

**Khem Karan and ors. Vs. State of U.P.**

**Khem Karan and ors. Vs. State of U.P.**

**SooperKanoon Citation :** [sooperkanoon.com/475449](http://sooperkanoon.com/475449)

**Court :** Allahabad

**Decided On :** Nov-26-1990

**Reported in :** 1991CriLJ2138

**Judge :** H.C. Mital and ;G.D. Dubey, JJ.

**Acts :** Evidence Act - Sections 32; ;Code of Criminal Procedure (CrPC) - Sections 161 and 313; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 34, 107, 114, 302, 304, 307 and 323

**Appeal No. :** Criminal Appeal No. 483 of 1978

**Appellant :** Khem Karan and ors.

**Respondent :** State of U.P.

**Advocate for Def. :** Dy. Govt. Adv.

**Advocate for Pet/Ap. :** G.C. Saxena, Adv.

**Judgement :**

**H.C. Mital, J.**

1. Of the above named appellant Gulta has died during the pendency of the appeal, hence his appeal stands abated.

2. Khem Karan appellant stands convicted and sentenced Under Sections 302 and 323 both read with Section 114, IPC to life imprisonment and six months R.I. respectively. Appellant Tukman stands convicted and sentenced under Sections 323 and 302 read with Section 34, IPC to life imprisonment and six months R.I. Appellant Gulta (now deceased) stood convicted and sentenced Under Sections 302 and 323 read with Section 34, IPC to life imprisonment and six months R.I.

3. According to the prosecution in brief on 22-10-1976 at about 7 a.m. when Devi Ram (deceased) was coming from his field with fodder for the cattle, in the way he met all the three appellants working in their field and on seeing them he asked them why did they unnecessarily indulge in abusing the children, whereupon Khem Karan exhorted his sons, the two appellants Gulta and Tukman 'Maro Saleko Aaj Yah Bach Kar Na Nikal Pae'. Thereupon Tukman gave a lathi blow on the head of Devi Ram and when the later tried to run to save himself Tukman exhorted his brother Gulta to fire whereupon Gulta fired a shot with his country made pistol as a result of which he received pellet injuries in his stomach and fell down. On hearing his cries his brother Ram Deen (P.W. 1), Bhagirath (P. W. 2) and others arrived. They carried him on a cot to the police station Shamshabad at a distance of three miles, where at 9-30 a.m. on the dictation of Devi Ram (deceased) FIR (Ex. Ka-13) containing the above facts was recorded and a case Under Section 307, IPC was registered and he was sent for medical examination to the hospital. The hospital at Shamshabad was closed and no Doctor was there, hence he was taken to Agra District Hospital, but before reaching there he died. At 11-15 a.m. Dr. B.P. Agarwal prepared Memo and sent it to S.O. Rakabganj, Agra about the dead-body lying in the hospital. Thereafter S. O. Chetan Swarup from P.S. Rakabganj reached the hospital and prepared an inquest report and other necessary papers and sent the dead body for postmortem. Autopsy on the dead body was conducted on the same day at 4-30 p.m. and the following injuries were noted.

1. Multiple gun shot wounds of entry  $1/8'$  x  $1/8'$  x tissue deep and cavity deep on the abdomen starting from 1' above the umbilicus to both thighs upper third part, 12' from the upper part of the wound at the umbilicus to the thigh. On front of abdomen lower part, on the penis on the scrotum, on the right thigh front and outer

parts and on the left thigh front part there were wounds.

2. Lacerated wound 1/2' x 4/10' x bone deep on the right side scalp 2 1/2' above right eye.

4. On internal examination multiple perforation by gun shot pellets were found in the small and large intestines and several pellets were recovered from the abdominal cavity. According to Dr. S. C. Sharma (P.W. 5) who had done the autopsy, the death was caused due to shock and haemorrhage as a result of the aforesaid fire-arm injuries.

5. Investigation of the case was entrusted to and completed by P.W. 6 S.I. Indrajit Sharma, who after completion of the investigation submitted charge-sheet against the accused. At the trial the appellants pleaded not guilty and the prosecution in all examined eight witnesses. P.Ws. 1 and 2 are the eye witnesses of whom P.W. 2 Bhagirath did not support the prosecution case and was treated hostile. P.W. 3 Prabhu Dayal is a witness of the inquest report. P.W. 4 constable Phool Singh had brought Devi Ram injured to the District Hospital, Agra and after his death he had taken his dead body to mortuary for postmortem. P.W. 5 Dr. S. C. Sharma had done the autopsy on the dead body and has proved the postmortem report. P.W. 7 Chetan Swarup S.I. had prepared the inquest report P.W. 8 Head constable Rajendra Singh has proved the FIR scribed by him at the dictation of the deceased and has further stated that he registered the case Under Section 307, IPC and, therefore, on receipt of information about the death of Devi Ram case was converted into Section 302, I.P.C. P.W. 6 S.I. Indrajit Sharma, I.O. deposed about the various steps taken by him in the course of investigation.

