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HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 975 OF 1999

Kangalu, S/o Ramprasad, aged 27 years, R/o Kondagaon, PS Kondagaon, District Bastar.

... Appellant

Versus

State of Madhya Pradesh (now Chhattisgarh)

... Respondent

CRIMINAL APPEAL NO. 1694 OF 1999

Sadik Khan @ Guddu, S/o Shahjad Khan, age 26 years, R/o Sarangipal, PS Kondagaon, District Bastar.

... Appellant

Versus

State of Madhya Pradesh (now Chhattisgarh)

... Respondent

CRIMINAL APPEAL NO. 1695 OF 1999

Salim Khan, S/o Sayyed Khan, age 22 years, R/o Mutton Market, PS Kondagaon, District Bastar.

... Appellant

Versus

State of Madhya Pradesh (now Chhattisgarh)

... Respondent

Mr. Akash Pandey, Advocate, for the Appellants in Criminal Appeal Nos. 975 of 1999 and 1695 of 1999.

Mr. Vishnu Koshta, Advocate, for the Appellant in Criminal Appeal No. 1694 of 1999.

Mr. Vinod Deshmukh, Deputy Government Advocate, for the State.

Hon'ble Shri Navin Sinha, Chief Justice

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per NAVIN SINHA, C.J.

15/10/2015

1. The Appellants stand convicted under Section 302/34 IPC to life imprisonment with fine of Rs. 5000/- each, in the event of failure to pay which, they were required to undergo one year further rigorous

imprisonment as ordered on 2.2.1999 by the Third Additional Sessions Judge, Bastar, in Sessions Trial No. 32 of 1998.

2. The deceased Vijay Shanker Tiwari @ Bam Tiwari is stated to have been assaulted at the Kondagaon bus stand by the Appellants on 25.10.1997 at about 9:50 p.m. '*Dehati Nalishi*' was lodged immediately by PW-1 Vijay Nayker stating that while he and the deceased were at the bus stand, the Appellants Kangalu and Sadik accompanied by a third unnamed came. Appellant Kangalu assaulted the deceased with a rod and Appellant Sadik assaulted with a knife. The witness tried to intervene, he was assaulted on the head with an iron rod by Appellant Kangalu. Formal FIR, Exhibit P-15, was registered the same day in which the witness again named Appellants Kangalu and Sadik accompanied by an unnamed third. The post-mortem of the deceased, Exhibit P-13, conducted by PW-8 Doctor S. Lonhare disclosed 12 incised injuries over different parts of the body, one lacerated wound on the right elbow and one abrasion on the occipital lobe of the skull caused by hard-blunt object opining that the death was homicidal in nature due to shock and excessive hemorrhage approximately 12:00hrs earlier.

3. The common submission on behalf of the Appellants was that there was no intention or pre-meditated design reflected for killing the deceased. Events took place on the spur of the moment, preceded by a verbal duel and scuffle after the parties suddenly met each other at the bus stand. They were all well known to each other from before. Since it was an assault made on the spur of the moment without premeditation on grave and sudden provocation and in retaliation, the conviction under Section 302/34 IPC was not justified. Appellant Sadik also

suffered injuries. His MLC was proved by PW-7 Dr. S.K. Kanwar. There was an incised wound on the left wrist, right index finger, two incised wounds on the right index finger. The first was grievous. The fact that the latter two were simple does not detract from the position that he attacked when he was assaulted.

4. It was further submitted on behalf of Appellant Kangalu that in the nature of assault by him with an iron rod, it cannot be said that he had any intention to kill. The first assault was on the elbow joint. The second was only an abrasion on the skull area. Nothing prevented the Appellant from making more severe repeated assaults if he intended to cause death. There is no evidence to suggest that he had come with co-accused with any pre-meditated intention. He had not come armed with the iron rod but picked it up suddenly from a cart standing nearby. The prosecution has not established that he was aware that co-accused Sadik was carrying a knife in the dickey of his Luna and they had come prepared with the common intention to use it. The Appellant Kangalu may therefore be liable for his individual act either under Section 324 or under Section 326 IPC. Reliance was placed on 1977 (1) SCC 746 (Ashok Kumar v. State of Punjab), 1990 (Supp) SCC 66 (A. Mohnam v. State of Kerala), 1994 Cr.L.J. 1098 (Shangara & Another v. State of Punjab), 2002 (6) SCC 518 (Baburam & Another v. State of U.P. & Others), 2005 (10) SCC 567 (Sukhbir Singh v. Kirtan Singh & Others) and 2009 (2) C.G.L.J. 3 (Sukhru @ Sampat v. State of Madhya Pradesh).

