, Alwar convicted the said accused under Sections 148, 302/149 and 323/149 of I.P.C. and sentenced them to suffer two years rigorous imprisonment and a fine of rupees one thousand in default for the offence under Section 148, rigorous imprisonment for life and a fine of rupees five thousand with default sentence of two years rigorous imprisonment for the offence under Section 302/149 IPC, and to suffer one year rigorous imprisonment for the offence under

A Section 323/149 IPC.

All the five accused appealed to the High Court. On appeal the High Court was of the view that the charges under Sections 148, 302/149 and 323/149 IPC against the appellants, Deen Mohd. and Jamil Khan had not been established beyond reasonable doubt and acquitted them. The present B Appellants Nos. 1 to 3 were, however, convicted by the High Court under Section 302 read with Section 34 IPC and sentenced to suffer imprisonment for life and fine of rupees five thousand with a default sentence of two years rigorous imprisonment and one year's rigorous imprisonment for the conviction under Section 323/34 IPC. The sentences were directed to run concurrently.

C The learned counsel for the appellant invited us to go into the minute details of the evidence to persuade us that the evidence before the Court could not have been accepted at all for convicting the appellants. He also tried to highlight some discrepancies and inconsistencies in the evidence. Two courts having concurrently accepted the evidence to sustain the charge, D we decline to go into the meticulous analysis of the evidence at the invitation of the learned counsel for the appellants. We may usefully recapitulate in this connection the dicta of this Court in *Harshadsingh Pahelvansingh Thakore* v. *The State of Gujarat*[1].

> "Judicial summitry, when the subject of dispute is reappraisal of E evidence even on the sophisticated ground of misappreciation, has to submit itself to certain self-restraining rules of processual symmetry. The trial court directly sees the witnesses testify and tests their veracity in the raw. The appellate Court, enjoying coextensive power of examination, exercises it circumspectly, looks for errors of probative F appraisal, oversight or omission in the record and makes a better judgment on the totality of materials in the light of established rules of criminal jurisprudence. As the case ascends higher, forensic review is more rarefied. Such being the restrictive approach, the Supreme Court cannot be persuaded, without stultifying the system of our judicature, to go over the ground of reading the evidence and G interpreting it a new so as to uphold that which appeals to it among possible alternative views. If there is perversity, miscarriage of justice, shocking misreading or gross misapplication of the rules, procedural and substantive, we interfere without hesitation. Of course other

H 1. [1976] 4 SCC 640

exceptional circumstances also may invoke our review jurisdiction. These prefatory observations have become necessary since, usually, appellants, hopefully slurring over these jurisdictional limitations, argue the whole way before us as if the entire evidence is at large for *de novo* examination. Such a procedure has been attempted in the present case and, for reasons just mentioned, we are disinclined to rip open the depositions to rediscover whether the evidence is reliable or not." A B

In Paragraph 31 of the judgment under appeal the High Court has summarized its findings as under :

"31. Bearing the principles propounded in the aforequotted judgments, in mind we now propose to consider the facts situation emerged in the instant case that may be summarized as under :- C

(i) Deceased Isab received 7 incised wound in the head and other parts of his body and 3 abrasions over right hand and right thigh.

(ii) Deceased Dhandhad received 9 incised wounds on the head and other parts of the body and two bruises on the skull. D

(iii) Appellant Mangu received four abrasions on both the hands and nose. Whereas appellant Sirdar sustained 1 lacerated wound on right leg, multiple abraded bruises on right shoulder and two abrasions on left knee. E

(iv) The informant Sahab Khan sustained 1 lacerated wound on head, bruises on left shoulder and right wrist and abrasion on left leg.

(v) Dispute regarding dividing wall of the fields was going on for the last 10-12 days prior to the date of incident between the appellant Mangu and deceased. F

(vi) According to site plan (Dhani) place of residence of the deceased situated towards the field of Mangu about 300 meters away from the place of incident.

