

State of U. P.

Vs

Jashodha Nandan Gupta and Others

Criminal Appeal No. 138 of 1972

(M. H. Beg, R. S. Sarkaria JJ)

25.02.1974

JUDGMENT

SARKARIA, J. -

1. This appeal by special leave against the judgment, dated September 17, 1971, of the High Court of Judicature at Allahabad, acquitting on appeal Jashodha Nandan Gupta, aged 18 years, Narain Prasad Gupta aged 17 years, Durga Prasad Dube, aged 18 years and Ram Samujh Singh aged 17 years, of charges under Sections 302/149, 148 and 147, Penal Code.

2. All the five accused-respondents were students of the Government Polytechnic, Gorakhpur. Accused Harish Chandra Dwivedi lived in Room No. 10 of Hostel No. 1, while the other accused resided in the adjacent Hostel No. II. The students were running their own messes on co-operative basis. Vijai Narain Pandey, a student, was the manager of the mess of which, among others, the deceased Kamta Prasad, Jashodha Nandan accused and one Narain Prasad Gupta were members. Every member had to make an advance deposit to cover his dues. The deposit of Narain Prasad Gupta had run out. On November 4, 1966, Vijai Narain Pandey orally told Narain Prasad Gupta that since he had not paid his mess dues, he would not be given food in the mess from the following day. Harish Chandra Dwivedi accused took up the cause of the defaulter. Accompanied by Narain Prasad Gupta, he went to Pandey and demanded an explanation from Pandey as to why the meals of Narain Prasad Gupta had been stopped. Pandey showed him the account. Jashodha Nandan was not satisfied. Both of them went away holding out threats to Pandey.

3. On November 6, 1966, at about 5 p.m. Jashodha Nandan Gupta and Harish Chandra Dwivedi accused confronted Pandey in front of Hostel No. 1. Jashodha Nandan slapped Pandey. Shortly thereafter, on the move of Pandey, thirteen members of the mess assembled and passed a resolution which was scribed by Kamta Prasad deceased, expelling Jashodha Nandan Gupta accused and Narain Prasad Gupta from the mess.

4. From November 7, 1966, the Polytechnic closed for Diwali holidays and reopened on November 16, 1966.

5. On that day, a notice was served on Narain Prasad Gupta that he and Jashodha Nandan Gupta had been expelled from the mess.

6. Jashodha Nandan Gupta returned to the Hostel, on November 17, 1966 and inquired of the deceased if the mess was running. The deceased retorted asking how the accused was concerned with the mess, adding that they had been expelled from the mess. Jashodha Nandan Gupta flew into

