

Shariff Ahmad vs The State on 5 September, 1955

Equivalent citations: AIR1957ALL50, 1957CRILJ28, AIR 1957 ALLAHABAD 50, ILR (1956) 2 ALL 188

JUDGMENT

Mukerji, J.

1. These are two connected appeals that have arisen out of the same incident. The appellants in both the appeals were convicted at the same trial which was held by the Sessions Judge of Moradabad. The appellants have been convicted under Section 302 read with Section 34, Penal Code and each one of them has been sentenced to transportation for life.

2. The charge against the appellants was that they intentionally caused the death of one Durgpalsingh, who was a constable, in furtherance of the common intention of all of them, on the night between the 3rd and 4th of October, 1950, in Mohalla Jagat within the police station of Sambhal. A first information report was lodged at police station Sambhal by constable Gulzari Lal on the morning of the 4th of October at 7.15 a.m. According to the time set down in this first information report of the offence, the offence is said to have been committed in the small hours of the morning of the 4th, that is to say, about 1 o'clock. The place of occurrence is said to be the playground of the Hind Higher Secondary School of Mohalla Jagat. This play-ground is said to be situate at a distance of about four furlongs towards the east of the police station. The occurrence fell within the police output of Panju Sarai of police station Sambhal.

It may here be noted that the first information report by Gulzari Lal did not contain an eye-witness account of the incident because Gulzari Lal was not an eye-witness of the Incident but made the report on information which he had gathered. According to the first information report, Durgpalsingh of police circle Panju Sarai was out on night duty at a cinema and that he had not returned home after performing his duties. Anxiety was felt by Amarpalsingh, a relation of Durgpalsingh, and he made enquiries and he learnt as a result of these enquiries that there was some firing soon after the cinema show was over and people were returning to their homes through the school playground, which was apparently a short-cut for people coming to Panju Sarai.

Certain enquiries were further made and it was discovered that Durgpalsingh's body lay on the play-ground. He had a bullet wound. This revelation prompted action and the first action taken was the making of the first information report at the police station. In this first information report Gulzari Lal gave an account of the facts which led to the discovery of Durgpalsingh's body on the play-ground and he also gave an account of how he had gathered up the facts which led to the incident in which Durgpalsingh lost his life.

The main group of people from whom enquiry was made were the Malis in whose company apparently Durgpalsingh was returning home when the incident took place. In the first information report this is what is precisely set down in regard to this matter :--

"The Malis said that while they were returning to their houses from the the cinema and reached the school ground we saw some people coming from the other side and that they were flasing their torches, that thereupon Durgpalsingh constable advanced two or three paces and challenged them by saying 'Who is flashing the torch', whereupon they flashed off the torch and the constable flashed on his torch, that on this they advanced towards them and called out 'All Mohalla people get away. We have to deal with this rascal' and began to fire. That they all ran away for fear of their lives and that they had seen the persons who had fired in the light of the torch and moon and could recognise them."

At the end of the first information report Gulzari Lal gave vent to his own suspicion in regard to the assailants by saying this:

"It is possible that this may be the work of Achhan and Om Prakash badmashes who have been absconding for a long time and roam about with unlicensed arms with their companions."

3. Immediately on receipt of the first information report the investigating officer reached the scene of incident. During the course of the investigation certain recoveries of shots and wads were made from the place of Incident. The dead body of Durgpalsingh was despatched for postmortem examination. A site-plan was prepared and other relevant steps in furtherance of the investigation were taken.

4. The site-plan indicates that the cinema from which the deceased was returning in company with the Malis lay to the east of the playground where the murder was committed and was separated by a road. To the south of the playground were certain houses or rooms and in one such room, which was to the west, was a kind of a workshop of one Kallu.

Between Kallu's workshop and the other rooms to its east was a little lane which connected the play-ground with the road that was to the south of the play-ground as also the rooms or buildings amongst which was Kallu's workshop. It would be appropriate to mention at this stage a few other facts :--

(1) It was a moonlight night.

(2) There was a good deal of light on the outside of the cinema hall and this light illuminated, though not very brightly, a portion of the playground.

(3) Some of the people who were returning, apparently, carried some torches with them also.

(4) As is natural, after the break-up of the cinema show people moved out of it in several groups; even the people, who had to travel west from the cinema hall in order to get to their homes, got out in at least two groups, one preceding ahead of the other.

5. The murdered man, Durgpalsingh, was in the second group of persons who were going towards the west from the cinema hall in order to get to their homes. The first group of people had amongst them a man called Dharni Dhar. who was a Head constable. This Dharni Dhar was not on duty at the cinema show as was the deceased Durgpalsingh, but had gone to the cinema to see the show as any other person who had been there that night. Dharni Dhar had with him a torch and was in plain clothes.

