

Ram DIn Sarabjit Vs. State

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Court : Allahabad

Decided On : Nov-04-1963

Reported in : 1964CriLJ579

Judge : R.N. Sharma and ; G.D. Sahgal, JJ.

Appellant : Ram DIn Sarabjit

Respondent : State

Judgement :

G.D. Sahgal, J.

1. Ram Din appellant (45 years) has been convicted of an offence Under Section 302 read with Section 34 of the Indian Penal Code by the IV Movable Civil and Sessions Judge, Gonda, and also of an offence Under Section 201 of the Indian Penal Code. While he has been sentenced to death for the offence Under Section 302 read with Section 34 of the Indian Penal Code, he has been sentenced to five years' rigorous imprisonment for the offence Under Section 201 of the Indian Penal Code. Along with the appeal that he has made we have before us the reference also Under Section 374 of the Code of Criminal Procedure for the confirmation of the death sentence. The appeal originally was filed from jail but later on the appellant was represented by Counsel.

2. According to the prosecution case. Ram Bachan deceased was the son-in-law of Ram Din appellant having been married to his daughter Smt. Bachchi. He belonged to village Amkolwa, hamlet of village Patna, Police Station Payagpur, district Bahraich, while Ram Din belonged to village Kamrawan, Police Station Itiathow in the district of Gonda. The name of Ram Bachan's father is Swami Dayal who is P. W. 2. About eight days before the Holi this year, Ram Din came to village Amkolwa to take his daughter along with him to his house in connection with the Holi festival as she had been residing at that time with her husband. Ram Bachan deceased was not willing to let her go. There was an altercation between him and Ram Din and Ram Bachan, catching hold of his neck even pushed him aside. Some villagers intervened in the matter and at their intervention Ram Bachan was persuaded to allow his wife to go with her father on a promise being made by Ram Din that he had no objection to his daughter being sent back the next day after the Holi to the house of her husband. Thus he took along with him his daughter to his own house from the house of her husband.

3. On the day of the Holi, Swami Dayal (P. W. 2) came to the house of Ram Din to take his daughter-in-law as had been promised by Ram Din. Ram Din refused to send his daughter along with Swami Dayal saying that he had been insulted by Ram Bachan and unless he had taken revenge, he would not be satisfied. Swami Dayal thus went back home and narrated what had taken place, to his son Ram Bachan. Ram Bachan himself proceeded that very day to the house of his father-in-law to bring back his wife. He did not return for three or four days. Swami Dayal then came in search of him to the house of Ram Din. When he asked Ram Din about his son, he was told that he had not been there. Ram Din resides in Chamaran ka purwa which is a hamlet of village Kamrawan. After being told that his son had not come there Swami Dayal went to another hamlet of the same village, namely, Ahiran ka purwa where he met Parmeshwari Ahir (P, W. 4). The former told him that he had come in search of his son but Ram Din had told him that he had not come there. Upon this Parmeshwari gave information to him that he had seen Ram Bachan on the next day of Holi in the house of Ram Din. Swami Dayal began to suspect the bona fides of Ram Din. He proceeded to the house of the village pradhan Sitla Prasad (P. W. 6) and narrated the whole story to him. Badri Prasad (P. W. 5) an ex-Mukhia was also present at that time. The village

pradhan sent Ram Baran (P. W. 9) to bring Ram Din to his house. Ram Din arrived when Swami Dayal was sitting there. On the arrival of Ram Din, Badri Prasad, the ex Mukhia, and Sitla Prasad began enquiring from him how it was that he was denying the arrival of Ram Bachan to his house when Parmeshwari had seen him at his house. After thinking and pondering over for sometime, Ram Din told them that he had murdered Ram Bachan with the help of his sons Amar Nath and Dularey and after killing him he had thrown him in Birni nala and that he had buried the trunk and the head at different places in Baghnakha nala. The chaukidar was then sent for. On the arrival of, the chaukidar the story was narrated to him. The chaukidar tied Ram Din with his turban and proceeded for the thana. Swami Dayal also accompanied him at the police station. Swami Dayal dictated a report on the 15th of March at 11.30 in the day wherein all these facts were narrated, the information report being Ex. ka-3.

