

Deepa Ram Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Mar-11-1987

Reported in : 1987WLN(UC)255

Judge : Shyam Sunder Byas and; Ashok Kumar Mathur, JJ

Appeal No. : S.B. Cr. Appeal No. 622 of 1981

Appellant : Deepa Ram

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Mr. Bhagwati Prasad

Judgement :

1. Since these two appeals, one by accused Deeparam and the other by accused Mohan Lal and Khyali Ram, are directed against one and the same judgment of the learned Additional Sessions Judge (1), Hanumangarh, dated October 21, 1981, they were heard together and are disposed of by a single judgment. By the judgment aforesaid, the learned Addl. Sessions Judge convicted and sentenced the accused persons as under: S.No. Accused's name Offence under Section Sentence awarded

(1) Mohan Lal(2) 302 and Imprisonment for life; 302/34, IPC

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27, Arms As above.

Act

(3) Deepa Ram 302/34, IPC Imprisonment for life.

2. The accused have come-up in appeal and challenge their convictions. The incident is alleged to have taken place at about 6.00 or 6.30 p.m. on September 17, 1980 in village Dholipal P.S. Sadulshahar district Ganga-nagar, in which two persons Amilal, aged about 30 years, and Kaluram Nayak, aged about 70 years, were gunned down to death.

3. Put briefly, the prosecution case is that PW 13 Mukhram Jat is the brother of the deceased-victim Amilal. PW 8 Joraram and PW 9 Chetram Nayaks are the sons of the deceased-victim Kaluram Nayak. They all reside(d) in village Dholipal. The appellants are residents of village Indrapura. Two of them, viz., Mohan Lal and Khyaliram are the real brothers inter se. In the afternoon on September 17, 1980, the appellants came on a motorcycle to village Dholipal and stopped it near the public road where at a time there was a liquor shop. They started selling illicit liquor to the villagers. Amilal (deceased-victim) went to the accused and told them that they should not sell the liquor in the Abadi of the village. This annoyed the accused persons and they started manhandling Amilal. Hearing the commotion, the deceased Kaluram Nayak and his sons Joraram and Chetram went there. Kaluram and his sons reprimanded the appellants that they were selling the illicit liquor and despite their illegal act, were manhandling Amilal. Accused Deeparam thereupon cried aloud that since they were not allowed to sell the liquor by these persons, they should be finished. Accused Khyaliram threw an empty bottle at Kaluram, which hit him on his head. Thereafter the appellants started manhandling Kaluram. Amilal also reprimanded the appellants and told that they should be ashamed of manhandling an old man (Kaluram). Amilal took up a brick piece and pelted it towards the appellants. The brick piece hit accused Mohan Lal. Accused

Deeparam then again cried what was the use of keeping the weapons and that those persons should be shot down. Accused Khyaliram took out a pistol. Amilal took to heels. Accused Khyaliram fired the pistol at Amilal which hit him on his back. Amilal fell down and started crawling to save himself. There was profuse bleeding from his gun-shot injury. When Kaluram and others tried to run away, accused Deeparam again cried aloud that the enemies were retreating and none should escape. Accused Mohan Lal, who had a D.B.B.L. gun, fired a shot which hit on the back of Kaluram. Kaluram fell down. The appellants again fired some shots, one of which hit Khaja Singh Jat-sikh, who incidently arrived on the spot. Thereafter the appellants mounted on the motor-cycle and sped away towards their village Indrapura. Kaluram passed away instantaneously on the spot while Amilal became unconscious. His condition was becoming precarious at every moment. He was taken in a bus to Sadulshahar Hospital. But he did not survive and passed away in the way. PW 8 Joraram, PW 13 Mukhram and some other persons reached Police Station, Sadulshahar, where Joraram verbally lodged report Ex. P 2 of the occurrence. The police registered a case and took-up the investigation. The investigation was conducted by the Deputy Superintendent of Police Mr. Jaweriya (PW 12). He first went to the Hospital, Sadulshahar and posted a police constable to keep a watch on the dead body of Amilal. In that very night, he arrived on the spot and noticed the dead body of deceased Kaluram lying at the place of the incident. Since it was night, no further investigation could be taken up. Next day on September 18, 1980, the Investigating Officer inspected the site, prepared the site plan Ex.P 30 and site inspection note. He also prepared the inquest of the dead body of the deceased Kaluram. He noticed 7/8/fired cartridge cases, some wads, one wrist watch, broken pieces of a glass bottle, blood-stained soil and bloodstained pieces of a brick scattered around the place of the incident. He seized and sealed all these articles. He came to the Hospital, Sadulshahar and prepared the inquest of the dead body of Amilal. The post-mortem examinations of the victim's dead bodies were conducted on September 18, 1980 by PW 11 Dr. Goyal the then Medical Officer Incharge, Primary Health Centre, Sadulshahar. The doctor noticed the following ante-mortem injuries on the dead bodies:

