

NuruddIn Molla and anr. Vs. State

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Court : Kolkata

Decided On : Dec-14-2004

Reported in : (2005)2CALLT505(HC),2005(1)CHN634

Judge : Bhaskar Bhattacharya and ;Arun Kumar Bhattacharya, JJ.

Acts : [Juvenile Justice Act, 1986](#) - Sections 2, 5, 7 and 21; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 307, 323 and 398; ;[Evidence Act, 1872](#) - Sections 3 and 9

Appeal No. : C.R.A. No. 53 of 1998

Appellant : NuruddIn Molla and anr.

Respondent : State

Advocate for Def. : Ranjit Kumar Ghoshal, Adv.

Advocate for Pet/Ap. : S.S. Roy and ;Amitava Karmakar, Adv. for appellant No. 1 and ;Jaymalya Bagchi and ;Saswata Gopal Mukherjee, Adv. for appellant No. 2

Judgement :

Arun Kumar Bhattacharya, J.

1. The hearing stems from an appeal preferred against the judgement and order of conviction and sentence passed by the Id. Judge, Special Court (E.G. Act) and

Additional Sessions Judge, 24 Pgs.(S), Alipore in S.C. Case No. 6(12) 96 [S.T. No. 6(1) 97] on 22.12.1997.

2. The miniaturized version of the prosecution is that on 01.08.1996 at about 23.40 hrs. when the de facto complainant Shyam Prasad Mehta after fetching drinking water in a jug reached near their grocery shop in the name and style of 'Probhat Stores' at 7/1, Bompas Road, Calcutta-29, a white coloured Ambassador car came and stopped there. The driver and one person remained inside the car. Out of six persons - two wearing pants and the rest wearing lungis - who came in front of the counter of their shop, one remained outside while five of them entered inside the counter. On their demand for the keys of cash box his father Gulab Mehta and elder brother Mukesh expressed their ignorance of the same, for which one of them assaulted his elder brother with the butt of a firearm on his face. He rushed inside, raised an alarm like his elder brother and pushed two of them. The miscreants came outside the counter and one of them armed with a firearm suddenly fired a shot towards his father resulting in bleeding injury on his chest followed by their rushing towards their car and boarding it. At the time of departure, one of the miscreants armed with a sharp-cutting weapon struck his father on his person. He noted down the number of the said car WB-02B-6942 on a cigarette packet. When his father was about to fall he held and brought him outside the shop. His neighbour Prasad Sen @ Pritamda and his wife took his father, elder brother and uncle Mohan to Sishu Mangal Hospital. His father succumbed to injuries at the said Hospital on 04.08.1996. Accused Sk. Akbar Ali, Sandip Arora @ Raju, Nuruddin Molla @ Noor Alam, Md. Afzal @ Sarju and Md. Rafique @ Chachu were identified at the TI parade. Hence, all the above five accused persons were charged under sections 302/34, 307/34 & 398 IPC.

3. During trial accused Rafique escaped from police custody, for which WA/PA is pending against him.

4. The defence case, as suggested to PWs. and as contended by the accused persons during their examination under Section 313 Cr. PC is that after a lapse of a number of days the FIR was written at the instance of police who supplied the vehicle No. The accused persons were identified to the witnesses at Lalbazar

before the TI parade. They are innocent.

5. 29 witnesses were examined on behalf of the prosecution, while none was examined on behalf of the defence, and after considering the facts, circumstances and materials on record, the Id. Court below found Sk. Akbar Ali and Nuruddin Molla guilty under sections 302/34, 307/34 & 398 IPC convicted them accordingly and sentenced them to suffer imprisonment for life and to pay fine of Rs. 5000/- i.d. to R.I. for six months each, to suffer imprisonment for life and to suffer R.I. for ten years each and to pay fine of Rs. 5000/- each i.d. to R.I. for six months each respectively, and acquitted the other two accused persons viz. Md. Afzal and Sandip Arora of the charges.

