1954

January 29.

KARNAL SINGH AND ANOTHER

v.

THE STATE OF PUNJAB.

[BHAGWATI, JAGANNADHADAS and VENKATARAMA AYYAR JJ.]

Indian Penal Code (Act XLV of 1860), ss. 34 and 149—Scope of—Charge under s. 302 read with s. 149—Conviction under s. 302 read with s. 34—Whether valid.

It was contended that the conviction of the appellants under s. 302, Indian Penal Code, read with s. 34 was illegal when they had been charged only under s. 302 read with s. 149 because the scope of s. 149 was different from that of s. 34, that while what s. 149 required was proof of a common object, it would be necessary under s. 34 to establish a common intention and that therefore when the charge against the accused was under s. 149, it could not be converted in appeal into one under s. 34.

Held, that it is true that there is substantial difference between the two sections but they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under s. 149 overlaps the ground covered by s. 34. If the common object which is the subject-matter of the charge under s. 149 does not necessarily involve a common intention, then the substitution of s. 34 for s. 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under s. 149 would be the same if the charge were under s. 34, then the failure to charge the accused under s. 34 could not result in any prejudice and in such cases the substitution of s. 34 for s. 149 must be held to be a formal matter. There is no such broad proposition of law that there can be no recourse to s. 34 when the charge is only under s. 149.

Whether such recourse can be had or not must depend on the facts of each case.

The facts of the present case warranted such a recourse.

Dalip Singh v. *State of Punjab* (A.I.R. 1953 S.C. 364), *Barendra Kumar Ghosh* v. *Emperor* (I.L.R. 52 Cal. 197 P.C.), *Lachman Singh* v. *The State* ([1952] S.C.R. 839) referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 64 of 1953.

Appeal by special leave from the Judgment and Order dated the 9th June, 1953, of the High Court of Judicature for the State of Punjab at Simla (Falshaw and Kapur JJ.) in Criminal Appeal No. 60 of 1953

arising out of the Judgment and Order dated the 15th December, 1952, of the Court of the Additional Sessions Judge, Ferozepore, in Sessions Case No. 50 of 1952 and Trial No. 57 of 1952.

Jai Gopal Sethi (*R. L. Kohli,* with him) for the appellants.

Porus A. Mehta for the respondent.

1954. January 29. The Judgment of the Court was delivered by

VENKATARAMA AYYAR J.—This is an appeal by special leave by Karnail Singh and Malkiat Singh against the judgment of the High Court of Punjab confirming their conviction by the Additional Sessions Judge of Ferozepore under section 302, Indian Penal Code, and the sentence of death passed on them.

The facts as found by the courts below are as follows: There had been long standing enmity between the appellants and their party on the one hand and the deceased Gurbaksh Singh and his party on the other, resulting in a number of crimes, and proceedings in court. On the 27th January, 1952, at about sunset time, Gurbaksh Singh was sitting inside his house on the sabath and his sister Mst. Bholan was in the kitchen. Then the appellants and their men came to the place armed with rifles, got on the roof of the house of Gurbaksh Singh and challenged him to come out. Gurbaksh Singh and Mst. Bholan went to the kotha and bolted the door from inside. Then the appellants and their men made holes in the roof with spades, ignited inflammable materials, such as dry twigs, and threw them inside the kotha through the holes and set fire to the building. Both Gurbaksh Singh and Mst. Bholan were caught inside and burnt to death. A brother of Gurbaksh Singh called Dev, who had been at that time away, was, according to the prosecution, seized when he subsequently turned up, thrown into the flames and was also burnt to death. Meantime one Gurnam Singh, P. W. 13, a cousin of Gurbaksh Singh and his neighbour, managed to slip out of the village and reported the occurrence at the police station at Nihal Singhwala,

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a place eight miles away (*vide* Exhibit PQ). It was then 10-30 P.M. On receipt of this information, the police sub-inspector, P.W. 25, went to the village with a posse of constables and with Gurnam Singh. He found the house mostly burnt and recovered therefrom the charred remains of three dead bodies and they were identified as those of Gurbaksh, Dev and Mst. Bholan. The appellant Karnail Singh was actually seen at that place and arrested on the spot. Malkiat Singh who had been mentioned in Exhibit PQ as one of the participants was found in his house with gunshot wounds and was also arrested. Eventually eight persons, including the appellants, were charged under section 148, Indian Penal Code, for forming an unlawful assembly with the object of burning the house of Gurbaksh Singh and murdering him, Der and Mst. Bholan, and under section 302 read with section 149 for their murder. The Additional Sessions Judge, Ferozepore, held that the case had not been established beyond doubt as against two of the accused and he accordingly acquitted them. He convicted the six others including the appellants under section 148 and section 302 read with section 149 and sentenced them to death. On appeal, the learned Judges of the Punjab High Court held that "although there can be no doubt whatever that the occurrence took place more or less on the lines described by the prosecution witnesses, and the primary object of the culprits must have been to murder Gurbaksh Singh, deceased, in consequence of the bitter enmity between him and the main body of the accused" and that "although it may very well be true that all the six appellants took part in this occurrence", the evidence against the four accused other than the appellants was insufficient to to sustain their conviction, as it consisted of the testimony of persons who were at a distance of 40 to 50 feet from the scene of occurrence and who claimed to identify the particular accused only by their voice. They were accordingly acquitted. Then dealing with the case against the two appellants they observed that as against them, there was evidence of the two eye-witnesses, Gurnam Singh (P. W. 13) and Maghar Singh

