

CASE NO.:
Appeal (crl.) 431 of 1999

PETITIONER:
Parsuram Pandey and Others

RESPONDENT:
The State of Bihar

DATE OF JUDGMENT: 14/10/2004

BENCH:
P. Venkatarama Reddi & P.P. Naolekar

JUDGMENT:
JUDGMENT

With
Criminal Appeal No 1199/2004
@ Special Leave Petition (Criminal) No. 2238 of 2004

P.P. NAOLEKAR, J.

Leave granted in S.L.P. (Crl.) No.2238 of 2004.

Both these appeals arise out of the same incident for which all accused persons have been convicted and sentenced. The accused/ appellants were tried for the offence along with two other accused persons namely, Dharm Raj Pandey and Shradha Ram. Raghunath Pandey-accused/appellant has been convicted under Section 302 of the IPC and awarded sentence of life imprisonment. He was further convicted and sentenced to two years RI under Section 148 IPC and 27 of the Arms Act. The accused/appellants Parshuram Pandey, Bishram Pandey and Somaru Pandey together with the other accused (non-appellants) have been convicted and sentenced to life imprisonment under Section 302 read with Section 149 of the Indian Penal Code and two years RI under Section 148 of the IPC. Parshuram Pandey, Bishram Pandey together with Dharmraj Pandey (non-appellant) have been further convicted and sentenced to 5 years RI under Section 307 for attempting to murder Rajendra Dusadh, Hriday Shankar Rai, Shampu Kumar Singh, Mathura Singh and Rajesh Singh and one year RI under Section 27 of the Arms Act. All these sentences have been ordered to run concurrently.

The prosecution case in nut-shell is as follows. That on 24th December 1989 at about 1.30 P.M. at Village Burhaila, FIR was lodged by informant-PW6, Birender Pandey informing that he along with Bharat Pandey (PW5) and Kanhaiya Pandey (deceased) were standing in their field. Appellant-Raghunath Pandey after getting his buffalo washed in the canal reached near Birender Pandey's field and drove the buffalo to graze the tori crop grown in the field. Birender Pandey objected to it, whereupon Raghunath Pandey abused him which was resisted by Kanhaiya Pandey(deceased). On this Raghunath Pandey went to his residence and returned with other accused persons, armed. Raghunath Pandey was armed with rifle and other accused persons, Parshuram Pandey and Bishram Pandey were armed with gun and Somaru Pandey armed with spear. On entering the field on exhortation of Somaru Pandey and Shradha Ram, Raghunath Pandey fired four shots by his rifle. Two shots hit Kanhaiya Ram

(deceased) who fell down after receiving injuries. Thereafter the appellants Parshuram Pandey, Bishram Pandey along with other accused persons started indiscriminate firing by their guns which caused injuries to the villagers. The appellant Somaru Pandey hurled spear towards Birender Pandey and Bharat Pandey which caused injuries to Bharat Pandey by the lathi protion of the spear. Surendra Pandey and other alleged eye-witnesses (PW3) and Ram Ekbal Pandey (PW4) reached the place of occurrence and saw the occurrence. The accused/appellants made good their escape. Kanhaiya Pandey was taken to Nana Nagar Hospital where he was declared dead.

The autopsy was conducted by (PW7) Dr. Parma Nand Rai and he found the following ante-mortem injuries on his person:

- 1) Lacerated wound with rugged and blackish marks 3 1/2" x 2 1/2" on the left side of upper chest, auxillary side of the chest;
- 2) Lacerated wound with blackish margin 4" x 3" x muscle deep on the medial side of upper chest, auxillary side of the chest;
- 3) Lacerated wound 4" x 3" x bone deep and inverted margin on the upper left arm on the same level as injury no.2
- 4) Lacerated wound with everted margin 5" x 3 1/2" x bone deep on lateral side of left arm. It is wound of exit.

