

**State Vs. Bakshish Singh and anr**

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**Court :** Delhi

**Decided On :** Nov-21-2012

**Judge :** S. P. Garg

**Appellant :** State

**Respondent :** Bakshish Singh and anr

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI RESERVED ON :

10. h September, 2012 DECIDED ON :

21. t November, 2012 + CRL.A. 89/2012 STATE ..... Appellant Through: Mr.Sanjay Lao, APP for the State. Versus BAKSHISH SINGH & ANR. .... Respondents Through: Mr.Mukesh Kalia with Mr.Varun Jamwal, Advocates. CORAM: MR. JUSTICE SANJIV KHANNA MR. JUSTICE S.P.GARG S.P.GARG, J.

1. State has preferred the present appeal against the judgment dated 15.12.2010 of learned Additional Sessions Judge in Sessions Case No.22/3/09 by which the respondents Bakshish Singh @ Manny and Sandeep Singh @ Sunny were acquitted of the charge under Section 302 IPC and convicted for the offence punishable under Section 304 Part II read with Section 34 of the IPC. In brief, the prosecution case is as under:2. On 11.06.2009 a meeting took place at the shop of Bhupinder Singh (PW-4) at Mangolpuri in which deceased, PW-24A (Deepak Marwah), the respondents and 3 or 4 other persons participated to resolve money

dispute between the deceased and his brother Deepak Marwah, on one side and the respondents on the other side. The dispute could not be resolved in the said meeting. On the same day i.e.11.06.2009, Daily Diary (DD) No.3A was recorded at 12:30 night at Police Station Vikas Puri on getting information from PCR that a person injured in an accident at J Block, Vikas Puri, Paschim Vihar was admitted at Balaji hospital. The investigation was assigned to ASI Prem Singh who with Constable Surender reached the hospital and collected the MLC of Rahul Marwah (since deceased). He was unfit to make statement. No eye witness was available at the hospital. ASI Prem Singh reached the spot at J-86, Vikas Puri and was informed by the neighbours that the family members of the injured had taken him to the hospital. He made endorsement over DD No.3A and sent the rukka for lodging First Information Report under Section 279/337 IPC at 10:25 A.M. on 12.06.2009. At the spot, the Investigating Officer met PW-3 (Smt.Manju Puri) and made inquiries from her. No eye witness was available at the spot also. On 25.06.2009 Rahul Marwah succumbed to the injuries in the hospital. Inquest proceedings were conducted. Body was sent for postmortem examination to DDU hospital. The Investigating Officer recorded statements of Deepak Marwah and his mother-Joginder Kaur . It revealed that Rahul Marwah was intentionally hit with vehicle No. HR51U7925 made Hundai Accent, by the respondents. Section 304 IPC was added and the investigation was taken over by Inspector Arunender Singh on 30.06.2009. During investigation PW-24B (Mohan Singh Utpal) and PW14 (Surjit Singh) claimed that they had witnessed the incident. Their statements under Section 161 Cr.P.C. were recorded. They informed the police that both the respondents had deliberately hit Rahul Marwah with their car at about 05:00 P.M. when he was coming from park while talking on mobile. The respondents reversed the car and struck against Rahul Marwah with an intention to kill him.

3. On 06.07.2009 the respondents were arrested at about 07:00 P.M. The car not HR51U7925 was seized by seizure memo (Ex.PW-1/A). The respondents were interrogated and their disclosure statements were recorded. During further investigation, the exhibits were sent to Forensic Science Laboratory and the reports were collected. The Investigating Officer recorded statements of the witnesses conversant with facts and after completion of the investigation, a

charge-sheet was submitted against the respondents for committing offences punishable under Section 120B IPC, 302 read with Section 120B/34 IPC. CrI.A.No.89/2012 The respondents were duly Page 3 of 27 charged and brought to trial. The prosecution examined 25 witnesses to prove the charge. The respondents in their statements under Section 313 Cr.P.C. denied the allegations and pleaded false implication. After appreciating the evidence and documents on record and considering the rival contentions of the parties, the Trial Court by the impugned judgment convicted the respondents under Section 304 Part II/34 IPC and sentenced them to undergo imprisonment for the period already undergone by them since 6th July, 2009 and to pay a fine of `3,00,000/- each. The total fine amount of `6,00,000/- was payable as compensation to the mother of the deceased Rahul Marwah.

