Prithvey Singh Vs. State

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Court : Delhi

Decided On : Feb-13-2002

Reported in : 2002IIIAD(Delhi)698; 2002CriLJ2874; 96(2002)DLT785

Judge : B.A. Khan and; V.S. Aggarwal, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 34, 149, 201, 300, 302, 304(I), 307, 324, 326 and 420; Code of Criminal Procedure (CrPC) , 1973 - Sections 313 and 360; Evidence Act - Sections 134

Appeal No. : Crl. Appeal Nos. 302/1980 and 81/1981

Appellant : Prithvey Singh;state

Respondent : State;davinder Singh and ors.

Advocate for Def. : Anil Soni, Addl. P.P. in Criminal Appeal No. 302/1980 and ; J.S. Arora, Addl. P.P. in Criminal Appeal N

Advocate for Pet/Ap. : J.S. Arora, Adv. in Criminal Appeal No. 302/1980 and; Anil Soni, Addl. P.P. in Criminal Appeal No. 81/1

Disposition : Appeal No. 302/1980 dismissed

Judgement :

V.S. Aggarwal, J.

1. By this common judgment the two appeals Prithvey Singh v. State and State v. Davinder Singh and Ors. can conveniently be disposed together because both the appeals arise out of the same alleged incident and the judgment of the trial court dated 29th August, 1980. By virtue of the impugned judgment the learned trial court acquitted Rajbir Singh, Mahavir Singh and Sahdev of the charges against them. Devinder and Prithvey were held guilty of the offences punishable under Section 324/34 of the Indian Penal code. While they were acquitted (Devinder and Prithvey) of the offence punishable under Section 302 Indian Penal Code they were sentenced to undergo rigorous imprisonment for two years. Aggrieved by the said judgment of the learned trial court Prithvey has preferred the appeal referred to above while the State assails the order of the learned trial court acquitting the accused persons with respect to the offence punishable under Section 302 Indian Penal Code. Needless to state that in the appeal preferred by the State of 8th April, 1981 leave was granted with respect to Devinder and Prithvey only. Consequently so far as the other accused who had been acquitted by the learned trial court there is no controversy before us.

2. The relevant facts cajoled from the prosecution case are that Braham Parkash and his brother Ram Chander were running a tailor shop known as Deepak Tailors near Police Station Nangloi, Delhi. There was a quarrel between Azad Singh r/o Nangloi and Devinder Singh. On 18th May, 1977 at about 7.30 PM Braham Parkash and Hans Raj were sitting on a cot in front of the shop of the Deepak Tailors. Devinder Singh and others came with open knives in their hands and assaulted both Braham Prakash and Hans Raj. The injured were removed to the police station and then to the hospital. Hans Raj succumbed to the injuries while Braham Prakash was stated to be in the hospital.

3. Rajbir Singh was the person at whose instance the First Information Report was recorded. This led to the investigation of the matter and after completion of the investigation challan was submitted against the accused including Devinder Singh and Prithvey Singh besides others. The learned trial court framed charges against the accused persons for offences punishable under Section 302/34, 307/34 while as against Sahdev Singh a charge was framed for the offence punishable under Section 201 Indian Penal Code. Needless to state that all the accused persons

pleaded not guilty and claimed a trial. The prosecution case revolved around the testimonies of three alleged eye witnesses, namely Rajbir Singh, PW1, Braham Prakash, PW3 and Ram Chander PW7. Regarding other matters there was little controversy raised before us and we deem it unnecessary to dwell into the same. Suffice to state that it had been opined that Hans Raj deceased on whose person post-mortem had been conducted by Dr. Bharat Singh, was stated to have died as a result of the injury which was sufficient to cause death in the ordinary course of its nature. In their statements under Section 313 Code of Criminal Procedure all the accused persons pleaded not guilty and denied their involvement in the offence.

4. The learned trial court on appraisal of the evidence relied upon the testimonies of the eye witnesses to held Devender and Prithvey guilty of the offence punishable under Section 324 Indian Penal Code. However, it was held that so far as other accused are concerned there is no evidence against them nor there was evidence to show that Devinder and Prithvey had committed the offence punishable under Section 302 Indian Penal Code. The learned trial court did not deem it necessary to award benefit of Section 360 Criminal Procedure Code to any of the accused, namely Devinder and Prithvey.

5. Learned counsel for the appellant vehemently urged that none of the witnesses examined by the prosecution could be relied upon. Their testimonies necessarily had to be rejected and thereforee benefit of doubt necessarily must be given to Prithvey, appellant. According to him, Rajbir Singh and Ram Chander, PW1 and PW7 were not present at the site. As per the evidence on the record they had come to the site subsequently and consequently statement of Braham Prakash even according to the learned counsel was doubtful, his prayer for acquitting Prithvey should be accepted. On the contrary, learned counsel for the State vehemently urged that the accused persons were holding knives when they had come. Devinder had given the fatal blow which was sufficient to cause death in the ordinary course of its nature. thereforee, keeping in view the provisions of Section 300 of the Indian Penal Code read with Section 34 of the said Code the accused persons should have been held guilty of the offence punishable under Section 302/34 Indian Penal Code.

