

(2016) 07 DEL CK 0209

In the Delhi High Court

Case No : Criminal Appeal No. 1106 of 2012

Putul Kumar

APPELLANT

Vs

State Govt. of NCT of Delhi

RESPONDENT

Date of Decision : 12-07-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, Section 323, Section 324

Citation : (2017) 236 DLT 3

Hon'ble Judges : P.S. Teji, J.

Bench : Single Bench

Advocate : Mr. Amit Chadha, Additional Public Prosecutor, for the State in CrI. Appeal No. 87 of 2013; Mr. Sanjan K. Singh and Ms. Sangeeta Singh, Advocates, for the Appellant in CrI. Appeal No. 1669 of 2013, CrI. M.B. No. 647 of 2016 (Bail).; Mr. Kunal Aurora, Advo

Final Decision : Disposed Off

Judgement

P.S. Teji, J. - By these four separate appeals filed under Section 374(2) of Cr. P.C., the appellants seek to challenge the judgment dated 04.07.2012 as well as order on sentence dated 07.07.2012, passed by the learned Additional Sessions Judge-II, North East, Rohini Courts, Delhi in Sessions Case No.98/2011 (FIR No.312/2008 under Section 302/323/34 IPC, P.S. Shalimar Bagh).

2. Since the FIR as well as impugned order in all the four appeals are the same, therefore, with the consent of the counsel appearing on behalf of all the appellants, arguments in all the appeals are heard together and all the appeals are disposed of by this common order.

3. In brief, the facts of the case are that on 05.06.2008 at about 11:45 PM DD No.41A was received at Police Station Shalimar Bagh pursuant to which ASI Ram Darsh along with HC Rajesh reached Ambedkar Hospital and collected the MLC of injured who was unconscious and unfit for statement. Thereafter, ASI Ram Darsh and HC Rajesh reached RBI Colony where they came to know that a quarrel had taken place at CA Block Jhuggies but no eye witness was found. Rukka was

prepared on DD No.41A and the FIR of the present case was got registered. On 08.06.2008 injured Yaswant Meena expired during treatment at RML Hospital pursuant to which further investigation of the case were handed over to Inspector Pooran Chand. Thereafter, postmortem of the deceased was got conducted. On 08.06.2008 one Pradeep Kumar met the investigating officer who informed him that the deceased Yashwant @ Jaswant Meena was his close friend and on 05.06.2008 at about 7:30 - 8:00 PM they had gone to Police Colony Shalimar Bagh on a motorcycle and while returning at about 10:00 PM they reached the juice rehri of Natu whom they knew previously since they used to take juice from him. Natu refused to give them juice on which there accrued a verbal altercation between Natu and Yashwant @ Jaswant. At that time one other person was also standing at the juice rehri who ran towards the jhuggies and called his other associates who also came to the spot duly armed with dandas and wooden fatta. All the said persons thereafter started beating Yashwant @ Jaswant Meena with the said dandas and wooden fatta and also gave fist and leg blows to Yashwant @ Jaswant Meena. Pradeep Kumar further informed the police that when he tried to intervene, the said boys gave beatings to him too, pursuant to which he too received injuries. Yashwant @ Jaswant Meena tried to run towards the side of the road but one of the assailants chased him and gave a blow on his head with the help of a wooden fatta due to which Yashwant @ Jaswant fell down on which the other assailant also gave beatings to him. The eye witness Pradeep Kumar also informed the police that he himself escaped and ran towards the corner of RBI Colony where he informed about the incident to one ice-cream seller and requested him to shift Yashwant @ Jaswant Meena to his relatives and also asked another boy to bring his motorcycle.

4. On the basis of the said statement of Pradeep Kumar investigation commenced. On 09.06.2008 pursuant to a secret information, the accused Brijesh Kumar was apprehended and arrested. Thereafter, on the pointing out of accused Brijesh Kumar, the other accused namely Subhash Kumar, Putul Kumar and Vipin Kumar were arrested. Pursuant to their disclosure statements, accused Subhash and Brijesh got recovered the danda and a fatta used in the commission of offence from the bushes near the nehar. On 13.06.2008 the Test Identification Parade of all the four accused were conducted in which they refused to participate. Thereafter, efforts were made to trace the accused Pramod @ Natu and process under Section 82/83 Cr.P.C. were issued against him and on 29.08.2008 the accused Pramod @ Natu surrendered before learned MM after which the accused was arrested. Pursuant to his disclosure statement the accused Pramod @ Natu got recovered the wooden Musli used in the juice machine with which he had inflicted injuries upon Yashwant @ Jaswant Meena. After completion of investigation, charge sheet was filed against all the accused persons before the Court.

