



Non-Reportable

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1515 OF 2011**

Maheshwari Yadav & Anr.

... Appellants

versus

The State of Bihar

... Respondent

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. This is an appeal preferred by the accused nos.1 and 2. The learned Trial Court convicted accused no.3 – Paro Yadav, for the offence punishable under Section 302 of the Indian Penal Code, 1860 (for short, 'IPC'). The appellants were convicted for the offences punishable under Section 302 read with Section 34 of the IPC and Section 325 read with Section 34 of the IPC. The appellants were sentenced to undergo life imprisonment for the offence punishable under Section 302 read with Section 34 of the IPC. They were also sentenced to undergo rigorous imprisonment for three years for the offence punishable under Section 325 read with Section 34 of the

IPC. Separate appeals were preferred by the appellants and accused no.3 before the Patna High Court. By the impugned judgment and order dated 7th October 2005, the appeals have been dismissed. The accused no.3 – Paro Yadav filed a Petition for Special Leave to Appeal (Criminal) no.4802 of 2006, which this Court dismissed vide its order dated 11th December 2006.

2. We are setting out the prosecution case in brief. PW-4 (Jagdish Manjhi) is the first informant. The incident occurred on 10th March 1997 when the PW-4 visited Village-Shrirampur to participate in a Baraat. At about noon, he went to Village-Chhitmakhanpur to meet his maternal nephew Gholti Yadav (deceased). After that, PW-4 and his cousin Narayan Manjhi (PW-5) and Gholti Yadav (deceased) proceeded to catch a train. They crossed the railway line, and when they were moving further, they found appellant no.1 – Maheshwari Yadav, standing there with a lathi (stick) in his hand. On seeing appellant no.1, the deceased warned PW-4 not to talk to appellant no.1. In the meanwhile, appellant no.2 – Mannu Yadav, and the accused no.3 came there. The appellant no.2 exhorted the accused no.3 to kill the deceased. The deceased tried to run away when the accused no.3 fired a bullet at him by a musket. The bullet hit the back of the deceased. He tried to run away. However, he fell near the wheat field of one Chadi Rai. After that, all the three accused started assaulting the PW-4. When PW-5 tried to intervene, he was also assaulted by the accused no.3. The accused no.3

assaulted PW-4 with the butt of the musket. On hearing the noise, villagers came there when the accused ran away. According to the prosecution case, apart from PW-4 and PW-5, the incident was witnessed by PW-1 (Rinku Yadav), PW-2 (Pinku Yadav) and PW-3 (Subodh Pd. Yadav). Jawahar Yadav and one Tribedanand were also the witnesses who were not examined.

3. The motive pleaded by the prosecution is that two months before the incident, the accused no.3 had brought a horse of one Awadhi Yadav by committing theft. After learning about the theft, Awadhi Yadav called upon the accused no.3 to return the horse. When the accused no.3 tried to assault the said Awadhi Yadav, the deceased saved him, and therefore, the accused no.3 was annoyed with the deceased. Both the courts have believed the testimony of the eye-witnesses.

SUBMISSIONS

4. The submission of the learned counsel appearing for the appellants is that the only allegation against the appellant no.2 was of exhortion. There was no allegation against appellant no.1 of assaulting the deceased. The submission of the learned counsel appearing for the appellants is that there was no evidence of common intention shared by the appellants and the accused no.3. Therefore, the appellants could not have been convicted for the offences punishable under Section 302 with the aid of Section 34 of the IPC. His

submission is that apart from the fact that the motive was not proved, in any case, even according to the prosecution, there was enmity between the deceased and the accused no.3. He submitted that PW-1, PW-2 and PW-3 were the sons and real brother of the deceased respectively and were interested witnesses. It is doubtful whether PW-4 and PW-5 had actually seen the incident. According to the prosecution case, PW-4, PW-5, and the deceased were proceeding towards the railway station to board a train. However, the version of PW-4 and PW-5 is that they were proceeding towards the bus/motor stand. He submitted that the conduct of PW-1, PW-2 and PW-3 was unnatural as they did not try to save the deceased. He pointed out that two alleged eye-witnesses have not been examined, and, therefore, adverse inference deserves to be drawn against the prosecution. He submitted that there was a delay of eight hours in registering the First Information Report.

5. The learned counsel appearing for the respondent–State of Bihar submitted that as the conviction of the accused no.3 has been confirmed by this Court, no interference can be made with the conviction of the appellants who had been convicted with the aid of Section 34 of the IPC. He urged that both the courts have appreciated the evidence of the eye-witnesses and have believed their version. Hence, no interference is called for.

