

Subhash and Shiv Shankar

Vs

State of U.P.

Criminal Appeals Nos. 287-88 of 1978

(M. M. Dutt, S. Natarajan JJ)

14.04.1987

JUDGMENT

NATARAJAN, J. -

1. These appeals by special leave arise out of a common judgment rendered by the Allahabad High Court in three criminal appeals filed before it by the appellants and one Raj Kishore. Appellant Subhash and appellant Shiv Shankar were convicted along with Raj Kishore by the fourth Additional Sessions Judge, Bareilly under Section 302 read with the Section 34 Indian Penal Code and Section 324 read with Section 34 Indian penal Code respectively for having committed the murder of one Ram Babu and for having caused hurt with a knife to witness Dinesh Shankar. For the said convictions they were awarded imprisonment for life and three years' RI, respectively and the sentences were ordered to run concurrently. One Om Kumar who was also sent up for sessions trial under the two charges mentioned above was acquitted by the Sessions Judge. The three convicted persons preferred appeals to the High Court and the High Court has confirmed the convictions and sentences awarded to Subhash and Shiv Shankar but acquitted Raj Kishore.

2. The offences in question were committed on March 12, 1971 i.e., a day after Holi festival at about 11 a.m. on the Bareilly-Nainital Road in Bareilly. The prosecution case was that while Shiv Shankar caught hold of Ram Babu, Subhash, Raj Kishore and Om Kumar repeatedly stabbed him with knives and caused fatal injuries to him. When Dinesh Shankar (PW 2) tried to intercede he was also stabbed by Subhash and caused an injury. Besides Dinesh Shankar (PW 2) the occurrence was witnessed by an uncle of Ram Babu viz. Budh Sen (PW 1) and Shyam Behari (PW 3) and some others. Ram Babu and Dinesh Shankar were taken to the hospital but Ram Babu was pronounced dead in the hospital. The motive for the occurrence was that about 15 to 20 days prior to the occurrence Ram Babu had given a machine part to Subhash for being welded but Subhash failed to carry out the work; nevertheless he refused to return the machine part without the repair charges being paid to him. Ram Babu refused to pay the charges and there was an altercation but the parties were pacified by Dinesh Shankar and Ram Babu took away the machine part without paying any charges to Subhash. The quarrel had taken place about 3 or 4 days before the occurrence. Bearing this grudge in mind, when Ram Babu, accompanied by Budh Sen and Dinesh Shankar was proceeding to Qutabkhana to witness the Holi celebrations, Subhash assisted by his three companions attacked Ram Babu in the manner set out earlier and caused fatal injuries to him. There were as many as 14 injuries which had injured the pleura, left lung, pericardium and the heart. These injuries were certified to be sufficient in the ordinary course of nature to cause death. Dinesh Shankar (PW 2) also had sustained as incised wound on his left thigh.

3. Budh Sen (PW 1) got a report Ex. Kha-1 written by his son and presented it at the police station

at 1.12 p.m. Therein he has stated that accused Subhash was known to him but the other three assailants were not known to him but the another witness Bhuvan Chand examined as CW 1, had informed him that the one Raja Ram was one of the assailants of Ram Babu. It would appear that subsequently Bhuvan Chand refused to testify out of fear of the accused and hence he was not cited as a witness in the charge-sheet. Even so, having regard to the averments in Ex. Kha-1 the Sessions Judge examined Bhuvan Chand as a court witness. He, however, failed to corroborate Budh Sen and stated that he did not know anything about the occurrence.

4. Subhash was absconding and he surrender before the court on March 12 (sic 17), 1971. He was subsequently questioned by the Investigating Officer and he gave information regarding the names and addresses of the other three assailants. Raj Kishore was arrested on May 23, 1971 and Shiv Shankar was arrested on the June 14, 1971 from the office of the Central Excise. Bareilly where he was employed. Om Kumar surrendered himself in court on July 15, 1971.

5. Test identification parades were held for Raj Kishore and Shiv Shankar on May 5, 1971 wherein Shiv Shankar was identified by Budh Sen. Dinesh Shankar and Shyam Behari but Raj Kishore was identified only by Dinesh Shankar. In the subsequent test identification parade held for Om Shankar on July 27, 1971 none of the witnesses was able to identify him. The defence of all the accused was one of denial.

