

Kamal Kishore & Ors. Vs. the State

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Court : Delhi

Decided On : Nov-14-2014

Judge : Kailash Gambhir

Appellant : Kamal Kishore & Ors.

Respondent : The State

Judgement :

* IN THE HIGH COURT OF DELHI AT New Delhi Judgment delivered on:

14. h November 2014 + CRL.A. 658/1999 KAMAL KISHORE & ORS.
Appellants Through: Mr. Mohammed Shamikh, Advocate Versus THE STATE
Through: Respondent Mr. Sunil Sharma, Additional Public Prosecutor for the
State AND CRL.A. 693/1999 VIDYA SAGAR Through: Appellant Mr.
Mohammed Shamikh, Advocate Versus THE STATE Through: Respondent
Mr. Sunil Sharma, Additional Public Prosecutor for the State CORAM: HON'BLE
MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT

KAILASH GAMBHIR, J.

1. By this appeal filed under section 374 of the Criminal Procedure Code, 1973 (hereinafter referred to as Cr.P.C.), the appellants seek to challenge the impugned judgment dated 19.11.1999 and order on sentence dated 22.11.1999, whereby the

appellants herein were convicted for committing offences punishable under Section 302/452/506/34 Indian Penal Code, 1860 (hereinafter referred to as IPC) and were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.1000 each and in case of default, to undergo simple imprisonment for a period of one month, for an offence committed u/s 302 IPC. The appellants were further sentenced to undergo RI for one year and pay fine of Rs.500/- for offence under section 452 read with section 34 IPC, in default thereof to undergo SI for 15 days and were also ordered to undergo RI for one month for offence under section 506 read with section 34 IPC.

2. The facts germane to the case of the prosecution are: The deceased, Anand Kishore was residing with his wife Somwati and other family members at WZ-104C, Harijan Colony, Tilak Vihar and was occupying a portion of the first floor of the house. His brother, Girdhari Lal occupied the other portion of the first floor where he was residing with his wife, Rajbala, son Kapil Kishore and other family members. Accused Nanak Chand was the father, and accused Vidya Sagar, Vinod and Suresh were the brothers of Somwati. Accused Kamal Kishore was also related to her. A case was registered by the police at PS Tilak Nagar on the statement of Kapil Kishore wherein he had alleged that quarrels were a common occurrence between Somwati and the deceased on family matters. His parents had interfered and tried to pacify them on many occasions. At times the father in law and brother in law of the deceased used to intervene and threaten to kill him as alleged. On the day of the incident, i.e. 25.07.1997, when the complainant returned home at about 2 PM, his mother Rajbala informed him that a quarrel had taken place between Somwati and the deceased and that she had informed Vinod (brother of Somwati) to make Somwati understand. He had further alleged that on the same day at about 4:20PM, the accused persons came and barged into the room where the deceased was sleeping, they abused him and gave him beatings including fist blows. Accused Nanak Chand exhorted the other accused persons to put an end to the daily disputes once and for all. Thereafter, accused Suresh held the deceased from his left arm while accused Vinod held him from his right arm. Accused Nanak Chand held him by his hair and accused Kamal Kishore held him by his legs while accused Vidya Sagar inflicted a knife blow on the left side of his chest. The deceased started bleeding profusely. The complainant and his cousin

Narender tried to intervene and his mother Rajbala raised an alarm, hearing which the accused fled away threatening to kill them if they dared to intervene. The Investigation Officer (hereafter referred to as the IO) seized the blood stained bed sheet and mattress and also got the scene of incident photographed. The accused persons were apprehended from Keshav Puram Bus stop, at around 9:30PM on the basis of secret information.

3. To prove its case the prosecution examined as many as 22 witnesses. After the completion of the prosecution evidence, statement of the accused persons were recorded under Section 313 of the Cr.P.C. wherein the entire incriminating evidence was put to them, to which they pleaded innocence and false implication and voluntarily submitted that no recovery was made from them. The defense examined two witnesses, i.e. DW1- Rattan Chand and DW-2 Sukhi Ram.

4. Learned Additional Sessions Judge after having analyzed the evidence adduced by the prosecution witnesses, the MLC report on record and the post-mortem report marked as Exhibit PW17A concluded that homicidal death of the deceased Anand Kishore was caused by the accused persons in the manner as deposed by the eye witnesses. The learned Judge disbelieved the defense raised by the accused persons in their statements recorded under Section 313 Cr.P.C. Learned Additional Sessions Judge observed that the death of Anand Kishore was caused in furtherance of common intention of the accused persons to commit the murder of the deceased and that the accused persons also committed the offence of criminal trespass at the time of the incident at the house of the deceased. On the point of sentence of the accused persons, Learned Additional Sessions Judge, sentenced them to undergo imprisonment for life under Section 302 IPC read with Section 34 IPC and imposed a fine of Rs. 1000 each upon them and in default of payment of fine, to further undergo simple imprisonment for a period of one month each under section 302 IPC. The accused persons were also sentenced to undergo rigorous imprisonment for a period of one year each with fine of Rs. 500/- for committing an offence under Section 452 IPC read with Section 34 IPC and in default thereof to undergo simple imprisonment for fifteen days each. All the accused persons were further ordered to undergo R.I. for one month each for commission of offence punishable under section 506 read with section 34 IPC. All

the said sentences were directed to run concurrently. Feeling aggrieved, the appellants have approached this Court to challenge the said judgment on conviction and order on sentence.

