
(2001) 11 RAJ CK 0055
In the Rajasthan High Court
Case No : Criminal Appeal No. 111 of 1996

Bhadar @ Bahadur and Another APPELLANT
Vs
State RESPONDENT

Date of Decision : 23-11-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2002) 3 RLW 1708

Hon'ble Judges : Shiv Kumar Sharma, J;A.C. Goyal, J

Bench : Division Bench

Advocate : R.S. Agarwal, for the Appellant; R.P. Meena, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Goyal, J.—Appellants Mahendra and Bhadar @ Bahadur were tried for offence u/s 302 read with Section 34 I.P.C. by the learned Additional Sessions Judge, Khetri, district Jhunjhunu. The learned Additional Sessions Judge convicted and sentenced both the accused-appellants u/s 302 read with Section 34 I.P.C. to life imprisonment and a fine of Rs. 1000/-, in default thereof to further undergo rigorous imprisonment for 6 months. Against their conviction and sentence, they filed this appeal.

2. The facts in brief giving rise to this Appeal are that PW1 Shri Mool Chand, brother of the deceased Shri Nathuram submitted a written report Ex.P.1 at Police Station, Khetri at about 2.30 p.m. on 27.3.1994 with the averments that at about 1.30 p.m. the informant was going towards the houses of the persons of Kumhar caste. He heard hue and cry and then he saw that Mahendra s/o Balu Ram was inflicting knife blows to his brother Nathu Ram and Shri Bhadar was causing injuries with a broken glass bottle. On a call made by him, his cousin brother Shri Bhagirath also came there and when they came to intervene, both the accused ran away. Thereafter, they proceeded to Khetri Hospital by a Jeep.

Shri Nathu Ram died near hospital.

3. A formal FIR Ex.P.2 No. 82/94 was registered u/s 302 read with Section 34 IPC. Investigation commenced and charge- sheet came to be filed against both the accused-appellants.

4. The learned Additional Sessions Judge, Khetri framed the charge u/s 302 read with Section 34 IPC and it was explained to the accused-appellants. They pleaded not guilty and claimed trial. Seven witnesses were examined on behalf of the prosecution. The circumstances appearing against the accused- appellants in the evidence were explained to them as provided u/s 313 Cr.P.C. Both the accused-appellants pleaded innocence. No witness was examined on behalf of the accused. Having heard final submissions, both the accused were convicted and sentenced as stated above.

5. We have heard learned counsel Shri R.S. Agarwal for the appellants, learned Public Prosecutor Shri R.P. Meena and have carefully considered the entire evidence.

6. The Post Mortem on the dead body of Nathu Ram was conducted by P.W. 3 Dr. B.S. Dadarwal on 27.3.1994. He was posted as Senior Medical Officer Khetri and prepared Post-mortem report Ex.P.12, and found following ante-mortem injuries on the person of deceased.

1. One stab Wound :- 2" x 1/2" x 6" deep on between the space, 1 and 2 left ribs just lateral to the left border of sternum, slightly oblique, clothes blood present at the mouth of wound.

2. One Incised Wound :- 1/2" lateral to the injury No. 1 and 1 and 1/2" from the left border of sternum. Slightly oblique. Size one and half inch x half inch x half inch.

3. One Stab Wound :- Just above the left fourth rib and between third left rib, two inch from the left border of sternum. 4" below the left clavical bone. Horizontal Size 1/2" x 5" deep. All the above three wounds are medial to left mid- clavicular line.

4. One Incised Wound :- 1 and 1/2" x 1/2" x 1/2" at ant axillary fold of left axilla, at the space of 4th rib. Horizontal.

5. One Stab Wound :- 1 and 1/2" x 1/2" x 5 and 1/2", 1 and 1/2" below the Injury No. 4, Horizontal.

Lungs :- Left Lung :- 1. One Incised Wound : - 1/2" x 1/2" x 1" lob oblique.

2. One Incised Wound :- 3/4" x 1/2" x 4" on lateral part of left lower lob, Horizontal.

Corresponding Area of the above wounds, incised wound also present in Left Pleura.

