

HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

DIVISION BENCH

BEFORE: G.S.AHLUWALIA

AND

RAJEEV KUMAR SHRIVASTAVA, JJ.

Criminal Appeal No. 542/2003

State of Madhya Pradesh

Versus

Ram Outar and Subhash

Shri B.P.S.Chouhan, learned Public Prosecutor, for the appellant/
State.

Shri R.K.Singh Kushwaha, learned counsel for the respondents.

J U D G E M E N T

(30/04/2021)

Per Rajeev Kumar Shrivastava, J.:

Challenge in this appeal filed by the State/appellant under Section 378 of the CrPC is to the judgement dated 4.2.2003 passed by Sixth Additional Sessions Judge (Fast Track Court), Bind in Sessions Trial No.347/2000, whereby the present respondents Ram Outar and Subhash Sharma were acquitted from the charge of Sections 148, 302, 149 of the IPC.

2. Vide the judgement impugned in the present appeal, the trial Court has acquitted accused Subhash and Ramavtar from the offences under Sections 148 and 302 read with Section 149 of IPC but has convicted the accused/appellant Ashok under Section 302 read with Section 34 of IPC for the murder of Mataprasad and under Section 302 read with Section 34 of IPC for the murder of Tejraj, considering the fact that there was common intention. Against conviction and sentence, accused Murari and Ashok has

filed separate Criminal Appeal No. 196/2003. As per the request of learned counsel for the parties, both the appeals (Criminal Appeal No.196/2003 and Criminal Appeal No. 542/2003) are being decided simultaneously by passing separate judgment in each appeal. It is further pertinent to note that the appeal filed by Kishan Dutt, Ramvaran and Ramkishore against their conviction has been delinked from the present appeal as the aforesaid accused persons were absunder and they were separately tried and judgment was passed on 23.1.2019.

3. The facts necessary to be stated for disposal of the instant appeal are that as per prosecution version, on 16.10.1999 deceased Mataprasad and Tejram left their house at about 5-6 am for the purpose of ploughing the field asking the family members to bring breakfast at the field itself. Harendra Kumar (PW-4) and Shailendra (PW-9), son and daughter of deceased Tejram respectively, and Dharmendra, son of deceased Mataprasad reached at the field in order to serve the breakfast. At that time, the deceased Mataprasad and Tejram were cutting grass. In the meantime, accused persons reached there by their tractor-trolley. Accused Subhash was driving the tractor and other accused persons were armed with guns etc. Seeing them, Tejram and Mataprasad tried to run away. When they started their tractor, all the accused persons surrounded them and Murari fired a gunshot which hit Mataprasad and Mataprasad fell down from the tractor. Harendra, Shailendri and Dharmendra being afraid of that hide themselves in the field of Bajra. All the accused persons were beating Mataprasad and Tejram. Shriprakash, Ramkumar, Jaiprakash and Sitaram working in their adjoining fields reached there. After the incident, accused persons went away. In the incident, Mataprasad and Tejram died on the spot.

4. First Information Report was lodged on 16.10.1999 at Police Station Pawai, District Bhind by Harendra Kumar (PW-4). Thereafter, Lash Panchnama was prepared and map was also prepared. Statements under Section 161 of CrPC were recorded and after completion of investigation charge sheet was filed.

5. The grounds raised are that on the date of incident accused Subhash was driving the tractor by which all the accused persons reached at the place of incident and after commission of offence accused persons returned back by the same tractor. The aforesaid act was in furtherance of common object and presence of accused Ram Outar at the place of incident has been proved. Harendra Kumar (PW-4) and Shriprakash (PW-2) have stated in their statement that Subhash and Ram Outar had also surrounded deceased Mataprasad and Tejram along with other co-accused persons and they were saying “maaro bachne na paaye” (“Kill them, do not leave them alive”). In First Information Report Subhash and Ram Outar are implicated as accused. The FIR was lodged just immediately after the incident. The trial Court had convicted the co-accused Murari and Ashok on the basis of same set of evidence and has acquitted Ram Outar and Subhash. Therefore, considering the fact that there was common object and to achieve the object of unlawful assembly the aforesaid offence has been committed by the respondents Ram Outar and Subhash. Hence, the present appeal has been filed.

