

Chhota Vs. State of Madhya Pradesh

Chhota Vs. State of Madhya Pradesh

SooperKanoon Citation : sooperkanoon.com/508548

Court : Madhya Pradesh

Decided On : May-03-2005

Reported in : 2006(1)MPHT267

Judge : A.K. Gohil and ;Chandresh Bhushan, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34 and 302; Code of Criminal Procedure (CrPC) - Sections 157

Appeal No. : Criminal Appeal No. 210/1991

Appellant : Chhota

Respondent : State of Madhya Pradesh

Advocate for Def. : M.P.S. Bhadoriya, Public Prosecutor

Advocate for Pet/Ap. : Atul Gupta and ;Himanshu Kaushal, Advs.

Disposition : Appeal allowed

Judgement :

A.K. Gohil, J.

1. Being aggrieved by the impugned judgment dated 5th September, 1991 passed by Special Judge, Gwalior in Special Case No. 8/85, whereby the Trial Court has convicted the appellant under Section 302/34 of IPC and sentenced to

imprisonment for life, this appeal has been preferred by the appellant.

2. The facts shorn of unnecessary details lie in a narrow compass. The appellant has been convicted with the aid of Section 34 of IPC. The incident took place on 5-5-84 at about 6 p.m. in front of the house of the deceased in Mohalla Jangipura at Dabra. The appellant who was carrying a 12 bore gun in his hand came in the company of Charanjeet on the spot. Charanjeet took the gun from the appellant and fired two repeat shots at Babulal, as a result of which Babulal fell down inside the veranda of his house and thereafter all the three accused persons fled away from the spot. Babulal died while being to police station. The report of the incident was lodged by Mithlesh (P.W. 5), wife of the deceased. Crime was registered. The matter was investigated and charge-sheet was filed.

3. As per prosecution story, the incident is said to be witnessed by Subhan Khan (P.W. 1), Hari (P.W. 2), Mithlesh (P.W. 5), who is wife of the deceased Babulal, Santosh (P.W. 7), who was 6 years' old child of the deceased and Kamlesh widow of the brother of the deceased, but she has not been examined. The Trial Court after considering the evidence of aforesaid eyewitnesses found that the appellant came on the spot alongwith another co-accused Charanjeet and one other, who could not be arrested and identified till now and at that time he was carrying a gun in his hand. Charanjeet took his gun on the spot but he had not objected. Charanjeet fired two repeat shots at deceased Babulal and thereafter he fled away alongwith that Charanjeet from the spot. The appellant has taken a specific defence in this case that he was going to meet Patwari alongwith his gun as he was called by Patwari and he had gone alongwith his gun and when he reached near the river, Charanjeet came behind him and snatched away his gun and ran away. Thereafter he went to the police station to lodge the report and he remained at the police station. He stated that when the dead-body of the deceased came in the police station then only he knew that Charanjeet has killed Babulal. The appellant's further specific defence was that when incident took place he was present at the police station. But he has admitted that his report was not written at the police station. However, the Trial Court found that it could not be proved from the defence version that he has lodged any report about snatching of his gun by Charanjeet from him and therefore the Trial Court found the appellant guilty on the

basis of his presence on the spot under Section 34 of the IPC and convicted him and sentenced as aforesaid, against which the appellant has filed this appeal. During trial, accused Charanjeet died. Therefore, the trial stood abated against him. One more accused who was present on the spot, could not be arrested till now and he is still absconding.

4. We have heard Shri Atul Gupta with Shri Himanshu Kaushal, learned Counsel for the appellant and Shri M.P.S. Bhadoriya, learned Public Prosecutor for the respondent-State.

5. The learned Counsel for the appellant vehemently argued that the appellant had no previous enmity with the deceased and therefore there could be no motive of the appellant of forming any common intention with the other two-accused persons. The common intention pre supposes prior concert and meeting of minds, but there is no evidence on this point available in the case. It is submitted by the learned Counsel for the appellant that the presumption of common intention drawn by the learned Trial Court is completely washed out as soon after the occurrence the appellant was seen at the police station by Mithlesh (P. W. 5), wife of the deceased. But he was not arrested and his arrest was postponed till 14-5-84, i.e., for complete 9 days and the prosecution has not explained on this point. It is further submitted that Subhan Khan (P.W. 1) and Hari (P.W. 2) are the chance witnesses and Mithlesh (P.W. 5), wife of the deceased and Santosh (P.W. 7) who is a child witness were not present on spot and she has not seen the incident. It was further argued that Santosh (P.W. 7) was around 6 years of age when the incident took place and he was examined in the Court after three years. Therefore, considering the age of this child witness, the possibility of tutoring him, can not be ruled out. Learned Counsel for the appellant vehemently submitted that the statements of the witnesses were recorded later on and the name of the appellant has not been mentioned in the documents, Ex. P-1, Ex. P-5 and Ex. P-6. It is further submitted that the prosecution has not examined the Investigating Officer in this case. Thus, on the basis of the aforesaid contentions it is stated by the learned Counsel for the appellant that the conviction of the appellant is bad in law. The learned Counsel also cited certain judgments on the question of common intention and he has taken us through the evidence of the witnesses in detail to

substantiate that there is no proof of the common intention on record.