5. Mr. Somer K. Sethi, learned counsel for the appellant-Pramod Kumar @ Natu urges that the Trial Court has relied heavily upon PW 7 Pradeep Kumar an alleged eyewitness who resurfaced only on 08.06.2008, without giving any valid

explanation of his whereabouts for 3 days. Therefore, the conduct of the witness was unnatural and not keeping with normal human conduct. As regards PW-8 Smt. Angoori Devi mother of deceased, it is contended that she did not tell the police at the earliest point of time that her deceased son had last gone with PW-7 Pradeep Kumar on his motorcycle.

6. It is further contended that the recovery of musli is shrouded in mystery as it was recovered after 2 months of the occurrence from the hut of the appellant. Anyhow, the recovery of musli in no way connects the appellant to the crime as it was not blood stained. It is further contended that the police never knew the name of the appellant and even if it is assumed that the police knew the name of the appellant, then the search of the appellant should have been done forthwith whereas they claim to the contrary.

7. Learned counsel for the appellant - Pramod Kumar @ Nattu further contended that appellant was not related to or connected to the other convicts of this case. It is also submitted that the Trial Court overlooked the fact that the deceased was the aggressor and even as per the alleged prosecution story, it was co-accused - Brijesh Kumar who chased the deceased and gave a fatal blow on his head due to which he fell on the ground.

8. Lastly, it is contended that the sentence imposed upon the appellant is on the harsher side, which is prayed to be reduced.

9. Mr. Sajjan K. Singh, learned counsel for the appellants-Putul Kumar and Brijesh Kumar urged that the appellants have been convicted primarily on the testimony of PW-7, whose deposition could not at all be considered as worthy for the conviction of the appellants. Application is disposed of with direction to file requisite certified copies and annexure within four weeks. It is further contended that the version of the eye witness cannot be considered a paramount ground for the conviction of any of the accused. It is further submitted that the evidence of PW-7 being the eye witness cannot be considered to be trustworthy, as according to him he was present at the place of occurrence along with the deceased and saw the deceased being beaten up not only by the fist and leg but also by the wooden danda and fatta but in spite of PW-7 being a close friend of deceased, he left his injured friend at the mercy of an ice cream vendor and did not bother to inform his family member. Moreover, PW-7 visited the Hospital to see his injured friend but on that day also he did not inform the police about his presence at the place of occurrence and he only informed after coming to know about the demise of Yashwant @ Jaswant Meena. It is further contended that the Trial Court wrongly held the testimony of PW-7 reliable and worthy for the purpose of conviction of the appellants. However, even if the version of prosecution were to be believed, it was only the PW-7 who had seen the appellants, giving leg and fist blows.

10. As far as weapon of offence, i.e. wooden musli, wooden danda and fatta are concerned, learned counsel for the appellants contended that the same were

neither recovered from the possession of appellants nor were they recovered at their instance. Therefore, it cannot be held that the appellants were involved in the incident, which caused the death of Yaswant Meena. It is further contended that it has not been proved by the prosecution that whether the appellants were responsible in giving direct injury to Yaswant Meena which caused his death. Even the medical evidence does not specifically indicate the role of the appellants.

11. As per case of prosecution, PW-18 was the person who was present at the spot at the relevant time and one of the important witnesses to prove the guilt of the accused but ultimately, PW-18 was declared as hostile witness as in his deposition, he completely retracted from his own statement by giving the reason that police under compelling circumstances had forcefully obtained his statement. It is submitted that despite the aforesaid position, the Trial Court held the appellants guilty on the ground that even the statement of a hostile witness that finds corroboration, can be read into evidence. Surprisingly the Trial Court found corroboration in the testimony of PW-18 in spite of the fact that he showed his ignorance about the alleged incident. In support of his contentions, learned counsel for the appellants has relied on the following judgments: -

(a) Richhpal Singh Meena v. Ghasi alias Ghisa and others, (2014) 8 SCC 918

(b) Buddhu Singh v. State of Bihar (Now Jharkhand), JT 2011 (6) SC 617;

(c) Jarnail Singh v. State of Punjab, JT 2009 (1) SC 644;

(d) Dinesh Kumar Sinha v. State of Jharkhand, (2009) 6 SCC 628;

12. Learned counsel for the appellants further contended that the prosecution could not prove the fact that the appellants were responsible for giving direct injury to the deceased/victim which caused his death. Lastly, it is contended on behalf of the appellants that the appellants are in custody since 09.06.2008 and have families to support and that they are the only bread earners in their families.

13. Ms. Anu Narula, learned counsel for the appellant-Vipin Kumar contended that the role attributed to the appellant-Vipin is that in the scuffle that was going on between the victim and other accused, he held the deceased from back and gave him fists and leg blows. Whereas the co-accused, Putul, Brijesh and Subhash gave danda, fatta and musli blows to the victim. It is further contended on behalf of the appellant-Vipin Kumar that he was arrested on the disclosure of the co-accused. However, the weapon of offences being danda/fatta and musli were recovered from other co-accused and there is no recovery from the present appellant.

