

Sri Narain and anr. Vs. State (Govt. of Nct of Delhi)

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Court : Delhi

Decided On : Jan-30-2014

Judge : G.P. Mittal

Appellant : Sri Narain and anr.

Respondent : State (Govt. of Nct of Delhi)

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

21. t January, 2014 Pronounced on:

30. h January, 2014 + CRL. A. 542/1998 SRI NARAIN AND ANR. Through
Appellants Mr. Dinesh Chander Yadav, Advocate versus STATE (GOVT. OF NCT
OF DELHI) Respondent Through Mr. Rajat Katyal, APP for the State with SI
Premveer Singh, PS Sultan Puri. CORAM: HON'BLE MR. JUSTICE SANJIV
KHANNA HON'BLE MR. JUSTICE G.P. MITTAL

JUDGMENT

G.P. MITTAL, J.

1. This appeal relates to a small dispute with very serious and painful consequences wherein a mother (Sunderi Devi) lost one of her sons (Hari Prakash) whereas the other (Sri Narain) and his wife (Smt. Savita) were

sentenced to imprisonment for life for committing murder of deceased Hari Prakash.

2. FIR No.512/1992 on the basis of which the appellants faced trial for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (IPC) in Sessions Case No.146 of 1996 was registered on the statement of deceased Hari Prakash, which the Trial Court (the Additional Sessions Judge) treated as a dying declaration. Believing the same to be true and voluntary, the ASJ relied on the same and held that the appellants shared a common intention to commit the murder of the deceased with one Late Surat Singh @ Bunty who was the brother of appellant Savita.

3. The English translation of the complaint Ex.PW2/B made by deceased Hari Prakash to SI Balbir Singh is extracted hereunder:

I stay at the above mentioned address. I had got my younger brother Sri Narain married around 1 years ago at Rewari. This house has 2 rooms; in one of the rooms my younger brother Sri Narain resides with his wife Savita while I and my mother stay on the roof and the room on the ground floor has been given on rent. My brother Sri Narain and his wife Savita insisted that we should get the ground floor room vacated and stay in the same to which I replied that we shall get it vacated and stay there after I get married. On this topic only, Sri Narains brother-in-law Surat Singh @ Bunty and his sister used to quarrel with my mother. They also fought on 24.10.1992. On 03.11.1992, at about 08:10 p.m., the dispute was again raised. My younger brother Sri Narain caught hold of me and his wife Savita gave me slaps and fist blows. Surat Singh @ Bunty, S/o Dutt Ram, R/o Bus Stand, Jhuggi took out a knife and stabbed in my abdomen and on my shoulder with an intention to kill me. Because Bunty was already in search of an opportunity to kill me and that is why he had stabbed me with a knife with an intention to kill me. My brother Sri Narain and his wife Savita had caught hold of me. They had already made a plan to take my life. Jagannath and others came to save me and my mother took me to DDU hospital. Please take legal action against them.

4. It is apparent from the MLC as also from the endorsement Ex.PW2/C made by SI Balbir Singh on the statement Ex.PW-2/B made by deceased Hari Prakash that

immediately after the incident, the deceased was removed to Deen Dayal Upadhyay (DDU) Hospital. SI Balbir Singh obtained the fitness certificate from the doctor to record the statement of the deceased.

5. In order to establish its case, the prosecution has examined 18 witnesses. Sundari Devi, the deceased's mother who was also a witness to the occurrence died during the course of trial before her statement could be recorded. Thus, the prosecution was left to examine Jagan Nath, the solitary eye witness of the incident. However, he did not support the prosecution version that he was a witness to the occurrence. He deposed that on the day of the incident, when he returned from his duty, he came to know that a quarrel had taken place. He removed the injured Hari Prakash (now deceased) to the hospital. He was permitted to be cross-examined by the learned Additional Public Prosecutor for the State but he stuck to his version and denied that he saw appellants Sri Narain and Savita catching hold of Hari Prakash and the third accused Surat Singh @ Bunty (since deceased) inflicting knife blows on the abdomen, shoulder and face of the deceased. Other witnesses examined by the prosecution have provided various links in the case of the prosecution to establish that the incident of stabbing took place at D-2/337, Sultan Puri, Delhi. Hari Prakash is stated to have succumbed to the injuries on 17.11.1992 (14 days after the incident). Dr. L.T.Ramani opined that the injury to abdominal viscera was sufficient to cause death in the ordinary course of nature. He stated that death was due to shock peritonitis following injury to the abdominal viscera.