4. Learned Additional Public Prosecutor while assailing the impugned judgment urged that the Trial Court did not appreciate the evidence in its proper and true perspective and fell into grave error in concluding that the respondents had no intention to kill Rahul Marwah and acted with the knowledge that the injury would likely to cause death. The Trial Court, contended the counsel, did not appreciate that the respondent-Bakshish had reversed the car and hit Rahul Marwah on the exhortation of respondent-Sandeep when he (Rahul Marwah) attempted to get up after being hit with the car, The respondents fled the spot after causing vital injuries. They had motive to cause injuries as in the meeting the money dispute could not be resolved.

5. Learned counsel for the respondents controverted the arguments and contended that there was no reliable, cogent and consistent evidence before the Trial Court even to convict the respondents under Section 304 Part II IPC. The Trial Court did not consider the vital discrepancies, contradictions and improvements emerging in the testimonies of prosecution witnesses. The respondents were falsely implicated by the family members of the deceased as they were insisting to return the money borrowed by the deceased. The respondents were not named at the first instance. PW-24B (Mohan Singh Utpal) and PW-14 (Surjit Singh) were not present at the spot at the time of occurrence. Their statements were recorded under Section 161 Cr.P.C after a considerable

delay. He urged to acquit the respondents for their conviction under Section 304 Part-II IPC.

6. We have considered the submissions of the parties and have examined the Trial Court record. At the outset, it may be mentioned that the respondents did not prefer appeal challenging their conviction under Section 304 Part II IPC. State has preferred the appeal against the impugned judgment for acquitting them of the charge under Section 302 IPC. We have heard the parties on merits including the question whether the respondents could challenge their conviction under Section 304 Part II IPC in an appeal preferred by the State for their acquittal under Section 302 IPC. Learned Additional Public Prosecutor vehemently argued that since the respondents did not challenge their conviction and it was an appeal preferred by the State against acquittal under Section 302 IPC, the conviction under Section 304 IPC recorded by the Trial Court on merits cannot be challenged.

7. cousins. Admittedly, the deceased and the respondents were first There were money transactions between them. PW-24A (Deepak Marwah), the deceaseds brother, admitted that he had borrowed `1,50,000/- from the respondents. The respondents claimed that a sum of `3,00,000/- was lent to Deepak and Rahul in December, 2008. Deepak had issued a post dated cheque No.095472 dated 12.05.2009 drawn on UTI Bank Limited for `3,00,000/-. PW-24A (Deepak Marwah) and his mother Joginder Kaur (PW-15) claimed that they had returned the borrowed amount to the respondents which was denied by them. It is not in controversy that on 11.06.2009 between 3:00 to 4:00 P.M. a meeting was organised at Bhupinder Singh (PW-4)s shop at Mayapuri in which deceased, PW-24A (Deepak Marwah), the respondents, three/four other persons participated. Nothing material emerged in the meeting and it ended in fiasco within few minutes.

8. The police machinery came into motion when Daily Diary (DD) No.3A dated 12.06.2009 was recorded at 12.30 A.M. (night) at Police Station Vikas Puri on getting information that an accident had taken place near J-Block, Vikas Puri, and the injured was admitted at Balaji Hospital, Paschim Vihar. In the rukka, (Ex.PW-21/A) it was mentioned that no eye-witness was available in the hospital. There was no indication with which vehicle the accident had taken place. When the

