

A STATE OF U.P.
v.
GANGA RAM AND ORS.

OCTOBER 25, 2005

B [H.K. SEMA AND P.P. NAOLEKAR, JJ.]

Penal Code, 1860:

C Sections 302/34—Conviction of accused on the basis of evidence of eye-witnesses—Acquittal by High Court on the ground that no resident of vicinity was examined as witness and that Prosecution witnesses were related—Correctness of—Held: Not correct as testimony of eyewitnesses is corroborated by medical evidence—They were subjected to lengthy cross examination but nothing had elicited to discredit their testimony in chief—
D Further, non-examination of resident of the vicinity or pedestrian as witness would not throw away the otherwise reliable testimony of eyewitnesses which is natural and inspires confidence.

E Section 34—Two accused armed with country made pistols accompanied the other accused armed with SBBL gun and DBBL gun—Killed the deceased—Conviction under Section 302 with the aid of Section 34—Justification of—Held: Justified, as the circumstances, clearly inferring the intention of the two accused for committing an offence in furtherance of common intention—It cannot be said that they accompanied the other accused as an idle curiosity.

F *Evidence:*

Eyewitness—Testimony of—Evidentiary value of—Deceased attacked on a road—Non-examination of any pedestrian or resident of the vicinity—Held, not fatal and cannot be ground to disbelieve the creditworthy testimony
G of eyewitness which inspired confidence.

Prosecution evidence—Held: To be weighed and not counted—It is within the domain of prosecution to choose a witness.

According to Prosecution, the deceased was witness in a criminal case

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against accused A-3 and A-4. Accused were threatening the deceased not to appear as a witness in that case but he showed determination to give statement. On the fateful day, when the deceased, PW-1 and PW-2, father of the deceased were on their way to their village, the accused fired at the deceased with weapons. Trial Court found them guilty under Sections 302/34 IPC. On appeal, High Court disbelieved the testimony of eye-witnesses and ordered acquittal. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. To bring home the guilt of accused, the prosecution amongst others examined two eye-witnesses, PW-1 and PW-2. Admittedly, PW-1 is the father of the deceased and therefore his evidence had to be weighed with caution. This witness was subjected to lengthy cross-examination. No suggestion was put to witness denying the presence of the accused at the place of occurrence and weapons carried by each accused as described by P.W.1, therefore, the substance of accusation against the accused made in chief of P.W.1 remains unimpeached. PW-2, another eye-witness, who is resident of the same village was also subjected to lengthy cross-examination but nothing could be elicited from his mouth to discredit his testimony in-chief. In fact, no question or not even a suggestion, was put to this witness to demolish the substance of the testimony about the factum of the incident, lucidly narrated by him, which inspires confidence. The testimony of P.W.1 and P.W.2 is well corroborated by the medical evidence and the post mortem report conducted by P.W.4 in material particulars. [529-C-D; 530-E-F; 531-D-E]

2.1. The High Court had recorded acquittal of accused on the ground that the occurrence is stated to have taken place on a pucca road on which bullock-carts, buses and other vehicles also go. The time is also of 5.15 p.m. but no outsider or pedestrian or resident of the vicinity has been named in the FIR or in the statement of the witnesses but only P.W-2 has been examined as an independent witness. This ground, taken by the High Court, is far-fetched and contrary to the testimony of eye-witnesses. This can be hardly a ground to disbelieve the otherwise creditworthy testimony, which inspired confidence.

[531-F-G]

2.2. It is now well-settled principle of law that whom to cite as a witness and whom not is within the domain of the prosecution. It is also well settled principle that the prosecution evidence has to be weighed and not to be counted. It is just because any other pedestrian or resident of the vicinity has not been cited as witnesses will be no ground to throw away the otherwise reliable

A testimony of the eyewitnesses which is natural and inspires confidence. There is no evidence on record to show that there were other pedestrian or resident of the vicinity present at the relevant time, besides the prosecution witnesses. The aforesaid reasons by the High Court is based on conjectures and surmises and is perverse. [531-G-H; 532-A-B]

