



[Non- Reportable]

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1431 of 2013

DILIP SHAW @ SANATAN & ANR.APPELLANTS

VERSUS

THE STATE OF WEST BENGAL
AND ORS.RESPONDENTS

WITH
CRIMINAL APPEAL NO. 1430 OF 2013

J U D G M E N T

ANIRUDDHA BOSE, J.

Both these appeals are directed against a judgment of conviction delivered by a Division Bench of the High Court at Calcutta on 5th February, 2009 finding the appellants guilty of offences under Part-I of Section 304 read with Section 149 of the Indian Penal Code as also under Section 148 thereof. The

appellants in the Criminal Appeal No.1431 of 2013 are Dilip Shaw @ Sanatan and Uttam Shaw. In Criminal Appeal No. 1430/2013, there are three appellants, Paresh Shaw @ Parash, Gopal Prosad Sarkar @ Phatik and Mohd. Kayum Khan. Paresh and Gopal have been found guilty, in addition to the aforesaid provisions of the Code, under Section 9-B (2) of the Explosives Act, 1884. The Division Bench reversed the judgment of acquittal passed on 29th April, 1987 by the Additional Sessions Judge, First Court, Howrah in Sessions Trial Case No. XXI (4) of 1985. The appellants have been sentenced to undergo rigorous imprisonment for 10 years and pay fine of Rs. 5000/- each. In default of payment of fine, they have been directed to suffer further rigorous imprisonment for a period of one year in the judgment under appeal. The High Court did not award any sentence for offences other than part I of Section 304 read with Section 149 of the Code, considering award of said punishment as the rest were lesser offences. At the time the petitions for Special Leave to Appeal was instituted, one of the main grounds relied upon by the petitioners in support of the appeal was

that the copy of the judgment of the Division Bench was not available. But the copy of the judgment of the Division Bench has been annexed to the counter-affidavit filed by the State marked annexure "R-9." The appellants had also subsequently been supplied the certified copy of the judgment impugned. Because of this reason, applications were taken out by the appellants in both the appeals for raising additional grounds in support of the respective criminal appeals. In this judgment, we have considered these additional grounds. Arguments at length have been advanced before us on behalf of the appellants on the basis of the judgment under appeal.

2. The origin of the case lies in an incident that took place on 25th March, 1981, resulting in death of one Gurdev Singh and injuries to several members of his family. It has been recorded in the judgment of the Division Bench that there was past enmity between the family members of the deceased and his assailants. On behalf of the appellants, it was submitted that there was no basis for referring to

past enmity by the High Court. From the evidence of a prosecution witness Jagar Singh (P.W.8), we find that appellants Paresh and Gopal were witnesses in a case in which said Jagar was an accused. It has been stated by Jagar in his cross-examination that in the said case, allegation was that Jagar and his brother had assaulted Nageswar. This fact, in our view, could lead to the inference of there being past enmity between the respective families.

3. Prosecution version of the case is that in the morning, at about 7.30 A.M. on 25th March 1981, a boy had come to the residence of Sarban Singh (P.W. 6) and reported that someone had come to see him. Sarban then went out of his residence and met the visitor nearby. That visitor happens to be one Suresh Rampuria, who was also a prosecution witness (P.W.5). He was, however, declared hostile. Suresh had some business relationship with a member of the family of the deceased. While these two individuals were talking to each other, around 14/15 persons surrounded Sarban and started assaulting him. The location of the place of occurrence was

Belilious Road in Howrah. The residence of the family of the victims is on a lane adjacent to Belilious Road, though the street address of the victims' residence is 326/1, Belilious Road. The area where victims reside is known as "Vistipara". In the Trial Court's judgment, the distance of the victims' house has been recorded to be about 40-45 ft. from the main road (i.e. Belilious Road). On hearing Sarban's cries for help, his family members rushed to the location and rescued him. Sarban (P.W. 6) deposed that Hadis, one of the accused persons tried to assault him with a knife, but on intervention of his brother Jagar (P.W.8), he was saved as the P.W.8 snatched away the knife from Hadis. It also forms part of the complaint of the victims' family that Kayum had snatched away Sarban's wrist watch at that time. When Sarban was returning to his home with rest of the family members, a bomb was thrown from the rear side which landed in front of Bimla. Said Bimla is wife of Jagar (P.W.8) and has deposed as the P.W. No. 3 at the trial. A second bomb was also hurled at the group comprising of the family members of the deceased. That bomb exploded behind Gurdev

