

Shyam Sunder and Others

Vs

State of Uttar Pradesh

Criminal Appeal No. 515 of 1978

(S.R. Pandian, K. Jayachandra Reddy JJ)

21.12.1990

JUDGMENT

S. RATNAVEL PANDIAN, J. –

1. The three appellants in this appeal are challenging the correctness of the judgment of the High Court of Allahabad (Lucknow Bench) rendered in Criminal Appeal No. 61 of 1974 dismissing the appeal and confirming the judgment of the trial Court. The facts of the case briefly stated are as follows :

On June 25, 1972 the brother of Shyam Sunder (appellant 1), by name, Suresh was murdered. The deceased in this case Raj Narain was implicated in that case and he surrendered before the court on June 28, 1972. One month previous to this occurrence, the deceased had been granted bail and released from jail. Since then he left his original house on account of fear and was residing in Kanhaipurwa along with one Shambhu Dayal, but occasionally visited his old house. Vinod Kumar (appellant 2) is the son of appellant 1 and both of them were residing at Mohalla Unchathak which adjoins the village where Raj Narain along with his family members initially used to reside. On account of the murder of Suresh there was bitter animosity between the appellants 1, 2 and the deceased.

2. On August 27, 1972 at about 8.30 p.m. while the deceased was proceeding to his house, the three appellants surrounded him. Appellant 2 caught hold of the deceased and appellant 1 gave a blow to the deceased by the butt of his gun. Thereafter appellant 3 fired a shot with his pistol from behind the deceased and caused an injury, to which injury he succumbed later on. On seeing the witnesses approaching the scene, all the appellants took to their heels. The injured was brought to the house of one Radha Krishna. Smt. Ram Beti and Smt. Vimla took the injured to the police station, Kotwali, where the injured Raj Narain lodged a report at about 9.05 p.m. On the basis of the report a case was registered. Ex. Ka-5 is the first information report. Then Raj Narain was removed to the District Hospital where he was medically examined by about 10 p.m. The Medical Officer found on his person a lacerated wound the left ear and a gunshot wound on the left side of his back with blackening around the wound. Since the condition of the injured was dangerous, a dying declaration was recorded by the First Class Magistrate on a requisition from the Medical Officer, at about 10.55 p.m. The dying declaration is marked as Ex. Ka-7. The Sub-Inspector took up the investigation and interrogated the injured Raj Narain and recorded his statement as Ex. Ka-12, which statement was similar to that of Ex. Ka-7. The Investigating Officer after visiting the scene spot examined the witnesses. Raj Narain died on August 29, 1972 at about 9.50 p.m. The Investigating Officer held the inquest over the dead body. Dr. S.C. Raj conducted autopsy over the dead body. After completing

the investigation the challan was filed. The defence of these appellants was of a complete denial. Vinod Kumar stated in his recorded statement under Section 313 CrPC that since he was an injured witness in the murder case of Suresh, he is falsely implicated in the case. Appellant 3 stated that since he happens to be the cousin of appellant 1 he has been falsely implicated. The trial court convicted appellant 3 under Section 302 (simpliciter) and appellants 1 and 2 under Section 302 read with Section 34, IPC and sentenced each of them to undergo imprisonment for life. The High Court on appeal confirmed the judgment of the trial court. Hence this present appeal.

3. During the course of the hearing of the appeal, it was brought to our notice that appellant 3 had died. As no near relative of the deceased has approached this Court within 30 days of the death of appellant 3 for leave to continue the appeal as contemplated under Section 394, the appeal as against appellant 3 abated. Therefore, now we are concerned only with the case of appellants 1 and 2.

4. Of the witnesses examined, Ram Beti (PW 3) who is the wife of the deceased has deposed that she was informed by her father that all the three appellants assaulted her husband. In her further evidence she states that she took her husband to the police station where her husband made a complaint. PW 6 who claims to be an eye-witness has deposed that while appellant 2 caught hold of the deceased, appellant 1 assaulted the deceased by hitting him with the butt of his gun. Then at the instigation of appellant 2 appellant 3 fired a shot at the deceased. PW 9, the City Magistrate speaks about the recording of the dying declaration of the deceased Ex. Ka-7.

5. We heard the learned counsel appearing for the appellants as well as the counsel for the State and perused the records. In our considered opinion, the accusation against appellant 2 (Vinod Kumar) that he caught hold of the deceased and that it was only thereafter appellant 3 fired a shot from behind is highly artificial and improbable because if the deceased had been shot at the time when appellant 2 had caught hold of him, appellant 2 would also have received some injuries. Moreover, the evidence adducted on the side of the prosecution as against this appellant 2 is highly unnatural and unbelievable. No doubt in Exs. Ka-5, ka-7 as well as in Ex. Ka-12 the deceased had consistently mentioned the name of appellant 2 and attributed the overt act of catching hold of him. The fact that appellant 2 was an eye-witness in the murder case of Suresh filed against the deceased Raj Narain, is not disputed. Therefore, as rightly pointed out by the learned counsel, the deceased Raj Narain would have mentioned the name of this appellant 2 also as one of the assailants. If really appellant 2 had participated in the commission of this crime, he would have been the first person to attack the deceased since Raj Narain had previously murdered his grandfather. However, as we are of the view that the evidence against appellant 2 is very weak and meagre besides it being artificial, we are giving the benefit of doubt to this appellant 2 and hold that he is entitled for an acquittal.

6. Coming to the case of appellant 1 (Shyam Sunder) it is alleged that he hit the deceased with the butt of his gun. The overt act attributed to this appellant consistently found in all the 3 dying declarations (Exs. Ka-5, Ka-7 and Ka-12) besides the evidence of PW 6 corroborates that version. Appellant 1, who was armed with a gun did not fire at the deceased but only hit with the butt of the gun. If really he had intended to kill the deceased he himself would have fired at the deceased and murdered him especially when he was armed with a pistol. It is alleged that this appellant 1 instigated appellant 3 to kill the deceased. This version of the prosecution that appellant 1 instigated appellant 3 is unbelievable for the reason that while he himself was armed with a gun there was no necessity to instigate appellant 3 to kill the deceased. The consistent case of the prosecution is that appellant 3 suddenly fired standing from the back of the deceased. This spells out that appellant 1 would not have expected appellant 3 to shoot at the deceased. It further indicates that appellant 1 was not sharing the intention of appellant 3 in putting an end to the life of the deceased. Therefore,

even if the entire evidence is accepted, appellant 1 could not be held to have intended to cause the death of the deceased, but however he would have intended to cause that lacerated wound which in the opinion of the Medical Officer was simple in nature. Therefore, he would be liable to be punished under Section 324 IPC and not under Section 302 IPC.

7. In the result, we set aside the conviction of appellant 2 under Section 302 read with Section 34 IPC and the sentence of imprisonment for life by allowing his appeal and acquit him. So far as appellant 1 is concerned, we set aside his conviction under Section 302 read with 34 IPC and the sentence of imprisonment for life, instead convict him under Section 324 IPC and sentence him to undergo rigorous imprisonment for 3 years. As pointed out earlier the appeal of appellant 3 abated.

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