Investigating Officer reached the place of accident and made inquiries, no eye-witness came forward to report the incident. Another DD No.4/A (Ex.13/A) dated 12.06.2009 was recorded at Police Station Vikas Puri at 02.50 A.M. night on getting information from PCR that a boy injured in a quarrel was admitted in ICU in Balaji Hospital. From the contents of both the DD entries, it transpires that the police was not aware as to who had caused the accident and what was the number of the offending vehicle. No eye-witness was available to narrate the occurrence. family member of the victim reported the incident to the police. No PW-3 (Smt.Manju Puri) R/o J-80, Vikaspuri, Delhi informed the mother and brother of the victim about the accident. She deposed that on 11.06.2009 from some children she came to know that Rahul had fallen on the road in an accident with a car. She accompanied Rahuls mother to the spot. Rahul was taken to the hospital by them. She did not see who else accompanied the injured. In the cross-examination she revealed that her statement was recorded after two-three days. Admittedly, PW-3 ( Manju Puri) was not a witness to the occurrence. She had informed the family members of the victim about the incident. She did not indicate the vehicle with which the incident had taken place. She did not claim if any other person/family member of the victim was present at the spot when Rahul was shifted to hospital by his brother and mother.

9. The prosecution did not examine any witness from U.K. Nursing home and Chanan Devi hospital where the injured Rahul was first taken to ascertain as to who had brought the victim there and at what time. It was also not ascertained if any alleged history was recorded there. As per MLC (Ex.PW-10A) at Balaji hospital prepared by PW-10 (Dr.Pareejat Saurabh), Rahul Marwah was brought at 06:45 P.M. by his brother Deepak Marwah on 11.06.2009. In the alleged history it was described a road traffic accident RTA. The patient was unfit to make statement. There is no mention if mother of the patient had accompanied Deepak to the hospital or any other family member or relation of the victim was with them at that time. PW-21(SI Prem Singh), initial IO proved endorsement (Ex.PW-21/A) and deposed that he met Mrs.Manju Puri near the house of the injured and prepared site plan (Ex.PW-21/B) at her instance. He did not find any eye witness. On 25.06.2009, an information was received about Rahul Marwahs death. The investigation was transferred on 30.06.2009 to Insp. Arunender Singh (PW-25).

PW-21 admitted that nobody had told him about the manner of the incident and he did not find any eye-witness at the spot till 25.06.2009. He further admitted that he did not visit the hospital from 12.06.2009 to 23.06.2009 and did not interrogate the mother and brother of the victim. He recorded Deepak Marwahs statement on 25.06.2009.

10. The prosecution placed reliance on PW-24B (Mohan Singh Utpal)s testimony, an alleged eye witness. He deposed that on 11.06.2009 at about 5:30 P.M. while going to the house of his uncle Pawan at Vikas Puri when he was at a distance of about 50 yards from the spot, he saw an Accent Car of golden metallic colour there. It suddenly picked up speed and struck against Rahul who was coming out from the car while talking on mobile. Rahul fell down on his right side. The driver of the vehicle looked behind, reversed the car and again dashed against Rahul, who was dragged to some distance. Thereafter, the vehicle sped away at a fast speed. He further testified there were two Sikh gentlemen in the car. He then went to Rahuls house to inform his family members. From a servant, he came to know that they had already left for the spot. When he returned to the spot, the family members had already taken Rahul to hospital in a vehicle. In the cross-examination by APP after courts permission, he admitted that the vehicle had run over Rahul on his thighs. In the cross-examination, he was confronted with his statement (Ex.PW-24/DA) where some facts deposed in the court did not find mention. He denied the suggestion that he did not visit Delhi till 17.07.2009 and was not a witness to the occurrence.

11. Testimony of PW-24B does not inspire confidence at all. His conduct is quite unreasonable and unnatural. He is an alleged chance witness who had seen the occurrence in which Rahul was deliberately and repeatedly hit by the driver with a co-passenger in the car. As per PW-24B Rahul had suffered extensive and serious injuries. He did not produce any documentary evidence to show his visit or stay in Delhi on 09/10.06.2009. There was no specific purpose to visit Rahuls house on 11.06.2009. Neither did he report the incident to the police nor did he accompany with the injured to the hospital. He did not raise alarm to apprehend the culprits. He did not visit the injured in the hospital. He conveniently went to Amritsar and from there to Mumbai. He did not inquire about the well-being of the injured from

