

A

MAHADEO SAHNI AND ORS.

v.

STATE OF BIHAR

AUGUST 13, 2002

B

[UMESH C. BANERJEE AND Y.K. SABHARWAL, JJ.]

C

Penal Code, 1860—Sections 302/149, 147, 148 and 304 Part II/149—Murder—Conviction under Sections 302/149, 147 and 148—Upheld by High Court—Assault by various persons with various weapons—Medical evidence supported prosecution case as to weapons used for assault—Plea to convert the conviction under Section 304/149—Held there is no factual support for altering the conviction—Prosecution succeeded in establishing charges under Section 302/149.

D

Practice and Procedure—Appreciation of evidence—Interference by Supreme Court—Though generally not permissible but could interfere in case of miscarriage of justice or perversity.

E

According to the prosecution the appellants assaulted two persons with various weapons resulting in their death and the assault was witnessed by PWs 2 and 4, and the assault, was supported by medical evidence.

F

Trial Court observed that doctor's evidence did not disclose as to which injuries were independently sufficient to cause death in ordinary course of nature and that there was evidence to conclude that all the accused were independently guilty of murder. Thus the accused were convicted and sentenced under Section 302/149 IPC. The court further convicted and sentenced four of the accused under Section 148 and the rest of the accused under Section 147 IPC. High Court confirmed the conviction and sentence.

G

In appeal to this Court appellant contended that they could not have been convicted under Section 302 and their offence would fall under Section 304 Part II/149 as prosecution failed to prove as to who among the accused had struck the fatal blow resulting in death of the deceased.

H

Dismissing the appeals, the Court

HELD: 1.1. In the instant case there is no factual support for bringing

in Section 304 Part II instead of Section 302 and there exists, by appreciation of evidence, a definite finding that the prosecution has succeeded in establishing the charges under Section 302 read with Section 149 IPC and accordingly all the accused persons were rightly convicted, and in addition thereto three accused were convicted under Section 148 IPC while the other accused were convicted under Section 147 IPC. [510-E, F, G]

Ramkishan and Ors. v. State of Rajasthan, [1997] 7 SCC 518, distinguished.

1.2. Since during the pendency of the appeal before the High Court, appellant Nos. 2 and 6 passed away, and since A9 passed away during the pendency of the appeal before this Court, the appeal against them stands abated. [511-B, C]

2. It is trite to record that in the normal course of events the apex Court would not re-appreciate or effect a further scrutiny of the evidence on record. But this is not a rule steadfast or an inevitable practice-flexibility in the administration of justice stands out to be the hall-mark in our justice delivery system. The requirement of the situation stands out to be a basic tenet in the Indian jurisprudential system and the approach being justice oriented the interest of justice would prompt this Court to rise to the occasion and thus there being a rule steadfast of not appreciating the evidence would not arise-miscarriage of justice or perversity would prompt even the apex Court to go into the matter since technicality ought not to outweigh the course of justice. [503-H; 504-A, B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 574-575 of 2002.

From the Judgment and Order dated 22.2.1999 of the Patna High Court in CrI.A. (D.P.) No. 62 87 with CrI.A. (D.B.) No. 74 of 1987.

K.B. Sinha, R.R. Dubey, Surjit K. Singh and S.B. Upadhyay for the Appellants.

Saket Singh, for B.B. Singh for the Respondent.

The Judgment of the Court was delivered by

BANERJEE, J. It is trite to record that in the normal course of events the apex Court would not re-appreciate or effect a further scrutiny of the evidence on record. We, however, hasten to add here that this is not a rule

- A steadfast or an inevitable practice flexibility in the administration of justice stands out to be the hall-mark in our justice delivery system. The requirement of the situation stands out to be a basic tenet in the Indian jurisprudential system and the approach being justice oriented the interest of justice would prompt this Court to rise to the occasion and thus there being a rule steadfast of not appreciating the evidence would not arise miscarriage of justice or perversity would prompt even the apex Court to go into the matter since technicality ought not to outweigh the course of justice.

- The issue in the contextual facts falls for determination is whether in fact there has been such a miscarriage warranting intervention of this Court and as contended to alter the sentence of 302 read with Section 149 IPC to 304 Part II read with Section 149 IPC the issue no doubt needs a detail scrutiny of evidence on record but the nature of injuries, the medical evidence and the eye-witnesses account do not however lend much credence to such a submission in the matter under consideration.

