
(2019) 12 JH CK 0233

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 459 Of 2001

Nazrul Sheikh And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 17-12-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302
Arms Act, 1959 — Section 27

Citation : (2019) 12 JH CK 0233

Hon'ble Judges : Shree Chandrashekhar, J; Ratnaker Bhengra, J

Bench : Divison Bench

Advocate : J.P. Jha, S.P. Jha, Manoj Kumar, Aishwarya Prakash, Vandana Bharti

Final Decision : Allowed

Judgement

Shree Chandrashekhar, J

1. The informant, namely, Md. Tarik Anwar has named Nazrul Sheikh, Hifazul Sheikh, Belal Sheikh and Taimur Sheikh as accused who along with

two unknown persons have committed murder of his father, namely, Md. Asraf Ali. On the basis of his fardbeyan which was recorded at 4:30 a.m on

06.08.1997, Rajmahal P.S. Case No. 171 of 1997 was registered on 06.08.1997 against them under section 302/34 of the Indian Penal Code and under

section 27 of the Arms Act.

2. In Sessions Case No. 14 of 1998, the appellants have been convicted and sentenced to R.I for life under section 302/34 of the Indian Penal Code

and R.I for one year under section 27 of the Arms Act.

3. The prosecution's case as described by the informant is recorded in the fardbeyan. The informant has stated that it was about mid-night of

5/6.08.1997 when he was returning after a video-show and when he reached near his house he has seen 5-6 persons on his veranda. In the torch light

he has identified the appellants. He has seen two unknown persons also there and all of them were talking with each other. In the meantime, Hifazul

Sheikh and Nazrul Sheikh on seeing him coming home uttered that Tarik has come therefore let us kill and leave, whereupon Taimur Sheikh and Belal

Sheikh fired shot at his father which hit him on his head and chest. Thereafter, the accused persons fled away and while fleeing away they have fired

one more shot. When he reached near his father he found him dead. The informant has stated that in the night his mother and brother were also

sleeping on the veranda and they have also seen the occurrence. He has further stated that on raising hulla several villagers assembled there and the

reason for the occurrence was a long standing dispute between his father and Taimur Sheikh. He has also stated that 5-7 days prior to the occurrence

Taimur Sheikh had threatened his father to kill him.

4. During the trial the prosecution has examined 12 witnesses; the informant is P.W.7.

5. The prosecution has projected P.W.7, P.W.9 and P.W. 11 as the eye-witnesses.

6. The prosecution witness, namely, Md. Imtaz Sheikh-P.W.10 has claimed that he has seen 5-6 persons fleeing away and amongst them Nazrul

Sheikh, Hifazul Sheikh, Belal Sheikh and Taimur Sheikh were carrying pistol in their hand.

7. The informant has deposed in the court that he has seen 5-6 persons talking on his veranda. At that time there was a lantern on his veranda. He has

seen the appellants amongst whom Taimur Sheikh and Belal Sheikh were carrying pistol. He has narrated a similar story about the occurrence as

described by him in his fardbeyan. He has also stated that few days back Taimur Sheikh had threatened his father for withdrawing the case filed

against him. The wife of the deceased, namely, Tohbina Bibi-P.W.9 has stated that in the fateful night she was sleeping on the veranda by the side of

her husband. She has stated that on hearing sound of fire shot when she woke-up she has seen the appellants running away. The son of the deceased,

namely, Md. Rahim Sheikh-P.W.11 has stated that in the mid-night at about 12:00-12:15 a.m he has heard sound of two fire shots. He has seen

Taimur Sheikh and Belal Sheikh carrying pistol in their hand. He has also stated

that he has seen the appellants running away from his house and he has seen that his father has suffered fire shot injuries on his temple and chest. Md. Imtaz Sheikh-P.W.10 has also stated that he has seen the appellants running away and at that time Taimur Sheikh and Belal Sheikh were carrying pistol in their hand.

