SUPREME COURT OF INDIA

Babu & Anr

Vs.

State Rep.By Insp.of Police

Crl.A.No. 358-359 of 2008

(A.K. Patnaik and H.L.Gokhale,JJ.)

19.03.2013

JUDGMENT

A.K.Patnaik, J.

1. These are appeals against the judgment dated 06.09.2007 of the Division Bench of the Madras High Court in Criminal Appeal Nos.641, 551 and 552 of 2006.

FACTS

2. The facts very briefly are that on 25.01.2004 at 22:45 hours, Dhanaprabhu (hereafter referred to as the 'informant') lodged a First Information Report in Police Station K.4, Anna Nagar. In this First Information Report, the informant stated: his father and he had been running a plastic company in the name of 'Economic Plastic Industries' and his younger brother, Ravi, is also in the said business. There was previous enmity between Ravi and one Elumalai and on 25.01.2004 at around 5.30 p.m. Elumalai telephoned to the wife of Ravi, Vijayalakshmi, and threatened her saying 'Ask your husband to behave or else, things will be different' and Vijayalakshmi informed this to her husband Ravi. On the same day, at around 10.00 p.m., the informant, Ravi and his friend Gubendiran were on their way to Naduvankarai Pillaiyar Kovil Street, through the Naduvankarai Bridge. While crossing the Seema Matriculation School at around 10.15 in the night, they saw Elumalai, and Ravi asked Elumalai as to why he telephoned to his wife and threatened her, and at once Elumalai and Prakash retaliated and took out knives from their hips and hacked Ravi on his head. Ravi's head got cut and smashed and Ravi fell down in a pool of blood. Gubendiran, who attempted to prevent the attack, was hacked by Prakash with a knife and this was intercepted by Gubendiran with his left hand and Gubendiran started bleeding. Thereafter, Babu, Senthil and Nagaraj, who were with Elumalai, hacked on the head of Ravi with their knives and all of them ran away with their knives towards the East and Ravi died on the spot. Pursuant to the FIR, a case was registered under Sections 147, 148, 341, 324 and 302 of the Indian Penal Code, 1860 (for short 'the IPC'). After investigation, a charge-sheet was filed against Elumalai (A-1), Prakash (A-2), Babu (A-3), Senthil (A-4), Nagaraj (A-5) and Udaya (A-6).

3. At the trial, the informant was examined as PW-1. Gubendiran, who accompanied Ravi on 25.01.2004 to the place of occurrence and witnessed the occurrence and got injured, was examined as PW-2. Nagarajan, who had gone in search of Ravi on 25.01.2004 at about 10 O' clock in the night and come to the place of occurrence, was examined as PW-3. On the basis of the evidence of PW-1, PW-2 and PW-3 as well as other witnesses, the trial court convicted A-1, A- 2, A-3 and A-4 under Sections 148 and 324 IPC read with Section 149 IPC and Section 302 IPC read with Section 149 IPC and also convicted A-6 under Sections 147 and 324 IPC read with Section 149 IPC and Section 302 IPC. The trial court, however, acquitted A-5 of all the charges. Aggrieved, the appellants filed Criminal Appeal Nos. 509, 641, 551 and 552 of 2006 before the High Court and by the impugned judgment, the High Court acquitted A-6 (the appellant in Criminal Appeal No. 509 of 2006), but maintained the convictions of A-1, A-2, A-3 and A-4. Aggrieved, A-1, A-2, A-3 and A-4 have filed these criminal appeals.