On the dead body of Amilal

- (1) Lacerated wound 1/2" x 3/4", x 1/4" in the back of upper 1/3rd of left fore-arm;
- (2) Lacerated wound 3/4" x 1/2" x 1/6" in the left inter-scapular region;
- (3) Lacerated wound 1/4" x 1/6" x 1/6" in the left lumbar region in the back;
- (4) Contusion 3/4" x 1/2" in the back of right elbow;
- (5) Abrasion 3/4" x 1/4" in the back of left elbow;
- (6) The wound of entrance which is of 1/2" in diameter with inverted edges and bruise was present in between 8th and 9th ribs and 8th right inter-costal space in the back at the posterior axillary fold. It was upwards, forward and medially damaging underlying tissues and lower lobe of lung, and pleura and also right lobe of the liver. Liver and lower lobe of lung severely damaged and lacerated. A pellet was lodged in the tissue of right lobe of liver which was preserved and sealed after packing in glass vial. It was grievous, 8th rib of right side was fractured in the back. Abdominal cavity and thoracic cavity contained semi-clotted and fluid blood.

4. Injuries No. 1 to 5 were simple caused by some blunt weapon while injury No. 6 was caused by a gun shot. In the opinion of Dr. Goyal, the cause of death of Amilal was shock and haemorrhage as a result of fire-arm injury to lung and liver. The post-mortem examination report issued by him is Ex.P 24.

On the dead body of Kaluram

- (1) Firearm wounds: the wound of entrance 1/2" in diameter in middle 1/3rd of left posterior axillary fold with inverted and bruised edge. It was running upwards, forward and medially damaging the upper lobe of left lung with pleura and other tissues fracturing 1st rib and inter costal muscle of 1st space. One pellet recovered underlying the skin in subcutaneous tissues in front of left chest;
- (2) The wound of entrance was 1/2" in diameter 1" lateral to 1st wound in the back which was running upward, forward and medially damaging the upper lobe of lung and fracturing second rib and other tissues severely. Upper lobe severely lacerated and one pellet recovered from 2nd intercostal space in muscle in front of left chest. The edges of the wound were inverted and bruised;

(3) Fire-arm wound: the wound of entrance 1/2" in diameter was present in left inter-scapular region 3" lateral to the 1st wound. The edges inverted and bruised. The wound was running upward, forward and medially damaging lower part of upper lobe of lung and severely lacerating it. One pellet was recovered, underlying the skin, in 3rd intercostal space in front of left chest. Subcutaneous tissues fracturing 3rd rib and intercostal muscle also severely damaged;

(4) Fire-arm wound: the wound of entrance 1/2" in diameter present in right inter-scapular region, the edges of which were inverted and bruised. The wound was running upward, forward and medially damaging right upper lobe of lung of its upper part. It was severely lacerated, first rib fractured, first intercostal muscle was damaged and one pellet was recovered from in front of right chest in right supra clavicular region in sub-cutaneous tissues;

(5) Lacerated wound of 1" x 1/4" x 1/4" was present on left parietofrontal region, which was simple in nature and was caused by any blunt weapon.

