

Rajesh Govind Jagesha

Vs

State of Maharashtra

With

Criminal Appeal No. 738 of 1997

Sharif Anwar Saiyyad

Vs

State of Maharashtra

With

Criminal appeal No. 739 of 1997

Vs

State of Maharashtra

Criminal Appeals Nos.737-39 of 1997

(G. B. Pattanaik, R. P. Sethi JJ)

11.02.1999

JUDGMENT

SETHI, J-

1. The appellants herein along with Santosh @ Sandeep @ Shanu were tried for the commission of offences punishable under Sections 302, 504 read with Section 34 IPC by the Sessions Judge, Thane. They were alleged to have committed the murder of Joy Kutty on 2-1-1993 at about 4.45 p.m. in a locality of Mumbai known as Vashi. They were convicted and sentenced to suffer imprisonment for life for commission of offences under Section 302 read with Section 34 IPC. The appeal filed by all the accused persons were dismissed by the High court vide the judgment impugned in these appeals. All the accused persons excepting accused Santosh @ Sandeep @ Shane have preferred these appeals alleging that the courts below have not appreciated the evidence properly in the case and that no case for conviction was made out against them. The prosecution witnesses were alleged to be interested and chance witnesses and were alleged to have not seen the occurrence. It is further contended that appellant Rajesh Govind Jagesha, Accused 2 before the trial court could not be convicted as he was not properly identified at the identification parade which is stated to have been held in violation of the settled principles of law and after a prolonged unexplained delay.

2. The case of the prosecution is that on 30-12-1992 at about 9. P.m., the complainant Mandip Singh

Johal, his cousin brother Surinder Singh and cousin sister Sarita @ Rita were returning to their homes from the market in Sector 6 of Vashi locality and when they reached the corner of Sectors 6 and 7, Harish Jagesha, Accused 3, Sharif Anwar Siyyad, Accused 1 along with their two companions started teasing Rita by indulging in whistling. Surinder Singh looked at the aforesaid persons angrily. The said persons had beaten the complainant and Surinder Singh with fists. Sarita @ Rita lodged a complaint at Vashi Police Station on 1-1-1993 But the culprits could not be arrested despite efforts made by the police. On 2-1-1993, the complainant, his friends Joy Kutty, Dinesh Panchal, Harprit Singlh Randhava, Kishore, Surinder Singh and Sarita @ Rita had gone to win-Win Hotel. On return, they left Rita at the house and at about 4.40 p.m. when they were passing from row house 'G' and 'R' in Sector 7 towards the market, Accused 1 and 3 along with their two companions came from behind, abused and attacked Joy Kutty with weapons like swords, chopanions came from behind, abused and attacked Joy Kutty with weapons like swords chopper and gupti. Being apprehensive to the safety of their lives all except Hoy Kutty ran from the place of occurrence. They reached autorickshaw-stand in Sector 6 and when they were proceeding towards Vashi Police Station to lodge the report, they saw that Joy Kutty was running towards Sterling Hospital by the highway from octroi nake. All of them lifted Joy Kutty and brought him to Sterling Hospital. As no doctor was available in the hospital, Joy Kutty was taken to Lajshadip Hospital where, after examining, the doctors declared Joy Kutty as dead. The complaint exhibit 18 was lodged by Mandip Singh Hohal with B.A. Kadam, PSI at about 5.30.p.m. After registering the offence bearing No. 2 of 1993, the PSI rushed to Lakshadip Hospital and conducted an inquest Panchnama on the dead body of the deceased. At the instance of Accused 2 a sword (Article 9) was attached as per exhibit 59 and panchnama Exhibit 69- A on 4-1-1993. Bloodstained clothes of Accused 1 and 2 were seized on the same day. A sword and chopper (Articles 16 and 17) were attached as per memorandum Exhibit 43 and panchnama Exhibit 44 at the instance of Accused 2 on 7-1-1993. Accused 3, namely, Harish Govind Jagesha and Accused 4 Santosh were arrested on 20-1-1993. On 23-1-1993 a knife and tow shirts were recovered form the house of Accused 4 at his instance vide memorandum exhibit 61 and panchnama Exhibit 61-A. After the charges were framed against the accused persons under Sections 302, 504 read with Section 34 IPC they pleaded not guilty and claimed to be tried. On appreciation of evidence, the trial court held that the prosecution had proved that the death of Joy Kutty on 2-1-1993 in Sector 7, Vashi was a common intention attacked Joy Kutty with weapons like sword, chopper and gupti and thereby committed the offence of murder.

