

CASE NO.:
Appeal (crl.) 664 of 2007

PETITIONER:
Raju @ Raj Kumar

RESPONDENT:
State of Rajasthan

DATE OF JUDGMENT: 03/05/2007

BENCH:
S. H. Kapadia & B. Sudershan Reddy

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 664 OF 2007
(Arising out of S.L.P. (Crl) No.4446 of 2006)

KAPADIA, J.

(1) Leave granted.

(2) This criminal appeal by grant of special leave is directed against impugned judgment dated 13.1.06 delivered by Rajasthan High Court at Jaipur in D.B. Criminal Appeal No.660/04 confirming the conviction under Section 148 IPC imposed by Addl. District and Sessions Judge, Jaipur, in Session Case No.49/2001.

(3) On 1.9.1989 at 9.20 pm Uttam Prakash (pw.4) lodged an FIR at Police Station Ashok Nagar, Jaipur, in which he claimed that he and his father Ram Kishan Khandelwal (since deceased) had left their house, situated at A-10, Sikar House Area, for his uncle's house at C-10, Madan Kunj, Prithvi Raj Road, Jaipur, when at 9 pm while the deceased was sitting on the bed talking with PW.4's aunt and uncle, 10 to 12 persons entered the room and surrounded the deceased. These 10 to 12 persons were armed with knives, swords and pick-axes. PW.4 was threatened and told not to shout. PW.4 in his FIR stated that in his presence the accused (appellant herein) stabbed his father, Ram Kishan Khandelwal. According to the FIR, when PW.4's uncle raised an alarm the appellant herein along with others fled. Ram Kishan Khandelwal died. According to the FIR, there was enmity between Ram Kishan Khandelwal on one hand and Hanuman, Hanif, Chhitar and Ramesh Shanker on the other hand. On the basis of the said report investigation commenced. The case was registered for offences under Sections 147, 149 and 302 of Indian Penal Code (for short, 'IPC'). On the basis of the information given by the appellant herein, weapons of offence and blood soaked clothes were recovered. PW. 25, a Judicial Magistrate, conducted identification parade of the appellant herein and others. The police thereafter submitted their charge-sheet, inter alia, against the appellant herein. 31 witnesses were examined. 74 documents were produced by the prosecution. During the course of the trial it was revealed that Ram Kishan Khandelwal and his family used to live at Sikar House Area in Jaipur. Hanuman and Chhitar were his neighbours. They were on inimical terms. There was property dispute. The bathroom of

Hanuman and Chhitar was demolished by Jaipur Development Authority. Hanuman and Chhitar were under the impression that the bathroom was demolished on the complaint of Ram Kishan Khandelwal. Hanuman and Chhitar sold their house to Hanif (one of the co-accused). Prior to his death, Ram Kishan Khandelwal had lodged an FIR with Police Station Shastri Nagar, Jaipur, in which he had asked for police protection. Ram Kishan Khandelwal was also an accused in many criminal cases. These cases were pending. According to the prosecution, Hanuman, Chhitar and Hanif entered into a criminal conspiracy for the murder of Ram Kishan Khandelwal. According to the prosecution, however, the appellant herein along with Aziz, Iqbal, Mahendra Singh, Hamid and Firoz committed the actual murder. Therefore, according to the prosecution there were two groups of persons, the first set/group of persons entered a criminal conspiracy but the actual murder was done by Iqbal, Aziz, Raju Naik (appellant herein), Mahendra Singh, Hamid and Firoz.

(4) In this case, we are concerned with the conviction of Raju Naik (appellant herein). He was charged for offences under Sections 302, 120B, 148, 149 and 460 IPC.

(5) Two issues arise for determination in this criminal appeal. The first concerns the merits of the case and the second concerns an argument advanced on behalf of the appellant that the appellant has completed the sentence of three years on 8.3.2007 as he was convicted for offence under Section 148 IPC which has been disputed by the State on the ground that the appellant stood convicted under Section 302 IPC and sentenced to life imprisonment.

