SUPREME COURT OF INDIA

Anil Sharma

Vs

State of Jharkhand

Appeal (Crl.) 622-624 of 2003

(Doraiswamy Raju and Arijit Pasayat)

30/04/2004

JUDGMENT

ARIJIT PASAYAT, J.

Six persons faced trial for alleged commission of offences punishable under Sections 147, 148, 149, 326, 307 read with Section 34, 452 read with Section 34 and 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC'). Appellant-Anil Sharma was sentenced to death. The others were sentenced to undergo imprisonment for life under Section 302 read with Section 34 IPC. Each was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.2, 000/- each with default stipulation for the offence punishable under Section 307 read with Section 34 IPC.

The prosecution version in a nutshell is as follows:

Hare Ram Singh @ Manoj Singh (PW-6) who was the cousin of Sudhir Singh @ Bhoma (hereinafter referred to as the 'deceased') lodged fardbayan. He claimed to be an injured in the occurrence in question which took place on 22.1.1999. The occurrence is said to have taken place at 6.45 A.M. on that day in Ward No. 2 of Jail Hospital in Birsa Munda Central Jail, Ranchi and on the basis of fardbayan, Lower Bazar P.S. Case No. 12/99 was registered at 11.00 A.M. on that day and formal F.I.R. (Ext. 8/1) was drawn up. The said Fardbayan (Ext.8) along with the formal F.I.R. (Ext.8/1) was received in the court of C.J.M., Ranchi on 23.01.1999.

Recital in the fardbayan was that PW-6 had gone to Ward No. 2 of the Jail Hospital at 6.45 A.M. on 22.01.1999 as usual to his cousin deceased Sudhir Singh @ Bhoma from his Ward No. 6 of the Jail and he used to sit with Sudhir for the whole day and he also used to keep his clothes etc. there. Soon thereafter, when he was talking with deceased Sudhir Singh, accused-appellants Anil Sharma, Sushil Srivastava, Niranjan Kumar Singh, Md. Hasim @ Madhu Mian all armed with Chhura, Bablu Srivastava and Gopal Das armed with belt and iron rod respectively along with 10 or 12 other persons came near deceased Sudhir Singh and appellant Anil Sharma caught hold of his collar and at this stage deceased asked as to "what has happened, brother" and in the meantime appellant Anil Sharma assaulted him by Chhura and appellant Sushil Srivastava, Niranjan Kumar Singh and Md. Hasim @ Madhu Mian made assault on him by Chhura with which they were armed and appellant Bablu Srivastava and Gopal Das also assaulted him by belt and iron rod respectively, besides 10 or 12 other persons aforesaid who had surrounded and assaulted him. The informant (PW-6) requested appellant Anil Sharma to let off and leave deceased Sudhir Singh and also enquired as to what is the matter, but no avail and the deceased fell on the ground as a result of injuries sustained. Appellant Anil Sharma thereafter mounted attack on the informant and inflicted a blow on his neck by Chhura and appellant Sushil Srivastava and Niranjan Kumar Singh assaulted him by Chhura causing bleeding injury on his head and left hand respectively. The informant (PW-6) also fell down being injured and other persons aforesaid also assaulted him by kicks and fists. There was then the ringing of alarm bell. After few minutes the Jail constables came there blowing whistles and during that period there was a great stampede and deceased Sudhir Singh in an unconscious state along with the injured informant was shifted to R.M.C.H. Ranchi for treatment where the informant was undergoing treatment. But Sudhir Singh died on his way to the Hospital.

The trial Court found the accused persons guilty on consideration of the evidence led by the prosecution by examining 18 witnesses. Twelve witnesses were examined on behalf of the accused persons who pleaded innocence and false implication. They took a specific stand that they were in their wards inside the jail and, therefore, the question of committing any murder was totally improbable. There was no report made by Hare Ram Singh (PW-6) as claimed. The Trial Court recorded conviction and awarded sentences as afore-noted. For its conclusions Trial Court primarily relied on evidence of PWs 5 and 6, who claimed to be eye witnesses.

