

IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

CRL. A No. 180 of 2008

SRI PRAKASH CHOWHAN

-Versus-

STATE OF ASSAM

.....appellant

..... respondent

CRL. A No. 195 of 2008

SRI RAJESH SAHU @ MUN SAHU
SON OF LATE BADRI SAHU
RESIDENT OF KENDUGURI
UNDER DEMOW POLICE STATION
IN THE DISTRICT OF SIVASAGAR,
ASSAM

-Versus-

STATE OF ASSAM

.....appellant

..... respondent

B E F O R E

HON'BLE MR. JUSTICE MIR ALFAZ ALI

For the petitioner	: Mr. B.M. Choudhury : Mr. P. Bora
For respondents	: Ms. S Jahan (Addl. PP, Assam)
Decided on	: 07.12.2017

JUDGMENT & ORDER (CAV)

Both these appeals are directed against the judgment and order dated 16.10.2008 passed by the learned Addl. Sessions Judge (F.T.C.), Sivasagar in Sessions Case No.35(s-s) of 2003, arising out of G.R. Case No.935/2002. By the said judgment, both the appellants were convicted under Section 304 Part-II read with Section 34 IPC and sentenced to imprisonment for 5 (five) years and fine of Rs.3,000/- each with default stipulation.

[2] As per the prosecution case, on 15.09.2002, one Dulu Dutta (deceased) was travelling in a bus called "Ma Darshani". Both the appellants made the aforesaid bus stop at Kenduguri Tiniali and dragged the deceased Dulu Dutta out of the bus and mounted assault on him with a bamboo stick causing serious injuries. Immediately the victim was taken to Demow hospital, wherefrom he was shifted to Medical College Hospital, Dibrugarh, where the victim succumbed to the injuries on 17.09.2002. The younger brother of the victim lodged an FIR (Exhibit-1), on the basis of which police registered a case and after usual investigation submitted charge-sheet against both the appellants under Sections 302/34 IPC. The offence under Section 302/34 IPC being exclusively triable by the Court of Sessions, the learned Judicial Magistrate committed the case to the Court of Sessions.

[3] In the course of trial, the learned Addl. Sessions Judge framed charge against both the appellants under Section 302/34 IPC, to which they pleaded not guilty. In order to establish the charge, the prosecution examined as many as 13 witnesses. On appreciation of evidence, learned trial Court convicted both the accused appellants under Section 304 (Part-II) read with Section 34 IPC and awarded sentence as indicated above.

[4] Aggrieved by the judgment of conviction and sentence, both the appellants have filed the aforementioned appeals separately.

[5] I have heard Mr. B.M. Choudhury and Mr. P Bora, learned counsels for the appellants and Ms. S Jahan, learned Addl. PP, appearing for the State.

[6] Learned counsel for the appellant in CrI. A No.180/2008 strenuously argued that there was no evidence of common intention of the appellants to commit the offence under Section 304 part II IPC and the learned trial Court erroneously convicted the appellants invoking provisions of Section 34 IPC. The contention of the learned counsel for the appellant Rajesh Sahu @ Mun Sahu was that there was no involvement of the appellant Rajesh Sahu in assaulting the victim by bamboo stick and therefore, he could not have been convicted for offence under Section 304 (Part-II) by invoking Section 34 IPC.

[7] Learned Addl. PP Ms. Jahan supporting the conviction and sentence of the accused/appellant and the reasons assigned by the learned trial Court contended, that the evidences brought on record was sufficient to prove the guilt of the accused beyond all reasonable doubt and therefore, the impugned judgment requires no interference by this Court.

[8] I have perused the evidence on record and considered the submission made by the learned counsel for the parties.

[9] From the evidence on record it transpires that PW-1 the informant, PW-2, PW-3, PW-5 and Pw-7 were not eye witnesses to the occurrence and they only came to know about the occurrence later on. PW-5 was declared hostile by the prosecution. PW-8 was the witness to the seizure, by which a motor cycle was seized. PW-10 was the doctor and PW-11 and PW-12 were the Investigating Officer. Learned trial Court essentially relying on the oral testimony of PW-4, PW-6 and PW-9 as well as the doctor (PW-10), recorded the conviction of the accused/appellants.

