

A SH. JAGANNATH AND ORS.
v.
STATE OF UTTAR PRADESH

JANUARY 12, 1995

B [DR. A.S. ANAND AND M.K. MUKHERJEE, JJ.]

C *Indian Penal Code, 1860—Section 302/34 and 324/34—Common intention—Ocular evidence that appellants chased and surrounded deceased when he was attacked by other accused—No role attributed to them in FIR—Evidence of PW1 of their having assaulted deceased with lathis—Whether their common intention was to commit murder—Held, No—Their common intention was to cause injuries to deceased with a deadly weapon—Conviction u/s 302/34—Not sustainable—Accused convicted u/s 324/34.*

D **The three appellants had been convicted u/s 302/34 IPC, for assaulting the deceased with lathis. A heated altercation took place between the deceased and the accused over dismantling of the mend which divided their respective agricultural lands. While the altercation was going on, the three appellants reached there armed with lathis. Trial Court convicted them**
E **primarily upon the ocular evidence that the appellants assaulted the deceased with lathis while other accused assaulted him with spear resulting in his death and thereby concluding that they shared the common intention of committing the murder of deceased. In appeal, the High Court concurred with all the findings recorded by the trial judge and dismissed**
F **the appeal. This appeal had been filed against the judgment of the High Court. Both the courts took into consideration the fact that testimony of PW 1 stood corroborated by the FIR, which he lodged with utmost dispatch. It was not stated in the FIR that the appellants had also assaulted the deceased much less with lathis.**

G **The respondents urged that even if the testimony of PW1 that the three appellants assaulted the deceased could be relied upon as he did not attribute any such role to them in the FIR still then their conviction under Section 302 r/w 34 IPC for committing the murder of the deceased should be upheld having regard to the fact that the evidence of PW1 that the**
H **appellants had chased and surrounded the deceased when he was attacked**

by the other accused stood corroborated by the FIR and that their such criminal acts, clearly established their common intention to commit the murder.

Allowing the appeal, this Court

HELD : 1.1. In view of the concurrent findings of fact, it would not have, ordinarily, been justified to disturb the same but on perusal of the impugned judgments, it was found that both the courts below failed to consider that PW1 did not state in the FIR that the three appellants had assaulted the deceased with lathis. This aspect of the matter assumed importance for, in concluding that the three appellants shared the common intention of committing the murder of the deceased, with accused and, for that matter, convicting them under Section 302 with the aid of Section 34 Indian Penal Code - while convicting the other accused u/s 302 IPC simpliciter, the trial court was much influenced by the fact that the appellants assaulted him with spear resulting in this his death. [201-E-G]

1.2. In the FIR, the only role that was ascribed by PW1 to the appellants relating to the attack on the deceased was that when he had run towards the village they had also chased him along with the other two accused and surrounded him. In the FIR he did not state that the appellants had also assaulted the deceased. [202-C]

1.3. Relying upon the sole-testimony of PW1 both the courts below took into consideration the fact that his testimony stood corroborated by the FIR which he lodged with utmost dispatch. In view of this material omission it would be hazardous to place implicit reliance upon the statement of PW1 without any corroborating evidence that the appellants had along with the other accused assaulted the deceased resulting in his death and that they shared the common intention with the other accused to commit the murder of the deceased. [202-D-F]

Beside the evidence of PW1 of their having assaulted the deceased with lathies, there was no other evidence to indicate that they wanted the deceased to be done away with. Though their acts facilitated the stabbing of the deceased by the other accused, there was nothing to indicate that the appellants knew that he intended to kill him though they must have anticipated that he would assault the deceased with the spear he was carrying. Therefore, though the common intention of the appellants to

A cause the death of the deceased had not been established beyond all reasonable doubts, it had been conclusively established that their common intention was to cause injuries to the deceased with a deadly weapon, namely, spear. Therefore, they are convicted u/s 324/34 IPC and sentenced to rigorous imprisonment for a period of two years each. [203-B-E]

B CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 63 of 1994.

From the Judgment and Order dated 27.9.93 of the Allahabad High Court in Crl. A. No. 255 of 1979.

C R.K. Kohli, Harjinder Singh, Varinder Kr. Sharma, Debasis Mishra, Pramod Swarup and A.S. Pundir for the appearing parties.

The Judgment of the Court was delivered by

D **M.K. MUKHERJEE, J.** This appeal by special leave is directed against the Judgment of the Allahabad High Court dismissing the appeal preferred by the three appellants herein and one Badri Narayan (since dead) challenging the conviction and sentence recorded against them under Section 302/34 and 323/34 of the Indian Penal Code (hereinafter referred to as the 'IPC') by the Additional Sessions Judge, Gonda.

E The story as put forth by the prosecution was that on June 7, 1978 at or about 9.00 A.M. a heated altercation took place between Shyam Narain (the deceased) and his brother Narain Dutt on the one hand and Badri Narain and his son Swami Nath (since acquitted) on the other, over dismantling of the mend which divided their respective agricultural plots. At that time Badri Narain was holding a spear and Swami Nath a *Kudal* with him. While the altercation was going on, the three appellants reached there armed with lathis. In course of the altercation when Swami Nath attempted to attack Shyam Narain with the *Kudal* the latter and Narian Dutt tried to run away towards the village but could not succeed as the five accused persons, including the appellants, surrounded them and started assaulting Shyam Narain with their respective weapons. On hearing the shouts of Shyam Narain and Narain Dutt when their brother Swami Dayal and his son Ramashis reached there, the three appellants also assaulted them with lathis. As a result of the beating when Shyam Naryan dropped

down dead, the accused persons ran away. Swami Dayal then went to the police station and lodged an FIR whereupon a case was registered, which ended in a chargesheet against all the five accused persons.

