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STATE OF U.P.

v.

JHINKOO NAI

AUGUST 03, 2001

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[M.B. SHAH AND DORAISWAMY RAJU, JJ.]

Penal Code, 1860 :

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Ss. 302/34, 307/34 and 324—Murder—Common intention to commit the offence—Inference of—Murder by inflicting knife blows—Accused persons trying to rape the victim and on her resistance one of the accused murdering her and the other two injuring her father and mother—Pending trial, one of the accused died—Trial Court convicting two of the accused for offences under Sections 302/34 and 307/34 and acquitting the third accused—Pending appeal before High Court, the other co-accused also died—High Court altering the sentence of respondent-accused to one under Section 324 by holding that the act of knife blows by accused was his individual acts—Held, not justified—Conviction and sentence as ordered by trial court, restored.

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Section 302/34—Common intention—Held, can be proved on the basis of direct evidence or by inference from acts or attending circumstances and conduct of the parties—No distinction can be made between persons inflicting fatal and non-fatal injuries for allocating the guilt.

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Accused persons armed with weapons entered the house of complainant in the night to take revenge for a quarrel that had taken place during the day. They forcefully lifted the daughter of complainant to satisfy their lust. When she resisted, one of the accused stabbed her in the chest resulting in her death. On raising alarm, accused persons gave knife blows to other inmates of the house. During the pendency of trial, one of the accused died. Trial Court convicted two of the accused persons for offences under Sections 302/34 and 307/34 IPC and acquitted the third accused. Convicted persons filed appeal before the High Court. During the pendency of the appeal one of the co-accused expired and his appeal stood abated. High Court held that the assault by knife on complainant and her husband were individual acts of accused and altered the conviction of respondent accused from Sections 302/34 and 307/34 IPC to one under Section 324 IPC. Hence this appeal by State

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and the respondent accused filed SLP against his conviction. A

Allowing the State's appeal and dismissing the SLP filed by the respondent-accused, the Court.

HELD : 1. The High Court erred in altering the conviction of the accused from Sections 302/34 and 307/34 IPC to one under Section 324 IPC on the ground that assault by knife on complainant and her husband were individual acts of the accused. The order of the High Court is quashed and set aside. The order of conviction and sentence passed by the trial court is restored. [271-D, E, F] B

2.1. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. For common intention, there could rarely be direct evidence. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of the case. When several persons simultaneously attack with common intention, no distinction between causing the fatal and non-fatal wounds could be drawn while allocating the guilt. [270-C-D] C
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H.P. Thakore v. State of Gujarat, [1976] 4 SCC 640, relied on.

Mithu Singh v. State of Punjab, [2001] 4 SCC 193, distinguished. E

2.2. In the instant case, accused were armed with knives; they entered the house of the complainant in the night; on refusal to submit to their sexual lust, accused despite resistance by the girl lifted her and brought her to the verandah. At that stage when deceased was crying and resisting, her father and her mother got up and started raising shouts. One of the accused gave knife blow to the deceased and two others gave knife blows to her father and mother. From these facts, the only reasonable inference which could be drawn is that common intention of the accused was to ravish the young poor harijan girl and in case of resistance, to commit murder by inflicting knife blows. Their adventure in criminality cannot be watered down or nullified by contending that injuries caused by them have not resulted in death of the complainant and her husband, viz. the parents of the girls. [271-A, B, C] F
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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1077 of 1999. H

A From the Judgment and Order dated 28.5.99 of the Allahabad High Court in CrI. A. No. 2478 of 1980.

WITH

S.L.P. (CrI.) No. 2857/2001 IN CrI. M.P. No. 9206/2000 (Vice Versa).

B Praveen Swarup, Prashant Choudhary and Pramod Swarup, Advs. for the appellants/Petitioner.

K.B. Sinha, Sr. Adv., R.K. Singh and P.N. Ramalingam, Advs. with him for the Respondent.

