

A NANDU RASTOGI @ NANDJI RASTOGI AND ANR.

v.

STATE OF BIHAR

OCTOBER 1, 2002

B [N. SANTOSH HEGDE AND B.P. SINGH, JJ.]

Penal Code, 1860:

C *Section 302 read with Section 34—Conviction under—Prosecution case supported by witnesses—No allegation of assault against one of the accused and yet he too was convicted—Conviction of the accused—Justification of—Held, justified as common intention of the accused to commit murder was proved—Arms Act, 1959—Section 27.*

D *Section 34—Applicability of—Held, to attract the Section it is not necessary that each one of the accused must assault—It is enough that they shared common intention to commit the offence and in furtherance thereof each one played assigned role by doing separate acts, similar or diverse.*

E **Appellants and another accused 'J' were tried for having committed murder of a person. Prosecution case was that the three accused alongwith 2 unknown persons came armed with country made pistol. While PW1-informant was sitting in his shop with his son (deceased) alongwith other persons, two of the accused and another unknown person caught hold of the deceased and took him inside the residential apartment of his house and shot him dead. Others were threatened by another accused and an**

F **unknown person with country made pistols. Prior to the incident one of the accused had administered threat to PW1-informant. The motive of the murder was that appellant-accused who had subsequently purchased the house sold by PW1, wanted one of the tenants in the shop in the premises to be evicted, to which the deceased objected. FIR was lodged immediately**

G **after the incident. PW-2, mother of the deceased who was inside the house, is said to have seen accused 'N' shooting the deceased, when she was coming out of the house on being informed by her grandson that dacoits had entered their shop. PWs 1, 3, 5 supported the prosecution case. All the witnesses identified the appellants-accused and accused 'J'.**

H **Trial Court convicted appellants and accused 'J' u/s 302/34 IPC and**

u/s 27 of Arms Act, 1959. Conviction was upheld by High Court. A

Appeal of accused 'J' to this court was dismissed as he did not surrender. Appellants contended that prosecution case is not reliable in view of non-examination of grandson of PW1; and that conviction of accused 'B' was not justified as there was no allegation that he took part in the assault. B

Dismissing the appeals, the Court

HELD: 1.1. There is hardly anything in the cross-examination of the witnesses which may cast a doubt on the truthfulness of testimony of PWs 1,2,3 and 5. Their credibility has not been impeached. They are natural witnesses and have deposed in a forthright manner. There is no reason to interfere with the findings recorded by the trial court and the High Court. C
[35-E, F]

1.2. The failure of the prosecution to examine the grand child of the informant does not in any manner adversely affect the prosecution case, particularly when large number of witnesses who are found to be reliable have supported the case of the prosecution. The fact that the accused had reasons to be unhappy with the conduct of the deceased and his father, cannot be disputed, and in fact, earlier in the evening appellant 'N' had administered a warning to the informant in the presence of PW5. The First Information Report was lodged promptly and there was, therefore, no opportunity for the prosecution to concoct a false case. The actual killing was witnessed by the mother of the deceased, PW2, which is only natural because she was inside the house. The evidence on record, therefore, leaves no room for doubt that relations between appellants on the one hand and the informant and his son on the other hand were strained. D
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[35-G, H; 36-A, B]

2. To attract Section 34 IPC it is not necessary that each one of the accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate acts, similar or diverse. The facts of this case are eloquent and the role of accused 'B' in preventing the prosecution witnesses from going to the rescue of the deceased was the role played by him with a view to achieve the ultimate objective of killing the deceased. There is no doubt that all the five persons who came to the shop of the informant had a common intention to commit H

A the murder of the deceased and they acted pursuant to a pre arranged plan. The facts clearly are consistent only with the hypothesis of their acting in furtherance of a common intention. They have, therefore, rightly been convicted with the aid of Section 34 IPC. [38-B, D]

B *Parshuram Singh v. State of Bihar : JT (2002) 1 SC 407 and Suresh and Anr. v. State of U.P., [2001] 3 SCC 673, distinguished.*

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1299-1300 of 2001.

C From the Judgment and Order dated 15.1.2001 of the Patna High Court in Crl. A. Nos. 126, 136 and 47 of 1994.

P.S. Mishra, Vishnu Sharma, S. Chandrashekhar, Upendra Mishra, Gaurav Agrawal and Prashant Kumar for the Appellants.

