

Virender Kumar @ Bittoo Vs. State

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Court : Delhi

Decided On : Feb-01-1995

Reported in : 1995(2)Crimes466; 59(1995)DLT341; 1995(33)DRJ352

Judge : P.K. Bahri and; S.D. Pandit, JJ.

Acts : [Constitution of India](#) - Article 141; [Indian Penal Code \(IPC\), 1860](#) - Sections 302

Appeal No. : Criminal Appeal No. 74 of 1989

Appellant : Virender Kumar @ Bittoo

Respondent : State

Advocate for Pet/Ap. : P.P. Malhotra,; Madhulika Mohan and; P.S. Sharma, Advs

Judgement :

P.K. Bahri, J.

(1) Appellant, Virender Kumar @ Bittoo S/o Sh.Hari Shanker r/o Village Maujpur has been convicted of an offence punishable under Section 302 of Indian Penal Code vide judgment dated April 20, 1989 of an Additional Sessions Judge, Shahdara and has been sentenced to undergo rigorous imprisonment for life and pay a fine of Rs.1,000.00 and in default to further undergo rigorous imprisonment for two years.

(2) He has filed this appeal challenging his conviction and the sentence. As a matter of fact, along with the appellant, Joginder Singh, Jaswant Singh and Ramesh Singh were also tried for the offence punishable under Section 302 read with Section 34 Indian Penal Code While Joginder Singh has been acquitted, Jaswant Singh and Ramesh Singh have been convicted for offence punishable under Section 324 read with Section 34 of the Indian Penal Code and have been sentenced to undergo rigorous imprisonment for two years each. Jaswant Singh and Ramesh Singh have not, it appears, filed any appeal against their conviction and sentences.

(3) The case of the prosecution, in brief, is that Public Witness 4 Lalla and his maternal uncle Maruf Public Witness 5 were working in a factory at New Seelampur at the relevant time. Ujjair, since deceased, was Maruf's brother's wife's brother. He had come from his village for sight seeing to Delhi on April 4, 1984 and he stayed with Public Witness 5 Maruf. On April 6, 1984, all of them at about 6.45 P.M. had boarded a bus of Route No.241 from Seelampur Bus Stand and Ujjair and Lalla had taken their seats on a berth in that bus whereas Maruf sat immediately on the back seat. The bus had reached Welcome bus stand where certain passengers boarded the bus. Out of them three were stated to be young boys of medium height and medium built who stood near the said berth where Ujjair and Lalla were sitting. One of the said boys required Ujjair to vacate the seat so that he could sit therein. But Lalla and Ujjair did not respond and the second boy remarked as to whether they had not heard the direction of the other boy that Ujjair should vacate the seat whereupon Ujjair retorted that he would not vacate the seat. The third boy then raised his voice and proclaimed that they would get the seat vacated then and there and he instigated his companion by uttering the words 'Is sale ko bata do'. On this the second boy whipped out a dagger from the right dub of his belt and stuck a blow on the left side chest of Ujjair as a result of which Ujjair started bleeding. An alarm was raised. Lalla and Ujjair gave support to Ujjair and required the driver to stop the bus but the moment the bus slowed down, the three assailants jumped from the running bus and made their escape. The bus stopped at Shahdara Chowk. Lalla and Maruf removed Ujjair in a rickshaw to a hospital where the doctor declared Ujjair as brought dead.

(4) From the hospital an information was given to Police Station Shahdara which was recorded at Daily Diary No.75A at about 8.45 P.M, copy of which is Public Witness 20/A mentioning that Ujjair having knife injuries had been got admitted in the hospital by his relatives and he had died. S.I.Om Prakash along with Constable Ram Kishan proceeded to the hospital and after obtaining the M.L.C, Ex.PW11/A recorded the statement of Public Witness 4 Lalla, Ex.PW4/C and had sent the same vide his endorsement, Ex.PW10/B through Constable Ram Kishan on the basis of which the F.I.R. was registered, copy of which is Ex.PW10/C.