5. On behalf of the Appellants, arguments were addressed by Mr. Mohammad Shamikh, Advocate. The State was led by Mr. Sunil Sharma, Learned Additional Public Prosecutor.

6. Addressing arguments on behalf of the appellants, Mr. Mohammad Shamikh, Advocate, categorized his submissions under various heads, which can be outlined as under:

- a. That in this case there is admittedly a single blow given to the deceased Anand Kishore which caused his death.
- b. That for taking it out of the purview of section 302 IPC, the only relevant consideration in the case is to show that there was grave and sudden provocation in the mind of the appellants on account of which they lost power of self control and committed the offence. That admittedly deceased Anand Kishore on the date of incident had given severe beatings to his wife Smt. Somawati (PW-4) who is the sister of the appellants and this incident was narrated to the appellants by Smt. Rajbala (PW-10), which gave provocation to the appellants and infuriated them. That on account of this grave and sudden provocation the appellants lost the balance of mind and committed the offence.
- c. That as per the deposition of Kapil Kishore (PW-3), appellants Suresh, Vinod and Kamal Kishore had already caught hold of the deceased and had grabbed him by his legs and hands before any exhortation by the accused Nanak Chand, which shows that the appellants Vinod, Suresh and Kamal Kishore had no intention of killing the deceased Anand Kishore but the only objective was probably to teach him a lesson as he had harmed their sister.
- d. That the alleged weapon of offence i.e. knife, used by the accused Vidya Sagar in stabbing the deceased was examined by Dr. Komal Chand (PW-17) and he was of the opinion that the injury found on the body of the deceased could not have been caused by the said weapon, i.e. knife. To support his arguments, Ld. Counsel for the appellants relied on the judgment in the case of Jagtar Singh v. State of Punjab 1983 SCC (Cri) 459 7. The aforesaid contentions raised by the learned counsel for the appellants were strongly refuted by Mr. Sunil Sharma, learned Additional Public Prosecutor for the State. Learned APP for the State submitted that the case

set up by the prosecution is based on cogent and clinching evidence of eye witnesses fully corroborated by the circumstantial evidence and therefore, no fault can be found in the well reasoned judgment passed by the learned Trial Court holding the appellants guilty for the commission of the offence punishable under Section 302/ 452/506/34 IPC. Learned APP thus prayed that this Court in the exercise of appellate powers may not interfere with the view taken by the learned trial Court as it is based on unimpeachable evidence of the three eye witnesses and the circumstantial evidence proved through various prosecution witnesses.

8. We have heard learned counsel for the parties at considerable length and have also perused the lower court record.

9. In the present case it has sufficiently been proved on record by the Prosecution from the testimony of PW-2 Narender Singh, PW-3, Kapil Kishore and PW-10, Smt. Rajbala, being the eye witnesses to the said incident, that on 25.07.1997, somewhere between 4 PM to 4:15 PM all the five accused being, Nanak Chand, Suresh, Kamal, Vidya Sagar and Vinod came to the house of the deceased, when he was sleeping. They went inside his room and started abusing and giving fist blows to the deceased. Thereafter accused Nanak Chand exhorted accused Vidya Sagar to put an end to this everyday dispute, and on this, the accused Vidya Sagar took out a sharp edged weapon like knife and stabbed the deceased on the left side chest, while other accused persons were holding the deceased. After committing the offence, all the accused persons ran away and the deceased started bleeding profusely. PW-2 and PW-3, immediately lifted the accused and took him to the DDU Hospital, where he was declared brought dead. As per the MLC proved on record, the victim was brought dead. As per the post mortem report proved on record as Ex.PW-17/A, and the testimony of PW-17 - Dr. Komal Singh before the Trial Court, the following ante mortem injuries were noted by him in the report:

1. A spindle shaped wound of 0.8 cm x 0.5 cm x 1.5 cm place on left side of the chest on 7th ICS. It was 9.5 cm from the left side 14 cm from epigastria point. Wound was gapping. Its edges were smooth, even, clean cut well defined and averted. No sand particle was found.

