[2023] 13 S.C.R. 761 : 2023 INSC 887

CASE DETAILS

CHANDRA PRATAP SINGH

v.

STATE OF M.P.

(Criminal Appeal No. 1209 of 2011)

OCTOBER 09, 2023

[ABHAY S. OKA AND PANKAJ MITHAL, JJ.]

HEADNOTES

Issue for consideration: Whether the High Court was justified in altering the charge u/s. 302 read with ss. 148 and/or 149 to a charge u/s. 302/34 IPC, and convicting and sentencing the appellant for the offence punishable u/s 302/34 and u/s. 201 IPC.

Penal Code, 1860 – ss. 302 rw s. 34, 201 – Murder – Common intention – Causing disappearance of evidence of offence, or giving false information to screen offender – Conviction of accused persons for the offence punishable u/s. 302 rw ss. 148 and 149 and s. 201 and sentenced accordingly, for committing triple murder – High Court acquitted three of them and as regards remaining substituted their conviction with s. 302/34, while maintaining conviction u/s. 201 – Correctness:

Held: Grave prejudice caused to the appellant by altering the charge u/s. 302 read with ss. 148 and/or 149 to a charge u/s. 302/34 without giving any notice to the appellant or his advocate about the charge – No reason recorded in the impugned judgment to show that s.34 was applicable – No finding recorded that there was sufficient evidence to prove that the four accused who were ultimately convicted had done the criminal act in furtherance of a common intention – On perusal of the evidence of prosecution witness, there was no evidence of the presence of common intention which is the necessary ingredient of s. 34 – Only the act of stopping the deceased would not, by itself, bring the case within the purview of s.34 – No overt act attributed to the appellant by any prosecution witness in the assault on the deceased – It is difficult to infer a prior meeting of minds – There is no overlap between common object and common intention – However, the

evidence of eyewitnesses very consistent on the role played by the appellant in dragging the dead body of the deceased and throwing the same into a well – Thus, there is every justification for convicting the appellant for the offence punishable u/s. 201 of causing the disappearance of the evidence of the crime – Appellant's conviction u/s. 302/ 34 set aside, however, the conviction for the offence punishable u/s. 201 is confirmed – Appellant having already undergone the sentence, the bail bonds are cancelled. [Para 13-16, 18-20]

Code of Criminal Procedure, 1973 – s. 386 rw s. 216 – Appeal against conviction – Power of court to alter or add the charge – Notice of the charge proposed to be altered or added to the accused – Necessity of:

Held: In view of the wide powers conferred by s. 386 Cr.PC, an Appellate Court can exercise the power u/s. 216 of altering or adding the charge – Principles of natural justice require the appellate court to put the accused to the notice of the charge proposed to be altered or added when prejudice is likely to be caused to the accused by alteration or addition of charges – Unless the accused is put to notice that the appellate court intends to alter or add a charge in a particular manner, his advocate cannot effectively argue the case – Court can give the notice of the proposed alteration or addition of the charge even by orally informing the accused or his advocate when the appeal is being heard – Court can grant a short time to the advocates for both sides to prepare themselves for addressing the Court on the altered or added charge. [Para 12]

LIST OF CITATIONS AND OTHER REFERENCES

Mala Singh v. State of Haryana (2019) 5 SCC 127 : [2019] 3 SCR 932; *Chittarmal v. State of Rajasthan* (2003) 2 SCC 266 : [2003] 1 SCR 49 – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1209 of 2011.

From the Judgment and Order dated 01.12.2004 of the High Court of Madhya Pradesh at Jabalpur in CRLA No. 992 of 1992.

Appearances:

D. S. Naidu, Sr. Adv., Raghavendra S. Srivatsa, Ms. Komal Mundhra, Ananvay Anand Vardhan, Ms. Divya Narayan, Saurabh Agrawal, Advs. for the Appellant.