6. Rajbir Singh, PW1 in his testimony had deposed that he had left his residence at about 7.00 or 7.30 PM for going to Rohtak. He had crossed the shop of Deepak Tailors and had come about 25 yards ahead of it at that time he noticed Devinder Singh and his companions coming from the opposite side. Devinder Singh and his companions were holding knives. He knew Devinder Singh and his other two companions but immediately he added that he only knows Devinder Singh but not the other two companions. He only identified Devinder Singh in court and not the others. When he looked back he saw that Devinder Singh had given a knife blow to Braham Prakash under his arm and thereafter gave a knife blow to Hans Raj. Before the knife blows were given to Braham Prakash and Hans Raj they were sitting outside of the shop of Deepak Tailors. Braham Prakash was given the knife blow when he was running into the shop and Hans Raj was given the knife blow when he was trying to escape. At that time many persons collected there. The witness added that he had taken the injured persons to the police station Nangloi wherein they were both bleeding. His statement, copy of which was PW1/A had been recorded. During cross-examination he added that he had known Devinder Singh for the past 5/6 years prior to occurrence. Earlier Devinder Singh was living near his house. He admitted that he had told the police in his earlier statement recorded under Section 161 Code of Criminal Procedure that he had brought the injured by a rickshaw to the police station. He admitted that he had supported both the injured while they were made to walk for 10 to 15 yards but he did not talk to them at that time. According to this witness his own clothes were not blood stained but lot of blood fell on the rickshaw.

7. The testimony of this witness clearly reveals that it cannot be termed that he was present at the spot. It is patent that he had come subsequently. This is for the reason that as per the testimony of this witness he had taken both the injured to the hospital. Both the deceased as well as Braham Prakash had walked 10 to 15 paces with the help of this witness and as per his own version he had taken them on the rickshaw thereupon to the police station. If that was so and deceased and the injured were bleeding profusely it cannot be believed that his own clothes will not be blood stained. In addition to that Braham Prakash and one of the injured in unambiguous terms during his testimony states that Rajbir Singh had come subsequently. Braham Prakash, PW3 during his examination in Chief does not

specifically state about the presence of this witness at the relevant time. However, he was cross-examined in this regard. In his cross-examination conducted on 24th January, 1979 he admitted 'Rajbir Singh PW did not come to me after I had entered my shop. Rajbir PW came to me about 5 minutes after the occurrence.' In other words, as per his testimony Rajbir witness had come after five minutes of the occurrence to him. Rajbir was basically a chance witness and taking totality of the facts it cannot be termed that he had witnessed the occurrence as stated by him. Necessarily his testimony had to be excluded.

8. Ram Chander is the brother of injured Braham Prakash. He appeared as PW7. He admitted that his shop is located in Punjabi Basti and deceased Hans Raj was his friend. Hans Raj used to work in Delhi Gate exchange. The witness added that on 18th June, 1977 Hans Raj had come and sat outside his shop. He had told his brother and Hans Raj that he would be coming back after some time and had gone to bazar. At about 7.40 PM he reached his shop. He was at a distance of 400 to 50 yards when he saw 3 or 4 persons were quarrelling with his brother. There was a tall man who had stabbed his brother Braham Prakash. Braham Prakash went towards his shop and Devinder accused followed him. Braham Prakash had hardly entered the shop when Devinder gave him a knife blow. He ran towards the shop. Devender accused ran out of the shop and told Prithvey that Hans Raj deceased could also be caught hold of. He should not be allowed to go because he was the friend of Braham Prakash. By the time he reached close to the shop and peeped into the shop he saw that Braham Prakash had fallen down. All the three accused persons and that tall man had caught hold of Hans Raj. Hans Raj was given a knife blow by Devinder. He identified Rajbir to be accused who had slapped Braham Prakash. He stated that he had chased the accused persons and when he returned to his shop he found that Hans Raj deceased and Braham Prakash had already been removed to the police station.

9. The statement of this witness has been assailed on the ground that he was the brother of injured Braham Prakash. If his brother had been injured at that very moment then it would be a natural conduct on the part of the brother to take him to the hospital.

10. At this stage suffice to mention that every person reacts in a particular way in a particular situation. If the brother rather than attending to his injured brother chases the accused on that ground the testimony as such cannot be rejected. But it is a factor which cannot be ignored. It is always the totality of the circumstances which prompts the court to come to a particular conclusion as to whether a particular witness has to be relied upon or not. In the present case Braham Prakash, PW3 has specifically stated that he and the deceased were sitting on the cot Ram Chander PW7 had gone towards the bus stop for some work. In other words he excludes the presence of Ram Chander at the relevant time. This testimony gets further fortification from the further statement of injured Braham Prakash that when Hans Raj fell down Rajbir, PW1 had reached there and removed them to the police station. He further adds that at that time 'my brother had not reached there'. In other words, the injured Braham Prakash whose presence indeed cannot be doubted to be present at the spot excludes the presence of his brother Ram Chander and thereforee his testimony also in the peculiar facts deserves to be rejected.

11. The prosecution had further examined Braham Prakash the injured himself. At this stage we deem it necessary to mention that Section 134 of the Evidence Act in its stark brevity unfolds itself in the following words:-

134. Number of witnesses. -- No particular number of witnesses shall in any case be required for the proof of any fact.

12. In other words the legislature in its wisdom thought that plurality of the witnesses is not necessary. It is the quality of evidence rather than quantity which is material. The Supreme Court had considered this aspect in the well known decision in the case of Vadivelu Thevar v. The State of Madras : 1957 CriLJ1000 . It was held that very often crimes are committed in presence of one witness only. It is the discretion of the Judge to scrutinise the same and come to a conclusion about the quality of evidence of the single witness. If the testimony is wholly reliable conviction can be based on a sole testimony. The Supreme Court described the nature of the witnesses to be of three types, namely wholly reliable, wholly unreliable and neither reliable nor wholly unreliable. It was held that when a

witness is wholly reliable a conviction can always be based on his sole testimony. The precise findings reads:-

'....Hence, in our opinion, it is a sound and well established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

(12) In the first category of proof, the court should have no difficulty in coming to its conclusion either way-it may convict or may acquit on the testimony of a single witness, if it is sound to be above reproach or suspicion of interestedness, incompetence or subordination. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witness in proof of any fact, they will be indirectly encouraging subordination of witnesses.....'