[10] PW-4 stated that he was the conductor of the bus in which the victim was travelling. According to him, the victim Dulu Dutta was travelling in the bus. After moving some distance, accused Prakash Chowhan with Rajesh Sahu as pillion rider came in a scooter and overtook the bus. They stopped the scooter on the road obstructing the bus and consequently the driver stopped the bus. Both the accused/appellant dragged the victim from the bus and severely assaulted him by a stick. On being assaulted by the accused/appellants, the victim Dulu Dutta fell down raising alarm "save save." Immediately he (PW-4)

and some passengers got down from the bus and he (PW-4) took the victim to hospital in a motor cycle. It was elicited during cross-examination of PW-4, that both the accused persons assaulted the victim, but he had not noticed as to who had hit on the head of the victim. It was also elicited during his cross-examination that the accused persons also threatened the passengers not to get down from the bus.

[11] PW-6 stated that he was travelling in the bus called "Ma Darshani". The victim Dulu Dutta was also travelling in the said bus. According to him, accused Prakash Chowhan who was following the bus on scooter, stopped the bus and spoke something with the driver. After moving some distance from Demow, accused Prakash Chowhan parked his scooter in front of the bus. According to him, there was another person on the scooter as pillion rider. Prakash Chowhan instructed the driver to park the bus at Kenduguri. After giving such instruction, Prakash Chowhan was moving ahead of the bus in his scooter with the bus following and Prakash Chowhan after stopping the bus, took out the victim Dulu Dutta and assaulted him with a stick. The victim was taken to hospital by Arup Dutta (PW-4). It was elicited in his cross-examination that initially when the bus was stopped, the pillion rider of the scooter was sitting on the scooter and subsequently both of them came forward. It was elicited in his cross-examination, that he knew the accused Prakash Chowhan by name from before, but had not known the name of Rajesh Sahu @ Mun Sahu and had come to know the name of Mun Sahu from police. During cross-examination it was also elicited, that he had seen Dulu Dutta being assaulted with something like lathi (stick), but could not notice properly. He further stated that he had seen Prakash Chowhan assaulting the victim.

[12] PW-9 who is another eye witness travelling in the bus stated that the bus stopped at Kenduguri. As the bus was waiting for a long time, he along with other passengers got down and noticed that both the accused persons were altercating with the victim Dulu Dutta. The people assembled there dispersed them and he came back to the bus. When the bus was not moving for a long time, he again came down and found that a person was quarrelling with Dulu Dutta. During cross-examination it has been elicited, that when he got down

from the bus for the first time, he noticed two persons altercation with the victim Dulu Dutta and when he came down from the bus for the second time also, he noticed that the altercation was going on. It was further elicited in the cross-examination that while getting down from the bus he had seen the accused Rajesh Sahu @ Mun Sahu altercation with the victim.

[13] Although all these three vital eye witnesses were subjected to lengthy cross-examinations, nothing material could be elicited capable of creating any dent in their evidence with regard to the material fact, that both the accused/appellants brought down the victim from the bus, picked up a quarrel with him and assaulted him thereby causing injuries, which resulted in his death.

[14] PW-10 the Doctor who conducted the post-mortem examination found the following injuries on the person of the victim.

1. One abrasion with contusion measuring 6 cm×4 cm present on right forearm, ulnar side, 6 cm above the tip of ulnar styloid process.

2. One lacerated wound measuring 4 cm × 3 cm scalp layers deep on right parietal area of the scalp which was found on stitches.

[15] In the opinion of the doctor, death was caused due to coma resulting from head injuries and the injuries were anti-mortem and caused by blunt force impact. The doctor stated that the injuries found on the scalp was sufficient to cause death of the person in ordinary course of nature. It was further elicited during cross-examination of the doctor, that the injuries found on the scalp of the deceased could be caused by spilt bamboo. The death of the victim because of the injuries sustained on the head, caused by blunt object has not been disputed in the present case. The presence of the accused persons at the place of occurrence and involvement in the incident has also not been denied.

[16] The accused/appellant Rajesh Sahu in his examination under Section 313 Cr.P.C. admitted that the scooter was parked in front of the bus and there was altercation between the victim and the accused/appellant Prakash Chowhan. He also stated in his cross-examination that he along with other passengers of the bus intervened and dispersed the accused Prakash Chowhan. Accused

Rajesh Sahu further stated in his statement under Section 313 Cr.P.C. that someone from the bus rebuked Prakash Chowhan by using slang language. He further stated that when Prakash Chowhan was altercating with the victim, he tried to dissuade Prakash Chowhan from quarrelling.