(5) The post-mortem on the dead body of Ujjair was performed by Dr.L.T.Ramani, Public Witness 18. He found one incised stab wound spindle shaped 2.5cm x 1cm. x placed horizontally on the left side front of the chest at the level of nipples 4cm medial of the left nipple. Margins were regular and both ends were equally tapering. The said injury on internal examination was found to communicate with the left chest cavity through fourth inter coastal space and after cutting the interior margin of the left lung upper lobe, the injury continued on the pericardium of the heart. The cut on the pericardium was 2 cm. long. The injury further continued on the left ventricle through and through its interior wall, chamber and posterior wall. The cut on the posterior wall of the ventricle was 3 mm. long and posterior wall of the pericardium showed a small nick. The total depth of this injury was 10 cm. from the body surface. The doctor had opined vide his report Ex.PW18/A that the injury was ante mortem and was caused by sharp edged weapon which was sufficient to cause death in the ordinary course of nature. The death was due to haemorrhage and shock resulting from the said injury.

(6) PW20 S.I.Om Prakash Kaushik had investigated the case. He had seized the bus in question i.e. Dhp 2858 vide Seizure Memo Ex.PW2/A on 9th April 1984. The conductor of the bus Khem Singh had handed a bag containing certain papers but we need not refer to the said evidence because the same has not been linked with the appellant. As long as the investigation remained with him up to 23rd April 1984, he could not trace out the culprits.

(7) Inspector M.S.Sapra, Public Witness 22 had taken over the further investigation of the case and on May 4 1984, he had arrested Joginder from Bus

Stand Shahdara and had recorded the disclosure statement of Joginder and recovered his t-shirt and pant, Ex.P4 and P5. On the basis of some secret information, on the same day, he is stated to have arrested accused Virender, appellant, and accused Jaswant. On the basis of disclosure statement of the appellant, it was discovered that the weapon of offence had been given to Jaswant and Jaswant had got recovered this dagger, Ex.P2 from near Ganda Nallah which stood buried under the earth and which was converted into a sealed parcel vide memo Ex.PW6/B. The appellant is stated to have got recovered his t-shirt, P4A and pant P3. Accused Ramesh was also arrested on the same day from his house.

(8) The case property was sent to C.F.S.L. and C.F.S.L. reports were received but they are of no help to the prosecution as no blood was detected on the dagger and also on the clothes of the appellant. The accused were produced before the Metropolitan Magistrate on 5th May 1984 in muffled faces along with application Ex.PW22/A and Magistrate Public Witness 19 had made an order on the same day fixing 11th May 1984 as the date for holding Test Identification Parade and he had directed the accused to keep themselves in muffled faces. On 11th May 1984 at the time of holding of test identification parade, all the accused declined to participate in the test identification parade stating that they have been shown to the witnesses earlier and even their photographs had been shown. The Magistrate had recorded the proceedings, Ex.PW19/B to Public Witness 19/G in that connection and had administered due warning to the accused including the appellant that their refusal to participate in the test identification parade can be used against them during the trial. Thereafter the supplementary statements of the eye witnesses were recorded who identified the said accused as the said culprits.

(9) There was no fourth culprit mentioned in the F.I.R. but in supplementary statements, it came out that Joginder Singh was also present in that bus and had exhorted the assailants to escape from the spot and one piece of his shirt in grappling came into possession of Maruf. We need not refer in detail the evidence which appeared against the accused Joginder Singh and other two accused. We will be confining our judgment only to the question whether offence had been brought home to the appellant in the present case or not beyond any shadow of

reasonable doubt. The learned Additional Sessions Judge has brought home the offence to the appellant on the testimony of Public Witness 4 and Public Witness 5.