his family members. He allegedly visited Delhi again on 18.06.2009 but did not lodge any complaint with the police and returned Mumbai on 20.06.2009. On 25.06.2009 he was informed about Rahul's death. Again he did not visit the family to console them. Gulshan, his friend, purportedly asked him to come to Delhi as he had seen the incident. It took him more than twenty days to visit Delhi on 17.07.2009 to record statement under Section 161 Cr.P.C. The inordinate delay in recording the statement of this crucial witness makes his presence at the spot highly suspicious and doubtful. There was no reason for him to remain mum for so long and not to report the incident to the police or the family members of the victim. He made improvements and testified facts which were not mentioned in the statement under Section 161 Cr.P.C. (Ex.PW-24/DA). There was no occasion to suddenly visit Delhi on 17.07.2009 and to go directly to the police station alone to record statement. His testimony is in conflict with medical evidence. In the cross-examination, he elaborated that the vehicle ran over the thigh and private parts of Rahul and he was dragged upto a distance of two meters. However, in the post-mortem report, only head injury was depicted. The autopsy doctor categorically ruled out run over injury. Presence of this witness at the spot was not spoken to by any other witness. PW-3 (Manju Puri) who was the first person to inform the family, did not depose his presence. PW-14 (Surjit Singh) who claimed herself to be an eye-witness did not corroborate him. The respondents were not known to the witness prior to the incident. He was not asked to participate in the Test Identification Proceedings. Identification of this respondent in the Court for the first time makes his presence doubtful. PW-24A (Deepak Marwah) and PW15 (Joginder Kaur) did not claim that they had seen PW-24B at the spot. The prosecution did not examine Anoop to corroborate PW21's version to have gone to inform the family members about the incident.

12. PW-14 (Surjit Singh) is the deceased's brother-in-law (Jeeja). He claimed that on 11.06.2009, he saw a golden coloured Accent vehicle hitting Rahul Marwah when he was returning to his house from the park. After hitting Rahul Marwah, the vehicle went ahead. When Rahul attempted to get up, Sandeep's exhortation, respondent-Bakshish hit Rahul again and sped away. In the cross-examination by APP with court's permission, he admitted that respondent No.1 started the car all of a sudden and struck Rahul at a very fast speed. In the cross-examination, he

disclosed that he was facing trial in a case vide FIR No.809/1999 under Sections 365/323/341/34 IPC Police Station Vikas Puri. On 11.06.2009 he went to his in-laws house to collect money from his mother-in-law. The injured was taken in Wagon R to the hospital along with Deepak, his mother and one more person besides him. He denied the suggestion that he was not present at the spot on 11.06.2009 at 5:30 P.M. He explained that on 12.06.2009 he left Delhi for business purpose to Madhya Pradesh and remained out of Delhi till 24.06.2009. He was informed on phone about Rahuls death by his brother-in-law.

13. On critical analysis of the statement, we find PW-14s presence at the spot highly doubtful. Post-event conduct of the witness is abnormal, unnatural and contrary to accepted human behaviour. Admittedly, he did not report the incident and the vehicle number with which the victim was hit to the police. He did not name the culprits soon after the incident. His name does not find mention in the MLC (Ex.PW10A) to infer that he had accompanied the victim to the hospital. He did not visit the respondents to make inquiries about the incident. Conveniently, he allegedly left to Madya Pradesh on 12.06.2009 for some business purpose and remained out of Delhi till 24.06.2009. Even during his presence in Madhya Pradesh, he did not report the incident to the police or family members of Rahul on phone. No evidence was produced to substantiate his visit and stay in Madya Pradesh for about twelve days. He did not divulge the place where he stayed during this period. His presence was not spoken to by PW-24B (Mohan Singh Utpal) known to him. The telephone call record (Ex.PW-20/A&B) falsifies his presence at that location that day. His statement was recorded for the first time on 07.05/2010, after a considerable unexplained delay. His claim is contradictory to the version of PW-21 (Prem Singh) who recorded that no eye-witness was available at the hospital or the spot till the sending of rukka on 12.06.2009 at 10:25 A.M. In fact, the police was not aware about the identity of the culprits and was groping in dark considering it a case of Road Traffic Accident (RTA) till the death of the victim. The case registered was only under Section 279/337 IPC. Neither PW-14 (Surjit Singh) nor PW-24B (Mohan Singh Utpal) came forward to claim themselves eye-witnesses prior to the victims death. There is nothing on record to infer or suggest that the police visited the house of the respondents to apprehend them prior to the victims death.



