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SUBHASH KUMAR

V.

STATE OF UTTARAKHAND

Criminal Appeal No. 933 of 2009

MAY 06, 2009

B

[S. B. SINHA AND DR. MUKUNDAKAM, JJ.]

C

Penal Code, 1860: s. 302/34 – Assault by accused with three co-accused – FIR disclosing name of the accused and the fact of his being armed with weapon – Specific overt act attributed to him in deposition of the victim – Conviction of all the accused by trial court – High Court confirming the conviction while reducing the sentence of the accused – Acquittal of the co-accused giving them benefit of doubt as their names were not mentioned in FIR and TI Parade not

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conducted – On appeal, Conviction confirmed – The accused is not entitled to acquittal by analogy of the case of the co-accused.

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CRIMINALAPPELLATE JURISDICTION : Criminal Appeal No. 933 of 2009

From the Judgment and Order dated 27.08.2008 of the Hon'ble High Court of Uttrakhand at Nainital in CrI. Appeal No. 150 of 2003

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Sanjeev Bhatnagar (for Ms. Kusum Chudhary), for the Appellant.

Jatinder Kumar Bhatia, for the Respondent.

The Judgment of the Court was delivered by

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S.B. SINHA, J.

1. Leave granted.

2. This appeal is directed against a judgment and order dated 27.08.2008 holding the appellant guilty for commission

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of offence under Section 324 read with Section 34 of the Indian Penal Code ("IPC" for short) and sentencing him to undergo one year's rigorous imprisonment and fine of Rs.1,000/- only.

3. One Surendra Kumar Sehgal was a student of D.B.S. (P.G.) College. Appellant herein also was a student of B.A. Part II of the same college. On 31.1.2000, when Surendra Kumar Sehgal was entering the college through its gate to attend his N.C.C. class, appellant along with three other persons who were armed with "Khukries" (a sharp edged weapon) assaulted him on instigation made by the appellant as a result whereof he suffered five injuries, which are as under:

- i. Incised wound 6 cm x 1.0 cm muscle deep on back side of head 11 cm above right ear. This injury was fresh and it was bleeding.
- ii. Incised wound 2 cm x 0.5 cm x skin deep backside of the head and 7 cm below the injury no.1 and the blood was oozing from this injury.
- iii. Incised wound 5 cm x 1 cm x muscle deep, on the left of head and 6 cm above the left ear.
- iv. Incised wound 2.5 cm x 1.1. cm x muscle deep. In the left upper forearm of index finger of left hand from which blood is coming out.
- v. Incised wound 2 cm x 1 cm x muscle deep on the side of middle finger of left hand and blood is coming out this."

4. Appellant was tried for commission of an offence under Sections 307, read with Section 34 of the IPC along with Surendra @ Sonu, Manoj @ Monu and Hargopal. Surendra and Manoj are brothers of the appellant whereas Hargopal is their maternal uncle.

5. The learned trial judge recorded a judgment of conviction finding the accused persons guilty of commission of offence under Section 324 read with Section 34 of the IPC.

A However, by reason of the impugned judgment whereas
the other accused, namely, Surendra, @ Sonu, Manoj @ Monu
& Hargopal were given the benefit of doubt, the judgment of
conviction and sentence passed by the learned trial judge as
B against the appellant was upheld. However, his sentence was
reduced to rigorous imprisonment for one year from three years.

6. Mr. Sanjeev Bhatnagar, learned counsel appearing on
behalf of the appellant would urge:

C (i) On a plain reading of the First Information Report
("FIR" for short) it would appear that the appellant
was not armed with any "Khukri"; no overt act was
attributed to him and his involvement in the matter
both in regard to possession of an arm as also an
instigation to others to assault him being an outcome
D of improvement in the depositions of the complainant
before the court, the impugned judgment is liable to
be set aside.

E (ii) Out of four accused, three having been acquitted,
appellant in any event could not have convicted with
the aid of Section 34 of the IPC.

7. Mr. Jatinder Kumar Bhatia, learned counsel appearing
on behalf of the State, on the other hand, would support the
impugned judgment.

F 8. The occurrence took place at about 1.00 p.m. on
31.1.2000. The FIR was lodged on the same day at about 3.15
p.m. The statement of the informant was recorded by the
Investigating Officer. It was hand written. Before us, the finding
of fact arrived at by both the courts below that the informant
G received injuries inflicted on him by "Khukri (s)" is not in dispute.
It also stands admitted that the first informant was assaulted
with a sharp edged weapon by more than one person. In the
FIR, it had categorically been stated that the appellant along
with three others who were armed with "Khukri" accosted him
H at about 1'O clock when he entered in the College through a gate.