3. The High Court, after appreciating the evidence in depth and dealing with all aspects of the matter, dismissed the appeal by holding:

"Thus considering the evidence of eyewitnesses PW 1 and PW 2 coupled with the medical evidence, the evidence pertaining to identification parade, the evidence in the matter of recovery of bloodstained clothes and weapons thought the confessional statements of the accused and the blood scrapings from the car corroborates the eyewitness testimony of PW 1 and PW 2. We have, therefore, no hesitation in upholding judgment of the Sessions Court convicting all the appellants under section 302 read with Section 34 IPC."

Learned counsel appearing for Accused 2, namely, Rajes Govind Jagesja has vehemently argued that his client has not been proved to be connected with the commission of the crime, beyond all reasonable doubts. It is contended that as the identification parade was held after a prolonged delay and no person with the resemblance of the features relating to Accused 2 detailed in the FIR was included in the test identification parade, the authenticity of the witnesses in identifying Accused 2

cannot be accepted. The admitted position is that in the FIR lodged, the name of Accused 2 has not been mentioned. It is also not disputed that the identification parade was held on 13-2-1993, much after the said accused had been remanded to custody. There is no explanation as to why the test identification parade was held after an unexplained delay. It is worth noticing that the FIR lodged by Mandip Singh Johal, PW it is stated:

" At that time, at about 4.55 hours, the persons i.e. (1) Harish, (2) Sharif and two others came running and abusing from behind us, and they started inflicting blows on Joy with the sword, chopper and the gupti-like weapon in their hands. As a result thereof, Joy screamed all of a sudden. Hence, we all ran away by the road, which we found. While we were coming to police station in a rickshaw from rickshaw-stand of Vashi, Sector 7, we saw Joy, who was running along highway from toll gate towards Sterling Hospital.

my friends, who were with me. My brother and I will identify all the persons, who killed Joy, if they are shown to us....

.the persons i.e. (1) Harish, and (2) Sharif and other two, out of whom one was a driver of a Yamaha motorcycle sporting a beard came running from behind, taking the chopper, swords and edged weapons like gupti in their hands, in front of G-55, and abused us and inflicted blows on the chest, head and on the person of my friend Joy Kutty, aged 19, residing at Sion Koliwada, CGS Quarters who was walking behind all persons and was with me, with the sword, chopper and the gupti, and Killed him."

As noticed earlier, Accused 2 was arrested on 20-1-1993. It is also not disputed that at the time of identification parade, the appellant was not having a beard and long hair as mentioned at the time of lodging of FIR. It is also not disputed that no person with a beard and long hair was included in the parade. The witnesses are alleged to have identified Accused 2 at first sight despite the fact that he had removed the long hair and beard. What prevented the Magistrate from associating one or two persons having resemblance with the persons named in the FIR is a mystery shrouded with doubts and not cleared by the prosecution. The possibility of the witnesses having seen the said accused between the date of arrest and the test identification parade cannot be ruled out.

4. This Court in *State of A.P. v. M.V. Ramana Reddy (Dr)*<sup>1</sup> held that where there is unexplained delay in holding the identification parade, the evidence of the prosecution regarding identify of an accused cannot be held absolutely reliable and in such a case the accused is entitled to the benefit of doubt. The explanation for delay in holding the identification parade offered by the prosecution in the instant case is not trustworthy. The non-availability of a Magistrate in a city like Bombay for over a period of five weeks from the date of the arrest of Accused 1 and 2 and three weeks from the arrest of Accused 3 and cannot be accepted. It is not denied that scores of Magistrates are available in the city of Bombay and that the investigating agency was not obliged to get the parade conducted from a specified Magistrate. The High Court was not justified in holding the parade could not be held early on account of alleged difficulties of the special Executive Magistrate. It was not for the defence to prove that the parade held was suffering from legal infirmities because, admittedly, the onus of proof in criminal case never shifts as the accused is presumed to be innocent till proved otherwise, beyond all reasonable doubts, by the prosecution. In cases where a person is alleged to have committed the offence and is not previously known to the witnesses, it is obligatory on the part of the investigating agency to hold identification parade for the purposes of enabling the witnesses

