

[2022] 2 S.C.R. 1

SURYAVIR

v.

STATE OF HARYANA

(Criminal Appeal No. 177 of 2022)

FEBRUARY 03, 2022

**[UDAY UMESH LALIT AND
PAMIDIGHANTAM SRI NARASIMHA, JJ.]**

Penal Code, 1860 – ss. 302, 34 and 120-B – Indian Arms Act, 1959 –s.25 – The present appellant-original accused no.1 along with two persons ('D' and 'P') were tried for having committed murder of PW-12's son – FIR was registered against the accused persons at the instance of PW-12 (father of deceased) – Recovery memo of weapon was prepared – Trial Court convicted accused no.1 and 'D' of offence punishable u/s. 302/34IPC and acquitted 'P' of all charges – On appeal against conviction High Court affirmed the view taken by trial Court – Accused 'D' preferred SLP challenging his conviction and sentence, which was rejected by the Supreme Court – Appellant-accused no.1 thereafter approached SupremeCourt against the judgment of High Court contending that the identity of the accused persons was not established – Held: PW-12 and PW-15 (mother of deceased) were not aware of the identity of the assailants – Their source of information was rumours, on basis of which an assertion about the identity of the appellant was made in FIR – Therefore, assertions in the FIR and examination-in-chief of witnesses are not trustworthy – PW-12 in his examination in chief asserted that his wife (PW-15) informed him that on the day previous to incident two accused persons came to their house asking about their son, while he was away – Whereas, PW-15 had not asserted in her examination-in-chief that two accused had come to her house on previous day hence, there was no occasion for her to have seen the appellant earlier – Furthermore, no Test Identification parade was conducted – Box identification for the first time in court is not reliable in itself to establish the identity of the assailants – Evidence of recovery is not in itself sufficient in absence of substantive evidence – Prosecution failed to establish its case beyond reasonable doubts – Appellant acquitted – Similar benefit of doubt extended to the accused 'D' and acquittal granted.

A **Allowing the appeal, the Court**

HELD: 1. It is quite clear that PW-12 and PW-15 were not aware of the identity of the assailants. Their source of information was rumours, on the basis of which an assertion about the identity of the appellant was made in the first information report. What was the source of information, was never disclosed at any juncture nor any witness was examined by the prosecution to establish that. In the absence of primary source who knew the identity and had witnessed the incident, such assertions in the first information report as well as the examination-in-chief of the witnesses would not be adequate and trustworthy. It was not even the case of PW-15 that two convicted accused had come to her house on the previous day. As a matter of fact, she did not even assert anything about the incident that occurred on the previous day. There was, thus, no occasion for her to have seen the convicted accused earlier. Furthermore, no test identification parade was conducted. Box identification by the witnesses for the first time in court, in the circumstances, could not by itself be relied upon to establish the identity of the assailants. [Para 17][9-E-H]

2. That leaves this with subsidiary evidence regarding recovery, which in the absence of substantive evidence, by itself would not be sufficient. In the circumstances, in our considered view, the prosecution failed to establish its case beyond reasonable doubt. The appellant would, therefore, be entitled to acquittal. The instant appeal is thus allowed acquitting him of the charges levelled against him. [Para 18][10-A-B]

3. In view of this Court, the cases of both the convicted accused *i.e.* ‘D’ and the present appellant stand on the same footing and if after having considered the matter, benefit is given to the present appellant, similar benefit ought to be extended to ‘D’. [Para 20][10-C-D]

Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra
(2003) 2 SCC 708; *Harbans Singh vs. State of U.P.*
(1982) 2 SCC 101 : [1982] 3 SCR 235 – relied on.

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Case Law Reference

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[2003] 2 SCC 708 relied on Para 21**[1982] 3 SCR 235 relied on Para 21**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 177 of 2022.

B

From the Judgment and Order dated 12.03.2014 of the High Court of Punjab and Haryana at Chandigarh in CRA No. D-1049-DB of 2009.

R. Basant, Sr. Adv., Sudarshan Rajan, Mahesh Kumar, Rohit Bhardwaj, Hitain Bajaj, Vishnu Pazhanganat, Ms. Swati Garg, Prabodh Shukla, Advs. for the Appellant.

