

**HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE**

**D.B: HON'BLE SHRI JUSTICE P.K. JAISWAL AND HON'BLE**

**SHRI JUSTICE ALOK VERMA**

**Cr.A. No.1356/2010**

**Lakhan and Anr.**

**Vs.**

**State of Madhya Pradesh**

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Shri Harshwardhan Pathak, learned counsel for the appellants.

Shri Devendra Singh, learned Panel Lawyer for the respondent/State.

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**JUDGMENT**

**(Delivered on 01/04/2015)**

**Per Alok Verma, J.**

This criminal appeal is directed against the conviction and sentence passed by the learned Additional Sessions Judge, Indore in Sessions Trial No.185/2006 by judgment dated 10.11.2010 whereby the learned Additional Sessions Judge convicted the accused Lakhan under section 302 IPC and accused Virendra under section 302 r/w section 34 IPC and sentenced them to life imprisonment and fine of Rs.1,000/- each

with default clause.

2. According to prosecution story, marriage of younger brother of complainant Kamalsingh Nayak was to be solemnized in village Limbodi with daughter of Bhanwarlal Patel. The marriage party reached the village at about 10:00 pm. to the place of the ceremony which was field of one Samundar Patel. On reaching there, the persons from the family of the girl invited them to have dinner first as the food was ready. At that moment, the band was playing music and the present accused who were from girl's side were dancing on the tune.

3. The complainant Kamalsingh went out and asked the persons playing the band to stop playing and have food. This was objected to by the present accused persons and altercation and scuffle took place between them, and thereafter, the complainant getting himself released from them, went inside marriage pandal. The accused followed him and inside the pandal, they started using abusive language against them. On this, the deceased Mahendra @ Makhan, who was nephew of the complainant tried to stop them from using such abusive language against the complainant. Suddenly, the accused Virendra caught hold of the deceased from behind and the

accused Lakhan brought out a knife from his pocket and inflicted one single injury on right portion of chest of the deceased due to which blood started loosing out. The incident was witnessed by Jagdish (P.W.8) Trilokchand (PW-1) and Kailash (PW-5). The persons present there tried to catch hold of the accused but they fled away along with knife, and thereafter, the deceased was taken to M.Y. Hospital in a Maruti Van, where he was declared brought dead. The intimation of his death was sent to Police Station Bhanwarkua, District Indore where the First Information Report was lodged by the complainant Kamalsingh (PW-11) at 11:50 pm. The FIR was prepared by Fateh Bahadursingh (PW-12) and the matter was investigated by Station Incharge B.S. Parihar (PW-16).

4. The accused Lakhan faced trial charged under section 302 IPC and the co-accused faced trial charged under section 302 r/w section 34 IPC. After recording evidence and the accused statement, the learned Additional Sessions Judge found them guilty under the sections and sentenced them as aforesaid. As per the inferences of the learned Additional Sessions Judge, the death of the deceased was homicidal and it was inferred by him that the injury was caused by the accused persons with an intention to cause death of the deceased.

5. Aggrieved by the aforesaid conviction and sentence, this appeal is filed on following grounds, inter-alia, that :-

- (i) That the findings of the lower court is against the law and facts.
- (ii) In the present case provisions of section 34 IPC cannot be invoked, as there are no evidence of any common intention and any overt act done in furtherance of such common intention.
- (iii) The quarrel started at fit of moment. There was no pre-meeting of mind and does not prove that the accused Virendra was knowing that the co-accused was carrying a knife in his pocket which he would use to kill the person.
- (iv) The incident took place without any premeditation and pre-meeting of mind and in heat of passion and only one injury was caused on the deceased and, therefore, this does not fall under section 302 IPC but it falls under section 304 Part II of IPC.
- (v) The learned lower court also did not take into consideration that the story of the prosecution is unnatural and the deceased was not taken to the nearest police station and they did not inform in the police station while they were going towards M.Y. Hospital

and the Police Station Bhanwarkua falls on way to M.Y. Hospital.