- Let us however at this juncture briefly advert to the factual backdrop. The facts reveal the prosecution case as below:

- On 8.5.84 at about 11.30 p.m. informant Munar Mahto (PW8) went to Tariyani Chowk Police Station within the district of Sitamarhi and lodged an FIR (Ext. 3) stating therein that on the same day at about 3.00 p.m. he alongwith his father Gajar Mahto, uncle Bitin Mahto, Ram Bilas Mahto (PW 4) and Ram Chandra Mahto (PW2) had gone to Turki Bazar. Appellants Jiva Lal Sah and Gagandeo Sah had also gone to Turki Bazar and in the market where ever the informant and his men went they both kept watch on them after staying at some distance. After marketing when the informant and his men started for their house, appellants Jiya Lal Sah and Gagandeo Sah proceeded ahead of them. When the informant and his men reached a village footh path, going towards Ladaura Mahinwara near the field of one Bharat Singh in Nandna Sareh situated at village Kumhrar, all of a sudden all the appellants came from a maize crop field and started assaulting the father of the informant who was going ahead of the informant and his remaining companions. Appellant Gagandeo Sah and Mahadeo Sahni ordered their companion to kill all even if their lands were sold and on this instigation appellant Rajendra Sahni started assaulting the father of the informant with a lathi and appellant Naga Sahni with a Dabiya (a sharp cutting weapon). When Bitin Mahto, uncle of the informant, tried to rescue the father of the informant he was assaulted by appellant Gagandeo Sahni with a Garasa and

he, after receiving injuries, fell down. Appellant Bachu Sahni thereupon started assaulting the father and uncle of the informant with a 'Phatha' (bamboo stick) and appellant Shyam Nandan Sahni started assaulting the uncle of the informant with a dagger. Appellant Rajan Sahni and Binod Sahni by putting lathis on both sides of the neck of the father of the informant pressed their lathis and remaining appellants started indiscriminately assaulting the father and uncle of informant with lathis saying that when they had identified them they would finish them. Informant, Ram Chandra Mahto (PW2) and Ram Bilas Mahto (PW4) out of fear were watching the occurrence from some distance. It was a moonlit night. When the informant raised hulla villagers namely, Mitan Mahto, Phul Shankar Mahto (none of them examined), Ram Ekbal Mahto (PW6) and Mohan Mahto (PW5) replied that they were coming and after hearing their replies the appellants fled away but appellant Musafir Sahni was caught and he was assaulted by the mob who had caught him. The informant found that his father and uncle had died.

The post-mortem report as is available on record as regards the injuries sustained by Jagdish Mahto and who eventually succumbed to the same read as below :

- (i) Lacerated wound 1¼" X 1/3" scalp deep on left side of occipital region.
- (ii) Lacerated wound 1¼" X ¼" X scalp deep on left side of occipital region.
- (iii) Incised wound 1½" X ¼" X scalp deep on left side of forehead.
- (iv) Lacerated wound 1¼" X 1/3" scalp deep on left parietal region.
- (v) Incised wound 1" X 1" X scalp deep on left temporal region behind left ear.
- (vi) Lacerated wound 1½" X ¼" X scalp deep on left temporal region behind left ear.
- (vii) Lacerated wound 2" X ¼" X scalp deep on left side of occipital region.
- (viii) Bruise 3½" X ¾" on back of left side of chest.
- (ix) Bruise 4½" X 1" on back of left side of chest.
- (x) Bruise 4" X ¾" on back of right side of chest.

A (xi) Bruise 2" X ¾" on back of right side of chest.

It is Dr. Bishwanath Bijoria, who happened to be PW 3 conducted the post-mortem examination of Jagdish Mahto not only found the above injuries on the dead body but also categorically recorded that injury Nos. (iii) and (v) were caused by a sharp cutting weapon which may be 'Chhura' or 'grasa' and

B remaining injuries were caused by hard blunt substance which may be lathi or 'phtha' and time elapsed since death was within 36 to 60 hours approximately. He has stated that rigor mortis was absent and death was caused by shock and hemorrhage due to aforesaid injuries.

C As regards the Gajar Mahto, the post-mortem report indicates the following ante-mortem injuries :-

(i) Incised wound 2" X ¼" X ¼" just below chin.

(ii) Lacerated wound 1½" X 1/3" X 1/4" on the right side of the chin.

D (iii) Lacerated wound 1" X 1/4" X ¼" on the right side of mandible area below right angle of mouth.

(iv) Incised wound ¾" X 1/5" X 1/5" on the right side of mandible region.

(v) Lacerated wound 1½" X ½" X scalp deep on mid parietal region.

E (vi) Lacerated wound 1½" X ½" X scalp deep on occipital region.

(vii) Lacerated wound 1¼" X ½" X ½" at cleft between ring finger and middle finger of right hand.

(viii) Bruise 3½" X ¾" on lower part of front of left side of chest.

F (ix) Bruise 4" X 1" on lower part of chest and upper part of abdomen.