(10) The learned counsel for the appellant has vehemently argued that Public Witness 4 and Public Witness 5, who are the relations of the deceased, have not explained as to how they came to identify the appellant as one of the culprits. In the present case, what we find is that no question has been put to Public Witness 4 Lalla and Public Witness 5 Maruf in order to elicit the facts as to how they identified the appellant as the person who actually stabbed Ujjair. The facts that the occurrence had taken place in the manner stated by these two witnesses are not disputed. Obviously, when Lalla had made the statement to the police, which is the basis of the F.I.R, the names of the culprits were not known and he had narrated the incident in the manner it occurred and there is no reason to doubt the statements of Public Witness 4 and Public Witness 5 that the occurrence had taken place in the manner stated by them which stands duly corroborated from the contents of the F.I.R. The fact that Ujjair had met homicidal death in the manner stated by these two witnesses duly corroborated from the post mortem report is also not under challenge and stands proved beyond any shadow of reasonable doubt.

(11) PW4 Lalla had categorically stated in Court that it was Virender, appellant, who had taken out the dagger from dub of his pant and stuck the vital blow on the chest of Ujjair. Nothing substantial was brought out from the cross-examination that this witness Lalla had any reason to falsely implicate the appellant. It was not even suggested to Lalla in cross-examination that accused, appellant had been shown to him at any time prior to 11th May 1984, the date fixed for holding Test Identification Parade or that any photograph of the appellant had been shown to him. In cross-examination on behalf of Jaswant and Ramesh, it was suggested that Jaswant and Ramesh had been in custody of the police since April 26- 27 1984 and they had been shown arrested on May 3, 1984 and were shown to Lalla on that day which suggestion was denied by the witness. In case the said accused had been detained, as alleged, by the police illegally, the accused, when they were produced before the Metropolitan Magistrate, would not have failed to make

any statement to the Magistrate orally or in writing mentioning that they had been detained earlier and had been wrongly shown as arrested on May 3, 1984.

(12) The Test Identification Parade was fixed for May 11, 1984. Till then, the appellant or the accused had not moved any application and had not sent any representation to the authorities that in fact they had been shown to the witnesses even prior to their arrest or after their arrest or that their photographs had been taken at any point of time. The fact that they were produced in muffled faces before the Magistrate indeed was not even disputed by the accused while cross-examining the Magistrate in that connection. The Magistrate had given directions in writing that the accused including the appellant should keep themselves in muffled faces. There was no cross-examination on this aspect of the matter. The statement of Public Witness 19 Sh.P.C.Ranga, Metropolitan Magistrate, remained unchallenged. So, it is not possible to countenance the plea that appellant or any other accused had been shown to the witness Lalla at any time prior to the fixation of the date for holding test identification parade.

(13) In cross-examination of Lalla, it was brought out that he had been called to Police Station for the Test Identification Parade along with Maruf and bus conductor but it was not elicited from him that as to on what date they were called. The witness has categorically stated that they had been called as the date for holding test identification parade had been fixed. If that is so, it cannot be said that they had come to the police station at any time for seeing the appellant and other accused. The testimony of Lalla suffers from no infirmities. He has no reason to falsely implicate the appellant and allow the real culprit of his uncle's murder to go scot free.

(14) It is significant to mention that the witness has not been confronted with any material portions of his statement vis-a-vis his statement recorded in the F.I.R. or the supplementary statement recorded. It is true that the witness had brought in the role of Joginder Singh for the first time in supplementary statement but it would not mean that mere fact that Joginder Singh had been acquitted, the statement of the witness is not to be accepted with regard to the role of the appellant. Joginder's acquittal was due to the fact that in the F.I.R. only three culprits were

mentioned and the Court thought it fit to give the benefit of doubt to Joginder.

(15) Similarly, the statement of Public Witness 5, Maruf, is also credible. He had narrated the facts as they occurred on the day of the occurrence and he denied the suggestion that accused had been shown to him in the police station. It is pertinent to mention that no specific suggestion was given as to on what particular date the accused had been shown to this witness in the police station. This witness had deposed that he had gone to the police station on the day the bus was taken into possession but that was a day when none of the accused had been arrested. In one sentence, the witness mentioned that he had come to know that accused had been arrested by the police on 11th April 1984 but obviously this date is not correct because it is not the case of the appellant or other accused that they were arrested on 11th April 1984 or prior to that date. According to the suggestion given in cross-examination, it was tried to show that accused had been detained 3/4 days prior to their being formally shown arrested on 3rd May 1984. So, it is evident that this witness could not have possibly come to know about the arrest of accused on 11th April 1984. May be this mistake occurred on account of some error in typing. The witness might have been referring to the date fixed for test identification parade on which date the witnesses were called by the police but that date was the 11th May 1984.

