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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 12.04.2012

Decided on : 20.04.2012

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CRL.A. 1270/2011 & CrI.M.(Bail) No.1790/2011

VEERA

..... Appellant

Through : Mr.R.K.Singh, Advocate.

CRL.A. 1271/2011 & CrI.M.(Bail) No.1791/2011

SONU

..... Appellant

Through : Mr.R.K.Singh, Advocate.

CRL.A. 12/2012 & CrI.M.(Bail) No.28/2012

RAJESH @ SAHIL

..... Appellant

Through : Mr.A.J.Bhambani with Ms.Bhavita
Modi, Advocates.

Versus

STATE

..... Respondent

Through : Mr.Sanjay Lao, APP for the State.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. These three appeals are directed against a judgment and order of the learned Additional Sessions Judge, Delhi, dated 21-11-2011 in SC No. 70/2009. By the

impugned judgment, the Trial Court convicted the appellants for the offence punishable under Sections 302/34 IPC and sentenced them to undergo imprisonment for life, besides other sentences.

2. The prosecution alleged that the accused, i.e. the appellants Sonu s/o Veera, Veera S/o Middha and Rajesh @ Sahil S/o Sh. Charan Singh (hereafter referred to by their names) during the night intervening 17/18.05.2006, in furtherance of their common intention assaulted Ashok Kumar s/o Bishambhar (who subsequently died, hereafter referred to by his name or as “deceased”) and Kailash s/o Bishamber (also hereafter referred to by his name, or as PW-2). It was alleged that the assault took place with knife between 10.45 PM and 12.45 PM in front of the house (of the victims), i.e. No. A-704, Bhalaswa Dairy, S.P. Badli, Delhi. The prosecution also alleged that the accused, further to their common intention had inflicted repeated stab injuries on Kailash with such intention or knowledge and under circumstances that if it had resulted in Kailash’s death, all of them would have been guilty of culpable homicide. They had also inflicted several knife blows on the deceased, which led to his death. The matter was reported to the police officials and the statement of Sunita, (Ex. PW-1/A) was recorded and the FIR was registered against all the accused. During investigations all the accused were arrested; their personal searches were conducted and disclosure statements were recorded. They were medically examined. It was alleged that a “*button dar*” knife was recovered at the instance of Rajesh. After completion of the investigation, all the accused were sent up for trial. Upon being charged in the court under Sections 302/307/34 IPC (and a charge against the accused Rajesh @ Sahil) under Section 25/54/59 Arms Act, the accused pleaded not guilty and claimed trial.

3. The prosecution, in support of its case, examined eighteen witnesses. The statements of the accused were recorded under Section 313 Cr.PC. in which they

claimed that they were innocent and had been falsely implicated. Rajesh, in addition, stated that at the relevant time, he was repairing a scooter/motorcycle and Veera stated that on the day of occurrence, he had a quarrel with Sunita as he used to park the rickshaw in front of her house which she objected to, which resulted in a quarrel. After considering all these, the Trial Court, by its impugned judgment held that the accused/Appellants were guilty as charged, convicted them and issued the sentences in the manner described earlier.

4. Counsel for the Appellant argued that the conviction and findings recorded by the impugned judgment are in error of law, and therefore, unsustainable. It was contended that Prosecution Witnesses PW-2 Kailash and PW-1 Sunita were interested witnesses being the deceased's brother and sister therefore, their testimonies could not have been given credence for the purpose of convicting the accused. Furthermore, Kailash was injured and consequently their testimonies could not have been relied upon without corroboration by independent witnesses. The Trial Court fell into error in placing trust on those witnesses.

5. It was also argued on behalf of the Appellants that at the relevant time, many members of the public were present at the spot, but none was joined in the investigation nor examined by the prosecution in the court. The absence of public witnesses therefore, rendered the prosecution case suspect. The Trial Court ought to have scrutinized the evidence more carefully. It did not do so, and gave blind credence to the alleged witnesses of recovery such as police officers. The impugned findings therefore, were in error of law, and unsustainable.

6. It was submitted that the version of Sunita could not have been relied on because she was not near the spot, where the attack occurred. The prosecution also did not lead evidence to prove that the place was well lit. Since it was the

prosecution's allegation that the attack occurred around 11 PM on the day of the incident, it had to prove that there was sufficient light. Counsel stressed that this witness was clear that she did not live in the house of the deceased, but in a place which was of a distance covered by two hours. Even if there was a typographical mistake in the recording of her deposition regarding her residence, the evidence led showed that the crime occurred near House No 696, whereas PW-1 lived in House No. 704. PW-1 stated that PW-2 Kailash had seen the incident whereby the deceased had abused the accused; however, the latter did not mention about that. Most importantly, submitted learned Counsel, since PW-1 lived in her house, there was no reason for her to be near the spot, where the deceased and his brother used to sleep.

