

(2011) 03 P&H CK 0392

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Appeal No. 1054 SB of 2001

Shabir and Another

APPELLANT

Vs

The State of Haryana

RESPONDENT

Date of Decision: March 22, 2011**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 120

Hon'ble Judges: K.C. Puri, J**Bench:** Single Bench**Final Decision:** Dismissed

Judgement

K.C. Puri, J.

By this common order, I intend to dispose of Criminal Appeal No. 1054 SB of 2001 titled as Shabir and Anr. v. The State of Haryana Criminal Appeal No. 1054 SB of 2001 and Criminal Appeal No. 1302 SB of 2001 titled as Ram Chander @ Chander and Anr. v. The State of Haryana Criminal Appeal No. 1302 SB of 2001 as both these appeals arose out of the same incident. For convenience, facts are being taken from Crl. Appeal No. 1054 SB of 2001.

2. This is an appeal directed by the accused-Appellants against the judgment and order dated 11.9.2001 passed by Shri A.K. Bimal, Additional Sessions Judge, Karnal vide which the Appellants have been convicted under Sections 458, 459, 380 and 120-B of the Indian Penal Code (in short ♦ the IPC) and sentenced them to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 500/- each and in default of payment of fine to further undergo rigorous imprisonment for a period of ten days u/s 458 of the IPC each ; to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs. 500/- each and in default of payment of fine to further undergo rigorous imprisonment for a period of ten days u/s 459 of the IPC each, to undergo rigorous imprisonment for a period of one year u/s 120-B

of the IPC and to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs. 500/- each and in default of payment of fine to further undergo rigorous imprisonment for a period of ten days u/s 380 of the IPC each. However, all the substantive sentences were ordered to run concurrently.

3. The brief facts of the prosecution case are that on 9.5.1989 complainant Yasin Mohd appeared in police station Indri and lodged a complaint stating that he is the resident of village Japti Chhapra and is an agriculturist. They are four brothers in all and the eldest one is residing separately. The younger to him namely Gulam Hasan had already expired leaving his son Zinda Hussain behind. He along with his brother Akhtar Hasan and nephew Zinda Hussain are residing jointly in a house.

4. It has been alleged that a day before the registration of the FIR, the family members were sleeping inside the house. At about 1.00a.m., in the night, he listened the loud voice of his mother Smt. Kumbra. She was crying for help as she had been looted. The complainant woke up and saw 3-4 persons coming out of the room of his mother. Accused Tahir Hussain alias Tara armed with an unlicensed pistol and Irfan armed with a pistol came near him and when the complainant responded to the voice of his mother, accused Tahir Hussain inflicted a butt blow of his pistol on the back side of his shoulder. When his mother came out of the room raising hue and cry, accused Irfan fired upon her which hit on her left foot. His mother told the complainant that the accused had taken away the box containing Rs. 25,000/- papers relating to the commission agents shop. They had also taken away a shirt containing Rs. 2000/- and one wrist watch. In the meantime Zinda and Akhtar also woke up and raised loud noise. Several villagers assembled there and all the accused fled away from the site after firing several shots in the air. Accused Singha and Sabir Hussain were also identified at the site whereas the remaining accused were identified by the other persons and they can be recognized if they happen to come present before him. On this complaint, a formal FIR was recorded and the investigations were commenced.

5. Sub Inspector Fateh Singh along with other police officials reached in village Japti Chhapra and inspected the scene of the crime. He lifted the blood soaked earth from the site which was taken into possession. On the same day, he took into possession empty cartridges of .12 bore, one of .315 bore, one of .303 bore vide recovery memo Ex.PO and the same was sealed with the seal bearing impression FS in the presence of the witnesses. The pellets which were lying in the Dehleej and outside the courtyard were also taken into possession. The same were also sealed with seal bearing impression FS in the presence of the witnesses. Thereafter, he prepared the rough site plan Ex.PQ with marginal notes at the site and recorded the statements of the witnesses and did other usual acts of investigations. The seal after use was handed over to Tasvir Hussain on 10.5.1989. The parcels were deposited with MHC with seal intact.

6. It has been further alleged that on 31.5.1989 accused Irfan was arrested and on interrogation he made a disclosure statement in the presence of other witnesses. In pursuance of that disclosure statement, he got recovered the pistol .12 bore along with two live cartridges which were taken into possession. The rough sketch of the pistol was also prepared by him. The seal was handed over to PW Sabir Hussain. Rough site plan of the place of recovery was also prepared.

