

Madhya Pradesh High Court

Depu @ Depak vs State Of M.P. on 6 May, 2022

Author: Vivek Rusia

- : 1 :-

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE
HON'BLE SHRI JUSTICE VIVEK RUSIA
&
HON'BLE SHRI JUSTICE AMAR NATH (KESHARWANI)

HEARD ON THE 20th OF APRIL, 2022

JUDGMENT PASSED ON 6th OF MAY, 2022

CRIMINAL APPEAL No. 1052/2009

Between: -

DEPU @ DEPAK S/O BHERULAL, AGED ABOUT 25
YEARS, OCCUPATION- LABOUR, R/O NILGANGA,
CHOURAHA, UJJAIN

.....APPELLANT

AND

STATE OF MADHYA PRADESH THROUGH POLICE
STATION KOTWALI, DISTRICT UJJAIN (MADHYA
PRADESH)

.....RESPONDENTS

CRIMINAL APPEAL No. 1220/2009

Between: -

1. JOGU @ JOGI @ YOGESH S/O PARAMANAND,
AGED 23 YEARS, R/O NEELGANGA CHOURAHA,
UJJAIN, DISTRICT UJJAIN.
2. ASHOK S/O JAGDISH, AGE 24 YEARS, R/O 28,
BHADURGANJ MAELI GALI, NO.3, UJJAIN,
DISTRICT UJJAIN.
3. VISHAL S/O VIJAY RATHORE, AGE 20 YEARS,
R/O 132 CHAMPAKUNDI BHADURGANJ, UJJAIN,
DISTRICT UJJAIN.

.....APPELLANT

AND

STATE OF MADHYA PRADESH THROUGH POLICE
STATION KOTWALI, DISTRICT UJJAIN (MADHYA
PRADESH)

.....RESPONDENTS

- : 2 :-

Shri Virendra Sharma, learned counsel for the appellants.

Shri Kamal Kumar Tiwari, learned Government Advocate for
the respondent/State.

JUDGMENT

Both the criminal appeals are being decided by the common judgment as all the appellants have been convicted and sentenced for murdering Manish and attempting to murder Rupesh.

***** Appellants have preferred these appeals under Section 374 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C.") against the judgment of conviction dated 07.08.2009, passed by Sessions Judge, Ujjain in Sessions Trial No.278/2007, whereby the appellants have been convicted and sentenced as mentioned below:-

Appellant-Depu @ Depak S/o Bherulal

CONVICTION			SENTENCE	
Section	Act	Imprisonment	Fine Amount	Imprisonment instead of fine
302/34	IPC	Life Imprisonment	Rs.10,000/-	6 Months S.I.
307/34	IPC	7 Years	Rs.10,000/-	6 Months S.I.
Both the sentence shall run concurrently.				

Appellant- Jogu @ Jogi @ Yogesh S/o Parmanand CONVICTION SENTENCE Section Act
Imprisonment Fine Amount Imprisonment instead of fine 302/34 IPC Life Imprisonment
Rs.10,000/- 6 Months S.I.

307/34 IPC 10 Years Rs.10,000/- 6 Months S.I

Both the sentence shall run concurrently.

Appellant- Ashok S/o Jagdish

CONVICTION			SENTENCE	
Section	Act	Imprisonment	Fine Amount	Imprisonment instead of fine
302/34	IPC	Life Imprisonment	Rs.10,000/-	6 Months S.I.
307/34	IPC	10 Years	Rs.10,000/-	6 Months S.I.

Both the sentence shall run concurrently.

Appellant- Vishal S/o Vijay Rathore

CONVICTION			SENTENCE	
Section	Act	Imprisonment	Fine Amount	Imprisonment instead of fine

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302/34	IPC	Life Imprisonment	Rs.10,000/-	6 Months S.I.
307/34	IPC	7 Years	Rs.10,000/-	6 Months S.I.

Both the sentence shall run concurrently.

[2] The case of the prosecution, in brief, is as follows: -

(a) As per the prosecution story, on 06.08.2007 near about 07:00 PM, the complainant Ashish was going to Paan shop from his house. He found that the accused persons were quarreling with Rupesh (the injured) and Manish (the deceased). Jogu Mali, Depu Meena, and Ajay Rathore were carrying a knife and assaulting Rupesh. His brother Manish came forward to save Rupesh, Ashok threatened Manish, and then Manish ran away from there. Ashok inflicted the injury to Manish by means of a knife. Accused Jagdish and Depak have instigated Ashok that Manish used to interfere with their business let finish him today. Ravi was carrying a stick. All accused persons have assaulted Manish and Rupesh. The incident was witnessed by localities. Manish and Rupesh were taken to Hospital by Ashish and Sanjay, on the day Manish died.

