

BIRENDRA DAS & ANR.

v.

STATE OF ASSAM

(Criminal Appeal No. 1130 of 2010)

JULY 1, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

PENAL CODE, 1860:

s.302 read with s.34 - Murder - Common intention - Conviction by courts below - Held: Appellants were not on lookers -- Their intention is clearly reflectible from their presence with weapons at the place of occurrence till the commission of the crime and thereafter dragging the dead body to the courtyard of one of the accused-appellant -- Thus, it cannot be said that s.34 of IPC is not attracted - In the circumstances establishing of any motive is inconsequential - Criminal law - Motive.

Out of the nine accused named in the FIR, three were declared absconders, three being juveniles, were referred to juvenile court and the remaining three were prosecuted for committing the murder of the father of PW-1. The case of the prosecution was that all the nine accused hacked the deceased with deadly weapons causing his death. Thereafter they dragged his body to the courtyard of accused-appellant no. 1 and severed his limbs. When PW-2 tried to intervene, he was also attacked which resulted into injury on the finger of his left hand. The trial court convicted the two appellants u/s 302/34 IPC and sentenced them to rigorous imprisonment for life. The High Court affirmed their conviction and sentence.

In the instant appeal it was contended for the appellants that s.34 IPC was not attracted as no overt act

A was attributed to the appellants nor was there anything on record to show that they shared any common intention; and that the record did not show any motive for the alleged crime.

B Dismissing the appeal, the Court

HELD: 1.1 Undisputedly, the death of the deceased was homicidal in nature as proved by the medical evidence. PW-1, the son of the deceased, has categorically stated about his father getting the blows and falling down. He has mentioned the names of the appellants to be present there. It has come out in his testimony that when he tried to go near his father, they tried to attack him and out of fear he ran away and informed his paternal uncle (PW-2). In the cross-examination, he has stood embedded in his version and the suggestion that he had not seen the occurrence has been strongly denied. His testimony is corroborated by PW 5 and the injured eye-witness PW-2. The injury of PW-2 was proved by PW-4, the doctor who had medically examined him. Similar is the evidence of other prosecution witnesses. Considering these aspects along with the factum that the dead body was seized from the courtyard of accused-appellant no. 1, it cannot be said that the eye-witnesses who have been cited as such are really not eye-witnesses and they have been planted. [para 8-13] [186-A, B, F-H; 187-A-B, C, E-F]

1.2 Though PW-1, son of the deceased, has stated that the appellants were present at the scene of occurrence, but that is not the only evidence against them. It is also seen in the evidence of others that the appellants were armed with weapons and dragged the dead body of the deceased to the courtyard of accused-appellant no. 1. Both the accused-appellants were charged for the substantive offence u/s 302 IPC in aid of s.34. The conditions precedent which are requisite to be

satisfied to attract s.34 IPC are that the act must have been done by more than one person and the said persons must have shared a common intention either by omission or commission in effectuating the crime. A separate act by each of the accused is not necessary. In the case at hand, the appellants were not onlookers. Their intention is clearly reflectible from their presence with weapons at the place of occurrence till the commission of the crime and thereafter dragging the dead body to the courtyard of accused-appellant no. 1. Thus, it cannot be said s.34 of IPC is not attracted. [para 17] [187-G-H; 188-A, B-D; 189-G; 190-A]

Mohan Singh v. State of Punja 1962 Suppl. SCR 848 = AIR 1963 SC 174; *Lallan Rai and Others v. State of Bihar* 2002 (4) Suppl. SCR 188 = 2003 (1) SCC 268; *Goudappa and Others v. State of Karnataka* (2013) 3 SCC 675 - relied on.

Barendra Kumar Ghosh v. King Emperor AIR 1925 PC 1- relied on.