(16) It is true that the conductor of the bus Public Witness 9 Khem Singh, wrongly typed as Prem Singh, had turned hostile and did not support the prosecution case as he had deposed that he had not seen the person being stabbed in the bus and he had only come to know from the passengers that a person had been stabbed. He was duly confronted with his police statement but he denied having stated to the police that he had seen the culprits getting away from the bus and escaping after stabbing a person in the bus. He even disowned that he had handed over a bag containing the documents to the police vide recovery memo Ex.PW9/A. He, however, admitted his signatures on the said recovery memo. So, it is evident that this witness is not a truthful witness. He had, in cross-examination, stated that he was called to the police station on May 3, 1984 and at that time he, Maruf and Lalla had seen all the four accused present in the police station. It is quite clear that he had given this statement in order to give some defense to the accused. As already

indicated above, the defense of the accused was not that they were shown to the witnesses on 3rd May 1984. The defense, as suggested, was that they had been detained prior to May 3,1984 and during that period, they had been shown to the witnesses and they were shown formally arrested on May 3,1984. We are of the considered view that Additional Sessions Judge was right in discarding this statement of Public Witness 9 from consideration.

(17) The other evidence, as discussed above, clearly indicated that there was no occasion for the witnesses to have seen the accused prior to the date fixed for holding test identification parade.

(18) We, hence, in view of the above discussion, come to the conclusion that the Additional Sessions Judge was right in coming to the conclusion that the appellant had on that date and time stabbed Ujjair with a dagger and Ujjair had succumbed to his injuries because of the said fatal blow given by the appellant to Ujjair.

(19) Learned counsel for the appellant has, however, vehemently argued that as no substantive charge has been framed against the appellant for an offence punishable under Section 302 Indian Penal Code and as all the accused had been charged for an offence punishable under Section 302 read with Section 34 of Indian Penal Code and as two of the accused had been convicted of an offence punishable under Section 324 read with Section 34 of Indian Penal Code, the appellant could not have been convicted of an offence punishable under Section 302 of Indian Penal Code.

(20) He has placed reliance on a judgment of the Supreme Court given in the case of State of West Bengal Vs . Vindu Lachmandas Sakhrani, : 1994 CriLJ919 . The facts of the said case, in brief, were that one Vindu Lachmandas Sakhrani had been charged for an offence punishable under Section 364 and Section 302 read with Section 34 of Indian Penal Code for kidnapping and murder of six year old child Nita. Her husband Lachmandas was also charged under Section 302 read with Section 34 Indian Penal Code. The husband was acquitted but his wife Vindu was convicted under Section 302 and Section 364 Indian Penal Code.

(21) The High Court had upheld the acquittal of the appellant and had also set aside the conviction of the wife. The matter was taken to the Supreme Court. The Supreme Court found that the High Court had examined each of the circumstances in detail and had come to the conclusion that the case against the wife was not proved beyond reasonable doubt. The Supreme Court held that they saw no ground to differ with the reasoning and conclusions reached by the High Court. A point was raised before the Supreme Court that there was no independent charge under Section 302 Indian Penal Code either against the husband or against the wife and it was pleaded that the husband having been acquitted, there being no independent charge under Section 302 Indian Penal Code against the wife, she could not be convicted for the said offence. The Supreme Court held as follows:-

'WE see force in the argument advanced by the learned counsel. Both husband and wife were charged with an offence under Section 302 read with S.34, Indian Penal Code. The charge which was based on the common intention of the two failed with the acquittal of the husband and there being no charge under Section 302 simplicities against the wife she could not be convicted. In any case there is no evidence on the record to show that she independently committed the offence.'