6. Being aggrieved by, and dissatisfied with, the above conviction and sentence, both the said convicts Sk. Akbar and Nuruddin have preferred the present appeal.

7. All that now requires to be considered is whether the Id. Court below was justified in passing the above order of conviction and sentence.

8. Before we open the discussion, we may shortly dispose of a little question, as was agitated by Mr. Jaymalya Bagchi, Id. Counsel for appellant Akbar so that the desk may be clear for dealing with the main issue which actually deserves to be dealt with here. Mr. Bagchi on drawing Court's attention to order dated 19.02.1997 and on citing three decisions reported in : 1984 CriLJ168 , 1998 SCC(Cri) 125 and 1989 SCC(Cri) 486 submitted that though his client Akbar filed a petition supported by a doctor's certificate contending that he was a juvenile, the same was simply kept with the record without disposing it. He further submitted that as it is a question of jurisdictional fact which hinges upon the determination of the issue as to whether Sk. Akbar was juvenile or not at the time of alleged occurrence, it was obligatory on the part of the Id. Court below to enquire into the matter by giving his client an opportunity to produce necessary evidence in this regard, and since such failure goes to the root of the matter it casts a duty upon this Court to send the case back on remand after setting aside the order of conviction and sentence for determination of the said question first.

9. Indubitably, Section 21 of the [Juvenile Justice Act, 1986](#) confers jurisdiction solely on a Juvenile Court to be constituted under Section 5 read with Section 7 and in the absence thereof on the Judicial Magistrate, 1st Class under Sub-section (2) of Section 7, as the [Juvenile Justice Act, 1986](#) has been enacted by Parliament knowing fully well that the Code of Criminal Procedure, 1973 is in full force throughout the Territory of India except the State of Jammu & Kashmir. Furthermore, the Act is enacted for the care, treatment, protection, development and rehabilitation of the juvenile and for adjudication of certain matters and other dispositions. There is no theory of punishment inserted in the Act and the whole thrust is on the protection, development and rehabilitation. The juveniles cannot be sent to prison, bail cannot be refused and the maximum that happens is juvenile delinquents be given in the care of either the probation officer or the parents or some fit person or institution but not by way of punishment but only with a view to rehabilitating them. On account of all these reasons, the jurisdictions of all other Courts are ousted and it is solely conferred on Juvenile Court constituted under the [Juvenile Justice Act, 1986](#), and in its absence on the concerned Magistrate, 1st Class. There is also no doubt that the plea of juvenility can be raised for the first time in appeal, as was held in State of West Bengal v. Gopinath Ghosh, reported in : 1984 CriLJ168 , where the plea of child status being raised for the first time was allowed in the interest of justice observing that whenever a case is brought before the Magistrate and the accused appears to be aged 21 years or below, before proceeding with the trial or undertaking an inquiry, an enquiry must be made about the age of the accused on the date of occurrence. The aforesaid word 'appears' is significant, as it leads to indicate that the question of inquiry would arise only when the accused appears to be a juvenile. Even in the aforesaid decision in 1998 SCC(Cri) 125 (supra), so referred to by Mr. Bagchi, it was held that obligation on the part of the Court to hold an enquiry for determination of the age of the accused would arise only when it entertains any doubt about the age as claimed by the accused. So, when such a plea was taken in the petition for bail filed on behalf of the accused Akbar at the stage of cross-examination of P.W. 3 the same was disposed of by way of rejection vide Order No. 8 dated 06.02.1997. At the time of holding TI parade on 17.10.1996 the above accused Akbar declared his age as 17 years which was noted down by the Id. Magistrate (P.W. 16) as per