Heart :- (i) Left ventricle :- 1/4" x 1/4" x whole thickness of left ventricle (incised wound). Laterally.

(ii) Right ventricle :- One incised wound on ant-part of right ventricle size 1/2" x 1/2" x whole thickness of right ventricle. Corresponding area of pericardium to the wounds on ventricle also shows incised wounds. Thoracic cavity full of blood. All wounds are anti-mortem in nature.

7. In his opinion the cause of death was haemorrhage and shock due to stab wounds on heart and lung. Dr. Dadarwal further opined that these injuries could be caused by knife or broken glass bottle and were sufficient to cause death in ordinary course of nature. In cross-examination Dr. Dadarwal stated that these injuries were not possible due to fall on stone.

8. On the basis of this medical evidence the learned trial Judge has rightly come to this conclusion that deceased Nathu Ram died because of these injuries which were sufficient to cause death in ordinary course of nature. Now, the most crucial question in this appeal before us is as to who caused these injuries on the body of deceased Nathu Ram.

9. Two witnesses i.e. P.W.1 Mool Chand and P.W. 2 Bhagirath were examined as eye-witnesses. According to the prosecution story, P.W. 5 Suresh Kumar Swami also came to the place of occurrence just after the incident. This occurrence, according to the prosecution, took place on the next day of Holi. P.W.1 Mool Chand stated that at about 1.30 p.m. on that day, he was going to the houses of Girdhari and Sanwata and at that time he witnessed that the accused Mahendra was inflicting knife blows and accused Bhagirath was causing injuries by broken glass bottle to his brother Nathu. Nathu fell down and even thereafter both the accused inflicted injuries upon Nathu Ram. Upon raising hue and cry by him, his cousin brother Bhagirath reached there, who was three or four steps behind him. Thereafter Girdhari, Suresh Swami, Girdhari Thakar and Sawat Ram also reached there. P.W. 1 Mool Chand has been subjected to detailed cross-examination but nothing adverse has come out. P.W. 2 Bhagirath has fully corroborated the statement of P.W. 1 Mool Chand. He stated that he was also going to the houses of Sanwata and Girdhari and when he reached near their houses, he saw that accused Mahendra and Bhadar were causing injuries to Nathu Ram respectively by knife and broken glass bottle. He has also stated that Mool Chand was going ahead of him and when they reached near Nathu, both the accused ran away and at that time Suresh, Girdhari Thakar, Sawata Kumahar and Girdhari Kurnhar also reached there. Thereafter they took Nathu to Hospital but near hospital Nathu died. It is also stated by P.W. 1 Mool Chand and P.W. 2 Bhagirath that Ex.P. 1, written report, which is in the hand of P.W.5 Suresh Swami was submitted by them at the Police Station P.W.2 has also been cross-examined in detail. P.W. 5 Suresh Kumar Swami stated that on 27.3.1994, he was in his room. On hearing hue and cry, he came out and saw that Nathu was lying there. There was profuse bleeding from his wounds and both the accused persons were running from the place of occurrence. He also

saw that Mool Chand and Bhagirath were coming there from the opposite side. Thereafter Nathu was being taken to hospital in a jeep of Rameshwar Kumhar but on the way Nathu died. In cross-examination, he stated that his house is situated about 15-10 steps away from the place of occurrence and Girdhari and Sawata were also seen coming to the place of occurrence. It is also stated by him that he did not see the actual occurrence. He further stated that houses of both the accused persons are side by side, one km. away from the village.

10. Learned counsel for the appellants contended that no motive has been proved and there is no averment in written report Ex.P.1 as to why both the appellants committed murder of Nathu Ram and in absence of any motive, the prosecution case appears to be doubtful. Learned Public Prosecutor has opposed these arguments.

