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Surajbhan Vs. State of M.P. (Cr.A. No. 6213 of 2021)

**HIGH COURT OF MADHYA PRADESH
GWALIOR BENCH**

DIVISION BENCH

G.S. AHLUWALIA

&

DEEPAK KUMAR AGARWAL J.J.

Cr.A. No. 6213 of 2021

Surajbhan Singh

Vs.

State of M.P.

Shri Prakhar Dhengula Counsel for the Appellant.
Shri C.P. Singh Counsel for the State.

Date of Hearing : 11-1-2022
Date of Judgment : 20-Jan-2022
Approved for Reporting :

Order

20- January -2022

Per G.S. Ahluwalia J.

1. This Criminal Appeal under Section 374 of IPC has been filed against the judgment and sentence dated 9-7-2021 passed by 1st Additional Sessions Judge, Gohad, Distt. Bhind in S.T. No.118/2007 by which the Appellant has been convicted and sentenced for the

following offences :

Convicted under Section	Sentence
302/149 of IPC	Life Imprisonment and fine of Rs. 1,000/- in default 6 months R.I.
307/149 of IPC	R.I. for 5 years and fine of Rs. 1,000/- in default 6 months R.I.
148 of IPC	R.I. for 1 year and fine of Rs.500/- in default 6 months R.I.

All the sentences shall run concurrently.

2. According to prosecution story, the complainant Bhanupratap Singh Gurjar, lodged an FIR on 16-10-2006 at 10:45 A.M., on the allegation that at about 10:15 A.M., he, his father Pahalwan, uncle Darshan Singh, Cousin brother Ajab Singh were irrigating the field of Ajab Singh. At that time, the Appellants as well as Surajbhan and Dilip came to their field. They were armed with guns, lathi and other weapons and surrounded his Father, Uncle and Cousin brother and started abusing them. Kedar Singh and Ramhet said that they (accused persons) would irrigate their fields first and in case if they (complainant party) do not agree for that, then they (complainant party) would be killed. His father replied, that some portion of his field is left for irrigation and let it be completed. Then Bharat Singh by using abusive language started insisting that he will irrigate his land. His uncle also tried to persuade Bharat Singh that he may wait for some time. Kedar Singh, Ramhet and Surajbhan were having mouser guns, whereas Bharat was having *Farsa*, Devaram, Dilip and

Rampreet were having lathis. Kedar fired a gunshot causing injury on the head of his father. Ramhet also caused gunshot injury to his Uncle Darshan Singh. Surajbhan also fired gunshot causing injury on the head of his father. Dilip Singh, Rampreet, Devaram started assaulting Ajab Singh by means of lathi, *Farsa* as a result, he also fell down. Ajab Singh sustained injuries on his head, hands and legs as Bharat Singh had assaulted him by *Farsa*, whereas Devaram, Dilip and Rampreet had assaulted by lathis. His father Pahalwan and Darshan Singh died on the spot. Kedar Singh also chased him and fired gunshots, but he escaped and ran towards his house. Ravi and Brijendra have witnessed the incident. Kedar Singh has left his white shirt, photocopy of his license and diary with Rs.150/- on the spot, which he has brought.

3. On the basis of the report lodged by complainant Bhanupratap Singh, police registered offence under Sections 302, 307, 147, 148, 149, 120-B of I.P.C. The dead bodies of Pahalwan Singh and Darshan Singh were sent for post-mortem. The spot map was prepared. Statements of the witnesses were recorded. Police after completing the investigation, filed charge sheet against the Appellants and Surajbhan for offence under Section 147, 148, 149, 302, 307, 120-B of I.P.C., whereas co-accused Dilip was shown absconding.

4. The Trial Court by order dated 23-1-2008 framed charges against the Appellant under Sections 148, 302 or in the alternative 302/149, for murder of Pahalwan and Darshan Singh, 307/149 of IPC

for making an attempt to kill Bhanupratap Singh and Ajab Singh.(It is not out of place to mention here that singular charge under Section 302 or in the alternative 302/149 of IPC was framed for murder of Pahalwan and Darshan Singh, instead of framing charges on two counts. Similarly, singular charge under Section 307/149 of IPC was framed for attempting to kill Bhanupratap Singh and Ajab Singh, instead of framing charges on two counts.)

5. The Appellant abjured his guilt and pleaded not guilty.

6. The prosecution examined Bhanupratap Singh (P.W.1) and Ajab Singh (P.W.2) and thereafter, the Appellant Surajbhan absconded and accordingly by order dated 25-10-2008, he was declared absconding. He was again arrested and produced before the Trial Court on 3-4-2017. Thereafter, by order dated 21-6-2017, it was observed, that since, the evidence of Bhanupratap Singh (P.W.1) and Ajab Singh (P.W.2) was recorded in presence of the Appellant, therefore, summons be issued for appearance of other witnesses. Accordingly, the prosecution examined, Brijendra (P.W.4), R.S. Rathore (P.W.5) and Dr. G.R. Shakya (P.W.10). According to the prosecution, since, all material witnesses were examined, therefore, the prosecution closed its right on 27-2-2020.

