

CASE NO.:
Appeal (crl.) 596 of 2005

PETITIONER:
DHANESHWAR MAHAKUD and ORS.

RESPONDENT:
STATE OF ORISSA

DATE OF JUDGMENT: 05/04/2006

BENCH:
S.B. SINHA & P.P. NAOLEKAR

JUDGMENT:
JUDGMENT

P.P. NAOLEKAR J.

The appellants herein namely, Dhaneshwar Mahakud, Ganeshwar Mahakud, Dasratha Mahakud and Kamala Kanta Mahakud (originally A-2 to A-5) alongwith two other persons, namely, Pitabash Mahakud (A-1) and Sanjeeb Kumar Mahakud (A-6) were tried for the offences punishable under Sections 148, 302/149 and 323/149 of the Indian Penal Code (IPC). The Court of Sessions convicted and sentenced all the six accused to undergo life imprisonment for causing death of two persons, namely, Biswanath Barik and Umakant Barik. In an appeal filed in the High Court, A-1 and A-6 were acquitted, whereas the accused appellants (A-2 to A-5) were not found guilty under Sections 148 and 149, IPC, but their conviction under Sections 302 and 323, IPC and the sentence of life imprisonment for the offence under section 302 IPC was confirmed. No separate sentence had been passed under Section 323 IPC. The appellants, are therefore, before this Court challenging the order of the High Court.

The brief facts of the case are as follows: As per prosecution version, on 23rd March, 1992 at about 7.30 a.m., Dhaneshwar (A-2) Ganeswar Mahakud (A-3), Dasratha Mahakud (A-4) and Kamala Mahakud (A-5), the appellants herein, went to the disputed piece of land situated by the side of Palasapanga-Bamebari road located in village Malda. Dhaneshwar Mahakud and Ganeswar Mahakud were carrying crowbars, whereas Dasratha Mahakud and Kamala Mahakud were armed with axes. They started digging pits in order to fix pole therein for construction of a shop house. Umakant Barik (deceased) along with Kanduru Barik (his father) and Biswanath Barik (deceased) (his uncle) reached the spot and objected to the said act of the accused persons. On this, they were assaulted by the accused persons with crowbars and axes resulting in the death of Umakant Barik and Biswanath Barik and causing injuries to Kanduru Barik (PW-7). The incident was witnessed by Mangaraj Barik (PW-5), a hotel owner, who was having his hotel nearby the place of incident. At about 9.00 a.m., Sankhali Barik (PW-1), relative of the deceased, lodged the FIR in Joda Police Station that about 8.00 a.m. while he was coming from Village Bamebari, on his way he saw his uncle's son Umakant Barik lying dead in an open field and there were several cut injuries on the head and face of Umakant Barik. The body of Biswanath Barik was also lying dead in a pool of blood who had sustained injuries on different parts of his body including head. He saw the wife and daughters of his uncle sitting and crying near the dead bodies.

The prosecution has mainly based its case on the evidence of two eye witnesses, namely, Mangaraj Barik (PW-5) and Kanduru Barik (PW-7) and the statements of the doctors who performed the autopsy on deceased Umakant Barik and Biswanath Barik, namely, Dr. Bibhuti Bhusan Mohanty (PW-4) and Dr. Surendranath Sahu (PW-6)

The plea of the accused persons is of complete denial to the alleged

allegations set forth against them. It is the case of the accused Kamala Mahakud, as is evident from his statement recorded under Section 313 Cr. P.C., suggestions put to the prosecution witnesses in their cross-examination and the evidence of Nandu Munda (DW-3), that while he was engaged in the construction of a shop room over his land and for the said purpose was digging pits to fix poles, the deceased persons along with injured (PW-7) armed with deadly weapons came to the spot and attacked him and in order to save his life he whirled the axe which he was holding whereby the deceased persons sustained injuries and died. In short, Kamala Mahakud pleaded right of self-defence and property, whereas Dasratha Mahakud by examining DW-2 (Bimbadhar Mahanta) had set up the defence of alibi.