13. This being the position of law one can conveniently refer to the testimony of Braham Prakash, PW3. In his examination in chief he describes the incident and the relevant portion of the same in his won words reads:-

'..... We were on visiting term. On 18.6.77 at about 7.30 p.m. I was present outside my shop and was sitting on the cot. Hans Raj deceased was also sitting with me. At that time my elder brother had gone towards bus stop for some work. Hans Raj desired to have a cup of tea and asked for a cup of tea. One cup of tea was called for and thereupon Hans Raj asked for another cup of tea. In the meantime four young persons came to our shop. I had known two persons whose names one Devinder and Pirthi. These are the two persons now present in court. (the witness

has correctly identified the accused). In those days I had known the other two persons by face but now I know them by their names even. Their names are Rajbir and Mahabir. (The witness identifies Rajbir and mahabir accused persons present in court). Devinder and Rajbir accused asked us that by giving liquor to Azad you had created a quarrel. Azad was known to us and he used to come and sit at our shop. We denied our involvement in the quarrel created by Azad. Davinder gave me a slap and I tried to go to the shop for my protection and thereupon Devinder accused gave me a knife blow under my arm. Hans Raj deceased tried to ran away. I had also told him to run away. He has seen me being giving knife blow. Devinder accused told his companion not to let Hans Raj run away. Rajbir accused and Prithvey accused were armed with knifes and they prevented Hans Raj deceased from running away.....'

14. He was subjected to lengthy cross-examination and his testimony had been assailed basically on the ground that he had made certain improvements with respect to his earlier statement made to the police.

15. We deserve it necessary to mention that no witness can reproduce in a mathematical manner about what he had earlier stated. With the passage of time the human memory fumbles and falters and certain improvements would appear in the testimony of most truthful witness. Braham Prakash is one of the injured persons. His presence at the site thereforee cannot be doubted. Reading of the statement as a whole reveals that he has not changed the substratum of the prosecution version. It remains the same. It clearly indicates that so far as Devinder and Prithvey are concerned they were very much involved in the crime in this regard. In the absence of any other cogent reasons there is no ground to reject the testimony of Braham Prakash who is basically a witness who can be described as a wholly truthful. To that extent the findings of the trial court do not require any interference.

16. Learned counsel for the accused persons contended that in the facts of the case it cannot be termed that Prithvey had shared any common intention with Devinder Singh to cause the injury and thereforee the provisions of Section 324 read with Section 34 of the Indian penal code cannot be attracted in the facts of

the case.

17. Section 34 of the Indian Penal Code, by itself does not create an offence but provides that when more than one person in furtherance of their common intention commits a criminal act each of such person is liable for that act. In other words, if an act is done in furtherance of their common intention the co-accused is equally liable but there has to be a proper meeting of mind in this regard. Some of the precedents in this regard can well be taken note of and would be in the fitness of things.

18. Before the Supreme Court in the case of Mania Singh v. State of Rajasthan : 1976 CriLJ835 there was a matter where the charge related to commission of the offence of unlawful assembly by the appellant along with others, namely four co-accused. There was no direct or substantial evidence to show that offence was committed by the appellant along with other unnamed persons. The other co-accused had been given the benefit of doubt and had been acquitted. It was held that it would not be permissible to take the view that it must have been some persons along with the appellant in causing injury to the deceased.

19. Similarly in the case of Dasrathlal Chandulal Joshi v. State of Gujarat : 1979 CriLJ1078 accused No. 2 as per the facts established had merely accompanied accused No. 1 for collecting donations. Accused No. 1 was stated to have forged the receipts of collection of donations. There was on evidence to show that accused No. 1 was taken in confidence or that he knew that receipt were forged. It was held in the facts that in the absence of any material it could not be termed that accused No. 2 could be held guilty of the offence of forgery under Section 420 read with Section 34 of the Indian Penal Code.

20. Similarly in the case of Rangaswami v. State of Tamil Nadu : AIR 1989 SC1137 appellant Rangaswami had accompanied the accused persons who committed murder. There was no evidence that appellant went with the accused for purpose of committing murder. He had no enmity with the victims. He had not uttered any instigator words. It was held that provisions of Section 34 of the Indian Penal Code in the fats could not be drawn against the said appellant. A Division Bench of Rajasthan High Court in the case of Issaq Mohammed and Anr. v. State

of Rajasthan while dealing with the same situation held:

'In the instant case, accused Mohammed Safi merely caught hold of the collar of the shirt of the deceased Munti. There is no material on record to show that he knew that accused Issaq Mohammed was having a Gupti in the pocket of his pants. There is again no evidence to suggest that accused Mohammed Safi excited, instigated, prompted or exhorted accused Issaq Mohammed to cause injuries to the deceased. Section 34 requires simultaneous consensus on the part of the accused persons. The common intention must be to commit the particular offence. The common intention of one must not only be known to the other but must also be shared by him. In the instant case, from the material on record, it cannot be inferred that the intention of accused Issaq Mohammed to commit the murder of the deceased was known to Mohammed Safi and he had shared that common intention. Merely because he caught hold of the deceased by the collar of his shirt, it cannot be inferred that there was a common intention to commit the murder. The conviction of accused Mohammed Safi under Section 302 with the aid of Section 34 IPC is, thereforee, not sound. His conviction should be altered to that under Section 326/34 IPC.'

