

Sita Ram Vs. State

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SooperKanoon Citation : sooperkanoon.com/685628

Court : Delhi

Decided On : Apr-20-1973

Reported in : ILR1973Delhi459

Judge : Jagjit Singh and; A.B. Rohtagi, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34

Appeal No. : Criminal Appeal No. 90 of 1971

Appellant : Sita Ram

Respondent : State

Advocate for Pet/Ap. : B.G. Singh and; I.D. Ahluwalia, Advs

Judgement :

Jagjit Singh, J.

(1) This appeal is on behalf of Sita Ram. He was tried by Shri K. S. Sidhu, Additional Sessions Judge, Delhi, along with Mahipal on the charges of abducting, on June 26, 1970, at about 8. p.m., Chameli, wife of Chatar Singh from Jhugi No. J-128, Karampura, Delhi, and for murdering her on the same night at Ganda Nala, Najafgarh, near Devi Ram Park. Thus the charges against the two accused were under sections 364 and 302 read with section 34 of the Indian Penal Code. On May 28, 1971 the learned trial Judge acquitted Mahipal but after finding Sita Ram

guilty sentenced him for the offence of abduction to five years rigorous imprisonment and for the offence of murder to imprisonment for life. Both the sentences were, however, directed to run concurrently.

(2) The appellant is about 21 years of age. Chameli deceased was about 40 or 42 years old. She along with her husband Chatar Singh and a young daughter of about 17 years of age, named Saraswati, used to live in Jhugi No. J-128, Karampura, Delhi.

(3) Sham Lal, elder brother of Sita Ram, had also been living in the Jhugi of Chatar Singh for about a year and a half before the murder of Chameli. Some months thereafter Sita Ram as well shifted to that Jhugi. As stated by Chatar Singh (P.W. 3) before he came to Delhi he and his wife used to live at Aligarh where Sham Lal had developed illicit relations with Chameli and had openly started living with her. He deposed that it was for this reason that he and his wife came to Delhi but Sham Lal followed and started living with them.

(4) It is in the evidence of Chatar Singh that with his daughter, Saraswati, illicit relations were developed by Sita Ram. He mentioned that the relations between Sham Lal and Chameli and between Sita Ram and Saraswati had brought him bad name in the brotherhood and were the cause of resentment on the part of Gir Raj to whom his elder daughter is married.

(5) Further Chatar Singh stated that Sita Ram was keen to marry Saraswati and Sham Lal also wanted that marriage to take place. Chameli was, however, said to be opposed to the idea of Saraswati marrying Sita Ram as she wanted Saraswati to marry some one else. It was mentioned that some negotiations had been going on for arranging the marriage of Saraswati with some one in Rajasthan.

(6) Saraswati (P.W. 4) admitted that Sham Lal had illicit relations with her mother and that Sita Ram wanted to marry her and that her parents were against that marriage. Sita Ram as well did not deny that he and his brother were living in the Jhugi of Chatar Singh and that he desired to marry Saraswati. It is, therefore, a logical inference that because the mother of Saraswati was the main hurdle in the way of Sita Ram in the fulfillment of his desire of marrying Saraswati so he must

have harboured ill will against Chameli.

(7) The prosecution version regarding the abduction and murder of Chameli was that on June 26, 1970, at about 8 p.m., Sita Ram came to the Jhugi of Chatar Singh, when Chameli, Chatar Singh and Saraswati were present. He asked Chameli to accompany him on the pretext that from Mahipal he would get her a loan of Rs. 4,000.00. which would be re-payable by Installments. On this Chameli accompanied Sita Ram. Shortly afterwards Basanti (P.W. 5), who was running a tea shop in her Jhugi (No. 115) in Karampura, saw Sita Ram, Mahipal and Chameli going on a cycle. Chaman Singh (P.W. 6), a tea stall-holder in front of the Central Jail, Delhi, saw Sita Ram, Chameli and another person at about 9 p.m. as they took tea at his stall. At about 10 p.m. Rajesh Kumar (P.W.I), a boy of about eleven years of age, who was present at the tea shop of his father due to his father having gone away to attend some marriage, also saw them. They were again seen together by Jit Lal (P.W. 18) as he happened to be at the shop of Kanhaya Lal and Om Parkash, brothers of Sita Ram, when Sita Ram, Chameli and another person came there to leave a cycle. Lastly they were seen by Daulti (P.W. 9) when after cleaning utensils at the house of one Dharam Pal she was returning to her Jhugi in front of the shop of Kanhaya Lal and Om Parkash. According to her she saw Sita Ram, Chameli and Mahipal going towards the Ganda Nala.