(6) On the merits of the case, we find that there is no reason to disbelieve Uttam Prakash (pw.4), the son of Ram Kishan Khandelwal (deceased). The incident took place on 1.9.89 around 9 pm when the deceased was sitting on the bed. Uttam Prakash (pw.4) and his father, Ram Kishan Khandelwal, had gone for dinner at his uncle's place at C-10, Madan Kunj, Prithvi Raj Road, Jaipur. When the deceased was sitting on the bed Uttam Prakash (pw.4) saw 10 to 12 persons entering the room and surrendering Ram Kishan Khandelwal. They were armed with knives, swords and pick-axes. Uttam Prakash (pw.4) saw the deceased being stabbed. Uttam Prakash (pw.4) has deposed that it was dinner time, that the deceased was sitting on the bed whereas he was in conversation with his aunt. Both the courts below have come to the conclusion, placing reliance on the post-mortem report, that there was an injury on the chest of the deceased and that the knife and the clothes recovered vide Ex.P.32 had human blood. The cause of the death, as given in the post-mortem report, was syncope. There was one more witness Rattan Devi (pw.20) but she could not identify the appellant in the identification parade. However, both the courts below have come to the conclusion, on the basis of the evidence of pw.4 that the appellant herein (Raju @ Raju Kumar) was a member of the unlawful assembly; that he carried the knife; that he had entered the room where the deceased was sitting on the bed and that Ram Kishan Khandelwal (deceased) was stabbed to death by the appellant herein. In the

circumstances, we do not find any infirmity to the extent of the conviction of the appellant herein under Section 148 IPC.

(7) The question is : whether this Court in special leave petition could convict the appellant under Section 302 IPC without any appeal from the State.

(8) Now coming to the second issue, we find that in this case seven out of ten accused were convicted by Additional District and Sessions Judge, No.1, (Fast Track) Jaipur City, Jaipur, for different offences. Appellant herein was charged under Section 148, 302, 120B and 460 IPC. However, he has been convicted under Section 148 IPC. According to the trial court the cause of death is syncope. According to Butterworth's Medical Dictionary, 'Syncope' is a temporary loss of consciousness caused by a fall in blood pressure.

(9) We also quote hereinbelow paras '65' and '66' of the said judgment which read as follow:

"65. From the above decision I have reached the conclusion that out of all the accused, the accused No.(1) Abdul Aziz s/o Salamuddin, accused No.2 Raju @ Raj Kumar s/o Mali Ram, accused No.3, Durga Das @ Bhaya s/o Bhanwar Lal have committed punishable crime u/s 460, 148 and 302 of Indian Penal Code for which their crime is hereby proved and the accused No.4, Feroz @ Shreya s/o babu Khan has committed punishable crime under the Indian Penal Code Section 148, 302/149, 460 for which their crime is hereby proved and the accused No.5 Hanuman Sahai s/o Mahadev Prasad, accused No.6 Chhitar Mal s/o Mahadev Prasad, accused No.7 Mohd. Haneef s/o Abdul Hakim have committed punishable crime u/s 302/120B of the Indian Penal Code for which their crime is hereby proved and the accused No.8 Sayeed s/o Abdul Rasheed is acquitted from the allegations of punishable crime under Section 302 read with Section 149, 148, 120B and 460 of Indian Penal Code.

66. This case is a matter of murder, conspiracy to murder and co-operation in murder for which it would be justified to punish the accused with the minimum punishment and for rest of the crime the accused were heard, for which they are punished with rigorous imprisonment as mentioned below:

SENTENCE

Therefore, the accused mentioned below on being found guilty under Section as mentioned against each under Indian Penal Code are punished as below:

Sl.
NO.
Name of
the
Accused

Section
Punishment
Penalty
Illegible
(sic)

