

RAJESH GOVIND JAGESHA
v.
STATE OF MAHARASHTRA

NOVEMBER 2, 1999

[G.B. PATTANAİK AND R.P. SETHI, JJ.]

Indian Penal Code, 1860.

Criminal Trial—Sections 302 and 34—Test Identification Parade—Prolonged unexplained delay—FIR mentioning person with beard and long hairs—No. person with beard and long hairs included in the parade—Alleged accused having removed beard and long hairs by the time of identification parade—Witnesses identifying accused at first sight—Held, under the facts and circumstances, accused entitled to benefit of doubt—Possibility of witnesses having seen the accused after arrest cannot be ruled out.

It was alleged that the complainant and his friends, including the deceased, were moving about when the appellants along with 'S' came from behind and attacked the deceased with swords, chopper and gupti which resulted in his death. Witnessing the attack, the complainant and his other friends ran from the spot to save their lives. Appellants alongwith 'S' were convicted of offence under Section 302 read with Section 34 IPC by the trial court. Appeal filed by them was dismissed by the High Court. Against the order of the High Court, the appellants have filed the present appeals.

The appellants contended that the prosecution witnesses were interested and chance witnesses; that identification parade regarding accused No. 2 was not conducted properly and held after prolonged unexplained delay; that there was no motive; and that Section 34 IPC could not be applied as common object was not established.

Disposing of the appeals, the Court

HELD: 1.1. In cases where a person is alleged to have committed the offence and is not previously known to the witnesses, it is obligatory on the part of the investigating agency to hold identification parade for the purposes of enabling the witnesses to identify the person alleged to have committed the offence. The absence of test identification may not be fatal if the accused is

A known or sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement or is arrested on the spot immediately after the occurrence. The evidence of identifying the accused person at the trial, for the first time, is from its very nature, inherently of a weak character. The holding of identification parade being a rule of prudence for corroboration is required to be followed strictly in accordance with the settled position of law and expeditiously. The delay, if any, has to be explained satisfactorily by the prosecution. [283-C, D, F, G]

Budhsen & Anr. v. State of U.P., [1970] 2 SCC 128, relied on.

C 1.2. The admitted position is that in the FIR lodged, the name of accused No. 2 had not been mentioned. Accused No. 2 was arrested on 20.1.1993 but the identification parade was held on 13.2.1993. The explanation for delay in holding the identification parade offered by the prosecution is not trustworthy. It is not disputed that at the time of identification parade, the appellant was not having beard and long hairs as mentioned at the time of lodging of FIR. It is also not disputed that no person with beard and long hairs was included in the parade. The witnesses are alleged to have identified the accused No. 2 at the first sight despite the fact that he had removed the long hairs and beard. What prevented the Magistrate from associating one or two persons having resemblance with the persons named in the FIR is a mystery shrouded with doubts and not cleared by the prosecution. The possibility of the witnesses having seen the said accused between the date of arrest and the test identification parade cannot be ruled out. As the test identification parade regarding accused No.2 was not conducted properly and suffered from unexplained delay, he is entitled to benefit of doubt. [281-G; 282-E, F; 283-H]

F *State of Andhra Pradesh v. Dr. M.V. Ramana Reddy & Ors.*, AIR (1991) SC 1938, relied on.

G 2. 'Motive' in a criminal case based upon ocular testimony of witnesses is not at all relevant. Where the direct evidence regarding the commission of offence is worthy of credence and can be believed, the question of motive becomes, more or less, academic. 'Motive may be relevant in a case based upon circumstantial evidence only, being one of the circumstances.'

[284-B-D]

H *Gurcharan Singh & Anr. v. State of Punjab*, AIR (1956) SC 460 and

Datar Singh v. The State of Punjab, AIR (1974) SC 1193, relied on.

3. PWs 1 and 2 were eye-witnesses who had seen the occurrence in which the deceased was murdered and cannot be held to be not reliable being interested and chance witnesses. [284-E]

4. Sections 34 and 149 of the IPC are distinct and distinguishable. No pre-meditation or previous meeting of mind is necessary for the applicability of Section 34 IPC. The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purposes of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. The circumstances of the case clearly show that the accused persons had come on spot with deadly weapons and inflicted injuries on the deceased with the intention of causing his death. [284-F, G, H; 285-A]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 737 of 1997 etc.

