Israr vs State Of U.P on 6 December, 2004

Equivalent citations: AIR 2005 SUPREME COURT 249, 2005 (9) SCC 616, 2004 AIR SCW 6916, 2005 ALL. L. J. 201, 2004 (10) SCALE 237, 2005 SCC(CRI) 1260, 2004 (7) SLT 387, (2005) 26 ALLINDCAS 357 (SC), 2005 (26) ALLINDCAS 357, (2004) 10 JT 526 (SC), 2004 (10) JT 526, 2005 CRILR(SC&MP) 228, 2005 CRILR(SC MAH GUJ) 228, (2004) 10 SCALE 237, (2005) 2 KCCR 107, (2005) 3 SCJ 268, (2005) 1 EASTCRIC 166, (2005) 30 OCR 205, (2004) 8 SUPREME 718, (2005) 1 ALLCRIR 157, (2005) 1 BLJ 624, (2005) 1 CHANDCRIC 32, (2005) 1 ALLCRILR 337, (2005) 1 CRIMES 76, (2005) 2 RECCRIR 40, (2005) 1 CURCRIR 1, (2005) 51 ALLCRIC 481, 2005 (1) ALD(CRL) 388, 2005 (2) ANDHLT(CRI) 29 SC, (2005) 2 ANDHLT(CRI) 29

Author: Arijit Pasayat

Bench: Arijit Pasayat, S.H. Kapadia

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           CASE NO.:
Appeal (crl.)  1425 of 2004

PETITIONER:
ISRAR

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT: 06/12/2004

BENCH:
ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
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JUDGMENT 2004 Supp(6) SCR 695 The Judgment of the Court was delivered by ARIJIT PASAYAT, J. : Leave granted.

Appellant calls in question legality of the judgment rendered by a Division Bench of the Allahabad High Court upholding his conviction for offences punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short 'IPC'). The appellant faced trial along with one Afzal @ Patel. Both of them were convicted in the aforesaid manner and each was sentenced to undergo imprisonment for life.

In a nutshell prosecution version which led to trial of the appellant along with his co-accused is as follows :

Zamil Ahmad (hereinafter referred to as 'deceased') had his grocery shop in mohalla Gali Darjiyan, P.S, Kotwali, Muzaffarnagar City. Accused Afzal had forcibly demanded money from Kalloo, younger brother of the deceased. Kalloo had told this fact to deceased and when he complained to accused Afzal he threatened to Kill him.

On the night of 4.10.1979 at about 9.30 p.m. Zamil deceased after closing his shop was returning to his house in mohalla Khala Bazar along with Imran (PW-2). When he reached in front of Maszid Kunharan Near Mohalla Khalla Bazar accused Afzal alias Patel and his uncle accused-appellant Israr met him and they started saying that he had got them arrested and no body would save them. Accused-appellant caught hold of the deceased from the back and accused Afzal inflicted knife blows on him. Deceased raised alarm and hearing his alarm, Noor on him. Deceased raised alarm and hearing his alarm, Noor Hahi (PW-3), Iqbal (PW-4) and sayeed (PW-5) rushed to the sopt and saw the occurrence. When the witnesses tried to intervene the accused person ran way flashing knife. Imran (PW-2) took Zamil Ahmad to Disrict Hospital, Muzaffarnagar where his injuries were examined by Dr. R.K. Tandon who found three incised wounds on his person and prepared injury report (Ext. Ka.17).

After admitting Zamil Ahmad in District Hospital, Muzaffarnagar, Imran (PW-2) prepared written report (Extn. Ka.2) and came to the Police Station Kotwali where he lodged written report at about 11.15 p.m. On the basis of written report chik F.I.R. (Ext. Ka. 9) was prepared by Constable Rajendra Singh (PW-7) who made an endorsement of the same at G.D. report (Ext. Ka-10) and registered a case against both the accused under Section 324 IPC. Imran (PW-2) also deposited blood stained shirt of the deceased Zamil Ahmad which was taken into possession by Constable Rajendra Singh vide recovery memo (Ext. Ka-3).

The investigation of the case was taken by Fateh Singh (PW-8), who arrested the accused persons. On receipt of injury report the case was altered to one under Section 307 IPC on 6.10.1979.

The dying declaration of deceased was reported on 7.10.1979 by Sri Jag Prasad, Executive Magistrate, Muzaffarnagar (CW-1). The condition of Zamil Ahmad was serious and, therefore, on the night of 8/9.10.1979 he was shifted to All India Institute of Medical Sciences, New Delhi, where he died on the night of 9.10.1979 at about 11.15 p.m. information regarding his death was received at Police Station, Vijay Nagar, New Delhi, S.I. Ram Niwas (PW-6) of P.S. Vijay Nagar, New Delhi, came to All India Institute of Medical Sciences, New Delhi, where he conducted inquest report (Ext, Ka-5) and other relevant papers. He sealed the dead body of the deceased and sent the same for postmortem.

Autopsy on the dead body of the deceased was conducted at Delhi on 10.10.1979 by Dr. P.C. Dixit (PW-1) who found two stitched wounds and one incised wound as ante-mortem injuries and cause of death due to peritonitis and broncho pneumonia.

> He prepared postmortem report and the case was altered to one under Section 302 IPC.

