Hethubha Alias Jithuba Madhuba & Ors vs The State Of Gujarat on 13 March, 1970

Equivalent citations: 1970 AIR 1266, 1971 SCR (1) 31, AIR 1970 SUPREME COURT 1266, 11 GUJ L R 863, 1970 SC CRI R 418, (1970) 2 SCJ 635, 1970 SCD 404, 1970 MADLJ(CRI) 814

Author: A.N. Ray

Bench: A.N. Ray, I.D. Dua

PETITIONER:
HETHUBHA ALIAS JITHUBA MADHUBA & ORS.

Vs.

RESPONDENT:
THE STATE OF GUJARAT

DATE OF JUDGMENT:
13/03/1970

BENCH:
RAY, A.N.
BENCH:
RAY, A.N.
DUA, I.D.

CITATION:
1970 AIR 1266 1971 SCR (1) 31
1970 SCC (1) 720
CITATOR INFO :
F 1971 SC1836 (6)
E 1981 SC 365 (2,3)

ACT:
Code of Criminal Procedure, 1898, s. 429--Difference of opinion among two Judges--If third Judge can deal with whole case.
Indian Penal Code, 1860--S. 34--Scope of--Accused acting pursuant to pre-arranged plan to attack two persons--Killing one person by mistake instead of the other--If 'common intention' can be inferred.

HEADNOTE:
The three appellants were charged with offences under ss.

302 and 323 read with s. 34, of the Penal Code and appellants 1 and 2 were charged with the individual offences under ss. 302 and 323 for intentionally causing the death of A, mistaking him for V and for causing simple hurt to V. The Sessions Judge acquitted all the three accused under s. 302 read with s. 34 but convicted them under s. 304 Part 11 read with s. 34 and sentenced them to suffer rigorous imprisonment for five years. Appellants 1 and 2 were also convicted for the offence under s. 323 and appellant 3 was convicted for the offence under s. 323 read with s. 34. All three were sentenced for these convictions to rigorous imprisonment for terms. to run concurrently.

On appeal to a Division Bench of the High Court one learned Judge held, that the first appellant alone was responsible for the fatal injury on A and found him guilty under s. .302, while the second and third appellants were found guilty under s. 324 read with s.. 34. The second learned Judge was of the view that all the accused must be acquitted as he was not satisfied with, the evidence and proof of.-the identity. of the accused. The case was then placed- before , a, third learned Judge under s. 429 Cr. P.C. who held that the first appellant must 'be convicted under s. 302 while the second and third appellants must be convicted, under s. 302 read with s. 34 and all of them must be sentenced to suffer rigorous prisonment for life. The conviction of the first and second appellants under s. 323 and of the third appellant under s. 323 read with s. 34 was upheld.

In appeal to this Court it was contended (i) that the third learned Judge under s. 429 Cr. P.C. could only,.deal with the differences between the two learned Judges and not with the whole case; and (ii) that there was no comnmittee intend on within the meaning of supp I.P.C. on the part of the three appellants to kill A as he was attacked by, mistake.

HELD : Dismissing the appeal.

(i) Section on of the Criminal Procedure Code states "that when the judges comprising the Court of Appeal are equally divided in opinion the case with their opinion thereon shall be laid before another Judge of the same Court and such Judge, after hearing,if any, as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such before another Judge, and, secondly, the Judgment and order will follow the, opinion of the third learned Judge. It is, therefore, manifest that the third learned Judge can or will deal with the whole case. [35 D-F]

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Babu and Ors. v. State of Uttar Pradesh, [1965] 2 S.C.R. 771; referred to.

(ii) The plea that A was mistaken for V would not take away the common intention established by a pre-arranged plan and participation of all the accused in furtherance of common intention. The act might be done by one of the several persons in furtherance of the common intention of them all

without each one of them having intended to do the particular act in exactly the same way as an act might be done by one member of an unlawful assembly in prosecution of the common intention which the other members of the unlawful assembly did not each intend to be don.-. [36 H]

On the facts, it was clear that the attack took place in pursuance of a pre-arranged plan., The attack by appellants 1 and 2 on A and the evidence showing that appellant 3 held back P during the attack all proved common intention, participation and united criminal behaviour of all; appellant 3 was therefore equally responsible and guilty with appellants 1 and 2 who had attacked A.