CONTENTIONS ON BEHALF OF THE PARTIES

4. Mr. P.R. Kovilan Poonakunpran, learned counsel appearing for A-3 and A-4, the appellants in Criminal Appeal No. 353 of 2008, and Mrs. Anjani Aiyagari, learned counsel appearing for A-1 and A-2, the appellants in Criminal Appeal Nos. 358-359 of 2008, submitted that originally eight accused persons were charged for the offence under Section 302 read with 149 of the IPC, but two of these accused persons were juveniles and were proceeded against under the Juvenile Justice (Care and Protection of Children) Act, 2000, and out of the remaining five accused persons, the trial court acquitted A-5 and the High Court acquitted A-6 and there remain only four accused persons (A-1 to A-4) who have been convicted under Section 302/149 of the IPC. They submitted that for a conviction under Section 302 of the IPC with the aid of Section 149 of the IPC, a minimum of five accused persons have to form an unlawful assembly with the common object of causing the death of a person and in this case since after the acquittal of A-6 by the High Court, there are only four accused persons, the conviction under Section 302/149 of the IPC is not sustainable. In support of this submission, they relied on the decision of this Court in Mohan Singh and Another v. State of Punjab (AIR 1963 SC 174), Shaji and Others v. State of Kerala[(2011) 5 SCC 423] and Raj Kumar alias Raju v. State of Uttaranchal (now Uttarakhand) [(2008) 11 SCC 709].

5. Learned counsel for the appellants next submitted that the offence under Section 302 of the IPC is in Chapter XVI of the IPC titled "Of Offences Affecting the Human Body", whereas Sections 141 and 149 of the IPC are in Chapter VIII of the IPC, which is titled "Of Offences against the public tranquility". They submitted that the provisions relating to unlawful assembly thus deal with offences against public tranquility and can have no application to offences against the human body and therefore the High Court is not right in maintaining the conviction of the appellants under Section 302 of the IPC with the aid of Section 149 of the IPC.

6. Learned counsel for the appellants argued that the very foundation of the prosecution case is that on 25.01.2004 at about 5.30 p.m. A- 1 had telephoned to the wife of the deceased and threatened her and the wife of the deceased informed the deceased and at 10.00 p.m. on the same day the deceased along with PW-1 and PW-2 went to the place where the incident took place, but the prosecution has not been able to prove that there was a telephone in the house of the deceased. In this context, learned counsel for the appellants referred to the evidence of the Investigating Officer, PW-13, to the effect that he had not enquired whether the deceased had a telephone facility at his residence. They submitted that since the foundation on which the prosecution case begun has not been proved, the trial court and the High Court should not have held the appellants guilty.

7. Learned counsel for the appellants submitted that the evidence of PW-1, PW-2 and PW-3, who claim to be eye-witnesses, should not have been believed by the trial court and the High Court to convict the appellants. They submitted that only PW-2 was with the deceased at the time of the occurrence, and PW-1 in fact came to the place of occurrence in search of the deceased after the occurrence had taken place. They submitted that there were discrepancies in the evidence of PW-1, PW-2 and PW-3. They pointed out that while PW-1 has stated that when the incident took place there were 40 persons at the place of occurrence, PW-2 has stated that there was nobody nearby except the accused persons and PW-3 has stated that he has neither seen PW-1 nor PW-2 at the place of occurrence. Learned counsel for the appellants submitted that the truth is that PW-2 had earlier named someone else as the accused, but he was put up in the lockup and pressurized by the police to name the appellants as the accused persons. They referred to the evidence of PW-2 to show that he was actually put in the lockup for five days and that he had given the oral complaint to the authorities in this regard.

8. They further submitted that there were several doubts with regard to the date and time when the FIR was lodged as well as the place where the FIR was lodged. They referred to the evidence of PW-10, the Head Constable of K.4 Police Station where the FIR was registered, to show that he has not stated that the FIR was registered at the Police Station. They submitted that PW-1 has also stated in his evidence that when he went between 10.30 p.m. and 11.00 p.m. to the Police Station to lodge the FIR, he saw the Sub- Inspector and the Sub-Inspector wrote the FIR, but he admits that he does not know the name of the Sub-Inspector and that he saw the Inspector on the next day and on the day when he lodged the FIR, he did not see the Inspector. On the other hand, the FIR (Ext. P-21) shows that the Inspector of Police had himself signed the FIR on 25.01.2004. They cited the decision of this Court in Meharaj Singh (L/Nk.) etc. v. State of U.P. [(1994) 5 SCC 188] for the proposition that where there is delay in lodging of the FIR, there is danger of introduction of a false prosecution story as an afterthought.

