

Dharam Pal Vs. State

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Court : Delhi

Decided On : May-10-2007

Reported in : 141(2007)DLT478; 2007(96)DRJ420

Judge : Mukul Mudgal and; P.K. Bhasin, JJ.

Acts : Indian Penal Code (IPC) - Sections 34, 201, 302 and 304; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Crl. Appeal No. 62/2006

Appellant : Dharam Pal

Respondent : State

Advocate for Def. : Sunil Sharma, APP.

Advocate for Pet/Ap. : Mukesh Jain, Adv

Judgement :

Mukul Mudgal, J.

1. This appeal filed by the appellant Dharam Pal challenges the judgment of the learned Additional Sessions Judge in Sessions Case No. 132/01 in FIR No. 334/01, P.S. Kashmere Gate, Delhi under Sections 302/201/34 IPC. The impugned judgment convicted the appellant under Section 302 read with Section

34 IPC while convicting the other co-accused Kameshwar, Lal Behari, Raj Kumar and Prem Kumar under Section 304-II read with Section 34 IPC for a period of 5 years and also convicted all the accused under Section 201 read with Section 34 IPC for 3 years imprisonment and the sentences were to run concurrently. The case alleged by the prosecution is that on 21st July, 2001, one Jagdish Sahni came to the Police Station and gave a statement which forms the basis of the FIR, which is stated by the prosecution as follows:

That he (Jagdish Sahni) resides at house No. 80, Jawala Ghat, Yamuna Bazaar, Kashmere Gate, Delhi and runs a tea shop near Nigam Bodh Ghat, Delhi. He further stated that lot of scrap dealers and rickshaw pullers frequent his shop for taking tea. These persons work for the whole day and sleep in the parks near Hanuman Mandir, Yamuna Bazaar, Delhi. Since, the customers of the complainant are poor and could not pay instantly, so the complainant visits their spots where they sleep at night to recover his money.

It was stated by the complainant that 13-14 days ago, at about 11 pm or 12 pm when he had gone in the park at night to collect his dues, he saw 6 boys namely Prem Kumar, Raj Kumar, Kameshwar, Shakeel @ Gainda, Lal Bihari and Dharampal beating a boy. On enquiry, he came to know that when Dharampal was sleeping on the pavement of main road, the said boy tried to steal the watch from the wrist of Dharampal, but he got awake and called his friends and they all started beating the said boy and they then took injured to a park while beating him. Raj Kumar was having a danda in his hand whereas Prem Kumar was giving fist and kick blows. Dharampal took out his belt out from the pant and started beating the said boy with it. Thereafter, Kameshwar took that belt from Dharampal and started beating the said boy. Accused Shakeel @ Gainda then took the belt from Kameshwar and strangulated the boy by tightening the belt around his neck. When Shakeel @ Gainda was tightening the belt, the said boy tossed in pain to free himself but other accused hold of the boy and were exhorting 'SAALE TO PARK ME HI GAAD DETE HAIN'. Thereafter, the assailants asked the complainant to run away and threatened him to keep quite lest he would also meet the same fate.

The complainant ran away from the park and later on he was told by one Kishan that the dead body of that injured was buried by the 6 assailants in the park itself that since he was afraid of the assailants, he did not disclose this fact to police and that now on 21.7.2001 he had come to police station and had lodged this report.

2. On the basis of this report, FIR bearing No. 334/01 Under Section 302/301/34 IPC was registered at Police Station Kashmere Gate, Delhi and investigation started. On completion of investigation, challans were filed before the Ld. MM on different dates as accused Dharampal was arrested later on. On completion of formalities, the case was committed to the Court of Sessions.

3. On 13th March 2002, charges were framed against accused Prem Kumar, Raj Kumar, Kameshwar, Lal Bihari and Dharampal under Sections 302/201/34 IPC to which they pleaded not guilty and claimed trial.