[17] The accused/appellant Prakash Chowhan while denying the incriminating evidence against him during examination under Section 313 Cr.P.C., stated that while he was proceeding in the scooter, some passengers from the bus shouted at him uttering slang words. He also stated that when the bus stopped at Kenduguri, he had seen Rajesh Sahu @ Mun Sahu altercating with a passenger of the bus. He further stated in his examination under Section 313 Cr.P.C. that he had seen a stick in the hand of Rajesh Sahu @ Mun Sahu and some people were trying to dissuade him. He also stated during examination under Section 313 Cr.P.C., that when a passenger of the bus sustained injury, Rajesh Sahu @ Mon Sahu left the place with the stick in his hand.

[18] What therefore transpires from the statement of both the accused persons in their examination under Section 313 Cr.P.C. is that both the accused/appellants during their examination under Section 313 Cr.P.C admitted their presence at the place of occurrence and also the factum of the victim being assaulted. However, both the accused persons have been found to have made an attempt to shift the liability of assaulting the victim upon the other.

[19] Though the statement of the accused recorded under Section 313 Cr.P.C., not being on oath, is not evidence 'stricto sensu', the law with regard to the scope of use of the statement of the accused under Section 313 Cr.P.C. is well settled by catena of authorities of the Apex Court as well as of this Court. Some of them are *State of Maharashtra Vs. Sukhdeo Singh* reported in (1992) 3 SCC 700, *Mintu Kalita @ Mitu Kalita Vs. State of Assam* reported in 2006 (1) GLT 393, *Baiju Baby and Ors. Vs. State of Arunachal Pradesh & Ors.* reported in 2009 (1) GLT 405, and *State U.P. Vs. Lakhmi* reported in (1998) 4 SCC 336, and *Rajkumkar Singh Vs. State of Maharashtra* reported in (2013) 5 SCC 722..

[20] The Apex Court in the case of **Sukhdev Singh** (supra) clearly held that such statement recorded under Section 313 Cr.P.C. can be used for proving the guilt of the accused and held as under:

"51. That brings us to the question whether such a statement recorded under section 313 of the Code can constitute the sole basis for conviction. Since no oath is administered to the accused, the statements made by the accused will not be evidence stricto sensu. That is why sub-section (3) says that the accused shall not render himself liable to punishment if he gives false answers. Then comes sub-section (4) which reads

"313. (4). The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

*Thus the answers given by the accused in response to his examination under section 313 can be taken into consideration in such inquiry or trial. This much is clear on a plain reading of the above sub-section. Therefore, though not strictly evidence, sub-section (4) permits that it may be taken into consideration in the said inquiry or trial. This court in the case of *Hate Singh v. State of Madhya Bharat, 1953 Cr.L.J.1933* held that an answer given by an accused under section 313 examination can be used for proving his guilt as much as the evidence given by a prosecution witness. In *Narain Singh V. State of Punjab. [1963] 3 SCR 678* this Court held that if the accused confesses to the commission of the offence with which he is charged the Court may, relying upon that confession, proceed to convict him. To state the exact language in which the three-Judge Bench answered the question it would be advantageous to reproduce the relevant observations at pages 684-685 :*

"Under section 342 of the Code of Criminal Procedure by the first sub-section, insofar as it is material, the Court may at any stage of the enquiry or trial and after the witnesses for the prosecution have been examined and before the accused is called upon for his defence shall put questions to the accused person for the purpose of enabling him to explain any circumstance appearing in the evidence against him. Examination under section 342 is primarily to be directed to those matters on which evidence has been led for the prosecution to ascertain from the accused his version or explanation - if any, of the incident which forms the subject-matter of the charge and his defence. By sub-section (3), the answers given by the accused may "be taken into consideration" at the enquiry of the trial. If the accused person in his examination under Section 342 confesses to the commission of the offence charges against him the court may, relying upon that confession, proceed to convict him, but if he does not confess and in explaining circumstance appearing in the evidence against him sets up his own version and seeks to explain his conduct pleading that he has committed no offence, the statement of the accused can only be taken into consideration in its entirety.