5. Injuries Nos. 1 to 4 were opined to have been caused by some fire-arm while injury No. 5 was stated to have been caused by some blunt weapon. The doctor was of the opinion that the case of death of Kaluram was shock and haemorrhage as a result of fire-arm injuries to both the lungs. The post-mortem examination report prepared by him is Ex.P 25. One pellet was found lodged in the dead body of Amilal and four pellets were found lodged in the dead body of Kaluram. These pellets were taken out and sealed by Dr. Goyal. They were despatched to the Investigating Officer. Accused Khyaliram was arrested on September 18, 1980, accused Deeparam was arrested on September 21, 1980 and accused Mohan Lal was arrested on September 25, 1980. In consequence of the information furnished by accused Khyaliram and Mohan Lal, one gun and one pistol were recovered. The motor-cycle, on which the appellants had mounted while going to village Dholipal and coming back, was also seized. The blood-stained clothes of the dead victims were sent for chemical examination and they were found stained with human blood. After when the investigation was over, the police submitted a crime report against the three appellants in the Court of Judicial Magistrate, Hanumangarh, who, in his turn, committed the case for trial. The learned

Additional Sessions Judge framed charges under Sections 302, 302/34, 307, IPC and under Sections 25 and 27 of the Arms Act against accused Mohan Lal and Khyaliram and under Sections 302/34 and 307/34, IPC against accused Deeparam. The accused pleaded not guilty and faced the trial. Two of them, viz., Khyaliram and Deeparam denied their presence on the place of the incident and thus pleaded alibi. Accused Mohan Lal admitted his presence on the place of incident but stated that he had gone there in connection with some official work. One Jaideo Jat was also with him on his motor-cycle. PW 8 Jogaram and PW 9 Chetram along with their father Kaluram (deceased) were prosecuted in a murder case on a report lodged against them by Jaideo. Kaluram and Chetram were convicted but Jogaram was acquitted. Jaideo had a gun. The residents of village Dholipal, including Chetram, Jogaram and Mukhram made an assault on him (Mohan Lal) He fell down and became unconscious. He was admitted in the Government Hospital, Sadulshahar on the same day where he remained an indoor patient till he was arrested by police on September 25, 1980. After his becoming unconscious, he could not know what had happened and how Amilal and Kaluram were done to death. The suggestion put forward on his behalf is that since there were inimical relations between Kaluran, Jogaram and Chetram on one hand and Jaideo on the other hand, it was Jaideo who had fired the shot and thereby killed the victims. In support of its case, the prosecution examined 14 witnesses and filed some documents. In defence, the accused adduced no evidence. On the conclusion of the trial, the learned Sessions Judge found the prosecution case substantially true against the appellants. He found no substance in the defence plea of the accused persons. The three accused were consequently convicted and sentenced as mentioned at the very out-set. Aggrieved against their convictions, the accused have taken these appeals.

6. We have heard the learned Counsel for the appellants and the learned Public Prosecutor. We have also gone through the case file carefully.

7. Learned Counsel for the appellants did not challenge the opinion of PW II Dr. Goyal about the number and nature of the injuries sustained by the deceased Amilal and Kalu Ram nor his opinion about the cause of their death. We, therefore, need not touch the evidence of Dr. Goyal in details. Suffice it to say that Amilal

and Kalu Ram died on account of gun shot injuries. Their deaths were homicidal.