From the Judgment and Order dated 23.12.96 of the Bombay High Court in Crl. A. No. 185 of 1995.

Ms. Rani Jethmalani (NP) for the appellants. in Crl. A. Nos. 737 and 739/97.

A.S. Nambiar and K.R. Nambiar for the appellant in Crl. A. No.738/97.

K.G. Shah and G.B. Sathe for the Respondent.

The Judgment of the Court was delivered by

SETHI, J. The appellants herein with Santosh @ Sandeep @ Shanu were tried for the commission of offences punishable under Sections 302, 504 read with Section 34 IPC by the Sessions Judge, Thane. They were alleged to have committed the murder of Joy Kutty on 2.1.1993 at about 4.45 p.m. in a locality of Mumbai known as Vashi. They were convicted and sentenced to suffer imprisonment for life for commission of offences under Section 302 read with Section 34 IPC. The appeal filed by all the accused persons was dismissed by the High Court vide the judgment impugned in these appeals. All the accused persons excepting accused Santosh @ Sandeep @ Shanu have

A preferred these appeals alleging that the courts below have not appreciated the evidence properly in the case and that no case for conviction was made out against them. The prosecution witnesses were alleged to be interested and chance witnesses and were alleged to have not seen the occurrence. It is further contended that appellant Rajesh Govind Jagesha, Accused No. 2 before the Trial Court could not be convicted as he was not properly identified at the Identification Parade which is stated to have been held in violation of settled principles of law and after a prolonged unexplained delay.

The case of the prosecution is that on 30th December, 1992 at about 9 p.m. The complainant Mandip Singh Johal, his cousin brother Surinder Singh and cousin sister Sarita @ Rita were returning to their homes from the market in Sector No. 6 of Vashi locality and when they reached at the corner of Sectors 6 and 7, Harish Govind Jagesha, Accused No. 3, Sharif Anwar Saiyyad, Accused No. 1 along with their two companions started teasing Rita by indulging in whistling. Surinder Singh looked at the aforesaid persons angrily. The said persons had beaten the complainant and Surinder Singh with fists. Sarita @ Rita lodged a complaint at Vashi Police Station on 1.1.1993 but the culprits could not be arrested despite efforts made by the police. On 2.1.1993, the complainant, his friends Joy Kutty, Dinesh Panchal, Harprit Singh Randhava, Kishore, Surinder Singh and Sarita @ Rita had gone to Win-win Hotel. On return, they left Rita at the house and at about 4.40 p.m. when they were passing from row house 'G' and 'R' in Sector 7 towards the market, Accused Nos. 1 and 3 along with their two companions came from behind, abused and attacked Joy Kutty with weapons like swords, chopper and gupti. Being apprehensive to the safety of their lives all except Joy Kutty ran from the place of occurrence. They reached Auto Rickshaw stand in Sector 6 and when they were proceeding towards Vashi Police Station to lodge the report, they saw that Joy Kutty was running towards Sterling Hospital by the Highway from Octroi Naka. All of them lifted Joy Kutty and brought him to the Sterling Hospital. As no doctor was available in the hospital, Joy Kutty was taken to Lakshadip Hospital where, after examining, the doctors declared Joy Kutty as dead. The compliant Exhibit 18 was lodged by Mandip Singh Johal with B.A. Kadam, PSI at about 5.30 p.m. After registering the offence bearing No. 2/93, the PSI rushed to Lakshadip Hospital and conducted an inquest Panchanama on the dead body of the deceased. At the instance of Accused No. 2 a sword (Article No. 9) was attached as per Exhibit 59 and Panchanama Exhibit 59 A on 4.1.1993. Blood stained clothes of the accused Nos. 1 and 2 were seized on the same day. A sword and chopper (Articles 16 and 17) were attached as per Memorandum Exhibit 43 and panchanama Exhibit 44 at the instance of

Accused No. 2 on 7.1.1993. Accused No. 3, namely, Harish Govind Jagesha and Accused No. 4 Santosh were arrested on 20.1.1993. On 23.1.1993 a knife and two shirts were recovered from the house of Accused No. 4 at his instance vide Memorandum Exhibit 61 and Panchanama 61-A. After the charges were framed against the accused persons under Sections 302, 504 read with Section 34 IPC they pleaded not guilty and claimed to be tried. On appreciation of evidence, the Trial Court held that the prosecution had proved that the death of Joy Kutty on 2.1.1993 in Sector 7 Vashi was a homicidal one. It was held that prosecution had succeeded in proving, beyond all reasonable doubts, that the accused persons in furtherance of their common intention attacked Joy Kutty with weapons like sword, chopper and gupti and thereby committed the offence of murder.