21. The Supreme Court in the case of M.A. Abdulla Kunhi and Ors. v. The State of Kerala : 1991 CriLJ525a where there was a direct and cogent evidence stating that one of accused rushed with sword to attack deceased but was obstructed by one of prosecution witnesses and held that there was a common intention between the accused persons and Section 34 of the Penal Code would be attracted. A few years later in the case of State of Uttar Pradesh v. Rohan Singh and Anr. 1996 Cri.L.J. 2884 the Supreme Court had drawn a clear distinction between sharing a similar intention and common intention. It was held:-

'There is a material difference between the sharing of similar intention and common intention. Section 34, IPC can be attracted only if the accused share a common intention and not where they share only similar intention. There are no circumstances on the record from which it may be possible to draw the inference that the respondents had shared the common intention. Mere presence together is not sufficient to hold that they both shared the common intention to murder Naqi

Raza and injure Mashooq Khan.'

22. Lastly on this question we may refer with advantage to the decision of the Supreme Court in the case of Suresh and Anr. v. State of UP : 2001 CriLJ1462 . It was held that merely because a person is present it cannot be termed that he shared the common intention with the other accused. From the aforesaid conclusions can conveniently be drawn that Section 34 of the Indian Penal Code lays down the joint role, joint responsibility for criminal act performed by more than one persons. That person need not take active part, he should be present but could be at a distance. Criminal sharing of motive need not necessarily be overt or covert by active person or by other methods has to be seen from the facts of the case. It is rare that direct evidence of sharing the common intention contemplated by Section 34 of the Indian Penal Code would be available. It has to be adjudged on basis of the evidence on the record and other material as if there was a common intention to commit particular act or not. It can even develop at the spur of the moment.

23. In this regard Braham Prakash, PW3 had stated that Devender and Prithvey had come outside the shop. It was Devender who had slapped him and thereupon gave him knife blow when deceased Hans Raj tried to run away he was given the knife blow by Devinder. He had told his companions not to let Hans Raj run away. He stated that Prithvey accused was also armed with knife and they prevented Hans Raj from running away. During cross-examination he admitted that he does not know from where Devinder had taken out the knife. He had taken out the knife suddenly. He could not state as to from which place the knife was taken out. He could not even state as to form which side the other two accused persons had taken out the knives. Perusal of the statement of Braham Prakash shows that the version of prosecution that accused persons had come brandishing the knives is not correct. Suddenly Devinder had taken out the knife. Since they had all come together it can safely be inferred that they had a common intention to cause hurt because of the previous dispute. But there is precious little on the record to show that there was any common intention to commit any further injury than to cause simple hurt on these persons. Consequently so far as Prithvey is concerned he was rightly held guilty of offence punishable under Section 324/34 of the Indian

Penal Code along with Devinder.

24. Learned counsel for the State urged that it was Devinder who had caused the fatal blow and in any case he should be held guilty for the offence punishable under Section 302 of the Indian Penal Code.

25. We know from the decision of the Supreme Court in the case of Virsa Singh v. State of Punjab : 1958 CriLJ818 that whether there is an intention to commit a particular offence is always a question of fact. It is the totality of the circumstances which prompts the court to try such a conclusion. The Supreme Court went in detail as to under what circumstances Section 300 'Thirdly' can be pressed into service. In paragraph 12 Supreme Court had given the following guidelines:-

(12) To put it shortly, the prosecution must prove the following fats before it can bring a case under Section 300 'thirdly';

. First, it must establish, quite objectively, that a bodily injury is present;

. Secondly, the nature of the injury must be proved; These are purely objective investigations.

. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

. Once these three elements are proved to be present, the enquiry proceeds further and,

. Fourthly, if must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

1. By this common judgment the two appeals Prithvey Singh v. State and State v. Davinder Singh and Ors. can conveniently be disposed together because both the appeals arise out of the same alleged incident and the judgment of the trial court dated 29th August, 1980. By virtue of the impugned judgment the learned trial

court acquitted Rajbir Singh, Mahavir Singh and Sahdev of the charges against them. Devinder and Prithvey were held guilty of the offences punishable under Section 324/34 of the Indian Penal code. While they were acquitted (Devinder and Prithvey) of the offence punishable under Section 302 Indian Penal Code they were sentenced to undergo rigorous imprisonment for two years. Aggrieved by the said judgment of the learned trial court Prithvey has preferred the appeal referred to above while the State assails the order of the learned trial court acquitting the accused persons with respect to the offence punishable under Section 302 Indian Penal Code. Needless to state that in the appeal preferred by the State of 8th April, 1981 leave was granted with respect to Devinder and Prithvey only. Consequently so far as the other accused who had been acquitted by the learned trial court there is no controversy before us.

2. The relevant facts cajoled from the prosecution case are that Braham Parkash and his brother Ram Chander were running a tailor shop known as Deepak Tailors near Police Station Nangloi, Delhi. There was a quarrel between Azad Singh r/o Nangloi and Devinder Singh. On 18th May, 1977 at about 7.30 PM Braham Parkash and Hans Raj were sitting on a cot in front of the shop of the Deepak Tailors. Devinder Singh and others came with open knives in their hands and assaulted both Braham Prakash and Hans Raj. The injured were removed to the police station and then to the hospital. Hans Raj succumbed to the injuries while Braham Prakash was stated to be in the hospital.