1.
Abdul Aziz

460
Ten years
500/-
3months

2.
Raju @ Raj
Kumar
148

Three years
200/-
1 month

3.
Durga Das
@ Bhaya
302
Life
Imprisonment

1000/-
6months

4.
Feroz @
Sherya
460
Ten years
500/-
3months

148
Three years
200/-
1 month

302/149
Life
Imprisonment
1000/-
6months

5.
Hanuman
Sahai
302/120B
Life
Imprisonment
1000/-
6months

6.
Chhitar
Mal
- do -
- do -
- do -
- do -

7.
Mohd.
Haneef
- do -

- do -
- do -
- do -

The accused in this case are on bail, hence for getting the punishment they are being taken in the judicial custody. The punishment warrant of the accused may be prepared as per above and sent to the Central Jail, Jaipur. Punishment of all the crime will be simultaneous. In this case, the seized item of proof will be destroyed after expiry of six months of the appeal period. The file after recording of the decision may be admitted in the office. The accused with the proven crime may be provided with a copy of the decision without any cost."

(10) If one reads para '65' with para '66', we find that Abdul Aziz has been accused No.1 and he is convicted under Section 460 IPC. This is clear from para '65'. It is in consonance with the chart in para '66'. Similarly, the appellant (Raju @ Raj Kumar) was accused No.2 and he has been convicted under Section 148 IPC. This is clear from para '65'. To this extent, para '65' is in consonance with para '66' (chart annexed thereto). Durga Das was accused No.3 and he has been convicted under Section 302 IPC both under paras '65' and '66'. It appears from the reading of para '65' that accused No.1 was convicted under Section 460 IPC, accused No.2 was convicted under Section 148 IPC and accused No.3 was convicted under Section 302 IPC respectively. The word "respectively" is omitted. Be that as it may, the State did not go in appeal against the order of the trial court convicting Raju @ Raj Kumar (appellant herein) for convicting him under Section 302 IPC in addition to his conviction by the trial court under Section 148. Even the High Court, by the impugned judgment, has merely dismissed the appeal filed by the appellant herein upholding the conviction of Raju @ Raj Kumar under Section 148 IPC. It is argued before us, on behalf of the State, that we should convict the appellant herein under Section 302 IPC, particularly, when the reasoning given in the concurrent findings indicate that the appellant herein had stabbed the deceased in the chest with the knife. In our view, such a request cannot be granted. Offence under Section 148 IPC is distinct and separate from the offence under Section 302 IPC. The State should have filed an appeal seeking conviction of the appellant under Section 302 IPC apart from his conviction under Section 148 IPC. This has not been done in the present case. The offence of rioting with deadly weapon under Section 148 IPC is separate and distinct from the offence under Section 302 IPC. Moreover, according to the trial court, the cause of death is syncope.

(11) In the case of Satbir v. Surat Singh and others \026 AIR 1997 SC 1160, the accused was sentenced under Section 302/148 IPC and, therefore, this Court took the view that separate sentence under Section 148 was not necessary.

(12) In the case of Nanda Kishore Mohanty v. The State of Orissa \026 AIR 1961 Orissa 29, it has been held that once a charge under Section 148 IPC was framed the Magistrate must say whether the person charged is convicted or acquitted. In that case, though the petitioner was charged under Section 148 IPC, the judgment of the Magistrate was silent as to whether petitioner was guilty or not. The Additional Sessions Judge assumed that the petitioner stood convicted under Section 148 IPC altered the conviction to Section 147 IPC. In that case, the petitioner was also charged under Section 455/149 IPC and under Section 323/149 IPC. In that connection, it was held as under :-

"(6) Another serious mistake committed by the Magistrate was his omission to mention expressly in his judgment as to whether he convicted the petitioner under Section 148, I. P. C., or not. Once a specific charge under that section was framed, the Magistrate must expressly say whether he convicts the accused of that offence or whether he acquits him of that offence. Though the petitioner was charged under Section 148, the judgment of the Magistrate is silent as to whether that charge was proved or not. The learned Sessions Judge also committed an error by overlooking this mistake on the part of the trying Magistrate and assuming that there was a conviction under that section by the Magistrate and that he would be justified in altering it to a conviction under Section 147, I. P.C. It is indeed unfortunate that in cases of this type where sentences of imprisonment have been passed the two lower courts should have committed such obvious mistake, presumably through negligence.

