

(1983) 12 GUJ CK 0023
In the Gujarat High Court

Luhana Chandulal Dayalji

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 09-12-1983

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 302, 34, 34

Citation : (1984) 2 GLR 804

Hon'ble Judges : V.V. Bedarkar, J;M.B. Shah, J

Bench : Division Bench

Judgement

V.V. Bedarkar, J.—Both these appeals are directed against the judgment of the learned Additional Sessions Judge, Porbandar, District Junagadh, in Sessions Case No. 58 of 1980, by which he convicted Luhana Chandulal Dayalji, appellant (original accused No. 3) of Criminal Appeal No. 221 of 1981, for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code, and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs. 50/-, and in default of fine to undergo rigorous imprisonment for further one month. He, however, acquitted Aher Parbat Ala (original accused No. 1) and Mer Mulu Munja alias Choti (original accused No. 2) for the offences with which they were charged. Original accused No. 3 Luhana Chandulal Dayalji has filed Criminal Appeal No. 221 of 1981 against the order of conviction and sentence passed against him, while the State has filed Criminal Appeal No. 431 against the order of acquittal passed in favour of original accused No. 1 Aher Parbat Ala and original accused No. 2 Mer Mulu Munja alias Choti, and also for not convicting original accused No. 3 Luhana Chandulal Dayalji for the offence u/s 302 of the Indian Penal Code simpliciter without the aid of Section 34 of the Indian Penal Code.

2. The prosecution case is that on 29-7-1980 at about 3-00 p.m. the incident is alleged to have taken place when complainant Veja Meraman and deceased Mer Raja Jeta had gone to the shop known as Gothania Automobiles at Porbandar. Both of them belong to village Khabhodar, and on that day they had gone to

Porbandar for some Court case. After the case was adjourned, they had gone to purchase some motor spare-parts at Gothania Automobiles. At that time accused No. 3 came there and abused Raja Jeta by his mother and sister and then gave a blow with a knife on his abdomen. On receipt of the knife blow, Raja Jeta pressed his abdomen and ran towards the railway lines. Accused No. 3 and one another person, who was later on identified to be Aher Parbat Ala (original accused No. 1) followed him, overcame him and started giving blow with knives. When complainant Veja Meraman tried to go near Raja Jeta, it is alleged that Mer Mulu Munja alias Choti (original accused No. 2, who was standing with a Tamancha, threatened him saying that if he went near them, he would be blown of. Therefore, the complainant was afraid and did not proceed further. In the meantime, two persons, viz., Hothi Jiva (Ex. 20) and Natha Popat (Ex. 21) came from the other side. It is alleged that as Natha Popat raised a shout, the accused ran away. Thereafter, these three witnesses, Natha Popat, Hothi Jiva and the complainant, went near Raja Jeta who had died. Complainant Veja Meraman went to the City Police Station, Porbandar and gave his complaint. The police thereafter started investigation and the accused were charge-sheeted, committed to the Court of Session and tried, and after hearing the case, the learned Sessions Judge passed the orders as aforesaid.

3. The only question to be considered is whether accused No. 3 should be convicted for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code. We have come to the conclusion that he cannot be convicted for the offence u/s 302 of the Indian Penal Code simpliciter, because it is not proved that the fatal blows are given by him to the deceased. Now, it is argued that because accused Nos. 1 and 2 are acquitted, and there is no person whose constructive liability could be fastened to accused No. 3, he cannot be convicted for the offence of murder, punishable u/s 302 read with Section 34 of the Indian Penal Code, but he can be convicted for the offence committed by him, and that is only u/s 324 of the Indian Penal Code.

4. In order to support this contention, reliance is placed on the decision of the Supreme Court in Krishna Govind Patil Vs. State of Maharashtra, In that case the Supreme Court considered that where the High Court acquitted 3 of the 4 accused charged for an offence u/s 302 read with Section 34 of the Indian Penal Code giving them the benefit of doubt in view of the fact that their identity was not established, but convicted the 4th accused u/s 302 read with Section 34 of the Indian Penal Code on the ground that he had committed the offence alongwith one or other of the acquitted accused, and held that the conviction of the 4th accused was clearly wrong. It was observed that when the accused were acquitted either on the ground that evidence was not acceptable or by giving benefit of doubt to them the effect in law would be that they did not take part in the offence. Hence the effect of acquittal of the three accused was that they did not conjointly act with the 4th accused in committing the murder. If that was so, the 4th accused could not be convicted u/s 302 read with Section 34 of the Indian Penal Code for having committed the offence jointly with the acquitted

persons. That decision was given by the Supreme Court on the peculiar facts of that case.

