MAQSOODAN & OTHERS

v.

STATE OF UTTAR PRADESH [AND VICE-VERSA]

December 15, 1982

[D. A. DESAI, BAHARUL ISLAM AND V. BALAKRISHNA ERADI, JJ.]

Penal Code—Common intention—How determined.

Evidence Act—Dying declaration—Person making the statement not dead and deposed in Court—Statement if could be called dying declaration—Such statement if admissible under section 32—Not quantum of evidence but quality relevant.

The prosecution case against the 12 accused persons was that, armed with deadly weapons, they waylaid and assaulted the deceased and three others accompanying him, and that someone among another group of 12 of their associates standing at some distance constantly incited the accused with the words "kill, kill". The deceased received serious injuries and died on the following morning.

While the appellant was convicted under s. 302 Indian Penal Code and sentenced to death, ten other accused were convicted and sentenced variously. One of them was acquitted.

On appeal the High Court reduced the sentence of death passed on the appellant to imprisonment for life. Convictions of four of the 11 accused were altered from under s. 302/149 and s. 307/149 to one under ss. 302/34 and 307/34 I.P.C. All of them were however acquitted of the offences under s. 147 or s. 148 I.P.C. The convictions and sentences against the other six accused were set aside and they were acquitted.

It was contended on behalf of the appellants that their conviction was unsustainable in law because the evidence of the eye witnesses, who were interested parties, could not be safely relied upon.

Dismissing the appeal,

HELD : The High Court erred in stating that the testimony of the four eye witnesses suffered from numerous infirmities, that they made improvements in their testimoney and that there were variations in their earlier and later statements. On that count alone their testimony could not be held to be infirm. It is the duty of the Court to remove the grain from the chaff. [49 C-D]

A The parties were inimical for a long time. The four witnesses were the injured persons and therefore, their presence at the time and place of occurrence could not be doubted. The presence of all the four accused in the scene of occurrence and their participation in the crime had been proved beyond reasonable doubt despite the improvements and variations in the evidence of witnesses. [49 E-F]

B In a case of this kind it is not the number of witnesses examined or the quantity of evidence adduced by the prosecution that counts. It is the quality that counts. Eye witnesses, examined in the case were the best and natural witnesses. The accussed persons were known to the witnesses and they did not have any reason to omit the real culprits and implicate falsely accused persons. [49 G-H; 50 C]

C A statement, written or verbal, of relevant facts made by a person who is dead, is called a dying declaration and is admissible in evidence under s. 32 of the Evidence Act. But when a person who has made a statement, even if it be in expectation of death but is not dead, it is not a dying declaration. It is not admissible under s. 32 of the Evidence Act. [50 E-F]

In the instant case the two witnesses whose statements were erroneously called dying declarations by the High Court were alive and deposed in the D case. Such statements are admissible under s. 157 of the Evidence Act as former statements made by them to corroborate their testimony in the Court. [50 F-G]

Common intention is a question of fact and is subjective. It can be inferred from facts and circumtances. In the instant case the appellants who were related to one another were armed with deadly weapons when they waylaid E and attacked the deceased and his companions, someone incited them to "kill", and after the assault they left the scene of occurrence together and they were arrested from the same place. There was the therefore common intention and the High Court was justified in convicting them under s. 302/34, IPC. [52 A-C]

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 175 of 1974.

Appeal by special leave from the judgment and order dated the 18th October, 1973 of the Allahabad High Court in Crl. Appeal Nos. 1307 and 1966 of 1973.

G AND

Criminal Appeal Nos. 367-369 of 1974.

Appeals by special leave from the judgment and order dated H the 18th October, 1973 of the Allahabad High Court in Criminal Appeal No. 1307 of 1973 connected with Crl. Appeal Nos. 1287 and 1566 of 1973.

Rajendra Singh, R.K. Garg B.P. Singh and *Ranjit Kumar* for the Appellant. A

O.P. Rana and *M.V. Goswami* for the Complainant.