6. Per Contra, learned counsel for the respondents opposed the submissions and submitted that the trial Court after appreciation of evidence available on record has rightly acquitted the respondents and no interference is called for by this Court in the findings of acquittal arrived at by the trial Court.

7. Heard learned counsel for the parties and perused the

record.

8. On perusal of trial Court's judgment it is apparent that the trial Court has acquitted co-accused Murari and Ashok from the charges of section 148 of IPC. As per prosecution, PW-4 Harendra Kumar, who lodged the FIR Ex./9, was eye-witness and immediately after incident Harendra Kumar had lodged the report, hence supported the story of prosecution, but from the statement of Harendra Kumar it is not reflected that the accused Subhas had participated in the incident. There was no overt act on the part of Subhash and Ram Outar. The trial Court has convicted accused Ashok with the help of Section 34 of IPC.

9. Section 34 of Indian Penal Code runs as under :-

“34.-- Acts done by several persons in furtherance of common intention.-- When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

10. Section 34 of the Indian Penal Code recognises the principle of vacarious liability in criminal jurisprudence. A bare reading of this Section shows that the Section could be dissected as follows :

- (a) Criminal act is done by several persons;
- (b) Such act is done in furtherance of the common intention of all; and
- (c) Each of such persons is liable for that act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court in determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common

intention are proved then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 I.P.C. Must be done by several persons. The emphasis in this part of the Section is on the word 'done'. It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity. The Section does not envisage a separate act by all of the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

11. Section 34 is intended to meet a situation wherein all the co-accused have also done something to constitute the commission of a criminal act. Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34 e.g., the co-accused can remain a little away and supply weapons to the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this; One of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. The act mentioned in Section 34 I.P.C., need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act e.g., a co-accused, standing near the victim face to face saw an

armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the Section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 I.P.C., cannot be invoked for convicting that person. This Section deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the Section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. This Section refers to cases in which several persons both intend to do and do an act. It does not refer to cases where several persons intended to an act and some one or more of them do an entirely different act. In the latter class of cases, Section 149 may be applicable if the number of the persons be five or more and the other act was done in prosecution of the common object of all.

12. In **Suresh Sankharam Nangare vs. State of Maharashtra [2012 (9) SCALE 345]**, it has been held that “if common intention is proved but no overt act is attributed to the individual accused, section 34 of the Code will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, section 34 cannot be involved. In other words, it requires a pre-arranged plan and pre-supposes prior concert, therefore, there must

be prior meeting of minds.”

13. In **Shyamal Ghosh vs. State of West Bengal [AIR 2012 SC 3539]**, it is observed that “ Common intention means a pre-oriented plan and acting in pursuance to the plan, thus common intention must exist prior to the commission of the act in a point of time.”

14. In **Mrinal Das vs. State of Tripura [AIR 2011 SC 3753]**, it is held that “the burden lies on prosecution to prove that actual participation of more than one person for commission of criminal act was done in furtherance of common intention at a prior concert.”

15. In **Ramashish Yadav v. State of Bihar [AIR 1999 SC 1083]**, it is observed that “it requires a pre-arranged plan and pre-supposes prior concert therefore there must be prior meeting of mind. It can also be developed at the spur of moment but there must be pre-arrangement or premeditated concert.”

16. Mainly two elements are necessary to fulfill the requirements of Section 34 of IPC. One is that the person must be present on the scene of occurrence and second is that there must be a prior concert or a pre-arranged plan. Unless these two conditions are fulfilled, a person cannot be held guilty of an offence by the operation of Section 34 of IPC. Kindly see, **Bijay Singh v. State of M.B. [1956 CrLJ 897]**.