2. On acceptance of the direct evidence on record on proper scrutiny and analysis, proof of existence of motive or strength of motive does not affect the prosecution case. That apart, it is always to be borne in mind that different motives may come into operation in the minds of different persons and it would be well nigh impossible for the prosecution to prove the motive behind every criminal act. Therefore, when the appellants armed with lethal weapons were present during the occurrence and participated in dragging the deceased to the courtyard of accused-appellant no. 1, establishing of any motive is absolutely inconsequential. [para 21] [191-C-E]

Balram Singh and Another v. State of Punjab AIR 2003 SC 2213; *Atley v. State of U.P.* AIR 1955 SC 807; and *State*

A *of Uttar Pradesh v. Kishanpal and Others* 2008 (11) SCR 1048 = 2008 (16) SCC 73 - relied on

Case Law Reference:

B 1962 Suppl. SCR 848 relied on para 14

2002 (4) Suppl. SCR 188 relied on para 15

AIR 1925 PC 1 relied on para 15

(2013) 3 SCC 675 relied on para 16

C AIR 2003 SC 2213 relied on para 18

AIR 1955 SC 807 relied on para 19

2008 (11) SCR 1048 relied on para 20

D CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1130 of 2010.

From the Judgment and Order dated 30.08.2007 of the High Court of Gauhati at Assam in Criminal Appeal No. 106 of 2005.

E Kiran Bhardwaj (A.C.) for the Appellants.

Vartika S. Walia (for Corporate Law Group) for the Respondent.

F The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeal is directed against the judgment of conviction and order of sentence dated 30.8.2007 passed in Criminal Appeal No. 106 of 2005 by the Gauhati High Court affirming the verdict of conviction of the learned Sessions Judge, Karimganj in Sessions Case No. 135 of 2004 whereby the learned trial Judge had convicted the appellants under Section 302 in aid of Section 34 of the Indian Penal Code (for short "IPC") along with another and sentenced

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each of them to undergo rigorous imprisonment for life and to pay a fine of Rs.5000/- each, in default to pay the fine, to suffer further imprisonment for one year. A

2. The case related to the murder of a forty year old man by the name of Matilal Das in the morning of 29.9.2003 by hacking him at various parts of the body in a brutal manner with deadly weapons and the injuries sustained by him were quite serious in nature. On the date of occurrence, about 8.30 a.m., deceased Matilal Das was proceeding towards his home from his shop and at that time, the accused persons, namely, Rajan Das, Sadhan Das, Madan Das, Birendra Das, Jara Das, Bapan Das, Lakshmi Rani alias Latashi Rani and Smt. Jyotsna Das, all being armed with deadly weapons like bhojali, dao, etc. accosted him in front of the house of Birendra and immediately Rajan Das dealt a blow on the head of Matilal from behind by bhojali. After the assault, the deceased raised alarm and fell down on the road. Thereafter, all the accused persons hacked him as a result of which he sustained number of injuries and breathed his last on the spot. Hearing the scream of Matilal, Nripendra Das and Sanjan Das came to the spot and, at that juncture, Sadhan Das tried to attack Sanjan Das, but he managed to flee away from the spot. However, he inflicted a dao blow on Nripendra Das which caused an injury on the finger of his left hand. Thereafter, accused Birendra and others dragged the dead body of Matilal to Birendra's courtyard and there they continued to hack the body resulting in severing of certain limbs. Sanjan Das, son of the deceased Matilal, lodged an FIR with the Officer-in-Charge of Kaliganj Watch Post which was entered vide G.D. Entry No. 424 dated 29.9.2003 about 10.00 a.m. It was forwarded to the Officer-in-Charge, Karimganj Police Station to register a case and, accordingly, case No. 314/2003 was registered for the offences punishable under Sections 147, 148, 149, 341, 324, 307 and 302 IPC. After the criminal law was set in motion, the Investigating Officer conducted the inquest of the dead body of the deceased Matilal and sent it for post mortem, seized the bhojali which was about B
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- A 15 inch in length and a dao of 2 feet in length, both stained with blood, in the presence of the witnesses vide Exts. 4 and 6. The injured Nripendra Das was sent to Karimganj Hospital for examination of injuries and treatment. After recording the statements of the witnesses under Section 161 of the Code of Criminal Procedure (Cr.PC), a charge-sheet was placed against the accused persons and the said charge-sheet showed Sadhan Das, Jara Das and Jyotsna Rani as absconders. The learned Chief Judicial Magistrate, Karimganj committed the case to the Court of Session except that of accused Rajan Das, Madan Das and Bapan Das who were found to be juvenile on the basis of medical report and, accordingly, were sent to the juvenile court at Silcher. After committal, the learned Sessions Judge, considering the matter in entirety, framed charges against Birendra Das, Latasil Das and Jara Das under Section 302 read with 34 IPC.