The High Court after appreciating the evidence in death and dealing with all aspects of the matter, dismissed the appeal by holding :

“Thus considering the evidence of eye witnesses P.W. 1 and P.W. 2 coupled with the medical evidence, the evidence pertaining to identification parade, the evidence in the matter of recovery of blood stained clothes and weapons through the confessional statements of the accused and the blood scrappings of blood from the car corroborates the eye witnesses testimony of P.W. 1 and P.W. 2. We have, therefore, no hesitation in upholding judgment of the Sessions Court convicting all the appellants under Section 302 read with Section 34 of the IPC.”

Learned counsel appearing for Accused No. 2, namely, Rajesh Govind Jagesha has vehemently argued that his client has not been proved to be connected with the commission of the crime, beyond all reasonable doubts. It is contended that as the identification parade was held after a prolonged delay and no person with the resemblance of the features relating to Accused No. 2 detailed in the FIR was included in the test identification parade, the authenticity of the witnesses in identifying Accused No. 2 cannot be accepted. The admitted position is that in the FIR lodged, the name of Accused No. 2 has not been mentioned. It is also not disputed that the identification parade was held on 13.2.1993, much after the said accused had been remanded to custody. There is no explanation as to why the test identification parade was held after an unexplained delay. It is worth noticing that in the FIR lodged by Mandip Singh Johal PW had stated :

“At that time, at about 4.55 hours, the persons i.e., 1) Harish, 2) Shariff

A and two others came running and abusing us from behind; and they started inflicting blows on Joy with the sword, chopper and the gupti-like weapon in their hands. As a result thereof, Joy screamed all of a sudden. Hence, we all ran away by the road, which we found. While we were coming to Police Station in a rickshaw from rickshaw stand of Vashi Sector 7, we saw Joy, who was running along highway from Toll Naka towards Sterling hospital.

BMy friends, who were with me. My brother and I will identify all the persons, who killed Joy, if they are shown to us.....

Cthe persons i.e. 1) Harish and 2) Shariff and others two, out of whom one was a driver of Yamaha Motor-cycle sporting beard came running from behind, taking the chopper, swords and edged weapons like gupti in their hands, in front of G-55, and abused us and inflicted blows on the chest, head and on the person of my friend Joy Kutty, age 19, residing at Sion Koliwada, C.G.S. Quarters who was walking from behind all persons and was with me, with the sword, chopper and the gupti, and killed him.”

As noticed earlier, the Accused No. 2 was arrested on 20.1.1993 but the identification parade was held on 13.2.1993. It is also not disputed that at the time of identification parade, the appellant was not having beard and long hairs as mentioned at the time of lodging of FIR. It is also not disputed that no person with beard and long hairs was included in the parade. The witnesses are alleged to have identified the accused No. 2 at the first sight despite the fact that he had removed the long hairs and beard. What prevented the Magistrate from associating one or two persons having resemblance with the persons named in the FIR is a mystery shrouded with doubts and not cleared by the prosecution. The possibility of the witnesses having seen the said accused between the date of arrest and the test identification parade cannot be ruled out.

This Court in *State of Andhra Pradesh v. Dr. M.V. Ramana Reddy & Ors.*, AIR (1991) SC 1938, held that where there is unexplained delay in holding the identification parade, the evidence of the prosecution regarding identity of an accused cannot be held absolutely reliable and in such a case the accused is entitled to the benefit of doubt. The explanation for delay in holding the identification parade offered by the prosecution in the instant case is not trustworthy. The non-availability of a Magistrate in a city like Bombay for over a period of five weeks from the date of the arrest of Accused