(8) It was also the prosecution case that early in the morning of June 27, 1970 Chatar Singh had left his Jhugi for the place where he used to work as a labourer. Saraswati remained behind in the Jhugi. She was informed by Inder Pal, younger brother of Mahipal, that Chameli was lying dead in the Ganda Nala. On getting that information she sent her brother, Madan, to inform her father. After a few minutes Chatar Singh returned to the Jhugi. In the meantime Sita Ram came there. Chatar Singh, Sita Ram and Saraswati then went to the Ganda Nala and reached there at about 8. a. m.

(9) On the morning of June 27, 1970, at 6.53 a. m., one B. K. Chadha gave information by telephone to the Police Control Room that the dead body of a woman was lying in the corner of the drain or the Nala of Inderlok, Onkar Nagar, near Kacha Pal of Dev Ram Park. Sub-Inspector Khairati Lal (P. W. 14) entered

the report in the Roznamcha and made arrangements for a police van of the Flying Squad to proceed to the place where the dead body was stated to be lying. He as well informed Police Station Sarai Rohila.

(10) Assistant Sub-Inspector Jashandev Singh (P.W. 15) of Police Station Sarai Rohila, on being given a copy of the message received from the Police Control Room, went to the Ganda Nala and saw that the dead body of a woman was lying there with stab wounds on the neck and abdomen. He also noticed trail of blood leading to a place in the vacant land or Maidan, at a distance of about 40 paces, where the ground was soaked with blood. Near the dead body were some pieces of broken glass bangles and one Chapal. Name of Chameli was tattooed on the left wrist. Before he could ascertain the identity and other particulars of the dead woman he sent a report to the Duty Officer of the Police Station for registration of the case. Later on, at about 8 a. m., Chatar Singh, Saraswati and Sita Ram arrived there. Still later, nearly at 9.15 a. m., Inspector Piara Singh (P.W. 19) came there and took over the investigation from him.

(11) It was noticed by Inspector Piara Singh that on the bushirt and trousers worn by Sita Ram there were some stains which appeared to be of blood. He, therefore, took Sita Ram into custody and took into possession his clothes. On the same day Mahipal was as well arrested.

(12) On June 29, 1970 Sita Ram, while in police custody, was alleged to have made a disclosure statement (Exhibit PD) to Inspector Piara Singh, in the presence of Mahesh Chand (P. W. 11) and Bir Sain (P. W. 13), that he had thrown a knife in the bushes near the railway track and could get it recovered. In consequence of that information a knife (Exhibit p-8) was recovered from the bushes near the railway track.

(13) Earlier to being arrested Sita Ram and Mahipal were as Well alleged to have gone to Jit Lal (P. W. 18) at about 1.15 a. m. in the morning. According to Jit Lal his help was sought by Sita Ram by saying that as Chameli was not agreeing to his marrying Saraswati so he had killed her and thrown her in a Nala.

(14) The version of Sita Ram was that he had gone to the Jhugi of Chatar Singh, where he used to live along with his brother Sham Lal, on June 26, 1970 at 6 p.m. It was stated that at that time there was a quarrel between him on the one side and Chatar Singh and his son-in-law Gir Raj on the other and that during the quarrel he suffered some injuries and went away to Green Park and it was from there that he was arrested on the next day at about noon-time. He did not admit to have taken away Chameli with him or to have been seen between 8 p. m. and 11.30 p. m. by Basanti, Chaman Singh, Rajesh Kumar, Jit Lal and Daulti in the company of Chameli. He, however, admitted that at the time of his arrest his trousers and bushirt were stained with human blood and that those clothes were taken into possession by Inspector Piara Singh. The Explanationn given by him to account for the presence of blood on his clothes was that either his own blood or that of Gir Raj had fallen on his clothes during the scuffle between him and Gir Raj. The making of any extra-judicial confession to Jit Lal or giving any information to Inspector Piara Singh regarding his throwing a knife into bushes near the railway track or recovery of a knife (Exhibit p-8) in consequence of that information were denied by him.

(15) The learned trial Judge believed the prosecution version against Sita Ram but considered that the evidence against Mahipal was not sufficient to connect him with the offence of abduction and murder. In that connection it was remarked that Mahipal 'might have parted company with Sita Ram accused before the latter killed Chameli deceased that night'.