6. Since accused Om Kumar was not identified by any of the witnesses at the test identification parade and since his name was not mentioned in Ex. Kha-1 the Sessions Judge acquitted him of the charges and convicted only the two appellants and Raj Kishore. The High Court acquitted Raj Kishore because he had been identified only by Dinesh Shankar and not by the other witnesses but, however, confirmed the conviction of these two appellants and it is against such confirmation by the High Court, the appellants have preferred these appeals.

7. Before dealing with the case of Subhash we can conveniently deal with the appeal of Shiv Shankar. Admittedly, he was not known to any of the eye witnesses and his name does not also find a place in the first information report Ex. Kha-1. His name came to be known only through Subhash when he was questioned in the jail on April 7, 1971. Even if it were so, it is not understandable why the Investing Officer should have taken three weeks to question Subhash after his surrender in court on March 17, 1971. Be that as it may, even after getting the name and address of Shiv Shankar from Subhash, the in Investigating Officer has failed to trace him and arrest him till June 14, 1971. Shiv Shankar was an employee in the office of the Central Excise Department at Bareilly itself. It is, therefore, difficult to believe that the Investigating officer would not have been able to trace him and arrest him for nearly 9 weeks after coming to know of Shiv Shankar's name and address from Subhash. As a matter of fact, the Investigating Officer has stated in his evidence that he visited the house of Shiv Shankar two or three times to arrest him but Shiv Shankar was not to be found. If Shiv Shankar was absent from the house the Investigating Officer could have easily learnt from the neighbours where he was working and where he had gone and located him and arrested him. It is not the prosecution case that Shiv Shankar was absconding. In such circumstances it is difficult to accept the prosecution case that the Investigating officer could not trace and arrest Shiv Shankar till June 14, 1971 in spite of coming to know on April 7, 1971 itself that he was one of the assailants of Ram Babu.

8. Apart from this infirmity we further find that Shiv Shankar was not put up for test identification parade promptly. The identification parade has been held three weeks after his arrest and no explanation has been offered for the delay in holding the test identification parade. There is,

therefore, room for doubt as to whether the delay in holding the identification parade was in order to enable the identifying witnesses to see him in the police lock-up or in the jail premises and make a note of his features.

9. Over and above all these things there remains the fact that a sufficiently long interval of time had elapsed between the date of occurrence when the witnesses had seen Shiv Shankar for a few minutes and the date of the test identification parade. It is, no doubt, true that all the three witnesses had correctly identified Shiv Shankar at the identification parade but it has to be borne in mind that nearly 4 months had elapsed during the interval. It is relevant to mention here that neither in Ex. Kha-1 nor in their statements during investigation, the eye witnesses have given any descriptive particulars of Shiv Shankar. While deposing before the Sessions Judge they have stated that Shiv Shankar was a tall person and had 'sallow' complexion. If it is on account of these features the witnesses were able to identify Shiv Shankar at the identification parade, they would have certainly mentioned about them at the earliest point of time because their memory would have been fresh then. Thus in the absence of any descriptive particular of Shiv Shankar in Ex. Kha-1 or in the statements of witnesses during investigation, it will not be safe and proper to act upon the identification of Shiv Shankar by the three witnesses at the identification parade and hold that he was one of the assailants of Ram Babu. As pointed out in *Muthuswami v. State of Madras* (AIR 1954 SC 4 : 1954 Cri LJ 236), where an identification parade was held about 2 1/2 months after the occurrence it would not be safe to place reliance on the identification of the accused by the eye witnesses. In another case *Mohd. Abdul Hafeez v. State of A. P* (AIR 1983 SC 367 : (1983) 1 SCC 143 : 1983 SCC (Cri) 139). It was held that where the witnesses had not given any description of the accused in the first information report, their identification of the accused at the sessions trial cannot be safely accepted by the court for awarding conviction to the accused. In the presented case there was a long interval of nearly 4 months before the test identification parade was held and it is difficult to accept that in spite of this interval of time the witnesses were able to have a clear image of the accused in their minds and identify him correctly at the identification parade.

10. Mr. U. R. Lalit, learned counsel for Shiv Shankar further contended that Shiv Shankar had certain distinctive features like scars on the face, reddish lips etc., and these marks of identification should have been furnished to the witnesses before they were called upon to identify Shiv Shankar at the identification parade. We do not think it necessary to go into the merits of this argument in the light of our conclusion already reached. As the conviction of Shiv Shankar is based solely with reference to his identification at the identification parade, he has to be given the benefit of doubt and acquitted in the light of our finding. Accordingly, Shiv Shankar's appeal has to succeed.

