A HARI SHANKER ETC.

v.

STATE OF U.P. ETC.

MAY 6, 1996

B [FAIZAN UDDIN AND SUJATA V. MANOHAR, JJ.]

Criminal Law :

Penal Code, 1860 : Sections 34 and 302/34.

C *Common intention—Sharing of—Exhortation by accused—Allegation of—Not found in FIR or statement made under S. 161 Cr PC—Mere fact that co-accused fired gun which belonged to accused for which he had valid licence would not lead to only inference that accused lent it out to co-accused for purpose of killing deceased—Acquittal of accused by High Court—Held:*
D *no interference called for.*

Fire arm injury—Mark of blackening—Would be found in case gun was fired from close range of about 3 feet—Presence of wad of cork—Indicated shot was fired from distance of about 2 yards—Held : having regard to length of barrel of 12 bore gun the ocular version that gun was fired from a distance
E *of about 4 to 5 paces away, not inconsistent with medical evidence.*

Firearm injury—Gun was fired from behind when deceased was pushing motor cycle—Wound of entrance was upwards towards left lower chest—Held : testimony of eye-witnesses was consistent with medical evidence—Plea of accused that while he was pushing motor cycle gun went
F *off accidently not acceptable.*

The appellant and respondent in the respective appeals, were convicted under Section 302 and Section 302/34, India Penal Code, 1860 respectively and sentenced to undergo life imprisonment by the Session
G **Judge. They had filed separate appeals in the High Court against their respective conviction and sentence. The High Court dismissed the appeal filed by the appellant-accused and allowed the appeal filed by the respondent- accused and acquitted him. Aggrieved by the High Court's judgment the appellant and the son of the deceased preferred the present appeals.**

H **According to the prosecution, the wife of deceased had leased her**

land to respondent-accused for purposes of manufacture of bricks. The wife had issued notice to the respondent-accused demanding the arrears of rent. The brother-in-law of PW 1 had died but the deceased could not join the funeral for want of information. The deceased, therefore, went to the house of the father of the brother-in-law alongwith PW 4 for condolence. The respondent-accused and appellant-accused also reached there when the respondent-accused raised dispute with the deceased against the notice served on him. During the heated exchange the deceased told the respondent-accused that he would not permit him to manufacture bricks unless the arrears of rent were paid. The respondent-accused went away saying that he would see how he could not permit the brick kiln to work. On the same day when PW 3 arrived at the house, the deceased accompanied by PW 4 got up to go back home. The deceased kicked his Motor Cycle to start but it did not start. He and PW 4 pushed the Motor Cycle with a view to starting it. Meanwhile, the appellant-accused with a single barrel gun and the respondent-accused came running from behind. The respondent caught hold of the Motor Cycle from behind and commanded the appellant to fire at the deceased and kill him. At this the appellant fired a gun shot on the back of the deceased and the appellant and respondent immediately vanished from the place of occurrence and while going away the appellant threw down the spent cartidge and loaded the gun again. The incident was seen by PW 1, PW 3 and PW 4 who were present at the time and place of occurrence. PW 1 took the deceased to the Hospital where he died soon thereafter. A First Information Report was lodged and a post-mortem was held.

In the appeal before this Court, it was contended that there was absence of motive on the part of the appellant-accused; that there was no consistency in the medical evidence and the occular version of PWs 1, 3 and 4; that according to the post-mortem report the direction of the entrance wound was upward towards the heart which was not possible to be caused if the appellant-accused had fired the gun in a standing posture; that this was possible only when the appellant-accused was pushing the Motor Cycle in a bending position while the gun went off; and that the respondent-accused shared the common intention to commit the murder of the deceased since he had exhorted the appellant-accused to fire at the

A deceased.

