

A HARDEEP SINGH & ORS.

v.

STATE OF HARYANA

(Criminal Appeal No. 468 of 2007)

June 11, 2008

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[DR. ARIJIT PASAYAT AND P.P. NAOLEKAR, JJ.]

Penal Code, 1860 – s. 302 read with s. 34 – Murder – Three accused persons armed with weapons causing fatal injuries to deceased – Exhortation by the fourth accused – Injuries caused by first two accused on the head as also legs of the deceased – However, third accused caused injuries only on arm – Incident witnessed by deceased's son and his wife – Conviction of first three accused u/s.302 r/w s.34, however, acquittal of the fourth one – Correctness of – Held: There was no discrepancy in the evidence of eye-witnesses – They sufficiently established the role played by first two accused – Evidence cannot be discarded on the ground that the witnesses being a close relative, thus a partisan witnesses – s. 34 is applicable – Thus, conviction of first two accused u/s.302 r/w s.34 justified – However, in view of the injuries inflicted by the third accused, his conviction altered to one u/s. 304 (Part II) – Custodial sentence of eight years awarded.

Penal Code, 1860 – s. 34 – Common intention – Applicability of – Requirement for – Stated.

According to the prosecution case, on the fateful day, when the deceased was going for a visit along with his son-PW 7 and his wife, all of a sudden accused GS, HS , HJ and JS armed with weapons reached there. GS exhorted the other accused to kill the deceased. HJ and JS inflicted gandasi blows on the legs of the deceased and as a result he fell down. Thereafter, HJ and HS inflicted blows on the head of the deceased. HS and JS assaulted the deceased on his arms. The complainant and his

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mother shouted. The accused fled away with their weapons. The deceased succumbed to his injuries. FIR was lodged. Investigation was carried out. The doctor conducted the post mortem and found 14 injuries on the body of the deceased. Appellants were convicted u/s 302 read with s. 34 IPC. GS was acquitted. The State and the appellants filed appeals. PW 7-complainant filed Revision challenging the acquittal of GS and sought enhancement of sentence of accused persons. The High Court dismissed both the appeals as also the Revision. It held that the evidence of PWs 7 and 8 sufficiently established the accusations. Hence the present appeals.

Partly allowing the appeal, the Court

HELD: 1.1 Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal 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. [Para 7] [1122-A & B]

1.2 The ground that the witness being close relative and consequently being a partisan witness, should not be relied upon cannot be accepted. [Para 10] [1123-A]

Dalip Singh and Ors. v. The State of Punjab AIR (1953) SC 364; Guli Chand and Ors. v. State of Rajasthan 1974 (3) SCC 698; Vadivelu Thevar v. State of Madras AIR (1957) SC 614; Rameshwar v. State of Rajasthan AIR (1952) SC 54; Masaltı and Ors. v. State of U.P. AIR (1965) SC 202; State of Punjab v. Jagir Singh AIR (1973) SC 2407; Lehna v. State of Haryana 2002 (3) SCC 76; Gangadhar Behera and Ors. v. State of Orissa 2002 (8) SCC 381; Babulal Bhagwan Khandare and Anr. v. State of Maharashtra 2005 (10) SCC 404; Salim Saheb v. State of M.P. 2007(1) SCC 699 – referred to.

2.1 Section 34 IPC has been enacted on the prin-

- A 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
- B course of criminal act perpetrated by several persons arises u/s. 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be
- C 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
- D 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 is 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. [Para 14] [1124-B,C,D,E & F]

Ashok Kumar v. State of Punjab AIR 1977 SC 109 – relied on.

- F 2.2 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
- G acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision. [Para 14] [1124-F,G & H]

- H 2.3 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. [Para 15] [1125-A,B & C]

Ch. Pulla Reddy and Ors. v. State of Andhra Pradesh;
AIR (1993) SC 1899 – referred to.

3. The evidence of PWs 7 & 8 clearly establishes the roles played by the appellant HS and HJ. It is also clear from the prosecution evidence that on hearing of the exhortation of the acquitted GS, JS and HJ had given blows on the legs of the deceased. After he fell down, HS gave blow on the head. Similarly HJ also gave blows on the head. After the deceased fell down JS did not attack on any vital part of the deceased's body. He assaulted on the arm of the deceased. In the aforesaid circumstances, while appeal filed by the accused appellants HS and HJ Singh is dismissed, the appropriate conviction of JS would be under Section 304 Part II IPC. His conviction is accordingly altered. Custodial sentence of eight years would meet the ends of justice. [Para 16] [1125-D,E,F & G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 468 of 2007

From the Judgment and Order dated 6.1.2006 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 198-DBA of 1997.

