

**Shankar and anr. Vs. the State**

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**Court :** Delhi

**Decided On :** Apr-21-2014

**Judge :** V. K. Jain

**Appellant :** Shankar and anr.

**Respondent :** The State

**Advocate for Pet/Ap. :** Mr. S.C. Sagar, Mr. Rajesh Rajora, Ms. Ritu Gauba, Mr. Dinesh Chander Yadav, Mr. Mahinder Singh, Mr. Amit Tiwari

**Judgement :**

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

16. 04.2014 Date of Decision:

21. 04.2014 + CRL. A.224of 2010 SHANKAR AND ANR. Through: ..... Appellant Mr. S.C. Sagar and Mr Rajesh Rajora, Advs. versus THE STATE ..... Respondent Through: + Ms. Ritu Gauba, APP. CRL. A.226of 2010 RAKESH KUMAR CHOLA ALIAS RAJESH ..... Appellant Through: Mr. Dinesh Chander Yadav, Mr. Mahinder Singh & Mr. Amit Tiwari, Advs. versus THE STATE ..... Respondent Through: Ms. Ritu Gauba, APP. CORAM: HON'BLE MR. JUSTICE V.K. JAIN JUDGEMENT V.K. JAIN, J.

In the night intervening 30/31st October, 2004, Police Control Room received an information that a person namely Pradeep had been stabbed in Gali Akhade Wali,

Sita Ram Bazar, Delhi and was being taken to JPN Hospital. The information, when conveyed to Police Station Hauz Qazi was recorded vide DD No.3A and a copy of the said DD was handed over to SI Mahmood Ali for investigation. SI Mahmood Ali reached JPN Hospital, where the injured Pradeep was found admitted. In his statement to the police officer, Pradeep stated that on 30.10.2004, he was returning home on the motorcycle of his neighbour Aditya, after purchasing sweets. His younger brother Naveen and his friend Bisham @ Chintu were following them on scooter. At about 11.15 PM, when he reached Sita Ram Bazar in Gali Bajrang Bali, Bunty, S/o Bhola, Rakesh and Shankar, were already present there. Rakesh told Bunty and Shankar that they would teach him (the complainant) a lesson and started beating him by fist and slaps. When his friend and his brother tried to save him, Rakesh held him, whereas Shankar and Bunty gave knife blows in his abdomen and all of them then ran away. An FIR under Section 307/34 of IPC was registered on the aforesaid statement of the complainant. During investigation, the injured (complainant) told the Investigating Officer that by mistake, he had given wrong name of the father of Bunty, whereas correct name was Nihal. He also alleged that Bunty had given him danda blow, whereas knife blow was given by Shankar. He also alleged that the persons named in the FIR were accompanied by another boy namely Omi, who was living in gali Khatikan, but he had forgotten to mention his name in the first statement and Omi had also given the fist and stab blows to him. Thus, four persons, namely, Rakesh, Shankar, Jitesh @ Bunty @ Tie & Omi alias Om Prakash were prosecuted under Section 307/34 of IPC. The accused Shnakar was also prosecuted under Section 25 of Arms Act.

2. On 28.8.2006, all the four accused were charged under Section 307/34 of IPC. The accused Shankar was also charged under Section 25/27 of Arms Act. Since the accused persons not pleaded guilty to the charges, 13 witnesses were examined by the prosecution. No witness, however, was examined in defence.

3. The complainant Pradeep Yadav came in the witness-box as PW-1 and inter alia stated that on 30.10.2004, at about 11.00 PM, he was returning to his home on the motorcycle of his friend and neighbour Aditya Bajpayee, after purchasing sweets from Standard Sweets, Sita Ram Bazar. His brother Naveen Yadav and

friend Bhism were following them on their scooter. When they reached near gali Bajran Wali at Main Road, Sita Ram Bazar, at about 11.15 PM, he saw the accused Bunty @ Jitesh, Shankar, Rakesh and Om Prakash, all of whom were previously known to him standing there. They stopped his motorcycle and Shankar caught him by collar and led him down on ground and all the accused in furtherance of their common intention, said AAJ ISKA KAAM TAMAM KER DETE HAIN. The accused Rakesh @ Chola caught him by waist, Bunty assaulted him with a danda on his head, Omi assaulted him with fist and slaps and Shankar attacked him with a knife on his stomach. He also alleged that all of them had personal enmity with him since on one of the occasions, they had a quarrel with his neighbour Deshraj and he (the witness) had intervened in the matter and got it settled. He further stated that after assaulting him, the accused persons ran away and he was brought to the hospital by his cousin brother Anil Yadav. He also stated that accused Shankar was identified by him in Tis Hazari Complex. However, in cross-examination by Additional PP, he stated that he had identified Shankar in the police station on 22.11.2004.