Dalveer Bhandari for the Respondent.

B

The Judgment of the Court was delivered by

BAHARUL ISLAM, J. These four Criminal Appeals are by special leave. Crimininal Appeal No. 175 of 1974 is by the four appellants—Maqsoodan, Madan Mohan, Prayagnath and Nando who have been convicted under Sections 302/34 and 307/34 Penal Code. C

2. The material facts may be briefily stated as follows :

On 8.6.1972 at about 5.45 or 6 00 a.m., when Sulley (P.W. 1) along with his brother, Jadon (deceased), his son, Rajendra (C.W. 1) and his nephew Vijay Kumar (P.W. 3) were going from their house in Neem Gali, Mathura, to their Dharamshala in Mohalla Bengali Ghat, via Vishram Ghat and reached the area called Shyam Ghat, they were waylaid by the twelve persons accused in the case and were assaulted. According to the prosecution, the accused persons were variously armed with Ballams, pharsas and lathis. Another group of twelve or thirteen persons who were associates of the accused was standing at Vishram Ghat and some one was constantly inciting the accused persons with the expression, "kill, kill" whereupon the accused persons attacked and assaulted Jadon, Vijay Kumar, Rajendra and Sulley. Jadon and P.W. 3 were severely injured. The condition of Jadon was very precarious. After the assault, the miscreants left. P.W. 1 arranged for a lorry belonging to one Vishnu Chaubey and carried the injured persons to the District Hospital. The driver of the lorry was one Than Singh. Jadon and P.W. 3 were removed to the operation theatre. Thereafter, P.W. 1 proceeded to the Police Station, Kotwali at Mathura and submitted a written First Information Report (FIR) about the incident. The FIR was written by his nephew, Prakash Chandra Chaturvedi (P.W. 8). The FIR was lodged at 6.30 a.m. at the Police Station and has been proved in this case as Ex. "Ka-16". After lodging the FIR, P.W. 1 came back to the hospital where the injuries of all the four injured persons were examined by Dr. B.S. Babbar. As the condition of the injured persons was serious, intimation was sent to Shri U.C. Tripathi (D.W. 7), Sub-Divisional D E F G H

A Magistrate, Sahabad, for recording their statements. The Magistrate came and recorded the statements of P.W. 3 and C.W. 1 at 9.15 a.m. and 9.20 a.m. respectively. Jadon was operated upon and his condition was such that he could not make any statement. In fact, he succumbed to the injuries the next day, namely, 9.6.1972 at 3.25 p.m. The post-mortem examination was conducted on the B dead body of Jadon by Dr. B.S. Babbar on 10.6.1972 at 10.00 a.m.

3. The police after investigation submitted charge-sheet against the twelve accused persons, all of whom pleaded not guilty. The First Additional Sessions Judge, Mathura, who tried the case, C convicted eleven out of the twelve accused persons and acquitted accused No. 12, Kanhaiya. Appellant Maqsoodan was convicted under Section 302 I.P.C. and sentenced to death. The other ten accused persons were convicted under Sections 302/149 and 307/149 I.P.C. and sentenced to imprisonment for life, each under Section 302/149 Penal Code. Accused Parmatma was convicted under Section 147 I.P.C. D and the rest were convicted under Section 148 I.P.C. They were sentenced to various terms of imprisonment. The sentences of imprisonment were directed to run concurrently. There was also a reference for the confirmation of the death sentence imposed on Maqsoodan.

