

RAMESHWAR AND ANOTHER

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v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 2448 of 2009)

AUGUST 16, 2019

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[R. BANUMATHI AND A. S. BOPANNA, JJ.]

Penal Code, 1860: s.302 r/w s.34 – Conviction and life imprisonment – Prosecution case was that on the fateful day, appellant no.1 armed with farsa (axe) along with five other accused persons including appellant no.2 armed with rifles and danda came near the house of the victim-deceased – Appellant no.1 attacked the deceased with farsa and exhorted others to kill the deceased – Deceased ran out of the courtyard – Four co-accused standing at the door of adjacent house caught hold of the deceased – Mother of deceased tried to save the deceased and in the process received injuries near her ear – Appellant no.2 fired gun shot at the deceased which hit his back – Appellant no.1 took gun from accused no.3 and fired at the deceased – When villagers came, all the accused fled away from the spot – Trial court convicted appellant no.1 and 2 under s.302 r/w s.34 while it acquitted all the other co-accused – High Court affirmed the conviction and sentence of life imprisonment holding that even though there were contradictions in the statement of PW-1-complainant (wife of deceased) recorded in the court and her statement in the FIR, however, since the prosecution was able to prove that the appellants shared the common intention to commit the murder of the deceased, the court can invoke s.34 and in such a situation, it was not necessary for the prosecution to prove that the gun shot injuries which resulted in the death of the deceased was caused by which of the two appellants – On appeal, held: To invoke s.34, it must be established that the criminal act was done by more than one person in furtherance of common intention of all – It must, therefore, be provided that there was common intention on the part of several persons to commit a particular crime; and in furtherance of that common intention, the crime was actually committed by them – The presence of appellant No.2 was established by consistent evidence of the eye-witnesses – Admittedly, appellant

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- A *No.2 was armed with rifle and, thus, shared the common intention acting in concert with appellant No. 1 – When appellant No.2 has been proved to have acted in furtherance of the common intention, his conviction under s.302 was rightly affirmed by the High Court by invoking the aid of s.34 – Since appellant No.1 passed away during pendency of the appeal, and, therefore, appeal against him is dismissed as abated.*
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Dismissing the appeal, the Court

- HELD :** 1. As per the post-mortem certificate, the deceased sustained one gun shot injury, that is, circular hole of 1.5 cm on his back. PW-15-the Investigating Officer had seized one .12 bore cartridge and one .12 bore empty cartridge from the spot. PW-15 also seized two plastic pieces which were emitting the smell of gun power and these material objects were seized under seizure memo. Insofar as accused No.3 (since acquitted) who is said to have fired a gun shot, none of the witnesses have stated as to which part of the body of the deceased the said gun-shot was hit. Considering the fact that there was no cogent evidence against accused No. 3, the trial court granted benefit of doubt and acquitted him. As rightly held by the High Court, the evidence against the appellants-accused is not identical as against the co-accused No. 3 who was acquitted. [Para 11] [368-G-H; 369-A-B]

2. As held by the High Court, even assuming that appellant No.1 has fired gun shot, the conviction of appellant No.2 can be sustained with the aid of Section 34 IPC. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be provided that (i) there was common intention on the part of several persons to commit a particular crime; and (ii) in furtherance of that common intention, the crime was actually committed by them. In the instant case, the presence of appellant No.2 was established by consistent evidence of the eye-witnesses viz. PWs 1, 2, 6 and 7. Admittedly, appellant No.2 was armed with rifle and thus shared the common intention acting in concert with accused-appellant No. 1. When appellant No.2 has been proved to have acted in furtherance of the common intention, his conviction under Section 302 IPC was rightly

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affirmed by the High Court by invoking the aid of Section 34 IPC. There is no reason for warranting interference with the impugned judgment. The conviction of appellant No.2 under Section 302 IPC read with Section 34 IPC and the sentence of life imprisonment imposed upon him is affirmed. Since the appellant No.1 has passed away, the appeal against him is dismissed as abated. [Paras 12-13] [369-B-F]

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2448 of 2009.

From the Judgment and Order dated 25.06.2008 of the High Court of Madhya Pradesh, Jabalpur Bench, Gwalior in Criminal Appeal No. 275 of 1995.

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Nagendra Rai, Sr. Adv., Rajesh, Advs. for the Appellants.

Rahul Kaushik, Ms. Bhuvneshwari Pathak, Ms. Shilpi Satyapriya Satyam, Siddharth Chakravorty (for Mrs. Swarupama Chaturvedi,), Advs. for the Respondent.