6. In their examination under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.), the appellants have simply denied the incident. They have not given any account or any explanation as to how the incident actually occurred.

7. As stated earlier, the ASJ relied on the statement Ex.PW-2/B made by injured Hari Prakash (the deceased) treating it as a dying declaration. He repelled the contention raised on behalf of the appellants that the dying declaration recorded by the police officer ought not be believed as there was an opportunity to call the Magistrate, holding that Hari Prakash's death was not anticipated by PW-2 and therefore it was not a case where there was an opportunity to summon a

Magistrate to record the dying declaration. Consequently, the appellants were convicted holding them constructively liable for the act of their deceased co-accused Surat Singh @ Bunty with the aid of Section 34 IPC.

8. There is twin challenge to the impugned judgment laid by the learned counsel for the appellants. First, since the deceased was not under expectation of death, statement Ex.PW-2/B could not have been taken as a dying declaration and second, there was no evidence to show that there was any pre-concert or prior meeting of minds or a pre-arranged plan to cause fatal injury on the person of the deceased between the appellants and the co-accused Surat Singh @ Bunty (since deceased). Therefore, they could not have been convicted under Section 302 with the aid of Section 34 IPC.

9. Coming to the first question, having recourse to Section 32 of the Indian Evidence Act, 1872 (the Act) we may say that it is not the requirement of law that the person making the statement must be under expectation of death. The relevant portion of Section 32 of

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases: (1) When it relates to cause of death.- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. (emphasis supplied) (2) (3) (4) (4) (5) (6) (7) (8)

10. Thus, a bare perusal of the provisions of Section 32 of the Act discloses that for considering the circumstances of the transaction which resulted in a death, the statement made by the deceased person need not be made while he is under expectation of death.

11. In *State of Haryana v. Mange Ram & Ors.*, (2003) 1 SCC637 the Supreme Court highlighted the distinction on this aspect under the English Law and the Indian Law and held that the expectation of imminent death is not the requirement of Indian law and while reversing the judgment of acquittal held thus:

11. The main reason for discarding Exhibit PQ is that when the statement was recorded by the police, the deceased was not under the shadow of death and the injuries received by him were not even considered dangerous to his life. The other reason given is delay in recording Exhibit PQ with the result that there was ample intervening time for deliberation and false implication of the accused on account of previous enmity as also the non-examination of Sant Ram by the prosecution and introduction of PW5 as a false witness in the dying declaration. The basic infirmity committed by the High Court is in assuming that for a dying declaration to be admissible in evidence, it is necessary that the maker of the statement, at the time of making the statement, should be under the shadow of death. That is not what Section 32 of the Indian Evidence Act says. That is not the law in India. Under the Indian law, for dying declaration to be admissible in evidence, it is not necessary that the maker of the statement at the time of making the statement should be under the shadow of death and should entertain the belief that his death was imminent. The expectation of imminent death is not the requirement of law.....

12. The first contention raised is therefore bound to be rejected.

13. Coming to the second contention we may say that before the Court can convict a person constructively for the act of another, it must satisfy itself of the existence of a prior concert between them or a pre-arranged plan. It is true that the common intention could arise at the spur of moment and be formed suddenly even at the spot, however, there has to be positive evidence of the same. Particularly, where a fatal blow is given by one person and the others who are present at the spot are

unarmed, there has to be some positive evidence to draw an inference of common intention.