Shankarlal Kachrabbhai and Ors. v. State of Gujarat, [1965] 1 S.C.R. 287; referred to.

The dominant feature of s. 34 is the element of participation in actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert. There is a pre-arranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in s. 34 of the Indian Penal Code. The existence of common intention is to be the basis of liability. That is why the prior concert and the pre-arranged plan is the foundation of common intention to establish liability and guilt. [36 E]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.100 of 1967.

Appeal from the judgment and order dated March 13,1967 of the Gujarat High Court in Criminal Appeal No. 566 of 1965. J. L. Hathi, K. L. Hathi and K. N. Bhat, for the appellant. S. K. Dholakia, Badri Das Sharma and S. P. Nayar, for the respondent.

The Judgment of the Court was delivered by Ray, J.-This is an appeal from the judgment of the High Court of Gujarat.

The appellants were charged with offences under sections 302 and 323 read with section 34 of the Indian Penal Code. Accused Nos. 1 and 2 were charged for the individual offences under sections 302 and 323 of the Indian Penal Code for intentionally causing death of Amarji and for causing simple hurt to Vaghji Mansangji. The deceased Amarji was the brother-in-. law (sister's husband) of Vaghji Mansangji. Two important eyewitnesses were Pabaji Dajibha and Pachanji Kesarji. Amarji was Pabaji's mother's sister's son. Pachanji is the first cousin of Vaghji Mansangji.

Accused No. 3 Mulubha is the maternal uncle (mother's bro- ther) of accused No. 2 Ranubha Naranji and accused No. 1 Hethubha alias Jitubha is the son of another maternal uncle of accused No. 2.

Accused No. 2 was residing at Bhalot. Vaghji also resided there. About two months prior to the date of the occurrence on 26 January, 1965 at 8 p.m. there was a quarrel between the children of the house of accused No. 2 Ranubha and the children of the house of Vaghji. There was exchange of words between the members of the two families. Accused No. 2 Ranubha and his father Naranji assaulted the wife of Vaghji. Vaghji then filed a complaint. Ultimately, the complaint was compounded on the intervention of accused No. 3 Mulubha. The prosecution case is that because of the behaviour of accused No. 2 Ranubha towards the wife of Vaghji, Ranubha had to leave his own village of Bhalot and had to go to reside with his maternal uncles at Bhuvad. The further prosecution case is that the relations of Ranubha thereafter went to village Bhalot for fetching the goods of Ranubha and at that time they had threatened Vaghji and others that Ranubha had to leave the village and Vaghji and others would not be able to continue to, reside in the village.

