
(2005) 07 AHC CK 0064
In the Allahabad High Court
Case No : Criminal Appeal No. 2402 of 1985

Kirpal Singh, Kallu Singh and Vijay Pal Singh (In Jail) APPELLANT
Vs
State RESPONDENT

Date of Decision : 11-07-2005

Acts Referred:

Penal Code, 1860 (IPC) — Section 120A, 149, 302, 307, 323

Citation : (2005) 3 ACR 2774

Hon'ble Judges : R.P. Yadav, J;Imtiyaz Murtaza, J

Bench : Division Bench

Advocate : P.N. Mishra, Shashank Shekhar, Madan Singh, Samit Gopal and A.D. Giri, for the Appellant; Mewa Lal Shukla, V.P. Srivastava and Brahm Singh and A.G.A., for the Respondent

Final Decision : Allowed

Judgement

R.P. Yadav, J.—This criminal appeal is directed against the judgment and order dated 9.9.1985, passed by V Additional Sessions Judge, Moradabad in ST. No. 622 of 1983 convicting the appellant Kirpal Singh u/s 302 I.P.C, and appellant Vijay Pal Singh and Kallu Singh u/s 302 read With Section 34 I.P.C. and sentencing each of them to imprisonment for life. Learned Sessions Judge has further convicted appellant Vijay Pal Singh u/s 323 I.P.C. and sentenced him to six months R.I. The sentences have been directed to run concurrently.

2. Appellant Kallu Singh died during the pendency of the appeal and so his appeal has abated.

3. Complainant, Smt. Jishna (P.W.1) is widow of Ram Kumar Singh (deceased), who was murdered in this incident on 30.5.1983 There were four accused, namely, Kallu Singh and his three sons, Kirpal Singh, Vijai Pal Singh and Devendra Kumar, One of the four accused, namely, Devendra Kumar was acquitted by the learned Sessions Judge, so this appeal was preferred by three convicted accused appellants and out of them, one died during pendency of the

appeal only two appellants are left now who have pressed this appeal.

4. The complainant, Smt. Jishna P.W. 1 as well as all four accused are residents of village Dudaila, which lies at a distance of five kilometres from outpost Kanth within the circle of police station Chhajlet, District Moradabad. They belong to same caste

5. Briefly stated, the prosecution case was that about six months prior to the incident some dispute had arisen between Ram Kumar Singh (deceased) and Kalloo Singh over the question of raising the level of pathway after filling in the earth thereon, the earth for which was being dug and taken away from the field of appellant Kalloo Singh. Ever since the said dispute, the parties were not on the talking terms and they also did not participate in the community dinner. On the date of occurrence i.e. 30.5.1983, at about 2.00 p.m., some quarrel had taken place between the grand-sons of Kalloo and the children of Ram Kumar Singh (deceased). Shri Ram Kumar Singh went to the house of the appellants for getting the matter reconciled, but the appellant Kalloo Singh and his sons not only abused him but were also ready to assault him. Ram Swaroop and others who were present on the spot, intervened. At about 7.00 p.m., on the same day, Ram Kumar Singh (deceased), his wife, complainant Smt. Jishna (P.W. 1) and his son Rupendra Kumar (P.W. 2) were returning from the Jungle. Ram Kumar Singh (deceased) was slightly ahead of his wife and son and when they reached near the house of appellants, who were standing in front of their house, the appellant Kalloo Singh is said to have exhorted his sons to kill him and to finish the dispute for ever, whereupon the appellant Kirpal Singh fired with his gun at Ram Kumar Singh, with the result he tumbled down on the road. On hearing the cries of complainant, Smt. Jishna (P.W.1) and noise of the firearm, Mishri Singh (P.W.3), Hari Raj Singh, Battu Singh and others reached there and saw the occurrence. It is also alleged that another shot was fired, by appellant Vijai Pal Singh with his country made pistol, which hit Smt. Shanti Devi, wife of Natthu Singh who also sustained injuries. After seeing the witnesses on the spot the appellants alongwith other accused ran away towards jungle.

