
(2004) 08 AHC CK 0016
In the Allahabad High Court
Case No : Criminal Appeal No. 2717 of 1981

Israr and Others (in Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 27-08-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 307, 323, 34

Citation : (2005) 1 ACR 798

Hon'ble Judges : M.C. Jain, J;K.K. Misra, J

Bench : Division Bench

Advocate : Brijesh Sahai and Virendra Singh, for the Appellant; R.S. Sengar, A.G.A., for the Respondent

Judgement

M.C. Jain, J.—Three persons, namely, (i) Israr son of Mohammad Ali, (ii) Jabir son of Israr and (iii) Riyazul son of Dalsher were tried in Sessions Trial No. 408 of 1980 before the IXth Additional Sessions Judge, Etah. Israr came to be convicted u/s 302, I.P.C. for the murder of one Huddan and also u/s 323 read with Section 34, I.P.C. Life imprisonment was awarded to him u/s 302, I.P.C. and six months rigorous imprisonment u/s 323 read with Section 34, I.P.C. The remaining two Jabir and Riyazul were convicted u/s 302 read with Section 34, I.P.C. and also u/s 323, I.P.C. Life imprisonment was awarded to them for the former offence and rigorous imprisonment for six months for the latter. Both the sentences were ordered to run concurrently. All these three persons preferred this appeal against their conviction and sentences. Appellant No. 1 Israr came to be murdered during the pendency of this appeal on 8.10.1984 and the appeal in respect of him abated as per order dated 4.5.2004.

2. Presently, therefore, the Court is concerned with the remaining two accused-Appellants Jabir and Riyazul.

3. The facts may be stated briefly. The incident took place on 5.12.1979 at 8.30 a.m. in village Bhargain of P.S. Aliganj, district Etah and the F.I.R. was lodged the

same day at 1.15 p.m. by Iqbal Khan P.W. 1 (eye-witness). One Huddan was murdered in the incident and hurt was caused to Iqrar P.W. 2. The allegations were that on the fateful day and time, the first informant Iqbal and his brothers Huddan and Iqrar were going to irrigate their field. Huddan and Iqrar were a little ahead being followed by Iqbal. When they reached near the chaupal of Rahimuddin Khan, accused Appellant Israr, his son Jabir and Riyazul emerged from their hiding by the side of the shop of Murtza Lala and commanded them to stop. Jabir and Riyazul started assaulting Iqrar with lathi and pharsa, Jabir was armed with a pharsa whereas Riyazul had a lathi. Israr had a gun. Israr held out that revenge would be taken as his son had been earlier beaten up by them. Huddan came forward to save Iqrar, but Israr opened fire on him which hit him. Iqrar also sustained injuries. The shouts attracted Nawab Ali and Ali Ahmad P.W. 3 who were also going to their fields to irrigate them. The accused Appellants ran away. Iqbal P.W.1 got report scribed by Zabar Ali and took Huddan and Iqrar on the bullock cart to the police station. The report was lodged at the police station. Iqrar and Huddan were sent for medical examination. The condition of Huddan was serious. Initially, the case was registered u/s 307, I.P.C. but was converted u/s 302, I.P.C. consequent upon the death of Huddan in Agra on 8.12.1979. The case was investigated by S.I. Jiraj Singh P.W. 8. Ultimately, the accused Appellants were booked for trial.

4. It would be relevant to state here that initially the injuries of Huddan were examined by Dr. Chhotey Singh P.W. 7 in P.H.C., Aliganj, on 5.12.1979 at 2.12 p.m. Three gunshot injuries were found on his person. Out of them, the first one was on abdomen on the left side. It was dangerous to life. Injury No. 2 was on the medial and upper part of injury No. 1 and third one was on upper part and outer aspect of left forearm, corresponding to injury No. 1.

5. Iqrar was medically examined by the same Doctor on 5.12.1979 at 2.35 p.m. and the injuries found on his person were a lacerated wound on the left side of skull, abrasion with traumatic swelling on the back and upper part of right forearm ; double line contusion on the back and lower part of the left arm and contusion on outer aspect of the left shoulder front. First and third injuries were kept under observation and X-ray was advised. The rest were simple. No X-ray was subsequently taken or produced, meaning thereby all these injuries turned out to be simple. They were caused by blunt object.

6. Huddan having died at Agra, his inquest report was prepared by S.I. Karan Singh P.W. 6 there. The formal proof of the post-mortem report was dispensed with by the defence. Suffice it to say that he died of firearm injuries sustained by him. He was aged about 38 years.

7. Apart from the medical evidence and that related to investigation, the star witnesses of the prosecution were Iqbal P.W. 1, Iqrar P.W. 2 and Ali Ahmad P.W. 3. Hasibulla P.W. 4 was examined by the prosecution as a witness of an earlier incident involving Iqrar and Jabir-Iqrar was allegedly coming with his plough, Jabir dragged his plough whereupon Iqrar gave 2-3 slaps to Jabir. This witness

along with others had intervened.

8. The defence was of denial.

9. We have heard Sri B. Sahai, learned Counsel for the Appellants and Sri R. S. Sengar, learned A.G.A. from the side of the State.

