

[2019] 4 S.C.R. 521

DEEP NARAYAN CHOURASIA

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v.

STATE OF BIHAR

(Criminal Appeal No. 180 of 2019)

FEBRUARY 25, 2019

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**[ABHAY MANOHAR SAPRE AND  
DINESH MAHESHWARI, JJ.]**

*Penal Code, 1860: ss.302/149 – Five persons tried for murder – Trial court convicted one accused under s.302 IPC and under s.27 of Arms Act and other four co-accused under s.27 of Arms Act only – On appeal, High Court convicted four co-accused also under ss.302/149 along with the accused – In the instant appeal, only one co-accused challenged the order of High Court – Held: High Court completely under misconception misdirected itself by forming an opinion as if all the five accused were convicted under ss.302/149 and convicted four co-accused also under s.302/149 along with the accused – High Court failed to apply its judicial mind and committed fundamental jurisdictional errors – There was no appeal filed by the State against the order of acquittal of co-accused under ss.302/149 nor was there any notice of enhancement of their sentence issued by the High Court suo motu to these four accused – High Court failed to see that the trial court had acquitted all the accused under s.149 IPC, yet proceeded to convict all the accused under s.149 IPC without there being any appeal filed by the State on this issue – Further, although the High Court wrongly convicted the appellant along with three others for the offence punishable under ss.302/149 IPC, yet did not award any sentence to any of the four accused under ss.302/149 IPC which was mandatorily required to be awarded to each convicted accused as provided under s.354(3), Cr.P.C. – Impugned order is set aside qua all the co-accused persons – Matter remanded to High Court for adjudication on respective merits in accordance with law – Code of Criminal Procedure, 1973 – s.354(3) – Arms Act, 1959 – s.27.*

*Appeal: Non-appealing accused – Effect of decision in appeal on the non-appealing accused – In the instant case, appeal of sole appellant is allowed – Whether the entire impugned order is to be*

- A *set aside or only qua the sole appellant – Held: The entire impugned order is to be set aside against all the accused – An order, which is based entirely on wrong factual premise once held illegal by a superior Court at the instance of one accused, cannot be allowed to stand against other non-appealing accused persons also – An illegality committed by a Court cannot be allowed to be perpetuated*
- B *against a person to a lis merely because he did not bring such illegality to the notice of the Court and instead other person similarly placed in the lis brought such illegality to the court's notice and succeed in his challenge – Non-appealing co-accused are also entitled to get benefit of the order of this Court and are, therefore,*
- C *entitled for re-hearing of their appeals along with the appellant – Judgment/Order – Penal Code, 1860 – ss.302/149.*

**Allowing the appeal and remitting the matter to High Court, the Court**

- D **HELD: The High Court proceeded on wrong factual premise that all the five accused have suffered conviction under Section 302/149 IPC read with Section 27 of the Arms Act by the Additional Sessions Judge. It was not so. The entire impugned order deserves to be set aside against all the five accused. An order, which is based entirely on wrong factual premise once held**
- E **illegal by a superior Court at the instance of one accused, cannot be allowed to stand against other non-appealing accused persons also. It will be a travesty of justice delivery system where an accused, who is convicted of a lesser offence (Section 27 of the Arms Act alone) and was acquitted of a graver offence (Section 302/149 IPC) is made to suffer conviction for commission of a**
- F **graver offence (Section 302/149 IPC) without affording him of any opportunity to defend such charge at any stage of the appellate proceedings. If the other four accused had filed the appeals in this Court, they too would have got the benefit of this order. A fortiori, merely because they did not file the appeals and the case**
- G **is now remanded for re-hearing of the appeal at the instance of one accused, the benefit of re-hearing of the appeal cannot be denied to other co-accused. In other words, the non-appealing co-accused are also entitled to get benefit of the order of this Court and are, therefore, entitled for re-hearing of their appeals along with the present appellant. It is for all these reasons, the**
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**impugned order stands set aside also *qua* all the accused persons.**[Paras 17, 28, 29, 31-33][527-F; 530-B,C, D, G] A

*Durga Shankar Mehta v. Thakur Raghuraj Singh & Ors.* AIR 1954 SC 520 : [1955] SCR 287 – followed.

