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STATE OF ORISSA
v
ARJUN DAS AGRAWAL AND ANR.

AUGUST 13, 1999

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[G.T. NANAVATI AND S.N. PHUKAN, JJ.]

Criminal Law

C *Penal Code, 1860—Section 34—Common intention—Accused 'A' & 'M' among others convicted by trial court—Acquittal by High Court—Participation by 'M' proved by eye witnesses—Held, acquittal by High Court erroneous.*

D *Common intention—No evidence regarding participation of 'A'—Only evidence of instigation—Held, no inference can be drawn that he had common intention of causing death of the deceased—Acquittal by High Court upheld.*

E Respondents along with 14 others were tried inter-alia for the offence of murder of one D. Sessions Court convicted the respondents among others under Section 302 read with Section 149 IPC. On appeal High Court acquitted the Respondents while convicting the others. The High Court held that the conviction of respondents was not sustainable as the evidence of Prosecution is not corroborated by medical evidence, as against them.

F In appeal to this Court the State relying on the evidence of PWs 1 to 4 sought for the conviction of appellants. PW1 wife of the deceased made a specific statement that accused pushed her back when she tried to approach one 'D' who was assaulting her deceased husband. According to her, accused instigated other accused to kill the deceased. The deposition of PW1 was corroborated by PWs 2-4. The respondents defended the appeal by pointing out the contradictions in the evidence.

G Allowing the appeal partly, the Court

HELD : 1. It is found from the evidence on record as extracted above that accused 'M' went to the house of the deceased along with other accused persons where accused 'D' gave knife blows to the deceased. It is also found that the accused-respondent 'M' also prevented PW1, wife of the deceased

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for rescuing her husband as she was pushed by accused-respondent 'M' and she fell down. From the evidence of PW2, it is found that the accused-respondent 'M' caught hold of tuft of beard of the deceased. The evidence on record is sufficient to conclude that in the criminal act namely giving fatal blows to the deceased accused-respondent 'M' actively participated in the said criminal act in furtherance of the common object, namely to cause death of the deceased. The High Court erred in allowing the appeal of accused 'M'. 'M' is convicted under Sec.263/34 IPC and sentenced to undergo RI for life. [450-C-D-E-F]

2. From the evidence on record it is found that accused-respondent 'A' never went inside the house of the deceased nor took any part in the commission of the murder. He only instigated by shouting at the other accused persons. There is nothing in evidence to show that due to his instigation more blows were given by the accused persons. Therefore, no inference can be drawn that this accused-respondent had common intention of causing death of the deceased or that he actually participated in the criminal act. The acquittal of this accused by High Court is upheld. [450-G-H; 451-A]

3. It is a settled position of law that Section 34 IPC does not create a distinct offence and it is the participation of the accused that the intention of committing crime is established and Section 34 IPC is attracted. To rope in a person with the aid of Section 34 IPC, prosecution has to prove that the criminal act was done by actual participation of more than one person and that the said act was done in furtherance of common intention of all engaged at a prior concert. [450-B]

Mahabir Gope v. State of Bihar, [1963] 3 SCR 331; *Jagir Singh v. State of Punjab*, [1967] 3 SCR 256 and *Bharwad Mepa Dana & Anr. v. State of Bombay*, [1960] 2SCR 172, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 5 of 1993.

From the Judgment and Order dated 27.1.87 of the Orissa High Court in CrI. A. Nos. 72 and 73 of 1983.

Raj Kumar Mehta for the Appellant.

U.R. Lalit, Ajay Bhalla and P.K. Jain for Respondent No. 1.

T. N. Singh, (A.C.) for Respondent No. 2.

A The Judgment of the Court was delivered by

B **PHUKAN, J.** Sixteen persons were booked for trial under Sections 302/149, 302/34, 341/149, 449, 451/34, 427/34 and 323 Indian Penal Code for causing death of deceased Bhagirathi Panda. The Sessions Judge, Koraput in Sessions Case No. 134/85 by judgment dated 2nd April, 1986 after appreciation of the evidence of 16 witnesses for prosecution and seven witnesses of defence came to the finding that the deceased met with homicidal death and accordingly convicted accused Dillip Kumar Chand under Section 302 I.P.C., accused Kishanlal Kamini, Manmohan Das alias Manu Bangali, Prafulla Kumar Pradhan and Arjun Das Agrawala under Section 302/149 I.P.C. The trial court also found accused Radheshyam Agrawala, Uttam Kumar Behra, Devi Misra, Babuli alias Sudhansu Sekhar Das guilty and convicted them under Sections 451 and 427 I.P.C. Other accused persons were found not guilty and acquitted them.