11. Coming now to the appeal of Subhash it was strenuously contended by Mr. Frank Anthony, learned counsel that the prosecution evidence suffers from numerous infirmities and as such the Sessions Judge and the High Court ought not to have convicted him. His further argument was that in any case the benefit of doubt given to Om Kumar and Raj Kishore, ought to have been given to Subhash also. Mr. Anthony argued that Ex. Kha-1 could not have been given at 1.12 p.m. because there is no evidence to show when the report was sent to the magistrate and when it was received by him. The learned counsel referred to *Gurudev Singh v. State* (1963 Punj LR 409), where the dangers ensuing from a first information report not being lodged promptly have been pointed out. We are unable to accept the argument of Mr. Anthony because there are no materials to warrant an interference that Ex. Kha-1 had been given later but antedated to cover up the delay in making the report. It is true that the first information report sent to court does not contain the magistrate's endorsement regarding the time of its receipt, but Ram Kishan, Head Constable (PW 5) has deposed that the special report was dispatched to the magistrate at 1.20 p.m. itself through constable Chiman

Lal and that the General Diary contains an entry to that effect.

12. It was seriously urged by Mr. Anthony that the motive put forward for the occurrence was of a flimsy nature and it is unbelievable that for non-payment of repair charges Subhash would have attacked Ram Babu along with his companion. This argument has to fail because Dinesh Shankar has clearly deposed that there was an altercation between Subhash and Ram Babu thereon four days earlier and Ram Babu took away the machine part without paying repair charges to Subhash. There is, therefore, nothing improbable in Subhash having nurtured a grievance against Ram Babu and wanting to settle scores with him. The evidence of the eye witnesses is clearly to the effect that Subhash told his companions on seeing Ram Babu, that he is the person who had quarrelled with him and taken away the machine part without paying the repair charges. Making common cause of his grievance Subhash's companions had also joined him in perpetrating an attack on Ram Babu. The intent of Subhash in launching an attack on Ram Babu can be gauged from the fact that when Dinesh Shankar tried to intervene, he had prevented him and inflicted a stab injury on him also.

13. The further argument of Mr. Anthony was that Budh Sen did not have proper eyesight, that Shyam Behari was a chance witness and that Bhuvan Chand named in Ex. Kha-1 had failed to support the prosecution case and as such there is no acceptable evidence to convict Subhash. He also stated that even though Dinesh Shankar is an injured witness, there is no guarantee that his evidence is truthful. None of these contentions, in our opinion, has any merit. Budh Sen has stated that his eyesight is poor without glasses but with spectacles he can see well. It is not the case of the appellant that Budh Sen was not wearing his spectacles at the time of the occurrence. Insofar as Dinesh Shankar and Shyam Behari are concerned, their presence at the scene cannot admit any doubt because their names find a place in Ex. Kha-1. Moreover Dinesh Shankar has sustained an injury on his left thigh. The evidence of these witnesses has been accepted by the Sessions Court and the High Court and we see no reason to take a different view. Insofar as Bhuvan Chand (CW 1) is concerned, the prosecution has satisfactorily explained why he was not cited as a witness. He had no doubt furnished the name of Raja Ram alias Raj Kishore to Budh Sen but he subsequently backed out fearing reprisal at the hand of the accused. Mr. Anthony argued that even if his contentions are not accepted, Subhash can be convicted only for an offence under Section 324 Indian Penal Code for the injury caused to Ram Babu as well as Dinesh Shankar. We may mention here that the Sessions Judge had framed a separate charge against the appellant Subhash under Section 324 Indian Penal Code in addition to the charge under Section 324 read with Section 34 Indian Penal Code. Mr. Anthony invited our attention to State of U. P. v. Hari Prasad (AIR 1974 SC 1740 : (1974) 3 SCC 673 : 1974 SCC (Cri) 203 : 1974 Cri LJ 1274) and Ugar Ahir v. State of Bihar (AIR 1965 SC 277 : 1964 BLJR 615 : 1965 (1) Cri LJ 256), to contend that when the substratum of the prosecution case fails, the entire case has to fail. We find the facts in those cases were entirely different and hence they can have no relevance to this appeal. In the present case, the prosecution version fully survives in spite of the acquittal of the other accused for want of proof of identity.