(b) Information was given to the Police on which Dehati Nalish was registered, followed by an FIR No180/2007 for the offence punishable under Section 302, 307, 119 read with Section 34 of I.P.C. The investigation was set into motion, a spot map was drawn, and blood stain soil, mobile and sleepers were seized from the spot. Lash Panchanama of Manish was prepared, thereafter postmortem was carried out. All accused were arrested and on their disclosure arms were recovered. Upon completion of the investigation, police filed a charge-sheet under Section 302, 307, 144, 147, 148, 149 of I.P.C. and Section 25 of Arms Act against Ravi, Depu @ Depak, Jogu @ Jogi @ Yogesh, Deepak, Jagdish, Ashok and Vishal. The trial was committed to the Sessions Court.

[3] Charges were framed against the appellants, which they denied and pleaded for trial. The prosecution has examined as many as 14 witnesses from PW-1 to PW-16 and got marked various documents. In defence, the appellant examined four witnesses.

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[4] After evaluating the evidence that came on record, the learned Sessions Judge has acquitted accused Ravi, Deepak S/o Jagdish, Jagdish from all the charges and convicted the appellants namely Depu @ Depak S/o Berulal, Jogu @ Jogi @ Yogesh, Ashok and Vishal and sentenced them as stated above. Hence, these criminal appeals before this Court.

[5] Out of the four accused, Depu @ Depak S/o Bherulal is on bail, the rest of the appellants have undergone more than 14 years of incarceration in the jail.

[6] Learned counsel for the appellants has argued that the learned Additional Session Judge has wrongly convicted the appellants when the prosecution has failed to establish the charges beyond reasonable doubts. There are omissions and contradictions which have been ignored by the learned Additional Session Judge. It is further submitted by the learned counsel that as per evidence that came on record, the appellants had no intention to commit the murder of Manish. The quarrel of

appellants was going on with Rupesh, Manish was trying to save Rupesh and sustained injuries on his chest, and back and died, therefore, the offence will not travel more than 304 (Part-I) of I.P.C. The allegation of causing the injury by means of the knife is only against Ashok, who has undergone 14 years of incarceration. Jagdish, Deepak S/o Jagdish and Ravi have been acquitted by the trial court on the same set of evidence by disbelieving testimony of ocular witnesses. Vishal is said to have caused injury on the back of Manish, others have caused minor injuries hence, they have wrongly been convicted u/s 302 with the aid of section 34 of I.P.C that after acquitting them under section 147,148 and 148 I.P.C. It is further submitted that once all the accused persons have been acquitted for the offence punishable under Section 147, 148 and 149 of I.P.C, as it is not a case of unlawful assemble with common object to commit the murder of Manish. The appellants were not charged under section 34 of I.P.C. therefore, they have been wrongly convicted u/s 302 and 307 I.P.C. with the aid of section 34 of I.P.C.

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[7] Learned Government Advocate has argued in support of the judgment and prayed for dismissal of criminal appeals. [8] As per the testimony of Dr P.M. Kumawat (PW-4) and his autopsy report, Manish sustained two stab wounds on the chest and back apart from the other seven injuries and died due to excessive bleeding. The stab injuries to Rupesh on his thy caused by the appellants Jogu and Depu are also not in dispute. Since there is no challenge to these findings by the appellants, we see no reasons to re-examine the same hence same are hereby confirmed.

[9] Learned counsel for the appellants has challenged that it is not a case of murder but culpable homicide not amounting to murder. In view of the statement of PW-2 and PW-10, who are the eyewitness, their testimony has remained unchallenged in the court. Both caused the stab injury on the vital parts of the body of the deceased and he died because of said injuries hence the learned Additional Session Judge has not committed any error in convicting the appellants Ashok and Vishal under section 302 of I.P.C. for the murder of Manish by means of a knife.

[10] The prosecution has examined Rupesh (PW-10), who has also been attacked by these appellants by means of a knife and he has fully supported the case of the prosecution. Rupesh has been confronted with his statement recorded under Section 161 of Cr.P.C. and according to him, police did not record that Jogu has caused the injury on his thy.

