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Court : Punjab and Haryana

Decided On : Dec-09-1959

Reported in : 1960CriLJ851

Judge : A.N. Grover, J.

Acts : [Evidence Act. 1872](#) - Sections 27 and 32; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302 and 304; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 161 and 162

Appeal No. : Criminal Appeal No. 11-D of 1959

Appellant : Rajindra Kumar

Respondent : The State

Judgement :

(1) This judgment will dispose of both the appeals (Criminal Appeals 11-D and 14-D of 1959).

(2) These appeals are directed against the conviction of the appellants under S. 304, Part II, of the Indian Penal Code. Appellant Rajender Kumar was sentenced to six years' rigorous imprisonment and the other appellant Hari Shankar, to four years' rigorous imprisonment.

(3) According to the case of the presecution, the appellants and Din Dayal deceased lived in Bedwara, a part of Delhi city. Sometimes prior to the occurrence Om Parkash, a minor brother of Chhagan lal P. W. 7, was alleged to have been kidnapped by the appellants, the minor having taken with him a suim of Rs. 2,000/- from his brother's shopped. Din Dayal deceased appeared as a presecution witness in that case but was declared hostile. The trial Magistrate convicted the appellants for kidnapping Om Parkash and sentenced them to rigorous imprisonment for six months on 3-3-1958. They had filed an appeal and were on bail on the day of assurance and it may be mentioned that they were subsequently acquitted by the appellate Court in that case. according to the prosecution the relations of the appellants with the deceased Din Dayal became strained on account of Din Dayal appearing as a witness in the kidnapping case against the appellants. On 25-5-1958 Hari Shankar appellant reported to the police that Din Dayal had given a beating in order to extort money vide Exhibit P/J. It is alleged that on 30-5-1958 at about 9 or 9-30 p. m. both the appellants were sitting the Dharamshala in Bedwara when Din Dayal appeared there having come from his house.

He was attacked by both of them. Hari Shankar held him by the arms while Rajender Kumar gave him three stab blows with a knife on the chest back and left thigh. On hearing his alarm his brother Bhup Singh P. W. 3 and two others neighbors, Ram Saroop P. W. 4 and Sarup Chand had come and had seen the occurrence. Rajinder Kumar managed to escape and was arrested later on 9-6-1958. Ram Saroop P. W. 6 and Sarup Chand who had been originally cited as a prosecution witness but appears to have been given up by the prosecution, were able to apprehend Hari Shankar on the spot, Din Dayal was carried in a rickshaw by Bhup Singh, his brother, to the Kotwali from where he was carried to the Irwin Hospital. He was given necessary treatment but it was noted for the first time on 12-6-158, that his injuries were dangerous and grievous. He ultimately died in the hospital on 21-7-1958. Both the appellants were committed to the Court of Session for their trial under S. 302 read with S. 34 of the Indian Penal Code, and were finally convicted as stated above, of an offence under S. 304, Part II Indian Penal Coe.

(4) The prosecution evidence consists mainly of two eye-witnesses, namely Bhup Singh P. W. 3 and Ram Sarup P. W. 6. The testimony given by P. W. 3 Bhup Singh who supported the prosecution case fully was assailed by Mr. Nuruddin Ahmad, the learned counsel for Rajinder Kumar, on various grounds. It is pointed out that apart from the fact that he was the brother of the deceased, he could not have been presented at the spot because he along with his wife was carrying on business and was living near the Harding Bridge. Bhup Singh himself stated that his in-laws lived near the Hardinge Bridge but he did not live with them though he was running a shop jointly with them.

It was stated by him that he was living with his elder brother Din Dayal in a house in Bedwara. That house was in the tenancy of his uncle with whom they were living because their father had been murdered three or four months before the date of the occurrence. Ram Saroop P. W. 6, the other eye-witness, who resided in the same house where Din Dayal and his uncle were residing was confronted while he was being cross-examined with his statement before the Committing Magistrate that Bhup Singh lived near the Hardinge Bridge and visited Bedwara occasionally, although at the trial he said that it was incorrect that Bhup Singh and his wife lived near the Harding Bridge permanently. It is contended by Mr. Naruddin that in view of all this it could not be safely said that Bhup Singh P. W. 3 was residing in Bedwara and could have been present at the time of the occurrence which took place in quite a sudden manner.

