

CASE NO.:
Appeal (crl.) 199 of 2000

PETITIONER:
Rajan Rai

RESPONDENT:
State of Bihar

DATE OF JUDGMENT: 10/11/2005

BENCH:
B.N.AGRAWAL & A.K.MATHUR

JUDGMENT:
J U D G M E N T

B.N. AGRAWAL, J.

The sole appellant was convicted by the trial court under Section 302 read with Section 34 of the Indian Penal Code ['IPC' for short] and sentenced to undergo imprisonment for life. He was further convicted under Sections 3 & 5 of the Explosive Substances Act, 1908 [hereinafter referred to as 'the Act'] and sentenced to undergo rigorous imprisonment for a period of 10 years on each count. The sentences were, however, ordered to run concurrently. On appeal being preferred, High Court upheld the conviction. Hence this appeal by special leave.

Prosecution case, in short, was that on 10.6.1983 at about 7.45 p.m. when Joginder Singh [PW 9] came back to his house, he found his brother \026 Bhola Singh sitting at the outer verandah of the house chatting with one Shobha Rai [DW 3]. At about 8.10 p.m. Joginder Singh heard sound of explosion and found that a bomb was thrown upon his brother \026 Bhola Singh. Thereafter he saw the appellant \026 Rajan Rai, accused Kameshwar Rai, Tileshwar Rai [since deceased], Sipahi Rai, Bankim Rai and Dasrath Rai having bags in their hands and throwing bombs on his brother as a result of which he fell down and succumbed to the injuries. PW 9 caught the appellant from his waist whereupon accused Kameshwar Rai threw a bomb upon him. Ram Ayodhya Rai [DW 1] Ram Gobind Sau [DW.2] and DW 3 also sustained splinter injuries on their hands and legs during the course of the occurrence. The occurrence was also witnessed by some other persons who were present there. Thereafter, the accused persons fled away. Motive for the occurrence disclosed is old grudge and animosity. The Parsa Police Station was at a distance of 1/4th kilometer from the place of occurrence, as such Baban Prasad Singh, Sub-Inspector of Police, [PW 17], who was in-charge of the said Police Station on that day, upon hearing sound of bomb explosion along with other police officials came to the place of occurrence and recorded fard-beyan of PW 9 at 8.25 p.m. in which the aforementioned facts were stated on the basis of which formal First Information Report [FIR] was registered at 9.30 p.m. on the same day in which names of all the six accused persons, including the appellant, were disclosed.

Police after registering the case took up investigation and on completion thereof submitted chargesheet against all the six accused on receipt whereof cognizance was taken and all of them were committed to the Court of Sessions to face trial. As the appellant \026 Rajan Rai was absconding, his trial was separated from that of other five accused persons, out of whom Tileshwar Rai died before the commencement of trial, as such, the trial proceeded against the remaining four accused persons and the same was registered as Sessions Trial Nos. 245 of 1983 and 20 of 1984. Defence of the accused persons was that they were innocent, no occurrence much less the occurrence alleged had taken place and that they had no complicity with the crime, but were falsely roped in to feed fat the old grudge.

In the aforesaid Sessions Trial Nos. 245/1983 and 20/1984, which proceeded against the aforesaid four accused persons, as stated above, both

the parties adduced evidence and upon conclusion thereof all the four accused persons were convicted under Section 302 read with Section 34 IPC and sentenced to undergo imprisonment for life. They were further convicted under Sections 3 and 5 of the Act and sentenced to undergo rigorous imprisonment for 10 years on each count. The sentences were, however, ordered to run concurrently. Against the said judgment, appeals were preferred by the aforesaid four convicted accused persons. During the pendency of the appeals, the appellant could be apprehended and was put on trial giving rise to Sessions Trial No. 181 of 1985, during the course of which both the parties examined witnesses and upon conclusion of the trial, the trial court convicted the appellant, as stated above, against which judgment also an appeal was preferred before the High Court.

The appeals preferred by the four convicted accused persons challenging their conviction recorded in Sessions Trial No. 245/1983 and 20/1984 were decided by the High Court on 4th October, 1996 and the same were allowed and their convictions and sentences set aside, which attained finality as the matter was not carried further to this Court. The appeal filed by the appellant was taken up later on and by the impugned judgment, the High Court upheld his convictions and sentences. Hence this appeal by special leave.