7. It was contended next that there are other serious discrepancies in the testimony of PW-1 which point to her unreliability, and the reasonable inference that she was not an eyewitness, and was not present when the incident occurred. For instance, she clearly deposed to having given the intimation (*rukka*, PW-1/A) at 4:00 AM, on 18-5-2006; the prosecution's allegation, and the document (*rukka*) was admittedly recorded – according to the police, at 02:30 AM. Further, she did not significantly mention that any electric pole was located near the crime scene; however, in her court testimony, she mentioned it, which was a significant and serious improvement. These inconsistencies undermined the credibility of her deposition, and the Trial Court fell into error in giving any credence to it. It was submitted that Veera had a quarrel with Sunita (PW1) regarding rickshaw parking in front of her house and in order to take revenge, the accused persons were falsely implicated in the case.

8. It was next urged that there is a serious and reasonable doubt about whether PW-2 was at the spot, when the incident allegedly occurred. In this connection,

counsel submitted this witness did not actually see anything; he heard shrieks. He did not mention anything about the sufficiency of light to enable identification of the culprits. The testimony of this witness was in stark contrast to that of PW-1, who claimed to be present. She lived somewhere else, and yet claimed to have witnessed the incident; on the other hand, PW-2 who was sleeping at the spot, admittedly did not see the accused.

9. It was also argued that Rajesh was not present at the spot and was busy in repairing a scooter and motorcycle. Counsel stressed that an overall appreciation of the oral testimony of the prosecution witnesses showed that only PW-1 claimed to be the ocular witness. Her deposition was utterly unreliable, also because she mentioned that two accused had been apprehended at the spot, which is starkly contrary to the prosecution story of their being arrested later. In fact, she contradicted PW-4, who deposed to having gone in search of Raju, Veera and Sonu, much after the incident, on 18-5-2006 at 2-45 PM. It was also argued that the prosecution had not been able to link the so-called recoveries at the behest of the accused, with the crime.

10. The APP has argued that PW-1, the complainant and Kailash (PW2) the injured witness, supported the prosecution in all material aspects during which they categorically identified all the accused as those who attacked Kailash and Ashok by which Kailash received serious dangerous injuries and Ashok had died. It was also submitted that there was sufficient corroboration on record to the ocular versions of the prosecution witnesses through documentary evidence which was proved. The testimony of the doctor, who proved the postmortem examination report of the deceased Ashok established that the deceased was murdered by the accused in furtherance of their common intention.

11. It was also argued on behalf of the State that Kailash's MLC was duly proved. It was also further submitted that a detailed investigation was conducted during which all the relevant documents were prepared, which were proved. Counsel urged that barring minor discrepancies, which were natural having regard to the difference in perception and recollection of witnesses, their testimonies were credible. It was argued that the testimonies of PW-1 and PW-2 had to be seen cumulatively; what was seen by PW-1 was corroborated by the latter, who saw the second or latter part of the attack. So far as motive was concerned, the APP urged that this assumes secondary importance, since the prosecution relied on ocular testimony of witnesses.

12. The material witnesses upon whose testimonies, the prosecution rests are Sunita (PW1) and Kailash (PW2). The latter witness is also an injured witness; the injuries caused on him, resulted in the accused being convicted under Section 307 IPC. PW-1 deposed that on night of 17.05.2006, while she was lying on a cot outside her house No. A-704, Bhalaswa Dairy, around 10.30/11.00 PM, she saw the Appellants, Sonu and Rajesh go there quietly. The deceased Ashok abused Sonu. The latter (Sonu) left for home. Soon after, 10/15 minutes, or so later, all the accused, i.e. Sonu, Veera and Rajesh went back; Ashok was then sitting on his cot. She also stated that Sonu had a knife in his hand; Veera and Rajesh caught hold of Ashok. Sonu gave knife blow to Ashok's chest after which he raised an alarm. A few members of the public, and Kailash (and who was lying on the nearby cot) went there and tried to save Ashok. While doing so, Kailash gave a *danda* blow to Sonu's hand, as a result the knife fell from Sonu's hand. However, immediately, the appellant Rajesh lifted the knife and inflicted the injuries on Kailash. She also deposed that Kailash's *danda*, fell down on; when all the accused inflicted injuries on Ashok, he became unconscious and fell down. Kailash was however conscious.