The trial court relying on the evidence of pw-1, Pw-5 and pw-7 concluded that intention was apparently to cause death of the deceased and cause injuries to Kanduru Barik. The trial court did not accept the right of private defence pleaded by Kamala Mahakud (A-5). The plea of alibi taken by Dasratha Mahakud (A-4) was also rejected and consequently verdict of guilt was recorded.

The High Court has recorded the findings in the appeal preferred by the accused, that PW-5 who was the owner of hotel nearby the place of occurrence was a natural witness to incident and PW-5's statement is corroborated by the evidence of injured eye-witness (PW-7). The High Court has also found support to the version of these witnesses from the evidence of Nand Kishore Dandasena (PW-8), residing at a distance of 200m. from the hotel who had confirmed the presence of the accused appellants at the place of occurrence. Further corroboration was extracted from the evidence of PW-1 who lodged the FIR and has mentioned the names of the four accused persons present at the place of occurrence. The High Court has acquitted two persons, namely Pitabash Mahakud (A-1) and Sanjeeb Kumar Mahakud (A-6) who were charged along with the accused-appellants as the High Court had a reasonable doubt as to the involvement of those accused persons in commission of the crime. Since the two charged accused were acquitted, the High Court has held that the accused-appellants, who are four in number, could not be convicted taking aid of Section 149, IPC. The High Court has rejected the plea of right of self defence of Kamala Mahakud and plea or alibi claimed by Dasratha Mahakud. However, on the basis of the evidence led by the prosecution, the High Court has held that the offence under Section 302 IPC was found proved against the accused-appellants and convicted them on the basis.

Mr. Janaranjan Das, the learned counsel appearing for the appellants, has urged before us that the High Court having rightly found that the accused-appellants could not be convicted under Section 302 read with Section 149, IPC, has erred in convicting the appellants under Section 302, IPC on the basis of the evidence led by the prosecution as the evidence on record does not prove the factum of death being caused by each and every appellant by their individual separate act. To counter this argument, the learned counsel for the State has urged before us that although the High Court has not found the appellants guilty under section 149, IPC in the facts proved by the prosecution, the conviction imposed on them under Section 302 IPC could very well be supported with the aid of Section 34 IPC as there was common intention of all the accused-appellants to cause death of Umakant Barik and Biswanath Barik with the use of deadly weapons and the assault was made on them with the common intention which was formed at the place of incident as is clearly revealed from the evidence of eye-witnesses examined by the prosecution and well supported by the medical evidence.

Before we consider the eye-witnesses' version of the incident and the medical evidence, we would like to venture upon the argument advanced by the counsel for the appellants that whether in the absence of a charge under Section 34 IPC the accused-appellants can be convicted with the aid thereof, when they were charged with an offence under Section 302 read with section 149, IPC only. To convict the accused of an independent charge

under Section 302, IPC it is necessary that the Court should reach to the conclusion that the injuries inflicted by each individual taken in isolation, were sufficient in the ordinary course of nature to cause death of deceased persons. If the Court reaches to the conclusion on the basis of the material placed before it that the injuries were sufficient in the ordinary course of nature to cause death and the nature of injuries was homicidal, the Court can convict each and every accused under Section 302 IPC, but if the Court cannot conclusively reach to the finding that each and every individual involved in commission of the offence has caused such injuries which are sufficient in the ordinary course of nature to cause death, the accused cannot be convicted under Section 302 IPC. If the injuries caused are sufficient in the ordinary course of nature and they have been caused in furtherance of the common intention, then each and every individual propagating the common intention can be convicted under Section 302 read with Section 34, IPC although he has not been charged under Section 34 IPC and has been charged under Section 149 IPC along with Section 302 IPC.