Sub-section (1) of Section 313 corresponds to sub-section (1) of section 342 of the old Code except that it now stands bifurcated in two parts with the proviso added thereto clarifying that in summons cases where the presence of the accused is dispensed with his examination under clause (b) may also be dispensed with. Sub-section (2) of section 313 reproduces the old sub-section (4) and the present sub-section (3) corresponds to the old sub-section (2) except for the change necessitated on account of the abolition of the jury system. The present sub-section (4) with which we are concerned is a verbatim reproduction of the old sub-section (3). Therefore, the aforesaid observations apply with equal force."

[21] Thus, the provision of Section 313(4) Cr.P.C and the above authority makes it abundantly clear that if the accused during examination under Section 313 Cr.P.C, makes any confession, the Court may rely upon such confession for arriving at a finding with regard to guilt of the accused.

[22] What is evident from the examination of the accused/appellants under Section 313 Cr.P.C. in the present case is that the factum of the victim being assaulted had not been disputed by any of the accused/appellant. They only tried to shift the culpability of assaulting the victim, upon the other. Apparently, the accused/appellants during their examination under Section 313 Cr.P.C. did not confess to the commission of offence. But both the accused/appellants, while explaining the incriminating evidence against them, sought to put up a case of their own to exculpate themselves. The question therefore, emerges here is, in explaining the incriminating evidence during examination under Section 313 Cr.P.C., when the accused puts up a case of his own to exculpate himself, what shall be the effect of such exculpatory statement and explanation given by the accused during examination under Section 313 Cr.P.C.? Apex Court in *Narain Singh Vs. State of Punjab (1963) 3 SCR 678* as referred in *Sukhdev Singh Case (supra)* observed that if the accused in his examination under Section 313 Cr.P.C. (old Section 342) confessed to the commission of offence/charges against him, Court may proceed to convict him relying upon such confession. But if he does not confess and in explaining the circumstances appearing in the evidence against him, sets his own version and seeks to explain his conduct pleading that he has committed no offence, in such case, statement of the accused can only be taken into consideration in its

entirety. Therefore, one thing is clear that when the accused confesses his guilt during examination under Section 313 Cr.P.C., Court can straight way rely upon such confession and proceed to convict him on the basis of such confession. But when he does not confess, and in explaining the incriminating evidence against him, sets a case of his own to exculpate himself, in that case, not only the exculpatory portion but his statement as a whole has to be taken into consideration. Each of the accused/appellants in the present case, though, tried to set up a case of their own by shifting the culpability on the other, both the accused have, in the process, admitted their presence at the place of occurrence and also the factum of assault on the victim. Thus the statement of both the accused/appellants in their examination under Section 313 Cr.P.C. in its entirety reinforces the evidence of the PW-4, PW-6 and PW-9 that both the accused persons assaulted the victim causing injuries to him.

[23] Referring to the medical evidence and showing that there was only one injury on the head, which caused death of the accused, learned counsel for the appellant placing reliance on the decision of the Apex Court in *Balu and Others Vs. State (U.T. of Pondicherry)* reported in *2016 CrI. L.J 176* contended that initially none of the accused persons were armed with any weapon and in course of the quarrel, one of the accused brought a bamboo stick and hit the victim on his head and therefore, there was no common intention of the accused persons in hitting the victim on his head, and as such, the accused persons could not be convicted under Section 304 (Part-II) IPC with the aid of Section 34 IPC. It has also been contended, that a random individual act of any of the accused persons without prior meeting of the minds cannot bind the other accused by constructive liability.

[24] Learned counsel Mr. B.M. Choudhury placing reliance on *Banwari Vs. State of U.P* reported in *AIR 1962 (SC) 1198* and also *Balu & Others (supra)* submitted that there was no overt act on the part of the accused Raju Sahu and therefore, he could not be convicted with the aid of Section 34 IPC, as according to PW-6 only accused Prakash assaulted the victim with stick.

