Union Of India & Ors vs Sunil Kumar Sarkar on 28 February, 2001

Equivalent citations: AIR 2001 SUPREME COURT 1092, 2001 (3) SCC 414, 2001 AIR SCW 957, 2001 LAB. I. C. 1114, 2001 (1) JT (SUPP) 193, 2001 (2) SCALE 286, (2002) 1 JCR 264 (SC), 2001 (4) SRJ 45, 2001 (2) UJ (SC) 976, 2001 SCC (L&S) 600, (2001) 2 RAJ LW 190, (2001) 2 SCT 64, (2001) 2 RECCRIR 40, (2001) 2 SERVLR 271, (2001) 2 SUPREME 199, (2001) 2 SCALE 286, (2001) 1 UC 518, (2002) 4 ALL WC 2928, (2002) 1 CHANDCRIC 154, (2001) 2 LAB LN 9

Bench: S.P.Bharucha, N.S.Hegde

CASE NO.:
Appeal (civil) 7769 of 1995

PETITIONER:
UNION OF INDIA & ORS.

Vs.

RESPONDENT:
SUNIL KUMAR SARKAR

DATE OF JUDGMENT: 28/02/2001

BENCH:
S.P.Bharucha, N.S.Hegde, Y.K.Sabharwal

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T..J SANTOSH HEGDE, J.

A General Court Martial (GCM) under the provisions of the Army Act, 1950 was initiated against the respondent herein for certain allegations of defrauding the Border Road Organisation (the Organisation) in which the respondent was working as a Superintendent, Buildings & Roads, Grade-II. On the conclusion of the said GCM proceedings, he was found guilty of some of the charges framed against him and was sentenced to undergo R.I. for one year which sentence under the Army Act was subject to confirmation by the higher authorities under Chapter XII of the Army Act. Pursuant to the said sentence, the respondent was taken into custody on the very day i.e. 28th

July, 1976. When the conviction and sentence was taken up by the confirming authority, same was remanded back to the GCM for reconsideration. On remand, the GCM again heard the respondents counsel and modified its earlier order whereby while finding the respondent again guilty reduced the earlier sentence of R.I. for one year to that of six months. This order was also subject to confirmation. However, in view of the fact that the respondent who by virtue of the first order was undergoing the sentence, had completed the period of six months by that time, the GCM directed the release of the respondent from custody on 28th January, 1977. The second order of conviction was confirmed by the authority concerned on 26.3.1977. In the meantime, the authorities acting under Rule 19 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (for short the Central Rules) with a view to initiate disciplinary proceedings issued a show cause notice dated 26.3.1977 calling upon him to show cause why suitable order be not passed against him. The respondent submitted his reply to the said show cause notice. The authority on the conclusion of the said departmental inquiry under the said Rule dismissed the respondent from service. The appeals and the review petitions filed by the respondent to the appropriate authorities against his conviction by the GCM as well as his dismissal under the Central Rules came to be dismissed. The respondent challenged these orders of his conviction under the Army Act as well as his dismissal under the Rules by way of a writ petition before a learned Single Judge of the Calcutta High Court who, after hearing the parties, noticed certain defects in the orders impugned before him, hence, allowed the writ petition and issued the following directions:

> The Chief Engineer, Project Sevak is directed to give a personal hearing to the petition and after such hearing he shall pass a fresh order either confirming the earlier order dated the 23rd October, 1978, or passing such an order as he may deem fit and proper. The fresh order must contain the reasons. Similarly I direct the Director- General of Border Roads to give a personal hearing to the petitioner in connection with his post-confirmation petition and pass a fresh order either confirming the earlier order dated the 23rd March, 1979, or passing a fresh order as he may think fit and proper. The fresh orders must contain the reasons.
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> Against the said judgment of the learned Single Judge, none of the respondents before the learned Single Judge, who are now appellants before us, preferred any appeal. Hence, the said order has become final so far as they are concerned. The respondent, however, not being satisfied, preferred an appeal before the Division Bench of the said High Court and the High Court as per its impugned order allowed the said appeal holding that the Court Martial proceedings as well as the disciplinary proceedings initiated by the appellants were vitiated by the fact that the authorities had chosen to keep the respondent under suspension without there being any reason therefor, and that the respondent was taken into custody immediately after the pronouncement of the sentence by the GCM without the said order being confirmed as required by the Army Act. The Division Bench also found against the disciplinary authority for having passed the impugned order of dismissal solely based on the finding of the Court Martial proceedings which, according to the Division Bench, showed that the disciplinary authority had a pre-determined mind. It also observed that the findings of the Court Martial proceedings were not based on the material on

> record and amounted to a perverse order. It is against this order of the Division Bench dated 30.3.1994 that the appellants are before us in this appeal. We have heard learned counsel for the parties, and perused the records. As noticed above, one of the grounds relied upon by the Division Bench to pass the impugned order was that the respondent was kept under suspension by the disciplinary authority after the GCM proceedings were over and while he was still in custody. According to the Division Bench, this was contrary to Rule 10 of the Central Rules inasmuch as certain condition precedent required under the Rule was not existing when the order of suspension was made. It seems that the Division Bench was of the opinion that once a person is in custody the question of keeping him under suspension does not arise.