to identify the person alleged to have committed the offence. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement. Such a parade may not be necessary in a case where the accused person is arrested on the spot immediately after the occurrence. The evidence of identifying the accused person at the trial, for the first time, is from its very nature, inherently if weak character. This Court in *Budhesn v. State of U.P.*<sup>2</sup> held that the evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances the details of the part which such persons played in the crime in question with reasonably particularity. The test identification is considered as a safe rule of prudence for corroboration. Though the holding of the identification proceedings may not be substantive evidence, yet such proceedings are used for corroboration purposes in order to believe or not the involvement of the person brought before the court for the commission of the crime. The holding of identification parade being a rule of prudence is required to be followed strictly in accordance with the settled position of law and expeditiously. The delay, if any, has to be explained satisfactorily by the prosecution.

5. Looking into the attending circumstances and the totality of evidence produced in the Court, we are of the opinion that as the test identification parade regarding Accused 2 was not conducted properly and suffered from unexplained delay, he is entitled to the benefit of doubt.

6. Regarding the involvement of Accused 1 and 3, we have again been taken through the evidence of the prosecution and are satisfied that both the trial court as well as the High Court were Justified in holding them guilty for the commission of the offence punishable under Section 302 read with Section 34 IPC. We are not impressed with the arguments that as the earlier occurrence in which Sarita @ Rita was teased has not been established by the prosecution, the appellants were entitled to acquittal as, according to them, there did not exist any motive for the commission of the crime. "Motive" in a criminal case based upon ocular testimony of witnesses is not at all relevant. This Court in *Gurcharan Singh v. State of Punjab*<sup>3</sup> held that:

"But it has repeatedly been pointed out by this court that where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance,"

Again in *Datar Singh v. State of Punjab*<sup>4</sup> this Court reiterated that mere absence of a strong motive for committing the crime cannot be of any assistance to the accused if the offence could be proved by evidence. Where the direct evidence regarding the commission of offence is worthy of credence and can be believed, the question of motive becomes, more or less, academic. "Motive" may be relevant in a case based upon circumstantial evidence only, being one of the circumstances.

7. We are also not impressed with the submission of the learned counsel appearing for the appellants that PWs 1 and 2 not reliable being interested and chance witnesses. Both the courts below have held and we agree with their finding that the said witnesses were eyewitnesses who had seen the occurrence in which Joy Kutty was murdered. Mr Nambiar, the learned Senior Advocate appearing for Accused 1 further submitted that as a common object was not established, the trial court committed a mistake of law by applying the provisions of Section 34 IPC in holding the appellants guilty of the crime. Section 149 IPC are distinct and distinguishable. The meaning and scope of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purposes of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. The circumstances of

the present case clearly show that the accused persons had come on the spot with deadly weapons and inflicted injuries on Joy Kutty, obviously with the intention of causing his death. The eyewitnesses ran from the spot to save their lives, We do not find any error of law in appreciation of evidence by the trial court as well as the High Court, so far as the accused persons other than Accused 2 are concerned.

8. Under the circumstances Appeal No. 737 of 1997 filed by Rajesh Govind Jagesha, Accused 2 is allowed by setting aside the judgments of the trial court as well as the High Court insofar as they relate to him. He is acquitted and directed to be set at liberty, if not arrested or sentenced in any other case. Appeals Nos. 738 and 739 of 1997 filed by Sharif Anwar Saiyyad and Harish Govind Jasesja, Accused 1 and 3 are dismissed by upholding the conviction and sentence Awarded by the trial court as well as the High Court.