

(2001) 07 AHC CK 0185

Allahabad High Court

Case No: Criminal Appeal No. 748 of 1982

Ashwani Vashisht and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: July 11, 2001

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 300, 302

Citation: (2002) CriLJ 619

Hon'ble Judges: J.C. Gupta, J; Bhanwar Singh, J

Bench: Division Bench

Advocate: V.C. Tewari, N.P. Midha, G.S. Chaturvedi and Hemendra Kumar, for the Appellant; Deo Raj and A.G.A., for the Respondent

Final Decision: Disposed Of

Judgement

J.C. Gupta, J.

This appeal arises out of judgment and order dated 20-3-1982 passed by the then Addl. Sessions Judge, Bijnor convicting and sentencing appellants u/s 302 read with Section 149, IPC to imprisonment for life. Appellants Ashwani Vashisht, Manoj Vashisht and Manoj Goel have further been convicted and sentenced to one year R.I. u/s 148, IPC while appellants Nos. 4 and 5 have been convicted and sentenced to undergo six months R.I. each u/s 147, IPC. All the appellants have been further convicted and sentenced to undergo six months R.I. each u/s 323/149, IPC. All the sentences have been ordered to run concurrently.

2. Rivalry amongst two groups of student of a college union led to an untoward incident on 25-4-1981 at about 10.35 a.m. within the precinct of Sahu Jain Degree College, Najibabad which resulted in the death of a young boy Krishna Chand aged about 20 years.

3. Briefly stated, the prosecution story is that previously Krishna Chand deceased and accused Ashwani Vashisht used to study in Murti Devi Intermediate College, Najibabad. Both of them contested election of the Commerce Union and Ashwani Vashisht came victorious. He celebrated his victory and started to tease and bemuse Krishna Chand who felt humiliated and took it offensive. Relations between Ashwani Vashisht and Krishna Chand became strained. After completing their intermediate course, they both took admission in Sahu Jain Degree College, Najibabad in B.Com Part I. Accused Manoj Vashisht was also studying in the same college in B.A. final while accused Sanjay Sharma, Naresh Chand Sharma and Manoj Goel were students of B.Com (final) in the same college.

4. It is alleged that on 23-4-1982 at about 10.00 a.m. accused persons met Krishna Chand deceased in the college premises and said that he was unnecessarily posing himself as self-styled leader of the college. On this, some altercation took place between Krishna Chand and accused Ashwani Vashisht and both exchanged abuses. Accused Ashwani Vashist extended threat to Krishna Chand to see him in future.

5. It is further said that on 25-4-1981 at about 10-30 a.m. Krishna Chand, Ram Gopal, P.W. 3, Ankur Bishnoi, P.W. 5, Zaheer Alam P.W. 4 and Jamuna Prasad were talking to each other near the college library. Accused Ashwani Vashisht, his brother Manoj Vashisht and colleagues accused Naresh Chand Sharma, Sanjay Sharma and Manoj Goel came therefrom the side of college canteen. At that time Ashwani and Manoj Vashisht were armed with knife, Manoj Goel was having a revolver while Naresh Chand Sharma and Sanjay Sharma carried hockey with them. Naresh Chand Sharma and Sanjay Sharma caught hold hands of Krishna Chand and on the asking of accused Manoj Goel, Ashwani Vishisht and Manoj Vashisht inflicted knife blows on Krishna Chand as a result of which he fell down on the ground. Thereafter Naresh Chand Sharma and Sanjay Sharma assaulted, P.W. 5 Ankur Bishnoi with hockey and caused injuries to him when he and other boys tried to intervene. All the accused persons then ran away from the scene of occurrence. Victim Krishna Chand was ultimately carried to hospital where he was declared dead.

6. Ram Gopal, P.W. 3 scribed the FIR and lodged the same at the police station at 11.30 a.m. on the same day. With the registration of case, police came into action. Station Officer, B.B. Lal P.W. 9 in whose presence case was registered took up investigation and he recorded the statements of first informant Ram Gopal and injured Ankur Bishnoi. Sub-Inspector S.N. Khandoori, P.W. 10 was sent to hospital to hold inquest. After the inquest, dead body of Krishna Chand was sent to mortuary for postmortem examination.

