

SUPREME COURT OF INDIA**Bench: Justices Abhay S. Oka and Ujjal Bhuyan****Date of Decision: 7th February 2024**

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1465 OF 2011

KISHORE & ORS. ...APPELLANTS**VERSUS****STATE OF PUNJAB ...RESPONDENT****Legislation:**

Sections 148, 149, 302, 323, 326, 460 of the Indian Penal Code, 1860

Subject: Criminal appeal in a case involving charges of rioting, house-breaking by night causing death, and murder – Key focus on the reliability of eyewitness testimony and the legality of convictions based on such testimony in the absence of a Test Identification Parade (TIP).

Headnotes:

Accused Conviction and Sentencing – Kishore, Bala, and Banaras (appellants) convicted for offences under Sections 148, 460, and 302 read with Section 149 of IPC – Sentences ranged from two years to life imprisonment - Acquittal of two co-accused by High Court upheld, casting doubt on formation of unlawful assembly [Paras 1-2, 7, 15].

Eyewitness Testimonies – PW-8 and PW-9's identification of appellants in court, not preceded by Test Identification Parade – Reliability of their testimony questioned due to vague descriptions and failure to identify assailants clearly [Paras 4, 10-12].

Non-examination of Key Witnesses – Non-examination of Lovepreet Kaur, Amritpal Kaur, and Satbir Singh (injured witness) – Their testimonies were crucial for establishing the involvement of appellants in the crime [Para 12].

Injuries and Liability – Accused no.3 (Bala) and accused no.5 (Banaras) linked to non-fatal assaults – Accused no.2 (Kishore) associated with more serious assault, but insufficient evidence for murder charges [Para 13].

Recovery of Stolen Ornaments – Doubts raised about the identification of recovered ornaments by PW-9, and failure to examine goldsmith or person who arranged other ornaments for identification - This weakens the prosecution's case on recovery of stolen items [Para 14].

Conviction under Section 460 IPC – Lack of specific roles attributed to accused by key witnesses, and absence of unlawful assembly, makes Section 149 IPC inapplicable – High Court did not alter the charge to apply Section 34 IPC [Para 15].

Decision – Appeal allowed – Convictions of Kishore, Bala, and Banaras set aside due to insufficient and unreliable evidence - Appellants acquitted of all charges [Para 16].

Referred Cases:

- Raju Manjhi v. State of Bihar¹ (2019) 12 SCC 784

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. The appellants are the accused nos.2, 3 and 5 – Kishore, Bala, and Banaras respectively. Five accused faced trial for the offences punishable under Section 148 of the Indian Penal Code, 1860 (for short, ‘the IPC’), Section 460 read with Section 149 of the IPC and Section 302 read with Section 149 of the IPC. All the five accused were convicted. For the offences punishable under Section 148 of the IPC, they were sentenced to undergo imprisonment for two years. For the second offence punishable under Section 460, read with Section 149 of the IPC, they were sentenced to undergo rigorous imprisonment for ten years. For the offence punishable under Section 302 read with Section 149 of the IPC, they were sentenced to undergo life imprisonment.

2. The accused preferred an appeal before the High Court of Punjab and Haryana at Chandigarh. By the impugned judgment dated 27th April 2010, the High Court acquitted the accused no.1–Raka and the accused no.4–Lakhan but confirmed the conviction of the present appellants.

3. According to the prosecution case, on the intervening night of 3rd and 4th July 2003, PW-8 (Khushbir Singh) was sleeping with his parents Pratap Singh and Gurpal Kaur, in their bedroom. Khushbir Singh is the complainant. His brother Satbir Singh and his wife Narinder Kaur (PW-9) were sleeping in another room. The two daughters of Satbir Singh and Narinder Kaur were sleeping in another room. PW-8 heard the cries of his nieces, and therefore, he was awakened from sleep. According to him, four to five persons who had entered his house assaulted PW-8, PW-9 and her husband–Satbir Singh. They broke the locks of the almirah in the house and took away

ornaments and cash. The accused assaulted Pratap Singh and Gurpal Kaur. Both of them were injured and succumbed to injuries in the hospital.

SUBMISSIONS

4. The learned counsel appearing for the appellants has taken us through the evidence of the material prosecution witnesses. The learned counsel submitted that though the two eye-witnesses, PW-8 (Khushbir Singh) and PW-9 (Narinder Kaur), did not know the accused, a test identification parade was not conducted. The witnesses purported to identify the accused in the Court for the first time one year after the incident. Moreover, both the witnesses have not stated that they had seen any of the accused assaulting the deceased – Pratap Singh and Gurpal Kaur. The learned counsel pointed out that the most crucial witnesses, Lovepreet Kaur and Amritpal Kaur, whose respective ages were 17 and 8 years, were not examined. The learned counsel pointed out that only after hearing the shouts of these two girls that PW-8 and PW-9 were awakened. Therefore, the prosecution needed to examine at least one of them. Secondly, Satbir Singh – the husband of PW-9 (Narinder Kaur), who was the injured witness, has not been examined. Inviting our attention to the evidence of PW-8 and PW-9, the learned counsel submitted that their evidence is entirely doubtful and cannot be believed at all.