(x) Bruise 1¼" X 1" just right side of chest in front region.

(xi) Bruise 3" X ¾" on anterior surface of right thigh.

(xii) Bruise 2" X ¾" on anterior surface of right thigh.

G (xiii) Bruise 3½" X 1" on mandible side of left thigh.

(xiv) Bruise 1½" X ½" in front of neck.

It is the self-same doctor who conducted the post-mortem examination also recorded that the aforesaid injuries, injury Nos. (i) and (iv) were caused

H by a sharp cutting weapon which may be a dabia and rest injuries were

caused by hard blunt substance which may be lathi and bhala and time elapsed since death was 36 to 46 hours approximately. Rigor mortis was absent and death was caused by shock and hemorrhage due to aforesaid injuries.

The medical evidence as is available on record does support the case of the prosecution that both the deceased died of injuries caused by weapons such as dagger, garasa and dabia as also by some hard blunt substance which may be in the category of lathi and phatha.

Learned advocate appearing in support of the appeals has been rather eloquent in his contentions that the prosecution has failed to establish as to who among the accused persons had struck the fatal blow resulting in the death of the deceased and observations of the learned Sessions Judge has been taken recourse to in support of such a contention, which we will presently refer to and for convenience sake, the same is set out below:

“In this case the evidence of doctor does not disclose that which of the injuries inflicted over the persons of victims was independently sufficient to cause death in ordinary course of nature. Rather his evidence went to reflect that the victim died due to shock and haemorrhage due to accumulative affect of the injuries on the victims. There is no evidence to that effect that all the accused persons had common intention to commit murder of the two victims. The evidence on record went to reflect that the mob constituting unlawful assembly was aware of the fact that they were armed and it may result in dreadful consequences as well. In this view of the matter I find that there is no evidence to conclude that all the accused persons were independently guilty of murder as required under Section 302 IPC under which all the accused persons stand charged. As such in my opinion, charge under section 302 IPC framed by my learned predecessor against all the accused persons does not stand substantiated by the evidence on record as our discussions have shown. As such the accused persons will get exoneration of direct charge under section 302 IPC.

However, the evidence on record goes to reflect that all the accused persons had intended to cause severe injuries by infliction of blows by their respective deadly weapon which may led to dire consequences and infliction of injuries by some of the accused persons with deadly weapons like dagger, dabia, garasa and lathis accumulatively

- A resulted in the death of two victims on the spot. The evidence lead by the PWs that accused Binod and Rajan had killed Gajar by pressing his neck in between two lathis by strangulation is not substantiated by the evidence of doctor. If that would have been proved by the evidence of the doctor certainly the fate of both these accused persons would have been quite different and they would have been held guilty of direct charge under section 302 IPC. In view of the evidence it transpires that all the accused persons jointly jumped upon the two victims and severe blows at the hands of some of the accused persons with deadly weapon contributed to the commission of murder of the 2 victims and murder resulted in consequence of the total blows amounting to accumulative effect of the injuries over the victims. So from the evidence it becomes conspicuous that some of the accused started with their respective weapons in prosecuting their common object of doing way with the lives of the victims committed the murder of two victims. As such their acts and performance and all warrant the application of section 302 IPC read with 149 IPC and all the accused persons stand charged under section 302/149 IPC as well."
- B
- C
- D

It is on the basis of the aforesaid the Learned Sessions Judge returned a verdict of guilt and sentencing all the appellants to undergo life imprisonment under Section 302 read with Section 149 Indian Penal Code. Appellants Gagandeo Sahni, Shyam Nandan Sahni and Naga Sahni have further been convicted and sentenced to undergo rigorous imprisonment for 3 years under Section 148 IPC and the remaining appellants have further been convicted and sentenced to undergo rigorous imprisonment for 2 years under Section 147 IPC.

- E
- F Significantly, it is this conviction and sentence which stands confirmed by the High Court and hence these appeals before this Court.

- G The decision of this Court in *Ramkishan and Ors. v. State of Rajasthan* [1997] 7 SCC 518] has been sheet-anchor for the appellants herein with the reasoning that this Court ought to come to a conclusion that the offences, if any, in the facts and circumstances of the matter in issue would only fall under Section 304 Part II read with Section 149 IPC and not under Section 302 IPC. We are, however, unable to record our concurrence therewith. It is in this context the observations of this Court in *Ramkishan* (supra) would be of some relevance. This Court in paragraphs 3 to 7 stated as below :-
- H

“3. The trial court found that there were two sets of accused in the case, one set belonging to Kumhar caste while the other belonging to the Gujar community. The appellants belong to the Gujar community. The trial court found that the evidence of the eyewitnesses who had implicated not only the appellants but also five others belonging to the Kumhar caste could not be believed fully and consequently gave benefit of doubt to the five accused belonging to the Kumhar caste and acquitted them.