4. Station Officer Dost Mohammad (P. W. 12) was present there and he started the investigation. He interrogated Ram Din who promised to point out the dead body of the deceased Ram Bachan. Ram Din took the Station Officer along with him to the Baghnakha nala in village. Parsohni. Mangal Singh (P. W. 1) and Sheo Ram Singh (P. W. 3) also accompanied them. Ram Din took out the trunk and the head of the deceased Ram Bachan. He did so by first removing the earth from under the nala and taking out the trunk and later on he took the party to another place about 150 yards away where the head was taken out from inside the water. That body and that head, according to Swami Dayal, were parts of the body of his son Ram Bachan. An inquest was held by the Investigating Officer and the dead body was sent for post-mortem examination. The usual site plan was prepared. The Investigating Officer then proceeded to village Kamrawan and did the rest of the investigation, Amar Nath was thus arrested on the 16th of March. He handed over a knife to the investigating Officer. After the investigation was completed, three persons were charge-sheeted, namely, Ram Din and his two sons Ram Nath and Dularey.

5. Dularey was discharged by the Committing Magistrate and Amar Nath has been acquitted by the learned Sessions Judge who has convicted only the appellant Ram Din for the offences already indicated above.

6. Mention has been made about Amar Nath and Dularey as this background has to be understood in order to appreciate the points that may arise in the case at a later stage,

7. Ram Din admitted that he had taken back his daughter from the house of Ram Bachan about eight days before the Holi but he denied that there was any unpleasantness about it or that it was only at the intervention of some residents of the village that the girl was allowed to go on Ram Bachan's refusing to send her in the beginning. He also admitted that on the day of the Holi in the evening Swami Dayal came to his house to take back his daughter-in-law but added that he was persuaded to take her away two or four days after. Swami Dayal then went back after enjoying a feast during the night and Ram Bachan did come to his house. He denied that he had committed the murder. He also denied that he had made any confession or any portions of the dead body of Ram Bachan were recovered at his pointing. Amar Nath also denied these facts. He also denied the recovery of any knife being made at his pointing. Their case was that Badri Prasad Mukhia, Sitla Prasad pradhan and Ram Baran belonging to the same family and having enmity with the accused were instrumental in getting this story cooked up against them. The suggestion made is that when the dead body of Ram Bacban was found floating in the nala, both Swami Dayal and Ram Din proceeded to the police station to give this information but the Sub-Inspector after coming to village Kamrawan was prevailed upon to prosecute them and the evidence was cooked up to implicate them.

8. Twelve witnesses were examined at -the trial on behalf of the prosecution but none was examined on behalf of the accused.

9. The learned Sessions Judge found favour with the prosecution and held that the offence had been established against Ram Din though it was not established against his son Amar Nath. Amar Nath was thus acquitted while Ram Din was convicted.

10-20. (After discussion of evidence and the retracted confession of the accused His Lordship proceeded as follows:) Thus these circumstances confirm the veracity of the confession and we have no hesitation in holding, agreeing with the

learned Sessions Judge, that the confession, though exact words of the confession are not before us, was actually made in which Ram Din implicated himself by being the murderer along with his sons. The murder is said to have been done by strangulation. There is, however, no evidence against the sons apart from this confession. The evidence against one of them was so small that he was discharged by the Committing Magistrate himself while the other had to be acquitted as the knife by which he could have been connected and which, was recovered at his pointing out, was not proved to be blood-stained.

21. The charge against Ram Din, however, was not of murder simpliciter, that is, an offence Under Section 302 but of an offence under that section read with Section 34 of the Indian Penal Code. The confession does not describe the actual part that was played by him in committing the murder. It describes that he and his two sons strangled the deceased. We do not know whether it was by any action in particular of Ram Din that the death ultimately resulted or it was on account of what might have been done by his sons that the death took place. If Ram Din could be guilty on the strength of this confession, he could be guilty only with the assistance of Section 34 of the Indian Penal Code and not without its assistance. Under Section 34 when a criminal act is done by several persons in furtherance of the common intention of all, each one of such persons is liable for the act in the same manner as if it were done by him alone. The criminal act in this case, if we rely on the confession, was done by several persons in furtherance of their common intention, those several persons, according to the prosecution, being Ram Din, the father, and his two sons Amar Nath and Dularey. It was under this section alone, therefore, that a conviction could be recorded for an offence Under Section 302 of the Indian Penal Code and not a conviction for that offence under that section simpliciter. The question is whether any conviction could be recorded for an offence Under Section 303 of the Indian Penal Code read with Section 34 of the Code in these circumstances.

22. We must remember that it is not the case of the prosecution that the offence was committed by Ram Din with the assistance of his two sons or with the assistance of any other person. The case for the prosecution definitely was that the murder was committed by Ram Din with the assistance of his sons, one of

whom was discharged and the other acquitted. There was no other person who was suggested to have been involved in the murder.

