

Subhag and ors. Vs. State

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Court : Allahabad

Decided On : May-08-1963

Reported in : 1964CriLJ75

Judge : D.S. Mathur and ;Gyanendra Kumar, JJ.

Appellant : Subhag and ors.

Respondent : State

Judgement :

D.S. Mathur, J.

1. This is an appeal by Subhag and eight others against their conviction of offences punishable under Secs. 148, 302/149 and 324/149, I.P.C. They have all been sentenced to one year's Rule I. under Section 148 I.P.C., to imprisonment for life on both the counts under Section 302/149 I.P.C. and to two years' Rule 1. and a, fine o): Rs, 100/- each in case of default, another four months' Rule I. under Section 324/149 I.P.C. All the sentences are to run consecutively. Jagan, Chattir and Udit, appellants, have been given notice to show cause' why their sentence under Section 302/149 I.P.C. be not enhanced to death.

Subhag, Lachhman, Udit and Kishore, appellants 1, 4V 5 and 8, are brothers and Bechan, appellant No. 9, is their cousin. Rameshwar, appellant No. 7, is the son of Bechan. Jagan and Chatur, appellants Nos. 2 and 3, are inter se brothers and they

are cousins of Subhag, appellant No. 1. Bhual, appellant No. 6, is the nephew Rameshwar, appellant No. 7. All the appellants are thus collaterals and descendants of Subhag's grand-father. The two persons murdered are Suraj Deo and his son Jagdish, Ramdeo (P. W. 3) is the brother of Suraj Deo and Vijay Bahadur (P. W. 16) is the brother-in-law (Sala) of Ramdeo. The; appellants, the deceased and the above two witnesses are all residents of village Siswa Babu, situate within the jurisdiction of police station Belghat of district Gorakhpur. The other two (ye-witnesses; Lochan and Khuddur (P. Ws 7 and 9), reside in neighbouring villages and during the relevant period were working as labourers of Surajdeo and Jagdish.

2. On the morning of 24-9-1961 at about 8 a.m Suraj Deo along with his son Jagdish and their labourers including Lochan and Khuddur went to their field in village Chhapparhat for harvesting the paddy crop. Some of the labourers returned earlier with bags of harvestet paddy and the last to return were Suraj Deo, Jagdish and Lochan. Khuddur was a few paces ahead of them They passed the field of Jagbodh, situate in village Siswa Babu, at about 10 p. m.

The prosecution case is that all the appellants along with three or four unknown persons were lying in ambush and on the arrival of the above three persons came out of the cover and assaulted them, Jagan, Chatirr and Udit were armed with pharasas and the rest with spears The appellants first of all assaulted Suraj Deo and killer him at the spot. Jagdish tried to run away but he was surrounded in the field of Lalta Lai, not far away from Jagbodh's field, and was given a beating by Jagan, Chatur and Edit. He also died at the spot. Lochan received a few spear injuries, it is said, at the hands o Bachan and Bhual.

3. Vindhya Chaj alias Lattur (P. W. 8) and Ran Acha (P. W. 15) were then returning to their village Rapatpur, and their attention being attracted by the shout: of Suraj Deo and Jagdish, they proceeded in that direction and were able to witness a major part of the occur hence. Ramdeo (P. W. 3), Vijay Bahadur (P. W. 16 and Raja Singh son of Jagdish, who were in or near this house situate at a distance of 125 paces, arrived late am were able to witness the assault on Jagdish only. Khuddur (P. W. 9) was, as mentioned above, a few paces ahead of Suraj

Deo and others and he 'naturally could witness the incident from the beginning.

4. On the arrival of the witnesses the appellant fled away. There after Ramdeo removed the dead bodies of Sursj Deo and Jag dish to their house. village Siswa Babu and sent Vijay Bahadur to cal the village Choukidar. Meanwhile Ramdeo took down report for being delivered at the police station. The Cahokia arrived at about 1 a. m. at night when Locha along with the village Cahokia left for the police sets action. They left the village at about 1.30 A. M. The police station is four miles from village Siswa Babu, but they were delayed on account of the boat being on the other basic of the river falling on the way. There was a bridge on the river at a distance of four miles, but Lochan and the village Cahokia waited for the boat instead traveling by their longer route. They thus reached time police station at 6.30 A. M. when a formal F. I. R., Ex Ka-5, was registered on the basis of the written report, The explanation furnished is one which can be accepted. in other words, there was no unreasonable delay in making the report.

