

Vinod and anr. Vs. the State

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Court : Delhi

Decided On : May-10-2011

Judge : Badar Durrez Ahmed; Veena Birbal, Jj.

Acts : Indian Penal Code (IPC) - Sections 302, 34, 307, 325; Code of Criminal Procedure (CrPC) - Sections 174, 313

Appeal No. : CRL.A. 789/2002; CRL.A. 785/2002

Appellant : Vinod and anr.

Respondent : The State

Advocate for Def. : Ms Richa Kapur, Adv.

Advocate for Pet/Ap. : Mr Ajay Verma; Mr Gaurav Bhattacharya; Ms Maria Riba; Mr Anirudh Wadhwa, Adv.

Judgement :

1. Both the appeals are directed against the judgment dated 14.08.2002 passed in Sessions Case No.40/1999 by the learned Additional Sessions Judge, New Delhi, arising out of FIR No.1/99 registered at Police Station Delhi Cantt. wherein both the appellants have been convicted under Section 302/34 IPC and u/s 323/34 IPC for having committed the murder of one Sanjay and having caused simple hurt to Jagdish. The appeals are also directed against the order of sentence dated 2.9.2002, whereby both the appellants are directed to undergo imprisonment for

life and to pay a fine of Rs.100/- each and in default thereby to further undergo R.I for seven days.

2. Briefly the facts relevant for disposal of appeal are as under:- A case was registered against aforesaid two appellants and the co-accused, namely, Raj Kumar & Rajinder @ Chutki vide FIR No.1/1999 (Ex. PW15/1) in Police Station Delhi Cantt on the statement Ex. PW1/1 of complainant Jagdish (PW.1) wherein he had alleged that on 31st December, 1998 at about 11.30 pm, appellants Vinod, Rakesh and their friends were quarreling with a boy, namely, Jeet PW-4 near the shop of Randhir. He and his brother Sanjay i.e deceased had intervened and the quarrel was brought to an end. In that process, some altercation and exchange of slaps had taken place. The appellants and their friends left by saying that they would be back within no time. After sometime when Jagdish (PW-1) and deceased Sanjay were standing near the shop of Randhir, four persons i.e both the appellants and co-accused persons Rakesh and Raj Kumar came again. Appellant Vinod was having a cricket bat in his hand, Raj Kumar was holding a wicket, Rakesh was having a wicket in his hand and another co-accused was having a lathi. They then assaulted him and when the deceased Sanjay tried to save him, appellant Vinod had hit the head of deceased Sanjay with a cricket bat and his associates had also started giving beatings to Sanjay. When he raised an alarm, they all ran away. Initially, this case was registered under section 307/34 IPC and when the injured Sanjay died on 1st January, 1999, an offence u/s 302 IPC was also added. Investigation was handed over to Inspector Anand Sagar (PW 18). On that day, I.O. PW-18 made search for accused persons but could not locate them. A report u/s 174 Cr.P.C. was prepared and statements of father (PW 7) and Sh. Rati Ram (PW 3), uncle of deceased were recorded in the proceedings u/s 174 Cr.P.C. On 01.01.1999, statements of Raju (PW 2), Jeet Singh (PW 4) and Jagdish (PW 1) were recorded. Postmortem examination of deceased was got done. The co-accused Raj Kumar was arrested on 03.01.1999, whereas both the appellants had surrendered on 04.01.1999. The appellants and the co-accused had made their respective disclosure statements to I.O. (PW-18) i.e. Ex. PW2/2, Ex. PW18/4 and Ex. PW18/5 respectively. Appellant Vinod got recovered a cricket bat (Ex P1) from his house which was lying under the cot inside the room. Appellant Rakesh got recovered a wicket (Ex.P2) from the roof of first floor of his

house. The same were seized by preparing necessary memos. After completion of necessary investigation, a challan was filed against the accused persons i.e Vinod, Rakesh and Raj Kumar. In the said challan, accused Rajinder @ Chutki was shown as a proclaimed offender.