From the post mortem report it is clear that the injuries found on the person of the deceased are lacerated wound of 3 1/2" X 2 1/2" on the left side of the chest just above the level of nipple and lacerated wound of 4" x 3" x muscle deep on the medial side of upper chest and auxillary side of the chest apart from a wound of entry and exist on the upper left arm. The Injury No.1 and Injury No. 2 could not have been caused of the same shot and must have been by two gun shots.

On the internal examination he found the following injuries:
"Left auxillary blood vessel badly lacerated and upper arm badly lacerated and fractured. Fracture is compounding nature."

In the opinion of the doctor the cause of death was hemorrhage and shock as a result of the fire arm. S.K. Singh, the doctor, who has conducted the postmortem, he has found lacerated wound with blackish margin, which indicates that the firing was from a near distance. The other injured persons namely, Hriday Shankar Rai, Sampu Kumar Singh, Rajesh Singh, Mathura singh were examined by Dr. Shiva Nand Prasad (PW8) on 24.12.1989 and he has opined that the injuries sustained by these persons were simple and were caused by suspected gun-shot. Prosecution has examined only one injured witness namely, Rajesh Singh while defence has examined Sampu Kumar Singh, DW2. The trial court and High Court while relying on the statement of PW3 Surendra Pandey, PW4 Ram Ekbal Pandey, PW5 Bharat Pandey, PW6 Birendra Pandey convicted the accused persons. Defence plea of accidental firing deserves rejection.

It is urged by the learned counsel for the appellant that on proper appreciation of the evidence on record, PW3 Surendra Pandey and PW4 Ram Ekbal Pandey could not be held to have been present at the place at the time of the occurrence.

PW 3 and 4 claim themselves to be the eye-witnesses but in the FIR lodged by PW6 at the police station it is revealed that Surendra Pandey-PW3 and Ram Ekbal Pandey-PW4 have reached the place of occurrence after hearing the noise. The FIR records, that hearing the fire shots and noise from the family members and co-villagers, Surender Pandey and Ram Ekbal Pandey (Pws 3 and 4) and many other came who had seen the occurrence and accused persons. Therefore, as per the FIR these two witnesses have reached the spot after hearing the fire shots and the noise from the family members. PW5 - Bharat Pandey in his cross-examination has admitted that after the accused fled away, his family members came. His brother PW3- Surendra Pandey and father PW4-Ram Ekbal Pandey reached the spot after the accused persons had already fled away. PW3 has deposed that on 24.12.1989 at about 1.30 O' clock at day time he was in verandah of his house and he saw accused persons armed with guns were going towards Dusadi Tola and he has followed them. In cross-examination he has admitted that he has followed the accused persons after 2-4 minutes of hearing the 'hulla'. The statement clearly indicates that he has not immediately followed the accused persons but he left his residence after 2-4 minutes of hearing the hulla. He was attracted to the place of incident after he has heard the 'hulla'. Thus the statement of this witness clearly shows that he has reached the place of incident after the incident was over. PW-4 has deposed that on the date of incident he was at the door of his house and he saw the accused persons going towards the Dusadi Tola. His son Surendra Pandey-PW3 was also sitting at the door. Both of them moved to see where these people were going. Thus the father and the son have followed the accused persons at the same time and must have reached the place of incident after the incidence had occurred. The deposition of these witnesses read with the statement of PW5 \026Bharat Pandey and the incident recorded in the FIR leaves no manner of doubt that these witnesses were not the eye-witnesses and have not seen the incident happening. They reached the spot later on.