We do not agree with this opinion of the Division Bench because the Division Bench failed to notice that the respondent was due to be released on 27.1.1977 after serving the six months R.I. imposed on him. After his release in the normal course, he was entitled to claim reinstatement in service unless departmental proceedings were initiated against him for the misconduct for which he was convicted. Therefore, the authority thought it necessary to keep the respondent under suspension, hence, the orders under Rule 10 of the Central Rules were issued keeping the respondent under suspension. Rule 10(1)(a) of the Central Rules empowers the appointing authority to place a Government servant under suspension if an inquiry is either being conducted against him or is contemplated against him. In the present case, a disciplinary authority had decided to initiate the disciplinary proceeding against the respondent and pursuant to the said decision and in exercise of the power vested in him by Rule 10(1)(a) of the Central Rules, the respondent was kept under suspension. Therefore, the concerned authority was well within its statutory power to keep the respondent under suspension and, in our opinion, the High Court fell in error in finding fault with the said decision on the ground that there was no need to keep the respondent under suspension when he is undergoing a sentence of imprisonment. The next finding of the Division Bench that the GCM erred in taking the respondent into custody immediately after it imposed the sentence without the said order of sentence being confirmed by the higher authority is also contrary to the provisions of the Army Act. Section 167 of the said Act mandates that when a person is sentenced by a Court Martial his sentence shall be reckoned to commence on the day on which the original proceedings were signed by the Presiding Officer whether such sentence is revised or not. In the instant case, the Court Martial pronounced the sentence on 28.7.1976 and the respondent was taken into custody on the same day which was in accordance with Section 167 of the Army Act. The Division Bench, in our opinion, did not notice this provision of the Army Act when it found fault with the GCM for taking the respondent into custody before the sentence imposed by it was confirmed by the confirming authority. The Division Bench also found fault with the order of dismissal passed by the disciplinary authority on the ground that the same was solely based on the conviction suffered by the respondent in the Court Martial proceeding. The court in this regard held that the disciplinary authority had a pre-determined mind when he passed the order of dismissal. Here again, in our opinion, the Division Bench did not take into consideration Rule 19 of the Central Rules which contemplates that if any penalty is imposed on a Government servant on his conviction in a criminal charge, the disciplinary authority can make such order as it deems fit (dismissal from service is one such order contemplated under Rule 19) on initiating disciplinary proceedings and after giving the delinquent officer an opportunity of making a representation on the penalty proposed to be imposed. As a

matter of fact, this type of disciplinary procedure is contemplated in the Constitution itself as could be seen in Article 311(2)(a). Rule 19 of the Central Rules is in conformity with the above provisions of the Constitution. This, as we see, is a summary procedure provided to take disciplinary action against a Government servant who is already convicted in a criminal proceeding. The very foundation of imposing punishment under Rule 19 is that there should be a prior conviction on a criminal charge. Therefore, the question of having a pre-determined mind does not arise in such cases. All that a disciplinary authority is expected to do under Rule 19 is to be satisfied that the officer concerned has been convicted of a criminal charge and has been given a show cause notice and reply to such show cause notice, if any, should be properly considered before making any order under this Rule. Of course, it will have to bear in mind the gravity of the conviction suffered by the Government servant in the criminal proceedings before passing any order under Rule 19 to maintain the proportionality of punishment. In the instant case, the disciplinary authority has followed the procedure laid down in Rule 19, hence, we cannot agree with the Division Bench that the said disciplinary authority had any pre-determined mind when it passed the order of dismissal. The Division Bench next came to the conclusion that the finding arrived at by the GCM is perverse. In regard to this finding, this is what the court has observed in its judgment:

> It also appear to us that the decision arrived at by the G.C.M. was arrived at without consideration of evidence and as such the same are perverse. There has been no proper consideration of relevant facts and materials and no reasonable man acting bona fide and with proper consideration could have come to the impugned finding, rendering such decision/conviction and all proceedings subsequent thereto to be void ab initio.
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> A perusal of the judgment impugned clearly shows that its finding that the decision of the GCM was arrived at without consideration of evidence is not factually supported by any material and is only an ipse dixit of the court. The Division Bench has not pointed out what is the evidence that has not been considered by the GCM and how its findings are perverse. In the absence of these basic facts, we are unable to agree with the Division Bench that the findings of the GCM on facts is either not based on material on record or is perverse. Before concluding we must point out that during the course of arguments, a doubt was raised as to the maintainability of the concurrent proceedings initiated against the respondent by the authorities. The respondent in this case has been punished for the same misconduct both under the Army Act as also under the Central Rules. Hence, a question arises whether this would tantamount to double jeopardy and is in violation of Article 20 of the Constitution of India. Having considered the arguments addressed in this behalf, we are of the opinion that so far as the concurrent proceedings initiated by the Organisation against the respondent both under the Army Act and the Central Rules are concerned, they are unexceptionable. These two proceedings operate in two different fields though the crime or the misconduct might arise out of the same act. The Court Martial proceedings deal with the penal aspect of the misconduct while the proceedings under the Central Rules deal with the disciplinary aspect of the misconduct. The two proceedings do not overlap. As a matter of fact, Notification

No.SRO-329 dated 23.9.1960 issued under the Central Rules and under sub-sections (1) and (4) of Section 4 of the Army Act makes this position clear. By this notification, the punishments that could be meted out under the Central Rules have been taken out of the purview of the Court Martial proceedings under the Army Act. We further find support for this view of ours in the judgment of this Court in R. Viswan & Ors. v. Union of India & Ors. (AIR 1983 SC 658). As noticed above, in view of the fact that the appellants have not challenged the directions issued by the learned Single Judge in the writ appeal, the same remain undisturbed by this judgment while we allow this appeal and quash the judgment of the Division Bench impugned before us.