Shri P.S. Mishra, learned Senior Counsel appearing in support of the appeal, attacked the impugned judgment on three counts. Firstly, it has been submitted that as in the appeal arising out of the earlier trial, the High Court acquitted other four accused persons on merit, it was not permissible for it to uphold conviction of the appellant on the basis of evidence of the same witnesses examined during the course of trial of the appellant. Secondly, in the facts and circumstances of the present case, the High Court was not justified in upholding the convictions of the appellant as the evidence of the four eyewitnesses, namely, PWs 2,3,5 and 9 could not have been relied upon, especially in view of the fact that their names were not disclosed in the FIR and the three eyewitnesses, namely, DWs 1, 2 and 3, who were injured witnesses named in the FIR, did not support the prosecution case so far as complicity of the appellant with the crime was concerned. Lastly, it has been submitted that there being only six accused persons out of whom four acquitted and prosecution of one Tileshwar Rai dropped, he having died before the commencement of trial, the conviction of the appellant under Section 302 read with Section 34 IPC was not justified as he could not have shared the common intention either with the four acquitted accused persons or even with Tileshwar Rai, whose prosecution was dropped. On the other hand, Shri B.B. Singh, learned counsel appearing on behalf of the State of Bihar, submitted that judgment of acquittal rendered by the High Court in appeals arising out of convictions of other four accused persons in their trial was inadmissible and irrelevant in the present trial. Further, the evidence of PWs 2,3,5 and 9 has been rightly relied upon by the trial court as well as the High Court. Lastly, learned counsel submitted that conviction of the appellant under Section 302 read with Section 34 IPC was warranted in law as the appellant could have shared the common intention with accused Tileshwar Rai, who died before the commencement of trial and his prosecution was simply dropped by virtue of his death which cannot be equated with the case of acquittal.

Coming to the first submission very strenuously canvassed by Shri Mishra, it would be necessary to refer to the provisions of Sections 40 to 44 of the Indian Evidence Act, 1872 [in short 'the Evidence Act'] which are under the heading 'Judgments of Courts of justice when relevant', and in the aforesaid Sections the circumstances under which previous judgments are relevant in civil and criminal cases have been enumerated. Section 40 states the circumstances in which a previous judgment may be relevant to bar a second suit or trial and has no application to the present case for the obvious reasons that no judgment order or decree is said to be in existence in this case which could in law be said to prevent the Sessions Court from holding the trial. Section 41 deals with the relevancy of certain judgments in probate, matrimonial, admiralty or insolvency jurisdiction and is equally inapplicable. Section 42 refers to the relevancy and effect of judgments, orders or decrees other than those mentioned in Section 41 in so far as they relate to matters of a public nature, and is again inapplicable to the present case. Then comes

Section 43 which clearly lays down that judgments, order or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of the Evidence Act. As it has not been shown that the judgment of acquittal rendered by the High Court in appeals arising out of earlier sessions trial could be said to be relevant under the other provisions of the Evidence Act, it was clearly "irrelevant" and could not have been taken into consideration by the High Court while passing the impugned judgment. The remaining Section 44 deals with fraud or collusion in obtaining a judgment, or incompetency of a court which delivered it, and can possibly have no application in the present case. It would thus appear that the High Court was quite justified in ignoring the judgment of acquittal rendered by it which was clearly irrelevant.

This question had arisen before the Privy Council in the case of *Hui Chi \026 ming v. R*, [1991] 3, All E.R. 897, wherein the Court was dealing with a case of murder trial. In the said case, principal offender was acquitted of murder, but convicted of manslaughter at a trial before the High Court of Hong Kong. The said order attained finality. Thereafter, another accused, who was facing trial arising out of the same very occurrence and whose trial was separated, was convicted for the charge of murder by the same High Court, ignoring the judgment of acquittal of the principal accused of the charge of murder, holding that the same was inadmissible. The application for leave to appeal against the conviction of the accused having been dismissed by the Court of Appeal of Hong Kong, the accused appealed by special leave to the Privy Council. In that case, conviction for the charge of murder was upheld by the Judicial Committee holding that evidence of the outcome of an earlier trial arising out of the same transaction was irrelevant and therefore inadmissible since the verdict reached by a different jury, whether on the same or different evidence, in the earlier trial amounted to no more than evidence of the opinion of that jury. Further, it was laid down that a person could properly be convicted of aiding and abetting an offence even though the principal offender had been acquitted and accordingly, the trial judge had rightly excluded evidence of the principal offender's acquittal of murder.

