Maqsoodan and Others

Vs

State of Uttar Pradesh

Criminal Appeals Nos. 175

(Baharul Islam, D. A. Desai. V. B. Eradi JJ)

15.12.1982

JUDGMENT

BAHARUL ISLAM J. -

1. These four criminal appeals are by special leave. Criminal Appeal No. 175 of 1974 is by the four appellants Maqsoodan, Madan Mohan, Prayagnath and Nando who have been convicted under Sections 302/34 and 307/34, Penal Code.

2. The material facts may be briefly stated as follows :

3. On June 8, 1972 at about 5.45 or 6 a.m. when Sulley (PW 1) along with his brother, Jadon (deceased), his son, Rajendra (CW 1) and his nephew Vijai mar (PW 3) were going from their house in Neem Gali, Mathura, to their Dharamshala in Mohalla Bengali Ghat, via Vishram Ghat and reached the area called Shyam Ghat, they were waylaid by the 12 persons accused in the case and were assaulted. According to the prosecution, the accused persons were variously armed with ballams, pharsas and lathis. Another group of 12 or 13 persons who were associates of the accused was standing at Vishram Ghat and someone was constantly inciting the accused person with the expression, "kill, kill" whereupon the accused persons attacked and assaulted Jadon, Vijay Kumar, Rajendra and Sulley. Jadon and PW 3 were severely injured. The condition of Jadon was very precarious. After the assault, the miscreants left. Pw 1 arranged for a lorry belonging to one Vishnu Chubby and carried the injured persons to the District Hospital. The driver of the lorry was one Than Singh. Jadon and PW 3 were removed to the operation theatre. Thereafter, PW 1 proceeded to the Police Station, Kotwali at Mathura and submitted a written First Information Report (FIR) about the incident. The FIR was written by his nephew, Prakash Chandra Chaturvedi (PW 8). the FIR was lodged at 6.30 a.m. at the police station and has been proved in this case as Ex.'Ka-16'. After lodging the FIR PW 1 came back to the where the injuries of all the four injured persons were examined by Dr. B. S. Babbar. As the condition of the injured persons was serious, intimation was sent to Shri U. C. Tripathi (DW 7). Sub-Divisional Magistrate, Sahabad, for recording their statements. The Magistrate came and recorded the statements of PW 3 and CW 1 at 9.15 a.m. and 9.20 a.m. respectively. Jadon was operated open and his condition was such that he could not make any statement. In fact, he succumbed to the injuries examination was conducted on the dead body at Jadon by Dr. B. S. Babbar on June 10, 1972 at 10 a.m.

4. The police after investigation submitted charge/sheet against the 12 accused persons, all of whom pleaded not guilty. the First Additional Sessions Judge, Mathura, who tried the case, convicted 11 out of the 12 accused persons and acquitted accused 12, Kanhaiya, Appellant Maqsoodan was convicted under Section 302, IPC and sentenced to death. The other 10 accused persons were

convicted under Sections 302/149 and 307/149, Penal Code. Accused Parmatma was convicted under Section 147, IPC and the rest were convicted under Section 148, IPC. They were sentenced to various terms of imprisonment. The sentences of imprisonment were directed to run concurrently. There was also a reference for the confirmation of the death sentence imposed on Maqsoodan.

5. The convicts filed several appeals before the High Court of Allahabad. The High Court altered the convictions of Maqsoodan, Madan Mohan, Prayagnath and Nando, from under Sections 302/149 and 302/149 to ones under Sections 302/34 and 307/34, Penal Code. The sentence of death imposed on Maqsoodan was reduced to imprisonment for life. All of them were acquitted of the offence under Section 147 or section 148, IPC. The convictions and sentences as against the other six accused persons were set aside and they were acquitted. The acquittal off Kanhaiya was affirmed. Criminal Appeals Nos. 367, 368 and 369 of 1974 have been filed by the State against the acquittal of the 11 accused persons of the offenses under Sections 147 and 148, Penal Code; S. L. P. No. 766 of 1974 is by the State against the acquittal of Kanhaiya.

6. All these appeals will be disposed of by this common judgment.

7. Shri Rajendra Singh, learned counsel appearing for the appellants in Criminal Appeals No. 175 of 1974, first submits that the conviction of the four appellants is unsustainable in law he submits that the evidence of the four witnesses, namely, PW 1, Sulley, CW 1, Rajendra PW 3, Vijay Kumar and PW 2, Jagdish, cannot form the basis of the conviction as only one witness, namely, PW 2, Jagdish, out of five witnesses named in the FIR has been examined; the eye-witnesses examined are interested and their evidence cannot be safely relied on.

8. The High Court has found that the testimony of the eye-witnesses, namely, PWs 1,2,3 and CW 1 "suffer from numerous infirmities". It, therefore, sought support to their testimony from the two earlier statements, erroneously called dying declarations, Exs. Ka-22 and Ka-23 made by PW 3 Vijay Kumar and PW 2 Jagdish respectively. The infirmities referred to by the High Court consisted in according to the High Court, improvements made by the witnesses and variations in their earlier and latter statements. In our opinion, on that ground alone, the testimony of PWs 1,2,3 and CW 1 cannot be held to be infirm. It is the duty of the court to remove the grain from the chaff. These four witnesses are the injured witnesses having received the injuries during the course of the incident. Their presence at the time and place of the occurrence cannot be doubted : in fact it has not been challenged by the defence. As both the parties were inimical for a long time, it will be prudent to convict only those persons, whose presence and participation in the occurrence have been proved by the prosecution beyond reasonable doubt. We agree with the finding of the High Court that the presence and participation of the appellants Maqsoodan, Madan Mohan, Prayagnath and Nando, who are appellants in Criminal Appeals No. 175 of 1974 has been proved beyond reasonable doubt, despite the improvements and variations in their evidence.