a rage and proclaimed that since the deceased was at the root of mischief, he would deal with him (deceased). At about 7 p.m. on that day, all the five accused were closeted in a conference in Room No. 7 of Hostel II in the occupation of Narain Prasad Gupta and Ram Samujh Singh accused. The deceased accompanied by his room-mate, Parmatmanand Tewari (P.W. 2), apprehending trouble, went to the office of Shri B. N. Singh, Warden (P.W. 1), at 8.15 p.m., and complained that Jashodha Nandan Gupta had abused him. Mr. Singh advised them to go to their room while he would call Jashodha Nandan and inquire. Mr. Singh then sent his peon to call Jashodha Nandan but the latter refused to obey. The Warden then went away to his residential quarter which is a part of Hostel II. Thereafter, Jashodha Nandan Gupta, accompanied by the other four accused, went to the quarters of Mr. Singh and complained that Kamta Prasad had abused him. Mr. Singh told the accused how Kamta Prasad had made a similar charge against him. He advised them not to quarrel over trifles and assured that he would see to their mess arrangements on the following day. Thereafter, all the five accused, proceeded to their rooms. Kamta Prasad and Parmatmanand Tewari, who had seen the accused earlier proceeding to the quarter of the Warden, had come out and stood on the khuronja road (raised footpath) at the corner of the Hostel. When the accused on their return from the Warden's quarter reached that point, Kamta Prasad asked Jashodha Nandan as to why they had gone in a body to make a false complaint to the Warden when, in fact, Jashodha Nandan himself had abused him. A sharp altercation and exchange of abuses ensued between Jashodha Nandan accused and Harish Chandra Dwivedi on one side, and Kamta Prasad deceased on the other. Jashodha Nandan Gupta then fisted Kamta Prasad. Pushkal Singh (P.W. 3), Ranjit Bahadur Singh, and Parsuram Singh, the other companions of Kamta Prasad, came to the latter's rescue. At this juncture Harish Chandra Dwivedi and Ram Samujh Singh accused whipped out Rampuri knives. The deceased then pushed Harish Chandra Dwivedi and ran towards his Hostel. All the five accused chased the deceased. Jashodha Nandan Gupta intercepted the deceased by going in front of him, while Harish Chandra Dwivedi stabbed the deceased from behind with a knife. Dwivedi gave another knife blow on the back of Kamta Prasad while the latter was trying to escape. The deceased staggered to a distance of four or five paces and slumped to the ground. Pushkal Singh (P.W. 3) and other witnesses were pelting the assailants with stones. After the assault, they chased the accused who went into Room No. 10 of Hostel No. 1 in which Harish Chandra Dwivedi and two other students resided. The accused bolted the door of the room from inside. Pushkar Singh P. W. 3, then locked the door from outside. Meanwhile, Parsuram Singh who was a witness of the stabbing, ran to the quarter of the Warden and reported that the five accused were assaulting Kamta Prasad with a chhura in front of the Hostel. Mr. Singh ran to the scene of occurrence and found Kamta Prasad lying unconscious in a pool of blood outside the Hostel just near Room No. 8. On inquiry, Parmatmanand Tewari (P.W. 2) Pushkal Singh (P.W. 3), Parsuram Singh and Ranjit Bahadur Singh, who were present there, told the Warden that, after assaulting Kamta Prasad, all the five accused had entered Room No. 10 of Hostel No. 1 Kamta Prasad was soon removed in a rickshaw to the Sadar Hospital. Tewari accompanied him. B. N. Singh also reached there. The doctor examined Kamta Prasad and declared him dead. Mr. Singh then wrote out the report Ka (1), about the occurrence in the verandah of the Hospital and sent it to the Police Station per Parmatmanand Tewari, where, on its basis, a case was registered at 10.10 p.m. Inspector Behari Lal Srivastava (P.W. 14) immediately reached the Hospital along with Ram Badan Singh (P.W. 13), Sub-Inspector. After giving directions to the Sub-Inspector for holding the inquest, the Inspector forthwith reached Room No. 10 of Hostel 1. Pushkal Singh opened the lock. The accused were asked to unbolt the door from inside. They refused to do so unless the crowd at the door was sent away. On the assurance of the Police Inspector, the door was unbolted. All the five accused and two other students, Ram Asre Rao and Sri Prakash Jaiswal, were found inside the room. The Inspector took the accused into custody. On a search of the room, two knives, Ex. 1 and Ex. 2, concealed in a quilt under the cot of Harish

Chandra Dwivedi, respondent, were found. The knives were slightly wet and appeared to have been washed. Some water was also found splattered on the floor inside the room. Since there were injuries on Harish Chandra Dwivedi and Ram Samujh Singh, the Inspector sent them for medical examination.

7. Fifteen witnesses were examined by the prosecution at the trial. Out of them, Parmatmanand Tewari (P.W. 2) and Pushkal Singh (P.W. 3) were the eye-witnesses of the occurrence. The Warden Mr. B. N. Singh, was examined as P.W. 1.

8. The plea of the accused was one of denial of the prosecution case. They added that they had been falsely implicated on account of enmity. Harish Chandra Dwivedi examined Vishram Singh (D.W. 1), Head-clerk of the Polytechnic to produce some documents which, however, were not proved.

9. Fully relying on the evidence of the eye-witnesses, Parmatmanand Tewari (P.W. 2) and Pushkar Singh (P.W. 3) the trial Court convicted Harish Chandra Dwivedi under Section 302, Penal Code, and the remaining accused under Section 302/49, Penal Code, in respect of the murder of Kamta Prasad and sentenced each of them to imprisonment for life. Harish Chandra Dwivedi and Ram Samujh Singh were further convicted under Section 148, Penal Code, and sentenced to two years rigorous imprisonment each. The other three accused were further convicted under Section 147, Penal Code, and sentenced to one year's rigorous imprisonment each. It was directed that the sentences would run concurrently.