8. On such evidence, Mr. J. P. Jha, the learned Senior counsel for the appellants has contended that identification of the appellants in the night by the prosecution witnesses is doubtful. It is further contended that the admitted enmity between the parties was the reason why the appellants have been falsely implicated in this case.

9. The appellants are known to the informant. It has come in the evidence that Belal Sheikh and Taimur Sheikh are residing within a distance of half kilometer from the house of the informant and other two appellants are also residing nearby. The informant and his brother both have stated that a lantern was lit in the veranda. The informant has stated that he has seen the appellants in the torch light though the lantern and torch have not been produced during the trial. But then, their identification by the informant and the other prosecution witnesses cannot be doubted particularly when they are named in the First Information Report. The contemporaneous documents such as the fardbeyan, the First Information Report, the inquest report and the post-mortem report which were prepared promptly would rule out false implication of the appellants. The occurrence has happened at around mid-night, information to the police station was given at 2:00 a.m, fardbeyan of the informant is recorded at 4:30 a.m and inquest is prepared at 5:00 a.m. The aforesaid events which have happened in quick succession would eliminate possibility of implication of the appellants in the crime after due deliberations. On the plea raised by the learned Senior counsel for the appellants which is based on the medical evidence that stomach and bladder of the deceased were found empty and while so, the prosecution has failed to establish that Md. Ashraf Ali has died in the mid-night of 06.08.1999, all that we intend to record is that in her cross-examination the wife of the deceased has stated that before the occurrence her husband had gone to ease himself.

10. The mistakes committed by the investigating officer during the investigation may create a doubt on the prosecution's case, but then, the

mistake must be such that it goes to the root of the prosecution story. Failure of the investigating officer to collect blood-stained soil, recover lantern

and torch and make inquiries about the case filed by brother of the informant against Taimur Sheikh, in our opinion, would not shake foundation of the prosecution's case.

11. The doctor who has conducted the postmortem examination has observed the following injuries on Md. Asraf Ali;

(I) Penetrating wound

(a) entry wound " 1½" circular, 1½" behind the right ear over right temporal bone with multiple fracture of right temporal bone, some small

pieces of bones were separated from the parent bone. Root of right ear cartilage was free from skin and lacerated.

Exit wound " 1½" circular on the posterior part of left temporal region, multiple cracks and several bone pieces separated from the parent bone.

The entry and exit wounds were through & through and communicating with the Probe. Charring sign was found around the entry.

Parts Injured " Pia & dura matter were matted, cerebellum was completely lacerated and shanken to a piece of fat. The whole brain matter and

cranium were blooded with blood.

(II) Penetrating wound

(a) Entry " 1¼" circular 1½" lateral to the vertebral column on the 8th intercostal space on the back.

Exit " 1½" oval in shape in between the 6th and 7th inter costal space ½" below and medial to the right nipple. The 6th and 7th ribs were

broken at the site of the injury.

The entry and exit wounds were through and through and communicating to the probe, sign of charring was present at the site of entry.

Parts Injured " whole right lungs collapsed & matted with decomposed blood. Right lungs shaken and pale, pleura matted with blood.

(III) Multiple burn injury over the skin of chest, abdomen, both arms and hand due to explosive powder.

12. According to the doctor, the injuries were ante-mortem in nature and caused within 12 hours from the post-mortem. In the opinion of the doctor

the injuries were sufficient to cause death in ordinary course of nature. Thus, the medical evidence corroborates the ocular evidence on complicity of

the appellants, namely, Taimur Sheikh and Belal Sheikh in the crime.

13. Now the question is whether all the appellants can be convicted with the aid of section 34 of the Indian Penal Code.

14. Section 34 of the Indian Penal Code embodies constructive liability of all for the act done by one. It talks of prior concert or prior meeting of

minds. Though it is not necessary that the accused persons must have had deliberations before they have committed the crime; common intention can

be formed instantly and at the place of occurrence itself, but to fasten liability upon all the accused persons with the aid of section 34 of the Indian

Penal Code the prosecution must establish that death has been caused in furtherance of common intention of all. In *Bharwad Mepa Dana and*

Anr. Vs. The State of Bombay reported in AIR 1960 SC 28,9 the Hon'ble Supreme Court has held that the principle which section 34 IPC

embodies is participation in action with the common intention of committing a crime and once such participation is established, section 34 is at once

attracted. In *Girija Shankar vs. State of U.P.* reported in (2004) 3 SCC 793, the Hon'ble Supreme Court has observed, thus;

“9. 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 minds 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 the moment; but it must necessarily be before the commission of the crime.”