(16) The post-mortem on the dead body of Chameli was conducted by Dr. A. K. Ghosh (P.W. 10), Medico-Legal Adviser, Police Hospital, Delhi. The Doctor found the following anti-mortem injuries :-

'(1)One wedge shaped wound 1/2' X 3/10' over the front of right neck one-half inch below the angle of lower jaw. (2) One spindle shaped wound 1' X 1/2' with smooth clean cut inverted margins over the right neck three inches vertically below the right ear. (3) One spindle shaped wound 1'X1/2' over the front of the right neck three inches above the middle of right collar bone. (4) One spindle shaped wound 3/4' X 1/2' with smooth clean cut inverted margins over the front of the right neck

two inches above the internal end of right collar bone. (5) One spindle shaped wound 1/2' X 4/10' with smooth clean cut inverted margins over front of the right neck just beyond the lower margins of the thyroid cartilage. (6) One spindle shaped wound 1/2' X 4/10' with smooth clean cut inverted margins two inches vertically above the Xiphisteruum. (7) One spindle shaped wound 3/4' X 4/10' with smooth clean cut inverted margins just above the inner end of left collar bone. (8) One spindle shaped wound 1' X 1/2' over the left side of the abdomen two and a half inches below and one-fourth inch to the left of epigastrium. (9) One spindle shaped wound 1'X 4/10' over the middle of abdomen one and a half inches below the epigastrium. (10) One spindle shaped wound 1/2' X 4/10' with smooth, clean cut, inverted margins three inches vertically below the epigastrium. (11) One spindle shaped wound 1' X 1/2' with smooth, clean cut, inverted margins four inches below the epigastrium. (12) One wedge shaped wound 1/2'X4/10' over the right side of the abdomen with smooth, clean cut, inverted margins four inches below the middle of right costal arch.'

(17) On dissection it was found that the blood vessels of the left side of the neck had been cut and there was a through and through opening behind the traahea. The depth of each one of injuries Nos. 1, 2 and 4 to 7 was found to be 2-1/2'. Injury No. 8 was 4' deep and had caused an opening through the stomach by piercing through the left lobe of the liver up to the interior surface. Depth of injuries Nos. 9 to 12 was 1/2' In the opinion of Dr. Ghosh, death was due to shock and haemorrhage as a result of injuries to vital organs. Injuries Nos. 3 and 8 were stated to be sufficient ill the ordinary course of nature to cause death even individually. Further it was mentioned that except injuries 1 and 12 all the other injuries found on the body of Chameli deceased could have been caused by the knife which was sent to him on June 30, 1970 for eliciting his further opinion. That knife was the same one which was alleged to have been recovered on June 29, 1970 in consequence of the information given by Sita Ram while in police custody.

(18) The very day Sita Ram was arrested he was got examined from Dr. Saran Prasad (P.W. 12), Assistant Police Surgeon. Dr. Prasad found the following simple injuries on his person :-

(1) Abrasion 1' X 1/10' on the left forearm. (2) Abrasion 1/4' X 1/10' above injury No. 1. (3) Abrasion 1/2' X 1/10' on the left forearm above injury No. 2. (4) Two abrasions each 1/2' X 1/10' on the right wrist back portion, lying parallel to each other. According to Dr. Prasad the contusions on the person of Sita Ram may have been caused in a scuffle or by bangle pieces.

(19) The knife said to have been recovered as a result of the information given by Sita Ram and the clothes removed from his person after his arrest were sent to the Chemical Examiner and the Serologist for examination and report. The Chemical Examiner found the knife to be 'extensively stained with large, medium and small blood stains'. The bushirt and the trousers of Sita Ram were reported to be stained with 'a few blood stains'. The Serologist found the blood stains on the bushirt to be of human origin. The blood stains on the trousers and the knife having disintegrated their origin could not be determined.

(20) Bawa Gurcharan Singh, learned counsel for the appellant, contended that the conviction of Sita Ram for abduction and murder of Chameli was not justified. It was urged that there was no motive for the appellant to kill Chameli. The witnesses on whose evidence the prosecution had relied were stated to be not reliable. It was also submitted that the report sent by A.S.I. Jashandev Singh on the basis of which the first information report was recorded in Police Station Sarai Rohila was in fact not dispatched at 7.50 a.m. but probably after 10 a.m. The recovery of a knife even if held to be in consequence of information given by the appellant or the presence of blood stains of human origin on the bushirt of the appellant were contended to be of no consequence. Lastly it was stated that Mahipal having been acquitted the appellant could not be convicted for the offences of murder, as one of the charges against both the accused was that they had in furtherance of their common intention murdered Chameli.

(21) There is the evidence of A.S.I. Jashandev Singh that he had sent his report before 8 a.m. The time given at the end of the report (Exhibit Public Witness 15/B) is 7.50 a.m. On the basis of that report even the formal First Information Report was recorded by H. C. Narinder Nath (P.W. 17) at 8.10 a.m. Not even a suggestion was made to that official that the F.I.R. was ante-timed. The contention

that the report of A.S.I. Jashandev Singh (Exhibit Public Witness 15/B) was probably dispatched after 10 a.m. is, therefore, without any basis.