5. The learned counsel invited our attention to the evidence of PW-7, who is a witness to the disclosure statements made by the accused and the consequent recovery. The ornaments were recovered based on the disclosure statements of all five accused. Though recovery was also made from Raka (accused no.1) and Lakhan (accused no.4), they have been acquitted by the High Court by the impugned judgment. She pointed out that PW-7 deposed that the seized ornaments were mixed with other ornaments for the purposes of identification. He stated that a goldsmith was called for the identification of ornaments. However, the goldsmith was not examined. Therefore, serious doubt is created about the prosecution case regarding the identification of the stolen ornaments by PW-9.

6. The learned counsel appearing for the respondent–State of Punjab, urged that both PW-8 and PW-9 had seen the accused for a sufficiently long time during the incident, and their examination had been recorded within one year from the date of the incident. Therefore, the test identification parade

was not necessary at all. He urged that the failure to hold the test identification parade was not fatal to the prosecution as the testimony of PW-8 and PW-9 was reliable. The learned counsel relied upon a decision of this Court in the case of **Raju Manjhi v. State of Bihar**¹. He submitted that the eyewitnesses have identified the present appellants and therefore, no interference is called for.

CONSIDERATION OF SUBMISSIONS

7. We find that as the appellants had undergone sentence for more than seven years, by the order dated 25th July 2011 of this Court, they have been enlarged on bail till the disposal of this appeal. We must note here that all the five accused were convicted for the offence punishable under Section 148 of the IPC, which is the offence of “rioting, armed with deadly weapon”. Section 146 of the IPC provides that whenever force or violence is used by unlawful assembly or by any member thereof in prosecution of the common object of such assembly, every member of the unlawful assembly is guilty of the offence of rioting. Therefore, the condition precedent for attracting Section 148 of the IPC is that there has to be an unlawful assembly. Under Section 141 of the IPC, the unlawful assembly must be of five or more persons. All five accused have been convicted for the offences punishable under Sections 460 and 302 with the aid of Section 149. Section 149 incorporates vicarious liability of all the members of an unlawful assembly for the acts done with a common object. In the present case, the High Court has acquitted two out of three accused of all charges. Therefore, we will have to proceed on the footing that there was no unlawful assembly within the meaning of Section 141 of the IPC. Thus, the conviction under Section 148 of the IPC cannot be sustained. Even the conviction for the offences under Sections 460 and 302 with the aid of Section 149 of the IPC cannot be upheld as there was no unlawful assembly. Perhaps the High Court could have altered the charge by applying Section 34 of the IPC, provided there was evidence on record. But that has not been done.
8. It is true that a test identification parade is not mandatory. The test identification parade is a part of the investigation. It is useful when the eyewitnesses do not know the accused before the incident. The test identification parade is usually conducted immediately after the arrest of the

¹ (2019) 12 SCC 784

accused. Perhaps, if the test identification parade is properly conducted and is proved, it gives credence of the identification of the accused by the concerned eyewitnesses before the Court.

The effect of the prosecution's failure to conduct a test identification parade will depend on the facts of each case.

- 9.** In this case, the evidence of both eyewitnesses was recorded within one year of the date of the incident. There is no significant time gap between the date of the incident and the identification by the witnesses before the Court. If the evidence of these two witnesses is reliable and inspires confidence, the conviction can be based on their testimonies.
- 10.** Therefore, we must analyse the testimonies of PW-8 and PW-9 to ascertain whether their version inspires confidence. PW-8 (Khushbir Singh) is the son of the deceased Pratap Singh and Guralp Kaur. He deposed that his two nieces, Lovepreet Kaur and Amritpal Kaur (daughters of PW-9 Narinder Kaur), were sleeping in a room next to the room where he, along with his deceased parents, were sleeping. PW-8 stated that around 3 to 4 a.m., he heard the cries of his nieces. Thereafter, he found that there were three to four persons in the house, who were in the age group of 32 to 35 years. He claimed that the lights in the house were on. He identified only three accused (the appellants). The witness claimed that he challenged one of them, who gave a blow by 'Sarva' on his right ear. He stated that the blow was given by accused no.3-Bala (appellant no.2). Thereafter, he vaguely stated that his parents challenged the accused, but they also caused injuries to them as well. Further, he stated that his brother – Satbir Singh and PW-9 also woke up, and both suffered injuries. However, the witness has not stated which accused and in what manner, the accused assaulted his parents (the deceased). There is only one vague statement that when the deceased challenged them, the accused caused injuries to them. Thereafter, he stated that they demanded keys to open the cupboard, and due to the threat administered by them, the keys were handed over to them. Later, the accused walked away with cash and ornaments. In the cross-examination, he reiterated that he was awakened after hearing the cries of his nieces. He also accepted that he had not seen the accused before the occurrence, and therefore, he could not tell the names of the accused.
- 11.** PW-9 (Narinder Kaur) stated that around 2 to 3 a.m., she heard the cries of her family members. At that time, the lights in her house were put on. She stated that two persons entered her room, and one of them inflicted injuries on her husband– Satbir Singh. She stated that she received injuries from accused no.2–Kishore (appellant no.1), and she became unconscious. After pointing out to accused no.5 – Banaras (appellant no.3), she stated that he caused injuries to her husband – Satbir Singh. But she has not stated anything about the weapon of assault used by them for assault. Then, she

