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SUDIP KR. SEN @ BILTU

v.

STATE OF WEST BENGAL & ORS.

(Criminal Appeal No. 17 of 2016 etc.)

B

JANUARY 07, 2016

[T. S. THAKUR, CJI AND R. BANUMATHI, J.]

Penal Code, 1860:

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s. 302 rw s. 34 – Murder – Conviction u/s. 302 rw s. 34 – On facts, appellants and another co-accused came together, one accused abused the victim and one of them exhorted others – On such exhortation, two accused caught hold of the victim and two accused fired at the victim resulting in his death – On basis of the evidence of PW 6-single witness, trial court convicted and sentenced the appellants and co-accused u/s. 302/34 – High Court upheld the order – Interference with – Held: Not called for – There is no ground to interfere with the concurrent finding recorded by the courts below as to the reliability of PW-6 and to record the conviction – Evidence of PW-6 to the effect that all the appellants and another co-accused were doing illegal business of extorting money from the flat owners as also as regards the entire incident – Facts and circumstances clearly establish that there was prior concert and that the appellants acted in furtherance of common intention in committing the murder of the victim and thus, were rightly convicted u/s. 302/34.

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s. 34 – Common intention – Connotation of – Held: Common intention implies pre-arranged plan – Under s.34 a pre-concert in the sense of a distinct previous plan is not necessary to be proved – Essence of liability u/s. 34 is conscious mind of persons participating in the criminal action to bring about a particular result – Question whether there was any common intention or not depends upon inference to be drawn from the proved facts and circumstances of each case.

Prithipal Singh & Ors. vs. State of Punjab & Anr. 2012 (14) SCR 862; (2012) 1 SCC 10 – referred to.

Case Law Reference

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2012 (14) SCR 862 referred to. Para 12

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal A
Nos. 17 of 2016 etc.

From the Judgment and Order dated 24.09.2012 at the High Court
at Calcutta in Crl. Appeal No. 544 of 2004.

WITH

Crl. A. Nos. 19, 21, 23 and 25 of 2016 B

Mehul M. Gupta, R. P. Gupta, Rauf Rahim, Sunita Sharma, Sumita
Hazarika, Rukhsana Choudhury, Shashi Kiran, Sukesh Ghosh,
Rameshwar Prasad Goyal for the Appellant.

Joydeep Mazumdar, Parijat Sinha, Rohit Dutta, Sweety
Chattopadhyay for the Respondents. C

The Judgment of the Court was delivered by

R. BANUMATHI, J. 1. Delay condoned. Leave granted.

2. These appeals arise out of the common judgment dated
24.09.2012 passed by the High Court of Calcutta dismissing Criminal D
Appeal No.544 of 2004 filed by the appellants and thereby affirming the
conviction of the appellants under Section 302 read with Section 34 IPC
and sentence of life imprisonment and a fine of rupees five thousand
imposed on each of them.

3. Briefly stated case of the prosecution is that on 13.01.2002 at E
about 08.30 p.m., complainant-PW1-Gora Das was having tea alongwith
some of his friends at the shop of one Bablu Pal-PW5 at Shakherbazar.
Sandipan Majumdar-PW6 sitting on his motorcycle was also having tea
in front of tea stall of PW-5. At that time, the appellants came in a body
to the place of occurrence. At first, appellant-Sudip Kumar Sen @ Biltu F
(A-3) abused the deceased-Saikat Saha and asked him as to why he did
not meet Jishu da in the court as he was asked to do so at several
occasions. Appellant-Apu Chatterjee @ Soumitra (A-6) said that if the
men of Khoka were not killed then there would be no peace. On such
exhortation, appellants-Tapas Das @ Bhambal (A-2) and Sankar Das G
@ Bhai (A-4) caught hold of Saikat Saha-deceased and appellants
Goutam Ghosh (A-1) and Sk. Kochi @ Sk. Mobarak (A-5) fired at him
and Saikat Saha sustained two gunshot injuries in the right chest. Gora
Das-PW1 and Sandipan Majumdar-PW6 had immediately taken injured
Saikat Saha to Calcutta Medical Research Institute. Dr. Debasish Pal-
PW9 examined Saikat Saha and declared that he was brought dead and H
issued Injury Report (Ex.4) and Death Certificate (Ex-P4/1).

