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Court : Delhi

Decided On : Feb-17-2012

Judge : Pradeep Nandrajog & the Honourable Ms. Justice Pratibha Rani

Appeal No. : Crl.A.215 of 1999 & 339 of 2003

Appellant : Rajesh Kumar and Another

Respondent : State

Judgement :

PRATIBHA RANI, J.

(Oral)

1. Appellants Rajesh Kumar and Sarwan Kumar have been convicted for having committed offence punishable under Section 302/34 IPC in relation to the homicidal death of one Krishan Kumar. They have been sentenced to undergo imprisonment for life and to pay a fine of `2000/- each and in default, to undergo simple imprisonment for one year.

2. Feeling aggrieved, the two appellants have approached this Court by way of two separate appeals.

3. The criminal law was set into motion on the basis of information received vide DD No.23 dated 16.11.1995 at PS Trilok Puri from Ct. Gopal Prasad posted at

JPN Hospital that one Krishan Kumar, son of Sh.Mool Chand, resident of 13/59, Trilok Puri had been got admitted with stab wounds in the hospital by his brother Radhey Shyam, and that Krishan Kumar had been declared brought dead. The copy of DD was handed over to SI Mahesh Chand Meena who alongwith Ct. Dharampal and Ct. Dhyan Singh reached the hospital.

4. Prem Kumar, an eye witness met him in the hospital and made statement Ex.PW6/B to the effect that on 16.11.1995 at about 9.00 PM he alongwith his neighbourer Krishan Kumar was going to the market at Block No.27, Trilok Puri, Delhi for purchasing ice for fish. When they reached on the road between Block No. 13 and 14 near Neha General Store, they saw 10-12 persons gathered at the Chowk and appellant Rajesh was seen in the crowd. Krishan Kumar went near Rajesh to ask as to what had happened and why the crowd had collected there. On this, appellant Rajesh became annoyed and said "Tu Bada Badmaash Hai, Tu Kyon Beech Mein Aa Raha Hai". Krishan Kumar replied that he was simply asking and why he had got annoyed. On this altercation took place between them and they started grappling.

5. Appellant Sarwan Kumar, who was also present there, took out a knife and asked Rajesh "Dekhta Kya Hai, Maar Rajesh Jo Hoga Dekh Lenge". Thereafter, appellant Rajesh also took out a knife and stabbed Krishan Kumar 4-5 times due to which Krishan Kumar sustained injuries on his face, hands and chest. On hearing the noise, Radhey Shyam, brother of Krishan Kumar also reached there and tried to overpower the appellants but they managed to flee from there. Thereafter when they were taking Krishan Kumar to their house, he fell down on the road and they took him to J.P.N. Hospital in a three wheeler scooter. At the hospital, Krishan Kumar was declared „brought dead?.

6. SI Mahesh Chand Meena made his endorsement on the statement Ex.PW6/B of Prem Kumar and got the FIR No.705/1999 registered under Section 302/34 IPC at PS Trilok Puri and further investigation was conducted by Inspector Vinod Kumar, Addl. SHO.

7. During investigation, spot was inspected and photographed, seizures were made and site plan was prepared. He also conducted inquest proceedings in the

presence of Radhey Shyam and Prem Kumar and appellants were arrested. After completion of investigation, appellants were sent to face trial for the offence punishable under Sec.302/34 IPC.

8. After the committal of the case to the Sessions Court, both the appellants were charged for the offence punishable under Section 302/34 IPC to which they pleaded not guilty and claimed trial.

9. Prosecution examined 17 witnesses in all to substantiate the charge and the incriminating evidence was put to the appellants under Section 313 Cr PC. Appellant Rajesh stated that at the time of incident, he was present at his house. He came to know that a quarrel had taken between Rajesh @ Kalia and the deceased but he was falsely implicated in this case. Appellant Sarwan stated that he was called at the police station by the IO and detained in this case by the police.

10. Five defence witnesses have been examined by the appellants to prove that appellant Rajesh was not present at the spot at the time of incident and that quarrel had taken place between one Rajesh @ Kalia and the deceased.

11. After considering the testimony of material prosecution witnesses, appellants Rajesh Kumar and Sarwan Kumar were convicted for the offence punishable under Section 302/34 IPC and sentenced as stated herein above.

12. We have heard Mr.M.L.Yadav, Advocate for appellant Rajesh Kumar and Mr.Sumeet Verma, Advocate for appellant Sarwan Kumar as well as Mr.Harsh Prabhakar, Advocate for the State.