described the ornaments which were taken by the accused. She deposed that on 22nd October 2003, she identified the ornaments in the police station in the presence of the witnesses. In the cross-examination, she was confronted with her statement recorded under Section 161 of Cr. PC. She accepted that in the statement, she had not stated that she could identify the accused. Her explanation was that no such question was put to her. She stated that she had not seen the accused before the occurrence of the incident. She stated that the ornaments produced in the Court could be procured from Sarafa Bazaar, and she had not given any specific mark of identity on the ornaments except stones.

- 12.** Thus, PW-9 has not even stated that she had seen any of the accused assaulting the deceased. As pointed out earlier, even the version of PW-8 is very vague about the accused assaulting the deceased. Another important aspect is that PW8 stated that he was awakened due to the cries of his nieces, Lovepreet Kaur and Amritpal Kaur. Though he accepted that Lovepreet Kaur was 16 to 17 years old, the prosecution has not examined Lovepreet Kaur. Similarly, Satbir Singh, husband of PW-9, who was the injured witness, has not been examined. The prosecution has not come out with any reason for not examining these two vital witnesses. It is very difficult to connect any accused with the injuries sustained by the deceased in the absence of any cogent evidence. Therefore, it is not possible to uphold the conviction for the offence punishable under Section 302 of the IPC.
- 13.** At the highest, from their evidence, it can be deduced that accused no.3– Bala caused injuries to PW-8, accused no.5– Banaras assaulted PW-9's husband and accused no.2 – Kishore assaulted PW-9. As far as Satbir Singh is concerned, PW-1 has deposed that injury no.1 (lacerated wound measuring 6cm×2cm on the posterior carpel of the left ear and to the pinna) was dangerous. However, he has not deposed about any fracture suffered by him. As far as PW-9 is concerned, she suffered a horizontal fracture of the temporal bone. As regards PW-8, PW-1 has not deposed that he suffered any fracture. He deposed about the wound on the right ear pinna and lacerated wound measuring 4cm×0.6 cm on the back of the base of the right ear. In the absence of the charge under Section 34 of the IPC, at the highest, accused Banaras and Bala could have been convicted of the offence punishable under Section 323 of the IPC and accused no.2–Kishore could have been held to be guilty of the offences punishable under Section 326 of

the IPC. However, all of them have undergone sentences of more than seven years, which is more than what can be imposed for these offences in the facts of this case.

Therefore, in any case, they will have to be let off.

- 14.** Now, we turn to the evidence of recovery of ornaments. Two of the five accused from whom the recovery was made, have been exonerated by the High Court. PW-7 (ASI Ajaib Singh) deposed that PW-9 identified the recovered ornaments from the other ornaments which were arranged through MHC. In the cross-examination, he stated that the other ornaments were arranged by a goldsmith and were mixed with the ornaments recovered at the instance of the accused. However, he stated that he was not aware of the fact how MHC had procured the said ornaments. The examination of the goldsmith or the person from whom the other ornaments were brought was necessary to prove that the ornaments were identical to the ones recovered at the instance of the accused. But that was not done. Therefore, even the identification of the ornaments by PW-9 becomes doubtful. The prosecution case regarding the recovery of the ornaments at the instance of the appellants also becomes doubtful.
- 15.** Moreover, as regards the offence punishable under Section 460 of the IPC, there was no specific role attributed to any of the accused by PW-8 and PW-9, and all of them have been convicted only with the aid of Section 149 of the IPC. It is established that there was no unlawful assembly as two out of five accused have been acquitted. The High Court could have altered the charge by applying Section 34 instead of Section 149 of the IPC, but that was not done. Now, twenty-one years after the incident, at this stage, we cannot modify or alter the charge, especially when all three appellants accused have undergone incarceration for more than seven years. Even if we do that, even otherwise, the prosecution has failed to prove the commission of the offence.
- 16.** Accordingly, the appeal must succeed. We set aside the impugned judgment and order dated 27th April 2010 of the High Court of Punjab and Haryana at Chandigarh rendered in the Criminal Appeal no.197-DB of 2009 and the impugned judgment and order passed in SC No.32/T dated 20th February 2004 by the Additional Sessions Judge, Patiala on 12th January 2009 insofar as the present appellants are concerned and acquit them of the charges

framed against them. As the appellants are presently on bail, their bail bonds stand cancelled.

17. The appeal is, accordingly, allowed.

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