

Nadeem Vs. State of Nct and ors.

Nadeem Vs. State of Nct and ors.

SooperKanoon Citation : sooperkanoon.com/956162

Court : Delhi

Decided On : Mar-15-2013

Judge : G.P. Mittal

Appellant : Nadeem

Respondent : State of Nct and ors.

Advocate for Def. : Ms. Rajdipa Behura, Mr. P.S. Gondi

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

8. h March, 2013 Pronounced on:

15. h March, 2013 + Crl. A.852/2011 NADEEM Appellant Mr.Ayush Gupta, Advocate Through: Versus STATE OF NCT & ORS. Through: Respondents Ms. Rajdipa Behura, APP for the State/Respondent No.1. Mr. P.S. Gondi, Advocate for the Respondents No.2 to 4. CORAM: HON'BLE MR. JUSTICE G.P.MITTAL JUDGMENT G. P. MITTAL, J.

1. Appellant who is a victim of murderous assault by Respondents No.2 to 4 approaches this Court under Section 372(proviso) for enhancement of sentence to them as they were released on furnishing bond of good conduct under Section 4 of the Probation of Offenders Act, 1958(Act of 1958) after having holding them guilty under Section 307 Indian Penal Code (IPC).

2. The Appellant is brother of Wasim. Wasim is husband of Shabnam. Respondents Rashid and Shahid are brothers of Shabnam, whereas Respondent Imran is cousin of Shabnam. It is the case of the prosecution that there was some acrimony between the family of Wasim (complainants family) and the family of Shabnam on account of matrimonial discord between the two (Wasim and Shabnam). The Respondents were nursing a grudge against Wasim and his family members as their sister Shabnam was being ill-treated by Wasim and his family members.

3. As per prosecution version, on 16.05.2007 at about 12 midnight Appellant Nadeem was sitting on the stairs leading to his house when the three Respondents came there. It is alleged that the three Respondents who were accompanied by one more person at that time wanted to know about Wasim. The Appellant allegedly informed the Respondents that Wasim might be available on the second floor where he used to reside with his parents. In the meanwhile Rashid exhorted his brother Shahid to finish the job by saying Dekhta kya hai kaam jaldi kar de. Shahid allegedly took out a country-made pistol and fired on the complainant/Appellant. He suffered a bullet injury on his right arm and started bleeding. The three Respondents along with their fourth associate escaped from the spot. The Appellants employee Dilshad (PW10) witnessed the incident. On hearing the cries of his son, the Appellants father came downstairs and noticed the three Respondents along with one more person fleeing from the spot. The Appellant was removed to Guru Teg Bahadur (GTB Hospital). He was initially treated in the emergency ward and was later referred to orthopaedics and surgery emergencies for further treatment. The doctor opined that there was no blackening on the site of injury as the wound was not caused from the firearm at a close range.

4. The Appellants shirt containing two holes, one vest and a pair of trousers were seized which were found to be stained with the blood of AB group. Country-made pistol could not be recovered from the possession of the Respondents. After completion of the investigation, a charge sheet was presented against them(the Respondents No.2 to 4).

5. In order to establish its case, the prosecution examined 21 witnesses including Nadeem(PW2), the complainant and victim of the gun shot injury, Rahees(PW1), father of the victim who reached the spot immediately after the incident and Dilshad(PW10), an employee of the victim who is an eye witness to the incident.

6. In their examination under Section 313 Cr.P.C., the Respondents denied the allegation of the prosecution and pleaded false implication. Respondents No.2 to 4 examined Shahbuddin(DW1) who was a mediator in the marriage of Shabnam and Wasim and Liyakat Ali (DW-2) who is father of Shabnam. They simply deposed about the acrimony between the two families on account of the alleged harassment meted out to Shabnam at the hands of Wasim and his family members.

7. On appreciation of evidence, the learned Additional Sessions Judge(ASJ) held that although the recovery of country-made pistol had not been established, yet believing the version given by the Appellant(the Complainant) and eye witness Dilshad(PW10), the learned ASJ found that the evidence produced by the prosecution was reliable and even if there was some enmity between the family of Shabnam on the one hand and the family of Wasim on the other hand, the real culprits will not be allowed to go scot free to falsely rope in the Respondents. He held that the Appellant was hurt with intention to cause death in furtherance of the common intention of the three Respondents. They were accordingly held guilty for the offence punishable under Section 307 IPC and released on probation.