6. Ram Kumar Singh (deceased) who had sustained fire-arm injuries, was taken to the Government Hospital, Kanth in a tractor, which was arranged by his wife Jishna (P.W.1). They reached there at about 10.00 p.m. Dr. Narendra Kumar (P.W.5) medically examined Ram Kumar Singh and declared him dead at 10.15 P.M. The Medical Officer sent the information of his death by report (Ext. Ka 3) to the outpost Kanth in the same night.

7. Complainant, Jishna (P.W.1) got a report (Ext. Ka 1) scribed by one Anand Kumar in the hospital premises and lodged the same at outpost Kanth at 10.50 p.m. same night. On the basis of this report, a formal FIR (Ext.Ka-4) was prepared by Head Constable, Mahabir Singh, who also made entries in the G.D. at serial No. 29 registering the case under Sections 302 and 307 IPC (vide Ext. Ka 5). When this case was registered, Shri Laxmi Chandra Sharma S.I. (P.W.6) was present at the outpost Kanth and took the investigation himself. He

interrogated Smt. Jishna complainant (P.W.1). Thereafter P.W. 6 Laxmi Chandra Sharma, S.I. reached the Government Hospital Kanth and after leaving the dead body of Ram Kumar Singh under the supervision of constable and Chaukidar, he went to the spot and made search of all the appellants and took in police custody the blood stained and plain earth and prepared memo (Exts. 4 and 5). He also recovered empty cartridge from the spot (Ext. 6) and prepared their joint memo (Ext.ka-6). Thereafter, he went to the Government Hospital, Kanth, where he held inquest on the dead body of Ram Kumar Singh between 6.00 a.m. to 7.30 a.m. on 31.5.1983 and prepared inquest report (Ext.Ka-7). He also prepared diagram of dead body (Ext Ka 8) and other relevant documents (Exts. ka 9 to 11). The dead body was sealed and sent to the Mortuary for post-mortem through constables Ramvir Singh and Jagesh. The post-mortem on the dead body was conducted by Dr. D.N Sharma (P.W.7) on 21.5.1983, at 4.00 p.m. He found the following anti-mortem injuries on the dead body of Ram Kumar Singh:-

"Fire arm wound entrance 2.5 cm x 2.5 cm into chest cavity deep over the left scapular middle region with inverted and lacerated margins, direction forwards, subcutaneous tissues congested. Lt. Scapula underneath fractured with fracture of IV Lt. Rib, pleura underneath lacerated Lt. Pleural cavity contains 4 Oz of altered blood. Lt. Lung lacerated in the middle. One cap. Two pieces of wadding 29 (Twenty nine). Small pellets recovered from underneath the lung tissue.

There is no blackening, charring or tattooing around the wound of entrance."

8. In the opinion of the Doctor, the said injury was caused by fire arm and the cause of death was due to shock and haemorrhage as a result of fire-arm injury.

9. Shanti Devi was medically examined by Dr. Narendra Kumar Sharma (P.W. 5) at 6.00 a.m. on 31.5.1983. He found the following injuries on. her person:-

Single gunshot wound .3 cm x .2 cm with depth U.O.with inflammed margins on middle of clavicle , no burning, no tattooing and no scorching.

10. In the opinion of Doctor, the said injury was caused by-fire arm and was about half day old (vide injury report Ext. Ka 4).

11. Shri Laxmi Chandra Sharma S.I.(P.W. 6) inspected the spot again on 31.5.1983 and prepared site plan (Ext ka- 12). Thereafter/the investigation was taken by S.O., Shri Channan Singh (P.W.8). He examined the appellants and took in custody the gun of appellant Kirpal Singh after preparing the memo (Ext. ka-16). After completing the investigation, he submitted charge- sheet (Ext. ka-17) on 26.6.1983 .

12. The accused pleaded not guilty and asserted that they were falsely implicated due to enmity. It was suggested on their behalf that Ram Kumar Singh (deceased) was killed somewhere else in the dark night and the real culprits could not be known.