6. In defence the accused did not adduce any evidence.

7. Learned Sessions Judge believed the prosecution case and relied on the testimony of P.W. 1, the FIR recorded at the dictation of the deceased and statement Under Section 161, Cr. P.C. of the deceased, both admissible Under Section 32 of the Evidence Act, hence convicted and sentenced the appellants as already stated above.

8. The main assailant Gulta has died during the pendency of the appeal and his appeal stands abated. Now this appeal has been pressed on behalf of Khem Karan and Tukman, the other two appellants.

9. In his report the deceased had stated that the appellants had incurred malice against him as a case against them for setting fire to an engine was pending hence they used to abuse his children whenever they used to pass near their field. On that day at 7 a.m. when he was bringing fodder in the way he found these appellants working in their field and he asked them why they abused his children. Thereupon at the exhortation of Khem Karan, 'Maro Saleko', Tukman wielded a lathi and when he tried to escape to save his life, at the exhortation of Tukman Gulta fired with his country made pistol and on receipt of which he fell down and shouted. On hearing his cries, his brother Ram Deen and Bhagirath arrived there. In that view of his statement it is apparent that both Ram Deen and Bhagirath could have heard his cries after the fire of the shot as according to the deceased himself he had shouted after he received the shot. Bhagirath (P.W. 2) who was declared hostile also stated the same that on receipt- of the cries of Devi Ram when he reached there, he found him lying on the ground with pellet injuries. Ram Deen had also arrived there and then brought a cot and took him to P.S. Shamsabad. He specifically stated that he did not see the appellants causing injuries. His testimony is perfectly in tune with the contents of the FIR lodged by the deceased Devi Ram himself. However, P.W. 1 Ram Deen had stated that while at about 6-30 p.m. when he was going towards his field, near the field of the accused he saw blood oozing out from the body of the deceased and the appellants then surrounded him, that Tukman had stated 'Sala Nikla Jata Hai Goli Maar Do', thereupon appellant Gulta fired a shot with his katta. He does not at all say that he had reached there on hearing the cries of Devi Ram. In view of the statement of the deceased in the FIR apparently there has been an improvement in the version of this witness to the effect that he had reached there earlier before the shot was fired at the behest of Tukman. His testimony, therefore, to that extent is not free from suspicion.

10. There is no other evidence to show how the fight had started, except the statement of the deceased in the FIR as well as Under Section 161, Cr. P.C. The

letter is nothing but a verbatim copy of the FIR and, therefore, there does appear to be force in the contention of the learned counsel for the appellants that the same appears to have been prepared by the Investigating Officer subsequently otherwise there would have been mention about that fact in the general diary of the police station when it contains the fact that the FIR was recorded at the dictation of the deceased, the case was registered and along with Majrubi Chitthi the injured Devi Ram was sent for the examination of his injuries to the hospital. Whether the statement Under Section 161, Cr. P.C. of the deceased is read or not is not at all material as its contents are the same as that of the FIR.

11. On a plain reading of the FIR it is clear that per chance the deceased found the appellants working in their field and protested to them why they abused his children and thereupon the appellants had caused injuries to him. According to the version of the deceased himself Khem Karan had only said to his sons 'Maro Saleko' which in the common language would mean 'to beat' particularly mere protests of Devi Ram to the appellants why they abused his children could not be a matter or circumstance to prompt Khem Karan his sons to kill Devi Ram. The learned Sessions Judge also, therefore, did not charge nor found guilty Khem Karan of the offences Under Section 302 and 323 read with Section 34, IPC but only Under Section 114, IPC. Section 107 reads as follows :--

107. A person abets the doing of a thing, who --

First -- Instigates any person to do that things, or

Secondly -- Engages with one or more other persons or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing, or

Thirdly -- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1 -- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2 -- Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

12. In the present case the allegation is only of instigation. It has to be seen whether Khem Karan had instigated his sons to commit the murder. As already stated above, prima facie the circumstances of the case did not at all have a cause to instigate for the commission of the offence of murder simply because the deceased had protested to Khem Karan why he abused his children. The instigation could at most be for beating. Hence in our view, against Khem Karan prima facie, an offence for instigation for the commission of the offence of murder is not made out and he can be held guilty for abetting an offence of causing simple injuries. That apart it is not in the FIR that Khem Karan had also instigated Gulta to fire shot with his pistol, but it is alleged that Tukman had exhorted Gulta to fire shot and, therefore, Khem Karan cannot be held guilty of abetting the offence of murder. He was simply to be convicted for instigating the offence Under Section 323, IPC as Tukman had only caused simple lathi injury on the head of the deceased. His conviction and sentence, therefore, for the offence Under Section 302 read with Section 114, IPC are liable to be set aside.