A 4. Gora Das-PW1 lodged the complaint on 14.01.2002 at 1.45
a.m. before Thakurpukur Police Station, on the basis of which FIR was
registered in Case No.12 of 2002 under Section 302 read with Section
34 IPC and Sections 25 and 27 of the Arms Act against unknown persons.
A. K. Ghosh- Investigating Officer-PW13 had taken up the investigation
and visited the spot and examined the available witnesses including PW6-
B Sandipan Majumdar who informed the police that he had witnessed the
event and PW-6 also named the accused. On his statement, the appellants
and accused Sk. Kochi @ Sk. Mobarak and one Jishu Jain were arrested.
After investigation, chargesheet was filed against the appellants and
other accused under Section 302 read with Section 34 IPC, Section 120-
C B IPC and Sections 25 and 27 of the Arms Act.

5. To prove the charges against the accused, prosecution
examined thirteen witnesses and adduced documentary evidence. Upon
appreciation of evidence and observing that PW-6 is a trustworthy witness,
Additional Sessions Judge, Alipore convicted the appellants and Sk. Kochi
D under Section 302 read with Section 34 IPC and sentenced each of
them to undergo life imprisonment and also imposed a fine of rupees
five thousand on each of them. The trial court acquitted the co-accused
Jishu Jain of all the charges levelled against him. Aggrieved by the
verdict of conviction, the appellants filed appeal before the High Court.
The High Court vide impugned judgment dated 24.09.2012 dismissed
E the appeal thereby affirmed the conviction and sentence imposed on the
appellants as aforesaid. Being aggrieved, the appellants-Goutam Ghosh
(A-1), Tapas Das @ Bhambal (A-2), Sudip Kr. Sen @ Biltu (A-3),
Sankar Das @ Bhai (A4) and Apu Chatterjee @ Soumitra (A-6) are
before us. Accused Sk. Kochi @ Sk. Mobarak (A-5) has not challenged
F the impugned judgment.

6. Learned counsel for the appellants contended that both the
courts below failed to take into account the serious flaws, inconsistencies
and contradictions in the statement of prosecution witnesses which
according to the appellants, practically demolished the version of the
prosecution as propounded by the testimony of PW-6. It was submitted
G that in the cross-examination, PW-1 categorically stated that at the time
of occurrence he and his friends ran to the spot which is at a distance of
few yards from the tea stall and therefore PW-6 could not have witnessed
the occurrence sitting on the motor cycle and taking tea along with PW-
1 and version of PW-6 is totally contradictory to the statement of PW-
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1. Raising doubts as to the credibility of testimony of PW-6, it was submitted that PW-6 is said to have accompanied PW-1 in taking the deceased to the hospital, he did not reveal the identity of the assailants to PW-1 and not even at the time of lodging the FIR which was registered against unknown persons. A

7. Per contra, learned counsel for the respondent-State contended that the culpability of the appellants have been proved to the hilt by the evidence of PW-6 who was a natural eye-witness to the occurrence and that he was standing outside the tea stall and was in a vantage position to see the assailants and witness the occurrence. It was further submitted that the courts below recorded concurrent findings to the credibility of PW-6 and there is no ground warranting interference with the conviction of the appellants. B C

8. We have considered the rival contentions and perused the impugned judgment and material on record.

9. Sandipan Majumdar-PW6 has stated that on the date of the incident i.e. on 13.01.2002 at about 8.30 p.m., while he was taking tea at the tea stall at Shakerbazar, Saikat Saha, PW1-Gora Das and others were also taking tea there. PW-6 had categorically stated that the assailants armed with firearms came together and Sudip Kumar Sen (A-3) started abusing Saikat Saha and questioned him as to why he did not meet Jishu da in the court inspite of several reminders. Apu Chatterjee (A-6) shouted that there will be no peace if the men of Khoka were not killed. On such exhortation, Tapas Das (A-2), Sankar Das (A-4) caught hold of deceased and Goutam Ghosh (A-1) and Sk. Kochi (A-5) fired at Saikat Saha. PW-6 stated that the appellants were doing illegal business of collecting money from the flat owners in the locality and an altercation took place over the said matter and PW-6 further stated that the appellants also used to come to the deceased and thus he knew all of them. PW-6 was examined by the police on the very next day i.e. on 14.01.2002 and in his statement before the police, PW-6 named the appellants-accused except Jishu Jain as the assailants. PW-6 was a natural eye-witness to the incident. Throughout the searching cross-examination, PW-6 remained consistent and his evidence remained unshaken. That PW-6 is a natural witness is also borne out from the fact that PW-6 accompanied PW1-Gora Das in immediately taking the deceased to the hospital and the same is evident from the Injury Report (Ex.4) and Death Certificate (Ex-4/1) issued by PW9-Dr. Debasish Pal which clearly D E F G H

A mention that the deceased was brought to the hospital by PW-1 and PW-6.