In view of the death sentence imposed on accused Anil Sharma a reference was made to the Jharkhand High Court under Section 366 of the Code of Criminal Procedure, 1973(in short the 'Code'). The High Court upheld the conviction as recorded by the trial Court but altered the sentence of death imposed on the accused appellant-Anil Sharma to one of life imprisonment. In substance, except the modification of sentence so far as accused appellant Anil Sharma is concerned, the appeal was dismissed. Evidence of witnesses was analysed in view of the stand that the so-called eye witnesses version is clearly not capable of acceptance.

In support of the appeals, it has been submitted that there was delay in recording the FIR. There was non-examination of many vital witnesses. Evidence of the defence witnesses was not carefully analysed. PW-6 later on made a statement under Section 164 of the Code that his evidence was recorded under pressure. There were exaggerations in respect of what had been indicated in the Fardbayan as recorded. Non production of the hospital register and non examination of the Warden and Head Warden, cast serious doubts on the veracity of the prosecution version and the Courts below should not have brushed aside those infirmities lightly. The production of the register and the

examination of the warden and head warden would have established that place of occurrence as indicated is highly improbable. The citus has not been proved. No blood stains have been found or seized. PW-6 is not a resident of the jail. He claimed to be an inmate of Ward No.6 and though he stated that he was inside the camp of the jail, nothing material in that regard has been established. As soon as PW-6 came out of the jail in May 2001, he filed an affidavit stating as to how the statements made by him during trial were wrong. It has been erroneously held that no prejudice was caused by not getting him re-examined. Different yardsticks have been adopted for the prosecution and the defence witnesses. PW-5's presence at the spot of occurrence as claimed is highly doubtful. The canteen manager himself has improbabilised the presence of the witnesses. Even if it is accepted that PW-5 was present his evidence does not guarantee truthfulness. There was no corroborative material. After having discarded the evidence of PWs 1, 2 and 4 there was no justification to act on the evidence of PWs 5 and 6. The FIR has been despatched after considerable delay and there has been delayed examination of PW-5. So far as PW-5 is concerned, he was examined under Section 164 of the Code. He has not named Sushil Srivastava in the statement recorded before the Magistrate though in the cross examination he accepted that what was stated before the Magistrate was correct. The assault part as indicated by PW-6 in the so-called FIR was given a go by in Court.

Though in the FIR it was stated that the assault was made by respective weapons the Court has come to a presumptive conclusion that no physical assault was made but by holding the head the killing by accused Anil Sharma was facilitated.

Section 34 IPC has been wrongly applied. There was no specific role attributed to any of the accused persons except the accused Anil Sharma. The inconsistency between the evidence of PWs 5 and 6 probabilises the defence version. Even if it is accepted that the accused persons except accused Anil Sharma were present if there was no participation the conviction as made is not maintainable.

In response, learned counsel for the State submitted that in addition to the evidence of the aforesaid witnesses, the evidence of other PWs more particularly, PW-12 shows that the occurrence took place inside the jail. The concurrent views of the trial Court and the High Court should not be interfered with. The evidence of PWs 5 and 6 shows that they are reliable and believable. Merely because some documents have not been produced that does not in any way dilute the prosecution version or render the evidence of the eye-witnesses doubtful. No prejudice has been caused to the accused in any manner by not accepting the prevaricating stand of PW-6.

The evidence of PWs 5 and 6 has been attacked by the accused-appellants on the ground that their presence at the alleged spot of occurrence is not believable. Non-production of certain documents and non-examination of some of the official witnesses were pressed into service. It is true that PW-6 made an application for getting examined afresh and the same was turned down. Again the defence filed a similar application. The Court considered the same and found it to be without substance. PW-6 was examined in Court on 22.1.2000, 25.1.2000 and 27.1.2000. He made an application before Trial Court on 17.7.2001 about alleged pressure on him to depose falsely. A bare reading of the same shows that the same is extremely vague and bereft of substance. Though it was stated pressure was put on him and he was subjected to third degree treatment, he has not specifically named anybody and made vague mention about "some police officials".