5. The crime was registered in the presence of the Station Officer, Section I. Gulab Chand Bhatia (P. W. 17), who after sending Locham to the hospital for medical examination proceeded to the village. He first of all held an inquest on the dead bodies and sent them 'for post mortem examination and then took the blood-stained and unstained earth in his possession and recorded the statement of their witnesses.

6-9. [After narrating the medical evidence, the judgment proceeds:)

10. There was a Banger land lying at the back of 'the house of Suraj Deo and Jagdish and closet to the house of Jagan and Chapter. Both the parties were anxious to got the land, but Suraj Deo and Jag dish succeeded to obtain the land. This was in a proceeding under Section 229-B of the U. P. Zamindari Abolition and Land Reforms Act. Jagan auld Chatur felt annoyed and bore a grudge against Suraj Deo and Jagdish. The prosecution case also is that Lagan, brother of Jagan, was murdered in the district of Faizabad four or five months before the present occurrence and Jagdish deceased along with others was named as one of the murderers of Lagan. They were committed to the Court of Session and the murder case was pending at the time of the occurrence, It may here be mentioned that the

murder case later resulted in acquittal of all the accused persons. Jagdish had also moved an application for taking proceedings under Section 107, Cr.P.C. against some of the appellants.

11. All the appellants pleaded not guilty and alleged to have been falsely implicated in the case- on account of enmity. They took up the usual plea that the murder was committed by unknown persons who had not been recognized. No witness was examined in 'defence.

12. Taffy learned Sessions Judge viewed with doubt the presence of Vindhyachal and Ram Achal (P. Ws. 8 and 16) but relying upon the testimony of the other four eye-witnesses convicted the appellants of the offences detailed above. The learned Sessions Judge was of the view that both Vindhyachal and Ram Achal were chance witnesses and it was rather unusual for them to return to their village at 10 P. M.

13. The learned Advocate for the appellants has taken us through the evidence of the eye-witnesses including Vindhyachal and Ram Achal and we are in disagreement with the learned Sessions Judge that the presence of these two witnesses at the time of the assault was doubtful. However, on giving due consideration to the opinion expressed by him we would not place implicit reliance on the testimony of Ram Achal. As far as Vindhayachal is concerned we find no justification to reject his evidence. The learned Sessions Judge was apparently moved by the factor that no villager would have liked to return to his village late at night. This is contradicted by the fact that Surajdeo and Jagdish, deceased, were also returning late at 'night.

The prosecution case is that both the deceased and Lochan were assaulted near the fields of Jagbodh and Lalta Lai at 10 p. m. The appellants have also not alleged that the present incident took place before or shortly after sunset. When Suraj Deo and Jagdish could return to their village at about 10 p. m. other villagers would not have hesitated to come back to their houses at about that time. When the Sessions Judge has drawn wrong inference from the so-called conduct of the eye-witnesses WB would be fairly justified in ourselves assessing the evidence and in departing from the view expressed by the learned Sessions Judge, at least in

so far as Vindhyachal (P. W. 8) is concerned.

14-20. (After discussing the oral testimony on record, their Lordships proceeded:)

21. The learned Sessions Judge, however, awarded to each of the appellants the sentence of imprisonment for life for the offence under Section 302/149, I.P.C. The reasons given by him for awarding the lesser sentence for imprisonment for life are, in brief, that the death of Suraj Deo and Jagdish was the cumulative effect of all the injuries, it could not be said with certainty as for which of the accused had given the particular blow, and none of the injuries of Jagdish were such which could individually be said to be sufficient to cause death and it was not known who had caused the fatal Injuries. The learned Sessions Judge also observed with regard to Jagdish that the injuries were on non-vital parts of the body. The learned Sessions Judge was of the opinion that the murder committed was frusta, heinous, pre-planned and dastardly, yet he regarded the present case as one in which the sentence of death could not be awarded to any one. The learned Sessions Judge was, it appears, inclined to be of opinion that Jagdish was assaulted by Jagan, Chatur and Udit and he could easily place these three appellants in a category of their own and award them the higher sentence.

The fact that the death was the cumulative effect of all the injuries could not be given any undue importance, where the accused persons appeared to have acted brutally and the murder was a pre-planned one, for example, if three persons inflict severe injuries with a deadly weapon like Pharsa or spear and they are all aware of the injuries caused by others, the net offence committed by them is the sum total of the consequences of all the injuries caused, what is necessary to ascertain is the actual part played by the accused and if their conduct was such as to justify taking a severe view. If the courts of law take a contrary view, the result shall be that an individual would not by himself commit the murder but would always seek the assistance of others so that none may be awarded the higher sentence of death and in case of conviction all may escape with the lesser punishment of imprisonment for life.

