

(2018) 01 CHH CK 0072
In the Chhattisgarh High Court
Case No : Criminal Appeal No.976 Of 2012

Gajju @ Arun Yadav

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 06-01-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 323

Code Of Criminal Procedure, 1973 — Section 161, 313, 374(2), 437A

Citation : (2018) 01 CHH CK 0072

Hon'ble Judges : Sanjay K. Agrawal, J; Sharad Kumar Gupta, J

Bench : Division Bench

Advocate : B.N. Nande, Ashish Shukla

Final Decision : Allowed

Judgement

Sanjay K. Agrawal, J

1. Appellant Gajju @ Arun Yadav has been convicted for offence punishable under Section 302 read with Section 34 of the IPC and sentenced to

imprisonment for life and further sentenced to fine of ₹ 5,000/ and in default of payment of fine, one year RI has been imposed upon him. Feeling

aggrieved against the judgment of conviction recorded and sentence awarded, this appeal under Section 374 (2) of the CrPC has been preferred.

2. Essential facts unfolded during the course of trial are as under: 2.1) As per the prosecution case, on the fateful night of 21.10.2005 at 11.30

p.m., co-accused Madan @ Tulsi @ Bhurwa, Tulsi Yadav and Sanju Kumar who were tried in Sessions Trial No.97/2006 and convicted vide

judgment dated 29.7.2006 and two other co-accused namely Gajju @ Arun Yadav, the appellant herein, and Shera (who has not preferred appeal)

alleged to have restrained deceased Narendra Yadav and demanded money for

consuming liquor. On being denied, firstly, co-accused Tulsi Yadav slapped Narendra Yadav, thereafter, Narendra Yadav came with gas pipe in his defence and tried to assault Sanju and Tulsi Yadav, then Madan and Shera caused dagger blow to Narendra Yadav 3-4 times, Tulsi Yadav slapped him and the appellant herein is said to have instigated the co-accused by saying 'maro maro' and caused his death.

2.2) Jeetu Singh Thakur (PW-4) lodged first information report vide Ex.P-3 on 22-10-2005 at 12.20 a.m. and morgue vide Ex.P-4. The

investigating officer left for the scene of occurrence and after summoning the witnesses, conducted inquest over the dead body of the deceased.

Inquest report Ex.P-2 was prepared. Spot map was also prepared. Bloodstained soil and plain soil were seized from the spot and dead body was sent

for autopsy to Dr. B.R. Ambedkar Hospital vide Ex.P-7 where Dr. Shivnarayan Manjhi (PW-9) conducted autopsy vide Ex.P-9 and found multiple

stab injuries over the body of the deceased and cause of death was stated to be shock and haemorrhage due to multiple stab injuries over the body of

the deceased. Sealed clothes and viscera were seized during the course of investigation and accused Madan was taken into custody. He made

disclosure statement of dagger vide Ex.P-16 and same was recovered at his instance vide Ex.P-17. Black colour shirt of Madan was also seized

vide Ex.P-18. 2.3) Statements of witnesses were recorded under Section 161 of the CrPC and after completion of due investigation, charge-sheet

was filed in the Court of Additional Chief Judicial Magistrate, Raipur who, in turn, committed the case to the Court of Sessions, Raipur. 2.4) In order

to prove the guilt of the appellant and other co-accused, the prosecution examined as many as 14 witnesses and exhibited 33 documents. Statements

of witnesses were recorded under Section 313 of the CrPC in which they denied the circumstances appearing against them and pleaded innocence

and stated false implication in the offence in question.

2.5) The learned Additional Sessions Judge after appreciating oral and documentary evidence on record, convicted the present appellant and one

Shera for offence under Section 302 read with Section 34 of the IPC and sentenced as stated in the opening paragraph of the judgment leading to

filing of this appeal under Section 374 (2) of the CrPC.