In *Malhu Yadav and Ors. v. State of Bihar*, [2002] 5 SCC 724, this Court has held as under:

"14.... The prosecution has established that the aforesaid four accused persons joined in the actual doing of the act which resulted in the death of the deceased and the common intention though not initially in existence, was formed during the transaction on the spot. The existence of the common intention amongst the aforesaid accused persons has been established from the surrounding circumstances and from their conduct on the spot. The absence of the charge under Section 34 against the aforesaid accused persons would not make any difference because on the proved facts and evidence available on record, their intention to commit an offence has been established. Failure to charge accused under Section 34, who stood charged under Section 149 IPC would not result in any prejudice to them (*Dalip Singh v. State of Punjab*, [1954] SCR 145). The aforesaid accused persons can, therefore, be convicted for the major offence read with Section 34".

Similarly in *Chittarmal v. State of Rajasthan*, AIR (2003) SC 796, this court has held as under:

"14. It is well settled by a catena of decision that S.34 as well as S.149 deal with liability for constructive criminality, i.e., vicarious liability of a person for acts of others. Both the Sections deal with combination of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of minds, while common object does not necessarily require proof of prior meeting of minds or pre-concert. Though there is substantial difference between the two Sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under S. 149 overlaps the ground covered by S.34. Thus if several persons numbering five or more, do an act or intend to do it, both Ss. 34 and 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of S.34 for S.149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of S.34 for S.149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of S. 149 is therefore no bar in convicting the appellants under S. 302 read with S.34 I.P.C. If the evidence discloses commission of an offence in furtherance of the common intention of them all. (See *Barendra Kumar Ghose v. King Emperor*, AIR (1925) PC 1; *Mannam Venkatadri and Ors. v. State of Andhra Pradesh*, AIR (1971) SC 1467; *Nethala Pothuraju and Ors. v. State of Andhra Pradesh*, AIR (1991) SC 2214 and *Ram Tahal and Ors. v. State of U.P.*, AIR 1972 SC 254)."

[Lachhman Singh Ors. v. The State, AIR (1952) SC 167 (para 13) and Karnail Singh and Anr. v. State of Punjab, AIR 1954 SC 204 (para 7) are two other cases on the same point.

In Hamlet alias Sasi & Ors. v. State of Kerela, [2003] 10 SCC 108 (Para 17) this court has held as follow:

"This court in Nethala Pothuraju v. State of A.P., [1992] 1 SCC 49 has held that the non-applicability of Section 149 IPC is no bar in convicting the accused under section 302 read with section 34 IPC if the evidence discloses commission of an offence in furtherance of the common intention of such accused. This is because both Section 149 and 34 IPC deal with a combination of persons who become liable to be punished as shares in the commission of offences. Therefore, in cases where the prosecution is unable to prove the number of members of unlawful assembly to be five or more, courts can convict the guilty persons with the aid of section 34 IPC provided that there is evidence of record to show that such accused shared the common intention to commit crime. While doing so the courts will have to bear in mind the requirement of Section 34. It is well known that to establish the common intention of several persons to attract section 34 IPC the following two fundamental facts have to be established : (i) common intention and (ii) participation of the accused in commission of the offences. If the above two ingredients are satisfied, even overt act on the part of some of the persons sharing the common intention is not necessary....."

Recently in Gurpreet Singh v. State of Punjab, [2005] 12 SCC 615, this Court has relied upon the case of Ramji Singh and Anr. v. State of Bihar, [2001] 9 SCC 528 for the proposition that charges framed under simpliciter Section 302 can be changed to Section 302 read with section 34 of IPC. The relevant portion of the judgment in Ramji Singh's case is extracted below:

"14. Legal position as to whether in the absence of charge under Section 34 conviction could be maintained under Section 34 was cleared by the constitution Bench in Willie (William) Slaney v. State of M.P., AIR (1956) SC 116 where this Court observed at para 86: (AIR p.137)

"86. Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled-up one involving the direct liability 'and the constructive liability' without specifying who are directly liable and who are sought to be made constructively liable.