13. Out of the 17 witnesses examined by the prosecution, PW-3 Sh.Mahesh Chand is the photographer who took the photographs and proved the same as Ex.PW-3/1 to 5 and negatives as Ex.PW3/6 to 10. PW-4 Ct. Rishi Pal and PW-5 HC Ram Charan were associated with PW-17 Inspector Vinod Kumar during the investigation of the case. PW-6 is SI Mahesh Kumar who accompanied by PW-8 Ct. Dhyan Singh and PW-9 Ct. Dharam Pal visited the hospital on receipt of DD No.23, recorded the statement of PW-11 Sh. Prem Kumar and after making his

endorsement, got the FIR registered. PW-7 Ct. Gopal Parsad is the Duty Constable posted at JPN Hospital on that date. He conveyed the information of deceased Krishan Kumar being brought dead to the hospital which was recorded by PW-14 Ct. Nand Kishore vide DD No.23, copy of which is Ex.PW-6/A. PW-10 HC Balbir Singh is the Duty Officer who recorded the FIR No.705/95. PW-12 HC Devraj was working as MHC(M) at the relevant time with whom the case property was deposited in the Malkhana and later on taken by him to FSL, Malviya Nagar for examination. PW-13 Ct. Udai Kumar was given up as unnecessary. PW-16 is Dr.V.K. Goel who prepared the MLC of Krishan Kumar and declared him „brought dead?.

14. PW-1 Sh.Radhey Shyam and PW-11 Sh.Prem Kumar are the eye witnesses to the occurrence, PW-2 is Sh.Suraj Prasad who on seeing Radhey Shaym and Prem Kumar lifting Krishan Kumar in injured condition, accompanied them to Irwin Hospital in a TSR. PW-15 Dr. D. Harish conducted the postmortem and proved the postmortem report as Ex.15/A. PW-17 Inspector Vinod Kumar is the investigating Officer who took over the investigation after registration of the FIR recorded on the basis of endorsement made by SI Mahesh Kumar on the statement Ex.PW6/B.

15. PW-1 Sh.Radhey Shaym is a witness to the occurrence as well real brother of the deceased. It was he who removed his brother to JPN Hospital in three wheeler scooter where he was declared „Brought Dead?. His statement is to the effect that on 16.11.1995 at about 9.00/10.00 pm when he was going towards his house and reached gali of Block No.13, he saw both the appellants holding knives in their hands and appellant Rajesh Kumar was wielding knife blows on his brother Krishan Kumar who was seen in the sitting position on the ground when stabbed by appellant Rajesh Kumar on his face and chest. He tried to overpower the assailants but they pushed him on one side and ran towards ganda nala. PW-11 Prem Kumar was standing on one side when the appellant Rajesh Kumar was inflicting blows to his brother. PW-11 Prem Kumar helped him in lifting his brother to remove him to their house but his brother fell down near house No.13/46, Trilok Puri. He tried to lift him and in the meantime, Suraj also came there and they all lifted Krishan Kumar (deceased), hired an auto and took him to JPN Hospital where he was declared „Brought Dead?. He also stated that police officer seized

his shirt as well as that of Prem Kumar. PW-1 Sh. Radhey Shyam is also a witness to the investigation conducted by the police i.e. lifting blood sample and getting the scene of occurrence photographed as well as to the seizure of shirt and pant of appellant Rajesh Kumar and knife.

16. PW-11 Sh. Prem Kumar was accompanying the deceased who was going to buy ice for fish. He is also the complainant, who met the police in the hospital on whose statement the FIR was registered wherein both the appellants were named as the assailants. His statement before the Court in sum and substance identical to what he stated in the complaint Ex.PW6/B. He also deposed about the arrival of Radhey Shyam, brother of the deceased Krishan Kumar at the spot at the time when the deceased was being attacked with dagger on his face, chest and hand by appellant Rajesh Kumar on being exhorted by appellant Sarwan Kumar. He has also corroborated the statement of PW-1 Radhey Shyam that on way to their house, Krishan Kumar collapsed at some distance and then removed in a TSR to JPN Hospital where he was declared „Brought Dead?.

17. PW-2 Sh.Suraj Prasad corroborated the statement of PW-1 Sh.Radhey Shyam and PW-11 Sh.Prem Kumar to the extent that he had seen deceased Krishan Kumar in injured condition and being tried to be lifted by Radhey Shyam and Prem Kumar. He also accompanied PW-1 Radhey Shyam, PW-11 Prem and the deceased in three wheeler scooter to Irwin Hospital.