17. In a murder case a few accused persons were sought to be roped by Section 34 I.P.C. It was found that one of the accused persons alone inflicted injuries on the deceased and the participation of the other accused persons was disbelieved. The person who alone inflicted injuries was held liable for murder and others were acquitted. Kindly see, **Hem Raj vs. Delhi**

(Administration) [AIR 1990 SC 2252].

18. In **Dashrathlal v. State of Gujarat [1979 CrLJ 1078 (SC)]**, it has been observed that “by merely accompanying the accused one does not become liable for the crime committed by the accused within the meaning of Section 34 I.P.C.”

19. There was land dispute between the members of a family, as a result of which deceased persons were attacked by the accused persons, in which one accused stabbed both the deceased persons and other caused simple injuries with a stick. It was held that the conviction of both the accused under Section 34 read with Section 302 IPC was not proper. Other accused was convicted under Section 324 of IPC. Kindly see, **Rajagopalswamy Konar vs. State of Tamil Nadu [1994 CrLJ 2195 (SC)]**.

20. In **Sheikh Nabab v. State of Maharashtra [1993 CrLJ 43(SC)]**, it is observed that “the overtact on the part of accused could not be proved and it was held that the order of the conviction was not proper.”

21. From perusal of the record, it is evident that Dr. O.P.Kashtwar (PW-5), has stated that on 16.10.1999, Constable No.3 Vishambhar Dayal of Police Station Pawai, had brought the body of deceased Mata Prasad S/o Dashrath R/o Birgawa. Post-mortem of body of Mataprasad was done and vide post-mortem report (Ex.P/10) following injuries were found on the body of deceased Mataprasad :-

- (i) Lacerated wound 4cm x 4cm x muscle deep on left side of neck below lobule of left ear, blackening around wound present;
- (ii) Lacerated wound 4cm x 4cm x muscle deep, margin everted, blunt probang could be passed through injury No.(i) to injury No.(ii);
- (iii) Lacerated wound 2.5cm x 2cm. Oval in shape over right side of chest at right steno

- clavicle joint margin invert, blackening present over the wound;
- (iv) Lacerated wound 15cm x 12cm x muscle deep on right side upper scapula region, muscle tissues coming out, ribs No.4,5,6 were fractured. Thoracic cavity was filled with blood.
 - (v) Lacerated wound 2.5cm x 2cm posterior over rear of neck, blackening around wound present;
 - (vi) Lacerated wound 3cm x 2cm over right side back of chest, margin everted;
 - (vii) Lacerated wound 12cm x 12cm x muscle deep over middle of left forearm and one third part of muscle absent.

The aforesaid injuries were anti-mortem injuries and were caused prior to 18 hours of death. The cause of death was shock due to excessive external and internal bleeding owing to injuries over the body.

22. On the same day, Dr. O.P.Kashtwar (PW-5) has also conducted post-mortem of deceased Tejram S/o Dashrath, R/o Village Birgawa, and found following injuries on the body of deceased Tejraj vide post-mortem report (Ex.P/11):-

- (i) Lacerated wound, left scapular region, size 2.5 cm square in shape, margin inverted, blackening around wound present;
- (ii) Lacerated wound 1.5 cm square in shape over right ear, blackening over the wound present and banks were inverted;
- (iii) Lacerated wound 8cm x 3cm x muscle deep, far from injury No.(ii) and wound banks were everted.

The aforesaid injuries were anti-mortem and were caused prior to 18 hours of death of deceased. The cause of death was shock due to excessive external and internal bleeding owing to injuries over the body.