14. PW-24A (Deepak Marwah) suspected the respondents to be the persons who killed his brother. He did not depose that his brother-in-law Surjit had witnessed the incident and had identified the respondents to be the culprits.

15. PW-24A (Deepak Marwah) after getting information from PW-3 (Manju Puri) reached the spot with his mother and took Rahul to hospital. Police officials reached Balaji hospital after they made call at number 100 after 10:00 P.M. They did not disclose that PW-14 (Surjit Singh) had witnessed the occurrence and had accompanied them to the hospital. He did not claim that PW-24 B (Mohan Singh Utpal) was a witness to the occurrence. In the cross-examination, he admitted that Mohan Singh Utpal was known to him personally and used to visit them regularly. He expressed inability to tell if he had met him in between 11.06.2009 to 25.06.2009. He did not remember that his brother-in-law Surjit was in Delhi in between 12.06.2009 to 25.06.2009. Apparently, the witness is concealing material facts. It is not expected that he would not be aware about the whereabouts of his brother-in-law Surjit Singh for about 12 days when his close relation was on death bed.

16. PW-15 (Joginder Kaur) deceaseds mother was not a witness to the incident. She made improvements in her deposition. She did not reveal that PW-14 (Surjit Singh) had given graphic detail of the incident to her or that she had told the names of the culprits and the number of the vehicle with which Rahul was hit. She is not categorical that in her statement recorded on 11.06.2009 she had given the number of the offending vehicle to ASI Prem Singh. She stated that she did not know till date as to why her son was killed. She was not certain that PW-14 (Surjit Singh) was in Delhi after 11.06.2009. She was also not aware if PW-24B (Mohan Singh Utpal) met her after the incident.

17. From the testimonies of PW-24 A (Deepak Marwah) and PW-15 (Joginder Kaur), it is crystal clear that PW-14 (Surjit Singh) and PW-24 B (Mohan Singh Utpal) did not disclose them that the incident was witnessed by them. Had they seen the incident and recognized the culprits and the offending vehicle on the day of occurrence, they would have set the police machinery in motion that day itself. Their silence without any plausible reason for long, casts serious doubts about

their presence at the spot. Their belated statements recorded under Section 161 Cr.P.C. without plausible explanation rule out their presence. Both PW-14 and PW-24 B did not contact the family members and the police after 11.06.2009 and allegedly left for their respective jobs/business. No efforts were made to intercept the offending vehicle or the culprits.

18. No independent public witness was joined/associated. The police was not aware about the vehicle number with which the accident took place. The police did not examine any witness present in the park from where the victim was coming on foot while talking on his mobile. No such mobile or its call details were brought on record to find out the location of the victim to ascertain with whom he was conversing. There is inconsistent version whether the victim was coming from the park or from the car. PW-3 (Manju Puri) had testified that some children were saying that the accident was caused by some car. However, none noted down the number of the car.

19. Admittedly, there was money dispute between the parties and to resolve it, a meeting took place at the shop of PW-4 (Bhupinder Singh). PW-4 turned hostile and denied the contents of statement mark X. He has no ulterior motive to resile from his statement under Section 161 Cr.P.C. as he was equally related to the deceased, his real nephew (bhanja). He did not depose that threat was extended by the accused after the meeting at about 03.00 P.M. The money dispute was pending since long. At no stage prior to 11.06.2009 the accused ever threatened. They did not cause any harm to PW-24 A (Deepak Marwah) or the deceased. No complaint was ever lodged against them about their hostile conduct or behavior. Rather a meeting was convened to resolve the dispute in the presence of family members and close relatives. After the meeting the victim went to park from his residence. When he was returning from the park at about 05.30 P.M. the occurrence took place. It is not on record that the accused persons had chased the victim. It was not in their anticipation that the victim would go to park and return at 05.30 P.M. to intentionally cause accident with their vehicle. It was improbable for PW-14 (Surjit Singh) to hear the alleged conversation between the accused to reverse the vehicle to hit the deceased. Possibility of the victim to have met with an accident (hit and run case) with a vehicle while talking on mobile phone cannot

be ruled out.