C

S. Udaya Kumar Sagar, AAG, Dr. Monika Gusain, Adv. for the Respondent.

The Judgment of the Court was delivered by

UDAY UMESH LALIT, J.

D

1. Delay condoned. Leave granted.

2. This appeal challenges the judgment and order dated 12.03.2014 passed by the High Court¹ in CRA-D-No.1049-DB of 2009.

3. The present appellant (original accused No.1) and two persons named Devender alias Dhola and Pardeep were tried in Sessions Trial No.16 of 19.03.2009 in the Court of Sessions Judge, Jind for having caused the murder of one Rajinder alias Raju on 1.10.2008 at about 6.00 p.m and thereby committed offences punishable under Section 302/120-B of the Indian Penal Code, 1860² and Section 25 of the Indian Arms Act, 1959³.

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4. The crime came to be registered pursuant to FIR No.566 of 01.10.2008 lodged with City Police Station, Jind at the instance of one Om Prakash, later examined as PW-12 in the trial. The substantive part of the report was as under:

“Yesterday, on 30.09.2008, I had been to Delhi, as usual for bringing

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¹ The High Court of Punjab and Haryana at Chandigarh.

² ‘IPC’, for short.

³ ‘The Arms Act’, for short.

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A the goods. On my return to my house in the evening at about 5.30,
my wife Janki Devi told me that Kuldeep and Kamaljeet had sent
two youngsters at our home pretending to see the house, who
forcibly entered the house and asked about our son Raju, who
was not present at house at that time. They were sent out by my
wife. My wife can identify them on confrontation. Today, at about
B 6.00 p.m. I and my wife Janki Devi, were going to market for
purchasing some household goods. When, after coming out of the
house, we reached at the main road, on which the 'Gurudwara'
situates, my son Raju was seen coming from Bharat Cinema side.
A white car came alongwith him from his back side, occupied by
C three youngsters. The car was suddenly stopped by the side of
Raju and two boys alighted from it and, before my sight, one of
the boys fired from his pistol on Raju's neck. Raju fell down on
the ground right on receiving the shot and the duo fled away towards
the canal in that car. Later on, whose names were known to be
D Suryavir son of Balram, Brahman r/o Aggarwal Market, Jind,
Pardeep son of Balwan Jat r/o Bhiwani Road, Jind and Devender
@ Dhola son of Umed Singh, caste Jat of Sharma Nagar, Bhiwani
Road, Jind. I and my wife started taking care of my son Raju who
was smeared with blood and brought him to General Hospital,
Jind for treatment in a three-wheeler, who breathed his last in the
way itself. I suspect that Kamaljeet and Kuldeep sons of Meghraj
E Punjabi resident of Ved Nagar, Jind hatching a conspiracy, have
got my son Raju shot dead through Suryaveer, Pardeep and
Devener @ Dhola, due to the grudge of not vacating the house."

F 5. Post-mortem on the body of the deceased was conducted by
Dr. Ashwani Kumar, later examined as PW-2, who observed: -

G "3. Injuries – (A) A lacerated wound of size 1 centimeter x 0.9
cm x depth (/) on gape of neck placed 1 cm below posterior hairline
and 2 cm lateral to midline on left side. Margins are inverted and
tattooing present around the wound clotted blood was present
around the wound.

H (B) Lacerated wound of size 1.8 x1 cm x depth (?) was present
on neck 9 cm above to upper end of sternum and 1.5 cm lateral to
midline on left side Horizontal placed Margins averted Clotted
blood was present around the wound.