A Kumud Lata Das for the Appellant.

T.V. George for the Respondent.

The Judgment of the Court was delivered by

B Dr. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the judgment of a Division bench of the Punjab & Haryana High Court dismissing the appeal filed by the appellants. By a common judgment two appeals and one criminal Revision were disposed of. Four persons faced trial for alleged commission of offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC'). One of them i.e. Gurcharan Singh was acquitted by the learned Sessions Judge, Sirsa. State questioned his acquittal. Similarly the complainant, PW7 also filed the revision petition seeking enhancement of the sentence of convicted accused persons to death sentence, apart from questioning of acquittal of Gurcharan Singh. By the common judgment the High Court dismissed the Criminal Appeal filed by the State and the Criminal Revision filed by the complainant while dismissing the appeal filed by the appellants also.

E 2. Background facts in a nutshell are as follows:

F Sukhdev Singh (PW-7) lodged FIR at 5.30 PM on 3.11.1994 that on 3.11.1994 at about 4.30 PM, he was going with his mother Pritam Kaur to visit the house of his father's sister on the eve of Diwali festival. At that time, his father Amrik Singh (hereinafter referred to as 'deceased') was going about 10 paces ahead of them on the same foot way for his domestic work. As soon as deceased reached in front of the house of one Parlhand Singh son of Karnail Singh, then all of a sudden, acquitted accused Gurcharan Singh, armed with gandasi, Hardeep Singh, armed with dattar, Harjinder Singh armed with gandasi and Jaswinder Singh also armed with gandasi, emerged from a street known as schoolwali gali. Acquitted accused Gurcharan Singh raised a lalkara (exhortation) that "Aaj Isko Bach Kar Jane Mat Dena". Soon thereafter, his sons ap-

pellants Harjinder Singh and Jaswinder Singh inflicted gandasi injuries on the deceased with an intention to commit his murder. They gave gandasi blows, which landed on the legs of the deceased. As a result, the deceased fell down on the road. His turban also went off his head and fell on the ground. Thereafter accused appellant Hardeep Singh gave dattar blow, hitting the deceased on his head. He was followed by accused appellant Harjinder Singh, who also inflicted a gandasi blow on the head of the deceased. Thereafter, acquitted respondent Gurcharan Singh and accused appellant Jaswinder Singh caused further injuries with gandasi on the arms of the deceased. Complainant Sukhdev Singh and his mother Pritam Kaur raised a hue and cry saying "Mar Dia Mar Dia". After that the deceased was dragged by all the four accused inside the house of accused-appellant Harjinder Singh. Complainant Sukhdev Singh and his mother Pritam Kaur followed them and raised hue and cry. On hearing their noise all the aforesaid four accused, namely, Gurcharan Singh, Hardeep Singh, Harjinder Singh and Jaswinder Singh, ran away with their weapons towards the village side. The complainant and his mother looked at the deceased who had succumbed to the injuries. The complainant, leaving behind his mother near the dead body at the spot, went to the police post to lodge a report. His statement was recorded by Kartar Singh, Incharge, Police Post, Kariwala, on 3.11.1994 itself. On receipt of ruqa (Ex.PB), a formal FIR (Ex.PB/1) under Sections 302/34 IPC was registered by ASI Baljit Singh (PW3) at Police Station, Ding, at 6.50 PM. He sent a special report through Constable Bhoop Singh (PW-5) on the same day to JMIC, Sirsa. A detailed inquest report (Ex. PD /4) was prepared on 3.11.1994 itself by ASI Kartar Singh (PW 9). Dr. Narinder Chaudhary (PW 4) conducted the post mortem (Ex.PD) of the deceased on 4.11.1994 at about 10.15 AM. He found as many as 14 injuries on the dead body. They are as under:

"1. A 'V' shape incised wound each limb measuring 8 cms x 2cms x brain deep over the left parietal region 8 cms away from the pinna of the left ear. On

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A dissection, there was fracture of the left parietal bone. Infiltration was present underlying the injury.

2. An incised wound of 6 cms x 2 cms x scalp deep over the top of the scalp. On dissection, infiltration was present and there was no fracture.

B 3. An incised wound of 8 cms x 1.5 cm x muscle deep, anterior and middle third to the right leg. Corresponding cut was present in the kachha. On dissection, underlying bone (tibia) was fractured and infiltration was present.

C 4. An incised wound of 4 tens x 1.5 cms x bone deep. Lateral aspect of the right knee joint.