[25] It is evident that initially the accused persons were not armed with weapon and in course of the quarrel, one of the accused brought a bamboo stick

and hit the victim on his head. Section 34 embodies the principle of joint liability in committing an offence and essence of such joint and constructive liability is the existence of common intention animating the offender leading to perpetrate the offence in furtherance of such common intention. The two essential conditions for invoking the provisions of Section 34 IPC are (i) the common intention or prior meeting of mind to do a criminal act and (ii) participation of all the accused in doing that act in furtherance of the common intention. Therefore, Section 34 contemplates doing of an act by several persons in furtherance of common intention. It is not necessary that in all cases, the common intention should be present before commencement of the criminal act. Common intention may develop even subsequently during the course of commission of the offence. It is to be borne in mind, that in furtherance of common 'intention' implies that intention of all the accused persons participating in the crime must be common or the accused persons must have a pre-arranged plan to bring about a particular result. It is not necessary that all the accused participating or involved in the offence must do a particular act. What the law requires for invoking section 34 IPC is that some overt act qua each of the accused. Different accused may act differently but their intention must be to bring about particular result. The essence of constructive liability or joint liability lies in principle that one can be held liable for the act done by the other provided the essential condition as indicated above that pre arranged plan or common intention to bring about particular result is present. Therefore, common intention has the reference to bring about a particular result and not to any particular act done to further the common intention. Once the common intention to commit a particular offence or to bring about a particular result is established, the nature of participation of each individual sharing the common intention is immaterial. Different individual sharing common intention may contribute differently or in other words overt act qua each accused may be different to achieve the ultimate result in furtherance of the common intention. But all shall be jointly liable for the assault. The Apex Court in Balu & Others (supra) relied by learned counsel for the appellant also observed that:

10. To invoke Section 34 Indian Penal Code, 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 proved that (i) there was common intention on the part of several persons to commit a particular crime and (ii) the crime was actually committed by them in furtherance of that common intention. The essence of liability under Section 34 Indian Penal Code is simultaneous conscious mind of persons participating in the criminal action to bring about a particular result. (Emphasis is are) Minds regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. Common intention implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Common intention is an intention to commit the crime actually committed and each accused person can be convicted of that crime, only if he has participated in that common intention.

[26] In the present case it is abundantly clear from the testimony of PW-4, PW-6 and PW-9, that both the accused persons brought down the victim from the bus, picked up quarrel with him and hit him and the above acts of both the accused clearly established, that both the accused persons had the common intention to assault and cause injury to the victim. When there was common intention of both the accused persons to cause injury to the victim and in furtherance of that common intention both the accused persons participated in the commission of crime, it is immaterial as to which accused dealt which blow. Once it is established that there was common intention to do a particular offence or to bring about a particular result and in furtherance of such intention all the accused persons participated in the criminal act, they will be jointly and constructively liable. In order to invoke Section 34 IPC the twin requirements are the common intention and participation of all the accused. The participation of the accused in the crime does not necessarily mean that all the accused persons are to do the same thing or all the accused persons are to act in the same manner.

[27] The unshaken testimony of PW-4, PW-6 and PW-9 coupled with the admission of the accused persons during examination under Section 313 Cr.P.C., as discussed herein before, leaves no room for doubt that the accused persons had the common intention to cause injuries to the victim and in furtherance of such common intention assaulted the victim causing injuries. Therefore, who

caused the actual injury or who dealt the fatal blow, in the facts and circumstances of the present case, loses its importance and both the accused persons are held to be liable jointly, even if, the fatal blow was given by one, inasmuch as, the common intention to cause injury to the victim has clearly been established. When the common intention to cause injury to the victim and participation of both the accused persons is found to have been clearly established beyond all reasonable doubt, both the accused persons shall be liable for committing the offence of causing injury which ultimately resulted in death of the victim. Thus, the prosecution succeeded in proving beyond all reasonable doubt that both the accused persons in furtherance of their common intention to cause injury, assaulted the victim causing injuries, which led to his death.

[28] Evidently, there was no intention to cause death as would appear from the facts and circumstance of the case. Therefore, the learned trial Court rightly appreciated the evidence and came to the finding that there was no common intention to cause death or to cause such bodily injuries as is liable to cause death, but the common intention to cause injury resulting in the death was very much there. Situated thus, the impugned judgment of conviction and sentence of the accused appellants under Section 304 (Part-II) read with section 34 IPC cannot be faulted. Accordingly, the appeal is dismissed. The accused/appellants are directed to surrender before the learned trial Court within two months and serve out the sentence.

[29] Send back the LCR.

JUDGE

Smita