9. Learned counsel for the appellants submitted that the investigation was defective inasmuch as the knives (MO 1 to MO 5), which were alleged to have been used on the deceased by the appellants and recovered by the Police, have not been examined by finger print experts to find out the real accused persons. They submitted that the appellants should be acquitted of

the charge under Section 302/149 of the IPC for the same reasons for which A-5 and A-6 have been acquitted by the trial court and the High Court.

10. Finally, learned counsel for the appellants submitted that the evidence led through PW-1, PW-2 and PW-3, in any case, shows that after provocation by the deceased there was a sudden fight between the accused persons on the one hand, and the deceased, PW-2 and PW-3, on the other hand, and therefore the offence allegedly committed by the appellants falls under Exception 4 toSection 300 of the IPC and the appellants are at best to be guilty of culpable homicide not amounting to murder and are liable to punishment under Section 304 of the IPC. They submitted that the appellants have already undergone 11 years of imprisonment and should now be set at liberty. In support of this submission, they relied on the decisions of this Court in Felix Ambrose D'Souza v. State of Karnataka [(2009) 16 SCC 361], State of Andhra Pradesh v. Thummala Anjaneyulu [(2010) 14 SCC 621] and Veeran and Others v. State of Madhya Pradesh [(2011) 11 SCC 367].

11. In reply, learned counsel for the State, Mr. V. Balaji, submitted that both the trial court and the High Court have believed the evidence of PW-1, PW-2 and PW-3 and there is no good ground shown for this Court to discard the evidence of the aforesaid three eye-witnesses. He further submitted that it is not correct that the deceased did not have a telephone at his house as the evidence of PW-1 would show that Vijayalakshmi, the wife of the deceased, had a cell phone. He further submitted that PW-2 is a witness who was injured in the occurrence and this will be clear from the FIR in which it is stated that PW-2, who attempted to prevent the attack on the deceased, was hacked by Prakash with a knife and as a result he got a cut on the left hand. He submitted that the discrepancies in the evidence of PW-1, PW-2 and PW-3 pointed out by the learned counsel for the appellants, if any, are not material and in any event do not belie the prosecution case against the appellants that the knives with which the offence was committed (MO 1 to MO 5) have not been examined by finger print experts. He further submitted that the FIR also corroborated the substantive evidence of PW-1, PW- 2 and PW-3 and was registered within half an hour of the incident without any delay. He submitted that the contention of the appellants that date and time of the lodging of the FIR was doubtful has no substance as would be clear from Exts. P-1 and P-21 as well as the evidence of PW-1 and PW-13.

12. In reply to the contention of the appellants that the appellants are at best guilty of culpable homicide not amounting to murder under Section 304 of the IPC, he submitted that a perusal of the post mortem report (Ext. P-7) and the evidence of the Doctor who conducted the postmortem, PW-7, would show that there were multiple injuries on the face and head of the deceased on account of which the deceased died. He argued that the injuries were of a very grave nature and would in the ordinary course cause death of a person and therefore the appellants by causing the injuries intended to cause the death of the deceased and are guilty of the offence under Section 302 of the IPC.

