

HIGH COURT OF MADHYA PRADESH AT JABALPUR
DIVISION BENCH
Criminal Appeal No. 03/2006

1. Karun @ Rahman, S/o
Sheikh Sukadu Musalman,
aged about 28 years,

2. Jallu @ Sheikh Jalil, Son
of Sheikh Majit Chand
Musalman, aged about 28
years,

Both residents of Seoni Malwa,
District Hoshangabad (M.P.).

Versus

The State of Madhya Pradesh

PRESENT : **Hon'ble Shri Justice R.S. Jha**
 Hon'ble Smt. Justice Nandita Dubey

Whether approved for reporting : **Yes**

For the Appellants: Shri S.C. Datt, Sr. Advocate
 with Shri T.P. Jaiswal, Advocate.

For the respondent/State: Shri Ajay Shukla,
 Govt. Advocate

Arguments heard on : 06.11.2017
Judgment delivered on : 20.11.2017

Law laid down
Significant paragraph numbers :13,14,18,19,28,29,30.

J U D G M E N T

As per Nandita Dubey, J.:

This appeal has been filed by the appellants, being aggrieved by the judgment dated

23.12.2005, passed by Third Additional Sessions Judge, Hoshandbad, District Hoshangabad in S.T. No. 375/2003, whereby appellant No.1 Karun @ Rahman has been found guilty for the offence punishable under Sections 302 and 324/34 of the Indian Penal Code and has been sentenced to life imprisonment and fine of Rs.500/- and rigorous imprisonment for one year and fine of Rs.500/- respectively and appellant No.2 Jallu @ Sheikh Jalil has been found guilty for the offence punishable under Sections 302/34 and 324 of the Indian Penal Code and has been sentenced to life imprisonment and fine of Rs.500/- and rigorous imprisonment for one year and fine of Rs.500/- respectively, in default of fine, they have to suffer rigorous imprisonment for two months for each offence.

2. Initially this present appeal was filed by both the appellants. However, in view of the withdrawal of the appeal by appellant No.1 Karun @ Rahman, this appeal is heard only for appellant No. 2 Jallu @ Sheikh Jalil.

3. The prosecution story, in brief is that on 09.05.2003 at about 8.30 P.M., the accused persons

namely Karun @ Rehman and Jallu @ Sheikh Jalil attacked Rammohan (deceased) and Shanu (P.W.-2) with *ballam* and *gupti* respectively, who sustained grievous injuries due to it.

4. A report to that effect (Ex.P-1) was lodged by P.W.-1 Gayatribai at 9.45 P.M. at Police Station, Seoni Malwa.

5. According to P.W.-1 Gayatribai, 3-4 days prior to the incident, Shanu (P.W.-2) had a fight with the accused persons. On 09.05.2003, a quarrel ensued between appellant Jallu and P.W.-2 Shanu, who then stabbed P.W.-2 Shanu with *gupti* in the chest stating P.W.-2 Shanu will not go alive today. Rammohan (deceased), P.W.-1 Gayatribai and P.W.-3 Rekha rushed to intervene and save P.W.-2 Shanu, whereupon, Karun stabbed Rammohan with *Ballam* in his stomach, who sustained a cut in his stomach and his intestine got spilled out. Hearing the shouts of P.W.-1 Gayatribai and P.W.-3 Rekha, neighbors came to the spot and the accused persons ran away. According to the prosecution, the incident was witnessed by P.W.-1 Gayatribai, P.W.-2 Shanu, P.W.-3 Rekha and P.W.-4 Shivnarayan.

6. Based on the complaint lodged by P.W.-1 Gayatribai, a case was registered against the accused persons in Crime No.137/03 under Section 307 read with Section 34 of the Indian Penal Code. Rammohan and P.W.-2 Shanu were examined by Dr. G.R. Karode (P.W.-7) in P.H.C., Seoni Malwa and thereafter referred to District Hospital, Hoshangabad. On 11.05.2003, Rammohan succumbed to the injuries and the case was altered to Section 302 of the Indian Penal Code. The accused persons were arrested on the same day and on the direction of Jallu and Karun, *gupti* and *ballam* were recovered from them respectively.