(22) So far as the motive is concerned we are unable to agree with the contention of the learned counsel for the appellant. Admittedly the appellant was keen to marry Saraswati. The evidence of Chatar Singh (P.W. 3) was that as Sita Ram was not doing any work Chameli was not willing to give Saraswati in marriage to Sita Ram. Saraswati (P.W. 4) stated that Sita Ram wanted to marry her but her mother did not agree and, therefore, talks for her marriage with some one in Rajasthan were already going on. Normally any mother, even though she herself may be leading life of immorality, would not like her daughter to marry some one who may not be doing any work and will not be able to maintain her daughter. Opposition on the part of Chameli to the proposal for the marriage of her daughter with Sita Ram was, therefore, in no way unnatural. Obviously, therefore, Sita Ram must have felt greatly offended when Chameli did not agree to the alliance of her daughter with him. There was thus motive on his part to eliminate Chameli.

(23) The version of Sita Ram that on the evening of June 26, 1970 at 6 p.m. there was a scuffle between him and Gir Raj and that the injuries found on his body next day on medical examination were caused during that scuffle is without any basis. Saraswati stated that there was no altercation (Marpeet) between Gir Raj and Sita Ram. She also denied the suggestion that Sita Ram had left after the alleged altercation and had not come to the Jhugi at 8 p.m. or that he did not take with him her mother. Similarly Chatar Singh stated that there was no incident at about 6 p.m. and that his wife was taken away by Sita Ram at about 8 p.m. by giving her the allurements that he would arrange for her a loan of Rs. 4,000.00 repayable by easy installments.

(24) There are no reasons whatsoever to disbelieve the testimony of Chatar Singh and Saraswati regarding Sita Ram persuading Chameli to go with him at about 8 p.m. on June 26, 1970 and that earlier on that day there was no altercation in which Sita Ram may have sustained any injuries.

(25) Basanti (P.W. 5) saw Chameli going on a cycle along with Sita Ram and another man at about 8 p.m. As she was running a tea-stall in a Jhugi in

Karampura, the locality in which the Jhugi of Chatar Singh was situate, so she should have been in a position to see Chameli, Sita Ram and another man going on a cycle. She already knew Chameli and Sita Ram but frankly admitted that she did not know the other man on the cycle.

(26) According to Chaman Singh (P.W. 6) he had served tea to Sita Ram, Chameli and another man who was with them when they came to his tea shop in front of the Central Jail, Delhi, at about 9 p.m. It was urged before us that Chaman Singh should not be believed as he had no license for running a tea stall and, therefore, it is doubtful whether he had in fact any tea shop in front of the Central Jail. There are many persons who are running tea stalls in small shops or Jhugis without any license. The mere fact that he had no license does not mean that he possible could not be running a tea stall. Sita Ram on being questioned regarding his being seen in the company of Chameli by Basanti, Chaman Singh and others denied that fact but did not say that Basanti, Chaman or the father of Rajesh Kumar had no tea-shops.

(27) Another witness Rajesh Kumar (P.W. 1) stated about Sita Ram coming to his father's shop in Rajwanti garden at about 10 p.m. on June 26, 1970 accompanied by a woman and another man. Rajesh Kumar, however, was not only a child witness but was not acquainted with either Sita Ram, Mahipal or the deceased. He stated that he saw Sita Ram for the first time that night at about 10 p.m. As the three persons were not previously known to him his evidence about Sita Ram being one of them cannot be implicitly relied upon.

(28) The other witnesses who were said to have seen Sita Ram with Chameli and another man were Jit Lal and Daulti. It appears to us that implicit reliance cannot as well be placed on the testimony of Jit Lal (P.W. 18). The statement made by him was that at about 11.15 p.m. or 11.30 p.m. he was at the Halwai shop of Om Parkash and Kanhaya Lal, brothers of Sita Ram, when Sita Ram along with Chameli and Mahipal came there and left after leaving the cycle at that place. He further deposed that on the same night at about 1.15 a.m. Sita Ram and Mahipal came to his dairy in Tri Nagar when Sita Ram told him that as Chameli was not agreeing to his marriage with her daughter so he had killed her and thrown her

body in the Nallah. The witness was declared hostile as at first he had only stated about Sita Ram coming to the shop of Om Parkash and Kanhaya Lal with Chameli. Moreover his presence at the shop of the brothers of Sita Ram about the time of mid-night was not natural. He may have been supplying milk to Om Parkash and Kanhaya Lal but that was not the time for supplying milk and he did not say why he went there at such a late hour. He admitted that the supply of milk had been made at about 6 p.m. or 6.30 p.m. It was also not likely that Sita Ram should have gone to him for making a confession when he was in no position to help that person. Moreover he did not disclose to any one about the confession having been made to him by Sita Ram till he was examined by the police.