4. PW-2 Naveen Yadav is the brother of the complainant. He inter alia stated that on 30.10.2004, he along with his brother Bhism was coming on the scooter of Bunty, whereas his brother Pradeep was coming on the motorcycle of Aditya Bajpayee. At about 11.15 PM, when they reached gali Bajran Wali, Sita Ram Bazar, they found all the accused present there. The accused Rakesh stopped the motorcycle and asked the other accused to teach him a lesson and started beating him. Thereafter, all the accused said AAJ ISKA KAAM TAMAM KER DETE HAIN. He further stated that accused Rakesh caught his brother by his waist and Bunty assaulted him with danda, Om Prakash assaulted with fist and Shankar attacked him with a knife. After assaulting his brother, all the accused persons ran away from the spot, whereas his brother Pradeep was taken to hospital. PW-5 Bhism Kumar inter alia stated that at about 3-4 years ago, he along with his friend Naveen Yadav was going towards Sita Ram Bazar from Hauz Qazi. Aditya and Pradeep Yadav were going ahead of them on the motorcycle being driven by Aditya Bajpayee. When they reached near Bajrang Wali gali, accused Bunty and Shankar came from the front side along with three more persons and stopped the motorcycle of Pradeep Yadav. Bunty hit a danda on Pradeep, whereas Shankar

inflicted knife blows on him and, thereafter, those persons ran away. He, however, could not identify the other persons who had committed the offence along with Bunt and Shankar.

5. Shri Aditya Bajpayee came in the witness box as PW-6 and inter alia stated that on 30.10.2005, at about 11.30 PM, he was returning from Hauz Quazi on motorcycle and was drunk. He noticed 15-20 boys were quarrelling with each other and his motor cycle fell down. He then ran in the street. When he came out of the street, he found Pradeep Yadav bleeding from his stomach portion. He took Pradeep on bike and removed him to his house. During cross-examination by the learned APP, he admitted that Pradeep Yadav was sitting behind him on his motorcycle.

6. PW-7 Shri Anil Yadav stated that on 30.10.2004, at about 11.00 AM, when he was present at his shop near Lal Darwaja, he heard some noise in the area and went towards there, where he saw his cousin brother Pradeep lying in a pool of blood and took him to hospital in a rickshaw. PW-12 SI Mahmood Ali is the Investigating Officer of this case. He inter alia stated that after arresting the accused Shankar, he had interrogated him and recorded his disclosure statement Ex.PW-12/E. Shankar led them to a public urinal near Ajmeri Gate, Delhi and got recovered one Buttondar knife, after lifting the same from its roof. PW-13 Constable Nagender Kumar has also deposed with respect to recovery of Buttondar knife. PW-4 Dr Virender Kumar proved the signatures of Dr. Naveen Kushwaha on the MLC of the Pradeep Ex.PW-4/A7 In their respective statements under Section 313 Cr.P.C., the appellants denied the allegations against them and claimed to be innocent. Vide impugned judgment dated 01.02.2010 all the four accused persons were convicted under Section 307 read with Section 34 thereof. Vide impugned Order on Sentence dated 08.02.2010, they were sentenced to undergo RI for three years each and to pay fine of Rs 2000/- each or to undergo SI for two months each in default. The appellant Shankar, however, was acquitted of the charge under Section 25 and 27 of Arms Act. Being aggrieved from their conviction and sentence awarded to them, the appellants are before this Court by way of this appeal.

