

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

BEFORE

HON'BLE SHRI JUSTICE PREM NARAYAN SINGH

CRIMINAL APPEAL No. 8763 of 2023

BETWEEN:-

**VIJAY S/O TOLARAM, AGED ABOUT 35 YEARS,
OCCUPATION: LABOR, GRAM NAYAKHEDI,
P.S. NANAKHEDA, DISTRICT UJJAIN (MP)**

....APPELLANT

AND

**THE STATE OF MADHYA PRADESH
THROUGH POLICE STATION NANAKHEDA,
DISTRICT UJJAIN (MP)**

.....RESPONDENT

CRIMINAL APPEAL No. 10693 of 2023

BETWEEN:-

**MUKESH S/O TOLARAM,
AGED ABOUT 39 YEARS, OCCUPATION:
AGRICULTURE R/O GRAM NAYAKHEDI
P.S. NANAKHEDA DISTT.UJJAIN (MADHYA PRADESH)**

...APPELLANT

AND

**THE STATE OF MADHYA PRADESH
THROUGH POLICE STATION NANAKHEDA,
DISTRICT UJJAIN (MP)**

...RESPONDENT

(SHRI VIRENDRA SHARMA- ADVOCATE FOR APPELANTS)

(SHRI RAJESH JOSHI- GOVERNMENT ADVOCATE FOR RESPONDENT/STATE)

Reserved on :16.08.2023

Delivered on :12.09.2023

This appeals coming on for admission this day, the court passed the following:

JUDGMENT

This order shall govern the disposal of these appeals as they are arisen out of same order date and same Sessions Trial number, hence, they are heard analogously and are being decided by this common order.

2.These appeals are filed against the judgment of conviction and sentence dated 06.07.2023 passed by the Sessions Judge, Ujjain District Ujjain in Sessions Trial No.174/2021, whereby appellants Mukesh and Vijay both have been convicted for offence under section 324/34 (two counts) of Indian Penal Code (hereinafter referred to as 'IPC') and sentenced to undergo 03-03 years R.I. with fine of Rs.1000/-, 1000/- with default stipulations.

3. As per the prosecution story, on 01.06.2021 due to petty dispute regarding use of pathway situated between the field of appellants and complainant party, the appellants hurled abuses and on being stopped by the complainant, appellants assaulted Vikas by kicks & fists, in between Mukesh took a knife from his pocket and assaulted Vikas on his head, chest, back, hip and stomach due to which he sustained injuries and started bleeding. When Dilip came in rescue Mukesh gave a knife blow on his chest due to which Dilip sustained injury near his chest and started bleeding. Thereafter Dilip's relatives Jitesh and Dharmendra came to rescue the injured, then the accused persons threatened the complainant party to kill them, if they use the path way in future. Dilip filed a complaint, on the basis of which police registered crime No.336/2021 for offence under Sections 307, 323, 294, 506, 34 of IPC against the accused persons.

4. During investigation Police reached Sanjivini hospital wherein injured Dilip was admitted for treatment. On 02.06.2021, Dr. Rajendra Bansal submitted MLC report of injured Vikas and Dilip. On 02.06.2021, police recovered blood stained cloth from Dilip and at the

instance of Dilip, police reached on the spot and prepared spot map, seized blood stained earth and plain earth, arrested accused Vijay and Mukesh. Further on the basis of memorandum statement of Mukesh, police recovered iron knife and blood stained shirt from his possession and thereafter, recorded the statement of the witnesses. After completion of investigation, charge-sheet was filed against the accused persons for offence under Sections 307, 323, 294, 506, 34 of IPC, 1860 before the Judicial Magistrate First Class, Ujjain, District Ujjain who committed the case to the Court of Session, Ujjain whereupon charges were framed under Section 307 (on two counts), 294 and 506-II against the appellants.

5. Accused persons namely, Basantabai and Seemabai have already been acquitted from the aforesaid offence. Appellants Vijay and Mukesh abjured their guilt and took a plea that they have been falsely implicated in the present case In this regard, the prosecution has examined as many as 14 witnesses namely the Dililp (PW-1), Vikas (PW-2), Dharmendra (PW-3), Sunil(PW-4), Dinesh (PW-5), Dr. Devesh Kumar (PW-6), Rajesh (PW-7), Lakhan (PW-8), Monabai(P.W.9), Dr.

Rajendra Bansal (P.W.10), Virendra Sharma (P.W.11), Priyanka Mimrot (P.W.12), Sunil (P.W.13), Omprakash Ahir (P.W.14).

6. Having analyzed the testimony of prosecution and argument of both parties, the learned Trial Court has convicted and sentenced the appellants as hereinabove.