7. It has been further alleged that on 29.6.1989 accused Chander alias Ram Chander who was arrested by ASI Mohinder Singh was joined in the investigations and he got the place of occurrence identified. Site plan of the place of occurrence was prepared. After the completion of the necessary investigation, challan was presented in the Court of learned Judicial Magistrate Ist Class, Karnal for the trial of the accused.

8. The learned Magistrate, after supplying copies of documents to the accused, committed the case to the Court of learned Sessions Judge, Karnal as the offence alleged against the accused was exclusively triable by Court of Session vide order dated 14.10.1999.

9. A charge under Sections 458, 459, 380 and 120-B of the IPC was framed against the accused to which they pleaded not guilty and claimed trial.

10. The prosecution, in support of its case examined Dr. Sushil Bhatia as (PW-1), ASI Bhim Singh as (PW-2), HC Raj Kumar as (PW-3), HC Ajit Singh as (PW-4), HC Bhag Singh as (PW-5), Mohd. Yasin as (PW-6), Dr. R.S. Chaudhary as (PW-7), Jinda Hassan as (PW-8), Shabir Hussain as (PW-9), Jahir Abbas as (PW-10), SI Gurcharan Singh as (PW-11), Inspector Mahender Kumar as (PW-12), SI Ram Parkash as (PW-13), SI Gurdial Singh as (PW-14), Fateh Singh (PW-15) and placed certain documents on the record.

11. The accused were examined u/s 313 Code of Criminal Procedure and all the incriminating evidence appearing against them were put to them to which they denied and pleaded false implication. The accused examined Mohd. Hussain (DW-1), Azam Ali (PW-2) and Jaffar Abbas (DW-3).

12. The trial Court found the accused guilty under Sections 458, 459, 380 and 120-B of the IPC vide judgment and order dated 11.9.2001 and sentenced them, as narrated above.

13. Feeling dissatisfied with the above said judgment of conviction, the accused have filed the present appeals.

14. Learned Counsel for the Appellants have submitted that so far as the accused Ram Chander alias Chander son of Ratia is concerned, none of the eye-witnesses has given his name. Yasin Mohd (PW-6), the complainant in this case has named only Tahir Hussain and Irfan and injuries with the Gun has been attributed to both of them only. According to the complainant, Tahir Hussain accused gave butt of pistol blow on the back side of shoulder of Mohd. Yasin but there is no

corresponding injury. So, Mohd. Yasin (PW-6) and Shabir Hussain (PW-9) were not present. Mohd. Yasin (PW-6) has stated that persons have collected in which Shabir Hussain and Singha were also there. Mohd Yasin (PW-6) has stated that besides the above four accused, one person was there to whom he failed to recognize.

15. Jinda Hassan (PW-8), the other eye-witness, in the cross-examination, has categorically stated that he does not know any Ram Chander nor he has seen him coming to the house of the complainant. So, the presence of Ram Chander is totally belied.

16. It is further submitted that no part has been attributed to Sabir Hussain and Singha in the occurrence. Mohd. Yasin (PW-6) and Jinda Hussain (PW-8) are discrepant regarding the presence of Sabir Hussain and Singha.

17. It is further contended that attribution against Tahir Hussain is that he gave blow with butt of pistol on the shoulder of Mohd. Yasin (PW-6) but there is no corresponding injury. So, his presence is doubtful. The injury has been attributed to Irfan, who has since died. So, the other accused are liable to be acquitted.

18. Learned Counsel for the Appellants further contended that Mohd. Yasin (PW-6) in his cross-examination has admitted that accused Tahir Hussain is son-in-law of his sister Asgari. There is a strained relationship of her sister and accused Tahir Hussain and on that account he has been falsely implicated.

19. Lastly, learned Counsel for the Appellants have submitted that in case the Court is not inclined to accept the prayer of the Appellants for acquittal, in that case, the sentence is harsh. The Appellants are facing trial since 1989 i.e. for the last 22 years. So, prayer has been made for reduction of sentence to the already undergone.

20. Learned State counsel as well as learned Counsel for the complainant have supported the judgment of the trial Court.

21. I have considered the submissions made by learned Counsel for the parties and have gone through the records of the case.

22. Since this is the first appeal and as such whole of the evidence required re-appreciation.

23. The law was set in motion after recording the FIR at the instance of Mohd. Yasin. He has stated that on yesterday night (a day before the registration of the FIR) he was sleeping in front of the Karyana shop, which was situated adjoining to his house. In the house of Mery Khubran, Jinda Hussain and Akhtar Hussain were sleeping along with their family. At about 1.00a.m., he heard the noise of his mother and got up and saw that 3 - 4 persons were coming towards him from the room of his mother. Electric light was on. He tried to catch them. Tahir Hussain alias Tara hit butt of country made 12 bore pistol on his waist. Khubran disclosed that these persons had taken away little box containing Rs. 25,000/- and took away Rs. 2000/-

from the pocket of the shirt of the complainant. They have also taken one citizen wrist watch.