A three Judges' Bench of this Court had occasion to consider the same very question in the case of *Karan Singh vs. The State of Madhya Pradesh*, AIR 1965 SC 1037, in which there were in all 8 accused persons out of whom accused Ram Hans absconded, as such trial of seven accused persons, including accused Karan Singh, who was appellant before this Court, proceeded and the trial court although acquitted other six accused persons, convicted the seventh accused, i.e., Karan Singh under Section 302 read with Section 149 IPC. Against his conviction, Karan Singh preferred an appeal before the High Court. During the pendency of his appeal, accused Ram Hans was apprehended and put on trial and upon its conclusion, the trial court recorded order of his acquittal, which attained finality, no appeal having been preferred against the same. Thereafter, when the appeal of accused Karan Singh was taken up for hearing, it was submitted that in view of the judgment of acquittal rendered in the trial of accused Ram Hans, the conviction of accused Karan Singh under Section 302 read with Section 149 IPC could not be sustained, more so when other six accused persons, who were tried with Karan Singh, were acquitted by the trial court and the judgment of acquittal attained finality. Repelling the contention, the High Court after considering the evidence adduced came to the conclusion that murder was committed by Ram Hans in furtherance of the common intention of both himself and accused Karan Singh and, accordingly, altered the conviction of Karan Singh from Section 302/149 to one under Section 302/34 IPC. Against the said judgment, when an appeal by special leave was preferred before this Court, it was contended that in view of the verdict of acquittal of accused Ram Hans, it was not permissible in law for the High Court to uphold conviction of accused Karan Singh. This Court, repelling the contention, held that decision in each case had to turn on the evidence led in it. Case of accused Ram Hans depended upon evidence led there while the case of accused Karan Singh, who had appealed before this Court, had to be decided only on the basis of evidence led during the course of his trial and the evidence led in the case of Ram Hans and the decision there arrived at would be wholly irrelevant in considering merits of the case of Karan Singh, who was appellant before this

Court. This Court observed at page 1038 thus:-

" As the High Court pointed out, that observation has no application to the present case as here the acquittal of Ramhans was not in any proceeding to which the appellant was a party. Clearly, the decision in each case has to turn on the evidence led in it; Ramhans's case depended on the evidence led there while the appellant's case had to be decided only on the evidence led in it. The evidence led in Ramhans's case and the decision there arrived at on that evidence would be wholly irrelevant in considering the merits of the appellant's case."

In that case, after laying down the law, the Court further considered as to whether the High Court was justified in converting the conviction of accused Karan Singh from Section 302/149 to one under Section 302 read with section 34 IPC after recording a finding that the murder was committed by Ram Hans in furtherance of common intention of both himself and accused Karan Singh. This Court was of the view that in spite of the fact that accused Ram Hans was acquitted by the trial court and his acquittal attained finality, it was open to the High Court, as an appellate court, while considering appeal of accused Karan Singh, to consider evidence recorded in the trial of Karan Singh only for a limited purpose to find out as to whether Karan Singh could have shared common intention with accused Ram Hans to commit murder of the deceased, though the same could not have otherwise affected the acquittal of Ram Hans. In view of the foregoing discussion, we are clearly of the view that the judgment of acquittal rendered in the trial of other four accused persons is wholly irrelevant in the appeal arising out of trial of appellant \026 Rajan Rai as the said judgment was not admissible under the provisions of Sections 40 to 44 of the Evidence Act. Every case has to be decided on the evidence adduced therein. Case of the four acquitted accused persons was decided on the basis of evidence led there while case of the present appellant has to be decided only on the basis of evidence adduced during the course of his trial.

Now the question arises as to whether the trial court as well as the High Court was justified in placing reliance upon the evidence of PWs 2,3,5 and 9. PW 9 is the informant himself and, being brother of the deceased, most competent person to have witnessed the occurrence that had taken place in the outer verandah of the house. PW 9 himself was injured in the said occurrence and was examined by Dr. B.P. Tribedi [PW 12] who found four injuries on his person caused by explosive substance, such as bomb. The Investigating Officer [PW 17] heard the sound of bomb explosion at the police station which was at a distance of 1/4th kilometer from the place of occurrence and arrived there at 8.25 p.m. ,i.e., only after 15 minutes of the occurrence which had taken place at 8.10 p.m. - and recorded fard-beyan of PW 9 on the basis of which formal FIR was registered at the police station. The informant - PW 9 in his substantive evidence in the court has supported the prosecution case disclosed by him in all material particulars. In the FIR he disclosed names of three witnesses specifically, who had received injuries, namely, DWs 1, 2 and 3. Apart from these injured witnesses, it has been stated in the FIR that there were other persons as well who had seen the occurrence. Immediately after the fard-beyan was recorded, the statements of PWs 2, 3 and 5 were recorded by the police without any delay whatsoever. In their statements made before the police, they have categorically supported the prosecution case disclosed in the FIR. They have also specifically stated that all the accused persons threw bomb upon the deceased as a result of which he received injuries and succumbed to the same. PW 9 stated in his evidence that the three injured witnesses, referred to above, were not ready to depose out of fear of the accused persons. Presence of three injured witnesses, namely, DWs 1, 2 and 3 at the place of occurrence has been accepted by them and their injuries have been proved by the two doctors \026 PWs 15 and 16. In their evidence, DWs 1, 2 and 3 have simply stated that the appellant was not present at the place of occurrence. It appears that these three injured witnesses were not ready to depose on behalf of the prosecution out of fear of the accused persons, as such, merely because they could not be examined by the prosecution, the evidence of PWs 2, 3 and 5 cannot be discarded especially when their statements were recorded by the police immediately after recording of the fard-beyan. As such, no adverse inference can be drawn