18. PW-15 Dr.D.Harish conducted the postmortem and in his report Ex.PW15/A, he has noticed eight external injuries and cause of death as opined by him is due to hemorrhage and shock consequent upon stab injury to lung (vide injury No.8) which was sufficient to cause death in the ordinary course of nature.

19. PW-17 Inspector Vinod Kumar is the investigating officer who visited the spot on receiving the wireless message about a murder being committing in Block No.13- 14, Trilok Puri and investigation was taken over by him after registration of the FIR which was got registered by PW-6 SI SI Mahesh Chand. He collected the blood sample, earth control, chappal and blood with earth control and seized the same vide memos Ex.PW1/g, H, D, J and E respectively. He also seized the clothes of PW-1 Radhey Shyam and PW-11 Prem Kumar who removed the

deceased to hospital, prepared the site plan at the instance of PW-1 Sh. Radhey Shyam, conducted the inquest proceedings, got the spot photographed. He also got the postmortem conducted and the clothes of the deceased handed over by the doctor were seized and exhibits were deposited in the malkhana. He has arrested the appellants Rajesh Kumar and Sarwan Kumar on 19.11.1995 and on the basis of disclosure statement made by appellant Rajesh Kumar, knife was got recovered which was seized vide memo Ex.PW5/B after preparing its sketch Ex.PW1/A. He also seized the blood stained shirt and pant of the appellants. He has identified the knife Ex.P1 to be the same which was recovered at the instance of appellant Rajesh Kumar.

20. On behalf of appellants, it has been submitted that the eye witnesses produced by the prosecution are interested witnesses and not creditworthy. Their conduct during the occurrence cast a serious doubt regarding their presence at the spot. Not only that, the allegations against Sarwan Kumar are only that of exhortation and mere exhortation is not sufficient to convict him with the aid of Section 34 IPC when neither he has caught hold of the deceased nor inflicted any injury. As per statement of PW-1 Sh. Radhey Shyam, the role attributed to appellant Sarwan Kumar is that he had also taken out knife and asked appellant Rajesh "Dekhta Kya Hai, Maar Rajesh Jo hoga Dekh Lenge?". Referring to the report (1998) 7 SCC 216 Matadin and Another v. State of Maharashtra, it has been urged that, the kind of exhortation in this case is more in the sense of abuse like „Maar Sale Ko?and it can never mean that he exhorted appellant Rajesh Kumar to kill the deceased Krishan Kumar. Learned counsel for the appellant further submitted that the kind of knife used cannot be carried in the pocket in view of its size and the circumstances indicate that such type of knife generally used by fish sellers and the appellant Rajesh Kumar happened to pick the knife from there in sudden quarrel and attacked the deceased without any intention to kill him. While pointing out to the discrepancies in the testimonies of material prosecution witnesses, it has been pointed out that one of the eye witnesses Prem Kumar is friend of the deceased while another Radhey Shyam is real brother of the deceased, they are interested witnesses on whose testimony the conviction cannot be based for a heinous crime like 302 IPC. It has been submitted that there was absolutely no motive for the appellant to commit the alleged offence. Relying

on the judgment (2012) 1 SCC (Cri) 454 Ranjitham vs. Basavaraj and Ors., it has been submitted that in the alternative, it was a sudden fight and the appellants did not take any undue advantage during the quarrel in the light of the fact that the appellant Sarwan Kumar was also claiming to be armed with knife but he did not cause any stab injury and at the most, the case falls under Section 304 IPC.

21. On the other hand, Mr. Harsh Prabhakar, Advocate has submitted that in view of the nature of weapon used, the vital parts where injuries were caused as reflected in the postmortem report, the appellants are guilty of committing the offence of murder as their case does not fall in any of the exceptions. Referring to the testimony of material witnesses, on behalf of State, it has been submitted that the appellants were armed with knives, attacked the deceased without even slightest provocation who was simply interested in knowing as to why the crowd had gathered there, for whatever reasons, it was to the disliking of appellant Rajesh Kumar and without any rhyme or reason, he inflicted multiple stab wounds to Krishan Kumar who collapsed there and then and declared brought dead in the JPN hospital. Submitting that there is no reason to disbelieve the eye witness account whose presence at the spot is duly proved by the fact that Sh. Prem Kumar has made statement Ex. PW6/B in the hospital itself and Sh. Radhey Shyam, brother of the deceased had removed him to the hospital, the impugned judgment calls for no interference.