3. The accused persons pleaded innocence and false implication and claimed to be tried.

4. At the trial, the Prosecution, in order to bring home the charge, examined 11 witnesses, namely, Sanjan Das, PW-1, son of the deceased Matilal, Nripendra Das, PW-2, a relation of the deceased, Dr. Rabindra Nath Das, PW-3, who conducted the autopsy on the dead body of the deceased, Dr. Pradip Dey, PW-4, who examined PW-2, Namita Rani Das, PW-5, sister of the deceased, Samiran Das, PW-6, neighbour of the deceased, Gita Das, PW-7, a co-villager, Bibhash Bardhan, PW-8, a formal witness, Rinku Rani, PW-9 and Haren Ghosh, PW-10, who had seen part of the incident, and Prabhat Saikia, PW-11, the Investigating Officer. Apart from adducing oral evidence, the prosecution placed reliance on a large number of documents. The accused persons chose not to adduce any evidence.

5. On consideration of the evidence on record, the learned Sessions Judge found that the accused-appellants therein were guilty and imposed the sentence. On appeal being preferred

by two of the convicts, the High Court gave the stamp of approval to the conviction and the sentence as has been stated hereinbefore. A

6. In support of the appeal, Ms. Kiran Bhardwaj, learned counsel for the appellant, has submitted that the High Court has faulted in accepting the evidence of the principal witnesses cited by the prosecution as eye-witnesses though they arrived at the spot after some length of time. It is urged by her that the appellate court has been swayed away by the emotion because of the brutality involved in the murder and hence, the approach as requisite under the criminal law has been flawed and the result is unwarranted affirmation of conviction. It is her further submission that Section 34 IPC is in no way attracted inasmuch as no overt act has been attributed to the present appellants and there is nothing on record to show that they had shared any common intention. It is argued by her that though the prosecution has alleged commission of such a ghastly crime by the accused persons, yet remotely no motive has been indicated or even endeavoured to be traced and that shows that there has been spinning of allegations on some kind of suspicion or conjectures. B
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7. Ms. Vartika S. Walia, learned counsel appearing for the State, in oppugnation, has contended that description of murder as brutal cannot be construed to be a pre-determined judicial mind because the learned trial Judge as well as the High Court has analysed the evidence in a microscopic manner and found that the accused-appellants are guilty of the offence. The learned counsel would contend that carrying of weapons to the place of occurrence and the other activities which have been brought in the evidence against the appellants have clearly established the factum of common intention as envisaged under Section 34 of the Penal Code. The specious stand that no motive has been established by the prosecution is absolutely irrelevant and deserves rejection as there is ample direct evidence to show the commission of the crime by the accused-appellants. F
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A 8. Before we proceed to deal with the contentions
 canvassed at the Bar, it is imperative to state that there is no
 dispute that the death of the deceased Matilal Das was
 homicidal in nature. The doctor, who conducted the post
 mortem on the dead body of Matilal Das, had found the following
 B injuries: -

- "(1) Right foot completely severed from the leg.
- (2) Right index finger is completely separated from the
 hand. Other fingers are partially separated.
- C (3) Fracture right wrist joint. Lacerated injury over the
 right wrist joint about 4" x 3" bone deep.
- (4) Fracture of the right femur.
- D (5) A sharp cut injury over the forehead extending
 whole circumference of the head about 1" x ½" x
 ½" just above the ear.
- (6) Sharp cut injury over the left thigh upper part about
 3" x 1.5" x 1".
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9. The said witness has opined that the death was due to
 shock and haemorrhage resulting from the injuries sustained
 by the deceased and all the injuries were ante mortem in nature.