13. To substantiate the charges, the prosecution examined, Smt. Jishna (P.W.1),

Sri Rupendra Kumar (R.-W.2), Sri Mishri Singh (P.W.3), Shri Rajveer Singh Constable (P.W.4), Dr. Sarendra Kumar (P.W.5), Shri Laxmi Chandra Sharma, S.I. ((P.W.6), Dr. Devendra Nath Sharma (P.W.7) and Shri Channan Singh S.I. (P.W.8), whereas defence has examined Sri Puran Singh (D.W.1), Shri Harish Chand (D.W.2) and Shri Nihal Chand (D.W.) 3.

14. P.W. 1, Smt. Jishna is the first informant of the case and the unfortunate widow of Ram Kumar Singh (deceased). She had supported the incident in toto. She stated that about six months prior to the incident in question some quarrel had taken place between her husband and appellants on the question of raising the level of pathway by filling the earth which was being dug from the field of appellant Kalloo Singh. She also deposed about the incident that had taken place between the sons of Kalloo Singh and her children on the date of incident at about 2.00 p.m. It was stated by her that after the quarrel between children of the two families, Ram Kumar Singh had gone to the house of appellant Kalloo Singh with a view to get the matter reconciled amicably, but he was abused there. She stated that at about 7.00 p.m.. on 30.5.1983, when she along with her husband Ram Kumar Singh and her son Rupendra Kumar (D.W. 2) was returning from Jungle, and when they reached the front of house of Kalloo Singh, she noticed that Kalloo Singh alongwith his sons was standing there and Kirpal Singh was having a gun and Vijay Pal Singh was having a country made pistol and rest were empty handed. She further stated that after seeing Ram Kumar Singh, Kalloo Singh exhorted his sons to kill him so that entire dispute between them may come to an end , where upon Kirpal Singh appellant is said to have fired a shot with his gun, which hit Ram Kumar Singh consequently, he fell down on the road. She also stated that P.W. 3, Mishri Singh had also arrived at the spot after hearing the cries, Second fire is said to have been made by appellant Vijay Pal Singh with his country mad pistol, the pellets of which had hit Smt. Shanti Devi, wife of Natthu Singh. She also stated about the factum that after arranging the tractor, she took her husband to hospital Kanth, where the doctor declared her husband dead.. She also stated that her report (Ext. Ka-1) was written by Anand Kumar which she handed over at outpost Kanth.

15. P.W.2, Rupendra Kumar, is son of Ram Kumar Singh (deceased) and P.W. 3, Mishri Singh is the resident of the same village. They are the eyewitnesses and have fully supported the prosecution story. Rest of the witnesses are formal and their evidence has already been referred to earlier. It would be needless to repeat over the same.

16. Out of three witnesses examined by the defence, Puran Singh (D.W.1) has tried to depose that there was no way for coming to the house of Ram Kumar Singh from the house of appellants in case one comes from jungle. Harish Chandra (D.W.2), who is licensed arm-dealer has deposed that he has brought a S.B.B.L. Gun, which contains the same number at chop, body and barrel marked chop is removable and diametre of barrel is 1-8 cm. He stated that diametre of barrel of all factory made guns is the same. In cross-examination, he stated that

he is not ballistic expert and has no degree or diploma on this subject. His evidence was based on one S.B.B.L. gun only, which he brought with him. Nihal Singh (D.W. 3) was a clerk in Collectorate, Moradabad. He dealt with the license matters. According to him, Ram Kumar Singh was having licence No. 4348 Part II, gun No. 2026/71 of 12 bore.

17. The learned Sessions Judge considered the entire evidence and came to the conclusion that prosecution has succeeded in proving its case beyond reasonable shadow of doubt against three appellants, however he found that intention to commit murder of Shanti Devi was not proved but the intention was to kill Ram Kumar Singh. He convicted the appellant Kirpal Singh u/s 302 IPC on the finding that it was his shot, which killed him. However, for the murder of Ram Kumar Singh, he held that his murder was committed in furtherance of the common intention of other two appellants, namely, Kalloo Singh and Vijay Pal and convicted them u/s 302 read with Section 34 I.P.C. He further held appellant Vijay Pal Singh guilty u/s 323 IPC for having caused simple injuries to Smt. Shanti Devi. He convicted and sentenced the three appellants in the manner as stated above for imprisonment of life under Sections 302 & 302/34 IPC and 6 months R.I. u/s 323 IPC.