14. In *Laxmanji & Anr. v. State of Gujarat*, (2008) 17 SCC48 relying on *Jai Bhagwan v. State of Haryana*, (1999) 3 SCC102 the Supreme Court held thus:

11. In order to bring a case under Section 34 it is not necessary that there must be a prior conspiracy or premeditation. The common intention can be formed in the course of occurrence. To apply Section 34 apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of the accused in the commission of an offence. If common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability. But if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked.....

15. Since it is difficult to get direct evidence of the fact that any act done by the accused persons at the spot is in furtherance of the common intention of all or of some of them present at the scene of crime, the inference of common intention has necessarily to be drawn from the circumstances established by the prosecution. In *Brijlala Pd. Sinha v. State of Bihar*, (1998) 5 SCC699 the Supreme Court ruled that unless a common intention is established as a matter of necessary inference from the proved circumstances, the accused persons will be liable for their individual acts and not for the acts done by any other person. In para 11 of the report, the Supreme Court held as under:

11. Unless a common intention is established as a matter of necessary inference from the proved circumstances the accused persons will be liable for their individual act and not for the act done by any other person. For an inference of common intention to be drawn for the purposes of Section 34, the evidence and the circumstances of the case should establish, without any room for doubt, that a meeting of minds and a fusion of ideas had taken place amongst the different accused and in prosecution of it, the overt acts of the accused persons flowed out as if in obedience to the command of a single mind. If on the evidence, there is doubt as to the involvement of a particular accused in the common intention, the

benefit of doubt should be given to the said accused person....

16. In *Dharam Pal and Ors. v. State of Haryana*, AIR 1978 SC1492 the Supreme Court observed as under:

15. A criminal court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case....

17. In *Salim @ Naju v. State*, Criminal Appeal No.976/2012, decided by a Division Bench of this Court on 20.09.2013 to which one of us (G.P. Mittal, J.) was a party, the juvenile and the two appellants asked for the mobile phone from the deceased and the deceased refused to hand over the same to the accused persons. Immediately thereafter the co-accused, that is, the juvenile attacked the deceased with a knife which he took out. What provoked the juvenile to attack the deceased with the knife could not be deciphered. The Division Bench held that although it was difficult to accept the contention raised on behalf of the State that the three accused wanted to rob the deceased of the mobile phone, yet even if it was assumed that the three boys wanted to commit the robbery, there was no evidence to show common intention to cause injury on the vital part of the body of the deceased was shared by the two appellants.

18. In *Surender Kumar @ Dimpy & Ors. v. State*, Criminal Appeal No.702/2001, decided by a Division Bench of this Court on 19.11.2009, the facts were that the appellant Surender used to tease Usha, a neighbour. Usha made a complaint about the same to her father, two brothers and mother. All four had an altercation with appellant Surender. Surender's parents reached the spot. When the verbal dual was going on between Surender on the one hand and Rajesh, Naresh and Kishal Lal (the deceased) on the other hand, accused Ramesh Chand took Usha's brother Kishan Lal in a bear hug from behind and Surender gave him a knife blow. On facts, it was found that there was no evidence that the co-accused, that is,

appellants Ramesh Chand and Ved Rani were aware of Surender carrying a knife. The Division Bench held that the co-accused Ramesh Chand and Ved Rani cannot be said to have shared common intention to inflict a knife injury on the chest of the deceased by Surender. Para 50 of the report in Surender Kumar @ Dimpy is extracted hereunder:

50. That apart, on the issue of common intention shared by the accused, it has to be noted that the starting point of the episode was Surender being the antagonist on the street who teased Usha who went home and complained leading to the deceased, her two brothers and her mother going to the street to settle scores with Surender, who still remained the sole antagonist on the street. His parents joined the scene at stage two when at stage one a verbal duel was going on between Surender on the one hand and the deceased, Rajesh, Naresh and Krishna on the other hand. What did they know about the deceased (sic Surender) carrying a knife with him?. There is no evidence that they knew. Even if they caught hold of the deceased it cannot be said that they did so sharing any common intention to murder the deceased or the common intention to inflict a knife injury on the chest of the deceased by Surender.

