

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1565 OF 2012

NAIM AND ANOTHER

.... Appellants

Versus

STATE OF UTTARAKHAND

.... Respondent

J U D G M E N T

Uday Umesh Lalit, J.

1. This appeal arises out of judgment and order dated 24.07.2012 passed by the High Court of Uttarakhand at Nainital allowing Government Appeal No.386 of 2003 and setting aside the order of acquittal passed by the District and Sessions Judge, Haridwar in Sessions Trial No.26 of 2000 insofar as the present appellants are concerned.

2 On 07.09.1999 at about 1.30 pm the complainant Mustafa submitted a written report in Police Station Bhagwanpur, Haridwar to the effect that in the intervening night between 6th and 7th September 1999 he along with his brother Behroj, nephew Wasim and father Ali Hassan were sleeping in the verandah and that in the night at about 1200 hrs. he woke up and saw one Sabbir armed with *Palkati*, his brother Kabir armed with *pharsa* and one Naim armed with *lathi* coming to the verandah. Naim allegedly asked where was Ali Hassan, whereupon Kabir stated that Ali Hassan was sleeping and exhorted that he be killed, after which Sabbir gave a blow by *palkati* on the neck of Ali Hassan while he was sleeping. Ali Hassan died instantaneously. Upon alarm being raised these three persons ran away and while running they were seen by Farid Akhtar and Taimur.

3. On the basis of the above report Case Crime No.147 of 1999 under Section 302/504 IPC was registered. During the investigation statements of the complainant and other witnesses were recorded. Sabbir, Naim and Kabir were arrested and their statements led to the recovery of *palkati* and other weapons. The post-mortem on the body of the deceased was conducted by Dr. O.P. Sharma. After completion of investigation Sabbir, Kabir and Naim were charged for having

committed the offences under Section 302 read with Section 34 IPC and under Section 504 IPC.

4. The prosecution examined complainant as PW-1, his brother Behroj as PW-2, nephew Wasim as PW-4 and Taimur as PW-3. The earliest version in the form of FIR, which was within few hours of the incident naming all the three accused was reiterated by PW-1 Mustafa and supported by other three eye-witnesses, namely, PWs 2, 3 and 4. However, the trial court was of the view that the fatal blow was dealt by Sabbir and though the other two accused, namely, Kabir and Naim were present at the place of occurrence, they had not participated in the actual assault. The appreciation by the trial court in this respect is quoted hereunder:

“From the depositions of above four witnesses it is clear that accused Kabir was having farsa and accused Nayeem was having lathi in hand, but they have not used both the weapons. It has been stated for Nayeem that he loudly said as where is Ali Hassan, only he has to be seen and Kabir said that Ali Hassan is sleeping here, kill him. If all three had come with the intention to cause murder of Ali Hassan then definitely all three would have caused blows but only Sabbir caused blow by palkati and neck of Ali Hassan cut. In post mortem report also only one injury in neck is stated and it is stated that death occurred due to that. In post mortem report it is told only one incised wound 12 x 7cm x deep backbone, right side of neck which was 3 cm below from right jaw. The margins of wound was clear cut and fourth neck backbone was

cut. All vessels and muscles of right side were cut. Apart from this no other injury was found on his body and it is also not case of prosecution that Nayeem and Kabir also caused blows.”

5. The trial court thus convicted Sabbir under Section 302 and sentenced him to undergo rigorous imprisonment for life. The other two accused Naim and Kabir were acquitted of the charges under Section 302 read with Section 34 IPC and Section 504 IPC.

6. The convicted accused Sabbir preferred an appeal against conviction, namely, Criminal Appeal No.285 of 2003 in the High Court of Uttarakhand at Nainital. The High Court

affirmed the view taken by the trial court insofar as Sabbir was concerned and dismissed the appeal. Special leave petition arising therefrom was also dismissed by this Court on 08.03.2010 and thus the case against Sabbir and his conviction and sentence stood concluded and confirmed.

7. In the meantime the State, being aggrieved by the order of acquittal insofar as Kabir and Naim are concerned, preferred Government Appeal No.386 of 2003. The High Court after appreciating the entire material on record found the approach of the

trial court to be completely erroneous in granting the benefit to Kabir and Naim. It was observed that all three accused were armed with deadly weapons and had entered the house of the deceased at 1200 hrs. in the night and that the essence of Section 34 IPC, namely, consensus of minds of two or more persons to participate in a criminal act to bring about a particular result was fully evident. The High Court, therefore, set aside the acquittal of said Kabir and Naim and convicted them under Section 302 read with Section 34 IPC and sentenced them to undergo imprisonment for life.

8. This appeal under Article 134(1)(b) and Article 134(2) of the Constitution of India read with Section 379 IPC seeks to challenge the view taken by the High Court.

9. Appearing for the appellants Mr. P.S. Datta, learned senior counsel submitted that the probability of the occurrence in the manner suggested by the prosecution was completely doubtful, that there was delay of two months in examining PW-2 Behroj under Section 161 Cr.P.C., that no independent witnesses were examined, and that, in any event of the matter, the fundamental aspects of Section 34 IPC were completely absent in the case. The learned senior counsel thus

submitted that appeal deserves to be allowed and the accused Kabir and Naim ought to be acquitted of the charges leveled against them. Mr. Prateek Dwivedi, learned counsel, on the other hand, appearing for the State countered the submissions made on behalf of the accused-appellants and supported the view taken by the High Court.

10. In the instant case the FIR lodged by PW-1 within two hours of the incident had named all three accused ascribing particular weapons in their hands and also definite role to them. The FIR further stated that the incident in question was witnessed by Farid and Taimur and that along with the complainant his brother Behroj and nephew Wasim were also sleeping in the verandah. The FIR thus in clear terms disclosed not only the identity of the accused but also the role played by them, so also the names of the persons who subsequently were examined as prosecution witnesses. The entire case of the prosecution insofar as the conviction of Sabbir is concerned rested on the very same testimony coming from the witnesses which case was accepted right upto this Court. The only discordant note that was struck by the trial court was on the applicability of Section 34 IPC insofar as the role ascribed to and played by other two accused, namely, Kabir and Naim.

11. We must observe that Kabir was armed with *pharsa* and Naim was armed with a *lathi*, that all three accused had entered the house of the deceased and the complainant at midnight in the company of Sabbir who was also armed with a sharp cutting weapon. When three persons separately armed with weapons storm into the house of the victim in the dead of the night, merely because only one out of them uses the weapon and gives the fatal blow, would not absolve the others. The others may not be required to use their weapons but that by itself does not change the role of such other accused to that of a mere bye-stander. The circumstances can show that the others shared the same intention. In the instant case the common intention to bring about a definite result is evident from the circumstances on record. Additionally, the role of exhortation is also ascribed to the present appellants. In the circumstances, in our considered view, Section 34 IPC is definitely attracted and the High Court was completely justified in setting aside the order of acquittal. The order of acquittal as regards Kabir and Naim was perverse and unwarranted. Having thus considered the matter in its independent perspective we are not persuaded to take a view different from the one which weighed with the High Court.

12. We, therefore, confirm the judgment and order of the High Court and dismiss the present criminal appeal. The accused, who are in custody, shall serve the sentence awarded to them by the High Court.

.....J.
(Dipak Misra)

.....J.
(Uday Umesh Lalit)

New Delhi,
November 21, 2014



JUDGMENT