8. In assailing the conviction of accused Mohan Lal and Khyali Ram, Mr. Garg, who argued the appeals at length, raised the following contentions: The first contention is that the three eye-witnesses PW 8 Jora Ram, PW 9 Chet Ram and PW 15 Mukh Ram were the close relatives of the deceased-victims, the first two being the sons of Kalu Ram and the third being the brother of deceased Amilal. The presence of Sadhu Singh, Mahaveer, Khajja Singh and Badri Prasad was admitted by these three eye witnesses. Sadhu Singh, Khajja Singh and Mahaveer were not examined. Badri Prasad (PW 1), who was examined, did not support the prosecution story and was declared hostile. Since the independent witnesses were available and yet they were not produced by the prosecution, a presumption should be raised that they were not examined because their evidence was unfavourable to the prosecution. PW 1 Badri Prasad has not supported the prosecution case. In these circumstances it would not be safe to accept the statements of PW 8 Jora Ram, PW 9 Chet Ram and PW 13 Mukh Ram at the face value. These three eye witnesses, being the close relatives of the victims, were naturally interested persons and as such the true and correct narration of the incident could not be expected from them. It was, on the other hand, contended by the learned Public Prosecutor that the FIR Ex. P 2 was lodged by the eye witnesses within two hours of the incident. The Police Station is nearly 14 miles from the place of the incident. The report was, thus, promptly lodged. In this report, a full and complete narration of the incident has been given. The names of all the eye witnesses have been mentioned there in. The presence of the three eye witnesses was not open to any doubt. These witnesses had not strained relations with the appellants. The appellants have not subscribed reasons as to why they had falsely deposed against them. The non-examination of some witnesses present on the spot has no material consequence because their names were mentioned in the FIR Ex. P 2 and were not suppressed or concealed. The prosecution was not bound to examine each and every witness of the incident. Mahaveer, Sadhu Singh and Khajja Singh were cited as witnesses in the Calendar. The prosecution did not examine them to avoid multiplicity of evidence. If the accused thought that their evidence was favourable to them, they could have also produced them in evidence. We have taken the respective submissions into

consideration.

9. PW 8 Jora Ram, PW 9 Chet Ram and PW 13 Mukh Ram had claimed to have seen the incident from the commencement to the end. They deposed that the three appellants came on a motor-cycle to their village and started selling illicit liquor near the public road. Amilal (the deceased-victim) objected. The appellants started manhandling him. Hearing the noise, these three witnesses reached the spot of the occurrence. They reprimanded the appellants. The appellants got annoyed and threw an empty bottle which hit Kalu Ram's (the deceased-victim's) head. Amilal told the appellants that they should be ashamed of beating an old man. Accused Deepa Ram asked the other accused persons to finish all of them who were there. Accused Khyali Ram took out a pistol and fired at Amilal while he was running away. The shot hit on the back of Amilal. Amilal fell down. Accused Mohan Lal fired a shot at Kalu Ram which hit him on his back while he was trying to run away. Kalu Ram started crawling and fell down. Thereafter some more shots were fired by accused Khyali Ram and Mohan Lal. These three eye witnesses were cross-examined at length but on the whole their evidence remained unshaken and unshattered. Nothing could be elicited from them which may be of any help to the appellants.

10. It is true that these three eye witnesses are closely related to the deceased-victims. PW 8 Jora Ram and PW 9 Chet Ram are the sons of the deceased-victim Kalu Ram whereas PW 13 Mukh Ram is the real brother of the deceased-victim Amilal. Their close relationship with the deceased-victims, however, cannot be a valid ground for rejecting their evidence especially when in the FIR, promptly lodged by them, they have named the appellants as the assailants. The FIR was lodged within two hours of the incident. It is not suggested that these eye witnesses had any grouse against the appellants. No strained relations were there between these witnesses and the appellants and as such we are unable to conceive that they would falsely implicate the appellants in serious charges like that of murder.

11. Mr. Garg argued at length that some independent persons, who were present on the spot, were not examined by the prosecution. The prosecution is, thus, guilty

of with holding the material witnesses. The only independent witness examined by the prosecution is PW 1 Badri Prasad, who has not supported the prosecution. We find no substance in the contention. PW 1 Badri Prasad, as his police statement Ex. P 1 shows, was not a witness of the incident. He had arrived on the spot after when the murders were committed. Sadhu Singh, Mahaveer Prasad and Khajja Singh were not examined by the prosecution though Khajja Singh had received a minor firearm injury in the incident. In our opinion, the non-production of these three persons in evidence is not of any material consequence. The prosecution is not bound to examine all the witnesses of the incident. Before a presumption can be drawn against the prosecution for not examining the material witnesses, it should be shown that the evidence of those eye witnesses, who have been examined, is unreliable and doubtful. If the witnesses examined by the prosecution are found reliable and truthful, the non-examination of the other eye witnesses has no consequence. In Pal Singh v. State of Uttar Pradesh), it was observed that once the Court comes to the conclusion that the evidence led by the prosecution is reliable, infirmities arising out of the non-examination of other witnesses would not be sufficient to put the prosecution out of the Court. We are unable to conceive that PW 8 Jora Ram, PW 9 Chet Ram and PW 13 Mukh Ram had not seen the incident and falsely introduced themselves as the ocular witnesses. As such, the non-examination of Sadhu Singh, Mahaveer Prasad and Khajja Singh has no telling effect.

