

Prem Kumar Rai Vs. State of Sikkim

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Court : Sikkim

Decided On : Jun-04-2002

Reported in : 2004CriLJ4702

Judge : Ripusudan Dayal, C.J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 300 and 302

Appeal No. : Criminal Appeal No. 17 of 2001

Appellant : Prem Kumar Rai

Respondent : State of Sikkim

Advocate for Def. : N.B. Khatiwada, APP and; Karma Thinlay, AGA

Advocate for Pet/Ap. : A. Moulik and; Anita Lepeha, Advs.

Disposition : Appeal allowed

Judgement :

Ripusudan Dayal, C.J.

1. Appellant, Prem Kumar Rai, and two other accused persons, namely, Dawa Tshering Tamang and Arun Kumar Subba were convicted by the learned Sessions Judge. South and West Sikkim at Namchi under Section 302 read with Section 34 of the Indian Penal Code and each of them was sentenced to undergo

imprisonment for life and to pay a fine of Rs. 5,000 and in default of payment of fine to undergo further imprisonment for three months. Only one of them, namely, P. K. Rai who is referred in the judgment as accused No. 3, has filed this appeal.

2. Accused No. 1, Dawa Tshering Tamang, is the nephew of Dhan Bahadur Tamang, PW-1. Prosecution case, in brief, is that on 15-11-1999 all the three accused persons came to the house of Dhan Bahadur Tamang at about 7.30 p.m. After some time, the deceased Bhim Bahadur Manger also came there. The accused had some hot discussion with accused Nos. 2 and 3, namely, Arun Kumar Subba and Prem Kumar Rai on some pecuniary matter. Thereafter, all the three accused persons went out of the house of Dhan Bahadur Tamang but the deceased continued to remain there. After about 10 minutes, all the three accused persons again came to the house of Dhan Bahadur Tamang, PW-1 and again had hot discussion with the deceased. Then all the three accused persons again went out of the house of Dhan Bahadur Tamang, PW-1. After about 15 minutes thereof, the deceased also left the house of Dhan Bahadur Tamang, PW-1. Thereafter, the deceased, Bhim Bahadur Mangar went to the house of Lallmaya Tamang, PW-2 and asked her for a lamp. Accordingly, her nephew, Pradip Tamang, PW-5 prepared one bottle lamp and gave the same to the deceased at about 8 p.m. After fifteen minutes thereof, Pradip Tamang, PW-5 heard the deceased groaning. Then, Pradip Tamang, PW-5 asked Lallmaya Tamang, PW-2 to call the two teachers who were their neighbours. Accordingly, she called the two teachers, namely Pemba Sherpa, PW-12 and D. B. Chettri, PW-13. They all went to the spot and the teachers PW-12 and PW-13, seeing the deceased lying in the ginger field, told them that the matter was very serious and should be reported to the police. Then one of the teachers, namely, D. B. Chettri, PW-13 went to the house of Chumla who had a telephone in order to inform the police. The other teacher Shri Pemba Sherpa PW-12 remained at the place of the occurrence. The telephone call was made by Chumla. Chumla has not entered the witness box. Within one hour police from Barmiok out post reached the spot. Thereafter, the victim was admitted in Singtam Hospital. On the next day, that is, 16-11-99 he was admitted in the STNM Hospital, Gangtok where he died on 17-11-99 at 10.35 a.m. The post-mortem on the body of the deceased was conducted by Dr. K. B. Gurung, PW-28 who gave his opinion that the death had occurred on account of the injuries

produced by blunt force. A written complaint of the incident was made by Phul Maya Magar PW-7, wife of the deceased, on 17-11-1999. That complaint is exhibit P-I and is to the effect that all the three accused persons had assaulted the deceased on 15-11-1999 evening resulting in the death of the deceased. On the basis of the complaint, formal FIR, Exhibit P-16 was recorded by Temi Police Station under Sections 302/34, IPC. Before the complaint, Exhibit P-1 had been lodged by Phul Maya Magar, ASI, Sangay Bhutia, PW-18 who was the Incharge of the Barmiok out post had visited the place of occurrence on 15-11-1999 at about 8.30 or 9 p.m., after receiving the telephone message and found that the victim was lying in a ginger field in an unconscious condition, bleeding profusely and not being in a state to speak out. He collected one slipper and one cycle chain on the spot. Cycle chain is said to be belonging to accused No. 1, Dawa Tshering Tamang, and the slipper is said to be belonging to accused No. 2 Arun Kumar Subba. Nothing belonging to accused No. 3, the appellant, was found on the spot. The witness Sangay Bhutia, PW-18 and others removed the victim to Singtam Hospital from where he was removed on 16-11-99 to STNM Hospital. After the formal FIR was lodged, further investigation was conducted by S.I., L.M. Pradhan, PW-29. During the course of the investigation, he seized the cycle chain and also the chappal from ASI Sangay Bhutia, PW-18.