3. The charges were framed against the appellants and co-accused Raj Kumar vide orders dated 13th August, 1999, for having committed the offence punishable u/s 302/34 IPC and u/s 307/34 IPC to which they pleaded not guilty and claimed trial.

4. The prosecution, in all, had examined 20 witnesses before the Ld. Addl. Sessions Judge, Delhi, out of which, Jagdish PW 1, Raju PW 2 and Jeet PW 4, are the alleged eye witnesses to the occurrence. Rati Ram PW 3, uncle of the deceased Sanjay, had identified the dead body of Sanjay. Daya Chand, PW.7, father of deceased Sanjay had handed over the blood stained jacket Ex.P3 of deceased Sanjay which he was wearing at the time of the incident to the police and the same was seized vide memo Ex.PW.7/1. He had also identified the dead body of Sanjay. Remaining witnesses relate to police and medical evidence.

5. In the statement under section 313 Cr.P.C, the appellants had denied the incriminating evidence against them. The appellant Vinod had stated that he was friendly with a girl Seema, daughter of Jai Om and had eloped with her. Jai Om belonged to the family of Jagdish PW 1. The family of Jai Om had falsely implicated him in a case of rape wherein he was ultimately acquitted. Thereafter, Jai Om and his family became inimical to him and had falsely implicated him in the case. The appellant Rakesh had stated that he had helped Vinod in fighting the aforesaid rape case and due to that reason he was also falsely implicated in the present case. No evidence in defence was led by the appellants.

6. After considering the evidence on record, the learned ASJ had convicted both the appellants, that is, Vinod and Rakesh under Sections 302/34 IPC and 323/34 IPC and sentenced them to undergo imprisonment for life whereas co-accused Raj Kumar was acquitted in respect of both the charges as it was held that there was no evidence on record to connect him with the alleged occurrence.

7. Appellants have challenged the impugned judgment of conviction as well as order of sentence by filing the separate appeals, which are being taken up together for disposal.

8. At the outset, learned counsel for the appellant Vinod has submitted that he has instructions from the appellant to submit that appellant is admitting the alleged occurrence. It is contended that in any event, appellant could not have been held guilty for the offence punishable u/s 302/34 IPC. Learned counsel has submitted that occurrence took place in a sudden fight in the heat of passion upon a sudden quarrel. It is contended that accused persons had not taken undue advantage or acted in a cruel or unusual manner. It is contended that as per evidence on record, the role assigned to the appellant-Vinod was that he had given one cricket bat blow on the head of the deceased. Learned counsel has further contended that the facts and circumstances of the case only establishes the ingredients of exception 4 of section 300 IPC, as such it is not a case of murder but a case of culpable homicide not amounting to murder. It is further contended that there is no previous enmity between the appellant-Vinod and deceased. In support of his case, learned counsel for the appellant has relied upon *Sukhbir Singh v. State of Haryana* reported in (2002) 3 SCC 327.

9. Learned counsel for the appellant Rakesh has contended that the role assigned to the appellant Rakesh is that he had given a single blow of wicket to deceased Sanjay. There is no evidence on record to show that the Rakesh had common intention with the remaining the accused persons to commit the occurrence. It is contended that there is nothing on record to show that which of the accused had caused fatal blow to deceased Sanjay which resulted in his death. It is contended that at the most, appellant Rakesh can be convicted only for the offence u/s 325 IPC. Learned counsel has relied upon *Dariyao & Anr vs State* reported in 1969 Criminal Law Journal 1237.