No order as to costs.

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.821 OF 2000

Suresh and anr. Appellant

:versus:

State of U.P. Respondent

WITH

CRIMINAL APPEAL NO. 160 OF 2001

State of U.P. Appellant

:versus:

Pavitri Devi Respondent

J U D G M E N T

THOMAS, J.

Section 34 of the Indian Penal Code is a very commonly invoked provision in criminal cases. With a plethora of judicial decisions rendered on the subject the contours of its ambit seem well neigh delineated. Nonetheless, when these appeals were heard a two-judge Bench felt the need to make a re-look at the provision as to whether and if so to what extent it can be invoked as an aid in this case. Hence these appeals were heard by a larger Bench.

In one of the appeals A-1 Suresh and his brother-in-law A-2 Ramji are fighting their last chance to get extricated from the death penalty imposed on them by a Sessions Court which was confirmed by a Division Bench of the High Court. In the other appeal Pavitri Devi, the wife of A-1 Suresh (also sister of A-2 Ramji) is struggling to sustain the acquittal secured by her from the High Court in reversal of the conviction for murder ordered by the Sessions Court with the aid of Section 34 IPC.

On the night of 5.10.1996 when Ramesh (brother of appellant Suresh) and his wife and children went to bed as usual they would have had no foreboding that it was going to be the last night they were sleeping on this terrestrial terrain. But after they, in their sleep, crossed the midnight line and when the half crescent moon appeared with its waned glow above their house the night turned red by the bloodiest killing spree befallen the entire family. The motely population of that small house were whacked to pieces by armed assailants, leaving none, but a single tiny tot, alive. The sole survivor of the gory carnage could have seen what happened inside his sweet home only in the light which itself turned carmine. He narrated the tale before the Sessions Court with the visible scars of the wounds he sustained on his person.

That infant witness (PW-3 Jitendra) told the trial court that he saw his uncle (A-1 Suresh) in the company of his brother-in-law (A-2 Ramji) acting like demons, cutting the sleeping children with axe and chopper. He also said that his aunt (A-3 Pavitri Devi) clutched the tuft of his mothers hair and yelled like a demoness in thirst for the blood of the entire family.

Lalji (PW-1), the uncle of the deceased Ramesh (who is uncle of A-1 Suresh also) and Amar Singh (PW-2) a neighbour gave evidence supporting the version of PW-3 Jitendra. But the said two witnesses did not attribute any overt act to Pavitri Devi except saying that she too was present near

the scene of occurrence. The house of the accused was situated not far away from the scene of occurrence but across the road which abuts the house of the deceased.

The doctor (PW5-C.M. Tiwari) who conducted the autopsy on the dead bodies of all the deceased described the horrifying picture of the mauled bodies. The youngest of the victims was a one year old child whose skull was cut into two and the brain was torn asunder. The next was a three year old male child who was killed with his neck axed and the spinal cord, trachea and the larynx were snipped. The next in line was PW-3 Jitendra - a seven year old child. (His injuries can be separately stated). His immediate next elder was Monisha a nine year old female child, who too was axed on the neck, mouth and chest with her spinal cord cut into two.

The mother of those little children Ganga Devi was inflicted with six injuries which resulted in her skull being broken into pieces. The last was Ramesh the bread winner of the family, who was the father of the children. Four wounds were inflicted on him. All of them were on neck and above that. The injuries on Ramesh, when put together, had neared just short of decapitation.

PW-3 Jitendra had three incised wounds on the scapular region, but the doctor who attended on him (PW-6 S.K. Verma) did not probe into the depth of one of them, presumably because of the fear that he might require an immediate surgical intervention. However, he was not destined to die and hence the injuries inflicted on him did not turn fatal.

The motive for the above dastardly massacre was the greed for a bit of land lying adjacent to the house compound of the deceased which A-1 Suresh claimed to be his. But deceased Ramesh clung to that land and it resulted in burgeoning animosity in the mind of Suresh which eventually grew alarmingly wild.

The evidence of PW-1 Lalji and PW-2 Amar Singh was considered by the Session Court in the light of various contentions raised by the counsel for the accused. The trial judge found the said evidence reliable. The Division Bench of the High Court considered the said evidence over again and they did not see any reason to dissent from the finding made by the trial court. The evidence of PW-3 Jitendra, the sole survivor of the carnage, was evaluated with greater care as he was an infant of seven years. Learned Judges of the Division Bench of the High Court accepted the evidence of PW-3 only to the extent it secured corroboration from the testimony of PWs.1 and 2.

Though Mr. K.B. Sinha, learned senior counsel made an endeavour to make some tears into the fabric of the testimony of PWs.1 and 2 he failed to satisfy us that there is any infirmity in the findings recorded by the two courts regarding the reliability of the evidence of those two witnesses. As the learned senior counsel found it difficult to turn the table regarding the evidence against the accused which is formidable as well as trustworthy, he focussed on two aspects. First is that acquittal of Pavitri Devi does not warrant interference from this Court. Second is that this is not a case belonging to the category which compels the court to award death penalty to the two appellants, Suresh and Ramji.