[11] Jogu and Deepu are said to have caused injury to Rupesh PW-10 on both thy hence they have been convicted under section 307 / 34 of I.P.C. According to PW-10 near about 07:00, he received information that Ashok, Jogu and Depu were quarreling with Abhishek. He went along with Manish near Congress Bhawan, to save Abhishek therefore, these appellants had no dispute with Rupesh and Manish hence there cannot be premeditation or preplanning to kill or injured them. Since Rupesh and Manish suddenly came between the quarrel and other accused have assaulted them by means of a knife in a heat of passion

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and anger. The learned Additional Session Judge has acquitted them under Section 147, 148 and 149 of I.P.C which means there was no common object to form unlawful assemble in the prosecution to commit an offence by these appellants. Since they caused stab injuries on the non-vital part hence at the most they are liable to be convicted u/s 324 of I.P.C. because of their overt act.

[12] Depu and Jogu assaulted the Rupesh by means of the knife on his thy which is not a vital part of the body, the treating doctor did not opine that the injuries could have been fatal. Had there been the intention to kill Rupesh they would have stabbed his vital part of the body, therefore, they have wrongly been convicted under Section 302 and 307 with the aid of section 34 of I.P.C. Rupesh was examined by Dr Anil Sinha (PW-8) who found incised wound 1 1/2 / 1/2 on his thy and did not give opinion that these injuries are sufficient to cause death, therefore, Jogu and Depu are liable to be convicted under section 324 of I.P.C. for causing injury to Rupesh, hence, their conviction accordingly liable to modify. But they all have been convicted with the aid of 34 I.P.C. So far as section 34 of I.P.C. is concerned, there is no material that appellants shared a common intention to attack Manish (the deceased) and Rupesh (the injured). Learned Additional Session Judge has convicted them with the aid of section 34 of I.P.C. because after the acquittal of three accused the number of accused has been reduced to 4. There is no evidence led by the prosecution that all 4 appellants shared the common intention to commit this crime, therefore, all the appellants have wrongly been convicted under section 302/34 and 307/34 of I.P.C. We find support from the judgment passed by the Apex court which is reproduced below with relevant paras:-

Mala Singh v. State of Haryana, reported in (2019) 2 SCC (Cri) 452

43. This principle of law was then reiterated after referring to law laid down in Willie (William) Slaney [Willie (William) Slaney v. State of M.P. AIR 1956 SC 116 : 1956 Cri LJ 291] in Chittarmal v. State of

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Rajasthan [Chittarmal v. State of Rajasthan, (2003) 2 SCC 266 : 2003 SCC (Cri) 514] in the following words: (Chittarmal case [Chittarmal v. State of Rajasthan, (2003) 2 SCC 266 : 2003 SCC (Cri) 514] , SCC p. 273, para 14) "14. It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations 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 the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. 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 Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 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 Section 34 for Section 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 Section 149 is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. (See *Barendra Kumar Ghosh v. King Emperor* [*Barendra Kumar Ghosh v. King Emperor*, 1924 SCC OnLine PC 49 : (1924-25) 52 IA 40 : AIR 1925 PC 1] ; *Mannam Venkatadari v. State of A.P.* [*Mannam Venkatadari v. State of A.P.*, (1971) 3 SCC 254 : 1971 SCC (Cri) 479] ; *Nethala Pothuraju v. State of A.P.* [*Nethala Pothuraju v. State of A.P.*, (1992) 1 SCC 49 : 1992 SCC (Cri) 20] and *Ram Tahal v. State of U.P.* [*Ram Tahal v. State of U.P.*, (1972) 1 SCC 136 : 1972 SCC (Cri) 80])"

44. In the light of the aforementioned principle of law stated by this Court which is now fairly well settled, we have to now examine the evidence of this case with a view to find out as to whether the High Court was justified in convicting Appellants 2 and 3 herein for commission of offence of murder with the aid of Section 34 IPC which was initially not the charge framed against the appellants herein by the Sessions Judge.