10. On the other hand, learned counsel for the State has contended that the present case does not fall under exception 4 of section 300 IPC as is contended by counsel for appellant-Vinod. The evidence on record clearly establishes that appellants have committed the offence of murder. It is contended that there were

two separate incidents on the day of occurrence. In the first incident, as per evidence on record, appellants Vinod and Rakesh and one more person were quarrelling with Jeet (PW.2) and deceased Sanjay had intervened and separated them. At that time, they had some altercation and appellants and the associates had left the place by saying that they would be back soon. Immediately they had come back armed with weapons in their hands. It is contended that Vinod was armed with a cricket bat, Rakesh was having a wicket in his hand while their associate was having a lathi. It is contended that they had come to the spot again with premeditation. It is contended that second fight was not a sudden fight, as such the occurrence does not fall under exception 4 to section 300 IPC and appellant has been rightly convicted under section 302/34 IPC.

11. We have considered the submissions made and perused the entire material on record.

12. There are three eye witnesses to the alleged occurrence i.e Jagdish PW 1, Raju, PW 2 and Jeet PW 4. As per prosecution, Jagdish PW 1 is the brother of deceased Sanjay and he had also sustained injuries at the time of alleged incident. Jagdish (PW 1) has categorically deposed that on 31st December, 1998 at about 11.30 pm, he along with his three brothers namely Sanjay, Rakesh and Shyam were standing in front of his house no.T-101, Old Nangal Village, Delhi Cantt. A scuffle was going on in front of shop of Randhir between Jeet (PW 4) and accused persons i.e Rakesh, Vinod and Chutki wherein they were beating Jeet PW 4. The complainant Jagdish (PW 1) along with his brothers went to the shop of Randhir and had intervened. Thereafter, accused persons went towards their houses by saying that they would be back within no time. Thereafter, when deceased Sanjay was taking Jeet (PW 4) towards his house, he saw the appellants and Chutki coming back and started beating the deceased Sanjay. Appellant-Vinod had a cricket bat (Ex. P1) in his hand, Appellant-Rakesh had a wicket (Ex. P2) in his hand while Chutki had a lathi in his hand. He had also identified appellants before the court. He has also deposed that they had attacked Sanjay with the respective weapons they had in their hands. They had also caused injuries to him and he fell down. After beating them, they ran away and PCR Van came and removed Sanjay to hospital. Later on he was also taken to

hospital. He had been cross-examined at length but his material deposition as regards presence of Vinod and Rakesh at the spot and having caused injuries to him and deceased Sanjay was not shaken in cross-examination. His material deposition is in consonance with statement Ex.PW 1/1 on the basis of which FIR No.561/98 (Ex.PW.15/DB) was registered. The other eye witnesses, i.e., Raju (PW 2) and Jeet (PW 4) have also supported the case of prosecution as regards the presence of appellants Vinod and Rakesh at the spot and having caused injuries to deceased Sanjay and complainant Jagdish (PW.1) at the incident. These material witnesses were cross-examined at length and their material deposition as regards presence of Vinod and Rakesh having caused injuries to Sanjay and Jagdish (PW 1) was not shaken in cross-examination.

13. Reading the entire evidence, it cannot be said that the appellants were not present at the spot and that they did not cause injuries to deceased Sanjay and Jagdish (PW 1).

14. The evidence of material witnesses of the prosecution also stand corroborated by the MLC Ex PW 6/1 of the deceased Sanjay which shows Contused Lacerated Wound (CLW) on left parietal region and left frontal region. The MLC Ex.PW 6/1 of deceased Sanjay is proved on record by Dr. Rajiv Sharma (PW 6). The said doctor has also opined that the said injuries can be caused by a blunt object. The MLC of Jagdish (PW 1) shows that injuries are simple in nature having been caused by blunt object.

15. The evidence of eye witnesses also finds corroboration from postmortem report (Ex. PW5/1). The aforesaid report is proved by Dr. Alexander F. Khakha (PW 5) and the same shows the following external injuries:-

- i) Black eye-left side with swelling.
- ii) Laceration on the left side forehead 2 cms. Above the eye brow size 2.5 cms x 0.5 cms.
- iii) Abrasion on the left side forehead two cms. Above injury no.2. Size 2 cms x .9 cms.

iv) Laceration on the left side top front of head. Size 4.2 cms. X 0.5 cms x 0.5 cms.