*Harbans Singh v. State of U.P. & Ors.*, (1982) 2 SCC 101 : [1982] 3 SCR 235; *Raja Ram & Ors. v. State of M.P.* (1994) 2 SCC 568 : [1994] 2 SCR 114; *Chellappan Mohandas & Ors. v. State of Kerala* (1995) Supp(1) SCC 259; *Dandu Lakshmi Reddy vs. State of A.P.* (1999) 7 SCC 69 : [1999] 1 Suppl. SCR 535; *Anil Rai v. State of Bihar* (2001) 7 SCC 318 : [2001] 1 Suppl. SCR 298; *Bijoy Singh & Anr. v. State of Bihar* (2002) 9 SCC 147 : [2002] 3 SCR 179; *Gurucharan Kumar & Anr. v. State of Rajasthan* (2003) 2 SCC 698 : [2003] 1 SCR 60; *Suresh Chaudhary v. State of Bihar* (2003) 4 SCC 128; *Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra* (2003) 2 SCC 708; *Pawan Kumar v. State of Haryana* (2003) 11 SCC 241 : [2003] 1 Suppl. SCR 710 – relied on. B C D

**Case Law Reference**

[1955] SCR 287	followed	Para 25	E
[1982] 3 SCR 235	relied on	Para 27	
[1994] 2 SCR 114	relied on	Para 27	
(1995) Supp (1) SCC 259	relied on	Para 27	F
[1999] 1 Suppl. SCR 535	relied on	Para 27	
[2001] 1 Suppl. SCR 298	relied on	Para 27	
[2002] 3 SCR 179	relied on	Para 27	
[2003] 1 SCR 60	relied on	Para 27	G
(2003) 4 SCC 128	relied on	Para 27	
(2003) 2 SCC 708	relied on	Para 27	
[2003] 1 Suppl. SCR 710	relied on	Para 27	

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A CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 180 of 2019.

From the Judgment and Order dated 14.11.2017 of the High Court of Judicature at Patna in Criminal Appeal (DB) No. 77 of 1994.

B Brajesh Kumar, A. P.Sinha,. Saurav Kumar, Advs. for the Appellant.

The Judgment of the Court was delivered by

C **ABHAY MANOHAR SAPRE, J.** 1. This appeal is filed against the final judgment and order dated 14.11.2017 passed by the High Court of Judicature at Patna in Criminal Appeal (DB) No.77 of 1994 whereby the High Court dismissed the appeal filed by the appellant herein.

2. In order to appreciate the short question involved in this appeal, a few relevant facts need mention *infra*.

D 3. Five persons, namely, (1) Lukho Prasad Chourasia, (2) Birendra Prasad Chourasia, (3) Binod Prasad Chourasia, (4) Deep Narayan Chourasia and (5) Kanhai Prasad Chourasia were tried for commission of offence of murder of Kaushalya Devi on 06.02.1992 under Section 302/149 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and Section 27 of the Arms Act by the Additional Sessions Judge, Munger in Sessions Case No. 264/1992.

E 4. By judgment dated 08.02.1994, the Additional Sessions Judge convicted the accused-Kanhai Prasad Chourasia for the commission of offence under Section 302 IPC and Section 27 of the Arms Act and he was accordingly sentenced to undergo life imprisonment under Section 302 IPC and rigorous imprisonment for seven years under Section 27 of the Arms Act. Both the sentences were to run concurrently.