3. Mr. B.N. Nande, learned counsel appearing for the appellant, would submit

that the prosecution has miserably failed to bring home the ingredients of offence of Section 302 read with Section 34 of the IPC against the appellant. He would further submit that severe dagger blow was caused by co-accused Madan and Shera. Neither there is any intention on the part of the present appellant nor he has participated in the crime in question by extending any overt act and as such, conviction of the present appellant is based on surmises and conjectures and in fact, he has been convicted with the aid of Section 34 of the IPC which is not at all attracted in absence of any intention and overt act on the part of the appellant, therefore, the present appellant is entitled to be acquitted. Lastly, he would submit that co-accused Tulsi Yadav, who has slapped deceased Narendra Yadav and who was also convicted by the learned Additional Sessions Judge in a separate S.T.No.97/2006 vide judgment dated 29-7-2006, had preferred Criminal Appeal No.835/2007 in which his conviction for offence under Section 302 read with Section 34 of the IPC has been set aside and he has been convicted only for offence under Section 323 of the IPC and sentenced to undergo RI for one year and therefore the case of the present appellant is better than that of Tulsi Yadav, as he has slapped the deceased and was only convicted for offence under Section 323 of the IPC, whereas, allegation and evidence brought against the present appellant is only that he instigated the other co-accused to kill deceased Narendra Yadav as such, there is no overt act on the part of the appellant, therefore, he is entitled for clear acquittal by granting this appeal.

4. Mr. Ashish Shukla, learned Deputy Advocate General appearing for the State/respondent, would support the impugned judgment of conviction recorded and sentenced awarded and would submit that the prosecution has proved the applicability of Section 34 of the IPC. He would further submit that overt act on the part of the accused is not necessary, if he had common intention to commit the offence as such, the appellant has rightly been convicted with the aid of Section 34 of the IPC by the learned Additional Sessions Judge and the appeal deserves to be dismissed by confirming the conviction recorded by the learned Additional Sessions Judge.

5. We have heard learned counsel for the parties and considered their rival submissions and also went through the original records of the trial Court with utmost circumspection and carefully as well.

6. The first question for consideration would be whether the death of Narendra Yadav was homicidal in nature.

7. In order to prove the homicidal nature of death of Narendra Yadav, Dr. Shivnarayan Manjhi (PW⁹) has been examined. He has conducted

autopsy vide Ex.P⁹ and found following injuries: ¹

1. Stab wound present over left side of chest, 4 cm left to midline and 14 cm lower to the clavicle vertically in the size of 2 x 6 cm, extending into

chest cavity cutting tissue in the passage and entered into left lung and membrane of the heart;

2. Stab wound of 2.5 x 0.5 cm below injury No.1 into cavity deep, cutting tissue of the passage entered into pericardium into heart in the left vertical in

the size of 3.5 x 1 cm;

3. Incised wound over right chest of 4 x 0.4 x 0.2 cm;

4. Incised wound over right chest, 2 cm right to injury No.3;

5. Red colour abrasion present on 2 cm above from right anterior superior spine region of 0.5 cm;

6. Abrasion over left elbow of 0.5 cm.

8. Thus, death of the deceased was as a result of above²stated fatal injuries found over the body of the deceased and it has rightly been held to be

homicidal death by the Additional Sessions Judge which has not been even seriously disputed by learned counsel for the appellant. In light of this, it is a

clear case of homicidal death and there is no possibility of whatsoever of suicide or accidental death. We, therefore, hold that deceased Narendra

Yadav met with homicidal death.

9. This would bring us to the next question as to whether appellant Gajju @ Arun Yadav has rightly been convicted for offence under Section 302 of

the IPC with the aid of Section 34 of the IPC. In order to decide this point, it would be appropriate to refer to the testimony of four eyewitnesses

namely Jeetu Singh Thakur (PW⁴), Sanjay Yadav (PW⁵), Vikku Baghel (PW⁷) and Ashwani Kumar (PW¹³), as conviction is based merely

on the testimony of these eyewitnesses.

10. Jeetu Singh Thakur (PW⁴) has stated before the Court that on the fateful day at 11 p.m. near Katora talab, he and Annu reached near Shyam

Nagar, Raipur then Sanju and Tulsi - co³accused, came and demanded money

from Narendra Yadav for consuming liquor which was denied by deceased Narendra Yadav then Sanju slapped Narendra Yadav and thereafter, co-accused Shera, Tulsi, Gajju - the present appellant and Madan came and started abusing them and immediately thereafter, Madan picked out dagger from his waist and caused 3-4 dagger blows to Narendra Yadav and immediately thereafter, Shera also caused dagger blow to Narendra Yadav. Narendra Yadav fell down on the spot and present accused/appellant Gajju seen shouting 'maro maro' and then they absconded from the scene of occurrence.

11. Sanjay Yadav (PW-5) has similarly stated that dagger blow was caused by Madan on the abdomen area of Narendra Yadav and also by Shera and other co-accused standing therein were shouting 'maro maro'.