3. Rajbir Singh was the person at whose instance the First Information Report was recorded. This led to the investigation of the matter and after completion of the investigation challan was submitted against the accused including Devinder Singh and Prithvey Singh besides others. The learned trial court framed charges against the accused persons for offences punishable under Section 302/34, 307/34 while as against Sahdev Singh a charge was framed for the offence punishable under Section 201 Indian Penal Code. Needless to state that all the accused persons pleaded not guilty and claimed a trial. The prosecution case revolved around the testimonies of three alleged eye witnesses, namely Rajbir Singh, PW1, Braham Prakash, PW3 and Ram Chander PW7. Regarding other matters there was little controversy raised before us and we deem it unnecessary to dwell into the same.

Suffice to state that it had been opined that Hans Raj deceased on whose person post-mortem had been conducted by Dr. Bharat Singh, was stated to have died as a result of the injury which was sufficient to cause death in the ordinary course of its nature. In their statements under Section 313 Code of Criminal Procedure all the accused persons pleaded not guilty and denied their involvement in the offence.

4. The learned trial court on appraisal of the evidence relied upon the testimonies of the eye witnesses to held Devender and Prithvey guilty of the offence punishable under Section 324 Indian Penal Code. However, it was held that so far as other accused are concerned there is no evidence against them nor there was evidence to show that Devinder and Prithvey had committed the offence punishable under Section 302 Indian Penal Code. The learned trial court did not deem it necessary to award benefit of Section 360 Criminal Procedure Code to any of the accused, namely Devinder and Prithvey.

5. Learned counsel for the appellant vehemently urged that none of the witnesses examined by the prosecution could be relied upon. Their testimonies necessarily had to be rejected and thereforee benefit of doubt necessarily must be given to Prithvey, appellant. According to him, Rajbir Singh and Ram Chander, PW1 and PW7 were not present at the site. As per the evidence on the record they had come to the site subsequently and consequently statement of Braham Prakash even according to the learned counsel was doubtful, his prayer for acquitting Prithvey should be accepted. On the contrary, learned counsel for the State vehemently urged that the accused persons were holding knives when they had come. Devinder had given the fatal blow which was sufficient to cause death in the ordinary course of its nature. thereforee, keeping in view the provisions of Section 300 of the Indian Penal Code read with Section 34 of the said Code the accused persons should have been held guilty of the offence punishable under Section 302/34 Indian Penal Code.

6. Rajbir Singh, PW1 in his testimony had deposed that he had left his residence at about 7.00 or 7.30 PM for going to Rohtak. He had crossed the shop of Deepak Tailors and had come about 25 yards ahead of it at that time he noticed Devinder

Singh and his companions coming from the opposite side. Devinder Singh and his companions were holding knives. He knew Devinder Singh and his other two companions but immediately he added that he only knows Devinder Singh but not the other two companions. He only identified Devinder Singh in court and not the others. When he looked back he saw that Devinder Singh had given a knife blow to Braham Prakash under his arm and thereafter gave a knife blow to Hans Raj. Before the knife blows were given to Braham Prakash and Hans Raj they were sitting outside of the shop of Deepak Tailors. Braham Prakash was given the knife blow when he was running into the shop and Hans Raj was given the knife blow when he was trying to escape. At that time many persons collected there. The witness added that he had taken the injured persons to the police station Nangloi wherein they were both bleeding. His statement, copy of which was PW1/A had been recorded. During cross-examination he added that he had known Devinder Singh for the past 5/6 years prior to occurrence. Earlier Devinder Singh was living near his house. He admitted that he had told the police in his earlier statement recorded under Section 161 Code of Criminal Procedure that he had brought the injured by a rickshaw to the police station. He admitted that he had supported both the injured while they were made to walk for 10 to 15 yards but he did not talk to them at that time. According to this witness his own clothes were not blood stained but lot of blood fell on the rickshaw.

7. The testimony of this witness clearly reveals that it cannot be termed that he was present at the spot. It is patent that he had come subsequently. This is for the reason that as per the testimony of this witness he had taken both the injured to the hospital. Both the deceased as well as Braham Prakash had walked 10 to 15 paces with the help of this witness and as per his own version he had taken them on the rickshaw thereupon to the police station. If that was so and deceased and the injured were bleeding profusely it cannot be believed that his own clothes will not be blood stained. In addition to that Braham Prakash and one of the injured in unambiguous terms during his testimony states that Rajbir Singh had come subsequently. Braham Prakash, PW3 during his examination in Chief does not specifically state about the presence of this witness at the relevant time. However, he was cross-examined in this regard. In his cross-examination conducted on 24th January, 1979 he admitted 'Rajbir Singh PW did not come to me after I had

entered my shop. Rajbir PW came to me about 5 minutes after the occurrence.' In other words, as per his testimony Rajbir witness had come after five minutes of the occurrence to him. Rajbir was basically a chance witness and taking totality of the facts it cannot be termed that he had witnessed the occurrence as stated by him. Necessarily his testimony had to be excluded.