B 2.3. Both the eyewitnesses had stated that they traveled together with the deceased and were coming back together with the deceased from Bareilly where the incident had taken place and narrated the entire story as aforesaid. The High Court has recorded their presence on the spot doubtful without assigning any reason. High Court was also of the view that they did not see the occurrence and had named the accused persons out of animosity without assigning any reason. [533-A-C]

C 2.4. The way the High Court appreciated the prosecution evidence is in the form of cross-examination of the prosecution witnesses. The evidence must be read and appreciated as it is. Nothing can be read to the evidence. [532-G]

D 3. The conviction recorded by the Trial Court was under Section 302 with the aid of section 34. The two accused armed with country made pistols accompanied the other accused armed with SBBL gun and DBBL gun respectively went to the place of occurrence, way laid the deceased and party and attacked the deceased. It cannot be said that they accompanied the other accused as an idle curiosity. The aforesaid circumstances, would clearly infer the intention of the two accused for committing an offence in furtherance of common intention. Their conviction under Section 302 with the aid of Section 34 cannot be said to be unjustified. [533-G-H; 534-A-B]

E *Mithu Singh v. State of Punjab*, [2001] 4 SCC 193 and *State of Rajasthan v. Kishan Singh and Ors.*, [2002] 10 SCC 160, held applicable.

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 660 of 1999.

G From the Judgment and Order dated 15.9.97 of the Allahabad High Court in Crl.A. No. 3013 of 1979.

Sahdev Singh, Vivek Singh and J.K. Bhatia for the Appellant.

H T.N. Singh and V.K. Singh for the Respondents.

The Judgment of the Court was delivered by

H.K. SEMA, J. Four accused, A-1 Ganga Ram, A-2 Raghubir, A-3 Lal Singh and A-4 Rajendra Singh were put to trial before the Trial Court for the murder of deceased-Tula Ram under Section 302/34 IPC. The Trial Court convicted all of them under Section 302 read with Section 34 IPC and sentenced them to rigorous imprisonment for life. On appeal, the High Court acquitted all of them. Hence, this appeal by special leave by the State of U.P.

During the pendency of the appeal, A.2- Raghubir and A.3-Lal Singh expired. The appeal against them already stands abated. This appeal, therefore, is survived *qua* A.1-Ganga Ram and A.4-Rajendra Singh. It may be noted that A.1-Ganga Ram and A.2-Raghubir are real brothers and A.3-Lal Singh and A.4-Rajendra Singh are real brothers.

Facts may be noted briefly:-

P.W.3-Rajendra Singh filed a complaint case against the accused persons Rajendra Singh and Lal Singh in the Court of Special Judicial Magistrate, Bareilly, in which the deceased-Tula Ram was cited as one of the witnesses. On 27.7.1978, the deceased-Tula Ram had gone to depose in the said complaint case against the accused Rajendra Singh and Lal Singh. It is alleged that the accused persons had threatened on several occasions not to appear as a witness but deceased-Tula Ram was determined to give statement. On 27.7.1978 at about 5.15 p.m. when the informant PW-1 Dhakan Lal (father of the deceased), P.W.2-Hemraj, the deceased-Tula Ram were coming back to their village from the bus-adda, Meerganj, the informant and others stopped at the Meerganj Sindhauli road in the jungle of Kalyanpur to smoke *bidi*. The deceased-Tula Ram went about fifty-sixty steps ahead of them. Accused Raghubir armed with single barrel gun (SBBL gun), accused-Lal Singh armed with double barrel gun (DBBL gun), accused-Ganga Ram and accused-Rajendra Singh armed with Tamancha (country made pistol) emerged from behind the stones heaped at the road. Accused Lal Singh told the deceased-Tula Ram that he had been warned not to appear as a witness but he was adamant and therefore he should not be left and should be killed. Thereupon Raghubir and Lal Singh made one fire each at Tula Ram with their respective weapons. Tula Ram fell down on the road. When the informant and others raised an alarm, the accused persons ran away towards west. P.W.1-Dhakan Lal left behind P.W.2-Hemraj near the dead body and he got the FIR written by P.W.3-Rajendra Singh and lodged the FIR at police station, Meerganj. A case was

A registered under the aforesaid Sections of Law and after the completion of the trial; the Trial Court recorded the conviction as above.