12. Vikku Baghel (PW-7) has corroborated the statements of other witnesses that dagger blow was caused by Madan and Shera and other co-accused were shouting 'maro maro'.

13. Similar is the statement of Ashwani Kumar (PW-13) that dagger blow was caused by Madan and Shera and other co-accused were instigating Madan and Shera to kill deceased Narendra Yadav.

14. Aforesaid narration of the statements of four eyewitnesses would clearly show that dagger blow was caused by co-accused Madan and Shera and other co-accused including Tulsi Yadav and present accused / appellant Gajju instigated / exhorted mainly Madan and Shera to kill the deceased by shouting 'maro maro'.

15. The question would be whether Section 34 of the IPC is attracted in the facts of the present case to convict the appellant for offence under

Section 302 of the IPC. At this stage, it would be appropriate to notice Section 34 of the IPC which reads as follows: "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.

16. A focused glance of the aforesaid provision would show that the essence of Section 34 of the IPC is simultaneous consensus of the minds of

persons participating in the criminal action to bring about a particular result and such consensus can be developed at the spot also. Thus, Section 34 is

intended to cover a situation wherein the accused persons have done something with common intention to constitute a criminal act.

17. In the matter of Barendra Kumar Ghosh v. King Emperor AIR 1925 PC 1, it has been held as follows: "Section 34 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.

18. In the matter of Mahbub Shah v. King Emperor AIR 1945 PC 118, it has been held as under: "Section 34 lays down a principle of joint liability

in the doing of a criminal act. The section does not say 'the common intentions of all', nor does it say 'an intention common to all'. Under the section

the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in

furtherance of such intention. To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one

of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the

persons in the same manner as if the act were done by him alone.

19. Thereafter, the Constitution Bench of the Supreme Court in the matter of Mohan Singh v. State of Punjab AIR 1963 SC 174, while dealing with

the scope of Section 34 of the IPC, held as under: "?

13. ... Like Section 149, Section 34 also deals with cases of constructive 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 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 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.

20. In the matter of *Suresh v State of U.P.* (2001) 3 SCC 673, Thomas, J, speaking for the Supreme Court has held two conditions precedent which are imperative for applying Section 34 of the IPC, which are as under: Â?

23. Thus 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.

21. In the matter of *Lallan Rai v. State of Bihar* (2003) 1 SCC 268, Their Lordships of the Supreme Court while relying upon the dictum laid down in *Barendra Â Kumar Ghosh (supra)* and *Mohan Singh (supra)*, have held that the essence of Section 34 is simultaneous consensus of the mind of

persons participating in the criminal action to bring about a particular result. It has been stated therein that such consensus can be developed on the spot, but in any case, such a consensus must be present in the commission of the crime itself.

22. In the matter of *Nagaraja v. State of Karnataka* (2008) 17 SCC 277, Their Lordships of the Supreme Court have held that to impose vicarious

liability under Section 34 of the IPC: (1) common intention, and (2) participation of accused in the commission of an offence must be proved, and

further held that prosecution is bound to prove the factum of common intention amongst the accused persons.

23. In the matter of *Virendra Singh v. State of Madhya Pradesh* (2010) 8 SCC 407, Their Lordships of the Supreme Court have held that liability

under Section 34 of the IPC can arise only when two conditions stand fulfilled i.e. firstly, mental element or intention to commit criminal act conjointly

with another or others; and secondly, actual participation in one form or the other in commission of crime. Section 34 is intended to cover a case

where a number of persons act together and on facts of case it is not possible for prosecution to prove as to which of the persons who acted together,

actually committed the case. Under Section 34, it is the intention to commit the crime and accused can be convicted only if such intention has been

shared by all accused.

24. In the matter of *Syed Yousuf Hussain v. State of Andhra Pradesh* (2013) 4

SCC 517, the Supreme Court has held that to get Section 34 of the IPC attracted, certain conditions precedent are to be satisfied. The act must have been done by more than one person and they must have shared a common intention either by omission or commission in effectuating the crime. It is always not necessary that every accused must do a separate act to be responsible for the ultimate criminal act. What is required is that an accused person must share the common intention to commit the act.

25. Very recently, in the matter of *Vijendra Singh v. State of Uttar Pradesh* (2017) 11 SCC 129, Their Lordships of the Supreme Court have

reiterated the principles of law for applicability and scope of Section 34 of the IPC and summarised the principles therein by holding as under: "28.