(29) Similarly the evidence of Daulti (P.W. 9) is not such on which it may be safe to rely. Though she stated to have seen Sita Ram, Chameli and Mahipal going towards the Nallah at about 11 p.m. in the night yet she admitted, when her statement was recorded by the learned trial Judge, that it was for the first time that she was stating in that Court about seeing those persons passing in front of her Jhugi.

(30) But even after discarding the evidence of Rajesh Kumar, Jit Lal and Daulti (P.Ws 1, 8 and 9) there is still the evidence of Basanti and Chaman Singh (P.Ws. 5 and 6). They are reliable witnesses and we are satisfied that they did see Sita Ram going on a cycle with Chameli and another man on the night of June 26, 1970. Basanti saw them at about 8 p.m. while Chaman Singh served them tea nearly an hour later.

(31) Thus from the prosecution evidence it is fully established that Sita Ram had persuaded Chameli to go with him from her husband's Jhugi, at about 8 p.m., on June 26, 1970 and that afterwards they were seen by Basanti and Chaman Singh going on cycle along with another man. Further there can be no doubt that Sita Ram had induced Chameli to accompany him on the false pretext that he would arrange for her a loan.

(32) On his arrest the bushirt and trousers of Sita Ram were stained with blood and it was admitted by Sita Ram that the stains were of human blood. Even the serologist found the blood on the bushirt to be of human origin, though he could

not express any opinion regarding the blood on the trousers due to the blood stains having got disintegrated. As there was no altercation on the evening of June 26, 1970 between Sita Ram and Gir Raj the blood on the clothes of Sita Ram must have fallen after Sita Ram took away Chameli from her husband's Jhugi.

(33) The information given by Sita Ram while in police custody led to the discovery of a knife which had extensive stains of blood. The injuries on the body of Chameli found by Dr. Ghosh, excepting two of the injuries, could be caused with that knife.

(34) The presence of human blood on the clothes of Sita Ram and his knowing the place where a blood-stained knife was hidden clearly indicated his complicity in causing the injuries to the deceased which resulted in her death. As two of the injuries, Nos. 1 and 12, could not be caused with the knife recovered at the instance of Sita Ram so there must have been some one else with him who joined him in causing injuries to the deceased.

(35) The identity of the other person with Sita Ram who joined in causing injuries to the deceased could not be established. Mahipal was given benefit of doubt as the possibility of his leaving Sita Ram and Chameli on the way to the Nallah could not be eliminated. There can, however, be not the least doubt that Sita Ram was not alone in causing injuries to Chameli. The fact that two weapons were used for causing injuries clearly indicates that Sita Ram had an associate, who has remained unnamed. The fact that Chameli was taken to a lonely place near a drain and as many as twelve stab wounds were inflicted, mostly on her neck and the abdomen clearly shows that the common intention of Sita Ram and his associate was no other than to cause the death of their victim and in causing the injuries to her they were acting in furtherance of their common intention.

(36) The learned counsel for the appellant relied upon *Prabhu Babaji Navle v. State of Bombay* : 1956 CriLJ147 , *Krishna Govind Patil v. State of Maharashtra* : [1964]1SCR678 and *Baul and another v. The State of V. P.* : 1968 CriLJ872 in support of his contention that as Mahipal was acquitted of the charge of murder so the present appellant cannot be convicted of murder by applying section 34 of the Indian Penal Code.

(37) So far as the legal position is concerned it seems to be well settled. In the case of Krishna Govind Patil (supra) Subba Rao, J. (as his Lordship then was), while delivering the judgment of Court, observed that before a Court can convict a person under section 302 read with section 34 of the Indian Penal Code 'it should come to a definite conclusion that the said person had prior concert with one or more other persons, named or unnamed, for committing the said offence'.

(38) To bring out the impact of section 34 on different situations his Lordship gave three illustrations, the third one of which was as follows:-

'A, B, C and D are charged under the said sections. But the evidence is directed to prove that A, B, C and D, along with 3 others have jointly committed the offence.'

(39) As regards this illustration it was also observed:

'A Court is certainly entitled to come to the conclusion that one of the named accused is guilty of murder under Section 302, read with Section 34, of the Indian Penal Code, though the other three named accused are acquitted, if it accepts the evidence that the said accused acted in concert along with persons, named or unnamed, other than those acquitted, in the commission of the offence'.

(40) In the case of Prabhu Babaji Navle (supra) the appellant was charged under section 302 read with section 34, with four named persons. The four others were acquitted. The Supreme Court held that the appellant alone could not be convicted as on the facts of that case it was not possible to reach a conclusion that the appellant shared a common intention with other unknown person or persons. The case of Baul (supra) is as well distinguishable. In that case there was no question of the convicted person sharing a common intention with some unknown person or persons.

