

CASE NO.:
Appeal (crl.) 1310 of 2005

PETITIONER:
Jagannath

RESPONDENT:
State of M.P.

DATE OF JUDGMENT: 18/09/2007

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 1310 OF 2005

S.B. SINHA, J :

1. Appellant before us with one Prabhudayal was tried for alleged commission of an offence under Section 302/34 of the Indian Penal Code. A First Information Report was lodged by one Dhoomsingh (PW-11) at Obeydullaganj Police Station on 16.09.1986 alleging that he and Ramsingh (since deceased) had collected pieces of wood from the bank of a river near their house, but the appellant and Prabhudayal, however, came there and committed theft thereof. An altercation took place. While the altercation was going on, Prabhudayal allegedly inflicted one axe blow on the head of the deceased causing an injury on his person. Two other prosecution witnesses, viz., Naval Singh (PW-2) and Hukumchand (PW-12) came to the scene of occurrence. They were also allegedly assaulted and consequently sustained injuries. The deceased while being taken to the police station breathed his last on the way.

2. Before the learned Trial Judge, the accused raised a defence that the deceased Ramsingh and Dhoomsingh (PW-11) accompanied by some other persons came to the house of Prabhudayal and asked his wife Kasturibai, who examined herself as DW-1, to serve them chicken and on her refusal to do so, they tried to outrage her modesty; injuries were caused to her in the process. A criminal case was instituted in that behalf. The incident is said to have taken place because of the said fact.

3. The learned Trial Judge, however, relying on the testimonies of the aforementioned witnesses and opining that they are injured witnesses, came to the conclusion that as the prosecution evidence was corroborated by medical evidence, the accused must be held to be guilty for the alleged commission of offence under Section 302 of the Indian Penal Code, and were sentenced to undergo rigorous imprisonment for life. An appeal preferred thereagainst by the accused has been dismissed by the High Court by reason of the impugned judgment.

4. Before embarking upon the questions raised before us, we may, however, notice that along with the appellant and the said Prabhudayal, one Dhan Singh was also prosecuted. He, however, was acquitted. The said judgment has not been questioned.

5. In its judgment, the High Court opined as under:

"From the evidence of the three eye witnesses of the prosecution corroborated by the medical evidence, it is amply proved that accused Prabhudayal caused the death of Ramsingh by

causing injury by the axe on his head. This was a serious injury. Therefore, accused Prabhudayal must be held to have caused the death of Ramsingh intentionally. So far as appellant Jagannath is concerned, he has been convicted by the Trial Court with the aid of Section 34 I.P.C. It is found from the testimony of Dhoom Singh (P.W. 11), Hukumchand (P.W. 12) and Naval Singh (P.W.2) that accused Jagannath caused injuries to Dhoom Singh (P.W. 11) and Naval Singh (P.W. 2). Accused Jagannath was armed with an axe. He came with accused Prabhudayal. He caused injuries to Dhoom Singh (P.W.11) and Naval Singh (P.W.2) in furtherance of the common intention. From these facts it is borne out that he had also formed common intention with accused Prabhudayal to cause the death of Ramsingh. The trial court has rightly found appellant Jagannath guilty for the offence punishable under Section 302/34 I.P.C."

6. Mr. Balraj Dewan, learned counsel appearing on behalf of the appellant contended that having regard to the prosecution case itself and the evidence brought on record by the prosecution, the appellant herein cannot be said to have shared any common intention with Prabhudayal for causing the murder of the deceased Ramsingh.

7. Ms. Vibha Datta Makhija, learned counsel appearing on behalf of the State, however, supported the impugned judgment.

8. A short question, therefore, which arises for our consideration is as to whether the appellant is said to have shared any common intention with Prabhudayal in causing the death of Ramsingh.

9. For the aforementioned purpose, we may accept the statements of the prosecution witnesses and in particular the evidence of Naval Singh (PW-2), Dhoomsingh (PW-11) and Hukumchand (PW-12). As per these witnesses, both the brothers collected pieces of wood floating in the river Barkhukhar because of the flood, which were taken away by all the accused. According to the said witnesses, therefore, they had committed theft. They wanted to take away the same back from their possession. They had stopped the accused from taking the same away, whereupon Prabhudayal hit Ramsingh with an axe blow on his head. Appellant is said to have hit PW-11 on his back.