P.W.4 - Dr. I.S. Tomar, conducted the autopsy on the dead body and prepared the postmortem report (Ex.Ka-3). He found the following antimortem injuries on the dead body of the deceased:

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“1. 9 gunshot wounds on the right side of chest in an area of 14 cm x 8 cm. 2 cm below the right nipple and were extended upto the lower part of the central bone of the chest. Each wound was 0.8 cm x 0.8 cm x chest deep in size and the edges of the wounds were parted and turned inverted. There was no blackening and burning around the wounds. The direction of the wounds was from right to left and to backside.

C

2. Scratch 2 cm x .5 cm on the left side of chest below the collar bone.

D

3. *Internal examination.*

1. The fourth, fifth and sixth rib bone on the right side was fractured due to injury

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2. Both lungs and the membranes above them were punctured in the middle.

3. The membrane above the heart was punctured through and through in the right side of heart.

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4. There was about 1 litre blood on each side in the chest.

5. There was about 600 cc blood in the peritoneal cavity and it was punctured at one place on the upper side.

G

6. Liver was punctured from one to the other and 15 ounce of half digested food was there.

7. Liver left part was punctured through and through.

4. In my opinion the death occurred due to shock and hemorrhage due to injuries.

H

5 Large bullets were extracted from the body of the deceased

which were as under:-

One from the right lung, two from the left lung, one from heart and one from abdominal cavity. These bullets were sealed at the time of examination. The clothes of the above deceased, which were 4 in number, were also sealed at the same time and were sent to S.O.Meerganj.

5. This report was prepared at the time of the examination of the dead body, which is written and signed by me is and is marked Ex.Ka-3.
6. The injuries of the deceased were ordinarily enough to cause death. His death could have been caused at about 5, 5.15 in the evening on 27.7.1978.

To bring home the guilt of the accused, the prosecution amongst others examined two eyewitnesses, P.W.1- Dhakan Lal and P.W.2- Hemraj. Admittedly, P.W.1- is the father of the deceased and therefore his evidence has to be weighed with caution. He stated that in a complaint case filed by P.W.-3 against accused Lal Singh and Rajendra Singh, his deceased son Tula Ram was cited as a witness. He further stated that the accused persons used to ask his son not to give evidence to which his son used to reply that he would give evidence and stated the evidence truthfully.

PW1-Dhakan Lal was examined on 23.8.1979 for the incident happened on 27.7.1978, he deposed as under:-

“About 1. ½ year ago my son Tula Ram had come to Bareilly to give evidence in the said complaint case. I had also later on come to Bareilly on the said day to fetch medicine for my younger son Chotey Lal. After getting medicines I reached bus stand to go home, at about 3 in the afternoon. There I met my son Tula Ram, Sardar Singh and Khem Raj. We all four sat together in the bus to go home. We alighted on the Meerganj bus stand. It would have been about 4, 4.15 p.m. We started on foot towards our village, while enroute Gaindan lal who is our brother also met us. He also accompanied us to our village. When we reached near the boundary of village Nagaliya Kalyanpur on Meerganj Sindholi Road we halted there to smoke bidi and tobacco. My son Tula Ram does not smoke bidi or tobacco. He went ahead of us by about 50-60 steps. I saw that all the four accused persons

A present in the court came out from the trenches on the western side
of the road among whom Lal Singh was holding a double barrel gun,
Raghunath was holding a single barrel gun and Ganga Ram and
B Rajender had country made pistols in their hands. Accused Lal Singh
said to my son that you did not stop from giving evidence and we
kill you today. Then our son started running towards us. Just then
accused persons Raghubir and Lal Singh fired at our son with the
guns. On being hit he fell down there on the road on the western side.
On our shouting all the accused persons present in the court ran away
through the sugarcane fields on western side.

