SUPREME COURT OF INDIA

Damodar

Vs.

State of Rajasthan

Crl.A.No.1190 of 2001

(Doraiswamy Raju and A. Pasayat, JJ.)

18.09.2003

JUDGEMENT

ARIJIT PASAYAT, J.:-

1. In these three appeals the factual matrix relates to the same incident and the judgment impugned being the same they are heard together and disposed of by this common judgment.

2. Appellant-Munna (in Crl. A.45/2002) faced trial for alleged commission of offence punishable under Section 302, appellant-Balak Dass (in Crl. A. No.46/2002) under Section 302 read with Section 34, Section 302 read with Section 120B and Section 302 read with Section 114, and appellant-Damodar (in Crl. A. No. 1190/2001) under Section 302 read with Section 34, and Section 302 read with Section 120B of the Indian Penal Code, 1860 (in short the 'IPC'). Accused appellant-Munna was found guilty of offence punishable under Section 302, 302 read with Section 120B while other two appellants Damodar and Balak Dass (A-4 and A-2 respectively) were found guilty of offence punishable under Section 302 read with Section 120B. Appellant-Balak Dass was additionally found guilty of offence punishable under Section 302 read with Section 34 IPC. One

Jagdish who also faced trial, was convicted and sentenced. Though he had preferred an appeal before the High Court, but the same was held to have abated on account of appellant's death.

3. They were alleged to be perpetrators of homicidal death of one Guru Ram Ratan Giri (hereinafter referred to as the 'deceased') an octogenarian Sadhu. The motive of crime was stated to be property dispute. On the basis of information given by Shiv Prasad (PW-15) on 18-10-1990, the fateful day, law was set in motion. According to the informant the deceased had gone to repair a cycle. When he did not return for long time, informant went to search for him. When they were returning on the cycle, they found station wagon RSZ 5253 was being driven by accused-Munna rashly. The deceased asked Shiv Prasad to get down from the cycle. The vehicle was being driven by Munna whereas accused-appellants Damodar and Balak Dass were accompanying him along with others. On being instructed by accused-appellant Balak Dass, Munna ran the vehicle over the deceased. At the spot, accused-Jagdish (A-3) who had died during the pendency of the appeal before the High Court, was present and he came in a scooter made sure that the deceased was no longer alive and they all ran away. Another disciple of the deceased named Santosh Giri (PW6) also witnessed the occurrence. Investigation was undertaken by Setha Ram (PW-16). The summom bonum of materials collected during investigation reveals involvement of four accused persons named above and others. Accordingly, charge-sheet was filed. Initially on the basis of information lodged, investigation commenced in respect of offence punishable under Section 307 read with Section 34 IPC, later on after the death of the deceased the case was covered into one for offence punishable under Section 302 read with Section 34 IPC. Seventeen witnesses were examined and 26 documents were exhibited to substantiate prosecution version. The accused persons pleaded innocence and 5 documents were exhibited to substantiate their plea of innocence. On consideration of the materials on record, Additional Sessions Judge, Ajmer found the accused-appellants guilty and convicted them as aforesaid. Accused-Munna was convicted and sentenced to imprisonment for life and to pay a fine of Rs. 5,000/-. Accused-Balak Dass was convicted for an offence punishable under Section 302 read with Section 34 and Section 302 read with Section 120B and was sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/-. Accused-Jagdish was convicted for an offence punishable under Section 302 read with Section 120B and sentenced to imprisonment for life and to pay a fine of Rs. 5,000/-. Similar sentence was imposed on accused-Damodar.

4. In appeal, the High Court of Rajasthan at Jaipur put its seal of approval on the convictions and sentences and dismissed the appeal filed by the accused appellants. As noted above, accused-Jagdish died during the pendency of the appeal before the High Court. Accused persons have separately filed three appeals before this Court.

