

IDRISH BHAI DAUBHAI

A

v.

STATE OF GUJARAT

JANUARY 31, 2005

[P. VENKATARAMA REDDI AND S.B. SINHA, JJ.]

B

Criminal Trial :

Penal Code, 1860—Section 302/34—Accused along with other persons allegedly causing death of one and hurt to other—Conviction of accused under sections on basis of evidence of prosecution witnesses—High Court upheld the order—Correctness of—Held: Accused entitled to benefit of doubt since there exist discrepancies in the statements of prosecution witnesses vis-a-vis First Information Report and Post Mortem Report—No overt act attributed to accused to hold him guilty of sharing common intention to commit the offence—Even exhortation not enough to prove common intention—Also eye witnesses are interested witnesses—Hence order of High Court set aside—Evidence Act, 1872.

Single Judge convicted and sentenced the appellant - accused under section 302/34 IPC for sharing common intention with other accused for causing death of S and simple hurt to PW 3.

It is alleged that dispute arose between S and other accused persons with regard to a transaction of land/house. Appellant inflicted stick blow on the head of S as a result he fell down and accused no. 1 inflicted knife blow on his chest. PW-3 tried to intervene and accused no. 2 inflicted knife injury. Appellants' mother had sickle in her hand. S and PW-3 were taken to the hospital and S was declared dead. FIR was lodged. Charges were framed. Sessions Judge examined the prosecution witnesses and convicted the appellant under section 302/34 IPC, accused no. 1 under section 302 IPC and accused no 2 under section 302/34 and section 324 IPC, however, he acquitted accused no. 3. High Court dismissed the appeal filed by the appellant and accused no. 1. Appeal of accused no. 2 stood abated since he expired. This Court dismissed the SLP filed by accused no. 1. Thus, the appeal is confined only to the appellant.

A Appellant - accused contended that there are contradiction and inconsistencies in the deposition of the witnesses and FIR; that the prosecution could not prove beyond any reasonable doubt the role played by appellant in the incident, nor the alleged intention shared by appellant and other co-accused for causing the death of the deceased; and that the doctor failed to note the colour of the wound and the exact place of skull vault where the injury had occurred in the autopsy report.

B Respondent-State contended that though certain discrepancies exist in the statements of the witnesses' *vis-a-vis* FIR and the Post Mortem Report, the evidence of the three witnesses, who have proved the prosecution case as against the appellant cannot be discarded.

C **Allowing the appeal, the Court**

D **HELD 1.1.** The statements made in the First Information Report in a case of this nature must be given due importance. In the instant case, the statements of the prosecution *vis-a-vis* the allegations made in the FIR and Inquest Report are contradictory and/or inconsistent with each other. In the FIR nothing has been mentioned about the appellant's role as regard his hitting the deceased with a stick on his head as deposed by the prosecution witnesses and also the sequence of events is different from what was deposed by PW-1. Furthermore, PW-1 categorically stated that

E the accused persons became agitated only after the appellant allegedly hit the deceased with a stick and accused no. 1 and 2 went into their house and came back with knives which stands contradicted by the statement of PW-5 who alleged that both the appellant and accused no. 1 were standing by the side of the road with a stick and open knife in their hands.

F **[892-C-D-E]**

G 1.2. The prosecution has also failed to bring any materials on record to show that there had been any pre-concert or pre-arranged plan so as to hold that the appellant had any common intention to commit the alleged offence. FIR itself suggests that the accused persons became excited all of a sudden. In the FIR only one overt act is attributed to the appellant that is his exhortation 'maro, maro' which took place as alleged in the FIR only after injuries had been inflicted by accused Nos. 1 and 2 and no injury was inflicted on the deceased or PW-3 after the alleged exhortation. Appellant by no means can be held guilty of sharing a common intention with other accused to commit murder of the deceased or cause injuries to PW-3. On the other hand, if he was the first person to cause injury to the

deceased by inflicting a blow on his head by a stick, it is wholly unlikely A that he would imagine that accused No. 1 and 2 would go back to their house to bring the knives and inflict injuries to the deceased and PW-3 and, therefore, it is not a case where a common intention amongst the accused persons can be said to have been existing either from the beginning or was formed at the spur of the moment. Exhortation, by itself is not enough to prove common intention on the part of the accused. B

|892-G-H; 893-A-B|

1.3. The inquest panchama did not refer to the head injury on the dead body, the colour of wound and also did not note the exact place in the skull vault where the injury had occurred which would have enabled him to ascertain the time of the injury although presence or absence of injuries on all other parts of the body of the deceased had been noticed. Also the eye-witnesses are also interested witnesses. Therefore, it is a fit case where the benefit of doubt should be given to the appellant. Hence, the order of High Court is set aside. [894-B-C] C

State of Orissa v. Arjun Das Agarwal and Anr., AIR (1999) SC 3229 and Ramashish Yadav and Ors. v. State of Bihar, AIR (1999) SC 3830, referred to.