15. The informant is specific on his stand in his fardbeyan as well as in the court. He has stated that Belal Sheikh and Taimur Sheikh have fired shots

at his father. Firing at Md. Asraf Ali by these two appellants has not been witnessed by any other prosecution witness, but P.W.2 and P.W.7 have

stated that they have seen the appellants fleeing away and at that time Taimur Sheikh and Belal Sheikh were carrying pistol in their hand. P.W. 10 has

also stated that he has seen Taimur Sheikh and Belal Sheikh carrying pistol, fleeing away with Nazrul Sheikh and Hifazul Sheikh and two other

unknown persons. No specific overt act has been alleged by the prosecution witnesses against the appellants, namely, Nazrul Sheikh and Hifazul

Sheikh. None of the prosecution witnesses has stated that Nazrul Sheikh and Hifazul Sheikh were carrying any weapon. Nazrul Sheikh and Hifazul

Sheikh are relatives of other two appellants. They were talking to Taimur Sheikh and Belal Sheikh at the veranda of the informant and they have exhorted to run away.

16. On such facts, it cannot be held that Nazrul Sheikh and Hifazul Sheikh have shared common intention with other two appellants to commit murder of Md. Asraf Ali.

17. Accordingly, their conviction under section 302/34 of the Indian Penal Code and under section 27 of the Arms Act is set-aside. They are acquitted of the criminal charges framed against them in Sessions Case No. 14 of 1998.

18. On complicity of Taimur Sheikh and Belal Sheikh, we find that the prosecution evidence is cogent and consistent. During their cross-examination, the prosecution witnesses have stood to their ground and nothing material could be elicited by the defence which could have thrown doubt on their

complicity in the crime. The minor inconsistencies in the testimony of the prosecution witnesses and lapses during the investigation are not sufficient,

particularly, in the face of consistent evidence of the eye-witnesses, for their acquittal from the charges under section 302/34 of the Indian Penal Code

and under section 27 of the Arms Act. All the prosecution witnesses have spoken in unison that Taimur Sheikh and Belal Sheikh were carrying pistol

and the informant has said that they have fired shots at Md. Asraf Ali which have proved fatal. They have been seen running away from the place of

occurrence immediately after the occurrence and they were carrying pistol in their hand.

19. Merely because the prosecution has failed to bring on record the details of case filed against Taimur Sheikh and the investigating officer has failed

to collect material objects from the place of the occurrence, conviction of Taimur Sheikh and Belal Sheikh cannot be challenged. From cross-

examination of the prosecution witnesses, it transpires that a case against Taimur Sheikh was infact filed by the brother of the informant.

20. Accordingly, conviction of the appellants, namely, Taimur Sheikh and Belal Sheikh does not warrant interference by this Court.

21. In the result, Criminal Appeal (DB) No. 459 of 2001 is allowed qua the appellants, namely, Nazrul Sheikh and Hifazul Sheikh alias Hifizul Sheikh,

however, dismissed against the appellants, namely, Belal Sheikh and Taimur Sheikh.

22. The appellants, namely, Nazrul Sheikh and Hifazul Sheikh alias Hifizul Sheikh are on bail and, therefore, they stand discharged of liability of the bail-bonds furnished by them.

23. The appellants, namely, Belal Sheikh and Taimur Sheikh are also on bail and, therefore, their bail-bonds are cancelled. They shall surrender before the court below to serve the remaining sentences.

24. Let a copy of the judgment be transmitted to the Court concerned through FAX.

25. Let lower-court records be transmitted to the court concerned, forthwith.