14. Pointing out towards the discrepancies in the prosecution case, learned counsel for the appellant - Vipin contended that although the appellant had refused to participate in the TIP in jail but the PW-7 in his deposition claimed that he gave description/physical appearance of the accused persons to the police. It is further contended on behalf of the appellant that there was no

motive for the appellant to beat the deceased/victim. More so, it is submitted that the alleged description given by PW7 regarding the appellant does not match with the actual description of the present appellant. Even the eye witness (PW 18 Dinesh) has also not deposed anything against the appellant.

15. Circumstantial discrepancies have been pleaded in the deposition of PW-14/ Ice-cream wala, PW-7 and PW-28 and contended that the entire conduct of the PW-7 is questionable and dubious and the correct genesis of the incident has been suppressed. It is further contended that there is no evidence against the appellant and so far as the disclosure of co-accused is concerned, that cannot bind the appellant, especially in absence of motive/pre-mediation/intention or even knowledge on the part of the appellant.

16. It is vehemently argued that Section 34 of IPC cannot be invoked or presumed and that even if it is presumed that appellant was there or allegedly held the deceased from back, no intention or knowledge can be attributed to him only on the basis that any fatal blow or injury would prove to be sufficient or likely to cause death in ordinary course. Moreover, it is contended that the deceased died almost after 1?-3 days of the incident.

17. On the quantum of sentence, learned counsel for the appellant - Vipin Kumar contended that the conviction under Section 304(I) IPC and awarding 10 years imprisonment, is the highest substantive sentence and apart from the same, awarding of Rs.50,000/- as fine and in default 3 months SI is exorbitant, especially when admittedly appellant is a Jhuggi dweller. In support of her contentions, counsel has relied on the following judgments: -

- (a) Harbans Nonia and others v. State of Bihar, AIR 1992 SC 125;
- (b) Vencil Pushpraj v. State of Rajasthan, AIR 1991 SC 536;
- (c) Tholan v. State of Tamil Nadu, AIR 1984 SC 759;
- (d) Karuppiah and another v. The State, 1996 Cri.L.J. 3776;
- (e) Jeev Dan v. The State, 1996 Cri.L.J. 3929;
- (f) Shailesh alias Shailendra v. State of Maharashtra, 1995 Cri.L.J. 914;
- (g) Mohd. Issa @ Raj v. State, Crl. A. No.926/2010 decided on 09.04.2013

18. Mr. Amit Chadha, learned Additional Public Prosecutor for the State vehemently opposed the aforesaid contentions raised by the counsel representing the respective appellants and submitted that the prosecution has proved the identity of the accused and the manner in which the offence was committed. It is further submitted that there is nothing which could shatter the veracity of the prosecution witnesses or falsify the claim of the prosecution. All the material witnesses have supported the prosecution case and the testimonies of the prosecution witnesses do not suffer from any infirmity, inconsistency or contradiction and are consistent and corroborative. It is further submitted that

the common intention of the accused persons is writ large from the fact that all the accused persons acted in consortium which is evident from the fact that Subhash ran away from the spot to call others and they immediately came to the spot with whatever they could lay their hands on. It is further submitted that the learned Additional Sessions Judge has passed a reasoned order thereby convicting the appellants after considering all the aspects of the matter which does not call for any interference from this Court.

19. I have heard the submission made by both the sides and also gone through the contents of the appeals and the impugned orders passed by the learned Additional Session Judge in this case.

20. The proportionality of sentence imposed upon the accused depends on the roll attributed to the accused. In Criminal Appeal No. 945/2004, titled as Pulicherla Nagaraju @ Nagaraja v. State of A.P., decided on 18.08.2006, the Hon'ble Apex Court dealt with the question of determination of the offence under Section 302, 304, Part I/Part II IPC, in the following words:

"Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters, plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under section 302, are not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may

throw light on the question of intention. Be that as it may."

21. In the case in hand, while perusing the facts and circumstances of the case, the indisputable facts are that the appellant - Brijesh Kumar was apprehended and arrested on 9.6.2008 and on his pointing out, the other accused persons namely Subhash Kumar, Putul Kumar and Vipin Kumar were arrested. Danda and fatta used in the commission of offence were recovered from the appellant - Subhash and Brijesh from the bushes near the nehar and the other accused Pramod @ Natu surrendered himself before the learned Metropolitan Magistrate after process under Section 82/83 Cr. P.C. were issued against him, i.e., on 29.08.2008 and he had disclosed that he had used the wooden Musli and he had inflicted injuries upon the victim Yashwant @ Jaswant Meena.