7. Dr. G.C. Singh, P.W. 2 conducted autopsy on the dead body of Krishna Chand on 26-4-1981 at 9-30 am and found following ante mortem injuries :

1. Incised wound 2.4 cm. x 1.2 cm. x cavity deep on left side back at the lower border of left scapula lateral to it.

2. Incised wound 2 cm. x 0.8 cm. x muscle deep, 5 cm. medial to injury No. 1.
3. Incised wound 3.4 cm. x. 0.5 cm. x cavity deep on right side back, 4 cm. medial to the middle of right scapula.
4. Contusion 1 cm. x 0.3 cm. on left of bridge of Nose.
5. Contusions 2 in number each measuring 1.5 cm. x 1 cm. on the front of left knee joint.
8. The internal examination revealed that pleura was cut on both sides and lung underneath injury Nos. 1 and 3 was cut on posterior surface. Right lung at outer border in middle part 1.5 cm. x 0.5 cm. in continuation to injury No. 3 was found cut. Right lung had another cut in an area of 1.2 cm. x 0.3, 2 cm. medial to cut No. 1, in long and in continuation with it. Left lung was also cut in an area of 1.2 cm. x 0.8 Cm. on the posterior surface of middle of it throughout the thickness. Heart was also punctured on the posterior surface on left verticle at its upper part.
9. In the opinion of the doctor death was caused due to shock and hemorrhage as a result of ante-mortem injuries. Post-mortem report is Ex. Ka 2. Dr. Singh P.W. 2 has further opined in his deposition before the trial Court that ante-mortem injuries of Krishna Chand were sufficient in the ordinary course of nature to cause death.
10. Ankur Bishnoi, P.W. 5 was medically examined on 25-4-1981 at 4.50 p.m. Dr. A.K. Dubey, P.W. 1 and he found following injuries :
 1. Lacerated wound 2 ½ cm. x ½ cm. x muscle deep on back of skull 17 cm. above the 7th cavical vertebral spin and 11 cm. from left Ear, clotted blood present, cozing of blood was present.
 2. Contusion 5 cm. x 2 cm. on the outer and top of the right shoulder joint reddish in colour.
11. The injuries were simple in nature and their duration was fresh and they were caused by hard blunt object. Injury report of Ankur Bishnoi is Ex. Ka. 1. Dr. Dubey in his statement before the Court below has stated that injuries of Ankur Bishnoi could be caused by blunt object like hockey/stick at about 10.30 a.m. on the same day.
12. After recording statements of Ram Gopal and Ankur Bishnoi at the police station itself, the Investigating Officer proceeded to the house of accused persons in their search and thereafter he went to place of occurrence, made inspection and on the pointing out of witnesses prepared site plan Ex. 4. He also collected sample of plain and blood stained earth through memo Ex. Ka. 9. He also recorded statements of Jamuna Prasad and Zaheer Alam and also interrogated some teachers and other members of staff of the college. On completion of investigation, all the accused persons were challenged through charge-sheet Ex. Ka. 10.

13. Before the trial Court prosecution produced 10 witnesses in all. They were P.W. 1 Dr. A.K. Dubey, P.W. 2 Dr. G.C. Singh, P.W. 3 Ram Gopal, P.W. 4 Zaheer Alam, P.W. 5 Ankur Bishnoi, P.W. 6 Dinesh Pal, P.W. 7 constable clerk Kedar Singh who prepared Check FIR and registered the case in the general diary, P.W. 8 Gomani Ram, P.W. 9 B.B. Pal Investigating Officer and P.W. 10 S.I., S.N. Khandoori who prepared the inquest report.

14. The defence of accused persons was of total denial and they stated of their false implication due to enmity. They produced two witnesses in defence, namely, Ram Autar Bharadwaj, D.W. 1 and Kali Charan, D.W. 2.

15. On evaluation of evidence on record the learned Sessions Judge has found the appellants guilty of committing the murder of Krishna Chand and for causing simple hurt to Ankur Bishnoi in prosecution of their common object.