5. The submission on behalf of Appellant Sadik was of having acted under grave and sudden provocation on the spur of moment when a verbal duel ensued followed by scuffle when he was also assaulted

resulting in a free fight, to maintain conviction at best under Section 304 (Part II)/34 IPC.

6. The submission on behalf of Appellant Salim was that the prosecution has not established beyond reasonable doubt that he was the third person present when the assault took place. PW-1 Vijay Nayker in his Court statement identified the Appellant Salim for the first time stating that he knew him from before but offered no explanation for not having named the Appellant in the '*Dehati Nalishi*' and the FIR. If there is any reasonable doubt with regard to his presence based on the evidence led by the prosecution, the benefit of doubt has to go to the accused.

7. Learned Counsel for the State opposing the appeal submitted that PW-1 Vijay Nayker is an injured eye-witness and therefore completely reliable. The Appellants have not alleged any motive or previous enmity for their false implication by the witness. Animosity existed between the deceased and Appellant Sadik. No evidence or material has been placed by the Appellants why PW-1 Vijay Nayker was lying to falsely implicate them. PW-3 Nabbu Khan has stated that he knew both the Appellants and the deceased. Even he has mentioned of the assault by Appellants Kangalu and Sadik. The Incident was not incited or ignited by the deceased or PW-1 Vijay Nayker who were at the bus stand since earlier where the witness had his shop. It was the Appellants Kangalu and Sadik, accompanied by a third, who came and incited the altercation by questioning the conduct of the deceased in trying to be a "*Dada*". The Appellants cannot take a defence of a grave and sudden provocation if the origin of the occurrence lay in their conduct. Intention was to be gathered from all surrounding

circumstances as rarely is direct evidence available. The intention of the Appellant to kill the deceased is apparent from the fact that Appellant Kangalu assaulted with an iron rod twice. The deceased fell down after which Appellant Sadik gave repeated 12 incised wounds with a knife. When PW-1 Vijay Nayker tried to intervene for saving the deceased, Appellant Kangalu did not hesitate to attack the witness with the iron rod thereby displaying the clear intention that they did not want any impediment in their object to kill the deceased and were ready to do away with any obstruction that would come. Salim has been named in the first page of the F.I.R. and also in the police statement as holding the deceased while Sadik assaulted him.

8. Appellant Salim has been named by PW-1 Vijay Nayker in his Court statement also. The statement made in Court must take precedence over any police statement. No question was asked to the witness during cross examination why he had not named the Appellant earlier. PW-6 Bharat Shrivastava who took PW-1 Vijay Nayker to the hospital has also named the Appellant Salim in his police statement.

9. We have considered the submissions on behalf of the parties and examined the evidence on record also. The confession and recovery of an iron rod and knife from Appellants Kangalu and Sadik respectively, marked Exhibits P-8 and P-9, is not considered relevant in absence of any forensic report.

10. Intention is to be gathered from all surrounding facts and circumstances preceding and after the attack. It includes the manner in which the assailants came, whether together or separate, nature of the

instrument used, the manner of assault, the number of injuries caused, and their conduct during the assault more particularly with regard to any obstruction that may surface during the assault to interrupt or break the assault.

11. The deceased and PW-1 Vijay Nayker were at the bus stand in natural sequence as the latter had his shop there. Appellant Kangalu and Sadik came together on the Moped of the latter and accosted the deceased questioning his conduct in trying to act like a "*Dada*". It was fairly acknowledged that there are criminal prosecutions pending against the deceased and the Appellants also. On the incitement and aggression by the Appellant Kangalu, a verbal duel took place followed by a scuffle. Appellant Kangalu assaulted with an iron rod and gave not one, but two blows upon the deceased. When PW-1 Vijay Nayker tried to intervene, the Appellant Kangalu did not hesitate to assault the witness also causing him a lacerated wound on the left occipital region evident from his MLC report proved by PW-7 Dr. S.K. Kanwar. The conduct of Appellant Kangalu in having assaulted the deceased twice coupled with the assault on PW-1 Vijay Nayker when he tried to intervene, reveals his intention to ensure that the assault on the deceased did not fall short of his objective to kill acting in tandem with Appellant Sadik. Even if Appellant Kangalu was not aware that the co-accused was carrying a knife in his dickey, yet there is no evidence that Appellant Kangalu at any time tried to intervene and stop Appellant Sadik from making twelve continuous and repeated assaults on the deceased. The presence of twelve incised wounds themselves is evidence of the fact that the assault by Sadik on the deceased continued for some time. Appellant Kangalu therefore had enough

opportunity to at least make an effort to stop the co-accused after he may have made one or two assaults at best if they did not have the common intention to kill. The fact that by his passive presence he facilitated repeated assaults while he kept standing with an iron rod in his hands leaves us to conclude that the Appellants did have a common intention. Appellant Sadik cannot be said to have acted on grave and sudden provocation. If an accused originates the incident or occurrence himself, the defence of grave and sudden provocation cannot be taken and neither can it be claimed to be a case of free fight.