5. In support of the appeals, Mr. Sushil Kumar, learned senior counsel for the appellants submitted that the version of PW-15, the informant which has been held to be reliable by both the trial Court and the High Court suffers from vulnerability. The evidence on record clearly establishes that his presence at the spot of occurrence at the time of alleged incident is highly doubtful. There is even discrepancy as to the place where the FIR was written. In several documents it was indicated, for example, the inquest report that the death was due to accident and it appears to be a case where after deliberation a plain simple case of accident has been termed as a murder with oblique motive. It is

accepted by prosecution that there was a telephonic call received on the basis of which investigation was started. Therefore, the so-called FIR by PW-15 is one covered by Section 162 of the Code of Criminal Procedure, 1973 (in short the 'Code'). There is no material to show that accused-Munna was knowing driving or was the owner of the vehicle. If the vehicle was being driven at a speed of 40 K. M., it is not possible for any person much less PW-15 to hear from a distance of about 20 feet as to what was being said. Therefore, it is highly improbable that he could have heard accused-Balak Dass asking accused-Munna to run the vehicle over the deceased. The ingredients for bringing in application of Section 120B are clearly absent. There is no material whatsoever brought on record to prove any conspiracy. It was therefore submitted that prosecution version is highly improbable and not supported by any material evidence on record. Since PW-6 has been disbelieved, the defence version that there was no eye-witness as claimed and that PWs-6 and 15 came to the spot after hearing about the accident is more probable.

6. In response, learned counsel for the respondent-State submitted that PW-15 was about 13 years of age at the time of accident. Though his mental faculties were of high order, the fact that he was witnessing before his eyes a carefully planned murder is bound to have created a sense of panic, and disturbance of mental composure. Therefore, minor discrepancies in his evidence cannot be a ground for discarding his credible, cogent and trustworthy evidence. The telephonic call was made by unknown person and did not disclose any cognizable offence. Merely because the officer who received the telephone message wanted to verify whether any incident had taken place, that cannot be a ground to hold that the report lodged by the informant PW-15 was hit by Section 162 of the Code. The case of conspiracy has been clearly made out. As conspiracies are always hatched in a secret manner, there cannot be any direct evidence of conspiracy. Accusations, according to her have been established by evidence on record and the concurrent findings recorded by the two Courts below should not be interfered, and the appeals should be dismissed.

7. In order to consider the correctness of conclusions arrived at by the two Courts below, it has to be seen whether evidence of PW-15 has been rightly accepted to be truthful and reliable. So far as PW-15 is concerned, it has to be noted that at the time of occurrence he was about 13 years of age and was a student. The incident is of October 1990, PW-15 was examined in August 1997 i.e. nearly after seven years, it cannot be lost sight of that long passage of time some times erases the memory and minute details are lost sight of. In this background, it has been stated that if a case is proved perfectly it is argued that it is artificial. If a case has some flaws inevitably because human beings are prone to err, it is argued that it is too imperfect. While, therefore, assessing the evidence one has to keep realities in view and not adopt a hyper sensitive approach. The so-called discrepancies pointed out by learned counsel for the appellants like the vehicle from which witness saw the approaching bus or with which part of the offending vehicle the cycle was hit are too trifle to affect credibility of PW's-15 evidence. Filtering out these minor discrepancies, cream of the evidence remains on which the credibility of the evidence lies. That being so, the conclusions arrived at by the two Courts below on evaluation of evidence do not need any interference.

8. Coming to the plea that the officer did not enquire as to whether the accused was the owner of the vehicle or had a driving licence, significantly when the substance of the accusations was put to the

accused in examination under Section 313 of the Code, no plea was taken that the offending vehicle did not belong to the accused or that he was not driving. Only an evasive reply was given that he (accused-Munna) did not know driving. There is a gulf of difference between saying that he was not driving the vehicle or was not the owner of the vehicle. Examination under Section 313 of the Code is not an empty formality. The purpose is to bring to the notice of the accused the materials brought on record by the prosecution to substantiate its accusation. An opportunity is granted to the accused to explain incriminating circumstances against him and have his say in the background of the evidence brought on record by the prosecution. Therefore, the mere fact that the officer did not enquire as to whether the accused-Munna had a driving licence or not is too insignificant factor to corrode credibility of the ocular testimony. Further, even if he was not the owner of the vehicle or did not have a driving licence, it is really of no consequence if he, in fact, drove the vehicle. Evidence on record clearly establishes that he did so.