To bring home the charges levelled against them the prosecution rested its case primarily upon the ocular version of the incident as given out by Swami Dayal (P.W.1), Jamil Khan (P.W.2) and Narain Dutt (P.W.3). The learned trial judge, found that the claim of Jamil Khan and Narain Dutt that they were present at the time of the incident and, for that matter, had witnessed the same was wholly untenable and, therefore, left their evidence out of consideration. As regards, Swami Dayal (P.W.1), the learned Judge observed that find of injury on his person, as testified by the doctor (P.W.5) and his prompt lodging of the F.I.R. lent sufficient corroboration to his testimony to form the basis of conviction. It having, however, appeared to the learned Judge that Swami Nath was roped in because he was the son of Badri Narain though he did not participate in the assault he acquitted Swami Nath, while recording the order of conviction and sentence against the appellants and Badri Narain. The High Court concurred with all the findings recorded by the learned trial Judge and dismissed the appeal.

In view of the concurrent findings of fact we would not have, ordinarily, been justified to disturb the same but then on perusal of the impugned judgments we find that both the learned courts below failed to consider that Swami Dayal did not state in the F.I.R. that the three appellants had assaulted the deceased with lathis. This aspect of the matter assumes importance for, it appears that in concluding that the three appellants shared the common intention of committing the murder of Shyam Narain with Badri Narain and, for that matter, convicting them under Section 302 with the aid of Section 34 I.P.C. - while convicting Badri Narain under Section 302 I.P.C. simpliciter - the trial court was much influenced by the fact that the three appellants assaulted Shyam Narain with lathis while Badri Narain assaulted him with spear resulting in his death.

From the testimony of Swami Dayal (P.W.1) we get that on the fateful morning when he was going towards their plot along with his son Ramashish he saw accused Swami Nath and Badri Narain having heated arguments with his brothers Shyam Narayan and Narian Dutt regarding the

A dismantling of the mend. At that time he found Badri Narain holding a spear and Swami Narain a *Kudal*, but his brothers unarmed. While they were on the plot and the arguments were going on the other three accused (the three appellants herein) reached there with lathis. All of them then started abusing Shyam Narain and Narain Dutt. In the meantime Swami Nath attacked Shyam Narain with the *Kudal* but as he retreated it did not hit him. Then, as Shyam Narain and Narain Dutt tried to flee towards the village, all the accused persons attacked Shyam Narain. According to P.W.1, Badri Narain assaulted him with spear and the three appellants with the lathis. He next spoke about the assault on him and his son by the three appellants and Badri Narain. In the F.I.R. however, the only role that was ascribed by P.W.1 to the three appellants relating to the attack on Shyam Narain was that when he had ran towards the village they had also chased him along with the other two accused and surrounded him. To put it negatively, in the F.I.R. he did not state that the appellants had also assaulted the deceased much less with lathis.

D As already stated in relying upon the sole testimony of P.W. 1 both the learned courts below took into consideration the fact that his testimony stood corroborated by the F.I.R. which he lodged with utmost dispatch. In that context, it was expected, in the fitness of things, that if really the appellants had assaulted the deceased Swami Dayal , P.W. 1 would have certainly mentioned that fact in the F.I.R. In view of this material omission it would be hazardous to place implicit reliance upon the statement of P.W. 1 without any corroborating evidence that the appellants had along with Badri Narain assaulted Shyam Narain resulting in his death; and to hold, as a corollary thereto, that they shared the common intention with the other accused to commit the murder of Shyam Narain.

G It was, however, urged on behalf of the respondents that even if the testimony of Swami Dayal that the three appellants assaulted the deceased could not be relied upon as he did not attribute such role to them in the F.I.R. still then their conviction under Section 302 read with Section 34 of the I.P.C. for committing the murder of Shyam Narain should be upheld having regard to the fact that the evidence of P.W.1 that the appellants had chased and surrounded the deceased when he was attacked by the other accused stood corroborated by the F.I.R. and that their such criminal acts, clearly established their common intention to commit the murder.

Undoubtedly the above criminal acts of the three appellants, which must be held to be conclusively proved in view of the concurrent findings of the Learned Courts below, clearly indicate that they shared some common intention with the other accused but then the question is whether their common intention was to commit the murder: Besides the evidence of P.W.1 of their having assaulted the deceased with lathis - which we have found to be unacceptable - there is no other evidence, to indicate, that they wanted the deceased to be done away with. It cannot be gainsaid, however, that their acts facilitated stabbing of the deceased by Badri Narain but there is nothing whatsoever to indicate that the appellants knew that he intended to kill him though they must have anticipated that he would assault the deceased with the spear that he was carrying. In that view of the matter we conclude that though the common intention of the appellants to cause the death of Shyam Narain has not been established beyond all reasonable doubts, it has been conclusively established that their common intention was to cause injuries to the deceased with a deadly weapon, namely spear.

In the result the conviction of the appellants under Section 302 read with Section 34 IPC and the sentence of imprisonment for life for causing the death of Shyam Narain are set aside and instead they are convicted under Section 324 read with Section 34 IPC and sentenced to rigorous imprisonment for a period of two years each. Their other conviction under Section 323 read with Section 34 IPC, along with the sentence of six months each thereunder, is upheld as it does not suffer from any infirmity. The sentences shall run concurrently. The appeal is thus allowed in part.

A.G.

Appeal allowed.