(P. W. 14), that Maghar Singh was not a reliable witness, that nothing could be urged against the evidence of Gurnam Singh, that even so it would be unsafe to base a conviction on his evidence alone, but that the presence of Karnail Singh at the spot and the existence of wounds on the person of Malkiat Singh afforded sufficient corroboration of the evidence of Gurnam Singh. They accordingly confirmed the conviction and sentence as against the appellants. As four of the accused were acquitted in appeal, the learned Judges set aside the conviction of the appellants under section 149 and substituted section 34, Indian Penal Code, therefor.

Two contentions have been urged on behalf of the appellants, that the evidence which had been accepted by the learned Judges as reliable was insufficient to establish the guilt of the appellants and that their conviction under section 34 was bad as no charge had been framed against them under that section. On the first point, the argument of the learned counsel for the appellants was that having held that the only eye witness whose evidence was worthy of credence was P.W. 13, and that even his evidence could not be acted upon unless it was corroborated, the learned Judges were in error in holding that there was such corroboration against the appellants. The circumstance relied on by the court below as corroborating the evidence of P.W. 13 was that the appellants were proved to have been present at the scene of occurrence. and there was no satisfactory explanation from them therefor. As regards Karnail Singh, the police sub-inspector, P.W. 25, actually found him emerging out of the burning house with a spear in his hand. He had injuries on his person and his pyjama was blood-stained. He was arrested on the spot and the spear and the pyjama were seized and marked as Exhibits P-12 and P-20. As for Malkiat Singh, his name was mentioned in the first information report, Exhibit PO, and P.W. 25 went to his house and found him with gunshot wounds and arrested him. In the statement given by Karnail Singh under section 342, Criminal Procedure Code, he stated that when he saw the house

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of Gurnam Singh on fire, he went there and was assaulted by culprits, that Malkiat Singh came there to help him, that when they were grappling with the culprits he was attacked and Malkiat Singh received a gunshot and thereafter they went away to their houses. The statement of Malkiat Singh also was on similar lines. There was no evidence that any other person or persons were responsible for the acts and the learned Judges therefore rejected as untrue the explanation of the appellants that "they received these injuries while intervening against some unknown assailants on behalf of their bitterest enemy."

It is contended for the appellants that the mere presence of Karnail Singh at the place of occurrence would in itself mean nothing and that it would amount to corroboration only if some further act incriminatory in character was proved. With reference to Malkiat Singh, it was argued that the existence of gunshot wounds would be inconclusive as there was no evidence as to how they were caused. It was contended that the theory of the learned Judges that Gurbaksh Singh might himself have shot at him through the hole while he was on the roof was wholly unsupported by evidence and opposed to the medical evidence in the case as to the nature of the wounds and to the fact that no gun was recovered from the house, and that there was accordingly nothing to connect Malkiat Singh with the incident at the house of Gurbaksh Singh. With reference to the statements of the accused admitting their presence at the place but explaining that some culprits had set fire to the house and that they went there thereafter, it was argued that if the statements were to be taken into consideration they must be taken as a whole and that it was not proper to accept the incriminating portion and reject the exculpatory portion thereof and the observations of this court in *Hanumant* v. *State of Madhya Pradesh*(1), at page 1111 were relied on in support of this position. The result according to the appellants is that there was not sufficient

(1) [1952] S.C.R. 1091.

corroboration of the evidence of P. W. 13 to support their conviction.

It is necessary in view of this contention to examine the evidence in order to see what corroboration there is against each of the appellants. So far as Karnail Singh is concerned, his presence, at the scene of occurrence under the circumstances disclosed in the evidence is sufficient to corroborate the evidence of P.W. 13. It should be remembered that Gurnam Singh is not an approver. He is a witness against whom the learned Judges had nothing to say and if they required corroboration of his evidence it was because he was a relation of the deceased and it was considered not safe to base a conviction on his sole testimony. The corroboration that is required in such cases is not what would be necessary to support the evidence of an approver but what would be sufficient to "lend assurance to the evidence before them, and satisfy them that the particular persons were really concerned in the murder of the deceased." (Vide *Lachhman Singh* v. *State*(1)). Karnail Singh was arrested on the spot with a spear and a bloodstained pyjama, and these are pieces of evidence which would support the inference that he was concerned in the crime.

