
(2014) 09 SHI CK 0032
In the High Court Of Himachal Pradesh
Case No : Cr. Appeal No. 329 of 2008

State of Himachal Pradesh

APPELLANT

Vs

Vishal Sephiya

RESPONDENT

Date of Decision : 24-09-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 173, 313

Evidence Act, 1872 — Section 91, 92

Penal Code, 1860 (IPC) — Section 147, 148, 149, 307

Citation : (2014) 09 SHI CK 0032

Hon'ble Judges : Sureshwar Thakur, J;Rajiv Sharma, J

Bench : Division Bench

Advocate : Ashok Chaudhary, Additional Advocate General, Advocate for the Appellant; Rajesh Mandhotra and V.S. Rathore, Advocate for the Respondent

Final Decision : Allowed

Judgement

Sureshwar Thakur, J.—The instant appeal, is, directed by the State, against the impugned judgment, rendered on 21.1.2008, by the learned Additional Sessions Judge-II, Kangra at Dharamshala, in, Sessions case No. 3-D/VII/2005, whereby, the learned trial Court acquitted the accused/respondents for theirs having committed offence punishable under Sections 147, 148, 307 IPC read with Section 149 IPC.

2. Brief facts of the case, are, that, on 3.7.2003 a telephonic information with regard to admission of an injured in the hospital was received from Zonal Hospital, Dharmshala. On receipt of information, police party headed by SI Gulzari Lal rushed to the Hospital. Police recorded the statement of Varun Sharma, who was accompanying the injured, u/s 154 Cr.P.C., as the injured was not capable to make a statement. It has been deposed by Varun Sharma in his statement that he was studying in BSC final year in Government College, Dharamshala and when he had gone to the college along with Anil Sharma, then near the office of Principal, Manoj Sharma and Sudhir Sharma met them and

there were 6-7 boys of the college, who were standing at some distance and out of those boys one boy had come and asked Manoj Sharma that he was called by other boys and thereafter that boy started dragging Manoj Sharma and the remaining boys encircled him and started giving beatings to Manoj Sharma. One of those boys had stabbed Manoj Sharma in his stomach with knife, in sequel thereto Manoj Sharma sustained injuries over his arm and throat. Thereafter all those boys had run away along with knife. It has further been mentioned by Varun Sharma that he did not know the names of the boys but he along with Sudhir Sharma can identify those boys. He further disclosed in his statement that the boy who stabbed Manoj Sharma had also threatened him. His statement was sent to the Police station for registration of FIR. During the course of investigation, the police had prepared the spot map and recovered knife at the instance of accused Kuldeep Singh. The knife was taken into possession. The injured was got medically examined. As per the medical opinion, the injuries sustained by the injured were dangerous to life to be caused with sharp edged weapon.

3. On conclusion of the investigation, into the offence, allegedly committed by the accused, final report u/s 173 of the Code of Criminal Procedure was prepared and filed in the Court.

4. The accused were charged, for, theirs having committed offence punishable under Sections 147, 148, 307 IPC read with Section 149 IPC, by the learned trial Court, to, which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 10 witnesses. On closure of prosecution evidence, the statements of accused, u/s 313 of the Code of Criminal Procedure, were recorded, in, which they pleaded innocence and claimed false implication. They chose to lead evidence in defence, but later on no defence evidence has been adduced.

6. On appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused.

7. The State of H.P., is, aggrieved by the judgment of acquittal, recorded by the learned trial Court, in, favour of the accused/respondents. The Learned Additional Advocate General has concertedly, and, vigorously contended, that, the findings of acquittal, recorded by the learned trial Court, are, not based on a proper appreciation of evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal, be, reversed by this Court, in, exercise of its appellate jurisdiction, and, be replaced by findings of conviction, and, concomitantly an appropriate sentence, be also imposed upon the accused/respondents.

8. On the other hand, the learned defence counsel, has, with considerable force and vigour, contended that the findings of acquittal, recorded by the Court below, are, based on a mature and balanced appreciation of evidence on record, and, do not necessitate interference, rather merit vindication.

9. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

10. The first witness, who stepped into the witness box, in, proof of the prosecution case, is, PW-1, Dr. Neelam Mehta. Injured has been deposed to have examined by this witness. On examination, she found following injuries on the person of the complainant/injured:-

1. Wound one in number incised with sharp cut margins size 3 cm X 3 cm just below the right rib cage on abdomen part. Fresh bleeding from the wound was present.