7. After completion of the investigation, accused Karun @ Rahman was charged for committing the offence punishable under Sections 302 and 307/34 of the I.P.C. and appellant Jallu @ Sheikh Jalil was charged under Sections 307, 302/34 of the I.P.C.

8. To substantiate the charges, on behalf of the prosecution, 12 witnesses were examined. The accused persons abjured their guilt and pleaded false implication.

9. The learned trial Court vide impugned judgment dated 13.12.2005, convicted the accused persons relying on the testimony of the eye witnesses P.W.-1 Gayatribai, P.W.-2 Shanu (injured) and P.W.-3 Rekha and held that the prosecution has established the guilt of accused persons beyond reasonable doubt and convicted them as aforesaid.

10. Shri S.C. Datt, learned Sr. Counsel appearing for the appellant Jallu has assailed the evidence of P.W.-1 Gayatribai and P.W.-3 Rekha, contending that there are material contradictions in the FIR, case diary statement and the court statement, which render their evidence untrustworthy. Learned Sr. Counsel further submits that the case diary statements of the eye witnesses were recorded after considerable delay which casts serious doubt on the credibility of the prosecution case. It is submitted that the injured eye witness, P.W.-2 Shanu has not supported the prosecution story and was declared hostile. He further submits that there is no allegation in the FIR that the accused/appellant Jallu assaulted the deceased and under these circumstances, accused/appellant Jallu could not have been convicted under Section 302 with the aid of Section 34 of the

I.P.C.

11. Shri Ajay Shukla, learned Govt. Advocate appearing for the respondent/State, on the other hand, has disputed the stand of appellant as regard to the discrepancies in the statements of P.W.-1 Gayatribai and P.W.-3 Rekha. According to him, the trial Court after appreciating the facts and circumstances in its entirety has arrived to the conclusion of guilt of the appellant.

12. We have heard the learned counsel for the parties at length and meticulously perused the record.

13. In **State Vs. Sarvanan & anr. (2008) 17 SCC 587**, while dealing with the issue of material contradictions/omissions, the Supreme Court has held:

“While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The Trial Court, after going through the entire evidence, must form an opinion about the credibility

of the witnesses and the appellate Court in normal course would not be justified in reviewing the same again without justifiable reasons.”

14. In the case of **Kuriya & anr Vs. State of Rajasthan (2012) 10 SCC 433**, the Supreme Court has held :

30. This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. Reference in this regard can be

made to the judgments of this Court in Kathi Bharat Vajsur and Another v. State of Gujarat [(2012) 5 SCC 724], Narayan Chetanram Chaudhary and Another v. State of Maharashtra [(2000) 8 SCC 457], Gura Singh Vs. State of Rajasthan [(2001) 2 SCC 205], Sukhchain Singh v. State of Haryana and Others [(2002) 5 SCC 100].

32. These are variations which would not amount to any serious consequences. The Court has to accept the normal conduct of a person. The witness who is watching the murder of a person being brutally beaten by 15 persons can hardly be expected to state minute by minute description of the event. Everybody, and more particularly a person who is known to or is related to the deceased, would give all his attention to take steps to prevent the assault on the victim and then to make every effort to provide him with the medical aid and inform the police. The statements which are recorded immediately upon the incident would have to be given a little leeway with regard to the statements being made and recorded with utmost exactitude. It is a settled principle of law that every improvement or variation cannot be treated as an attempt to falsely implicate the accused by the witness. The approach of the court has to be reasonable and practicable. Reference in this regard can be made to Ashok Kumar Vs. State of Haryana [(2010) 12 SCC 350] and Shivlal and Another v. State of Chhattisgarh [(2011) 9 SCC 561].

