

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

SPECIAL LEAVE PETITION (CRL.)NO. 191 of 2014

Pal Singh & Anr.

...Appellants

Versus

State of Punjab

...Respondent

ORDER

Dr. B.S. CHAUHAN, J.

1. This special leave petition has been filed against the judgment and order dated 4.7.2013 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. D-14-DB of 2005, maintaining the conviction and sentence of life imprisonment of the petitioners under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as the 'IPC').
2. Facts and circumstances giving rise to this petition are that:

A. As per the case of the prosecution, an FIR No. 69 dated 14.4.2002 was lodged at 1.00 a.m. alleging that five accused persons including the present two petitioners committed the murder of Sarabjit Singh @ Kala. Thus, on the basis of the complaint the case was registered under Sections 148, 302/149 IPC in P.S. Sadar, Phagwara, District Kapurthala.

B. In view thereof, the investigation ensued and after completion of the investigation, a charge sheet was filed against the five accused persons including the present two petitioners under Sections 148, 302/149 and 120-B IPC. The trial was concluded and the learned Sessions Court convicted all the five accused persons including these two petitioners vide judgment and order dated 16.11.2004 for the aforesaid offences and awarded different sentences including life imprisonment under Section 302 IPC.

C. Aggrieved, all the five accused persons preferred Criminal Appeals before the High Court. Accused Pal Singh @ Amarjit Singh, appellant in Criminal Appeal No. D-14-DB of 2005 died during the pendency of the appeals. Thus, his appeal stood abated. Accused Sarabjit Singh and Gurdev Singh @ Manga had been acquitted of the charges under Sections 148 and 302 r/w 149 IPC and the appeal of the

present petitioners had been dismissed, and therefore their conviction under Section 302 IPC and the sentences awarded by the trial court remained intact.

Hence, this petition.

3. Shri Pramod Swarup, learned senior counsel appearing for the petitioners has vehemently submitted that as one of the accused has died and two have been acquitted by the trial court, the present petitioners had been convicted under Section 302 IPC simpliciter for which no charge had ever been framed. Therefore, the conviction of the petitioners deserves to be set aside. He has also taken us through the judgments of the trial court as well as of the High Court and the relevant evidence to show that none of the petitioners could be held exclusively responsible for the murder of Sarabjit Singh @ Kala. Thus, the petition deserves to be allowed.

4. Both the courts below had considered the evidence on record and the relevant issue for us remains to consider the consequences of not framing the charge properly and none else.

Initially, the charges had been framed by the trial court under Sections 302 r/w 34 IPC and Section 120-B IPC against all the

accused persons. Fresh charges were subsequently framed under Sections 148, 302, 302/149 and 120-B IPC. Therefore, the ultimate situation remained that there was charge under Sections 302, 302/149 and 120-B IPC. The trial court has convicted the present two petitioners and sentenced them to undergo imprisonment for life and to pay a fine of Rs.2,000/- each. In default of payment of fine to undergo further RI for one month each for the offence punishable under Section 302 IPC. These petitioners also stood convicted and sentenced to undergo RI for a period of two years each and fine of Rs.1000/- each and in default of payment of fine, to undergo further RI for a period of one month each for the offence punishable under Section 148 IPC. However, they have been acquitted of the charge under Section 120-B IPC. The High Court has affirmed the conviction and sentence of the present petitioners under Section 302 IPC, but set aside the conviction under Section 148 IPC. The ultimate result remains that the present two petitioners had been convicted under Section 302 IPC.

5. Whether it is legally permissible in the facts and circumstances of the case to convict these two petitioners under Section 302 IPC simpliciter without altering the charges by the High Court?

In order to decide the limited issue it may be necessary for us to go into some detail to the factual matrix of the case.

6. The post-mortem report revealed the following injuries on the person of the deceased:

1) Diffuse swelling 4 cm x 5 cm on the left temporo parietal region. Clotted blood was present in both the nostrils. Underlying skull bones were fractured, laceration of the brain matter was present. Cranial cavity was full of blood.

2) Diffuse swelling 6 cm x 6 cm on the top of head. Skull bones were fractured. Laceration of brain matter was present. Cranial cavity was full of blood.

3) Diffuse swelling 6 cm x 5 cm on the right side of the fore-head. Underlying skull bones were fractured. The cranial cavity was full of blood.

4) Right eye was black. Underlying bone was normal.

7. It is also on record that these two petitioners were having the iron rods while the other three accused named in the FIR were empty handed. The evidence on record had been that Pal Singh, petitioner no.1 raised an exhortation that Sarabjit Singh @ Kala be caught hold

and should not escape alive and gave two iron rod blows on his head. Manjinder Singh, petitioner no.2 gave two iron rod blows on the person of Sarabjit Singh, out of which one hit his forehead and other his right cheek. On hearing hue and cry, a large number of people gathered on the place of occurrence and all the five accused persons ran away. Version of the prosecution and the injuries found on the person of the deceased stood proved by the evidence of Gurdev Singh (PW.6) and Amandeep Singh (PW.11) as well as by the deposition of Dr. Daljit Singh Bains (PW.1), Senior Medical Officer, Civil Hospital, Phagwara. The ocular evidence of the eye-witnesses corroborates with the medical evidence. As there are concurrent findings in this regard we have not been invited to determine the said issue.