8. The sole contention raised by the learned counsel for the Appellant is that it was established on record that the Appellant suffered gunshot injury at the hands of the Respondents. Admittedly, in Section 307 IPC in case an injury is caused, the maximum punishment provided is imprisonment for life and fine. Thus, the provisions of Section 4 of the Act of 1958 are not applicable in an offence under Section 307 IPC where injury is caused. Therefore, the learned ASJ acted illegally in giving benefit of Section 4 of the Act of 1958 to the Respondents No.2 to 4. It is urged that otherwise also, the reason recorded for extending the benefit, that is, the matrimonial dispute between the sister of the convicts and brother of the complainant having been amicably settled was factually incorrect. It is urged that

the dispute is still going on and the litigation is pending.

9. To appreciate the contention, it would be appropriate to extract the provisions of section 4(1) of the Act of 1958 hereunder:

4. Power of court to release certain officers on probation of good conduct. (1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct and in the meantime to keep the peace and be of good behaviour: Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

10. Thus, it is evident that the provisions of Section 4 are attracted when a person is held guilty for an offence not punishable with death or imprisonment for life. In the instant case, admittedly the Appellant suffered a gun shot injury and as per the provisions of section 307 IPC, the offender was punishable with imprisonment for life or imprisonment which may extend upto 10 years and with fine. The question for consideration is if one of the possible punishment in the instant case was imprisonment for life and fine, whether the case would be out of bound for the applicability of Section 4 of the Act of 1958.

11. In *Subhash Chand v. State of Haryana & Ors.*, AIR 198.SC 584(2), the Supreme Court considered the applicability of Section 2(4) of the Punjab Borstal Act, 1926 in a case under Section 302 IPC. The Supreme Court held that since one of the punishment for the offence of murder is death, therefore, the offence of murder would be covered within Section 2(4)(i)(a) of the Punjab Borstal Act which

excludes an offence punishable with death from the definition of offence under this Act and Punjab Borstal Act shall have no application to an offence punishable under Section 302 IPC.

12. In *Bhupinder Singh & Ors. v. Jarnail Singh & Anr.*, (2006) 6 SCC 277, the Supreme Court while interpreting the provision of Section 167(2) of the Code of Criminal Procedure held that where it is possible to award an imprisonment of 10 years or more, Section 167(2)(ii) shall be attracted and the period of filing the charge sheet will be 90 days. Similar view was taken by a Division Bench of this Court in *Om Prakash v. State (NCT of Delhi)*

6. AD Delhi 493.

13. In *Chaman Singh v. State*, 1999(49) DRJ 182, the question directly fell for consideration before a learned Single Judge of this Court and while relying on *Som Nath Puri v. State of Rajasthan*, AIR 197 SC 1490, *State of Gujarat v. V.A. Chauhan*, AIR 198 SC 35, and *State of Rajasthan v. Kailash Chandra*, 1995 SCC (Cri) 249, it was held that where an accused is convicted of an offence punishable under Section 307 IPC which is an offence punishable with life imprisonment, the offender is not entitled to the benefit of the Act of 1958. A Division Bench of this Court in *Manoj Tyagi v. Gaurav @ Chotu & Anr.*, (Crl.A.37/2011) decided on 25.05.2011 observed that when an offender is held guilty under Section 307 IPC in case an injury has been caused on the person of the victim, the provision of Section 4(1) of the Act of 1958 will not be applicable. Thus, if a person is held guilty for the offence punishable under Section 307 IPC, he will not be entitled to the benefit of Section 4 of the Act of 1958.

14. Respondents No.2 to 4 have not preferred any Cross-Appeal. Under Section 377(3) of the Code where an Appeal has been filed against the sentence on the ground of its inadequacy, the accused may plead for his acquittal or for reduction of sentence.

15. The learned counsel for the Respondents No.2 to 4 argues that it was a case of single injury that too on the right arm and thus the Respondents could not have been convicted under Section 307 IPC, rather the case was made out only under

Section 324 IPC.

16. It is not a case where the vital part of the body was avoided by the assailant. The bullet injury was caused between the shoulder and elbow on the right arm. This part of the arm is very close to the chest and, therefore, it cannot be said that the assailant had no intention to cause injury with such intention or knowledge and, in such circumstances, if by that act he had caused death, he would be guilty of murder. But, at the same time, it is required to be seen whether the Respondents No.2 and 4(Rashid and Imran) shared the common intention to inflict injuries on the person of the complainant.

