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Court : Allahabad

Decided On : Feb-01-1968

Reported in : 1969CriLJ1273

Judge : S.D. Khare and ;R.L. Gulati, JJ.

Appellant : Dariyao and anr.

Respondent : State

Judgement :

S.D. Khare, J.

1. This appeal is directed against an order dated 21-121964 passed by the learned Sessions Judge, convicting both the appellants, namely, Dariyao and Parsi under Section 302 read with Section 34, Penal Code and sentencing them each to imprisonment for lie.

2. The person who lost his life was Sia Ram, a resident of village Tikri, within police circle Fatehpur Sikri, district Agra.

3. The prosecution case briefly stated, was that Sia Ram (deceased) had a gaut (a place for preparing and storing cow dung cakes) on an open land to the west of the pathway in front of the nehra of Parsi (appellant). Parsi and his brother wanted to take possession over that land. A few years ago they entered into an

arrangement with Bharat Singh (D.W.I) to whom the adjoining plot belonged and on the strength of that arrangement they wanted to take possession over the land of the gaut belonging to Sia Ram (deceased). A day prior to the occurrence the womenfolk belonging to the house of Parsi (appellant) prepared cow dung cakes on the land of the gaut. Sia Ram (deceased) and his brother very much resented that act and there was an altercation between Sia Ram on the one hand and Parsi on the other. The latter removed his cow dung cakes from that place only after the intervention of the village people. About a fortnight prior to the occurrence there bad been a quarrel between Sia Ram (deceased) on the one hand and Daryao on the other because the latter wanted to take water from the common gul at an hour earlier than the his scheduled time of the turn. It was on account of these ill-feelings that on 28th February, 1964, at about 10 a. m. both the appellants armed themselves with lathis, stationed themselves in front of the gant near the house of Parsi and abused Umrao, a distant uncle of Sia Ram As soon as Sia Ram (deceased) happened to pass that way and asked the appellants why they were abusing Umrao when the entire matter had been settled a day earlier both the appellants attacked Sia Ram with lathia and struck one blow each. Sia Ram fell down unconscious. He was taken to the district hospital at Agra. He, however, succumbed to his injuries the same day at 5 p.m.

4. The first information report of the occurrence was lodged by Kanhaiya (P. W. 1), a brother of Sia Ram, at police station Kotwali, Agra, the same evening at 5 30 p.m. The names of the appellants, the weapons us el by them and the names of the witnesses were mentioned in that report.

5. The usual investigation followed. The investigating officer did not find any blood at the place of the occurrence.

6. The post-mortem examination on the dead body of Sia Ram performed by Dr. Brahm Sumiran Lal (P. W. 2) on 29th February, 1964, at 2 p.m. revealed that Sia Ram had received only two ante mortem external injuries as noted below:

(1) Abrasion 4/10' X 2/10' on the left side frontal region of the head 4 1/2' above the left ear and 3 1/2' above the left eye-brow with swelling of the whole left side of the scalp, and (2) Two abrasions on the right side of the face 3/10' X 1/10' and

2/10' X 1/10' only about 1/3' apart from each other between the nose and the right cheek bone.

The interal examination revealed that the whole scalp was thickly effused with blood all over. There was fracture of the vault of the skull and the crack extended from left parietal bone just under the abrasion described in external injury No. 1, going on either side in the temporal bones. One more crack extended from the left parietal bone to the upper orbital margin. There was also a fracture of both temporal bones extending partly to both sides of the middle cranial fossa. The fracture of the frontal bone extended into the left orbital plate of frontal bone. In the opinion of the doctor death was due to coma as a result of the head injury. The doctor was further of the opinion that the injuries caused were sufficient in the ordinary course of nature to result in death. Obviously the head injury could and did prove fatal.

7. The prosecution relied on the testimony of four eye-witnesses of the occurrence. They are Kanhaiya Lal (P. W. 1), a brother of the deceased, Umrao (P. W. 4), a distant uncle of the deceased, and two other residents of the Tillage namely, Karan Singh (P. W 3) and Kaushal Singh (P. W. 10) who happened to pass that way at the time of the occurrence. They fully supported the prosecution case, although none of them who able to tell who amongst the appellants had caused the fatal injury.