7. The Appellant did not examine any witness in his defence.

8. The Trial Court by the impugned judgment convicted and sentenced the Appellant for the offences mentioned above.

9. Challenging the judgment passed by the Court below, it is

submitted by the Counsel for the Appellant Kedar Singh that Bhanupratap Singh (P.W.1) and Ajab Singh (P.W.2) are unreliable witnesses. The ocular evidence is not supported by medical evidence. The presence of rigor mortis indicates, that the deaths had already taken place much prior to the alleged time of incident. In fact some unknown persons might have killed the deceased Pahalwan and Darshan Singh in the wee hours, but on account of previous enmity, the Appellants have been falsely implicated. Multiple fired cartridges were found on the spot, whereas according to prosecution witnesses, only four gunshots were fired. In the FIR it is alleged by Bhanupratap Singh that Kedar had left his white shirt on the spot, and he has brought the same, but in his evidence, he clearly stated that after leaving the place of incident, he did not return to the spot, therefore, it is clear that there was no occasion for the complainant to bring the white shirt of Kedar to the police station. The witnesses are related and interested witnesses, therefore, they are not reliable. It is further submitted that while deposing in the Trial of Co-accused Dilip, these witnesses had clearly stated that the Appellant was not present on the spot, therefore, they are not reliable.

10. *Per contra*, the Counsel for the State has supported the findings recorded by the Trial Court.

11. Heard the learned Counsel for the parties.

12. Before advertizing to the facts of the case, this Court would like to consider as to whether the judgment passed by the Trial Court is a

complete judgment or not?

13. The Trial Court in para 34 of its judgment has convicted the Appellant under Section 302/149 of IPC for causing murder of Pahalwan Singh and under Section 307/149 of IPC for making an attempt to kill Bhanupratap (P.W.1), however, the judgment is completely silent with regard to charge under Section 302/149 of IPC for murder of Darshan Singh and under Section 307/149 of IPC for attempt to kill Ajab Singh (P.W.2).

14. It is not out of place to mention here that initially, Bhanupratap Singh (P.W.1) and Ajab Singh (P.W.2) were examined in the presence of the Appellant, but thereafter, he absconded accordingly, he was declared absconding by order dated 25-10-2008. The Appellant was arrested after the conviction of the co-accused persons. Accordingly, the Trial of the Appellant resumed.

15. One Dilip was also absconding right from the day one. He was arrested during the trial of the Appellant. Since, Bhanupratap Singh (P.W.1) and Ajab Singh (P.W.2) were examined in presence of the Appellant, therefore, they were examined in respect of co-accused Dilip only. Although Bhanupratap Singh (P.W.1) and Ajab Singh (P.W.2) supported the prosecution story, but they turned hostile on the question of identity of Dilip Singh. However, they also said that the Appellant was also not there. Brijendra (P.W.4) was examined in respect of Appellant and Dilip, but he too turned hostile on the question of identity.

16. During the course of final argument before the Trial Court, it was argued by the Counsel for the Appellant, that since Bhanupratap Singh (P.W.1), and Ajab Singh (P.W.2) in their evidence recorded on 6-12-2018 and 16-4-2018 respectively, have also stated that the Appellant was also not there, therefore, they are unreliable witness. However, the Trial Court rejected the arguments by holding that initially, Bhanupratap Singh (P.W.1) and Ajab Singh (P.W.2) were examined in the presence of the Appellant, therefore, their evidence, which was led in respect of Dilip Singh, cannot be read in favor of the Appellant.

17. The findings recorded by the Trial Court are perfectly correct in the light of the judgment passed by the Supreme Court in the case of **Karan Singh Vs. State of M.P.** reported in **AIR 1965 SC 1037** and **A.T. Mydeen and anr. Vs. The Assistant Commissioner, Customs Department** vide order dated **29/10/2021** passed in **Criminal Appeal No.1306/2021**.

18. The Supreme Court in the case of **A.T. Mydeen (Supra)** has held as under :

39. The provisions of law and the essence of case-laws, as discussed above, give a clear impression that in the matter of a criminal trial against any accused, the distinctiveness of evidence is paramount in light of accused's right to fair trial, which encompasses two important facets along with others i.e., firstly, the recording of evidence in the presence of accused or his pleader and secondly, the right of accused to cross-examine the witnesses. These facts are, of course, subject to exceptions provided under law. In other words, the culpability of any accused cannot be decided on the basis of any evidence, which was not recorded in his

presence or his pleader's presence and for which he did not get an opportunity of cross-examination, unless the case falls under exceptions of law, as noted above.

