

Markami Deva and ors. Vs. State of Chhattisgarh

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Court : Chhattisgarh

Decided On : Nov-18-2008

Reported in : 2009CriLJ585

Judge : Rajeev Gupta, C.J. and; Sunil Kumar Sinha, J.

Appellant : Markami Deva and ors.

Respondent : State of Chhattisgarh

Advocate for Pet/Ap. : Mr. Awadh Tripathi

Disposition : Appeal dismissed

Judgement :

Sunil Kumar Sinha, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 21-12-2001 passed by the Fourth Additional Sessions Judge, Jagdalpur (Bastar) in Sessions Trial No. 514/2000, whereby, the appellants have been convicted under Ss. 449 and 302/ 34, I. P. C. and sentenced to undergo R.I. for 5 years and fine of Rs. 200/- and imprisonment for life and fine of Rs. 300/- with default sentences in both the counts. Appellant-Malla has been further convicted under Section 324, I. P. C. and sentenced to undergo R.I. for 1 year and to pay a fine of Rs. 100/-, in default of payment of fine to further undergo R.I. for 1 month.

Appellants-Malla, Deva S/o. Joga and Hidma have been also convicted under Section 323, I. P. C. and sentenced to undergo imprisonment for 6 months and to pay a fine of Rs. 100/-, in default of payment of fine to further undergo R.I. for 6 months. The sentences so awarded to the appellants have been directed to run concurrently.

2. The case of the prosecution is that on 7-10-2000 at about 4.00 p.m. the appellants, armed with deadly weapons, committed house trespass in order to commit murder of deceased Gandami Ganga. After such trespass, they dragged the deceased out of his house and attacked him by knife, danda and banda. The deceased died on the spot. 'The incident was witnessed by Gandami Sukdi (PW-2, wife of younger brother of the deceased) and Gandami Munni (PW-3, daughter of PW-2). Sukdi (PW-2) and Munni (PW-3) when tried to intervene, they were also assaulted. Malla assaulted Sukdi with some weapon and other appellants assaulted Munni. Sukdi immediately rushed to her husband Gandami Lachah (PW-1) and narrated the story to him. On 8-10-2000, Gandami Lachah lodged the First Information Report (Ex.-P/I).

3. On such information, the Investigating Officer reached to the scene of occurrence and prepared spot map (Ex. P/2). After giving notice (Ex. P/10) to the Panchas, he prepared inquest (Ex. P/11) on the body of the deceased. The dead body of the deceased was sent for its post-mortem to P. H. C, Sukma under Ex. P/12 and the postmortem examination was conducted by Dr. R.K. Kuruwanshi (PW-5), who prepared his report Ex. P/4. The Autopsy Surgeon found the following external injuries on the body of the deceased:

- (i) An incised wound size 1 inch x 1 inch on the forehead;
- (ii) Upper portion of left ear-pinna was cut and there was swelling around it;
- (iii) One lacerated wound of about 3 inches at the back portion of skull on occipital bone;
- (iv) One pierced wound of about 2 inches length on the right side of the chest and
- (v) Swelling on the upper portion of the neck.

According to the Autopsy Surgeon, all the injuries were antemortem in nature, injury Nos. 1, 3 and 5 were caused by hard and rough object and injury Nos. 2 and 4 were caused by hard and sharp edged weapon. On internal examination, he found that there was fracture of the occipital bone. Right 6th and 7th ribs were also fractured and the right lung was punctured. Blood was present in the brain and first cervical bone was detached from the base of skull. He opined that the cause of death was hypovolemic and neurogenic shock as a result of grievous injuries on the vital organs and it was homicidal in nature.

4. In further investigation, a knife was seized from the possession of appellant Markami Malla under Ex. P/15, danda was seized from the possession of appellant Markami Deva s/o. Joga under Ex. P/16 and an iron banda was seized from the possession of Markami Deva s/o. Airra under Ex. P/17. Gandami Sukdi (PW-2) and Gandami Munni (PW-3) were also sent for their medical examination and their injury reports Ex. P/7 and P/25 were received. Gandami Sukdi had received one small incised wound of about 1/4 inch, superficially, on her occipital region, whereas, no external injury was seen on the body of Gandami Munni. .