On dissection of injury No.A. subcutaneous tissue and muscles were lacerated on further dissection, there is laceration of left wall of trachea. Major blood vessel on left side were lacerate collected of blood was present in trachea and illegible. On further dissection injury No.A communicates with injury No. B. A

(C) A lacerated wound of size 1 x 1 cm depth (?) was present on anterior surface of left thigh 9 cm below anterior superior iliac spine margins are inverted and tattooing was present Clotted blood was present. B

On dissection of injury No.C there is laceration of subcutaneous soft and muscles on further dissection by going illegible and illegible there was of relieve girds (anterior margin) illegible left illegible and found embedded in the muscles between L4 & L5 vertebrae on left side. C

4. Scalp Skull, chest wall ribs and cartilages, abdominal wall mouth pharynx esophagus illegible bladder and organs of generations were healthy Brain Membranes pleura right and left lung, beast illegible have spleen kidneys stomach small and large intestine pale healthy, stomach contains 100 cc of semi digested food, small intestine contains chyme and gases, large intestine contains fecal matter and gases. Larynx and trachea as described. D

In my opinion cause of death in this case was due to shock and hemorrhage as a result of injuries describe by me. All injuries were antemortem in nature and sufficient to cause death in ordinary course of nature.” E

6. After completion of investigation, chargesheet was filed in which it was asserted that the assailants had come on motorcycles and after having fired at the deceased had fled away on the motorcycles. F

7. During the trial, the prosecution relied upon the testimony of PW-12 Om Parkash, father of the deceased and PW-15 Janki Devi, mother of the deceased. G

A. PW-12 in his examination-in-chief stated as under:-

“On 30.09.2008, I returned from Delhi in the evening and my wife informed that two young boys had come at in our house and they had entered our house forcibly. She further told me that our landlord sent them. She further told me H

- A that they had enquired about Rajinder *alias* Raju from her and she had sent them out saying that Rajinder *alias* Raju was not available in the house.
- B On the next day *i.e.* 1.10.2008 after I returned from Delhi, I alongwith my wife sent to the market to make some purchase of household articles. When we reached on the road of the market, we saw Rajinder *alias* Raju coming from the side of Bharat Cinema. In the meantime, 2-3 persons came from Bharat Cinema side and they fired at my son Rajinder *alias* Raju and after that we lost our senses.
- C Thereafter, I brought my son Rajinder *alias* Raju in an auto rickshaw to General Hospital, Jind. Again said when I was bringing him to the hospital, Rajinder *alias* Raju died on the way. There was rumour in the Mohala that Suryavir, Devender *alias* Dhola and Pardeep had fired at my son Rajinder *alias* Raju. Said Suryavir, Devender *alias* Dhola and Pardeep are today present in the Court facing trial in this case. I do not know why they killed my son Rajinder *alias* Raju. I lodged report with the police vide my statement Ex.PH. It bears my signatures. The police had called me and had told that Suryavir, Devender *alias* Dhola and Pardeep were the assailants. Again said, I was called by the police for identification of the accused and I had identified them as the killers of my son Rajinder *alias* Raju. Memos Exs.PS and PT bear my signatures. The police had come to my house at noon time and had taken me away saying that some secret information was received. The police had interrogated the accused, who had disclosed about the weapon of offence. The police had first taken me to Rohtak Road, Jind and thereafter the accused had got recovered the weapons from near an electric pole installed near the Forest Office. After removing some earth the accused had got recovered pistol and revolver, and cartridges, which were wrapped in a polythene bag. The police had brought the pistol and revolver after putting the same in black polythene bag and thereafter, I do not know what proceedings the police did. Recovery memo Ex.PU bears my signatures. The police obtained my signatures on sketches Ex.PV and PW when the pistol and revolver were got recovered. I do
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not know what proceedings the police on 24.10.2008 did.” A

In his cross-examination, the witness accepted:

“It is correct that I had stated to the police that three young boys had come in a white colour Maruti car and one out of them had fired at my son and thereafter the same went away in the same car. Volunteered- at that time, I was not in complete senses.” B

B. PW-15 Janki Devi in her examination-in-chief stated as under:-

“All the three accused, now present in the Court, have committed murder of my son named Raju on 1st October, i.e. about seven months back and now 8th months is running, at about 06:00 P.M. At that time, I alongwith my husband had come from our house for going to the market. After we had covered a short distance from our house towards the road, I saw that my son Raju was coming from the side of Bharat Cinema, Jind. When we reached the road. I saw that my son Raju was at a distance of 15 to 20 yards from us. All the three accused now present in the Court were standing near my son Raju and all the three accused were armed with pistols and they fired shots at my son Raju. After receipt of fire shots my son Raju fell down. Thereafter, we took our son Raju to General Hospital Jind, in a three-wheeler. Before reaching the hospital, my son died on the way. C D E

... ..