10. The evidence on record has been carefully examined by us. The submission of learned Counsel for the accused-Appellants is that the shooting of Huddan was individual act of the deceased accused Appellant Israr and accused-Appellants Jabir and Riyazul did not share his intention with regard thereto. Therefore, they could not be convicted u/s 302 read with Section 34, I.P.C. for the murder of Huddan. He also urged that as per the own testimony adduced by the prosecution, offence committed by these two does not travel beyond Section 323 read with Section 34, I.P.C. and it being a petty and minor offence, they should be treated with leniency. On the other hand, learned A.G.A. urged that they did share the common intention of Israr in shooting Huddan and as such they have rightly been punished for the murder of Huddan with the aid of Section 34, I.P.C.

11. On giving our thoughtful consideration to the arguments advanced from both the sides in the light of the evidence on record ; we are of the opinion that the shooting of Huddan was the individual act of the deceased accused Appellant Israr wherefor surviving accused-Appellants Jabir and Riyazul cannot be held vicariously liable with the aid of Section 34, I.P.C. We shall state reasons for our this conclusion.

12. Needless to say, Section 34, I.P.C., recognizes the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. But essential requirement is that a common intention presupposes prior concert, i.e., a pre-arranged plan of the accused participating in an offence. True, such preconcert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. The common intention can be formed previously or in the course of occurrence and at the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the evidence and circumstances of the case. To attract the application of Section 34, I.P.C., it must be established beyond any shadow of doubt that the criminal act was done by several persons in furtherance of the common intention of all. In other words, the prosecution must prove facts to justify an inference that all the participants of the act had shared a common intention to commit the criminal act which was finally committed by one or more of the participants.

13. In the present case, it is very clear from the testimony of the informant Iqbal

P.W. 1 (brother of the deceased Huddan and injured Iqrar) that at the start of the incident, the accused-Appellants Jabir and Riyazul had started assaulting Iqrar with lathi and pharsa. Though he did not spell out as to who was armed with what weapon but it came to be stated by the injured Iqrar P.W. 2 himself that Jabir had a pharsa and Riyazul had a lathi. Iqrar did not sustain any sharp edged injury capable of being caused by pharsa. To explain it away, Iqbal P.W. 1 stated that Iqrar himself had a lathi with the help of which he warded off the pharsa blows. Anyway, it is a fact that Iqrar only sustained blunt weapon simple injuries. The previous background is also to be taken note of that two days earlier, Iqrar had given 2-3 slaps to Jabir when the latter had dragged his plough. It is also there in the testimony of Iqbal P.W. 1 and Iqrar P.W. 2 that the accused had shouted aloud of taking revenge of that earlier marpit. Iqbal P.W. 1 clearly stated that Israr (deceased accused Appellant who shot Huddan) had come following his son Jabir. It was when Huddan came forward to save Iqrar from the assault launched by Jabir and Riyazul that Israr opened shot on him (Huddan). The consistent case of the prosecution is of single shot having been fired by Israr on Huddan.

14. Taking stock of the sequence in which the incident occurred, it becomes clear that the common intention of the surviving accused Appellants was only to give a beating to Iqrar to settle score of the earlier incident in which Jabir had been given 2-3 slaps by Iqrar. Had the common intention been of murder, start would have been made with shooting itself. Huddan was not directly concerned with the earlier incident, though he was the brother of Iqrar. He came to be targeted by Israr simply because he intervened and tried to come to the rescue of his brother Iqrar to save him from the assault launched on him by Jabir and Riyazul. Israr (deceased accused-Appellant), who had not joined in the assault earlier, opened shot on him and it was his individual act wherefor Jabir and Riyazul could not be held to be vicariously liable.

15. In the light of the above discussion, we find that the surviving accused-Appellants only committed an offence punishable u/s 323 read with Section 34, I.P.C. They are entitled to be acquitted of the charge u/s 302 read with Section 34, I.P.C.

16. The incident took place on 5.12.1979, nearly 25 years back. The injuries sustained by the victim were simple of blunt object. Jabir gave his age as 18 years at the time of the recording of his statement u/s 313, Cr. P.C. on 13.10.1981. Riyazul disclosed his age on that date as 19 years. The trial Judge has not made any contrary remark concerning their age. They must be grown up persons now. The ends of justice would be met to modify their sentence for having voluntarily caused hurt to Iqrar to the period of imprisonment already undergone by them plus payment of fine of Rs. 1,000 by each of them. The record shows that after their conviction by the trial court on 2.11.1981, the bail order in this appeal was passed by this Court on 20.11.1981. May be that they remained in jail for sometime earlier also before being granted bail during trial.

Therefore, we shall modify their sentence to the period of imprisonment already undergone and a fine of Rs. 1,000 u/s 323 read with Section 34, I.P.C. In default of payment of fine, each of them would be directed to undergo rigorous imprisonment for three months.

17. In the final result, we allow this appeal in part. We uphold the conviction of surviving accused-Appellants Jabir and Riyazul u/s 323 read with Section 34, I.P.C., but they are acquitted of the charge u/s 302 read with Section 34, I.P.C. Their sentence is modified to the period of imprisonment already undergone by them and a fine of Rs. 1,000 to be paid by each of them. In default of payment of fine, each of them shall undergo rigorous imprisonment for three months u/s 323 read with Section 34, I.P.C. The appeal of the accused-Appellant Israr, who was murdered during pendency of the appeal, has already abated under order dated 4.5.2004. The amount of fine shall be deposited by the Appellants by 30.9.2004. If the same is not paid by that date, each of them shall go to jail in default of payment of fine, as we have ordered above.

18. The judgment be immediately certified to the lower court for necessary entries in the relevant register and reporting compliance to this Court within two months from the date of receipt of a copy of this order.