12. Apart from that, the names of Sadhusingh, Mahaveer Prasad and Khajjasingh have been mentioned in the Calender of witnesses filed by the prosecution. If the accused thought that their evidence was helpful to them, it was open to them to examine them in defence. But the defence also did not examine them. Taking all these facts and circumstances into consideration, the non-examination of the aforesaid three persons has no adverse consequence against the prosecution.

13. It was argued that one Jaideo had fired the shots. He was alone there with accused Mohan Lal on the motor-cycle. We again find no substance in the contention. PW 8 Joraram, in his cross-examination, stated that he, his brother Chetram (PW 9) and his father Kaluram (deceased-victim) were tried in a double murder case in a report lodged by Jaideo. Joraram was acquitted and the

remaining two Chetram and Kaluram were convicted. Thus, PW 8 Jogaram and PW 9 Chetram must be presumed to be on inimical term with Jaideo. If Jaideo was there with accused Mohan Lal, these two witnesses PW 8 Joraram and PW 9 Chetram would have never omitted him as the assailant. It is inconceivable that PW 8 Joraram and PW 9 Chetram, who had no grouse or malice against the appellants, would deliberately omit the name of Jaideo who is their arch enemy and substitute in his place the names of the appellants as the assailants and that too for no rhyme or reason. Had Jaideo been present on the spot, he would have been the first person to be named by these witnesses as the assailants of the victims. The first contention raised by the learned Counsel most, therefore, be rejected.

14. It was next argued that the injuries found on the person of accused Mohan Lal were not explained by these three eye witnesses. Mohan Lal was admitted in the Sadulshahar Hospital and remained as an indoor patient there till he was arrested on September 25, 1980, vide arrest memo Ex. P 42. He had received multiple injuries including the fracture of mandible bone. It was argued that the failure on the part of the prosecution witnesses to explain these injuries strongly suggests that they have suppressed the real facts. The contention is barren and bizarre. It is true that 7/8 injuries were found on the person of accused Mohan Lal, vide his injury report Ex P 27. On X-ray examination, his mandible bone was found fractured. The three eye-witnesses PW 8 Joraram, PW 9 Chetram and PW 13 Mukhram stated that Amilal (the deceased-victim) threw a piece of brick at the appellants which hit accused Mohan Lal. This explanation may not be very satisfactory but the presence of injuries on the person of accused Mohan Lal shows that they were inflicted to him after the murders were committed. In case they were committed before he fired the shot, he could not be in a physical fit position to fire the shots. The circumstances show that after the two murders were committed, those, who were present on the spot, manhandled the accused Mohan Lal and it was then that he received some injuries on his person. There is no rule of universal application that the prosecution is bound to explain the injuries of the accused in each and every case. Much depends on the facts and circumstances in which the offence was committed. The mere presence of injuries on accused Mohan Lal does not show that the victims were the aggressors. Both the victims

were absolutely unarmed. They, therefore, could not inflict the injuries on accused Mohan Lal. The contention of Mr. Garg, has, thus, no substance.

15. It was lastly argued by Mr. Garg that the fire-arms recovered at the instance of accused Khyaliram and Mohan Lal were not sent for examination to the Ballistic Expert. So also, the empty cartridge cases found on the spot were also not sent for examination. This infirmity, argued Mr. Garg, badly damages the prosecution case. We again find not much substance in the contention. The gun and the pistol recovered at the instance of the accused Khyaliram and Mohanlal and the fired cartridges found on the scene of the occurrence were certainly not sent for examination to the Ballistic Expert. The pistol was sent to the Police Lines for examination, which was certainly not proper. But in view of the direct and positive evidence of the three eye witnesses Joraram (PW 8), Chetram (PW 9) and Mukhram (PW 13) that shots were fired from the pistol and the gun, this infirmity, if it can be taken as an infirmity at all, has no, telling effect on the prosecution. It does not appear that the prosecution had any oblique design or motive in not obtaining the opinion of the Ballistic Expert. Had the gun, pistol and the fired cartridges were sent for examination to the Ballistic Expert, it would have further added strength to the prosecution. But the non-sending of these articles to the Ballistic Expert has no adverse effect.