Badruddin v. State of U.P., [1998] 7 SCC 300 and Balram Singh and Anr. v. State of Punjab, [2003] 11 SCC 286, relied on. E

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 614 of 2004.

From the Judgment and Order dated 21/22.5.2003 of the Gujarat High Court in Crl. A. No. 1136 of 1995. F

K. Radhakrishnan, Sanand Ramakrishnan and Rajiv Mishra for M/s. P.H. Parekh & Co. for the Appellant.

Yashank Adharu and Ms. Hemantika Wahi for the Respondent. G

The Judgment of the Court was delivered by

S.B. SINHA, J. The Appellant herein was convicted for commission of an offence punishable under Section 302/34 of the Indian Penal Code ('IPC for short) and had been sentenced to undergo rigorous imprisonment for life as also a fine of Rs. 500 and in default thereof to undergo additional three H

A months' simple imprisonment. He was prosecuted along with three others for sharing common intention for causing death of one Siddique Ahmed Patel and causing simple hurt with sharp cut weapon to Yusuf Adam Patel (PW-3).

B At about 5.45 p.m. on 29.11.1993, the deceased was allegedly going to a mosque for offering prayer (Namaz). When he was passing by the house of the accused persons situated at village Sarod, all the four accused persons were standing there. A quarrel ensued between them, when the deceased Siddique was asked as to why he had entered into a transaction of the house instead of land to which he answered that he had entered into a transaction with his maternal uncle, whereupon, the Appellant herein allegedly inflicted a stick blow on his head, as a result of which he fell down. Accused No. 1 Bilal Ahmed Ibrahim Kabha thereafter inflicted a knife blow on his chest. Yusuf Adam Patel tried to intervene and in the process he was also injured; a knife injury on him was caused by the Accused No. 2. The Accused No. 3, the mother of the Appellant herein, was said to have a sickle in her hand.

C D The deceased and the injured were said to have been taken to the referral hospital at Jambusar, where Siddique was declared dead and the injured was asked to go to Baroda Hospital. A First Information Report was lodged in this behalf by one Mehmood Adam Patel. On completion of investigation, a charge-sheet was filed for offences punishable under Section 302 IPC, Section 302 read with Section 34 IPC, Section 324 IPC, Section 324 read with Section 34 IPC and Section 135 of the Bombay Police Act.

F Before the learned Sessions Judge nine witnesses were examined on behalf of the prosecution. The learned judge while passing a judgment of acquittal in favour of the Accused No.3, convicted Bilal Ahmed for commission of an offence punishable under Section 302 IPC. The Accused No. 2 Ahmed Ibrahim Kabha was found guilty for commission of offence punishable under Section 302/34 IPC as also under Section 324 IPC, whereas the Appellant herein was found guilty of commission of offence punishable under Section 302/34 IPC, whereagainst an appeal was filed.

G During the pendency of the appeal, the Accused No. 2 Ahmed Ibrahim Kabha expired and as a result his appeal stood abated. The High Court of Gujarat by reason of the impugned judgment dismissed the appeals preferred by the Appellant as also Bilal Ahmed. The Special Leave Petition filed by Bilal Ahmed appears to have been dismissed by this Court by an order dated 6.2.2004.

H

Mr. K. Radhakrishnan, the learned Senior Counsel appearing on behalf of the Appellant, would take us to the First Information Report as also the depositions of the witnesses pointing out contradictions and inconsistencies contained therein. The learned counsel would contend that even from the Autopsy of Dr. Raghunandan (PW-2) it would appear that he had not noted the colour of the wound and, thus, was not in a position to state the time of the injury with certainty, nor did he note the exact place of skull vault where the injury had occurred. It was argued that the injury allegedly caused by the Appellant herein with a stick on the head of the deceased had not been noticed by the Investigating Officer in the Inquest Panchnama. The learned counsel would, therefore, urge that the prosecution has not been able to prove beyond any reasonable doubt the role played by the Appellant herein in the incident, nor the alleged intention shared by the Appellant and other co-accused for causing the death of the deceased Siddique, can be said to have been proved.

Mr. Yashank Adhyaru, learned Senior Counsel appearing on behalf of the State of Gujarat, on the other hand, would contend that though certain discrepancies exist in the statements of the witnesses *vis-a-vis* the First Information Report and the Post Mortem Report, there is no reason to discard the evidences of the three witnesses, who have proved the prosecution case as against the Appellant.