C The following Judgment of the Court was delivered :

SHAH, J. In Sessions Trial No. 391 of 1977, Jhinkoo Nai and Tahir were convicted for the offence punishable under Sections 302 and 307 read with 34 IPC. Third accused Imtiyaz alias Chitharu was acquitted. Against that judgment and order, Jhinkoo Nai alongwith Tahir filed Criminal Appeal

D No. 2478 of 1980 before the High Court of Allahabad. Pending appeal, Tahir expired and his appeal proved abated. By judgment and order dated 28.5.1999, the High Court set-aside the conviction of Jhinkoo Nai for the offence punishable under Section 302 read with Section 34 IPC and Section 307 read with Section 34 IPC but convicted him for the offence punishable under Section 324 IPC and sentenced to suffer RI for two years.

E Against that judgment and order, the State has preferred Criminal Appeal No. 1077 of 1999. Accused Jhinkoo Nai has also filed special leave petition against the said order which is delayed by 454 days.

F The learned counsel for the appellant-State submitted that the judgment and order passed by the High Court acquitting the respondent for the offence punishable under Section 302 read with Section 34 IPC is, on the face of it, illegal and erroneous. As against this, learned counsel appearing on behalf of the respondent-accused supported the reasons recorded by the High Court acquitting the respondent for the offence punishable under Sections 302 and

G 307 read with 34 IPC.

For appreciating the contention raised by the learned counsel for the parties, we would refer to the facts as proved by the prosecution. It is the prosecution story that on 14.2.1975, as it was alleged that there was illicit relationship of accused Chitharu and Tahir with Subhawati d/o Sanichari,

H there was a quarrel between Sanichari Devi and Nageshari (PW5) wife of

Mani Ram (PW4). At the time of this quarrel, deceased Chandratara and Mantara daughters of Nageshari were present. The accused Tahir and Chitharu were also sitting nearby. It is the say of the prosecution that during this quarrel Sanichari had given a threat to Nageshari that she would teach her a lesson in near future for the allegation made against her daughter. On the same day, in the mid-night, while Mani Ram and his wife Nageshari were sleeping on the verandah of the house and their two daughters were sleeping inside the room, four persons, namely, Deep Chand, who died during the pendency of the trial, Tahir who died during the pendency of the appeal in High Court, Jhinkoo Nai and Imtiyaz alias Chitharu entered into the house of Mani Ram. Tahir, Jhinkoo and Deep Chand entered into the room where Chandratara and Mantara were sleeping. All of them lifted Chandratara who was merely 18 years old and brought her in Osara (Verandah). It is the say of the prosecution witnesses that deceased Chandratara was resisting and was not prepared to satisfy the lust of the accused. At that time, Tahir stabbed her on the left side of chest and she died instantaneously. Nageshari started shouting. Thereafter, Mani Ram and other daughter Mantara also started raising alarm. At that time, Jhinkoo gave a knife blow to Nageshari on her chest, Deep Chand gave three knife blows to Mani Ram. It is also alleged that Chitharu who was standing with lathi in his hand gave a lathi blow to Mani Ram. Thereafter, they ran away from the scene of occurrence. The aforesaid prosecution story is proved and is accepted by the Sessions Court as well as the High Court on the basis of evidence of PW3 Mantara d/o Mani Ram, who was sleeping alongwith her sister on the fateful night, PW4 Mani Ram and PW5 Nageshari. The Sessions Court rejected defence version that in the night in question a dacoity was committed at the house of Mani Ram as absolute false by observing that it looks quite improbable that a poor Harijan who earns his livelihood by doing Halwahi or Mazdoori should have been made victim of dacoity.

Learned counsel for the respondent vehemently submitted that in view of the evidence led by the prosecution, it is apparent that there was no intention of the accused to commit murder of the deceased, but it was at the most to commit rape. Therefore, the High Court rightly held that assault by knife on Mantra and Nageshari was individual acts of Jhinkoo (respondent) and Deep Chand (deceased) and the High Court rightly altered the conviction of the respondent from Section 302 to section 324 IPC. Learned counsel also referred to the decision rendered by this Court in *Mithu Singh v. State of Punjab*, [2001] 4 SCC 193 and submitted that even though both the accused were armed with pistol, the Court has not drawn the inference of common

A intention as the one shot was fired by other accused.