5. After completion of usual investigation, the charge-sheet was filed in the Court of Judicial Magistrate First Class, Sukma, who in turn committed the matter to the Court of Session Judge, Jagdalpur, from where, it was received on transfer by the Fourth Additional Sessions Judge, Jagdalpur, who conducted the trial and convicted and sentenced the accused/appellants as aforementioned.

6. The conviction of the appellant is based upon the testimonies of two eye-witnesses namely Gandami Sukdi (P.W. 2) and Gandami Munni (P.W. 3) supported by the medical evidence, FIR and other circumstances of the case.

7. Mr. Awadh Tripathi, learned Counsel for the appellants has not disputed the homicidal death of the deceased. He argued that the two eye-witnesses are close relatives of the deceased as they are the wife and daughter of the real brother of the deceased, therefore, they are interested witnesses and their testimonies should not be relied on. He also argued that so far as appellant Hidma is concerned, he was unarmed, therefore, conviction of this appellant Under Sections 449 & 302 with the aid of Section 34, IPC cannot be sustained as there is hardly

any evidence of sharing of common intention by this appellant.

8. On the other hand, Mr. Akhil Mishra, learned Dy. Govt. Advocate, for the State, opposed these arguments and supported the judgment passed by the Sessions Court.

9. We have heard the learned Counsel for the parties at length and have also perused the records of the sessions case.

10. The Apex Court held in the matter of *Rizan v. State of Chhattisgarh*, through the Chief Secretary, Govt. of Chhattisgarh,, Raipur, : 2003 CriLJ1226 , in para 6, that the relationship is not a factor to affect credibility of a witness. It is more often than not a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such a case, the Court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible.

11. In *Namdeo v. State of Maharashtra*, : 2007 CriLJ1819 , the Apex Court held that a witness who is a relative of deceased or victim of the crime cannot be characterized as 'interested'. The term 'interested' postulates that the witness has some direct or indirect 'interest' in having the accused somehow or other convicted due to animus or for some other oblique motive. The Apex Court also observed that a close relative cannot be characterized as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinized carefully, if on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole' testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one. The Apex Court also referred to the decision rendered in the matter of *Harbans Kaur v. State of Haryana*, : 2005 CriLJ2199 , in which, it was held that there is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused.

12. Therefore, in view of the above, it cannot be held that the testimonies of P.W. 2, Gandami Sukdi, and P.W. 3, Gandami Munni, cannot be relied on only on the ground that they are the close relatives of the deceased. We are to scrutinize their evidence with due care and caution and if their evidence passes the test of credibility in appreciation by applying the above principles, the conviction can well be based on their such testimonies.

13. P.W. 2, Sukdi, deposed that deceased Ganga was the brother of her husband. On the fateful day at about 4.00 p.m. he was murdered by the appellants namely - Markami Deva, Markami Malla, Hidma and Markami Deva by assaulting him with lathi, danda & Knife. She added that when the appellants were assaulting her Jeth, she was present in the house and when she tried to intervene, appellant Malla assaulted her with knife on her head. She further deposed that Munni (P.W. 3) was also present at that time and she was also assaulted by appellants by hands and slaps. She has also deposed about the specific role, played by each of the appellants and has deposed that Hidma has assaulted the deceased with hands and slaps. She has very specifically deposed that when the deceased was attacked by the appellants, he hidden himself in a Dhan Kothi (a big pot used in the village for keeping paddy), but the appellants caught him and dragged him out and assaulted him in the above manner.

14. P.W. 3, Munni, also deposed that deceased Ganga was assaulted by the appellants due to which he died on the spot itself. The incident was witnessed by her and her mother. She very categorically deposed that when the appellants were threatening the deceased, he rushed inside the house and hid himself in puti (pot for keeping paddy) but the appellants also entered into the house, took him out from the puti and dragged him out to the gali from the house and then assaulted him.