11. It is factually correct that no motive is mentioned in the written report Ex.P.1 but, it is not necessary in all the cases that each and every fact finds place in the first information report and mere omission of the motive in F.I.R. does not create any doubt in the prosecution story. On perusal of the entire evidence, it is well-proved that there was enmity between both the appellants and deceased. P.W. 1 Mool Chand stated that one day earlier to Holi, a quarrel took place between Nathu and his son on the one hand and both the accused appellants on the other hand. According to Mool Chand, both the accused abused Nathu and thereafter Nathu gave two first blows to accused Mahendra and one slap to accused Bhadur. It is also important to mention here that one suggestion was given to this witness in cross-examination and answer to this suggestion was "humne Mahendra Mulzim ki aural ko nahi bhagaya tha". By putting such question to PW 1 Mool Chand regarding abduction of the wife of accused Mahendra goes to show that there was previous enmity and thus according to the statement of PW 1 Mool Chand, it is true that a quarrel took place between both the accused and the deceased Nathu two days prior to this occurrence. It is also observed that only on account of absence of motive, the prosecution evidence cannot be discarded if such evidence is otherwise reliable. Thus, the first contention raised by learned counsel for the appellants cannot be accepted.

12. It was next argued that both the eye witnesses PW 1 Mool Chand and PW2 Bhagirath are interested witnesses and no independent witness has been examined as eye witness and further Girdhari Kumhar, Girdhari Thakur and Sawata Kumar have not been examined and therefore, the evidence of PW 1 Mool Chand and that too of PW 2 Bhagirath is not reliable beyond doubt. No doubt, PW1 Mool Chand is brother of deceased Nathu but only on this count his evidence cannot and should not be discarded. PW 2 Bhagirath is said to be the cousin brother of deceased Nathuram but he has stated in cross-examination as under.

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13. Both these witnesses have stated that they were going to the houses of

Girdhari and Sawata. FW1 Mool Chand has stated in cross-examination that his house is 60 steps away from the place of occurrence. PW2 Bhagirath has also stated in cross-examination that Sawata's house is about 40 steps away from the place of occurrence and he saw that occurrence near the houses of Sawata and Girdhari. The houses of Sawata and Girdhari have been shown in Sita Plan Ex.P.5. As per site plan Ex. P.5 the occurrence took place at "X" marked place and Mool Chand saw that occurrence from "A" marked place which was 19 steps away from the place of occurrence. PW 2 Bhagirath saw that occurrence from "B" marked place which was 30 steps away from the place of occurrence and houses of Girdhari Singh and Sanwata were situated 21 steps and 44 steps away respectively from the place of occurrence and the house of second Girdhari was situated 35 steps away from there. The house of PW5 Suresh Swami has also been shown in site plan Ex.P.5 which was 34 steps away from the place of occurrence As stated earlier it is also important to mention here that it was the day of "dhulandi" and people use to greet each other on this day. Therefore, presence of PW.1 Mool Chand and PW.2 Bhagirath near the place of occurrence was not unnatural. Looking to the entire statements of PW.1 Mool Chand and PW.2 Bhagirath there appears no grounds to disbelieve their statements only on this count that they are the interested witnesses. Ex. 1 F.I.R. was submitted at the Police Station just after one hour of the occurrence by both these witnesses Mool Chand and Bhagirath. The statements of these two witnesses find corroboration from the statement of PW 5 Suresh Kumar Swami who is an independent witness and he has clearly stated that upon hearing hue and cry he came there and saw Nathu in a seriously injured condition with profuse bleeding and both the accused appellants were running from the place of occurrence. He also accompanied Nathu Ram to the hospital. The oral evidence of PW 1 Mool Chand, PW.2 Bhagirath and PW.5 Suresh Kumar is also supported by other evidence i.e. evidence of recovery of knife (katar) and broken glass bottle. Ex.P.6 dated 28.3.94 is arrest memo of accused Mahendra Kumar. Ex.P.15 dated 29.3.94 is the information of the accused Mahendra u/s 27 of the Indian Evidence Act and Ex.P.8 dated 29.3.94 is the seizure memo of knife (katar) at the instance of accused Mahendra. According to the information of accused Mahendra Ex.P.15 this knife was recovered from the house of accused Mahendra. P.W.6 Ammi Lal, the then S.H.O. Police Station Khetri, has stated that he arrested accused Mahendra Kumar and prepared Arrest Memo Ex.P.6. Thereafter this accused gave information regarding Katar, which was recorded by him as Ex.P. 15 and according to this information the Katar was recovered at the instance of accused Mahendra from his field house in presence of Suresh Kumar and Bhagirath. P.W.2 Bhagirath and P.W. 5 Suresh Kumar have supported the statement of P;W. 6 Ammi Lal. This Katar has been identified as Article 1 by P.W.5 Suresh Kumar and P.W.6 Ammi Lal. Similarly Ex.P.7, dated 28.3.1994 is the arrest memo of accused Bhadar. Ex.P.16 dated 29.3.1994, is the information given by this accused according to the Provisions of Section 27 of the Indian Evidence Act and Ex.P.11 dated 29.3.1994 is the recovery memo of broken glass bottle from bushes near the place of occurrence. P.W.6 Ammi Lal, the