against the prosecution for not examining the three injured witnesses. The evidence of PWs 2, 3 and 5 is consistent with the prosecution case disclosed in the FIR as well as in the substantive evidence of the informant PW 9. In our view, the trial court and the High Court were quite justified in placing reliance upon their evidence. In view of the facts stated above, we are of the view that the prosecution has succeeded in proving its case beyond reasonable doubt.

The last submission to be examined is whether the appellant could have been convicted under Section 302 read with Section 34 IPC for sharing the common intention with accused Tileshwar Rai for causing the death of the deceased. So far as accused Tileshwar Rai is concerned, he died before the commencement of trial, as such his prosecution stood dropped which cannot, in any manner, tantamount to acquittal. Shri Mishra submitted that the effect of dropping the prosecution of Tileshwar Rai would tantamount to his acquittal and relied upon a decision of this Court rendered in the case of Krishna Govind Patil Vs. State of Maharashtra, 1964 (1) SCR 678, to show that if all other persons were acquitted, one person alone could not be convicted under Section 302 read with section 34 IPC. In the said decision, a four Judges' Bench of this Court was considering a case in which there were in all four accused persons and all of them were acquitted by the trial court of the charge under Section 302 read with Section 34 IPC. The High Court upheld acquittal of the three accused persons, but convicted the fourth accused under Section 302 read with Section 34 IPC. When the matter was brought to this Court, the conviction was set aside as apart from these four accused persons, there was no other fifth accused and in view of the acquittal of three accused persons, the conviction of the appellant before this Court under Section 302 read with section 34 IPC could not be maintained as there was none else with whom he could have shared the common intention to cause death of the deceased. While acquitting, this Court observed that neither it was the prosecution case that there was any fifth accused person nor was there any evidence to that effect, meaning thereby that if there could have been any other accused person known or unknown other than the four persons tried, the conviction of the appellant before this Court could have been upheld as it could have been said that he shared the common intention with the fifth unknown accused person to commit the offence. To illustrate the point, if in a case First Information Report is lodged against four persons, known as well as unknown, and tried, out of whom three acquitted, one person can be convicted under Section 302 IPC simpliciter in case it is found that injury inflicted by him was fatal one, but he cannot be convicted under Section 302 with the aid of Section 34 IPC as in view of acquittal of the other accused persons, he cannot be said to have shared the common intention with anybody. On the other hand, if there are three persons, two named and one unknown, whose identity could not be ascertained even during the course of investigation, and upon being put on trial, out of the two named one gets acquitted, the other can be convicted under Section 302 with the aid of Section 34 IPC as it can be said that the convicted accused shared the common intention with the unknown person if there is evidence to that effect. In the present case, all the four eyewitnesses, namely, PWs 2, 3, 5 and 9, upon whom reliance has been placed by the two courts below, have candidly and consistently stated that the appellant and accused Tileshwar Rai along with other accused persons came to the house of the deceased and threw bomb upon him as a result of which he received injuries and succumbed to the same. We have already found that the evidence of these witnesses has been rightly found to be reliable by the trial court as well as the High Court so far as the appellant is concerned. We do not find any reason whatsoever to discard their evidence so far as participation of accused Tileshwar Rai in the crime is concerned. From the prosecution evidence it becomes clear that appellant shared common intention with accused Tileshwar Rai to cause death of the deceased. Thus, we have no difficulty in holding that if accused Tileshwar Rai would not have died, on the basis of evidence adduced by the prosecution, which is unimpeachable, he was liable to be convicted under Section 302 with the aid of Section 34 IPC, but merely because he died before the commencement of his trial and could not be tried, the appellant cannot take any advantage therefrom. For the foregoing reasons, we are of the view that the High Court has not committed any error in upholding convictions of the

sole appellant under Section 302 read with Section 34 IPC as well as Sections 3 and 5 of the Act.

In the result, the appeal fails and the same is dismissed. Bail bonds of the appellant, who is on bail, are cancelled and he is directed to be taken into custody forthwith to serve out the remaining period of sentence for which a compliance report must be sent to this Court within one month from the date of receipt of copy of this order.

JUDIS