14. The last argument of Mr. Anthony was that in any event when the other accused persons are acquitted, Subhash alone cannot be convicted under Section 302 read with Section 34 Indian Penal Code in the absence of evidence to show that he caused any of the fatal injuries on Ram Babu. This argument is devoid of any merit. The case of Subhash stands on a different footing from that of the other accused because he has clearly named and the particulars of his profession and address have been furnished in Ex. Kha-1. All the witnesses have stated that he was known to all of them. In contrast the names of the other accused were not known to the eye witnesses and the name of Raj Kishore alone had been furnished to Budh Sen by Bhuvan Chand. Besides attacking Ram Budh Subhash had also attacked Dinesh Shankar. He was absconding and had later surrendered himself in

court. No test identification parade was held for him because his identity was never in doubt. He had a grudge against Ram Babu and it was on his instigation that the attack on Ram Babu had been launched. His case, therefore, stands on a distinctively different footing from that of the other accused persons. Even though the other accused are acquitted it is only for want of proof of their identity and not because the eye witnesses had not because the eye witnesses had not seen the occurrence or that the occurrence had taken place in a different manner. Subash cannot, therefore escape the consequences of the attack jointly committed by him and his accomplices in furtherance of their common intention even though the other accused stand acquitted for want of acceptable proof of their identity. Mr. Anthony referred us to the decision in Vijay Kumar v. State of J & K (AIR 1982 SC 1023 : (1982) 2 SCC 43 : 1982 SCC (Cri) 348) to contend that when the other accused stand acquitted Subhash also should be acquitted of the charge under Section 302 read with Section 34 Indian Penal Code. The facts in that case bear no comparison with the facts in this case. On the other hand Amir Hussain v. State of U. P. (AIR 1975 SC 2211 : (1975) 4 SCC 247 : 1975 SCC (Cri) 505 : 1975 Cri LJ 1874) will be the decision apt for consideration in this case. In the above case 10 persons were acquitted by the Sessions Judge and three alone were convicted under Section 302 read with Section 34 Indian Penal Code. Among those three two were acquitted by the High Court and consequently only one of the accused stood convicted. The said accused appealed to this court and contended that since the other two accused had been acquitted, he should also be acquitted of the charge under Section 302 read with Section 34 Indian Penal Code. Repelling the contention this Court held as follows : (SCC pp. 249-50, paras 9-11)

Much stress has been laid on behalf of the appellant upon the fact that despite the evidence of the above mentioned four eye witnesses, the High Court has acquitted Karimuddin and Mohd. Ibrahim accused. It is, in our view, not necessary to express an opinion on the point as to whether those two accused were rightly acquitted or not. All that we can say is that the benefit of doubt which resulted in the acquittal of the other two accused would not vitiate the conviction of the appellant in case the evidence adduced against him is found to be satisfactory and convicting. The material on record establishes that the appellant had a motive to join the assault on Ibrahim Pradhan. The appellant held out a threat and report about it was lodged by Ibrahim deceased at the police station about 3 1/2 months prior to the present occurrence. The evidence about the motive lends assurance to the evidence of the eye witnesses regarding the complicity of the appellant.

We would, therefore, maintain the conviction of the appellant. As regards the sentence, it may be stated that the only injury which is attributed to the appellant is an incised wound on the right arm of Ibrahim. The incised wound which was found on the scalp of Mehandi Hasan was ascribed by the eye witnesses to Karimuddin who has been acquitted. In view of the fact that a comparatively minor injury was attributed to the appellant and he is being vicariously held liable for the fatal injuries caused by the other culprits, we consider it to be a fit case in which we might substitute the lesser sentence for the extreme penalty of death. We accordingly maintain the conviction of the appellant but reduce his sentence to that of imprisonment for life.

15. We are, therefore, of the view that even though the other accused stand acquitted and even though there is no evidence that Subhash caused one of the fatal injuries, he cannot escape conviction under the section 302 read with Section 34 Indian Penal Code when his participation with three other assailants in the attack on Ram Babu has been established beyond reasonable doubt by the prosecution. We, therefore, confirm his convictions and the sentences, awarded therefor.

16. In the result Criminal Appeal No. 287 of 1978 will stand dismissed while Criminal Appeal No. 288 of 1978 will stand allowed. Appellant Subhash will surrender himself to custody failing which

he should be arrested for serving out the sentence. Appellant Shiv Shankar will stand acquitted of the convictions under Section 302 read with the Section 34 Indian Penal Code and Section 324 read with Section 34 Indian Penal Code and his bail bonds will stand cancelled.

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