8. Ram Chander is the brother of injured Braham Prakash. He appeared as PW7. He admitted that his shop is located in Punjabi Basti and deceased Hans Raj was his friend. Hans Raj used to work in Delhi Gate exchange. The witness added that on 18th June, 1977 Hans Raj had come and sat outside his shop. He had told his brother and Hans Raj that he would be coming back after some time and had gone to bazar. At about 7.40 PM he reached his shop. He was at a distance of 400 to 50 yards when he saw 3 or 4 persons were quarrelling with his brother. There was a tall man who had stabbed his brother Braham Prakash. Braham Prakash went towards his shop and Devinder accused followed him. Braham Prakash had hardly entered the shop when Devinder gave him a knife blow. He ran towards the shop. Devender accused ran out of the shop and told Prithvey that Hans Raj deceased could also be caught hold of. He should not be allowed to go because he was the friend of Braham Prakash. By the time he reached close to the shop and peeped into the shop he saw that Braham Prakash had fallen down. All the three accused persons and that tall man had caught hold of Hans Raj. Hans Raj was given a knife blow by Devinder. He identified Rajbir to be accused who had slapped Braham Prakash. He stated that he had chased the accused persons and when he returned to his shop he found that Hans Raj deceased and Braham Prakash had already been removed to the police station.

9. The statement of this witness has been assailed on the ground that he was the brother of injured Braham Prakash. If his brother had been injured at that very moment then it would be a natural conduct on the part of the brother to take him to the hospital.

10. At this stage suffice to mention that every person reacts in a particular way in a particular situation. If the brother rather than attending to his injured brother chases the accused on that ground the testimony as such cannot be rejected. But

it is a factor which cannot be ignored. It is always the totality of the circumstances which prompts the court to come to a particular conclusion as to whether a particular witness has to be relied upon or not. In the present case Braham Prakash, PW3 has specifically stated that he and the deceased were sitting on the cot Ram Chander PW7 had gone towards the bus stop for some work. In other words he excludes the presence of Ram Chander at the relevant time. This testimony gets further fortification from the further statement of injured Braham Prakash that when Hans Raj fell down Rajbir, PW1 had reached there and removed them to the police station. He further adds that at that time 'my brother had not reached there'. In other words, the injured Braham Prakash whose presence indeed cannot be doubted to be present at the spot excludes the presence of his brother Ram Chander and thereforee his testimony also in the peculiar facts deserves to be rejected.

11. The prosecution had further examined Braham Prakash the injured himself. At this stage we deem it necessary to mention that Section 134 of the Evidence Act in its stark brevity unfolds itself in the following words:-

134. Number of witnesses. -- No particular number of witnesses shall in any case be required for the proof of any fact.

12. In other words the legislature in its wisdom thought that plurality of the witnesses is not necessary. It is the quality of evidence rather than quantity which is material. The Supreme Court had considered this aspect in the well known decision in the case of Vadivelu Thevar v. The State of Madras : 1957 CriLJ1000 . It was held that very often crimes are committed in presence of one witness only. It is the discretion of the Judge to scrutinise the same and come to a conclusion about the quality of evidence of the single witness. If the testimony is wholly reliable conviction can be based on a sole testimony. The Supreme Court described the nature of the witnesses to be of three types, namely wholly reliable, wholly unreliable and neither reliable nor wholly unreliable. It was held that when a witness is wholly reliable a conviction can always be based on his sole testimony. The precise findings reads:-

'....Hence, in our opinion, it is a sound and well established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

(12) In the first category of proof, the court should have no difficulty in coming to its conclusion either way-it may convict or may acquit on the testimony of a single witness, if it is sound to be above reproach or suspicion of interestedness, incompetence or subordination. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witness in proof of any fact, they will be indirectly encouraging subordination of witnesses.....'

13. This being the position of law one can conveniently refer to the testimony of Braham Prakash, PW3. In his examination in chief he describes the incident and the relevant portion of the same in his won words reads:-

'..... We were on visiting term. On 18.6.77 at about 7.30 p.m. I was present outside my shop and was sitting on the cot. Hans Raj deceased was also sitting with me. At that time my elder brother had gone towards bus stop for some work. Hans Raj desired to have a cup of tea and asked for a cup of tea. One cup of tea was called for and thereupon Hans Raj asked for another cup of tea. In the meantime four young persons came to our shop. I had known two persons whose names one Devinder and Pirthi. These are the two persons now present in court. (the witness has correctly identified the accused). In those days I had known the other two persons by face but now I know them by their names even. Their names are Rajbir

and Mahabir. (The witness identifies Rajbir and mahabir accused persons present in court). Devinder and Rajbir accused asked us that by giving liquor to Azad you had created a quarrel. Azad was known to us and he used to come and sit at our shop. We denied our involvement in the quarrel created by Azad. Davinder gave me a slap and I tried to go to the shop for my protection and thereupon Devinder accused gave me a knife blow under my arm. Hans Raj deceased tried to ran away. I had also told him to run away. He has seen me being giving knife blow. Devinder accused told his companion not to let Hans Raj run away. Rajbir accused and Prithvey accused were armed with knifes and they prevented Hans Raj deceased from running away.....'

14. He was subjected to lengthy cross-examination and his testimony had been assailed basically on the ground that he had made certain improvements with respect to his earlier statement made to the police.

15. We deserve it necessary to mention that no witness can reproduce in a mathematical manner about what he had earlier stated. With the passage of time the human memory fumbles and falters and certain improvements would appear in the testimony of most truthful witness. Braham Prakash is one of the injured persons. His presence at the site thereforee cannot be doubted. Reading of the statement as a whole reveals that he has not changed the substratum of the prosecution version. It remains the same. It clearly indicates that so far as Devinder and Prithvey are concerned they were very much involved in the crime in this regard. In the absence of any other cogent reasons there is no ground to reject the testimony of Braham Prakash who is basically a witness who can be described as a wholly truthful. To that extent the findings of the trial court do not require any interference.

16. Learned counsel for the accused persons contended that in the facts of the case it cannot be termed that Prithvey had shared any common intention with Devinder Singh to cause the injury and thereforee the provisions of Section 324 read with Section 34 of the Indian penal code cannot be attracted in the facts of the case.