19. In State v. Sunil @ Akash @ Sagar, Criminal L.P. 527/2011, decided on 23.01.2012 by another Division Bench of this Court, Respondent Sunil held the deceaseds hands from the back and coaccused Vipin inflicted knife injuries on deceaseds (Suraj) chest and then both the accused fled from the spot. In the absence of any knowledge that Vipin was armed with a knife and was bound to use it, the Division Bench opined that Sunil was rightly acquitted of the offence of murder with the aid of Section 34 IPC.

20. In Kashmira Singh v. State of Punjab, 1995 Supp (4) SCC558 appellant Kashmira Singh was tried along with two others William and Sukhchain Singh for the offence under Section 302 read with Section 34 IPC. The three were alleged to be pick pocketers. As per the prosecution, on 30.05.1979, deceased Sukhbinder Singh and his brother PW-4 and uncle PW-5 had gone to Amritsar to get the tractor repaired. It was alleged that the appellant (Kashmira Singh) tried to put his hands in the shirt pocket of PW-5 who questioned him as to what was he doing.

Thereupon, PW-5 called the deceased and the deceased tried to catch hold of the appellant. But in the process, the appellant and his co-accused Sukhchain Singh caught hold of the deceased and William who happened to be there took out a knife from his pant pocket and gave a blow to the deceased on his neck. The deceased fell down and the trio ran away. The Supreme Court held that the appellants (Kashmira Singh as well as Sukhchain Singh) could not be said to have shared common intention with the co-accused William to cause injury with the knife on the vital part of the body. Allowing the appeal, the appellant Kashmira Singh and Sukhchain Singh, (who had not even preferred the appeal), were acquitted.

21. Coming to the facts of the instant case, it has to be borne in mind that it was the statement Ex.PW-2/B, being dying declaration, made by the deceased to the police, which formed the basis of the appellants conviction under Section 302 IPC with the aid of Section 34 IPC. The statement is completely silent that the appellants had exhorted Surat Singh @ Bunty to kill or to stab the deceased. The statement does not even show that the appellants were aware of co-accused Surat Singh @ Bunty carrying a knife with him. The statement reveals that when the deceased was held by appellant Sri Narain, he was given slaps and fist blows by appellant Savita. It was at this point of time that Surat Singh @ Bunty suddenly took out a knife and stabbed in the deceaseds abdomen. Although, we affirm the view taken by the learned ASJ that there was no reason to disbelieve the statement Ex.PW-2/B made by the deceased to SI Balbir Singh when he was fully conscious and had no motive to falsely implicate anyone, yet there is absolutely no material to show that the appellants Sri Narain and Savita shared the common intention to inflict the knife injury by co-accused Surat Singh @ Bunty. It is not even stated that while the injuries were being inflicted, appellant Sri Narain continued to hold the deceased. Thus, the appellants conviction under Section 302 read with Section 34 IPC cannot be sustained. The same is liable to be set aside.

22. However, from the dying declaration Ex.PW-2/B the appellants are clearly guilty of causing simple injuries with blunt object, that is, slaps and fists blows in furtherance of their common intention. They are, therefore, convicted for the offence punishable under Section 323 read with Section 34 IPC and are

sentenced to undergo simple imprisonment for six months each, which they have already undergone.

23. The appellants were enlarged on bail in pursuance of the orders dated 13.01.1999 (Savita) and 03.04.2003 (Sri Narain) respectively passed by this Court. Their personal bonds and surety bonds are ordered to be discharged.

24. The appeal is allowed in above terms. (G.P. MITTAL) JUDGE (SANJIV KHANNA) JUDGE JANUARY30 2014 vk

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