The accused present in the Court, after firing shots at my son Raju, had then escaped from the spot on the motorcycles towards the canal. From the hospital, I came back to my house. The police had visited the spot and lifted blood from there vide recovery memo Ex.PM. which was attested by me. I had pointed out the place of occurrence to the police.” F G

In her cross-examination, the witness stated:-

“I had mentioned before the police that the accused after firing shot had escaped on the motorcycles (confronted with statement Ex.DA wherein it is not so recorded).” H

A 8. The Trial Court by its judgment and order dated 15.10.2009 accepted the case of prosecution insofar as accused Suryavir and Devender were concerned, while benefit of doubt was given to the third accused Pardeep, who was acquitted of all the charges. The Trial Court convicted Suryavir and Devender of the offences punishable under Section 302 read with 34 IPC and sentenced them to undergo life sentence. For the offence under Section 25 of the Arms Act, they were awarded substantive sentence of one year and six months and to pay a fine in the sum of Rs.2000/-.

B 9. The convicted accused Suryavir and Devender preferred CRA-D-No. 1049-DB and 1087-DB of 2009 respectively in the High Court, which by its common judgment and order impugned herein affirmed the view taken by the Trial Court and dismissed both the appeals.

C 10. Accused Devender alias Dhola preferred S.L.P. (Crl.) No.9957 of 2016 challenging his conviction and sentence. Said Special Leave Petition was rejected by this Court at the admission stage on 05.12.2016 without any reasoned order.

D 11. S.L.P. (Crl.) Diary No(s). 19963 of 2020 was thereafter preferred by Suryavir *i.e.* the appellant with delay challenging the very same judgment rendered by the High Court.

E 12. At the stage of issuance notice, it was fairly accepted that the case of the co-accused was rejected by this Court but it was submitted that the matter called for interference by this Court.

13. Now the matter is taken up for final hearing.

F 14. We have heard Mr. R. Basant, learned Senior Advocate and Mr. Uday Kumar Sagar, learned Advocate for the State.

15. Mr. Basant learned Senior Advocate submits:-

G (a) Going by the contents of the First Information Report, PW-12 was unaware of the identity of the assailants and it was only on the basis of rumors that he came to know about the names of the assailants. The source of such information establishing the identity of the assailants was neither disclosed nor any evidence in that behalf was led by the prosecution.

H (b) PW-12 Om Prakash clearly asserted that the assailants had come in a white car which version was completely given a go-by when

the witnesses stepped into the box; and the prosecution now asserted that the assailants came on motorcycles and after having shot the deceased fled away on the motorcycles. A

(c) The incident of the previous day was not even adverted to by PW-15; Janki Devi. It was also not the case of the prosecution that those two persons who had come to the house of PWs 12 and 15 were the same persons who were now convicted. B

(d) Though the witnesses had never disclosed the identity of the assailants on the basis of their own knowledge, even, in order to check whether they had really seen the assailants, test identification parade ought to have been conducted. Such test identification parade would have afforded greater assurance to the Court about the identity of the assailants. C

(e) The alleged enmity with and suspicion against Kamaljeet and Kuldip was not even investigated into.

16. Mr. Uday Kumar Sagar, learned Advocate appearing for the State on the other hand submits that two courts had consistently taken the view which also found affirmation in dismissal of Special Leave Petition preferred by co-accused Devender and that there is no reason to take a different view in the matter. D

17. It is quite clear that PW-12 and PW-15 were not aware of the identity of the assailants. Their source of information was rumours, on the basis of which an assertion about the identity of the appellant was made in the first information report. What was the source of information, was never disclosed at any juncture nor any witness was examined by the prosecution to establish that. In the absence of primary source who knew the identity and had witnessed the incident, such assertions in the first information report as well as the examination-in-chief of the witnesses would not be adequate and trustworthy. It was not even the case of PW-15 that two convicted accused had come to her house on the previous day. As a matter of fact, she did not even assert anything about the incident that occurred on the previous day. There was, thus, no occasion for her to have seen the convicted accused earlier. Furthermore, no test identification parade was conducted. Box identification by the witnesses for the first time in court, in the circumstances, could not by itself be relied upon to establish the identity of the assailants. E
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A 18. That leaves us with subsidiary evidence regarding recovery, which in the absence of substantive evidence, by itself would not be sufficient. In the circumstances, in our considered view, the prosecution failed to establish its case beyond reasonable doubt. The appellant would, therefore, be entitled to acquittal. The instant appeal is thus allowed
B acquitting him of the charges levelled against him.

