

Dal Chand @ Dalia Vs. the State

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Court : Delhi

Decided On : Oct-23-1981

Reported in : 1982CriLJ1477; 21(1982)DLT127

Judge : D.K. Kapur and; J.D. Jain, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 147, 148, 149, 302, 307, 323, 324 and 326; Code of Criminal Procedure (CrPC) - Sections 173, 233, 234, 235, 236, 237, 239, 313, 342 and 464; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 232, 535 and 537

Appeal No. : Criminal Appeal No. 132 of 1977

Appellant : Dal Chand @ Dalia

Respondent : The State

Advocate for Pet/Ap. : Usha Kumari and; Harish Gulati, Advs

Judgement :

J.D. Jain, J.

(1) The appellant has been convicted by an Additional Sessions Judge, Delhi, of an offence under Section 302, Indian Penal Code, for having committed murder of one Balwant Siogh, a military personnel by intentionally/knowingly causing, his death on 21st April, 1975 vide judgment dated 22nd February, 1977. He has also

been convicted of an offence under Section 324 read with Section 34, Indian Penal Code, for the injuries inflicted on the person of Bhim Singh by his associate Inderjit Singh. Further he has been convicted of an offence under Section 324 read with Section 34, Indian Penal Code, on account of his associate Dalip inflicting injuries on the person of Ami Chand and other military personnel at the same time and date. He has been sentenced to imprisonment for life on the first count and rigorous imprisonment for one year on each of the other two counts. However, all the sentences have been directed to run concurrently. Feeling aggrieved he has preferred this appeal.

(2) The prosecution version as unfolded by Gopi Ram, Public Witness 1, succinctly is that he had developed acquaintance/friendly relation with Ami Chand, Public Witness 10, a military personnel stationed at Military camp Anand Parbat (for short Military Camp) because both of them happened to be devotees of Goddess Vaishno Devi and they used to meet quite often at Jagrans (recitation of religious songs in devotion to Goddess during whole of a night). Ami Chand would even call upon him (Gopi Ram) at his residence at Bapa Nagar off and on. On the fateful evening of 21st April, 1975, Ami Chand along with his fellow military-men Bhim Singh, Balwant Singh, K. J. John, Gurmit Singh, Bhanwar Singh and Lakhi Ram had gone to Karol Bagh for shopping at what is called Somwar Bazar (Monday market). While they were returning from the Bazar they happened to meet Gopi Ram at his residence and the latter entertained all of them to tea and snacks. Thereafter, they left the house of Gopi Ram at about 8.30 P.M. and proceeded towards the Military Camp via Arya Samaj Road. They had hardly covered a distance of about 20125 paces when the appellant and his companions Inderjit @ Billa, Dalip Sethi and one more person, namely, Sunil, all of whom were armed with knives accosted them proclaiming that 'you have not stopped visiting the Mohalla (locality), we shall see today that you no longer visit the Moholla.' Saying so they opened an attack on the military personnel mentioned above. Balwant Singh, who happened to be ahead of all of them was attacked by Dal Chand, appellant, who inflicted stab injury on the left side of the abdomen of Balwant Singh with a double edged sharp weapon. He also caused injuries on the buttock of Balwant Singh with the knife. When his companions tried to intervene and rescue him, Inderjit Singh accused gave a knife blow to Bhim Singh Pathania

which hit him on the upper part of the chest at the root of the neck. Further Dalip dealt a knife injury on the arm of Ami Chand. The military personnel tried to apprehend the assailants but all of them managed to escape. Gurmit Singh, Public Witness 11, and K. J. John, Public Witness 23, who helped Balwant Singh who was in a bad shape and removed him to Medical Inspection Room in the Military Camp. The other injured persons were also taken to the Military Camp. From there all of them were removed by the military people, namely. S/Shri Dr. Rakesh Mehta, Public Witness 8 and Subedar Major Mool Chand, Public Witness 9, etc., Balwant Singh was declared dead by Dr. K. M. D.Rao of Military Base Hospital (Public Witness 3). The other two injured persons were likewise medically examined and were found to have sustained incised wounds.