10. The convicts preferred an appeal to the High Court. The learned Judges of the High Court accepted the evidence of the prosecution witnesses with regard to the circumstances which led to the strained relationship between the accused on one side, and the deceased and his friends on the other. They further found :

It is also not in doubt that just before the occurrence the five appellants went to meet Sri B. N. Singh (P.W. 1) who informed them about the complaint made by Kamta Prasad deceased and advised them to go back to their rooms and devote their time in studies.

The learned Judges, however, held that the testimony of the two eyewitnesses, Parmatmanand Tewari (P.W. 2) and Pushkal Singh (P.W. 3), with regard to Harish Chandra Dwivedi being the actual assailant of the deceased, was unreliable and unacceptable for these reasons :

(a) These witnesses or their companions Parsuram Singh and Ranjit Bahadur Singh did not tell B. N. Singh (P.W. 1) when he made, enquiries from them at the spot soon after the occurrence, as to who in particular out of the accused had caused the knife injuries to Kamta Prasad. All that the witness told B. N. Singh was that all the five accused were assaulting Kamta Prasad with a chhura. Therefore, the story that Dwivedi inflicted the knife injuries on the deceased was developed subsequently.

(b) It was not improbable that in the turmoil, altercation and confusion that preceded the actual assault, the witnesses failed to recognise the actual assailant.

(c) There appears to be great force in the contention that when it was discovered that Harish Chandra Dwivedi and Ram Samujh Singh had injuries on their persons and the knives were recovered from the room of Harish Chandra Dwivedi, the part of causing the knife injuries was ascribed to him.

On the above reasoning, the High Court concluded :

It may be that the assailant was from amongst these five accused persons, but it is extremely doubtful that it was Harish Chandra Dwivedi and not any one else.

11. The High Court then considered the further question whether the accused could be convicted with the aid of Section 149, Penal Code. This question was answered in the negative, in these terms :

It cannot be contended that their object in making a complaint to the Warden against the deceased was in any sense unlawful. While they were coming back from the quarter of the Warden, the deceased met them in the way. This meeting was wholly unexpected They met the deceased just by chance and if an altercation took place at that place, which ultimately resulted in the deceased receiving fatal injuries, it could not be said that there was any common object and the assembly of the five accused had become unlawful at that stage

* * *

Some of the accused persons may not have even been aware that some one amongst them had a knife with him, and in these circumstances we are not prepared to hold that it had become any unlawful assembly of which the common object was to cause injuries to the deceased.

12. In the result, the High Court set aside the convictions and acquitted all the accused, with this observation :

The identity of the real assailants being in doubt and the provisions of Section 149, I.P.C., being inapplicable to the facts and circumstances of the present case, it is not possible to sustain the conviction of the appellants.

13. Mr. Uniyal, learned Counsel for the appellant State contends that the High Court grievously erred in treating the First Information Report made by Mr. B. N. Singh, as be-all and end-all of the prosecution case. It failed to appreciate that the informant was not an eye-witness of the occurrence, and the snap-shot information on which this report was based, was derived from other witnesses at a moment when Kamta Prasad was dying - gasping for breath. There was no time to make a fully enquiry. In that situation - proceeds the argument - naturally, the first consideration that prevailed with the Warden and the witnesses, alike, was to get Kamta Prasad to the Hospital without loss of time. Counsel maintains that the High Court was clearly in error when it spurned this inherently plausible explanation offered by P.W. 2., in cross-examination, for his failure to inform the Warden that the knife injuries on the deceased had been inflicted by Dwivedi accused. It is emphasised that the Investigating Officer recorded the statements of these P.Ws. during the same night, and since the witnesses were not confronted and contradicted with anything in their police statements on this point, the presumption would be that they had denounced Dwivedi as the author of the knife injuries of the deceased, at the earliest opportunity, and had not invented that story subsequently as an afterthought. The High Court, it is argued, did not give due weight to the evaluation of the evidence made by the trial Court which had the opportunity of observing the demeanour of the witnesses.

