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GURDIAL SINGH
v.
STATE OF PUNJAB

AUGUST 21, 1995

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[M.K. MUKHERJEE AND G.T. NANAVATI, JJ.]

Indian Penal Code. 1860/Arms Act, 1959 :

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Ss. 302 read with s.34, s.326/s. 25—Three accused firing at victim—Death caused—Autopsy—Report indicating gunshot injuries caused by different types of fire arms collectively sufficient to cause death—Trial Court convicting one accused under s. 302 I.P.C. and s. 25 Arms Act—Other two accused acquitted—Held, appellant is liable for his individual act only—In view of medical report it cannot be conclusively inferred that death was caused by injuries inflicted by appellant only—He can neither be convicted under s.302 simpliciter not under s.302 read with s.34 as acquittal of other accused is not based on mistaken identity—Conviction u/s. 302 set aside—Appellant convicted under s.326 IPC conviction under s.25. Arms Act maintained.

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The appellant, alongwith two others, was charged for offences punishable under s.302 read with s.34 IPC and s.25 Arms Act. The prosecution case was that on the date of the incident, PW. 3 and his son were in their shop. At 6.30 p.m., when the son of PW. 3 came out of the shop, the three accused reached there on a scooter, shot him with their respective

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fire arms and ran away. The victim died instantaneously, PW. 3 lodged an F.I.R. with the police. The deceased was taken to the hospital. The doctor, PW. 1, conducting the autopsy, found four injuries on the person of the deceased which according to him were caused by two types of fire arms and were collectively sufficient in the ordinary course of nature to cause death. The investigation led to the arrest of the appellant and the recovery

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of an unlicensed 12 bore gun with 25 cartridges from his possession. The case was committed to the Special Court, which convicted the appellant under s.302 IPC and s.25, Arms Act and sentenced him to life imprisonment and rigorous imprisonment for one and half years under the two counts respectively. The other two accused were acquitted. Aggrieved, the

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appellant filed the appeal.

Disposing of the appeal, this Court

HELD : 1. The finding of the trial court that the appellant shot at the deceased with a gun causing injuries on his person is unassailable in view of the evidence of PW.3 supported by other evidence on record, namely, the evidence of the doctor (P.W.1) who held post-mortem examination and found, besides other injuries, two lacerated punctured wounds - corresponding with each other - which according to him could be caused by a gun, if fired from a close range; the F.I.R. lodged with promptitude; the evidence of PW.4 showing the arrest of the appellant the same night and recovery of a 12 bore gun with 25 cartridges, from his possession; the report of the Director of Forensic Science Laboratory proving that the empties recovered from the spot had been fired from the gun recovered from the appellant, and the earth seized from the spot found by the Chemical Examiner to contain human blood. [865-E-H]

1.2. However, the appellant cannot be convicted under Section 302 IPC, even with the aid of Section 34 IPC, as the prosecution laid evidence to prove that only the three arraigned person were responsible for the murder and the acquittal is not based on the ground of mistaken identity. In view of the opinion of the doctor it cannot be conclusively inferred that the death was caused by the injuries inflicted by the appellant alone so as to make him liable under s.302 I.P.C. simpliciter. He did not state that the two gun shot injuries attributable to appellant's firing were sufficient to cause death in the ordinary course of nature. The appellant would, therefore, be liable for his individual act only, which unmistakably makes out, in view of the weapon used by him and the nature of injuries caused, an offence under s.326 I.P.C. [868-A-B]

Maina Singh v. State of Rajasthan, [1976] SCC 827; *Harshad Singh v. State of Gujarat*, (1977) CrL. Law Journal 352 and *Piara Singh v. State of Punjab*, [1980] 2 SCC 401; referred to.

1.3. The conviction of appellant under Section 302 IPC is set aside. He is convicted under Section 326 IPC. More than 11 years having elapsed since the offence was committed, the appellant is sentenced to rigorous imprisonment for seven years. Since the gun used by the appellant was an unlicensed one, the conviction and sentence imposed under Section 25, Arms Act, are maintained. Both the sentences would run concurrently.

[868-C-D]

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 537 of 1985.

From the Judgment and Order dated 11.6.85 of the Special Court, Ferozepore in Trial No. 108 of 1985.

B R.S. Sodhi for the Appellant.

