
(1978) 04 RAJ CK 0016
In the Rajasthan High Court
Case No : Criminal Appeal No. 573 of 1972

Vijay Raj and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 03-04-1978

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 304, 307

Citation : (1978) WLN 146

Hon'ble Judges : A.P. Sen, Acting C.J.; R.L. Gupta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

A.P. Sen, Actg. C.J.

1. This appeal ? D.B. Original Appeal No. 761 of 1972 - has been preferred by the State Govt. against the judgment of the Additional Sessions Judge No. 2. Jodhpur dated 28.6.1972 acquitting the respondents of offences under Sections 302 302 r/w 34 148 307 307 r/w 149 and 307 r/w 34 of the Indian Penal Code resulting in the murder of one Pukhraj and in attempt to commit murder of his son Parasmal PW/13. The connected appeal - S.B. Criminal Appeal No. 573 of 1972 - has been filed by the accused Vijaykishan against his conviction u/s 324 r/w 34 of the Indian Penal Code for causing hurt to Parasmal PW/13 and u/s 326 r/w 34 for causing grievous hurt to the deceased Pukhraj with a sharp-edged weapon.

2. The deceased Pukhraj had obtained a decree for possession of a house from the court of Munsif Magistrate, Bilara against one Devilal, the uncle of she three accused Vijay Raj alias Vijay Kishan, Ghanshyam and Vasudeo. Vijay Raj had filed an objection under Order XXI Rule 58 of the CPC the hearing of the execution proceedings was fixed in the court of the Munsif Magistrate on 30-1-1971 and the deceased had gone to attend the hearing. But as he was not feeling well, his son Parasmal PA/13 asked him to go home. After a while,

Shantilal PW/1, another son of Pukhraj came and relieved Parasmal who had to go to the tehsil in connection with the registration of a sale deed executed by Jawanram PW/27.

3. According to the prosecution; at about 3.00 PM., the three accused Vijay Raj, Ghanshyam and Vasudeo, who are brothers, along with their two companions, the accused Mahesh & Roop Kishore, all armed with pharsis and knives way laid Parasmal PW/13 near the hotel of one Dhaglaran while he was returning from the tehsil along with Jawanram and started assaulting him. The deceased Pukhraj who was sitting on a chabutra in front of his house with Durgaram PW/12, on hearing of the alarm raised by his son Parasmal PW/13, rushed to his rescue. Thereupon, the accused persons assaulted the deceased Pukhraj with their weapons and caused multiple injuries on his body. While Vijayraj caught hold of the deceased Pukhraj, the accused Ghanshyam struck him a blow on the head with a pharsi, the accused Vasudeo with a knife and the remaining two accused Mahesh and Roop Kishore with their weapons. The deceased Pukhraj was given three blows with a pharsi on his head, as a result of which he fell down unconscious in a pool of blood. On being informed of the assault on his father Pukhraj and brother Parasmal, Shantilal PW/1 who was in the court, immediately rushed to the spot and found them both lying in injured condition on the ground. He took them to the Government Dispensary, Bilara and also lodged a first information report exhibit P/I at the Police Station, Bilara at 3.30 PM. i.e., within half an hour of the incident. In the report, he stated that Vijayraj and Ghanshyam had assaulted the deceased Pukhraj and Parasmal along with their 2/3 companions.

4. The injured were treated for their wounds by Dr. Ashok Ramchandani at the Government Dispensary, Bilara vide injury reports exhibit P/9 and P/10. He found that the deceased Pukhraj had the following external injuries:

(i) incised wound 2 3/4" x 1/2" x 1/2" with bleeding on the scalp on the left of mid line played longitudinally just behind hair line; fracture of skull bone underlying wound No. 1 along its whole length

(ii) Incised wound 2" x 1/2" with bleeding oblique on the left parietal region of scalp at middle external laterally forwards fracture of skull underlying wound No. 3 along its whole length.

(iii) Incised wound 2" x 1/2" x 1/2" with bleeding on the right parietal" region of scalp placed oblique on its posterior part; fracture of skull underlying wound No. 4 along its whole length.

(iv) Bruise 2" x 1" on the back of its forearm at middle.

The doctor also found that Parasmal PW/13 had the following external injuries:

(i) Stab wound 1" x 1/2" x 1/2" deep on the right side on the postero lateral aspect of flank of abdomen extending deep in to the muscular tissue inwards and down wards.

