SUPREME COURT OF INDIA

Krishnan

Vs.

State

Crl.A.Nos.1149 with 1226 of 2002

(Doraiswamy Raju and A. Pasayat, JJ.)

28.07.2003

JUDGEMENT

ARIJIT PASAYAT, J.:-

1. These two appeals are directed against the common judgment of the Madras High Court whereby conviction of the appellants under S. 302 of the Indian Penal Code, 1860 (in short the 'IPC') read with S. 34 thereof and the sentence for imprisonment for life was confirmed.

2. Additionally, accused-appellants-Ayyar Thavar and Porutchyelvan were convicted for the offence punishable under S. 323, I.P.C. and sentenced to undergo RI for three months. Such conviction and sentence have been upheld.

3. Acquisitions which form the basis of prosecution in essence are as follows :

Maheswari (hereinafter referred to as the 'deceased') was allegedly having an illicit relationship with Azagu Raja, Sub-Inspector of Police who is the husband of Minnalkedi (A-6). She was originally an accused but was acquitted by the trial Court. The said Minnalkedi is the daughter of Ayyar Thavar. Accused-Porutchyelvan is the son of accused No. 1-Ayyar Thavar and accused-Krishnan and Ganesan are cousins of Porutchyelvan. Originally, 7 persons were alleged to be the authors of a homicide in which Maheswari lost her life on 3-12-1991. Accused-Mylakkal is the wife of Ayyar Thavar and another accused-Selvi was their daughter. Mylakkal, Minnalkedi and Selvi were acquitted of the charges by the trial Court. Originally, all the accused persons were charged of offences punishable under S. 302, I.P.C. read with S. 34, I.P.C. and also under S. 120-B, I.P.C. and S. 341, I.P.C. The appellants-Ayyar Thavar and Porutchyelvan were in addition accused of committing offence punishable under S. 323, I.P.C.

4. Deceased-Maheswari was working as a Branch Post Master in a village post office. She was unmarried. One year prior to the occurrence she developed intimacy with Azagu Raja. This was objected to by the accused persons and accused-Krishnan and Ganesan reprimanded the deceased and warned her when she was returning from her place of work not to have any connection with Azagu Raja. Report was filed at the Police Station by the deceased in this regard. Thereafter, the police looked into the matter and advised them not to quarrel with each other. Six months prior to the occurrence, deceased used to tell her brother Parameswaran (P.W. 1) that she was receiving telephonic threats from the accused. P.W. 1 decided to take the deceased to her work place and to bring her back home in view of such threats. On 26-6-1991, again the deceased gave a report to the SHO, Srivilliputhur Town Police Station stating that she was apprehending danger at the hands of the accused. Even one week prior to the occurrence, the three acquitted accused came to the Branch Post Office and threatened her with dire consequences and even told her that her life was in danger. On 3-12-1991 at about 2.30 p.m. P.W. 1 went to the work place of the deceased and when both of them were coming back, suddenly the accused-appellants emerged from the side of a Milk dairy. Accused-appellant-Ayyar Thavar said in a loud voice as to how the deceased dared to continue her intimacy with his son-in-law, notwithstanding the warnings given to her. He tried to assault the deceased. When it was warded off by P.W. 1, he was given fist blows on his neck and nose and pushed down. On seeing this, the deceased tried to escape by running towards the nearby Milk dairy.

5. Accused-appellant-Ayyar Thavar inflicted a cut injury on the backside of the deceased uttering in loud voice "die with this." Accused-Porutchyelvan gave a blow with aruval on the head of the deceased on the right side. Similarly, accused-appellants-Krishnan and Ganesan caused cut blows on her back. When the deceased fell down, the accused-appellant-Ayyar Thavar inflicted another cut on the right ear lobe. Thereafter, all the four accused persons ran away. P.W. 1 entrusted the body of the deceased with Rengan (P.W. 2) and rushed to the nearby Police Station and gave a report at about 3.00 p.m. Periyakaruppan (P.W. 11) reduced the same into writing and registered a case and prepared a first information report and sent the same to the Court and the concerned higher officials. He also sent P.W. 2 with a medical memo for treatment and rushed to the place of occurrence and sent the injured Maheswari for treatment with a Constable. Dr. Muthuswami (P.W. 7) examined her at about 3.40 p.m. on 3-12-1991 and found five injuries. P.W.1 was also examined at about 4.00 p.m. and injury was noticed on the nose. Titus Gnanadoss (P.W. 12), the Inspector of Police at the Police Station took up the investigation. Intimation was received by him about death of the deceased

at about 4.40 p.m. Post-mortem was conducted by Dr. Abbas Ali (P.W. 8). After completion of investigation the case was committed to the Court of Session, Kamarajar and the trial was held.