8. Parsi (appellant) did not dispute the time and place of the occurrence. Hs plea, however, was that the gaut belonged to him and had also been in his possession, that Sia Ram and others wanted to disturb his possession, that on a protest being made by Parsi (appellant) Umrao bad struck him with a lathi and Sia Ram had caused pharsa injury on his palm and that it was in the exercise of the right of private defence that Pharsa had used his lathi. Dariyao (appellant) did not admit his presence at the time of the occurrence and pleaded alibi.

9. Four witnesses were examined in defence. Bharat Singh (D. W. 1) and Badri Pratad Lektpil (D. W. 4) were examined to prove that plot No. 88 belonged to Bharat Singh. Bharat Singh deposed that the gaut formed part of plot No. 88 and Parsi and his brother had entered into possession of that land about six years ago

after Bharat Singh had permitted him to do so Babu Lal (D. W. 2) gave out the defence version of the case, while Dr. Ram Chandra (D. W. 8) stated that on 28th February, 1964 at about 9 30 p.m. he had examined Parsi and found seven injuries on his person, consisting of two contused wounds on the head, one incised wound on the right palm, three contusions, one on the back and two on the arms, and one abrasion on the right knee.

10. Documentary evidence was led to show that on the night between 28th and 29th February, 1964 Dariyao (appellant) had been apprehended by the residents of village Undel and taken to police station Rupbas, district Bharatpur the same night. Village Undel is at distance of about ten miles from the place of occurrence.

11. The learned Sessions Judge, after having considered the entire evidence on the record, arrived at the conclusion that Parsi had received no injury at the time of the occurrence, that there was no substance in the alibi plea taken by Dariyao (appellant), that the prosecution witnesses were reliable, that the gaut had all along been in possession of Sia Ram and his brother and that the occurrence had taken place in the manner alleged by the prosecution and stated by the prosecution witnesses. He, therefore, convicted and sentenced both the appellants as stated earlier.

12. We have heard the learned Counsel for the appellants and examined the record. In our opinion the learned Sessions Judge was perfectly justified in placing reliance on the prosecution witnesses and arriving at the con-elusion that the gaut had all along been in possession of Sia Ram and his brother, that the occurrence had taken place in the manner stated by the prosecution witnesses and that Parsi had received no injury at the time of the occurrence.

13. The house of Kanhaiya Lal (P. W. 1) is at a distance of about 150 paces from the place of occurrence. He is the own brother of Sia Ram (deceased). He could not have come from his house to reach the place of occurrence in time to witness the occurrence. However, his statement is that at the time of the occurrence he had gone to the village pond, which is adjacent to the gaut, an he had taken his cattle to drink water in the pond.

Being quite close to the place of occurrence at the time of the occurrence he could have witnessed the occurrence. The presence of Umrao (P. W 4) was not disputed by Parsi (appellant) while explaining the circumstances appearing against him. The explanation given by Parsi (appellant) was that Umrao had given a lathi blow to Parsi before the occurrence took place. The other two witnesses, namely, Karan Singh and Kaushal Singh (P. Ws. 3 and 10) are residents of the village and they fully explained how they happened to be near the place of occurrence when the occurrence took place. Since the occurrence had taken place quite close to the pond and the village pathway those persons, who were near the pond or on the pathway, must be considered to be natural and probable witnesses of the occurrence.

14. Kanhaiya Lal and Umrao are relations of the deceased. They must have shared the ill-feeling which existed between the deceased on the one hand and the appellants on the other. However, they could not be expected to leave oat of the real assailants of Sia Ram in order to falsely implicate the appellants. Karan Singh and Kaushal Singh could not be interested in falsely implicating the appellants.

15. The testimony of the prosecution witnesses is fully corroborated by the first information report which in the circumstances of the case was lodged without unreasonable delay. Sia Ram had been seriously injured and therefore, the first concern of all his relations must have been to rush him to the hospital to receive medical aid. He. however, succumbed to his injuries soon after reaching the district Hospital. The first information report was lodged at police station Kotwali within 20 minutes of his death.

16. It is clear from the statement of the doctor who performed the post mortem examination that the injuries sustained by Sia Ram could have been caused with lathis. When cross-examined the doctor admitted that injury No. 2 could also be due to a fall. That part of the doctor's statement does not, in our opinion, go against the prosecution case. There is definite evidence on the record that both the appellants had used their lathis and each had applied it once and the testimony of the doctor is that the two injuries could be caused with blunt weapons

such as lathis.