Dismissing the appeals, this Court

HELD : 1. Marks of blackening would be found in case the gun is fired from a close range of about 3 feet and the presence of wad of cork would B indicate that the shot was fired from a distance of about 2 yards. A close scrutiny of the evidence of the 3 eye witnesses, namely, PW 1, PW 3 and PW 4 goes to show that the appellant was not pushing the Motor Cycle and he came running with the gun when the Motor Cycle was being pushed by PW 3 while the respondent was holding it back and it was at that point of time C that the appellant fired at the deceased from a distance of about 4 to 5 paces away. This distance was only approximate, and having regard to the length of barrel of a 12 bore gun, the ocular version cannot be said to be inconsistent with medical evidence. All the 3 witnesses have deposed that the deceased was on the ground and pushing the Motor Cycle by holding the handles of Motor Cycle. It is common knowledge that when anybody holds D the handles and runs on the ground to push the Motor Cycle he is bound to bend forward and in that process if someone fires from behind that bullets or pellet are bound to move upwards. In the present case the post-mortem report and the evidence of PW 2 goes to show that the wound of entrance was on the left lower chest posterior (back part) and, therefore, the pellets are bound to travel upwards. Therefore, the testimony of the eye E witnesses is consistent with the medical evidence and no fault could be found in the same so as to render it doubtful or in any case unreliable. [356-A-E]

Medical Jurisprudence by Modi, 21st Edn., p. 268, referred to.

F

2. It is settled law that if the genesis of the motive of the occurrence was not proved the ocular testimony of the witnesses as to the occurrence could not be discarded only by reason of the absence of motive, if otherwise the evidence was worthy of reliance. [354-H]

G 3. The allegation of exhortation by respondent is not to be found in FIR or in the statement made under Section 161 of Criminal Procedure Code. 1973. The mere fact that the appellant had fired the gun which belonged to the respondent for which he had a valid licence would not lead to the only inference that the respondent had lent it out H to the appellant for the purposes of killing the deceased. [357-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 30 of 1988 Etc. A

From the Judgment and Order dated 27.3.87 of the Allahabad High Court in Crl.A. No. 2417 of 1977.

U.R. Lalit, G.K. Mathur, V.A. Mohta, Ms. Kumud L. Das, P.K. Dey, Ms. Rani Jethmalani, R.C. Verma, K.K. Gupta, Ms. K.L. Das, B.K. Kulshreshtha, Anish Ahmad and A.S. Pundir Advocates with them for the appearing parties. B

The Judgment of the Court was delivered by C

FAIZAN UDDIN, J. 1. In session trial No. 395/1976 the appellant Hari Shanker was charged and tried under Section 302, IPC alongwith the respondent Shiam Behari who was charged and tried under Section 302/34, IPC and both were accordingly found guilty and sentenced to undergo life imprisonment by the Session Judge, Budaun. The appellant Hari Shanker D went up in appeal being Criminal Appeal No. 2417/1977 and the respondent Shiam Behari also filed separate appeal being Criminal Appeal No. 2082/1977 against their respective conviction and sentence. The High Court of Allahabad by a common judgment dated March 27, 1987 gave the benefit of doubt to respondent Shiam Behari and, therefore, allowed his appeal and acquitted him of the offence he was charged with. However, the appeal E of the appellant Hari Shanker was dismissed by the High Court against which he has filed Criminal Appeal No. 30, 1988. Subhash Chand the son of the deceased Parshadi Lal has filed Criminal Appeal No. 29, 1988 against the aforesaid order of acquittal of respondent Shiam Behari recorded by the High Court.

F

2. Briefly stated the prosecution case was that Smt. Sushila Devi, the wife of deceased Parshadi Lal had leased her land to the respondent Shiam Behari on January 12, 1972 for purposes of manufacture of bricks. Smt. Sushila had issued notice to the respondent Shiam Behari on 6.3.1976 through her Advocate demanding the arrears of rent amounting to Rs. G 8000, which was served on Shiam Behari on March 26, 1976. On July 23, 1976 one Rejesh Kumar, brother of son-in-law of Ved Prakash, PW 1, resident of the same locality in Budaun had died but the deceased Parshadi Lal could not join the funeral for want of information. The deceased Parshadi Lal, therefore, went to the house of Sita Ram, the father of Rajesh Kumar in Mohalla Chaudhary Sarai alongwith his friend Chandra Pal H

