

HIGH COURT OF MADHYA PRADESH,
PRINCIPAL SEAT AT JABALPUR

CRIMINAL APPEAL NO. 1544/2007

Guddu & Durga Shankar Yadav & others

-Versus-

The State of M.P.

CORAM:-

Hon'ble Shri Justice Hemant Gupta, Chief Justice,
Hon'ble Shri Justice Vijay Kumar Shukla, Judge.

Shri Siddharth Datt, Advocate for the appellants.
Smt. Namrata Agrawal, Government Advocate for
respondent/State.

Whether approved for reporting ? Yes/No

<i>Whether approved for reporting?</i>	Yes
<i>Law laid down</i>	<i>To substantiate a charge under Section 302 with the aid of Section 34, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of the both. Common intention has to be distinguished from same or similar intention.</i>
<i>Significant paragraph Nos.</i>	13

J U D G M E N T

(Jabalpur: 18.01.2018)

Per- V.K. Shukla, J.

The instant appeal has been filed by the appellants Guddu @ Durga Shankar Yadav S/o Tulsu Yadav, Harikesh Yadav S/o Khilan Singh Yadav and Pappu @ Mahilal Yadav S/o Tulsiram Yadav challenging the order of conviction and sentence dated 12th

July, 2007 passed by the Additional Judge, Begum Ganj (Fast Track) to the Court of 3rd Additional Sessions Judge, Raisen in Sessions Trial No. 113/2004 (State of M.P. Vs Guddu @ Durga Shankar & Ors.) whereby the appellants have been convicted as under:

Conviction U/s	Sentence
For appellant No. 1 Guddu @ Durga Shankar Yadav	
U/s 302 of IPC	Imprisonment for Life and fine of rs.1000/- each, in default of payment of fine amount, to undergo further simple imprisonment of six months.
For appellants no.2 Harkesh Yadav & appellant no.3 Pappu @ Mahilal Yadav	
U/s 302/34 of IPC	Imprisonment for Life and fine of rs.1000/- to each, in default of payment of fine amount to undergo further simple imprisonment of six months.
Both the sentences to run concurrently.	

2. Prosecution case in nutshell, is that on 08.06.2004 at about 1:30 P.M. in the afternoon, the complainant Nitesh Kumar alongwith his mother and brothers namely Raj Kumar and Mani Kumar were at their shoe shop. It is alleged that, at that time accused/appellant no.1 Guddu @ Durga Shankar Yadav came there, who was in credit of Rs.40/- towards purchase a pair of shoe. It is alleged that on a demand having been made by Mani Kumar of the said Rs.40/-, it is alleged that Guddu got enraged and started abusing and thereafter, he went away. It is alleged that after two minutes the accused Guddu again came alongwith two other appellants Harikesh Yadav and Pappu @ Mahilal Yadav

at the shoe shop of the complainant. The appellant no.1 Guddu @ Durga Shankar Yadav was carrying an axe and the other appellants were having '*Ballam*' and when Nitesh tried to close the shop, the appellant no.1 Guddu @ Durga Shankar had given an axe blow on the chest of the deceased. It is alleged against the other appellants that they abused and shouted to kill him. When the other persons namely Neelesh, Bahadur Rajput, Bhagwan Singh, Rajkumar, Sandhyabai and Savita Jain reached at the spot, the accused persons fled away.

3. The report was lodged by Nitesh Jain (P.W.-1). Initially a marg intimation was registered and then, an F.I.R. was registered as Ex.P-4 by M.S. Rathod (P.W.-7). '*Panchnama*' was prepared vide Ex.P-7 and the spot map was prepared vide Ex.P-8. Dead-body of the deceased was sent for postmortem. The accused persons were arrested. On the discovery statement of accused/appellant no.1 Guddu, the blood stained axe was seized. After investigation, the charge-sheet was filed and the appellants were prosecuted. The trial Court convicted the appellant no.1 under Section 302 I.P.C. and the appellants no. 2 & 3 have been convicted under Section 302 read with Section 34 of I.P.C.

4. Learned counsel for the appellants submitted that there was no intention to murder the deceased Mani Kumar.

Appellant no.1 Guddu had gone to the shop of the deceased, the deceased had demanded the loan amount and Guddu got enraged and started abusing to the deceased. It was a sudden provocation and therefore, at the most, offence punishable under Section 304 Part-II of I.P.C. shall be made out and not under Section 302 of I.P.C.

5. Per contra, learned Government Advocate for the State submitted that the accused persons have been rightly convicted and sentenced by the impugned order. The appellants were armed with axe and '*Ballam*'. Appellant no.1 had inflicted injuries with axe and other appellants were present at the spot armed with '*Ballam*' and were shouting to kill the deceased. Thus the accused persons had common intention to commit murder of the deceased Mani Kumar, sharing common object.

6. To appreciate the rival submissions, raised at the bar we proceed to examine the testimony of eye witnesses. P.W.-1, Nitesh Jain in para-1 of his deposition, deposed that when he was in the shop, the appellant Guddu came to his shop and when his elder brother asked to repay the amount of Rs.40/-, he started abusing and left the shop and within two minutes he returned armed with an axe and the other appellants were carrying '*Ballam*'. Appellants no. 2 & 3 were shouting to kill the deceased.

