Sham Shankar Kankaria vs State Of Maharashtra on 1 September, 2006

Equivalent citations: AIRONLINE 2006 SC 613

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Bench: Arijit Pasayat, C.K. Thakker

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           CASE NO.:
Appeal (crl.)  661 of 2005

PETITIONER:
Sham Shankar Kankaria

RESPONDENT:
State of Maharashtra

DATE OF JUDGMENT: 01/09/2006

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
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J U D G M E N T With Crl. A. No. 358 of 2005, Crl. A. Nos. 634-636 of 2005, Crl. A. Nos. 700-702 of 2005 ARIJIT PASAYAT, J.

These appeals are directed against a common judgment of the Division Bench of the Bombay High Court by which eight appeals were disposed of. Six of them were by the accused persons while two were by the State. Out of the two Criminal Appeals filed by the State, one was against the acquittal of the accused persons of the charge under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') and of Section 135 of the Bombay Police Act, 1951 (in short the 'Bombay Act'). The other was for enhancement of sentence. The two appeals filed by the State were allowed, except in respect of two who had died, while the six appeals filed by the accused persons were dismissed.

The appeals were directed against the judgment and order dated 6th February, 1993 passed by the learned Third Additional Sessions Judge, Nasik whereby accused No.1 Sham Shankar Kankaria was convicted for offence punishable under Section 304 Part II IPC. The other five accused persons were convicted for offence punishable under Section 325 read with Section 34 IPC. All the six accused persons were convicted for offence punishable under Section 342 read with Section 34 IPC. For the first offence accused No.1 Sham Shankar Kankaria was sentenced to undergo rigorous imprisonment for six years and to pay fine of Rs.3,000/- with default stipulation. For the second offence each of accused Nos. 2 to 6 were sentenced to undergo rigorous imprisonment for four years

and to pay fine of Rs.2,000/- with default stipulation. For the third offence, all the six were sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.3,000/- each with default stipulation. The accused Nos.1 to 6 were acquitted of the charge under Section 302 read with Section 34 IPC and Section 135 of Bombay Act. While the accused persons challenged their conviction and sentence, the State questioned correctness of the judgment of the trial court and prayed for enhancement of sentence and for conviction under Section 302 of the first accused and under Section 302 read with Section 34 IPC in respect of each of the accused persons.

Prosecution version in a nutshell is as follows:

> On 13th January, 1992 one Vijay @ Bablu, the son of Kashinath Kedare, who was residing with his parents and other members of the family in House No.1342, situated at Khadkali area of Nasik City, was called by the accused No.3 Sanjay and the accused No.5 Khandu and, therefore, he left his house at about 8 p.m. along with the said accused persons. He did not return till late night. At about 2'o clock in the night between the 13th and 14th January, 1992, accused Khandu went to the house of Vijay and knocked the door of his house. On opening the door by Sanjay Kedare (P.W.9), accused Khandu informed Sanjay that his brother Vijay had been assaulted and was lying at some place. Sanjay thereupon accompanied Khandu who took him to the top floor of Bharti Lodge, where Sanjay found his brother Vijay in injured condition tied to the cot with his hands and legs tied. Sanjay also saw some blood oozing out from the head of Vijay. Sanjay released the hands and legs of Vijay and asked him as to how it had happened, whereupon he was told by Vijay that all the six accused after tying him to the cot, assaulted him severely with instruments like iron pipe and wooden stick on the allegation that he had stolen a bicycle. Sanjay thereupon carried Vijay to his residence and Vijay once again narrated the said incident to his mother in the presence of Sanjay and from there, he was taken in a rickshaw to the Civil Hospital, Nasik. On the way to the hospital, Vijay became unconscious and on being admitted to the hospital, he was declared to have been dead. Sanjay lodged complaint in writing at Bhadrakali Police Station where the FIR was registered relating to offences under Sections 302, 342, 143, 147 and 149 IPC read with Section 37(1) read with Section 135 of the Bombay Act. On commencement of the investigation, all the six accused were arrested, their clothes were seized under the panchnama. The body of the deceased Vijay was subjected to the inquest panchnama as well as post mortem examination. The medical officer opined that the death of Vijay was due to shock, intracranial hemorrhage and due to fracture of skull. After carrying out the spot panchnama, the articles at the spot of the incident including the blood scrapping were collected from the scene of offence. The iron pipe was recovered at the instance of the accused No.1 Sham Kankaria, Coir Cord and pieces of wooden pegs having blood stains were seized from the spot of the incident. The seized articles were sent for examination by the Chemical Analyser. The blood sample of the deceased was also collected and sent for medical analysis along with the clothes on the body of the deceased. On conclusion of the investigation, all the six accused were charge-sheeted. They were tried before learned Additional Sessions Judge and were convicted and

sentenced by the judgment and order dated 6th February, 1993. Challenge was made to the same before the High Court, as noted above.

The High Court analysed the evidence and was of the view that the trial court was not justified in acquitting the accused persons of the charge of offence punishable under Section 302 read with Section 34 IPC and by only convicting accused No.1 Sham Shankar Kankaria in terms of Section 304 Part II IPC. During the pendency of the appeals, accused No.3 Sanjay and accused No.5 Khandu Deoram Abhang expired. Therefore, the two appeals filed by them were held to have abated. Similar was the case in the appeals filed by the State, so far as they were concerned. For rest of the accused the appeal filed by the State was allowed and the appeals filed by the accused persons were dismissed.

Each of the accused persons were held guilty for offence punishable under Section 302 read with Section 34 IPC. Accordingly, conviction was recorded and sentence imposed as noted earlier.