12. Grave and sudden provocation would mean a completely unexpected sudden behaviour of the other sufficient in intensity to make a normal person loose self control even momentarily. It is not possible to arrive at such finding in the facts of the present case. We therefore find it difficult to hold that Appellants Kangalu and Sadik acted under grave and sudden provocation on the spur of moment without having taken undue advantage or acted in cruel or unusual manner, given the number of incised injuries upon the deceased, to give benefit of Section 4 of Section 300 IPC. We also find it difficult in the facts to accept the submission that they were liable for their individual acts and there was no common intention.

13. PW-1 Vijay Nayker in his court deposition stated that he knew Salim from before the occurrence, yet the latter was not named in the *Dehati Nalishi* lodged by him immediately after the occurrence. Even otherwise, the third unknown person alleged to have been present according to the witness was not ascribed any role in the assault by the witness. In the body of the FIR lodged on basis of the same by PW-1 Vijay Nayker again there is a reference to a third unnamed person but

no role ascribed to him in the assault. Only the cover page of the FIR mentions the name of Salim as an accused. In the police statement, the witness stated that Salim held the deceased while Sadik assaulted with the knife. This role assigned to the third person was completely missing at the earlier two stages. Again in the court deposition, the witness has not stated that Salim held the deceased while Sadik assaulted but has made an omnibus allegation only with regard to the Appellant Salim. The police statement of PW-1 Vijay Nayker bears overwriting of the date and therefore the insertion of the name of Salim in the police statement subsequently cannot be ruled out. PW-9 N. Nuruti, the Investigating Officer, proved the *Dehati Nalishi*, Exhibit P-1, and the FIR, Exhibit P-15, on basis of the same. He deposed that he had recorded the same at the police station strictly according to the disclosures made before him. No cross-examination was done of the witness by PW-1 Vijay Nayker on the issue with leave of the Court. In the circumstances, we find it difficult to hold conclusively that the third unnamed person was Salim much less that he was actively involved reflecting common intention. The possibility of his name being introduced at a subsequent stage cannot be ruled out and the benefit of doubt therefore has to be given to him. PW-6 Bharat Shrivastava has turned hostile.

14. In Ashok Kumar (*supra*) relied upon by Appellant Kangalu, there was difference between the ocular evidence and medical report. Co-accused had been convicted under Section 326/34 IPC holding there was no intention to cause death but grievous hurt only. No appeal against the same had been filed. The case is therefore distinguishable on its own facts.

15. In A. Mohnam (supra) the assault was made by the Appellants with sticks only as distinct from the present case of an iron rod used by Appellant Kangalu including on the occipital lobe of the skull of the deceased and assault by him on PW-1 when he tried to come to the aid of the deceased.

16. In Shangara (supra) the assault took place over a trivial dispute between family members with regard to liquor and mutton. Appellant no.3 had assaulted on the thigh only once. His conviction therefore was altered to under Section 326 IPC. Appellant no.3 had not assaulted another to prevent him from coming to the aid of the deceased. The case is again distinguishable on its own facts from that of the present case.

17. In Baburam (supra) the Appellant assaulted with lathi after which shots were fired by others. The specific finding was of absence of any common intention. In these circumstances the conviction was altered from Section 302/34 IPC to Section 325/34 IPC.

18. In Sukhbir Singh (supra) a finding had been arrived at on facts for absence of any common intention.

19. In Sukhru @ Sampat (supra) the incident took place in an inebriated condition preceded by scuffle after which single knife blow was inflicted. On those facts it was held that the accused had not acted in cruel or unusual manner.

20. The above discussion leaves us satisfied that it is difficult to uphold the conviction of Appellant Salim in absence of any evidence positively establishing that he was the unnamed third person present at the time of assault. In any event, no overt-act of assault has been attributed to the unnamed third person.

21. In conclusion, the appeal of Appellants Kangalu and Sadik is dismissed. Their bail-bonds are cancelled and they are directed to surrender and/or be taken into custody forthwith for serving out their remaining period of sentence.

22. The appeal of Appellant Salim is allowed subject to conditions in Section 437-A Cr.P.C.

Sd/-
(Navin Sinha)
Chief Justice

Sd/-
(P. Sam Koshy)
Judge

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