D B.B. Singh and Kumar Rajesh Singh, for the Respondent.

The Judgment of the Court was delivered by

E **B.P. SINGH, J.** The appellants in these appeals, namely, Nandu Rastogi @ Nandji Rastogi and Bal Mukund Rastogi are brothers. They alongwith one Jagdish Chamar and Mohan Singh were put up for trial before the 2nd Additional Sessions Judge, Rohtas at Sasaram, who found the appellants and Jagdish Chamar guilty of the offence under Section 302/34 IPC and under Section 27 of the Arms Act but acquitted Mohan Singh. They were sentenced to undergo imprisonment for life under Section 302/34 IPC and to undergo rigorous imprisonment for one year under Section 27 of the Arms Act. They F preferred three appeals before the High Court but by a common judgment and order, the High Court dismissed the appeals and affirmed their conviction and sentence. Three special leave petitions were preferred before this Court but since Jagdish Chamar did not surrender to his sentence, his special leave G petition was dismissed by order dated 3rd December, 2001 while special leave to appeal was granted to the appellants herein.

The informant Shyam Mohan Rastogi, PW.4 is the uncle of the appellants being the cousin of their father. The deceased Shankar Rastogi was the son of the informant PW.4. It is alleged that in an occurrence which took place at about 7.00 p.m. on 12.11.1985 he was shot dead by appellant Nandu H Rastogi. It is the case of the prosecution that the three accused, alongwith

two unknown persons, came armed with country made pistols and perpetrated the crime. According to the prosecution the background in which this occurrence took place, and which also discloses the motive for the offence, is that the informant PW.4 owned a house which he sold to one Braj Kishore Rastogi, who in turn sold the said house to appellant Nandji Rastogi. Manjoor Ansari, PW.1 was the tenant of a shop in that building, but Nandji Rastogi was pressurising him to vacate the premises. Shankar, (deceased) son of the informant, took the side of Manjoor Ansari and declared that he will not permit Nandji Rastogi to forcibly evict him. He even threatened that he may challenge the sale of the house by his father since his father had no legal authority to sell his share in the house. It appears from the evidence on record that Manjoor Ansari is on good terms with the informant and his family members and continued to occupy the shop premises even on the date of occurrence.

The case of the prosecution as disclosed in the First Information Report lodged by PW.4 at 8.00 p.m. on 12th November, 1985, soon after the occurrence, is that at about 5.00 p.m. the informant was sitting in his shop, namely, Shankar Stores, alongwith his tenant Ayodhya Tiwari, PW.5 when Nandji Rastogi came there and warned the informant to caution his son that he should not interfere in his matters. He threatened that if he did not do so his son may be killed. So saying, he went away threatening the informant with dire consequences. At about 6.45 p.m. electricity supply was cut off when he was sitting in his shop alongwith one Shambhu Lal, his son Mukund, Manjoor Ansari, PW.1 and Shankar Rastogi (deceased) his son. Since it was the diwali day, candles and earthen lamps were lit in his shop and elsewhere. 15 minutes later appellant Nandji alongwith his brother appellant Bal Mukund Rastogi, accused Jagdish Chamar and two other unknown persons entered his shop armed with country made pistols. Nandji and Jagdish caught hold of his son and took him inside to the residential apartment which is just behind the shop, at gun point. When the informant and others wanted to intervene, they were prevented by appellant Bal Mukund Rastogi and his companion who stood guard with country made pistols in their hands. They threatened them to keep quiet. After Shankar Rastogi was taken inside the house by Nandji Rastogi, Jagdish Chamar and one other unknown person, he heard the report of gun fire followed by crying of women inside the house. An alarm was raised and the accused fled away threatening them. When he went inside he found his son bleeding and unconscious. People who had gathered there, took the deceased to Kudra Hospital where he was declared dead.

A After investigation four persons were put up for trial including the appellants, Jagdish Chamar and one Mohan Singh, who was acquitted by the trial court. The defence of the appellants was that no such incident as alleged took place and that they had been falsely implicated on account of some dispute over a common wall. Suggestions were put to some of the witnesses that a dacoity took place in the house of the deceased and in the course of that dacoity the deceased was shot dead.

