

(2003) 05 AHC CK 0146

In the Allahabad High Court

Case No : Criminal Appeal No. 100 and 746 of 1981

Sushil Kumar Jain; State of U.P.

APPELLANT

Vs

State of U.P.; Rakesh Kumar Bisaria & Anr.

RESPONDENT

Date of Decision : 13-05-2003

Acts Referred:

Evidence Act, 1872 — Section 3
Penal Code, 1860 (IPC) — Section 302

Citation : (2003) 05 AHC CK 0146

Hon'ble Judges : M.C.Jain, J and K.N.Ojha, J

Final Decision : Dismissed

Judgement

M.C. Jain, J.—These are two connected appeals challenging the judgment and order dated 19121980 passed by Sri R.C. Verma, the then II Additional Sessions Judge, Aligarh in S.T. No. 546 of 1979. The appellant in Criminal Appeal No. 100 of 1981 is one Sushil Jain who has been convicted under Section 302 I.P.C. and sentenced to life imprisonment. The other Criminal Appeal No. 746 of 1981 has been preferred by the State challenging the acquittal of two coaccused, namely, Rakesh Kumar Bisaria and Subhash Chand Shiroti of the charge of Section 302 IPC read with Section 34 I.P.C. The trial Court convicted these two only under Section 324 I.P.C. read with Section 34 I.P.C. and directed them to be released on probation on furnishing personal bond of Rs. 2,000/ by each of them with one surety in like amount to keep peace and be of good behaviour for a period of one year.

2. The incident took place in between the night of 8/981979 at about 1.30 a.m. in Labour Colony, Police Station Hathras. The deceased was Jai Shanker who was allegedly stabbed to death by Sushil Kumar Jain while two others (coaccused) (respondents in Criminal Appeal No. 746 of 1981) caught hold of him. The report was lodged by Suresh Chand Sharma P.W. 3 real brother of the deceased at 2.15 a.m. The distance of the Police Station from the place of occurrence was only one Km. A "swang" (dramatic performance) was held in the fateful night in the Labour Colony, Hathras just in front of Labour Welfare Centre. A "Pandal" had

been settled there with arrangement of Loudspeakers as also of electric light. The drama related to "Kali Nagin alias Beqasoor Beti. Suresh Chand P.W. 3 and his deceased brother had taken their seats just to the southeast of the stage of "pandal". The accused Sushil Kumar Jain and Rakesh Kumar Bisaria arrived there and stood just in front of two brothers, obstructing their view of dramatic performance. When Jai Shanker asked them to move aside, they started hurling abuses. Jai Shanker objected to it and exchange of hot words took place. Both the accused however, went away after issuing a threat to settle the score with Jai Shanker.

3. The dramatic performance lasted at about 1.15 O'clock in the night and when it came to an end, the audience dispersed. The witnesses, Komal Kishore, Ashok Kumar and Vineet had come to see the show but after the quarrel between the deceased and two accused referred to above. They as well as the deceased were going away. But when they met each other, friendly conversation started which lasted for about 10 or 15 minutes. In this slow process, Jai Shanker was proceeding a few paces ahead of others. Just then all the three accused arrived there and taunted Jai Shanker that he was behaving as a "Danda" and that he had insulted them and that, too their own locality i.e. the Labour Colony where the "Swang" was being performed. Subhash Shiroti and Rakesh Kumar Bisaria held the hands of Jai Shanker (deceased), while the accused appellant Sushil Kumar Jain landed three knife blows on his chest. An Alarm was raised by witnesses as also by Jai Shanker. As witnesses proceeded for apprehending the accused, all of them ran away flaunting their knives to scare them away.