9. Shri Rajendra Singh has submitted that it is not safe to rely on the testimony of PWs 1,2,3 and CW 1 as the prosecution has not examined all the witnesses named in the FIR except Jagdish, or has the prosecution examined any of the neighbors. It is not the number of witnesses examined nor the quantity of evidence adduced by the prosecution that counts. It is the quality that counts. Learned counsel has not pointed out to us that any witness better or more creditable has been omitted by the prosecution. As stated above, the eye-witnesses examined in this case were the best and natural witnesses. Learned counsel also has criticized that during the course of evidence, prosecution alleged that Maqsoodan gave two blows but that fact was not mentioned in the FIR. He has also criticised that the injured witnesses do not say who injured whom. This, on the contrary, shows that

the witnesses examined were not tutored and they gave no parrot like stereotyped evidence. It may be remembered that PW 1 who lodged the FIR received as many as seven incised wounds, one of them being on the left chest : he look Jadon, who had received serious injuries five incised injuries and PW 3, who was also seriously injured, to the hospital. He lodged the FIR thereafter. The condition of his mind and disposition can easily be imagined. There were bound to be some errors in the FIR. It may also be remembered that the FIR was lodged within half an hour of the occurrence. There was little time lost. The occurrence took place at about 6 a.m. on June 8, 19722. It is nobody's case that the witnesses were unable to recognise the real culprits. The accused persons were well-known to the witnesses from before. They did not have any reason to omit the real culprits and implicate falsely the accused persons. The evidence of PWs 11, 2, 3 and CW 1 could have been accepted even without corroboration. Even so, the High Court rightly pressed into service the earlier statements of PW 3 and CW 1 (Exs. Ka-22 and Ka-23) respectively.

10. Exs. Ka-22 and Ka-23 have been wrongly called dying declarations. The statement written or verbal, of relevant facts made by a persons who is dead, is called a dying declaration : it is relevant under Section 32 of the Evidence Act, when the statement is made by the person as to the cause of his death, or as any of the circumstances of the transaction which resulted in his death, in case, in which that person's death comes into question.

11. When a person who has made a statement, maybe in expectation of death, is not dead, it is not a dying declaration and is not admissible under Section 32 of the Evidence Act. In the instant case, the makers of the statements Exs. Ka-22 and Ka-23, are not only alive but they deposed in the case. Their statements, therefore, are not admissible under Section 32; but their statements however are admissible under Section 157 of the Evidence Act as former statements made by them in order to corroborate their testimony in court. In the instant case, Exs. Ka-22 and Ka-23 respectively corroborate the testimony in court of PW 3 and CW 1 respectively.

12. The High Court has found that the witnesses later on improved the story and roped in some other persons. As a rule of caution, the High Court has found that the participation of the four appellants in the offence has been proved beyond reasonable doubt and the presence and participation of the other eight accused persons named by them have not been proved beyond doubt. We do not find valid reason to interfere with this finding of fact of the High Court, in these appeals under Article 136 of the Constitution.

13. As the number of accused persons present and participating in the occurrence have not been proved to be five or more, the High Court has rightly held that the common object necessary for constituting an unlawful assembly has not been proved, and therefore in the facts and circumstances of the case, the High Court correctly held that common intention has not been proved and as such the four appellants were rightly acquitted of the offence under Section 302 read with Section 149, IPC, and also rightly acquitted all the other accused persons of the offences under Sections 147 and 148, IPC.

14. Shri Rajendra Singh next submits that if any offence at all has been committed by the appellants of Criminal Appeal No. 175 of 1974, the offence may be under Section 326, IPC depending on the medical evidence and circumstances of the case and that Section 34, IPC cannot apply as no common intention has been proved. We cannot accept this submission. Dr. B. S. Babbar, PW 3, who held the post-mortem examination on the dead body of Jadon found a number of wounds out of which the following were serious :

1. Incised wound 2" x 1/4" x scalp deep on head.

2. Incised wound 3" x 1/4" x scalp deep on the head.

3. Stiched wound with draining tube 3" towards upper portion of the stomach on right side.

4. Stiched wound 1.1/2" on the upper portion of the left side of the stomach.

15. In his opinion, death was due to cyncope following shock and hemorrhage as a result of the injuries. According to him, injuries 1 and 2 separately was sufficient to cause death in the ordinary course of nature. It, therefore, cannot be argued that the offence committed was not murder.

16. Common intention is a question of fact. It is subjective. But it can be inferred from facts and circumstances. In this case, the appellants were related. All of them were armed with deadly weapons. They were together. There was an order by someone, "kill, kill", when all of them simultaneously attacked the deceased and PWs 1, 2, 3 and CW 1. After the occurrence, they left together; they were later arrested from the same place. The High Court therefore rightly held that the appellants caused the injuries with the common intention, and was justified in convicting the appellants under Sections 302/34 of the Penal Code. We, therefore, affirm the conviction and sentences inflicted by the High Court on Maqsoodan, Madan Mohan, Prayagnath and Nando, appellants in Criminal Appeal No. 175 and 1974 and dismiss the appeal.

17. As held above that the High Court rightly held that the prosecution failed to prove the common object and therefore it rightly acquitted all the accused persons of the offences under Sections 147 and 148.

18. In the result, the State appeals are also dismissed.

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