8. The learned counsel for the appellant has assailed the impugned judgment on the following grounds: i. In the FIR, the complainant alleged that knife blow to him was given by Bunt and Shankar, whereas when he came in the witness box, he claimed that knife blows to him were given only by Shankar; ii. The appellant Om Prakash @ Omi was not named in the FIR though he was previously known to the complainant; iii. There was a previous enmity between the appellant and the complainant; iv. When the complainant went to hospital, he claimed to have been assaulted by some known persons, but did not name any of them; v. The complainant was smelling alcohol when he was examined by the doctor; vi. The prosecution has failed to connect the knife alleged to have been recovered from the appellant Shankar with the injuries allegedly sustained by the complainant; vii. No offence under Section 307 of IPC is made out from the deposition of the witnesses and at best Section 324 of IPC is attracted. viii. Group of the blood, which is alleged to have been found on the knife was not taken, meaning thereby that the prosecution failed to prove that the knife alleged to have been recovered from the appellant Shankar was used for causing injuries to the complainant. ix. Neither the knife nor the clothes of the injured, alleged to have been recovered at the instance of the appellant Shankar, were produced during trial and shown to the eye witnesses.

9. As far as the appellant Om Prakash @ Omi is concerned, he was not named in the FIR, though the complainant claims that the said accused was previously known to him. Since the aforesaid appellant was previously known to the complainant, it is quite unlikely that he would have missed his name while giving statement to the IO on the night intervening 30/31.10.2004. The complainant in his aforesaid statement named all other assailants, but did not name Omi. The omission to name Omi has to be examined in the light of the fact that according to the complainant he had a previous animosity with them. More importantly, the FIR shows involvement of only three persons and not four persons in the incident. In these circumstances, when the FIR alleges involvement of three persons, the appellant Om Prakash @ Omi being previously known to the complainant was not named in the FIR and there was previous enmity between the parties, the possibility of false implication of the appellant Om Prakash @ Omi cannot be ruled out. The aforesaid appellant, therefore, is entitled to benefit of doubt.

10. Though in the FIR the complainant imputed knife blows to the accused Bunty as well as Shankar whereas no knife blow to Bunty was imputed by him when he came in the witness box, that omission would have no bearing as far as the case against the appellant Shankar is concerned. The complainant was consistent, in the FIR as well as while deposing in the court that the appellant Shankar had given knife blows to him. As far as Bunty is concerned, he has accepted the decision of the trial court and has not preferred any appeal.

11. As far as the previous enmity between the appellants and the complainant is concerned, the same could be a cause for causing injuries to the complainant as well as a motive for false implication. The court, in such a case has to carefully scrutinize the evidence and then decide whether previous enmity was the cause behind the incident in question or the complainant has tried to settle scores by implicating an innocent person. A perusal of the MLC of the complainant Pradeep Yadav would show that when he was examined in the hospital, he had as many as three (3) clean incised wounds over his right side loin. The injured Pradeep Kumar was unlikely to cause such serious injuries to himself only with a view to implicate the appellants in a false case. This is not the case of the appellants that some other person had caused the aforesaid injuries to the complainant Pradeep Kumar. When Pradeep went to the hospital soon after the incident he alleged that he had been assaulted by some known persons in Gali Akhade Wali about half an hour earlier. The above statement given by him in hospital is in consonance with the FIR lodged by him. Therefore, in the facts & circumstances of the case it appears to me that the complainant Pradeep Kumar was attacked on account of the previous enmity he had with Shankar and his accomplices and this was not a case of false implication. Not giving names of the assailants while taking admission in the hospital is insignificant considering that soon after the incident the complainant was examined by the Investigating Officer and the accused persons were named in his statement to the police.

12. The complainant smelling of alcohol at the time he was examined in the hospital would be of no consequence considering that this is not the case of the appellants that a fight had ensued between them and the complainant and the said fight was initiated by the complainant under influence of liquor. Though there is no

evidence to connect the knife alleged to have been recovered from the appellant Shankar with the injuries sustained by the complainant, that by itself does not indicate that no knife at all was used for causing injuries to him. At best the court can infer that the knife alleged to have been recovered by the police was not the same knife which was used for causing injuries to the complainant. It cannot lead to the inference that no knife at all was used. As noted earlier three (3) incised wounds were found on the person of the complainant when he was examined in the hospital. The incised wounds are certainly possible from a knife and this is not the case of the appellants that they had used a weapon other than knife for causing those injuries to the complainant. Similarly, the failure of the prosecution to prove the group of the blood on the knife and show the knife and the clothes of the complainant to him at the time he was examined in the court would be of no consequence considering the direct testimony of the complainant with respect to use of the knife as well as identity of the persons who gave the said injuries to him.