6. During trial of the case, accused persons pleaded innocence. The plea taken was that the deceased had four sisters and one of them was not getting proposals for marriage because everybody knew about her illicit relationship with Azagu Raja. Therefore, P.W. 1 and other members of the family killed the deceased and put blame on the accused-appellants and the ladies of their family. Accused-appellant-Krishnan took the plea that at the relevant point of time he was not present and referred the warning notice given in a daily. His stand was that Azagu Raja had falsely implicated him in the case.

7. Accused-appellant-Ganesan took the plea that at the relevant point of time he was working in Sethupathi High School as Officer, Education Department and, therefore, the question of his presence at the place of occurrence could not have arisen as claimed. He examined D.W. 1, the Head Master of the School to substantiate his claim.

8. The trial Court analysed the evidence on record and found that P.W. 1's evidence was credible and cogent, though some doubts were expressed on the veracity of P.W.2's evidence. Nevertheless since the evidence of P.W. 1 was credible, as noted above, the accused-appellants were convicted and sentenced. But evidence was found to be inadequate so far as three ladies are concerned.

9. Before the High Court the plea of innocence and the plea regarding alibi were pressed into service but the High Court did not accept the same. It found the view expressed by the trial Court to be legally and factually sound and confirmed the conviction and the sentence.

10. In appeal before the High Court, the plea of alibi and the materials produced by accused-appellant-Krishnan were found to be of no consequence. Analysing the evidence and the materials produced by him it was held that the plea of alibi was not established.

11. In support of the appeals, learned counsel for the appellants submitted that it would be extremely unsafe to sustain the conviction on the basis of P.W. 1's evidence. If one reads his statement of Parameswaran as recorded at the police station for the purpose of registering a FIR, it appears that it was after calculated deliberation and cannot be the statement of a person who claimed to have seen the ghastly attacks on his sister. Even with such deliberate planning also the complaint has many loose ends. No definite role was ascribed to accused-appellants-Krishnan and Ganesan. In view of accepted hostility of P.W. 1 with the accused-appellants, the defence plea that P.W. 1 and other members of his family were the authors of the crime is more probable.

12. It is stated that improvement has been made in the Court from what was stated in the statement which was treated as FIR. The claim that P.W. 1 ran after the accused and the deceased on getting up after having fallen down by the impact of the blows given by the accused-appellants-Ayyar Thavar and Porutchyelvan, has not been stated in Court.

13. The medical evidence is at variance with the ocular evidence and, therefore, casts doubt thereon. Even if the prosecution case is accepted in its entirety, accused-appellants 3 and 4 cannot be held guilty of offence punishable under S. 302, I.P.C. as the ingredients of S. 34, I.P.C. are not made out. According to the prosecution, blows were given on the back and this did not result in fatal injuries which were attributed to the assaults by the appellants-Ayyar Thavar and Porutchyelvan. It was submitted that the defence plea of alibi taken by accused-appellant-Ganesan has been wrongly discarded by the trial Court and the High Court and similar is the case with the plea taken by accused-appellants-Krishnan. Had the plea of alibi of accused-appellant been accepted, it would have clearly established how the prosecution was trying to falsely implicate more persons. In other words, it was submitted that the material is inadequate so far as the accused-appellants-Krishnan and Ganesan are concerned and at the most they could be convicted for offence punishable under S. 324 or S. 326, I.P.C. It is pointed out that accused-appellant-Krishnan is an Advocate and has already been in custody for nearly 4 years.

14. Here, it has to be noted that the accused-appellant-Ganesan has died on 12-4-2003 and his appeal has abated in terms of S. 394 of the Code of Criminal Procedure, 1973 (in short the 'Cri. P.C.').

15. In response, learned counsel for the State submitted that the evidence of P.W. 1 has been carefully analysed by both the trial Court and the High Court. In spite of detailed analysis, nothing infirm was noticed therein to warrant rejection thereof. The scenario as described by P.W. 1 has been partially held to be established by the evidence of P.W. 2 though his evidence in its entirety was not accepted by the trial Court. The First Information Report was lodged immediately after the incident and the relevant particulars were given.

16. Rival contentions need careful consideration.

17. The fact that the First Information Report was given almost immediately, rules out any possibility of deliberation to falsely implicate any person. All the material particulars implicating the four appellants were given. It has to be noted that both the trial Court and the High Court have analysed in great detail P.W.'s evidence to form the basis for conviction. Therefore, the trial Court and the High Court rightly acted upon the evidence of P.W. 1. The highly hypothetical imaginative story advanced by the defence to contend that P.W. 1 and his family members killed the deceased is

too hollow to be accepted. If that was really so, they would not have chosen the place and the time for doing so. There is not even a shadow of material to substantiate the plea.