9. PW-15 has categorically stated as to how he knew the accused persons and their names. In spite of incisive cross-examination, the defence was not able to even water down the said assertion of PW-15. Accusations have been brought home, as rightly observed by the trial Court and the High Court, by the prosecution so far as accused-Munna is concerned.

10. Coming to the question whether the message received on telephone would be treated as the FIR, the D.D. entry (Ex. P-21) shows that unknown person had given an information about a vehicle hitting the deceased. In order to constitute the FIR, the information must reveal commission of an act which is a cognizable offence.

11. As observed by this Court in Ramsinh Bavaji Jadeja v. State of Gujarat (1994 (2) SCC 685), the question as to at what stage the investigation commences has to be considered and examined on the facts of each case, especially, when the information of an alleged cognizable offence has been given on telephone. Any telephonic information about commission of a cognizable offence, if any, irrespective of the nature and details of such information cannot be treated as first information report. If the telephonic message is cryptic in nature and the officer in charge, proceeds to the place of occurrence on the basis of that information to find out the details of the nature of the offence if any, then it cannot be said that the information which had been received by him on telephone shall be deemed to be a FIR. The object and purpose of giving such telephonic message is not to lodge the first information report but to make the officer in charge of the police station to reach the place of occurrence. On the other hand, if the information given on telephone is not cryptic and on the basis of that information the officer 1994 AIR SCW 2042 : 1994 Cri LJ 3067 in charge is prima facie satisfied about the commission of a cognizable offence and he proceeds from the police station after recording such information to investigate such offence then any statement made by any person in respect of the said offence including about the participants shall be deemed to be a statement made by a person to the police officer in the course of investigation covered by Section 162 of the Code.

12. On reading of the DD Entry (Ex. P-21) we are of the view that the trial court has rightly held that it did not constitute the FIR and therefore the written report lodged by PW-15 vide Exhibit P-20 is not hit by Section 162 of the Code.

13. All the three accused persons have been found guilty of offence punishable under Section 302 read with Section 120B IPC. The conspiracies are not hatched in open, by their nature, they are secretly planned, they can be proved even by circumstantial evidence, the lack of direct evidence relating to conspiracy has no consequence. See E. K. Chandrasenan v. State of Kerala (AIR 1995 SC 1066) . 1995 AIR SCW 1079 : 1995 Cri LJ 1445

14. In Kehar Singh and others v. The State (Delhi Administration) (AIR 1988 SC 1883 at p. 1954), this Court observed: 1989 Cri LJ 1 at P. 71

"Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation or agreement. The express agreement, however, need not be proved. Nor actual meeting of the two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Conspiracy can be proved by circumstances and other materials. See State of Bihar v. Paramhans (1986 Pat LJR 688). To establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be in ferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do so, so long as it is known that the collaborator would put the goods or service to an unlawful use. See State of Maharashtra v. Som Nath Thapa (1996 (4) JT (SC) 615). AIR 1996 SC 1744 : 1998 AIR SCW 1977 : 1996 Cri LJ 2448, Para 24

15. It was noticed that Sections 120-A and 120-B, I.P.C. have brought the law of conspiracy in India in line with English law by making an overt act inessential when the conspiracy is to commit any punishable offence. The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the Court must inquire whether the two persons are independently pursuing the same end or they have come

together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty under Section 120-B of the Indian Penal Code.

