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**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
AJAY RASTOGI; ABHAY S. OKA; JJ.**

CRIMINAL APPEAL NO. 1661 OF 2009; March 15, 2022
GADADHAR CHANDRA v. THE STATE OF WEST BENGAL

Indian Penal Code, 1860; Section 34 - Common intention pre-supposes prior concert. It requires meeting of minds, a pre-arranged plan before a man can be vicariously convicted for the criminal act of another. The criminal act must have been done in furtherance of the common intention of all the accused. In a given case, the plan can be formed suddenly. (Para 9)

Summary: Appeal against concurrent conviction of appellant by invoking Section 34 IPC - Allowed - The prosecution has failed to prove ingredients of Section 34 of IPC in this case - non- examination of two crucial eye witnesses makes the prosecution case about the existence of a prior concert and pre-arranged plan extremely doubtful.

For Appellant(s) Mr. Siddhartha Dave, Sr. Adv. Ms. Soumya Gupta, Adv. Mr. Aditya Vaibhav Singh, Adv. Ms. Jemiben, Adv. Ms. Vidhi Thaker, Adv. Ms. Aarushi Singh, Adv. Mr. Rameshwar Prasad Goyal, AOR; For Respondent(s) Mr. Suhaan Mukerji, Adv. Mr. Nikhil Parikshith, Adv. Mr. Vishal Prasad, Adv. Mr. Abhishek Manchanda, Adv. Mr. Sayandeep Pahari, Adv. Mr. Tanmay Sinha, Adv. for M/s. PLR Chambers And Co.

J U D G M E N T

ABHAY S. OKA, J.

1. The Sessions Court has convicted the appellant-accused for an offence punishable under Section 302 read with Section 34 of the Indian Penal Code (for short 'IPC'). The appellant has been sentenced to undergo rigorous imprisonment for life. The appeal preferred by the appellant against the judgment of the Sessions Court has been dismissed by the impugned judgment of the Calcutta High Court dated 23rd December 2008.

FACTUAL ASPECTS

2. The incident is of 2nd August 1976. PW1 Shri Khiroda Mohan Paul, Head Master of a High School, and the deceased Purna Chandra Ghosh, assistant teacher in the said school, were returning home from the school at about 5.30 pm. Though the deceased was having a bicycle, both were proceeding to their village on foot. When they came near the railway gate, they noticed that the accused (the appellant and Arjun Mondal, a juvenile) were sitting along with Susanta Kr. Chandra and Rabu. The appellant and the said Arjun came running from behind and caught hold of the bicycle of deceased Purna Chandra Ghosh. The appellant questioned the deceased as to why he had assaulted his elder brother. Words were exchanged between the appellant, Arjun and PW1 as well as the deceased. The appellant and Arjun took out knives. When PW1 tried to prevent the assault, the appellant brandished his knife and threatened to assault PW1 in case he obstructs. There was a scuffle between Arjun and the deceased. The deceased tried to defend himself by using his bicycle and umbrella. In the scuffle, Arjun stabbed the deceased with his knife. Thereafter, both the appellant and Arjun left the place.

3. On the earlier date, this Court directed the learned counsel appearing for the respondent-State of West Bengal to take instructions on the progress of the trial against Arjun before the

Juvenile Justice Board. The learned counsel appearing for respondent stated that the record of the Juvenile Justice Board has been destroyed in the floods of 2000. Hence, the case against Arjun has not progressed.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE APPELLANTS

4. Shri Siddhartha Dave, the learned senior counsel appearing for the appellant firstly submitted that Section 34 of IPC was not attracted in the present case. He urged that prior concert and prearranged plan to kill the deceased has not been established. He submitted that the only overt act alleged against the appellant is of brandishing a knife and threatening to assault PW1. There was a scuffle between Arjun and the deceased. It was Arjun who stabbed the deceased which led to his death. He submitted that though the knife allegedly used by Arjun was recovered, the knife allegedly used by the appellant was admittedly not recovered. He urged that as Section 34 of IPC will not apply to this case, the conviction of the appellant will have to be set aside. He stated that the appellant has undergone incarceration for approximately seven years and six months.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE RESPONDENT

5. Shri Nikhil Parikshith, the learned counsel appearing for the respondent State, submitted that the testimony of PW1, PW6, PW11 and PW13 shows that there was prior a enmity between the appellant and the deceased, which establishes the motive. He submitted that the statement of Arjun recorded under Section 164 of the Criminal Procedure Code, 1973 (for short 'CrPC') corroborates the role played by the appellant of brandishing his knife. He urged that the non-recovery of the knife used by the appellant is of no consequence as there is a cogent evidence against the appellant. He submitted that there was a meeting of minds and prior concert on the part of the appellant and Arjun. He submitted that the statements made by PW1 in his cross-examination show that blows were exchanged between the appellant and the deceased. He submitted that the appellant actively assisted Arjun by holding the shirt's collar of the deceased. He pointed out that the appellant made no effort to prevent Arjun from committing the crime. He urged that now the appellant cannot raise a contention regarding the absence of common intention as the said contention was never raised before the Trial Court or the High Court.