his statement. 'Juvenile', within the definition of Section 2(h) of the [Juvenile Justice Act, 1986](#), means a boy who has not attained the age of 16 years or a girl who has not attained the age of 18 years. It is required to be shown that on the date of alleged offence the accused was less than 16 years of age. In the case on hand, the incident took place on 01.08.1996 and accused Akbar, as per his own declaration, was found to be 17 years as on 17.10.1996. As the plea of juvenility of the above accused Akbar has been agitated before this Court also, the evidence of the Id. Magistrate (P.W. 16) who held the T.I. parade of the above accused can be taken into consideration. It is the specific evidence of the above witness in cross-examination that he noted the age of Akbar in the TI parade report as per his statement on being satisfied, about which there is no denial. Instead of moving against the said order dated 06.02.1997 before higher forum, Akbar came up with another petition on 19.02.1997 along with a certificate issued by doctor praying for considering the said accused as juvenile. On the face of the above, when accused Akbar appeared to be much more than 16 years of age as per his own statement on the date of alleged occurrence and there was no doubt in regard to the said age, the question of inquiry was out of the way. Accordingly, there being no scope to entertain successive petitions on the same ground, there appears to be no infirmity in passing the order for keeping the petition with the record, and as such we fail to subscribe to the above contention of Mr. Bagchi.

10. Let us now turn to the discussion on the main issue.

11. Out of the above 29 witnesses, P.Ws. 3 to 6 being eye-witnesses, P.W. 7 who arrived at the P.O. immediately after the occurrence and P.W. 28 (1.O.) are vital, others being post-occurrence and/or formal witnesses.

12. P.W. 3 (de facto complainant) after fetching water from a tubewell at Dr. Sarat Banerjee Road in a jug came in front of the counter of their shop at 7/1, Bompas Road, Calcutta at about 11.40 p.m., found the white coloured Ambassador car to stop in front of their shop, six persons - two armed with revolvers, two with nepala, one with sword and another with katari to come out therefrom, one took position at the gate of shop and five others entered into the shop. Two miscreants armed with revolvers pointed their arms towards his father and elder brother Mukesh (P.W. 6),

for which they stood up when the said miscreants demanded key of the almirah from them. On the reply of Mukesh that he was without key, one of them viz. Nuruddin assaulted him with the butt of his revolver four times - thrice on his head and one near his eye resulting in his bleeding injuries. He entered into the shop and pushed out those two miscreants. All the five miscreants came out, took position in front of the counter and when he cried for help, one of the miscreants shot fire at the chest of his father and another miscreants viz. Akbar assaulted his father on his face and left joint of hand with nepala followed by their rushing towards the vehicle and boarding it. He rushed to the vehicle when it was about to move and noted down its No. WB-02B-6942 on a cigarette packet collected from a place near their counter. He rushed to their shop, found blood coming out of the wounds of his father who was falling down touching his hand on the glass container of the shop kept on the wall rack, clung him and cried for help. Pritamda (P.W. 7), para boys and Pritamda's wife came. Pritamda and others took his father and brother and he himself unsuccessfully searched for a taxi. His father and brother were put in the car brought by Pritamda's wife and Pritamda and his uncle Mohan Mehta also boarded there. Before leaving Pritamda informed him that they were going to Sishu Mangal Hospital. After about half an hour police came to their shop when he narrated the incident which was recorded by the police (Ext. 4). As per his evidence, Nemai (P.W. 4) and Ajit Mallick (P.W. 5) are amongst the five witnesses who also witnessed the occurrence, but he cannot recollect the names of others. P.W. 4 who is a fruit-seller at Lake Market and was gossiping with P.W. 5, Parvez (since murdered) and Jamil (not examined) standing on the opposite footpath of the above shop, found six/seven persons to get down from the car, a few of them to enter inside the shop while a few others to remain outside, the victim and miscreants altercating and the former was shot fire and then the miscreants coming out of the shop and fled away in the car. One/two persons were inside the car, said he. P.W. 5 on seeing six/seven persons to come out from the car parked near the above shop took them to be customers of the shop, heard a hue and cry near the shop, a firing sound, a cry of shopkeeper for help and then saw the miscreants to escape in the said vehicle. As the miscreants were armed with nepala and revolver they did not move towards the shop. During T.I. parade he shortly narrated the incident but failed to identify Akbar. According to the