Similarly, It cannot be laid down as an inflexible rule that whenever it is not known who had caused the fatal injury or it is not known if the Injuries caused by an

individual were by themselves sufficient in the ordinary course of nature to cause death, the lesser sentence must be. Awarded to all irrespective of the part played by them. Such a view shall lead to an anomalous position, namely, where the murder is committed by an individual he can be sentenced to death and not if the murder is committed by more than one person in a more brutal manner.

22. In *Dalip Singh v. State of Punjab* : [1954]1SCR145 the exercise of judicial discretion to refrain from sentencing all to death when there was no means of determining who dealt the fatal blow was considered to be sound, but their Lordships made it clear that a Judge is not bound to do so as he has as much right to exercise his discretion one way or the other. It was also made clear that it was impossible to lay down a hard and fast rule for each case must depend on its own facts. In other words, the trial Judge can award sentence of death to all the accused persons or to only a few depending upon the facts and circumstances of the case. He should not, in each and every case, be unduly moved by the factor that it was not known who had inflicted the fatal injury or caused injuries which by themselves would have been sufficient to cause death. What is necessary is that there should be no discrimination and all the accused persons equally placed be awarded the same sentence (*See Weir Singh v. State of Punjab*, : AIR 1956 SC754).

23. Coming to the instant case *Jagan, Chatur and Udit* could be placed in a group of their own as these three accused were said to have assaulted *Jagdish* and to have caused his death. The main enmity was with *Jagan* and *Chatur*. In other words, the Sessions Judge would have been fully justified if he had awarded the sentence of death to *Jagan* and *Chatur* or to *Jagan, Chatur and Udit*. However, the Sessions Judge decided to award the sentence of life imprisonment to these appellants also and the question, that naturally arises is whether this Court shall be justified to enhance their sentence to death.

24. Section 367 (5) has been repealed and substituted by a different clause under the Cr.P.C. Amendment Act XXVI of 1955 which came into effect from 1-1-1956. Prior to the repeal of the old Section 367 (5), Cr.P.C. the sentence of death was a normal penalty for murder and imprisonment for life an exception for the award of

which reasons had to be given; but since after the amendment of the Cr. F. C. the Sessions Judge is at liberty to award either of the two sentences, as he may consider appropriate. The sentences provided for the offences of murder, dacoit with murder etc. now stand in the same category as sentences provided for other criminal offences and the trial Judge can award any of the punishments so provided and whatever punishment is awarded shall be deemed to be in the exercise of his judicial discretion. The enhancement of the sentenced from imprisonment for life to death shall, therefore, be governed by the same principles as are applicable to enhancement of sentence for other offences.

25. The law with regard to the enhancement of sentence is now well settled and is beyond controversy. The award of sentence is discretionary and the discretion exercised by the trial Judge can be interfered with in appeal only if it was improperly exercised, i. e. not in accordance with the well established principles. Further, the appellate court shall not be justified to interfere with the sentence awarded simply because as trial court it would have awarded a higher sentence. Enhancement of sentence is thus possible only if the trial Judge had acted arbitrarily and did not follow the rules applicable to, the award of sentence.

26. We are inclined to be of opinion that the trial Judge had proceeded on a wrong assumption of law but the present case is not one where we would be fully justified to enhance the sentence. The eyewitnesses say that three of the appellants, namely, Jagan, Chatur and Udit, had caused injuries to Jagdish which resulted in this death but in the first information report, allegations were made against all the accused persons. The Sessions Judge has not recorded a finding in clear words whether, in his opinion, Jagdish was assaulted by these three persons only or by others also. The Sessions Judge first of all, noted the prosecution allegation that the ten injuries of Jagdish were caused by accused, Jagan, Chatur and Udit, and thereafter observed that it could not be said with certainty 'as to which accused gave which of the blows'. The judgment can thus suggest that the Sessions Judge was inclined to accept this part of the prosecution story also, but the possibility of his taking a contrary view cannot be excluded. In case the Sessions Judge was of the opinion that Jagdish was assaulted not necessarily by the above three appellants only, but by others also he could decide not to place Jagan, Chatur and

Udit in a group of their own. In other words, even though we are of opinion that some of the accused persons could be awarded the sentence of death, the present is not a case in which we would be justified to enhance the sentence of either of the thr appellants.

27. The appeal is hereby dismissed and the conviction and sentence of all the nine appellants are main- tained. They are confined in jail and shall be released after serving out the sentence. The order staying the realization of fine is vacated. The notice served for enhancement of sentence is vacated.

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