5. Two abrasions contusions measuring 3 x 2 cms, 2.5 cms x 2.5 cms over the anterior aspect of right knee joint. On dissection of injuries no.4 and 5 right patellar bone was fractured. Infiltration was present.

D 6. Incised wound 11 cms in length, anterior posteriorly (through and through) from the root of the right little finger to the root of the right thumb. Underlying bone, muscle tendons vessels and nerves were cut.

E 7. Incised wound of 6cms x 1.5 cms muscular deep over the posterior and middle to the right fore-arm. Underlying bones were fractured. Infiltration was present.

F 8. Contusion of 3 cms x 2 cms over the top of the left shoulder joint. Infiltration was present underlying the tissue.

G 9. Two *contusions* varying in size. Posterior to the left elbow.

10. Contusion of 4 cms x 2 cms, posterior and middle to the left fore-arm. Underlying bone (ulna) was fractured and infiltration was present.

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11. Abrasion contusions, four in number, varying in size, A dorsum of the left hand. On dissection infiltration was present.
12. Contusion of 3 cms x 1 cm on the left knee joint.
13. Incised wound of 5.5 cms x 1.5 cms x bone deep, B anterior and middle third to the- left leg. Underlying bone was fractured. Infiltration was present.
14. Contusion of 2.5 cms x 2 cms over the lower third to the sternum. Infiltration was present under the injury." C

3. After completion of the investigation, charge sheet was filed. Since the accused persons pleaded innocence, the trial was held. As noted above, the appellants were convicted while Gurcharan Singh was acquitted. Appeal was filed by the State and the present appellants and the revision was filed by the complainant. D

4. Before the High Court the basic stand taken by the appellants was that the evidence of PWs 7 & 8 do not inspire confidence. The High Court did not find any substance in the appeal filed by the appellants and held that the evidence of PWs 7 & 8 sufficiently established the accusations. E

5. In support of the appeal, learned counsel for the appellant submitted that the evidence of PWs 7 & 8 does not inspire confidence, particularly when they are relatives of the deceased. Additionally, even if the prosecution version is accepted in toto, the conviction for offence punishable under Section 302 read with Section 34 IPC cannot be maintained. Plea that the FIR was ante timed was also taken with reference to the time of inquest. The basic plea is regarding the applicability of Section 34 IPC. It is pointed out that the Doctor has opined that only injury no. 1 alone could have resulted in the death. F G

6. Though learned counsel for the appellants submitted that the evidence of PWs 7 & 8 does not inspire confidence, no discrepancy in their evidence could be focused to discard their H

A evidence.

7. We shall also 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 conceal 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.

C 8. In *Dalip Singh and Ors. v. The State of Punjab* (AIR 1953 SC 364) it has been laid down as under:-

D "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 E 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.

F 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 G prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

H 9. The above decision has since been followed in *Guli Chand and Ors. v. State of Rajasthan* (1974 (3) SCC 698) in which *Vadivelu Thevar v. State of Madras* (AIR 1957 SC 614) was also relied upon.

10. 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."

11. Again in *Masalti and Ors. v. State of U.P.* (AIR 1965 SC 202) this Court observed: (p. 209-210 para 14):

"But it would, we think, be unreasonable to contend 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."

12. To the same effect is the decision in *State of Punjab v. Jagir Singh* (AIR 1973 SC 2407), *Lehna v. State of Haryana*

A (2002 (3) SCC 76) and *Gangadhar Behera and Ors. v. State of Orissa* (2002 (8) SCC 381).

13. The above position was also highlighted in *Babulal Bhagwan Khandare and Anr. v. State of Maharashtra* [2005(10) SCC 404] and in *Salim Saheb v. State of M.P.* (2007(1) SCC 699).

14. 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 of 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 is 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.

15. 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.

16. We find that the evidence of PWs 7 & 8 clearly establishes the roles played by the Hardeep Singh and Harjinder Singh. It is also clear from the prosecution evidence that on hearing of the exhortation of the acquitted Gurcharan Singh, Jaswinder Singh and Harjinder Singh had given blows on the legs of the deceased. After he fell down, Hardeep Singh gave blow on the head. Similarly Harjinder Singh also gave blows on the head. After the deceased fell down Jaswinder Singh did not attack on any vital part of the deceased's body. He assaulted on the arm of the deceased. In the aforesaid circumstances, while appeal filed by the accused appellants Hardeep and Harjinder Singh is dismissed, the appropriate conviction of Jaswinder Singh would be under Section 304 Part II IPC. His conviction is accordingly altered. Custodial sentence of eight years would meet the ends of justice.

17. The appeal is allowed to the aforesaid extent.

N.J.

Appeal partly allowed.