F 10. Keeping in view the injuries sustained by the
 deceased, it is to be seen how the prosecution has established
 the complicity of the accused-appellants in the crime. PW-1,
 the son of the deceased, has categorically stated about his
 father getting the blow and falling down. He has mentioned the
 G names of the appellants herein to be present there. It has come
 out in his testimony that when he tried to go near his father, they
 tried to attack him and out of fear he ran away and informed
 his paternal uncle Nripendra, PW-2. It is in his evidence that
 the dead body of his father was brought to the courtyard of
 H Birendra. In the cross-examination, he has stood embedded in

his version and the suggestion that he had not seen the occurrence has been strongly denied. A

11. PW-2 has deposed that he saw Sadhan, Madan and Rajan assaulting the deceased and when he tried to intercept, he was assaulted and sustained an injury on his finger. His injury on the finger has been corroborated by Dr. Pradip Dey, PW-4. He has also deposed that the deceased was bleeding profusely and was dragged inside the courtyard of Birendra. B

12. PW-5, Namita Rani Das, has testified that Sadhan, Madan, Rajan and Bapan were hacking the deceased Matilal and Birendra, Latani, Jyotsna and Jara were dragging the dead body to the side of the fence. It has come out in her evidence that the appellants were armed with deadly weapons. In the cross-examination, certain suggestions have been given as regards the existence of animosity between her husband and Matilal Das on one side and Birendra on the other over some Panchayat road. Though the said aspect has been accepted by her, yet the same cannot be treated as a ground to discredit her testimony which has remained absolutely unshaken. Similar is the evidence of other prosecution witnesses. C D E

13. Considering these aspects along with the factum that the dead body was seized from the courtyard of Birendra, it is difficult to accept the submission urged by the learned counsel for the appellants that the eye-witnesses who have been cited as such are really not eye-witnesses and they have been planted and, accordingly, we reject the same. F

14. The next limb of argument is that there has been no allegation of any overt act against the present appellants and their mere presence would not establish their complicity. Learned counsel for the appellant has invited our attention to the evidence of PW-1, son of the deceased, who has stated that the present appellants were present at the scene of occurrence. But that is not the only evidence against them. It is also seen in the evidence of others which we have already dealt H

- A with hereinabove that the appellants were armed with weapons and dragged the dead body of the deceased to the courtyard of Birendra. From the aforesaid, the question arises whether the common intention can be derived or not. What is really proposed by Ms. Bhardwaj is that the appellants had not
- B inflicted any blow on the deceased. The aforesaid contention, needless to say, is totally without any substratum. Both the accused persons were charged for the substantive offence under Section 302 IPC in aid of Section 34 of the Penal Code. The conditions precedent which are requisite to be satisfied
- C to attract Section 34 of the Penal Code are that the act must have been done by more than one person and the said persons must have shared a common intention either by omission or commission in effectuating the crime. A separate act by each of the accused is not necessary. The Constitution
- D Bench in *Mohan Singh v. State of Punjab*¹, while adverting to the concept of Section 34 IPC, has ruled thus: -

- E "Like Section 149, Section 34 also deals with cases of constructive criminal liability. It provides that where 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. The essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. If the common intention in question
- F animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the
- G same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34."

H 1. AIR 1963 SC 174.

