

Mukesh Vs. State

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Court : Rajasthan Jodhpur

Decided On : Sep-10-2015

Appellant : Mukesh

Respondent : State

Judgement :

[1]. IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

(1) D.B. CRIMINAL APPEAL NO.501/2008 Mukesh Versus State of Rajasthan (2) D.B. CRIMINAL JAIL APPEAL NO.656/2008 Ramesh @ Babu Versus State of Rajasthan Date of Judgment ::

10. 09.2015 PRESENT HON'BLE MR. JUSTICE GOVIND MATHUR HON'BLE MISS JUSTICE JAISHREE THAKUR Mr. Shambhoo Singh]. Mr. Mridul Jain]. for the appellants Mr. C.S. Ojha - Public Prosecutor Mr. Deepak Menaria for the complainant BY THE COURT : Being arising out of conviction recorded and sentence awarded under one judgment pertaining to the same incident, these two appeals are decided by this common judgment. The judgment impugned is dated 24.06.2008 passed by learned Additional Sessions Judge (Fast Track) No.2, Udaipur in Sessions Case No.8/2008. In brief, facts of the case are that on 07.06.2006, a written report (Ex.P/4) was submitted by Mr. Heeralal Paneri at [2]. Police Station Amba Mata, Udaipur with assertion that on the same day at about 9.00 p.m. his son Yogesh proceeded for Udaipur by his motorcycle to have diesel

and other articles for tractor. At about 10.45 p.m. Mr. Prakash Chandra Menariya informed him telephonically that serious beating had been given to Yogesh by Ramesh, resident of Bedala Talai and by Mukesh Prajapat. Ramesh gave several blows on the abdomen and neck of Yogesh. Efforts were made to save him, but he has been murdered by Ramesh and Mukesh. A police team also arrived at the spot of occurrence and had taken Yogesh to hospital. The accused persons prior to that fled from the spot towards Bedla. On having telephonic information, Heeralal rushed to the hospital and found his son dead. On basis of the information given as per the written report (Ex.P/4), a case was registered against Ramesh and Mukesh for initiating investigation for commission of an offence punishable under Section 302/34 IPC and against Jaswant for commission of an offence punishable under Section 201 IPC. The investigating agency during the course of investigation arrested the accused persons on 08.12.2006 and on the same day, at the instance of accused Ramesh a blood stained knife, blood stained sweater, blood stained pant and blood stained handkerchief were recovered. At the instance of accused Mukesh, a blood stained jacket and blood [3]. stained shirt were recovered. These articles alongwith the cloths worn by deceased Yogesh at the time of the incident with blood stains were sent for their serological examination to the Forensic Science Laboratory, Udaipur. The Forensic Science Laboratory as per its report (Ex.P/39) found all the articles aforesaid stained with 'O' group blood. The investigating agency also got autopsy done on the corpse of deceased Yogesh and as per the postmortem report (Ex.P/31), the cause of death was haemorrhagic shock due to antemortem injuries on neck, head, lung and liver, which were sufficient to cause death in ordinary course of nature. During the course of the investigation, statements of several witnesses, including eye-witnesses, were taken as per Section 161 Cr PC. After completing the investigation, a police report as per the provisions of Section 173 Cr PC was filed before learned Session Court, which on basis of that, after providing opportunity of hearing to the accused persons, framed charges for an offence punishable under Section 302/34 IPC against accused-appellants Ramesh and Mukesh and for an offence punishable under Section 201 IPC against accused Jaswant. On denial of the charges, trial commenced as desired. The prosecution supported its case with the aid of 16 witnesses, out of whom Mr. Prakash Chandra (P.W.3), Mr. [4]. Amit

