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PRATAP SINGH
v.
STATE OF HARYANA

DECEMBER 7, 1990

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[KULDIP SINGH AND K. RAMASWAMY, JJ.]

Indian Penal Code, 1860: Sections 302, 326/34.

Code of Criminal Procedure, 1973: Section 173.

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Criminal Trial—Accused charged under Sections 302 and 326 vicariously with the aid of Section 34—On the date of charge-sheet no material with the prosecution to show that the accused actually participated in crime and gave knife injury—During trial accused confronted with evidence accusing him of substantive charges under both offences i.e. inflicting knife injuries to the deceased and prosecution witness—Trial held prejudicial to the accused—Benefit of doubt given to the accused.

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The appellant and his co-accused were convicted by the Additional Sessions Judge under Sections 302, 326 read with section 34 of the Indian Penal Code and were sentenced to rigorous imprisonment for life and four years respectively. On appeal the High Court acquitted the co-accused but upheld the conviction and sentence of the appellant.

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In appeal to this Court it was contended on behalf of the appellant (i) that the appellant was convicted for an offence for which he was not chargesheeted because in the charge-sheet he was charged vicariously with the aid of section 34 for both the offences i.e. under sections 302 and 326, but at the trial contrary to charge-sheet he was confronted with evidence accusing him of the substantive charge under section 302 for causing death of the deceased and under section 326 for causing grievous hurt to the prosecution witness; (ii) the co-accused having been acquitted by the High Court, part of the testimony has been proved to be false and as such cannot be relied upon to support the conviction of the accused.

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Allowing the appeal, this Court,

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HELD: 1. The charge against the appellant was framed on the basis of the material collected during the investigation by the prosecution. On the date of the charge-sheet there was no material with the prosecution to show that it was the appellant who gave knife injury to

the deceased and the prosecution witness. Even otherwise when the police report under Section 173 of the Code of Criminal Procedure, which is the basis of the chargesheet, implicated the appellant vicariously with the aid of Section 34, I.P.C., it is difficult to rule out prejudice when at the trial, evidence was led to show that he actually participated in the crime and inflicted injuries to the deceased and grievous hurt to prosecution witness. In any case this cannot be certified as a fair-trial. The infirmities pointed out on behalf of the appellant when examined in the light of the charge framed against the appellant will show that it is difficult to carry the conviction of the appellant beyond reasonable doubt. Accordingly the appellant-accused is given the benefit of doubt and acquitted. The conviction and sentence is set aside. [507C-F]

2. When the Trial Court and the High Court on appreciation of the evidence have believed the eye-witnesses and have based the conviction of the appellant on their testimony. It is not for the Supreme Court to reappraise the evidence. [505E]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 332 of 1990,

From the Judgment and Order dated 28.9.1988 of the Punjab and Haryana High Court in Cr. A. No. 137 DB of 1987.

Mrs. Kawaljit Kochhar and J.D. Jain for the Appellant.

Rana Ranjit Singh and A.G. Prasad for the Respondent.

The Judgment of the Court was delivered by;

KULDIP SINGH, J. Partap Singh and Parkasha accused were convicted by the Additional Sessions Judge, Karnal under Sections 302, 326 read with Section 34 of the Indian Penal Code and were sentenced to rigorous imprisonment for life and four years respectively. On appeal the High Court acquitted Parkasha but upheld the conviction and sentence of Partap Singh. This appeal via special leave petition is by Partap Singh against the judgment of the High Court.

The First Information Report was recorded on the basis of the statement of Nar Singh. According to the prosecution story Nar Singh and Krishan deceased were rickshaw pullers and used to live together in a room at Panipat. On August 26, 1986 at about 11 p.m. both of

A them went out to ease themselves in a rickshaw driven by Mannu who was brother of Nar Singh's wife. On their way back they met two boys near the Sabzi Mandi. One of them was whistling. The boys got the impression that the persons in Rickshaw were objecting to their whistling. The boy having "swarthy complexion, stout body and height 5'. 6" and having beard" took out a knife meant for vegetable-cutting from his pocket and gave a blow to Nar Singh in his abdomen. Krishan came forward to rescue Nar Singh whereupon the same assailant gave a knife blow to him on the left side of his abdomen. The F.I.R. further stated that the other co-accused was also having "swarthy complexion heavy body and height about 5'. 8" ". The accused persons ran away from the spot after giving knife blows.

C The injured were removed to the hospital. On being declared fit by the doctor the statement of Nar Singh was recorded at 12.40 p.m. on August 27, 1986 and thereafter the case was registered at the police station at 12.50 p.m. Krishan died at 9.30 p.m. on August 28, 1986. Autopsy on the dead body revealed that the injury had ruptured the small intestine and was sufficient to cause death in the ordinary course of nature. The injury on the person of Nar Singh was declared as grievous in nature.

E Both the accused were arrested on September 9, 1986. At the time of arrest knife Exhibit P-4 was recovered from the possession of Parkasha accused.

F Both the accused when examined under Section 313 of the Criminal Procedure Code denied the prosecution allegations and pleaded false implication. The accused further pleaded that they were arrested on September 2, 1986 and was kept in the police custody upto September 9, 1986 on which date their arrest was shown and they were produced before the Court. According to the accused Parkasha he was shown to the witnesses during the period when he was kept in police custody. The prosecution evidence consists of eye-witness testimony of Nar Singh and Mannu.

G We have heard Mrs. kawaljit Kochar, learned counsel for the appellant and Mr. Rana Ranjit Singh, counsel for the State of Haryana.