2. One small abrasion on dorsum of right side 3mm x 1mm tailing on upper side.

10. The cause of death of the victim as opined by the Doctor was due to hemorrhage shock, by the injury on the left side chest, which may in the ordinary course of nature cause death. The weapon of offence was also shown to the said doctor and the doctor after having seen the weapon opined that the injury mentioned in the post mortem report was not possible by the weapon produced before him.

11. The learned Trial Court held the appellant, Vidya Sagar guilty for committing the offence of murder punishable under Sections 302 and 452 of IPC and all the other appellants namely, Vinod, Suresh and Kamal Kishore, for the offence of murder punishable under Sections 302 and 452 read with section 34 IPC, after evaluating and analyzing the evidence adduced by the prosecution. So far as the findings of the Ld. Trial Court that the appellant, Vidya Sagar had stabbed the deceased, we do not find any infirmity in the said decision.

12. Now dealing with the first contention raised in the present appeal, whether the offence committed by the appellant, Vidya Sagar would be culpable homicide amounting to murder under Section 300 IPC or would be culpable homicide not amounting to murder, under Section 299 IPC. To deal with this question, let us first refer to the said provisions which are reproduced as under: "Section 300: Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or- (Thirdly) -If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or- And Section 299: Culpable homicide: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

13. Since the learned Trial Court has convicted the accused under Section 300 clause thirdly i.e. intentionally causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-it is important at this stage to examine the elements of this section.

14. In the landmark judgment of Virsa Singh v. State of Punjab reported in (1958) 1 SCR1495 the Hon'ble Supreme Court held that the following are the four steps of inquiry involved in the offence of Murder under section 300 IPC, clause thirdly: "i. first, whether bodily injury is present; ii. second, what is the nature of the injury; iii. third, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended; and iv. fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature."

15. In the present case, there is an injury on the body of the accused; it is a fatal injury; the injury is the one which the accused, Vidya Sagar intended to inflict; however the injury has not been proved to be sufficient to cause death in the ordinary course of nature. For bringing the offence under this clause it is essential to prove that the injury was one which is sufficient in the ordinary course of nature to cause death. This is an objective and not a subjective test, meaning thereby that the sufficiency of the injury has to be proved by pure medical examination and the opinion of the doctor and it has nothing to do with the fact whether the accused had the knowledge of its sufficiency or not. Thus all what is required to prove the sufficiency of the injury to cause death is the opinion of the doctor who conducted the post mortem to state that the injury was sufficient in the ordinary course of nature to cause death. If it be so, this clause stands proved. In the present case, on the contrary, it has been clearly stated in the post mortem report proved on record as Ex.PW17/A, as well as the testimony of PW-17 - Dr. Komal Singh, that the injury caused by the accused was the one which may cause death in the ordinary course of nature. Thus it was not sufficient in the ordinary course of nature to cause death.

16. This being so, we find it difficult to hold the accused liable under clause thirdly of section 300. It is further pertinent to mention that nothing has been placed on record to show any previous enmity between the accused and the deceased and also the accused had a sensitive relation with the deceased, he being the husband of his real sister, however, at the time of committing the offence the accused was deprived of his senses, being in an anguished state and thus when he received

even the slightest of instigation from his father, he went on to stab the deceased without even a second thought. In such circumstances it cannot be said with conformity that the accused intended to kill the deceased, nevertheless, since the accused was carrying some knife like weapon, he can be attributed the knowledge that by such a stab, he may cause an injury which is likely to cause death of the deceased, thus, the culpability of the accused will be under Section 304 part II, IPC.

17. Dealing with the second and the last contention raised in the present appeal i.e. whether the accused Vinod, Suresh and Kamal Kishore, shall be held liable with Vidya Sagar for causing death of the deceased under Section 302 IPC read with section 34 IPC.

18. Common intention as envisaged under Section 34 IPC is an exception to the rule of evidence. It lays down the principle of constructive liability, wherein even if one person commits the crime, all the other persons who were sharing a common intention with them, will also be liable as if the offence was committed by them personally. A person may be having a similar intention like the other, but a similar intention becomes common when there is an agreement between the individuals sharing that intention i.e. when they mutually agree to commit an offence conjointly and there is meeting of minds, consensus ad idem. This mutual agreement results into a mutual agency, wherein one person represents the other and therefore even if one person commits the offence, it is deemed that all of them have committed the same. It is further pertinent to mention here that for proving common intention, it is essential to prove that there was a meeting of minds. Meeting of minds shall be proved at any time before the incident. It may even take place on the spot. The prosecution may prove it either by proving the agreement or the conduct of the parties. The burden of proving the meeting of minds is on the prosecution. The burden is strict and the court shall not presume anything till proved.