4. The prosecution examined 17 witnesses and then the Trial Court recorded the statements of the accused persons under Section 313 Cr.P.C. The two eye-witnesses in the case were PW-1 Jagdish Sahni who lodged the FIR and PW 4 Kishan who was the witness to the incident. The PW-1 Jagdish Sahni deposed as follows:

That he was present at his shop at Nigam Bodh Ghat, Kashmere Gate, Delhi when he saw 5-6 persons beating a boy who have dandas and belts. The deceased boy suddenly gave a teeth bite on the thumb of the accused Dharampal who exhorted 'Yeh Paagal Ho Gaya Hai Isko Maar Do'. The accused Shakeel @ Gainda tightened the belt around the neck of that boy and as a result thereof he died on the spot. Apart from Shakeel @ Gainda and Dharampal, Raj Kumar, Prem Kumar, Lal Bihari and Kameshwar were also giving beatings to the boy.

5. PW-4 Kishan also deposed that a pick pocket was trying to steal the watch from the wrist of Dharampal who woke up and had quarrel with the pick pocket and called his other companions. One Shakeel @ Gainda started beating the pick pocket and put a leather belt around the neck of the said boy and the other accused such as Dharampal and Kameshwar were beating him with belts. Other accused persons were having lathis and were giving lathi blows on the said person

resulting in his death.

6. The recovery of the body was effected at the instance of the accused Prem Kumar, Raj Kumar and Kameshwar about 14 days later.

7. Principally on the basis of the statements of the eye-witnesses, the trial court recorded the conviction of the accused by recording the following finding:

13. Thus, the prosecution had proved:

(a) the presence of accused person;

(b) the presence of victim;

(c) the death of victim;

(d) his burial by accused;

(e) the exhuming of his dead body; and

(f) the cause of death.

8. On the basis of the above findings, the Trial Court further held as under:

The facts only show that accused Lal Bihari, accused Kameshwar, accused Prem Kumar and accused Raj Kumar had come to help accused Dharampal when they came to know that the deceased was trying to steal the watch of the accused Dharampal and hence they all started beating the boy. Their intention was to teach the said boy a lesson by beating him but not to kill him.

It is well settled that if the intention of all accused persons was to teach victim a lesson, but one of them had exceeded such intention and had killed the victim then only such person shall be liable for murder.

16. All the accused persons no doubt had started beating the deceased to teach him a lesson but it was only on exhortation of accused Dharampal that accused Shakeel @ Gaimda strangulated the deceased. This shows that accused Dharampal and accused Shakeel @ Gaimda exceeded the common intention and

caused death of the said boy. The fact shows that only accused Dharampal and accused Shakeel Gainda were responsible for causing death of the said boy and their individual acts cannot be attributed to remaining accused persons.

17. If any person share a common intention to cause hurt/grievous hurt but actually cause an injury sufficient in the ordinary course of nature to cause death then can this be regarded as an act committed by him jointly with other accused or that the said act is only an individual act. The answer settled in the following judgment:

In *Rejender Singh v. State of Bihar and Ors.* 2000 (2) JCC 460 where one of the appellant gave a lathi blow on the leg of deceased while Rajender inflicted serious injuries from a ballum to deceased. It was also held that Trilok shared no common intention with Rajender to cause fatal blow to deceased.

18. Thus, from the facts it is proved that it was accused Dharampal and accused Shakeel @ Gainda who were actually responsible for murder of the said boy.

However, since all other remaining accused continued beating the boy till he died, may be by fists and kicks, cannot deny the knowledge that if any person is beaten black and blue continuously he may die. Hence, accused Lal Bihari, accused Kameshwar, accused Prem Kumar and accused Raj Kumar would be liable under part II Section 304 IPC.

9. The trial Court thereafter in our view correctly applied the above position of law laid down in respect of common intention in *Rejender Singh v. State of Bihar and Ors.* 2000 (2) JCC 460 and *Sukhdev Yadav and Ors. v. State of Bihar* : 2002 CriLJ80 and came to the conclusion that none of the contradictions and improvements were substantial enough to destroy the substratum of the prosecution case. The Trial Court's judgment thus does not deserve any interference except the nature of offence against the appellant and the punishment to be awarded to him. The delay in lodging the FIR was also found to be on account of fear of Shakeel @ Gainda. Taking into account the above findings accused Prem Kumar, Raj Kumar, Kameshwar and Lal Bihari were convicted under Section 304 Part II read with Section 34 IPC and were sentenced to

rigorous imprisonment of five years and fine of Rs. 500/- and in default of payment of fine to further undergo simple imprisonment for one month upon each of the accused person. In so far as the appellant Dharampal is concerned, he was convicted under Section 302 read with Section 34 IPC with imprisonment for life with fine of Rs. 500/-.