FINDINGS OF THE COURT

13. It is not necessary for us to deal with the contention of the learned counsel of the appellants that the provisions of Sections 141 and 149, IPC, relating to unlawful assembly would not be attracted in case of offences affecting the human body such as the offence under Section 302, IPC, nor is it necessary for us to deal with the contention of the appellants that after the acquittal of A- 5 and A-6 by the trial court and the High Court respectively, there were only four accused persons and for constituting 'unlawful assembly', a minimum of five persons are necessary because we find from the evidence that the conviction of A-1, A-2, A-3 and A-4, the appellants herein, underSection 302, IPC can be sustained without the aid of Sections 141 and 149, IPC. PW-1 has stated that at 10.25 p.m. on 25.01.2004, they saw that A-1 and A-2 had threatened the deceased and at that time A-2 was standing close to A-1 and when the deceased abused A-1, all of them hacked the deceased on his head and the deceased swooned and fell down and at once A-1, A- 2, A-3 and A-4 along with three others attacked the deceased with the knives. PW-2 has similarly stated that when the deceased asked A-1 as to why he was threatening his wife by phone, at once A-1 took out his knife from his hip and hacked the deceased and the deceased fell down and A-1 cut his head and face and thereafter A- 1, A-2, A-3, A-4 and three other persons hacked the deceased. PW-3 has also stated that when he went to Naduvankarai to meet the deceased, A-1 and A-2 hacked the deceased and the other accused persons kicked the deceased and tortured the deceased and the accused were armed with knives. Thus, the evidence of PW-1, PW-2 and PW-3 makes it clear that the deceased was attacked by A-1, A-2, A-3 and A-4 in furtherance of their common intention and therefore all the four accused persons (the appellants) were liable for the criminal act of causing the death of the deceased under Section 34, IPC, as if the criminal act was done by each of them alone. In Dhanna etc. v. State of M.P. [(1996) 10 SCC 79], this Court has held that where the Court finds that the strength of the assembly was insufficient to constitute it into "unlawful assembly", but the remaining persons who participated in the crime had shared common intention with the main perpetrators of the crime, the Court can take the aid of Section 34 of the IPC even if the said Section was not specifically mentioned in the charge.

14. We have considered the discrepancies in the eye-witnesses account of the occurrence given by PW-1, PW-2 and PW-3 pointed out by the learned counsel for the appellants with regard to the names and number of persons who were present at the place of occurrence when the incident took place on 25.01.2004, but we find that PW-1, PW-2 and PW-3 were examined on 21st September, 2005 more than one and a half years after the incident and it was natural for them to differ in some respects of what they saw and what they remember. As has been held by this Court in State of Rajasthan v. Smt. Kalki and Another [(1981) 2 SCC 752], in the depositions of witnesses there are always normal discrepancies however honest and truthful the witnesses may be and these discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like.

15. We have also considered the contention of the learned counsel for the appellants that it is doubtful that the FIR was registered at the Police Station and that the FIR may not have been registered on 25.01.2004 but on the next day when PW-1 met the Inspector of the Police

Station. We, however, find that the Inspector of Police who has been examined as PW-13 has stated very clearly in his evidence that on 25.01.2004 at 10.45 pm when he was at the Police Station, PW-1 lodged a complaint and he wrote down that complaint and read it over to PW-1 and obtained his signature and registered Crl No.181/2004 under Sections 147, 148, 341, 324 and 302, IPC. The complaint written by PW-1 has been marked as Ext.P-1 and the printed FIR prepared by PW-13 has been marked as Ext.P-21. PW-13 has further stated that the printed FIR was sent to the 5th Metropolitan Magistrate and the copies were sent to the higher officials concerned and immediately he visited the place of occurrence at 11.30 p.m. The evidence of PW-13 is supported by the evidence of PW-1 who has stated that after his brother died, he informed his house and informed the police at K.4 Anna Nagar Police Station and the police came and saw the place at which the murder was committed. In his cross examination, however, he has stated that Sub-Inspector had written the FIR and that he did not know the name of the Sub-Inspector and he saw the Inspector on the next day and when he lodged the complaint he has not seen the Inspector. On a reading of the evidence of PW-1, in its entirety, one can only come to the conclusion that the FIR was lodged by PW-1 on 25.01.2004 soon after the incident between 10.30 p.m. to 11 p.m. but PW-1 was confused as to the designation of the officer before whom he lodged the FIR, the Sub-Inspector or the Inspector. We have, therefore, no doubt that the FIR was lodged at the K.4 Police Station within half an hour of the incident on 25.01.2004. Hence, the decision of this Court in Meharaj Singh (L/Nk.) etc. v. State of U.P. (supra) that where there is delay in lodging of the FIR, there is danger of introduction of a false prosecution story does not apply to the facts of the present case.