16. We have heard Shri G.S. Chaturvedi and Sri V.C. Jewari Sr. Advocates for the appellants, learned A.G.A. for the State and Shri Deo Raj for the complainant.

17. Factum of death of Krishna Chand has neither been disputed nor assailed before us by the learned counsel for the appellants. Statement of Dr. G.C. Singh, P.W. 2 coupled with the post-mortem report and other evidence on record leaves no room of doubt regarding homicidal death of Krishna Chand.

18. It has now to be determined whether prosecution has succeeded in proving its case beyond reasonable doubts against all the appellants?

19. Out of the witnesses examined before the trial Court, eye-witness account has been given by P.W. 4 Zaheer Alam, P.W.5 Ankur Bishnoi and P.W. 6 Dinesh Pal, while P.W. 3 Ram Gopal turned hostile. It may not be out of place to mention here that out of the three witnesses who supported prosecution case, P.W. 5 Ankur Bishnoi had himself received injuries during the course of same incident wherein Krishna Chand was stabbed to death.

20. P.W. 4 Zaheer Alam stated that at the relevant time he was studying in B.Com Part I in Sahu Jain Degree College. Krishna Chand deceased was his class mate. He further stated that all the accused persons were also studying in the same college and were known to him from before which claim of his has not been assailed. It has also been stated by him that before taking admission in Sahu Jain Degree College, he along with Krishna Chand deceased and Ashwani Vashisht used to study in Murti Devi Intermediate College and were class mates. He stated of the motive that election of College Union was contested by Krishna Chand and accused Ashwani Vashisht wherein Ashwani Vashisht succeeded and Krishna Chand was defeated. However, accused Ashwani Vashisht started to tease, bemuse and scorn Krishna Chand on his defeat. Once they had quarrelled with each other but with the intervention of Jamuna and Ram Gopal it did not take any serious turn. However, relations between Ashwani Vashisht and Krishna Chand became tensed and utmost

tight. He further stated that on 23-4-1981 all the accused persons had threatened Krishna Chand. He also gave full account of the incident which occurred on 25-4-1981 at about 10.35 a.m. in the college premises. According to him Naresh Chand Sharma and Sanjay Sharma caught hold of hands of Krishna Chand while Ashwani Vashisht and Manoj Vashisht inflicted knife blows upon Krishna Chand. Manoj Goel brandished his revolver towards them saying that if anyone of them would try to rescue Krishna Chand he would shoot him down. Ankur Bishnoi was assaulted by Sanjay Sharma and Naresh Chand Sharma with hockey when he advanced towards them. Ankur Bishnoi also sustained injuries.

21. Ankur Bishnoi P.W. 5 has also stated of the motive and has given a vivid account of the incident in question. Since he himself sustained injuries on his person his presence cannot be doubted. He has stated that Naresh Chand Sharma and Sanjay Sharma had caught hold of Krishna Chand and then on the asking of Manoj Goel, Ashwani Vashisht and Manoj Vashisht inflicted knife injuries to Krishna Chand and when he and others attempted to save Krishna Chand, accused Naresh Chand and Sanjay Sharma beat him with hockey. P.W. 6 Dinesh Pal is yet another witness who stated of the presence of the accused persons though according to him he did not see the actual occurrence and when he was attracted to the scene of occurrence on hearing cries he saw accused persons running towards the college gate. Krishna Chand was lying injured near the portico of college library.

22. All these three witnesses were cross-examined at length by the counsel for the accused persons but nothing material could come out to discredit them. It could not be disputed or denied from defence side that P.W. 4 Zaheer Alam P.W. 5 Ankur Bishnoi and P.W. 6 Dinesh Pal were all studying in Sahu Jain Degree College. Deceased was also a student on the same college. Incident occurred at about 10-30 a.m., therefore, the presence of the eye-witnesses was most natural and probable. Nothing could be brought on record to indicate that these witnesses had any reason to depose falsely against the accused persons as they were neither inimical to the accused persons nor were having any affinity with the deceased. It is true that evidence of P.W. 6 Dinesh Pal is not of much help to the prosecution as his evidence is in the nature of *res gestae*. According to him he was told by Zaheer Alam that Krishna Chand was stabbed by Ashwani Vashisht and Manoj Vashisht while Ankur Bishnoi was assaulted by Sanjay Sharma and Naresh Chand. However, Zaheer Alam who was examined as P.W. 4 himself has not stated that he had told to this witness names of accused persons and, therefore, the statement of P.W. 6 is hearsay in nature and cannot be acted upon. Moreover he is not alleged to have told the names of assailants as soon as he arrived at the scene of occurrence by any person present there and even according to him he came to know of the names of accused persons through the mouth of Zaheer Alam only after he had come back to the scene of occurrence from Hospital. This piece of evidence is thus hearsay and not even relevant as *res gestae*. But his evidence carries with it corroborative value in fixing time and place of occurrence. We have minutely examined the statement of