40. The essence of the above synthesis is that evidence recorded in a criminal trial against any accused is confined to the culpability of that accused only and it does not have any bearing upon a co-accused, who has been tried on the basis of evidence recorded in a separate trial, though for the commission of the same offence.

41. It is also an undisputed proposition of law that in a criminal appeal against conviction, the appellate court examines the evidence recorded by the trial court and takes a call upon the issue of guilt and innocence of the accused. Hence, the scope of the appellate court's power does not go beyond the evidence available before it in the form of a trial court record of a particular case, unless section 367 or section 391 of Cr.P.C. comes into play in a given case, which are meant for further inquiry or additional evidence while dealing with any criminal appeal.

42. In the present controversy, two different criminal appeals were being heard and decided against two different judgments based upon evidence recorded in separate trials, though for the commission of the same offence. As such, the High Court fell into an error while passing a common judgement, based on evidence recorded in only one trial, against two sets of accused persons having been subjected to separate trials. The High Court ought to have distinctly considered and dealt with the evidence of both the trials and then to decide the culpability of the accused persons.

19. The Supreme Court in the case of **Karan Singh (Supra)** has held as under :

4. The only question argued in this appeal is whether in view of the acquittal of Ramhans by the learned Sessions Judge from which there had been no appeal, it was open to the High Court to hold that the Appellant was guilty of murder under S. 302 read with S. 34 by finding on the evidence that Ramhans who shared a common intention with him, shot the deceased dead and attempted to murder Ramchandra. In the High Court reliance had been placed on behalf of the Appellant on the judgment of this Court in Pritam Singh v. State of Punjab, (S) AIR 1956 SC 415. That case referred with approval to the judgment of the Judicial Committee in Sambasivan v. Public Prosecutor, Federation

of Malaya, 1950 AC 458 at p. 479, where it was observed that

"the effect of a verdict of acquittal... is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication."

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' case and the decision there arrived at on that evidence would be wholly irrelevant in considering the merits of the Appellant's case. We may add here that Mr. Misra appearing for the Appellant did not in this Court rely on Pritam Singh's case, (S) AIR 1956 SC 415.

5. Mr. Misra contended that the decision of this Court in Krishna Govind Patil v. State of Maharashtra, AIR 1963 SC 1413 showed that the High Court was wrong in ignoring the fact of the acquittal of Ramhans. We are unable to accept that contention. The point there considered really was whether when four persons had been charged with the commission of an offence of murder read with S. 34 and the trial Court had acquitted three of them it was legal to convict the remaining accused of the offence of murder read with S. 34. The High Court had held that that could be done. This Court set aside the judgment of the High Court mainly on the ground that such a decision would result in conflicting findings. It was observed,

"While it (the High Court) acquitted accused 1, 3 and 4 under S. 302 read with S. 34 of the Indian Penal Code, it convicted accused 2 under S. 302 read with S. 34, of the said Code, for having committed the offence jointly with the acquitted persons. This is a legally impossible position." That case no doubt discussed various situations where it is possible after acquitting certain persons to hold that the conviction of other or others was justified under S. 34 on the ground that the evidence showed that there were other unknown persons who were associated with those convicted though the charge did not mention them. With this aspect of the matter we are not concerned in this case and neither was the case of Krishna Govinda Patil, AIR 1963 SC 1413.

6. We are therefore of opinion that the judgment in Krishna Govind Patil's case, AIR 1963 SC 1413 does not assist the

Appellant at all. On the other hand we think that the judgments earlier referred to on which the High Court relied, clearly justify the view that in spite of the acquittal of a person in one case it is open to the Court in another case to proceed on the basis of course if the evidence warrants it - that the acquitted person was guilty of the offence of which he had been tried in the other case and to find in the later case that the person tried in it was guilty of an offence under S. 34 by virtue of having committed the offence along with the acquitted person. There is nothing in principle to prevent this being done. The principle of Sambasivam's case, 1950 AC 458 has no application here because the two cases we are concerned with are against two different persons though for the commission of the same offence. Furthermore, as we have already said, each case has to be decided on the evidence led in it and this irrespective of any view of the same act that might have been taken on different evidence led in another case.

20. Thus, the evidence which was led in the Trial of co-accused Dilip cannot be read in favor of the Appellant Surajbhan. Further, on 6-12-2018 and 16-4-2018, Bhanupratap Singh (P.W.1) and Ajab Singh (P.W.2) respectively, were being examined for co-accused Dilip only and not for the Appellant Surajbhan. Therefore, the Appellant Surajbhan would not get benefit of any word uttered by Bhanupratap Singh (P.W.1) and Ajab Singh (P.W.2) in their examination on 6-12-2018 and 16-4-2018 respectively.