As Dharni Dhar was proceeding and was passing through the lane that joined the play-ground with the road to the south he saw a group of five or six people coming from the opposite side. This group passed Dharni Dhar's group closeby and as they were passing by him Dharni Dhar enquired as to who they were and where they, were going. They made no reply and passed by hurriedly into the play-ground. This conduct appeared unusual to Dharni Dhar and he asked them to stop and he flashed his torch at them. The group of persons did not stop but abused Dharni Dhar and told him that if he proceeded any further towards them he would do so at the risk of his life.

According to Dharni Dhar, they fired twice or thrice but no one was injured. This act of firing was thought by Dharni Dhar to be the noise of crackers and. therefore, he asked the people who were with him to make an attempt to catch the people who appeared to him to be miscreants. No. body appears to have joined in the chase and therefore Dharni Dhar could do nothing further.

According to his version, he at least was able to see the faces of those persons in the light of his electric torch and the light which emanated from the workshop of Kallu. Dharni Dhar immediately thereafter made a report at the police station of this incident. This report of Dharni Dhar is Ex. P6 in the case and was made at police station Sambhal at 1 a.m. This report of Dharni Dhar is a piece of very important corroborative evidence for it was made by him almost immediately after the incident.

6. After the incident with Dharni Dhar and his group the second incident happened. The group of five or six persons, who had fired at Dharni Dhar's group, proceeded towards the east of the play-ground and naturally enough, therefore, they came face to face with the group that was following Durgpalsingh. It may be here mentioned that on the evidence it is clear that some of the people in Durgpal Singh's group had heard sounds of firing which was indulged in by the miscreants when Dharni Dhar had his meeting with them.

7. The sequence of events was repeated almost to a detail when Durg Pal Singh's group came sufficiently near to seeing the miscreants. They were challenged by Durgpalsingh when they flashed their torches at Durgpalsingh's group; they switched off their light and thereafter they, according to the evidence, shouted to the people, who formed Durgpalsingh's group, to keep clear as they wanted to deal with the tyrant.

We may here point out that there has been in the evidence a slight variation in the actual words which were used by the miscreants but there has been no variation in the substance of the matter: we may further point out that the variation has been so slight and so non-essential that we have found no reason not to accept the substance of the matter.

The companions of Durgpalsingh broke away from him on hearing the threatening words of the miscreants and as they had done so Durgpalsingh was fired at and he met with the injuries that caused his death. There was almost a stampede amongst his companions for no one returned or looked back to see what had happened to Durgpalsingh, or for the matter of that to anybody else, as a result of the firing.

8. As we have pointed out earlier, Durgpalsingh's dead body was discovered the next morning and the murder was out, so to say, then.

9. On the first information report and other investigations the police suspected Achhan and Om Prakash, who were history-sheeters and about whom police had information that they were wandering the country-side with illicit fire-arms, Therefore, they naturally looked out for them but were unable to find them at their residences and so proceedings were taken against them under Sections 87, and 88, Criminal P. C.

10. A post-mortem was held on the body of Durgpalsingh on 4-10-1950 at 5.30 p.m. The postmortem examination revealed that Durgpalsingh had four injuries, all gun-shot wounds. Lead was recovered from inside the body of the deceased at two places. Death was due to shock and haemorrhage following the gun-shot wounds.

11. On 14-12-1950, there was a dramatic turn in the investigation when, according to the prosecution, Ganga Sahai, one of the appellants in Appeal No. 300 of 1952, walked up to the camp of Sri R. T. I. Mohan, a Sub-Division Magistrate of Sambhal, and made a confession to him. This confession was recorded by Sri Mohan in a narrative form and at the end of this confession Sri Mohan appended the following certificate :--

"Certified that above statement was voluntarily made after I had satisfied myself after questioning the accused. I also explained to him that his statement would be recorded and that he could be convicted on it and that I was a Magistrate and no threat or promise were held out."

In this confession Ganga Sahai mentioned as His participants in the crime Om Prakash and Achhan. The confession dealt with not only the incident with which we are concerned in these appeals, but also with other incidents with which we are not concerned. The statement that Ganga Sahai made touching upon the incident with which we are concerned was a fairly detailed statement. After the recording of the statement of Ganga Sahai Sri Mohan sent him to the police and he was taken into custody by them. Ganga Sahai was admitted into Moradabad Jail on 16-12-1950.