Nos. 1 and 2 and three weeks from the arrest of accused Nos. 3 and 4 cannot be accepted. It is not denied that scores of Magistrates are available in the city of Bombay and that the investigating agency was not obliged to get the parade conducted from a specified Magistrate. The High Court was not justified in holding that the parade could not be held early on account of alleged difficulties of the Special Executive Magistrate. It was not for the defence to prove that the parade held was suffering from the legal infirmities because, admittedly, the onus of proof in criminal case never shifts as the accused is presumed to be innocent till proved otherwise, beyond all reasonable doubts, by the prosecution. In cases where a person is alleged to have committed the offence and is not previously known to the witnesses, it is obligatory on the part of the investigating agency to hold identification parade for the purposes of enabling the witnesses to identify the person alleged to have committed the offence. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement. Such a parade may not be necessary in a case where the accused person is arrested on the spot immediately after the occurrence. The evidence of identifying the accused person at the trial, for the first time, is from its very nature, inherently of a weak character. This Court in *Budhen & Anr. v. State of U.P.*, [1970] 2 SCC 128, held that the evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances the complainant or the witnesses came to pick out the accused person and the details of the part which such persons played in the crime in question with reasonable particularity. The test identification is considered as a safe rule of prudence for corroboration. Though the holding of the identification proceedings may not be substantive evidence, yet such proceedings are used for corroboration purposes in order to believe or not the involvement of the person brought before the Court for the commission of the crime. The holding of identification parade being a rule of prudence is required to be followed strictly in accordance with the settled position of law and exeditiously. The delay, if any, has to be explained satisfactorily by the prosecution.

Looking into the attending circumstances and the totality of the evidence produced in the Court, we are of the opinion that as the test identification parade regarding Accused No. 2 was not conducted properly and suffered from unexplained delay, he is entitled to the benefit of doubt.

Regarding the involvement of Accused Nos. 1 and 3, we have again being taken through the evidence of prosecution and are satisfied that both

A the Trial Court as well as the High Court were justified in holding them guilty for the commission of the offence punishable under Section 302 read with Section 34 of the IPC. We are not impressed with the arguments that as the earlier occurrence in which Sarita @ Rita was teased has not been established by the prosecution, the appellants were entitled to acquittal as, according to them, there did not exist any motive for the commission of the crime. 'Motive'

B in a criminal case based upon ocular testimony of witnesses is not at all relevant. This Court in *Gurcharan Singh & Anr. v. State of Punjab*, AIR (1956) SC 460 held that "but it has repeatedly been pointed out by this Court that where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance". Again in *Datar Singh*

C *v. The State of Punjab*, AIR (1974) SC 1193, this Court reiterated that mere absence of a strong motive for committing the crime cannot be of any assistance to the accused if the offence could be proved by evidence". Where the direct evidence regarding the commission of offence is worthy of credence and can be believed, the question of motive becomes, more or less, academic. 'Motive' may be relevant in a case based upon circumstantial evidence only, being one

D of the circumstances.

We are also not impressed with the submission of the learned counsel appearing for the appellants that the PWs 1 and 2 are not reliable being interested and chance witnesses. Both the Courts below have held and we

E agree with their finding that the said witnesses were eye-witnesses who had seen the occurrence in which Joy Kutty was murdered. Mr. Nambiar, the learned Senior Advocate appearing for Accused No. 1 further submitted that as a common object was not established, the Trial Court committed a mistake of law by applying the provisions of Section 34 of the IPC in holding the appellants guilty of the crime. Section 34 and Section 149 of

F the IPC are distinct and distinguishable. The meaning and scope of common intention and common object has properly been understood by the Trial Court as well as the High Court. No pre-meditation or previous meeting of mind is necessary for the applicability of Section 34 of the IPC. The existence of common intention can be inferred from the attending circumstances of the

G case and the conduct of the parties. No direct evidence of common intention is necessary. For the purposes of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. The circumstances of the present case clearly show that the accused persons had come on spot with deadly weapons and inflicted injuries on Joy Kutty,

H obviously with the intention of causing his death. The eye-witnesses ran from

the spot to save their lives. We do not find any error of law in appreciation of evidence by the Trial Court as well as the High Court, so far as the accused persons other than Accused No. 2 are concerned. A

Under the circumstances the Appeal No. 737 of 1997 filed by Rajesh Govind Jagesha, Accused No. 2 is allowed by setting aside the judgments of the Trial Court as well as the High Court in so far as it relates to him. He is acquitted and directed to be set at liberty, if not arrested or sentenced in any other case. Appeal Nos. 738 and 739 of 1997 filed by Shariff Anwar Saiyyad and Harish Govind Jagesha, Accused Nos. 1 and 3 are dismissed by upholding the conviction and sentence awarded by the Trial Court as well as the High Court. B
C

A.K.T.

Appeals disposed of.