An examination of the other facts and circumstances and the evidence show that this contention is without much force. It is established on the record that as soon as Din Dayal was stabbed, Bhup Singh, his brother, took him in a rickshaw first to the Kotwali and then to the Hospital. Nihal Singh, Sub-Inspector of Police, who appeared as P. W. 14 stated that when he started in his police van from the Kotwali, Din Dayal the injured person and his brother Bhup Singh P. W., met him in the main gate of the Thana. He carried the injured person and Bhup Singh P. W. to the Hospital in the police van and got the injured person admitted in the Emergency Ward. It is difficult to believe that Bhup Singh would have accompanied Din Dayal deceased to the Kotwali and then to the Hospital if he had not been present from an earlier stage because very little time would have elapsed

between the stabbing and the taking of Din Dayal in the rickshaw to the Kotwali and the suggestion of the learned counsel for the appellant cannot be accepted that Bhup Singh was sent for from his residence near the Hardinge Bridge and he then accompanied his brother who had been stabbed and took him to the Kotwali and then to the Hospital.

(5) The other criticism of Mr. Nuruddin is common to the testimony of both the eye-witnesses Bhup Singh and Ram Saroop. It is urged that according to their evidence the occurrence took place in a very crowded part of the city and there were several shops of milk-sellers, hallways, birisellers etc., round about the place where Din Dayal was stabbed. None of these witnesses who could be regarded as independent came forward to give evidence and only Bhup Singh who was the brother and Ram Saroop who admittedly was a friend of the family of Din Dayal appeared as witnesses. This argument was examined by the learned Additional Sessions Judge in paragraph 13 of his judgment. Bhim Singh P. W. 23, the Sub-Inspector, who was the Investigating Officer stated that nobody from the neighbourhood was willing to help him because of fear from the appellants. It is quite possible that even if some persons witnessed the occurrence, they were reluctant to appear as witnesses against the appellants owing to a general impression that they might harm them if they gave evidence seeing the precedent of Din Dayal having been stabbed by the appellants because he had appeared as a prosecution witness against them.

(6) It is next contended that according to the evidence of Dr. Daya Nand P. W. 21, Hari Shankar, who was examined on 31-5-1958, was found to have as many as five injuries the duration being 12 to 24 hours. These injuries consisted of two scabbed abrasions on the middle portion of the left leg, an abrasion on the right shoulder, a contusion on the left thigh, another contusion of the left knee and a contusion on the right thigh. It is submitted that the eye-witnesses did not state as to how these injuries were caused and, therefore, their testimony was of a doubtful character. It is in the evidence of Ram Saroop P. W. 6 that appellant Hari Shankar made an attempt to escape and he fell down. This would explain some of the injuries which were found on the person of Hari Shankar. It has been suggested on behalf of the prosecution that when Hari Shankar was caught by Ram Saroop

P. W. 6 and Sarup Chand, it is possible that they gave him some beating and he may have received some injuries of the nature which were found on him.

(7) The learned Additional Sessions Judge considered the evidence of the two eye-witnesses and came to the conclusion that there was nothing against them which could in anyway affect the probative value of their evidence. I am in agreement with him and I find it difficult to hold that their testimony should not be believed.

(8) The learned counsel for the State relied on the statement of Din Dayal, Exhibit P/R., which was recorded on 31-5-1958 by Bhim Singh, Sub-Inspector, P. W. 23. According to that statement the incident had taken place in the manner stated by the other eye-witnesses Bhup Singh and Ram Saroop. It is contended by the learned counsel for the appellants that the aforesaid statement was not admissible as it was a statement recorded by the police under S. 161 of the code of Criminal Procedure and that it was not a dying declaration because Din Dayal died much later and was not under an immediate apprehension of death. Section 162 of the Code of Criminal Procedure which prohibits the use of a statement made to the police itself contains an exception in sub-s. (2) in the following terms:

'Nothing in this section shall be deemed to apply to any statement falling within the provisions of S. 32, clause (1) of the Indian [Evidence Act. 1872](#), or to affect the provisions of S. 27 of that Act.'

Clause (1) of S. 32 of the Indian Evidence Act provides that statements, written or verbal, of relevant facts made by a person who is dead, **** are themselves relevant facts 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. The statement of Din Dayal, therefore, would be relevant and admissible under the aforesaid provision. It is well settled by now that there is difference between the Indian Rule and the English Rule with regard to the necessity of the declaration having been made under expectation of death.