There is satisfactory evidence on the record to show that from the time that Ganga Sahai was in police custody he was not shown to any one and that due precaution was taken to cover his face till he was actually put in jail. Identification proceedings were held in respect of Ganga Sahai accused on 19-1-1951, at Moradabad Jail by Sri Prakash Narain, Magistrate 1st class. All necessary precautions were taken and he was correctly identified by Babu, Faqirchand, Chhoteylal and Dharni Dhar. No objections were taken by Ganga Sahai at the time of the identification proceedings. None committed any mistakes.

12. Accused Om Prakash was arrested by Hukumsingh constable on the night between the 26th and the 27th of February, 1951. Constable Hukum-Singh along with one Rameshwarsingh was on patrol duty when they came upon this accused somewhere in Mandi Kishan Das Sarai, police station Sambhal. Rameshwar recognised him and therefore these constables went up to arrest him.

According to the story of the prosecution, this accused fired at them but fortunately that did not deter the constables from getting hold of him. When he was arrested he was found in possession of a pistol, three live cartridges and one used cartridge in the barrel of the pistol. The arrest and the circumstances leading up to the arrest were deposed to by Hukumsingh constable.

The prosecution did not examine Rameshwar and thereby opened themselves to a good deal of criticism at the hands of the defence, though we may here state that the non-examination of Rameshwar did not in any manner detract from the value of the evidence given by Hukumsingh constable, which we think satisfactorily established the fact of the arrest of this accused and the circumstances in which the arrest was made. Identification proceedings in respect of this accused were conducted in the Moradabad Jail on 5-3-1951, by Sri Johri, a third class Magistrate of Moradabad, after due and necessary precautions had been taken.

We may here mention that the identification proceedings, which were held on 5-3-1951, were also in respect of the identification of the other accused Achhan alias Sharif Ahmad, who is the appellant in Appeal No. 1164 of 1951. Achhan was arrested on 16-2-1951, by Matain Khan, a zamindar of Janehta. Matin Khan had appeared in evidence and had deposed that the Station Officer and the Circle Inspector had told him in the month of January that they were looking out for Achhan and that they wanted his assistance in arresting Achhan because he often came to Janehta.

The evidence of Matin Khan shows that he, on getting information that Achhan was outside the abadi Of Janehta, went there with some men and apprehended Achhan and another companion of his Anand Samp. He also proves the fact that with Achhan and Anand Sarup was one Liaqat also, who fired when they were being chased, and that as a result of that firing one Nadir Khan was hit and injured. Liaqat, however, could not be captured and the only two people who were apprehended were Achhan and Anandsarup.

Achhan had a pistol and some cartridges. We are satisfied on the evidence of Matin Khan, which has not been shaken in cross-examination in any manner, that Achhan and Anandsarup were arrested as stated by Matin Khan. At the identification parade, which was held on 5-3-1951, Achhan was identified correctly by Charni, Babu, Dharni Dhar, Chand Babu and Suresh, while Om Prakash was

correctly identified by Faqirchand, Shiva Kumar, Bhure and Dharni Dhar.

13. The defence of the appellants was more or less a denial of the prosecution case.

14. Ganga Sahai retracted his confession on 26-5-1951, before the committing Magistrate. He stated that the Station officer made him make the confession after beating him. We may at this stage mention that on the state of the evidence in this case it was not necessary to rely on the confession at all.

The trial Judge, however, was satisfied that the confession which Ganga Sahai made was a voluntary confession. We have seen no reason to take a different view of the confession, but as we have said, it is not necessary on the state of the evidence in this case to make any use of the confession either against the co-accused of Ganga Sahai or even as against Ganga Sahai himself, and therefore we do not propose to enter into any further discussion of the points that were raised in regard to this confession made by Ganga Sahai.

15. The prosecution case was supported by the eye-witness testimony of Babu, Chhotey Lal, Chand Babu, Suresh, Charni, Bhure; Faqirchand and Shiv Kumar : To this list of witnesses must also be added Dharni Dhar who deposed to the first incident which in sequence preceded the incident, in which Durgpalsingh lost his life, only a few minutes earlier.

16. Babu was one of the persons who was returning from the cinema along with Durgpalsingh and others. He has deposed to prove the main allegations of the prosecution. We have found nothing in his testimony to which exception could be taken. His cross-examination did not shake him in any particular and we are satisfied that his evidence was worthy of credence and has been rightly accepted by the learned Judge.

17. Chhotey Lal was also, in our opinion, a satisfactory witness and was rightly believed by the trial Judge.

18. Charni, Bhure, Faqirchand and Shiv Kumar or Shanti Kumar were also satisfactory witnesses in our opinion for we have found nothing in their testimony which could make them witnesses of doubtful veracity.