(41) In the present case the evidence and the circumstances show that the murder of Chameli deceased was committed by the appellant and some unknown person in furtherance of their common intention. The conviction of the appellant, for the offence of murder, by applying section 34 of the Indian Penal Code, was, therefore, in no way unjustified.

(42) Regarding abduction of the deceased by the appellant there is the direct evidence of Chatar Singh and Saraswati, which finds support from the testimony of Basanti and Chaman Singh (P.Ws. 5 and 6). His conviction for the offence of abduction was, therefore, equally justified.

(43) The appeal is accordingly dismissed and the convictions and sentences of the appellant are maintained.

Avadh Behari, J.

(44) I am in complete agreement with the conclusions recorded by my brother Jagjit Singh, J. Since an argument was raised by the appellant's counsel that in this case no charge in the alternative was framed by the Committal Magistrate and since Mahipal had been acquitted the appellant could not be convicted of murder, I thought that this aspect of the case required consideration.

(45) The charge was framed on February 15, 1971, in this case and is in the following terms:-

'1. Sita Ram s/o Ram Swaroop aged 21 years r/o Inderlok, Delhi. 2. Mahipal Singh s/o Bhoop Singh aged 27 years r/o Akrahat, P. S. Khair, Distt. Aligarh (U.P.)..... (Accused). 1. Lokeshwar Prasad: JMFC: Delhi hereby charge you accused Sita Ram and Mahipal Singh as follows: Firstly: That you on the 26th day of June, 1970 at about 8 p.m. at Jhuggi No. J-128 Karampura, Delhi, in furtherance of your common intention abducted one Chameli in order that the said Chameli might be murdered and thereby committed an offence punishable u/s 364 read with 34 Indian Penal Code and within the cognizance of the court of Sessions. Secondly: That you on the night between 26th and 27th June, 1970 at Ganda Nala, Najafgarh near Devi Ram Park, within the jurisdiction of P. S. Sarai Rohella and in furtherance of your common intention did commit murder by intentionally causing the death of one Chameli and thereby committed an offence punishable u/s 302 read with 34 Indian Penal Code and within the cognizance of the court of Sessions. And I hereby direct that you be tried by the said court on the said charges.'

(46) The argument is founded on Section 34, Indian Penal Code. Reliance was placed on certain Supreme Court decisions which I shall endeavor to examine.

(47) In *Jagir Singh v. State of Punjab*, : 1968 CriLJ89 , six named accused persons A, B, C, D, E and F were charged under Section 302 read with Section 34 of the Indian Penal Code for committing the murder of G and the evidence was directed to establish that the said six persons had taken part in the murder and it was not known who gave the fatal blow. C, D, E & F were acquitted. It was argued that the remaining two accused A and B could not be convicted of the offence under Section 302 read with Section 34. This argument was rejected by the Supreme Court. Their Lordships observed at page 45:

'.. . If the court can, on a proper appraisal of the evidence find that there were six assailants, the witnesses were mistaken as to the identity of C, D, E and F, and four unknown culprits together with A and B took part in the murder in furtherance of the common intention of all, the court can convict A and B of the offence under S. 302 read with Section 34. Though it is not known who gave the fatal blow, each of the assailants including A and B is responsible for the murder as if it was committed by him alone.'

(48) The learned counsel for the appellant also relied on *Prabhu Babaji Navle v. State of Bombay*, : 1956 CriLJ147 and *Krishna Govind Patil v. State of Maharashtra*, : [1964]1SCR678 .

(49) The case of *Prabhu Babaji Navle* (supra) is clearly distinguishable. There the appellant was charged under Section 302 read with Section 34, Indian Penal Code with four named persons. The four others were acquitted. The Supreme Court held that the appellant alone could not be convicted of the offence under Section 302 read with Section 34, Indian Penal Code. On the facts of that case it was not possible to reach a conclusion that the appellant shared a common intention with the other unknown person or persons.

(50) The case of *Krishna Govind Patil* (Supra) is also distinguishable. There four accused were charged under Section 302 read with Section 34, Indian Penal Code. The High Court acquitted accused 1, 3 and 4 on the ground that it was

doubtful whether any one of them participated in the commission of the offence and convicted accused No. 2 on the ground that one or more of them might have participated in the offence. The finding recorded by the High Court was legally impossible. Having found that accused 1, 3 and 4 did not take part in the offence, it was held that the High Court could not find that one or more of them might have participated in the offence with accused No. 2. There was not a single observation in the judgment of the High Court to indicate that any person or persons other than the named accused participated in the offence. In those circumstances the Supreme Court set aside the conviction of accused No. 2.