P.W. 4 Zaheer Alam and P.W. 5 Ankur Bishnoi and find no reason to discard the same. Their evidence get full corroboration from medical evidence inasmuch as during autopsy as many as three incised injuries were found on the dead body of Krishna Chand. They were peculiar knife injuries. Ankur Bishnoi is said to have been assaulted by hockey by accused Naresh Chand and Sanjay Sharma. During medical examination, P.W. 1 Dr. Dubey had found two blunt object injuries on Ankur Bishnoi. Injury No. 1 was a lacerated wound on the back of skull while injury No. 2 was a contusion on top of right shoulder. Both these injuries could be the result of an assault made by hockey. The injuries were found to be fresh when they were examined on the same day at 4-50 p.m. and as per opinion of Dr. Dubey they could be caused at about 10-30 a.m. on the same day. Ankur Bishnoi suffered injuries at the hands of two of the accused person namely, Sanjay Sharma and Naresh Chand. The incident had occurred in broad day light and, therefore, there could be no difficulty for the witnesses to have identified the assailants of Krishna Chand and Ankur Bishnoi. Ankur Bishnoi who had himself sustained injuries would be the last person to leave out the real assailants and implicate innocent persons falsely against whom he had no ill will whatsoever. He could not be said to be interested in roping innocent persons by shielding the real accused who had assaulted him. The first information report was lodged promptly i.e. at 11-30 a.m. The promptitude with which the FIR was lodged giving full account of the incident tends support to the truthfulness of the version given at the trial.

23. Learned Sessions Judge has given cogent and valid reasons for placing reliance on the evidence of the prosecution witnesses of fact examined at the trial and we find no good reason to differ with him.

24. The mere fact that none of the teachers" or other member of the staff of college could be produced to support the prosecution story will not have any adverse affect on the prosecution case particularly in the circumstances of the case. The incident had occurred between two rival groups of student and in such cases teachers and other staff members would try to keep them away from police proceedings or proceedings before the Court. It is also well settled that where the eye-witness account of the witnesses produced in Court is found acceptable and when the same has with stood, the test of cross-examination, non-examination of other witnesses would pale into significance. Therefore, non-examination of teachers or other members of staff of college as witnesses cannot be considered fatal to the prosecution case as it stand fully supported by acceptable eye-witness account. The real question for determination in such cases is not as to what is the effect of non-examination of certain witnesses and the question will be whether the witnesses examined in Court on oath should be believed or not. Once the evidence of the witnesses examined at the trial is found reliable and trustworthy the non-examination of other witnesses will not effect the credibility of the witnesses.

25. Before we conclude, we may also refer to the evidence of D.W. 1 Ram Autar Bharadwaj and D.W. 2 constable Kali Charan. D.W. 1 Ram Autar had brought before the Court admission forms of Class B.Com Part I of Sahu Jain Degree College and stated that on the admission form of Zaheer Alam he had given local address of Mukund Singh, Ex. M.L.A. His evidence is of no use and does not discredit the veracity of prosecution witness. D.W. 2 constable Kalicharan on the basis of Check register of concerned police station stated that a non-cognizable report of one Viresh Kumar was registered u/s 323, I.P.C. against Ankur Bishnoi, Krishna Chand and Lokman. There is nothing to suggest that Viresh Kumar was in any way related to or connected with any appellant. By this defence evidence the truthfulness of prosecution case is not at all affected.