The case of Malkiat Singh presents greater difficulty. He was arrested in his house with gunshot wounds on his person and unless it could be established that they were received at the scene of occurrence that would not be sufficient to connect him with the crime. We agree that the mention of his name in Exhibit PQ cannot be held to be sufficient corroboration because that is only the statement of P. W. 13 at an earlier stage and it is not independent evidence. With reference to the statement of the accused under section 342, Criminal Procedure Code, it is true that if it is sought to be used as an admission it must be read as a whole; but where it consists of distinct and separate matters, there is no reason why an admission contained in one matter should not be relied on without reference to the statements relating to other matters. In this case the

(1) [1952] S.C.R. 839 at p. 845.

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admission of the appellant that he was present at or near the scene of occurrence is distinct and separate from his explanation as to how he received the injuries. The learned Judges having disbelieved, in our opinion rightly, the statement of the appellant that the house was burnt by some unknown enemies of Gurbaksh Singh and that it was they who murdered him, we do not see any objection to the statement of the appellant that he was present at the scene of the occurrence from being used as an admission. Another piece of corroboration which the learned Judges relied on was that in their view the gunshot wounds must have been received by Malkiat Singh at the house of Gurbaksh Singh. They gave their finding on this point in the alternative. They observed that the injuries might have been caused by Gurbaksh Singh firing from inside the house. But of this there is no evidence and the medical evidence is in fact opposed to it and as already stated, no gun was recovered from the house of the deceased. In the alternative, they observed that the injuries might have been caused by a shot from one of his own men. This view is supported by the evidence of P. W. 14 who deposed that while the incidents were in progress Malkiat Singh stated that he had been shot by one of his own men and then left the place. It is argued for the appellant that as the learned Judges had declined to act on the evidence of P. W. 14, the alternative suggestion must be ruled out as unsupported by evidence. What all the learned Judges remarked about P.W. 14 was that it was "impossible to place any very great reliance on Maghar Singh's evidence". But then they also expressly referred to his evidence on this point (Vide page 61 of the record) and accepted it as one of the possible alternatives (Vide page 65). And on their finding that the injuries must have been received at the place of occurrence and the theory that Gurbaksh Singh fired the shot being negatived, there is no difficulty in holding that they were prepared to accept the evidence of P. W. 14 on this point. Thus there are ample materials for holding that the gunshot wounds were received by Malkiat Singh in the house of Gurbaksh Singh and

that is sufficient corroboration of the evidence of P. W. 13. In this view we must overrule the first contention.

Then the next question is whether the conviction of the appellant under section 302 read with section 34, when they had been charged only under section 302 read with section 149, was illegal. The contention of the appellants is that the scope of section 149 is different from that of section 34, that while what section 149 requires is proof of a common object, it would be necessary under section 34 to establish a common intention and that therefore when the charge against the accused is under section 149 it cannot be converted in appeal into one under section 34. The following observations of this court in *Dalip Singh* v. *State of Punjab*(1) were relied on in support of this position:—

"Nor is it possible in this case to have recourse to section 34 because the appellants have not been charged with that even in the alternative and the common intention required by section 34 and the common object required by section 149 are far from being the same thing."

It is true that there is substantial difference between the two sections but as observed by Lord Sumner in *Barendra Kumar Ghosh* v. *Emperor*(2), they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under section 149 overlaps the ground covered by section 34. If the common object which is the subject-matter of the charge under section 149 does not necessarily involve a common intention, then the substitution of section 34 for section 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under section 149 would be the same if the charge were under section 34, then the failure to charge the accused under section 34 could not result in any

(1) A.I.R. 1953 S.C. 364 at p. 366.

(2) I.L.R. 52 Cal. 197 (P.C.).

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prejudice and in such cases the substitution of section 34 for section 149 must be held to be a formal matter. We do not read the observations in *Dalip Singh* v. *State of Punjab*(1) as an authority for the broad proposition that in law there could be no recourse to section 34 when the charge is only under section 149. Whether such recourse can be had or not must depend on the facts of each case. This is in accord with the view taken by this court in *Lachhman Singh* v. *The State*(2) where the substitution of section 34 for section 149 was upheld on the ground that the facts were such "that the accused could have been charged alternatively either under section 302 read with section 149, or under section 302 read with section 34."

Examining the record from this point of view the findings are that both the appellants who had long standing enmity with Gurbaksh Singh, got on the roof of his house and set fire to it, with the deceased and Mst. Bholan couped up within. If it was their object under section 149 to burn the house and cause the death of Gurbaksh Singh, that was also their intention under section 34. On the facts of this case there can be no difference between the object and the intention with which the offences were committed. Our attention was also drawn to the wording of the charge which while mentioning section 149 also sets out that in prosecution of the common object the accused intentionally set fire to the house and murdered Gurbaksh Singh and Mst. Bholan. We are satisfied that the substitution of section 34 in the place of section 149 in the charge by the court below has resulted in no prejudice to the appellant and it is therefore not open to objection.

The appeal fails and is dismissed.

Appeal dismissed.

Agent for the appellants: *Naunit Lal.*

Agent for the respondent: *R. H. Dhebar.*

(1) A.I.R. 1953 S.C. 364.
(2) [1952] S.C.R. 839.