It is then submitted by the learned counsel for the appellant that the fact situation alleged by the prosecution of the commencing of the incident does not inspire confidence in the circumstances of the case. As per the counsel it was impossible for the accused Raghunath Pandey to put his buffalo in the field for grazing when Birender Pandey, Bharath Pandey and Kanhaiya Pandey were standing in the field. Particularly so, when the investigating officer did not find any foot marks of the animal in the field and therefore the whole genesis of the incident is false and therefore the prosecution could not be believed. It may be true that there may be exaggeration in the prosecution case in so far as as Raghunath Pandey deliberately putting his buffalo in the field to graze the standing crop. It might be that the buffalo must have strayed in the field and that would have caused heated argument between Raghunath Pandey and the deceased Kanhaiya Pandey, Bharat Pandey and Birender Pandey which has enraged Raghunath Pandey who went to his house and came back with his rifle and thereafter the incident occurred. Exaggerated story put up by the prosecution would not wash away the entire incident, which has been proved by the witnesses who were present on the spot. The incident might have commenced somewhat in different manner but the fact of the commission of the offence, when proved by the witnesses the prosecution's case cannot be thrown out only on the basis that prosecution has put inflated version of the commencement of incident. PW6 - Birender Pandey, the informant reiterated his version as given in the FIR. In his statement he said that he was in the field along with Bharat Pandey and Kanhaiya Pandey on

the fateful day. Raghunath Pandey came near the field and let loose his buffalo in the field of the informant to graze the standing tori crop and when he protested, Raghunath Pandey started abusing him and Kanhaiya Pandey intervened and objected the act of Raghunath Pandey, whereupon Raghunath Pandey went to his house after threatening and came back with his rifle along with other accused persons who were also armed with the fire arms. It is further stated that on exhortation of Somaru Pandey and Shradha Ram, Raghunath Pandey fired 4 shots by his rifle out of which two shots hit Kanhaiya Pandey who fell down. Thereafter, Dharmraj Pandey, Parshuram Pandey and Bishram Pandey, indiscriminately started firing their guns which caused injuries to Rajesh Singh-PW1 and Somaru Pandey-DW2 and other villagers. It is further deposed that appellant Somaru Pandey and Shradha Ram hurled spear and Bharat Ram was injured by the back portion of the spear. PW5-Bharat Pandey corroborated the statement of PW6-Birender Pandey when he stated in the Court that he was present in the field along with Kanhaiya Pandey and Birender Pandey when Raghunath Pandey came there and let loose his buffalo to graze the tori crop standing in the field of Birender Pandey which was objected to by Birender Pandey and Raghunath Pandey abused him. Kanhaiya Pandey objected to the said act of Raghunath Pandey. Thereafter, Raghunath Pandey went to his house and came back with fire arm with other accused armed with guns and Somaru Pandey, Shradha Ram armed with spear. Immediately after having reached the field Raghunath Pandey fired four shots by his rifle, out of which two shots hit Kanhaiya Pandey and he fell down. The other accused persons started indiscriminate firing with the result the villagers sustained injuries. Statements of these two witnesses have been found trustworthy by two courts below as regards causing injuries by fire arms by Raghunath Pandey to Kanhaiya Pandey. The injury sustained by the deceased Kanhaiya Pandey corroborates ocular statements of these two witnesses. On consideration of the evidence, the evidence of these two witnesses is reliable and convincing except to the extent that some embellishments were made in explaining the genesis of incident. The evidence of these two eye witnesses is consistent with the medical evidence and does not create doubt regarding the real manner in which the incident has taken place and the injuries caused by Raghunath Pandey to Kanhaiya Pandey by use of fire arm. We do not find any infirmity in the reasoning of Courts below in placing reliance on the statement of these two witnesses for convicting Raghunath Pandey for causing death of Kanhaiya Pandey.

It is submitted by the learned counsel for the appellants Parshuram Pandey, Bishram Pandey and Somaru Pandey that in the facts and circumstances of the case these appellants could not have been convicted under Section 302 read with Section 149 for causing death of Kanhaiya Pandey. Further they are wrongly convicted under Section 307 for causing injury to the villagers and their further conviction under Section 27 of the Arms Act is not in conformity with the evidence led by the prosecution.