B PWs. 1 to 5 are the witnesses examined by the prosecution to prove its case. PW.6 Dr. Shyam Sunder Singh is the doctor who performed the post-mortem examination on the body of the deceased at 10.00 a.m. on 13th November, 1985. The post mortem report and his evidence leaves no manner of doubt that Shankar Rastogi met a homicidal death. This was not even challenged by the appellants. PW. 7 is the investigating officer.

C PW.1 Manjoor Ansari deposed that he was sitting with Shambhu Lal, his son Mukund Lal, Shankar (deceased) and the informant in the shop of the informant when 4-5 persons came armed with country made pistols. He identified the appellants and Jagdish Chamar. Nandji Rastogi, Jagdish Chamar and one unknown accused took Shankar to the residential portion of the premises from the shop where he was sitting. The residence of the informant is behind the shop in the same building. The remaining two persons, namely Bal Mukund Rastogi and one unknown accused prevented them from intervening, in the matter. Soon thereafter he heard the sound of gun fire and thereafter the accused fled. Kamla Rastogi, PW.2, mother of deceased Shankar, and wife of the informant, came out and informed them that Nandji had shot dead her son. This witness claims to have gone inside the house and seen Shankar lying injured. He was removed to the hospital where he was declared dead.

D Kamla Rastogi, PW.2 is the mother of the deceased. She has stated that she was in the kitchen when her grand son aged about 10-11 years, came and told her that dacoits had entered the shop. She rushed towards the shop but on the way she saw Nandu and Jagdish holding her son, while one unknown person was standing behind them. Nandu fired from his pistol injuring Shankar who fell down on the spot. She thereafter came out, met her husband and informed him, but prevented him from going inside on account of fear. She also met, Manjoor Ansari, Shambhu Lal and his son Mukund Lal etc. from whom she learnt that they were prevented from going inside by appellant Bal Mukund Rastogi and another person.

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Mrityunjay Singh, PW.3 deposed that he was having tea at a tea stall nearby when the lights went off. Soon thereafter he heard the report of gun fire and rushed towards the house of the informant. He saw 5 persons coming out of the house of the informant armed with country made pistols. Out of them, he identified the appellants and Jagdish Chamar. A

Shyam Mohan Rastogi, informant, in his deposition fully supported the facts mentioned by him in the First Information Report. He further stated that while he was trying to enter his house he was hit by an unknown accused on his head with the butt of the pistol. He further stated that Ayodhya Tiwari, PW.5 and Mrityunjay Singh, PW.3 came soon after the incident. He also informed the Court that Shambu Lal and his son Mukund Lal were not willing to depose as witnesses in the case. B C

The last important witness Ayodhya Tiwari, PW.5 deposed about the incident which took place at 5.00 p.m. in which Nandji Rastogi had threatened the informant warning him to caution his son, the deceased. At the time when the firing took place he was in his room. He resided in the house of the informant. When he heard the report of gun fire he wanted to come out of the house, but on seeing 5 persons coming out and running away, he did not stir out of his room immediately. Later he came out and was told by Mrityunjay Singh, PW.3, the wife of Manjoor, and the parents of the deceased about the occurrence. He had identified the appellants and Jagdish Chamar. D E

Though the trial court and the High Court have undertaken a critical scrutiny of the evidence on record, with the help of counsel for the parties, we have also read the entire evidence. There is hardly anything in the cross-examination of the witnesses which may cast a doubt on the truthfulness of their testimony. Their credibility has not been impeached. They are natural witnesses and have deposed in a forthright manner. There is no reason for us to interfere with the findings recorded by the trial court and the High Court. F

Mr. P.S. Mishra, Senior Advocate, appearing for the appellants submitted that the grand child of the informant, who first came and reported to his grand mother Kamla Rastogi that dacoits had entered the shop was not examined by the prosecution. In our view the failure of the prosecution to examine the grand child of the informant does not in any manner adversely affect the prosecution case, particularly when large number of witnesses who are found to be reliable have supported the case of the prosecution. The fact that the accused had reasons to be unhappy with the conduct of the deceased and his father, cannot be disputed, and in fact, earlier in the evening Nandji H