E 4. The convicts filed several appeals before the High Court of Allahabad. The High Court altered the convictions of Maqsoodan, Madan Mohan, Prayagnath and Nando, from under Sections 302/149 and 307/149 to ones under Sections 302/34 and 307/34 Penal Code. The sentence of death imposed on Maqsoodan was reduced to imprisonment for life. All of them were acquitted F of the offences under Section 147 or Section 148 I.P.C. The convictions and sentences as against the other six accused persons were set aside and they were acquitted. The acquittal of Kanahaiya was affirmed. Criminal Appeals No. 367, 368 and 369 of 1974 have been filed by the State against the acquittal of the eleven accused persons of the offences under Sections 147 and 148, Penal G Code; S.L.P. No. 766 of 1974 is by the State against the acquittal of Kanahaiya.

5. All these appeals will be disposed of by this common judgment.

H 6. Shri Rajendra Singh, learned counsel appearing for the appellants in Criminal Appeal No. 175 of 1974, first submits that

the conviction of the four appellants is unsustainable in law; he submits that the evidence of the four witnesses, namely, P.W. 1, Sulley, C.W. 1, Rajendra, P.W. 3, Vijay Kumar and P.W. 2, Jagdish, cannot form the basis of the conviction as only one witness, namely, P.W. 2, Jagdish, out of five witnesses named in the FIR has been examined ; the eye-witnesses examined are interested and their evidence cannot be safely relied on.

The High Court has found that the testimony of the eye witnesses, namely, P.Ws 1, 2, 3 and C.W. 1 "suffer from numerous infirmities". It, therefore, sought support to their testimony from the two earlier statements erroneously called dying declarations, Exhibits Ka 22 and Ka 23 made by P.W. 3 Vijai Kumar and P.W. 2 Jagdish respectively. The infirmities referred to by the High Court consisted in, according to the High Court, improvements made by the witnesses and variations in their earlier and latter statements. In our opinion, on that ground alone, the testimony of P.Ws. 1, 2, 3 and C.W. 1 cannot be held to be infirm. It is the duty of the court to remove the grain from the chaff. These four witnesses are the injured witnesses having received the injuries during the course of the incident. Their presence at the time and place of the occurrence cannot be doubted; in fact it has not been challenged by the defence. As both the parties were inimical for a long time, it will be prudent to convict only those persons whose presence and participation in the occurrence have been proved by the prosecution beyond reasonable doubt. We agree with the finding of the High Court that the presence and participation of appellants Maqsoodan, Madan Mohan, Prayagnath and Nando, who are appellants in Criminal Appeal No. 175 of 1974 has been proved beyond reasonable doubt, despite the improvements and variations in their evidence.

Shri Rajender Singh has submitted that it is not safe to rely on the testimony of P.Ws. 1, 2, 3 and C.W. 1 as the prosecution has not examined all the witnesses named in the FIR except Jagdish, nor has the prosecution examined any of the neighbours. It is not the number of witnesses examined nor the quantity of evidence adduced by the prosecution that counts. It is the quality that counts. Learned counsel has not pointed out to us that any witness better or more creditable has been omitted by the prosecution. As stated above, the eye witnesses examined in this case were the best and natural witnesses. Learned counsel also has criticized that during the course of evidence, prosecution alleged that Maqsoodan

A gave two blows but that fact was not mentioned in the FIR. He has also criticised that the injured witnesses do not say who injured whom. This, on the contrary, shows that the witnesses examined were not tutored and they gave no parrot like stereotyped evidence. It may be remembered that P.W. 1 who lodged the FIR received as many as seven incised wounds, one of them being on the left chest; B he took Jadon, who had received serious injuries and who later on succumbed to them, and C.W. 1, who received five incised injuries and P.W. 3, who was also seriously injured, to the hospital. He lodged the FIR thereafter. The condition of his mind and disposition can easily be imagined. There were bound to be some errors in the FIR. It may also be remembered that the FIR was lodged with- C in half an hour of the occurrence. There was little time lost. The occurrence took place at about 6.00 a.m. on 8.6.1972. It is nobody's case that the witnesses were unable to recognise the real culprits. The accused persons were well-known to the witnesses from before. They did not have any reason to omit the real culprits and implicate falsely the accused persons. The evidence of P.Ws. 1, 2, 3 and C.W.1 D could have been accepted even without corroboration. Even so, the High Court rightly pressed into service the earlier statements of P.W. 3 and C.W.1 (Ex. Ka-22 and Ka-23) respectively.