It has come in evidence that PW5-Bharat Pandey, PW6-Birender Pandey, were standing near by the deceased Kanhaiya Pandey. Parshuram Pandey and Bishram Pandey were carrying fire arms, whereas Somaru Pandey was carrying spear. The incident has happened within a short span of time. The witnesses have said that the accused persons entered the field and immediately thereafter Raghunath Pandey opened four shots at Kanhaiya Pandey, the deceased. Kanhaiya Pandey received two gun-shot injuries and fell down. Thereafter, Parshuram Pandey and Bishram Pandey had started indiscriminate firing. Somaru

Pandey had hurled spear at Bharat Pandey. It has also come in the prosecution evidence that after hot exchange of words Raghunath Pandey came back within few minutes from his residence armed with rifle and accompanied by other accused persons to the field. The evidence also shows that neither Bharat Pandey or Birender Pandey have received any injuries by the fire arms. It is not stated by the eye-witnesses that Parshuram Pandey or Bishram Pandey while indiscriminately firing from their fire arms had aimed at Kanhaiya Pandey, the deceased nor there is any evidence on record that Bharat Pandey, Birender Pandey who were standing near the deceased have received any injuries by the fire arm. PW1-Rajesh Singh has deposed that on 24.12.1989 at 1.30 P.M. he was going towards the place of one Mathura Uncle of the Village and while he was passing by the side of field of Birender Pandey, all of a sudden he heard the noise of 4-5 firing shots and simultaneously he had received pellet injuries. He has not stated that he has sustained injuries by any of the accused persons firing at him. In fact he has not seen the actual firing of the guns. He is a witness who was going by the side of the field of Birender and sustained injuries by fire arm. He has only heard the noise of 4-5 firing shots. Thus this witness has not stated that he has received the injuries at the hands of Parshuram, Bishram or Somaru. DW2-Sampu Kumar Singh who was examined by defence, sustained injuries by the fire arm, has not named any of the accused person to be the person who has caused him injuries in the incident. Thus there is no evidence on record that the injuries sustained by the villagers by fire arm was intended to be caused by the accused persons. There is no evidence on record that any of the villagers (passer-by) have received any specific injury by a fire arm used by either Parshuram or Bishram intended to be caused to them.

By virtue of Section 149 IPC every member of an unlawful assembly at the time of the commission of the offence is guilty of an offence committed by any member of the unlawful assembly. The Section creates constructive or vicarious liability of the members of the unlawful assembly for unlawful acts committed pursuant to the common object by any other member of that assembly. The basis of constructive guilt under Section 149 is mere membership of an unlawful assembly. In a case under Section 149 the accused if is a member of the unlawful assembly, the common object of which is to commit a certain crime and if that crime is committed by one or more members of that assembly every person who happened to be a member of that assembly would be liable for that criminal act by virtue of his being a member of it, irrespective of the fact whether he actually committed the act or not. To attract Section 149 of the IPC the prosecution must prove that the commission of the offence was by any member of an unlawful assembly and such offence must have been committed in prosecution of the common object of the assembly or must be such that the members of the assembly knew that it was likely to be committed. Unless these three elements are satisfied by the prosecution the accused cannot be convicted with the aid of Section.

The facts which have been proved by the prosecution are that on heated exchange of words in the field of Bharat Pandey, between Bharat Pandey, Birender Pandey, Kanhaiya Pandey with Raghunath Pandey, Raghunath Pandey went home enraged and returned back immediately thereafter (within 3 minutes according to PW-6) with a rifle accompanied by other accused persons who were also carrying guns and spear. Immediately on entering the field, Raghunath Pandey opened fire at Kanhaiya Pandey and as a result thereof he received two gun-shot injuries from the weapon used by Raghunath Pandey. Neither Parshuram Pandey nor