4. From the place of occurrence, the witnesses shifted Jai Shanker on a rikshaw. When he was produced in the Hospital at Hathras, the Doctors declared him to be dead. Suresh Chand then prepared the FIR and presented it at the Police Station on the basis of which a case was registered and the investigation was started which was entrusted to S.I. Hari Prasad Verma, P.W. 10. After recording the statement of informant, he went to Hospital, prepared inquest report and completed other formalities. The deadbody was ultimately sent for postmortem which was conducted by Dr. R.A. Singh P.W. 9 on 981979 at 4.30 p.m. The deceased was aged about 23 years and half a day had passed since he died. The following antemortem injuries were found on his person:

- (1) Incised wound $1\frac{1}{2}$ " x $1\frac{1}{4}$ " x chest cavity deep, 2" below and out of left nipple.
- (2) Incised wound 1" x $1\frac{1}{2}$ " x chest deep, 2" behind injury No. 1.
- (3) Incised wound $3\frac{3}{4}$ " x $1\frac{1}{2}$ " x chest deep $21\frac{1}{2}$ " behind and above left nipple.

Margins of all wounds were clean cut and wounds spindle shaped.

5. On internal examination, pleura on the left side was found punctured. Left was punctured at three places. Pericardium was also punctured. Left ventricle of the heart was punctured through and through near apex.

6. The cause of death was shock and haemorrhage resulting from antemortem

injuries which were sufficient to cause death in ordinary course of nature.

7. The defence was of denial and of false implication due to enmity.

8. In support of its case, the prosecution in all examined twelve witnesses. The eyewitnesses were Suresh Chand, informant P.W. 3, Komal Kishore P.W. 6, Vineet P.W. 7 and Ashok Kumar P.W. 8. The evidence of Chandra Bhan P.W. 1 was about supplying of the Loudspeakers and electric items and also regarding signatures of Sushil Kumar Jain in his diary. The evidence of Ishwari Prasad P.W. 2 was about supply of three items of flooring and signatures of Rakesh Bisaria in his Register. The rest were formal witnesses regarding Postmortem, Investigation, etc.

9. In Criminal Appeal No. 100 of 1981, we have heard the arguments of Sri Shishir Tandon brief holder of Sri G.S. Chaturvedi, learned Counsel for the appellant and Shri G.S. Bisaria learned A.G.A. from the side of State. In the connected State Appeal No. 746 of 1981 which has been filed by the State, the arguments of Sri G.S. Bisaria learned A.G.A. have been heard in support of the appeal and of Sri Kamal Krishna, learned Counsel for the respondents in opposition thereof. The record of the lower Court has been summoned before us, which we have carefully perused.

10. Having regard to the medical evidence contained in post mortem report of the deceased proved by Dr. R.A. Singh P.W. 9 (who conducted autopsy), it admits of no doubt that Jai Shanker deceased was the victim of violence. The Doctor also specifically stated that the injuries found on his person were sufficient to cause death in ordinary course of nature. In fact, the factum of murder has not been disputed either from the other side.

11. So far as the question of motive is concerned, it is never incumbent on the prosecution to prove it. Further, motive recedes into insignificance when there is direct ocular testimony as is the case here. To be short, motive is not evidence in a case, but is only indicated to heighten the probability. Apart from there being reliable testimony of eyewitnesses, evidence has come on record indicating the background of the present incident impregnate of the motive. Suresh Chand P.W. 3 brother of the deceased testified that he along with his deceased brother had gone to see "Swang" (dramatic performance) when an altercation took place between the deceased on the one hand and the accused Sushil Kumar Jain and Rakesh Bisaria on the other. The reason was that these two accused had stood in front of the deceased obstructing his view of the "Swang". It is also clear from the evidence on record adduced by the prosecution that these two accused were actively involved in the holding of the said "Swang" Chandra Bhan P.W. 1 and Ishwari Prasad P.W. 2 gave evidence about supplying of articles for the "Swang". Chandra Bhan P.W. 1 had his shop in the town known as "Jai Bharat Radios". He testified that two electric bulbs of 500 watts with holders and two wire pieces had been supplied by him to the accused Sushil Kumar Jain for the "Swang" in the Labour Colony. Ishwari Prasad P.W. 2 had supplied three pieces of floors (phars) to accused Rakesh Bisaria. Both these were independent witnesses. They