evidence of P.W. 6 (Mukesh), out of six/ seven persons who came out of the car, three/four persons entered into the shop while two remained outside, one out of the two armed with revolver demanded key of the cash-box at the point of revolver, and when he asked for the reason, he was assaulted by one of the miscreants viz. Nuruddin with the butt of revolver on the left side of his eyebrow resulting in his bleeding injury. He raised an alarm. The miscreants who entered inside, on crossing the counter shot fire from a distance of 2/3 cubits at his father. Shyam (P.W. 3) who went to fetch water and saw the miscreants, appeared at the time of assault on him and his father and he also raised hallah. The miscreants escaped by the above car. He caught his father when the latter was on the verge of falling down on getting firearm shot. He and his father were taken to Sishu Mangal Hospital in a vehicle driven by Pritamda's wife. He was discharged on that very night but his father died after three days. P.W. 7 who was standing on their verandah in the first floor after taking dinner and saw a white coloured Ambassador moving towards Southern Avenue slowly leaving the place near the shop of Gulab Mehta, on hearing a call 'Pritamda' came to the P.O., found Gulab Mehta lying inside the shop with profuse bleeding and Mukesh (P.W. 6) sitting placing his hand on his head. Mukesh reported that his father was shot fire by the miscreants and he was assaulted with the butt of a revolver. He and his wife took Gulab, Mukesh and his another relative in a car to Sishu Mangal Hospital and arranged for admission of Gulab who sustained injuries on his belly portion and informed the matter to Tollygunge P.S. over phone.

13. Mr. Bagchi on referring to the above evidence of P.W. 3 contended that had he pushed the two miscreants armed with revolvers, for which they came out of the shop, as deposed, he would not have remained unhurt, that it is the specific evidence of P.W. 7 in cross-examination that he did not find brother of Mukesh at the relevant time, that P.W. 3 claims to have caught hold of his father at the time of his falling down which is contradicted by P.W. 6 and if really he held has father and took him to the vehicle with the assistance of others his dress would have been stained with blood, but here no such bloodstained dress of P.W. 3 has been seized and as such the story of presence of P.W. 3 at the P.O. and witnessing the alleged incident should not be believed at all.

14. Undoubtedly, that part of the evidence of P.W. 3 that after being pushed out by him the two miscreants armed with revolvers came to the other side of the counter like good boys is not worthy of belief, since had he pushed them out he would not have been spared by those two miscreants. Furthermore, P.W. 3 claims to have noted down the number of the vehicle which too cannot be believed inasmuch as if the miscreants after committing the crime rushed towards the Ambassador car and took their seat, it could not be expected that he after entering into the shop and collecting the pen from the place where it is generally kept followed by picking up of the cigarette packet from a place near the counter and then running towards the vehicle would be able to note down the number as the vehicle obviously could not be expected to wait so long. Moreover, the vehicle number noted by him did not tally with the vehicle seized. There are some other inconsistencies in his evidence but these alone are no ground for rejection of his testimony in toto. It is to be borne in mind that even if a witness tries to embroider a story not on vital point to give a credible look to the case, he need not be false to the main issue nor can it defeat justice. The presence of P.W. 3 at the P.O. is admitted by P.W. 6 but all that he contended when he and his father were being assaulted P.W. 3 appeared at that time which does not appear to be in disharmony with the evidence of P.W. 3 whose specific evidence is that he was standing in front of the counter of the shop and when his elder brother (P.W. 6) cried out loudly after being assaulted with the butt of revolver by a miscreant, he entered into the shop, and so in such a situation P.W. 6 could not be expected to divert his attention to see where P.W. 3 was prior to his entry into the shop. P.W. 7 informed the matter over phone to Tollygunge P.S. from Sishu Mangal Hospital which was recorded in the G.D. (Ext. 24) at about 00.05 hrs. on 02.08.1996 by P.W. 28 who being accompanied by other officers had been to the P.O. at about 00.15 a.m. and recorded the statement of P.W. 3 (Ext. 4) as also the statements under Section 161 Cr. PC of P.Ws. 4,5, Parvez and Jamil on that very night. Had P.W. 3 not witnessed the incident, it would not have been possible on his part to give a vivid description of the same in the FIR. There is no material to indicate that prior to recording of the said FIR., P.W. 3 consulted with any other person. The seizure list (Ext. 5/1) as also the evidence of P.W. 28 reveal that the wearing apparel of P.W. 3 stained with blood of the victim was seized which strengthens the story of presence of P.W. 3 at the scene of