5. That decision in case of Krishna Govind Patil (supra) was considered by the Supreme Court in Yeshwant and Others Vs. The State of Maharashtra,

In Krishna Govind Patil Vs. State of Maharashtra, this Court held that where four persons were charged u/s 302 read with Section 34, I.P.C., the effect of finding that three of them, who were specifically indicated as the "other participants" were entitled to the benefit of doubt, it was not possible to convict the fourth accused u/s 302 read with Section 34, I.P.C. It is clear that in that case, the only remaining accused could, if at all, be convicted u/s 302 simpliciter. Apparently the evidence was not good enough to sustain the conviction of the remaining accused person singly. We do not think that this decision, which depends upon its own facts, as criminal cases generally do, lays down any general principle that, where the identity of one of the participants is doubtful, the whole case must end in acquittal. Such a question belongs to the realm of facts and not of law.

In para 26 the Supreme Court has observed:

This Court said in Krishna Govind Patil's case (supra). There is not a single observation in the judgment (of the High Court) to indicate that persons other than the said accused participated in the offence, nor is there any evidence in that regard." In the case before us, there is evidence that the man who used the axe on Sukal was a man who looked like Brahmanand Tiwari, the appellant, and could be this accused himself. We are, however, not satisfied that the indentify of the man who used the axe on Sukal is satisfactorily established as that of the appellant Brahmanand Tiwari. In such a case, we think that the remaining accused persons could be convicted with the aid of Section 34 I.P.C. for the offences they committed. Indeed, if five persons are laying in wait for two to pass and then pounce upon them so that three are engaged in attacking one and two attack the other, it may be difficult to hold, as the High Court has done, that Sections 147 and 149 I.P.C. would be inapplicable. But, as the accused have been acquitted of the charge of rioting, we cannot enter into this question and convert this acquittal into a conviction u/s 147 I.P.C. at this stage.

The Supreme Court considered the applicability of Section 34 of the Indian Penal Code.

6. In the instant case before us, the evidence on record shows that there was a squint eyed person. The trial Court felt doubt whether that squint eyed person was accused No. 1 or somebody else. The trial Court has not come to the conclusion, as we also do not come to the conclusion, that there was no other person present. Other person present was a squint eyed person, but whether that person was accused No. 1 or not is doubtful and, therefore, Section 34 of the Indian Penal Code would be applicable, because another person who was described as a squint eyed person was certainly there.

7. The Supreme Court had an occasion to consider such a case in *Harshadsingh Pahelvansingh Thakore Vs. The State of Gujarat*, In that case, in para 8, an argument was advanced before the Supreme Court that since three out of the four accused had secured acquittal the invocation of Section 34 of the Indian Penal Code was impermissible. The Supreme Court observed:

The flaw in this submission is obvious. The Courts have given the benefit of doubt of identity but have not held that there was only one assailant in the criminal attack. The proposition is plain that even if some out of several accused are acquitted but the participating presence of a plurality of assailants is proved, the conjoint culpability for the crime is inescapable. Not that the story of more than one person having attacked the victim is false, but that the identity of the absolved accused is not firmly fixed as criminal participants. Therefore, it follows that such of them, even if the number dwindled to one, as are shown by sure evidence to have knifed the deceased, deserve to be convicted for the principal offence read with the constructive provision.

This is what is completely applicable to the instant case. It cannot be overlooked that applicability of Section 34 of the Indian Penal Code to a case depends upon the particular facts and circumstances of that case. Therefore, we have to scrutinise and pronounce upon the particular facts before us, and as the facts before us clearly show that there was another person present who had a knife, and alongwith that person accused No. 3 was also there and he had started giving knife blows to the deceased and, therefore, because that squint eyed person could not be properly identified, presence of other person alongwith accused No. 3 cannot be doubted. The learned trial Judge was, therefore, right in convicting accused No. 3 for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code.

8. Though on merits the appeal filed by accused No. 3 deserves to be dismissed, we have to mention one aspect. Here, in this case, though accused No. 3 is sentenced to imprisonment for life, the learned trial Judge has awarded fine of Rs. 50/- and in default of payment of fine to undergo rigorous imprisonment for further one month. How can a person who has been sentenced to suffer imprisonment for life would undergo further imprisonment for one month ? In fact, this Court has a number of times considered this aspect and set aside the order of fine. In spite of this, merely because in the Indian Penal Code for the offence u/s 302, words used are "and also fine," it is the impression in the minds of the Sessions Judges that even if they sentence an accused person to suffer imprisonment for life, they have to award the sentence of fine, being mandatory. This is not the correct impression. In this view of the matter, the sentence of fine deserves to be set aside.

9. In the result. Criminal Appeal No. 221 of 1981 filed by appellant Luhana Chandulal Dayalji (original accused No. 3) is partly allowed. The order of conviction and sentence of imprisonment for life u/s 302 read with Section 34 of the Indian Penal Code is confirmed, but the order of sentence of fine of Rs. 50/-,

in default rigorous imprisonment for further one month, is set aside.

10. Criminal Appeal No. 431 of 1981 filed by the State is dismissed confirming the order of acquittal passed by the learned trial Judge in favour of respondent Nos. 1 and 2 (original accused Nos. 1 and 2) and the acquittal of respondent No. 3 (original accused No. 3) for the offence u/s 302 of the Indian Penal Code simpliciter.