4. The trial court after appreciating the evidence, in the case of the appellants, opined that there was no evidence on the record to show any pre-meditation on the part of the appellants. It was also concluded that the prosecution had failed to establish as to who among the 10 accused, had struck the fatal blow resulting in the death of Bhura. The learned Sessions Judge further observed that “it remains a mystery who the killers of Bhura are”. This observation was made in the context of as to who had caused the fatal injuries, particularly when according to the prosecution case itself none of the appellants was armed with a lathi and the deceased had suffered a few blunt-weapon injuries. We find that the prosecution has established the complicity of the appellants with the crime but the question, however, is about the nature of offence committed by them.

5. Dealing with the actual assault, the learned Sessions Judge has observed :

“As Bhura and Ramphool had broken the leg of Ranjita and they were going to ‘Foota Dungar’ in bullock cart to fetch wood from there, the Gujar accused must have intended to attack them by obstructing the cart and inflicting injuries to them in that situation.”

(emphasis ours)

The trial court went on to observe :

“As sufficient evidence is not available regarding the fact that all the five accused were involved in causing the death of the deceased Bhura and that all the five accused had come out from one ‘pole’, it cannot be said that they had formed an unlawful assembly to kill the deceased Bhura before the incident. But after the start of ‘marpit’ they (accused) inflicted grievous hurt (to) deceased Bhura.”

A So far as the recoveries are concerned the trial court rightly did not believe the same and observed :

B “I have, therefore, no hesitation to conclude that all the ten accused were arrested on 5.11.1981 and that the evidence regarding their arrest on 21.11.1981, and disclosure statements and recoveries of weapons on 22.11.1981 is all fabricated and false. The IO seems to have acted in this manner in his zeal to strengthen the prosecution case.”

C 6. However, in spite of recording all the above findings, the trial court still convicted the appellants for offences under Section 302 IPC and Section 148 IPC and the High Court also confirmed their conviction and sentence. In our opinion the approach of both the courts below on the question of nature of offence was faulty and erroneous.

D 7. On the basis of the findings of the learned trial court, as noticed above, it is quite obvious that the intention of the appellants could only have been to cause injuries to the deceased by obstructing his bullock cart and they did not share any common intention or object to cause the death of the deceased. Instead by causing injuries with an axe it could be said that the appellants should have realised that the injuries were likely to cause his death but that would only bring the case of the appellants under Section 304 Part II IPC and not one under Section 302 IPC.”

E Unfortunately, however, in the matter under consideration, there is no factual support for bringing in Section 304 Part II instead of Section 302 and there exists, by appreciation of evidence, a definite finding that the prosecution
F has succeeded in establishing the charges under Section 302 read with Section 149 IPC and accordingly all the accused persons were so convicted and in addition thereto accused Gagandeo Sahni, Shyam Nandan Sahni and Naga Sahni were convicted under Section 148 IPC while the other accused Rajendra Sahni, Mahadeo Sahni, Siyaram Sahni, Rajan Sahni, Ram Binod Sahni, Bachu Sahni, Mangal Sahni, Lalan Sahni, Jiyalal Sah, Gagandeo Sah and Mosafir
G Sahni were convicted under Section 147 IPC. The High Court as the first Court of appeal dealt with evidence scrutinised it and upon such appreciation and scrutiny recorded its finding in concurrence with that of the learned Sessions Judge and it is by reason of specific plea raised in support of the appeals, we did in fact examine the evidence relied upon and said to be warranting an
H alteration of charge and consequent reduction of sentence, but we are afraid

there cannot possibly be any concurrence therewith on the available materials on record. A

Be it noted that in the Sessions Trial there were a total of 14 accused persons who stood convicted by the Sessions Judge, Sitamarhi and 6 of the 14 accused moved the High Court in appeal, which stands dismissed. Significantly, however, during the pendency of the appeal before the High Court, appellant No.2 Siyaram Sahni and appellant No.6 Lalan Sahni passed away, the appeal in High Court thus stood abated as against the above-noted appellants. The factum of abatement of appeal as regards the above named two accused persons, however, has not been dealt with nor mentioned in the judgment of the High Court. We, however, think it fit and appropriate to record such abatement. Be it also noted that the appellant No.9 herein, Bachu Sahni also passed away during the pendency of the appeal before this Court on 14th July, 2001. B C

The appeal against appellant No.9 thus also stands abated. In the result the appeals fail and stand dismissed. The appellants herein are to serve out the remaining portion of the sentence. D

K.K.T.

Appeal dismissed.