(P.W.5), Mr. Rajesh (P.W.6), Mr. Omkarlal (P.W.8) and Chandresh (P.W.9) were cited as eye-witnesses. Dr. Aneesh (P.W.14), a member of the Medical Board that conducted autopsy on the corpse of deceased Yogesh, adduced medical evidence and Mr. Rajvijay Singh (P.W.16) narrated all the steps taken by the investigating agency while investigating the crime in question, he being the investigating officer. As per the provisions of Section 313 Cr PC, opportunity was given to the accused-appellants and Mr. Jaswant to explain the adverse and incriminating circumstances against them in the prosecution evidence. Accused Ramesh while availing that, termed the entire evidence false with explanation that accused Mukesh was involved with him in the profession of Conductor. and he had certain disputes with him. For this reason, he has been falsely implicated in the case. He also pleaded innocence. Accused Mukesh also termed the entire evidence false with explanation that he made efforts to save Yogesh and he had been falsely implicated in the case at the instance of father of deceased Yogesh due to some old vengeance. This accused also stated that Dalichand and Heeralal were present at the spot and they have also witnessed the entire incident. In defence, certain documents were exhibited and those are police statement of Prakash Chandra (Ex.D/1), police [5]. statement of Omkarlal (Ex.D/2), police statement of Chandresh (Ex.D/3), police statement of Narendra Singh (Ex.D/4), police statement of Amit (Ex.D/5) and police statement of Ramesh (Ex.D/6). Learned trial court after examining the entire evidence in detail, acquitted accused Jaswant, but recorded conviction of appellants Ramesh and Mukesh. Accused Ramesh has been convicted for an offence punishable under Section 302 IPC and sentenced to undergo life term imprisonment with a fine of Rs.10,000/- and further to undergo 10 months' simple imprisonment in default of payment of fine. Conviction of accused Mukesh has been recorded for an offence punishable under Section 302/34 IPC and he too has been sentenced to undergo life term imprisonment with a fine of Rs.10,000/- and further to undergo 10 months' simple imprisonment in default of payment of fine. In appeal, the argument advanced by Mr. Mridul Jain, learned counsel appearing on behalf of accused- appellant Ramesh is that the entire evidence adduced by prosecution suffers from serious contradictions and that creates a reasonable doubt about involvement of accused Ramesh in the crime in question. According to learned counsel, eye-witnesses on whom the trial

court relied have [6]. over-exaggerated the incident and that is sufficient to arrive at the conclusion that they have not placed true facts before the court. As per learned counsel, Mr. Prakash Chand Menaria (P.W.3), as a matter of fact, was not even an eye-witness. Mr. Shambhoo Singh, learned counsel appearing on behalf of appellant Mukesh submitted that no adequate evidence is available on record to establish common intention among the accused persons and participation of Mukesh in the crime in question in furtherance to any common intention said to be shared. While opposing the appeal, learned Public Prosecutor submit that cogent and very reliable evidence is adduced by the eye-witnesses that indicates participation of the accused persons in the crime in question. Beside that, recovery of the weapon of offence with blood stains having group 'O' matching with the blood group of the deceased is sufficient to establish the charges leveled. With regard to accused Mukesh also, learned Public Prosecutor submits that in addition to whatever stated by the eye-witnesses, the recovery of blood stained jacket and shirt having blood group 'O' matching with the blood group of the deceased is sufficient to uphold the conviction recorded by the trial court. Heard learned counsel for the accused-appellants, learned Public Prosecutor and learned counsel for the [7]. complainant. In view of the medical evidence adduced by Dr. Aneesh, there is no dispute about homicidal death of Mr. Yogesh. The only issue required to be determined is culpability of the accused persons. Before examining the evidence adduced by the eye-witnesses, it shall be appropriate to mention that even as per the counsel for the accused- appellants, the recoveries made at the instance of the accused persons stand established in view of the evidence adduced by the prosecutor, as such, not much discussion is required in that regard. However, we have examined the recovery memos and the statements given by the attesting witnesses and the investigating officer and on basis of that, we are having no doubt about the recoveries made by the investigating agency during the course of investigation at the instance of the accused persons. So far as the evidence adduced by eye-witnesses is concerned, in our considered opinion, that too is definite and no reasons exists to treat that as exaggerated what to talk of false. Mr. Prakash Chand (P.W.3), who happens to be brother- in-law of complainant Heeralal, while getting his testimony examined before the trial court stated that on 07.12.2006 at about 10.15 p.m. he was on way to his in-laws house.

On arriving near Lakshmi Apartment, this witness saw deceased [8]. Yogesh moving on road covering his stomach with hands. Ramesh and Mukesh were behind him. Ramesh was having a knife in his hands and he gave 3-4 blows to Yogesh on his stomach and neck. Mukesh caught hold of Yogesh; as a result of which, he fell down. As per this witness, both the accused persons then fled from the spot. During the course of cross-examination, this witness on being confronted with the statement given by him as per Section 161 Cr PC stated that no mention about holding of Yogesh by Mukesh is there. He also pleaded his ignorance as to why such averment does not exist in his police statement, but he accepted his signatures available on the leaf containing his police statement. The other witness Mr. Amit (P.W.5) stated that on 07.12.2006 in night at about 10.30 p.m. he alongwith his friend Chandresh Kumar Jain were busy with colouring and washing of his shop situated near Lakshmi Apartment. At that time, three young boys came on a motorcycle and out of them, one came to his shop to have cigarette. The cigarette being not available, the boy returned and on arriving close to his other friends, who were standing with motorcycle, he had some quarrel with them. Out of two boys, who were standing with bike, one threw a bottle of liquor on road and looking to that, the boy who came to purchase cigarette rushed towards the shop of this witness. He was chased by other boy, who [9]. were armed with knife. The boy armed with knife entered in the shop and gave several knife blows to the first boy in his abdominal region. The injured then ran towards motorcycle, where the other boy caught hold of him. This witness in his cross-examination stated that the boy who remained standing near the motorcycle, namely Mukesh, did not give any slap or punch to deceased Yogesh. He was also not in quarrel with Yogesh. The knife blows were given inside the shop and at that time, Mukesh did not come there and he watched the entire incident from some distance. Mr. Rajesh (P.W.6) while getting his testimony examined stated that on 07.12.2006 at about 10.30 p.m. he was present near the shop of Chandresh Kumar Jain being a watchman. At that time, three boys riding on a motorcycle came there. One boy out of them came towards the shop and asked for a cigarette. On being not available, the boy returned and had some quarrel with other boys, who were standing close to motorcycle. One boy among them threw bottle of liquor. The boy who came to have cigarette then ran towards the shop and he was chased by the