F 5. So far as co-accused-Lukho Prasad Chourasia, Birendra Prasad Chourasia, Binod Prasad Chourasia and Deep Narayan Chourasia are concerned, all the four were acquitted from the charge of commission of offence under Section 302 IPC. However, all the four accused were convicted for commission of offence under Section 27 of the Arms Act and accordingly sentenced to undergo rigorous imprisonment for five years. The concluding para of the order of Sessions Judge reads as under:

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**“Accordingly, on the basis of my findings, accused Kanhai Prasad Chaurasia, who is in custody, is convicted u/ss 302 IPC and 27 of Arms Act and is again remanded to custody to serve his sentence and accused Lukho Prasad Chaurasia, Birendra Prasad Chaurasia, Binod Prasad Chaurasia and Deep Narain Chaurasia; who are on bail; are convicted u/s 27 of Arms Act and, consequently, their bail bonds are cancelled and are taken into custody to serve their sentences.”**

6. All the five accused named above felt aggrieved by their respective conviction and the award of jail sentence and filed two criminal appeals in the High Court.

7. So far as Kanhai Prasad Chourasia is concerned, he filed Criminal Appeal(DB) No.112/1994 whereas the remaining four accused are concerned, they jointly filed Criminal Appeal(DB) No.77/1994 in the High Court of Patna. Both the Criminal Appeals were clubbed together for hearing.

8. So far as Criminal Appeal No.112/1994 filed by the accused Kanhai Prasad Chourasia is concerned, the question to be considered therein was only one, namely, whether the Additional Sessions Judge was justified in convicting him (Kanhai Prasad Choursia) under Section 302 IPC read with Section 27 of the Arms Act.

9. So far as Criminal Appeal No.77/1994 filed by remaining four accused, namely, Lukho Prasad Chourasia, Birendra Prasad Chourasia, Binod Prasad Chourasia and Deep Narayan Chourasia is concerned, the question involved therein was whether the Additional Sessions Judge was justified in convicting these four accused under Section 27 of the Arms Act and sentenced them to undergo rigorous imprisonment for five years.

10. The High Court, however, was completely under misconception and misdirected itself by forming an opinion as if all the five accused were convicted under Section 302/149 IPC and accordingly went on to appreciate the evidence and while dismissing both the appeals by a common judgment convicted four accused under Section 302/149 IPC along with Kanhai Prasad Chourasia.

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A 11. This is clear from the first and concluding paras of the impugned judgment, which are reproduced below:

First Para

B “As both these appeals arise out of a judgment dated 8<sup>th</sup> February, 1994, passed by the 12<sup>th</sup> Additional Sessions Judge, Munger in Sessions Trial No. 264/92, convicting the appellants under Section 302 of I.P.C. with life imprisonment and the other accused for offence under Sections 302/149 I.P.C. to life imprisonment, so also each of them for offence 27 of the Arms Act to five years’ R.I.,  
C these appeals have been filed by the appellants and they are being disposed of by this common judgment.” (Emphasis supplied)

Concluding Paras

D “Even though learned counsel for the appellants by taking us through the evidence tried to point out minor contradictions in the same, but we find that considering the complete reading of the evidence, the story as is narrated by the witnesses and as it is recorded in the fardbeyan by P.W.5 Sundar Tanti is proved. It is a case where the appellants after the incident that took place in the morning,  
E with an intention to commit the crime, armed with rifles and pistols came to the spot, committed the offence and while fleeing away, to threaten the villagers who had assembled there, firing in the air ran away. It is a case where they formed an unlawful assembly, committed the offence and, therefore, conviction under Section 302 and 302/149 of I.P.C. is proper and as the entire conviction is based on the evidence that came on record, we see no reason to interfere into the matter and allow this appeal. The prosecution has proved its case and the conviction, in our  
F considered view, does not suffer from any infirmity.

G Accordingly, we see no reason to interfere into the matter. The appeals being devoid of merit are dismissed. The appellants are on bail. Their bail-bonds are cancelled. They are directed to be arrested and taken into custody for undergoing the remaining part of their sentence.”

H (Emphasis supplied)

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12. The effect of the judgment of the High Court is three-fold. First, both criminal appeals stand dismissed; Second, conviction and sentence of Kanhai Prasad Choursia under Section 302 IPC read with Section 27 of the Arms Act is upheld; and Third, the remaining four accused - Lukho Prasad Chourasia, Birendra Prasad Chourasia, Binod Prasad Chourasia and Deep Narayan Chourasia also stand convicted under Section 302 IPC read with Section 149 IPC and Section 27 of the Arms Act. A  
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13. It is against this judgment, only one accused- Deep Narayan Chourasia has felt aggrieved and filed this appeal by way of special leave in this Court. C

14. So, the question, which arises for consideration in this appeal, is whether the High Court was right in dismissing the appeal filed by the appellant herein.

15. Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow the appeal, set aside the impugned judgment of the High Court and remand the case to the High Court for re-hearing of the appeal in question on merits in accordance with law. D

16. In our opinion, the Division Bench failed to apply its judicial mind and committed fundamental jurisdictional errors as detailed below. E

17. The first error was that the High Court proceeded on wrong factual premise that all the five accused have suffered conviction under Section 302/149 IPC read with Section 27 of the Arms Act by the Additional Sessions Judge. It was not so.

18. The second error was that the appellant (Deep Narayan Chourasia) along with other three accused (Lukho Prasad Chourasia, Birendra Prasad Chourasia and Binod Prasad Chourasia) were acquitted from the charge of commission of offence under Section 302/149 IPC by the Additional Sessions Judge but were convicted only under Section 27 of the Arms Act and were sentenced to undergo rigorous imprisonment for five years. However, as a result of the High Court's order, they were convicted under Section 302/149 IPC without there being any appeal filed by the State against the order of their acquittal and without there being any notice of enhancement of their sentence issued by the High Court *suo motu* to these four accused. F  
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A 19. In other words and as mentioned above, the question before the High Court was whether the appellant herein (Deep Narayan Chourasia) and other three accused were rightly convicted and sentenced to undergo rigorous imprisonment for five years under Section 27 of the Arms Act by the Additional Sessions Judge or not. Instead of recording any finding of affirmation of the conviction or acquittal, as the case may be, the High Court convicted all the four accused under Section 302/149 IPC also.

B 20. The third error was that the High Court failed to see that the Additional Sessions Judge had acquitted all the accused under Section 149 IPC, yet the High Court proceeded to convict all the accused under Section 149 IPC without there being any appeal filed by the State on this issue.

C 21. The fourth error was that though the High Court wrongly convicted the appellant along with three others for the offence punishable under Section 302/149 IPC, yet did not award any sentence to any of the four accused under Section 302/149 IPC.

D 22. Since the appellant and other three accused were acquitted of the charge under Section 302/149 IPC by the Additional Sessions Judge, yet the High Court convicted them under Section 302/149 IPC for the first time, the sentence prescribed under Section 302/149 IPC was mandatorily required to be awarded to each convicted accused as provided under Section 354(3) of the Code of Criminal Procedure, 1973.

E 23. The effect of the impugned judgment, therefore, is that though the appellant along with three accused have suffered conviction under Section 302/149 IPC but without sentence.

F 24. Now, the next question, which arises for consideration though not urged by any parties, is whether we should set aside the entire impugned order or set aside only *qua* the sole appellant herein because the other four accused though suffered conviction under Section 302/149 IPC alike the appellant herein did not file any appeal against their conviction and secondly, the other accused - Kanhai Prasad Chourasia whose conviction and sentence under Section 302/149 IPC read with Section 27 of the Arms Act was upheld has also not filed any appeal in this Court.

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25. The Constitution Bench of this Court in **Durga Shankar Mehta vs Thakur Raghuraj Singh & Ors.**, AIR 1954 SC 520 examined the question as to whether the powers conferred upon this Court under Article 136 of the Constitution can be exercised *suo motu* to meet the ends of justice in favour of non-appealing accused. A

26. The learned Judge B.K. Mukherjea (as he then was and later became CJI) speaking for the Bench in his distinctive style of writing answered the question in affirmative holding that: B

**“The powers given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land. The article itself is worded in the widest terms possible. .... The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this article in any way.....”** C  
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**This overriding power, which has been vested in the Supreme Court under Article 136 of the Constitution, is in a sense wider than the prerogative right of entertaining an appeal exercised by the Judicial Committee of the Privy Council in England.”** E