15. P.W.-1 Gayatribai in her case diary statement has stated that accused Jallu inflicted injury

with *gupti* and accused Karun with *ballam*, whereas in the statement before Court, she has named Jallu and Karun, both inflicting injuries with *ballam*. The evidence of P.W.-1 Gayatribai, when considered in view of the aforesaid legal position, makes it clear that misnaming the weapon in moment of fear and anguish is insignificant and cannot be made basis for doubting the case of prosecution. It will be unfair to expect a wife, whose husband is beaten to death and son is subjected to grievous injuries to watch with precision as to which of the accused was causing which injury and by what weapon. Nor this will make the whole testimony of the witness unacceptable especially when she is consistent in other material particulars, as there is no inconsistency with regard to identity of the accused persons or the time and the place of occurrence nor can her presence be doubted at the place of occurrence. P.W.-1 Gayatribai has clearly stated that there was previous enmity between the accused persons and P.W.-2 Shanu. According to her, an argument had ensued between the family members, when the accused persons came and asked them to stop abusing, appellant Jallu then started fighting with her son P.W.-2 Shanu. During the fight, accused Jallu brought *gupti* from his house and

stabbed Shanu (P.W.-2) in the chest. Karun also got a *ballam* and stabbed Rammohan (deceased), when he tried to intervene and save P.W.-2 Shanu, was also attacked by Karun with *ballam* and sustained stab wounds in his stomach, due to it his stomach got cut and his intestine spilled out. Then appellant Jallu attacked him with *gupti* and inflicted injuries on his arms. She has been corroborated in material particulars by P.W.-2 Shanu, the injured witness and P.W.-3 Rekha.

16. P.W.-2 Shanu, in conformity with his case diary statement, has deposed in his chief examination that an argumentative quarrel was going on between his family members outside their house. At that time, the accused persons came, armed with *gupti* and *ballam*. Jallu asked him to refrain from using abusive language, to which P.W.-2 Shanu replied that it was their family matter. Hearing this, accused/appellant Jallu stabbed him with *gupti* which resulted into injury on his chest. When his father, deceased Rammohan tried to save him, he was also assaulted by both the accused persons. According to P.W.-2 Shanu, accused Karun stabbed the deceased in stomach with *ballam* and appellant Jallu inflicted injuries on the shoulder

and head with *gupti*. However, in his cross-examination on the next day, he did a complete summersault and resiled from his previous statement and was declared hostile. He has stated that there was an argument going on between his father and mother and to avoid the same, his father came out of the house and was assaulted by some unknown persons. When P.W.-2 Shanu came out, he was also assaulted, but he could not see the assailants and has taken the name of accused persons due to suspicion on account of the previous enmity between them.

17. It is settled law that evidence of hostile witnesses can be relied upon to the extent to which it supports the prosecution version.

18. In **(1980) 1 SCC 30 Syad Akbar Vs. State of Karnataka** the Supreme Court has held:

"As a legal proposition, it is now settled by the decisions of this Court, that the evidence of a prosecution witness cannot be rejected wholesale, merely on the ground that the prosecution had dubbed him 'hostile' and had cross-examined him. We need say no more than reiterate what this Court said on this point in [Sat Paul v. Delhi Administration](#) (1):

"Even in a criminal prosecution when a witness is cross-examined and contradicted

with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be credit worthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto."

19. In (2012) 8 SCC 450 State Vs. Sanjeev

Nanda the Supreme Court has observed:

"99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby, eroding people's faith in the system.

100. This court in [State of U.P. v. Ramesh Mishra and Anr.](#) [AIR 1996 SC 2766] held that it is equally settled law that the evidence of hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In [K. Anbazhagan v. Superintendent of Police and Anr.](#), (AIR 2004 SC 524), this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court and they found the accused guilty.

101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in [Sidhartha Vashisht @ Manu Sharma v. State \(NCT of Delhi\)](#), (2010) 6 SCC 1 and in [Zahira Habibullah Shaikh v. State of Gujarat](#), AIR 2006 SC 1367, had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the Courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be

overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, [Section 193](#) of the IPC imposes punishment for giving false evidence but is seldom invoked.”