On 26 January, 1965 Amarji, Pabaji Vaghji and Pachanji took their carts of fuel wood for selling it in the village Khedoi which is about 7 miles from Bhalot. They left Bhalot at about 10 a.m. and reached Khedoi at about 1 p.m. The cart loads of fuel wood were sold in Khadoi by about 5 p.m. They made some purchases and then left Khedoi at about 7 p.m. While returning home Amarjis cart was in the front and Pabaji, Pachanji and Vaghji followed him in. that order. There was not much distance between each cart. When the carts had gone about 2 miles from Khedoi and they were about to enter village Mathda, the three accused persons were noticed waiting on the roads. All of them caught hold of Amarji and attacked him who was in the first cart. In the meantime, accused No. 3, Mulubha, caught hold of the hand of Pabaji and prevented him from going near Amarji. Mulubha was armed with an axe. Accused Nos. 1 and 2 dealt knife blows to Amarji. The prosecution suggested that the accused persons realised their mistake that instead of Vaghji they had attacked Amarji, and so both the accused Nos. 1 and 2 left Amarji and went to the cart of Vaghji and gave blows with sticks to Vaghji. On seeing the attack on vaghji Pabaji intervened and asked the accused to desist from attacking Vaghji any longer as they had already killed Amarji. Thereupon the accused stopped attacking Vaghji. By this time Amarji had come staggering to the spot where Pabaji was standing. Then Amarji was placed in one of the carts and Vaghji was made to sit in that cart. Pachanji drove his cart first and the two carts without any drivers which had been formerly driven by Vaghji and Amarji, were kept in the middle and Pabaji with the two injured men in his cart was driving his cart last. The carts were taken to village Khedoi. It is the prosecution case that the three accused persons followed these carts up to a certain distance and then accused Nos'. 1 and 2 left while accused No. 3 disappeared near Khari Vadi. Pabaji took the carts to Moti khedoi and saw police head constable Banesing who had come to Khedoi for patrolling work. Banesing was attached to the police outpost at Bhuvad. Banesing directed these persons to take Amarji to the Khedoi hospital. By that time Amarji had died. Banesing left Khedoi with Pabaji for Anjar police station which is about 8 miles from Khedoi. They reached, Anjar at about 11 p.m. and Pabaji's F.I.R. was recorded before police sub-inspector Khambholja. The police sub- inspector then preceded to, Khedoi hospital. Amarji was declared to be dead. The police sub-inspector recorded the statements of Vaghji and Pachanji and :then took steps in the investigation of the case.

At the trial all the three' accused denied having committed the offence.,., The Sessions Judge acquitted all the three persons under section 302 read with section 34. He however convicted all the accused for the offence punishable under section 304 Part II read,with section 34 and sentenced

them to suffer rigorous imprisonment for five years. Accused Nos. 1 and 2 were convicted for the offence under section 323 and accused No. 3 was convicted for the offence under section 323 read with section 34 of the Indian Penal Code. Accused Nos.. 1 and 2 were sentenced to suffer rigorous imprisonment for three months while accused No. 3 was sentenced to suffer rigorous imprisonment for two months. All the sentences were to run concurrent All the accused filed appeals against their convictions. Before the Division' Bench in the High Court of Gujarat Divan, J. held that accused No. 1 alone was responsible for the fatal injury on Amarji and he was found guilty for the offence under section 302 while accused Nos. 2 and 3 were found, guilty for the offence under section 324 read with section 34. Shelat, J. was of the view that all the accused must acquitted because he' was not satisfied with the evidence and proof of the identity of the accused. The case was then placed under Section 429 of Criminal' Procedure Code before Mehta, J. who held that accused No. 1 must be Convicted for the offence under section 302 while accused Nos. 2 and 3 must be convicted for the offence under section 302 read with section 34 and all of them should be sentenced to suffer rigorous imprisonment for life. The conviction of accused Nos. 1 and 2 under section 323 and of accused No. 3 under section 323 read with section 34 was upheld. The conviction of all the accused under section 304 Part 11 was altered by convicting accused No. 1 under section 302 and accused Nos. 2 and 3 under section 302 read with section 34 of the Indian Penal Code.

Counsel for the appellants contended first that the third learned Judge under section 429 of the Criminal Procedure Code could only deal with the differences between the two learned Judges and not with the whole case. The same contention had been advanced before Mehta, J. in the High Court who rightly held that under section 429 of the Criminal Procedure Code the whole case was to be dealt with by him. This Court in Babu and Ors. v. State of Uttar Peadesh (1) held that it was for tic third learned Judge to decide on what points the arguments would be heard and therefore he was free to resolve the differences as he thought fit. Mehta, J. here dealt with the whole case. Section 429 of the, Criminal Procedure Code states "that when the Judges comprising the Court of Appeal are equally divided in opinion, the case with their opinion thereon, shall be laid before another Judge of the same Court and such Judge, after such hearing, if any, as he thinks fit shall deliver his opinion, and the judgment or order shall follow such opinion". Two things are noticeable; first, that the, case shall be laid before another Judge, and, secondly, the judgment and order will follow the opinion of the third learned Judge. It is, therefore, manifest that the third learned Judge can or will deal with the whole case.