Internal examination of Head revealed that "there was extra vassation of blood under the scalp on the left fronto- temporo-parietal region of the head. Skull vault showed a fissure fracture of the left tempo-parietal occipital bones extending to the base of skull at middle craneal fossa bilaterally. Sub-dural and sub-arachnoid haemorrhage present on the left fronto temporo parietal lobes of cerebrum. Brain was grossly sedamatus. Intra-ventricular bleeding was present.

16. The post mortem report Ex. PW 5/1 shows that death was due to cranio cerebral injuries caused by blunt force impact with hard and blunt object/weapon. The said doctor has also opined that injury no.2, 3 & 4 could be caused by cricket bat Ex.P1 as well as wicket ExP2. Dr.Alexander PW.5 has also opined that injury no.4 and its corresponding internal injuries were sufficient to cause death.

17. The appellants had not led any evidence in defence to substantiate the alleged inimical relations. Not even copy of alleged FIR was placed by them on record. Under these circumstances, the stand taken by them was disbelieved by the learned ASJ.

18. Considering the evidence on record, we find no illegality in the finding of the learned ASJ that the accused persons are responsible for the alleged occurrence.

19. The contention of appellant-Vinod is that the present is not a case of culpable homicide amounting to murder but the evidence on record establishes that it is a case which would fall within exception 4 to Section 300 IPC.

Exception 4 to Section 300 of the IPC reads as under:-

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

20. In *Sukhbir Singh v. State of Haryana* (supra), wherein after altercation over the splashing of mud on the person of appellant, who was also slapped by the complainant party, appellant left the spot by declaring that a lesson would be taught to them. After some time, appellant with his associates came to the spot carrying weapons. Appellant gave two thrust blows with his bhalra on the upper right portion of the chest. As per allegations, his associates had also attacked. The appellant was convicted under section 302 IPC by the trial court. The conviction was also upheld by the High Court. The Supreme Court had set aside the conviction of the appellant u/s 302 IPC and held him guilty for the commission of offence of culpable homicide not amounting to murder punishable under section 304 (part I) of the IPC and was sentenced to undergo RI for 10 years. The relevant portion of the judgment is as under:- "18. To avail the benefit of Exception 4, the defence is required to probabalise that the offence was committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual manner. The exception is based upon the principle that in the absence of premeditation and on account of total deprivation of self-control but on account of heat of passion, the offence was committed which, normally a man of sober urges would not resort to. Sudden fight, though not defined under the Act, implies mutual provocation. It has been held by the courts that a fight is not per se palliating circumstance and only unpremeditated fight is such. The time gap between quarrel and the fight is an important consideration to decide the applicability of the incident. If there intervenes a sufficient time for passion to subside, giving the accused time to come to normalcy and the fight takes place thereafter, the killing would be murder but if the time gap is not sufficient, the accused may be held entitled to the benefit of this exception."

19. In the instant case, concededly, there was no enmity between the parties and there is no allegation of the prosecution that before the occurrence, the appellant and others had premeditated. As noticed earlier, the occurrence took place when Sukhbir Singh got mud splashes on account of sweeping of the street by Ram Niwas and a quarrel ensued. The deceased gave slaps to the appellant for no fault of his. The quarrel appeared to be sudden, on account of heat of passion. The accused went home and came armed in the company of others though without

telling them his intention to commit the ultimate crime of murder. The time gap between the quarrel and the fight is stated to be a few minutes only. According to Gulab Singh (PW 10) when Sukhbir Singh was passing in the street and some mud got splashed on his clothes, he abused Ram Niwas. They both grappled with each other whereupon Lachhman (deceased) intervened and separated them. Accused Sukhbir had abused Lachhman who gave him two slaps. The said accused thereafter went to his home after stating that he would teach him a lesson for the slaps which had been given to him. After some time he, along with other accused persons, came at the spot and the fight took place. His own house is at a different place. There is a street in between his house and the house of Lachhman (deceased). On the northern side of his house, the house of the appellant is situated. Similarly Ram Niwas (PW 11) has stated that after the quarrel the accused went towards his house and within a few minutes he came back with other accused persons. It is, therefore, probable that there was no sufficient lapse of time between the quarrel and the fight which means that the occurrence was "sudden" within the meaning of Exception 4 of Section 300 IPC."