20. Medical evidence is inconsistent with ocular version. As per the post-mortem report examination (Ex.PW-17/A), there were multiple grazed abrasions over the left leg, left knee, left elbow and left ankle. There was massive sub scalpular contusions; linear fracture on the frontal bone extending towards the parietal bone and fracture on the supraorbital ridge. The cause of death was coma due to head injury subsequent to the road traffic accident. It ruled out that the victim was run over by the vehicle. It did not offer any comment that the victim was hit by the offending vehicle intentionally.

21. Mechanical inspection of Vehicle HR51U7925 recovered from the possession of the respondents was conducted on 22.07.2009 by PW-23 (ASI Devender Kumar) at the request of PW-25 (Insp.Arunender Singh). In the report (Ex.PW23/A), no fresh damage or mechanical/paint work was detected on the vehicle. There was no damage/dent on the front and rear bumper/body. The vehicle was fit for road test. PW-23 AI Devander Kumars testimony remained unchallenged.

22. CFSL report dated 20.01.2010 was placed on record by the Investigating Officer Insp. Arunender Singh on 10.02.2010. It appears that the said report has not been proved. It reveals that Ex.1 (a) (black coloured pant in cut/torn condition with marks/indentation on the front portion); Ex.1(b) (blue coloured full sleeved check shirt make JACK & JONES in cut/torn condition) and Ex.1( c) (white coloured underwear make SUKHAD) were sent for examination. On microscopic examination of the Ex.1(a) it was opined that the marks/indentation stated to be imprints were not clearly visible. Hence, it could not be compared with the specimen tyre impression taken at the time of inspection of the car on 10.08.2009. No impression/marks could be detected on the exhibits marked 1(b) and 1(c ). Apparently, the report did not favour the prosecution.

23. On 14th July, 2009 an Investigating Officer Arunender Singh sought opinion from PW-17 (Dr.Komal Singh) autopsy doctor. The car not HR51U7925 was shown to him in the mortuary on 08.07.2009. The doctor in the report (Ex.PW-17/A) opined that injury No.1 could be caused by impact of front bumper of the car. Injury No.2 could be caused by the rear/ back bumper in standing position of the

victim. The expert, however, was unable to comment by observing the tyre marks of the car that car not HR51U7925, Hundai Accent, had hit the victim on 11.06.2009. The expert ruled out run over injury by the vehicle. He was also of the view it was not possible to comment whether injuries sustained on the body of the victim were caused by hitting the vehicle intentionally. In his opinion, the imprint found on the pant did not exactly resemble with the imprint/impression of the tyre.

24. Since the meeting had ended in fiasco and the parties could not resolve their dispute, it appears that the respondents were suspected as perpetrators as Rahul suffered injuries soon thereafter, at 05.30 P.M. There was no eye witness to establish beyond reasonable doubt that the accident was caused by the accused with their vehicle. Circumstantial evidence is completely incomplete and no inference can be drawn from the evidence on record that the respondents and none else were the authors of the injuries.

25. The respondents have been convicted under Section 304 Part- II IPC, and sentenced to imprisonment for the period already undergone, with fine of `3,00,000/- each (total of `6,00,000/-) which is to be paid, as compensation, to the mother of the deceased Rahul. It is brought to our notice that the period of incarceration, undergone by the appellants, is about 18 months. The sentence of imprisonment awarded seems to be incongruous and not acceptable, in view of the factual findings recorded by the Trial Court, on the involvement and the acts attributed to the respondents. This compels us, therefore, to examine the merits of the conviction under Section 304 Part-II IPC.