We will now deal with the role played by Pavitri Devi to see whether the court can interfere with the acquittal order passed in her favour by the High Court. PW-3 said that while he was sleeping the blood gushed out of the wounds sustained by his father reached his mouth and when he woke up he saw the incident. According to him, Pavitri Devi caught hold his mothers hair and pulled it up, thereafter she went outside and exhorted that everybody should be killed. But PWs.1 and 2 did not support the aforesaid version pertaining to Pavitri Devi. According to them, when they reached the scene of occurrence Pavitri Devi was standing in front of the house of the deceased while the other two were inside the house engaged in the acts of inflicting blows on the victims.

The position which prosecution succeeded in establishing against A-3 Pavitri Devi is that she was also present at the scene of occurrence. Learned counsel for the State contended that such presence was in furtherance of the common intention of the three accused to commit the murders and hence she can as well be convicted for the murders under Section 302 IPC with the aid of Section 34 IPC. Mr. K.B. Sinha, learned counsel contended that if Section 34 IPC is to be invoked as against Pavitri Devi the prosecution should have established that she had done some overt act in furtherance of the common intention.

We heard arguments at length on the ambit of Section 34 IPC. We have to consider whether the accused who is sought to be convicted with the aid of that Section, should have done some act, even assuming that the said accused also shared the common intention with the other accused.

Section 34 reads thus:

> Acts done by several persons in furtherance of common intention.- When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.
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> As the section speaks of doing a criminal act by several persons we have to look at Section 33 IPC which defines the act. As per it, the word act denotes as well a series of acts as a single act. This means a criminal act can be a single act or it can be the conglomeration of a series of acts. How can a criminal act be done by several persons?
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> In this context a reference to Section 35, 37 and 38 of IPC, in juxtaposition with Section 34, is of advantage. Those four provisions can be said to belong to one cognate group wherein different positions when more than one person participating in the commission of one criminal act are adumbrated. Section 35 says that when an act is done by several persons each of such persons who joins in the act with mens rea is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention. The section differs from section 34 only regarding one postulate. In the place of common intention of all such persons (in furtherance of which the criminal act is done), as is required in Section 34, it is enough that each participant who joins others in doing the criminal act, has the required mens rea.

Section 37 deals with the commission of an offence by means of several acts. The section renders any one who intentionally cooperates in the commission of that offence by doing any one of those acts to be liable for that offence. Section 38 also shows another facet of one criminal act being done by several persons without connecting the common bond i.e. in furtherance of the common intention of all. In such a case they would be guilty of different offence or offences but not for the same offence. Among the above four provisions the common denominator is the participation of several persons (more than one person) in the commission of a criminal act. The special feature of Section 34 is only that such participation by several persons should be in furtherance of the common intention of all.

Hence, under Section 34 one criminal act, composed of more than one act, can be committed by more than one persons and if such commission is in furtherance of the common intention of all of them, each would be liable for the criminal act so committed.

To understand the section better it is useful to recast it in a different form by way of an illustration. This would highlight the difference when several persons do not participate in the crime committed by only one person even though there was common intention of all the several persons. Suppose a section was drafted like this: When a criminal act is done by one person in furtherance of the common intention of several persons each of such several persons is liable for that act in the same manner as if it were done by all such persons.

Obviously Section 34 is not meant to cover a situation which may fall within the fictitiously concocted section caricatured above. In that concocted provision the co-accused need not do anything because the act done by the principal accused would nail the co-accused also on the ground that such act was done by that single person in furtherance of the common intention of all the several persons. But Section 34 is intended to meet a situation wherein all the co-accused have also done something to constitute the commission of a criminal act.

Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34, e.g. the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why Section 34 cannot apply in the case of those two persons indicated in the illustrations.

Thus to attract Section 34 IPC two postulates are indispensable. (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32 IPC. So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co- accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC.

There may be other provisions in the IPC like Section 120B or Section 109 which could be invoked then to catch such non participating accused. Thus participation in the crime in furtherance of the common intention is sine qua non for Section 34 IPC. Exhortation to other accused, even guarding the scene etc. would amount to participation. Of course, when the allegation against an accused is that he participated in the crime by oral exhortation or by guarding the scene the court has to evaluate the evidence very carefully for deciding whether that person had really done any such act.

A Division Bench of the Madras High Court has said as early as in 1923 that evidence of some distinct act by the accused, which can be regarded as part of the criminal act in question, must be required to justify the application of Section 34 IPC. (vide Aydrooss vs. Emperor, AIR 1923 Madras

187).