27. This Court has since then consistently extended the benefit of the order passed in appeal under Article 136 of the Constitution also to those accused who had not preferred the appeal against their conviction in the light of the aforementioned principle in appropriate cases.[see **Harbans Singh vs. State of U.P. & Ors.**, (1982) 2 SCC 101, **Raja Ram & Ors. vs. State of M.P.**, (1994) 2 SCC 568, **Chellappan Mohandas & Ors. vs. State of Kerala**, 1995 Supp(1) SCC 259, **Dandu Lakshmi Reddy vs. State of A.P.**, (1999) 7 SCC 69, **Anil Rai vs. State of Bihar**, (2001) 7 SCC 318, **Bijoy Singh & Anr. vs. State of Bihar**, (2002) 9 SCC 147, **Gurucharan Kumar & Anr. vs. State of Rajasthan**, (2003) 2 SCC 698, **Suresh Chaudhary vs. State of Bihar**, (2003) 4 SCC 128, **Akhil Ali Jehangir Ali Sayyed vs. State of Maharashtra**, (2003) 2 SCC 708 and **Pawan\_Kumar vs. State of Haryana** (2003) 11 SCC 241]. F  
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A            28. Having given our anxious consideration to this question and keeping in view the aforementioned principle of law laid down in decided cases, we are of the considered opinion that the entire impugned order deservers to be set aside against all the five accused.

B            29. In our view, an order, which is based entirely on wrong factual premise once held illegal by a superior Court at the instance of one accused, cannot be allowed to stand against other non-appealing accused persons also.

C            30. It is a fundamental principle of law that an illegality committed by a Court cannot be allowed to be perpetuated against a person to a *Lis* merely because he did not bring such illegality to the notice of the Court and instead other person similarly placed in the *Lis* brought such illegality to the Court's notice and succeed in his challenge.

D            31. It will be a travesty of justice delivery system where an accused, who is convicted of a lesser offence (Section 27 of the Arms Act alone) and was acquitted of a graver offence (Section 302/149 IPC) is made to suffer conviction for commission of a graver offence (Section 302/149 IPC) without affording him of any opportunity to defend such charge at any stage of the appellate proceedings.

E            32. Needless to say, if the other four accused had filed the appeals in this Court, they too would have got the benefit of this order. *A fortiori*, merely because they did not file the appeals and the case is now remanded for re-hearing of the appeal at the instance of one accused, the benefit of re-hearing of the appeal cannot be denied to other co-accused. In other words, the non-appealing co-accused are also entitled to get benefit of the order of this Court and are, therefore, entitled for re-hearing of their appeals along with the present appellant.

F            33. It is for all these reasons, the impugned order stands set aside also *qua* all the accused persons.

G            34. In the light of the foregoing discussion, the appeal succeeds and is accordingly allowed. The impugned order is set aside in its entirety. Both the Criminal Appeals, i.e., Criminal Appeal(DB) No. 77/1994 and Criminal Appeal(DB) No. 112/1994 are restored to their original numbers before the High Court for their analogues hearing.

H            35. We request the High Court to decide both the Criminal Appeals on their respective merits in accordance with law.

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36. Since the appellant-Deep Narayan Chourasia out of his total jail sentence of five years awarded by the Additional Sessions Judge for commission of offence under Section 27 of the Arms Act has already undergone jail sentence of five months, we release him (Deep Narayan Chourasia) on bail to the satisfaction of the concerned Trial Court pending Criminal Appeals before the High Court. A

37. We, however, make it clear that we have not expressed any opinion to the factual aspect of the case on their respective merits, which is subject matter of the two criminal appeals and, therefore, the High Court will decide both the appeals on their respective merits uninfluenced by any observations made by this Court. B

38. A copy of this order be sent to other four accused persons by the Registry of this Court to enable them to appear before the High Court for prosecuting their appeals. C

39. The High Court will issue notice to other four accused persons before hearing the appeals, if anyone fails to appear. The High Court may also consider appointing a lawyer for providing them legal assistance. D