Singh and caused injuries to him at that point of time. He had fallen down. Four other family members of Gurdev were also injured. They were Bimla (P.W.3), Jaswinder (P.W.4), Sarban (P.W.6) and Jagar (P.W.8). On hearing the sound of explosion, one Sakaldeo Singh (P.W.13), a head constable who was at a nearby police outpost reached the place of occurrence with some other police personnel. He found remnants of the bomb on the ground as also drops of blood at the place of occurrence. From deposition of Niranjana Dey (P.W.22), who at the material time was a Sub-Inspector with Howrah Police Station, it transpires that communication was received by the police station from the said police outpost and he had rushed to the spot with police force. He reached there at about 8 A.M. He found six persons injured from bomb explosion. He arranged for their removal to Howrah General Hospital and recorded the statement of Piyara Singh (P.W.1). The First Information Report was registered on the basis of statement given by said Piyara Singh, a member of the same family. An ambulance was pressed into service by the police and the injured persons were

taken to Howrah General Hospital for treatment. Among those injured, Gurdev was referred to S.S.K.M. Hospital, Kolkata. Said Gurdev succumbed to his injuries on the next day i.e. on 26th March, 1981. Another police witness, Kashiswar Majumdar (P.W.14) in his deposition has broadly given the same version about the location, sound of explosion and the remnants of bombs (he described them as splinters).

4. Gurdev's statement made to the Medical Officer of Howrah General Hospital, Dr. Subrata Ghosh (PW-9) was one of the factors considered by the High Court leading to conviction of the appellants. The Division Bench treated the statement of Gurdev as dying declaration. In his deposition, the PW-9 stated that Gurdev had told him that he was assaulted by Nageswar Sharma that morning as a result of which he sustained the injuries. Apart from the five appellants, the statement of Piyara Singh (P.W.1), which formed the basis of the First Information Report, also named Nageswar Sharma, Bhutnath, Uttam, Bhagat and Hadis as the

persons and 5 or 6 other individuals as assailants of Sarban. Charging of two bombs has also been attributed to them in the said statement and as per that statement, the said explosion had caused injury to Piyara's brother and the said brother's wife as well as 5 or 6 other persons. All the accused persons were charged under Sections 148, 302/149 and 324/149 of the Code. In addition, Paresh, Gopal and Nageswar were charged under Section 9-B (2) of the Explosives Act, 1884. The prosecution had altogether examined 22 witnesses. Among them, PW-1, PW-2, PW-3, PW-4, PW-5, PW-6, PW-7 and PW-8 were examined as witnesses of fact. They deposed as eye witnesses. PW-10 Dr. Dipen Kumar Biswas was the autopsy surgeon. PW-5, Suresh Kumar Rampuria, who was talking to Sarban Singh at the time of occurrence of the incident was declared hostile. Suresh and Tirath Dev Singh (P.W.7) who also deposed as witnesses of fact were not family members of the victim. In his examination-in-chief, P.W.7 had narrated the facts which broadly corroborated the prosecution version. But the P.W.7 did not name any of the appellants as the assailants or perpetrators of the

crime. He, however, had identified Nageswar Sharma in Test Identification Parade and again identified him in course of his deposition as the person who hurled the bomb.

5. All the other witnesses of fact were related persons. They had, in their depositions narrated presence of the nine individuals at the place of occurrence. They have been arraigned as accused persons. One of them, Hadis was not traceable. Trial was conducted in respect of rest of the accused. The depositions of prosecution witnesses were more or less uniform so far as narrating the factual basis of the prosecution case is concerned. The prosecution version is that though three among the accused were seen with bombs, two bombs were hurled, first by Paresh, the first appellant in Criminal Appeal No. 1430 of 2013 and next by another accused, Nageswar Sharma. Nageswar has since passed away. It was the bomb hurled by Nageswar which caused injuries to Gurdev Singh, to which he succumbed after being referred to the S.S.K.M Hospital from the Howrah General Hospital. It was in Howrah General Hospital, he