(22) It must be emphasised at this stage that the Supreme Court had found no evidence on the record to show that the wife independently committed the offence but that is not the case here. Here the facts clearly proved beyond reasonable doubt that it is the appellant who stabbed Ujjair with a dagger and thus the appellant had committed the substantive offence. This judgment was given by two Hon'ble Judges of the Supreme Court.

(23) In *Hem Raj Vs . State*, : 1990 CriLJ2665 , another judgment given by two Hon'ble Judges of the Supreme Court, the facts were that all the accused in that case had been charged under Section 302 read with Section 34 Indian Penal Code. But the appellant in that case was convicted of an offence punishable under Section 302 Indian Penal Code simpliciter. The Supreme Court held that there is no illegality in convicting the appellant under Section 302 Indian Penal Code simplicities though there was constructive charge framed against all the accused.

under Section 302 read with Section 34 Indian Penal Code .

(24) Section 464 of the Criminal Procedure Code lays down that 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 including any misguide of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(25) Section 218 of the Criminal Procedure Code lays down that for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately. Section 221 contemplates framing of alternate charges when there is a doubt as to what offence has been committed. Section 222 provides that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(26) So, the short question which arises for decision is whether framing of charge jointly under Section 302 read with Section 34 of Indian Penal Code for the murder of Ujjair, a particular accused can be convicted of substantive offence under Section 302 Indian Penal Code on the evidence led before the Court or not, even though no separate substantive charge has been framed against that accused under Section 302 Indian Penal Code .

(27) Learned counsel for the appellant has referred to Nanak Chand Vs . State of Punjab, : 1955 CriLJ721 . In the said case, charges had been framed under Section 302 and Section 325 read with Section 149 of Indian Penal Code The question which arose for decision before the Supreme Court was that in case the offence under Section 149 is not proved, can the accused be convicted of substantive offence under Section 302 Indian Penal Code or 325 Indian Penal Code when there had been no separate substantive charges under the said provisions. The Supreme Court held that in case a person is charged with an offence read with Section 149 Indian Penal Code , then if he is acquitted of the

said offence, then he cannot be convicted of the substantive offence without a specific charge being framed as required by Section 233 of the Criminal Procedure Code (old). The reason given for coming to this ratio is that Section 149 Indian Penal Code itself creates an offence as distinguished from Section 34 of the Indian Penal Code which does not create any independent offence. Keeping in view these differences between Section 149 and Section 34 of the Act, it was held by the Supreme Court that if no substantive charge is framed and only charge is framed of an offence read with Section 149 Indian Penal Code, then the accused cannot be convicted of any substantive offence. It is evident that such would not be the ratio if the charge of an offence is framed read with Section 34 of the Indian Penal Code.

(28) It is quite evident that the accused including the appellant had been supplied with all the statements and supplementary statements recorded under Section 161 of the Indian Penal Code and the appellant was very much aware of the allegation that fatal injury to Ujjair had been imputed to him. So, non-framing of charge under Section 302 Indian Penal Code against the appellant separately from the charge under Section 302 read with Section 34 of Indian Penal Code has not caused any prejudice in trial to the appellant.

(29) In case there is a conflict of judgments in between the two Supreme Court judgments cited above, then law is settled that a Bench having same Judge strength cannot over-rule the earlier judgment given by the same Bench strength.

(30) A Full Bench of the Allahabad High Court in case of Ganga Saran Vs . Civil Judge, Hapur, : AIR1991 All114 has laid down that if there is a conflict between two decisions of equal Benches of the Supreme Court which cannot possibly be reconciled, the Courts must follow judgment which appear to them to state the law accurately and elaborately and particularly so when the later decision of the Supreme Court did not notice the earlier decision of the Supreme Court.