H The learned counsel for the appellant has argued that the accused have not been named in the First Information Report. Excepting for the identification of the accused in the Court there is no evi-

dence to inculcate the accused in the case. She further submitted that in the First Information Report there was no mention about the existence of the street light near the place of occurrence. According to her, there was pitch dark at the place of occurrence and it was difficult rather impossible for the eye-witnesses to have seen the accused persons enough to identify them later on in the Court. Learned counsel has vehemently contended that the accused persons rightly refused to participate in the identification parade because they were shown to the witnesses during the period from September 2, 1986 to September 9, 1986 when they were illegally kept in police custody. The learned counsel further argued that Mannu an alleged eye-witness could have gone to the police station to lodge the First Informataion Report. Mannu did not talk about the occurrence to anyone nor did he go to the police station to lodge the report. She contended that the police waited till Nar Singh was declared fit by the doctor to make a statement and thereafter the F.I.R. was lodged on the basis of the statement of Nar Singh. According to her the presence of Mannu on the place of occurrence was doubtful. Lastly, the learned counsel contended that Parkasha accused having been acquitted by the High Court part of the testimony of the eye-witnesses has been proved to be false and as such they cannot be relied upon to support the conviction of the appellat Partap Singh.

The above arguments of the learned counsel sound plausible but the Trial Court and the High Court on appreciation of the evidence have believed the eye-witnesses and have based the conviction of the appellat on their testimony. It is not for us to reapprciate the evidence. The learned counsel has, however, taken us through the charge-sheet framed against the two accused by the Additional Sessions Judge, Karnal. The charge-sheet discloses that Parkasha co-accused who has been acquitted by the High Court was assigned the substantive role. He was charged under Section 302, I.P.C. for causing death of Krishan and under Section 326 for causing grievous hurt to Nar Singh. The appellat Partap Singh was charged with the aid of Section 34, I.P.C. for both the offences. He was charged with offences under Section 302/34 and Section 326/34, I.P.C. According to learned counsel at the trial, contrary to the charge-sheet the appellat Partap Singh was confronted with evidence accusing him of the substantive charge under Section 302, I.P.C. for causing death of Krishan and under Section 326, I.P.C. for causing grievous hurt to Nar Singh whereas co-accused Parkasha was assigned liability under Section 34, I.P.C. He was finally acquitted by the High Court.

A The learned counsel for the appellant has vehemently contended that both the Courts below were oblivious of the fact that the appellant was convicted for an offence for which he was never charge-sheeted. She contended that till November 12, 1986 when the appellant was charge-sheeted, the prosecution was not sure about the actual part played by the appellant in the crime. The learned counsel has also invited our attention to an order passed by the Additional Sessions Judge on December 16, 1986 by which the learned Judge rejected the application of the prosecution for amendment of the charge. The relevant part of the order is as under:

C “After arguments on the charge were addressed, a charge under Section 302 of Indian Penal Code and Section 326 of Indian Penal Code was framed against the accused Parkasha and a charge under section 302 of Indian Penal code read with Section 34 of Indian Penal Code and under Section 326 read with Section 34 of Indian Penal Code was framed against the accused Partap alias Gochar. The prosecution has opened the trial and as many as nine witnesses have already been examined. Seven witnesses have been given up by the prosecution. Only drafts man Balak Ram and Investigating Officers remained to be examined.

E Learned Public Prosecutor had to this stage moved an application for amendment of the charge stating that during the recording of evidence of the prosecution, it has come to light that it was Partap, a who has caused fatal injury to Kishan and grievous injury with sharp weapon to Nar Singh and that he should be substantially charged under Section 302/326 of Indian Penal Code, whereas Parkasha should be charged under Section 302 and 326 of Indian Penal Code read with Section 34 of Indian Penal Code. It was stated that no prejudice was going to be caused to the accused by this amendment of the charge.

G I have heard learned Public Prosecutor and learned defence counsel and find that the application for amendment of charge merits out right rejection. Charge against the accused was framed on the basis of the evidence collected by the prosecution and on the basis of argument addressed on behalf of the State and on behalf of the accused and the trial has opened. If during the trial, the witnesses have deposed contrary to the charge, charge can-

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not be amended on that score. If request of the prosecution is granted, it would definitely cause prejudice to the accused. Charge cannot be amended to be in conformity with the evidence which the prosecution has adduced at the time of trial. In fact, the duty is of the prosecution to lead evidence, to prove the charge against the accused. Amendment of the charge at this stage would mean placing cart before the horse. The application for amendment of the charge, therefore, rejected.”

We have given our thoughtful consideration to the arguments of the learned counsel. As stated by the Additional Sessions Judge in his order quoted above the charge against the appellant was framed on the basis of the material collected during the investigation by the prosecution. It is thus obvious that on the date of the charge-sheet there was no material with the prosecution to show that it was the appellant Partap Singh who gave knife injury to deceased Krishan and P.W. Nar Singh. Even otherwise when the police report under Section 173 Code of Criminal Procedure, which is the basis of the chargesheet, implicated the appellant vicariously with the aid of Section 34, I.P.C., it is difficult to rule out prejudice when at the trial evidence was led to show that he actually participated in the crime and inflicted injuries to the deceased and grievous hurt to P.W. Nar Singh. In any case this cannot be certified as a fair-trial. There is also force in the argument of the learned counsel that all the infirmities pointed out by her when examined in the light of the charge framed against the appellant, it is difficult to carry the conviction of the appellant beyond reasonable doubt.

After hearing the arguments of the learned counsel for the appellant and taking into consideration all the facts and circumstances enumerated above, we are left with a lurking doubt in our mind. We give the benefit to the accused-appellant and acquit him. The conviction and sentence of the appellant is set aside and he be released forthwith.

T.N.A.

Appeal allowed.