(vi) The learned Court also erred in not believing the statement of defence witness Samundar Singh Patel who deposed that in the marriage function, a dispute between the two families arose due to the demand of the boy's family of a motorcycle and during the dispute the deceased suffered injury and died. The learned lower court also did not take into consideration the facts that both the witnesses who supported the prosecution story to some extent were the closely relatives of the deceased and were interested persons.

6. The learned Additional Sessions Judge found that it was proved by the prosecution that the accused Virendra caught hold of the deceased from behind while the accused Lakhan inflicted one single injury from knife which caused penetrated wound in the right side of the chest of the deceased. The knife punctured his lungs and then his heart and bleeding from the wound resulted in death by shock and hemorrhage.

7. However, in this case the eye-witness Trilokchand (PW-1) turned hostile and did not support the prosecution case, this witness is a relative of the family of groom but he resiled from

his police station statement under section 161 Cr.P.C. and did not support the case of the prosecution. The same is the case of Kailash. He is also close relative of the family of the groom however, he also turned hostile and did not support the prosecution case. Jagdish (PW-8) and the complainant Kailash (PW-11) however, supported the case of the prosecution. Their narration of the incident is almost the same. They stated in their respective statements that on the date of incident i.e. 23.04.2006, they as members of marriage party of Gopal Nayak went to village Limbodi. The marriage of Gopal was to be solemnized with daughter of Bhanwarlal, Sarita. They started from their residence at 10:00 pm and reached the venue, the field of Samundar Patel after sometime. On reaching there, the family members of the bride asked them to have food first as the food was already ready. Kamalsingh (PW-11) went out to ask the persons playing band to stop playing and to ask them to have food. At that time, the present accused were dancing on the music played by the band. They objected to stopping of the music and altercation and scuffle took place between complainant and the present accused, thereafter, the complainant came back and informed Jagdish (PW-8), following him the accused also reached there and then when the deceased Mahendra tried to intervene and stop them to using abusive

language, the incident as stated above took place.

**8.** The counsel for the defence tried to assail the statements of these two witnesses on various grounds. Some of them are that the deceased was not taken to the nearest hospital and while going to M.Y. Hospital, Police Station – Bhanwarkua falls on the way, they did not choose to inform at the police station about the incident and directly went to the hospital. Defence counsel also tried to emphasize that there were four to five persons apart from Jagdish (PW-8) and Kailash (PW-11) in the Van, one of them could have been dropped at Police Station Bhanwarkua to inform the police.

**9.** The cross-examination of these two witnesses proceeded on these lines. The suggestions made by the defence counsel were duly denied, both the witnesses emphasized that they were anxious to take the accused to M.Y. Hospital because he was serious and was bleeding profusely.

**10.** The learned Additional Sessions Judge did not accept their objections and observed in the impugned judgment that the first priority of the family of the deceased was to shift him to a good hospital and if, they do so, they could not be disbelieved only because instead of informing the police first, they took the

deceased to the hospital.

**11.** This apart, we find that when the deceased was taken to MY. Hospital, the telephone operator Subhash informed Police Station Bhanwarkua that the deceased Mahendra @ Makhan was brought to the hospital dead. Such intimation was recorded by P.S. Bhaghel (PW-6) who was posted as head-constable at the police station. On this information, he registered the merg at Sr.No.33/2006. This intimation was received at the police station at 12:05 on 24.04.2006 that means almost 45 minutes after the incident. First information was prepared at 11:50 pm. on 23.04.2006 itself. Reaching these two arguments, it appears that the FIR P-15 is slightly ante timed, however, this difference of about 15 – 20 minutes would hardly makes any impact on the veracity of statements of these two witnesses.