20. In the instant case, the injuries found on the person of P.W.-2 Shanu and the fact that he was injured lends credibility to his testimony that he was present at the time of the incident. He has supported the prosecution case consistently in his chief examination, which was held on 11.11.2003. He was cross-examined by the defence, on the next day, i.e., on 12.11.2003, on which day, he turned hostile and resiled from his previous statement. It clearly appears that he was won over by the accused/defence. He has resiled from the previous statement with regard to the identity of the accused persons only. However, his evidence establishes the prosecution case with regard to the time, place, manner and weapon of the offence being knife and *ballam*.

21. Apart from the evidence of P.W.-2 Shanu, the prosecution version that appellant Jallu inflicted injury to P.W.-2 Shanu with knife and accused Karun with *Ballam* to deceased Rammohan gets

corroboration from the evidence of P.W.-3 Rekha, who also witnessed the occurrence and went to report the incident with her mother P.W.-1 Gayatribai and the FIR Ex.P-1 was lodged within an hour, disclosing the name of the accused persons. According to P.W.-3 Rekha, due to previous enmity, the accused persons had killed her father. According to her, Jallu inflicted injuries with knife to P.W.-2 Shanu and Karun and Jallu both to the deceased. The fact that she went alongwith her mother to lodge the FIR was also corroborated by the statement of Investigating Officer P.W.-8 R.C. Thakur.

22. The prosecution version gets further corroboration from the discovery of knife on the direction of accused Jallu and *Ballam* on the disclosure of accused Karun

23. P.W.-7 Dr. G.R. Karode, who initially examined the deceased Rammohan, found two deep stab wounds on left side of stomach, below ribs, two incised wounds on right arm and shoulder. P.W.-7 Dr. G.R. Karode found two incised wounds on the right and left arms of injured P.W.-2 Shanu and a stab wound on the right side of his chest extending from clavicular region upto lower abdomen. As per P.W.-7 Dr. G.R.

Karode, the injuries were caused by hard and sharp object and the injury to chest was dangerous in nature.

24. The contention of learned Sr. Counsel assailing the evidence of eye witnesses on account of delay in recording their statements does not merit acceptance. It is evident from the record that deceased Rammohan and injured Shanu (P.W.-2) were referred to the district hospital, Hoshangabad, where after two days, Rammohan succumbed to the injuries. However, Shanu (P.W.-2) was discharged on 20.05.2003. Statement of P.W.-1 Gayatribai, P.W.-2 Shanu and P.W.-3 Rekha were recorded on 18.06.2003, after they had returned from Hoshangabad. Moreover, the fact that the named FIR was lodged promptly within an hour of the incident by P.W.-1 Gayatribai alongwith P.W.-3 Rekha is also corroborated by I.O. P.W.-8 R.C. Thakur. Under the circumstances, delay in recording the case diary statements would not affect the credibility of the prosecution case.

25. The contention of learned Senior counsel appearing for the appellant Jallu that the provisions of Section 34 of the I.P.C. are not attracted in present case as the accused persons had no common intention

to kill the deceased , deserves to be rejected.

26. Evidence on record clearly established that accused Jallu and Karun came to the house of deceased and started a fight with P.W.-2 Shanu. Deceased Rammohan when tried to intervene to save P.W.-2 Shanu, both the accused went their house. Accused Jallu brought *gupti* and accused Karun brought *ballam* from their house and in furtherance of their common intention, committed the offence.