were neither thick with the deceased nor inimical to these two accused. We have gone through their crossexamination. Their testimony could not be blemished. So, reliable evidence is there about supply of articles by these two witnesses for being used in "Swang". The articles were supplied to the accused Sushil Kumar Jain and Rakesh Bisaria who were obviously actively involved in the holding of "Swang" in managerial capacity. Naturally, because of their managerial position, they took it ill when the deceased raised objection to the obstruction of his view in the "Swang" by their standing in front of him. These two accused must have considered it their right to stand anywhere. Therefore, they felt insulted when the deceased raised objection to their standing in front of him and that, too, in their own locality where the "Swang" was being performed. The altercation at the time of "Swang" was sufficient motive to the accused against deceased.

12. It has been argued by the learned Counsel for the appellant Sushil Kumar Jain that there was no light at the spot. To us, this argument seems to have no basis. It has to be pointed out that all the eyewitnesses claimed that they knew the accused persons from before and there was light of electricity coming from the nearby poles. The defence suggestion to Suresh Chand P.W. 3 was that there was failure of electricity. He denied it. The said defence suggestion, we find, is without any legal evidence to back it. The incident took place in city area where the availability of electric light in the night was quite natural. The prosecution witnesses were rightly believed that they recognized the accused in the light of electricity. It is also to be borne in mind that all of them knew the accused from before and the incident took place in this manner that two persons held the hands of the deceased and the third one Sushil Kumar Jain gave him knife blows. Therefore, it is not possible to accept the argument that there was no light at the spot.

13. Another argument advanced from the side of the appellant Sushil Kumar Jain is that eyewitnesses did not receive any blood on their clothes or hands. A perusal of medical evidence contained in the postmortem report of the deceased shows that injuries had been inflicted on him on his chest. Thus, there was no occasion of the extremities of the deceased having any blood. The witnesses could easily lift him by holding the extremities. The fact that the victim reached the hospital immediately after the incident shows, that there were witnesses present at the scene of occurrence who took him there. The presence of the eye witnesses at the spot cannot be doubted on the premise of blood having not been found on their clothes.

14. The argument of learned Counsel for the appellant Sushil Kumar Jain then is that the prosecution did not produce other eyewitnesses named as such in the FIR. It is cardinal principle of law that it is the quality of the evidence, and not the quantity that matters. It is not required of the prosecution to adduce repetitive evidence. Further, no suggestion was made to the investigating officer in his crossexamination that he withheld the other witnesses for any oblique motive. The guilt was proved to the hilt by the evidence that came to be adduced

by the prosecution at the trial. In the absence of the legal evidence of oblique motive for withholding other witnesses, it is not possible that any adverse inference under illustration (g) of Section 114 of Indian Evidence Act can be raised. The said illustration says:

The Court may presume that the evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

15. Criticism has been levelled by learned Counsel for the accused against the testimony of eyewitnesses which we find to be unsustainable. The defence produced a copy of the police report under Section 107/116 of Cr.P.C. (Kha2). The deceased was opposite party in that case and witness Ashok Kumar P.W. 8 was also the opposite party with him. This factor, far from helping the accused, rendered it highly probable that the deceased and Ashok Kumar were conversing after the "Swang" was over. Suresh Chand P.W. 3 had gone with the deceased to witness the "Swang" and it was quite natural that he was returning with him. The central core of the testimony of eyewitnesses remained unshaken (despite searching and lengthy cross examination) that Rakesh Bisaria and Subhash Shiroti caught hold the deceased while Sushil Kumar Jain gave knife blows to him. Their testimony is consistent as to the manner of assault. Komal Kishore P.W. 6 fully corroborated Suresh Chand P.W. 3 in all respects. He himself had been the President of Union of Students of Bagla Degree College and knew Jai Shanker who too, was a student there. After the "Swang" was over, he, Jai Shanker and other witnesses were returning home, when the incident occurred. On analyzing the testimony of eyewitnesses in an adjudicatory manner, we are of the view that it cannot be flawed that they witnessed the incident which occurred in the manner alleged by the prosecution on the given date, time and place. To repeat sufficient light was available at the spot facilitating the witnesses to unmistakably recognize the assailants whom they very well knew from before too.