In Barendra Kumar Ghosh vs. Emperor (AIR 1925 PC 1) the Judicial Commission after referring to the cognate provisions adverted to above, held thus:

> Read together, these sections are reasonably plain. S.34 deals with the doing of separate acts, similar or diverse by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for that act and the act in the latter part of the section must include the whole action covered by a criminal act in the first part, because they refer to it.
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> We have come across the observations made by another Judicial Commission of the Privy Council of equal strength in Mahbub Shah vs. Emperor (AIR 1945 PC 118). The observation is that Section 34 IPC can be invoked if it is shown that the criminal act was done by one of the accused in furtherance of the common intention of all. On the fact situation their Lordships did not have to consider the other component of the Section. Hence the said observation cannot be understood to have obviated the necessity of proving that the criminal act was done by several persons which is a component of Section 34 IPC.
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> In Pandurang vs. State of Hyderabad [AIR 1955 SC 216] Vivian Bose J., speaking for a three-judge bench of this Court focused on the second component in Section 34, IPC i.e. in furtherance of the common intention. There was no need for the bench to consider about the acts committed by the accused charged, in order to ascertain whether all the accused committed the criminal act involved therein. In other words the first postulate was not a question which came up for consideration in that case. Hence the said decision, cited by both sides for supporting their respective contentions is not of much use in this case.
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> Mr. Pramod Swarup, learned counsel for the State invited our attention to the decision of this Court in State of U.P. vs. Iftikhar Khan and ors. {1973 (1) SCC 512} in which it is observed that to attract Section 34 IPC it is not necessary that any overt act should have been done by the co-accused. In that case four accused persons were convicted on a fact situation that two of them were armed with pistols and the other two were armed with lathis and all the four together walked in a body towards the deceased and after firing the pistols at the deceased all the four together left the scene. The finding of fact in that case was also the same. When a plea was made on behalf of those two persons who were armed with lathis that they did not do any overt act, this Court made the above observation. From the facts of that case it can be said that there was no act on behalf of the two lathi-holders although the deceased was killed with pistols alone. The criminal act in that case was done by all the persons in furtherance of the common intention to finish the deceased. Hence the observation made by Vaidialingam, J., in the said case has to be understood on the said peculiar facts.

It is difficult to conclude that a person, merely because he was present at or near the scene, without doing anything more, without even carrying a weapon and without even marching along with the other assailants, could also be convicted with the aid of Section 34 IPC for the offence committed by the other accused. In the present case, the FIR shows that A-3 Pavitri Devi was standing on the road when the incident happened. Either she would have reached on the road hearing the sound of the commotion because her house is situated very close to the scene, or she would have merely followed her husband and brother out of curiosity since they were going armed with axe and choppers during the wee hours of the night. It is not a necessary conclusion that she too would have accompanied the other accused in furtherance of the common intention of all the three.

Mr. Pramod Swarup, learned counsel for the State contended that if she remained at the scene without sharing the common intention she would have prevented the other two accused from doing the ghastly acts because both of them were her husband and brother respectively. The inaction of Pavitri Devi in doing so need not necessarily lead to the conclusion that she shared a common intention with others. There is nothing to show that she had not earlier tried to dissuade her husband and brother from rushing to attack the deceased.

Thus we are unable to hold that Pavitri Devi shared common intention with the other accused and hence her remaining passively on the road is too insufficient for reversing the order of acquittal passed by the High Court in order to convict her with the aid of Section 34 IPC.

Mr. K.B. Sinha, learned senior counsel made an all out effort to save the convicted appellants from death penalty. The trial court and the High Court have given very cogent reasons and quite elaborately for choosing the extreme penalty. Knowing fully well that death penalty is now restricted to the rarest of rare cases in which the lesser alternative is unquestionably foreclosed as held by the Constitution Bench in Bachan Singh vs. State of Punjab {1980 (2) SCC 684} we could not persuade ourselves in holding that the acts committed by A-1 Suresh and A-2 Ramji should be pulled out of the contours of the extremely limited sphere.

Mr. K.B. Sinha cited a number of decisions including Panchhi and ors. vs. State of U.P. {1998 (7) SCC 177} in an endeavour to show that this Court had chosen to give the alternative sentence in spite of the ferocity of the acts perpetrated and a number of victims involved. None of such cases is comparable with the facts in this case. Even after bestowing our anxious consideration we cannot persuade ourselves to hold that this is not a rarest of rare cases in which the lesser alternative is unquestionably foreclosed.

Accordingly we dismiss both the appeals.

J [K.T. Thomas] New Delhi;

March 2, 2001.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 247 OF 1991

Sohan & Anr. ... Appellants

Versus

State of Haryana & Anr. ... Respondents

With

Criminal Appeal No. 731 of 1991

Rajinder and others ... Appellants

Versus

State of Haryana ... Respondents

J U D G M E N T

Shivaraj V. Patil J.

These appeals are directed against the judgment and order of the High Court of Punjab & Haryana made in Criminal Appeal No. 454-DB of 1985.

These appellants were accused nos. 1 to 6 before the Sessions Court. A-1 is the father of A-2. A-3 is the father of A-4 to A-6. A-1 and A-3 are brothers by birth.

The prosecution case as unfolded by PW-7 at the trial is that on 11.2.1985 the deceased Daya Nand and PW-7 Hoshiar Singh had started from their village in order to reach Bhiwani to attend court hearing in the appeal. When they were at the outskirts of the village, the six accused emerged from behind stones. Randhir (A-2) and Kartar (A-5) were armed with pharsis and rest of them with lathis.