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The Judgment of the Court was delivered by

R. BANUMATHI, J.

1. This appeal arises out of the judgment dated 25.06.2008 in Criminal Appeal No.275 of 1995 passed by the High Court of Madhya Pradesh at Gwalior Bench in and by which the High Court has affirmed the conviction of both the appellants (accused No.6 and 5) under Section 302 IPC read with Section 34 IPC and the sentence of life imprisonment imposed upon them along with fine of Rs.5,000/- each.

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2. Brief facts which led to filing of this appeal are:-

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On 08.01.1984 at about 10:00 am, complainant-Subhadra (PW-1), wife of deceased Ram Autar was cooking food in her house and deceased Ram Autar was taking the meals. After taking meals, deceased went out to the courtyard of the house for drinking water. At that time, appellant No.1-Rameshwari with whom the deceased had rivalry came to the courtyard armed with a *farsa* (axe) and five other accused persons armed with rifles and *danda* were also standing at the door of one Kedar Seth, neighbour and amongst them, appellant No.2-Balaram was also there. Appellant No.1 exhorted others to kill the deceased Ram

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- A Autar and thereafter, appellant No.1 attacked the deceased with *farsa*. Deceased ran out of the courtyard. Four persons standing at the door of Kedar Seth caught hold of deceased. Appellant No.1-Rameshwar and accused No.1-Ram Bharosey came there and joined the other co-accused. At that time, Tejabai, mother of deceased came and laid down on Ram Autar in order to save him. Accused separated Tejabai and when Tejabai tried to catch hold of *farsa* from accused Rameshwar, she sustained injury near her ear. Case of prosecution is that accused Rameshwar and Ram Bharosey caught hold of deceased and accused Balaram fired gun shot at deceased Ram Autar which hit the back of deceased due to which deceased fell down sustaining the gun shot injury.
- B Accused Rameshwar also is said to have taken the gun from accused No.3-Umacharan and fired at deceased Ram Autar due to which, deceased Ram Autar sustained injuries at the hands of accused Rameshwar also. When the villagers came, all the accused fled away from the spot. On the complaint lodged by PW-1-Subhadra, wife of deceased, FIR in Crime Case No.08/84 was registered under Sections 452, 147, 148, 302, 302 read with Section 149 IPC and under Sections 11 and 13 of the M.P. Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981.

3. Dr. P.S. Tomar, PW-10 had conducted the post-mortem and found the following injuries on the dead body of deceased Ram Autar:-

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 - (i) One circular hole of 1.5 cm on the back of deceased, situated in the middle of spinal cord;
 - (ii) Injury in the muscle;
 - (iii) Spinal bone of deceased was fractured;
 - (iv) Injury in lower blood vein.

Five pellets were found inside the spinal cord of deceased and all these pellets were sealed and handed over to Police. PW-10 issued post-mortem certificate (Ex.P6) opining that deceased died of the injuries and injury No.1 was sufficient to cause death. Appellant No.1-Rameshwar was arrested on 23.04.1984 and on being interrogated, he gave the statement which led to recovery of axe in the *gonad* under Ex.-P7-seizure memo. After completion of investigation, charge sheet was filed against the appellants and other four accused in the aforesaid offence.

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4. In order to prove the guilt of the accused, prosecution has examined PW-1-Subhadra, wife of deceased, PW-2-Ram Narayan, father of deceased, PW-6-Katori Bai and PW-7-Ram Gopal and the neighbours all of whom have spoken about the occurrence and also about the overt act of the accused. Prosecution has also examined doctor who conducted autopsy and other official witnesses. Upon consideration of the oral evidence, the trial court held that the oral evidence is amply corroborated by the medical evidence and also the recovery of axe at the instance of appellant No.1-Rameshwari. The trial court held that the prosecution has established the guilt of the accused beyond reasonable doubt and convicted appellant No.1-Rameshwari and appellant No.2-Balaram under Section 302 IPC read with Section 34 IPC and sentenced each of them to undergo life imprisonment along with fine of Rs.5,000/- each. Insofar as offence under M.P. Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam is concerned, the trial court held that there is no evidence on record to prove that the incident was done with the help of any dacoit and so, they were acquitted under the Act. The trial court acquitted all other accused from all the charges. Being aggrieved, the appellants have preferred appeal before the High Court.

5. The High Court held that even though there are contradictions in the statement of PW-1 recorded in the court and her statement in the FIR, since the prosecution has proved that the appellants have shared the common intention to commit the murder of the deceased, the court can invoke Section 34 IPC and in such a situation, it was not necessary for the prosecution to prove that the gun shot injuries which has resulted in the death of the deceased was caused by which of the two appellants. The High Court affirmed the conviction of the appellants under Section 302 IPC read with Section 34 IPC and the sentence of life imprisonment imposed upon them. Being aggrieved, the appellants are before us.

