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January, 23.

KRISHNA GOVIND PATIL

v.

STATE OF MAHARASHTRA

(S. J. IMAM, K. SUBBA RAO, RAGHUBAR DAYAL, and J. R. MUDHOLKAR, JJ.)

Criminal Law—Four persons charged with substantive offence read with s. 34—Three acquitted—Conviction of one under substantive offence read with s. 34—Propriety of—Different situations considered—Indian Penal Code, 1860 (45 of 1860), ss. 34, 302.

The four accused persons stood their trial before the Additional Sessions Judge for the murder of one Vishwanath. The charge against them was that they in view of their common grudge against the deceased, combined together and did away with the deceased. They were charged under s. 302 read with s. 34 of the Indian Penal Code and were also separately charged under s. 302 of the Penal Code. All pleaded not guilty to the charge and accused 1, 3 and 4 pleaded *alibi*, while accused 2 raised a plea of private defence. The learned Additional Sessions Judge acquitted all the accused on the ground that the prosecution witnesses were not speaking the truth and the version given by accused 2 was the probable one. The State preferred an appeal to the High Court against the order of acquittal under s. 302, read with s. 34, but not against the acquittal under s. 302 of the Penal Code. The High Court acquitted accused 1, 3 and 4 on the ground that it was doubtful whether any one of them participated in the commission of the offence and convicted accused 2 on the ground that one or more of them might have participated in the offence. Accused 2, the appellant, therefore, filed this appeal and contended that when three of the four named accused, who were charged under s. 302, read with s. 34, were acquitted, the court could not convict only one of the accused on the basis of constructive liability.

Held, that before a court could convict a person under s. 302, read with s. 34, it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence.

Held, further, that when accused were acquitted either on the ground that the evidence was not acceptable or by giving

benefit of doubt to them, the result in law would be the same : it would mean that they did not take part in the offence. The effect of the acquittal of accused 1, 3 and 4 is that they did not conjointly act with accused 2 in committing the murder. If they did not act conjointly with the appellant, he could not have acted conjointly with them. The judgment of the High Court does not indicate that persons other than the said accused participated in the offence, nor is there any evidence in that regard, therefore, the conviction of the appellant must be set aside.

Mohan Singh v. *State of Punjab*, [1962] Supp. 3 S. C. R. 848, held inapplicable.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 201 of 1962.

Appeal by special leave from the Judgment and order dated February 20, 1962, of the Bombay High Court in Criminal Appeal No. 1405 of 1961.

C. L. Sareen, for the appellant.

H. R. Khanna and *R. H. Dhebar*, for the respondent.

1963. January 23. The Judgment of the Court was delivered by

Subba Rao, J.

SUBBA RAO, J.—This appeal by special leave is directed against the judgment of a division Bench of the Bombay High Court setting aside the order of acquittal made by the Additional Sessions Judge, Kolaba, and convicting the appellant under s. 302, read with s. 34, of the Indian Penal Code and sentencing him to imprisonment for life.

The case of the prosecution may be briefly stated. In the year 1959, two persons by name Ramachandra Budhya and Govind Dhaya were murdered by some people. In all 11 accused, including one Deoram Maruti Patil, were brought to

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trial; and out of them 8 accused, including the said Deoram Maruti Patil, were acquitted. During that trial Deoram Maruti Patil's uncle, by name Vishwanath, actively helped Deoram Maruti Patil in the conduct of his defence. Accused 1 and 2 in the present case are the sons of Govind Dhaya and accused 3 and 4 are the nephews of Ramachandra Budhya. They bore a grudge against Vishwanath for helping Deoram Maruti Patil and bringing about his acquittal. On August 19, 1960, Vishwanath and one Mahadeo Pandu Patil left their village at about 8.30 p.m. in order to go to Pezari en route to Alibag. When they were walking along a bund, accused 1 to 4 came from behind, armed with long sticks and the stick carried by accused 1 had a blade attached to it. They belaboured the deceased resulting in his death.