D Accused Dallip Kumar Chand was sentenced to death. Accused Kishanlal Kamini, Prafulla Kumar Pradhan, Manmohan Das alias Manu Bangali and Arjun Das were sentenced to undergo imprisonment for life. The trial court, however, sentenced Radheshyam Agrawala, Uttam Kumar Behera, Devi Misra, Babuli alias Sudhansu Sekhar Das to rigorous imprisonment for one year.

E The Division Bench of the High Court in Death Reference No. 1 of 1986 and Criminal Appeal Nos. 72 to 74, 81,82 and 88 of 1986 by judgment dated 27.1.1987 allowed the appeals of Arjun Das Agarwal and Manmohan Das and were acquitted. The death reference and appeal of Dillip Kumar Chand were partly allowed and he was convicted under Section 302/34 IPC and his death sentence was converted to rigorous imprisonment for life. The appeals filed by Prafull Kumar Pradhan, Kishanlal Kamini, Radheshyam Agarwal, Devi Prasad Misra, Babuli @ Sudhansu Sekhar Das and Uttam Kumar Behera were dismissed.

The State of Orissa has filed the present appeal in respect of acquittal of Manmohan Das and Arjun Das Agarwal.

G The occurrence took place in the night of 17th July, 1982 at about 10.00 p.m. The deceased was running a hotel at his residence at village Narla road and at the time of occurrence he closed his business and was taking the accounts from the hotel boys. At about 10.00 p.m. in the night of occurrence some persons knocked at the door of hotel and asked for meals but the deceased told them that Chapati would not be available and they could be served with rice. As soon as hotel boy opened the door accused Devi Misra,

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Babuli alias Sudhansu Das, Uttam Behera and Radheshyam Agrawala went inside the hotel and immediately picked up quarrels with the deceased. Radhamani Panda w/o deceased rushed in and tried to arrange for the food for the above persons. She took her husband into the adjoining room. Though food was served in two plates, the above persons broke the chairs, tables, plates and tore out the electric wirings as at that time there was no supply of electricity. At that time wife of the deceased heard the cry of pain from the adjacent room and she rushed inside the room. She saw that her husband had been stabbed on his belly. Accused Dillip Chand was holding a knife and along with Kishanlal Kamini was trying to drag the deceased from out of the room. Accused Prafulla Kumar Pradhan also was man-handling the deceased and when she tried to rescue her husband, accused Manmohan Das pushed her back. All the four accused dragged the deceased out of the room to the verandha and the accused Dillip Chand gave 3-4 blows. Accused Arjun Das Agrawal standing on the road was instigating the assailants to finish the victim soon. Other accused persons namely Rambilash Agrawala, Motilal Agrawala, Madan Lal Agrawala, Santosh Kumar Kamani, Santosh Mishra, Puspak Biswal and Hajarilal Lal Agrawala surrounded the deceased while he was being assaulted by accused Dillip Chand and his associates. The wife of the deceased and other persons rescued the deceased and carried him back into the house.

Radhamani carried her deceased husband to Narla Hospital and she also sent information to the Narla Police Station. The Asstt. Sub-Inspector of the said Police Station reached at the hospital and took the First Information Report. The Doctor attending the injured advised that he should be immediately removed to the hospital at Bhawanipatna and in the same truck he was carried to Bhawanipatna Hospital and on reaching the hospital he was declared dead.

In this appeal filed by the State we have to examine whether the orders of acquittal passed by the Division Bench of the High Court in respect of two accused respondents namely Manmohan Das @ Manu Bangali and Arjun Das Agarwal were based on the proper appreciation of evidence on record or not? Both the above accused-respondents along with others were charged under Sections 302/149 and 302/34 IPC.

The case of the prosecution rests mainly on the evidence of Radhamani Panda-PW1 wife of the deceased, Kailash Chandra Panda-PW2 who was having a tea stall on the verandah of the hotel of the deceased, Baikuntha Panda-PW3 brother of PW2 who had got betel nut shop on the verandah of

A the hotel of the deceased and Bhaskar Panda-PW4 who was the cook in the hotel of the deceased.

B Both the courts below believed the above eye witnesses. In fact the High Court has recorded after carefully going through the evidence of the above eye witnesses that they were natural, competent, trustworthy and reliable witnesses. According to the High Court, their evidence finds substantial corroboration from the medical evidence and, therefore, the trial court rightly placed reliance on their evidence.

C We have also been taken through the evidence of the above witnesses by the learned counsel for the appellant, Mr. Mehta and we entirely agree with the findings of the trial court as well as the High Court. Though, Mr. T.N. Singh, amicus curie appearing for accused-respondent Manmohan Das @ Manu Bangali has drawn our attention to some of the contradictions, we are of the opinion, as recorded by the High Court that these were minor in nature and cannot demolish the case of the prosecution.