had made statements to P.W. 9, Dr. Subrato Ghosh, which were treated as dying declaration. P.W.9 has deposed that he found Gurdev Singh in extremely shocked stage and prognosis was grave. Gurdev had made statement to him that he was assaulted by Nageswar Sharma in the morning “with the help of bomb”. It transpires from his deposition that the statement of Gurdev as recorded by him was not in the language in which the victim had made the statement. This factor, however, by itself does not lower the quality of evidence of P.W.9. He is a neutral person and, in his deposition, he has stuck to the statement as recorded by him. The same witness described the injuries as one which might have had happened from the explosion of a bomb. The autopsy surgeon, P.W. 10 in his examination-in-chief stated that the death of Gurdev was due to the homicidal injuries referred to by him. These injuries were ante-mortem in nature and all the injuries were the results of bomb explosion. P.W.9 has confirmed treating other injured persons, being Jasbindar Singh (P.W.4), Bimla Devi (P.W.3), Sarban Singh (P.W.6) and Jagar Singh (P.W.8).

6. The Trial Court acquitted all the accused persons on the basis of certain discrepancies in the eye-witness accounts of the incident. The Trial Court did not find evidence of P.W.9 on the aspect of recording dying declaration to be reliable enough warranting conviction on that basis. We have already expressed our opinion on this aspect of the controversy. The judgment referred to the boy who had come to the house of the victim to call Sarban. The fact that he was not examined was held against the prosecution. The Trial Court also disbelieved the prosecution story about hurling of bombs to assault the victims on the ground that if assault to cause death was the object of the accused persons then they would have had indulged in assault with bombs at the first instance when Sarban was being rescued. Inference of the Trial Court was that there seemed to be no reason for waiting with the bombs till return of the family members of Sarban. There was evidence to the effect that the first bomb had landed in front of Bimla Devi. In the opinion of the Trial Court, in such a situation it would have been natural that her wearing apparels would have been ignited or borne signs of burning. There was no

evidence that her wearing apparels had been damaged. The Trial Court disbelieved the prosecution version as to who had hurled the bomb. It was observed by the Trial Court that when the family members of the victim were returning home, the bombs were charged from their rear side, and reasoning of the Trial Court was that it was not possible for them to find out who had hurled the bomb.

7. Before the High Court, the learned counsel for the accused did not defend the judgment of the Trial Court on fact. It has been recorded in the judgment of the High Court: -

“Mr. Bagchi, the learned Advocate appearing in support of the respondents did not seek to defend the judgment. He restricted his submission only as regards the degree of offence and the punishment which may be inflicted in this case. He submitted that it cannot be said that the intention of the accused persons was to kill either Gurdev or any was the member of his family. It cannot also be said that Gurdev was the targeted victim nor can it be said that Sarban was the targeted victim. According to him the accused persons may have intended to teach a lesson to the

members of the complainant party but there was no intention to kill. The bombs were hurled may be with the knowledge that the same might cause death but not with the intention to cause death because no one was not the targeted victim. He, therefore, submitted that the conviction in this case can at best be under Part II of Section 304 read with Section 149 I.P.C.”

The High Court, however, on the basis of evidence negated that defence and inter-alia, observed and held: -

“There is evidence before us to show that there was a family feud between the members of the complainant party and the accused Nageswar. If the accused persons, who had indulged into the act of rioting, really had intended to kill someone of the family of the party of the complainant then Sarban would have been killed at the first instance. Even according to Sarban at that time some 14/15 persons had surrounded him and began to assault him with fists, blows, kicks etc. All the accused persons were amongst those persons. When they began to assault him, he cried for help. P.W. 2 has deposed that the accused Nageswar, Gopal and Parash were armed with bombs and Hadis was armed with a knife. The knife of Hadis was snatched by Jagar Singh and thrown away in the lane. Even then the bomb was not charged. The bombs were

charged only when the members of the party of the complainant were returning home. The accused persons at that stage may have felt the sting of defeat. This feeling at that stage must have provoked them to throw the bombs regardless of whatever might happen.

We, therefore, are of the view that it is not correct to say that the case does not at all come within any of the exceptions of Section 300 IPC. We cannot also agree with Mr. Bagchi that the case would come within Part II of Section 304 of the IPC. The bombs were thrown with the intention to cause such bodily injury as was likely to cause death.