After completion of investigation charge sheet was placed and the accused persons who were committed to the Court of Sessions faced trial. They pleaded innocence. Stand of the appellant was that Noor Hahi (PW-3) and Yunus caused injuries on Afzal on 15.5.1979. Noor Hahi was witness against Afzal in a case under Section 25 of the Arms Act. Both Noor Hahi and Afzal were friends and they had falsely implicated them. To further the prosecution version 8 witnessess were examined. Jag Prasad, Executive Magistrate (CW-1) and Dr. T.N. Mathur (CW-2) were examined as court witnesses. Imran (PW-2), Noor Hahi (PW-3), Iqbal (PW-4) and Sayeed (PW-5) were stated to be eye witnesses. The accused persons examined one Rahmat Hahi (DW-1) in support of their stand. Considering the evidence on record, trial Court found them guilty. It is to be noted that PW-2 made a departure from the statement made during investigation. The other witnesses categorically stated that the accused-appellant caught hold of the deceased thereby facilitating the knife blows by Afzal. Both the convicted accused persons filed appeal before the Allahabad High Court. By the impugned judgment the appeal was dismissed and conviction and sentence were affirmed.

In support of the appeal Mr. Salmad Khurshid, learned senior counsel submitted that the evidence of the so called eye witnesses does not inspire confidence. There was no light which could have facilitated the identification. The so-called eye witnesses were partisan witnesses, being friends and relatives of the deceased. In any event, Section 34 has no application. There is nothing on record to show that the accused had any common intention to cause death of the deceased. Doctor's evidence was that the cause of death of the deceased. Doctor's evidence was that the cause of death was due to Peritonitis and Broncho Pneumonia. It was, therefore, submitted that even if there was any injury sustained with proper medical treatment and care, life of the deceased could have been saved. It was further submitted that one of the witnesses stated that the accused appellant fired a gun shot which the trial Court disbelieved. This shows exaggerations by the witnesses. It was, therefore, submitted that the courts below were not justified in finding the accused appellant guilty.

In response, learned counsel for the State submitted that the evidence of the eye witnesses is clear and cogent. Merely because the witnesses were friends or relatives of the accused, that cannot be ground to discard their credible and cogent evidence. The part played by the appellant has been vividly described by the witnesses and, therefore, Section 34 IPC has been right applied.

We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not counsel 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.

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."

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

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." Again in Masalti and Ors. v. State of U.P., AIR (1965) SC 202 this Court observed : (p. 209-210 para 14) :
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> "But it would, we think, be unreasonable to contended 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."

To the same effect is the decision in State of Punjab v. Jagir Singh, AIR (1973) SC 2407 and Lehna v. State of Haryana, [2002] 3 SCC 76. Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of

evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the Fact that evidence has been persons. Falsity of particular to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus " has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'. (See Nisa Ali v. The State of Uttar Pradesh, AIR (1957) SC 366). The above position was elaborately discussed in Sucha Singh and Anr. v. State of Punjab, (2003) 6 JT SC 348.

Coming to the plea relating to non-probability of identification, the evidence of PW-3 is very relevant. He has stated that the occurrence took place at the time of isha prayers which are concluded at about 9.30 p.m. There was light of the moon as well as of the neighbouring houses and the electric poles in the lane. The date of occurrence was 11th day of Lunar month and the place of occurrence is near the mosque as well as many houses close by. Therefore, identification was possible. Further a known person can be identified from a distance even without much light. The evidence of PW-3 has also been corroborated by the evidence of others. Evidence of PWs 3 to 5 proves that identification was possible.

In addition, the dying declaration which was recorded by CW-1 clearly establishes the roles played by the accused persons. Nothing has been shown as to how the same suffer from any infirmity. It is to be noted that before the trial Court the accused persons did not dispute that the death of the deceased was a result of injuries found by PW-1. Merely on the hypothetical plea that the deceased could have been saved with better treatment, the charge of murder does not get diluted. The plea is clearly untenable in view of the Explanation 2 appended to Section 299 IPC. The evidence of PW-3 to PW-5 is consistent that the accused appellant restrained the movement of the decided and held him while the other co-accused inflicted the knife blows.

Section 34 has been enacted on the principle of joint liability in the doing 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 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.

As it originally stood the Section 34 was in the following terms:

> "When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

In 1870, it was amended by the insertion of the words "in furterance of the common intention of all" after the word "persons" and before the word "each", so as to make the object of Section 34 clear. This position was noted in Mahbub Shah v. Emperor, AIR (1945) Privy Council 118.

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 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. The above position was highlighted recently in Anil Sharma and Ors. v. Stale of Jharkahand, [2004] 5 SCC 679.

in Abrahim Sheikh & Ors. v. State of West Bengal, AIR (1964) SC 1263 this Court stated that no doubt a person is only responsible ordinarily for what he does and Section 38 IPC ensures that. But Section 34 as well and Section 35 provided that if the criminal act is the result of the common intention, then every person who did the criminal act with such intention would be responsible for the total offence irrespective of the share which he had in its perpetration. The logic, highlighted illuminatingty by the Judicial Committee in the illustrious case of Barendra Kumar Ghosh v. Emperor, AIR (1925) PC1, is that in crimes as in other things "they also serve who only stand and wait".

Section 34 has, therefore, been rightly applied.

In view of the legal and factual position noted above, the irresistible conclusion is that the accused appellant ha been rightly held guilty and convicted. There is no merit in this appeal which is accordingly dismissed.