

(2017) 02 RAJ CK 0054
RAJASTHAN HIGH COURT
Case No: 10 of 2013

Devendra Singh S/o
Bhagwat Singh Rajput

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision: Feb. 10, 2017

Acts Referred:

- Code of Criminal Procedure, 1973, Section 161, Section 313, Section 374 - Examination of witnesses by police - Power to examine the accused - Appeals from convictions
- (

Hon'ble Judges: Gopal Krishan Vyas, Kailash Chandra Sharma

Bench: DIVISION BENCH

Advocate: Jagmal Singh Chuodhary, Amardeep Lamba, JPS Choudhary

Final Decision: Dismissed

Judgement

1. In this cr. appeal filed by the appellants under Section 374 Cr.P.C., the judgment dated 20.11.2012 passed by the learned Addl. Sessions Judge, Shahpura, District Bhilwara in Sessions Case No.12/2010 is under challenge whereby the learned trial court convicted the accused appellant Devendra Singh for the offence under Section 302 IPC and under Section 30 of the Arms Act whereas the two other accused appellants Hanuman Singh and Manvendra Singh convicted for offence under Section 302 / 34 IPC and following sentence was passed against them:

Accused appellant Devendra Singh:

Under Section 302 IPC Life imprisonment with fine of Rs.5,000/- and in default of payment of fine to further undergo six months RI.

Under Section 30 of the Arms Act Six months RI with fine of Rs.2,000/- with fine of Rs.2,000/- and in default of payment of fine to further undergo one month RI.

Accused appellants Hanuman Singh and Manvendra Singh:

Under Section 302 / 34 IPC Life imprisonment with fine of Rs.5,000/- and in default of payment of fine to further undergo six months RI

2. As per facts of the case, report (Ex.P/26) was submitted by the complainant Vishwanath Pratap Singh before the SHO Police Station, Fuliyakallan at the place of occurrence on 1.45 pm in which it was alleged that on 18.6.2010 his brother Maniraj Singh and Kamlesh Sharma went to see their agricultural field, thereafter, complainant alongwith PW--2 Hansraj, PW--3 Anil and PW--8 Chhotu Lal also went to the agricultural field for handing over the land for cultivation on contract (Sijara). When they reached on spot, the accused appellant Devendra Singh, Hanuman Singh and Manvendra Singh were already cultivating their field by tractor. The accused appellant Hanuman Singh was driving tractor and two other accused appellants Devendra Singh and Manvendra Singh were sitting on the tractor. According to the allegation of the complainant, Devendra Singh was having double barrel gun and they gave threatening to Maniraj Singh "how you entered in the field, now you will not alive". While saying so, accused appellant Devendra Singh fired on Maniraj Singh, which hit right side of his chest and due to said gun shot injury Maniraj Singh fell down. The other person Kamlesh Sharma run away from the site, but accused appellants followed him and again Devendra Singh made fired upon Kamlesh Sharma and therefore, Kamlesh Sharma also fell down and died on spot. As per submission of complainant he is eye witness of the incident. Thereafter, all the accused persons run away from the place of occurrence.

3. Upon aforesaid report submitted by the complainant Vishwanath Pratap Singh, FIR no.73/2010 for offence under Section 302 / 34 IPC and under Section 3 / 27 of the Arms Act was registered against the accused appellant and investigation was commenced. The investigating officer after conducting thorough investigation filed charge-sheet against the accused appellants in the court of Addl. Chief Judicial Magistrate, Shahpura, District Bhilwara from where case was committed to the court of Addl. Sessions Judge, Shahpura, District Bhilwara for trial.

4. The learned trial court commenced the trial in Sessions Case No.12/2010. In the trial after hearing arguments charge under Section 302 IPC and under Section 3 / 27 of the Arms Act were framed against the accused appellant Devendra Singh whereas charge under Section 302 / 34 IPC was framed against the accused appellants Hanuman Singh and Manvendra Singh, but all the accused appellants denied the charges and prayed for trial.

5. In the trial, statements of 25 prosecution witnesses were recorded from the side of prosecution to prove the case and thereafter, the statements of all the three accused appellants were recorded under Section 313 Cr.P.C, but they denied all the allegations levelled by the prosecution witnesses and said that they have been falsely implicated in this case due to enmity. In defence, no evidence was produced by them and finally after hearing arguments, the learned trial court convicted the accused appellants Devendra Singh for committing offence under Section 302 IPC read with Section 30 of the Arms Act whereas other two accused appellants Hanuman Singh and Manvendra Singh were convicted for the offence under Section 302 / 34 IPC vide judgment dated 20.11.2012.