(vii) Dead bodies of Isab and Dhandhad were found lying in the field of Mangu. G

(viii) The field of informant Sahab Khan situated just adjacent to the field of Mangu towards its south.

(ix) The statement of Zakir Hussain (Pw.1), Rudar (Pw.2), Sharif Khan (Pw.4) and Riyasat Ali (Pw. 5) were recorded by the police on H

July 14, 1997 i.e. after about 3 days of the incident. As according to Narpat Singh Rathore, I.O. (Pw. 15) they were not available to him.

(x) To the cross examination Narpat Singh Rathore, I.O. admitted that farsi recovered at the instance of appellant Jamil was sealed and marked as Article 1-A. A slip was pasted on the article which bore his signatures and date July 11, 1997, but it did not bear the signatures of Jamil. He further stated that Jamil was arrested on July 12, 1997 and farsi got recovered after his arrest.

(xi) There are omissions, embellishments and contradictions in the statement of Sahab Khan (Pw.3).

(xii) The injuries sustained by appellants Mangu and Sirdar Khan had not been explained by prosecution.

(xiii) Despite the Police Station fall on the way while taking the dead bodies. The informant did not give first information to the police."

These findings are broadly correct and must be taken as the basis for any further critical appraisal of the judgment under appeal.

Contentions :

The first contention urged by the learned counsel is that Mangu Khan and Sirdar Khan had also suffered injuries, which had not been explained by the prosecution. Consequently, it is argued that the whole of the prosecution case becomes suspect and induces a reasonable doubt, the benefit of which must legitimately go to the accused.

The injuries sustained by the deceased Isab and Dhandhad were extremely serious ones on vital parts of the body, which resulted in their death. The informant Sahab Khan had suffered a lacerated wound on the right side of his head and three abrasions on his right wrist and left leg respectively. As far as the injuries sustained by the accused persons are concerned, the injury report shows small abrasions and laceration on non-vital parts of the body. Apart therefrom, we are unable to accept the contention that in every case there is such an inexorable burden upon the prosecution to explain the injuries on the body of the accused failing which the prosecution case must be thrown out lock, stock and barrel. In *Hare Krishna Singh and Ors.* v. *State of Bihar*[2] this Court, after careful analysis of several judgments

2. AIR [1988] SC 863 para 8.

cited before it as authorities for the said proposition, observed as under: (vide paragraph 18)

> "The burden of proving the guilt of the accused is undoubtedly on the prosecution. The accused is not bound to say anything in defence. The prosecution has to prove the guilt of the accused beyond all reasonable doubts. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of the guilt of the accused beyond any reasonable doubt, the question of the obligation of the prosecution to explain the injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and in what circumstances injuries have been inflicted on the person of the accused."

Again, thus in paragraph 20 :

> "All the decisions of this Court which have been referred to and discussed above, show that when the Court has believed the prosecution witnesses as convincing and trustworthy, the Court overruled the contention of the accused that as the prosecution had failed to explain the injuries sustained by the accused in the same occurrence, the prosecution case should be disbelieved and the accused should be acquitted. Thus, it is not the law or invariable rule that whenever the accused sustains an injury in the same occurrence, the prosecution has to explain the injuries failure of which will mean that the prosecution has suppressed the truth and also the origin and genesis of the occurrence."

In the face of this authoritative pronouncement, we are unable to accept the contention that merely because the appellants, Mangu Khan and Sirdar Khan had a few abrasions and minor lacerated wounds on their bodies, the evidence which is otherwise acceptable becomes suspect or that the prosecution must fail on that score.