A Varshney, PW 4 for condolence. It is said that at about 1.00 PM the respondent Shiam Behari and the appellant Hari Shanker also reached there at the house of Sita Ram where the respondent Shiam Behari raised Bhatta dispute with deceased Parshadi Lal and protested against the notice served on him. According to the prosecution during the heated exchange deceased Parshadi Lal is said to have told Shiam Behari that he would not
B permit him the manufacture of bricks unless the arrears of rent were paid. The respondent Shiam Behari went away saying that he shall see how he did not permit the brick kilu to work. Further prosecution case was that on the same day at about 2.00 PM when Chandra Pal, PW 3 of Brahampur, Budaun arrived at the house of Sita Ram the deceased Parshadi Lal
C accompanied by Chandra Pal Varshney, PW 4 got up to go back home. Parshadi Lal kicked his Motor Cycle to start but it could not start. He and Chandra Pal Varshney then pushed the Motor Cycle with a view to start it. It is said that in the meanwhile the appellant Hari Shanker with a single barrel gun and the respondent Shiam Behari came running from behind. Shiam Behari caught hold the Motor Cycle from behind and commanded
D the appellant Hari Shanker to fire at Parshadi Lal and kill him. At this the appellant Hari Shanker fired a gun shot on the back of Parshadi Lal who fell on the ground and the appellant Hari Shanker and respondent Shiam Behari immediately vanished from the place of occurrence and while going away Hari Shanker threw down the spent cartridge and loaded the gun again. The incident is said to have been seen by Ved Prakash, PW 1,
E Chandra Pal, PW 3 and Chandra Pal Varshney, PW 4 who were present at the time and place of occurrence. Ved Prakash, PW 1 took injured Parshadi Lal to Budaun Hospital were he died soon thereafter.

3. Ved Prakash went to Kotwali, Budaun where he lodged a report
F Ext. Ka-1 same day at about 3.40 PM on the basis of which FIR Ext. Ka-4 was recorded by Head Constable Bhim Singh, PW 5. ASI Abdul Majid Khan, PW 6 prepared Panchnama of the dead body Ext. Ka-12 in the hospital. Dr. S.K. Nagaraiya, PW 2 performed an autopsy on the dead body of Parshadi Lal on July 25, 1976 and as per his post-mortem report Ext. Ka-2 he found the following ante-mortem injuries on the dead body of
G Parshadi Lal.

> Wound of entrance 1/5 cm X 1 cm on the left lower chest posteriorly back 4 cm away from mid line 20 cm below carvical spine with surrounding blackening in an area of 5 cm X 3 cm direction of the
H wound of entrance was upwards and towards heart.

On internal examination of the dead body the doctor found a piece of cork in muscular wall. A pellet was found in the intercostal space and one pellet was found in the left 6th intercostal space. Left side pleura was ruptured and left lung was also ruptured. The doctor also found one cork piece in the tissue of lower lobe of left lung. Perisardium was also ruptured. One pellet with a cork piece was found behind the posterior wall. The pellets and cork piece recovered from the dead body were sealed and sent to the police station. In the opinion of the doctor the death was due to shock and haemorrhage as a result of the aforesaid injuries which were sufficient in the ordinary course of nature to cause death. In the opinion of the doctor the victim would have been fired from a distance of about 3 feet.

4. A search of the accused persons was made soon after the report was lodged but they could not be traced out. There is no material on record to show as on what date the two accused were apprehended. But according to the learned counsel appearing for the appellant Hari Shanker and respondent Shiam Behari both the accused had surrendered themselves on August 14, 1976. The house of respondent Shiam Behari was searched on August 21, 1976 and a 12 bore licenced gun of respondent Shiam Behari was seized. The said gun was sent to the Ballistic Expert for examination and report. The Ballistic Expert, B. Roy, PW 8 examined the gun and the spent cartridge and gave his report Ext. P 15 indicating that the used cartridge was fired from the said 12 bore gun and that on examining the gun he found that the same could not be fired accidentally unless the trigger was deliberately pressed.

5. At the trial the appellant Hari Shanker and respondent Shiam Behari pleaded not guilty and stated that they were falsely implicated. They took the stand that when the Motor Cycle of Parshadi Lal could not start the deceased Parshadi Lal asked the appellant Hari Shanker who was holding the gun of respondent Shiam Behari, to give the push to his Motor Cycle and when the deceased Parshadi Lal was on the seat of the Motor Cycle the appellant Hari Shanker pushed from behind and when the Motor Cycle took the start with a jerk the gun which he was holding suddenly went of hitting the deceased Parshadi Lal. However, the learned Trial Judge on evaluation of the prosecution evidence rejected the defence plea stated above and found the appellant Hari Shanker guilty for the offence of murder under Section 302 and the respondent Shiam Behari was found guilty for the offence punishable under Section 302 read with Section 34