(3) It is further the case of prosecution that Sub-Inspector Rattan Lal, the then in charge Police Post Tank Road under the Police Station Karol Bagh (Public Witness 33), happened to be on patrol Along with Dhan Singh, Constable. When he reached Military Road he learnt about this occurrence and recorded statement, Ex. Public Witness Ha, of Gopi Ram on the basis of which formal first Information Report was recorded and a case under Sections 147, 148, 149 and 307 read with Section 34, Indian Penal Code, was registered against the 'appellant and his accomplices. Later on the offence under Section 302 read with Section 149, Indian Penal Code, was added thereto on receipt of information about the death of Balwant Singh.

(4) The prosecution examined as many as 33 witnesses in all. Of these Gopi Ram, Public Witness 1, Sukhdev Singh, Public Witness 2, Ami Chand, Public Witness 10, Gurmit Singh, Public Witness 11, Lakhi Ram, Public Witness 12, Bhim Singh, Public Witness 21 and K.J. John, Public Witness 23, are ocular witnesses. It may be pertinent to mention here that Ami Chand and Bhim Singh were also injured in the alleged incident. Dr. Bharat Singh Public Witness 4, is a Police Surgeon, who conducted autopsy on the dead body of Balwant Singh. He, inter alia. found one incised stab wound over the left-side front of the chest. Internal examination of the laid injury revealed that its track was directed medially and downward and this wound had entered the chest cavity through fifth intercostal space and had cut the tip of left ventricle of the heart including chamber of the heart. It then continued

over the diaphragm and had cut the lever on its superior border through and through and finally entered the stomach on its upper part human deep. The total length of the injury was found to be 4' and in the opinion of Dr. Bharat Singh it was sufficient in the ordinary course of nature to cause death.

(5) On close scrutiny and examination of the evidence of various witnesses, the learned Additional Sessions judge came to the conclusion that the prosecution had not been able to bring home the charges to Sunil accused beyond reasonable doubt. He expressed the opinion that presence of Sunil accused at the time and place of the aforesaid incident and his participation in the attack on Balwant Singh etc. was highly doubtful. So he acquitted Sunil. As a necessary corollary the learned Sessions Judge has held that the question of any unlawful assembly being formed by five persons, namely, the three accused Dal Chand @ Dalia, Inderjit Singh @ Billa and Sunil, who were being tried by him (in Sessions Case No. 83 of 1975, State v. Dal Chand & others) Along with two other persons, namely, Dalip and Jagdish, who were both minors and were tried by Children Court, did not arise. Hence, he acquitted all the three accused persons of charges under Sections 147 and 148. On a parity of reasoning he held that Section 149, Indian Penal Code, would not be attracted to the facts and circumstances of the case and as such no constructive liability' for the offences of murder and causing grievous hurt etc. could be fastened with the aid of Section 149. However, he has found that evidence on the record clearly revealed a pre-arranged plan and common intention on the part of the accused persons to cause grievous injuries/injuries to a military personnel because they strongly resented the visits of the latter to their Mohalla and the appellant had even proclaimed their resentment over this to Gopi Ram much before this unfortunate incident. So invoking Section 34, Indian Penal Code. the learned Sessions Judge has convicted the appellant as well as his co-accused Inderjit Singh of offences under Section 324 read with Section 34 and Section 326 read with Section 34, Indian Penal Code, for sharing the common intention of causing grievous injuries to Balwant Singh etc. Further he has found the appellant individually liable for substantive offence of murder of Balwant Singh.

(6) The learned counsel for the appellant (*amices Curiae*) has, at the outset, raised a very pertinent and important question of law. She has invited our attention to the fact that no charge for the substantive offence under Section 302 or for that matter Section 326, Indian Penal Code, was framed against the appellant even though the law requires that for , every distinct offence of which a person is accused there shall be a separate charge and every such charge shall be tried separately except in cases mentioned under Sections 234, 235, 236, 237 & 239, Code of Criminal Procedure. Thus, she has urged that a person charged with an offence read with Section 149, Indian Penal Code, which itself creates a specific offence, cannot, be convicted of the substantive offence without a specific charge being framed as required by Section 233, Code of Criminal Procedure Reliance in this context has been placed by her on *Suraj Pal v. State of Uttar Pradesh*, : 1955 CriLJ1004 , in which the Supreme Court elucidated the legal position as under :