13. As regards the role of the appellant Tukman, it could not be doubted that he had caused lathi injury on the head of the deceased. He has also been convicted for the offence Under Section 302 read with Section 34, IPC. According to the prosecution case as contained in the version of the deceased in the FIR when after receipt of the lathi injury he tried to escape, this Tukman exhorted Gulta to fire, whereupon Gulta had fired a shot as a result of while the deceased received a fatal injury resulting into his death within four hours.

14. The deceased had received the following gun shot injuries :--

1. Multiple gun shot wounds of entry 1/8' x 1/8' x tissue deep and cavity deep on the abdomen starting from 1' above the umbilicus to both things upper third part, 12' from the upper part of the wound at the umbilicus to the thigh. On front of abdomen lower part, on the penis, on the scrotum, on the right thigh front and outer parts and on the left thigh front part there were wounds.

2. Lacerated wound 1/2' x 4/10' x bone den on the right side scalp 2 1/2' above right eye.

15. It is clear that the injuries had been received in an area of 12' on the thighs and abdomen as has also been clearly shown in the postmortem report prepared by Dr. S.C. Sharma, hence the shot must have been fired from a distance of at least six feet.

16. To constitute common intention it is necessary that there was a prearranged plan and the criminal act was done in pursuance to that prearranged plan. The common intention to bring about a particular result may even develop on the spot in between a number of persons with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be interior in point of time to the commission of the crime showing a prearranged plan and prior concert. In the case of *Amrik Singh v. State of Punjab* 1972 Cri LJ 465 (SC) it has been held that though common intention may develop in course of the fight but there must be clear and unimpeachable evidence to justify that inference. Undoubtedly it is a difficult thing to prove the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. But however difficult may be the tasks, the prosecution must lead evidence of facts, circumstances and conduct of the accused from which their common intention can be safely gathered. In most cases it has to be inferred from the act or conduct or other relevant circumstances of the case in hand. This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one or some of them.

17. In the present case the accused had not arrived on the scene of occurrence with any determination and prior concert, but they were already present there, working in their field and the deceased when he was passing that way accosted them as to why they abused his children and thereupon at the behest of Khem Karan Tukman had wielded a lathi blow and subsequently when the deceased tried to escape, at the behest of Tukman Gulta had fired a shot. Considering the facts of the case that there could not be any prior determination or concert to kill

the deceased, but when the deceased had virtually reprimanded by protest to the accused why they had abused his children the act was committed and Gulta at the behest of Tukman had fired the shot from a sufficient distance with a country made pistol. Under the circumstances the intention to cause death be difficult to infer, but it can safely be inferred that Tukman had knowledge that fire with the pistol was likely to cause death and, therefore, under the circumstances of the case in our view conviction of Tukman for the offence of murder Under Section 302 read with Section 34, IPC should not be upheld, but he is liable to be convicted for the offence Under Section 304, Part II read with Section 34, IPC.

18. In the result Tukman's conviction Under Section 302, IPC read with Section 34, IPC is liable to be set aside and he is held guilty instead Under Section 304, Part II read with Section 34, IPC besides the offence Under Section 323, IPC for causing simple lathi injuries to the deceased.

19. As regards the sentence he has been found guilty Under Section 323 read with Section 114, IPC, He was aged 65 years of age in the year 1978 when he was tried and about 63 years of age when the occurrence took place, hence ends of justice would amply meet the sentence to the period already undergone by him as under trial and after his conviction till bail bond Was granted.

20. As regards Tukman we find that in his statement Under Section 313, Cr. P.C. he had given out his age as 16 years on 18-1-1978. The learned Sessions Judge subsequently specifically enquired his age and then again he repeated his age to be 15-16 years. However, the learned Sessions Judge has made his observation that he appeared to be between 18 to 20 years. The occurrence had taken place on 22-10-1976. Hence at the, time of bail he was above 16 years, but was below 18 years positively.

21. We accordingly set aside the conviction and sentence of Khem Karan Under Section 302 read with Section 114, IPC to life imprisonment, but maintain his conviction Under Section 323 read with Section 114, IPC but reduce it to the period already undergone.

22. The conviction of other appellant Tukman is altered from Under Section 302/34 to 304, Part II, IPC. He has already undergone an imprisonment for over one year. Considering that he was a young lad of about 17 years at the time of the occurrence and he has been at large for over nearly 12 years, in our opinion need not be committed to prison for any further period at this stage. In this particular case we also do not at all think it necessary to direct the appellant to pay any fine in addition to the term of imprisonment he has already suffered, particularly because the main assailant Gulta has died during the pendency of this appeal and his appeal stands abated.

23. The conclusion, therefore, is that appeal of Gulta stands abated. Khem Karan's conviction and sentence Under Section 302/114, IPC are set aside. His conviction is maintained Under Section 323 /114, IPC and his sentence is reduced to the period already undergone.

24. Tukman's conviction Under Section 302/34. I.P.C. is altered to Section 304, Part 11/34, I.P.C. and the sentence is reduced to the period already undergone.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**