occurrence, witnessing the incident and taking his father to the vehicle. It is further evidence of P.W. 3 that he went out of the room and searched for a taxi unsuccessfully while he found Pritamda's wife to come with her car. So the said evidence of P.W. 7 that he did not find any other brother except Mukesh cannot be considered to falsify, the above evidence and circumstances about witnessing the incident by P.W. 3. Accordingly, the above contention of Mr. Bagchi is not at all sustainable.

15. The question that now requires consideration is whether involvement of both the above appellants viz. Akbar and Nuruddin in the crime can be held to have been established.

16. As regards Akbar, he was identified at the TI parade by Sk. Jamil (not examined), P.W. 3 & P.W. 4 but the role played by him was not stated by them. If an identifying witness while identifying a suspect does not say anything about the specific part played by the suspect in the commission of offence, it does not render the evidence of identification inadmissible, as statements before the Id. Magistrate holding TI parade are not substantive evidence and identification at the TI parade is merely corroborative piece of evidence. In this connection, reference may be made to the decision of State of A.P. v. K. Venkata Reddy, reported in : 1976 CriLJ1723 . Nevertheless, as per evidence of P.W.3, out of the six persons who came out of the Ambassador car and proceeded towards the shop, two were armed with revolver, two with nepala, one with sword and another with katari and he identified Akbar in the Court as the person who assaulted his father with nepala which is contradicted by P.Ws. 4, 5 & 6. P.W. 6 who deposed that out of six/seven miscreants two were armed with revolver and one with nepala, identified Afzal (acquitted) in Court as the person who was armed with nepala, though, of course, in jail he identified the said Afzal as the person who was armed with sword. P.W. 3 failed to identify the said Afzal either in jail or in Court. P.Ws. 4 & 5 identified Afzal in jail as the person who was armed with nepala and after the sound of firing boarded the white Ambassador car, and the identification of the said Afzal armed with nepala in Court appears to be consistent with the above. P.Ws. 5 & 6 failed to identify Akbar either in Court or in jail, and P.W. 4 simply identified the said accused Akbar in Court without disclosing the role played by him. There is no