2. Incised wound on left forearm on dorsal side size about 10 cm x 10 cm.

MLC comprised in Ex. PW-1/A has been deposed to have issued by her. In her opinion, the injury is dangerous to life and can be caused with knife Ex. P-1.

11. PW-2 Dr. A.K. Kaundal deposes that on 8.7.2003, police has moved an application seeking his opinion about the capability of making the statement by the injured as well as the nature of the injures. He further deposes that in his opinion comprised in Ex. PW-2/B, the injured was fit to give statement and the injuries sustained to him with knife was life threatening. He further deposes that on an application comprised in Ex. PW-2/C, the case summary of the injured was sought, and, the case summary comprised Ex. PW-2/D has been deposed to be issued by him which is under his hand and bears his signatures.

12. PW-3 Inspector Balbir Singh deposes that after completion of the investigation, he prepared the final report.

13. PW-4 Manoj Kumar, complainant/injured deposes that on 3.7.2003 he had gone to find out his result of B.Com 1st year examination. He deposes that at about 1.30/2.00 p.m., while he was standing outside the office of the college, his class mates met him. He continues to depose that he was accompanied by his cousin Sudhir and were discussing about the result. He further deposes that in the meantime one boy came to him and asked him to accompany him as some other boys standing at a distance of 10/15 meters were calling him. He deposes that he thought that those boys might to know him and as such he accompanied that boy to that place where boys were standing. He continues to depose that they started making inquiry about his name and his parentage and further started asking irrelevant questions, which led him to ask them about the cause of such inquiry, to which those boys disclosed to him that there were taking his ragging. He further deposes that he disclosed to them that he is an old student and did not recognize them, thereafter all those boys started belaboring him as initially he was slapped and thereafter giving beatings with kick and fist blows and thereafter he was stabbed. He deposes that he was given a stab blow by the accused, who present in the Court standing on the extreme side. This witness during recording of his deposition has pointed out toward the accused, who disclosed his name to be Vishal. He deposes that he was dragged by the accused,

who is present in the Court. He has pointed out towards Ankush and the remaining accused who are present in the Court have been deposed by him to have started giving beatings to him with kick and fist blows, who have also been identified by him in the Court. He deposes that when he was given stab blow in his stomach, it started bleeding and his clothes were stained with blood. He was saved by Sudhir, Varun and Anil. He continues to depose that he was taken to the hospital by them in a vehicle. He remained admitted there for 20/25 days and thereafter remained bed rest for number of days. His statement has been deposed by him to have recorded after 4-5 days, as he was not in a position to speak. He deposes that the police recovered the knife from the accused present in the Court and he has identified the said person to be accused Kuldeep Singh. Knife Ex. P-1 has been deposed by this witness to have taken into possession vide seizure memo Ex. PW-4/A, which has been signed by him at encircled portion "A". Knife Ex. P-1 has been deposed by him to be the same which was taken into possession. During the course of his cross-examination, he admitted it to be correct that the police visited continuously for next three days. He further admitted it to be correct that before his surgery as well as after his surgery the police was seeking the identity of the assailants. He voluntarily deposes that he was not in a position to disclose anything because of injuries suffered. He further deposes it to be correct that he did not know the names of the assailants, yet it is stated to be incorrect that he did not identify the assailants. He voluntarily deposes that he knew the assailant by their identification through their faces. It is correct that no identification parade was conducted during investigation. He further admitted it to be correct that the police disclosed the names of the boys who were caught by the police. He further admitted it to be incorrect that vishal never stabbed him and that Ankush never caught him nor Ankush and Vivek gave him any beatings with kick and fist blows. He further stated it to be incorrect that the accused have been falsely implicated at the instance of the police.

14. PW-5 Sudhir Sharma deposes that he had gone to Dharmshala college with Manoj Kumar. He deposes that he was working at that time with LIC and had gone to meet Manoj Sharma in the college, who is son of his maternal uncle. He continues to depose that when they were standing in front of the office of the principal, Manoj Sharma one Varun and Anil also came over there and joined them, while they were discussing about the interview which has been faced by Manoj Sharma about two days back. He continues to depose that in the meantime, one boy came over there and called Manoj Sharma as he was called by some other boys who were standing at a distance. Ankush has been deposed by this witness to have directed by those boys that in case he did not come, let him dragged away. He further deposes that he can identify Ankush, who had come to call Manoj. He further deposes that on the asking of Manoj Kumar about the cause of taking away then Ankush gave a kick bow to Manoj and all those boys who were already standing there and today present in the Court started giving beatings to Manoj. Initially Manoj was given kick and fist blows and