The second and the main contention of counsel for the ap- pellants was that there was no common intention to kill Amarji. The finding of fact is, ,that the attack the three accused was a concerted one under prearranged plan. Amarji Was attacked by mistake :but whosoever inflicted, injury in the region of the collar-bone of Amarji must be held guilty of murder. under section 302. Amarji was further found to have been attacked by accused Nos. 1 and 2 and accused No. 3 who was armed with an axe caught hold of the hand of Pabaji. The injury on Amarji was an incised wound 1-3/4" *3/4" over the left side of the neck neck just above the left collar- bone. The direction of the wound was was towards right and downwards.The other injury was incised (1) [1965] 2 S.C.R. 771.

wound 1" * 1/2" * 1/2" over the chest (right side) near the middle line between the 6th and 7 ribs.

The- evidence establishes these features; first, that all the accused were related; secondly, they were residing at Bhuvad at the relevant time; thirdly, all the three accused made sudden appearance on the scene of the occurrence; fourthly, they started assault as soon as the carts arrived at the scene of the offence; fifthly, the way in which Amarji was attacked by accused Nos. 1 and 2 and stab wounds were infficted on him and the manner in which accused No. 3 held up Pabaji would show that the three accused were lying in wait under some pre-arranged plan to attack these persons when they were returning to Bhalot. It therefore follows that the attack took place in pursuance of the pre-arranged plan and the rapidity with which the attacks Were made also shows the pre-concerted plan. The attack by accused Nos. 1 and 2 on Amarji and the holding up, of Pabaji by accused No. 3 all prove ,common intention, participation and united criminal behaviour of all and therefore accused No. 3 would be equally responsible with ,accused Nos. 1 and 2 who had attacked Amarji.

This Court in the case of Shankarlal Kachrabhai and Ors. v. State of Gujarat(1) said that a mistake by one of the accused as to killing X in place of Y would not displace the common intention if the evidence showed the concerted action in furtherance of pre-arranged plan. The dominant feature of section 34 is the ,element of participation in actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert. There is a pre-arranged plan which is proved either from conduct or from circumstances of from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in section 34 of the Indian Penal Code. The existence of common intention is to be the basis of liability. That is why the prior concert and the pre- arranged plan is the foundation of common intention to establish liability and guilt.

Applying these principles to the evidence in the present case it appears that there was pre-arranged plan of the accused to commit offences. All the accused were lying in wait to attack the party of Amarji, Vaghji, Pabaji and Pachanji. Amarji was in the forefront. The accused attacked him. Vaghji was also attacked and prevented from going to the relief of Amarji. The plea that Amarji was mistaken for Vaghji would not take away the common intention established by pre-arranged plan and participation of all the accused in furtherance of common intention. The act might be ,done by one of the several persons in furtherance of the common intention of them all, without each one of them having intended (1) [1965] 1 S.C.R. 287.

to do the particular act in exactly the same way as an act might be done by one member of an unlawful assembly in prosecution of the common intention which the other members of the unlawful assembly did not each intend to be done. In view of the evidence that Amarji was killed in furtherance of the common intention of all the accused the appellants are guilty of murder. 'In Shankarlal's case(1) this Court said that if the common intention was to kill A and if one of the accused killed B to wreck his private vengeance, it could not be possibly in furtherance of the common intention for which others can be liable. But if on the other hand he killed B bona fide believing that he was A and the common intention was to kill A the killing of B was in furtherance of the common intention. All the three accused in the present case were lying in wait and assaulted the driver of the first cart and stabbed him in pursuance of their prearranged plan- Therefore, all the three accused including the appellant must share the liability of murder under section 302 read with section 34 of the Indian Penal Code. Further, in view of the finding that the the- concerted plan was to cause injuries to the intended victim with dangerous weapons with which the assailants were

lying in wait, the liability of the appellant is established. The conclusion of Mehta, J. is correct. The appeal, there- fore, fails and is dismissed. The accused must surrender to the bail and serve out the sentences.

R.K.P.S. Appeal dismissed..

(1) [1965] 1 S.C.R. 287.