Investigating Officer has proved Ex.P.7, Ex.P. 16 and Ex.P.11 and P.W.2 Bhagirath and P.W.5 Suresh Kumar have also supported the statement of P.W.6 Ammi Lal. There appears no reason to disbelieve the evidence of recovery of Katar and broken glass bottle respectively at the instance of accused Mahendra and accused Bhadar. Learned counsel for the appellants has, on the basis of note recorded in the end of the statement of P.W. 6 Ammi Lal argued that earlier the, broken glass bottle was marked as exhibit article inadvertently and thus no bottle was produced in the Court. But this argument can not be accepted at all because the statement of P.W. 5 Suresh Kumar was recorded on 10.10.1995 and he has identified Katar as Article 1 and bottle as Article 2 and this fact has also been recorded in the order sheet dated 10.10.1995. Statement of P.W. 6 Ammi Lal, Investigating Officer was recorded on 28.11.1995 from which it appears that this glass bottle was not produced before the Court at the time of statement and, therefore, the learned trial Judge recorded this note perhaps inadvertently that bottle was marked exhibit article by mistake. Blood smeared soil was also taken vide Ex.P.10 by the Investigating Officer Ammi Lal and was sealed at the spot. This fact has also been proved by P.W. 6 Ammi Lal, P.W. 2 Bhagirath and P.W. 5 Suresh Kumar. From the statement of P.W.6 Ammi Lal, it appears that four sealed packets were sent by him for chemical examination through Constable Randhir Sharma and F.S.L. Report is Ex.P.18. P.W. 7 Randhir Sharma Constable stated that he took four sealed packets from the Police Station Khetri on 19.4.1994 and handed- over the same with covering letter of Supdt. of Police in the office of F.S.L. Jaipur and got a receipt Ex.P. 17. According to Ex.P. 18 the report of State Forensic Science Laboratory, Rajasthan, Jaipur, Ex.1 blood smeared soil, Ex.3 Knife, Ex.4 Chaddi, Ex.5 Pant and Ex.6 Bushirt were stained with "B" group blood as such it is also proved that the clothes of the deceased Nathu Ram were stained with "B" Group human blood and the same blood was found on the Article Ex.3 knife, Although, this contention advanced by learned counsel for the appellants is factually correct, that this bottle was not sent for examination but only on this ground prosecution evidence can not be discarded at all. Learned counsel for the appellants has also drawn our attention to some contradictions. According to him it is not mentioned in Ex.P.1 that information Mool Chand was going to the houses of Girdhari and Sanwata, while it has been so stated in the statement of Mool Chand P.W.1. It is also not mentioned in the said document that Girdhari Kumhar, Girdhari Thakur, Sanwata and P.W. 5 Suresh Kumar also reached there soon after the occurrence while it has been so stated before the trial court by P.W. 1 Mool Chand and P.W.2 Bhagirath. If it is also argued that P.W.1 Mool Chand has stated in cross-examination that Bhagirath was coming with him while in F.I.R. Ex.P.1 it is stated that Bhagirath came there after hearing his hue and cry. It is also argued that P.W.1 Mool Chand has stated in cross-examination that he was coming from the house of Sanwata Ram while in Ex.P.1 F.I.R. and in his examination-in-chief, he stated that he was going to the house of Sanwata Ram.