17. The prosecution witnesses have further established that the gaut had all along been in possession of Sia Ram and his brother. It was suggested to Kanhaiya Lal (P. W. 1) that the gaut had been in possession of Parsi and his brother for more than 20 years. However, when Bharat Singh was examined as D. W. 1 he merely stated that Parai and his brother had been in possession of the gaut for the last six years only. The contention of Bharat Singh (D. W. 1) and Badri Prasad Lekhpal (D. W. 4) appeared to be that the gaut formed part of plot No. 88 which was entered in the name of Bharat Singh. However, there is no satisfactory evidence on that point, and it is clear from the cross-examination of these witnesses that the gaut could as well form part of the adjoining plot.

18. There is absolutely no fore in the plea of alibi taken by Dariyao (appellant). Even if it be assumed that during the night between 27th and 28th February 1964, he had been found in suspicious circumstances in a village ten miles away from the place of occurrence the same could not make the presence of Dariyao (appellant) improbable at the time and place of the occurrence. A. distance of ten miles could have been covered within four hours while Daritao (appellant) was apprehended more than 12 hours after the time of the occurrence.

19. All the prosecution witnesses have stated that Parsi had received no injury at the time of the occurrence Parsi (appellant) reached Agra on 28th February 1964. He, however, did not care to get his injuries-examined by any doctor of the district hospital. He contented himself by obtaining a certificate from Dr. Ram Chandra (D. W. 3) to the effect that he had received seven injuries. That certificate was not filed in Court at the time Parsi applied for bail. It saw the light of the day only on the date of the defence evidence, several months after the occurrence when there could be no opportunity to test the correctness of the report made by the doctor.

20. Parai absconded after the occurrence. He, however, surrendered himself before a Magistrate on 13th March 1964, and was sent to the district jail. Ho attempt was made to examine the jail doctor to prove that Parsi had some marks of injuries on his person when he was admitted to jail. The learned Counsel for the appellants, during the course of the arguments, submitted that the jail doctor had

not noted the injuries of Parsi (appellant). Had Parsi received bleeding injuries on 28th February 1964, the same could not have disappeared within two weeks and wore bound to be noticed by the jail doctor at the time of his admission in jail. The learned Sessions Judge was, therefore, perfectly justified in arriving at the conclusion that the injuries noted by the doctor were fake ones and that in any case Parai had not received any injuries at the time of the occurrence.

21. At this stage we might mention that while considering the value of the evidence of, Dr. Ram Chandra we have not taken into' consideration the findings of the learned Sessions Judge as to what the doctor had done in the matter of the grant of certificate in another criminal trial, because in our opinion that was not relevant. On other grounds we agree that no reliance could be placed on the doctor's certificate.

22. Babu Lal (D W. 2) was named in the first information report as an eye-witness of the occurrence. It was suggested to Babu Lal daring the course of his cross-examination that he was a maternal uncle of the appellants. He has stated that it is not so. The learned Sessions Judge has very rightly placed no reliance on the statement of Babu Lal, who had stated that blood had fallen at the place of the occurrence from the bleeding injury of Parsi. The investigating officer could not find any blood at the place of the occurrence. The facts and circumstances of the case fully corroborate the prosecution version and are clearly against the version put forward by Babu Lal (D. W. 2),

23. It has been contended by the learned Counsel (or the appellants that even though the prosecution witnesses be believed it will be difficult to infer from the foots and circumstances of the case that the common intention of the a pellants was to cause such injuries to Sia Ram as mere likely to result in his death. Reliance is placed on the following circumstances: -

(a) There could be no strong motive on the part of the appellants to cause the death of Sia Ram.

(b) Each of the appellants had struck one lathi blow only.

(c) Hone of the appellants struck Sia Ram after he had fallen down on the ground.

24. In our opinion there is good deal of force in the argument advanced by the learned Counsel for the appellants. None of the prosecution witnesses baa been able to state as to who amongst the two appellants had caused the fatal blow. Only two injuries were caused to the deceased, one of which was fatal and the other was a minor-injury. From the facts and circumstances of the case it is difficult to infer that both the appellants had shared the intention to cause such injuries to Sia Ram which could prove fatal.