(51) Apparently the evidence in that case was not good enough to sustain the conviction of the remaining accused persons singly. We do not think that this decision which depends upon its own facts, as criminal cases generally do, lays down any general principle that where identity of one of the participants is doubtful the whole case must end in acquittal. Such a question belongs to the realm of facts and not of law. It is, therefore, not possible to lay down the proposition that as a matter of law B must be acquitted where A has been given benefit of doubt in a case where A and B are tried of certain offence, e.g., murder read with Section 34, Indian Penal Code.

(52) It, therefore, appears to be established that where a number of persons are charged with an offence read with Section 34 and some of them are acquitted the remaining accused, if they are more than one, can clearly be convicted of the offence read with Section 34 notwithstanding the acquittal of the other accused.

(53) Where A and B are charged with murder of C, A as having himself done the act of killing and B as being liable for the offence by virtue of Section 34 the fact that B is acquitted is no bar to the conviction of A under Section 302. The fact that common intention is not established is no bar to the conviction of the person who actually commits the offence.

(54) After this case had been argued before us I came across a recent decision of the House of Lords which, in my opinion, has a direct relevance to the question which was posed to us in the arguments by the appellant's counsel. In *Director of Public Prosecutions v. Merriman* (1972) 3 All. E.R. 42 (6), the House of Lords held

that where two or more defendants were charged jointly with an offence it was not necessary for the prosecution, in order to secure the conviction of each defendant, to prove that each was acting in concert with the other, and accordingly it was open to the jury to convict each of committing independently of the offence which was the subject matter of the joint charge. In that case the facts were as follows:

(55) John Michael Merriman, the respondent and his brother Frank Merriman were charged jointly, on the first count of an indictment with wounding William Parry with intent to do him grievous bodily harm contrary to Section 18 of the Offences against the Person Act, 1861 Frank Merriman pleaded guilty to the charge but the respondent John Michael Merriman stood his trial. It was alleged by the prosecution that Frank Merriman and the respondent had attacked and stabbed Parry several times whilst Parry was ejecting them from a public house of which he was the licensee. According to Parry's evidence it was the respondent John Michael Merriman who had struck the first blow. The Judge took the view that if the Jury were not satisfied that the respondent had struck the first blow himself it would mean that Parry's recollection was unreliable and that it would be unsafe to convict the respondent on the alternative basis that he was helping Frank Merriman to attack Parry. Accordingly, he told the Jury that they need not go into the question of common purpose, whether the respondent and Frank Merriman were acting together but to make up their minds whether they were sure that Parry's statement of the first blow was correct. If so, they should convict. The respondent was convicted but the Court of Appeal allowed his appeal holding that if one of two persons indicated on a joint charge pleaded guilty the other could only be convicted if he was found to have acted jointly, and could not be convicted of committing independently the offence which was the subject matter of the joint charge. The House of Lords allowed the appeal and restored the conviction of the respondent.

(56) What is meant by a 'joint charge'? Lord Morris answered the question thus:

IN my view, it only means that more than one person is being charged and that within certain rules of practice or convenience it is permissible for the two persons to be named in one count. Each person is, however, being charged with having

himself committed an offence. All crime is personal and individual though there may be some crimes (of which conspiracy is an example) which can only be committed in co-operation with others. The offences charged in the present cases were individual charges against each of the brothers. Each is a separate individual who cannot be found guilty unless he personally is shown to have been guilty. The fact that in one count of an indictment it is set out that A and B wounded C does not warrant the conviction of either A or B unless individual guilt is established. It might be established in different ways. A's guilt might be proved by showing that he wounded C. A's guilt might be proved by showing that though he did not himself touch C he caused and directed B to do so; or it might be shown that A and B joined together with a common purpose of wounding C so that in effecting that common purpose each was but the accepted agent of the other. So, unless there is some special statutory provision, there is no magic in speaking of a joint charge. If the language of the law is to be used then a joint charge is also a several charge.'

(57) It was held that the respondent knew what was the charge against him and that there was no miscarriage of justice. Again at page 48 Lord Morris observed :

Fa and B are charged together with wounding with intent does that mean that the offence charged is a different offence from what it would be if they were separately charged with wounding with intent. In my view, for the reasons which I have already given it is not. Although charged together in one count each one is being separately charged and each is only being charged with the one offence. The guilt of A or of B might be proved by showing that the particular accused himself took direct action or it might be proved by showing that he committed his offence by using the hand of another. But if guilt is proved it is guilt of the offence charged and of no different offence and of no more than of the one offence charged in the count If A and E and C are jointly charged with the murder of X and if A alone is found guilty I cannot think that it could be said that he is being convicted of a different offence from that with which he was charged. If A and B are jointly charged in one count with wounding C and if A and B are tried together there are various conclusions as to the facts which a jury might reach. The jury might decide that both A and B were guilty because they had joined together (or acted 'in

concert') to do what was done; the jury might decide that B alone was guilty; the jury might decide that A and B were both guilty though what they did was not done in concerted action. It would be a singular state of the Law if the jury had to be told that the last three possibilities were not open to them because the charge laid was a limited or circumscribed one; or alternatively if the jury had to be told that if they thought that each accused had separately wounded C they could convict either A or B but not both of them'.