They surrounded the deceased and PW-7 saying In Ko Aaj Yahin zamin dai do aur khata kar do. Looking to the danger, the deceased and PW-7 ran into the nearby house of Nanak, the door of which was open. The accused chased them. PW-7 ran ahead deeper into the house and reached a point where there is a Neem tree and which is at higher level. He looked back and saw Daya Nand had scaled a dauli (a small wall). He was overtaken by Randhir who had also jumped over the dauli. Randhir gave a pharsi blow on Daya Nand. At that stage, accused Partap reached there and he also gave three lathi blows to Daya Nand in the back. Sohan, Ramanand and Rajinder also arrived there and each of them gave one lathi blow to Daya Nand. Sumer, son of Nanak, the owner of the house having come out of the house also saw this occurrence. After dealing with Daya Nand, the accused proceeded to chase PW-7 but he ran away to his house. After reaching home, he narrated, as to what happened, to his brother Dani Ram and cousin Tara Chand who were sitting at the entrance of the house and brought them to the spot of occurrence. They found Daya Nand lying unconscious and the accused had run away. They took Daya Nand to his house. From there, they brought him to Primary Health Centre at Gopi at about 8.00 or 8.15 A.M. According to PW-1, Dr. Dilbagh Singh, Incharge of the Gopi Primary Health Centre, Daya Nand was brought to hospital at 8.30 A.M. His condition was serious as he was having multiple injuries; after giving emergency treatment, referred him to General Hospital, Bhiwani giving a ruqa to Police Station, Badhra.

PW-2, Dr. R.N. Swami, attended Daya Nand at General Hospital, Bhiwani. He sent ruqa at 10.10 A.M. to the Incharge, Police Post, General Hospital, Bhiwani and proceeded with medical examination. He found 12 injuries on Daya Nand. In response to the ruqa sent by PW-2, Sub-Inspector, Udey Chand (PW-9), Incharge, Police Post, General Hospital, Bhiwani reached the emergency ward at 10.20 A.M. to find out if Daya Nand was in a fit condition to make statement. The doctor gave opinion that Daya Nand was unfit to make a statement. PW-9 has stated that a man who was present by the side of Daya Nand told him that PW-7 had gone to bring medicine. PW-9, Udey Chand could meet PW-7 at about 12.15 P.M. and recorded his statement as per Ex. PK/1 which constituted F.I.R. in the case. With his endorsement PK/2, PW-9 gave ruqa Ex. P.C. along with his application made to the doctor and copy of M.L.R. with a direction to carry to the Police Station Badhra for the registration of the case.

Daya Nand died at 12.10 A.M. on 12.2.1985. PW-2, Dr. Gupta intimated this fact to the Incharge, Police Post of the Hospital, Bhiwani. The dead body was subjected to post-mortem examination by Dr. R.G. Jindal (PW-4). The accused Randhir surrendered to the court on 14.2.1985. The remaining accused were also arrested on 15.2.1985. Thereafter recoveries were made at the instance of the accused as per the details given in the judgment of the Sessions Judge in paragraphs 20-27.

In support of the case, the prosecution examined 12 witnesses including PW-6 Amir Chand, Draftsman and PW-10 Deep Chand, the Headmaster of Government High School, Dalawas.

The learned Sessions Judge relying on the evidence of sole eyewitness PW-7 Hoshiar Singh convicted all the accused for the offences under Sections 148 and 302 read with Section 149 of IPC.

It is unfortunate that the approach and appreciation adopted by the Sessions Court was manifestly erroneous and contrary to the well-settled principles of law. It may be said that the approach of the

learned Sessions Judge has been one- sided. Lapses, omissions and contradictions in the prosecution case were either condoned or lightly brushed aside or were supported without any justification against the probabilities appearing in the case which is clearly demonstrated hereinbelow. It should be remembered that PW-7 Hoshiar Singh is the cousin of the deceased Daya Nand. Admittedly, there was civil litigation between the accused on the one side and deceased Daya Nand and himself and others on the other side. The alleged motive for the commission of offence is the very civil litigation. The suit for permanent injunction in respect of land in dispute was filed on 11.3.1982 by accused Sohan in which temporary injunction order was granted against the deceased and PW-7 and others which was confirmed later after hearing both the parties. Thereafter the suit itself was decreed on 20.12.1983. The deceased Daya Nand and PW-7 had filed appeal against the decree in the Court of Addl. District Judge, Bhiwani on 23.1.1984. Pw-7 had however admitted that accused Sohan was in exclusive possession of the said land. These facts are established by documents Ex. DA/1 to DA/10. PW-7 in the F.I.R. as well as before the curt had claimed that civil suit with regard to the joint land was instituted by him and Daya Nand against other co-sharers Sohan and others and that the same was dismissed. This was incorrect and belied by Ex. DA/1 to DA/10. When it was pointed out that PW-7 was not trustworthy as he had made false statement against the records being himself party to the proceedings, the learned Sessions Judge in para 35 of the judgment, dealing with the same has stated thus :-