7. Learned counsel for the appellants submitted that the allegation against both the accused persons is that they had beaten the complainants by kicks and fists but in the meanwhile, the appellant Mukesh has suddenly picked knife from his pocket and has assaulted Vikas and complainant Dilip. It is further submitted that only Mukesh has used knife and nothing was stated against the appellant Vijay for using knife. Since, the incident happened on the spur of moment, it cannot be attributed as pre-planned or pre-meditated incident. The Star Witness Dilip (PW-1) /complainant has not stated anything against the appellant Vijay. Even, he has not stated that Vijay has used kicks and fists. Therefore, the accused Vijay cannot be punished for Sections 324 and 324/34 of IPC as it would not apply on account of the fact that the appellant was not aware about the knife carried by the main accused

Mukesh. That apart, as per the statement of Dr. Devesh (PW-6), there was no injury of kicks and fists on the persons of injured Dilip and Vikas.

8. Learned counsel for the appellants submitted that on the basis of contrary testimonies of both injured witnesses, the appellants may be given benefit of doubt. He has also alternatively submitted that since the appellant Mukesh is in jail from the date of incident, his punishment may be reduced to undergone and looking to the role played by accused Vijay, he should only be punished for the sentence of undergone.

9. Learned Govt. Advocate has opposed the prayer by inviting the attention of this Court towards the statement of injured witnesses so also the conclusive paragraphs of the impugned judgment and submitted that the injuries caused by the appellants were serious in nature. He supported the judgment by submitting that there is clear evidence against the appellants, therefore, he prays for dismissal of the appeal.

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10. In backdrop of the aforesaid rival submission, the question for determination is as to whether the order of learned Sessions Judge qua

convicting and sentencing the appellants is correct in the eyes of law and facts?

11. In this appeal, learned counsel for the appellants submitted that the allegation of causing injury by using knife is against the appellant Mukesh, no prosecution witness has stated that the appellant Vijay has also assaulted with knife upon the injured persons. In this regard, statement of complainant/injured Dilip and another injured Vikas is required to be examined.

12. Complainant Dilip (PW-1) has stated that there is a dispute of path way between the accused persons and complainant party. On the date of incident, the accused persons Mukesh and Vijay came and started altercation. He and his brother tried to intervene the accused persons but they have started brain teasing (Magajmari). Thereafter, the accused Mukesh has picked out knife and assaulted Vikas. Statement of this witness finds support from the testimony of another witness Vikas (PW-2). Other witnesses Dharmendra (PW-3) and Sunil(PW-4), have also deposed about the injuries caused to Vikas. Dharmendra Vania(PW-3) specifically stated that Vikas had received the injury of knife and

blood was oozing thereof. Dr.Devesh (PW-6) has also supported the facts of said injury. He has found injuries on the person of Vikas and Dilip which were caused by sharp and blunt object. Testimonies of these witnesses remained unshaken in their cross-examination. Dr. Rajendra Bansal(PW-10) has also supported the aforesaid fact that the injuries found on the persons of injured. The said knife was seized by ASI Sunil Gond (PW-13) although he has admitted that the said knife was a knife which is used in the kitchen. Omprakash Ahir(PW-14), Investigating Officer has also supported the case of prosecution.

13.In view of the statements of aforesaid witnesses, it is well fortified that the accused Mukesh has assaulted both the injured persons with knife. Hence, findings of the Trial Court regarding conviction of Mukesh under Section 324 of IPC has no infirmity or illegality.

14.Now, the question for consideration is as to whether the aforesaid offence was committed by both the appellants jointly or in furtherance of common intension?

15.As per aforesaid deliberation, it is unearthed that the assault was commenced with kicks and fists only. Complainant Dilip, in his

statement, has not alleged anything against the appellant Vijay regarding the assault of knife. He only stated that on the dispute of path way between the accused persons and complainant party, the accused persons started brain teasing. Apart from this, complainant Dilip did not make any allegation against Vijay. Nevertheless, this witness has been declared hostile by the prosecution but still no question in this regard has been asked by Public Prosecutor in his cross examination. On this aspect, law laid down by Hon'ble Apex Court in the case of **Kunju Mohammad @ Khumani Vs. State of Kerala (2004) 9 SCC 193** is worth referring here:-

"We are at pains to appreciate this reasoning of the High Court. This witness has not been treated hostile by the prosecution, and even then his evidence helps the defence. We think the benefit of such evidence should go to the accused and not to the prosecution."

16. On this aspect, in the case of **Mukhtar Ahmad Ansari Vs. State of (NCT Delhi) (2005) 5 SCC 258** and **Raja Ram Vs. State of Rajasthan (2005) 5 SCC 272** it mandates that when the prosecution witness stated things in favour of defence and they have not been

declared hostile on that point, the testimony would be binding for prosecution.