CONSIDERATION OF SUBMISSIONS

6. We may note here that the accused no.3 was charged only under Section 302 of the IPC and Section 34 was not applied. Section 34 of the IPC has been applied only to the present appellants. One of the questions is when the main accused, who is the author of the fatal injuries sustained by the deceased, was not charged with Section 34 of the IPC, whether conviction of the appellants can be sustained. Section 34 of the IPC reads thus:

“34. 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.”

7. Section 34 essentially introduces vicarious liability. In a given case, where the offence is punishable under Section 302 of IPC, when the common intention is proved, but no overt act of assaulting the deceased is attributed to the accused who have been implicated based on Section 34, vicarious liability under Section 34 will be attracted. In this case, the bullet was fired by the accused no.3, as a result of which, the deceased lost his life. Even without the applicability of Section 34, the accused no.3 could have been convicted for the offence punishable under Section 302 of the IPC. To punish him under Section 302, it was not necessary to apply Section 34 of the IPC. Section 34 was applied to the appellants as they were sought to be roped in by alleging that

they shared common intention with accused no.3. To bring a case within Section 34, it is not necessary to prove prior conspiracy or pre-meditation. It is possible to form a common intention just before or during the occurrence.

8. One of the grounds of challenge is the failure to examine other eye-witnesses. However, in the facts of the case, a total of five eye-witnesses were examined. It is not axiomatic that in every case where the eye-witnesses are withheld from the court, an adverse inference must be drawn against the prosecution. The totality of the circumstances must be considered for concluding whether an adverse inference could be drawn. We have perused the notes of evidence of the material witnesses.

9. PW-1 to PW-5 are eye-witnesses. They are consistent on the role played by the accused no.3 of using a musket for firing the bullet at the deceased. They have deposed that the present appellants were present at the scene of occurrence along with the accused no.3. The appellants were carrying sticks in their hands, and the accused no.3 had a musket which was used to fire the bullet at the deceased. The said witnesses have deposed that the appellants assaulted PW-4 (Jagdish – the first informant). As found by the High Court and the Trial Court, PW-4 suffered a fracture. We may note here that the evidence of PW-5 has been discarded by the High Court mainly on the ground that he failed to identify accused no.3, who was the main accused.

10. PW-1 to PW-4 stated that appellant no.2 exhorted the accused no.3 to fire a bullet at the deceased. PW-1 is the son of the deceased. PW-4 (Jagdish) and PW-5 (Narayan) are the brothers-in-law of the deceased, and therefore, they are the maternal uncles of PW-1. PW-2 is the son of the deceased, and PW-3 is the deceased's brother. It is true that PW-1 has stated that at the time of the assault, other persons named by him were present. They have not been examined as witnesses. We have carefully perused the cross-examination of PW-1 to PW-3. Nothing is brought on record that will shake the credibility of the said witnesses. As regards PW-4, he stated that he, along with PW-5 and the deceased, started proceeding towards the bus stand. When they arrived near the railway station, they saw the three accused. A contradiction is sought to be pointed out by the learned counsel appearing for the appellants by stating that in the FIR, it is stated by the PW-4 that he along with his brother and the deceased, were going towards the railway station to catch a train and he did not state in the FIR that they were going towards the bus stand. This inconsistency is not significant, as his version of the main incident has not been shaken at all. It is true that the eye-witnesses examined before the court were close relatives of the deceased. That itself is no ground to discard their testimony. However, their evidence may require closer scrutiny. After having made closer scrutiny, we find their versions are of a very sterling quality. Moreover, all the persons named by PW-1 who were present were not independent witnesses. In a given case,

when independent witnesses are available who are not connected with the rival parties and the prosecution omits to examine them by confining its case to examining related witnesses, an adverse inference can undoubtedly be drawn against the prosecution. When the evidence of the eye-witnesses is of sterling quality, an adverse inference need not be drawn. Quality is more important than quantity.

11. Merely because they made no attempt to save the deceased or resist the accused is no ground by itself to disbelieve their case. The accused were carrying sticks and a gun. Therefore, the conduct of the appellants cannot be said to be unnatural.

12. The appellants were together and were in the company of the accused no.3. Obviously, they acted in concert. The appellants were carrying lathi, and the accused no.3, was moving with a musket. There was time available for the meeting of minds. Thus, the existence of common intention will have to be accepted.

13. Hence, we find every justification for convicting the appellants by both the Courts. Accordingly, we find no merit in the case, and the appeal is dismissed. As the appellants are on bail, we direct the appellants to surrender before the Trial Court within one month from today to undergo the remaining sentence.

14. As and when they undergo the requisite period of sentence and qualify for consideration for a grant of permanent remission as per the applicable policy, the State Government shall consider their case in accordance with the law.

.....J.
(Abhay S. Oka)

.....J.
(Pankaj Mithal)

**New Delhi;
December 13, 2023.**