In our view, contention raised by the learned counsel for the respondent-accused is without any substance. In case of *Mithu Singh* (Supra) the Court arrived at the conclusion that there was nothing available on record to draw an inference that co-accused had gone to the house of deceased with the

B intention of causing her death and such intention was known to the accused much less shared by him. Hence, Court set-aside the conviction under Section 302/34 IPC. We reiterate that for common intention, there could rarely be direct evidence. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case. It is

C settled law that the common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. Further, when several persons simultaneously attack with common intent, no distinction between causing the fatal and non-fatal wounds could be drawn while allocating the guilt.

D Negating similar contention this Court in *H.P. Thakore v. State of Gujarat*, [1976] 4 SCC 640 succinctly observed:

“...when a murderous assault by many hands with many knives has ended fatally, it is legally impermissible to dissect the serious ones from the others and seek to salvage those whose stabs have not proved fatal. When people play with knives and lives, the circumstances that one man's stab falls on a less or more vulnerable part of the person of the victim is of no consequence to fix the guilt for murder. Conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplish their purpose cumulatively. Section 34 IPC fixing constructive liability conclusively silences such a refind plea of extrication. {See *Amir Hussain v. State of U.P.*, [1975] 4 SCC 247 and *Maina Singh v. State of Rajasthan*, [1976] 2 SCC 827. Lord Sumner's classic legal shorthand for constructive criminal liability, expressed in the Miltonic verse ‘They also serve who only stand and wait’ a fortiori embraces cases of common intent instantly formed, triggering a plurality of persons into an adventure in criminality, some hitting, some missing, some splitting hostile heads, some spilling drops of blood. *Guilt goes with community of intent coupled with participatory presence or operation. No finer juristic niceties can be pressed into service to nullify or jettison the plain punitive purpose of the Penal Code.*”

(Emphasis supplied)

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Now let us apply the aforesaid principles to the facts of the present case and find out what reasonable inference could be drawn by a prudent man? Proved facts are—accused were armed with knives; they entered the house of the complainant dead at night; may be to take revenge of quarrel which had taken place at day time or because they are rich and head strong persons; on a refusal to submit and satisfy their sexual lust, accused including the appellant despite resistance by the girl lifted her and brought her in Osara. At that stage when deceased was crying and resisting, her father PW4 Mani Ram and her mother Nageshari PW5 got up and started raising shouts. Tahir, one of the accused gave knife blow to the deceased and two others gave knife blows to PW4 and PW5. From these facts, only reasonable inference which could be drawn is that common intention of the accused was to ravish the young girl of poor harijan and in case of resistance to commit murder by inflicting knife blows. Their adventure in criminality cannot be watered down or nullified by contending that injuries caused by them have not resulted in death of PW4 and PW5. In this view of the matter, the High Court materially erred in altering the sentence of the accused from the offence punishable under section 302/34 I.P.C. to section 324 I.P.C. by observing that assault by knife to Mani Ram and Nagesari were individuals act of Jhinkoo (appellant) and Deep Chand and the act of Tahir in inflicting the knife injury on the chest of the deceased appears to be his individual act and, therefore, appellant-Jhinkoo cannot be convicted for the offence punishable under section 302 read with 34 I.P.C. Hence, the impugned order passed by the High Court cannot be sustained.

In the result, the appeal filed by the State is allowed, the impugned order passed by the High Court is quashed and set-aside and the order passed by the Additional Sessions Judge, Azamgarh convicting the respondent for the offence punishable under Section 302 read with 34 IPC and Section 307 read with 34 IPC is restored. Respondent-Jhinkoo Nai be taken into custody for undergoing the remaining part of his sentence.

So far as the appeal filed by Jhinkoo is concerned which is delayed by 454 days, even if we condone the delay, the same would not survive because of his conviction under Section 302 IPC as stated hereinbefore. Hence, the delay is condoned and the special leave petition is dismissed.

Ordered accordingly.

S.V.K.

Appeal allowed and SLP dismissed.