The learned counsel next contended that the High Court had grossly erred in not appreciating that the ocular evidence on record was wholly inconsistent with and inexplicable in the light of the medical evidence. In particular, learned counsel drew our attention to the post mortem reports in

A both the cases. In the case of deceased Isab, the post mortem report dated 11.7.1997 indicated that the body was examined at 12.00 Noon on 11.7.97 and certified that death had occurred "within 24 hours prior to PM Examination". The cause of death appeared to be serious injuries caused on the head and skull resulting in wounds going deep into meninges, brain B matter coming out through bones and scalp. In the case of the deceased Dandhad, the post mortem report dated 11.7.1997 certified that his body was examined at 11.00 AM and death had occurred "within 24 hours prior to PM Examination". In both the cases, the post mortem report indicated "rigor mortis present all over the body". On the basis of these two documents, the learned counsel tried to build up a case that the prosecution story was C unbelievable, that the offence had been committed during previous night in the open field by unknown persons and the case had been falsely foisted on the accused on account of previous enmity over the construction of a bund. We see no basis whatsoever for this argument. In the first place, neither post mortem report suggests that the death had taken place exactly 24 hours before D the post mortem was conducted. All that the post mortem reports say is that the death had occurred "within 24 hours prior to PM Examination". Undoubtedly, the post mortem examination was carried out at 11.00 A.M./ 12 Noon on 11.7.1997. In other words, the post mortem reports suggest that the death might have occurred any time after 11.00/12.00 Noon of 10.7.1997. The contention urged by reference to text books on Forensic Medicine to E show the time within which rigor mortis develops all over the body also has no factual basis. It depends on various factors such as constitution of the deceased, season of the year, the temperature in the region and the conditions under which the body has been preserved. The record indicates that the body was taken from the mortuary. We notice that there is no cross examination, F whatsoever, of the doctor so as to elicit any of the material facts on which a possible argument could have been based. If these are the circumstances, then the presence of rigor mortis all over the body by itself cannot warrant the argument of the learned counsel that the death must have occurred during the previous night. Acceptable ocular evidence cannot be dislodged on such hypothetical bases for which no proper grounds were laid.

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The learned counsel then argued that the evidence on record showed that the bund had been constructed in the field of Mangu Khan about 10-15 days prior to the date of the incident. He urged that even if it was assumed that the bund had been constructed by trespassing upon the land of the H deceased, since the accused were in settled possession and the complainant

party were attempting to forcibly reoccupy the bund, right of private defence was available to the accused both in respect of their property and their person. The contention is wholly unfounded and misplaced. No such plea seems to have been raised during the trial, nor suggested during the cross examination of prosecution witnesses. Secondly, there is no evidence that the complainant party was approaching the accused party with an intention of causing a bodily harm, for they were wholly unarmed. It is the accused party which appeared to be armed with weapons like lathi, farsi, tanchia and katta. Further, the evidence on record does not suggest that any member of the complainant party had done any act which could have induced a reasonable apprehension in the minds of the accused of danger to their person or to their property. We are also not in a position to accept the contention of the learned counsel that the injuries sustained by the accused furnished such evidence.

The learned counsel then contended that, apart from the other charges of the five accused, the accused who had been charged under Section 302 simplicitor had been acquitted of the offence under Section 302, but convicted of the offence under Section 302 r/w Section 34 of IPC. According to the learned counsel, since the Sessions Court had acquitted the appellants of the charge under Section 302, it was not open to the High Court to convict them under Section 302 r/w Section 34 of IPC. This, in the submission of the learned counsel caused prejudice to the appellants, is a grave misdirection in law and has resulted in miscarriage of justice.

The High Court, after reappreciating the evidence on record, took the view that the prosecution had failed to establish charges under Sections 148, 302/149 and 323/149 IPC against the accused Deen Mohd. and Jamil Khan beyond reasonable doubt. This was the reason why they were acquitted. With regard to the present Appellants Nos. 1 to 3, the High Court was of the view that formation of the common intention to commit the offence on the spot was established against them. Relying on the judgment of this Court in *Malhu Yadav and Ors.* v. *State of Bihar*[3] the High Court held that although a charge under Section 34 IPC had not been framed against the present appellants, since the evidence showed formation of a common intention to commit the offence on the spot, their conviction under Section 302 IPC with the aid of Section 34 IPC would not cause any prejudice to them.