14. We have given our thoughtful consideration and are of the view that these

are minor contradictions, which are not material at all to discard the statements of these witnesses. Thus, on the basis of above discussion, it is proved beyond doubt that both the accused appellants inflicted these injuries to deceased Nathu Ram.

15. Now it has to be seen as to what offence is made out against both the accused appellants?

16. Learned counsel for the appellants Mr. Agarwal has argued that injuries mentioned in Post Mortem Report Ex.P.12 can not be said to be caused by broken glass bottle as no stab wound can be caused by a broken glass bottle. In support of his arguments. Mr. Agarwal has referred following paras of Modi's Medical jurisprudence and Toxicology 22nd Edition, which are as under:-

"(1) Incised or Slash Wounds (Page 339)

An incised or slash wound is produced by sharp cutting instrument such as a knife, razor, scissors, sword, gandas (chopper), axe, hatchet, scythe, kookri or any object such as a broken piece of glass or metal which was a sharp, cutting point or linear edge and are mostly intentionally inflicted. The cutting edge of a knife may be completely or partly sharp and partly blunt and the other edge may be blunt, serrated, scalloped or hollow, all these variations effect the shape of the wound.

(2) Punctured or Stab Wounds (Page 340)

These are popularly called slabs and are termed penetrating wounds, when passing through the tissues they enter a cavity of the body, such as the thorax or abdomen. These wounds are produced by a long piercing or stabbing instrument, such as pin, needle, knife, scissors, bayonet, spear, dagger, pickaxe, arrow, etc. The point of the instrument may be sharp or blunt.

17. Mr. Agrawal has stressed upon the omission of the word "broken piece of glass" at page 340 and contended that no stab wound can be caused by broken glass bottle but on careful consideration, this argument can not be accepted at all. Here in this case P.W. 3 Dr. Dadarwal has clearly stated that these injuries which were Incised Wounds and Stab Wounds in nature can be caused by broken glass bottle and knife and nothing adverse has come out in cross-examination.

18. It was next argued that there is no evidence to prove that both the accused appellants were having common intention to cause such injuries to cause the death of deceased Nathu Ram and that there is no evidence as to which injury was caused by whom and, therefore, it was wrong to convict both the accused persons u/s 302 read with Section 34 IPC. In support of his arguments, Mr. Agrawal placed reliance on *Deraj and Ors. v. State of Rajasthan* (1), *Dalel Singh and Anr. v. State of Rajasthan* (2), *Maladin v. State of Maharashtra* (3), *Ajay Sharma v. State of Rajasthan* (4). In *Deraj & Ors. (supra)*, the following facts were proved that the appellants and the deceased were the first cousins ; that there was no bad blood between them ; that the scuffle between the deceased

and the accused look place on a trivial matter relating to children: that the scuffle did not result in injury to any of them: that the motive that due to this scuffle the appellants wanted to finish the deceased is grossly inadequate, only two blows were inflicted to the deceased, one of them, on the head, was found fatal and it was not proved as to which of the appellants was the author of the fatal injury. In view of these circumstances, it was found difficult to raise an inference that the appellants had developed a common intention to kill the deceased. It was held that the applicability of Section 34 depends on a criminal act having been done in furtherance of the common intention of all. To constitute "common intention" u/s 34, it is necessary that the intention of each of the accused is known to the other and is shared by him. The question: whether there was a common intention is a question of the fact and has to be decided on evidence. Direct proof of common intention is seldom available and common intention can be inferred from circumstances and the acts of the parties. According to this decision, the common intention of the appellants was to cause grievous injury to the victim and therefore, the offence u/s 325/34 IPC was made out.