**12.** The learned counsel also argued before the lower court as well as before this Court that no independent witness from village Limbodi was examined, even the father of the girl Bhanwarlal was also not examined. Similarly, driver of the van and persons who were travelling in the van were not examined and according to them this created doubt on the correctness of the statements of these two witnesses. He also argued that



genesis of the dispute was different. After reaching the village, the family of the groom started demanding a motorcycle due to which the dispute arose between two families which resulted in a fight between members of the two families and in the fight the deceased sustained the injuries and died. To prove this defence story, Samundarsingh Patel (DW-1) was examined, who is Surpanch of the village. He stated in his statement that he attended marriage ceremony. There a dispute arose on demand by the boy's side of a motorcycle. They tried to advise them against such demand insisting that such a custom was not prevalent in their village. He left the ceremony. Later on he came to know that due to the dispute somebody died. However, the learned Additional Sessions Judge rightly disbelieved the version of this witness on the ground that he was a Surpanch of the village, still, he chose to remain silent during the investigation and did not disclose his knowledge about the dispute to the police. Subsequently, he appeared as defence witness which according to the learned Additional Sessions Judge is an after thought. In our considered opinion also the conclusion drawn by the learned lower court in respect of statement of this witness is just and proper and do not call for any interference by this Court.

**13.** So far as, non-examination of independent witness especially the persons from girl's family is concerned, this is a definitely a laps on the part of the investigating officer, he should have examined at least the driver of the Maruti Van in which the deceased was shifted to the hospital and the persons who were playing band in the ceremony and also other persons of the village who witnessed the incident. However, merely because of such lapses on the part of investigating officer, the statements of these two witnesses cannot be disbelieved.

**14.** As such, after going through the evidence available on record and close scrutiny of statements of Jagdish (PW-8) and Kailash (PW-11) who are close relatives of the deceased and therefore are interested witnesses, we find that the statement of Jagdish (PW-8) and Kailash (PW-11) can be relied upon and relying on their evidence, it is proved that the accused Virendra caught hold of the deceased from behind and accused Lakhan inflicted single knife injury on the deceased which resulted in his death.

**15.** This brought to us to the argument of the learned counsel for the appellant that the incident took place without any premeditation and pre-meeting of mind on spur of moment and,

therefore, there was no intention to kill the deceased. The act on the part of the accused Lakhan was such that only it can be inferred that by doing such an act, he is likely to cause death of the deceased and as such as per the argument, the act of the accused persons fall in the section 4 to section 3 of IPC and there only liable for culpable homicide to the deceased not amounting to murder and punishable under section 304 Part II of IPC because there was no intention to cause death and they did not take undue advantage and did not act in cruel or unusual manner.

**16.** To substantiate his argument, the learned counsel places reliance on the judgment of the Hon'ble Supreme Court in the case of **Sripathi and Ors. vs. State of Karnataka; AIR 2010 SC 249**, elaborating the provisions of section 34 IPC. The Hon'ble Apex Court observed in para 8 to 10 of the judgment which may be reproduced here for convenience.

“8.Coming to the plea regarding the applicability of Sec.34 IPC, we find that the evidence is not very specific as regards the role played by A.1, A.2 and A.3. It is the prosecution version that A.4 had the knife in his pocket which he suddenly brought out and stabbed the deceased.

9. Section 34 has been enacted on the principle of joint liability in the commission of a

criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar vs. State of Punjab* (AIR 1977 SC 109), the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the 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.

10. The Section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the commission of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between 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. As was observed in Ch. Pulla Reddy and Ors. vs. State of Andhra Pradesh (AIR 1993 SC 1899) : (1993 AIR SCW 1843), Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.”

17. It is apparent that the facts of this case were similar to the facts of the present case. There, the accused Pandit (A.4) inflicted a stab injury on the abdomen of one Jagannath and the other three accused persons caught hold of different parts of the body of the deceased on being told to do so by accused Pandit, the knife was suddenly brought out of the pocket of the accused A.4 and he stabbed the deceased. The Hon'ble Apex Court found