Bishram Pandey used their guns to fire at Kanhaiya Pandey, Bharat Pandey or Birender Pandey, who were standing nearby. No other overt act or role has been attributed to them which could definitely point out to their common object to kill or injure Kanhaiya Pandey or PWs 5 and 6. The mere fact that they accompanied Raghunath Pandey with weapons in hand does not necessarily lead to the inference that they had shared the common object or intention with Raghunath Pandey to kill Kanhaiya Pandey. Their behaviour at the scene of offence negatives such inference. However, the only fact proved by the prosecution is that they have started indiscriminate firing which resulted in some villagers receiving simple injuries, though the reason for such firing is not clear. In view of the short span of time within which the whole incident took place it could not be presumed that the three appellants along with the other accused Raghunath Pandey have informed the common object to do away with Kanhaiya Pandey. The fact that immediately after entering the field Raghunath Pandey opened fire at Kanhaiya Pandey, though the other accused who were also armed with gun, have not fired at Kanhaiya Pandey or his companions also indicates that the accused persons Parshuram and Bishram Pandey did not share the common object or intention to cause death of Kanhaiya Pandey. It cannot be said that they fired their guns and have missed the shot at Kanhaiya Pandey or any other person. Thus we find it difficult to hold as has been held by the trial court and the High Court that the accused Parshuram, Bishram and Somaru Pandey have formed the unlawful assembly with the common object to commit an offence of murder of Kanhaiya Pandey. In fact there is no evidence against Somaru Pandey except that he exhorted appellant/accused Raghunath Pandey to fire at Kanhaiya Pandey, which in the circumstances of the case is difficult to believe. Though PWs 5 and 6 deposed that he and Shradha Ram threw the spears at them and the stick portion of it injured PW5, no such injury was proved. PW5 refused to be examined by the doctor.

Thus the accused appellants Parshuram Pandey, Bishram Pandey and Somaru Pandey are acquitted of the charge under Section 302 read with Section 149 and imprisonment for life. Accused Parshuram and Bishram were also convicted under Section 307 for 5 years RI for causing gun-shot injuries to the villagers.

To constitute an offence under Section 307 two ingredients of the offence must be present:-

(a) an intention of or knowledge relating to commission of murder ; and

(b) the doing of an act towards it.

For the purpose of Section 307 what is material is the intention or the knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. Section clearly contemplates an act which is done with intention of causing death but which fails to bring about the intended consequence on account of intervening circumstances. The intention or knowledge of the accused must be such as is necessary to constitute murder. In the absence of intention or knowledge which is the necessary ingredient of Section 307, there can be no offence 'of attempt to murder'. Intent which is a state of mind cannot be proved by precise direct evidence, as a fact it can only be detected or inferred from other factors. Some of the relevant considerations may be the nature of the weapon used, the place where injuries were inflicted, the nature of the injuries and the circumstances in which the incident took place. On the evidence on record, where the prosecution has been able to prove only that

the villagers have sustained injuries by indiscriminate firing and it was an open area with none of the injured nearby there is a complete lack of evidence of intention to cause such injuries for which the accused persons Parshuram and Bishram could have been convicted under Section 302 of the IPC. Nature of the injuries sustained by the villagers is simple. None of the witnesses have stated that the fire arm causing injuries was being used by any particular accused for causing injuries to them. In fact the injured have not seen any of the accused persons using fire arms. There is no evidence about the distance from which the said two accused fired. The only evidence led by the prosecution is indiscriminate firing by Parshuram and Bishram which has caused simple injuries to the villagers. Amongst the injured villagers, only PW1 and DW-1 were examined. Thus this evidence does not constitute the intention or knowledge of the accused persons for committing the murder or doing of an act towards it. The evidence only shows that the villagers have sustained simple injuries. In the circumstances, we acquit Parshuram and Bishram under Section 307 of IPC.