A Rastogi had administered a warning to the informant in the presence of Ayodhya Tiwari, P.W.5. The First Information Report was lodged promptly at 8.00 p.m. on the same day and there was, therefore, no opportunity for the prosecution to concoct a false case. The deceased was shot dead in the residential apartment which was just behind the shop where male members of the family were sitting. The actual killing was witnessed by the mother of the deceased, PW.2, which is only natural because she was inside the house preparing sweets to celebrate the Diwali festival. The evidence on record, therefore, leaves no room for doubt that relations between appellants on the one hand and the informant and his son on the other were strained. On the date of occurrence the appellants alongwith Jagdish Chamar and two unknown persons came to the shop of the informant and while Bal Mukund Rastogi and one unknown accused prevented the informant and others from intervening by threatening them with pistols, Nandu Rastogi, Jagdish Chamar and the other unknown accused took Shankar Rastogi to the residential apartment, just behind the shop, where he was shot dead by Nandu Rastogi which was witnessed by Kamla Rastogi, PW.2, the mother of the deceased.

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Learned counsel for the appellants could not persuade us to accept the case of the defence that no such occurrence took place and that Shankar Rastogi was killed in the course of dacoity. There is no evidence whatsoever to support the defence case which must be rejected.

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He then submitted that in any event so far as Bal Mukund Rastogi is concerned, there is no allegation that he took part in the assault. He submitted that his false implication cannot be ruled out. In any event it is submitted that his conviction with the aid of Section 34 IPC is not justified in the facts and circumstances of the case. He relied upon two decisions of this Court in *Parshuram Singh v. State of Bihar*, JT (2002) 1 SC 407 and *Suresh and Anr. v. State of U.P.*, [2001] 3 SCC 673. These decisions do not help the defence.

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In *Parshuram Singh* (supra) this Court gave to two of the accused persons the benefit of doubt having regard to the peculiar facts and circumstances of that case. Against one of the accused in that case the allegation was that he exhorted the others to kill the deceased, and though he himself was armed with lathi, he did not take any part in the assault. The Court found that the surrounding circumstances of the case did not ensure the confidence that he made such an exhortation. Apart from not using the weapon, which was handy with him, there appeared no reason for him to take up the leadership of the gang as he had no quarrel with the deceased. As regards the other accused to whom the benefit of doubt was extended, the Court found that it

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was highly improbable that he would have refrained from using the inherently lethal weapon like the pistol which was in his possession if he shared the common intention. In our view the decision in *Parshuram Singh's* case rests on its own peculiar facts and no principle of law can be culled from that decision which may be of any assistance to the appellants in this case. A

Shri P.S. Mishra then drew our attention to paragraph 23 of the judgment in *Suresh v. State of U.P.* (supra) wherein it has been observed that to attract Section 34 IPC two postulates are indispensable : (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons. He also drew our attention to the discussion in the judgment about the difference between a "common intention" and "similar intention". It has been observed by this Court that to attract the applicability of Section 34 of the Code the prosecution is under an obligation to establish that there existed a common intention which requires a pre-arranged plan, because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention. The Court observed: B C D

"Section 34 of the Indian Penal Code recognizes the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case." E F G

In the facts of the case the Court found that Pavitri Devi, accused No.3 could not be held guilty of the offence of murder with the aid of Section 34 H

- A since she was merely standing on the road when the incident happened. Her mere presence without doing anything more, without even carrying a weapon, and without even marching along with the other assailants, did not attract Section 34 IPC. The facts of this case are quite different. Appellants alongwith three others came armed with country made pistols. They came together, and while two of them stood guard and prevented the prosecution witnesses from intervening, three of them took the deceased inside and one of them shot him dead. Thereafter they fled together. To attract Section 34 IPC it is not necessary that each one of the accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate acts, similar or diverse. The facts of this case are eloquent and the rôle played by Bal Mukund Rastogi of preventing the prosecution witnesses from going to the rescue of the deceased was the rôle played by him with a view to achieve the ultimate objective of killing Shankar Rastogi. We, therefore, entertain no doubt that all the five persons who came to the shop of the informant had a common intention to commit the murder of Shankar Rastogi and they acted pursuant to a pre arranged plan. The facts clearly are consistent only with the hypothesis of their acting in furtherance of a common intention. They have, therefore, rightly been convicted with the aid of Section 34 IPC.

We, therefore, find no merit in these appeals which are dismissed.

K.K.T.

Appeals dismissed.