17. Section 34 IPC is only a rule of evidence. It does not create a substantive offence. When two or more persons actively join in an assault on a third person, they are directly responsible for the injuries caused to the extent to which they had common intention to cause those injuries. It is well settled that for convicting a person with the aid of Section 34 IPC, there has to be a pre-arranged plan and acting in concert pursuant to the plan. At the same time, it is not necessary that there should be a long gap between the meeting of minds and the actual attack. The common intention can very well be developed at the spot and the same can be inferred from the conduct of the accused and the attending circumstances. In *Damodar v. State of UP.*, (2005) 1 SCC 54, where the parties were known to each other and the Appellant was in the company of Ravindra Singh who was carrying a loaded country-made pistol, he exhorted Ravindra Singh to kill the deceased whereof Ravindra Singh fired at the deceased from behind and killed him. The conviction of the Appellant with the aid of Section 34 was upheld by the Supreme Court.

18. I have carefully scrutinised the evidence of PW2 (the complainant). Nothing material was brought in his cross-examination to dispute the occurrence of opening fire from a revolver by Respondent Shahid. But, there are some contradictions with regard to exhortation purported to have been given by the Respondents No.2 and 4. The relevant portion of the complainants testimony is extracted hereunder: I offered them to take tea. Rashid told to Shahid that upper jakar kya karega ye betha hua tho hai isko goli mar. Also said jaldi kam kar.

Accused Shahid took out katta and fired on me. I sustained bullet injury on my right hand below shoulder. I raised alarm bacho bachao and on hearing the same my father came down and the neighbourer also gathered there...

19. Thus, as per this witness, Rashid exhorted Shahid to open fire on the complainant. The version as stated by the PW2 in his statement Ex.PW2/A is slightly different. In Ex.PW2/A, Rashid exhorted his brother Shahid Dekhta kya hai kaam jaldi kar de. At the same time, PW2 was not confronted with his statement Ex.PW2/A on the basis of which the FIR was recorded by the police. At the same time, no role whatsoever was attributed to Imran(Respondent No.4). When I turn to the testimony of Dilshad (PW10), who according to the prosecution is an eye witness, he gives a different version. He deposed as under: The persons who were inquiring about Waseem were abusing and one of them told maar saale ko, hamari behan ko bahut pareshaan kiya hai and then that person was being addressed had fired a shot. Accused Shahid is the person who had fired a shot.

20. Thus, he was not sure nor did he point out towards the person who exhorted Respondent No.3 Shahid to open fire. In the circumstances, it would be difficult to base conviction of Respondent No.4 Imran who has not been attributed any role and conviction of Respondent No.2 Rashid whose role is not specifically stated by PW10 and in the face of some variation in the testimony of PW2 and the statement Ex.PW2/A made to the police.

21. In the result, the Respondents No.2 and 4(Rashid and Imran) are acquitted of the offence punishable under Section 307 IPC read with Section 34 IPC.

22. The Respondent No.3 is convicted for an offence punishable under Section 307 IPC instead of Sections 307/34 IPC.

23. As far as quantum of punishment is concerned, I have already held above that provision of Section of 4 of the Act of 1958 was not applicable in the instant case where the Respondent No.3 was held guilty under Section 307/34 IPC. The learned ASJ acted illegally in extending the benefit of provision of Section 4 of the Act of 1958. Once a person is convicted for a serious offence, undeserved leniency cannot be shown to him. Countrymade pistols are not toys to be played

with. If a person carries a loaded pistol and opens fire to settle matrimonial dispute of his sister, he must face the consequences for the same. The learned ASJ also showed leniency on the ground that the matrimonial dispute between the sister of Respondent No.3 and the brother of the complainant has since been settled, which is factually incorrect. In the facts and circumstances of the case, I would award a sentence of rigorous imprisonment for a period of 03 years and a fine of `5,000/- to Respondent No.3. In default of payment of fine he shall further undergo simple imprisonment for 03 months.

24. The Respondent No.3 shall surrender before the Court of learned ASJ on or before 10.04.2013 to serve the sentence.

25. The Appeal is disposed of in above terms.

26. Pending Applications stand disposed of. (G.P. MITTAL) JUDGE MARCH 15 2013 pst

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com