Further, the accused at different stages prayed to recall PWs 5 and 6 which the Trial Court rejected. The orders had attained finality. The petition of PW-6 was considered in detail by the Trial Court and was rejected by order dated 8.8.2001. It appears that accused persons had filed an application on 3.7.2001 with a prayer to examine PW-6. Same was also rejected by order dated 5.9.2001. Both the orders dated 8.8.2001 and 5.9.2001 attained finality and also do not suffer from any infirmity.

So far as one of the points which was highlighted was that no cogent reasons have been given to discard the prayer made by PW-6 for his fresh examination. This aspect was specifically urged before the High Court and has been considered. It was held that the plea appeared to be after thought and there was no cogent reason for accepting the prayer. It is true that in a given case the accused can make an application for adducing additional evidence to substantiate his claim of innocence. Whenever any such application is filed before the Court, acceptability of the prayer in question is to be objectively considered. The High Court has elaborately dealt with this issue and concluded as to how the prayer was rightly held to be not tenable.

It is not that in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine or cavalier manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court ultimately can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

Non-production of documents which the appellants claim would have strengthened the claim of absence of PW-5 cannot in any way dilute the evidentiary value of the oral testimony. Even though the witnesses have been cross-examined at length, no material inconsistency has been elicited to discard the evidence of PWs 5 and 6. One of the pleas which was pressed into service is alleged relationship of PWs 5 and 6 with deceased and their criminal antecedents. As rightly noticed by the High Court on the aforesaid basis the evidence which is found truthful and credible otherwise should not be discarded. The Courts have to keep in view that in such matters deep scrutiny is necessary. After having kept these principles in view the Trial Court and the High Court have found that the evidence when carefully analysed on the whole was credible. After deep scrutiny the Courts below have found that there is ring of truth in the evidence of PWs 5 and 6.

So far as the delay in despatch of the FIR is concerned, it was noted by the High Court that the informant's Fardbayan was recorded at 10.00 a.m. on 22.1.1999. The inquest report was prepared on 22.1.1999 at 1925 hours. The inquest report was prepared by Executive Magistrate and the case

number is also mentioned. That being so, plea that the Fardbayan being ante timed has not been established. Post mortem was conducted on 22.1.1999 at 2200 hours. Above being the position, there can be no grain of doubt that the Fardbayan was recorded on the date of occurrence and filed at the indicated time and the case has been instituted on the basis of the said Fardbayan. Finding recorded by the High Court that Fardbayan was not ante timed is amply supported by evidence on record and no adverse view as claimed by the accused-appellants can be taken.

So far as the question as to whether equal treatment being given to the evidence of prosecution and defence witnesses is concerned, there can be no quarrel with the proposition in law. In the present case it is not that the Courts below glossed over the evidence of defence witnesses. In fact detailed analysis has been made to conclude as to why no importance can be attached to their evidence. **After carefully analysing the prosecution evidence and that tendered by the accused, the trial Court recorded the conviction. The High Court in appeal made further detailed analysis of the evidence and came to hold that there was no infirmity in the conclusions of the trial Court. The conclusions are not shown to suffer from any infirmity whatsoever to warrant interference #.**

Another point stressed by learned counsel for appellant relates to applicability of Section 34 IPC.

Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the **charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. #** As observed in Ashok Kumar v. State of Punjab), the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the 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.

As it originally stood the Section 34 was in the following terms:

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone." *

In 1870, it was amended by the insertion of the words "in furtherance of the common intention of all" after the word "persons" and before the word "each", so as to make the object of Section 34 clear. This position was noted in Mahbub Shah v. Emperor 1945 AIR (PC) 118).

The Section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in Ch. Pulla Reddy and Ors. v. State of Andhra Pradesh 0), Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.

The legality of conviction by applying Section 34 IPC in the absence of such charge was examined in several cases. In Willie (William) Slaney v. State of Madhya Pradesh it was held as follows:

"Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant" * .

The above position was re-iterated in Dhanna etc. v. State of Madhya Pradesh 0).

Section 34 IPC has clear application to the facts of the case on all fours, and seems to have been rightly and properly applied also. #

Looked at from any angle, judgment of the High Court does not suffer from any infirmity to warrant interference. The appeals fail and are dismissed.