26. On a careful examination of evidence on record our inescapable conclusions are : that it is firmly established that an incident occurred at about 10.35 a.m. on 25-4-1981 within the campus of Sahu Jain Degree College; that in the said occurrence accused-Ashwani Vashisht and Manoj Vashisht caused knife injuries to Krishna Chand which resulted in his death; that accused Naresh Chand Sharma and Sanjay Sharma caught hold of the hands of Krishna Chand before the knife blows were given to him by co-accused-Ashwani Vashisht and Manoj Vashisht; that accused-Naresh Chand and Sanjay Sharma assaulted Ankur Bishnoi with hockey when he tried to intervene to save Krishna Chand; and the participation of appellants-Ashwani Vashisht, Manoj Vashisht, Naresh Chand Sharma and Sanjay Sharma is proved beyond doubt.

27. However, we further find that case against accused-Manoj Goel is not free from doubt. Manoj Goel is said to be armed with a revolver but is not alleged to have used the same throughout the incident. P.W. 4 Zaheer Alam in his statement before the trial Court admitted that Manoj Goel was not studying with them when they were in Intermediate College. It is also noteworthy that in the F.I.R. no specific role was assigned to this accused with regard to previous incident of 23-4-1981 and even as per the own case of prosecution abuses were exchanged between Krishna Chand and accused-Ashwani Vashisht only and it was Ashwani Vashisht who had extended threat to Krishna Chand. It is further to be noticed that as per the F.I.R. the role assigned to this accused is of instigation and of brandishing revolver towards the witnesses when they tried to advance. P.W. 4 Zaheer Alam stated in his statement that he had told to the Investigating Officer that Manoj Goel asked Ashwani Vashisht and Manoj Vashisht to make assault on Krishna Chand and could give no explanation why this important fact was not mentioned in his statement recorded u/s 161, Cr. P.C. by the Investigating Officer. The Investigating Officer admitted that Zaheer Alam did not disclose to him that. Manoj Goel had asked Ashwani Vashisht and Manoj Vashisht to inflict knife injuries upon Krishna Chand. It would thus be seen that up to the stage of investigation role assigned to this accused was confined only to the brandishing of revolver towards the witnesses when they tried to advance to save Krishna Chand. Injured P.W. 5 Ankur Bishnoi in his statement

recorded before the trial Court has however, not assigned to this accused role of brandishing revolver towards the witnesses. Thus he has materially contradicted P.W. 4 Zaheer Alam with regard to the role played by accused-Manoj Goel. It would not be out of place to mention here that P.W. 4 Zaheer Alam has further admitted in cross-examination that at the time of occurrence Manoj Goel remained standing at a distance of 2-4 steps away from the place of assault. In these circumstances a reasonable doubt has been created in our mind that Manoj Goel was a member of unlawful assembly and we, therefore, find it safe and prudent to extend him the benefit of doubt. He deserves to be acquitted accordingly.

28. Next it has to be seen that for what offences appellants-Ashwani Vashisht, Manoj Vashisht, Naresh Chand Sharma and Sanjay Sharma could be held guilty?

29. As far as Ashwani Vashisht and Manoj Vashisht appellants are concerned it has come in evidence that both of them had inflicted knife blows upon deceased Krishna Chand in a premeditated manner. As per the post-mortem report injuries Nos. 1 and 3 were cavity deep and proved fatal inasmuch as right and left lung and heart were punctured underneath these injuries. Dr. G.C. Singh, P.W. 2 has categorically deposed in , his statement that ante-mortem injuries of deceased-Krishna Chand were sufficient in ordinary course of nature to cause death. Case is thus squarely covered by clause thirdly of Section 300, I.P.C. We, therefore, hold appellants Ashwani Vashisht and Manoj Vashisht guilty of the offence of murder punishable u/s 302 read with Section 34, I.P.C. They are further found guilty u/s 323 read with Section 34, I.P.C. with regard to simple injuries caused to P.W. 5 Ankur Bishnoi.