thereafter one body namely vishal gave him a knife blow and inflicted injuries over his arm and stomach. Thereafter all the accused persons have been deposed to have run away from there. He further deposes that Manoj was then taken to the hospital. Thereafter police arrived at the Hospital. On inquiry having been made by the police, this witness had disclosed the names of the assailants to the police. He further deposes that he knew all the assailants including the accused present in the Court. He further deposes that the injured remained admitted in the hospital for about 15/20 days. On his being cross-examined by the learned defence counsel he deposes it to be correct that he attended his office on 3.7.2003. He stated it to be incorrect that he came to know about the occurrence in the office and he then straight away rushed to the hospital. He did not disclose the police that he came to know about the name of the assailants as the assailants were calling each other with such names. He voluntarily deposes that he straight away disclosed the name of the assailants to the police as he knew their names as they used to move around in the town earlier. He did not tell the police the manner in which he was knowing their names. He cannot say about the number of students getting education in the college during that period. It is stated by him to be correct that he cannot say the particulars including addresses of the boys, who used to move around in the town. Voluntarily stated that he disclosed to the police that Vishal supehia gave knife blow to the injured. It is incorrect that neither he was knowing any assailants including vishal and Ankush nor he was knowing about their names and particulars. It is stated to be incorrect that he was not present on the spot. It is also stated to be incorrect that accused have been falsely implicated in a false case.

15. PW-6 Varun Sharma deposes that in the month of July, 2003 as he did not remember the exact date, he was coming near the office of principal at about noon, then he saw that Manoj was encircled by some boys, who called him, by raising his hands and sought his help. He continues to depose that when he tried to save him by taking out from those boys and in that process he was pushed and fell down on the ground. The witness was declared hostile he has resiled from his previous statement made u/s 154 Cr.P.C. On being permitted by the Court, this witness has been cross-examined. On his being cross-examined by the learned P.P., he stated it to be incorrect that knife Ex. P-1 was taken into possession at the instance of accused Kuldeep Singh under memo Ex. PW-4/A. Yet he has admitted his signatures over encircled portion Ex. PW-6/B over memo Ex. PW-4/A. It is also stated to be incorrect that he made statement supplementary mark X-1 of the knife having been produced by accused Kuldeep Singh which has been taken into possession under memo Ex. PW-4/A. During the course of his cross-examination, by the learned defence counsel, he deposes that he had signed over encircled portion Ex. PW-6/A and PW-6/B at the instance of the police.

16. PW-7 Ramesh Chand deposes that on receipt of statement u/s 154 Cr.P.C., FIR Ex. PW-7/A was registered, which bears his signatures with endorsement Ex. PW-7/B.

17. PW-8 SI Gulzari Lal deposes that on receipt of telephonic information on 3.7.2003 of injured having been admitted in the hospital, he alongwith HC Madan Lal and HHC Desh Raj rushed to the hospital. He deposes that he had moved an application to the incharge of the Hospital, seeking his opinion whether the injured was capable to give statement and it was opined by the incharge that injured was incapable of giving statement. Thereafter on 4/5 July, 2003 again opinion was sought from the Doctor regarding capability of injured of making statement and on 8.7.2003 the Doctor opined that the injured was fit to make statement. He also sought the opinion of the Doctor to the nature of the injury whether the same were dangerous to life vide application Ex. PW-2/A. Vide opinion Ex. PW-2/B the injury was opined to be dangerous to life. Case summary comprised in Ex. PW-2/D of the injured was also obtained on an application Ex. PW-2/C. He continues to depose that he recorded the statement of Varun Kumar u/s 154 Cr.P.C. comprised in Ex. PW-8/A, as per true version given by Varun Sharma including portion A to A and B to B. The statement has been deposed to have signed by Varun Sharma. Thereafter FIR was registered. He further deposes that he also recorded the supplementary statement of Varun Sharma. He continues to depose that he prepared the spot map comprised in Ex. PW-8/D. He further deposes that he arrested the accused persons. Ex. P-1 has been deposed by this witness to have produced by accused Kuleep singh in the presence of Varun and Manoj, which was taken into possession under memo Ex. PW-4/A after preparing sketch Ex. PW-8/E. Thereafter he recorded the statements of the witnesses and on completion of the investigation, final report has been produced by Inspector Balbir Singh. During the course of his cross-examination, he admitted it to be correct that Varun Sharma disclosed in his statement u/s 154 Cr.P.C. that he alongwith Sudhir can recognize the assailants as he did not know their names. It is stated to be correct that Sudhir Sharma is the first cousin of injured. It is stated to be correct that Sudhir Sharma was not a college student. It is correct that Sudhir Sharma was working in LIC for the last 2/3 years at the time of occurrence. It is stated to be correct that Anil kumar was also with Manoj Sharma, injured on that date. He further stated it to be correct that he recorded the statement of PW Anil Sharma on 5.7.2003 u/s 161 Cr.P.C. He further stated it to be incorrect that statement of PW Sudhir Sharma was not recorded on 3.7.2003. It is also stated to be incorrect that he has intentionally included Sudhir Sharma as a witness despite the fact that he was neither present on the spot nor he was conversant with the facts including conversant with the accused. It is stated to be correct that during investigation he did not verify whether these were only the accused as named during investigation and there are no other similar people of the same name in the college at the time of alleged occurrence. It is stated to be incorrect that he did not conduct the investigation in a fair manner so as to establish the identity of the assailants. It is stated to be incorrect that knife Ex. P-1 was never handed over by accused Kuldeep during investigation. It is stated it to be incorrect that knife Ex. P-1 has been falsely planted against the accused. It is also stated to be incorrect that since it was a false case thereby no identification parade was conducted.