24. It is further mentioned in the FIR that in the meantime Jinda and Akhtar got up, then the assailants on running shot two fires in the air. He and Jinda identified third person Shindha son of Banwari Gadaria. Fourth person was of whitish colour, middle height thin body and was of young age and wearing Chadar of Khakhi colour and checkdar shirt and was speaking the U.P. language.

25. Mohd. Yasin while appearing as prosecution witness has deposed in accordance with the FIR to the extent so far as the role attributed to Irfan and Tahir Hussain is concerned. He has stated that after firing from Irfan almost all the villagers collected there including Jafar Abas, Zahir Abas, Ali Kosar, Nawar Hassan, Ali Hassan, Daulat Hussain. He recognized the persons who were inside the house as Shabir Hussain, Singh Ram. In the examination-in-chief, he has not specifically named Ram Chander @ Chander son of Ratiya Jhimar. It is not out of place to mention here that in the FIR, name of Shabir Hussain has not been mentioned.

26. The other star witness for the prosecution is Zinda Hassan (PW-8), who has deposed in accordance with the testimony of Mohd. Yasin (PW-6), so far as the part attributed to Irfan and Tahir Hussain is concerned but he has stated in the examination-in-chief that he identified Sabir Hussain, Tahir Hussain @ Tara, Irfan @ Fanna and Chander Pal in the Court. However, in his cross-examination, he has stated that he does not know Chander nor he has seen him coming from the house. So, in these circumstances, he has altogether exonerated Chander regarding the occurrence in the cross-examination.

27. So far as Chander accused is concerned neither his name appears in the FIR nor the start witnesses Mohd. Yasin (PW-6) and Jinda Hassan (PW-8) have attributed any part to him.

28. So, the participation of Chander accused in the occurrence is highly doubtful.

29. So far as the part attributed to Irfan and Tahir Hussain is concerned, their names appeared in the FIR. Both Mohd. Yasin (PW-6) and Jinda Hassan (PW-8) have specifically named both the accused and injuries have been attributed to both of them. The weapon of offence have been recovered from their possession. So, their participation in the occurrence is proved beyond reasonable doubt.

30. However, Irfan accused has died during the pendency of the case before the trial Court and proceedings against him stand abated.

31. So far as the submission made by learned Counsel for the Appellant Tahir Hussain to the effect that due to strained relations of sister of complainant, Tahir Hussain has been falsely implicated is concerned, that submission is without any substance. Counsel for the Appellant could not convince, how the weapon of offence is recovered from him. Mere fact that injury on the person of the complainant was

on occipital region and not on his waist, also does not cause dent on the prosecution version so far as the said accused is concerned. The case of the prosecution is consistent so far as accused Irfan and Tahir Hussain is concerned.

32. So participation of Tahir Hussain in the occurrence coupled with the recovery of weapon of offence from him, proved his guilt beyond reasonable doubt.

33. Now the role attributed to the remaining two accused i.e. Sabir son of Hakar Hussain and Singha son of Banwari has to be appreciated.

34. Name of Sabir is not mentioned in the FIR. No specific role has been attributed to both Sabir and Singha in the occurrence by the star witnesses of the prosecution i.e. Mohd. Yasin (PW-6) and Jinda Hassan (PW-8). It is not stated by both of them that accused Sabir and Singha were having any weapon or have caused any injury to any one. So much so, even these two star witnesses have not stated that they have taken away any stolen articles. Mohd. Yasin (PW-6) has stated that he identified accused Sabir and Singha when all the villagers have collected there. So, in these circumstances, the participation of these two accused i.e. Sabir and Singha in the occurrence is doubtful and benefit of doubt has to be given to these two Appellants also.

35. In view of the above discussion, the appeals qua Sabir, Singha and Chander stand accepted. They stand acquitted by giving them benefit of doubt.

36. So far as appeal qua accused Tahir Hussain is concerned, there is no merit in his appeal. Moreover, no ground for reduction in sentence qua him is also made out due to the role attributed to him.

37. So, appeal qua him stands dismissed.

38. Both the appeals stand disposed of in the manner indicated above.

39. The Appellant-Tahir Hussain, who is stated to be on bail, shall be arrested to undergo the remaining part of his sentence.

40. A copy of this judgment be sent to the trial Court for strict compliance.