Blood was oozing out from both Kailash and Ashok. She also deposed that Ashok was made to lie down on the cot; in the meantime, members of the public had gathered. They apprehended accused Veera and Sonu and someone from the neighbourhood informed the PCR; the police officials reached the spot and shifted the injured to the hospital. PW-1 also accompanied them. She deposed that police officials reached the hospital and recorded her statement Ex. PW-1/A. She stated that Sonu, who was under the influence of liquor had also abused Kailash.

13. During the cross examination on behalf the accused PW-1 deposed that none of the public was present at the spot at the time of commission of the offence and in the street she was lying on her cot while accused lay on their respective cots in the same street. She further stated that as such there was no previous enmity between the accused and the deceased and that Kailash used to keep a *danda* with him to look after his dog. PW-1 stated that the deceased had abused accused Sonu in the name of sister in an incident which occurred about 3-4 days prior to the occurrence when Ashok and Kailash had beaten up Veera. She deposed that her clothes got blood stained during the occurrence. She deposed to having accompanied Ashok and Kailash in the ambulance to the hospital. At that time Ashok was unconscious and was almost dead. She denied that at the relevant time, she was inside her house as she was unwell due to her pregnancy and also denied not witnessing the incident.

14. PW-2, Kailash is the deceased's brother and injured. He too was an eyewitness to the occurrence. He testified that on 17.05.2006, he and the deceased Ashok were sleeping on their separate cots in the street outside their house, whereas his sister Sunita (PW1) was sleeping in the street on a cot. At about 11.00 PM/12.00 in the night, he heard shrieks of his brother Ashok upon which he woke up and saw that the accused Veera and Rajesh had caught hold of Ashok and Sonu

gave knife blows to the latter (Ashok). He also deposed that on seeing it, he took the *danda* lying near his cot and gave a blow on the hand of Sonu as a result of which the knife fell from Sonu's hand. However, Rajesh picked it up and inflicted blows upon him (i.e the witness). He further deposed to remaining conscious when they reached the BJRM hospital from where he was referred to Hindu Rao Hospital.

15. In his cross examination by the accused the witness deposed that at the relevant time, he was simply lying on his cot and not sound asleep. He also stated that the cot on which his brother Ashok lay was stained with blood and the bricks on the floor were also blood stained. He further explained that the deceased's cot was in between his cot and Sunita's cot. He affirmed that the police reached after about 15 minutes (of the incident) and he remained in the hospital for about 20 days.

16. PW-4, Sh. Atam Prakash another brother of the deceased Ashok, as well as of Kailash deposed that Kailash (PW-2) and the deceased were also his brothers and that on 17.05.2006, he was at his house at Jahangirpuri. He then came to know that Ashok and Kailash had been beaten due to which they were injured and had been shifted to BJRM Hospital. He went to the hospital; on reaching it, he came to know that Ashok had died, whereas Kailash was admitted in the Emergency Ward. He also deposed to being referred to Hindu Rao Hospital. He testified that when he reached at House No. A-704, Bhalaswa Dairy, certain police officials were present and his sister Sunita (PW-1) an eyewitness of the occurrence was also there. Her statement was recorded by the police officials. He further deposed that the police had also lifted the blood stained earth and earth control from the spot and seized the same through Memo Ex. PW-4/A. A blood stained *danda* was also lying at the spot. He deposed that one cot, pillow, mattresses (*dari*) and one bed sheet

(*chadder*) with blood stains were lying at the spot which were seized by the police officials by Memo Ex. PW4/B. He also deposed to going with police officials in search of the accused when they reached Rajesh's house. He was caught from there; after some time, Veera and Sonu were also traced out, who were also arrested. The witness proved their arrest through Memos as Ex.PW-4/C, Ex. PW-4/D and Ex. PW-4/E. Their personal searches were conducted through Memos Ex. PW-4/F, Ex. PW-4/G and Ex. PW-4/H. He testified that Rajesh too had helped in the recovery of a knife from his house. He had also disclosed that it was the same knife by which he and Sonu had inflicted injuries to Kailash and the deceased Ashok. He also testified that blood was noticed on the knife. Its sketch was produced as Ex. PW-4/J; the knife was seized by Memo Ex. PW-4/K. He also deposed that Rajesh's disclosure led to recovery of a blood stained pant and shirt. He had confessed that he was wearing them at the time of commission of the crime. This was also seized by the Police Officials by Memo Ex. PW-4/L. Thereafter, Sonu led the police to House No. A-709, Bhalaswa Dairy, from where he led them to the recovery of one check shirt and blood stained cream coloured trouser seized by the police officials by Memo Ex. PW-4/M. The *danda* which lay near the spot was also seized by Memo Ex. PW-4/Q. He further deposed to identifying the dead body of his brother Ashok in the hospital. He identified the blood stained *danda* as Ex.P1, blood stained knife as Ex.P2, *dari* as Ex.P4, sheet as Ex.P5, pillow Ex.P6, clothes of Rajesh as Ex.P7 and Ex.P8. He identified the clothes of Sonu, i.e. trousers Ex.P9 and shirt as Ex.P10.