23. Dr. Kashtwar (PW-5) has also stated that on 8.3.2000,

S.O. Police Station, Pawai sent a query report, wherein he informed the police that the injuries found over bodies of deceased Mataprasad and Tejram were caused by firearm. Injuries No.(i), (iii) and (v) were entry wounds and injuries No. (ii), (iv) and (vi) were exit wound found over the body of deceased Mataprasad, and injuries No.(i) and (ii) were entry wounds and injury No.(iii) was exit wound found over the body of deceased Tejram. The foreign bodies found in the body of Mataprasad and Tejram were sealed by him and handed over to the Police Constable. The death of deceased Mataprasad and Tejram was due to gunshot injury.

24. During trial, prosecution witness (PW) No.1 Ramlal, Constable, who is the witness to seizure memo (Ex.P/1) proved the recovery of metal particles, extracted from the body of the deceased Mataprasad and Tejram. Shriprakash (PW-2), the Eye-witness, Rampujan (PW-3) and Sukhdev Sharma (PW-6), are the witnesses of Ex.P/6 spot map, Ex.P/7 and P/8, seizure memos, whereby soil stained with blood, two covers of 12 bore cartridge and 2 brass cover of 315 bore cartridges. Harendra Kumar Sharma (PW-4), eye-witness, Dr. O.P.Kashtwar (PW-5), who did postmortem of the bodies of deceased Mataprasad and Tejram, Ram Kumar (PW-7), Jaiprakash Sharma (PW-8) and Shailendri (PW-9), who are the eye-witnesses, were examined. P.K.Chaturvedi (PW-10), Station Officer Police Station Surpura, who investigated the matter, Keshav Singh Tomar (PW-11), Head Constable, who lodged FIR (Ex.P/9), J.D.Verma (PW-12), who recorded statements under Section 161 of CrPC of witnesses Shriprakash, Ramkumar, Jaiprakash; Mahesh Shrivastava (PW-13), the-then S.O., Police Station Pawai, were examined. On the basis of statements given by the aforesaid witnesses the trial Court convicted and sentenced Murari (now dead) and Ashok, as

aforesaid. Eye-witnesses of this case, namely, Shriprakash, Ramkumar, Jaiprakash and Sitaram are the independent witnesses and Harendra Kumar (PW-9) and Shailendri (PW-9) are son and daughter of deceased Tejram. Another witness Dharmendra, who is the son of deceased Mataprasad, has not been examined. Shriprakash (PW-2), Ramkumar (PW-7), Jaiprakash (PW-8) have specifically stated that Murari caused gun shot injury on the chest of Mataprasad and also caused gunshot injury on the head of deceased Tejram and accused Ashok was also having 12 bore double barrel gun. Sitaram, who is also said to be the eye-witness, has not been examined by the prosecution and the statements given by the aforesaid prosecution witnesses remained unrebutted in cross-examination.

25. The Eye-witness, Harendra (PW-4) lodged the FIR (Ex.P/9). Immediately after the incident FIR has been lodged, but from the statement of PW-4 Harendra it is not reflected that the accused Subhash had participated in the incident. Besides above, from the prosecution evidence itself it is apparent that there is lack of evidence requiring to make the accused Ram Outar and Subhash liable with the aid of Section 34 I.P.C. Furthermore, prosecution has failed to prove any overt act on the part of present respondents Ram Outar and Subhash.

26. In the light of above annunciation of law, it is clear that in the case in hand the trial Court has acquitted the other co-accused from the charges of Section 148 of IPC. Therefore, with the aid of Section 34, the co-accused, who are respondents in this case namely, Ram Outar and Subhash, have been acquitted and as discussed above, no overt act on the part of the present respondents is proved. Therefore, in the light of aforesaid observations, we find no merit in the present appeal against

acquittal.

27. Consequently, the appeal filed by appellant/State u/s. 378 of the Cr.P.C against acquittal of present respondent Ram Outar and Subhash is dismissed and impugned judgment of trial court regarding aforesaid respondents is affirmed. Respondents are on bail. Their bail bonds are discharged and in future they need not to appear before Registry of this court in connection to this appeal.

28. With a copy of this judgment, the record of the trial court be sent back immediately.

(Yog)

(G.S.Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge