
(1987) 04 SC CK 0059

In the Supreme Court Of India

Case No : Criminal Appeal No's. 287-288 of 1978

Subash and Shiv Shankar

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 14-04-1987

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 324, 34

Citation : (1987) 11 ACR 541 : AIR 1987 SC 1222 : (1987) CriLJ 991 : (1987) 1 SCALE 838 : (1987) 3 SCC 331 : (1987) 2 SCR 962

Hon'ble Judges : S. Natarajan, J;M. M. Dutt, J

Bench : Division Bench

Advocate : Frank Anthony, Sushil Kumar and J.K. Das, in Criminal A. No. 287 of 1978, U.R. Lalit, S. K. Bisaria and A.D. Malhotra, in Criminal A. No. 288 of 197, for the Appellant; Prithvi Raj, C.P. Mittal and Dalveer Bhandari, for the Respondent

Final Decision : Disposed Of

Judgement

S. Natarajan, J.—These Appeals by Special Leave arise out of a common judgment rendered by the Allahabad High Court in three Criminal Appeals filed before it by the appellants and one Raj Kishore. Appellant Subash and appellant Shiv Shankar were convicted alongwith Raj Kishore by the 4th Additional Sessions Judge, Bareilly u/s 302 read with Section 34 Indian Penal Code and Section 324 read with Section 34 Indian Penal Code respectively for having committed the murder of one Ram Babu and for having caused hurt with a knife to witness Dinesh Shankar. For the said convictions they were awarded imprisonment for life and three year's R.I., respectively and the sentences were ordered to run concurrently. One Om Kumar who was also sent up for Sessions trial under the two charges mentioned above was acquitted by the Sessions Judge. The three convicted persons preferred appeals to the High Court and the High Court has confirmed the convictions and sentences awarded to Subash and Shiv Shankar but acquitted Raj Kishore.

2. The offences in question were committed on March 12, 1971 i.e., a day after Holi Festival at about 11 a.m. on the Bareilly-Nainital Road in Bareilly. The prosecution case was that while Shiv Shankar caught hold of Ram Babu, Subash, Raj Kishore and Om Kumar repeatedly stabbed him with knives and caused fatal injuries to him. When Dinesh Shankar (P.W. 2) tried to intercede he was also stabbed by Subash and caused an injury. Besides, Dinesh Shankar (P.W. 2) the occurrence was witnessed by an uncle of Ram Babu viz. Budh Sen (P.W. 1) and Shyam Behari (P.W. 3) and some others. Ram Babu and Dinesh Shankar were taken to the hospital but Ram Babu was pronounced dead in the hospital. The motive for the occurrence was that about 15 or 20 days prior to the occurrence Ram Babu had given a machine part to Subash for being welded but Subash failed to carry out the work; nevertheless he refused to return the machine part without the repair charges being paid to him. Ram Babu refused to pay the charges and there was an altercation but the parties were pacified by Dinesh Shankar and Ram Babu took away the machine part without paying any charges to Subash. The quarrel had taken place about 3 or 4 days before the occurrence. Bearing this grudge in mind, when Ram Babu, accompanied by Budh Sen and Dinesh Shankar was proceeding to Qutabkhana to witness the Holi celebrations, Subash assisted by his three companions attacked Ram Babu in the manner set out earlier and caused fatal injuries to him. There were as many as 14 injuries on Ram Babu among which 7 were punctured wounds. Among the punctured wounds, injury Nos. 7 and 8 were deep injuries which had injured the pleura, left lung, pericardium and the heart. These injuries were certified to be sufficient in the ordinary course of nature to cause death. Dinesh Shankar (P.W. 2) also had sustained an incised wound on his left thigh.

3. Budh Sen (P.W. 1) got a report Exhibit Kha 1 written by his son and presented it at the Police Station at 1.12 p.m. Therein he has stated that accused Subash was known to him but the other three assailants were not known to him but another witness Bhuvan Chand examined as C.W. 1, had informed him that one Raja Ram was one of the assailants of Ram Babu. It would appear that subsequently Bhuvan Chand refused to testify out of fear of the accused and hence he was not cited as a witness in the charge-sheet. Even so, having regard to the averments in Exhibit Kha 1, the Sessions Judge examined Bhuvan Chand as a court witness. He, however, failed to corroborate Budh Sen and stated that he did not know anything about the occurrence.

4. Subash was absconding and he surrendered before the court on 12.3.71. He was subsequently questioned by the Investigating Officer and he gave information regarding the names and addresses of the other three assailants. Raj Kishore was arrested on 23.5.1971 and Shiv Shankar was arrested on 14.6.71 from the office of the Central Excise, Bareilly where he was employed. Om Kumar surrendered himself in Court on 15.7.71.

5. Test identification parades were held for Raj Kishore and Shiv Shankar on 5.5.71 wherein Shiv Shankar was identified by Budh Sen, Dinesh Shankar and

Shyam Behari but Raj Kishore was identified only by Dinesh Shankar. In the subsequent test identification parade held for Om Kumar on 27.7.71 none of the witnesses was able to identify him. The defence of all the accused was one of denial.

6. Since accused Om Kumar was not identified by any of the witnesses at the test identification parade and since his name was not mentioned in Exhibit Kha 1 the Sessions Judge acquitted him of the charges and convicted only the two appellants and Raj Kishore. The High Court acquitted Raj Kishore because he had been identified only by Dinesh Shankar and not by the other witnesses but, however, confirmed the conviction of these two appellants and it is against such confirmation by the High Court, the appellants have preferred these Appeals.

7. Before dealing with the case of Subash we can conveniently deal with the appeal of Shiv Shankar. Admittedly he was not known to any of the eye witnesses and his name does not also find a place in the First Information Report Exhibit Kha 1. His name came to be known only through Subash when he was questioned in the jail on 7.4.1971. Even if it were so, it is not understandable why the Investigating Officer should have taken three weeks to question Subash after his surrender in Court on 17.3.1971. Be that as it may, even after getting the name and address of Shiv Shankar from Subash, the Investigating Officer has failed to trace him and arrest him till 14.6.1971. Shiv Shankar was an employee in the office of the Central Excise Department at Bareilly itself. It is, therefore, difficult to believe that the Investigating Officer would not have been able to trace him and arrest him for nearly 9 weeks after coming to know of Shiv Shankar's name and address from Subash. As a matter of fact, the Investigating Officer has stated in his evidence that he visited the house of Shiv Shankar two or three times to arrest him but Shiv Shankar was not to be found. If Shiv Shankar was absent from the house the Investigating Officer could have easily learnt from the neighbours where he was working and where he had gone and located him and arrested him. It is not the prosecution case that Shiv Shankar was absconding. In such circumstances it is difficult to accept the prosecution case that the Investigating Officer could not trace and arrest Shiv Shankar till 14.6.71 in spite of coming to know on 7.4.71 itself that he was one of the assailants of Ram Babu.

8. Apart from this infirmity we further find that Shiv Shankar was not put up for test identification parade promptly. The identification parade has been held three weeks after his arrest and no explanation has been offered for the delay in holding the test identification parade. There is, therefore, room for doubt as to whether the delay in holding the identification parade was in order to enable the identifying witnesses to see him in the police lock-up or in the jail premises and make a note of his features.

9. Over and above all these things there remains the fact that a sufficiently long interval of time had elapsed between the date of occurrence when the witnesses had seen Shiv Shankar for a few minutes and the date of the test identification

parade. It is, no doubt, true that all the three witnesses had correctly identified Shiv Shankar at the identification parade but it has to be borne in mind that nearly 4 months had elapsed during the interval. It is relevant to mention here that neither in Exhibit Kha I nor in their statements during investigation, the eye witnesses have given any descriptive particulars of Shiv Shankar. While deposing before the Sessions Judge they have stated that Shiv Shankar was a tall person and had 'sallow' complexion. If it is on account of these features the witnesses were able to identify Shiv Shankar at the identification, parade, they would have certainly mentioned about them at the earliest point of time because their memory would have been fresh then. Thus in the absence of any descriptive particulars of Shiv Shankar in Exhibit Kha 1 or in the statements of witnesses during investigation, it will not be safe and proper to act upon the identification of Shiv Shankar by the three witnesses at the identification parade and hold that he was one of the assailants of Ram Babu. As pointed out in *Muthuswami Vs. State of Madras*, where an identification parade is held about 2-1/2 months after the occurrence it would not be safe to place reliance on the identification of the accused by the eye witnesses. In another case *Vasanta Vs. State of Maharashtra*, it was held that where the witnesses had not given any description of the accused in the First Information Report, their identification of the accused at the Sessions trial cannot be safely accepted by the court for awarding conviction to the accused. In the present case there was a long interval of nearly 4 months before the test identification parade was held and it is difficult to accept that in spite of this interval of time the witnesses were able to have a clear image of the accused in their minds and identify him correctly at the identification parade.