'A charge against a person as a' member of an unlawful assembly in respect of an offence committed by one or other of the member? of that assembly in prosecution of its common object is a substantially different one from a charge against any individual for an offence directly committed by him while being a member of such assembly. The liability of a person in respect of the latter is only for acts directly committed by him, while in respect of the former, the liability is for acts which may have been done by any one of the other In embers of the unlawful assembly, provided that it was in prosecution of the common object of the assembly or was such as the members knew to be likely to be so committed. A charge under S. 149, I.P.C. puts the person on notice only of two alleged facts, viz., (1) that the offence was committed by one or other of the members of the unlawful assembly of which he is one, and (2) that the offence was committed in prosecution of the common object or is such that was known to be likely to be so committed. Whether or not S. 149, Indian Penal Code . creates a distinct offence (as regards which there has been conflict views in the High Courts), there can be no doubt that it creates a distinct head of criminal liability which has come to be known as 'constructive liability' a convenient phrase not used in the Indian Penal Code. There can, therefore, be no doubt that the direct individual liability of a person can only be fixed upon him with reference to a specific charge in respect of the particular offence. Such a case is not covered by Ss. 236 and 237, Criminal P. C.

The framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence, is the foundation for a conviction and sentence thereforee.'

(7) In that case a number of accused were tried on charges under Sections 147, 3231149, 3071149 and 3021149, Indian Penal Code. There were, however, no direct and individual charges against the accused for the specific offences under sections 307 and 302. The Sessions Judge found all the accused guilty of various offences as charged and sentenced them. On 'appeal the High Court acquitted some of them and as regards one of the.. accused who was suspected of firing his pistol against the deceased, the High Court while setting aside the convictions and sentences of all the accused under Sections 307(149 and 302, Indian Penal Code, convicted and sentenced him under Section 307 for transportation for life and to death under Section 302. Holding that there was no direct and individual charges against the accused for the specific offences under Sections 307 and 302, Indian Penal Code and that the absence of specific charges against the accused under the said Sections was a very serious lacuna in the proceedings and had materially prejudiced the accused, their Lordships set aside the conviction and sentence of the appellant under Sections 307 and 302.

(8) Evidently we are faced with the same situation in the instant case Inasmuch as no specific and separate charge hag been made against the appellant for the substantive offence under Section 302 of which be has been convicted and sentenced to life imprisonment. The first charge against the appellant and his co-accused was under Section 147, Indian Penal Code, for being members of an unlawful assembly; the second charge was under Section 148, Indian Penal Code, for being armed with knives, deadly weapons while being members of unlawful assembly; the third charge was under Section 302 read with Section 149, Indian Penal Code, for having committed murder by causing the death of Balwant Singh in prosecution of the common object of all of them. Similarly, the remaining charges are under Sections 307 & 324 read with Section 149, Indian Penal Code. Thus, it is crystal clear that no specific and distinct charge under Section 302, on which the appellant has been convicted, was ever framed against him. It is noteworthy that in Sura;) Pal v. State of Uttar Pradesh (supra) the appellant had

been specifically questioned by the Court of Sessions under Section 342. Code of Criminal Procedure, on the footing that he was the person who had fired at Public Witness 2 and the deceased Surajdin and the accused denied it. But even then the Supreme Court observed that 'this cannot be said to remove any prejudice that would arise by virtue of the vagueness in the charge & the sessions trial, as to who was the author of the pistol fire.'. Hence, the dictum laid in Suraj Pal (supra) will apply to the facts of the instant case which are almost identical with the facts to that case and there is no escape from the conclusion that the appellant has been materially prejudiced in his defense in the absence of specific charge against him under Section 302, Indian Penal Code and as such his conviction as well as sentence turn the said offence must necessarily be set aside.