evidence on the part of said P.W. 6 or P.W. 4 or P.W. 5 that the victim Gulab was assaulted with nepala or sword by any miscreants. On the contrary, it is the evidence of P.W. 6 that none was assaulted with nepala. Taking into consideration the above evidence of P.Ws. 4 & 5 it stands that just after firing the miscreants fled away by the said car. Again, considering the above evidence of P.Ws. 4 to 6 it appears that Afzal alone was armed with nepala and so the story of assault on the victim Gulab by Akbar with nepala, as deposed by P.W. 3 alone, which is uncorroborated, does not obviously stand. P.W. 10 (M.O. of Ramkrishna Seva Pratisthan) on examination of the victim Gulab on 01.08.1996 at about 11.55 p.m. found four injuries, out of which one was cut injury on right cheek 4 cm. x 0.5 cm. The above fourth injury i.e. cut injury on right cheek is inconsistent with the evidence of P.W. 17 (autopsy surgeon) who found one incised wound 1' x 1/4' x muscle over left side of face 1/2' above left Malar eminence and 2 1/2' left to midline. In other words, there was no injury on left joint of hand caused by nepala. Conviction on the testimony of solitary witness may be sustained if it is wholly reliable and the evidence is clear, cogent and unimpeachable. But when he is neither wholly reliable nor unreliable the Courts call for corroboration as a rule of prudence. If the evidence of P.W. 3 is taken into account, two miscreants armed with revolver viz. Nuruddin who caused injury of P.W. 6 with the butt of revolver and Md. Rafique (absconder) who shot fire towards his father, and Akbar who caused injury of his father with nepala were amongst the five miscreants who entered into the shop, If the evidence of P.Ws. 4 to 6, on the other hand, is considered Afzal (acquitted) alone was armed with nepala. As per evidence of P.W. 6, out of three/four persons entered into the shop, two were armed with revolver viz. Nuruddin and Rafique and one was armed with nepala i.e. Afzal, and none was assaulted with nepala. Therefore, Akbar was not inside the shop, since had it been so, P.W. 6 who compared to P.W. 3 being nearer to the victim and as such in a better position to see the miscreants, could recognize him, and if he was outside, the question of recognizing him by P.W. 6 was out of the way, for which possibly he failed to identify Akbar at the TI parade as also in Court. Again, if Akbar was outside by the side of P.W. 3 (who was standing near the counter), P.W. 3 would not have deposed as above that he saw Akbar to cause injury of his father with nepala inside the shop which is inconsistent and does not stand. When

one of the basis for identification is annexed to certain act which is found to be incorrect no reliance upon such identification can be placed. As regards P.W. 4 who simply identified Akbar without disclosing the role played by him or where he was actually i.e. whether inside or outside the shop, such evidence does not inspire confidence, since when P.W. 6 did not find him inside and the evidence of P.W. 3 is inconsistent, he being at a considerable distance his identification appears to be doubtful. Therefore, on the face of the above contradictory materials, involvement of accused Akbar in the crime appears to be doubtful and as such the said accused is entitled to the benefit of doubt. Accordingly, the prosecution cannot be held to have brought home the charges against him and he deserves to be acquitted.

17. In regard to appellant Nuruddin, he was identified in the TI parade as also in Court by P.W. 3 & P.W. 6. During TI parade both the above witnesses stated that he was involved in the incident. It is the specific evidence of P.W. 6 that three/four persons entered into the shop and two remained outside, that two persons were armed with revolver and one with nepala, that one of the miscreants demanded key of the cash box on the point of revolver and when he asked for the reason, one miscreant viz. Nuruddin assaulted him with the butt of revolver on the left side of the eyebrow resulting in his bleeding injury. The above evidence is more or less corroborated by P.W. 3 who stated that on the point of revolvers aimed at by two miscreants, his father and elder brother (P.W. 6) stood up and when they demanded key of the almirah, P.W. 6 replied that he was without key, for which one miscreant viz. Nuruddin assaulted him with the butt of his firearm four times-thrice on head and one near his eyeside. P.W. 7 who came to the P.O. just after the occurrence was reported by P.W. 6 that he was assaulted with the butt of a revolver and he along with his father and a relative was taken to Sishu Mangal Hospital in his car. P.W. 10 on examination of P.W. 6 at about 1.30 a.m. on 02.08.1996 found a cut injury on the left zygomatic region 2 cm. x 0.3 cm. x 0.3 cm., and the history of the said injury, as reported to him by the patient, is that he was assaulted by butt of a small arm. So, the above evidence of P.W. 3 relating assault on P.W. 6 thrice on his head being completely a mistaken one apparent from the above materials may be ignored.