6. In reply, Shri M.P.S. Bhadoriya, learned Public Prosecutor supported the prosecution story and the judgment of the Trial Court and prayed for dismissal of the appeal.

7. We have considered the rival contentions of the parties and have also perused the record.

8. Subhan Khan (P.W. 1), Hari (P.W. 2), Mithlesh (P.W. 5) and Santosh (P.W. 7) have consistently and categorically stated that the appellant was present on the spot carrying a gun in his hand. From the evidence of eye-witnesses, it is seen that another co-accused Charanjeet took the gun from the appellant and it was he who fired two repeated shots from that gun at the deceased. But the evidence of the witnesses to connect the appellant with common intention appears to be doubtful. We have therefore minutely examined the evidence of the eye-witnesses.

9. Subhan Khan (P.W. 1) has shown his presence on the spot as he had gone to a flour mill of one Jain and the said flour mill is away from 25-30 paces from the house of the deceased and he was standing there. In the evidence he has tried to impress upon as if he is an independent witness. He stated that he had seen the Babulal on that very day for the first time. All other eyewitnesses have also tried to impress upon that they had seen Babulal there for the first time, but this is not proved from their evidence. He has admitted in his cross-examination that one criminal case in which he and the deceased Babulal both were accused was pending since last four years and various other criminal cases are also pending against him. He stated that Chhota Chowkidar is also known to him. He was unable to give the description of the clothes of the deceased which he was wearing at the time of the incident. He has stated that though he had seen the empty cartridges but he could not give the description of the same. He deposed that the empty was of brass and he had also seen the pellets of the bullet on the wall of the house of deceased Babulal. He says that he had gone to hospital with the dead-body. He has also admitted that Daroga came to seize the dead-body. He had not told him that he had seen the incident of murder and his statement was recorded next day. He has denied that he had not brought the Thella for carrying

the body of Babulal. He has further admitted in the cross-examination that in many criminal cases he is being cited as a witness on behalf of the police but he has denied this suggestion that he is working as an informer to the police. In the cross-examination he has admitted that on the date of incident he was working at the farm of Mohansingh as a driver. The farm of Mohansingh is situated at Bhitwar, which is 27 k.m. away from his house. He stated that he left for his duty at 7-8 a.m. in the morning and came back at 7-8 p.m. in the evening. He has not produced any document or a slip of a flour mill where he had gone for grinding the wheat, though he has admitted that the slip was given to him. He has admitted that it has not been mentioned in his case-diary statement, Ex. D-1 that at the time of the incident appellant was wearing the belt of bullet though he had intimated to the police but why the police has not mentioned it in his case-diary statement he can not give any reason. When Charanjeet prepared second round in his presence but why this has not been mentioned in his case-diary statement he can not give any reason. He has admitted that after receiving the first shot Babulal tried to run from the spot and he received second shot while he was running but the police has not mentioned this and why the police has not mentioned the same in his case-diary statement he can not give any reason. He has denied that he had brought the Thella on the spot but why the police has not mentioned his case-diary statement (Ex. D-1), he can not give any reason. The police has recorded that Mithlesh (P. W. 5) was carrying the body of the deceased in Thella and he also accompanied but he does not remember whether this fact has been mentioned correctly or not. Why the police has not written that appellant was having a 12 bore gun and the barrel of the same was of a black colour and the butt of the gun was of dark brown colour, he can not give any reason. He stated that Babu Brahmin who is brother of Rama was also standing there but he had not informed the police. It was clearly written by the police in the case-diary (Ex. D-1) that at the time of firing he went inside the flour mill due to fear. This is also correct that immediately after the firing, Hari (P.W. 2) also went inside the house of Kamlesh. He has admitted that the gun was not recovered in his presence and the same was also not identified by him.