16. Learned Counsel for the appellant Sushil Kumar Jain then submitted on the basis of the document Kha2 to Kha9 (some chargesheets) that the deceased was being prosecuted in different cases and he was of hazardous character, so that any of his enemies might have killed him. It is mere speculation which cannot overshadow and eclipse the clinching and satisfactory evidence regarding his murder having been committed by the present accused. In view of the direct nature of testimony of eyewitnesses, imaginary doubt thrown from the side of the accused/appellant that the deceased had many enemies who could have been killed by one or more of them, is not sustainable. We, therefore, reject this argument.

17. Our conclusion based on the above discussion relating to all important aspects of the case is that it was proved to the hilt by clinching and conclusive evidence that it was the appellant Sushil Kumar Jain who murdered the deceased Jai Shanker and he has rightly been convicted under Section 302 I.P.C. with sentence of life imprisonment. We would, therefore, dismiss Criminal Appeal No. 100 of 1981 filed by him.

18. Learned A.G.A. arguing State Appeal No. 746 of 1981 has vehemently argued that Rakesh Kumar Bisaria and Subhash Chand Shiroti were also guilty of offence under Section 302 IPC read with Section 34 IPC as they had played potent role in the commission of the crime by holding the victim by arms when knife blows were given to him by Sushil Kumar Jain. They, according to him, shared the common intention of Sushil Kumar Jain and learned trial Judge committed an error by only convicting them under Section 324 IPC read with Section 34 IPC and releasing them on probation. Sri Kamal Krishna appearing from the side of the respondents (Subhash Chand Shiroti and Rakesh Bisaria) has countered the submission of learned A.G.A. supporting the view taken by the learned trial Judge.

19. We have given our anxious thought to this aspect of the matter. In a crime committed by more than one persons, more often than not, the Court has to determine the degree of culpability of those participating in the commission of the crime with the actual assailants. The question of common intention is one of fact, which has to be determined on the facts and circumstances of each case. In determining this pertinent question, the Court has to bestow thought on the motive for the crime, the weapons used in the attack and the conduct of each of the participants, both before and at the time of attack. These are some relevant considerations which help the Court in coming to the right conclusion. In the present case, the motive was quite trifling arising from quarrel which ended after short while in the "Swang". The occasion for the quarrel was that the accused Sushil Kumar Jain and Rakesh Bisaria had stood in front of the deceased while the show was on and view of the deceased was obstructed to which he raised objection. Exchange of hot words had taken place. No eyewitness stated that knife used by Sushil Kumar Jain was of a large size. There was no evidence as to what was the length of its blade or of the handle. There is no evidence that knife was flaunted by actual assailant Sushil Kumar Jain before the deceased was held by these two accused. Having regard to the trifling nature of the motive and in the absence of evidence about the size of knife, these two accused (Rakesh Kumar Bisaria and Subhash Chandra Shiroti) could not be deemed to share the common intention of Sushil Kumar Jain to murder the deceased. On cumulative consideration of the facts, evidence and circumstances of the case, it was rightly held by the Court below that so far as they were concerned, the offence did not travel beyond Section 324 IPC read with Section 34 IPC. Their release on probation in place of substantive sentence of imprisonment also does not call for any interference. We would, therefore, dismiss the State Appeal No. 746 of 1981.

20. Our final order is as under:

Criminal Appeal No. 100 of 1981 is dismissed and the conviction of appellant Sushil Kumar Jain under Section 302 IPC with sentence of life imprisonment is upheld. He is on bail and shall be arrested and sent to jail to serve out the sentence passed against him. The Chief Judicial Magistrate, Hathras shall do the needful.

State Appeal No. 746 of 1981 is hereby dismissed. The two respondents Rakesh Kumar Bisaria and Subhash Chand Shiroti are on bail.

The office is directed to send a copy of this judgment along with record of the case to the Court below for needful compliance under intimation to this Court within two months from the date of receipt.