10. Mr. U.R. Lalit, learned Counsel for Shiv Shankar further contended that Shiv Shankar had certain distinctive features like scars on the face, reddish lips etc., and these marks of identification should have been furnished to the witnesses before they were called upon to identify Shiv Shankar at the identification parade. We do not think it necessary to go into the merits of this argument in the light of our conclusion already reached. As the conviction of Shiv Shankar is based solely with reference to his identification at the identification parade, he has to be given the benefit of doubt and acquitted in the light of our finding. Accordingly, Shiv Shankar's appeal has to succeed.

11. Coming now to the appeal of Subash it was strenuously contended by Mr. Frank Anthony, learned Counsel that the prosecution evidence suffers from numerous infirmities and as such the Sessions Judge and the High Court ought not to have convicted him. His further argument was that in any case the benefit of doubt given to Om Kumar and Raj Kishore, ought to have been given to Subash also. Mr. Anthony argued that Exhibit Kha 1 could not have been given at 1.12 p.m. because there is no evidence to show when the report was sent to the Magistrate and when it was received by him. The learned Counsel referred to *Gurdev Singh and Ors. v. The State* [1963] Pun LR 409 where the dangers ensuing from a First Information Report not being lodged promptly have been pointed out. We are unable to accept the argument of Mr. Anthony because there

are no materials to warrant an inference that Exhibit Kha 1 had been given later but ante-dated to cover up the delay in making the report. It is true that the First Information Report sent to Court does not contain the Magistrate's endorsement regarding the time of its receipt, but Ram Kishan, Head Constable (P.W. 5) has deposed that the special report was despatched to the Magistrate at 1.20 p.m. itself through constable Chiman Lal and that the General Diary contains an entry to that effect.

12. It was seriously urged by Mr. Anthony that the motive put forward for the occurrence was of a flimsy nature and it is unbelievable that for non-payment of repair charges Subash would have attacked Ram Babu along with his companions. This argument has to fail because Dinesh Shankar has clearly deposed that there was an altercation between Subash and Ram Babu there on four days earlier and Ram Babu took away the machine part without paying repair charges to Subash. There is, therefore, nothing improbable in Subash having nurtured a grievance against Ram Babu and wanting to settle scores with him. The evidence of the eye-witnesses is clearly to the effect that Subash told his companions on seeing Ram Babu, that he is the person who had quarrelled with him and taken away the machine part without paying the repair charges. Making common cause of his grievance Subash's companions had also joined him in perpetrating an attack on Ram Babu. The intent of Subash in launching an attack on Ram Babu can be gauged from the fact that when Dinesh Shankar tried to intervene, he had prevented him and inflicted a stab injury on him also.

13. The further argument of Mr. Anthony was that Budh Sen did not have proper eye sight, that Shyam Behari was a chance witness and that Bhuvan Chand named in Exhibit Kha I had failed to support the prosecution case and as such there is no acceptable evidence to convict Subash. He also stated that even though Dinesh Shankar is an injured witness, there is no guarantee his evidence is truthful. None of these contentions in our opinion, has any merit. Budh Sen has stated that his eye sight is poor without glasses but with spectacles he can see well. It is not the case of the appellant that Budh Sen was not wearing his spectacles at the time of the occurrence. In so far as Dinesh Shankar and Shyam Behari are concerned, their presence at the scene cannot admit any doubt because their names find a place in Exhibit Kha I. Moreover Dinesh Shankar has sustained an injury on his left thigh. The evidence of these witnesses has been accepted by the Session Court and the High Court and we see no reason to take a different view. In so far as Bhuvan Chand (C.W. 1) is concerned, the prosecution has satisfactorily explained why he was not cited as a witness. He had no doubt furnished the name of Raja Ram alias Raj Kishore' to Budh Sen but he subsequently backed out fearing reprisal at the hands of the accused. Mr. Anthony argued that even if his contentions are not accepted, Subash can be convicted only for an offence u/s 324 Indian Penal Code for the injury caused to Ram Babu as well as Dinesh Shankar. We may mention here that the Sessions Judge had framed a separate charge-against the appellant Subash u/s 324 Indian Penal Code in addition to the charge u/s 302 read with Section 34 Indian

Penal Code. Mr. Anthony invited our attention to *The State of Uttar Pradesh Vs. Hari Prasad and Others*, and *Ugar Ahir and Others Vs. The State of Bihar*, to contend that when the sub-stratum of the prosecution case fails, the entire case has to fail. We find the facts in those cases were entirely different and hence they can have no relevance to this appeal. In the present case, the prosecution version fully survives in spite of the acquittal of the other accused for want of proof of identity.