18. Mr. S.S. Roy, Id. Counsel for Nuruddin, on referring a decision reported in : 1981 CriLJ1014 , contended that as none of the above two witnesses gave any description and identification marks of the miscreants in their statement or oral evidence and possibility of their mistake in identification cannot be ruled out, it will be unsafe to sustain conviction based upon their testimony. On referring another decision reported in : 1992 CriLJ3140 , he further contended that when identification of other accused persons being doubtful has not been accepted, benefit of doubt should be extended to his client also. The incident took place on the night of 01.08.1996, The record reveals that the said accused Nuruddin on being arrested in connection with another case was produced in this case on 29.09.1996 and he along with others was placed in the TI parade on 07.10.1996 when he was identified by the above two witnesses. An injured witness cannot exculpate the real offender and there appears to be no reason in the facts and circumstances discussed above to doubt their identification. Undoubtedly, there are a bit discrepancies in the number of miscreants entered into the shop, number took position outside, number of strike caused by the above accused etc. which are not vital nor can undo the effect of evidence otherwise sufficient. Witnesses are deposing after about a year of the occurrence and so some discrepancies in regard to collateral or subsidiary fact are bound to occur. To constitute reasonable doubt it must be actual and substantial as to the guilt of the accused person arising from the evidence or lack of it. It must not be imaginary or trivial. The facts and circumstances of the aforesaid decisions so referred to by Mr. Roy being different, the said decisions cannot have any application in this case. So, the above contention of Mr. Roy cannot be sustained.

19. It is terror which the possession of a deadly weapon naturally creates that has led the Legislature to provide for a severe sentence where the offender has such a weapon. Therefore, having regard to the above object, there is no material to interfere with the conviction and sentence of the above appellant Nuruddin under Section 398 IPC.

20. The next question that requires consideration is whether the above accused committed offence under sections 302/34 & 307/34 IPC also.

21. As disclosed from the evidence of P.Ws. 3 & 6 discussed above, on being assaulted by Nuruddin with the butt of revolver thereby causing a cut injury on the left zygomatic region when the above two witnesses raised alarm, all the miscreants went out, took position and one of them viz. Rafique (absconder) fired a shot from his revolver towards the victim Gulab who having sustained gun-shot injury at chest and other injuries was removed to Ramkrishna Seba Pratisthan (commonly known as Sishu Mangal) where he expired at about 9.55 p.m. on 04.08.1996. The cause of death as opined by the autopsy surgeon (P.W. 17) who found seven injuries, was due to the effects of gun-shot injury antemortem and homicidal in nature.

22. The constructive liability under Section 34 IPC would arise only if two ingredients viz. (1) there must be common intention to commit criminal act and (2) there must be participation of all the persons in doing such an act in furtherance of that intention are fulfilled. The necessary conditions for the application of Section 34, as observed in Gurdatta Mal's case, reported in : AIR 1965 SC257 , are common intention to commit an offence and participation of all the accused in doing act or acts in furtherance of that common intention. If these two ingredients are established all the accused would be liable for the said offence. Once it is found that the criminal act was done in furtherance of the common intention of all, each of such persons is liable for the criminal act as if it were done by him alone. It is the essence of Section 34 that the persons must be physically present at the scene of the occurrence and must actually participate in the commission of offence in some way or other at the time the crime is actually being committed, as was held in Shreekantiah Ramayya Munipalli's case, reported in : 1955 CriLJ857 . A common object is different from common intention in that it does not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the people get there. The essence of the distinction between the common intention required by Section 34 and the common object set out in Section 149 is that for a common object there need not be a prior meeting of minds. It is enough that each has the same object in view and that their number is five or more and that they act as an assembly to achieve that object. Mere distance of the scene of the crime cannot exclude culpability under Section 34 which lays down a rule of evidence to infer joint responsibility for criminal act

