REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOs. 1262-64 OF 2004

State of U.P. ….Appellant

Versus

Atul Singh etc.etc. ….Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Challenge in these appeals is to the judgment of a Division Bench of the Allahabad High Court directing acquittal of the respondents. Respondent Sanjay Vishwakarma was convicted for offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') whereas the other two accused persons were tried and convicted for the offence punishable under Section 302 read with Section 34 IPC.

2. Learned Additional Sessions Judge, Basti had convicted the respondents who preferred three separate appeals before the High Court. By the impugned judgment the High Court directed their acquittal.

3. Prosecution version in a nutshell is as follows:

On 21.11.1998 Radhey Shyam Pandey was at his house situated at Avas Vikas Colony District Basti and his son Ajay Kumar alias Pintu returned back home from the city and told him that a scuffle took place between him on one hand and Sanjay Vishwakarma, Atul Singh and Brij Kishore Singh alias Dimple on the other in front of A P N Degree College; and at that time he was accompanied by Vikas Singh and Sunil Kumar Verma and that his opponents were in search of him in order to kill him. Then Radhey Shyam Pandey along with his son Ajay Kumar alias Pintu accompanied by Vikas Singh and Sunil Kumar went from his house in order to make a complaint to the principal of APN Degree College. When they reached near the PCO in the pavement leading to the main road accused Sanjay Vishwakarma, Brij Kishore Singh alias Dimple and Atu1 Singh sighting Ajay Kumar exhorted that he should be killed. Thereupon, Ajay Kumar intended to run away by turning, but Sanjay Vishwakarma fired at

him with country made pistol and on receiving firearm injury Ajay Kumar fell down and all the three miscreants ran away on the motor cycle parked nearby. At that very time one Dina Nath Pandey and Udai Shankar Shukla reached there and tried to catch hold of the miscreants but they succeeded in making their escape good. Immediately thereafter Radhey Shyam Pandey and his wife Smt Anirudh Kumari took their injured son Ajay Kumar in a Jeep to the District Hospital, Basti. But by the time they reached the Hospital, injured Ajay Kumar succumbed to fatal injuries `sustained by him in the said incident. Then Radhey Shyam Pandey, father of the deceased went to the Police station Basti Kotwali, District Basti and lodged an FIR of the occurrence with the Police there at about 12.30 p.m. The Police registered a crime against the accused under section 302 IPC and started the investigation. After completing the investigation the Police submitted charge sheet against the accused accordingly.

As accused pleaded innocence, trial was held.

Prosecution examined eleven witnesses to further its case. The respondents examined three witnesses to substantiate their claim of innocence. The trial court placed reliance on the evidence of Radhey Shyam Pandey (PW1) who was an eye witness and directed conviction.

In appeal the High Court primarily relied on four circumstances to direct acquittal.

(1) The presence of Radhey Shyam Pandey (PW1) was not established. If he was really an eye witness then in the hospital records the name of his wife Anirudh Kumari could not have been shown as the persons who brought the deceased to the hospital. Being an advocate, he was expected to be at his place of practice and not at home. (2) As he claimed that he was going to meet the principal at a distance of 1½ K.M., he could not have needed a rickshaw for going to the college. Deceased was not a student of APN Degree College and therefore there was no question of making a grievance before the principal. (3) The site plan did not show the place from where he allegedly saw the occurrence or the place from where the shot was allegedly fired. (4) In the inquest report name of the accused, the nature of the weapon and the name of the assailants were not specifically mentioned. With these findings the direct acquittal was directed.

4. In support of the appeal learned counsel for the appellant stated that the reasonings indicated by the High Court to say the least are based on

surmises and conjectures. The law relating to the particulars to be indicated in the inquest report and the evidentiary value of the site plan have been completely lost sight of. The conclusions are contrary to the evidence on record. It was specifically stated by PW1 that because the date of occurrence was on Saturday and there was a strike in the court, this aspect has been completely lost sight of. The mother of the deceased had also accompanied PW1 to the hospital and merely because her name is stated, it cannot be a ground to doubt the presence of PW1 at the spot of occurrence.

