SUPREME COURT OF INDIA

Jodhraj Singh

Vs.

State of Rajasthan

Crl.A.No.634 of 2007

(S.B. Sinha and Markandey Katju JJ.)

27.04.2007

JUDGMENT

S.B. SINHA, J:

Leave granted.

Appellant together with various others were tried for commission of an offence under Section 302 of the Indian Penal Code for causing murder of one Vishava Priya @ Lalla on 13.12.1992. A First Information Report in relation to the said incident was lodged by one Ashok Kumar Sharma. The incident allegedly took place at about 6 p.m. on the said date. In the First Information Report, the complainant alleged that at the said date and time when he himself and his uncle Mahendra Kumar had been getting the Pattis loaded near the road, a tempo (a three wheeler) occupied by one Ajij Naeem, Bhupendra and the appellant arrived. The accused were armed with weapons like lathi, dhariya, ballam and sariya. As there existed a dispute between the deceased and Bhupendra, apprehending that they may kill him, the complainant and the said Mahendra Kumar immediately came to the place of occurrence and found the appellant and others assaulting the deceased. They, on seeing them, ran away. A First Information Report was lodged at about 9.10 p.m. on the same day. Appellant was named therein along with others, wherein it was alleged that he was armed with a gandasi and he along with others assaulted the deceased. It was furthermore alleged that Bhupendra had thrown a stone on the deceased, due to which he suffered a wound on his head. Investigation into commission of the offence was carried out. Upon completion of the investigation, a chargesheet was filed against the appellant as also the said Ajij, Naeem and Bhupendra.

Appellant had been absconding for about seven years. His case was separated from that of the other accused. Two separate trials, thus, took place in relation to the said incident.

In the first trial involving the accused named in the First Information Report, other than the appellant, several witnesses were examined. Two of them, viz., Ram Het (PW-8) and Ghasi Lal (PW-9) fully supported the prosecution case. One Pratap Yadav (PW-10) and Alok Tripathi (PW-14), however, were declared hostile therein. In the second trial, where the appellant was involved, they also turned hostile. Appellant was, however, convicted. Four separate appeals were preferred before the High Court.

The learned Sessions Judge as also the High Court, however, relied on the testimonies of the said witnesses as they, when confronted with their earlier statements, accepted that they had deposed

against the appellant.

According to them, they did so on having been asked to do so by some villagers. The learned Sessions Judge as also the High Court did not rely upon that part of the testimonies of the said witnesses. The High Court, therefore, by reason of the impugned judgment upheld the conviction and sentence of the appellant.

Mr. Mohan Pandey, learned counsel appearing on behalf of the appellant, at the very outset drew our attention to the fact that the deceased was a known criminal and a large number of cases were pending against him and as such the possibility of his being killed by some unknown persons cannot be ruled out. It was submitted that as four prosecution witnesses had turned hostile, the impugned judgment cannot be sustained.

The first informant Ashok Kumar Sharma examined himself as PW-

17. He, as noticed hereinbefore, not only named the appellant in the First Information Report but also in his deposition, he categorically stated about the role played by each of the accused persons. He stated that the appellant took part in the entire assault and furthermore inflicted a gandasi blow on the head of the deceased. He knew all the accused persons including the appellant from his childhood.

Both the learned Trial Judge as also the High Court relied upon the testimonies of the said witness. We see no reason to differ therewith.

Dr. Rakesh Kumar Sharma (PW-13) conducted the post mortem on the dead body of the deceased at about 9.45 a.m. on 14.12.1992. He found the following ante-mortem injuries on the person of the deceased:

"1. Abrasion < x < on left shoulder posteriorily.

2. Lacerated wound 1" x 1/2" x B.D. vertical on left side of chin.

3. Lacerated would 1" x =" x 1" on left angle of mouth.

4. Lacerated wound 3" x 1" x 2" on fore head left side.

Bone broken in pieces, brain matter, badly lacerated eye ball pushed inside.

5. Abrasion 1" x =" vertical on left cheek.

6. Lacerated wound 1" x =" x =" on left frontal parietal scalp.

7. Incised wound 4" x 2" x 2" transverse tempo parietal region left side, and 8. Bruise 1" x 1" on nose."

Ram Het (PW-2 in the first trial and PW-8 in the second) spoke in details about the participation of the accused persons including the appellant herein. So did the other eye-witness Ghasi Lal (PW-9).

In both the trials, common witnesses were examined. At the cost of repetition, we may state that the first informant had supported the prosecution case in its entirety in both the trials. He has been

believed.

The High Court took up all the appeals together for hearing. The only distinctive fact in the case involving the appellant was PWs 8 and 9 turned hostile, but the same, in our opinion, would not materially alter the prosecution case, as a conviction can even be based on the testimony of a single witness. The courts furthermore are entitled to rely upon a part of the testimony of a witness who has been permitted to be cross-examined by the prosecution.