26. We are of the considered view that this Court has ample jurisdiction in its revisional powers under Section 401 Cr.P.C. to examine the correctness of the findings of the Trial Court while assessing the guilt of the respondents. In State of Orissa vs. Mathuri Mallik and Anr. 1979 Cr.L.J.508, the Division Bench of the Orissa High Court was confronted with similar problem where the respondents jointly tried for offences under Sections 302/34 and 454 IPC, were convicted under Section 304 Part-II read with 34 IPC. The State preferred appeal against the order of acquittal on the ground that the Trial Court erred in not convicting the respondents under Section 302/34 IPC. There was no appeal by the respondents/

accused against their conviction under Section 304 Part-II read with Section 34 IPC. It observed :

6. We are of the opinion that the respondents are not entitled to challenge their conviction under Section 304/34 I. P. C. inasmuch as they have not preferred any appeal against the same. This is an appeal under Clause (a) of Section 386 Cr.P.C. (new) which provides for cases of appeal from orders of acquittal and therein the appellate court may reverse such order of acquittal and direct any one of the following: (1) a further enquiry, (2) a re-trial, (3) a committal for trial, or (4) finding him guilty and passing a sentence on him. It is only the order of acquittal which is the subject-matter of this appeal and not the order of conviction. In the case of *State of Andhra Pradesh v. Thadi Narayana* the accused was charged under Sections 302 and 392, I. P. C. The Court of Session acquitted him of those charges and convicted him only of an offence under Section 411, I. P. Code. The accused appealed to the High Court against the conviction and sentence, but the State Government did not appeal against the acquittal of the accused under Sections 302 and 392, I. P. Code. The High Court set aside the conviction and sentence under Section 411, I. P. C. and remanded the case to the Court of Session for re-trial of the accused on the charges under Sections 302 and 392, I. P. C. Their Lordships while construing the provisions of Section 423 of the old Cr.P.C. (corresponding to Section 386 of the new Cr.P.C.) observed as follows (at p. 211 of Cri LJ): In a case where several offences are charged against an accused person the trial is no doubt one; but where the accused person is acquitted of some offences and convicted of others the character of the appellate proceedings and their scope and extent is necessarily determined by the nature of the appeal preferred before the Appellate Court. If an appeal is preferred against an order of acquittal by the State and no appeal is filed by the convicted person against his conviction it is only the order of acquittal which fails to be considered by the Appellate Court and not the order of conviction. Similarly, if an order of conviction is challenged by the convicted person but the order of acquittal is not challenged by the State then it is only the order of conviction that falls to be considered by the Appellate Court and not the order of acquittal. The decision referred to above was followed in the case of *Lakhan Mahto v. State of Bihar* :

1966. riLJ1349 . In view of the aforesaid observations of the Supreme Court it cannot now be urged that in an appeal against acquittal preferred by the State, respondents are entitled to challenge their conviction when they have not preferred any appeal against the same. Since they have not availed themselves of the right of appeal, a revision at their instance would be barred, as provided by Subsection (4) of Section 401, Cr.P.C. It is, however, open to the High Court to act suo motu to prevent a miscarriage of justice. Omission of a convict to prefer an appeal does not debar the High Court from interfering with the conviction suo motu in exercise of its revisional powers. The High Court while assessing the guilt or otherwise of the accused can examine the correctness or otherwise of all the findings of the trial Court. As a Court of Revision the High Court may exercise all the powers vested in an appellate Court under Section 386, Cr.P.C. subject to the restrictions imposed by Sub-sections (2) and (3) of Section 401. That means that the accused should have been given an opportunity of being heard and that the High Court may not convert a finding of acquittal into one of conviction. The revisional powers of the High Court vested in it by Section 401, Cr.P.C. do not, however, create any right in the litigant, but only conserve the power of the High Court to see that justice is done in accordance with the recognised rules of criminal jurisprudence, and that the subordinate criminal courts do not exceed their jurisdiction, or abuse their powers vested in them by the Code, in this connection the decisions reported in :

1959. riLJ256 (Pranab Kumar Mitra v. State of West Bengal) and (Shailabala Devi v. Emperor) may be seen.

27. In State of Gujarat vs. Rohit and Anr. 1985 Cri.L.J.556, in similar circumstance, it was held that while hearing an appeal filed by the State against acquittal, High Court can exercise its revisional powers and acquitt the accused convicted under Section 304 (part-I) IPC despite not challenging his conviction and sentence. Discussing the law, the Court was of the view that the revisional power under Section 401 (1) of the Code of Criminal Procedure can be exercised by a Court of appeal and there was no difficulty to set aside the conviction, if ultimately the Court came to the conclusion that the conviction even for offence of culpable homicide was not justifiable and the accused had not filed any appeal before it against his

conviction.