9. It is also not in dispute that he sustained injuries on his head as also on his hand. He named Narendra Singh (P.W.1) as one of the eye-witnesses. He, however, was declared hostile. It has, however, not been disputed that the said Narendra Singh and one Shailly brought him to the hospital. He claimed to have identified the other three accused.

The High Court, however, accorded benefit of doubt to the three accused as no test identification parade was held.

The first informant, who examined himself as P.W.2, in his evidence stated:

"2. The incident is of 31.1.2000, day Monday and time about 1 p.m. At that time I was going to attend my NCC class in DBS College. As soon as I parked my scooter outside on the stand and entered in college, in the meantime Subhash, Surender @ Sonu, Manoj and their maternal uncle (Mama) Hargopal came behind me. They had been holding Khukhries in their hands. As these people came and Subhash put his hand on my shoulder. I saw behind and in the meantime Subhash said kill him "Jaan se Maar Dalo Saley ko" after this Hargopal assaulted with Khukhri on my head and thereafter Subhash also started assaulting with Khukhri and then all four people started very badly to me. All the four accused are present in the court."

Paragraph 9 of his evidence to which our attention has been drawn by Mr. Sanjeev Bhatnagar reads as under:-

"9. The inspector enquired from me with regard to this case. I had written in the report that Subhash was having Khukri. It is wrong to suggest that it is not written anywhere in the report that Subhash was holding Khukhri in hand."

We may place on record that our attention has also been drawn to the deposition of Mr. R.K. Kanojiya, SI of P.S. Dalanwala, Dehradun who examined himself as P.W.4, which reads as under:

A "17. I recorded the statement of Surendra Kumar on
1.2.2000. When I went to take the statement of injured to
hospital then because of his unconsciousness and did not
record statement of the doctor on 31.1.2000. I did not
write in the case diary that on 31.1.2000, the injured was
B admitted on which bed and in which ward. It is incorrect to
suggest that I had not gone to take the statement of the
injured to hospital on 31.1.2000. In the investigation, the
subscribed which I received in that all the accused persons
are shown having Khukri in their hands, only Subhash is
C having Khukhri in hand is not written."

From his evidence, it appears that he had gone to record
the statement of the informant in the hospital on 31.1.2000; when
he reached the hospital, the informant had become unconscious
and was in a serious condition. His statement could be recorded
D only on 1.2.2000. It was on that date the other accused persons
were named.

10. Appellant surrendered in the court of Chief Judicial
Magistrate on 7.2.2000. Manoj and Surendra were arrested on
11.2.2000. It is only on 7.3.2000, Hargopal had surrendered
E before the court.

11. FIR as is well known is not to be treated to be an
encyclopedia. Although the effect of a statement made in the
FIR at the earliest point of time should be given primacy, it would
F not probably be proper to accept that all particulars in regard to
commission of offence in detail must be furnished.

The prosecution has brought on record that four persons
assaulted the injured. P.W. 2 sustained serious injuries. He felt
unconscious but must have regained consciousness for some
G time. After he was brought to the hospital then he could get the
FIR lodged. If the deposition of P.W. 4 is to be believed, the
prosecution must be held to have proved that he became
unconscious again as a result whereof his statement could not
be recorded on that date.

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12. Not only the courts below but also the parties proceeded on the basis that the FIR disclosed that the appellant was also armed with "Khukri". We say so because we do not find that the contention raised before us by Mr. Bhatnagar, viz., that the FIR did not disclose the same had been raised before the courts below. The only suggestion given to the Investigating Officer, as noticed hereinbefore, was that it was written that all accused were shown having Khukri in their hands and not Subhash alone.

13. The testimony of Surendra (P.W.2) – informant – had been relied upon by both the courts below. We do not think that any case has been made out to take a different view.

All the four accused were convicted by the learned trial judge. The High Court, however, having regard to the fact that the other accused had not been named in the FIR and no test identification parade was held thought it fit to extend the benefit of doubt in favour of three of them. That would not mean that on the same analogy, a judgment of acquittal should have been recorded in favour of the appellant also.

Keeping in view the place of occurrence, it will not be hazardous to presume that the incident had taken place within a very short time. P.W. 2 in his evidence stated that three persons came from behind. He might not have been able to remember their names at the time when the FIR was lodged. But, in our opinion, as the offence must have been committed by more than one person and the appellant having been named in the FIR and specific overt act having been attributed to him by P.W. 2 in his deposition, we are of the opinion that no case has been made out to interfere with the impugned judgment.

14. For the aforementioned reasons, the appeal is dismissed.