18. Accused Vikas has been deposed by PW-4 to have delivered a stab blow with knife Ex. P-1 in the abdomen of the aforesaid, which sequelled oozing of blood therefrom and soiling of his clothes. Accused Ankush has been deposed by PW-4 to have dragged him and the remaining accused have been deposed to have delivered kick and fist blows. All the accused with the roles attributed to them by PW-4 in his deposition have been identified in Court by him. The testimony of PW-4 stands corroborated by the deposition of PW-5 who was accompanying PW-4 at the apposite stage. The Learned trial Court in recording findings of acquittal in favour of the accused had dispelled the testimony of the aforesaid on the score that the identification of the accused by the complainant/injured in Court is a frail piece of evidence, in face of it not having been preceded by a Test Identification Parade, wherein the complainant/injured had taken to identify the accused, in quick spontaneity to the occurrence. The said reason as attributed by the learned Court below in recording findings of acquittal in favour of the accused remain un-empowered, in the face of the learned trial Court having omitted to pay reverence to a judgment rendered in AIR 2004 SC 1253 titled Ashfaq vs. State, the relevant paragraph whereof is extracted hereinafter, wherein it has been voiced that where the complainant/injured had sufficient and adequate opportunity to gather an enduring impression of the identity of the accused, besides when on the impression gathered by the complainant/injured of the identity of the accused, as initially revealed to the Investigating Officer, such revelation led to the arrest of the accused, the factum that the identity of the accused has remained un-established in quick spontaneity to the occurrence by the holding of a Test Identification Parade, would not render the identification of the accused for the first time in the Court by the complainant/victim to be a feeble or infirm piece of evidence. Within the enshrined parameters of the judgment of the Hon'ble Apex Court the relevant paragraphs of which have been extracted hereinafter, it is to be determined whether credence ought to be imputed to the factum of the accused having come to be identified by the injured/complainant in Court, even when such identification for the first time in Court by the complainant/injured was un-preceded by a Test Identification Parade. The existence of the enshrined parameters contemplated in the aforesaid judgment of the victim/complainant having had sufficiency or adequacy of opportunity to gather or marshal an enduring impression of the identity of the accused is unraveled by the factum of the accused persons having been evidenced to have remained face to face with the complainant/victim for a reasonable time, obviously then it has to be firmly concluded that, there was sufficiency or adequacy of opportunity for the victim/complainant to gather in his mind a deeply etched impression, of their key identifiable features which were recalled by him during the course of his coming to identify the accused in the Court to be the persons who respectively delivered a knife blow in his stomach with knife Ex. P-1 and also perpetrated kick and fist blows besides dragged him. Moreover when the complainant carrying in his mind the identifiable features of the accused facilitated the arrest of the accused by the Investigating Officer is a potent circumstance which falls within the enshrined requirement of the verdict

of Hon''ble the Apex Court, relevant paragraph of which is extracted hereinafter

".....The case on hand is akin to the said case dealt with by learned Judges therein, in that among the accused one was already known on account of having white-washed their house, that they have entered their house and was for quite some time present there holding them at ransom by directing and using threat to relieve them of the valuables on which they could lay their hands and it is too much to claim, in spite of all these, that the evidence of P.Ws 2, 3 and 10 could not be either sufficient to properly identify the accused or relied upon against the accused in the absence of proper test identification parade. In this case, it has also further come on record that one whose identity was known was initially traced, that the said trail led the investigating authorities to the others and that the complainant was also said to have been associated even at that stage of investigation to identify the accused and ensure properly the arrest of the real accused. Consequently, we see no merit whatsoever in the grievance made and challenge to the judgments of the Courts below on this ground."