- (ii) Incised wound 1 1/4" x 1/2" x 1/2" deep on the hind plane of scalp longitudinally placed just behind hair line.
- (iii) Abrasion on 1 1/2" x 1/4" on the front of chest on left side lower aspect obliquely placed.
- (iv) abrasion 1 1/4" x 1/4" on the front of left shoulder.
- (v) abrasion on 1/2" x 1/4" on the left shoulder on its lateral aspect.
- (vi) abrasion on 1/2" x 1/4" on the part of abdomen on the right margin.
- (vii) abrasion on 3/4" x 1/2" on the part of left knee.
- (viii) abrasion on 1" x 1" on the front of right knee.
- (xi) abrasion on 2 1/2" x 1/4" on the middle of back at end of the twelfth thoracic vertebrae placed oblique.

Shri. Amarnath, Munsif PW/8 recorded the dying declaration of the deceased Pukhraj exhibit P/12 as well as that of Parasmal exhibit D/2. The deceased Pukhraj made the dying declaration to the effect:

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5. As the condition of the deceased Pukhraj and his son Parasmal had become precarious, they were rushed to the Mahatma Gandhi Hospital, Jodhpur where the deceased Pukhraj succumbed to his injuries on the next daytime 31-1-1971 at 7-20 AM.

6. Dr. P.R. Bhandari, Medical Jurist, Mahatma Gandhi Hospital PW/9 performed an autopsy on the dead body of the deceased Pukhraj and confirmed the external injuries found by Dr. Ashok Ramchandani On dissection, he found the following internal injuries:

- (i) fracture of the fronto-parietal region, left side into 3 pieces.
- (ii) depressed fracture of the left parietal bone just left to the injury No. 1.
- (iii) depressed fracture of the tight parietal region.
- (vi) incised wound 3 cm x 1/2 cm x 5 cm deep on the left frontal hemisphere of brain
- (v) incised wound (sic) cm x 1/2 cm x 3 cms deep on the right frontal

hemisphere.

In his opinion, the death of the deceased Pukhraj was due to coma as a result of the injuries mentioned above. Thus there can be no doubt that the death of the deceased was homicidal.

7. On 2-2-1971 Ganpatsingh S.H.O. Bilara PW/28. arrested the accused Vijayraj On 7.2 71, he arrested the accused Roop Kishore; and on 8.2.71 the accused Mahesh. The accused Vasudeo was arrested by Biswanath, Incharge, Sojatigate out post on 13-3-71 On the same day, Shri. R.R.P. Bhatnagar, Munsif, Bilara PW/5 held an identification parade vide identification memo exhibit P/8. The accused Roop Kishore gave information to the Police on 10-2-72 vide memo exhibit P/2 leading to the discovery of a knife, article 9, seized under seizure memo exhibit P/17 The Chemical Examiner by his report exhibit P/39, however, found it not to be stained with blood.

8. The Police put up a challan against the five accused persons namely, Vijay Raj, Ghanshvam, Vasudeo, Mahesh and Roop Kishore Under Sections 302 302 r/w 34 148 307 307 r/w 149 and 307 r/w 34 IPC. Of these, the accused Ghanshyam was absconding and, therefore, proceedings u/s 512 of the Code of Criminal Procedure, If 98 were taken against him. The remaining four accused persons were however put on their trial.

9. The accused persons abjured their guilt and denied the commission of the alleged offences. Their defence was one of complete denial and indeed the accused Vijay Raj pleaded alibi.

10. The prosecution examined 28 witnesses. It rests the case both on direct as well as circumstantial evidence. The direct evidence consists of the testimony of Shri Kishan PW/11, Durga Ram PW/12, Parasmal PW/13, Suresh Chandra PW/15, Man Singh PW/16, and jawanaram PW/27, of these, Shri Kishan PW/11, Man Singh PW/16 and jawanaram PW/27 turned hostile The circumstantial evidence consists of the testimony of Shantilal PW/1 and Ameer Khan PW/4 coupled with the recovery of a knife, article 9, by the accused Roop Kishore at his instance and on his information and the seizure of a bilti showing that the accused had taken a cycle on hire.

11. The learned Additional Sessions Judge has acquitted the accused Vasudeo, Mahesh and Roop Kishore giving them the benefit of doubt, but convicted the accused Vijay Raj alias Vijaj Kishan u/s 324 r/w 34 of the Indian Penal Code for having voluntarily caused simple hurt to Parasmal PW/13 and u/s 326 r/w 34 for having caused greivous hurt to the deceased Pukhraj.

12. The order of acquittal recorded by the learned Additional Sessions Judge, in so far as the accused Vasudeo, Mahesh & Roop Kishore are concerned does not warrant aa interference, but the conviction of the accused Vijay raj alias Vijay Kishan for the lesser offence of Section 326 r/w 34 IPC for causing greivous hurt to the deceased Pukhraj has caused manifest miscarriage of justice and his

acquittal must be interfered with.