C When we reached near Tula Ram by that time he had died. After
leaving all my three above companions near the dead body I reached
P.S. Meerganj on foot which is about 1.1/2 mile from there, wrong
when I reached Meerganj town there Rajender Singh of Hurharri near
the Dharamsala I dictated him all the incident on a paper, whatever I
dictated he wrote and made me affix my thumb impression. The written
D report was read over to the witness and he said that it is correct and
bears my signatures. It was marked Ex.Ka.1 I submitted this report in
P.S. Meerganj on the basis of which my report was recorded and copy
was given to me.”

E This witness was subjected to lengthy cross-examination running into
twenty pages. We have been taken through the entire deposition of the
witness in-chief as well as in cross-examination. We are surprised to notice
that not even a suggestion was put to witness denying the presence of the
accused at the place of occurrence and weapons carried by each accused as
described by P.W.1, therefore, the substance of acquisition against the accused
F made in-chief of P. W.1 remains unimpeached.

P.W.2-Hemraj, is another eyewitness, who is the resident of the same
village. He stated that he had also gone to Bareilly to give evidence along
with the deceased-Tula Ram and was coming back from there. He stated as
under:-

G “We started on foot from Meerganj bus stand to our village at about
4, 4.30 in the evening. We were going on the metalled road leading
from Meerganj to Sindholi. We all the five were going together and
halted near the kilu to smoke biri. Tula Ram did not stop but kept on
going ahead and went about 50-60 steps ahead of us. We also

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immediately started going ahead after lighting our biries and then saw that accused persons present in the court Rajender Singh, Lal Singh, Raghubir Singh and Ganga Ram among whom Raghubir Singh holding a single barrel gun, Lal Singh holding a double barrel gun and the remaining two accused persons holding country made pistols came on the road side from behind the stones and trenches on the western side of the road and Lal Singh challenged Tula Ram and said that you were asked not to give evidence but you did not agree, we will kill you. Saying this accused persons Lal Singh and Raghubir Singh fired with their guns being hit with which Tula Ram fell-down there. We shouted and then the accused persons aimed the barrels of their guns at us and ran towards the western side. Then we went near Tula Ram who was dead. At the time of occurrence none other than we four witnesses and the deceased had come there. Dhankan Lal went to the police station to register the report and we three remained guarding the dead body. Gaidan Lal was sent to home to inform.”

This witness also was subjected to lengthy cross-examination but nothing could be elicited from his mouth to discredit his testimony in-chief. In fact, no question or not even a suggestion, was put to this witness to demolish the substance of the testimony about the factum of the incident, lucidly narrated by him, which inspires confidence.

The testimony of P.W.1 and P.W.2 as quoted above is well corroborated by the medical evidence and the post mortem report conducted by P.W.4 Dr.I.S. Tomar, in material particulars.

One of the grounds, on which the High Court, recorded acquittal of the accused was that the occurrence is stated to have taken place on a pucca road on which bullock-carts, buses and other vehicles also go. The time is also of 5.15 p.m. but no outsider or pedestrian or resident of the vicinity has been named in the FIR or in the statement of the witnesses but only P.W.2-Hemraj has been examined as an independent witness. This ground, taken by the High Court, is far-fetched and contrary to the testimony of eyewitnesses. This can be hardly a ground to disbelieve the otherwise creditworthy testimony, which inspired confidence. It is now well-settled principle of law that whom to cite as a witness and whom not is within the domain of the prosecution. It is also well settled principle that the prosecution evidence has to be weighed and not to be counted. It is just because any other pedestrian or resident of the vicinity has not been cited as witnesses will be no ground to

A throw away the otherwise reliable testimony of the eyewitnesses which is natural and inspires confidence. There is no evidence on record to show that there were other pedestrian or resident of the vicinity present at the relevant time, besides the prosecution witnesses. In our view, the aforesaid reason by the High Court is based on conjectures and surmises and is perverse.