The accused persons are therefore convicted under Part I of Section 304 IPC read with Section 149 of the IPC. They are also convicted under section 148 IPC. Three persons, namely, Nageswar, Parash and Gopal are also found guilty under section 9B(2) of the Indian Explosives Act. However, considering the fact that we have convicted them under Section 304 Part I of the IPC read with Section 149 IPC, we are not inclined to award any separate punishment for the rest of the offences.”

8. Admitted position is that among the appellants before us, it was only Paresh who had hurled the bomb as per prosecution version. The

witnesses of fact, barring P.W.No.5 and P.W.No.7, have all stated that the appellants were present at the place of occurrence and were involved in initial assault of Sarban. PW-1, on the basis of whose statement the FIR was registered, has named Dilip, Gopal and Kayum specifically and has also stated presence of four or five others who had assaulted Sarban. P.W.2 has named Paresh, Dilip, Uttam and Kayum. P.W.6 has specifically named Dilip and Paresh whereas PW.8-Jagar Singh has named Paresh and Gopal. There is no major discrepancy or contradiction in the depositions of prosecution witnesses. There are some variations in prosecution witnesses' version as regards total number of assailants who were present at the place of occurrence, but it is not expected that these witnesses would count numbers in a moment when a group of persons started assault on Sarban. The question which we need to address now is whether finding of guilt against the appellant under Part I of Section 304 read with Sections 148 and 149 of the Indian Penal Code was justified or not. To get the appellants outside the purview of Section 149 of the Code, reliance on their behalf has been placed on the decisions of this

Court in the cases of **Radha Mohan Singh v. State of U.P. (2006) 2 SCC 450**, **Sukhbir Singh v. State of Haryana (2002) 3 SCC 327** and **Bal Mukund Sharma v. State of Bihar (2019) 5 SCC 469**.

These are all authorities involving cases of assault by several persons.

The Court found in these decisions that common object of all the accused persons of the unlawful assembly to commit murder was not established. It was not proved that the members of the unlawful assembly knew that murder was likely to be committed in prosecution of the common object of the assembly. In the case of **Sukhbir Singh (supra)** it was held:-

“14. The prosecution in the instant case could not specifically refer to any of the objects for which the accused are alleged to have formed the assembly. It appears, from the circumstances of the case, that after altercation over the splashing of mud on his person and receiving two slaps on his face from the complainant party, Sukhbir Singh declared to teach the complainant party, a lesson and went home. Immediately thereafter he along with others came on the spot and as held by the High Court wanted to remove the obstruction caused in the flow of water. As the common object of the assembly is not discernible, it can, at the most, be held that Sukhbir Singh intended to cause

the fatal blow to the deceased and the other accused accompanied him for the purpose of removing the obstructions or at the most for teaching a lesson to Lachhman and others. At no point of time any of the accused persons threatened or otherwise reflected their intention to commit the murder of the deceased. Merely because the other accused persons were accompanying him when the fatal blows were caused by Sukhbir Singh to the deceased, cannot prove the existence of the common object specifically in the absence of any evidence of the prosecution in that behalf. The members of the unlawful assembly can be held liable under Section 149 IPC if it is shown that they knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. It is true that the common object does not require prior concern and a common meeting of mind before the attack. It can develop even on spot but the sharing of such an object by all the accused must be shown to be in existence at any time before the actual occurrence.”

9. The decisions of this Court in the cases of **Padam Singh v. State of U.P. (2001) SCC 621** and **Sampat Babso Kale & Ors. v. State of Maharashtra (2019) 4 SCC 739** were relied upon in support of the appellants’ submissions that in an appeal against acquittal the High Court ought not to lightly interfere with the decision of the Trial

Court, which has recorded the evidence and observed the demeanour of witnesses. The ratio of these decisions are binding on us, but in our opinion they are not applicable in the facts of this case. The Trial Court's judgment is largely inferential. So far as prosecution witnesses are concerned, they uniformly narrated the sequence of events. There has been no major contradiction in the depositions of the prosecution witnesses. In the case of **Sampat Babso Kale (supra)**, the victim who made the dying declaration had 98% burn injury. There was evidence of the doctor in that case to the effect that if there was 98% burn injury, shock of the victim could lead to delusion. In this case, the P.W.9 deposed, in his cross-examination, that generally if general condition of a patient was low, he was extremely shocked and his blood pressure was low, with the injuries the nature of which Gurdev had suffered, he would not be in normal mental understanding. He however found the patient to be conscious, but his general consciousness (G.C) to be low. He also identified the injuries to be of such nature which may happen from explosion of a bomb. Thus, we do not find any reason to discard the evidence of

P.W.9. Moreover, what has been stated as “dying declaration” by deceased Gurdev stands corroborated by several other witnesses.