R.S. Suri for the Respondent.

The Judgment of the Court was delivered by

C M.K. MUKHERJEE, J. Darshan Singh, Mukhtiar Singh and Gurdial Singh, the appellant herein, were tried by the Judge, Special Court, Ferozepore for committing the murder of one Ram Pal with fire-arms in furtherance of their common intention. The learned Judge acquitted Darshan Singh and Mukhtiar Singh but convicted the appellant under Section 302 I.P.C. and 25 Arms Act, and sentenced him to suffer imprisonment for life for the first conviction and rigorous imprisonment for 1.1/2 years for the other, with a direction that the sentences would run concurrently. Hence this appeal.

D According to the prosecution case the deceased and his father Amrit Lal (P.W.3) used to run a *Kirana* shop in village Machhi Bugra. On June 2, 1984, at or about 6.30 P.M. When Ram Pal had come out of the shop to down its shutters the three accused came there on a scooter driven by Darshan Singh. The appellant and Mukhtiar Singh then got down from the scooter and shot at Ram Pal with the fire-arms, each of them was carrying, resulting in his instantaneous death. Thereafter all of them ran away on the scooter. Finding his son dead, Amrit Lal rushed to the police station to lodge a report.

E S.I. Joginder Singh (P.W. 4) recorded the F.I.R. and after making arrangements to send the special report to the *Ilaka* Magistrate left for the spot accompanied by Amrit Lal. Reaching there he held inquest upon the dead body of Ram Pal which was lying in the lane in front of the shop and sent it for post-mortem examination. He then inspected the spot and collected some blood stained earth, six empties of two different bores and made separate sealed parcels for the same. After completing the investigation at the spot. P.W. 4 went in search of the accused persons and

F succeeded in apprehending the appellant on that very night. From his

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possession he seized a 12 bore gun and 25 cartridges and sealed them. He sent all the seized articles to the experts for their opinions and on receipt of their reports and completion of investigation submitted charge-sheet.

The accused persons pleaded not guilty to the charges levelled against them and contended that they were falsely implicated. To prove its case the prosecution relied upon the ocular version of the incident as given out by P.W. 3 and other evidence adduced in support thereof. No witness was however examined on behalf of the accused persons.

In recording the impugned order of conviction and sentence against the appellant the learned Judge found that the evidence of P.W. 3 stood amply corroborated by the recovery of two empty cartridges from the spot and the report of the Ballistic Expert which showed that those two cartridges had been fired from the gun which was with the appellant at the time of his arrest and was seized. As no such corroborative evidence was available in respect of the other two accused the learned Judge did not feel inclined to rely solely upon the evidence of P.W.3 to convict them. Accordingly he gave them the benefit of reasonable doubt.

Having carefully gone through the evidence of P.W.3 in the light of other evidence appearing on record it appears to us that the finding of the learned Judge that the appellant shot at the deceased with a gun causing injuries on his person is unassailable. Considering the fact that the incident took place in front of the shop of P.W.3 he was the most natural and likely witness. His evidence, which was not in any way shaken in cross-examination, gets ample support from the evidence of Dr. Jaspal Singh (P.W.1) who held post-mortem examination on the dead body and found, besides other injuries, two lacerated punctured wounds - corresponding with each other - which according to him could be caused by gun, if fired from a close range. The next piece of evidence which corroborates PW 3 is the FIR which was lodged with promptitude. We next get, from the evidence of P.W. 4 that in that very night, at or about 2.30 A.M. the appellant was arrested and a 12 bore gun and 25 cartridges were recovered from him. The report of the Director of Forensic Science Laboratory (Ex.P.17) proves that the empties recovered from the spot by PW 4 had been fired from his gun. The other piece of circumstantial evidence, which also to some extent corroborates the case of the prosecution, is furnished by the fact that the earth that was seized by PW 4 from the spot was found by the

A Chemical Examiner to contain human blood.