21. However, it is surprising, that although the Appellant Surajbhan Singh was being tried for offence under Section 302/149 of IPC for committing murder of Pahalwan and Darshan Singh, but the Trial Court, without giving any finding in respect of murder of Darshan Singh, convicted him only for the murder of Pahalwan. At the cost of repetition, it is observed that the Appellant has also not

been acquitted for charge under Section 302/149 of IPC for murder of Darshan Singh. In fact the judgment is completely silent about the murder of Darshan Singh. Similarly, no finding was given by the Trial Court in respect of attempt to kill Ajab Singh (P.W.2), but held that the Appellant is guilty of making an attempt to kill Bhanupratap Singh (P.W.1). At the cost of repetition, it is observed, that the Appellant has also not been acquitted for charge under Section 307/149 of IPC for making an attempt on the life of Ajab Singh (P.W.2).

22. Thus, it is clear that the Trial Court has passed an incomplete judgment.

23. Now, the next question for consideration is that since, no appeal has been filed by the State in this regard, then whether this Court is helpless or can remand the matter for writing a judgment in respect of charge under Section 302/149 of IPC which was framed for murder of Darshan Singh as well as in respect of charge under Section 307/149 of IPC which was framed for making an attempt to kill Ajab Singh (P.W.2).

24. Although no appeal has been filed by the State, but this Court is not reversing the judgment passed by the Trial Court. It is merely found that the judgment passed by the Trial Court is incomplete. Section 386 of Cr.P.C. deals with the powers of Appellate Court, which reads as under :

386. Powers of the Appellate Court.— After perusing

such record and hearing the Appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction—

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence—

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

25. In the present scenario, this Court cannot issue notice to the Appellant for enhancement of sentence as no sentence has been awarded by the Trial Court on above mentioned two charges.

Further, this Court cannot remand the matter for re-trial, as no procedural lapse has been committed by the Trial Court, but only an incomplete judgment has been passed.

26. Section 482 of Cr.P.C. reads as under :

482. Saving of inherent powers of High Court.—

Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

27. The appeal is continuation of Trial. An appeal thus is a rehearing of the main matter and the appellate court can reappraise, reappreciate and review the entire evidence—oral as well as documentary—and can come to its own conclusion. Therefore, this Court is of the considered opinion, that even in absence of any appeal by State, this Court in exercise of powers under Section 482 of Cr.P.C., can remand the matter for writing the judgment in respect of charge under Section 302/149 of IPC for murder of Darshan Singh and under Section 307/149 for making an attempt on the life of Ajab Singh (P.W.2) also, which was erroneously left by the Trial Court.

28. Accordingly, the case is remanded back to the Trial Court with the following directions :

- (a) The Trial Court shall pass a judgment in respect of charge under Section 302/149 of IPC for murder of Darshan Singh;
- (b) The findings given by the Trial Court in respect of charge under Section 302/149 of IPC for murder of Pahalwan Singh shall not be

touched;

(c) The Trial Court shall pass a judgment in respect of charge under Section 307/149 of IPC for attempt to kill Ajab Singh (P.W.2);

(d) The findings given by the Trial Court in respect of charge under Section 307/149 of IPC for attempt to kill Bhanupratap Singh (P.W.1) shall not be touched.

(e) The Principal District and Sessions Judge, Bhind is directed to assign the file to some other Additional Sessions Judge and not to the judge who has passed the impugned incomplete judgment.

29. Let the whole exercise be completed within a period of 3 months from the date of receipt of record of this Case.

30. *Ex-consequenti*, the judgment and sentence dated 9-7-2021 passed by 1st Additional Sessions Judge, Gohad, Distt. Bhind in S.T. No.118/2007 is hereby **set aside**, and the case is remanded back for limited purposes in the light of directions given in para 28 of the judgment.

31. The Appellant is in jail. He shall continue to remain in jail.

32. Let a copy of this judgment be provided to the Appellant immediately, free of cost.

33. The Registry is directed to immediately sent back the record for necessary information and compliance.

34. The Criminal Appeal is **disposed of** accordingly.

35. The District Judge (Inspection), Gwalior is directed to conduct an enquiry into the matter, and if it is found that the Presiding Judge

was negligent in discharge of his duties, or has passed the incomplete judgment because of some extraneous considerations, then the matter be placed before Hon'ble the Chief Justice for action on administrative side.

36. Let the enquiry be completed within 2 months from today. The office is directed to immediately send a copy of this judgment along with copy of judgment dated 9-7-2021 passed by 1st A.S.J., Gohad, Distt. Bhind to the District Judge (Inspection), Gwalior for necessary action.

**(G.S. Ahluwalia)
Judge**

**(Deepak Kumar Agarwal)
Judge**