10. The provisions of Section 304 Part I was invoked by the Division Bench mainly on account of death of Gurdev. Prior to hurling of the two bombs at the family members of Sarban, one of which caused injuries to Gurdev, there was assault on Sarban in which involvement of all the accused persons have been established by the prosecution through cogent and reliable evidence. But death of Gurdev resulted from bomb injury at a time when the family members of the deceased were returning from the place where assault on Sarban occurred, close to their residence. The distance, however, between the two locations was very short.

11. In our opinion, the fact that there was short time gap and little deviation in describing the exact place of occurrence by themselves cannot detach the involvement of the persons who had hurled the bombs from rest of the accused persons altogether, who were part of the same group. They were harbouring common object, which fact

emerges from various factors including having assembled therewith weapons of assault and their participation in the acts of assault. These weapons were capable of causing death. The act of hurling bombs was in very close proximity in time to the act of assault on Sarban. The two incidents formed part of same chain of events assaults in this case. There was enough material to include the five appellants among the set of persons who had common object to assault. In hurling bombs, their target appears to have had been random but directed at members of the family of Gurdev. In that context, the High Court was right in not speculating upon the reason as to why they had gathered early in the morning at the place of occurrence. They were present there with lethal weapons which obviously reflected their motive. This was followed by assault on various members of the Singh family, which resulted in death of Gurdev and caused injuries on several others. The Trial Court's reasonings were fallacious and the High Court had rightly interfered in appeal. The ratio of the decisions in the cases of **Padam Singh (supra)** and **Sampat Babso Kale (supra)** do not aid the appellants.

12. We are also of the opinion that there was common object to assault. We have already dealt with the aspect of common object in commission of the offences. In the context of evidence available in this case, the ratio of the judgments of this Court in the cases of **Radha Mohan Singh (supra), Sukhbir Singh (Supra) and Bal Mukund Sharma (supra)** have no application. The evidences of prosecution witnesses of fact, who were eye witnesses, is uniform to the effect that all the appellants had participated in acts of assault of Sarban initially and subsequently other members of his family.

13. From the manner in which assault took place, we, however, are of the opinion that no intention could be attributed to the appellants to cause death of Gurdev. The bombs were charged from the rear of the group comprising of members of the Singh family but these were not targeted at anyone specific. The assaults were random, barring that on Sarban at the initial stage. We do not think in the given facts the appellants could be held guilty of Part I of Section 304 of the Code read with Section 149 thereof. We accordingly modify the conviction

imposed on the appellants to Part II of Section 304 of the Code read with Section 149 thereof. We also modify the sentence of the appellants and direct them to undergo rigorous imprisonment for five years each under Part II of Section 304 read with Section 149 of the Code. We however enhance the quantum of fine to Rs.50,000/- (Rupees Fifty Thousand) in respect of each of the appellants. The amount of fine shall be paid to the legal representatives of deceased Gurdev Singh as compensation. We also reduce the term of default punishment to six months' rigorous imprisonment instead of one year the High Court directed the appellants or any one of them to undergo if they do not make payment of fine. While modifying the term of imprisonment, we have taken into consideration the fact that the offences were committed about four decades back and the appellants at present are of advanced age. We find no reason to interfere with the finding of guilt by the High Court under Section 148 of the Code in respect of all the appellants and in so far as appellant Nos.1 and 2 in Criminal Appeal No.1430/2013 are concerned, under Section 9B (2) of the Explosives Act 1884. We approve the reasons given by the

High Court for not awarding separate punishments to the said appellants under the two aforesaid provisions for commission of offences under those sections.

14. The appeals are partly allowed in the above terms. Bail bonds of the appellants shall stand cancelled and the appellants are directed to surrender before the Trial Court within six weeks. In the event of their failure to surrender, the Trial Court shall take them into custody so that they serve out the sentence as directed. Detention, if any, already undergone by the appellants in the same case will be adjusted while computing the period of sentence.

.....J.
(Deepak Gupta)

.....J.
(Aniruddha Bose)

New Delhi,
Dated: March 02, 2020.