18. The appellants have challenged this conviction and sentence through this appeal.

19. We have heard the learned counsel for the appellants and learned A.G.A. for the State and have carefully examined the record.

20. It has been submitted by Shri Gopal Chaturvedi, Senior Advocate that injured witness Smt. Shanti Devi was not examined by the prosecution and prosecution story in the manner alleged does not seem to be probable. He further submitted that circumstances speak that it was a night occurrence and Ram Kumar Singh was killed somewhere else in the dark night and the real culprits could not be identified and appellants have been implicated falsely due to previous enmity. He further submitted that there was no evidence to support the conclusion of learned Sessions Judge that Vijay Pal Singh appellant had shared common intention to kill, Ram Kumar Singh so as to attract the provisions of Section 34 IPC. According to him the liability for murder of Ram Kumar Singh was that of only one and there being no evidence that his murder was committed in furtherance of common intention of Vijay Pal Singh, he could not be held guilty u/s 302 read with Section 34 IPC. His further contention is that witnesses are interested, related and partisan and so their evidence was not worthy of credence and conviction based on the testimony of such witnesses cannot be sustained.

21. Shri Mewa Lal Shukla, learned G.A. while strongly opposing the said arguments contended that the evidence of the eye-witnesses was fully corroborated by medical evidence and there was no reason to spare the real culprits and falsely implicate the appellants, who did this crime on account of

previous enmity and immediate motive was the quarrel between the children, which has taken place in the afternoon at about 2,00 p.m. Same day and an attempt by the deceased for peaceful settlement of the dispute had failed as the appellants had further humiliated him by hurling invectives at him. So he had come back, but the appellants got further enraged and it seems that they decided to liquidate him, while he had gone to field and he was way-laid and killed while coming back from his field (jungle). He further submitted that in fact the appellant Vijay Pal Singh was wrongly acquitted of the charges u/s 307 IPC. According to him, the witnesses examined by the prosecution are truthful and honest and there is no attempt on their part to falsely implicate anyone.

22. The prosecution case rested on the evidence of complainant Smt. Jishna (P.W.1) wife, Rupendra Kumar (P.W.2) son and Misri Singh (P.W.3). First two witnesses are the wife and son and third one Misri is said to belong to the same caste, clan and a collateral of the deceased. They are the eye witnesses and have narrated the incident in detail. It is in the evidence of these P.Ws and more specifically in the evidence of P.W. 3 that accused Kalloo Singh (since deceased) was also related to the deceased because Smt. Bhagvati, who is wife of Kalloo Singh (deceased accused) is the first cousin sister of complainant Smt. Jishna, P.W.1. However, despite the fact that the deceased as well as accused were related to each other from in-laws side, the fact is that all the three witnesses are related and interested witnesses, so their testimony will have to be scrutinized and evaluated with great care, caution and circumspection. The learned Sessions Judge while discussing the evidence of these P.Ws has also taken the due care and the findings recorded by him may be quoted here in extenso, which run as follows:-

"In this case three prosecution witnesses have been produced. P.W 1 Smt. Jishna wife of the deceased, P.W.2 Rupendra Kumar son of the deceased and P.W 3 Mishri Singh to support the prosecution case. P. W 3 Misri Singh is so said to be a family man of Ram Kumar Singh. So it is now argued that all the three witnesses are highly interested witnesses and as proved on this record they had the enmity with the accused. No doubt, it is so, but as held in Hari Obula Reddy and Others Vs. The State of Andhra Pradesh, and Ram Adhar Vs. State of U.P., Even the interested evidence is not unreliable and after careful scrutiny it could be relied upon. It was so held:-

"Interested evidence is not necessarily unreliable evidence. Even the partisanship by itself is not a valid ground for discrediting or rejecting the sole testimony. Nor is invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If found reliable it may by itself be sufficient to base conviction."