The four accused had to stand their trial for the murder of Vishwanath before the Court of the Additional Sessions Judge, Kolaba. The charge against them was that they, in view of their common grudge against the deceased, combined together and did away with the deceased. The said four persons were charged under s. 302, read with s. 34, of the Indian Penal Code for committing the murder of the deceased in furtherance of their common intention. All of them were also charged separately for the substantive offence under s. 302 of the Indian Penal Code. All the accused pleaded not guilty to the charge. While accused 1, 3 and 4 pleaded alibi, accused 2 raised a plea of private defence. The prosecution examined eye-witnesses, who deposed that the four accused overtook the deceased when he was going to village Pezari and felled him down by giving him lathi blows. None of the witnesses spoke to the presence of any other person, named or unnamed, who took part in the assault of the deceased. The learned Additional Sessions Judge found that the prosecution witnesses were not speaking

the truth and that the version given by accused 2 was the probable one. In the result he acquitted all the accused. The State preferred an appeal to the High Court against the said order of acquittal under s. 302, read with s. 34, of the Indian Penal Code ; but no appeal was preferred against the order of acquittal under s. 302 of the Indian Penal Code. The judgment of the High Court discloses that the learned Judges were inclined to believe the evidence of the witnesses, other than Kashinath and Shridar. But they dismissed the appeal against accused 1, 3 and 4 on the ground that the appeal was against an order of acquittal. But in regard to accused 2, they held that he was one of the participants in the assault and there was no basis for his plea of private defence. Having come to that conclusion, the learned Judges convicted accused 2 under s. 302, read with s. 34, of the Indian Penal Code. As regards the persons who participated in the assault along with accused 2, it would be appropriate to quote the words of the High Court itself :

> "Some of the other accused were undoubtedly concerned with the incident along with accused No. 2. Since it is possible that the story as given by the prosecution witnesses, and particularly by Mahadeo, was exaggerated, it is not safe to hold that each one of the other accused was also a participant in the offence. In view of the possibility that one or more of the other accused, i.e., accused Nos. 1, 3 and 4, might not have participated in the offence, we do not propose to interfere with the acquittal of these accused. But we are satisfied that accused No. 2 along with one or more of the other accused committed this offence and that accused No. 2 was, therefore, clearly guilty under section 302 read with section 34 I. P. Code".

To put it in other words, they, acquitted accused 1, 3 and 4 on the ground that it was doubtful whether

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any one of them participated in the commission of the offence and convicted accused 2 on the ground that one or more of them might have participated in the offence. Accused 2 has filed the present appeal against the judgment of the High Court.

The argument of learned counsel for the appellant may be put thus: The learned Additional Sessions Judge acquitted the accused under s. 302 of the Indian Penal Code and also under s. 302, read with s. 34, of the said Code. The appeal in the High Court was confined only to the acquittal of the accused under s. 302, read with s. 34, of the Indian Penal Code. The charge as well as the evidence was only directed against the four named accused as the participants in the common intention to commit the murder of the deceased. The High Court having acquitted accused 1, 3 and 4, inconsistently convicted accused 2 for having committed the murder of the deceased jointly with the three accused who had been acquitted. To put it differently, the argument is that when three of the four named accused, who were charged under s. 302, read with s. 34, of the Indian Penal Code, were acquitted, the court could not convict only one of the accused on the basis of constructive liability.

Learned counsel for the respondent counters this argument by stating that though the charge as well as the evidence was directed against the 4 named accused, a court could come to the conclusion that 3 of the 4 named accused are not identified but more than one had taken part in the commission of the offence and that in the present case on a fair reading of the entire judgment we should hold that the High Court found that though accused 1, 3 and 4 were not identified, 3 unidentified persons must have taken part in the murder. Section 34 of the Indian Penal Code reads:

> "When a criminal act is done by several persons, in furtherance of the common intention

of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

It is well settled that common intention within the meaning of the section implied a pre-arranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a court can convict a person under s. 302, read with s. 34, of the Indian Penal Code, it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence. A few illustrations will bring out the impact of s. 34 on different situations.

(1) A, B, C and D are charged under s. 302, read with s. 34, of the Indian Penal Code, for committing the murder of E. The evidence is directed to establish that the said four persons have taken part in the murder.

(2) A, B, C and D and unnamed others are charged under the said sections. But evidence is adduced to prove that the said persons, along with others, named or unnamed, participated jointly in the commission of that offence.

(3) A, B, C and D are charged under the said sections. But the evidence is directed to prove that A, B, C and D, along with 3 others, have jointly committed the offence.