10. Complainant-Gora Das (PW-1), though not named the assailants, in his evidence stated that while he was taking tea in the tea stall of Bablu Pal (PW-5) situated at Shakherbazar Behala at about 8.30 p.m., he heard sound of the firearm and when he ran to the spot, he found the deceased-Saikat Saha lying with bleeding injuries and that he along with PW-6 took the injured to Calcutta Medical Research Institute. Evidence of Pinku Biswas-PW2 is also to the same effect that he heard the sound of two shots and there was chaos in the street and shutters were closed down by shopkeepers and after sometime when people came out, they saw Saikat Saha with gunshot injuries. Evidence of Paritosh Pal-PW3 and Gora Das-PW1 who are the nearby shop owners is also to the same effect. Though PWs 1 to 4 have not named the assailants, their evidence shows that there was an occurrence in which Saikat Saha was shot by the assailants which lends assurance to the evidence of PW-6. Evidence of PW-6 that the deceased sustained two gunshot injuries is also supported by the medical evidence i.e. Injury Report (Ex.4) and Death Certificate (Ex.4/1) issued by Dr. Debasish Pal (PW-9).

11. It is well-settled that the court may act on a testimony of a single witness though uncorroborated, provided that the testimony of single witness is found reliable. Trial court which had the opportunity of seeing and hearing PW-6 found him wholly reliable and trustworthy and held that evidence of Sandipan Majumdar-PW6 cannot be doubted as far as the role attributed to A-1 to A-6 except Jishu Jain is concerned, which was affirmed by the High Court. We find no ground to interfere with the concurrent finding recorded by the Courts below as to the reliability of PW-6 and to record the conviction.

12. Observing that there is no impediment for recording conviction based on the testimony of a single witness provided it is reliable in *Prithipal Singh & Ors. vs. State of Punjab & Anr.*, (2012) 1 SCC 10, it was observed as under:-

“49. This Court has consistently held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is

not the number or the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence, rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.” [See *Vadivelu Thevar v. State of Madras*, AIR 1957 SC 614, *Sunil Kumar v. State (Govt. of NCT of Delhi)*, (2003) 11 SCC 367, *Namdeo v. State of Maharashtra*, (2007) 14 SCC 150 and *Bipin Kumar Mondal v. State of W.B.*, (2010) 12 SCC 91]

13. The appellants are convicted for the offence under Section 302 read with Section 34 IPC. Learned counsel for appellants—accused (A-2 to A-4 and A-6) submitted that accused Sudip Kumar Sen (A-3) and Apu Chatterjee (A-6) are said to have abused the deceased and Tapas Das (A-2) and Sankar Das (A-4) are alleged to have caught hold of the deceased and there is no evidence that A-2 to A-4 and A-6 have shared common intention with other co-accused to fire at the deceased and therefore conviction of these accused under Section 302 read with Section 34 IPC is not sustainable.

14. Section 34 IPC embodies the principle of joint liability in the doing of a criminal act and essence of that liability is the existence of common intention. Common intention implies acting in concert and existence of a pre-arranged plan which is to be proved/inferred either from the conduct of the accused persons or from attendant circumstances. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that:- (i) there was common intention on the part of several persons to commit a particular crime and (ii) the crime was actually committed by them in furtherance of that common intention. Common intention implies pre-arranged plan. Under Section 34 IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The essence of liability under Section 34 IPC is conscious mind of persons participating in the criminal action to bring about a particular result. The question whether there was any common intention or not depends upon inference to be drawn from the

A proved facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.

15. Considering the facts and circumstances of the case in hand,
B it is evident that there was prior concert and that the appellants have acted in furtherance of common intention. As seen from the evidence of PW-6, all the appellants and another co-accused Sk. Kochi were doing illegal business of extorting money from the flat owners. On the date of occurrence, all the appellants and another co-accused Sk. Kochi came together and Sudip Kumar Sen @ Biltu (A-3) started abusing the deceased and Apu Chatterjee (A-6) exhorted others that if the men of
C Khoka were not killed, there would be no peace. On such exhortation, Tapas Das and Sankar Das (A-2 and A-4) caught hold of the deceased and Goutam Ghosh and Sk. Kochi (A-1 and A-5) fired at the deceased. Facts and circumstances clearly establish meeting of minds and common
D intention of the appellants in committing the murder of Saikat Saha and the appellants were rightly convicted under Section 302 read with Section 34 IPC. No ground for interference under Article 136 of the Constitution of India is made out.

16. In the result, all the appeals fail and are dismissed accordingly.

E Nidhi Jain

Appeals dismissed.