13. In her carefully written judgment, the learned Additional Sessions Judge has ably marshalled the evidence to come to certain conclusions namely (1) the accused did not constitute an unlawful assembly &, therefore Section 149 was not applicable, (2) the presence of the accused Vasudeo who was not named either in the first information report exhibit P/1, or in the dying declaration made by the deceased Pukhraj exhibit P/12, nor named by PW/13 Parasmal in his earlier statement Exhibit D/2 recorded by Shri. Amarnath PW/8, or in his police case diary statement exhibit D/3, is doubtful, (3) the recovery of a bilti for a cycle showing that the accused Vasudeo had hired a bicycle from the shop of Ghanshyam PW/3 loses all importance firstly because the parentage and the Jodhpur address of Vasudeo were not written and secondly, in the register exhibit P/7 there is an interpolation, (4) the inculpatory statement of the eye-witnesses namely, Parasmal PW/13, Suresh chandra PW/15 Durgaram PW/12 and Jawanaram PW/27 identifying that the two accused Roop Kishore and Mibesh had joined in the assault on the deceased Pukhraj & his son Parasmal PW/13, is not worthy of any credence. Though these witnesses had identified these accused in court, such evidence of identification was, from its very nature, inherently of a weak character, as it was not supported by a proper test identification, (5) the test identification, parade held by Shri. R.R.P. Bhatnagar as per identification memo exhibit P/8 was of little evidentiary value, as there was unexplained, inordinate delay in holding the identification parade and further the two accused were not kept "baparda", (6) the recovery of knife, article 9, from open space like a fencing attributed to the accused in it self is not sufficient to fasten the guilty on him more so because the Chemical Examiner does not find, in his report exhibit P/34, it to be stained with blood, (7) there has been no fair investigation which reasonably creates doubt in prosecution case, in as much as firstly Ganpatsingh S.H.O. Bilara PW/28 admits during his cross examination that entries in the Rojnamcha were changed and there are interpolations in the case diary and secondly, because the investigation was taken away from Ganpatsingh S.H.O. PW/28 and handed over to Jalamsingh C.I. PW/25 for no explicable reason, and (8) though the participation of the accused Vijayraj in the assault on the deceased Pukhraj and his son Parasmal PW/13 is proved beyond all reasonable doubt, the common intention of the accused Vijayraj, who caught hold of the deceased, and his brother Ghanshyam, who struck him with a pharsi, was to commit an assault on his son Parasmal and not to commit the murder of the deceased Pukhraj We agree with the reasoning and conclusions of the learned Additional Sessions Judge except as regards the guilt of the accused Vijayraj for having only committed an offence punishable u/s 326 r/w 34 IPC in respect of the assault on the deceased Pukhraj.

14. The learned Additional Sessions Judge, has to our mind, rightly excluded the applicability of Section 149 of the Indian Penal Code In order to arrive at a conclusion regarding the vicarious liability of the accused for commission of an offence in pursuance of the common object of an unlawful assembly, the

prosecution has to establish that there was an unlawful assembly. The most important ingredient of an unlawful assembly is that the number of the members must be five or more. The deceased Pukhraj in his dying declaration exhibit P/12 stated that the assailants were 4 in number i.e., the accused Vijayraj, Ghanshyam & their 2 companions. Parasmal PW/13 was confronted with his statement exhibit D/2 recorded by Shri Amarnath PW/8 where in he had mentioned that Vijayraj and 2 or 3 other persons were there and the name of one was Ghanshyam, but he did not know the name of the rest. The name of the accused Vasudeo who is a brother of Vijayraj and Ghanshyam is missing in that statement. Shantilal PW/1 admits that while lodging the first information report exhibit P/1 he mentioned the names of the assailants as disclosed by Parasmal. Thus the prosecution having failed to establish that the assailants were five in number, there was no unlawful assembly and, therefore, Section 149 IPC was not applicable.

15. There is, however, sufficient convincing evidence to show that the accused Vijayraj and his companions sprang on the deceased Pukhraj and gave a beating to Parasmal PW/13. They were seen together immediately before the incident, jointly made an assault, and escaped together. The offences were therefore, committed in furtherance of common intention of the assailants which brings into play Section 34 of the Indian Penal Code.