The next question that fails for our determination is whether on the above findings the trial Judge was justified in convicting the appellant under Section 302 IPC simpliciter, after having acquitted the other two accused who along with the appellant were being tried under Section 302

B IPC with the aid of Section 34 IPC. This aspect of the matter assumes importance for PW 1 found four injuries on that person of the deceased which according to him were caused by two types of fire-arms and were collectively sufficient in the ordinary course of nature to cause death. He, however, did not state that the two injuries caused by the gun - which are
 C attributable to the appellant's firing - were sufficient to cause death in the ordinary course of nature. In other words, in view of the opinion of the doctor it can not be conclusively inferred that the death of Ram Pal was caused by the injuries inflicted by the appellant alone so as to make him liable under Section 302 IPC simpliciter.

D The above finding of ours, necessarily, begs also the question whether the appellant can be convicted under Section 302 IPC with the aid of Section 34 IPC. notwithstanding the acquittal of the other two accused.

E In *Maina Singh v. State of Rajasthan*, [1976] 2 SCC 827 a question arose as to whether an accused who faced trial with four others on charges under Section 302 IPC read with Section 149 IPC could be convicted under Section 302 IPC read with Section 34 IPC if the other four were acquitted. In deciding the question this Court considered earlier cases which dealt with similar question and held :

F "As has been stated, the charge in the present case related to the commission of the offence of unlawful assembly by the appellant along with the other named four coaccused, and with no other person. The trial in fact went on that basis throughout. There was also no direct or circumstantial evidence to show that the offence
 G was committed by the appellant along with any other unnamed person. So when the other four coaccused have been given the benefit of doubt and have been acquitted, it would not be permissible to take the view that there must have been some other person along with the appellant Maina Singh in causing the injuries to the deceased. It was as such not permissible to invoke Section 149 or
 H Section 34 IPC. Maina Singh would accordingly be responsible for

the offence, if any, which could be shown to have been committed by him without regard to the participation of others." A

In *Harshad Singh v. State of Gujarat*, (1977) Criminal Law Journal 352, a three Judge Bench of this Court observed, in negating a submission of the appellant therein that since three out of the four accused had secured acquittal the invocation of Section 34 IPC was impermissible, as under : B

"The flaw in this submission is obvious. The Courts have given the benefit of doubt of identity but have not held that there was only one assailant in the criminal attack. *The proposition is plain that even if some put of several accused are acquitted but the participating presence of a plurality of assailants is proved, the conjoint culpability for the crime is inescapable.* Not that the story of more than one person having attacked the victim is false, but that the identity of the absolved accused is not firmly fixed as criminal participants. Therefore, it follows that such of them, even if the number dwindled to one, as are shown by sure evidence to have knifed the deceased, deserve to be convicted for the principal offence read with the constructive provision." C D

(emphasis supplied) E

When a similar question again came up for consideration in *Piara Singh v. State of Punjab*, [1980] 2 SCC 401 this Court. quoted with approval *Maina Singh's case* (supra) and applying the principle laid down therein in the facts of the case presented before it observed as under: F

"The position as it stands on the face of the prosecution case as disclosed in the Court is that only five named and known persons including Piara Singh participated in the murderous assault on the deceased of which four have been acquitted which would lead to the nature presumption that the other four accused persons were not there. In these circumstances, therefore, the conclusion is inescapable that Piara Singh alone cannot be convicted under Section 302 with the aid of Section 34. The appellant, Piara Singh would only be liable for the individual act which he may have committed in respect of the assault on the deceased." G H

A Judged in the context of the principles of law laid down in the cases referred to above the conclusion is inevitable that the appellant before us cannot be convicted under Section 302 IPC, even with the aid of section 34 IPC, as the prosecution laid evidence to prove that only the three arraigned persons, were responsible for the murder and the acquittal is not based on the ground of mistaken identity. The appellant would therefore be liable for his individual act only, which unmistakably makes out, in view of the weapon used by him and the nature of injuries caused an offence under Section 326 IPC. Since the gun used by the appellant was an unlicensed one his conviction under Section 25 of the Arms Act has got to be upheld also.

C For the foregoing discussion we set aside the conviction of the appellant under section 302 IPC and convict him under Section 326 IPC. Considering the fact that since the offence was committed more than 11 years have elapsed, we sentence him to suffer rigorous imprisonment for seven years for the above conviction. The conviction and sentence imposed upon him under Section 25 of the Arms Act are maintained. Both the sentences will run concurrently. The appellant, who is on bail will, now surrender to his bail bond to serve out the sentence now imposed upon him.

R.P.

Appeal disposed of.