In such situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant."

This was reiterated by the Supreme Court a number of times. We may refer to Dhanna v. State of Madhya Pradesh, [1996] 10 SCC 79, where this position is reiterated after referring to the other cases. It held : (SCC pp. 82-83 para 9)

"9. It is, therefore, open to the court to take recourse to Section 34 of IPC even if the said Section was not specifically mentioned in the charge and instead Section 149 IPC has been included. Of course a finding that the assailant concerned had a common intention with the other accused is necessary for resorting to such a course. This view was followed by this Court in later decision

also. (Amar Singh v. State of Haryana, [1974] 3 SCC 81; Bhoor Singh v. State of Punjab, [1974] 4 SCC 754. The first submission of the learned counsel for the appellant has no merit.

Accordingly it is held that even in the absence of the charge under Section 34 conviction could be maintained by the courts below.

15. The counsel for the appellants could not show that any prejudice was caused to either of accused persons because of the non-framing of charge under Section 34.

16. It is true that the two injuries, which proved to be fatal, were not specifically attributed to either of the accused. The common intention can be formed at the spot. At time it is difficult to get direct evidence of pre-concert of minds. The common intention can be gathered from the circumstances and the manner in which assault is carried out. The manner in which assault was carried out leaves no manner of doubt in our mind that the appellants had come with the intention to kill the deceased. Their intention was not to cause injuries alone...."

It is apparent from the decisions rendered by this Court that there is no bar on conviction of the accused-appellants with the aid of Section 34 IPC in place of Section 149 IPC if there evidence on record to show that such accused shared a common intention to commit the crime and no apparent injustice or prejudice is shown to have been caused by application of Section 34 IPC in place of Section 149.

In the light of the aforesaid principles enunciated by this Court, we shall now scrutinize the evidence led by the prosecution.

PW-5, a hotel owner whose hotel was situated nearby the place of occurrence, has vividly described the occurrence. He deposed that the deceased Umakant came to the spot on cycle followed by the deceased Biswanath and Kanduru Barik, his uncle and father respectively. They came to his hotel and asked for the tiffin. He asked them to wait for some time. On that, they left the hotel. The deceased Umakant went near the place where the accused persons were digging pits and challenged them as to why they were doing that on the land and if the land in fact belonged to them they should get it verified by getting it measured by an Amin. Saying so, he caught hold of one of the poles fixed by the accused persons and tried to uproot it. Enraged by that act, the accused Dasaratha caught hold of his neck. The deceased Biswanath and the injured Kanduru, uncle and father, rushed to the spot to rescue Umakant. Just at that time, accused Kamala who was having the axe rushed towards the deceased Biswanath and gave one stroke of axe over his head. Accused-Dasaratha dealt another stroke of axe over the head of Biswanath. Biswanath fell down. The accused Ganesh Mahakud and Dhaneshwar Mahakud who were holding crowbars, assaulted the deceased Biswanath when he was lying on the ground. PW-7, father of Umakant, who was trying to take Umakant from the place, was attacked by Kamala over his head from the back side of the axe and Kamala also attacked Umakant by axe on his head. As a result thereof, he fell down sustaining severe injuries. Thereafter, all the accused person assaulted Umakant on different parts of his body by means of axe, crowbar and lathi with which they were armed and then the accused fled away. In his cross-examination, the only thing which was brought out is that he stated before the police "that the accused Ganesh Mahakud was bringing poles by means of a bullock-cart and the accused Dhanu was digging pit and the accused Kamala Mahakud was also digging pit." When the right of self-defence of Kamala Mahakud was put to this witness, he specifically denied that "while the accused persons Kamala and Dhanu were digging pits to fix poles, the deceased persons viz. Biswanath, Umakanta and injured Kanduru and one Raghaba PW2 being armed with weapons came to the spot and tried to attack the accused person." He also denied that just at the spur of the moment accused Kamala in order to save his life whirled the axe which he was holding and the deceased persons and injured came across and sustained injuries.