5. Learned counsel for the respondent-Sanjay submitted that the High Court has analysed the evidence. The inherent inconsistencies in the evidence of PW1 and the relevant features which clearly established that he could not have been an eye witness. In the aforesaid position the impugned judgment does not warrant interference.

6. Learned counsel appearing for Dimple alias Brij Kishore Singh and Atul Singh submitted that these accused persons were convicted by application of Section 34 IPC. The High Court has noted as to how Section 34 has no application to the facts of the case.

7. We find ample substance in the plea of learned counsel for the appellant that the conclusions of the High Court are based on surmises and conjectures and hypothesis. Mere non-mention of the names of the assailants or the nature of the weapon in the inquest report, cannot be a ground to discard the evidentiary value of PW1's evidence.

8. Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is an allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

9. In Dalip Singh and Ors. v. The State of Punjab (AIR 1953 SC 364) it has been laid down as under:-

> "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

10. The above decision has since been followed in Guli Chand and Ors. v. State of Rajasthan (1974 (3) SCC 698) in which Vadivelu Thevar v. State of Madras (AIR 1957 SC 614) was also relied upon.

11. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the

impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

> "We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in – 'Rameshwar v. State of Rajasthan' (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

12. Again in Masalti and Ors. v. State of U.P. (AIR 1965 SC 202) this Court observed: (p. 209-210 para 14):

> "But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

13. To the same effect is the decisions in State of Punjab v. Jagir Singh (AIR 1973 SC 2407), Lehna v. State of Haryana (2002 (3) SCC 76) and Gangadhar Behera and Ors. v. State of Orissa (2002 (8) SCC 381).

14. The above position was also highlighted in Babulal Bhagwan Khandare and Anr. v. State of Maharashtra [2005(10) SCC 404] and in Salim Saheb v. State of M.P. (2007(1) SCC 699).

15. So far as the non-mention of the name of PW1 who was accompanying the deceased to the hospital aspect is concerned, it is interesting that defence witness A.K. Singh (DW1) the Chief Pharmacist has clearly stated in his cross examination by the prosecution that in case an injured is accompanied by several persons to the hospital, only one's name is recorded who is most close to the injured. He has also stated that besides his mother and others may have accompanied the deceased to the hospital. The presumptuous conclusion that merely because the name of the deceased's mother was recorded in the medical records, PW1's presence is ruled out is indefensible. Similarly PW1 has categorically stated that he did not go to Court because it was a Saturday and the lawyers were on strike for a particular reason. There was no cross examination even on this aspect.

The High Court's conclusion that he was expected to be at the place of practice on the face of this stand shows non application of mind. The evidence of PW1 is credible, cogent and, therefore, the acquittal of Sanjay Vishvakarma as recorded by the High Court cannot be sustained and is set aside. So far as the other two persons are concerned, the High Court after analyzing the evidence of PW1 has categorically held that Section 34 has no application.

Section 34 has been enacted on the principle of joint liability in the commission 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 mind 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 moment; but it must necessarily be before the commission of the crime. The true contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab (AIR 1977 SC 109), the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

16. The Section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the commission of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by

him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in Ch. Pulla Reddy and Ors. v. State of Andhra Pradesh (AIR 1993 SC 1899), Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.

17. In the instant case, the High Court has rightly held that the evidence is not sufficient to bring in application of Section 34 IPC. Therefore while allowing the appeal qua Sanjay Vishvakarma, the appeal is dismissed for the other two accused respondents. Sanjay Vishvakarma shall surrender to custody forthwith to serve the remainder of sentence.

……..……J.
(Dr. ARIJIT PASAYAT)

……..……..J
(ASOK KUMAR GANGULY)

New Delhi,
May 08, 2009