27. In the instant case, the facts and circumstances of the case show that there was pre-concert of mind and the accused persons have acted in furtherance of common intention. As seen from the evidence of P.W.-1 Gayatribai, P.W.-2 Shanu and P.W.-3 Rekha, 5-6 days prior to the date of occurrence, a fight ensued between the accused persons and P.W.-2 Shanu and the deceased. On 09.05.2003, when P.W.-1 Gayatribai, P.W.-2 Shanu and the deceased were quarreling, in front of their house, the accused persons came and asked them not to abuse. P.W.-2 Shanu told them to mind their own business, on this a fight ensued between the accused persons and P.W.-2 Shanu. Appellant Jallu exhorted that he would not let

P.W.-2 Shanu go alive. Deceased Rammohan, when intervened to save P.W.-2 Shanu, appellant Jallu went to his house and brought *gupti* and attacked P.W.-2 Shanu, who sustained grievous injuries on his chest. Accused Karun also brought *ballam* from his house and assaulted deceased Ram Mohan, who sustained a cut in left side of his stomach, due to which his intestine spilled out. It is apparent from the evidence of P.W.-1 Gayatribai and P.W.-3 Rekha that after Rammohan fell down, appellant Jallu also inflicted injuries on his shoulder and arms, which makes it evident that the accused persons have participated in concert with preintent in committing the crime.

28. In *Balu @ Bala Subramaniam and Anr. Vs. State (UT of Pondicherry) (2016) 15 SCC 471*,
the Supreme Court has observed :-

“14. Common intention is seldom capable of direct proof, it is almost invariably to be inferred from proved circumstances relating to the entire conduct of all the persons and not only from the individual act actually performed. The inference to be drawn from the manner of the origin of the occurrence, the manner in which the accused arrived at the scene and the concert with which attack was made and from the injuries caused by one or some of them. The criminal act

actually committed would certainly be one of the important factor to be taken into consideration but should not be taken to be the sole factor.

15. Under [Section 34](#) IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. The question whether there was any common intention or not depends upon the inference to be drawn from the proving facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.”

29. Similarly in the case of **Sudip Kr. Sen @ Biltu and others vs State Of W.B. & Ors. (2016) 3 SCC 26**, the Supreme Court has held:-

“14. [Section 34](#) IPC embodies the principle of joint liability in the doing of a criminal act and essence of that liability is the existence of common intention. Common intention implies acting in concert and existence of a pre-arranged plan which is to be proved/inferred either from the conduct of the accused persons or from attendant circumstances. 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.

Common intention implies pre-arranged plan. Under [Section 34](#) IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The essence of liability under [Section 34](#) IPC is conscious mind of persons participating in the criminal action to bring about a particular result. The question whether there was any common intention or not depends upon inference to be drawn from the proved facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.”

30. In Ramesh Singh Vs. State of A.P.

(2004) 11 SCC 305, the Supreme Court has held :

“To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating [Section 34](#) in [the Indian Penal Code](#). 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 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 from the manner in which the accused arrived at the scene and mounted the attack, the determination and concert with which the attack was made, and 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. (See Noor Mohammad Yusuf Momin Vs. State of Maharashtra AIR 1971 SC 885)."

31. In the present case, from the totality of the circumstances and the way the occurrence took place and in view of the fact that appellant No.1 Karun, who was convicted on the basis of same set of fact, act/omission has withdrawn his appeal, it cannot be said that the appellant Jallu was not in concert with the other accused in committing the offence under which he was convicted.

32. From the aforesaid analysis of the material on record, it is apparent that the commission of the offence by the accused persons is clearly established beyond reasonable doubt and the trial Court has rightly analyzed and considered the statements of the eye witnesses and other factors to record a finding of guilt against the accused - appellant.

33. In the circumstances, the conviction of appellant under Sections 302/34 and 324 of the I.P.C. on account of having committed the murder of Rammohan and causing grievous hurt to P.W.-2 Shanu is affirmed and upheld and the sentence imposed upon

appellant Jallu by the trial Court is also confirmed.

34. In view of the aforesaid, the appeal filed by appellant Jallu, being devoid of merit is accordingly dismissed.

35. It is informed that appellant Jallu is on bail. His bail bonds shall stand cancelled and he is directed to surrender forthwith to undergo the remaining part of jail sentence.

(R.S.Jha)
JUDGE
20/11/2017

(Nandita Dubey)
JUDGE
20/11/2017

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