(31) In Union of India Vs . Godfrey Philips India Limited, : [1986]158ITR574(SC) , a judgment given by three Hon'ble Judges, it was held in para 12 as follows:-

'WE find it difficult to under stand how a Bench of two Judges in Jeet Ram's case could possibly overturn or disagree with what was said by another Bench of two Judges in Motilal Sugar Mills case. If the Bench of two Judges in Jeet Ram's case found themselves unable to agree with law laid down in Motilal Sugar Mills case, they could have referred Jeet Ram's case to a larger Bench, but we do not think it was right on their part to express their disagreement with the enunciation of the law laid down by a co-ordinate Bench of the same Court in Motilal Sugar Mills.'

(32) In well-known case of A.R.Antulay Vs . R.S.Nayak, : 1988 CriLJ1661 , the Constitution Bench of the Supreme Court had laid down that the Supreme Court under its rules of business ordinarily sits in Divisions and not as a whole one and each Bench, whether small or large, exercises the powers vested in the Court and decisions rendered by the Benches irrespective of their size are considered as decisions of the Court. However, the practice has developed that a larger Bench is entitled to over-rule the decision of a smaller Bench notwithstanding the fact that each of the decision is that of the Court.

(33) In Union of India Vs . Raghbir Singh, : [1989]178ITR548(SC) , the Constitution Bench of the Supreme Court has held that a pronouncement of law by a Division Bench of the Supreme Court is binding on the Division Bench of the same or a smaller number of Judges and in order that such decision will be binding, it is not necessary that it should be a decision by the Full Court or a Constitution Bench of the Court.

(34) It is quite evident that the judgment of the Supreme Court given previously was not brought to the notice of the Court which decided the later case. In view of the law laid down by the Constitution Bench of the Supreme Court, even if it was to be held that there is a conflict of opinion between the two judgments referred above, even then the later judgment being delivered by two Hon'ble Judges cannot be considered to have over-ruled the previous judgment delivered by the two Hon'ble Judges of the Supreme Court.

(35) So, we hold that the appellant, who had not been prejudiced in any manner in the trial by non framing of a substantive charge under Section 302 Indian Penal Code could be rightly convicted for the substantive offence although the charge

has been framed for commission of offence read with Section 34 Indian Penal Code when particularly Section 34 by itself does not bring about any offence.

(36) However, the learned counsel for the appellant has vehemently argued that ingredients of offence of murder, as laid down under Section 300 of the Indian Penal Code, were not made out. It was a case which could be covered by provisions of Section 304 Part-II.

(37) From the facts, it is clear that there was no motive of the appellant to kill Ujjair. He had no intention even to kill Ujjair. In the heat of the moment, on a very trifling dispute regarding vacation of a seat in the bus, the appellant had taken out a dagger and inflicted a blow with the dagger at random which landed on the vital part of the body of Ujjair. In such facts, it cannot be said that the appellant had intended to cause the said particular injury which was sufficient in ordinary course of nature to cause the death of Ujjair.

(38) In almost similar facts in case of Hem Raj (supra), the blow had landed on the chest of the deceased which had been caused in a spur of moment and in the heat of passion upon sudden quarrel, there being no pre-meditation or intention to cause fatal injury the Supreme Court had converted the offence from under Section 302 to under Section 304 Part-II of Indian Penal Code and had sentenced the accused in that case to undergo rigorous imprisonment for a period of seven years.

(39) In case of S.D.Soni Vs . State of Gujarat, : 1991 CriLJ330 , it was found that even though the accused might not have the intention to cause death, his act was done with the knowledge that it was likely to cause death and so he would be considered to have committed the offence punishable under Section 304 Part-II. In this case, the appellant was sentenced to undergo rigorous imprisonment for five years for the said offence.

(40) In the present case also, We find that the appellant had no intention to kill Ujjair and in a heat of moment on a sudden quarrel, he had taken out the dagger and at random had caused the blow on the body of Ujjair which landed on his chest resulting in his death. So, it cannot be said that he had intended to cause

that particular fatal injury.

(41) So, we partly allow the appeal and convert the conviction from under Section 302 Indian Penal Code to under Section 304 Part-II Indian Penal Code. The appellant has already undergone five years and about four months sentence. So, the interests of justice will be well met by awarding the sentence for the period already undergone which we award. The appellant need not now surrender. His bail bonds are cancelled.

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