13. It was also contended by the learned counsel for the appellant Shankar that PW6 Shri Aditya Bajpayee did not support the prosecution and the presence of PW5 Bhishma Kumar and PW2 Naveen Yadav at the time of the incident is doubtful considering that no injury was sustained by either of them and neither of them took the injured to the hospital. There may be merit in the submission. But, I need not go into this aspect of the matter considering that the deposition of the complainant Pradeep Yadav itself is sufficient to prove the case against the appellants Shankar and Rakesh Kumar. Ordinarily, the injured person is the best witness of the incident in which he sustained injuries. Being the victim of the crime he is likely to be the last person to let off the real culprit(s) and blame an innocent person for the injuries sustained by him. It would be his desire that the person who caused injuries to him is brought to justice. In *Mer Dhana Sida vs. State of Gujarat* AIR 1985 SC386 three injured witnesses had supported the prosecution. It was held by Honble Supreme Court that as there were three injured witnesses, and we would require very convincing submissions to discard the evidence of the injured witnesses whose injuries would at least permit a reasonable inference that they were present at the time of occurrence. Undoubtedly, this is subject to the requirement that there must be evidence to show that these witnesses received injuries in the same occurrence. Very cogent and convincing ground would be

required to discard the evidence of the injured. In *Machhi Singh vs. State of Punjab* 1983 CrL.J.1457, one witness Hakam Singh himself had sustained injuries in the course of incident in question, it was observed by Honble Supreme Court that it was difficult to believe that he would implicate the persons other than the real culprits and that the evidence of that witness alone, was sufficient to bring home the guilt the appellants even if one were to exclude from consideration, the evidence of other PWs. Identical view was taken by the Honble Supreme Court in a number of other cases including *Makan Jivan & Others Vs. The State of Gujarat*, AIR 1971 SC1797 *Hori Lal & Another Vs. The State of U.P.*

, AIR 1970 SC1969 and *Jamuna Chaudhary & Others Vs. State of Bihar*, AIR 1974 SC1822 14. Coming to the contention that no offence under Section 307 of IPC is made out either against the appellant Shankar or against the appellant Rakesh Kumar, in order to succeed in a charge for attempt to murder, the prosecution is required to prove (i) that the death of injured was attempted, (ii) that his death was attempted to be caused by or in consequence of the act of the appellant and (iii) that such act was done with the intention of causing death or that it was done with the intention of causing such bodily injuries as the appellant knew to be likely to cause death or were sufficient in the ordinary course of nature to cause death. Although the nature of injury may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances. What the court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under the circumstances mentioned in the section. The intention of the assailants can be gathered from the motive for the crime, nature of weapon used, number of blows given by him, severity of blow and the parts of the body where the injuries are inflicted and other surrounding circumstances, if any.

15. In the case before this Court, there was a previous enmity between the assailants on the one hand and the complainant Pradeep Kumar on the other. The appellant Shankar used a knife, which is a deadly weapon, for the purpose of causing injuries to him. The injuries were given in the loin area, which is a part of the body between ribs and pelvis, especially regarded as the seat of physical strength and generative power. This area also includes the genitals and public

area and the injuries on such a delicate part of the body, using a sharp edged weapon such as knife for the purpose can prove to be fatal. The appellant Shankar did not stop at giving one knife blow to the complainant and gave three (3) continuous knife blows one after another, all in the loin area. It is, thus, evident that he intended to cause murder of the complainant by giving stab wounds to him in a delicate part of his body. This inference finds strength from the fact that there was a previous enmity between the parties and, therefore, the appellant Shankar wanted to settle scores with the complainant by causing his death. In the facts & circumstances of the case, no fault can be found with the conviction of the appellant Shankar under Section 307 of IPC.