In the English Law the declaration should have been made under the sense of impending death whereas under the Indian Law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under the expectation of death. It appears, therefore, that the prosecution would be justified in pressing into service the statement contained in Exhibit R/P. At any rate, even if the so called dying declaration is excluded from consideration there can be no doubt that the conviction of the appellants can be sustained on the other evidence which has already been discussed.

(9) It was contended by the learned counsel for the appellants that no motive had been proved on their part for attacking Din Dayal deceased as alleged by the prosecution because the statement which Din Dayal had made in the kidnapping case was helpful to them and Din Dayal had actually turned hostile while appearing as a prosecution witness. There was thus no reason for the appellants feeling aggrieved by any evidence which might have been given by Din Dayal. Even if the evidence given by Din Dayal was innocuous and was not damaging to the appellants, it must be remembered that they had been convicted by the trial Magistrate on 3-3-1958 and it was after the occurrence that they were acquitted by the Sessions Court. On the date of the occurrence they must have been nursing a grievance against Din Dayal for having appeared as a prosecution witness.

(10) As regards the appellant Hari Shankar, it has been contended by his counsel that the original charge was under S. 302 read with S. 34, Indian Penal Code, whereas the conviction was made under the second part of S. 304 to which S. 34 could not be made applicable. It is urged that according to the prosecution itself the part played by Hari Shankar appellant was merely of holding the deceased and the stabbing was done by Rajinder kumar. There could in these circumstances be no question of a common intention to commit an offence of which Hari Shankar had been convicted. According to the learned counsel for Hari Shankar, the real charge which the prosecution might have established against Hari Shankar was one of abetment. It is pointed out that no specific charge was framed of abetment and therefore, there has been an illegal trial resulting in prejudice to the aforesaid appellant.

(11) As to whether S. 34 can apply to a case under the second part of S. 304, Indian Penal Code there appears to have been divergence of opinion among the High Courts which is discussed at page 770 of the Law of Crimes by Tatanlal. The preponderant view, however, is that it can be made applicable. Although to constitute an offence under the second part of the aforesaid section there must be no intention of causing death or such injury as the offender knew was likely to cause death, there must still be a common intention to do an Act with the knowledge that it was likely to cause death though without the intention of causing death though without the intention of causing death. In *Saidu Khan v. State*, ILR (1952) 1 All 639: (AIR 1951 All 21), it has been held by a Full Bench of the Allahabad High Court that it is possible to convict an accused person of an offence under S. 304, Part II, read with S. 34 of the Indian Penal Code provided it is established that each person taking part in committing the crime in furtherance of the common intention of all had knowledge that their Act was likely to cause death. At page 678 (of ILR All): (at p. 33 of AIR) the following observations of Wali-Ullah J., are noteworthy:

'The question whether any one of them or all of them is or are guilty of any specific crime is necessarily dependent upon some other factors, e.g., the necessary mental condition, or guilty knowledge or intention. If any one or more of them is proved to have the requisite kind of intention, e.g., the intention expressed in the earlier part of S. 299 of the Indian Penal Code, he will be punishable either under S. 302 or under S. 304, Part I, as the case may be. If, however, there is only guilty 'knowledge' as distinct from guilty 'intention', i. e., knowledge that the Act which is being performed may result in death, he will be punishable under Part II of S. 304. There is no difficulty in applying S. 34 so interpreted to a case which falls under S. 304, Part II. The common intention in the one case and the knowledge that the Act is likely to bring about death in the other, do not come into conflict at all. My answer, therefore, to the first question referred to us is in the affirmative. It is of course assumed that the 'accused person' in a particular case, is proved to have the requisite kind of 'knowledge' as mentioned in part II of S. 304, I. P. C.'

In the present case there can be no doubt that when appellant Hari shankar held the deceased while the other appellant, Raj kumar, inflicted a number of stab

wounds, the ingredients of the second part of S.34 as explained by the Full Bench decision mentioned above would be established.

(12) For all the reasons given above, the conviction of the appellants is maintained, but on a consideration of all the circumstances I would reduce the sentence of Rajinder Kumar to five years' rigorous imprisonment and that of Hari Shankar to three years' rigorous imprisonment. The appeals are allowed only to this extent.

(13) Order accordingly.

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