17. PW-4, during his cross examination, stated that the recoveries were effected on the same day in his presence. He has also stated that police officials has seized the *dari*, *chadar* and pillow at about 1.00/2.00 P.M. and wrapped them, prepared *pullanldas* after sealing them. The seal after use was handed over by the IO to a

policeman. He has denied to the suggestion that no such documents were prepared in his presence or that he deposed falsely.

18. The Trial Court's assessment and evaluation of the testimonies of PW-1 and PW-2 is found from the following extract of its judgment:

"27(c). After going through the entire testimony of Ms. Sunita (PW-1), it is clear that she has nowhere minced her words so far as identity of either of the accused persons and their causing knife injuries on the persons of Ashok and Kailash in the manner as alleged is concerned. Admittedly, at the relevant time she was lying on the nearby cot and her presence at the spot and her witnessing the occurrence in the manner as deposed by her before the Court is nowhere rebutted by the accused or shown to be false and does not raise any suspicion. She has also stated that after receiving injuries, the deceased Ashok had got unconscious and the injured Kailash (PW-2) had also received injuries on his person and it was in fact the PCR who had shifted them to the hospital.

27(d). Though, she was cross-examined at length on behalf of the accused persons, yet nothing is shown if the said incident did not occur in the manner as alleged or as deposed by Sunit or that Ms. Sunita (PW-1) was not present at the spot or she did not witness the occurrence as deposed. During her cross examination, she has also clarified that Kailash (PW-2) used to keep a danda with him to look after his dog and has accordingly, testified regarding the presence of danda with Kailash. She has also stated that the deceased Ashok, who was her brother had earlier abused to the accused Sonu in the name of his sister and Ashok and Kailash (PW-2) had also given beatings to the other accused namely Veera. Accordingly, the motive on the part of the accused persons to cause injuries and to commit the said offence has been duly proved on the record and it is also shown that the accused Sonu was the son of the accused Veera and the accused Rajesh was his close friend.

28(a). Kailash (PW-2) who is an eye witness to the occurrence and an injured as well has also been very straightforward in narrating before the Court that at the relevant time while he was sleeping on a nearby cot and on hearing the shrieks of his brother Ashok (since deceased), he woke up and saw that the accused Rajesh and Veera had caught hold of Ashok, whereas the accused Sonu was inflicting the knife injuries on his person and on

seeing it, he took the danda lying near his cot and gave danda blows on the hand of accused Sonu, due to which the knife fell down from the hand of the accused Sonu but the accused Rajesh lifted the same who gave knife blow on the person of Kailash. During lengthy cross examination of the said witness, it is nowhere been shown if he has not narrated the occurrence in the manner in which it occurred or that he is deposing falsely that the accused persons were not present at the spot and did not inflict injuries on the person of Ashok and Kailash. PW-2 has been very specific even in mentioning that the cot on which his brother Ashok (since deceased) was sleeping was stained with blood and even the bricks had got blood stained. He has also stated that the cot of the deceased Ashok was in between his cot and the cot of Ms. Sunita (PW-1) and accordingly, has corroborated the version of Ms. Sunita (PW-1) on all material aspects including deposing regarding various investigations conducted by the police officials in the case.

29. In the present case, though, Ms. Sunita (PW-1) and Kailash (PW-2) were cross-examined at length on behalf of the accused person, yet nothing at all is shown on the record if they are interested in getting the accused persons falsely implicated in the present case by leaving or allowing the real culprits to go scot free. In fact, no motive of false implication has ever been suggested to the said witnesses and the manner in which Ms. Sunita (PW-1) and Kailash (PW-2) have deposed before the Court clearly suggest that they had not only witnessed the entire occurrence but had stated the events in the manner in which they occurred and their testimonies do not suffer from any artificiality of exaggeration. It is well-settled law that being near relatives, the witnesses cannot be said to be necessarily interested. In the present case, PWs-1 and 2 are very natural witnesses whose presence at the spot and witnessing the entire occurrence has not been rebutted or shown to be false.”

19. It is apparent from the previous discussion that the Trial Court’s findings hinge primarily on the testimony of PW-1 and PW-2. Although the Appellants had submitted that their testimonies are untrustworthy, because they were closely related to the deceased, the argument is of not much consequence. In *Namdeo Vs. State of Maharashtra* 2007 CriLJ 1819 it was observed that:

“From the above case-law, it is clear that a close relative cannot be characterised as an 'interested' witness. He is a 'natural' witness. His

evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole' testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."