16. As far as the appellant Rakesh Kumar is concerned, the deposition of the complainant shows that he had held him by waist when the appellant Shankar gave knife blows to him. Before knife blows were given to the complainant, the accused persons had unequivocally expressed their intention to murder the complainant by saying - aaj iska kaam tamam kar dete hain. Section 34 of IPC is based on the principle of joint liability for committing a criminal act. In order to succeed in prosecution of a person who is charged with the aid of Section 34 of IPC, the prosecution must necessarily establish the existence of common intention which the accused share with each other and the commission of the offence in furtherance of that intention. The accused persons must be shown to be acting in consort though existence of a pre-arranged plan is not to be insisted in every case. A prior meeting of minds between the accused persons may be determined either from an overt act or from the conduct of the offenders during commission of the offence. It may also be inferred from the declaration made by them just before carrying out attack. Had the appellant Rakesh Kumar not held the complainant he could possibly have tried to save himself from the knife blows given to him by the appellant Shankar but, he became immobilised on account of Rakesh having held him by waist. The intent behind the appellant Rakesh in holding the complainant at the time knife blows were given to him by Shankar is evident from his continuing to hold the complainant by waist, so long as Shankar kept on giving knife blows to him. Had he not shared a common intention with the appellant Shankar to commit murder of the complainant he would have released the complainant as soon as the first knife blow was given to him. Therefore, in the facts & circumstances of the

case there can be no doubt that he shared a common intention with the appellant Shankar to commit murder of the complainant and it was in furtherance of the said common intention that he had held the complainant when multiple knife blows in his abdomen were given by Shankar. In *Satbir @ Lakha Vs. State of Haryana* (2012) 10 SCC755 the appellant held PW7, Jasbir Singh at the time knife blow was given to him by Accused No.1. It was contended on his behalf that there was nothing to show that he was aware of possession of knife by accused No.1 and there was no clinching evidence to show that he shared common intention with accused No.1 or the other accused in the infliction of injuries on the complainant party. Noticing the finding of the trial court that the injury on the body of PW7 Jasbir Singh was by virtue of the overt act of the appellant in having him immobile which facilitated accused No.1 Subhash Singh to inflict injuries to him, the contention was rejected. In *Ramesh Singh v. State of A.P.* [(2004) 11 SCC305, Accused No.2 and 3 had held the hands of the deceased when he was assaulted by the Accused No.1. Upholding their conviction, the Apex Court inter alia held as under:

Once the prosecution evidence tendered through PWs 1 to 3 is accepted, then it is clear that when A-2 and A-3 held the hands of the deceased, they had some intention in disabling the deceased. This inference is possible to be drawn because the appellants in their statement recorded under Section 313 Cr.PC did not give any explanation why they held the hands of the deceased which indicates that the appellants had the knowledge that A-1 was to assault the deceased. The fact that the appellants continued to hold the deceased all along without making any effort to prevent A-1 from further attacking, in our opinion, leads to an irresistible and an inescapable conclusion that these accused persons also shared the common intention with A-1.

In *Goudappa and others vs. State of Karnataka* [(2013) 3 SCC675, the role attributed to Accused No.3 and 4 was that they had caught hold of the deceased when, Accused No.5 caused injuries to him. The conviction of the aforesaid accused with the aid of Section 34 of IPC was challenged on the ground that from the aforesaid act, it could not be inferred that the crime was committed in furtherance of common intention. Rejecting the contention, the Apex Court inter

alia held as under:

23...when we proceed to consider the case of these two appellants, namely, Accused 3 Goudappa and Accused 4 Channappa alias Ajjappa, we have no hesitation in coming to the conclusion that the deceased Channappa was done to death in furtherance of their common intention. All the accused had assembled at once place and the moment the deceased came out of the house to spit, one of the accused started abusing him. They were armed with axe and jambia and by catching and immobilising the deceased these two accused facilitated the assault by Accused 5. Accused 5 stabbed the deceased with jambia over the left side of the chest and the blow was so severe that it penetrated into the heart and liver. The fact that these appellants held the deceased and facilitated the other accused to give the fatal blow and made no effort to prevent him from assaulting the deceased leads to irresistible and inescapable conclusion that these two appellants shared the common intention with Accused 5.

17. For the reasons, stated hereinabove, the appellant - Om Prakash @ Omi is given benefit of doubt and is acquitted whereas the conviction of the appellant - Shankar and Rakesh Kumar @ Rajesh under Section 307 of IPC read with Section 34 thereof is maintained. While maintaining the sentence awarded to the appellant - Shankar, the substantive sentence awarded to the appellant - Rakesh Kumar @ Rajesh is reduced from three (3) years, as awarded by the learned trial court, to two (2) years. The appeals stand disposed of accordingly. One copy of this order be sent to the concerned Jail Superintendent for information and necessary action. Trial court record be sent back alongwith a copy of this order. APRIL 21 2014 BG/bnesh CrI. A. No.224 and 226 of 2010

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