If we go through the testimony of all these three witnesses we find that although they are interested witnesses, they have spoken truth and their testimony is

truthful and trustwrothy. There is no such discrepancy in their statements which could make them unreliable. It has been argued that the circumstances show that they are not truthful witnesses. It is stated that Smt Jishna wife of the deceased Ram Kumar Singh, although present, did not even touch the body of Ram Kumar Singh after he fell down and no blood struck to the clothes of the lady. As we find in this case, the occurrence took place in a lane outside the house of the deceased and usually in villages the lady keeps away from their husband keeping in view all the customs of the village. It has come in the evidence that she did not go near the husband and there were many other village people who lifted him and took him to their house from where he was taken to the hospital. I do not find any thing unnatural or improbable in it."

23. We find that learned Sessions Judge has considered all the aspects of the matter with due care and caution and we find no reason to differ from him.

24. Learned counsel for the appellants did not make any effort to point out any material discrepancy or inherent improbability in the evidence of said witnesses. Medical evidence coupled with recovery of blood from the spot and the prompt FIR. proved the situm and manner of incident beyond doubt. It is true that Smt. Shanti Devi who was injured in this incident was not examined, but her absence will not render the testimony of the said witnesses unreliable. She might not have come forward for several reasons. She may be avoiding her involvement in the matter on account of fear of accused or she might have been won over, or she may be trying to remain neutral as the general tendency these days, is to avoid one's involvement in court matters.

25. Learned counsel could not successfully assail the findings on motive also which was proved by the prosecution witnesses. Quarrel about six months before over the digging of earth from the field of accused for path way and the wrangle between the children of that family on the eventful day, which had taken place at about 2.00 A.M. causing immediate annoyance and motive for this crime stand fully proved.

26. There were three witnesses examined By defence but evidence of none of them was of any assistance for establishing the innocence of the appellants. D.W. 1, Puran Singh tried to suggest that there was no way for coming to the house of deceased from his chak, which according to prosecution evidence was situated towards north at a distance of about half kilometres, but to a court question he had to state that Ram Kumar going to his field from his open land will go from the front of the house of appellant Kirpal Singh. Prosecution witnesses 1 to 3 overwhelmingly proved that the deceased was" coming from his chak to his house after peeling off the sugar cane in his field and the occurrence took place in front of the house of appellants where the passage is from west to east and to the north of the appellants" house.

27. Evidence of, D.W. 2, Harish Chandra is also not of any material importance. D.W.3, Nihal Chand's evidence that the deceased was also having a gun license

is undisputed. But his gun was not used in this incident, nor the deceased was having his gun with him at the time he was killed by appellant Kirpal Singh. Defence suggestion was rightly discarded by the learned Sessions Judge and we feel that the same does not deserve any serious consideration in view of the overwhelming evidence of the prosecution.

28. In view of above, the learned Sessions Judge has rightly believed the prosecution evidence and we fully agree with the finding of guilt recorded by him. However, the question that has been raised by the learned counsel for the appellants is regarding the legality of conviction of appellant, Vijay Pal Singh u/s 302 read with Section 34 IPC. He has not assailed the finding of Vijay Pal Singh, appellant being held guilty of Section 323 IPC for having voluntarily caused injuries to Smt Shanti Devi, but his argument is that there was no material to indicate that the murder of deceased was caused by appellant, Kirpal Singh in furtherance of common intention of Vijay Pal Singh, appellant.

29. The Hon"ble Apex Court while enunciating the law on the applicability of Section 34 IPC in the case of Krishnan and Anr. v. State 2003 SCC (Cri) 1577 has held as follows:-

"A charge u/s 34 IPC presuppose the sharing of a particular intention by more than one person to commit a criminal act. The dominant feature of Section 34 is the element of participation in actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert, There is a prearranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in Section 34 IPC. The existence of common intention is to be the basis of liability. That is why the prior concert and the prearranged plan is the foundation of common intention to establish liability and guilt.

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 section covered by a "criminal act" in the first part, because they refer to it. Constructive liability u/s 34 may arise in three well-defined cases. A person may be constructively liable for an offence which he did not actually commit by reason of;

- (1) The common intention of all to commit such an offence (Section 34).
- (2) His being a member of a conspiracy to commit such an offence (Section 120A)
- (3) His being a member of an unlawful assembly, the members whereof knew that an offence was likely to be committed (Section 149). (Para 29) Section 34 is framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. The reason why all are deemed guilty in such cases is that the presence of accomplices gives encouragement,, support and protection to the person

actually committing the act. The provision embodies the common-sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually.