other boy, who threw the liquor bottle. This boy was having a knife in his hand. The first boy to save himself entered in the shop. The other boy also entered in the shop and gave several knife blows to him. This witness further stated that at the distance of about 100 [10]. feet from the shop, the third boy caught hold of first boy and the second boy, who was armed with knife gave knife blows on the neck of the first boy, resulting into his death. In cross- examination, this witness failed to explain as to why his version about holding of deceased by the third boy was not mentioned in his police statement. Mr. Omkarlal (P.W.8) also narrated the facts in the same terms and he too failed to explain as to why nothing was mentioned about holding of deceased by accused Mukesh in his police statement. Another important eye-witness is Mr. Chandresh Kumar Jain (P.W.9) and his statement is in the same tune as narrated by Mr. Amit Jangid (P.W.5). This witness also accepted availability of his signatures on the police statement, but failed to explain about non-mentioning of participation of accused Mukesh by holding deceased Yogesh. On examination of the entire evidence, it is clear that deceased Yogesh and accused Ramesh and Mukesh came at the spot of occurrence riding on the same motorcycle. They had a bottle of liquor with them. Deceased Yogesh went to the shop where Chandresh Jain and Amit Jangid were present. Deceased Yogesh asked for a cigarette and then returned to his friends as the cigarette was not available. He had some quarrel with his other friends and at that time, the bottle of [11]. liquor was thrown and accused Ramesh chased Yogesh. Yogesh made an effort to save himself by entering into the shop, but accused Ramesh did not leave him. He also entered into the shop and gave several knife blows. Yogesh in injured condition moved towards the motorcycle, where Mukesh was standing. Ramesh chased him again and further gave knife blows to him. As per eye-witnesses, Mukesh caught hold of Yogesh, but it is not clear as to whether that was just a friendly effort or an effort to provide opportunity to accused Ramesh to cause further knife blows. It is not at all in dispute that both the accused persons fled from the spot together on the same motorcycle. The emphasis of learned Public Prosecutor is that moving from the spot of occurrence together by the same motorcycle indicates common intention shared by the accused persons. The entire evidence on being pondered leaves no doubt about killing of Yogesh by accused Ramesh. The narration of facts by the eye-witnesses and recovery of blood

stained weapon of offence having blood stains matching with the blood group of the deceased is sufficient to arrive at the conclusion that Ramesh committed an offence described under Section 300 IPC and punishable under Section 302 IPC, as such, the conviction recorded by the trial court with regard to this accused, in our considered opinion, does not suffer from any wrong. [12]. So far as other accused Mukesh is concerned, his conviction is recorded with the aid of Section 34 IPC. A heavy responsibility is upon the court to examine the evidence to infer common sharing of intention in furtherance of the criminal act done by accused Ramesh. To examine this aspect, before coming to the evidence available, we would like to mention that Section 34 IPC is not a substantive and distinct offence, but has been enacted on principle of joint liability in doing of a criminal act. It is only a rule of evidence with a distinctive feature of the element of participation in action. It is quite difficult to have direct proof of common intention and therefore, that can only be inferred from the circumstances appearing in the proved facts. Hon'ble Supreme Court in Abdul Sayeed Vs. State of Madhya Pradesh reported in 2010 (4) Criminal Court Cases 327 (S.C.) while dealing with scope of Section 34 IPC held as under :- Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the common intention. to commit the offence. The phrase common intention. implies a pre-arranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in [13]. point of time. The common intention to bring about a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different sense from the same intention. or similar intention. or common object.. The persons having similar intention which is not the result of the pre-arranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. (See Mohan Singh & Anr. v. State of Punjab, AIR 1963 SC174.

46. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this Section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the concerned persons had shared

a common intention. (vide : Krishnan & Anr. v. State of Kerala, (1996) 10 SCC508 and Harbans Kaur & Anr. v. State of Haryana, (2005) 9 SCC195. Undoubtedly, the ingredients of Section 34, i.e., that the accused had acted in furtherance of their common intention is required to be proved specifically or by inference, in the facts and circumstances of the case. (Vide: Hamlet alias Sasi & Ors. v. State of Kerala, (2003) 10 SCC108 Pichai alias Pichandi & Ors. v. State of Tamil Nadu, (2005) 10 SCC505 and Bishna alias Bhiswadeb Mahato & [14]. Ors. v. State of West Bengal, (2005) 12 SCC657.

47. In Gopi Nath @ Jhallar v. State of U.P., (2001) 6 SCC620 this court observed as under: 8..Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action - be it that it was not overt or was only a covert act or merely an omission constituting an illegal omission. The section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a pre-concerted or pre-arranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case.

. [15].

48. In Krishnan and Anr. v. State represented by Inspector of Police, (2003) 7 SCC56 this court observed that applicability of Section 34 is dependent on the facts and circumstances of each case. No hard and fast rule can be made out regarding applicability or non-applicability of Section 34.

49. In *Girija Shankar v. State of U.P.*, (2004) 3 SCC793 it is observed that Section 34 has been enacted to elucidate the principle of joint liability of a criminal act: Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances.

. [Emphasis added].

50. In *Virendra Singh v. State of Madhya Pradesh*, JT2010(8) SC319 this Court observed that: [16]. Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a pre-arranged and pre-meditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the pre-meditation and though the plan may be formed suddenly. In order that section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Section 34.. 51. Section 34 can be invoked even in those cases where some of the co-accused may be acquitted provided, it can be proved either by direct evidence or inference that the accused and the others have committed an offence in pursuance of the common intention of the group. (vide: *Prabhu Babaji v. State* [17]. of Bombay, AIR 1956 SC51.

52. Section 34 intends to meet a case in which it is not possible to distinguish between the criminal acts of the individual members of a party, who act in furtherance of the common intention of all the members of the party or it is not possible to prove exactly what part was played by each of them. In the absence of common intention, the criminal liability of a member of the group might differ according to the mode of the individuals participation in the act. Common intention means that each member of the group is aware of the act to be committed.

. By keeping in mind the legal limitations noticed above, we have examined the evidence available on record. Eye-witness Mr. Prakash Chand (P.W.3) stated that when he was passing through Lakshmi Apartment, he saw deceased Yogesh moving on road by covering his stomach with his hands. He was chased by accused Ramesh, who gave several knife blows to deceased in abdominal region and on his neck. As per this witness, accused Mukesh caught hold of deceased Yogesh; as a result of which he fell down. Subsequent to that, some more knife blows were given by accused Ramesh. This witness failed to explain as to why this version of facts was not available in his police statement, which was signed by him. Same is the position with two independent witnesses, namely, [18]. Mr. Amit Jangid (P.W.5) and Mr. Chandresh Kumar Jain (P.W.9). The other eye-witness Mr. Omkarlal and Mr. Rajesh also stated about holding of deceased by Mukesh, but at the same time, they also failed to explain as to why nothing was stated by them to the investigating agency in this regard. It is also relevant to notice that even as per the eye-witnesses, deceased Yogesh and accused persons came on the same motorcycle and after returning of Yogesh from the shop of Amit Jangid/Chandresh, they had some quarrel. In this quarrel, no participation of accused Mukesh is shown. It is only accused Ramesh, who chased Yogesh and gave knife blows. No evidence is available on record to establish any preplanning or occurrence of planning even during the course of crime between the accused persons to kill Yogesh. The emphasis of learned Public Prosecutor is only on the fact that both the accused persons fled from the spot together on the same motorcycle, therefore, inference should be drawn for existence of common intention. In our opinion, two young boys looking to the entire incident and the presence of other persons may have been afraid and may have moved from the spot of occurrence together, but merely on that count, no inference as suggested can be drawn. In

our considered view, the evidence in relation to common intention on the part of accused Mukesh in furtherance to the criminal act of accused [19]. Ramesh has not been established and therefore, his conviction for the offence punishable under Section 302/34 IPC is not justifiable. For the reasons given above, the appeal preferred by accused Ramesh @ Babu bearing D.B. Criminal Jail Appeal No.656/2008 is dismissed. His conviction recorded and sentence awarded by the trial court is affirmed. The appeal preferred by accused Mukesh bearing D.B. Criminal Appeal No.501/2008 is allowed. His conviction for the offence punishable under Section 302/34 IPC under the judgment impugned dated 24.06.2008 is set aside. The accused be released from the State custody forthwith, if not required in any other case. [JAISHREE THAKUR], J.

[GOV IND MATHUR], J.

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