8. Shri Pramod Swarup, learned senior counsel has placed a heavy reliance on the judgment of this Court in **Nanak Chand v. State of Punjab**, AIR 1955 SC 274, wherein it has been held that Section 149 IPC creates a specific offence but Section 34 IPC does not, and they both are separate and distinguishable. Section 149 IPC creates an offence punishable, but it depends on the offence of which the offender is by that section made guilty. Therefore, for the appropriate punishment section must be read with it. Section 34 does not,

however, create any specific offence and there is a clear distinction between the provisions of Sections 34 and 149 IPC and the said two sections are not to be confused. The principal element in Section 34 IPC is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In that situation, Section 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone.

9. In **Suraj Pal v. State of Uttar Pradesh**, AIR 1955 SC 419, this Court examined a case where the charge had been framed against the accused under Sections 147, 307/149 and 302/149 IPC, and there had been no direct and individual charge against any of the accused for specific offence under Sections 307 and 302 IPC, though the accused had been convicted under Sections 307 and 302 IPC. The court had set aside their conviction as no specific charge had been framed against any of the accused for which they had been convicted.

10. As there were doubts about the conflict/correctness of these two judgments, the matter was decided by a Constitution Bench in

Willie (William) Slaney v. State of Madhya Pradesh, AIR 1956 SC

116, and the court came to the following conclusions:

“Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled-up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence; without a charge can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.

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This judgment should not be understood by the subordinate courts as sanctioning a deliberate disobedience to the mandatory requirements of the Code, or as giving any license to proceed with trials without an appropriate charge. The omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for granted.

In the main, the provisions of section 535 would apply to cases of inadvertence to frame a charge induced by the belief that the matter on record is sufficient to warrant the conviction for a particular offence without express specification, and where the facts proved by the prosecution constitute a separate and distinct offence but

closely relevant to and springing out of the same set of facts connected with the one charged.”

11. In **Dhari & Ors. v. State of Uttar Pradesh**, AIR 2013 SC 308, this Court re-considered the issue whether the appellants therein could be convicted under Sections 302 r/w 149 IPC, in the event that the High Court had convicted three persons among the accused and the number of convicts has thus remained less than 5 which is in fact necessary to form an unlawful assembly as described under Section 141 IPC. This Court considered the earlier judgments in **Amar Singh v. State of Punjab**, AIR 1987 SC 826; **Nagamalleswara Rao (K) v. State of A.P.**, AIR 1991 SC 1075, **Nethala Pothuraju v. State of A.P.**, AIR 1991 SC 2214; and **Mohd. Ankoos v. Pubic Prosecutor**, AIR 2010 SC 566, and came to the conclusion that in a case where the prosecution fails to prove that the number of members of an unlawful assembly are 5 or more, the court can simply convict the guilty person

with the aid of Section 34 IPC, provided that there is adequate evidence on record to show that such accused shared a common intention to commit the crime in question. (See also: **Jivan Lal v. State of M.P.**,(1997) 9 SCC 119; **Hamlet v. State of Kerala**, AIR

2003 SC 3682; **Fakhruddin v. State of M.P.**, AIR 1967 SC 1326; **Gurpreet Singh v. State of Punjab**, AIR 2006 SC 191; and **S. Ganesan v. Rama Raghuraman & Ors.**, AIR 2013 SC 840).

12. In **Sanichar Sahni v. State of Bihar**, AIR 2010 SC 3786, this Court considered the issue and held:

“Therefore, ... unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory.”

13. In **Darbara Singh v. State of Punjab**, AIR 2013 SC 840, this Court considered the similar issue and came to the conclusion that the accused has to satisfy the court that if there is any defect in framing the charge it has prejudiced the cause of the accused resulting in failure of justice. It is only in that eventuality the court may interfere.

The Court elaborated the law as under:

“The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465 CrPC, which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing

the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

*“Failure of justice” is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be “failure of justice”; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be overemphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. “Prejudice” is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under criminal jurisprudence, then the accused can seek benefit under the orders of the court. (Vide: **Rafiq Ahmed @ Rafi v. State of U.P.**, AIR 2011 SC 3114; **Rattiram v. State of M.P.**, AIR 2012 SC 1485; and **Bhimanna v. State of Karnataka**, AIR 2012 SC 3026)”.*

14. In view of the above, we do not find any force in the submissions advanced on behalf of the petitioners on this count.

15. Shri Pramod Swarup has also placed reliance on the judgment of this Court in **Dhaneswar Mahakud & Ors. v. State of Orissa**, AIR 2006 SC 1727, wherein though the charge had been framed, this Court held that even if the accused has not been charged with the aid of Section 34 IPC and instead charged with the aid of Section 149 IPC, he can be convicted with the aid of Section 34 IPC when evidence shows that there was common intention to commit the crime and no prejudice or injustice has been caused to the accused therein. Even the conviction of the accused under Section 302 IPC simpliciter is permissible if the court reaches the conclusion on the basis of material placed before it that injuries caused by the accused were sufficient in the ordinary course of nature to cause death and nature of the injuries was homicidal.

16. If the test laid down in this case is applied to the facts of the instant case both the petitioners can be convicted under Section 302 IPC simpliciter as both of them could be convicted under Section 302/34 IPC as both of them came fully armed with iron rods and both of them gave two blows each on the vital part of the body i.e. head and forehead which proved fatal for the deceased. More so, no question had been put to Dr. Daljit Singh Bains (PW.1) as to whether

the injuries caused by each of the petitioners was sufficient to cause death independently. It is not a fit case where this court should examine the issue any further or grant any indulgence.

The special leave petition is dismissed accordingly.

.....J.
(Dr. B.S. CHAUHAN)

.....J.
(A.K. SIKRI)

New Delhi,
February 25, 2014



JUDGMENT

SUPREME COURT OF INDIA



JUDGMENT