23. In *Krishna Govind Patil v. State of Maharashtra* : [1964]1SCR678 the following observations have been made by the Supreme Court:

It is well settled that common intention within the meaning of the section implied a prearranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a Court can convict a person Under Section 302, read with Section 34, I. P. C, it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence. A few illustrations will bring out the impact of Section 34 on different situations.

(1) A, B, C and D are charged Under Section 302, firming their convictions. read with Section 34, of the Indian Penal /Code, for committing the murder of E. The evidence is directed to establish that the said four persons have taken part in the murder.

(2) A, B, C and D and unnamed others are charged under the said sections. But evidence is adduced to prove that the said persons, along with others, named or unnamed, participated jointly in the commission of that offence.

(3) A, B, C and D are charged under the. said sections. But the evidence is directed to prove that A, B, C and D, along with 3 others, have jointly committed the offence.

As regards the third illustration, a Court is certainly entitled to come to the conclusion that one of the named accused is guilty of murder Under Section 302, read with Section 34, I. P. C, though the other three named accused are acquitted, if it accepts the evidence that the said accused acted in concert along with persons, named or unnamed, other than those acquitted, in the commission of the offence. In the second illustration the Court can come to the same conclusion and

convict one of the named accused if it is satisfied that no prejudice has been caused to the accused by the defect in the charge. But in the first illustration the Court certainly can convict two or more of the named accused if it accepts the evidence that they acted conjointly in committing the offence. But what is the position if the Court acquits 3 of the 4 accused either because it rejects the prosecution evidence or because it gives the benefit of doubt to the said accused? Can it hold, in the absence of a charge as well as evidence, that though the three accused are acquitted some other unidentified persons acted conjointly along with one of the named persons? If the Court could do so, it would be making out a new case for the prosecution: it would be deciding contrary to which is not disclosed either in the charge or in reaching regard to which there is no basis in the evidence. There must be some foundation in the evidence that persons other than those named have taken part in the commission of the offence and if there is such a basis the case will be covered by the third illustration.'

Before their Lordships in support of the contention that a Court even in the first illustration, can acquit 3 of the 4 accused named in the charge on the ground that their identity has not been established, and convict one of them on the ground that more than one took part in the commission of the offence, reliance was placed upon the decision of the Supreme Court in *Mohan Singh v. State of Punjab* : AIR 1963 SC174 . There the appellants, along with three others were charged with having committed, offences Under Section 302 read with Section 149 as well as Section 323 read with Section 149 of the Indian Penal Code. The Sessions Judge acquitted two of them, with the result

That three of them were convicted. One of the accused was convicted Under Section 302 and Section 147 and two of the accused were convicted Under Section 302 read with Section 149 and Section 147 I.P.C. The High Court confirmed their convictions. On appeal by special leave to the Supreme Court two of the accused convicted Under Section 302 read with Sections 149 and 147, IPC contended, inter alia, that as two of the five accused were acquitted, their conviction Under Section 302 read with Sections 149 and 147, was bad in law. The Supreme Court held on the evidence that the said two accused had done the act pursuant to a pre-arranged plan and, therefore, they could be convicted Under

Section 302 read with Section 34 of the Indian Penal Code. During the course of that judgment the Supreme Court had been pleased to observe:

Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the Court less than five persons to be tried then Section 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial Court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge Under Section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge Under Section 149 because on the evidence the Court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the Court will have to be very careful, in reaching the said conclusion. But there is no legal bar which prevents the Court from reaching such a conclusion.

It was remarked that it would be seen from these observations that the Court was visualising a case where there was evidence on the record from which the Court can come to such a conclusion. It may be that the charge discloses only named persons; it may also be that the prosecution witnesses named only the said accused; but there may be other evidence, such as that given by the Court-witnesses, defence witnesses or circumstantial pieces of evidence, which may disclose the existence of named or unnamed persons, other than those charged or deposed to by the prosecution witnesses, and the Court, on the basis of the said evidence, may come to the conclusion that others named or unnamed, acted conjointly along with one of the accused charged. But such a conclusion is really

based on evidence.

24. This earlier case, though reported later was followed by *Ram Bilas Singh v. State of Bihar*, 1963 All LJ 609 : 1964 (i) Cri EJ 573 (SC). In that case the following passage from Archbald's *Criminal Pleading, Evidence and Practice* (23rd edn. p. 201, paragraph 361) was quoted:

Where several prisoners are included in the same indictment, the jury may find one guilty and acquit the others, and vice versa. But if several are indicted for a riot and the jury acquit all but two, they must acquit those two also, unless it is charged in the indictment and proved, that they committed the riot together with some other person not tried upon that indictment. 2 Hawk c. 47 Section 8. And, if upon an indictment for & conspiracy, the jury acquit all the prisoners but one, they must acquit that one also, unless it is charged in the indictment, and proved, that he conspired with some other person not tried upon that indictment.