15. In *Lallan Rai and Others v. State of Bihar*², relying upon the dictum laid down in *Barendra Kumar Ghosh v. King Emperor*³ and *Mohan Singh* (supra), it has been ruled that the essence of Section 34 is simultaneous consensus of the mind of persons participating in the criminal action to achieve a particular result.

16. Recently, in *Goudappa and Others v. State of Karnataka*⁴, the Court reiterated the principle stating that Section 34 of the Penal Code lays down a principle of joint liability in doing a criminal act and the essence of that liability is to be found in the existence of common intention, animating the accused leading to the doing of a criminal act in furtherance of such intention. It has been further stated therein that the principle inherent in Section 34 of the Penal Code is only a rule of evidence, but does not create a substantive offence and, therefore, if the act is the result of a common intention, then every person would get the criminal act shared, and the common intention would make him liable for the offence committed irrespective of the role which he had in its perpetration. Posing the question how to gather the common intention, the Court opined that the conduct of the accused soon before and after the occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and the nature of the injury caused by one or some of them are relevant. Emphasis has also been laid on the totality of the circumstances from which the common intention can be gathered.

17. In the case at hand, as has been indicated earlier, the appellants were not onlookers as the submission seems to be. Their intention is clearly reflectible from their presence with weapons at the place of occurrence till the commission of the crime and thereafter dragging the dead body to the courtyard

2. (2003) 1 SCC 268.

3. AIR 1925 PC 1.

4. (20130 3 SCC 675

A of Birendra. Thus, in our considered opinion, the submission that Section 34 of IPC is not attracted is extremely specious and does not deserve acceptance.

B 18. The last ground of attack on the sustainability of the conviction is that the prosecution has not been able to prove any motive. The learned counsel would submit that when the animosity between some of the witnesses and the deceased has been admitted, there can be a ground for false implication. We have already analysed the evidence brought on record and there is nothing to discard the same. In *Balram Singh and*
 C *Another v. State of Punjab*⁵, it has been clearly stated that if the incident in question as projected by the prosecution is to be accepted, then the presence or absence of a motive or strength of the said motive by itself would not make the prosecution case weak.

D 19. In this context, we may sit in a time machine and refer to few lines from *Atley v. State of U.P.*⁶ wherein it has been expressed thus: -

E "This is true, and where there is clear proof of motive for the crime, that lends additional support to the finding of the court that the accused was guilty, but absence of clear proof of motive does not necessarily lead to the contrary conclusion."

F 20. In *State of Uttar Pradesh v. Kishanpal and Others*⁷, while dealing with the presence of motive, a two-Judge Bench had to say thus: -

G "39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened

5. AIR 2003 SC 2213.

6. AIR 1955 SC 807.

H 7. (2008) 16 SCC 73.

even if the motive is not a very strong one. It is also settled A
law that the motive loses all its importance in a case where
direct evidence of eyewitnesses is available, because even
if there may be a very strong motive for the accused
persons to commit a particular crime, they cannot be
convicted if the evidence of eyewitnesses is not convincing. B
In the same way, even if there may not be an apparent
motive but if the evidence of the eyewitnesses is clear and
reliable, the absence or inadequacy of motive cannot stand
in the way of conviction."

21. Thus, acceptance of the direct evidence on record on C
proper scrutiny and analysis of proof of existence of motive or
strength of motive does not affect the prosecution case. That
apart, it is always to be borne in mind that different motives may
come into operation in the minds of different persons, for human D
nature has the potentiality to hide many things and that is the
realistic diversity of human nature and it would be well nigh
impossible for the prosecution to prove the motive behind every
criminal act. Therefore, when the appellants armed with lethal
weapons were present and witnessed the occurrence and
participated in dragging the deceased to the courtyard of E
Birendra, establishment of any motive is absolutely
inconsequential.

22. Consequently, the appeal, being devoid of merit,
stands dismissed.

R.P.

Appeal dismissed.