18. The evidence of Dr. Muthuswamy (P.W. 7) and Dr. Abbas Ali (P.W.8) do not in any way run contrary to the ocular evidence. In any event, the ocular evidence being cogent, credible and trustworthy, minor variance, if any, with the medical evidence are not of any consequence.

19. The plea of alibi advanced by the accused-appellants-Krishnan and Ganesan has been rightly discarded after elaborate analysis by the trial Court and the High Court. Section 34 has clear application to the facts of the case, when P.W. 1's evidence is considered. They have been rightly convicted by the application of S. 34.

20. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant."

21. It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence, the importance and primacy of the quality of the trial process. Eye-witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

22. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case. Referring to of probability amounts to 'proof' is an exercise the inter-dependence of evidence and the confirmation of one piece of evidence by another, a learned author says: (See "the Mathematics of Proof II"; Glanville Willimas; Criminal Law Review, 1979, by Sweet and Maxwell, p. 340 (342)).

"The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be

said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

23. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over-emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

24. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained institutions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uniformed legitimisation of trivialities would make a mockery of administration of criminal justice. This position was illuminatingly stated by Venkatachalia, J. (as His Lordship then was) in State of U.P. v. Krishna Gopal and another (AIR 1988 SC 2154). 1989 Cri LJ 288

25. Other plea relates to alibi claimed by accused-appellants-Krishnan and Ganesan. Accused-appellant-Krishnan claimed that he had given a warning notice and it would be evident from the warning notice itself. Accused-Ganesan relied on some documents to claim that he was in a school at the relevant point of time and could not have been at the spot of occurrence. It has been held by the trial Court that the documents were too general in nature and did not in any way establish that at the relevant point of time accused-appellant-Ganesan was not at the site of occurrence. It has also been held by the trial Court that fabricated documents were pressed into service. The conclusion does not suffer from any infirmity.

26. Similarly, warning notice does not indicate anything on which relevance was placed by accused-Krishnan. It did not in any way rule out the possibility of his presence at the place of occurrence. His claim has also been rightly discarded by the Courts below.

27. One of the pleas that was raised with great vehemence related to applicability of S. 34, I.P.C. to the case of accused-appellants-Krishnan and Ganesan. So far as the accused-Ganesan is concerned, in view of abatement of his appeal, there is no necessity to consider the plea. Nevertheless, we have

considered the plea in the background of S. 34, I.P.C. It is pointed out that the alleged assaults by these two accused were on the backside and not on the head, and according to medical evidence, injuries on the head were fatal.

28. It is to be seen whether the accused persons in furtherance of their common intention caused the death of the deceased on the alleged date, time and place. A charge under S. 34 of I.P.C. presupposes the sharing of a particular intention by more than one person to commit a criminal act. The dominant feature of S. 34 is the element of participation in actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert. There is a pre-arranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in S. 34 of the I.P.C. The existence of common intention is to be the basis of liability. That is why the prior concert and the pre-arranged plan is the foundation of common intention to establish liability and guilt.

29. Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of common intention, each person is liable for the result of them all as if he had done them himself; for 'that act' and 'the act' in the latter part of the section must include the whole section covered by a 'criminal act' in the first part, because they refer to it. Constructive liability under S. 34 may arise in three well-defined cases. A person may be constructively liable for an offence which he did not actually commit by reason of :

(1) the common intention of all to commit such an offence (Section 34);

(2) his being a member of a conspiracy to commit such an offence (Section 120-A);

(3) his being a member of an unlawful assembly, the members whereof knew that an offence was likely to be committed (Section 149). Section 34 is framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. The reason why all are deemed guilty in such cases is, that the presence of accomplices gives encouragement, support and protection to the person actually committing the act. The provision embodies the commonsense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually.

30. In view of the factual aspects highlighted above, the inevitable conclusion is that accused Krishnan and Ganesan are equally liable for commission of offence.

31. Applicability of Section 34 depends upon the facts and circumstances of each case. As such no hard and fast rule can be laid down as to the applicability or non-applicability of Section 34. For applicability of the section it is not necessary that the acts of several persons charged with commission of an offence jointly, must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

32. The fact situation in the present case has great similarity with those in Charan Singh v. State of Punjab (AIR 1998 SC 323). In that case principal accused gave a gandasa blow from the sharp side on the head of the deceased. That was the fatal blow. Co-accused also assaulted the deceased with the gandasa on the backside near the shoulder of the deceased. It was held that attack at different places on different sides of the weapons of assault did not show absence of common intention. 1997 AIR SCW 4302 : 1998 Cri LJ 657

33. In the background as highlighted above, charge under Section 302/34, I.P.C. stands established against both the accused persons.

34. In view of the legal principles inferred and the factual position analysed above, the only conclusion is that the appeals sans merit. We dismiss both the appeals.

Appeals dismissed.