6. Learned counsel for the appellant submits that the entire prosecution case is based upon testimony of four eye witnesses including PW--2 Hansraj, PW--3 Anil, PW--8 Chhotu Lal and the complainant PW--16 Vishwanath Pratap Singh, out of all the four witnesses, three witnesses namely PW--2 Hansraj, PW--3 Anil, PW--8 Chhotu Lal whose names are mentioned in the complaint by the complainant Vishwanath Pratap Singh turned hostile and did not support the prosecution case whereas the witness PW--16 Vishwanath Pratap Singh corroborated the allegation. The other witness PW--11 Brijraj Singh is hear say witness. The two other witness PW--21 Prahlad of recovery of tractor and site plan, turned hostile. PW--24 Ramjas witness of recovery memo of gun and site plan (Ex.P/34) also turned hostile and did not support the prosecution case, therefore, prosecution has not been proved the allegation of murder beyond reasonable doubt.

7. Learned counsel for the appellants argued that the learned trial court disbelieved the evidence for prosecution for murder of Kamlesh Sharma while discussing the entire evidence and no appeal has been filed by the State of Rajasthan against the said finding, therefore, there is no question to re-appreciate the evidence for the allegation of murder of Kamlesh Sharma in the present case.

8. As per learned counsel for the appellant, the recovery of gun and tractor has not been proved beyond doubt because witness of recovery PW--24 Ramjas turned hostile and did not support the prosecution case. It is also argued that PW--16 Vishwanath Pratap Singh, author of the FIR was not present on spot at the time of alleged incident because he came on spot after the incident. While inviting attention towards the statement of PW--16 Vishwanath Pratap Singh it is submitted that the said witness specifically stated that report (Ex.P/26) was dictated by the police, upon which I put my signature, therefore, on this count alone, FIR seems to be concocted and false. The statement of PW--16 Vishwanath Pratap Singh has not been corroborated by any eye witness whose names were disclosed by him because PW--2 Hansraj, PW--3 Anil, PW--8 Chhotu Lal turned hostile, therefore, obviously the entire prosecution case is based upon the testimony upon sole eye witness PW--16 Vishwanath Pratap Singh. The presence of the witness PW--16 Vishwanath Pratap Singh is doubtful, therefore it cannot be said that he is natural witness. While

inviting attention towards the statement of PW--16 Vishwanath Pratap Singh that the FIR (Ex.P/26) and Ex.D/1 police statement recorded under Section 161 Cr.P.C. it is submitted that there are major contradictions in the statement of PW--16 Vishwanath Pratap Singh. It is also argued that there is major contradiction in the statement of PW--11 Brijraj Singh, father of the deceased and PW--16 Vishwanath Pratap Singh on material issues, therefore, the testimony of both the witnesses cannot be relied upon to hold accused appellants guilty. Admittedly, the complainant party came on spot alongwith number of persons, at that time, the accused party was already cultivating their land, therefore, obviously it is a case in which occurrence took place due to quarrel made by the complainant party. In view of the above, the conviction of the accused appellant Devendra Singh under Section 302 IPC is not sustainable in law.

9. With regard to conviction of accused appellants Hanuman Singh and Manvendra Singh under Section 302 / 34 IPC it is submitted that as per Section 34 of the IPC criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. Further doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such accused persons, but in this case, accused appellants were already cultivating their land by tractor prior to incident where deceased Maniraj Singh and Kamlesh Sharma came on spot where accused appellant were in field. It is also evident from the fact disclosed in FIR (Ex.P/26) that complainant himself disclosed the fact that all the three accused persons asked to the complainant party "how they came in the agricultural field, now you will not be alive", therefore, there is no iota of evidence to convict accused appellants Hanuman Singh and Manvendra Singh for offence under Section 302 / 34 IPC. It is also argued that testimony of PW--16 Vishwanath Pratap Singh is not supported by any other reliable witness who was present at the time of occurrence, therefore, conviction of the appellants deserves to be quashed.

10. Without prejudice to above arguments, it is submitted that if this court comes to the conclusion that incident is proved then also there is no question to hold Devendra Singh guilty for offence under Section 302 IPC because before complainant party went on spot the accused appellants were already cultivating their land, which is undivided property of both the parties. As per evidence on record even if the entire evidence is accepted then also the accused appellant Devendra Singh can be held guilty for offence under Section 304 Part I IPC and not for offence under Section 302 IPC simplicitor.