Sunny Choudhary, Abhimanyu Singh, Karan Bishnoi, Prithvi Raj Singh, Advs. for the Respondent.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. This is an appeal by accused no. 2 who has been convicted by the High Court for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short, 'IPC'). The appellant was also convicted for the offence punishable under Section 201 of IPC. For the first offence, he was sentenced to undergo life imprisonment. For the second offence under Section 201 of IPC, he was sentenced to undergo rigorous imprisonment for five years.

2. There were 17 accused prosecuted for the offence of triple murder. Out of 17 accused, the Trial Court acquitted accused nos. 3 to 8, 10, 13, 15 and 17. The Trial Court convicted accused nos. 2, 9, 11, 12, and 16 for the offence punishable under Section 302, read with sections 148 and 149 and Section 201 of IPC. Accused nos.1 and 14 were convicted for the offence punishable under Section 302 read with Section 148 of IPC. The Trial Court did not frame a charge against any accused for the offence punishable under Section 302 read with Section 34 of IPC. The High Court acquitted accused nos. 9, 11 and 12.

3. The allegation was of the triple murder of Uma Prasad, Vinod Kumar and Munau @ Anant Kishore Khare. According to the prosecution case, on 2nd June 1987, Vinod Kumar had taken his brother Munau to village Naugaon by scooter for medical treatment. As they did not return till 5 pm, Uma Prasad Khare (deceased), who was the father of Vinod Kumar Khare and Munau, deputed Naval Kishore (PW-1) and Manua Chammer (PW-2)

to search his sons. PW-1 Naval Kishore was the nephew of Uma Prasad. Even Uma Prasad proceeded to search Vinod Kumar and Munau Khare. When they reached Hanuman temple, they saw the accused gathered near the temple with firearms and other arms like farsa, axe and ballam. The appellant – accused no.2 and accused no.16 were armed with a spear. The role ascribed to accused nos.2 and 16 is that they stopped Uma Prasad. As a result, he fell off his bicycle. According to the prosecution case, accused nos. 3, 5 and 7 (acquitted) exhorted the other accused to chop Uma Prasad into pieces. Accused nos. 7, 9 and 11 (acquitted) pointed their guns at PW-1 Naval Kishore and PW-2 Manua and told them not to interfere. The act of assaulting and killing Uma Prasad was allegedly done by accused no.1 and accused no.14.

4. Another allegation against the appellant is that as per suggestion of acquitted accused no.6, he, along with accused no.1, dragged the body of deceased Uma Prasad and threw the same into a well.

5. Further allegation of the prosecution is that after committing the murder of Uma Prasad, all the accused went towards the bus stand with the intention of killing Vinod Kumar Khare and Munau Khare. It is alleged that after about 15 minutes, the sound of two gun fires was heard, and it is alleged that Vinod Kumar Khare and Munau Khare were killed. As far as the allegation of killing these two persons is concerned, the Trial Court acquitted all the accused, and that part of the judgment of the Trial Court has become final.

6. A joint appeal was preferred by accused no.1, the present appellant-accused no.2 and accused no.16. Separate appeals were preferred by the other accused. While partly allowing the appeals, by the impugned Judgment, the High Court acquitted accused nos. 9,11 and 12. The High Court partly allowed the appeal of the present appellant and accused nos. 1,14 and 16 by substituting their conviction under Section 302 read with Sections 148 and/or 149 of IPC with Section 302 read with Section 34 of IPC. The appellant's conviction for the offence punishable under Section 201 of IPC was maintained.

7. We may note here that Special Leave Petition (criminal) no. 876 of 2012 filed by accused no.1 was dismissed as the said accused did not file proof of surrender. The application for restoration of the Special

Leave Petition was also dismissed. It appears that accused nos.14 and 16 did not prefer any appeal to this Court. They may have undergone the entire sentence.

SUBMISSIONS

8. The first submission of the learned senior counsel appearing for the appellant is that the appellant was not represented by his advocate when the appeal was called out for hearing before the High Court. In the cause title of the impugned judgment, the absence of the appellant's advocate has been mentioned. Moreover, the judgment does not refer to any submission made on behalf of any accused. He would, therefore, submit that the High Court has committed a gross illegality by proceeding with the hearing of the appeal in the absence of his advocate.