17. Section 34 of the Indian Penal Code, by itself does not create an offence but provides that when more than one person in furtherance of their common intention commits a criminal act each of such person is liable for that act. In other words, if an act is done in furtherance of their common intention the co-accused is equally liable but there has to be a proper meeting of mind in this regard. Some of the precedents in this regard can well be taken note of and would be in the fitness of things.

18. Before the Supreme Court in the case of Mania Singh v. State of Rajasthan : 1976 CriLJ835 there was a matter where the charge related to commission of the offence of unlawful assembly by the appellant along with others, namely four co-accused. There was no direct or substantial evidence to show that offence was committed by the appellant along with other unnamed persons. The other co-accused had been given the benefit of doubt and had been acquitted. It was held that it would not be permissible to take the view that it must have been some persons along with the appellant in causing injury to the deceased.

19. Similarly in the case of Dasrathlal Chandulal Joshi v. State of Gujarat : 1979 CriLJ1078 accused No. 2 as per the facts established had merely accompanied accused No. 1 for collecting donations. Accused No. 1 was stated to have forged the receipts of collection of donations. There was on evidence to show that accused No. 1 was taken in confidence or that he knew that receipt were forged. It was held in the facts that in the absence of any material it could not be termed that accused No. 2 could be held guilty of the offence of forgery under Section 420 read with Section 34 of the Indian Penal Code.

20. Similarly in the case of Rangaswami v. State of Tamil Nadu : AIR 1989 SC1137 appellant Rangaswami had accompanied the accused persons who committed murder. There was no evidence that appellant went with the accused for purpose of committing murder. He had no enmity with the victims. He had not uttered any instigator words. It was held that provisions of Section 34 of the Indian Penal Code in the fats could not be drawn against the said appellant. A Division Bench of Rajasthan High Court in the case of Issaq Mohammed and Anr. v. State of Rajasthan while dealing with the same situation held:

'In the instant case, accused Mohammed Safi merely caught hold of the collar of the shirt of the deceased Munti. There is no material on record to show that he knew that accused Issaq Mohammed was having a Gupti in the pocket of his pants. There is again no evidence to suggest that accused Mohammed Safi excited, instigated, prompted or exhorted accused Issaq Mohammed to cause injuries to the deceased. Section 34 requires simultaneous consensus on the part of the accused persons. The common intention must be to commit the particular offence. The common intention of one must not only be known to the other but must also be shared by him. In the instant case, from the material on record, it cannot be inferred that the intention of accused Issaq Mohammed to commit the murder of the deceased was known to Mohammed Safi and he had shared that common intention. Merely because he caught hold of the deceased by the collar of his shirt, it cannot be inferred that there was a common intention to commit the murder. The conviction of accused Mohammed Safi under Section 302 with the aid of Section 34 IPC is, thereforee, not sound. His conviction should be altered to that under Section 326/34 IPC.'

21. The Supreme Court in the case of M.A. Abdulla Kunhi and Ors. v. The State of Kerala : 1991 CriLJ525a where there was a direct and cogent evidence stating that one of accused rushed with sword to attack deceased but was obstructed by one of prosecution witnesses and held that there was a common intention between the accused persons and Section 34 of the Penal Code would be attracted. A few years later in the case of State of Uttar Pradesh v. Rohan Singh and Anr. 1996 Cri.L.J. 2884 the Supreme Court had drawn a clear distinction between sharing a similar intention and common intention. It was held:-

'There is a material difference between the sharing of similar intention and common intention. Section 34, IPC can be attracted only if the accused share a common intention and not where they share only similar intention. There are no circumstances on the record from which it may be possible to draw the inference that the respondents had shared the common intention. Mere presence together is not sufficient to hold that they both shared the common intention to murder Naqi Raza and injure Mashooq Khan.'

22. Lastly on this question we may refer with advantage to the decision of the Supreme Court in the case of Suresh and Anr. v. State of UP : 2001 CriLJ1462 . It was held that merely because a person is present it cannot be termed that he shared the common intention with the other accused. From the aforesaid conclusions can conveniently be drawn that Section 34 of the Indian Penal Code lays down the joint role, joint responsibility for criminal act performed by more than one persons. That person need not take active part, he should be present but could be at a distance. Criminal sharing of motive need not necessarily be overt or covert by active person or by other methods has to be seen from the facts of the case. It is rare that direct evidence of sharing the common intention contemplated by Section 34 of the Indian Penal Code would be available. It has to be adjudged on basis of the evidence on the record and other material as if there was a common intention to commit particular act or not. It can even develop at the spur of the moment.

23. In this regard Braham Prakash, PW3 had stated that Devender and Prithvey had come outside the shop. It was Devender who had slapped him and thereupon gave him knife blow when deceased Hans Raj tried to run away he was given the knife blow by Devinder. He had told his companions not to let Hans Raj run away. He stated that Prithvey accused was also armed with knife and they prevented Hans Raj from running away. During cross-examination he admitted that he does not know from where Devinder had taken out the knife. He had taken out the knife suddenly. He could not state as to from which place the knife was taken out. He could not even state as to form which side the other two accused persons had taken out the knives. Perusal of the statement of Braham Prakash shows that the version of prosecution that accused persons had come brandishing the knives is not correct. Suddenly Devinder had taken out the knife. Since they had all come together it can safely be inferred that they had a common intention to cause hurt because of the previous dispute. But there is precious little on the record to show that there was any common intention to commit any further injury than to cause simple hurt on these persons. Consequently so far as Prithvey is concerned he was rightly held guilty of offence punishable under Section 324/34 of the Indian Penal Code along with Devinder.