10. Hari (P.W. 2) has in his cross-examination deposed that he was knowing to Charanjeet from the time of murder of Rama. He is also known to Chhota Chowkidar since last 3-4 years. He is a resident of Jangipura of Dabra. This

witness is also facing 3-4 criminal cases. He stated that on the date of incident he had gone to take pieces of the cakes of cow-dung from the house of deceased Babulal. He was cross-examined in detail about the place from where he had seen the incident. He had seen the appellant from the distance of 20-25 paces. When he had seen the gun it was having a belt. But in the Article 'A' no belt has been shown. He had not seen in between any mark of identification of the gun. In cross-examination he has denied that he had not seen co-accused Charanjeet loading his gun. He had also not seen any empty falling from the gun. After the incident nobody of the vicinity came on the spot. Later on only 2-3 persons came on the spot. He does not know their names. He had not gone to the police station and the police had recorded his statement next day in the morning. The statement was recorded after preparation of the spot-map. On the further cross-examination this witness has stated that he does not know whether Charanjeet had taken or snatched the gun from the appellant.

11. Mithlesh (P.W. 7), wife of the deceased in her cross- examination has stated that while lifting the body of the deceased from the place of occurrence, her Sari had stained with blood, but the police has not seized the same. She has admitted that Ramashankar was the elder brother of her husband and Kamlesh is the wife of that Ramashankar, who is also her sister. Ramashankar has also been murdered and Charanjeet was prosecuted for the murder of Ramashankar but subsequently he was acquitted. She stated that her husband Babulal was a witness in that case. She stated that she is working as a nurse in the Field Health Centre Dabra and her duty hours were 8-12 in the morning and 5-6 in the evening. On the date of incident she was on duty till 12 o'clock and she was not available on duty in the latter part of the day, though she has admitted that she had signed over the attendance register and had not applied for leave for the period of second half between 5-6. She could not furnish any explanation as to why she was not available on her duty in the second half, though she had signed over the attendance register. She has admitted that on the date of incident her husband had gone to Court to give evidence. She had also accompanied her husband. Her statement was recorded by the police next day and the police has not interrogated either Subhan Khan (P.W. 1) or Hari (P.W. 2) in her presence. She only knew Subhan Khan (P.W. 1) from the date of incident. She does not know that Subhan

Khan was also an accused with her husband in criminal cases and at the time of lodging of the report whether Subhan Khan and Hari both were present at the police station or not. This fact has also not been mentioned in the FIR (Ex. P-9). Why the police has not written that she is also engaged in the business of selling milk and cow-dung cakes and Hari had come to take cakes of cow-dung, she can not give any reason. This fact has also not been mentioned in the spot-map. Though she has denied that her statement was not recorded after seeing the post mortem report, but she has stated that due to fear she could not narrated the actual facts to the police. Why the police has not written that after receiving the gunshot her husband came on the Veranda and fell down there, she can not give any reason. She has admitted that this fact has wrongly been mentioned that he had fell down there. The appellant was wearing a belt of Kartus but this could not be written in the report and she might have not narrated the same due to fear. She could not say whether Kartus were lying on the spot. Her presence has not been shown in the spot-map (Ex. P-1). She deposed that she had stated to the police but why the police has not mentioned the same she could not give any reason. She has denied the suggestion that the FIR (Ex. P-9) was written after two days. She has admitted that she has come to the Court to give her statement with Subhan Khan and she was carrying a gun which was kept outside of the Court. She had seen the appellant on the date of incident. She has admitted in her cross-examination that after the incident when she went to lodge the report she had seen the appellant present at the police station. He had come after 10-5 minutes and he remained in the police station till she was there.

12. Santosh (P.W. 7) is the son of deceased Babulal and he was aged about 6 years at the time of incident and 9 years on the date when he deposed before the Court. About the presence of appellant Chhota, he has stated in his cross-examination that he had seen him for the first time on the date of incident and he came to know about the name of the appellant next day when some persons were talking about the incident. Regarding presence of blood, he says that he had seen very small blood in the courtyard but he had not seen any blood in the way. His presence has also not been shown in the spot-map (Ex. P-1) and even in the FIR (Ex. P-9).