6. He relied upon various decisions of this Court on Section 34 of IPC. The said decisions are ***Rajkishore Purohit v. State of Madhya Pradesh and others, (2017) 9 SCC 483; Dhanpal v. State (NCT of Delhi), (2020) 5 SCC 705 and Pandurang, Tukia and Bhillia v. State of Hyderabad, AIR 1955 SC 216***. He submitted that no interference is called for with the judgments of the Sessions Court and High Court.

CONSIDERATION OF SUBMISSIONS

7. The prosecution's case is that PW1 and the deceased were proceeding to their village at about 5.30 in the evening on 2nd August 1976. When they reached the railway gate, they saw that the appellant, Arjun, Susanta Kr. Chandra and Rabu were sitting together. Only the appellant and Arjun got up and started running after PW1 and the deceased. Appellant questioned the deceased why he had assaulted one Dam (Subhas Chandra), the appellant's elder brother. The overt act alleged against PW1 is that after words were exchanged, he brandished a knife and threatened PW1 to assault. After PW1 retreated steps, Arjun tried to assault the deceased. By using his bicycle, the deceased tried to defend himself. There was a scuffle between the deceased and Arjun, and in the scuffle, Arjun stabbed the deceased. Arjun fled to jungle, and the appellant also left the place.

8. A question was asked to PW1 in the cross-examination that how many blows were exchanged between Gangadhar and the deceased. In response, PW1 stated that Arjun administered blows to the deceased, and at that time, Gangadhar was holding the shirt collar of the deceased. PW1 pleaded ignorance when a suggestion was given to him in the cross-examination that Arjun and the appellant also suffered injuries.

9. Apart from PW1, there is no other material witness. The prosecution relied upon the statement of Arjun recorded under Section 164 of CrPC. Even assuming that it is a confessional statement, in view of Section 30 of the Indian Evidence Act, 1872, the same cannot be used against the appellant as Arjun is being separately tried before the Juvenile Justice Board. It is not the prosecution case that the appellant and Arjun were waiting for the deceased near the road by which the deceased used to go back to his village after attending the school. PW1 had stated that along with Arjun and the appellant, Susanta Kr. Chandra and Rabu were also sitting. When the deceased and PW1 came there, the appellant and Arjun ran after them. The relationship between the appellant and Arjun is not brought on record. If, according to the prosecution case, there was a meeting of minds and prior concert between the appellant and Arjun when they were sitting with Susanta Kr. Chandra and Rabu, the prosecution ought to have examined both Susanta Kr. Chandra and Rabu. In fact, they appear to be eye witnesses to the incident. They were privy to the conversation between the appellant and Arjun. The prosecution has not explained its failure to examine these two crucial witnesses, who apart from being eye witnesses, were sitting along with the appellant and Arjun just before the incident near the place of incident. The prosecution has withheld the evidence of two material witnesses who could have thrown light on the incident. Hence, this is a case for drawing an adverse inference against the prosecution. Moreover, the knife allegedly used by the appellant has not been recovered. According to the prosecution, the appellant questioned the deceased why he had beaten Subhas Chandra, the appellant's elder brother. After that, there was an exchange of words. The exchange of blows was between the deceased and Arjun. The scuffle was between the deceased and Arjun. Ultimately, it was Arjun who stabbed the deceased. As consistently held by this Court, common intention contemplated by Section 34 of IPC pre-supposes prior concert. It requires meeting of minds. It requires a pre-arranged plan before a man can be vicariously convicted for the criminal act of another. The criminal act must have been done in furtherance of the common intention of all the accused. In a given case, the plan can be formed suddenly. In the present case, the non-examination of two crucial eye witnesses makes the prosecution case about the existence of a prior concert and prearranged plan extremely doubtful.

10. Hence, the prosecution has failed to prove ingredients of Section 34 of IPC in this case. The appellant has been implicated only with the aid of section 34. Therefore, the appeal must succeed.

11. Accordingly, the impugned judgments and orders dated 23rd December 2008 and 5th June 1990 of the High Court and Sessions Court are hereby set aside. The appellant is acquitted of the charges against him.

12. The appeal is allowed in the above terms. All the pending applications, if any, also stand disposed of.