7. Exts. Ka-22 and Ka-23 have been wrongly called dying declarations. The statement written or verbal, of relevant facts made E by a person who is dead, is called a dying declaration; it is relevant under Section 32 of the Evidence Act, when the statement is made by the person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case, in which that person's death comes into question.

F When a person who has made a statement, may be in expectation of death, is not dead, it is not a dying declaration and is not admissible under Section 32 of the Evidence Act. In the instant case, the makers of the statements Ex. Ka-22 and Ka-23, are not only alive but they deposed in the case. Their statements, therefore, G are not admissible under Section 32; but their statements however are admissible under Section 157 of the Evidence Act as former statements made by them in order to corroborate their testimony in the Court. In the instant case, Ex. Ka-22 and Ka-23 respectively corroborate the testimony in Court of P.W. 3 and C.W. 1 respectively.

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8. The High Court has found that the witnesses later on improved the story and roped in some other persons. As a rule of

caution, the High Court has found that the participation of the four appellants in the offence has been proved beyond reasonable doubt and the presence and participation of the other eight accused persons named by them have not been proved beyond doubt. We do not find valid reason to interfere with this finding of fact of the High Court, in these appeals under Article 136 of the Constitution.

9. As the number of accused persons present and participating in the occurrence have not been proved to be five or more, the High Conrt has rightly held that the common object necessary for constituting an unlawful assembly has not been proved, and therefore in the facts and circumstances of the case, the High Court correctly held that common intention has not been proved and as such the four appellants were rightly acquitted of the offence under section 302 read with section 149 I.P.C., and also rightly acquitted all the other accused persons of the offences under Sections 147 and 148 I.P.C.

10. Shri Rajinder Singh next submits that if any offence at all has been committed by the appellants of Criminal Appeal No. 175 of 1974, the offences may be under Section 326 I.P.C. depending on the medical evidence and circumstances of the case and that Section 34 I.P.C. cannot apply as no common intention has been proved. We cannot accept this submission. Dr. B.S. Babbar, P.W. 3, who held the post-mortem examination on the dead body of Jadon found a number of wounds out of which the following were serious :

1. Incised wound 2" x 1/4" x scalp deep on head.
2. Incised wound 3" x 1/4" x scalp deep on the head
3. Stiched wound with draining tube 3" towards upper portion of the stomach on right side.
4. Stiched wound 1.1/2" on the upper portion of the left side of the stomach.

In his opinion, death was due to cyncope following shock and Haemorrhage as a result of the injuries. According to him, injuries No. 1 & 2 separately was sufficient to cause death in the ordinary course of nature. It, therefore, cannot be argued that the offence committed was not murder.

A Common intention is a question of fact. It is subjective. But it can be inferred from facts and circumstances. In this case, the appellants were related. All of them were armed with deadly weapons. They were together. There was an order by some one, "kill, kill", when all of them simultaneously attacked the deceased and P.Ws. 1, 2, 3, and C.W. 1. After the occurrence, they left B together; they were later arrested from the same place. The High Court therefore rightly held that the appellants caused the injuries with the common intention, and was justified in convicting the appellants under Section 302/34 of the Penal Code. We, therefore, affirm the conviction and sentences inflicted by the High Court on Maqsoodan, Madan Mohan, Prayagnath and Nando, appellants in C Criminal Appeal No. 175 of 1974 and dismiss the appeal.

11. As held above that the High Court rightly held that the prosecution failed to prove the common object and therefore it rightly acquitted all the accused persons of the offences under Sections 147 and 148.

D

12. In the result, the State appeals are also dismissed.

P. B. R. *Appeal dismissed.*