5. So far as the decision of the Madras High Court, *Emperor v. Panchaksharam* 1938 (39) Cri LJ 87.(supra) is concerned, it appears that the accused-appellant in that case was acquitted of the offence punishable Under Section 304 I.P.C. but was convicted Under Section 335 I.P.C. and the State filed an appeal against the said acquittal. The Madras High Court in that case held that in an appeal against the acquittal, the accused is entitled to ask the court to consider all the evidence before it and all the possible grounds which may be raised against the conviction. The Madras High Court held that where an accused is acquitted Under Section 304 but convicted Under Section 335 and the crown appeals against the acquittal Under Section 304, the accused is entitled to argue on the facts of the case to show that he has not committed an offence Under Section 304 I.P.C. and although the acceptance of those arguments may not automatically set aside the conviction Under Section 335 I.P.C. yet if the Court were satisfied that no offence was committed, it would undoubtedly exercise suo motu its powers Under Section 439(1) Criminal P.C. and set aside the conviction.

6. The Nagpur High Court in *State Govt., Madhya Pradesh v. Sheodayal Gurudayal* 1956 Cri LJ 8.(supra) also took the same view following the decision of the Madras High Court, which we have discussed above. The Nagpur High Court held that if there was an appeal by the Crown against acquittal of a major offence, the conviction for the minor offence can be set aside by the High Court even though no appeal may have been filed by the accused against the conviction for the said minor offence. The Nagpur High Court held that in an appeal by the Crown against his major offence, the High Court has power Under Section 439(1) to acquit the accused where the facts found are incompatible with his guilt even for the minor offence. The Nagpur High Court held that the powers of the High Court under Sub-section (1) of Section 439 are not trammelled by Sub-section (5) which only negatives the right of the accused to come up in revision when he could have preferred an appeal.

7. So far as the decision of the Rajasthan High Court in the case of *The State v. Babulal and Bherumal* (supra) is concerned, the same view has been taken. The

Rajasthan High Court observed at para 11 as follows: Though therefore we must satisfy ourselves that on the facts the conviction is correct, the accused have no right to address us on the correctness of the conviction on the facts for one of them did not take the opportunity to appeal, and the other, though he did appeal, later did not press that appeal and allowed it to be dismissed. This aspect of the matter has to be borne in mind in view of the peculiar circumstances of this appeal by the State.

28. We have examined the evidence to ascertain if the respondents were authors of the injuries sustained by the deceased and were liable for conviction under Section 302 or 304 IPC. We do not find cogent, reliable and clinching evidence against the respondents to pronounce them guilty for the injuries sustained by the deceased. The Trial Court did not appreciate the evidence in its true and proper perspective. As discussed above, the conviction under Section 304 part-II IPC was not justifiable. Section 397 of the Code of Criminal Procedure empowers High Court to call for and examine the record of any proceedings before any inferior criminal Court situated within its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior Court. Section 401 (1) of the Court says that, in the case of any proceedings, the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 386, 389, 390 and 391 of the Code of Criminal Procedure. We are aware/ conscious that suo moto revision jurisdiction is to be exercised with extreme care and caution. In the present case, we are of the view that interest of justice demands such an interference. The record and proceedings of Sessions Case No.22/3/09 are before us in this appeal preferred by the State against acquittal. Hence we exercise our revisional power under Section 401 (1) of the Code of Criminal Procedure and set aside conviction of the respondents under Section 304 part-II IPC. The appeal preferred by the State against acquittal under Section 302 IPC has no merits and is dismissed.

29. During the course of arguments, on instructions from the respondents, Sh.Mukesh Kalia, learned counsel for the respondents stated at bar that in the



event of conviction or acquittal, the respondents would not insist for return of `6,00,000/- deposited as fine/compensation with the Trial Court to be paid to the mother of the deceased. We appreciate the gesture. In view of the statement, sum of `6,00,000/- deposited by the respondents be paid to the deceaseds mother. The personal bonds and sureties furnished by the respondents stand discharged.

30. The appeal is disposed of. (S.P.GARG) JUDGE (SANJIV KHANNA) JUDGE  
NOVEMBER 21 2012 sa/tr

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