14. The last argument of Mr. Anthony was that in any event when the other accused persons are acquitted, Subash alone cannot be convicted u/s 302 read with Section 34 Indian Penal Code in the absence of evidence to show that he caused any of the fatal injuries on Ram Babu. This argument is devoid of any merit. The case of Subash stands on a different footing from that of the other accused because he has been clearly named and the particulars of his profession and address have been furnished in Exhibit Kha I. All the witnesses have stated that he was known to all of them. In contrast the names of the other accused were not known to the eye witnesses and the name of Raj Kishore alone had been furnished to Budh Sen by Bhuvan Chand. Besides attacking Ram Babu Subash had also attacked Dinesh Shankar. He was absconding and had later surrendered himself in court. No test identification parade was held for him because his identity was never in doubt. He had a grudge against Ram Babu and it was on his instigation the attack on Ram Babu had been launched. His case, therefore, stands on a distinctively different footing from that of the other accused persons. Even though the other accused are acquitted it is only for want of proof of their identity and not because the eye witnesses had not seen the occurrence or that the occurrence had taken place in a different manner. Subash cannot, therefore, escape the consequences of the attack jointly committed by him and his accomplices in furtherance of their common intention even though the other accused stand acquitted for want of acceptable proof of their identity. Mr. Anthony referred us to the decision in *Chandubhai Shanabhai Parmar Vs. State of Gujarat*, to contend that when the other accused stand acquitted Subash also should be acquitted of the charge u/s 302 read with Section 34 Indian Penal Code. The facts in that case bear no comparison with the facts in this case. On the other hand *Amir Hussain Vs. State of U.P.*, will be the decision apt for consideration in this case. In the above case 10 persons were acquitted by the Sessions Judge and three alone were convicted u/s 302 read with Section 34 Indian Penal Code. Among those three, two were acquitted by the High Court and consequently only one of the accused stood convicted. The said accused appealed to this court and contended that since the other two accused had been acquitted, he should also be acquitted of the charge u/s 302 read with Section 34 Indian Penal Code. Repelling the contention this Court held as follows:-

Much stress has been laid on behalf of the appellant upon the fact that despite the evidence of the above mentioned four eye-witnesses, the High Court has acquitted Karimuddin and Mohd. Ibrahim accused. It is, in our view, not necessary to express an opinion on the point as to whether those two accused

were rightly acquitted or not. All that we can say is that the benefit of doubt which resulted in the acquittal of the other two accused would not vitiate the conviction of the appellant in case the evidence adduced against him is found to be satisfactory and convincing. The material on record establishes that the appellant had a motive to join in the assault on Ibrahim Pradhan. The appellant held out a threat and report about it was lodged by Ibrahim deceased at the police station about 3-1/2 months prior to the present occurrence. The evidence about the motive lends assurance to the evidence of the eye-witnesses regarding the complicity of the appellant.

We would, therefore, maintain the conviction of the appellant.

As regards the sentence, it may be stated that the only injury which is attributed to the appellant is an incised wound on the right arm of Ibrahim. The incised wound which was found on the scalp of Mehandi Hasan was ascribed by the eye-witnesses to Karimuddin who has been acquitted. In view of the fact that a comparatively minor injury was attributed to the appellant and he is being vicariously held liable for the fatal injuries caused by the other culprits, we consider it to be a fit case in which we might substitute the lesser sentence for the extreme penalty of death. We accordingly maintain the conviction of the appellant but reduce his sentence to that of imprisonment for life.

15. We are, therefore, of the view that even though the other accused stand acquitted and even though there is no evidence that Subash caused one of the fatal injuries, he cannot escape conviction u/s 302 read with Section 34 Indian Penal Code when his participation with three other assailants in the attack on Ram Babu has been established beyond reasonable doubt by the prosecution. We, therefore, confirm his convictions and the sentences awarded therefor.

16. In the result Crl. Appeal No. 287 of 1978 will stand dismissed while Crl. Appeal No. 288 of 1978 will stand allowed. Appellant Subash will surrender himself to custody failing which he should be arrested for serving out the sentence. Appellant Shiv Shankar will stand acquitted of the convictions u/s 302 read with Section 34 Indian Penal Code and 324 read with Section 34 Indian Penal Code and his bail bonds will stand cancelled.