Applicability of Section 34 depends upon the facts and circumstances of each case. As such no hard-and-fast rule can be laid down as to the applicability or non-applicability of Section 34. For applicability of the section it is not necessary that the acts of several persons charged with commission of an offence jointly, must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision."

30. For application of Section 34 IPC there should be prior meetings of mind and it must precede the criminal act and further there should be participation of all in furtherance of that common intention. Direct evidence on formation of common intention may not be easily available and forth-coming and the question has to be judged from the conduct of the alleged participators. The evidence is further required to be judged with caution and great circumspection. It is only when the inference of common intention is irresistible, such an inference should be reached else if on an evidence, it is possible to say that there may not be any common intention then in that circumstance the benefit of reasonable doubt would go to the accused. It is also note worthy that presence alone would not attract Section 34 IPC unless it is accompanied with some participatory conduct and at times it is possible that the common intention may arise at the spur of moment.

31. In the present case Vijay Pal Singh, appellant was charged u/s 302/34 IPC for murder of deceased and u/s 307 IPC for having caused fire arm injury to Smt. Shanti Devi.

32. The learned Sessions Judge did not hold appellant guilty u/s 307 IPC on the finding that "there was nothing on record to show that he had any intention or knowledge to kill Smt. Shanti Devi or that there was any common intention of any of the accused to do so. It may be voluntarily causing hurtSo, the circumstances for an offence u/s 307 IPC are not made out from the evidence on record. This is a simple case u/s 323 IPC for which no common intention could be attributed to the other three accused besides Vijay Pal Singh. It is an offence committed by Vijay Pal Singh u/s 323 IPC only".

33. The prosecution did not prefer any appeal challenging the acquittal of Vijay Pal Singh u/s 307 (PC and so the said finding is final. The learned Sessions Judge held that Vijay Pal Singh had not shared common intention with any of the other accused, yet he convicted him u/s 302/34 IPC The version set-forth in the report (F.I.R) was that Kalloo Singh exhorted his sons, whereupon, appellant Kirpal Singh fired with his gun. Witnesses arrived and while fleeing away Vijay Pal Singh fired with a Katta causing injuries to Smt. Shanti Devi, He did not fire or attempt to fire any shot at Ram Kumar Singh deceased. It appears that he used the country made pistol to frighten the witnesses in order to facilitate their

escape. From the above, it can not be said that Vijay Pal Singh had any common intention with appellant Kirpal Singh in causing murder of deceased Ram Kumar Singh. No prior meeting of mind or pre-concert for murder was proved. Appellant Kalloo Singh who was rightly, convicted u/s 302 read with Section 34 IPC, has already died. As against Vijay Pal Singh there is no material on record to indicate or denote prearranged plan or a prior meeting of mind or action in pre-concert. In the circumstances, appellant Vijay Pal Singh is entitled to get benefit of doubt for the charge u/s 302 read with Section 34 IPC.

34. In the result, the conviction of appellant Kirpal Singh u/s 302 IPC is upheld , whereas appellant Vijay Pal Singh's conviction u/s 302 /34 IPC is liable to be set"" aside.

35. Appeal of appellant Kirpal Singh is dismissed. His conviction u/s 302 IPC and sentence of imprisonment for life imposed upon him is confirmed.

36. Appellant Vijay Pal Singh is acquitted of the charge u/s 302/34 IPC, but his conviction and sentences u/s 323 IPC are maintained. His appeal is partly allowed.

37. Both the appellants are on bail. They shall surrender before the C.J.M. concerned within 15 days, failing which C.J.M. Moradabad will take appropriate steps to ensure their arrest and commit them to prison to serve out the sentences awarded to them. After they surrender or taken in custody, their bonds shall stand discharged.

38. Let a copy of this judgment be sent to C.J.M. Mordabad, within a week. He will submit compliance report to this Court within three months.