14. Mr. Uniyal further assails the finding of the High Court, to the effect that there was no unlawful assembly, and consequently, Section 149, Penal Code, was not applicable. It is submitted that all the five accused were throughout acting in concert; they joined and supported Jasodha Nandan in

abusing the deceased; Jasodha Nandan fisted the deceased and then all - two of them with drawn knives - chased the deceased and after the assault, they all ran away together and shut themselves together in the same room. The point pressed into argument is that as soon as Jasodha Nandan and Dwivedi whipped out their knives and started the chase, all the five had become aware of the knives and their possible use, and from that moment onwards the assembly had become unlawful, the common object of which was to cause grievous hurt; and, therefore, all should have been convicted at least under Section 326 read with Section 149 and also under Section 147, Penal Code.

15. In reply, Mr. Mookherjee, learned Counsel for Dwivedi appellant, and Mr. Nuruddin, learned Counsel for the other three appellants, maintain that the conclusions drawn by the High Court on the basis of evidence on the record, are not so unreasonable as would warrant an interference by this Court in the exercise of its special jurisdiction under Article 136 of the Constitution. Learned Counsel have reiterated the reasons with emphasis, given by the High Court. They have also advanced additional arguments to support the conclusions of the High Court.

16. Before dealing with the contentions canvassed, it may well be remembered that this appeal has been brought by special leave under Article 136 of the Constitution; and, as a self-made rule of practice, this Court does not interfere with the findings of fact reached by the High Court, unless exceptional and grave circumstances exist, or forms of legal process have been disregarded or otherwise there has been a gross miscarriage of justice. Where the judgment which is the subject of appeal under that Article, is one of acquittal, this Court will not interfere with the same in the exercise of its overriding jurisdiction unless that judgment is clearly unreasonable, or perverse or manifestly illegal or grossly unjust. Therefore, if in the nicely balancing probabilities of a case, two views of the evidence - one indicating acquittal and the other conviction - were reasonably possible, this Court would not disturb the High Court's order of acquittal.

17. Even if all that has been said and could be said on behalf of the appellant state, were given its due weight, the present would remain a case, as it were, precariously balancing on a knife-edge. The pivotal question was : Had P.Ws. 2 and 3 really seen and identified at the time of occurrence as to who out of the five accused dealt knife-blows to the deceased ? This question had further narrowed down into the issue : Why did these witness not inform the warden on the latter's enquiry, that it was Dwivedi who had caused the knife-injuries to the deceased ? To this there could be two answers, both more or less reasonable, leading to two alternative conclusions : (i) They did not do so, because they had not recognised or seen Dwivedi inflicting the Knife blows, and as such, did not know with certainty at the time of the warden's query as to who out of the five accused had caused the knife injuries to the deceased. (ii) They did see Dwivedi inflicting the knife-blows on the deceased, but did not specifically name Dwivedi as the author of the knife-injuries because time was out-of-joint and the paramount consideration that weighed with them was to remove Kamta Prasad immediately to the Hospital; and after the death of Kamta Prasad it just did not occur to anybody - they all being laymen - that it was necessary to post B. N. Singh with full particulars of the incident or to get the same otherwise incorporated in the First Information to the police.

18. The High Court has preferred conclusion (i) and rejected (ii) Mr. Uniyal wants us to reverse the choice, accept the explanation offered by the prosecution and draw conclusion (ii).

19. Much can be said for and a little less against the conclusion reached by the High Court.

20. The reasoning of the High Court viz., that if the witness had clearly seen and recognised Dwivedi stabbing the deceased with a knife, they could not have failed while giving the gist of the

incident to the warden in response to the latter's enquiry, to name Dwivedi as the actual assailant of the deceased, is not without substance. The information given to the warden on his enquiry was that all the five accused were assaulting the deceased with a chhura. The information was omnibus and general in character. It did not specify the assailant who caused the knife injuries. True there was no time to make a long narration, and the gravity of the situation permitted only the substance of the matter being conveyed to the warden. But the fact omitted was the heart of the matter, the core of its substance and the linchpin of the prosecution case. This omission, therefore, did point towards the conclusion drawn by the High Court.

21. On the other hand, the explanation offered by the prosecution for non-mention of this fact, was not so implausible that it could be rejected out of hand. Kamta Prasad lay profusely bleeding, life in him was fast ebbing. The deceased had to be taken to the Hospital at once. There was nor a moment to be wasted either in making a full investigation or in giving a whole narration of the incident. Thus far, the explanation may cover the field.