> The criticism is factually correct but it does not make any dent in the prosecution case.
>
> Hoshiar Singh is an illiterate witness and is not expected to know the background details of litigation. Suffice it to say that it is a common case of the parties that there was litigation over the land. In other words, there was bad blood between them and that is enough for our purpose.
>
> According to the learned Sessions Judge, it was enough for the purpose of establishing motive of the accused to commit the crime but failed to objectively consider why it was not enough to disbelieve the evidence of PW-7 in view of the fact that he was both interested and partisan that too in the absence of any corroboration.
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> As to the contention that PW-7, Hoshiar Singh, was most unlikely to accompany the deceased to Bhiwani on the date of occurrence on the ground that looking to Ex. DA/5 to DA/10, the order passed in the appeal, the presence of PW-7 was not there and in the appeal his presence was not required on 11.2.1985, the learned Sessions Judge observed that there was no bar for PW-7 from attending the court and that he was illiterate person and did not know what proceedings were to take place. That learned Sessions Judge added on his own Even otherwise also, the parties do attend even on dates which are not for final hearing. On behalf of the accused, efforts were made to show that neither the deceased Daya Nand nor PW-7 Hoshiar Singh on the date of occurrence at the time mentioned were going from their village to Bhiwani, referring to various circumstances, one of the circumstance being neither any money nor any documents were recovered from the dead body of Daya Nand. The learned

Sessions Judge has strongly observed thus :-

It is not disputed that injured Daya Nand was first carried home. If he had any documents or money on his person, the same might have been removed by the members of his family. There was no point in sending a dying man to the Hospital with money or documents in his pocket. The wiser course would be to remove them.

The case of the accused that it was a blind murder, must have taken place at night time was brushed aside without any deeper consideration.

When it was found that there was conflict in the evidence of PWs 6 & 7, the learned Sessions Judge preferred to believe PW- 7, a partisan, rather than the PW-6, the Draftsman, a Government servant. The learned Sessions Judge has dubbed him as a dishonest witness. If that be so, we fail to understand as to why the prosecution did not treat him as hostile.

When the contradiction in the evidence of PW-11 Sub Inspector Krishan Lal was pointed out with reference to sending of ruqa of the doctor along with the M.L.R., the learned Sessions Judge has stated thus:-

This discrepancy is there, but it is wholly immaterial. It appears that the memory of the S.I. was failing him on this point.

Similarly when it was contended that there was delay in the F.I.R., the learned Sessions Judge has stated that Daya Nand was in a serious condition; everybody including PW-7 were interested to save life of the deceased although the Sub Inspector of Police went to hospital at 10.20 AM, he could not meet PW-7 till 12.20. It is stated that PW-7 had gone to buy medicines and as such he was not available. The presence of PW-7 in the hospital was not spoken to by the doctor on duty and even his name was not mentioned as a person accompanying the deceased to the hospital. With all this, the learned Sessions Judge says that the delay in F.I.R. is never vital per se when the evidence otherwise inspires confidence. It is strange as to how such evidence of PW-7 alone without any corroboration could be said to inspire confidence.

Again when contradiction in the statement of ASI Kaura Ram was shown with regard to leaving police station for starting investigation, the learned Sessions Judge has stated thus:-

Surely, the statement of A.S.I. Kaura Ram does not tally with the record. But for whatever reason this lacuna may be, it does not go to the root of the matter even if we exclude the presence of Kaura Ram from the scene on 11.2.1985, the prosecution case will remain unaffected.

The learned Sessions Judge did not appreciate the evidence objectively. He failed to see that all the male members 3of the two families of the accused were involved because of enmity on account of land dispute. The evidence of PW-7, the sole eye- witness without any corroboration ought to have been scrutinized with great caution who has given the graphic details as to the injuries caused by each accused when he himself was frightened and was running away.

The trial court partly believed the recovery of weapons and clothes but the High Court totally disbelieved the recovery. This was also strong circumstance against the prosecution.

Reacting to the submission that non-examination of another eye-witness Sumer the learned Sessions Judge has stated thus :-

> But Sumer was given up as having been won over by the accused. And the phenomenon of such winning over is not unknown to the courts. In any event, Sumers non-examination does not wash away the remaining evidence.
>
> This approach of the learned Sessions Judge is unusual and strange. The learned Sessions Judge failed to objectively assess and analyse the evidence and circumstances consistent with crystalised judicial view and that it was unsafe to act on the sole evidence of PW-7 in the circumstances. An accused is presumed to be innocent until he is found guilty. The burden of proof, that he is guilty, is on the prosecution and that the prosecution has to establish its case beyond all reasonable doubts. In other words, the innocence of an accused can be dispelled by the prosecution only on establishing his guilt beyond all reasonable doubts on the basis of evidence. In this case, if only the Sessions Judge had reminded himself of the above-mentioned basic or fundamental principles of criminal jurisprudence, direction of his approach and course of his appreciation of evidence would have been different and thereby perversity in appreciation of evidence could have been avoided.
>
> It is equally unfortunate that the High court did not seriously and objectively re-appreciate the evidence placed on record as the first appellate court, but has simply appended its seal of approval to the judgment of the Sessions court. When it was pointed out that PW-7 was not a truthful witness inasmuch as he gave false statement with regard to the very litigation between the parties, the High Court observed that whatever may be the situation that a case was fixed in the appeal on 11.2.1985 and to attend the proceedings in the appellate court, someone had to go to the court. We fail to understand as to how someone had to essentially go to attend the court in appeal. The High Court proceeded to say that PW-7 had no reason to falsely implicate the accused 4 to 6 unless they were there. The observation of the High Court is that :-
>
> The manner in which Daya Nand deceased and Hoshiar Singh PW-7 were chased also shows that the accused were sufficient in number. The number and type of injuries on the dead body of Daya Nand deceased also suggests that the number of assailants

was quite big. These circumstances lend assurance to the truthful nature of this version.