The aforesaid authorities make it absolutely clear that each case has to rest on its own facts. Whether the crime is committed in furtherance of

common intention or not, will depend upon the material brought on record and the appreciation thereof in proper perspective. Facts of two cases

cannot be regarded as similar. Common intention can be gathered from the circumstances that are brought on record by the prosecution. Common

intention can be conceived immediately or at the time of offence. Thus, the applicability of Section 34 IPC is a question of fact and is to be ascertained

from the evidence brought on record. The common intention to bring about a particular result may well develop on the spot as between a number of

persons, with reference to the fact of the case and the circumstances of the situation. Whether in a proved situation all the individuals concerned

therein have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular

result can be said to have been developed and thereby intended by all of them, is a question that has to be determined on the facts. (See *Kripal v.*

State of U.P. AIR 1954 SC 706.) In *Bharwad Mepa Dana v. State of Bombay* AIR 1960 SC 289, it has been held that Section 34 IPC is intended to

meet a case in which it may be difficult to distinguish the acts of individual members of a party who act in furtherance of the common intention of all

or to prove exactly what part was taken by each of them. The principle which the section embodies is participation in some action with the common

intention of committing a crime; once such participation is established, Section 34 is at once attracted.

26. Following the principles of law laid down by Their Lordships of the Supreme Court with regard to applicability and scope of Section 34 of the IPC

in above stated judgments and keeping in mind those principles, reverting back to the facts of the present case, it is quite vivid that on the fateful day,

initially, co accused Sanju and Tulsi stopped deceased Narendra Yadav and demanded money for consuming liquor and when money was not given,

co accused Tulsi slapped the deceased and thereafter, co accused Shera, Tulsi, Gajju - the present accused/appellant and Madan came on the spot

and then Madan assaulted the deceased by dagger and thereafter, Shera also assaulted by dagger by which the deceased suffered fatal injuries over

the body. It is the opinion of the autopsy surgeon that on account of severe stab injuries, the deceased died on account of shock. In order to prove the

offence of homicidal death amounting to murder of Narendra Yadav by said common intention against Gajju, the present appellant, the prosecution

was under obligation to prove that he has committed the overt act or he was having knowledge or that appellant Gajju might have caused fatal

injuries resulting into the death of Narendra Yadav, but the fact of common intention against appellant Gajju has not been proved. It is also apparent on

record that so far as the overt act is concerned, it has not been established. It is not in dispute that dagger blow was caused by Madan and Shera. It

is also not established that the present appellant shared common intention with other co accused in order to commit the murder of Narendra Yadav

and even no injury was caused by the present appellant. Apart from this, it is appropriate to mention here that Tulsi Yadav, co accused who was

convicted for offence under Section 302 of the IPC with the aid of Section 34 of the IPC, has preferred appeal before this Court vide

Cr.A.No.835/2007 and this Court held that there was no common intention on the part of co accused Tulsi Yadav who only slapped the deceased.

27. The case of the present appellant is better than that of Tulsi Yadav, as Tulsi Yadav has slapped the deceased and this Court converted the

punishment awarded to Tulsi Yadav from offence under Section 302 of the IPC to Section 323 of the IPC, whereas the present appellant only shouted

'maro maro', no overt act has been alleged against the appellant herein and as such, the prosecution is absolutely failed to bring home the offence,

particularly the applicability of Section 34 of the IPC against the present appellant, as with the aid of Section 34 of the IPC, the appellant herein has

been convicted for offence under Section 302 of the IPC. Taking into consideration the evidence available on record and the legal analysis made herein[^]above and also taking into account the acquittal of Tulsi Yadav, who has slapped the deceased, under Section 302 of the IPC, the judgment of conviction recorded and sentence awarded to the present appellant under Section 302 read with Section 34 of the IPC cannot be sustained and the appellant is entitled for acquittal.

28. In the result, the appeal is allowed. Judgment of conviction recorded under Section 302 read with Section 34 of the IPC and sentence awarded to the present appellant, as stated in the opening paragraph of the judgment are hereby set aside. The accused / appellant is acquitted of all the charges levelled against him. We hereby direct that appellant Gajju @ Arun Yadav be released forthwith, if not required in any other case. However, his bail bonds shall remain in force for a period of six months in view of the provisions contained in Section 437[^]A of the CrPC.