22. It does not beyond the removal of Kamta Prasad to the Hospital. It breaks down on his death, because the report Ex. Ka-1 was written and prepared by the warden in the verandah of the Hospital after the death of Kamta Prasad. Presumably, Parmatmanand Tewari, P.W. 2, was also there. Admittedly, it was he who carried the report to the Police Station and handed it over there to the Station Officer. Why did P.W. 2 not get the fact of Dwivedi being the author of the knife injuries of the deceased, incorporated in Ex. Ka-1 when it was being prepared in the Hospital by B. N. Singh ? Kamta Prasad being dead, there was no more face against time. Was this lapse on his part due to the reason that B. N. Singh did not ask him about further and more specific particulars of the occurrence ? - Possibly. Was this omission due to the fact that the necessity of incorporating all material particulars in the First Information just did occur to them ? May be. Or, was it due to the fact that P.W. 2 and his companions by that time were not aware as to who out of the accused had stabbed the deceased ? - Probably.

23. The mere fact that P.Ws. 2 and 3 had in their police statements denounced Dwivedi accused as the persons who had made the fatal assault on the deceased could not necessarily neutralise the conclusion of the story having been necessarily developed subsequently after the arrest of the accused persons. We are told that Tewari P.W. was examined by the investigator at 2.30 a.m. i.e. about 6 hours after the occurrence and P.W. 3, Pushkal several hours later next morning. There was delay in the examination of these witnesses which had not been satisfactorily explained by the Investigating Officer. Indeed, there was no good reason why Tewari's statement was not recorded in the Police Station When he went there to hand over the note of B. N. Singh. He was an eye-witness of the occurrence. His statement could be recorded even as the F.I.R. either in place of Ex. Ka-1 or as supplementary thereto. Might be that P.W. 2's statement was not recorded by the Police at the time of registering the case, because then he was not in possession of all the material facts relating to the occurrence. In any case, before the examination of P.Ws. 2 and 3, under Section 161, Cr. P.C., the investigation had been substantially completed. All the five accused had been arrested and two freshly washed Rampuri knives recovered from underneath the cot of Harish Chandra Dwivedi Injuries were discovered on the persons of Dwivedi and Ram Samujh Singh accused. There was thus ground to suspect that the story of Dwivedi being the real assailant might have been introduced or reconstructed from imagination after the discovery of the aforesaid facts, during investigation.

24. In the light of what has been said above it is clear that the High Court's conclusion - that it had not been established beyond doubt that the knife injuries on the deceased were inflicted by Dwivedi accused - was not manifestly unreasonable or grossly erroneous as would warrant an interference by

this Court.

25. It still remains to be considered whether the accused were vicariously liable for the act of the unascertained assailant of the deceased, among them, by the application of Section 149 Penal Code. Answer to this will depend on the further question whether at any time during the occurrence an unlawful assembly constituted by these five accused came into being. It is conceded by Mr. Uniyal that before the pulling out of the knives and the chase of the deceased there was no unlawful assembly. But he maintains that such an assembly came into being as soon as Dwivedi and Ram Samujh drew their knives and all the five accused joined in the chase of the deceased and thereby helped the actual assailant, amount them, to give knife blows to the deceased. This proposition suffers from the fallacy of begging the question. The story of Dwivedi and Ram Samujh drawing their knives and chasing the deceased would be suspect for the same reason for which the story of Dwivedi giving knife-blows to the deceased was found to be doubtful. Indeed the occurrence including the quarrel and the stabbing, all, took place within such a narrow compass that it rendered the story of chase highly improbable. Further, if in that melee and confusion, the eye-witnesses could not make out with certainty as to who had stabbed the deceased, a fortiori all the accused "may not have even been aware that some one amongst them had a knife with him". In our opinion, therefore, the learned Judges of the High Court were right in holding that since the occurrence was a chance encounter, and the fatal assault was a sudden, unanticipated and individual act of the unascertained assailant, their assembly did not become unlawful at any stage.

26. All said and done, by any reckoning, the view of the evidence on record, taken by the High Court could not be said to be clearly wrong or unreasonable. We, therefore, dismiss this appeal.

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