9. He submitted that in view of the decision of this Court in the case of ***Mala Singh v. State of Haryana***[1], the appellant could not have been convicted with the aid of Section 34 of IPC as there was no evidence of common intention, which was necessary for attracting Section 34 of IPC. Moreover, the appellant and other accused ought to have been put to notice by the High Court that it intended to modify the charge for invoking Section 34. He submitted that prejudice has been caused to the appellant by alteration of the charge apart from the fact that ingredients of Section 34 of IPC were not proved. Hence, the appellant is entitled to acquittal.

10. The learned counsel appearing for the respondent urged that from the impugned judgment, it appears that the High Court has carefully perused the evidence of the prosecution witnesses. He submitted that in an appeal against conviction, under Section 386 of the Code of Criminal Procedure, 1973 (for short 'Cr.PC') read with Section 216 of Cr.PC, the Appellate Court, has the power to alter or add the charge when no prejudice is shown to the accused. He submitted that there was enough evidence on record to prove the ingredients of Section 34 of IPC. He invited our attention to the gravity of the offence and submitted that no interference is called for.

1 (2019) 5 SCC 127

CONSIDERATION OF SUBMISSIONS

11. The first issue is whether any prejudice was caused to the appellant, as his appeal was heard in the absence of his advocate. The cause title of the judgment clearly mentions that the advocate representing the appellant was absent. The order sheet of the appeal preferred by the appellant and two others (Annexure P-3) records that on 26th October 2004, when the appeal preferred by the appellant and two others was called out, the appellant's advocate was present. The appeal was heard on 23rd November 2004. The order sheet of that date records that the advocate for the appellant was absent. It also notes that the arguments were heard, and judgment was reserved. The impugned judgment does not refer to any submission canvassed on behalf of the appellant. The High Court has, thus, committed illegality by deciding the appeal against the conviction preferred by the appellant without hearing the appellant or his advocate. After finding that the advocate appointed by the appellant was absent, the High Court ought to have appointed a lawyer to espouse his cause.

12. In view of the wide powers conferred by Section 386 of Cr.PC, even an Appellate Court can exercise the power under Section 216 of altering or adding the charge. However, if the Appellate Court intends to do so, elementary principles of natural justice require the Appellate Court to put the accused to the notice of the charge proposed to be altered or added when prejudice is likely to be caused to the accused by alteration or addition of charges. Unless the accused was put to notice that the Appellate Court intends to alter or add a charge in a particular manner, his advocate cannot effectively argue the case. Only if the accused is put to notice by the Appellate Court that the charge is intended to be altered in a particular manner, his advocate can effectively argue that even the altered charge was also not proved. For example, in the present case, it was necessary for the Appellate Court to put the appellant to notice that it intended to convict him with the aid of Section 34 of IPC, for which a charge was not framed. We may add here that the Court can give the notice of the proposed alteration or addition of the charge even by orally informing the accused or his advocate when the appeal is being heard. In a given case, the Court can grant a short time to the advocates for both sides to prepare themselves for addressing the Court on the altered or added charge.

13. In the facts of the case, the appellant's advocate was absent on the date of the hearing. Therefore, there was no occasion for the High Court to put the advocate for the appellant to the notice that the charge under Section 302 read with Sections 148 and/or 149 of IPC was proposed to be altered to a charge under Section 302 read with Section 34 of IPC. Therefore, grave prejudice has been caused to the appellant by altering the charge without giving any notice to the appellant or his advocate about the charge. The reason is that there was no opportunity available to the accused to argue that there was no evidence on record to prove the existence of common intention, which is the necessary ingredient of Section 34 of IPC. There is one more crucial aspect of the case. A perusal of the impugned judgment shows that the High Court has extensively referred to the evidence of PW-1 Nand Kishore and PW-2 Manua. However, the entire judgment does not mention that the Court was altering the charge for the reasons recorded. No finding is recorded in terms of sub-section (4) of Section 216 of Cr.PC that the proposed alteration of the charge will not prejudice the accused in his defence.