19. From the prosecution evidence we find the following facts established :--

(1) that a group of persons were proceeding together at dead of night;

(2) that these persons were armed with firearms;

(3) that when challenged this group of people opened fire which deterred people from further scrutinising their movements;

(4) that as soon as this group came face to face with Durgpalsingh, one of them, at any rate, expressed in unequivocal terms that Durgpalsingh, to the exclusion of others, was going to be dealt with severely;

(5) that Durgpalsingh was fired at and killed; and (6) that these miscreants thereafter ran away together.

20. On the aforementioned circumstances the prosecution wanted the Court to come to the conclusion that the accused, who were undoubtedly amongst the group who acted in the manner set out above, had the common intention of causing the death of Durgpalsingh. The evidence which has been led in this case does not establish the fact as to who fired to kill Durgpalsingh. The common intention of the accused has to be determined on the aforementioned circumstances.

Learned counsel for the appellants strenuously contended that the circumstances were not enough for us to come to the conclusion that there was a common intention to kill Durgpalsingh. There is no gainsaying that unless there was sufficient evidence to establish common intention Section 34, Penal Code could not be pressed into use and all the appellants could not be convicted under Section 302, Penal Code.

21. Whether there was common intention or not is in the ultimate analysis a question of fact and, as the Supreme Court has said, it has to be determined on the circumstances of each case. The facts of one case cannot be used for purposes of analogy in determining the facts of another case, for there is then danger of losing the real import of salient facts of the case in point.

On the decisions of the Supreme Court it is also clear that common intention has come into being prior to the commission of the act in point of time, but it must be remembered, as has been pointed out by the Supreme Court, that this point of time has not to be a long gap. Indeed, as has been pointed out in the case of Kirpal v. State of U. P., AIR 1954 SC 706 (A), a common intention may develop on the spot and suddenly. It is further clear that direct evidence of common intention is a rarity and that common intention has to be found mostly on circumstantial, evidence.

As has been pointed out by the Supreme Court in Pandurang v. State of Hyderabad, AIR 1955 SC 216 (B), the ordinary rule on which circumstantial evidence has to be judged by Courts must be applied in judging circumstantial evidence showing common intention. Bearing in mind all the observations of their Lordships of the Supreme Court bearing upon this matter, we find that in this case the circumstantial evidence was ample to lead us to the conclusion that there was the common intention in all the appellants to kill Durgpalsingh.

22. The fact that the assembly, in which the appellants were, scrutinised the people whom they chanced to meet on their way towards the cinema with their torch-light is a clear indication that they were looking out for some one. The fact that they threatened people to keep out of their way was again a clear indication, and if we may say so, an unerring pointer to the fact, that they were determined to carry through some purpose. The shout, which emanated from the group to which the accused belonged, calling upon the people other than Durgpalsingh to get out of the fire range, was,

in our opinion, the clearest indication that there could be of their intention to deal with the Durgpalsingh and Durgpalsingh alone.

Learned counsel for the appellants argued that in the absence of evidence to show that they knew that Durgpalsingh would be returning that way and that they were likely to meet him in the way made it impossible for us to hold that they had a common intention of killing Durgpalsingh or that they were out in search of Durgpalsingh. There is undoubtedly no evidence to indicate that the appellants knew that Durgpalsingh was at the cinema that night and was likely to return that way, but we are satisfied that such evidence could not be led and if such evidence had been led we would have found it very difficult to rely on such evidence.

In judging this argument we have to bear in mind the fact that there is evidence to indicate that these accused were at large in this area. We have also evidence to indicate that Durgpalsingh was a constable who took his duties seriously and was strict with miscreants. It is not difficult to conceive that the fact that Durgpalsingh would be on duty at the cinema during the night show would be known to the appellants, and if it was not difficult for that knowledge to be easily available to the appellants then we see no difficulty in coming to the conclusion that they went out prepared that particular night to deal with Durgpalsingh while he was on his way back at the dead of night to his quarters.

The appellants must have known, as anybody of the locality knew, that the way from the cinema to Durgpalsingh's quarters lay through an uninhabited locality for some distance and that at night it was quite an easy matter to waylay him, and finish him. The miscreants possibly did not visualise that they would be identified by some people that may be returning with Durgpalsingh from the cinema. Be that as it may, on the evidence we are satisfied that there was the common intention in all the appellants to kill Durgpalsingh if they happened to meet him for, in our opinion, they were out together for the purpose.

23. In the result we are satisfied that the conviction of all the appellants in the two appeals was perfectly justified. We, therefore, dismiss both the appeals.