22. We have gone through the testimony of PW-1 Sh. Radhey Shyam, PW-2 Sh. Suraj Prasad, PW-6 SI Mahesh Kumar, PW-11 Sh. Prem Kumar, PW-15 Dr. D. Harish and PW-17 Inspector Vinod Kumar. We are not inclined to attach much importance to the discrepancies pointed out during the course of arguments and also noted down by learned Addl. Sessions Judge and dealt with in right perspective which calls for no interference.

23. So far as the contention of learned counsel for the Appellants that appellants had no motive to kill deceased Krishan Kumar is concerned, no doubt the prosecution has not been able to prove any motive but law is well settled that when direct evidence has established the crime, motive pales insignificance. In (2010) 12 Supreme Court Cases 91, Bipin Kumar Mondal vs. State of West

Bengal the Hon?ble Apex Court held as under:-

“24. It is settled legal proposition that even if the bsence of motive as alleged is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. (Vide Hari Shanker v. State of UP, Bikau Pandey v. State of Bihar and Abu Thakir v. State of T.N.)

24. So far as the judgment (1998) 7 SCC 216 Matadin and Another v. State of Maharashtra relied upon by learned counsel for the appellant is concerned, the same is clearly distinguishable on the facts of the present case. In that case, from the evidence adduced by the prosecution, it could be proved that while uttering the words „Maar Sale Ko?, he did not intent the deceased to be killed. It was also brought on record that he was not aware of the fact that his co-appellant Ram Singh was wearing buttondar knife on his waist and on his exhortation, he would use the same by stabbing. So not only common intention was ruled out but also the knowledge that the co-appellant was armed with a knife was also not proved.

25. In the instant case, as per the complaint Ex.PW6/B, not only Rajesh Kumar but Sarwan Kumar was also armed with knife. Section 34 IPC is an exception to the general rule that a person is responsible for his own act as it makes a person vicariously responsible for the act of others, if he has common intention to commit an offence. To hold a person guilty for the act of another there has to be prearranged plan and acting in concert pursuant to the plan. The common intention, to bring about a result, may also well develop on the spot.

26. The contention of learned counsel for the appellant Sarwan Kumar is that he merely exhorted saying “Dekhata Kya Hai, Maar Rajesh Jo Hoga Dekh Lenge” which was not sufficient to convict him under Sec.302/34 IPC is liable to be rejected in view of report (2004) 3 SCC 793 Girija Shankar v. State of U.P.; the Supreme Court elucidated the principle of joint liability of a criminal act in the

following words:-

“Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances”.

27. Now in order to invoke exception IV to Section 300 of the Code, the accused has to show that “(i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner.”

28. The cause of quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is also not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner.

29. In (1989) 2 SCC 217 Surinder Kumar v. Union Territory, Chandigarh,; it was observed that, “where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly.”

30. To bring his case under Exception IV to Section 300 of the Code, it is not necessary that the accused must produce evidence or put up his case by giving suggestions to the prosecution witnesses. An accused can always point out to the circumstances in the prosecution evidence to show that he is entitled to the benefit

under exception IV to Section 300 of the Code.

31. Testing the facts of the case on the principles set out in the above reports, we conclude that conviction under Section 302/34 IPC cannot be made.

32. After considering the submissions made by learned counsel for the appellant and appreciating the testimony of material eye witness, we are of the opinion that the offence proved against the appellant fall within exception IV to Section 300 IPC.

33. In view of the foregoing discussions, the appeals are partially allowed. The appellants are convicted for the offence punishable under Section 304 Part-I IPC.

34. As per nominal roll of the appellants, as on 16.05.2003 appellant Rajesh Kumar had already remained in custody for 7 years, 3 months and 12 days and as on 14.01.2004 appellant Sarwan Kumar had already remained in custody for 5 years, 11 months and 29 days.

35. Considering the fact that both the appellants had no earlier record of crime and they had already remained in custody for the period stated above, the sentence is reduced to the period already undergone by them during the investigation and trial of this case. Ordered accordingly.

36. Since the appellants are on bail, the bail bond and surety bond furnished are discharged.

37. Copy of the order be sent to the Superintendent, Central Jail, Tihar for record.

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