25. Section 34, Penal code, lays down that:

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

26. There is no clear evidence on the point as to who amongst the appellants caused the fatal injury to Sia Bun. The facts and circumstances of the case are such from which it is difficult to infer that the fatal injury was caused to Sia Ram in furtherance of the common intention of both the appellant?. When two persons attack another with lathis they could know that their sot was likely to cause grievvous hurt to the victim. However, it could not be further inferred, when each appellant struck ore blow only and one of the injuries wag simple and not on a vital part of the body, that the common intention was also to cause such injuries as were likely to result in death.

27. For the applicability of Section 34 of the Penal code a preconcert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop at the spur of the moment on the spat as between a number of persons with reference to the facts of the case and circumstances of the situation. Whether in a proved situation all the individuals concerned therein have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have developed and thereby intended by all of them is a question that has to be delermired on the facts of each case.

We are supported in this view by the case of Kripal v. State of U.P. : AIR 1954 SC706 . In that case the three accused persons, namely, A, B and E were working the well that morning when they saw M and S going past the well. They asked them where they were going. On being tell that they were going to harvest is sugarcane field they abused them and told them not to go there but to work for them. They did not listen to them and walked on. When they had gore 30 to 40 paces the three accused persons rushed at them and began to beat them with the handles of spears which were in the bands of B and E and with a lathi which was in A's hand. J arrived at the spot and asked the accused why they were beating his labourers and stopped them from beating them. A hit him on the legs with his lathi and he fell down. E stabbed him with his spear near the ear. B then stabbed him with his spear on the left jaw, put his legs on his chest and extracted the spear blade from his jaw and just as the blade came off J died. It was held that in the circumstances of the case the common intention to kill the deceased could not be attributed to all the three accused persons. The only common intention that could be attributed to all the three accused in so far as the assault on J was concerned was the common intention to beat J also with the weapons in their hands which were likely to produce grievous injuries. It was held that all the three accused persons were guilty in respect of their assault on J for an offence under Section 325/84, Penal code while B alone would be guilty in respect of the offence under Section 302, Penal Code.

28. It was held in the case of Afrahim Sheikh v. State of West Bengal : 1964 CriLJ350 that Section 34 when it speaks of a criminal act done by several persons in furtherance of the common intention of all has regard not to the offence as a whole but to the criminal act, that is to say, the totality of the aeries of acts which result in the offence. In the case of a person assaulted by many accused the criminal act is the offence which finally results though the achievement of that criminal act may be the result of action of several persons. A person is only responsible ordinarily for what he does, but the law in Section 34 and also in Section 53, Penal code says that if the criminal act is the result of a common intention then every person who did the criminal act with the common intention would be responsible for the total offence irrespective of the share which be had in its perpetration. The following passage appearing in Barendra Kumar Ghose's

case was quoted with approval:

Section 34, Penal Code deals with the committing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself. 'That act' and then again 'it' in the latter part of the section must include the whole of the action covered by the criminal act in the first part of the section.

It was farther held that the whole of the result perpetrated by several offenders is attributable to each offender notwithstanding that individually they may have done separate acts, diverse or similar provided there is common intention and provided the act is done in furtherance of the common intention of all.

29. The same view was reiterated in the case of Anda v. State of Rajasthan : 1966 CriLJ171 , in which it was held that in a, trial for an offence of murder under clause Thirdly of Section 300 read with Section 34, Penal Code, it is always a question of fact whether the accused shared a particular knowledge or intent and one has to look for a common intention, that is to say, some prior concert and what that common intention is. It was further held that where the assault was murderous and it could be apparent to all the assailants that the injuries that they were inflicting in furtherance of the common intention of all were sufficient in the ordinary course of nature to cause death, the offence must be held to be murder within clause Thirdly of Section 300 of the Penal Code.

30. In the present case it is not possible to infer such common intention on the part of the appellants, and, therefore, each of them can be convicted and sentenced only under Section 325 read with Section 34, Penal Code.

31. The appeal is partly allowed. The conviction and sentence of the appellants under Section 302/34, Penal Code are set aside and in its place each of them is convicted under Section 325/34, Penal Code and sentenced to five years' rigorous imprisonment. The appellants, who are on bail, must surrender and serve out the sentence now imposed on them.