17. This view is recently endorsed by the coordinate Bench of this Court in the case of **Mahendra Singh Vs. State of Madhya Pradesh (2023) Law Suit (MP) 135**, as such the statement of complainant regarding the fact that appellant Vijay is not involved in the crime would have binding effect on the prosecution.

18. The next point which is falling for consideration is as to whether the aforesaid offence was committed by the accused Vijay jointly or in furtherance of common intention? In this regard the following observation of Hon'ble Supreme Court in **Ramesh Singh @ Photti Vs. State of Uttar Pradesh (2004) 11 SCC**.

“As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to guilty. By introducing [Section 34](#) in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed

irrespective of the share which he had in its perpetration. [Section 34](#) IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted.”

19. Endorsing the aforesaid legal proposition, in the case of

Balveer Singh Vs. State of Madhya Pradesh AIR 2019 SC 2983

Hon'ble Apex Court observed as under:-

“To invoke [Section 34](#) IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that: (i) there was common intention on the part of several persons to commit a particular crime, and (ii) the crime was actually committed by them in furtherance of that common intention. The essence of liability under [Section 34](#) IPC is simultaneous conscious mind of persons participating in the criminal action to bring about a particular result. Minds regarding sharing of common intention gets satisfied when an overt act is

established qua each of the accused. Common intention implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Criminal act mentioned in [Section 34](#) IPC is the result of the concerted action of more than one person and if the said result was reached in furtherance of common intention, each person is liable for the offence as if he has committed the offence by himself."

20. In view of the aforesaid legal position, the evidence available on record has been examined. As per the testimony of injured witness Dilip (PW-1), Vikas (PW-2), it is revealed that the role of appellant Vijay is only to reach the place of incident and thereafter cooperating another accused Mukesh in causing injury with kicks and fists. Suddenly, accused Mukesh has assaulted with knife upon the injured persons but it cannot be assumed that it was a pre-meditated, pre-planned or pre-arranged incident. In this regard, the genesis of crime is also required to be explored in respect of this incident. There is nothing on record which suggests that there was an animosity between the accused Vijay and complainant party. Nevertheless, as per the statement of injured Vikas, accused Vijay has used kicks and fists on the basis of this act, it cannot be envisaged that there was a pre-arranged plan for

causing injury with knife between the accused Mukesh and Vijay. Therefore, it is not established beyond the reasonable doubt that the appellant Vijay has developed any common intention for causing injury to injured persons and in furtherance of that, the appellant Mukesh has assaulted both the injured with knife.

21. In these circumstances, it can be held that accused Vijay was certainly present with the main accused Mukesh but they have not premeditated, preplanned or prearranged the scene of crime regarding causing injury with knife. Accordingly, the appellant Vijay cannot be held liable for causing injury with knife to the injured persons. At the most, he may only be liable for causing injury by kicks and fists to Vikas and therefore, he may be convicted only for the offence punishable under Section 323 of IPC for causing injury to the injured Vikas. Whereas, the prosecution succeeds to prove its case against appellant Mukesh beyond the reasonable doubt that he has caused simple injury to complainant Dilip and Vikas using sharp edged knife and therefore, he is entitled to be convicted for the offence punishable under Section 324/34 (two counts) of IPC.

22. Now, coming to the part of sentencing, so far as the appellant Vijay is concerned, he is liable to be convicted only for the offence punishable under Section 323 of IPC (one count) and he has already served more than three months in custody with fine of Rs. 2,000/-. Under these circumstances, the cause of justice be served if appellant Vijay be sentenced only for undergone period and also to fine of Rs. 1000/- failing which he will suffer one month S.I. So far as, the appellant Mukesh is concerned, looking to the allegations of causing injury with knife upon two persons, his punishment of three years with fine of Rs. 1000/- for each count, does not warrant any interference .

23. In view of aforesaid discussion, in entirety, the finding of learned Trial Court with regard to conviction and sentence of accused Mukesh for the offence punishable under Section 324 of IPC (two counts) appears to be flawless and immaculate. Hence, the same is hereby affirmed and appeal of Mukesh (CRA No.10693/2023) stands dismissed, accordingly.

24. So far as, the appeal of Vijay is concerned, according to the aforesaid deliberations, findings of the learned Sessions Judge with

regard to conviction of appellant under Section 324/34 (two counts) is found perverse and against the law and facts. Accordingly, the appeal of appellant Vijay (CRA No.8763/2023) is partly allowed and his conviction under Section 324 (two counts) is modified to Section 323 (one count) of IPC and therefore, his sentence is reduced to undergone period of approximately three months with fine of Rs. 1,000/-, failing which, he will be sentenced for one month SI.

25.The judgment of learned trial Court regarding seized property, if any, stands confirmed.

26. A copy of this order along with respective record be sent to the concerned trial Court for necessary compliance.

(PREM NARAYAN SINGH)
JUDGE

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