22. Dr. Kulbhushan Goel (PW-1) has proved the postmortem report of the deceased which is Ex. PW-1/A and as per the medical evidence being the MLC of the deceased, it is opined that the cause of death was brain compression as a result of cranio-cerebral damage/injuries which were sufficient to cause death in ordinary course of nature and were consistent with the assault. The injuries on the deceased were ante-mortem in nature and injuries No.1 and 2 were caused by blunt force impact.

23. This Court has also gone through the impugned orders and observes that the learned Additional Sessions Judge had elegantly discussed the issue of deciding the punishment under the relevant section in the present facts and circumstances and ultimately reached to the conclusion of holding the appellants guilty for the offences under Section 304 (Part II) IPC. The Trial Court has also discussed the issue of common intention of the accused under Section 34 IPC and regarding the principal of joint liability in the commission of a criminal act. For better appreciation, the relevant paragraph is extracted below:

"In so far as the common intention of the accused are concerned, I may mention that Section 34 has been enacted on the principal of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in section. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of common intention of the persons who join in committing the crime. 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. 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 if prearranged or on the spur of the moment, but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of

them has done it individually by himself. As observed in *Ashok Kumar v. State of Punjab* reported in AIR 1997 (1) SCC 746 the existence of a common intention among the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision. The section does not say "the common intentions of all" nor does it say "an intention common to all. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Chinta Pulla Reddy v. State of A.P.* reported in 1993 Supp (3) SCC 134. Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying section 34, it is not necessary to show some overt act on the part of the accused."

24. Thereafter, the Trial Court dealt with the issue of falling of a case under the purview of Section 300 IPC or Section 304 IPC and applying the settled principles of law to the facts of the present case, in the light of the deposition of witnesses and the material on record observed that the weapon of offence was a musli which was already in possession of Pramod @ Natu in normal course which was used for preparation of juice and the place of incident is near the rehri of Pramod @ Natu, which shows that there was no preparation or premeditation. It was further observed that the accused Subhash immediately ran away from the spot and called others from their jhuggies, which were just adjacent to the place of quarrel, on which the other persons came to the spot with whatever they could lay their hands on i.e. danda and fatta with which they started beating the deceased and the eye witness Pradeep thereby inflicting injuries on them. It is further observed that the common intention of the accused is writ large from the said fact. While the other appellant - Vipin caught hold of the deceased from the back side, and gave fists and legs blows which blows were also given to the injured Pradeep Kumar. The nature of injuries found on the body of the deceased coupled with the nature of weapons used i.e. danda, musli, fatta etc. are evidence of a sudden quarrel/fight with the deceased and Pradeep on one side and the accused on the other. The fact that the common intention between the accused developed at the spot of the incident itself, was evident when the deceased Yashwant @ Jaswant Meena and injured Pradeep ran from the spot in order to save themselves, the accused followed them while Brijesh gave a fatta blow on the head of the deceased as a result of which the deceased fell down

after running for about 15 steps, and in the meanwhile all the other accused also reached there and again gave fists, legs, fatta and musli blows to the deceased. This which establishes that all the accused persons acted in consortium thereby proving their common intention.

25. The Trial Court further went to observe that the deceased Yashwant @ Jaswant Meena and his friend Pradeep Kumar ran away from the spot in order to save themselves, the accused followed them and it was the accused Brijesh who after 15 steps again given a fatta blow on the head of the deceased Yashwant @ Jaswant on account of which the deceased fell down after which all the accused reached the place where the deceased had fallen and continued to inflict the danda, musli, fatta, legs and fist blows. The said act of the accused persons in continuing the chase after the deceased was moving away from the spot in order to save himself, bring the case within the purview of Section 304 (Part I) IPC. Accordingly, the accused persons were held guilty for the offence punishable under Section 304 (Part I) read with section 34 of IPC (not under Section 302 of IPC). The Trial Court further held all the accused/appellants guilty for the offence punishable under Section 323 of IPC for causing simple injuries on the person of Pradeep Kumar.

26. From the aforesaid discussion of the settled principles, facts and circumstances as well as the impugned order, this Court finds no illegality or infirmity in the reasoning given by learned Additional Session Judge so far as the Appellants - Putul Kumar, Pramod Kumar alias Natu, Vipin Kumar and Brijesh Kumar and this Court finds no reason to take a different view from the said order. Accordingly, the impugned orders dated 04.07.2012 as well as order on sentence dated 07.07.2012 are upheld and the appeals filed by the appellants - Putul Kumar, Pramod Kumar alias Natu, Vipin Kumar and Brijesh Kumar are dismissed being without merit.

27. All the appellants are in jail. A copy of the order be sent to Jail Superintendant to apprise the respective appellants regarding fate of their appeal.

28. All the four appeals stand disposed of in the aforesaid terms.