

Dajya Moshya Bhil and Others

Vs

State of Maharashtra

Criminal Appeal No. 361 of 1984

(D. A. Desai, V. Khalid JJ)

03.08.1984

ORDER

1. Special leave granted limited to the question whether appellants 2 and 3 shared the common intention with appellant 1 for committing murder of Gunjarya son of Dhanya.
2. It may at once be mentioned that the special leave petition on behalf of petitioner 1 was dismissed at the admission stage.
3. A few facts necessary to dispose of the contention raised on behalf of appellants 2 and 3 may be stated. At a festival described as 'Indal' an altercation took place between deceased Gunjarya on one hand and appellants 2 and 3 on the other on account of the profane language used by appellants 2 and 3 who were then inebriated. Both of them were slapped by Gunjarya. The dispute consequent upon this altercation was settled by the local panchayat in which both appellants 2 and 3 on one hand and deceased Gunjarya on the other, were fined Rs 5 each. On May 26, 1981 when deceased Gunjarya accompanied by his two brothers Gobji and Pandys in company of PW 3 Hajarya, PW 4 Dajya and PW 5 Jahangriya and two others were busy dismantling the hut of one Bamanya for the purpose of erecting a new hut on the nearby plot, the three accused came together and declared their intention of avenging the insult inflicted on them by Gunjarya at the time of 'Indal' festival. At that time accused 1 was armed with a Dharya while appellants 2 and 3 were unarmed. Immediately all the three of them rushed towards deceased Gunjarya and when Gunjarya tried to escape he was chased. Original accused 1 gave a blow with a Dharya on the forehead of Gunjarya while appellants 2 and 3 were alleged to have pelted stones at Gunjarya resulting in causing two lacerated wounds to deceased Gunjarya. On these allegations all the three of them were tried by the learned Additional Sessions Judge, Dhule in Sessions Case 52 of 1981. The learned Judge convicted all the three of them for having committed an offence under Section 302 read with Section 34 of the Indian Penal Code and sentenced each of them to suffer imprisonment for life. All the three of them preferred Criminal Appeal No. 1040 of 1981 in the High Court of Judicature at Bombay. A Division Bench of the High Court dismissed the appeal and confirmed the conviction and sentence of all the three appellants. Hence this appeal by special leave limited to the question hereinbefore set out.
4. The High Court while upholding the conviction of appellants 2 and 3 for an offence under Section 302 read with Section 34 of the Indian Penal Code held that there were three circumstances which clearly provide a clue to the common intention of appellants 2 and 3 with appellant 1 and all the three were reiterated before us by Mr Bhasme, learned counsel for the State of Maharashtra. We will examine all the three circumstances to decide whether they provide necessary, adequate and sufficient evidence for holding that appellants 2 and 3 shared the common intention to commit murder of Gunjarya with appellant 1.

5. The three circumstances relied upon by Mr Bhasme in support of his submission are : (i) that the three accused came together : (ii) that all the three accused had a common motive to avenge the incident that occurred at 'Indal' festival; and (iii) that when the victim of assault Gunjarya tried to escape all the three of them chased Gunjarya.

6. It must straightway be conceded that the three appellants came together, near the place where deceased Gunjarya in Company of his two brothers, some witnesses and some companions were working and where the incident occurred. Standing by itself this circumstance may be sufficient to suggest that three had some common intention. The question is whether they had common intention to commit murder of Gunjarya. If the three shared the common intention to commit murder of Gunjarya as is now contended obviously appellants 2 and 3 would not come unarmed. It is admitted by the prosecution that at that time appellant 1 was armed with a dharya but appellants 2 and 3 were unarmed. It would be contrary to common sense to hold that appellants 2 and 3 accompanied appellant 1 with the avowed object of committing murder of Gunjarya yet came unarmed. Their intention by this very tell-tale circumstance is contraindicated. Let it be made clear here that in order to attract Section 34 it is not sufficient to prove that each of the participating culprits had the same intention to commit a certain act. What is the requisite ingredient of Section 34 is that each must share the intention of the other. Appellants 2 and 3 though they were in the company of the appellant 1 were shown to be unarmed. The High Court has overlooked this most important circumstance.