It is evident from the evidence placed on record that injuries caused to the villagers are the result of indiscriminate firing from the guns used by Parshuram Pandey and Bishram Pandey. It has also proved that Somaru Pandey was carrying spear which he had hurled at PW-5 but no injury was caused to him by it. It appears that after exchange of hot words between Raghunath Pandey and members of the complainant-party at the field of Birender Pandey the accused Raghunath Pandey came to his house and left his house within few minutes with rifle, observing Raghunath Pandey in a furious mood returning back to the field armed with rifle, the accused-appellants Parshuram Pandey, Bishram Pandey and Somaru Pandey must have apprehended some danger and thus accompanied him to the field. Raghunath Pandey immediately after reaching the field opened fire from the gun which he was carrying. He fired four shots, two shots out of them hit the deceased Kanhaiya Pandey and he fell down on field at the spot. The three accused persons finding Kanhaiya Pandey, deceased falling on the field seriously injured, apprehended retaliation from the complainant-party and from other villagers present nearby the field and to ward off any attack on them including Raghunath Pandey, must have started indiscriminate firing from the fire arms held by them. In the same process Somaru Pandey also threw spear at the member of the complainant-party which of course has not caused any injury. The common intention of the three accused developed immediately after the shots were fired at Kanhaiya Pandey, as a result thereof he fell down on the ground seriously injured. The plan to ward off attack in retaliation by the complainant-party and the other villagers present nearby and to prevent them from approaching towards place of incident and the accused persons, common intention developed at the spur of the movement at the place of occurrence during the commission of crime. The act of all the three accused persons of firing and throwing spear was in furtherance of the common intention of all of them. When the fire arms were used indiscriminately in the open place, the assailants may be presumed to know that result of such use of the weapon will very likely to give bodily injury to the persons and when such injuries are caused to the persons, it is the actual result from the assault made, and everyone of the persons concerned in the act will be guilty for that injury irrespective of the fact whether the prosecution has proved that a particular injury was caused by a particular accused person or not. Injury caused to the villagers by the fire arm although simple in nature are caused by accused person in furtherance of the common object of all the three accused persons. We, therefore, hold the

accused/appellants Parshuram Pandey, Bishram Pandey and Somaru Pandey guilty of offence under Section 324 read with 34 IPC.

It is lastly submitted by the learned counsel for the accused/appellants that the statement under section 313 Cr.P.C. of the accused persons have been recorded in a most cursory, casual and perfunctory manner by the Sessions court. It is urged that this is a normal practice followed in the court in the State. The manner in which the trial court recorded the statement under Section 313 Cr.P.C. of the accused persons, is not in accordance with law and, therefore accused-appellant are entitled for the benefit as they have not been provided with sufficient opportunity to explain the circumstances appearing in evidence against them. We have perused the statement under Section 313 Cr.P.C. and the question formulated by the trial court in the present case and we may say that it is far from satisfactory. This court time and again has laid down that it is obligatory on the part of the trial court to examine the accused for the purpose of enabling the accused personally to explain any circumstance appearing in evidence against him. If such opportunity is not afforded, the incriminating piece of evidence available in the prosecution evidence against the accused cannot be relied upon for the purpose of recording the conviction of the accused person. It is imperative on the court to record the statement under Section 313 Cr.P.C. of the accused persons so as to give opportunity to the accused persons to explain any incriminating circumstance proved by the prosecution. The duty cast on the court cannot be taken lightly. However, we find that no argument has been advanced by the counsel for the appellants in the trial court or before the High Court on the basis of improper recording of the statement under Section 313 of the Cr.P.C. In the present case, the counsel for the accused/appellant could not point out to us any prejudice being caused to the accused/appellants on account of the irregular, imperfect statement recorded under Section 313 of the Cr.P.C. That being the case, the accused are not entitled for any benefit for the lacuna in recording the statement of the accused under Section 313 of the Cr.P.C.

As the result of the aforesaid discussion and of the findings, appeal of accused/appellant Raghunath is dismissed and his sentence is maintained. The appeal of accused/appellants Parshuram Pandey, Bishram Pandey and Somaru Pandey is allowed and their conviction under Section 302 read with 149 IPC and Section 148 IPC is set aside. The appeal of accused/appellants Parshuram Pandey and Bishram Pandey is partly allowed, their conviction under Section 307 IPC and sentence of 5 years RI is set aside. Accused/appellants Parshuram Pandey, Bishram Pandey and Somaru Pandey are convicted under Section 324 read with 34 IPC and sentenced to three years RI. The sentence of appellants Parshuram Pandey and Bishram Pandey under Section 27 of the Arms Act is maintained. All these sentences shall run concurrently.