11. Learned counsel for the appellants submits that there is no allegation for inflicting any injury by two other accused appellants Hanuman Singh and Manvendra Singh to the deceased, so also, there is no allegation of prosecution that these accused appellants came on spot with the motive or intention to make quarrel, more so, all the three accused appellants were already cultivating their

agricultural field situated in Khasra No.938, so also, there is no allegation for participating in the incident or inflicting any injury by the accused appellant Hanuman Singh and Manvendra Singh, therefore obviously Section 34 IPC will not apply in this case so as to hold them guilty for offence under Section 302 IPC with aid of Section 34 IPC. Therefore, it is prayed that sentence awarded to the accused appellant Devendra Singh for offence under Section 302 IPC may kindly be altered to offence under Section 304 Part I IPC.

12. Per contra learned Public Prosecutor vehemently argued that there is no error in the finding of the learned trial court to convict the accused appellants for offence under Section 302 and 302 / 34 IPC because there is evidence of eye witness PW--16 Vishwanath Pratap Singh who was very much present when occurrence took place. The FIR was also registered upon his complaint (Ex.P/26) in which whole incident was reported by the complainant eye witness PW--16 Vishwanath Pratap Singh. Learned Public Prosecutor submits that although the other eye witnesses PW--2 Hansraj, PW--3 Anil and PW--8 Chhotu Lal turned hostile, but there is no reason to disbelieve the testimony of PW--16 Vishwanath Pratap Singh because the said witness stated on oath that on 18.6.2010 in the morning at about 7-8 am I, and my brother Maniraj Singh and Kamlesh Sharma, we all three left Shahpura and went to village. At about 9.30 am we reached in the house of our village ant at about 10" O Clock Maniraj Singh and Kamlesh Sharma went to the agricultural field to see the work of cultivation. According to this witness at about 11.15 - 11.30 am one Hansraj Jat, Anil Jat and Chhotu Balai came to his house and said that we have received phone call from your father, therefore, to take your land for cultivation on contract basis (Sijara) we aer hear to see the land. I asked the above persons that my brother Maniraj Singh and Kamlesh Sharma has already gone agricultural field, therefore, you may also go there so that they will show you the land.

13. According to this witness, the Hansraj said that your agricultural field is very big, how we will search them, you may come with us. Upon asking I went on spot on my own motorcycle and all the three persons Hansraj, Anil and Chhotu Lal accompanied me upon their motorcycle. All the persons reached in the agricultural field at about 12"O Clock and after showing land to the aforesaid persons, we came back near to the motorcycle. It is also pointed out land in question is joint property where Hanuman Singh and Manvendar Singh were doing their work for cultivating the land. The accused appellant Devendra Singh gave threatening, "how you came in the field, now you will face consequence", and thereafter, fired by the gun which he was having in his possession upon Maniraj Singh, at that time, to save me I immediately ran away and I jumped in the pit and hide in the bushes (Jhadi). The other person Kamlesh Sharma also run away from the place of occurrence, but all the accused persons chased him on tractor driven by the accused Hanuman Singh and Kamlesh Sharma was hit by tractor and fell down and all of sudden accused appellant Devendra Singh fired upon him. The said incident was seen by me when I was sitting behind the bushes (Jhadi). After inflicting gun shot injuries, Devendra

Singh and Hanuman Singh went to the village Aamli Kalu Singh on tractor. Thereafter, I came out from bushes and call my brother. All incident was reported by me through phone of Hansraj and informed that accused appellant caused gun shot injuries to Maniraj Singh and Kamlesh Sharma.

14. The contention of the learned Public Prosecutor is that the eye witness PW--16 Vishwanath Pratap Singh has proved its case beyond doubt, therefore, upon sole testimony of this witness, the learned trial court held accused appellants guilty for offence under Section 302 and 302 / 34 IPC in which there is no error. The gun was also recovered at the instance of the accused appellant Devendra Singh and as per FSL report it is proved that gun shot injury was caused by the said gun recovered as per information given by the accused appellant Devendra Singh.

15. Learned trial court accepted the prosecution case on the ground that although eye witness PW--2 Hansraj, PW--3 Anil and PW--8 Chhotu Lal turned hostile and did not support the prosecution case, but there is no reason to disbelieve the testimony of PW--16 Vishwanath Pratap Singh because he was very much present on spot because land in question is joint property of the accused appellants as well as complainant family. In view of the above, it is submitted that conviction based upon sole and reliable testimony of eye witness PW--16 Vishwanath Pratap Singh cannot be termed as illegal or erroneous because his presence has not been disputed by the appellants. Therefore, the instant appeal may kindly be dismissed.

16. After hearing learned counsel for the parties we have minutely perused the statements of all the prosecution witnesses to decide the case. After perusing the judgment impugned coupled with the evidence and argument of learned counsel for the appellants it emerges from the facts that following facts are not in dispute.