(9) The matter, however, does not end here and we have to consider the desirability of a retrial of the appellant on the substantive charge of murder. We notice that at the trial all the material prosecution witnesses have deposed that the appellant was responsible for dealing fatal blow on a Vital part of Balwant Singh, deceased, with a knife having both the edges sharp. This fact was revealed by Gopi Ram even in the First Information Report which was lodged soon after the occurrence. So, it was incumbent upon the learned Sessions Judge to frame a charge for the substantive offence of murder. No doubt, in view of Section 464, Code of Criminal Procedure, which is a combination of Sections 535, 232 & 537(b), Criminal Procedure Code of 1898, no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge unless in the opinion of the court of appeal a failure of justice has, in fact, been occasioned thereby. Thus, failure on the part of the trial court to frame such 'a charge is not per se a compelling reason to set aside the conviction and sentence of the appellant for the same but the prejudice to the appellant in the instant case appears to be writ large having regard to the serious lacuna and lapses on the part of the trial court in confronting the appellant with vital pieces of evidence on the record while he was under examination under Section 313 of the Code of Criminal Procedure. Not only the charge fails to pinpoint the attention of the appellant to the role allegedly played by him in the murder of the deceased Balwant Singh but his attention was not specifically directed to the same in his

examination under Section 313. Significantly no question seems to have been put regarding the nature of injury inflicted by him to the deceased. The charge is indeed serious and discloses a brutal attack. So without expressing any opinion on the merits of the case we are inclined to order retrial of the appellant, a course resorted to by the Supreme Court in Nanak Chand v. State of Punjab, : 1955 CriLJ721 , under similar circumstances. Of course, the Supreme Court did not order retrial in Suraj Pal but it was on account of certain special features and circumstances therein which were introduced by their Lordships as not warranting a retrial and not on principle.

(10) The seeming conflict of view between Nanak Chand v. State of Punjab and Suraj Pal v. State of Uttar Pradesh came upon a reference before a five Judges Bench of the Supreme Court in Willie (William) Shaney v. State of Madhya Pradesh. : 1956 CriLJ291 . It was emphasised by S. R. Das, Acting Chief Justice and Bose, J. that the object of the charge is to give the accused notice of the matter he is charged with and does not touch jurisdiction, if therefore the necessary information is conveyed to him in other ways and there is no prejudice, a trial 'is not invalidated by a mere fact that the charge was not formally reduced to writing. The essential part of this part of law is not any technical formula of words but the reality, whether the matter was explained to the accused and whether he understood what he was being tried for. Chandrasekhara, J. speaking for himself and on behalf of Jagannadhadas, J however, sounded a note of caution in the following words :

'THE omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it 'illegal, prejudice to the accused being taken for granted.'

(11) So having regard to the peculiar facts and circumstances of the case, the conviction of the appellant was sustained although the nature of offence was converted from one under Section 302, Indian Penal Code to that under Section 304 Part II of the Indian Penal Code. Ilam Singh & others v. State of U.P., 1976 Scc 630, is another case having almost identical facts, in that the accused numbering five in all were charged under Section 302 read with Section 149 and

no specific charge under Section 302 was framed against anyone of them. However, one of the accused persons, namely, Ishwar Singh was convicted under Section 302, Indian Penal Code and sentenced to death by the Sessions Judge. A contention was raised that conviction of Ishwar Singh for the said offence could not be sustained in the absence of a distinct and separate charge and the said illegality vitiated the trial. . . The Supreme Court spurned the contention with the observations that :

'THE F.I.R. mentions that Ishwar Singh 'gave a thrust with the ballam' to Chauhan Singh which killed him. The eyewitnesses repeat this story. Also, no grievance appears to have been made in the High Court that Ishwar Singh was prejudiced in his defense by being convicted of an offence with which he was not charged. The point was raised for the first time here before us. Considering all the relevant circumstances, we do not think it could be said that the accused was prejudiced in his trial.'

(12) It is crystal clear that no hard and fast rule or guidelines can be laid in this respect and every case must depend on its own merit, the problem being essentially one of prejudice to the accused resulting from omission to frame a specific charge.

(13) To sum up, therefore, the conviction as well as sentence of the appellant for the substantive offence of murder cannot be sustained. This appeal is accordingly allowed and the conviction as well as sentence of the appellant is set aside and the case is remanded to the Court of Sessions for retrial after framing a charge under Section 302 of the Indian Penal Code and in accordance with law. It shall be open to the Sessions Judge to frame charges on other counts which he may deem necessary under law having regard to the allegations made by the prosecution in the charge-sheet under Section 173, Code of Criminal Procedure and other relevant documents.

(14) Before parting with this case we also record our appreciation of the valuable assistance rendered by the amicus curiae Mrs. Usha Kumar.