16. While assailing the order of acquittal of the accused Vasudeo, Roop Kishore and Mahesh, the learned Public Prosecutor took us through the entire evidence on record. The learned Additional Sessions Judge has given cogent reasons for acquitting these accused and merely because we might, on a reappraisal of the evidence come to a different conclusion, is hardly a ground for interference. That apart, no other view on the evidence is possible than the one taken by her. As already stated, the name of the accused Vasudeo does not find mention either in the first information report exhibit P/1 lodged by Shantilal PW/1, or in the dying declaration exhibit P/12 or in the earlier statement of Parasmal exhibit D/2 recorded by Shri. Amarnath PW/8. Parasmal PW/13 was also confronted with his statement in the police case diary exhibit D/3, but he could give no convincing explanation for the omission of the name of the accused Vasudeo. He stated that so far as he recollects he had divulged the name of Vasudeo but he could not say why the Police did not record it. On the contrary Ganpatsingh S.H.O. PW/28 has stated that the statement exhibit D/3 was written by him as the witness had deposed. Further, Shantilal PW/1 admits during his cross-examination but Parasmal had not given him the name of the accused Vasudeo as one of the assailants. The presence of the accused Vasudeo at the place of occurrence is, therefore, doubtful.

17. So far as the other 2 accused Roop Kishore and Mahesh are concerned, the accused Roop Kishore was arrested on 7.2.71 while the accused Mahesh on 8.2.71. The identification parade was not held till 13-3-71 i.e., for more than a month. When Ganpatsingh S.H.O. PW/28 was put a pointed question as to the

delay in holding the identification parade, he had no explanation to offer. Shri. R.R.P. Bhatnagar PW/5 states that he had mentioned in column No. 10 of the identification memo exhibit P/8 whatever the accused had told him. In column No. 10, there is an entry that the accused informed the Magistrate that they were previously shown to the witnesses. The unexplained, inordinate delay in holding the identification parade coupled with the fact the accused were not kept "baparda" detracts from the value of such identification. This is a serious infirmity in the prosecution case. The identification by Parasmal, Suresh Chandra Durgaram and Jawanararh that the 2 unknown persons; accompanying the accused Vasudeo and Ghanshyam were the 2 accused Roop Kishore and Mahesh, is of little value unless such identification was corroborated by prior identification parade. The fact that the entries in the Rojnamcha were changed and there are interpolations in the case diary, creates considerable doubt about the complicity of these two accused. The learned Additional Sessions Judge was, therefore, right in giving them the benefit of her doubt. There are no compelling reasons for us to interfere with their acquittal.

18. In our judgment, the learned Additional Sessions Judge was not right in holding that since the common intention of the accused Vijayraj and his companions was to commit an assault on Parasmal PW/13, the accused Vijayraj could only be convicted u/s 326 r/w 34 I.P.C. The testimony of Parasmal, Suresh Chandra, Durgaram, Minsingh and Jawariram clearly shows that the accused Vijayraj caught hold of the deceased, Pukhraj while the absconding accused Ghanshyam dealt him a blow on his head with a Phorsi and their companions assaulted him with their weapons. In *Abraham Sheikh and Ors. v. State of West Bengal* AIR 1964 S.C. 1236, where 2 of the accused had caught hold of and felled the victim to the ground, while others armed with their deadly weapons, assaulted him. Their Lordships held that the two accused who pinned him to the ground were equally guilty with the others for culpable homicide not amounting to murder in furtherance of a common intention of all u/s 304 Part I of the Indian Penal Code. In the connected appeal D.B. Criminal (Jail) Appeal No. 156/71 *Ghanshyam v. State Rajasthan*, we have, following the view of their Lordships in *Hardev Singh and Another Vs. The State of Punjab*, held the absconding accused Ghanshyam guilty of an offence punishable u/s 304 Part I r/w 34 of the Indian Penal Code and sentenced him to rigorous imprisonment for 7 years. In the instant case, on the proved circumstances, it must be held that the accused Vijayraj is equally guilty of an offence punishable u/s 304 Part I r/w Section 34 I.P.C. When he caught hold of the deceased Pukhraj, he shared the common intention of all to cause him such bodily injury as well likely to cause his death, as he knew fully well that the accused Ghanshyam and others were armed with sharp edged weapons. Thus, the accused Vijayraj alias Vijay Kishan is convicted u/s 304 Part I r/w Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for a period of 7 years.

19. The result, therefore is that the appeal of the State Government partly succeeds and is allowed, while that of the accused Vijayraj alias Vijay Kishan fails

and is dismissed. The judgment of the Additional Sessions judge No. 2, Jodhpur is hereby modified only to the extent that the conviction of the accused Vijayraj alias Vijay Kishan u/s 326 r/w 34 IPC is altered to one u/s 304, Part I r/w Section 34 IPC and he is sentenced to suffer rigorous imprisonment for a period of 7 years