30. Now coming to the case of appellants-Naresh Chand Sharma and Sanjay Sharma it was vehemently argued by Shri G.S. Chaturvedi, for the appellants that these two accused persons cannot be said to have shared common intention of committing the murder of deceased Krishna Chand with co-accused-Ashwani Vashisht and Manoj Vashisht and at best they can be held guilty only u/s 326 read with Section 34, I.P.C. It is well settled that presumption of the common intention is subject to the same restrictions as other presumption and it must not take the form of a bare surmise or conjecture or suspicion. Inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. The role assigned to appellants-Naresh Chand Sharma and Sanjay Sharma is of catching hold of hands of Krishna Chand while the role of stabbing has been specifically assigned to co-accused-Ashwani Vashisht and Manoj Vashisht. There is nothing on record to indicate that there was any ill-feeling between the deceased-Krishna Chand and appellants-Naresh Chand Sharma and Sanjay Sharma. However, the circumstance that all the four accused persons came together and that two of them held the deceased while the other two stabbed him clearly indicates that they shared some common intention. The question that arises for consideration is whether the common intention was to commit murder of the deceased? On this issue the evidence led from prosecution side is not very sound as

it is not crystal clear if appellant-Naresh Chand Sharma and Sanjay Sharma had continued to hold the deceased even after Ashwani Vashisht and Manoj Vashisht had started stabbing him. Neither Naresh Chand Sharma nor Sanjay Sharma are alleged to have said anything at the time of incident to indicate that they wanted the deceased to be done away nor Ashwani Vashisht or Manoj Vashisht stated that they were going to kill Krishna Chand. In these circumstances we find ourselves unable to hold that the only inference possible is that these two appellants shared the common intention with co-appellants-Ashwani Vashisht and Manoj Vashisht to kill the deceased. No doubt they held the deceased which facilitated stabbing by Ashwani Vashisht and Manoj Vashisht but there is nothing to indicate that they fully knew that Ashwani Vashisht and Manoj Vashisht would cause fatal injuries to the deceased. However, we further find that they must have anticipated that at least grievous injuries would be caused. The present is one of those border line cases where one may with equal justification not be able to infer with certainty that the common intention was to commit murder or to cause grievous hurt and when one is in doubt benefit must go to the accused. We therefore, find it safe to conclude that the common intention of these two appellants has not been established beyond reasonable doubt to be to cause death but it certainly was to cause grievous hurt to the deceased. These two appellants are, therefore, held guilty u/s 326 read with Section 34, I.P.C. They are further found guilty u/s 323 read with Section 34, I.P.C. Conviction of all the appellants u/s 148 or 147, I.P.C. are set aside.

31. As a result of above discussion we alter the conviction of appellants-Ashwani Vashisht and Manoj Vashisht from Section 302 read with Section 149, I.P.C. to Section 302 read with Section 34, I.P.C. However, their sentence of imprisonment for life is maintained. Their conviction u/s 323 read with Section 149, I.P.C. is altered to Section 323 read with Section 34, I.P.C. but their sentence of six months R.I. each is maintained. Their conviction and sentence of one year R.I. u/s 148, I.P.C. are set aside.

32. Conviction and sentence of imprisonment for life of appellants-Naresh Chand Sharma and Sanjay Sharma u/s 302 read with Section 149, I.P.C. are set aside and the same is altered to Section 326 read with Section 34, I.P.C. Under this count each of these appellants is sentenced to three years R.I. Their conviction and sentence u/s 147, I.P.C. are set aside. Their conviction u/s 323 read with Section 149, I.P.C. is altered to, Section 323 read with Section 34, I.P.C. but their sentence of six months R.I. each is maintained. The sentences of all these first appellants shall run concurrently.

33. The appeal of appellant-Manoj Goel is allowed. His conviction and sentence as recorded by the learned Sessions Judge are set aside and he is acquitted of the offences charged for. He is on bail he need not surrender. His bail bonds are cancelled and sureties discharged.

34. Appellants-Ashwani Vashisht, Manoj Vashisht, Naresh Chand Sharma and Sanjay Sharma who are on bail shall be taken into custody and sent to jail forthwith for serving out their respective sentences as modified by this Court. C.J.M. concerned shall take immediate steps in this regard.

Appeal is accordingly decided.