B The second ground, on which the High Court, recorded acquittal is that P.W.1-Dhakan Lal has stated in cross-examination that at about 9.00 A.M. he himself had gone to Bareilly to purchase medicine for his younger son Chhotey Lal as there was ulcer in the ear of Chhotey Lal. What was the age of Chhotey Lal was not clear. The High Court has ultimately held as under:-

C “What prohibited Tula Ram to purchase medicine for his younger brother and if Tula Ram was going to Bareilly a bit earlier what was the necessity of the complainant to have gone to Bareilly to purchase the medicine for his younger son. This is not the case of prosecution that Tula Ram had refused to bring any medicine or if asked, he would not have brought the medicine. Therefore, the natural conduct shall be, if actually, the younger son of the complainant was ill and Tula Ram was actually going to Bareilly, he would have brought the medicine. There was no necessity for Dhakan Lal to have gone to Bareilly.”

E It will be noticed that P.W.1 had stated in cross-examination that he does not know that at what time on that day his deceased son Tula Ram had gone to Bareilly from home to give evidence because he had gone to the field in the morning. When he returned from the field he came to know from the children that at about 8.00 in the morning Tula Ram had gone to Bareilly to give evidence. He further stated that Tula Ram did not tell him earlier that he had to go to Bareilly to give evidence.

F We notice with dismay the findings recorded by the High Court, which are contrary to the evidence on record, based on surmises and conjectures. The way the High Court appreciated the prosecution evidence is in the form of cross-examination of the prosecution witnesses. The evidence must be read and appreciated as it is. Nothing can be read to the evidence. The High Court has also recorded as under:-

H “All the two witnesses examined in the case are chance witnesses. They are inimical and interested witnesses. Their presence on the spot is highly doubtful. It is apparent that they did not see the occurrence

and had named the accused persons out of animosity.”

We are unable to discern the reasoning of the High Court. Both the eyewitnesses had stated that they travelled together with the deceased and were coming back together with the deceased from Bareilly where the incident had taken place and narrated the entire story as aforesaid. The High Court has recorded their presence on the spot doubtful without assigning any reason. The High Court was also of the view that they did not see the occurrence and had named the accused persons out of animosity without assigning any reason.

Learned Counsel for the respondents submitted that in any event the two accused namely Raghbir and Lal Singh, who have been described as actual assailants, have expired and no active part has been attributed to the appellants namely Ganga Ram and Rajendra Singh, they are entitled to be acquitted. In this connection, learned counsel has relied upon the decision of this Court rendered in *Mithu Singh v. State of Punjab*, [2001] 4 SCC 193, where this Court has held that to substantiate a charge under Section 302 with the aid of Section 34 it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of both. An inference as to the intention shall have to be drawn from the acts or conduct of the accused or other relevant circumstances, as available. No quarrel over the proposition of Law.

Reliance has also been placed on the decision of this Court rendered in *State of Rajasthan v. Kishan Singh and Ors.*, [2002] 10 SCC 160, where this Court has held that two of the accused were also tried for substantive offence under Section 302 and the Trial Court acquitted the two accused who were tried for substantive offence under Section 302 and convicted the remaining three under Section 302 with the aid of Section 34. It was held that since the charge on substantive offence under Section 302 has not been established, the conviction of the other accused under Section 302 read with 34 was not maintainable. In our view, the aforesaid decisions cited by the learned counsel are of no help to the accused. This submission, in our view, is totally misconceived. In the present case, the conviction recorded by the Trial Court was under Section 302 with the aid of Section 34. The two accused armed with country made pistols accompanied the other accused armed with SBBL gun and DBBL gun respectively went to the place of occurrence, way laid the deceased and party and attacked the deceased. It cannot be said that they accompanied the other accused as an idle curiosity. The aforesaid

A circumstances, would clearly infer the intention of the present two accused for committing an offence in furtherance of common intention. Their conviction under Section 302 with the aid of Section 34 cannot be said to be unjustified.

B In the premises aforestated this appeal is allowed. The order of acquittal recorded by the High Court is set-aside. The order of conviction recorded by the Trial Court is restored. The respondents namely Ganga Ram and Rajendra Singh are directed to be taken back into custody forthwith to serve out the remaining part of sentence. Compliance report should be sent to this Court within one month.

C D.G.

Appeal allowed.