In State of U.P. v. Ramesh Prasad Misra and Another [(1996) 10 SCC 360], this Court opined:

"7. The question is whether the first respondent was present at the time of death or was away in the village of DW 1, his brother-in-law. It is rather most unfortunate that these witnesses, one of whom was an advocate, having given the statements about the facts within their special knowledge, under Section 161 recorded during investigation, have resiled from correctness of the versions in the statements. They have not given any reason as to why the investigating officer could record statements contrary to what they had disclosed. It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted"

[See also Gurpreet Singh v. State of Haryana, (2002) 8 SCC 18 and Gagan Kanojia & Anr. v. State of Punjab, 2006 (12) SCALE 479] Moreover, while recording a judgment of conviction, the court may consider a part of the deposition of a witness who had been permitted to be cross-examined by prosecution having regard to the fact situation obtaining in the said case. How the evidence adduced before it shall be appreciated by the court would depend on the facts and circumstances of each case.

It is trite that only because a witness, for one reason or the other, has, to some extent, resiled from his earlier statement by itself may not be sufficient to discard the prosecution case in its entirety. The courts even in such a situation are not powerless. Keeping in view the materials available on record, it is permissible for a court of law to rely upon a part of the testimony of the witness who has been declared hostile.

Appellant was seen in the company of the other accused. Sufficient materials have been brought on records to establish that he participated in commission of the offence. All the accused persons came together in a tempo. They were armed with various weapons. They assaulted the deceased. The learned Sessions Judge as also the High Court found existence of a motive for commission of the offence. They left the place of occurrence together. It may be that the ultimate cause of death was found to be an assault by stone on the head of the deceased which is said to be the act of Bhupendra but only by reason thereof existence of the common intention on the part of the appellant cannot be said to be absent.

Reliance by the learned counsel for the appellant on Mithu Singh v.

State of Punjab [(2001) 4 SCC 193] is misplaced. Therein, no overt act was attributed to the appellant therein. The court found that no evidence was brought on records as against him, save and except ipse dixit on the part of the witnesses. This Court, in the aforementioned fact situation, opined:

"6. To substantiate a charge under Section 302 with the aid of Section 34 it must be shown that the

criminal act complained against was done by one of the accused persons in furtherance of the common intention of both. Common intention has to be distinguished from same or similar intention.

It is true that it is difficult, if not impossible, to collect and produce direct evidence in proof of the intention of the accused and mostly an inference as to intention shall have to be drawn from the acts or conduct of the accused or other relevant circumstances, as available. An inference as to common intention shall not be readily drawn; the culpable liability can arise only if such inference can be drawn with a certain degree of assurance.

At the worst Mithu Singh, accused-appellant, knew that his co-accused Bharpur Singh was armed with a pistol. The knowledge of previous enmity existing between Bharpur Singh and the deceased can also be attributed to Mithu Singh. But there is nothing available on record to draw an inference that the co-accused Bharpur Singh had gone to the house of the deceased with the intention of causing her death and such intention was known to Mithu Singh, much less shared by him. Simply because Mithu Singh was himself armed with a pistol would not necessarily lead to an inference that he had also reached the house of the deceased or had accompanied the co-accused Bharpur Singh with the intention of causing the death of Gurdial Kaur.

In our opinion, an inference as to Mithu Singh, accused-appellant having shared with Bharpur Singh a common intention of causing the murder of the deceased Gurdial Kaur cannot be drawn. His conviction under Sections 302/34 IPC cannot be sustained and must be set aside."

Such is not the position here.

regards formation of common intention, this Court opined:

"Section 34 of the Indian Penal Code envisages that "when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons, is liable for that act, in the same manner as if it were done by him alone". The underlying principle behind the said provision is joint liability of persons in doing of a criminal act which must have found in the existence of common intention of enmity in the acts in committing the criminal act in furtherance thereof. The law in this behalf is no longer res integra. There need not be a positive overt act on the part of the person concerned. Even an omission on his part to do something may attract the said provision. But it is beyond any cavil of doubt that the question must be answered having regard to the fact situation obtaining in each case."

[See also Triloki Nath and Others v. State of U.P., (2005) 13 SCC 323] In Pardeep Kumar v. Union Administration, Chandigarh [(2006) 10 SCC 608], this Court opined:

"12. It is settled law that the common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. 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."

We are, having regard to the materials brought on record by the prosecution, satisfied that the appellant shared common intention with the other accused in committing the crime.

We, therefore, do not find any infirmity in judgments of the learned Sessions Judge and the High

Court. The appeal is dismissed accordingly.