In support of the appeals, learned counsel for the appellants submitted that the High Court has not kept in view the correct principles of law. Ramesh and Mustaq (PWs. 1 and

3) were stated to be eye witnesses. Their evidence does not inspire confidence and in fact they contradict each other in many material aspects. So-called dying declaration before Sanjay and Hirabai (PWs. 9 and 10) also lack credibility. In any event, the High Court should not have interfered with the well reasoned and well discussed judgment of the trial court without indicating any reason or basis therefor. Even according to the prosecution, there was only one injury inflicted on the head of the deceased. There was no eye witness as to who had assaulted on the head. A presumption has been made that the head injury was caused by the accused No.1 Sham Shankar Kankaria because the witnesses stated to have seen a small iron pipe in his hand. Even according to the prosecution version, the accused No.4 Raju was holding a small stick of about one foot long length and is supposed to have given blow on the legs and the hand. No role has been ascribed to the other appellants i.e. respondents 2 and 6. There is no question of applying Section 34 IPC because the prosecution itself is to the effect that the accused persons wanted to extract confession from the deceased that he had stolen a bicycle. There is no material brought on record that the accused persons shared any common object to either cause injury to the deceased or kill him. Residuary plea submitted is that the trial court found that Section 304 Part II IPC was the correct provision to be applied. The High Court attached undue importance to certain factors which had no relevance for deciding the question as to the nature of offence.

Learned counsel for the respondent-State on the other hand supported the judgment of the High Court.

At this juncture, it is relevant to take note of Section 32 of the Indian Evidence Act, 1872 (in short 'Evidence Act') which deals with cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant. The general rule is that all oral evidence must be direct viz., if it refers to a fact which could be seen it must be the evidence of the witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it, if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in Section 60. The eight clauses of Section 32 are exceptions to the general rule against hearsay just stated. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any Statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. These aspects have been eloquently stated by Lyre LCR in R. v. Wood Cock (1789) 1 Leach 500. Shakespeare makes the wounded Melun, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis explain:

> "Have I met hideous death within my view, Retaining but a quantity of life, Which bleeds away even as a form of wax, Resolveth from his figure 'gainst the fire? What is the world should make me now deceive, Since I must lose the use of all deceit?
>
> Why should I then be false since it is true That I must die here and live hence by truth?"

(See King John, Act 5, Sect.4) The principle on which dying declaration is admitted in evidence is indicated in legal maxim "nemo morituras proesumitur mentiri a man will not meet his maker with a lie in his mouth."

This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross- examination. Such a power is essential for eliciting the truth as an obligation of

oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Smt. Paniben v. State of Gujarat (AIR 1992 SC 1817):

> " (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See Munnu Raja & Anr. v. The State of Madhya Pradesh (1976) 2 SCR
>
> 764)]
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> (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See State of Uttar Pradesh v. Ram Sagar Yadav and Ors. (AIR 1985 SC 416) and Ramavati Devi v. State of Bihar (AIR 1983 SC 164)]
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> (iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See K. Ramachandra Reddy and Anr. v. The Public Prosecutor (AIR 1976 SC 1994)]
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> (iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See Rasheed Beg v. State of Madhya Pradesh (1974 (4) SCC 264)]
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> (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See Kaka Singh v State of M.P. (AIR 1982 SC 1021)]
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> (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See Ram Manorath and Ors. v. State of U.P. (1981 (2) SCC 654)
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> (vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. [See State of Maharashtra v.

Krishnamurthi Laxmipati Naidu (AIR 1981 SC 617)]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See Surajdeo Oza and Ors. v. State of Bihar (AIR 1979 SC 1505).

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See Nanahau Ram and Anr. v. State of Madhya Pradesh (AIR 1988 SC 912)].

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See State of U.P. v. Madan Mohan and Ors. (AIR 1989 SC 1519)].

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See Mohanlal Gangaram Gehani v.State of Maharashtra (AIR 1982 SC 839)]."

In the light of the above principles, the acceptability of alleged dying declaration in the instant case has to be considered. The dying declaration is only a piece of untested evidence and must like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration. [See Gangotri Singh v. State of U.P. [JT 1992 (2) SC 417), Goverdhan Raoji Ghyare v. State of Maharashtra (JT 1993 (5) SC 87), Meesala Ramakrishan v. State of Andhra Pradesh (JT 1994 (3) SC 232) and State of Rajasthan v. Kishore (JT 1996 (2) SC 595)].

There is no material to show that dying declaration was result of product of imagination, tutoring or prompting. On the contrary, the same appears to have been made by the deceased voluntarily. It is trustworthy and has credibility.

Criticism that PWs 9 and 10 being relatives have falsely implicated the accused persons needs rejection for the simple reasons that no material has been brought on record to show as to why they would falsely implicate the accused and shield actual culprit.

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 doing 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.

Judged in the background and the principle set out above, the inevitable conclusion is that the prosecution has clearly established that the vital blow was given by the accused No.1 Sham Shankar Kankaria. The question is what is the appropriate provision for his conviction. Taking into account the surroundings facts and the nature of the weapon allegedly used, in our considered view the correct provision for conviction would be Section 304 Part I, IPC and custodial sentence of 10 years would meet the ends of justice. His conviction under Section 342 IPC as well as the sentence are maintained. The sentences shall run concurrently. On the facts of the case Section 34 IPC has no application for the offence punishable under Section 304 Part-I IPC. There is no material to show that the accused persons shared common object of causing any injury to the deceased or to cause his death. That being so Section 34 IPC has no application. It is the prosecution case that the accused persons wanted to extract a confession from the deceased of his having committed theft of a cycle. So far as accused persons 2, 4 and 6 are concerned considering their role they have to be convicted under Section 342 read with Section 34 IPC, as also Section 325 read with Section 34 IPC. The corresponding sentences imposed by the trial Court and maintained by the High Court need no interference. In the ultimate result the appeals are partly allowed to the extent indicated above. 28007