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45. Having perused the entire evidence and legal position governing the issues arising in the case, we have formed an opinion that the appeal filed by Appellants 2 and 3 deserves to be allowed and the conviction of Appellants 2 and 3 deserves to be altered to Section 324 IPC. This we say for the following reasons:

45.1. First, once eight co-accused were acquitted by the High Court under Sections 302/149 IPC by giving them the benefit of doubt and their acquittal attained finality, the charge under Section 149 IPC collapsed against the three appellants also because there could be no unlawful assembly consisting of less than five accused persons. In other words, the appellants (3 in number) could not be then charged with the aid of Section 149 IPC for want of numbers and were, therefore, rightly not proceeded with under Section 149 IPC. 45.2. Second, keeping in view the law laid down by this Court in the cases referred to supra, the High Court though had the jurisdiction to alter the charge from Section 149 IPC to Section 34 IPC qua the three appellants, yet, in our view, in the absence of any evidence of common intention qua the three appellants so as to bring their case within the net of Section 34 IPC, their conviction under Sections 302/34 IPC is not legally sustainable.

46. In other words, in our view, the prosecution failed to adduce any evidence against the three appellants to prove their common intention to murder Mahendro Bai. Even the High Court while altering the charge from Section 149 IPC to Section 34 IPC did not refer to any evidence nor gave any reasons as to on what basis these three appellants could still be proceeded with under Section 34 IPC notwithstanding the acquittal of remaining eight co-accused.

47. It was the case of the prosecution since inception that all the eleven accused were part of unlawful assembly and it is this case, the prosecution tried to prove and to some extent successfully before the Sessions Judge which resulted in the conviction of all the eleven accused also but it did

not sustain in the High Court.

48. In our view, the evidence led by the prosecution in support of charge under Section 149 IPC was not sufficient to prove the charge of common intention of three appellants under Section 34 IPC though, as mentioned above, on principle of law, the High Court in its appellate jurisdiction could alter the charge from Section 149 to Section 34 IPC.

49. Section 34 IPC does not, by itself, create any offence whereas it has been held that Section 149 IPC does. As mentioned above, the prosecution pressed their case since inception and accordingly adduced evidence against all the accused alleging that all were the members of unlawful assembly under Section 149 IPC and not beyond

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it. The Sessions Court, therefore, rightly framed a charge to that effect. If the prosecution was successful in proving this charge in the Sessions Court against all the accused persons, the prosecution failed in so proving in the High Court.

50. The prosecution, in our view, never came with a case that all the 11 accused persons shared a common intention under Section 34 IPC to eliminate Mahendro Bai and nor came with a case even at the appellate stage that only 3 appellants had shared common intention independent of 8 co-accused to eliminate Mahendro Bai.

51. When the prosecution did not set up such case at any stage of the proceedings against the appellants nor adduced any evidence against the appellants that they (three) prior to date of the incident had at any point of time shared the "common intention" and in furtherance of sharing such common intention came on the spot to eliminate Mahendro Bai and lastly, the High Court having failed to give any reasons in support of altered conviction except saying in one line that conviction is upheld under Sections 302/34 IPC in place of Sections 302/149 IPC, the invoking of Section 34 IPC at the appellate stage by the High Court, in our view, cannot be upheld.

[13] In view of the above discussion, both criminal appeals are partly allowed, the judgment of conviction dated 07.08.2009, passed by Sessions Judge, Ujjain in Sessions Trial No.278/2007, is hereby modified as under and the appellants are convicted and sentenced as mentioned below:-

Appellant-Depu @ Depak S/o Bherulal

CONVICTION		SENTENCE		
Section	Act	Imprisonment	Fine Amount	Imprisonment instead of fine
324	IPC	Undergone	Rs.3,000/-	3 Months S.I

Appellant- Jogi @ Jogi @ Yogesh S/o Parmanand CONVICTION SENTENCE Section Act Imprisonment Fine Amount Imprisonment instead of fine 324 IPC 3 years Rs.3,000/- 3 Months S.I

Appellant- Ashok S/o Jagdish CONVICTION SENTENCE Section Act Imprisonment Fine Amount Imprisonment instead of fine 302 IPC Life Imprisonment Rs.10,000/- 6 Months S.I.

Appellant- Vishal S/o Vijay Rathore
CONVICTION

SENTENCE

- : 10 :-

Section	Act	Imprisonment	Fine Amount
302	IPC	Life Imprisonment	Rs.10,

[14] The appellant Depu @ Depak is on bail. His bail bond is discharged. He do not need to surrender before the Trial Court. The appellant Jogu@ Jogi @ Yogesh be set free after depositing the fine amount if he is not required to keep in jail in any other case.

The record of the learned trial court be sent back alongwith judgment for its compliance.

Office is directed to place the photocopy of this judgment in connected appeal.

Certified Copy as per rules.

(VIVEK RUSIA)
JUDGE

(AMAR NATH)

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