16. The evidence of the three eye witnesses Joraram (PW 8), Chetram (PW 9) and Mukhram (PW 13) is not open to any criticism. Their claim to have seen the incident from its commencement to the end is not untrue. They have not been falsely introduced as the ocular witnesses. On the strength of what they deposed, it can be safely held that accused Khyaliram fired a pistol at Amilal and thereby killed him and accused Mohanlal fired a shot from his DBBL gun at Kaluram and thereby killed him. The conviction of these two accused Khyaliram and Mohanlal under Section 302, IPC is fully justified and calls for no interference.

17. Coming to the appeal of accused Deeparam, it was argued that he was convicted under Section 302 with the aid of Section 34, IPC. The allegation against him is that he instigated and exhorted accused Khyaliram and Mohanlal to fire the shots. It was argued by Mr. Bhagwati Prasad, learned Counsel for the

appellant Deeparam that the evidence of verbal exhortation and instigation can be easily manufactured. Accused Deeparam did nothing in the whole incident. The accused had not come with a pre-arranged plan or design to commit murders. They had come only to sell the illicit liquor as per prosecution evidence. Murders were committed at spur of moment by accused Khyaliram and Mohanlal. Since these two accused had fire-arms, no instigation or exhortation was necessary. The evidence as to exhortation and instigation is discrepant and worthy of no credence. It was, on the other hand, contended by the learned Public Prosecutor that the three eye witnesses have stated that it was at the instigation and exhortation of accused Deeparam that the accused Khyaliram and Mohanlal pumped their bullets at Amilal and Kaluram.

18. The clinching issue before us is whether accused Deeparam instigated, incited and exhorted the other two accused to fire the shots? No doubt, the three eye witnesses have stated that accused Deeparam asked the other two accused to shot the fires and finish the persons who had collected on the spot. But we are unable to accept their testimony on this verbal instigation and exhortation. It is very easy to make an allegation of verbal exhortation and instigation. But cogent and coninvicing evidence is required to prove it. The evidence of verbal instigation and exhortation has always been treated as a weak and infirm evidence.

19. In *Jainul Haque v. State of Bihar*) the evidence of exhortation was treated as a very weak type of evidence. It was observed:

The evidence of exhortation is, in the very nature of things, a weak piece of evidence. There is quite often a tendency to implicate some person, in addition to the actual assailant by attributing to that person an exhortation to the assailant to assault the victim. Unless the evidence in this respect be clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant.

20. It is true that accused Deeparam was present on the scene of the occurrence. He had come on the motor-cycle with the other two appellants and after the incident was over, sped away on the motor-cycle with them But by his coming with the appellants and going back with them on the motorcycle, it cannot be inferred

that he had shared a common intention with them to commit the murders. He played no role in inflicting injuries to the deceased-victims. In absence of any positive overt-act on his part, it would not be proper to implicate and connect him with the murders by invoking Section 34, IPC. Section 34, IPC should ordinarily be not resorted to unless the circumstances compel to adopt it. Since accused Deeparam did nothing and yet he was to be implicated and connected with the murders, the eye witnesses assigned instigation and exhortation to him with the oblique motive to connect him with the murders. The appellants and accused Deeparam had come on motor-cycle to sell the illicit liquor. When they came, the circumstances do not show that they had any common intention to commit the murders. In these circumstances, it would not be free from risk to invoke Section 34, IPC to connect accused Deeparam with the murder. He is, therefore, entitled to acquittal.

21. In the result

(1) the appeal of accused Mohan Lal and Khyali Ram is dismissed. Their convictions and sentences for the various offences are maintained; and

(2) the appeal of accused Deeparam is allowed. His conviction and sentence under Section 302/34, IPC are set-aside and he is acquitted thereof. He is already on bail and need not surrender. His bail bonds shall stand cancelled.

22. The appeal shall stand accordingly disposed of.

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