21. In the instant case, the evidence on record shows that there was no enmity between the deceased or his brother Jagdish (PW 1) and the appellants. The evidence on record shows that there was a sudden fight between Jeet (PW 4) and the accused persons and deceased Sanjay along with brother Jagdish (PW 1) standing near his house had intervened. Immediately thereafter accused persons had left the spot and came back within no time armed with cricket bat, wicket and lathi as is discussed in the evidence. It is not the case of the prosecution that they had given repeated blows on the head of the deceased. Evidence on record also shows that there was hardly any time gap when they had left the spot and returned armed with aforesaid weapons. It cannot be said that there was premeditation for committing the occurrence. Evidence of all the eye witnesses shows that the accused persons had come back armed with bat and wicket within no time of leaving after the first occurrence. There is nothing on record to show that accused persons had taken undue advantage or acted in a cruel or unusual manner. There is nothing on record to show that repeated blows were given with Ex.P1 & Ex.P2 to the deceased Sanjay. It is not the case of prosecution that the pointed end of the wicket was used to cause the death of the deceased. The incident happened

all of a sudden.

22. We have also examined the contention of learned counsel for the appellant Rakesh that the said appellant had no common intention with the other accused person to commit the occurrence and no fatal blow was given by him and at the most he can be convicted under Section 325 IPC. The evidence of eye witnesses shows that he was present at the time of initial incident. Thereafter the said appellant had left the spot with others and within no time he had come again to the spot armed with wicket Ex.P2 with other co-accused and had given a beating to deceased Sanjay and Jagdish (PW1) along with appellant Vinod. The same establishes that appellant shared the common intention with others. It is well settled that common intention to commit the crime can be framed at the spur of moment. It has also come in the evidence of Dr Alexandar F. Khakha (PW 5) who has conducted the post mortem of deceased Sanjay vide report Ex. PW5/1 that injury No. 2, 3 and 4 could be caused by cricket bat Ex. P1 as well as wicket Ex. P2 and injury No.4 and its corresponding internal injuries were sufficient to cause death. Under these circumstances, it cannot be said that blow given by him was not the fatal blow. The contention raised by learned counsel for appellant Rakesh is rejected.

23. Keeping in view the facts and circumstances of the case, we are of the opinion that on the basis of evidence on record it is proved that appellants have committed the offence of culpable homicide without premeditation in a sudden fight in the heat of passion upon sudden quarrel and did not act in a cruel or unusual manner and their case is covered by Exception 4 of Section 300 which is punishable under Section 304 (Part I) IPC.

24. Both the appeals stand disposed of by partly allowing the same. The conviction of the appellants for the offence of murder is converted to a conviction under Section 304 (Part I)/34 IPC and their sentences of life imprisonment are reduced to 7 years of rigorous imprisonment. The sentence of fine of ` 100 and in default of payment of fine to undergo rigorous imprisonment of 7 days as imposed by the Ld. ASJ, is maintained. We also make it clear that if appellant Vinod has already undergone the sentence now imposed, then he shall be released forthwith,

if not required in any other case. Appellant Rakesh is on bail. If he has not undergone 7 years of rigorous imprisonment, he shall surrender forthwith and shall undergo the remaining sentence. On his surrender, the bail bond furnished by him will stand cancelled and the surety will also be discharged. Benefit of Section 428 Cr.P.C. be given to both the appellants.

The appeals are partly allowed, as above.

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