The following remarks made in *Harchanda v. Rex*, : AIR1950 All355 by Agarwala, J., were approved:

Now in a criminal case the burden of proof is always on the prosecution. It is for the prosecution to establish the responsibility of the accused for the crime alleged. Having regard to the fact that there is no appeal against the acquittal of the other five accused before us, and having regard to the fact that we cannot interfere with the finding of the learned Sessions Judge, so far as it concerns those accused, we cannot hold that either Durga Das or Sukhbir was responsible for inflicting the incised wounds: and since it was not the prosecution case that there was some unknown person along with the accused, who was also holding a sharp-edged weapon, we cannot ascribe the infliction of the incised wounds to some such Unknown person. The result of the prosecution evidence, taken with the findings of the learned Sessions Judge, is that the prosecution is unable to explain the infliction of the incised wounds. In my opinion, in such a case the accused cannot be held constructively liable for the infliction of those wounds.

In the instant case the indictment was as follows:

Firstly, that you on the intervening night of 11th and 12th March, 1963, in village Chamaranpurwa hamlet of Kamrawan, police station Itiathoke In furtherance of common intention of you all, committed the murder by intentionally causing death of Ram Bachan and thereby committed an offence punishable Under Section 302/34, IPC and within the cognizance of the Court of Sessions.

Secondly, that you on the same day, time and place in furtherance of the common intention of you both caused the disappearance of the dead body of Ram Bachan with a view to screen yourselves from the offence of murder and thereby committed an offence punishable Under Section 201 r read with Section 34, IPC and within the cognizance of the Court of Sessions.

25. The act on the basis' of which the appellants were charged was a joint act done by him and his son Amar Nath in furtherance of their common intention. There was no other person named in the charge who might have shared in the act except these two. The evidence also was not to effect that there was any other person along with them who might have committed the act. One of them, namely, Amar Nath has been acquitted. There was, therefore, left no one with whom Ram Din could share his intention in furtherance of which that act might have been committed. Ram Din, therefore, could not be convicted of an offence Under Section 302 read with Section 34 of the Indian Penal Code or Section 201 read with Section 34 of the Code. His conviction no doubt has been recorded Under Section 201 of the Indian Penal Code but, in fact, it is one Under Section 201 read with Section 34 of the Indian Penal Code. In view of the proposition arising out of illustration (1) in 1963 All LJ 748 : (AIR 1963 All 1413) referred to above the conviction of the appellant for an offence Under Section 302 read with Section 34 of the Indian Penal Code has not been correctly recorded. He cannot possibly be convicted Under Section 302, IPC as there is no evidence that it is he who has committed the murder. If he could be convicted on the evidence that has been produced in the case he could be convicted only for an offence Under Section 302 read with Section 34 or Section 201 read with Section 34 of the Indian Penal Code but as for such an offence more than one person was necessary who might have participated in the crime and the case was definite fiat the appellant and his son and these two alone were the persons who participated and the son has been

acquitted, there is left no one who could have committed the act resulting in the murder of Ram Bachan along with the appellant in furtherance of their common, intention. The appellant has, therefore, to be acquitted. He can thus neither be convicted of an offence Under Section 302 or 201 read with Section 34, IPC nor an offence Under Section 302 or 201 simpliciter.

26. The learned Counsel for the State placed reliance on a recent case of this Court *Bisbeshai Dhani Ram v. State* 1963 (1) Cri LJ 645 (All) but in that case the conclusion arrived at by the Bench who heard that case was that there were at least three persons who must have taken part in the crime though the Court was unable to establish the identity of two persons among them. The third was convicted Under Section 302 read with Section 34 of the Indian Penal Code. In the instant case the conclusion is not that one of them participated in the crime and the other was unknown though the appellant is known, but the conclusion arrived at is that though the act was said to have been committed by two known persons in furtherance of their common intention and by those two persons alone and no other, one of them was not there at all. It cannot, therefore, be said that the act was done by the known person alone or by him in concert with an unknown person in furtherance of their common intention.

27. As a result of all that has been discussed, the appeal has to be allowed and the conviction recorded by the teamed Sessions Judge has to be set aside. We allow the appeal of Ramdin and acquit him of the charges Under Section 302 and Section 201 both read with Section 34 of the Indian Penal Code and set aside the sentences of death and of imprisonment passed on him under the two counts respectively. The appellant who is in jail shall be set at liberty forthwith unless required in connection with some other case. The reference for the confirmation of the death sentence is hereby rejected.