D Radhamani Panda - PW1 wife of the deceased was the informant. She had supported completely the prosecution case. According to her the occurrence took place on 17th July, 1982 at about 10.00 p.m when the hotel was closed and her deceased husband was taking account from the employee.

E Two accused persons namely Radha and Babuli asked for meal by shouting and her deceased husband replied that only rice would be available. At the request of the above accused persons the door of the hotel was opened and four accused persons entered inside and two of them caught hold the beard of her deceased husband and thereafter they broke chairs, tables and pulled down the electric wires. It had been mentioned that at that time there was no supply of electricity and lamps were burning. PW1 requested the accused persons to cool down and took her husband to the adjacent room. She came out and asked the hotel cook namely Bhaskar Panda (P.W.4) to serve meals, while he was doing so in China plates, two other accused persons entered and all the accused persons crashed the plates. At the same time she heard

F her husband shouting that he was being killed and, therefore, she rushed inside the room and saw a knife injury on the left side of the belly of her husband. She (PW-1) saw accused Kishan was holding the beard of her husband and accused Dillip Chand was dragging. She had further stated that the assailants had found their way inside through another door. She had made a specific statement that while she was going to intervene accused - respondent

G Manmohan Das @ Manu Bangali pushed her back and she fell down.

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According to her accused- Arjun Das Agarwal was instigating to beat her husband. She along with others rescued her husband and brought him inside the hotel and all the accused persons dispersed. She took her husband in a truck along with others to Narla hospital and on way she dropped Baikunth Panda - PW3 to inform the police. On the advice of the local doctor after preliminary treatment deceased was removed to Bhawanipatna hospital in the same truck where he was declared dead. While at Narla hospital a Police Officer went there before whom this witness narrated the incident which was treated as the FIR. She made categorical statement that she was not mentally fit at that time due to the condition of her husband.

PW2 - Kailash Chandra Panda had a betel nut shop by the side of the hotel of the deceased. He had stated that he started running a tea stall on the verandah of the hotel of the deceased and gave the betel nut shop to his brother Baikunth Panda - PW3. He had supported the evidence of PW1 in all the above points. He categorically stated that as there was no electric supply, a petromax light was burning in the hotel of the deceased and lamps at his tea stall. He went inside the hotel and saw accused Dillip Chand gave a knife blow on the left side of belly of the deceased. According to him accused Kishan Lal Kamani caught hold the beard of the deceased and accused respondent Manmohan Das @ Manu Bangali and Prafulla caught hold of tuft of beard of the deceased. He supported the evidence of PW1 inasmuch as according to this witness when PW1 came to the room accused respondent Manmohan Das @ Manu Bangali pushed her back, thereafter the assailants dragged the deceased to the verandah where 3-4 more blows by knife were given by accused Dillip Chand . Regarding accused respondent Arjun Agarwala he had stated that this accused came out from the house and instigated the accused persons to kill the deceased. He along with PW1 and others rescued the deceased and carried him back.

Baikuntha Panda - PW3 brother of PW2 had deposed that at that time he was at the betel nut shop in front of hotel of the deceased. This witness identified accused respondent Manmohan Das @ Manu Bangali and further stated that he knew Dillip Chand, Arjuna Das Agarwala, Prafulla and Kishan Lal Kamini. This witness did not see the entire incident as he went to attend the call of nature on the back side of the hotel . When he heard the cries of the deceased he went inside the room .Though this witness had not specifically stated the part played by accused-respondent Manmohan Das @ Manu Bangali but he categorically stated the presence of this accused-respondent at the place of occurrence. Regarding accused-respondent Arjuna Das

A Agarwala this witness had also stated that the accused directed the others 'to finish deceased as soon as possible'. He also along with others accompanied PW1 in the truck.

B Bhaskar Panda - P.W. 4 was working as cook in the hotel of the deceased and he had supported fully the evidence of other witnesses. It is true that he had not stated the part played by accused-respondent Manmohan @ Manu Bangali but regarding accused-respondent Arjuna Das Agarwala he had stated that this accused asked others 'to finish him (deceased) soon'. From the evidences of the above witnesses the prosecution has been able to prove that accused-respondent Manmohan @ Manu Bangali was present at the place of occurrence and he took active part by holding the beard of the deceased and also resisting PW1 wife of the deceased to go to rescue her husband. Regarding accused-respondent Arjuna Das Agarwala only evidence is that after coming out from his house he instigated the accused persons to kill the deceased but there is no evidence on record to show that as a result of instigation more blows were given by accused Dillip Chand or any other action was taken by any other accused persons.