From a perusal of the First Information Report lodged by PW-1, it transpires that before the alleged incident took place altercations took place between the deceased and the accused persons as regard transaction of a land/house belonging to the deceased. It is stated that the Accused No. 1 Bilal Ahmed and his father Ahmed Ibrahim came with knives in their hands and Bibiben Ahmed, the mother of the Appellant, came with a sickle. "Getting excited all of a sudden", Bilal Ahmed is said to have given a knife blow on the chest of the deceased and Ahmed Ibrahim is said to have given a knife blow on the back of Yusuf Adam Patel and Bibiben Ahmed allegedly jumped upon both these persons shouting "Beat.....Beat". Meanwhile, the Appellant herein had come out taking a stick and rushed towards them saying "Beat.....Beat". The eye witnesses to the occurrence, viz. PW1, PW-3 and PW-5, on the other hand, in their respective depositions before the court stated that it was the Appellant who gave a stick blow on the head of the deceased whereafter only the injuries were inflicted by the other accused.

The sequence of events as contained in the First Information Report, H

A thus, materially differs from the statements made by the prosecution witnesses. The First Information Report does not even contain any statement to the effect that the Appellant had inflicted any injury whatsoever with the stick as was alleged by the prosecution witnesses before the learned Sessions Judge. The first informant who examined himself as PW-1 in his cross-examination accepted that in his complaint he did not allege that he was going to pray at the mosque, nor did he say that Siddique fell down after he was hit by a stick. He further asserted that he saw the incident from a distance of about 15 feet. He accepted that injured Yusuf was his brother whereas his wife is the sister of the deceased Siddique and the deceased Siddique is the son of his uncle, and his wife is also the daughter of his uncle. In paragraph 5 of his deposition, C however, he alleged that when the Appellant hit the deceased Siddique with a stick, Siddique fell flat and at that time only he and Yusuf were present. He thereafter alleged that the Accused Nos. 1 and 2 were also present emphasizing that they did not go to the house to get knives but he changed the story immediately by stating that the accused had come out of the house D with knives. He further stated that he saw the accused persons going into the house to get knives and he thought that they would stab. He, however, immediately thereafter stated "after hitting with the stick, he was stabbed immediately". He reiterated :

E "...It is true that I have not stated in the complaint that IDDISH hit SIDDIQUE on the head with a staff. And I have not stated that the other accused came after IDDISH hit him. I have not stated in the complaint that SIDDIQUE fell down after he was hit with the staff. I have not stated in the complaint that IDDISH had done any illegible (sic) act. I have also not stated that BIBIBEN injured anybody. It is true that BIBIBEN is present in the court and she was with the three male members. I do not know that if BIBIBEN was hit by a blow of the staff..."

F It is difficult to place any reliance on the statement of the said witness as regards the involvement of the Appellant herein in the incident.

G PW-2, Dr. Raghunandan, who performed autopsy on the dead body of the deceased Siddique on 30.11.1993, found the following external injuries on his person :

H "1. there was one cut wound on the chest near the 7th rib 2 cm by ½ cm deep up to cavity. It was between the two lungs and it was 27 cm below the rib cage bone and 7.5 cm away in a slant manner. In

this injury the muscles were cut. And the casing of the heart was A injured with a wound of 1.5 cm by .25 cm. And the outer covering of the heart was cut. This wound was deep up to the left cavity of the heart.

2. there was a hematoma measuring 4 cm by 3 cm on the center of the skull. These wounds were prior to the death." B

In his cross-examination, he admitted that the colour of injury no. 2 was not noted in the report which would have enabled him to ascertain the time of the injury nor did he note the exact place in the skull vault where the injury had occurred. C

In the inquest panchnama, no head injury on the dead body had been noted.

PW-3 is Yusuf who is an injured witness. In his deposition, he asserted that the Appellant had hit the deceased on the head from behind with a stick as a result whereof he swooned and fell down; whereafter Bilal Ahmed who was standing next to the Appellant stabbed Siddique in the chest and when he tried to rescue him, Ahmed Ibrahim stabbed him with a knife in the waist on the left side, whereupon only Bibiben came with a sickle shouting to kill them. In his cross-examination, however, he accepted that there had been verbal heated exchanges between Bilal Ahmed and Siddique but although at that time the people were moving on the road, he did not see anybody except the deceased and the accused persons. In his cross-examination, he admitted that the house of the Appellant is not near the mosque and it is at a far off place. D E