19. It is important to mention here that in view of the above facts, the common intention of both the accused appellants was found proved, though not for murder but for causing grievous injury.

20. In Dalel Singh's case (supra) 3 accused persons were tried for the offence u/s 302, 302/34, 307/34 IPC. One accused was acquitted by the Sessions Judge, while remaining two accused-appellants were convicted u/s 302/34 IPC. It was found proved that one accused appellant caused only three simple injuries and the other accused appellants caused punctured wounds which were proved fatal. In view of these facts, it was held that inference of common intention should be drawn only when it is clearly made out. When there is slightest doubt about the common intention then such an inference should not be drawn and assailants should be held responsible for their individual acts and should not be held responsible collectively.

21. In Matadin's case (supra) six accused were tried for offence under Sections 147, 148, 149 and 302 IPC. During trial one of the accused died and 3 of them were acquitted. Remaining two appellants were convicted u/s 302/34 IPC. The learned trial Judge held that accused Ram Singh assaulted the victim Ashok (deceased) with knife on account of which he sustained injury to his abdomen resulting in his death and as such he committed an offence punishable u/s 302 IPC. He further held that accused Matadin cried the words "Maro Sale Ko" and by that way instigated Ram Singh and other accused and thus Matadin was guilty of offence u/s 302/34 IPC. In view of these facts it was held by Hon'ble Supreme Court that the Courts below have not found, that the language which Matadin used exhorting his fellows was used in such a tone as to exhort them to kill Ashok or to cause grievous hurt to him by using dangerous weapons or means. When the words "Maro Sale Ko" are used it could mean "to beat" or even "to kill"

a person. Though the witnesses have stated that these words were used by Matadin in abusive way but from that it could not be said that he exhorted his fellows to kill Ashok. Therefore, conviction and sentence of Matadin u/s 302/34 IPC was set aside and he was convicted u/s 324/110 IPC.

22. Similar view has been taken by Hon''ble Supreme Court in Ajay Sharma's case (supra).

23. Per contra learned Public Prosecutor has argued that both the accused appellants caused as many as five increased and stab wounds simultaneously. According to learned Public Prosecutor accused appellants Mahendra inflicted blows with katar while the accused appellant Bhadar caused injuries with a broken glass bottle and according to the medical evidence all these injuries were caused on the vital part of the deceased Nathu Ram and all these injuries were sufficient to cause death in ordinary course of nature. Therefore, both the accused appellants shared a common intention which was to kill Nathu Ram and a common intention can even develop on the spot. He has placed reliance on Suresh and Another v. State of U.P. (5), wherein it has been held by Hon''ble Supreme Court that common intention envisages pre-concert or pre-planning which may develop at the spur of the moment. It was further held That the accused who was only present at the scene of the offence may also be liable for the ultimate criminal act done by several co-accused persons in furtherance of common intention of all of them. According to Section 34 IPC, it does not require separate individual acts by all the accused persons for making them liable for the ultimate criminal act and no overt act is needed on the part of an accused to attract Section 34 if he shares the common intention with others in respect of the ultimate criminal act which may be done by anyone of the accused sharing such intention.

24. We have given our thoughtful consideration to the arguments advanced by learned counsel for the appellants and learned Public Prosecutor. Keeping in view the judgments relied upon by learned counsel for the appellants and learned Public Prosecutor, we are of the considered opinion that in the facts and circumstances of the case before us it is well proved beyond any doubt that both the accused were having common intention which was to kill Nathu Ram as it was proved beyond doubt by the prosecution evidence that both the accused appellants were causing injuries simultaneously to the deceased Nathu Ram. The accused appellant Mahendra caused injuries with a Katar on the vital parts of deceased while accused appellant Bhadar also caused injuries on the vital parts of the body of Nathu Ram with a broken glass bottle and all these injuries were sufficient in ordinary course of nature to cause death. Therefore, both the accused appellants have been rightly held guilty u/s 302 read with Section 34 IPC. We accordingly dismiss this appeal.