The contention urged by the learned counsel is unsound in law. There

3. [2002] 5 SCC 724.

A is no doubt that Isab and Dhandhad were done to death by serious injuries to the vital parts of their bodies, namely, skull. That the three appellants had a common intention to cause such injuries is evident from their waiting with arms, early in the morning, in the field. The evidence on record justifies the conclusion of the High Court. The manner in which the complainant party was attacked and two of them were done to death is borne out by the evidence B and the High Court's findings on this issue are justified. May be, from the evidence, it may not be possible to pin point the person who dealt the fatal blow to each of the deceased. That is perhaps the reason why the appellants were all acquitted of the charge under Section 302 simplicitor. But when the evidence indicates that the three accused had repeatedly given blows with C lathi, farsi and tanchia, and it is not possible to identify and ascribe a particular injury to a particular accused, there would be nothing illegal in convicting the accused of the charge of Section 302 with the aid of Section 34 IPC. As to the object of Section 34, this Court in *B.M. Dana and Anr.* v. *State of Bombay*[4] observed :

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> "We accept the position that we do not know which particular person or persons gave the fatal blows; but once it is found that a criminal act was done in furtherance of the common intention of all, each of such persons is liable for the criminal act as if it were done by him alone. The section is intended to meet a case in which it may be E difficult to distinguish between the acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. The principle which the section embodies is participation in some action with the common intention of committing a crime; once such participation is established, S. 34 is at once attracted."

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In fact, this precisely appears to be the role of Section 34, as this Court had indicated in *Harshadsingh Pahelvansingh Thakore* (supra). In the felicitous words of Krishna Iyer, J. the legal proposition is :

> "We make the legal position clear that when a murderous assault by G many hands with many knives has ended fatally, it is legally impermissible to dissect the serious ones from the others and seek to salvage those whose stabs have not proved fatal. When people play with knives and lives, the circumstance that one man's stab falls on

H 4. AIR (1960) SC 289 para 19.

a less or more vulnerable part of the person of the victim is of no consequence to fix the guilt for murder. Conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplish their purpose cumulatively. Section 34 IPC fixing constructive liability conclusively silences such a refined plea of extrication. (See *Amir Hussain* v. *State of U.P.*[5] ; *Maina Singh* v. *State of Rajasthan*[6].) Lord Sumner's classic legal shorthand for constructive criminal liability, expressed in the Miltonic verse 'They also serve who only stand and wait' a fortiori embraces cases of common intent instantly formed, triggering a plurality of persons into an adventure in criminality, some hitting, some missing, some splitting hostile heads, some spilling drops of blood. Guilt goes with community of intent coupled with participatory presence or operation. No finer juristic niceties can be pressed into service to nullify or jettison the plain punitive purpose of the Penal Code."

In a situation when all the accused but one have been acquitted of the charge, it is possible to convict even the solitary accused under Section 302 with the aid of Section 34 (See also in this connection *Sukh Ram* v. *State of U.P.*[7] and *Pipal Singh* v. *State of Punjab*[8])

Learned counsel finally made a desperate appeal that if they were guilty, the appellants could be convicted only under Section 304 Part I IPC and not under Section 302. We are afraid, this plea is also not open. The situation was not one of a free fight. On the other hand, the evidence on record indicates that the intention was to ambush, attack and kill the persons, who were coming to protest about the unlawful construction of the bund. In our view, the situation is covered by Section 302 and not by Section 304, as urged.

We find no substance in these appeals, which are hereby dismissed.

N.J. Appeals dismissed.

5. [1975] 4 SCC 247.

6. [1976] 2 SCC 827.

7. AIR (1974) SC 323.

8. [2001] 2 SCC 292.