performed by a plurality of a persons. Criminal sharing, overt or covert, by active presence or by distant direction making out a certain measure of jointness in the commission of the act is the essence of the section. There must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused, as was expressed in Rambilas Singh's case, reported in : 1989 CriLJ1782 . Common intention implies acting in concert and existence of a prearranged plan which is to be proved either from conduct or from circumstances or from any incriminating fact. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action, as was held in Narinder Singh's case, reported in : 2000 CriLJ3462 . Whereas motive is the ultimate object which a person hopes to achieve, intention is the immediate state of mind. Motive is something which prompts a person to form an intention, and thus intention is a means and motive an end, as was held in Barendra Kumar Ghosh's case, reported in . In the case on hand, the motive of the accused persons was to commit dacoity. It was P.W. 6 who instead of making over the key of cash box, as demanded by accused Nuruddin and Rafique, asked for the reason for such demand when he was assaulted by Nuruddin with the butt of revolver causing a single injury followed by his treatment and discharge from hospital on the same night. Had the said accused Nuruddin any intention of causing death during commission of dacoity, he would not have given a single stroke with the butt of revolver causing an injury of not serious in nature. If there was at all any malignity, it would have been against P.W. 6 and not his father as he virtually refused to hand over the key, but still he was given a light blow with the butt of revolver thereby suggesting from the conduct of the above accused that he did not share with any common intention to cause murder of any person including the victim Gulab. The facts and circumstances of the case do not spell out existence of any pre-arranged plan or prior concert of mind to commit the offence of murder, and as such in our opinion, the joint responsibility of committing the murder cannot be attributed at least to the above accused. In this connection, the decision of Babu Singh, reported in 1995 Cr. LJ 2630 (SC), may be relied upon. Accordingly, the said accused Nuruddin cannot be roped with the offence of murder with the aid of Section 34 IPC.

23. As regards the offences under Section 307/34 IPC, in order to amount to an attempt to murder, the act attempted must be such that if not prevented or intercepted, it would be sufficient to cause death of the victim. To sustain conviction under Section 307, the intention to kill should be clearly proved by circumstances like persistence of attack on vital parts of the body or the assailant lying in wait armed with dangerous weapons or declaration made by him that the victim would be killed. The intention is not gatherable merely from the seriousness of resultant injury. Intent which is a state of mind can never be precisely proved by direct evidence as a fact; it can only be deduced or inferred from other facts. Some relevant considerations are: (1) the nature of weapon used, (2) the place where injuries were inflicted, (3) the nature of the injuries caused, (4) the opportunity available which the accused got. When an accused despite having a dangerous weapon in his hand inflicted minor injury, there was no intention on his part to commit murder, and accordingly it does not come within the mischief of Section 307. Here, as discussed above, despite having opportunity and though Nuruddin was armed with revolver he assaulted P.W. 6 with the butt of revolver only once causing a cut injury on the left zygomatic region which is not at all serious, for which P.W. 6 was medically treated and discharged from hospital on that very night. It may be inferred from the above fact that there was no intention on the part of Nuruddin to cause death of P.W. 6, and so the ingredients of Section 307 being absent, the conviction and sentence under Section 307/34 IPC was not justified. The offence virtually comes under the purview of Section 323 read with Section 34 IPC, and accordingly, the conviction may be altered to lesser offence from Section 307/34 IPC to one under Section 323/34 IPC, for which a sentence of three months S.I. and a fine of Rs. 500/- i.d. to S.I. for 10 days will be adequate and meet the ends of justice.

24. In the premises, in the light of the above discussion, the appeal be allowed in part on contest. The order of conviction and sentence in respect of appellant Sk. Akbar Ali be set aside, and he stands acquitted of the charges and be set at liberty at once.

25. The order of conviction and sentence under Section 398 IPC in respect of appellant Nuruddin Molla @ Noor Alam passed by the Id. Court below is hereby

affirmed. The conviction and sentence in respect of the said appellant is altered from Section 307/34 IPC to a lesser offence under Section 323/34 IPC, and he be sentenced to undergo S.I. for three months and to pay fine of Rs. 500/- i.d. to S.I. for 10 days. The order of his conviction and sentence under Section 302/34 IPC be set aside and he stands acquitted of the said charge.

26. The period undergone in jail custody be set off under Section 425 Cr.PC.

27. Let a copy of this judgment along with the L.C.R. be sent down at once to the Id. Court below.

Bhaskar Bhattacharya, J.:

28. I agree.

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