A of the Penal Code and, therefore, they were accordingly convicted and sentenced. On appeal, as stated in the early part of this judgment, the High Court gave the benefit of doubt to the respondent Shiam Behari and acquitted him of the charge while the conviction and sentence of the appellant Hari Shanker has been upheld. The appellant Hari Shanker has challenged his conviction as upheld by the High Court in Criminal Appeal B No 30 of 1988 while Subhash Chand the son of deceased Parshadi Lal has challenged the order of acquittal of Shiam Behari recorded by the High Court in Criminal Appeal no. 29 of 1988.

6. Shri Lalit, learned senior counsel appearing for the appellant Hari C Shanker first contended that in the absence of any motive on the part of appellant Hari Shanker it would not be safe to believe the prosecution version that he deliberately fired the gun at the deceased. He submitted that there is no reliable evidence to show any altercation between the deceased and the acquitted accused/respondent Shiam Behari with regard D to the outstanding dues in respect of the Bhatta land and particularly in the absence of the fact that Shiam Behari had threatened the deceased to see him later, there was absolutely no reason for the appellant Hari Shanker to have shot at the deceased. He submitted that the allegation of altercation prior to the incident of firing has not been supported by the prosecution witness Chandra Pal, PW 3. It is no doubt true that there is E no consistent evidence that the respondent Shiam Behari had given the threat to the deceased to see him later and that the said fact does not find place in the FIR Ext. Ka-4. It is also true that Chandra Pal, PW 3 did not depose about any altercation or heated exchange between the appellant Hari Shanker and the deceased but the reason appears to be that Chandra F Pal, PW 3 had reached the house of Rakesh Kumar much later where this altercation is said to have taken place. Ved Prakash, PW 1 and Chandra Pal Varshney, PW 4 both have categorically stated that there was heated exchange between the respondent Shiam Behari and the deceased with regard to the Bhatta dues against Shiam Behari. It is thus, not correct to say that there was no altercation between the respondent Shiam Behari and G the deceased Parshadi Lal. However, even if we accept that there was no motive for the crime, yet the direct evidence was not liable to be rejected. It is settled law that if the genesis of the motive of the occurrence was not proved the ocular testimony of the witnesses as to the occurrence could not be discarded only by reason of the absence of motive, if otherwise the H evidence was worthy of reliance. The evidence of the prosecution witness

Chandra Pal, PW 3 goes to show that there is a close relationship between Hari Shanker and respondent Shiam Behari. Chandra Pal stated that Hari Shanker is his *Sala* and Shiam Behari is his *Mama*. The appellant Hari Shanker would therefore be naturally interested with the cause of Shiam Behari.

7. Learned counsel for the appellant Hari Shanker next submitted that there is no consistency in the medical evidence and the ocular version of PW 1, PW 3 and PW 4, He, therefore, submitted that the ocular version of these so called eye witnesses could not be accepted in sustaining the conviction of the appellant Hari Shanker. He submitted that medical evidence as deposed by Dr. S.C. Nagauria, PW 2 indicated that he found the pellet and a piece of cork in wound No. 1 of the deceased which were taken out. Another piece of cork was found in left lung. On the blackening and seizure of cork pieces from the injuries of the deceased the doctor was of the opinion that the fire would have been made from a distance of 3 feet and not from the distance as deposed by prosecution witnesses. On the basis of this evidence the learned counsel vehemently urged that it was conistent with the plea of the defence of the appellant Hari Shanker that he was called upon by the deceased himself to push Motor Cycle and while he was pushing the Motor Cycle with one hand and holding the gun in the other, the gun went off accidentally. Learned counsel for the appellant further submitted that according to the post-mortem report Ext. Ka-2 the direction of the entrance wound was upward towards the heart which was not possible to be caused if the appellant, as deposed by the prosecution witness, had fired the gun in the standing posture. He submitted that this was possible only when the appellant was pushing the Motor Cycle in a bending position while the gun went off.