The statement of Kanduru Barik (PW-7), who was an injured eye-witness, totally supports the evidence of PW5. He disposed that when they went to take tiffin to the hotel of PW5, they found that the accused persons Kamala Mahakud and Dhanu Mahakud were digging pits over their land. The accused Dasaratha was bringing poles in order to fix the same in the pits dug by the accused persons over their land. He saw that his son Umakant went over the land and challenged the accused persons for their act also tried to take out the poles fixed by the accused persons. His son told them that before fixing the poles they should utilize the services of an Amin for demarcation of the land to find out the true position and they should have fixed the poles thereafter. The accused caught hold of the neck of his son Umakant and his brother Biswanath challenged the accused persons. Thereafter, the accused Kamala attacked with the axe over the right side of Biswanath. Biswanath fell down. Accused Dhanu Mahakud gave piercing blow of crowbar over the head of Biswanath. When he intervened and separated his son Umakant and dragged him to a distance of 10 ft. the accused persons Dasaratha Dhanu Kamala and Pitabas chased him in order to assault and then he saw that the accused persons assaulted his son Umakant by means of axe and on receiving injuries he fell down. Both of them died on the spot.

The version of the prosecution was supported by medical evidence of Dr. Bibhuti Bhusan Mohanty (PW-4) and Dr. Surendranath Sahu (PW-6). The doctors found the following injuries on dead bodies of Umakant Barlik and Biswanath Barik:

Injuries on the dead body of Umakant Barik as found by PW-6 on post- mortem

External Injuries

1. One lacerated injury 3"x 1 + scalp deep present on medial angle of the left eye damaging the left upper eye lid and eye ball and communication to the cranial cavity.
2. One lacerated injury 3"x1" x scalp depth present one inch above the first injury on left side of the fore-head communicating to the cranial cavity.
3. Lacerated injury of 2" x 1" on the tip and middle of nose about 1" depth damaging the middle septa of nose and the tip of the same.
4. Lacerated injury on the right eye of the size of 1/12"x1" and 4" depth damaging it completely i.e., the right eye.
5. Lacerated injury of 2" x 1 x 4" on the right side of forehead just above the right eye communicating freely to the brain cavity.
6. Lacerated injury of 3"x2"x2" on right cheek 2" lateral to the nose under which there is fracture of right maxilla and mandible bones.

Internal injuries

1. Injury nos. 1, 2 and 5 communicate freely to the brain i.e. cranial cavity through which brain matter is coming out. The bones underneath the said injuries i.e. frontal are fractured into many pieces and there is collapse of the texture of the cranial cavity.
2. Injury nos. 1 and 4 have damaged the left and right eyes and the under line bones.
3. Injury no. 3 has damaged the nasal bones and the surrounding tissues extensively.
4. Injury no. 6 has caused the fracture of right maxilla and mandible into many pieces and damaged the vessels.

5. All the injuries are covered with blood clots and are antemortem in nature.

Injuries on the dead body of Biswanath Barik as found by pw-4 on post mortem

External Injuries

1. One incised wound 1 3/4" x 3/4" on the frontal area of the head of right side.
2. Incised wound 1 3/4" x "+" on the front parietal area on the left side.
3. Incised wound 2" x 1/3" on the middle aspect of pinna of right ear across the cartilage.
4. On dissection of skull, there is fracture of the frontal bone of both side and also there is fracture of parietal bone. The bone chips were there inside the brain matter. There was laceration of the brain matter with haemorrhage involving both hemispheres.

Internal Injuries

The internal injuries of the deceased correspond to the external injuries described.