Lord Morris at page 50 concluded:

' ORthe reasons which I have given I consider that if A and B are jointly charged with wounding C it is open to the prosecution to secure a conviction of both A and B on the ground that they acted jointly or (no matter how either A or B has pleaded) to secure a conviction of either A or B or of both of them on the ground of an independent commission of the offence.'

(58) Lord Diplock with whom Lord Reid agreed put the matter thus:

'THEsource of the confusion lies, I believe, in the equivocal use of such expressions as 'joint offence' and 'joint charge of one offence'. It is hornbook law that, as Hawkins put it,'the offence of one man cannot be the offence of another, but everyone must answer severally for his own crime'But when two men are aiding one another in doing physical acts with criminal intent, though the means read of the either one of them is in law an actus reus of the separate offence of each. A 'joint offence' of two defendants means no more than that there is this connection between physical acts but also those of the other defendant may be relied on by the prosecution as an actus reus of the offence with which he is charged I conclude, therefore, that whenever two or more defendants are charged in the same count of an indictment with any offence which men can help one another to commit it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another defendant to do such an act, and, that in doing the act or in helping the other defendant to do it, he himself had the necessary criminal intent. This was held to be the law by Street CJ and Owen and Herron JJ in the Supreme Court of New

South Wales in *R v. Fenwick* - a case of rape. I respectfully agree with their reasoning'.

(59) Lord Morris, Viscount Dilhorne and Lord Diplock all relied upon *R v. Fenwick* (1953) 54 Crim App 147 of the Supreme Court of New South Wales and approved of that decision. There two accused were charged in one count with rape and the indictment did not contain separate counts alleging independent crimes of rape by each accused. The two accused were driving a girl home after a dance. Each one had intercourse with her. She said that it had been against her will. They said that she had consented. On appeal it was contended that it was not open to the jury, if they found an abser common purpose, to consider the individual cases of the two as separate charges had not been preferred against each of them. contention failed. Street CJ. said that point taken was technical 1 think it could be dealt with by an equally technical answer. Indictments are to be read jointly and severally'. Street CJ then went on to say:

'.....THIS indictment, as is the common practice in indictments in cases of murder, although it is framed against two accused, is to be regarded as a joint and several indictment of those accused.'

(60) Owen and Herron JJ agreed that the appeal should be dismissed. In *Hawkins' Plea of the Crown* (8th Edn. 1824) Vol. 20. 331 it is stated:

'IT seems certain at this day, that notwithstanding the offence of several persons cannot but in all cases be several, because the offence of one man cannot be the offence of another but every one must answer severally for his own crime, yet if it wholly arise from any such joint act which in itself is criminalthe indictment.....may either charge the defendants jointly and severallyor may charge them jointly only, without charging them severally because it sufficiently appears, from the construction of law, that if they joined in such act, they could but be each of them guilty, and from hence it follows, that on such indictmentsome of the defendants may be acquitted, and others convicted; for the law looks on the charge as several against each, though the words of it purport only a joint charge against all'

In Hawkins' Pleas of the Crown (8th Edn. 1824) Vol. 2, p. 331 out:

'EVERY indictment is as well several as joint'.

(61) Both the above celebrated authorities were followed by the House of Lords.

(62) If A and B are jointly charged and if the Prosecution set out to prove that they acted in concert but in prove that they acted separately each one is shown to have committed the offence with which he was charged. It is not as though either would be shown to have committed more than one offence or to have committed different offence from that with which he was charged. It would merely be that proof that he committed the offence of which he was charged would have been presented on an alternative basis.

(63) It is of course necessary that in such cases matters must arise out of one transaction. This was emphasised by Street CJ in R. V. Fenwick (supra) and in the speeches of Lord Diplock and Lord Morris. Lord Morris said:

'I agree respectfully with Lord Widgery CJ that it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act'.

Lord Diplocks said :

'WHERE a number of acts of a similar nature committed by one or more defendants were connected with one another in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same 'transaction or criminal enterprise, it was the practice, as early as the 18th century, to charge them in a single count of an indictment.'

(64) On the facts of the present case I have reached the conclusion that the charge framed against the two accused was a joint as well as several charge. 'The law looks on the charge as several against each, though the words of it purport only a joint charge against all'. The charge against Sita Ram can be read as a charge on the alternative basis as well.

(65) I would, therefore, dismiss the appeal and affirm the conviction.

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