3. Shri A. Moulik, counsel for the appellant has submitted that there is no evidence on record to connect the appellant with the crime and therefore, the appellant is entitled to acquittal.

4. After hearing the learned counsel for the appellant and perusing the record, I find that it is established by evidence on record that on 15-11 -1999 at about 7.30 p.m., there was heated discussion at the house of Dhan Bahadur Tamang, PW-1 between the two accused persons including the appellant and the victim. Thereafter, all the three accused persons including the appellant went out of the house of Shri Tamang and again came back after about 10 minutes. Again, the three accused persons had heated discussion with the deceased. These facts are proved by the statement of Dhan Bahadur Tamang, PW-1. Thereafter, deceased Bhim Bahadur Mangar went to the house of Lallmaya Tamang, PW-2 who is the sister of PW-1, Dhan Bahadur Tamang. Accused No. 1 Dawa Tshering Tamang is

also related to Dhan Bahadur Tamang, PW-1 and Lallmaya Tamang, PW-2. The deceased Bhim Bahadur Mangar asked Lallmaya Tamang PW-2 for a lamp. Accordingly, her nephew, Pradip Tamang PW-5 prepared a lamp and gave it to the deceased at about 8 p.m. It is also in evidence of Lallmaya Tamang, PW-2 that while the bottle lamp was being prepared, the deceased told her, after looking outside, that the three persons who were going down were the brothers of Siru Bari Maila meaning thereby accused Nos. 1, 2 and 3, whereupon she replied that it might be so. It may be noted that though it is in the evidence of Dhan Bahadur Tamang, PW-1, that accused No. 2 is the brother of Siru Maila, there is no evidence to show that accused Nos. 1 and 3 are also his brothers. Thereafter, the deceased left her house with the lamp. In the cross-examination, she has admitted that she had stated to the police that the three persons going down could not be recognized by her and she could also not say as to how the deceased had sustained injuries. Thus the evidence of Lallmaya Tamang PW-2 is of no help to the prosecution to connect the appellant with the crime. Sancha Bahadur Tamang, PW-6 has stated in his examination-in-chief that on the date of the occurrence at about 11 p.m. accused Nos. 2 and 3, namely, Arun Kumar Subba and Prem Kumar Rai, had knocked at his door and requested him to allow them to spend the night in his house. Accordingly, both of them were allowed to stay at his house during the night. The witness has further stated that before going to sleep both the accused persons had told him that they had beaten up the deceased Bhim Bahadur Mangar. However, in the cross-examination, he nullified his statement by saying that it is a fact that the accused persons did not state that they had come to his house after assaulting Bhim Bahadur Mangar. Therefore, the evidence of this witness is also of no help to the prosecution in connecting the appellant to the crime. The other witness is Phul Maya Mangar, PW-7 the wife of the deceased. She has deposed that at the Singtam Hospital she found her husband, the deceased, sleeping on bed but even after repeated calls he did not answer her questions as he was not in a position to speak. She has also stated that after some time the deceased made gestures showing three fingers and clenched his fist. Therefore fingers might have meant three assailants. But the statement falls short of implicating the appellant with the crime. Thus the only evidence on record against the appellant-accused is that he had on the date of occurrence heated

discussion along with the two other accused persons with the deceased. This evidence falls short of proving common intention which pre-supposes prior concert. Section 34, IPC requires a pre-arranged plan because before a person can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. Furthermore, in a case based on circumstantial evidence, the chain of circumstances that have to be established by the prosecution must be complete, leading to the inference of the guilt of the accused. The circumstances must be of a determinative tendency unerringly pointing towards the guilt of the accused and the circumstances taken collectively must be incapable of an explanation of any reasonable hypothesis save that of the guilt sought to be proved against the accused. Such circumstances have not been proved.

5. In the result, the appeal is allowed, the impugned judgment and order of the learned trial Court as to the conviction and sentence of the appellant, Prem Kumar Rai under Section 302 read with Section 34, IPC is set aside and the appellant is acquitted of these offences. The appellant who is in custody be released forthwith.

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