A. Admittedly all the three accused appellants were already cultivating their land situated in Khasra No.938. The complainant PW--16 Vishwanath Pratap Singh, PW--2 Hansraj, PW--3 Anil and PW--8 Chhotu Lal and deceased Maniraj Singh and Kamlesh Sharma went on spot. It is also admitted position of the prosecution case that all complainant and his brother went on spot to show the land to the alleged eye witnesses PW--2 Hansraj, PW--3 Anil and PW--8 Chhotu Lal because they were interested to take the land for cultivation on contract.

B. It is not in dispute that the land upon which occurrence took place is a joint undivided property of the accused appellant as well as of the complainant party, situated at Khasra No.938 and 939 of the village. It is also not in dispute that as per prosecution case allegation for causing gun shot injury is against accused appellant Devendra Singh only. There is no allegation for inflicting any injury by other two accused appellants Manvendar Singh and Hanuman Singh, it is also admitted fact that appellants were already cultivating land before reaching of PW--16 Vishwanath Pratap Singh and other persons

including two deceased persons.

C. It is not in dispute that gun shot injury was caused by the gun, which is said to be recovered vide Ex.P/33 during investigation. It is true that one of the witness of recovery PW--24 Ramjas declared hostile but recovery of gun has been proved by the prosecution. Upon perusal of finding given by the learned trial court it is obvious that allegation for causing death of Kamlesh Sharma has not been proved by the prosecution because the injury which is found upon the body of Kamlesh Sharma was different than the injury which can be caused from the gun recovered as per information given by the accused appellant Devendra Singh. The learned trial court gave finding that prosecution has failed to prove its case for murder of Kamlesh Sharma but has proved the allegation for causing gun shot injury to the deceased Maniraj Singh. There is no appeal against the finding of the learned trial court to disbelieve the allegation for committing murder of Kamlesh Sharma. The learned trial court held accused appellants are guilty for committing offence of murder of Maniraj Singh only.

D. It is also admitted position of the case that those named eye witness in the FIR (Ex.P/26) namely PW--3 Anil, PW--3 Anil and PW--8 Chhotu Lal turned hostile and did not support the prosecution case, but author of FIR PW--16 Vishwanath Pratap Singh proved its case for causing gun shot injury to the deceased Maniraj Singh. The other witness PW--5 Dr. Heerapal, PW--6 HS Dr. H.S. Sahwal and PW--12 Dr. Ashok Kumar Jain who were member of the medical board to conduct post mortem of Maniraj Singh and of Kailash Sharma was conducted by them but the witness Prahald (PW--21) of recovery memo of tractor (Ex.P/31) and site plan (Ex.P/32) turned hostile. The other witness PW--24 Ramjas motbir of recovery memo of gun (Ex.P/23 and P/24) and site plan turned hostile and did not support the recovery of gun as per information given by the accused appellant Devendra Singh. The investigation was conducted by PW--25 Surajbhan Singh, he has supported the prosecution case with regard to alleged offence of murder.

17. The above facts and evidence loudly speaks that accused appellants were already present in the agricultural field situated in Khasra No.938 and 939, they were not aggressor. The deceased Maniraj Singh and Kamlesh Sharma went first on spot and after some time PW--16 Vishwanath Pratap Singh and other three witnesses PW--2 Hansraj, PW--3 Anil and PW--8 Chhotu Lal reached on spot at 12.30 but all the three eye witnesses PW--2 Hansraj, PW--3 Anil and PW--8 Chhotu Lal turned hostile and not corroborated the allegation of PW--16 Vishwanath Pratap Singh but it emerges from the entire evidence and finding of the learned trial court that appellants were not aggressor, more so, they were already cultivating their share of land upon tractor when complainant party went in the field. It is also admitted fact of the case that there is no allegation of inflicting any injury by two

accused appellants Hanuman Singh who was tractor driver and Manvendar Singh. No weapon has been recovered from them nor any allegation is levelled against them for inflicting any injury by the eye witness PW--16 Vishwanath Pratap Singh. So also it is one of the important fact that except statement of PW--16 Vishwanath Pratap Singh no other witness has proved the allegation that two accused appellants Manvendar Singh and Hanuman Singh participated in the crime for causing death of the deceased Maniraj Singh.

18. In our opinion, the testimony of PW--16 Vishwanath Pratap Singh has wrongly been relied by the learned trial court so as to hold accused appellants Manvendar Singh and Hanuman Singh guilty for the offence under Section 302 / 34 IPC, therefore finding of the learned trial court recorded against them cannot be upheld because upon assessment of evidence Section 34 of the IPC will not apply in this case for want of evidence. The Section 34 of the IPC reads as under:

34. Acts done by several persons in furtherance of common intention.--When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.]