7. The second circumstances relied upon by the prosecution to establish that the common intention was shared by appellants 2 and 3 with appellant 1 is that all the three of them had a common motive to avenge the incident that occurred at the time of 'Indal' festival. The High Court has recorded a finding that at the time of the festival in the house of Parsi Basara, a quarrel took place between Gunjarya on one hand and appellants 2 and 3 on the other. There is not the slightest reference to the presence or participation of appellant 1, who is shown to be the principal culprit of the offence, in that quarrel. In this context it would be advantageous to turn to the direct testimony of Hazaria, PW 3 who has stated in his evidence that at the time of 'Indal' festival a quarrel took place between appellants 2 and 3 on one hand and deceased Gunjarya on the other. He does not say that appellant 1 who was charged with substantive offence of committing murder participated in the quarrel. It is not suggested that the appellants are interrelated. Therefore, it is not shown that appellant 1 was in any manner involved in this quarrel. It is therefore not correct to say that all the three of them had a common motive of avenging the insult suffered by appellants 2 and 3 at the time of 'Indal' festival. First appellant had nothing to do with that quarrel yet in fact, the only fatal blow was given by original accused 1 who was not shown to be concerned with that quarrel. He could not have any motive to commit murder of Gunjarya on account of that quarrel. Clearly therefore the contention that all the three of them had a common motive to avenge the incident that took place at the time of 'Indal' festival cannot be accepted as being contrary to record and the High Court was in error in placing reliance on it.

8. An incidental submission urged was that when the three accused came together to the scene of incident all of them threatened that they would avenge the insult felt by them and they would do so by killing Gunjarya. In respect of this aspect of prosecution case, the evidence apart from being contradictory is vague and of little assistance. All the three principal witnesses stated that accused 1 to 3 asked Gunjarya as to why he had given slaps to appellants 2 and 3 at the time of 'Indal' festival. It is impossible to believe that all the three of them spoke simultaneously the same language and used the same words. It is too general and a vague circumstance to permit any inference to be drawn against the accused.

9. The last circumstance relied upon on behalf of the prosecution is that the appellants 2 and 3 along with appellant 1 chased Gunjarya when he tried to escape from the scene of occurrence. There is evidence to that effect of the three prosecution witnesses. It is also brought out in evidence that appellants 2 and 3 pelted stones but no one says whether the stones hit Gunjarya. The gap in the evidence in this behalf is sought to be filled in by a reference to the medical evidence which shows that Gunjarya had suffered two lacerated wounds and the medical officer deposed that they were likely to be caused by pelting of the stones. Does it permit an inference of common intention to commit murder ? Appellant 1, the principal culprit charged with substantive offence of murder did not have that motive which appellants 2 and 3 had; appellant 1 must have some other motive of which appellants 2 and 3 were presumably unaware. Now if appellant 1 had some motive other than the one which the prosecution tried to infer and if he came armed with a dharya and yet appellants 2 and 3 accompanied him unarmed and empty-handed and if there is no evidence of prior meeting of minds and if appellant 1 had nothing to do with the quarrel that took place between deceased Gunjarya on the one hand and appellants 2 and 3 on the other, he had nothing to avenge on that account and therefore having given close attention to this circumstance we find it difficult to agree with the High Court that appellants 2 and 3 shared the common intention with appellant 1 namely to commit murder of Gunjarya.

10. All the circumstances when viewed in their cumulative effect would not permit an inference that appellants 2 and 3 shared common intention to commit murder of Gunjarya. Therefore the conviction of appellants 2 and 3 for an offence under Section 302 read with Section 34 of the Indian Penal Code cannot be sustained.

11. The next question is as to what offence appellants 2 and 3 have committed. Even though they came unarmed when they chased Gunjarya with appellant 1 who was armed with a dharya a weapon of cutting and pelted stones, an inference of common intention being formed on the spur of the moment can be made. The fact that appellant 1 was armed with a dharya and appellants 2 and 3 pelted stones causing injuries may permit an inference that appellants 2 and 3 could have shared the common intention with appellant 1 of causing grievous hurt to deceased Gunjarya. Therefore in the circumstances of this case the minimum common intention that can be attributed to appellants 2 and 3 is one of causing grievous hurt with a sharp-cutting weapon like a dharya. Thus appellants 2 and 3 are shown to have committed an offence under Section 326 read with Section 34 of the Indian Penal Code and they should be convicted accordingly. In the facts and circumstances of this case each of them must be sentenced to suffer rigorous imprisonment for 3 years.

12. Accordingly this appeal is partly allowed and the conviction of appellants 2 and 3 for the offence under Section 302 read with Section 34 of the Indian Penal Code and the sentence of imprisonment for life are set aside and each of appellants 2 and 3 is convicted for an offence under Section 326 read with Section 34 of the Indian Penal Code and each of them is sentenced to suffer rigorous imprisonment for 3 years.

</html