13. From the perusal of the aforesaid evidence of the eye- witnesses, it is clear that Subhan Khan (P.W. 1) and Hari (P.W. 2) both are the persons of criminal background. Subhan Khan (P.W. 1) is being cited regularly as a witness by the police in criminal cases and he is also acting as an informer to the police. Though, Subhan Khan (P.W. 1) and Hari (P.W. 2) both have been cited as witness of the spot-map (Ex. P-1), but it has not been shown that from which place Hari (P.W. 2) had seen the incident. Similarly, spot-map (Ex. P-1) has been prepared at the instance of Mithlesh (P.W. 5) and she is also a witness of the spot-map, but it has not been shown that from where she had seen the incident. Likewise the presence of Santosh has also been shown in the spot-map. Even in the spot-map (Ex. P-1) name of the appellant has also not been shown. After the FIR till the completion of the post-mortem which was started on 6-5-84 at 8.45 A.M., no document was prepared by the prosecution. The name of the appellant has not been mentioned in Ex. P-1, though the name of accused Charanjeet is shown in Ex. P-6. Surprisingly, Naksha Panchayatnama (Ex. P-6) was prepared on 6-5-84 in which it has been mentioned that the incident took place on 5-5-84 at 5 p.m. The same fact has been mentioned in Ex. P-8, which is an application for post-mortem of the dead-body whereas the incident took place on 5-5-84 at 18.15 hrs. as per FIR (Ex. P-9) then why in the documents Ex. P-6 and Ex. P-8 the time of incident has been mentioned as 5 p.m. instead of after 18.15 hrs. There is also overwriting in the FIR (Ex. P-9). There is no compliance of Section 157 of Cr.PC and even Investigating Officer has not been examined by the prosecution to support its case. The very important fact that as per the statement of Mithlesh (P.W. 5) the appellant was present at the police station just after the occurrence of incident and during the lodging of FIR by P.W. 5, but his arrest has been shown after nine days, i.e., 14-5-84. All this has created serious doubt over the prosecution story. It appears that the FIR (Ex. P-9) is antedated and ante-timed. More so, the statements of the witnesses were not recorded immediately and from the other facts also it appears that they were not present at the time of commission of the crime. Mithlesh (P.W. 5) has not furnished any explanation that when her duty hours in second half was between 5-6 in the evening why she remained absent from duty and went back to her house in the second half without moving any application for leave. This is not the prosecution case that she came back to her house after completing the duty

hours in the evening. Therefore, there appears that she was not present on the spot. From the aforesaid evidence it also appears that Subhan Khan (P.W. 1) and Hari (P.W. 2) who are the persons of criminal background, were working for the police and they were being cited as witnesses by the police. Therefore their presence has been cooked up as their evidence does not inspire confidence.

14. The appellant has examined himself as D.W. 1 in this case. He has stated that on the date of incident he was called by Patwari and therefore he was going to meet him at Dabra where on the way Charanjeet, another accused snatched his gun and ran away. Thereafter, he went to lodge the report to the police station, but his report was not recorded. He remained available at the police station and thereafter Diwanji came and informed him that Charanjeet had killed Babulal by gunshot. His presence at the police station has been supported by Mithlesh (P.W. 5), who is the wife of the deceased and this confirms that the appellant was present at the police station. Therefore, the statement of D.W. 1, appears to be more probable that he had gone to police station to lodge the report about snatching of his gun and he was not present on the spot and thus the story of the prosecution is not reliable that he was present on the spot when co-accused Charanjeet fired at the deceased. In this case, admittedly the appellant has been convicted with the aid of Section 34 of IPC and as per prosecution story his only overt act was that he was present on the spot carrying a gun in his hand, which was taken by Charanjeet and thereafter it was accused Charanjeet who fired shots from that gun. No overt act has been assigned to the appellant for participation in the commission of crime. There is nothing on record to show that he himself had given his gun to Charanjeet. The so called eye-witnesses have stated that the gun was taken or snatched by accused Charanjeet from the appellant. But nobody has stated that the gun was given by the appellant to Charanjeet. In the case of Ramnath Madhoprasad and Ors. v. State of Madhya Pradesh reported in : AIR 1953 SC420 , it has been held that even if it is held proved that all the accused were seen at the spot at the time of firing this fact by itself could not be held enough to prove the common intention of the appellant to murder. It can well be that four persons were standing together and one of them suddenly fired at the deceased this possibility has not been eliminated by any evidence on the record. In such a situation, it can not be said that there was no premeditation or

prearranged plan by the assailants of murdering the deceased. It is true that the common intention presupposes prior concert. It requires a prearranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. There must have been a prior meeting of minds to form a prearranged plan. The totality of the circumstances must be taken into consideration in order to arrive at a conclusion whether the accused had shared the common intention to commit the offence. In the background of the aforesaid principle the evidence of Subhan Khan (P.W. 1) has to be considered. He has stated that on the date of the incident when Darogaji came to inspect the dead-body he was present but he had not stated to the constable that he is the eye-witness of the incident.

15. Thus, considering the totality of the evidence on record, there is nothing on record, to prove that the gun was given by the appellant to share the common intention and considering the prosecution evidence as well as the defence version there is no conclusive evidence on record to hold that the appellant had shared the common intention to commit the murder. Thus, we allow this appeal and set aside the impugned judgment of conviction and sentence awarded to the appellant. The appellant is acquitted from the charge under Section 302/34 of IPC. He is on bail. His bail bonds be cancelled.