The testimony of PW-1 during the cross examination reveals that at the time of the attack, there was no eyewitness. Members of the public reached the spot later, upon hearing shrieks. Similarly, the discrepancy between the testimony of PW-1 and PW-2 – if that be called such- is due to the fact that PW-1 actually saw the entire episode, whereby Ashok had abused Sonu, after which he returned with the other accused, and the knife injuries were inflicted. Naturally, both the witnesses could not have seen the events as they unfolded themselves, because PW-2 was sleeping, and woke up on hearing his brother's shrieks. Thereafter, however, the testimonies of both PW-1 and PW-2 are entirely consistent; both mention how Sonu knifed Ashok; PW-2 hitting him with *danda*, leading to the knife falling down its being picked up by Rajesh, and the latter attacking PW-2 with it. The role attributed to Veera and Rajesh in Sonu's attack of Ashok is that they held him; on the other hand, PW-2 was attacked by Rajesh, while the other two held him.

20. In this case, the *rukka* (Ex. PW-1/A) was recorded at 2:30 AM on 18-5-2006; the FIR was registered at 2:55 AM. The crime team visited the spot at 3-30 AM and inspected the crime scene till 4-15 AM (Ex. PW-9/A). The MLC issued by Babu Jagjivan Ram Memorial Hospital shows that the injured Ashok was taken there at 1-25 AM on 18-5-2006 (Ex. PW-18/A). This documentary evidence is consistent with the ocular account of the time, when the attack took place, and the circumstances under which the FIR was recorded.

21. The postmortem report (Ex. PW-3/A) as well as the doctor who prepared it (PW-3) mention that Ashok had received 11 injuries, of which 9 were knife injuries. In his opinion (unchallenged during cross examination) death was caused by the shock due to hemorrhage as a result of multiple knife injuries, which affected his internal organs, like the lungs, heart, liver etc. PW-2 Kailash was hospitalized, till 29-5-2006 and had to undergo surgery, as is evident from his discharge slip/ OT notes (Ex. PW-6/B), which were proved by PW-18. The OT notes record that a stab wound 6cm x 2cm deep was found at the epigastric region (which is the upper central region of the abdomen, located between the costal margins and the sub-costal plane). This injury was dangerous according to the doctor.

22. In view of the above analysis, this Court is of the opinion that the prosecution had clearly proved its case, beyond reasonable doubt. The next question is, whether the Trial Court was justified in holding all the accused/Appellants responsible for the offence under Section 302, IPC, having regard to the fact that only Sonu concededly inflicted all the knife injuries upon the deceased Ashok. In *Gopi Nath @ Jhallar v. State of U.P.* (2001) 6 SCC 620 it was held that:

“Section 34 IPC has been held to lay down the rule of joint responsibility for criminal acts performed by plurality or persons who joined together in doing the criminal act, provided that such commission is in furtherance of the common intention of all of them. Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action - be it that it was not overt or was only covert act or merely an omission constituting an illegal omission. The Section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them

participated and engaged themselves in furtherance of the common intention which might be of a pre-concerted or pre-arranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case.”

In *Krishnan Anr. v. State* (2003) 7 SCC 56, it was observed that application of Section 34 is dependent on the circumstances of each case. No hard and fast rule can be made out regarding applicability or non-applicability of that provision. In *Girija Shankar v. State of U.P.* (2004) 3 SCC 793, it was held that Section 34 was enacted to elucidate the principle of joint liability of a criminal act

“Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must have been actuated by one and the same common intention in order to attract the provision..”

In this case, the sequence narrated by PW-1 shows that there was an altercation between the deceased and Sonu; the latter went away, returned with his other two friends, i.e. Veera and Rajesh. All participated in the assault on Ashok; Sonu

inflicted 9 knife injuries. His friends held or restrained Ashok, to facilitate the attack and ensure that he could not get away. Similarly, when PW-2 tried to hit Sonu, the Rajesh attacked him, and the other two held him. The injuries to Ashok were fatal, and those to PW-2 were dangerous enough for him to undergo surgery and be hospitalized for over 10 days. Therefore, the prosecution also proved common intention, of the accused, to attract the principle of joint liability under Section 34 IPC.

23. In view of the above discussion, the Court is of opinion that the findings and conviction of the Trial Court in the impugned judgment were justified. The appeals lack in merit, and are consequently dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

April 20, 2012

**S.P. GARG
(JUDGE)**