(at p.p. 1255-1256)

19. Consequently, the factual matrix of the case falling within the enshrined parameters contemplated in the judgment of Hon''ble Apex Court for dispensing with the necessity of a Test Identification Parade and vindicating the factum of identification in the Court of the accused by the injured/victim constrains this Court to conclude that the requirement of a Test Identification Parade preceding the identification of the accused in Court was as such dispensable. Consequently merely for lack of holding of a Test Identification Parade prior to the identification of the accused in Court, it was legally unwarranted for the learned trial Court to record findings of acquittal in favour of the accused/respondents. Fortification to the aforesaid inference flows from the lack of enunciation in the testimony of the Investigating Officer comprised in his cross-examination arising from apposite suggestion having been put to him or to the injured/complainant by the learned defence counsel, of the victim/injured never having gathered any enduring impression of the key characteristics features or the identifiable traits of the accused, omission of such suggestion to both the aforesaid by the learned defence counsel pronounces the factum of, hence, the defence having acquiesced to the fact of the injured/complainant having at the time of occurrence gathered an enduring impression of the key characteristics features and physical traits of the accused rendering him empowered to effectuate their arrest, as also to identify them in Court dehors a Test Identification Parade having preceded it.

20. The occurrence was fortuitous, besides the names of the accused were not known to the complainant/victim. The recovery of knife Ex P-1 under memo Ex. PW-4/A at the instance of accused Kuldeep Singh, has been proved by the deposition of PW-4. Even though the witness to the recovery PW-6 has turned hostile and has not deposed qua the factum of recovery of knife Ex. P-1 at the instance of accused Kuldeep Singh yet when during the course of his cross-

examination by the learned PP his having admitted his signatures on memo Ex. PW-4/A interdicts him to resile from the contents thereof in the face of the embargo envisaged under Sections 91 and 92 of Indian Evidence Act, against his deposing orally at variance to the recorded recitals of the memo which have been admitted by him to be signed by him. In sequel it has to be concluded that with there being a bar under Sections 91 and 92 of Indian Evidence Act against his deposing at variance to the apposite recorded recitals of the memo admitted to be signed by him, his oral testimony in detraction/digression to the recorded recitals, is not acceptable evidence. Obviously then as a natural corollary his having turned hostile so as to render inefficacious the factum of recovery of knife Ex. P-1 at the instance of accused Kuldeep is un-worthy. Rather it has to be concluded that with his having admitted his signatures on Ex. PW-9/A, its contents stand proved. With the formation of aforesaid inference it has to be concluded that the recovery of Ex. P-1 at the instance of accused Kuldeep under memo Ex. PW-4/A, is, an efficacious and reliable piece of evidence so as to connect the accused in the commission of offence for which they came to be charged and tried by the Court. In aftermath the factum of recovery of weapon of offence corroborates the factum of victim having identified the accused in the Court.

21. PW-1 in his examination-in-chief proved Ex. PW-1/A. He has also proved the fact of injury No. 1 being dangerous to life, besides he deposed that the injuries as noticed by him in Ex. PW-1/A can be caused with knife Ex. P-1. His testimony stands corroborated by PW-2, obviously then it stands formidably established by the prosecution that the injuries sustained by the victim/complainant were dangerous to life, Consequently, the offence u/s 307 IPC stood convincingly established against the accused. Even though the act of stabbing of the complainant/injured PW-4 is attributable to accused Vikas, nonetheless in the face of others, too, having joined accused Vikas in as much, theirs having formed an unlawful assembly, besides having perpetrated individual penal acts on the person of the injured/complainant renders all to be vicariously liable. The learned court below hence, ought to have held them guilty for the charge. It appears that it recorded findings of acquittal against the accused on the strength of gross misappreciation of evidence on record as also on gross non-application of the apposite law to the facts at hand. Consequently the learned trial Court has committed a legal misdemeanor which necessitates interference by this Court, as such the appeal preferred by the State is allowed and the accused are convicted for theirs having committed offence punishable under Sections 307 read with Sections 147, 148 and 149 IPC. Accordingly the impugned judgment of the learned trial Court is set aside. The Convicts be produced before this Court on 7.10.2014 for hearing them on quantum of sentence.