19. We have considered the entire evidence of the case in the light of Section 34 of the IPC. In our view, except PW--16 Vishwanath Pratap Singh there is no eye witness or other witness to prove participation of these two accused appellants Manvendar Singh and Hanuman Singh in the incident. All the three eye witnesses turned hostile and did not support the allegation levelled by the witness PW--16 Vishwanath Pratap Singh against these two accused appellants. Therefore, the finding of guilt recorded by the learned trial court to hold accused appellants Manvendar Singh and Hanuman Singh for offence under Section 302 / 34 IPC does not inspire any confidence.

20. In our opinion, upon re-appreciation of the entire evidence, the finding of guilt recorded by the learned trial court against the accused appellants Manvendar Singh and Hanuman Singh cannot be ruled out because there is no allegation for inflicting any injury by them and other allegations made by PW--16 Vishwanath Pratap Singh has not been corroborated by any independent witness. Therefore, both the accused appellants are entitled for the benefit of doubt.

21. With regard to finding against the accused appellant Devendra Singh we have considered the allegations of PW--16 Vishwanath Pratap Singh so also medical evidence and FSL report. There is no question to disbelieve the medical evidence so also FSL report coupled with the fact that gun in question was recovered at the instance of the accused appellant Devendra Singh. The presence of Devendra Singh has not been disputed by the learned counsel for the accused appellant, more so it is argued that upon appreciation of the entire evidence no offence under Section 302 IPC is made out against him because complainant party went on spot for

specific purpose to give land on contract to three persons namely, Anil, Hansraj and Chhotu Lal. When complainant party alongwith PW--16 Vishwanath Pratap Singh and deceased Maniraj Singh and Kamlesh Sharma reached, accused appellants were already cultivating their land on tractor. Therefore, obviously it cannot be said that they were having any apprehension or they were having any common object to commit offence of murder. The occurrence took place when complainant party entered in agricultural field, which is joint property of the family.

22. Admittedly, from complainant side, six persons went on spot including PW--16 Vishwanath Pratap Singh, deceased Maniraj Singh and Kamlesh Sharma, Anil, Hansraj and Chhotu Lal whereas all the three appellants were already cultivating their land and out of three accused appellants Devendra Singh was having gun in his possession which is used by him in the incident. Admittedly, Maniraj Singh died due to injury caused by accused appellant Devendra Singh but prosecution failed to prove its case against accused appellant for committing murder of Kamlesh Sharma. Therefore, the learned trial court disbelieved the entire evidence against the accused appellant for committing murder of Kamlesh Sharma.

23. In view of the fact that six persons went on spot and there was no preparation or common intention of the appellants to cause death of the deceased, but it emerges from the entire evidence that quarrel took place in the agricultural field situated in Khasra No.938 and 939 and in that quarrel Devendra Singh inflicted gun shot injury, which resulted into death of deceased Maniraj Singh. In our opinion, there is no strength in the argument of the learned counsel for the appellant that there was no intention of the accused appellant Devendra Singh to cause death of the deceased because he fired by gun with target and due to the said injury, the deceased Maniraj Singh died.

24. In view of the above, we are of the opinion that although prosecution has not proved the case against accused appellant Manvendar Singh and Hanuman Singh beyond reasonable doubt, but has proved the case against accused appellant Devendra Singh for committing offence under Section 302 IPC.

25. There is no strength in the argument of the learned counsel for the appellants that incident took place all of sudden or due to quarrel occurred on spot the gun shot injury was caused by the accused appellant Devendra Singh and he was already present in the agricultural field but it is not in dispute that he was in possession of gun which is used by him for causing gun shot injury to the deceased. Therefore, we are not inclined to accept the prayer of the accused appellant Devendra Singh to alter the conviction from Section 302 IPC to offence under Section 304 Part I IPC.

26. Consequently, the instant cr. appeal is partly allowed. The conviction and sentence of the accused appellants Manvendar Singh and Hanuman Singh for the offence under Section 302 / 34 IPC passed by the learned Addl. Sessions Judge, Shahpura District Bhilwara vide judgment dated 20.11.2012 in Sessions Case

no.12/2010 is hereby quashed and set aside but the conviction and sentence of the accused appellant Devendra Singh for committing offence under Section 302 IPC and under Section 30 of the Arms Act is hereby upheld and his appeal against the judgment dated 20.11.2012 is hereby dismissed.

27. The accused appellants Manvendra Singh and Hanuman Singh are in custody since 28.7.2010, therefore, they may be released forthwith, if not required in any other case.