19. We must now consider the effect of dismissal of S.L.P. (Crl.) No.9957 of 2016 preferred by co-accused-Devender alias Dhola. The order dismissing the special leave petition did not give any reason for dismissal.

C 20. In our view, the cases of both the convicted accused *i.e.* Devender and the present appellant stand on the same footing and if after having considered the matter, benefit is given to the present appellant, similar benefit ought to be extended to Devender.

D 21. In similar circumstances, in *Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra*⁴, a Bench of two judges of this Court relied upon the earlier decision rendered by a Bench of three Judges of this Court in *Harbans Singh vs. State of U.P.*⁵ and extended the benefit to a co-accused whose special leave petition and review application were dismissed by this Court.

E The relevant discussion on the point was:

F “6. The above is not enough to dispose of this matter. As the second accused Jabbar was placed on the same situation as the appellant in this case (if not lesser), Article 21 of the Constitution would not permit us to deny the same benefit to the second accused, notwithstanding the fact that the SLP and the review application filed by him have been dismissed by this Court. We are supported on this aspect by a course adopted by a three Judge bench headed by chief justice Chandrachud in *Harbans Singh v. State of U.P.* In that case also, the co-accused were sentenced and the sentence had been confirmed
G by this Court earlier. But when a benefit was granted in another appeal to one of the other co-accused, the three Judge bench held that the same benefit shall be extended to the earlier co-

⁴ (2003) 2 SCC 708

H ⁵ (1982) 2 SCC 101

accused also albeit the dismissal of their appeals on an antecedent date. A

7. The following passage from the said decision can be profitably extracted below:

“19. In the circumstances hereinabove stated, I am of the opinion that it will be manifestly unjust to allow the death sentence imposed on the petitioner to be executed. The question that, however, troubles me is whether this Court retains any power and jurisdiction to entertain and pass any appropriate orders on the question of sentence imposed on the petitioner in view of the fact that not only his special leave petition and review petition have been dismissed by this Court but also the further fact that his petition for clemency has also been rejected by the President. B C

20. Very wide powers have been conferred on this Court for due and proper administration of justice. Apart from the jurisdiction and powers conferred on this Court under Articles 32 and 136 of the Constitution, I am of the opinion that this Court retains and must retain, an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done. This power must necessarily be sparingly used only in exceptional circumstances for furthering the ends of justice. Having regard to the facts and circumstances of this case, I am of the opinion that this is a fit case where this Court should entertain the present petition of Harbans Singh and this Court should interfere.” E F

8. After bestowing our anxious consideration on the fact situation in this case and also the spirit of Article 21 of the Constitution we hereby order that the conviction passed on the second accused Jabbar shall also stand altered to Section 304 Part I, and a sentence of rigorous imprisonment for ten years be awarded to him. This is done on a parity of reasoning and justice, otherwise glaring injustice would result for him in a case where his role was by no means more serious than that of the present appellant who was A 1 in the case.” G H

- A 22. In the premises, for furthering the ends of justice, we recall the order of dismissal passed by this Court in S.L.P. (Crl.) No.9957 of 2016 and said SLP is restored to the file. This course is adopted even in the absence of any such prayer or application on part of Devender. We proceed to grant leave in his matter and allowing his appeal, we extend similar benefit to said Devender. He is thus acquitted of all the charges levelled against him.
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23. The Registry is directed to send appropriate intimation with regard to the appeal arising out of SLP (Crl.) No.9957/2016 being allowed to the concerned Jail authorities so that benefit can be extended to said Devender.
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24. Both convicted accused shall be set at liberty unless their custody is required in connection with any other offence.

Ankit Gyan
(Assisted by Aarsh Choudhary, LCRA)

Appeal allowed.