16. We also do not find any merit in the submission of learned counsel for the appellants that there was no evidence to show that at the residence of the deceased there was a telephone through which the wife of the deceased received the threat call from A-1 at 5.30 p.m. on 25.01.2004. PW-1 has stated that the wife of the deceased Vijayalakshmi had a mobile phone and A-1 had talked over cell phone to Vijayalakshmi. Similarly, we do not find any merit in the submission of learned counsel for the appellants that the prosecution case should not be believed as the knives (MO 1 to MO

5) which have been recovered had not been examined by the finger print experts to find out the real accused persons because in this case there is direct evidence of three eye witnesses, PW-1, PW-2 and PW-3, to establish beyond reasonable doubt that the appellants had struck the deceased with knives. If a defect in the investigation does not create a reasonable doubt on the guilt of the accused, the Court cannot discard the prosecution case on the ground that there was some defect in the investigation.

17. We are also not convinced with the submission of the learned counsel for the appellants that this was a case which fell under Exception 4 to Section 300, IPC. Exception 4 to Section 300, IPCis quoted hereinbelow:

> "Exception 4. Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and

without the offender having taken undue advantage or acted in a cruel or unusual manner." The language of Exception 4 to Section 300 is, thus, clear that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel provided the offender has not taken undue advantage or acted in a cruel or unusual manner. In this case, there is no evidence to show that the deceased was armed in any manner when he questioned A-1 as to why he had threatened his wife. On the other hand, the appellants were armed with knives and attacked the deceased on his head and face even after he fell down. Thus, A-1, A-2, A-3 and A- 4, who were the offenders, have taken undue advantage and acted in a cruel and unusual manner towards the deceased who is not proved to have been armed."

18. Moreover, we find from the evidence of PW-7, the doctor who conducted the post mortem of the deceased on 26.01.2004 at around 12.45 hours, that he found as many as six injuries on the head and face of the deceased. These injuries are extracted hereinbelow:

"Injury 1: A bruised injury in red colour admeasuring 3x2 cm on the left cheek and in 2x2 cm at the tip of the nose.

Injury 2: An oblique incised injury 3x0.05 cm bone deep on the lower jaw.

Injury 3: An incised injury vertical, 2x0.5 cm bone deep on th4 left side of the lower jaw.

Injury 4: An incised injury, oblique 3x05 cm muscle deep on the lower lip on its right side.

Injury 5: Several incised injuries crosswise and longitudinal. On opening it, it was found that the tissues on the cranium were found bruised and the bones of the skull fractured and brain smashed and visible from outside.

Injury 6: An incised injury seen horizontally and gaping in between the eyes, 22x6 cm. on dissecting, it was found that, all the tissues, nerves and blood vessels had got cut the face was smashed and the upper jaw bone and the lower jaw bone crumbled."

19. Both the eyes had got completely smashed and seen outside the eye-sockets. The teeth in the upper jaw and those of the lower jaw were broken and some fallen." PW-7 has further stated that due to these injuries sustained on his head and face, the deceased would have died as has been expressed by him in the post mortem report Ext.P-7. Considering the nature of the injuries and, in particular, injury nos.5 and 6, we have no doubt that the common intention of A-1, A-2, A-3 and A-4 was to cause the death of the deceased. Accordingly, A-1, A-2, A-3 and A-4 (the appellants) were guilty of the offences under Section 302 read with Section 34, IPC.

19. In the result, we find no merit in the appeals and we accordingly dismiss the same.