(7) The net result therefore is that though the petitioner was charged under Section 148, I. P. C., the trying Magistrate has not passed any order, either of conviction or acquittal in respect of that charge and the Sessions Judge has convicted him under Section 147, I. P. C. The omission of the trying Magistrate to convict the petitioner under Section 148, I. P. C., must in the circumstances be held to mean that he was acquitted of that charge. It is immaterial whether this omission was due to oversight or any other reason. Once there is, thus, an acquittal of the petitioner of the charge under Section 148, I. P. C., the Sessions Judge has no jurisdiction to alter the conviction to one under Section 147, I. P. C. The State should have moved the High Court for setting aside the order of acquittal in respect of the charge under Section 148. But this they did not do.

(8) The acquittal of the petitioner in respect of the offence under Section 148, I. P. C., will also affect his conviction under Section 455/149, I. P. C., and 323/149, I. P. C. The

conviction for these two offences is based on the assumption that the petitioner was a member of the unlawful assembly but his acquittal in respect of the charge under Section 148, I. P. C., must necessarily lead to the inference that he was not a member of such an assembly. Hence, his conviction under Sections 455 and 323, I. P. C., read with Section 149, I. P. C., must be set aside.

(9) There seems some force in the contention of the learned Standing Counsel for the State of Orissa, that the initial mistake was committed by the trying Magistrate through oversight, and he suggested that the case might be remanded to the trying Magistrate for recording a proper order either of conviction or of acquittal in respect of the charge against the petitioner under Section 148, I. P. C.

But I am not satisfied that at this stage it will be proper to remand the case for the aforesaid purpose. The incident took place more than four years ago, i.e., on 6-10-1955, and the petitioner has been sufficiently harassed because the appeal was first heard by the Addl. Sessions Judge but the judgment was set aside by the High Court in Criminal Revision and the appeal was reheard by the Sessions Judge of Cuttack.

It will not be proper at this belated stage to revive the whole proceeding and subject the petitioner to further harassment of a conviction by the trying Magistrate and also possibly of an appeal before the Sessions Judge. The mistake was partly that of the trying Magistrate and partly that of the prosecuting officers. The latter should have noticed the omission in the judgment of the trying Magistrate and then taken steps either by way of revision to this Court or by means of an appeal against acquittal, to get the mistake rectified.

(10) For the aforesaid reasons, I would allow this revision petition, set aside the conviction and sentence passed on the petitioner by the learned Sessions Judge, and acquit him. He should be set at liberty forthwith."

(13) Before concluding we may state that one of the arguments advanced on behalf of the State was that no prejudice would be caused to the appellant if he was to be convicted under Section 302 IPC. It was contended on behalf of the State that if one goes through the entire judgment of the trial court it is clear from the reasoning that the trial court had found the appellant guilty of murder under Section 302 IPC and that the appellant has never made any grievance against the said finding. It

is submitted on behalf of the State that even in the special leave petition, before this Court, this particular ground has not been taken by the appellant. We find no merit in this contention. We cannot convict the appellant under Section 302 IPC in the appeal preferred by the appellant herein. If we were to do so it would amount to travesty of justice. We cannot convict the accused under Section 302 without the State filing an appeal in that regard. In the present case, the State did not move the High Court in appeal against the conviction under Section 148 and nor did the State seek enhancement of punishment before the High Court in appeal.

(14) For the above reasons, we find that the appellant herein was convicted under Section 148 IPC; that, he was not convicted under Section 302 IPC; that he was sentenced for three years with fine in addition, one month sentence in default of fine; and that Raju @ Raj Kumar (appellant herein) has served sentence for three years commencing from 9.3.2004 ending on 8.3.2007. We are not sure as to whether he has paid the fine of Rs.200/-, if not, he shall pay the fine forthwith. On payment of fine he should be set at liberty forthwith. If he fails to pay Rs.200/- as fine then he will have to serve the sentence of one month in default.

(15) Accordingly, the appeal is allowed.