8. We have given serious consideration to the aforementioned submissions made by the learned counsel but we are not convinced with the said arguments. According to Medical Jurisprudence by Modi, 21st Edn. Page 268 blackening is found, if a fire arm like shot gun is discharged from a distance of not more than 3 feet and in the absence of powder residues no distinction can be made between one distant shot and another, as regards to distance. According to Modi (at page 269) if card wad is found in the wound it indicates that the shot was fired from less than two yards while its absence suggests more than two yards. But according to Taylor no such general rule can be laid down. Thus it appears that the marks of

A blackening would be found in case the gun is fired from a close range of about 3 feet and the presence of wad of cork would indicate that the shot was fired from a distance of about 2 yards. A close scrutiny of the evidence of the 3 eye witnesses, namely, Ved Prakash, PW 1, Chandra Pal, PW 3 and Chandra Pal Varshney, PW 4 goes to show that the appellant Hari Shanker was not pushing the Motor Cycle and he came running with the B gun when the Motor Cycle was being pushed by Chandra Pal Varshney while the respondent Shiam Behari was holding it back and it was at that point of time that the appellant Hari Shanker fired at the deceased Parshadi Lal from a distance of about 4 to 5 paces away. This distance was only approximate, and having regard to the length of barrel of a 12 bore C gun, the ocular version cannot be said to be inconsistent with medical evidence. All the 3 witnesses have deposed that Parshadi Lal was on the ground and pushing the Motor Cycle by holding the handles of Motor Cycle. It is common knowledge that when anybody holds the handles and runs on the ground to push the Motor Cycle he is bound to bend forward D and in that process if someone fires from behind the bullets or pellet are bound to move upwards. In the present case the post-mortem report and the evidence of Dr. S.K. Nagauria. PW 2 goes to show that the wound of entrance was on the left lower chest posterior (back part) and, therefore, the pellets are bound to travel upwards. We, therefore, find that the testimony of the eye witnesses is consistent to the medical evidence and no E fault could be found in the same so at render it doubtful or in any case unreliable. There is positive and direct evidence to show that when the deceased Parashadi Lal and Chandra Pal, PW 4 proceeded with the Motor Cycle it could not be started. They then tried to start it by pushing. It was at this point of time that the appellant and Shiam Behari whose house is F situated just at a distance of about 30-40 steps arrived there. Shiam Behari caught hold the Motor Cycle from behind to pull it back, followed by appellant Hari Shanker with a gun who fired at the victim.

9. Learned counsel for the appellant tried to assail the prosecution case on the basis of the place where Motor Cycle had fallen and the place G where the deceased had fallen and the presence of blood at a third place, but we find that nothing turns on that and no dent could be said to have been caused to the ocular version of the prosecution witnesses. We are, therefore, of the view that the conviction and sentence of the appellant Hari Shanker is well founded and there are absolutely no reasons or any H grounds to interfere with the same.

10. Learned counsel for the complainant Subhash Chand in Criminal Appeal No. 29/1988 however, took pains in pursuading us that the respondent Shiam Behari shared the common intention to commit the murder of Parshadi Lal which according to the learned counsel borne out from the fact that the appellant Hari Shanker and respondent Shiam Behari both came together while Hari Shanker was armed with the gun belonging to Shiam Behari and after firing at the victim both fled way together. He also submitted that having regard to the evidence that the respondent Shiam Behari exhorted the appellant Hari Shanker to fire at the victim clearly made out a case under Section 302 read with Section 34 IPC. He further submitted that after firing Hari Shanker threw out the spent cartridge and reloaded the gun which is established from the evidence on record which fact suggested that Hari Shanker prepared himself for the second shot in case there was any necessity to do so. We have examined the evidence and find that the allegation of exhortation by Shiam Behari is not to be found in FIR or in the statement made under Section 161 IPC. The mere fact that Hari Shanker fired the gun which belonged to Shiam Behari for which he had a valid licence would not lead to the only inference that Shiam Behari had lent it out to Hari Shanker for the purposes of killing Parshadi Lal. The evidence regarding the sharing of common intention by the respondent Shiam Behari is not very convincing and we are not inclined to take a different view from the one taken by the High Court. Consequently the Criminal Appeal No. 29/1988 filed by the complainant must fail.

11. In the result Criminal Appeal No. 29/1988 *Subhash Chand* v. *Shiam Behari & Ors.,* and Criminal Appeal No. 30/1988 *Hari Shanker* v. *State of UP* both fail and are hereby dismissed.

V.S.S. Appeals dismissed.