15. Though these witnesses have been put to lengthy cross-examinations by the counsel for the defence but nothing material could be brought on record, on which, either their testimonies may be discarded or it may be held that they are falsely implicating the appellants in crime in question. P.W. 2, Gandami Sukdi is wife of the real brother of the deceased and P.W. 3, Gandami Munni is her daughter,

therefore, their presence at the place of occurrence at about 4.00 p.m., is not unnatural. Moreover, both these witnesses have also received injuries in the same incident which also strengthen their claim that they were present at the place of occurrence and they had seen the occurrence, which admittedly took place in their house. The testimonies of these witnesses are corroborated by testimony of P.W. 1, Gandami Lachah, who is the brother of the deceased and husband of P.W. 3, Gandami Sukdi. He deposed that he was informed by P.W. 3 regarding the incident, on which, he knew everything and a First Information Report was lodged by him. The above versions of the witnesses are also corroborated by the contents of the FIR (Ex. P/1) lodged by P.W. 1, Gandami Lachah. The post-mortem report and the evidence of Doctor further corroborate the evidence of P.W. 2 and P.W. 3 and in appreciation, we do not find any reason to disbelieve their testimonies and the first argument advanced by the learned Counsel for the appellants cannot be accepted.

16. About conviction of appellant Hidma Under Sections 449 & 302 with the aid of Section 34, IPC Mr. Awadh Tripathi argued that he was unarmed and he has simply gone to the place of occurrence and has assaulted the deceased with hands and slaps, therefore, he was not sharing a common intention and his case was distinguishable.

17. We have carefully considered the said argument.

18. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that

there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is Just the same as if each of them has done it individually by himself. The existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision. Please see *Anil Sharma v. State of Jharkhand* : 2004 CriLJ2527 . The Apex Court further clarified that in 1870, Section 34 was amended by insertion of the words 'in furtherance of the common intention of all' after the word 'persons' and before the word 'each', so as to make the object of Section 34 clear. The section does not say 'the common intention of all', nor does it say 'and intention common to all'. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them.

19. It was further held by the Apex Court in the matter of *Dani Singh v. State of Bihar*, : 2004 CriLJ3328 that to constitute common intention, it is necessary that intention of each one of the accused be known to the rest and shared by them. Undoubtedly, it is difficult to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. But, however, difficult may be the task, the prosecution must lead evidence of facts, circumstances and conduct of the accused from which their common intention can be safely gathered. In most cases, it has to be inferred from

the act, conduct or other relevant circumstances of the case in hand. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether the accused had a common intention to commit offence for which they can be convicted. The facts and circumstances of cases vary and each case has to be decided keeping in view the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law.

20. If we examine the case of appellant Hidma on the above principles, it would be clear that he had gone to the house of the deceased along with the other appellants who were armed with deadly weapons like knife, danda & banda. When they tried to attack the deceased, he went inside his house and hid himself in the puti but the appellants went inside the house, searched out the deceased; took out from the puti; forcefully dragged him out of the house and then assaulted him with danda, knife, banda & hands and fists in the manner deposed by P.W. 2, Gandami Sukdi. The act of appellant Hidma clearly shows that he was sharing a common intention with the other appellants to commit the murder of the deceased and nothing less than that. Had he not shared the common intention, he should have dissociated himself after completion of the march to the house of the deceased and would not have trespassed the house and participated in searching, forcefully dragging and attacking over the deceased by the other appellants by deadly weapons in which he also participated with hands and fists. Therefore, the second arguments advanced by the learned Counsel for the appellants can also not be accepted.

21. For the foregoing reasons, we do not find any illegality or infirmity in the impugned judgment of the Sessions Court, warranting interference by this Court. The appeal has no merit, the same is liable to be dismissed and is accordingly dismissed.