We are unable to understand as to how chasing deceased Daya Nand and PW-7 showed that the accused were sufficient in numbers and similarly how the number and types of injuries on the deceased suggested that the number of assailants was quite big. If this is accepted, the number of accused could be more than six. Commenting on the non-examination of another eye-witness Sumer, the High Court has stated thus :-

As the land dispute between Daya Nand and his collateral on the one side and Sohan Lal accused on the other had resulted into this incident, Sumer, his father and other people in the village may not have liked siding with anybody. These days it is commonly seen that in such disputes, people normally abstain themselves from involving into the affairs of others by taking stand in favour or against any of the parties.

In the absence of any explanation by the prosecution as to the non-examination of the Sumer, this sort of conjecture by the High Court was neither warranted nor sustainable. The High Court has made further guess work by stating that:-

There may be other reasons for Sumer to stay away from the witness box which may not be envisaged by us.

In regard to non-examination of Dani Ram, the brother of PW-7 and Tara Chand, the cousin of PW-7, the High Court has stated that their appearance or non-appearance could hardly improve matters in favour of the accused.

It was pointed out that when Daya Nand was taken to Bhiwani hospital, Tara Chand was with him at the time of his medical examination and if PW-7 was with the deceased at that time, his presence would have been recorded by the doctor. The doctor stated that Tara Chand was there. PW-7 himself had stated that Tara Chand had accompanied him when he took Daya Nand, the deceased, to the hospital. This was another reason why Tara Chand should have been examined. Non-mentioning the name of PW-7 as accompanying the deceased to the hospital also raises the doubt as to his presence in the hospital.

The High Court has disbelieved the recovery of the clothes and weapons of the offences. With all this, the High Court affirms the judgment of conviction of the Sessions Court acting on the evidence of PW-7 alone.

We may add that the prosecution case entirely rested on the sole evidence of PW-7, who was not only interested being the cousin of the deceased and was inimical too to the accused in view of the civil litigation referred to above. It was unsafe to act on his

evidence without any corroboration. Although there were material witnesses available to corroborate, their non- examination or withholding their evidence was a serious lacuna in the prosecution case. Non-examination of another eye-witness, Sumer, whose name was mentioned in the FIR and who had witnessed the occurrence according to PW-7, was also fatal. PW-7 stated that he himself, his brother Dani Ram and his cousin Tara Chand went to the place of occurrence and lifted Daya Nand to his house and their clothes got bloodstained. The bloodstained clothes were neither produced nor seized. Failure to do so raises a serious doubt as to the version of PW-7. Dani Ram and Tara Chand were also not examined. PW-7 stated that immediately after the occurrence he ran towards his house; in front of his house Dani Ram and Tara Chand were sitting, he informed them and narrated about the incident and thereafter all three of them went to the place of occurrence and brought the deceased Daya Nand to his house. If only Dani Ram and Tara Chand were examined they would have corroborated the evidence of PW-7. This again shakes the prosecution case. The High Court disbelieved the recovery of both weapons and clothes. In all cases recovery by itself may not be material. But in this case in the absence of corroboration to the evidence of PW-7, the recovery aspect assumed importance. The civil litigation was started in 1982; the suit was decreed in favour of Sohan, accused no. 1 in 1993; the appeal filed by the deceased and PW-7 was pending on the date of occurrence; there was no immediate provocation or cause for committing the offence on 11.2.1985.

The credibility of PW-7 and truthfulness of his evidence in the circumstances needed to be scrutinized with great care and caution. His evidence does not inspire confidence for the reasons that (a) though he was a party to the civil suit as a defendant along with deceased Daya Nand, he falsely stated that it was deceased Daya Nand who filed the suit, when as a matter of fact it was the accused no. 1 Sohan, who had filed the suit. (b) He had made a wrong statement as to the possession of the disputed land but he was forced to admit the possession of accused Sohan in the cross-examination. (c) He stated, When the Draftsman came to the spot I was not there. PW-6, the draftsman clearly stated in his evidence that he prepared the site plan Exh. PN on the pointing out of PW-7 and Sumer (not examined by the prosecution). (d) He stated, We had picked up Daya Nand from the spot on our hands. Our clothes had got blood stained in this process. He further stated, I had not shown my blood stained clothes to the police. I had changed my clothes before leaving for Bhiwani.

In the light of what is stated above, after deeper consideration, detailed examination of evidence and probabilities of the case, in the light of the arguments advanced by the learned counsel on either side, we have no hesitation in holding that the Sessions Court as well as the High Court have concurrently and manifestly erred in convicting and sentencing the accused. In a case like this it is our duty to interfere with the impugned judgment and order to do substantial justice. Under these circumstances and in view of the discussion made above, we have no hesitation in holding that the

prosecution has failed to establish the guilt of the accused beyond reasonable doubt. Hence we set aside the judgment and order of the Sessions Court as affirmed by the High Court. Accordingly, these appeals are allowed and the accused are acquitted and their bail bonds shall stand discharged.

.....J. (U.C. BANERJEE) .....J. (SHIVARAJ V. PATIL) New Delhi Dated: 02.03.2001