14. There is no reason recorded in the impugned judgment to show that Section 34 of IPC was applicable. There is no discussion on this aspect in the judgment. Only in the operative part (paragraph 15), without assigning any reasons, the High Court held that the appellant was liable to be convicted for the offence punishable under Section 302, read with Section 34 of IPC. As stated earlier, there is a complete absence of any reason for concluding that Section 34 of IPC was attracted. The High Court has not recorded a finding that there was sufficient evidence to prove that the four accused who were ultimately convicted had done the criminal act in furtherance of a common intention.

15. Obviously, the Trial Court's conviction of the appellant under Section 302 with the aid of Section 149 of IPC could not be sustained. As per Section 141 of IPC, unlawful assembly must be of five or more persons. As the High Court confirmed the conviction of only four and acquitted all others, the offence of unlawful assembly was not made out, and therefore, the offences under Sections 148 and 149 were not made out.

16. In the ordinary course, we would have remanded the appeal to the High Court for a fresh hearing on the ground that the appellant was not heard before confirming conviction on a modified charge. However,

we cannot ignore that the incident is of 1987, and the present appeal is of 2011. Therefore, it will be unjust to pass an order of remand. Hence, we have examined the evidence on record.

17. In the case of ***Chittarmal v. State of Rajasthan***[2], this Court dealt with the conversion of charge from Section 302 read with Section 149 of IPC, to Section 302, read with Section 34 of IPC. Paragraph 14 of the said decision reads thus:

> **"14.** It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. **But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a prearranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is a substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not, therefore, to be permitted.** But if it does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. **The non-applicability of Section 149 is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all.**

2 (2003) 2 SCC 266

(See *Barendra Kumar Ghosh v. King Emperor* [AIR 1925 PC 1 : 26 Cri LJ 431], *Mannam Venkatadari v. State of A.P.* [(1971) 3 SCC 254: 1971 SCC (Cri) 479 : AIR 1971 SC 1467], *Nethala Pothuraju v. State of A.P.* [(1992) 1 SCC 49: 1992 SCC (Cri) 20: AIR 1991 SC 2214] and *Ram Tahal v. State of U.P.* [(1972) 1 SCC 136: 1972 SCC (Cri) 80: AIR 1972 SC 254])"

(Emphasis added)

18. We have carefully perused the evidence of PW-1 and PW-2. There is no evidence of the presence of common intention. Only the act of stopping the deceased Uma Prasad will not, by itself, bring the case within the purview of Section 34 of IPC. There is no overt act attributed to the appellant by any prosecution witness in the assault on deceased Uma Prasad. It is difficult to infer a prior meeting of minds in this case. There is no material to prove the existence of common intention which is the necessary ingredient of Section 34 of IPC. In this case, there is no overlap between a common object and a common intention. Therefore, the conviction of the appellant under Section 302, read with Section 34 will have to be set aside.

19. However, the evidence of two eyewitnesses (PW-1 and PW-2) is very consistent on the role played by the appellant in dragging the dead body of the deceased and throwing the same into a well. There is hardly any cross-examination on this aspect of both PW-1 and PW-2. Therefore, there is every justification for convicting the appellant for the offence punishable under Section 201 of IPC of causing the disappearance of the evidence of the crime. Hence, the conviction and sentence of the appellant for the offence under Section 201 of IPC will have to be maintained. The order dated 20th April 2012 passed in this appeal records that the appellant was enlarged on bail as he remained incarcerated for about nine years. The appellant was sentenced to undergo rigorous imprisonment for five years for the offence under Section 201 of IPC, which he has already undergone.

20. Hence, the appeal partly succeeds. We set aside the appellant's conviction for the offence punishable under Section 302, read with Section 34 of IPC. However, the appellant's conviction for the offence punishable under Section 201 of IPC is confirmed. The appellant has

already undergone the sentence for the said offence. Therefore, the bail bonds of the appellant stand cancelled.

21. The appeal is allowed on the above terms.

Headnotes prepared by:
Nidhi Jain

Appeal partly allowed.