10. While the incident was going on, Naval Singh (PW-2) came to the spot. PW-2 was in his field which was at a distance of about one furlong from the place of occurrence. According to him, the deceased was being assaulted by all the three accused with axe and spear which were in their hands. Prabhudayal on his intervention is said to have caused an injury on the left temple of Naval Singh. It may be noticed that even PW-11 did not attribute any overt act on the part of the appellant herein so far as the deceased Ramsingh was concerned.

11. Hukumchand (PW-12) also categorically stated that the pieces of wood collected by the deceased and PW-11 were taken away by the accused and they had followed them.

12. It is, therefore, evident that there had been a quarrel. There was no pre-meditation between Prabhudayal and the appellant herein. Altercations had taken place. Injury caused upon the deceased by Prabhudayal, therefore, in our opinion, was an individual act. Similarly, causing of injury upon the prosecution witnesses by the appellant was his individual act. While embarking upon the question as to whether any intention had been shared by the appellant with the said Prabhudayal or not, the backdrop in

which the incident had taken place, in our opinion, should be taken into consideration.

13. A common intention may be developed on the spot, but the same must not only be developed but also must be shared with the other accused.

14. Concededly, the occurrence took place all of a sudden. The act of theft on the part of the accused persons was complete. They had been taking away the wood. They were followed by the deceased and PW-11. They must have been obstructed from taking away the wood by them as the same were in their possession. It was at that juncture the deceased was said to have been assaulted by Prabhudayal and Dhan Singh. In a situation of this nature where the accused persons had acted at the spur of the moment having regard to the altercations which had preceded the incident, in our opinion, it is difficult to lead to the conclusion that Prabhudayal and the appellant had developed a common intention of causing death of the deceased. If the statements of the prosecution witnesses PWs 2, 11 and 12 are to be believed, they acted almost at the same time. We may notice that the third accused Dhan Singh has been acquitted. The State has not preferred any appeal thereagainst. The High Court has also convicted Prabhudayal under Section 302 of the Indian Penal Code holding that the same was his individual act. In this situation, we are of the opinion that it is difficult to uphold the contention of Ms. Makhija that the appellant is guilty under Section 302/34 of the Indian Penal Code.

15. In *Noor @ Noordhin v. State of Karnataka* [2007 (8) SCALE 665], this Court held as under:

"13. A common intention may be developed on the spot. Although a person may not be held guilty for having a common object, in a given situation, he may be held guilty for having a common intention, but such common intention must be shared with others..."

It was also observed:

"16. We have noticed hereinbefore that all the accused, other than the appellant, have been acquitted by the learned Trial Judge. The State did not prefer any appeal thereagainst. The prosecution, therefore, cannot say that the appellant had any common intention with any other accused persons who were named in the First Information Report. The matter might be different where a person is said to have formed common intention with other persons. The prosecution may succeed in obtaining a conviction against the appellant for commission of an offence under Section 34 of the Indian Penal Code if the names of the other accused persons and the roles played by them are known. Specific overt act of the accused is not only known but is proved. In this case the first information report was against known persons..."

16. In *Lala Ram v. State of Rajasthan* [2007 (8) SCALE 621], this Court observed:

"7. 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 are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself\005

"10. 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."

17. Dr. J.P. Nayak (PW-5) examined Hukamchand and found abrasion on his body and a contusion 2 x <" in the left side of chest and just above the left nipple and along with a contusion 2 x =" was also found. One abrasion 1 <" was found in the middle part of the chest and blood was clotted on it.

18. Dr. V.K. Srivastava (PW-8) examined Naval Singh and found like a half moon size wound =" x =" on his body on the left side of his head which was deep to the above of the bone. According to Dr. Srivastava, this injury was caused by a hard and blunt weapon.

19. Dr. Srivastava also examined Dhoomsingh and found the following injuries on his person:

- "(1) A incised wound 3 x 1/6" x 1/6" in a curve size on the back side of the chest.
- (2) Incised wound on the wrist of the left hand 1/3" x 1/3" x 1/3".
- (3) Contused injury on the wrist of left hand <" x <".

According to Dr. Srivastava, these injuries were simple in nature.

20. Injuries caused to Naval Singh and Hukamchand were also simple in nature. In view of the nature of injuries caused by the appellant, he cannot be held to be guilty of commission of an offence under Section 302/34 of the Indian Penal Code. We, therefore, are of the considered view that the appellant is guilty of commission of an offence under Section 326 of the Indian Penal Code and not under Section 302/34 thereof.

21. Keeping in view of the facts and circumstances of this case, we are of the opinion that imposition of a sentence of 10 years Rigorous Imprisonment under the aforementioned provision shall meet the ends of justice. The Appeal is allowed in part and to the extent mentioned hereinbefore.