that there was no evidence to show that accused A.1 to A.3 knew beforehand that the accused A.4 was carrying knife in his pocket and he would use it for inflicting injury on the deceased. The learned counsel also placed reliance on the judgment of the Hon'ble Supreme Court in **Ajay Sharma vs. State of Rajasthan, AIR 1998 SC 2798** and, therefore, the sentence under section 302/34 IPC was reduced to section 324 r/w section 110 of IPC and the accused was sentenced to period already undergone. For the accused Lakhan, the learned counsel for the defence places reliance on the judgment of the Hon'ble Apex Court in **Shivappa Buddappa Kolkar alias Buddappagol vs. State of Karnataka and others, AIR 2004 SC 5047**, where the accused during the quarrel suddenly took axe and gave solitary blow on back of head of the deceased resulting into his death. The Hon'ble Apex Court found that there was no premeditated or pre-arranged plan to attack the deceased. The medical evidence also did not show that the injury inflicted by itself would be sufficient in ordinary course of nature to cause death. In such a circumstances, the accused could only be imputed with knowledge that injury inflicted by him was likely to cause death and, therefore, the conviction was altered from section 300 to one under section 304 Part II and the accused was sentenced to undergo 5 years R.I. The learned

counsel also places reliance on the judgment passed by co-ordinate Bench of this Court in Criminal Appeal No.529 & 558 of 1999 dated 31.08.2009, here the co-ordinate Bench was dealing with the case, facts of which is similar to the present case. Deceased Kailash in that case along with his sister-in-law Saurambai (PW-3) was sitting in the courtyard of his house, his wife Suganbai (PW-5) was inside the house. Another sister-in-law Dhankunwarbai (PW-4) was also sitting in the courtyard while neighbour Bhagirath was sitting on a platform outside his house. The accused Badri and Bharat came to the house of the deceased, it was alleged that family of the accused and the deceased were having enmity prior to the incident. They were not attending social functions that take place in their respective families. The accused Badri and Bharat started abusive language against the wife of the deceased Kailash when he objected scuffle and altercation began. Accused Chander who was carrying Gupti inflicted single injury on deceased Kailash who died. The co-ordinate Bench of this Court acquitted the other accused from charges under section 302/34 IPC holding that there was no prior meeting of mind and common intention and the conviction of the accused Chander was converted into section 304 Part I of IPC.

**18.** Applying the principle laid down by the Hon'ble Apex Court in the co-ordinate Bench of this Court in aforementioned rules, it is apparent that the accused were not having any prior enmity with the deceased. The dispute initially took place with Kailash (PW-11). The deceased only tried to intervene and tried to stop them from using abusive language on which all of a sudden the accused Lakhan took out a knife and inflicted injury on the deceased, immediately after inflicting one single injury, he fled away.

**19.** Taking all these factors into consideration, we find that so far as, conviction of accused Lakhan under section 302 IPC is concerned, it cannot sustain as there appears to be no intention on his part to cause death, only there could be a knowledge imputed to him that by causing such injury he is likely to cause death of the deceased, as such, his case falls within the provisions of part II of section 304 IPC. So far as, the role played by another co-accused is concerned, it is said that he caught the deceased from behind to facilitate the another accused to inflict knife injury on the deceased. Prior to the incident, they were dancing on the music played by band immediately after their altercation, they followed Kailash (PW-11) there, subsequently, they inflicted the injury on the



deceased. Taking the evidence available on record, no prior meeting of mind or premeditation can be inferred, however, when he caught hold of the deceased some knowledge that the accused Lakhan would inflict some injury on the deceased could not be ruled out. Such common intention can be formed even during the commission of the act. As such, so far as the accused Virendra is concerned, looking to the injury caused, he can be held guilty under section 304 Part II IPC.

**20.** Accordingly this appeal is partly allowed. Conviction of accused Lakhan under section 302 IPC is set aside and he is convicting under section 304 Part II. Similarly, conviction of accused Vikram is also converted for section 302 r/w section 34 IPC to one under section 304 Part II IPC. Accordingly, the sentences of life imprisonment imposed on the accused are set aside, instead they are sentenced to R.I. of 7 years each and fine of Rs.1,000/- each and in default of payment of fine the accused shall further undergo simple imprisonment of 1 month each. The period of custody shall be set off in the period of sentence.

**21.** Order of the lower court in respect of seized property is confirmed.

**22.** With that observations and directions, this appeal stands

disposed of.

**( P.K. JAISWAL )**  
**JUDGE**

**( ALOK VERMA )**  
**JUDGE**

Kafeel