10. The State has not filed any appeal against the impugned judgment and we are only concerned about the appeal filed by the appellant as accused Shakeel @ Gaimda who played the major role in strangulating the deceased by tightening a belt round his neck continues to be a proclaimed offender and has not been arrested till now.

11. The main plea submitted by the learned Counsel for the appellant is that the only reason why the appellant has been treated differently from the other co-accused who were all charged under Section 302 read with Section 34 IPC is on account of the exhortation given by him. He submitted that exhortation mentioned by PW-1 Jagdish was not deposed to by PW-4 Kishan and the FIR which was lodged by Jagdish PW-1 also did not mention the exhortation. He further submitted that if the exhortation, said to be deposed to by PW1 and neither mentioned by PW4 another eye witness nor in the FIR, was disregarded, there is nothing to distinguish the case of the accused Dharampal from the case of the other co-accused who have been convicted under Section 304 Part II. He further submitted that even if exhortation was to be given by the accused Dharampal, it occurred on account of two significant facts. One that the wrist watch of Dharampal was attempted to be stolen by the deceased leading to the beating of the deceased and second the deceased gave a tooth bite on the thumb of the accused Dharampal. Even if the exhortation was given 'Yeh Paagal Ho Gaya Hai Isko Maar Do', this exhortation could not be held straightaway to be with an intention to kill the deceased but could have also been an exhortation occasioned by the circumstances and could have been only to beat the deceased. The learned Counsel for the appellant pleaded that there was no other special evidence to differentiate the case of the accused from the case of the co-accused. The learned Counsel for the appellant fairly stated that in view of the evidence on record, he is confining his pleas to the nature of the offence committed by the appellant.

12. Mr. Sharma, appearing for the State has opposed the above plea urged on behalf of the learned Counsel for the appellant by submitting that there was a beating by the appellant by the belt as deposed to in the FIR. The complaint about beating by belt by the appellant was only found in the testimony of PW-4. Taking into account the fact that the FIR was lodged by PW-1 Jagdish Sahni after about a fortnight from the incident when there was no immediate pressure on the PW-1, we feel that the absence of exhortation by the appellant Dharampal from the FIR is significant and appears to be an improvement in the testimony of PW-1, particularly when PW-4 does not depose to such an exhortation. Even if we are to assume that there was an exhortation, the facts pointed out by the prosecution reveal that the exhortation was in the nature of exclamation arising from a tooth bite on the thumb of the accused Dharampal by the deceased and could not be such an exhortation which could be construed to be motivated by an intention to kill the deceased. The incident appears to have occurred on the spur of the moment and the evidence against the appellant is no different than that against the other co-accused had been deposed to by PW1 as having used belts to beat the deceased. Even PW4 had deposed about use of belts by Dharampal, Kameshwar and Shakeel @ Gainda. Thus save for the allegation of exhortation the case of accused Dharampal cannot be differentiated from the other accused convicted under Section 304 II IPC. In this view of the matter, in view of the limited plea advanced by the learned Counsel for the appellant about the nature of the offence, we are satisfied that the case of the appellant could not be differentiated from the other co-accused owing to the omission of the exhortation in the FIR and in PW4 Kishan's testimony and accordingly, the appellant was liable to be convicted only under Section 304 Part II IPC. Accordingly, the appeal is partly allowed. Since, it is not disputed that the appellant Dharampal has already undergone more than 5 years imprisonment, the appellant is directed to be sentenced for the period already undergone by him. Accordingly, the appellant having served his sentence is ordered to be released from jail forthwith.

13. In so far as conviction under Section 201 is concerned, there is no evidence as to the destruction of the evidence against the appellant even as per the testimony of the eye-witness and indeed the recovery of the dead body. Accordingly, the conviction of the appellant under Section 302 read with Section 34 IPC and

Section 201 IPC is set aside and the appellant convicted under Section 304 Part-II and sentenced to the period already undergone.

14. The appeal stands partly allowed in the above terms and since the appellant has already undergone the awarded sentence he is directed to be released forthwith.

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