19. In the present case it is evident from the statements of PW-3, PW-4 as well as PW-12 on record that the deceased used to consume liquor and charas. It is also evident from the evidence of all the related witnesses that the deceased used to quarrel with his wife for not giving birth to a boy child and often used to beat her.

The evidence of these witnesses also makes it clear that for resolving these disputes between the deceased and PW-4, the accused persons often used to intervene. On the date of the incident also the deceased gave beatings to his wife, Somawati PW-4, consequent to which she received injuries on her person. The wife of the deceased, PW-4 thereafter went to the clinic of doctor Dharamvir on the ground floor of her house, however when she continued to feel pain, she was taken to some other doctor by the daughter of her sister in law, PW10. Thereafter the sister in law of the wife of the deceased, PW-10 informed the accused persons about the said incident over the phone. This has come in the evidence of both PW-4 as well as PW-10. Thus the accused persons did not come to the house of the deceased on their own rather they came to the house of the deceased in pursuance of the call received by them on which they were informed that the deceased has again given beatings to their sister, PW-4 and that she has received injuries on her person in consequence of it. In this background, any person of an ordinary prudence may lose patience and become annoyed and angry to know that their sister has again undergone physical harassment and trauma at the hands of her husband. Thus when the accused persons came to the house of the deceased they must have been enraged to see the plight of their sister and when they saw the deceased sleeping in an inebriated state while their sister on whom he inflicted the injuries was taken to doctor, they lost their self control and started beating and abusing the deceased. In this process, accused Nanak Chand who is the father of PW-4, Somawati being frustrated and infuriated by this routine quarrel and the deceased beating his daughter, asked his son to do away with this constant trouble, and on the spur of the moment the accused took out some weapon similar to a knife and gave a single blow on the left side chest of the deceased. It shall be noted here that the appellants Vinod, Suresh and Kamal Kishore, were already holding the deceased, before Nanak Chand uttered these words and the accused Vidya Sagar attacked the deceased. In these circumstances when all the accused persons except one came unarmed and the accused who was even armed was also not carrying a deadly weapon, it cannot be said that the accused persons had a common intention to cause murder of the deceased only. The mental state and conduct of the accused persons and particularly the immediate reaction of the accused Vidya Sagar, clearly shows that

all that happened, happened on the spur of moment and could not be said to have been commonly intended by the accused persons. The accused persons might be having a similar intention to teach a lesson to the deceased when they came to his house, as they all started abusing and giving him fist blows, however the common intention to murder the accused cannot be gathered. Further this is also clear from the fact that apart from this blow on the left side chest there is no other injury found on the body of the deceased except one small abrasion on the dorson of right side. Thus even if the accused person gave him beatings they did not cause any severe injury before Vidya Sagar gave him a blow, which shows that they had never intended to murder the deceased.

20. In the view of the aforesaid legal position and the factual matrix, we do not find accused Vinod, Suresh and Kamal Kishore, liable for causing death of the deceased under Section 302 IPC read with section 34 IPC. However, since they were involved in beating the deceased, they would be guilty of committing an offence under Section 323 of the Indian Penal Code.

21. In the view of the aforesaid, the judgment and the order of sentence passed by the learned Additional Sessions Judge dated 19.11.1999 and 22.11.1999 respectively, convicting the appellant, Vidya Sagar for the offence punishable under Section 302 IPC is modified to the extent that the appellant is convicted under Section 304 Part II IPC and the sentence of life imprisonment as awarded by the learned Trial Court is reduced to the period of sentence of five years imprisonment. As per record, the sentence of appellant Vidya Sagar was suspended by this Court vide order dated 06.08.2002 and as per his nominal roll, he spent two years and eight months and one day till 21.11.1999 and had earned one month and one day remission period. As on 06.08.2002, the total period of incarceration of the appellant comes to more than five years. Taking into consideration the period of incarceration already spent by the appellant in custody, the sentence of life imprisonment is modified to the period already spent by him.

22. And so far as the conviction of the appellants Vinod, Suresh and Kamal Kishore under Section 302 read with section 34 IPC is concerned, the same is modified to the extent that the appellants are convicted under section 323 read

with section 34 IPC. As per the nominal role placed on record the appellants, Vinod and Suresh Kumar remained in judicial custody for a period of 2 years 5 months 29 days which includes the remission period earned by them and the appellant Kamal Kishore remained in judicial custody for a period of 2 years 6 months 11 days which includes the remission period earned by him. Taking into consideration the period of incarceration already spent by the appellants Vinod, Suresh and Kamal Kishore in jail, the appeal filed by the appellants is allowed and the sentence of life imprisonment as awarded by the Ld. Trial Court is converted to the period of sentence already undergone by them.

23. It is ordered accordingly. KAILASH GAMBHIR, J SUNITA GUPTA, J.

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