
(2002) 05 MP CK 0076

In the Madhya Pradesh High Court

Case No : Criminal A. No. 1429 of 1996

Majid Khan and others

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 01-05-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 307, 324, 34

Citation : (2003) 1 MPLJ 242

Hon'ble Judges : S.P. Khare, J

Bench : Single Bench

Advocate : Ranjan Banerjee, for the Appellant; Yogesh Dhande, Panel Lawyer, for the Respondent

Final Decision : Allowed

Judgement

S.P. Khare, J.

Appellants Majid Khan, Mardan Khan and Subhan Khan have been convicted u/s "307/34", Indian Penal Code and sentenced to rigorous imprisonment for four years, four years and seven years respectively. They have also been sentenced to pay fine. They have been further convicted u/s "324/34", Indian Penal Code and sentenced to rigorous imprisonment for one year and to pay a fine of Rs. 500/- each. They were charged for the offences under sections 307 and 324, Indian Penal Code also but they have been acquitted of those charges.

It is no longer in dispute that an incident of violence took place on 9-10-1993 at about 7 A.M. in village Sukha in which Iddan Khan (P.W.4) sustained fourteen injuries out of which twelve were incised wounds and Imrat (P.W. 10) received two injuries as per reports Ex. D.2 and Ex. D.4 filed in the counter case. On the other hand accused Majid Khan was badly injured and he had five incised wounds coupled with several fractures on his body as per report Ex. D.3. There were counter cases. One was Sessions Trial No. 44 of 1994 against the appellants and the other was Sessions Trial No. 10 of 1994 against Iddan Khan (P.W.4) and

Imrat (P.W. 10). After trial of both the cases the finding which was arrived at by the trial Court was that it was a case of "free fight". It could not be ascertained with reasonable certainty who mounted the first attack and how the fight ensued but it was clear that both the sides were armed with lethal weapons, they came on the spot to strike each other with full preparation and there were serious injuries on both the sides. There was no other witness in the present case to support the prosecution version except the evidence of the two injured persons. Accused Subhan Khan was held to have caused most of the serious incised wounds found on the body of Iddan Khan (P.W.4) by Katarna, a sharp edged weapon which brought the case against him within the ambit of section 307, Indian Penal Code. The plea of self-defence set up by the appellants was negatived but on the basis of the material on record no specific finding could be arrived at which injuries of Iddan Khan (P.W.4) and Imrat Khan (P.W. 10) were caused by accused Majid Khan or Mardan Khan. The inference drawn by the trial Court in para 38 of the impugned judgment is that all the three appellants had formed common intention to cause the death of Iddan Khan (P.W. 4) and cause hurt to Imrat (P.W. 10) and in furtherance of that common intention they caused injuries to them. After recording this finding the appellants were convicted under sections 307/34 and 324/34, Indian Penal Code and they were acquitted of the alternative charges under sections 307 and 324, Indian Penal Code.

In this appeal the findings of fact arrived at by the trial Court have not been challenged. It has been pointed out that appellant Subhan Khan was not released on bail by this Court u/s 389 Criminal Procedure Code and he has served out the sentence imposed upon him by the trial Court. His appeal has not been pressed in view of the material available on record. But it has been argued that the trial Court after holding that it was a case of "free fight" erred in law in invoking section 34, Indian Penal Code for conviction of appellants Majid Khan and Mardan Khan and therefore, their conviction and sentence should be set aside. It is also contended that they have been acquitted of the charges under sections 307 and 324, Indian Penal Code and their acquittal under these sections not having been challenged has become final.

The question is whether appellants Majid Khan and Mardan Khan could be convicted with the aid of section 34, Indian Penal Code on the finding that it was a case of "free fight".

The doctrine of constructive liability does not apply in cases of free fight. In a free fight there is no right of private defence to either side and each individual is responsible for his own acts. There is no constructive or vicarious liability for the act of another. In a case of free fight the Court cannot call in aid sections 34 and 149, Indian Penal Code.

In *Gajanand and Others Vs. State of Uttar Pradesh*, the Supreme Court held that a free fight is "when both sides mean to fight from the start, go out to fight and there is a pitched battle". The question who attacks and who defends in such a fight is wholly immaterial and depends upon the tactics adopted by the rival

commanders. In *Kanbi Nanji Virji and Others Vs. The State of Gujarat*, it has been observed that once the conclusion is drawn that the injuries sustained by the persons were in course of a free fight, then only those persons who are proved to have caused injuries can be held guilty for the injuries caused by them. In *Puran Vs. State of Rajasthan*, it has been laid down that in a case of sudden mutual fight between the parties, there can be no question of invoking the aid of section 149, Indian Penal Code for imposing constructive criminal liability. The accused are to be convicted for their individual acts. Again in *Vishvas Aba Kurane Vs. State of Maharashtra*, it is said that in a free fight, no right of private defence is available to either party and each individual is responsible for his own acts. In *Bachan Singh and others Vs. State of Punjab*, it was held that a survey of the evidence leaves an impression that there was a free fight between the two groups, namely, the prosecution party and accused party, in which both parties sustained injuries. It is the settled law that in a free fight each accused will be liable for the individual act attributed to the particular accused. In *Boota Singh vs. State of Punjab* (1996) 2 SCC (Cri.) 622 it is reiterated that in a case of free fight, the provisions of sections 148 and 149, Indian Penal Code cannot be invoked and each accused shall have to be dealt with individually and shall be individually liable for the injuries caused by him. So was the decision in *State of Haryana Vs. Chandvir and others*, .

In the present case the finding of the trial Court is that there was a "free fight" between both the parties and both sides sustained injuries. Therefore, in view of the principle of law discussed above accused Majid Khan and Mardan Khan could not be convicted with the aid of section 34, Indian Penal Code for the act of co-accused Subhan Khan. They have not been held liable for their individual acts and have been acquitted of the charges under sections 307 and 324, Indian Penal Code.

In the result the appeal of accused Majid Khan and Mardan Khan is allowed. Their conviction and sentence under sections 307/34 and 324/34, Indian Penal Code are set aside and they are acquitted of these charges.