24. Learned counsel for the State urged that it was Devinder who had caused the fatal blow and in any case he should be held guilty for the offence punishable under Section 302 of the Indian Penal Code.

25. We know from the decision of the Supreme Court in the case of Virsa Singh v. State of Punjab : 1958 CriLJ818 that whether there is an intention to commit a particular offence is always a question of fact. It is the totality of the circumstances which prompts the court to try such a conclusion. The Supreme Court went in detail as to under what circumstances Section 300 'Thirdly' can be pressed into service. In paragraph 12 Supreme Court had given the following guidelines:-

(12) To put it shortly, the prosecution must prove the following fats before it can bring a case under Section 300 'thirdly';

. First, it must establish, quite objectively, that a bodily injury is present;

. Secondly, the nature of the injury must be proved; These are purely objective investigations.

. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

. Once these three elements are proved to be present, the enquiry proceeds further and,

. Fourthly, if must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

26. It is this backdrop that one has to consider as to whether in the peculiar facts of the present case what offence if any can be stated to have been committed.

27. Our attention has been drawn to certain other precedents which we can briefly refer to before adverting to the facts of the case. In the case of Santosh v. State of Madhya Pradesh (1975) SCC 727 there was a serious riot in which large number

of persons were involved. They attacked with sharp weapons and three persons died of the wounds. One of the question before the Supreme court was as to whether in the peculiar facts offence under Section 302 or 304 would be drawn. The Supreme Court held:-

'..... We also think that the learned Sessions Judge was in error in holding that the appellant could be convicted under Section 304(I)/149 I.P.C. For a conviction under Section 304(I) I.P.C., it has to be shown that the case of the convicted person falls within one of the five Exceptions. If it is doubtful whether the common object of the unlawful assembly joined by the appellant was to commit any acts which were either intended to cause death, or, from which knowledge of likelihood of death could be inferred, we think that persons could not be held vicariously liable for murder.'

28. Similarly in the case of Jaspal Singh v. State of Punjab : 1986 CriLJ488 the Supreme Court held that nature of offence does not depend merely on location of the injury caused by the accused. Intention of the person causing injury has to be gathered from a careful examination of all the fats and the circumstances. Identical was the view expressed by the Supreme court in the case of State of Gujarat v. Hari Bhai Keshva Bhai Patel 1990 SCC 606. It was held that injury was sufficient to cause death in the ordinary course and the findings of the High Court that it was offence punishable under Section 304 Part I were set aside but keeping in view the inordinate delay that has occurred further sentence has not been imposed.

29. Reference with advantage can also be made to the subsequent decision of the Supreme Court in the case of Ramesh Vithalrao Thakre and Anr. v. State of Maharashtra : 1995 CriLJ2907 . Therein a single blow was given in the abdomen by the accused while intervening to save her brother attacked by the accused. No other injury was given. It was held that accused can be clothed with knowledge and not intention that injury was likely to cause death. The accused was held guilty of the offence punishable under Section 304 Part II of the Indian Penal Code.

30. Learned counsel for the State has drawn our attention to the decision of the Supreme Court in the case of Ramashraya and Anr. v. State of Madhya Pradesh 2001 (1) SC 523, therein there was an altercation followed by an attack. There

were multiple injuries all over the body including skull. It was held that injuries were sufficient in the ordinary course of nature to cause death. The Supreme Court returned the finding that conviction under Section 302 Indian Penal Code was rightly held.

31. From the aforesaid the conclusion are obvious. It is on basis of the evidence, nature of injury where the injury is caused and surrounding circumstances which prompts the court to come to a conclusion as to whether there was an intention or knowledge on the part of the accused that injury is likely to cause death in the ordinary course of its nature. Dr. Bharat Singh, PW5 had conducted the post-mortem on the person of the deceased. He had found that there was only one injury which was incised stab wound on the back of left side chest i.e. of one and a half inch medial to the inferior angle of scapula. He had opined that injury was sufficient to cause death in the ordinary course of nature. The death was due to hemorrhage and shock resulting from the injury. But there are other circumstances also that have to be taken care of. It transpires in the statement of injured Brahm Prakash, PW3 that accused Devinder Singh had given knife blow. He had suddenly taken out the knife and caused only one injury. He did not care to repeat the same. It was towards the back side of the chest. These fats clearly show that there was not the intention but one can say that it was likely to cause death without intention to cause death. thereforee, Devinder Singh must be held guilty of the offence punishable under Section 304 Part II of the Indian Penal Code.

32. As regards the sentence the incident is stated to have taken place 24 years ago. At this stage it looks inappropriate keeping in view the long interval from the date of the incident till date to direct Devinder Singh to undergo some more punishment than awarded by the learned trial court. The ends of justice thereforee would be met in face of the factor referred to above if sentence in the peculiar facts is only restricted to two years as awarded by the trial court. With respect to Prithvey also the same factor comes in the way. Prithvey Singh has undergone only a couple of months sentence. As referred to above the has been held guilty of the offence punishable under Section 324/34 of the Indian Penal Code. Herein also it would be appropriate thereforee to sentence him to the one already undergone rather than direct him to undergo the rest of the sentence after expiry

of the 24 years.

33. For these reasons though Devinder Singh is held guilty of the offence punishable under Section 304 Part II of the Indian Penal Code. Both the appeals are disposed of and appeal of the Prithvey Singh is dismissed. Sentences are reduced to the one already undergone.

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