As regards the third illustration, a Court is certainly entitled to come to the conclusion that one of the named accused is guilty of murder under s. 302, read with s. 34, of the Indian Penal Code, though the

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other three named accused are acquitted, if it accepts the evidence that the said accused acted in concert along with persons, named or unnamed, other than those acquitted, in the commission of the offence. In the second illustration, the Court can come to the same conclusion and convict one of the named accused if it is satisfied that no prejudice has been caused to the accused by the defect in the charge. But in the first illustration the Court certainly can convict two or more of the named accused if it accepts the evidence that they acted conjointly in committing the offence. But what is the position if the Court acquits 3 of the 4 accused either because it rejects the prosecution evidence or because it gives the benefit of doubt to the said accused ? Can it hold, in the absence of a charge as well as evidence, that though the three accused are acquitted, some other unidentified persons acted conjointly along with one of the named persons ? If the Court could do so, it would be making out a new case for the prosecution : it would be deciding contrary to the evidence adduced in the case. A Court cannot obviously make out a case for the prosecution which is not disclosed either in the charge or in regard to which there is no basis in the evidence. There must be some foundation in the evidence that persons other than those named have taken part in the commission of the offence and if there is such a basis the case will be covered by the third illustration.

In support of the contention that a Court, even in the first illustration, can acquit 3 of the 4 accused named in the charge on the ground that their identity has not been established, and convict one of them on the ground that more than one took part in the commission of the offence, reliance is placed upon the decision of this Court in *Mohan Singh* v. *State of Punjab* (1). There, the appellants, along with three others, were charged with having committed offence under s. 302, read with s. 149, as well as s. 323, read

(1) [1962] Supp. 3 S.C.R. 848. 858.

with s. 149, of the Indian Penal Code. The Sessions Judge acquitted two of them, with the result 3 of them were convicted. One of the accused was convicted under s. 302 and s. 147 and two of the accused were convicted under s. 302, read with s. 149 and s. 147, of the Indian Penal Code. The High Court confirmed their convictions. On appeal by special leave to this Court, two of the accused convicted under s. 302, read with ss. 149 and 147, of the Indian Penal Code, contended, *inter alia*, that as two of the five accused were acquitted, their conviction under s. 302, read with ss. 149 and 147, was bad in law. This Court held on the evidence that the said two accused had done the act pursuant to a pre-arranged plan and therefore they could be convicted under s. 302, read with s. 34, of the Indian Penal Code. But in the course of the judgment different situations that might arise in the context of the question now raised were noticed. Adverting to one of the situations similar to that now before us, this Court observed :

> "Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried, then s. 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily

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displace the charge under section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under section 149 because on the evidence the court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the court from reaching such a conclusion."

It will be seen from the said observations that this Court was visualizing a case where there was evidence on the record from which the court can come to such a conclusion. It may be that the charge discloses only named persons; it may also be that the prosecution witnesses named only the said accused; but there may be other evidence, such as that given by the court-witnesses, defence witnesses or circumstantial pieces of evidence, which may disclose the existence of named or unnamed persons, other than those charged or deposed to by the prosecution witnesses, and the court, on the basis of the said evidence, may come to the conclusion that others, named or unnamed, acted conjointly along with one of the accused charged. But such a conclusion is really based on evidence. The observations of this Court really apply to a case covered by the third illustration given by us.

But the present case falls outside the said three illustrations. The High Court gave conflicting findings. While it 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. That is a legally impossible position. When accused were acquitted either on the ground that the evidence was not acceptable or by giving benefit of doubt to them, the result in law would be the same : it would mean that they did not take part in the offence. The effect of the acquittal of accused 1, 3 and 4 is that they did not conjointly act with accused 2 in committing the murder. If they did not act conjointly with accused 2, accused 2 could not have acted conjointly with them. Realizing this mutually destructive findings of the High Court, learned counsel for the State attempted to sustain the findings of the High Court by persuading us to hold that if the said finding was read in the context of the whole judgment, it would be clear that the learned Judges meant to hold that persons other than the acquitted accused conjointly acted with the convicted accused. We have gone through the entire judgement carefully with the learned counsel. But the observations of the learned Judges as regards the "other participants" in the crime must in the context refer only to the "one or other of the said three acquitted accused participated in the offence committed by accused 2." There is not a single observation in the judgment to indicate that persons other than the said accused participated in the offence, nor is there any evidence in that regard. We, therefore, hold that the judgment of the High Court cannot stand. We are satisfied that on the findings arrived at by the High Court, the conviction of accused 2 is clearly wrong.

In the result, we allow the appeal, set aside the conviction of the appellant and direct him to be set at liberty.

Appeal allowed.