PW-4, who conducted the post-mortem of deceased Biswanath, opined that the injuries sustained by the deceased were homicidal in nature. The same were fatal and were sufficient in the ordinary course of nature to cause death. The injuries on the deceased could be possible by the sharp edge of the axe and crowbar.

PW-6, who conducted the post-mortem of deceased Umakant, opined that the injuries were sufficient in the ordinary course of nature to cause death and were homicidal in nature. The injuries could be caused by heavy sharp cutting weapon like axe.

The injured eye-witness, Kanduru Barik (PW-7) had suffered the following injuries.

1. Abrasion with irregular margin of size 5cm. x 2cm. x 1/4th cm. On the posterior part on the sagittal suture of the scalp.
2. Abrasion of 4cm. x 3cm. x 1/4 cm. Over the left axillary area on the 5th and 6th of the thoracic ribs.

Dr. Raghunath Hembram (PW-11), who examined PW-7, opined that the injuries were simple in nature and could possibly be caused due to rough object. These could be caused by handle of the axe.

From the statements of these witnesses, it is clear that when the accused person were digging pits for fixing the poles, the complainant party reached to the spot, Umakant Barik approached the accused-appellants and restrained them from doing the act and asked them to get the measurement done by the Revenue Authority before putting poles, at that juncture one of the accused caught hold of his collar, to save him his uncle Biswanath reached to the spot and they were attacked by the accused-appellants simultaneously using the axe and crowbars which they were holding. Biswanath Barik was attacked first and thereafter the attack was directed towards Umakant Barik.

The nature of injuries sustained by the deceased clearly indicates the

intention of the accused-appellants to do away with the deceased. The evidence of the witnesses along with the injuries reported in post-mortem reports clearly bring out the common intention of the accused-appellants and we do not think that the accused-appellants would be prejudiced merely because the charge was framed under Section 302 read with Section 149, IPC and not under Section 302 read with Section 34, IPC. From the evidence of two witnesses, PW-5 and PW-7, it would appear that the accused appellant shared the common intention to cause death of victims.

The accused-appellant Kamala Mahakud has claimed the right of self-defence. In order to find out whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities, are all relevant factors to be considered. In the person case, the evidence reveal that there was no imminent danger to the property or person of Kamala Mahakud from the act of deceased Umakant Barik who had merely gone to the spot and asked the accused party to get the measurement of the land and tried to dislodge one of the poles fixed by the accused party. There was neither any occasion or any cause to attack the complainant party with weapons like axes and crowbars and to cause injuries on the vital parts of the body including head. There is no evidence on record to show that any of the accused-appellants has sustained injuries to deduce the factum of imminent danger to their person or property. The statement of Nandu Munda (DW-3), examined to establish the right of private defence cannot be relied upon. He has deposed that Umakant, Bisawanath, injured Kanduru and Raghava rushed to the land where the accused Kamala was digging pits being armed with axe and lathi in their hands and when they were about to assault the accused Kamala with axe just at that time accused Kamala whirled the axe and ran towards his house to save his life. According to him, he reached the spot at about 8 to 9 am. This witness cannot be believed as he has not given the full narration of facts. He has not said anything as to how Kamala who was attacked by three persons has not sustained any injury. His presence at the place of incident in-between 8 to 9 a.m. is doubtful as the FIR was lodged on 23rd, March 1992 at 9.00 a.m. in the Joda Police station which is about 39 kms. south-east from Malda, the place of occurrence. The occurrence of the incident as alleged by this witness would not have happened during the time when he had claimed his presence at the place of incident. The absence of detailed description of the incident itself speaks volumes of the credibility of this witness and we cannot rely on his statement to establish the right of self-defence of the accused-appellant Kamala Kanta Mahakud.

In overall consideration of the evidence, we find no infirmity in the conviction of the accused, appellants. We, however, convict and sentence the accused-appellants under Section 302 read with Section 34, IPC for life imprisonment instead of Section 302 simpliciter.

The appeal is dismissed in the above-said terms.