6. During the pendency of the appeal before this Court, appellant No.1-Rameshwari passed away and the appeal against him stands abated.

7. On behalf of appellant No.2, we have heard the submission of Mr. Nagendra Rai, learned senior counsel. We have also heard Mr. Rahul Kaushik, learned counsel on behalf of the respondent and perused the impugned judgment and other materials on record.

8. Learned senior counsel appearing on behalf of appellant No.2 has submitted that the High Court erred in affirming the conviction of

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- A the appellant No.2-Balaram by invoking Section 34 IPC. It was submitted that there was no clear evidence for arriving at the conclusion that there was any prior concert or meeting of mind before the commission of offence. It was further submitted that the deposition of the eye-witnesses viz. PW-1-Subhadra, PW-2-Ram Narayan, PW-6-Katori Bai and PW-7-Ram Gopal are inconsistent and contradictory to each other and while so, the trial court erred in basing the conviction upon such inconsistent evidence and the High Court erred in affirming the conviction and the impugned judgment convicting appellant No.2-Balaram is not sustainable.
- B 9. Learned counsel appearing on behalf of the respondent-State has submitted that upon appreciation of oral evidence of the eye-witnesses and other evidence, the High Court rightly affirmed the conviction of the appellants and the impugned judgment warrants no interference.
- C 10. Insofar as the contention that there are contradictions between the evidence of PW-1 made before the court and her statement in Dehati Nalishi (Ex.-P1), it was submitted that in Ex.-P1-Dehati Nalishi, PW-1 has stated that there were three gun shots - one by accused Rameshwar, one by accused Balaram which caused injury on the back of the deceased and one by accused Umacharan which caused injury on the body of the deceased. In their evidence before the court, PWs 1 and 2 have stated that appellant No.1 had fired gun shot upon the deceased; whereas, PWs 6 and 7 have stated that appellant No.2 had fired the deceased with his rifle. The trial court held that such contradictions would not affect the prosecution case because in Dehati Nalishi, PW-1 has clearly stated that appellant No.2-Balaram had fired upon the deceased from his rifle. The statement of PW-1 in Ex.-P1 appears to be more reliable because her statement in Ex.-P1 is corroborated by the statement of PWs 6 and 7. As per the evidence of PWs 6 and 7, appellant No.2 armed with rifle was present at the spot and that there were two gun shots at the time of the incident which were fired by accused Rameshwar and Balaram.
- D 11. As per Ex.-P6-post-mortem certificate, deceased Ram Autar sustained one gun shot injury, that is, circular hole of 1.5 cm on his back. Ram Lakhan (PW-15)-the Investigating Officer had seized one .12 bore cartridge and one .12 bore empty cartridge from the spot. PW-15 also seized two plastic pieces which were emitting the smell of gun power and the above material objects were seized under Ex.-P11-seizure memo.
- E H Insofar as accused No.3-Umacharan (since acquitted) who is said to

have fired a gun shot, none of the witnesses have stated as to which part of the body of the deceased the said gun-shot was hit. Considering the fact that there was no cogent evidence against Umacharan, the trial court granted benefit of doubt and acquitted him. As rightly held by the High Court, the evidence against the appellants-accused is not identical as against the co-accused Umacharan who was acquitted.

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12. Learned senior counsel for appellant No.2 mainly urged that there are contradictions in the evidence of the witnesses as to who fired gun shots on deceased Ram Autar. As held by the High Court, even assuming that appellant No.1-Rameshwar has fired gun shot, the conviction of appellant No.2-Balaram can be sustained with the aid of Section 34 IPC. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be provided that (i) there was common intention on the part of several persons to commit a particular crime; and (ii) in furtherance of that common intention, the crime was actually committed by them. In the present case, the presence of appellant No.2 has been established by consistent evidence of the eye-witnesses viz. PWs 1, 2, 6 and 7. Admittedly, appellant No.2 was armed with rifle and thus shared the common intention acting in concert with accused Rameshwar. When appellant No.2 has been proved to have acted in furtherance of the common intention, his conviction under Section 302 IPC was rightly affirmed by the High Court by invoking the aid of Section 34 IPC. We do not find any reason for warranting interference with the impugned judgment.

13. In the result, the conviction of appellant No.2-Balaram under Section 302 IPC read with Section 34 IPC and the sentence of life imprisonment imposed upon him is affirmed and this appeal is dismissed qua appellant No.2. Since the appellant No.1-Rameshwar has passed away, the appeal against him is dismissed as abated. The appellant No.2 shall surrender within a period of six weeks from today to serve the remaining period of sentence, failing which he shall be taken into custody.