On raising alarm, the appellants fled away. He stated that the deceased was taken to the police station and report was lodged, vide Ex.P-4 and 'marg' intimation is Ex.P-5. He also stated that while taking to the Police Station, the deceased breathed his last. The evidence of P.W.1, Nitesh is also supported by P.W.2 Savita Jain and P.W.3 Nand Kumar Jain.

7. The postmortem was carried out by Dr. R.C. Udeniya (P.W.5) and from his report, the evidence of the witnesses get corroborated so far as the injuries inflicted to the deceased by the appellant. no.1 are concerned. He found injuries on the chest which was incised wound of 11 c.m. x 4 c.m. x 20 c.m. and its depth was 20 c.m. Other two injuries had cut the ribs. He found that the injuries were caused by sharp edged weapon and the cause of death was excessive bleeding on account of these injuries.

8. Investigation was carried out by M.S. Rathor (PW-7) who deposed that he registered the F.I.R. (Ex.P-4) and had executed the dead body panchnama. He further stated that on the discovery statement of appellant no.1 the blood stained axe was seized and the same was sent for forensic analysis to F.S.L. The human blood was also found on the said weapon.

9. The important fact which has been stated by him is

that the F.I.R. was registered and the incident had taken place on 08.06.14 at about 12:30 P.M. The report was lodged at 15:00 hours and the statements of the witnesses have been recorded with an unexplained delay.

Thus on assimilation of the entire facts, we find that the appellant no.1, Guddu had gone to the shop of the deceased and on demand of subsisting money he got infuriated and came back in the shop armed with an axe and hit the deceased on the chest with the axe. His action of causing injury to the deceased with an axe on the vital and sensitive part of the body i.e. chest which resulted into death of the deceased.

10. The argument of the learned counsel for the appellant in respect of the appellant no.1, Guddu that he had no intention to kill the deceased cannot be accepted. The testimony of eyewitnesses regarding attribution of his role is specific and coherent. They have stated that the appellant no.1 Guddu came with an axe and caused injury on the vital part of the body like chest of the deceased. The nature of injury reflects that it was deep and had broken the ribs as well. Their testimony is further supported by Dr. R.C. Udeniya (PW-5). He has found the injuries on the chest of the deceased which were sufficient to cause death in the ordinary course of nature. The same is further coupled with the fact that an axe was seized on the discovery statement of the

appellant no.1, Guddu from a hidden place. The human blood has also been found on the said axe. The Seizure has been proved by the Investigating Officer M.R. Rathor (PW-7). Though the seizure witnesses have turned hostile but they have admitted their signatures on the memo. The ocular evidence is well corroborated with the medical and other evidence, therefore, we do not find any error in the order of conviction and sentence of the appellant no.1 Guddu @ Durga Shankar Yadav. Accordingly his appeal sans merit and is dismissed.

11. Now we proceed to examine the case of the appellant no. 2, Harikesh Yadav and appellant no.3 Pappu @ Mahilal Yadav. All the three eyewitnesses, namely, Nitesh Jain (PW-1), Savita Jain (PW-2) and Nand Kumar Jain (PW-3) have deposed that these appellants came alongwith the appellant no.1 Guddu. According to these witnesses they were armed with 'Ballam' and were shouting at the spot, but no overt act has been done by these accused persons. The prosecution witnesses have also not stated that there was any previous enmity of these two appellants with the deceased. It is further relevant to mention here that the description of the seized 'Ballam' has also not been disclosed by these witnesses. Further there is no recovery of these weapons.

12. In the case of *Mitthu Singh Vs State of Punjab*

AIR 2001 SC 1929 the Hon'ble Supreme Court has drawn a distinction between common intention and similar intention. The relevant part of para-6 is reproduced hereunder:

"6. To substantiate a charge under Section 302 with the aid of Section 34, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of the both. Common intention has to be distinguished from same or similar intention. It is true that it is difficult, if not impossible, to collect and produce direct evidence in proof of the intention of the accused and mostly an inference as to intention shall have to be drawn from the acts or conduct of the accused or other relevant circumstances, as available."

13. In the present case, on consideration of the facts, we find that the appellants no. 2 & 3 had accompanied the co-accused, but there is no material to infer that there was any prior meeting of minds or premeditation to commit murder of deceased. They had accompanied the appellant no.1 within two minutes, the appellant no.1 had gone from the spot after abusing the deceased. Simply because the appellants no. 2 & 3 were armed with a lethal weapon i.e. 'Ballam' which is a tool used in the village for the purpose of digging the field, it cannot be held that the appellants no. 2 & 3 either had the common intention or premeditation to kill the deceased. Further the 'Ballam' has not

been recovered.

14. In view of the aforesaid, the conviction of the appellants no. 2 & 3 under Section 302/34 IPC is unsustainable and is hereby set aside.

15. Ex consequenti, the appeal is partly allowed. The appeal filed by the appellant no.1 Guddu @ Durga Shankar Yadav is **dismissed**. The appeal filed on behalf of appellants No.2 & 3 Harikesh Yadav and Pappu @ Mahilal is **allowed** and the Judgment of conviction and order of sentence in respect of these appellants is set-aside. They be set at liberty forthwith, if not warranted in any other case.

(HEMANT GUPTA)
CHIEF JUSTICE

(VIJAY KUMAR SHUKLA)
JUDGE