PW-5 - Abdulla, is a vegetable merchant. He was also going to mosque F to offer 'namaz' after closing his shop nearby. He stated that when he reached near the house of the accused persons, the Appellant Idrish was having a stick and Bilal Ahmed was having an open knife, he had seen Siddique and Yusuf walking near the cross roads. He alleged :

"...At that time Bilal had started abusing Siddik and Bilal was saying, G "Why did you enter into transaction of house for my brother?" At that time Siddik had told, "I had not entered into transaction for your brother." I have entered into transaction with your maternal uncle Abbas Daud Bhatiya. At that time Idrish Daud had got excited and had given a blow on the head of Siddik with a long and thick staff H

A from behind as Siddik would have hardly walked two steps ahead. Therefore, on account of giddiness Siddikbhai had fallen down flat on the ground. At that time all of a sudden Bilal had run and given a blow of knife in his hand on the left portion of the chest of Siddik. At that time as Yusufbhai Adam Patel tried to intervene, Ahmed Ibrahim Kabha who was standing nearby and was having a knife in his hand had given a knife blow on left side back to Yusuf. At that time Bibiben who was standing nearby and was having a sickle in her hand had gone near Siddik and had attacked upon him and had started shouting that put these people to death..."

B

C The statements of the witnesses, as noticed hereinbefore, *vis-a-vis* the allegations made in the First Information Report are contradictory and/or inconsistent with each other. Whereas in the First Information Report nothing has been mentioned about the Appellant's role as regard his hitting the deceased with a stick on his head, even the sequence of events is different from that stated by PW-1 in his deposition before the court.

D

E

F In the First Information Report only one overt act is attributed to the Appellant that is his exhortation "*maro.. maro*". Such exhortation by itself may not give rise to an inference of sharing a common intention to cause death of the deceased Siddqiue and to cause hurt to PW-5. Such exhortation as alleged in the F.I.R. took place only after injuries had been inflicted by the Accused Nos. 1 and 2. No injury was inflicted on the deceased or PW-3 after the alleged exhortation.

G

H The prosecution has also failed to bring any materials on records to show that there had been any pre-concert or pre-arranged plan so as to hold that the Appellant had any common intention to commit the alleged offence. The First Information Report itself suggests that the accused persons became excited all of a sudden. It has also come on records that the Accused No. 3 Bibiben had also sustained injuries. The learned Sessions Judge himself has

found that prosecution has failed to prove her involvement in the matter. If A the Appellant exhorted after infliction of injuries were completed, he by no means can be held guilty of sharing a common intention with other accused to commit murder of the deceased or cause injuries to PW-3. On the other hand, if he was the first person to cause injury to the deceased by inflicting a blow on his head by a stick, it is wholly unlikely that he would imagine that the Accused Nos. 1 and 2 would go back to their house to bring the knives and inflict injuries to the deceased and PW-3 and, thus, a case of forming common intention at that time must be ruled out. It is, therefore, not a case where a common intention amongst the accused persons can be said to have been existing either from the beginning or was formed at the spur of the moment. Exhortation, furthermore, by itself is not enough to prove common intention on the part of an accused. C

In *State of Orissa v. Arjun Das Agarwal and Anr.*, AIR (1999) SC 3229, this Court stated :

“Regarding accused-respondent Arjuna Das Agarwal we find from D the evidence on record that this accused neither went inside the house of the deceased nor took any part in the commission of the murder. He only instigated by shouting at the other accused persons. There is nothing in evidence to show that due to his instigation more blows were given by the accused persons. Therefore, no inference can be drawn that this accused-respondent had common intention of causing death of the deceased or that he actually participated in the criminal act. Therefore, High Court rightly acquitted this accused.” E

What would form a common intention is now well-settled. It implies F acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts.

In *Ramashish Yadav and Ors. v. State of Bihar*, AIR (1999) SC 3830, this Court stated :

“...It requires a pre-arranged plan and it presupposes prior concert. G Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be pre-arrangement or premeditated concert... H

A [See also *Badruddin v. State of U.P.*, [1998] 7 SCC 300 and *Ramashish Yadav v. State of Bihar*, [1999] 8 SCC 555, referred to in *Balram Singh and Anr. v. State of Punjab*, [2003] 11 SCC 286].

B As noticed hereinbefore, even the inquest panchnama did not refer to the head injury although presence or absence of injuries on all other parts of the body of the deceased had been noticed. Furthermore, eye-witnesses are also interested witnesses.

C For the reasons aforementioned, we are of the opinion that it is a fit case where the benefit of doubt should be given to the Appellant herein. The appeal is, therefore, allowed and the impugned judgment is set aside. If the Appellant is in custody, he shall be set at liberty forthwith, if not wanted in connection with any other case.

N.J.

Appeal allowed.