16. Decision in Ajay Agarwal v. Union of India and others (1993 (3) JT (SC) 203) may be usefully referred to. It was held: AIR 1993 SC 1637 : 1993 AIR SCW 1866 : 1993 Cri LJ 2516, Para 8

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"8. . . . . .It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements; (1) agreement; (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law definition of 'criminal conspiracy' was stated first by Lord Denman in Jones' case that an indictment for conspiracy must "charge a conspiracy to do an unlawful act by unlawful means" and was elaborated by Willies, J. on behalf of the Judges while referring the question to the House of Lords in Mulcahy v. Reg and House of Lords in unanimous decision reiterated in Quinn v. Leathem: (1868) LR 3 HL 306

1901 AC 495

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rest in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful; punishable of for a criminal object, or for the use of criminal means."

This Court in B. G. Barsay v. State of Bombay held: AIR 1961 SC 1762 : 1961 (2) Cri LJ 828

"The gist of the offence is an agreement to break the law. The parties to such an agreement will be

guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law."

In Yash Pal Mittal v. State of Punjab [(1977) 4 SCC 540] the rule was laid as follows (SCC p. 543 para 9) : AIR 1977 SC 2433 : 1978 Cri LJ 189, Para 9

'The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators.'

In Mohammad Usman Mohammad Hussain Maniyar and others v. State of Maha-rashtra, (1981) 2 SCC 443, it was held that for an offence under Section 120-B, IPC, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act, the agreement may AIR 1981 SC 1062 : 1981 Cri LJ 588 be proved by necessary implication."

17. After referring to some judgments of the United States Supreme Court and of this Court in Yash Pal Mittal v. State of Punjab (1977 (4) SCC 540), and Ajay Aggarwal v. Union of India (1993 (3) SCC 609) the Court in State of Maharashtra v. Som Nath Thapa (1996 4 SCC 659) summarized the position of law and the requirements to establish the charge of conspiracy, as under (SCC p. 668, para 24) : AIR 1977 SC 2433 : 1978 Cri LJ 189[AIR 1993 SC 1637 : 1993 AIR SCW 1866 : 1993 Cri LJ 2516][AIR 1996 SC 1744 : 1996 AIR SCW 1977 : 1996 Cri LJ 2448, Para 24

"24. The aforesaid decisions, weighty as they are, lead us to conclude that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to nay lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be

necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service "to an unlawful use." [See 2000 (8) SCC page 203, State of Kerala v. P. Sugathan and another]. AIR 2000 SC 3323 : 2000 AIR SCW 3548 : 2000 Cri LJ 4584

18. The evidence on record is too scanty and meagre to bring in application of Section 120-B, I.P.C. No material has been brought on record so far as the appellant-Damodar is concerned, except that he belonged to the family of Balak Dass. It is also improbable that PW-15 could have heard about the exhortation by accused Balak Dass to run over the vehicle considering the distance from which the statement is said to have been made and the speed of the vehicle. Merely because accused-Damodar is the son of Balak Dass who it is brought on record had a dispute with the deceased over properties is not sufficient to establish the charge of conspiracy. That being so, the conviction of all the three appellants under Section 302 read with Section 120-B, I.P.C. cannot be maintained. There is also practically no material to maintain the conviction of appellant-Balak Dass for offence punishable under Section 302 read with Section 34, I.P.C. In the ultimate, the conviction of appellant-Munna under Section 302, I.P.C. is maintained but conviction under Section 302 read with Section 120-B, I.P.C. is set aside. The life sentence imposed on him with the fine for offence under Section 302 is maintained and he should serve the remaining sentence. Criminal Appeal No. 45/2002 is allowed to the extent indicated. The appeals filed by accused-Damodar and Balak Dass (Criminal Appeal Nos. 1190/2001 and 46/2002 respectively) are allowed and the conviction and sentence are set aside. They be set at liberty forthwith unless required to be in custody for some other case.

Order accordingly.