E Regarding acquittal of accused-respondent Manmohan Das @ Manu Bangali the High Court had not recorded any acceptable reason. Regarding accused-respondent Arjun Das Agarwal the High Court specifically recorded that there was no evidence that this accused entered into the place of occurrence. The High Court noted that the allegation was that he was standing outside and incited other accused persons to finish the deceased. Though, according to the prosecution in pursuance of the aforesaid act the deceased was assaulted by lathi but it was not corroborated by the medical evidence, therefore, the High Court held that conviction of accused-respondent Arjun Das Agarwal under Section 302/149 IPC is unsustainable.

G Though, Sessions Judge convicted Dillip Chand under Section 302 IPC and accused Kishanlal Kamini, Manmohan Das @ Manu Bangali, Prafull Kumar Pradhan and Arjun Das Agrawala under Section 302/149 IPC the division bench of the High Court convicted Dillip Chand under Section 302/34 IPC and appeals of Prafulla Kumar Pradhan, Kishanlal Kamini, Radheshyam Agarwal, Devi Prasad Misra, Babuli @ Sudhansu Sekhar Das and Uttam Kumar Behera were dismissed.

H As stated earlier the trial court framed charges against accused persons under Section 302/34 IPC and under Section 302/149 IPC. A question may

arise as to whether if an accused is charged under Section 302/149 IPC can he be convicted under section 302/34 IPC. A

This Court in *Mahabir Gope v. State of Bihar*, [1963] 3 SCR 331 considered the question of conviction under Section 302/34 IPC and 302/149 IPC. In that case appellant and 11 other persons were charged under Sections 147 and 302/34 IPC. According to the prosecution the appellant and other accused persons formed themselves into a unlawful assembly at Bhagalpur Special Central Jail and in prosecution of the common object of said assembly, the Chief Head Warder and the night Watchmen, were assaulted. They were also charged under Section 302/34 IPC for assaulting the Chief Head Warder in furtherance of the common object with a view to cause his death. While upholding the conviction under Section 302/34 IPC this Court held that the position would not be any different even if the appellant had been convicted under Section 302/149 IPC as Section 149 IPC provides that if an offence is committed by any member of unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the same assembly, is guilty of that offence. B C D

In *Jagir Singh v. State of Punjab*, [1967] 3 SCR 256 this Court also considered the same question. This Court referred to an earlier decision in *Bharwad Mepa Dana and another v. State of Bombay*, [1960] 2 SCR 172 in which 14 persons were charged with offences under Section 302 read with Sections 149 and 34 IPC. Out of 14 accused persons 7 were acquitted. On appeal the High Court acquitted one of the five convicted persons. This Court upheld the conviction and held that there was no difficulty in the application of Section 34 IPC as the number of the convicted persons was four and there was a clear finding that they shared the common intention with other accused persons whose identity was not established. The above ratio laid down in *Bharwad Mepa Dana and another* (Supra) was approved in this case namely *Jagir Singh* (Supra). E F

The trial court convicted accused Dillip Kumar Chand under Section 302 IPC and accused Kishanlal Kamini, Manmohan Das @ Manu Bengali, Prafulla Kumar Pradhan and Arjun Das Agrawala under Section 302/149 IPC. The High Court convicted accused Dillip Kumar Chand under Section 302/34 IPC and allowed the appeal of accused persons Manmohan Das @ Manu Bengali and Arjun Das Agrawala. In view of the ratio laid down by this court in *Mahabir* H

A Gope (Supra) and Jagir Singh (Supra), this Court in this appeal has to consider whether accused Manmohan Das @ Manu Bangali and Arjun Das Agrawala can be convicted under Section 302/34 IPC.

B It is a settled position of law that Section 34 IPC does not create a distinct offence and it is the participation of the accused that the intention of committing crime is established and Section 34 IPC is attracted. To rope in a person with the aid of Section 34 IPC, prosecution has to prove that the criminal act was done by actual participation of more than one person and that the said act was done in furtherance of common intention of all engaged at a prior concert.

C Coming to the facts of this present case we find from the evidence on record as extracted above that accused Manmohan Das @ Manu Bangali went to the house of the deceased along with other accused persons where accused Dallip Chand gave knife blows to the deceased. We also find that the accused respondent Manmohan Das also prevented Radhamani Panda-
D PW1 wife of the deceased to rescue her husband as she was pushed by accused-respondent Manmohan Das and she fell down. From the evidence of Kailash Chandra Panda-PW2 we find that the accused -respondent Manmohan Das @ Manu Bangali caught hold of tuft of beard of the deceased.

E The above evidence on record is sufficient for us to come to the finding that in the criminal act namely giving fatal blows to the deceased accused-respondent Manmohan Das @ Manu Bangali actively participated in the said criminal act in furtherance of the common object namely to cause death of the deceased. The accused - respondent Manmohan Das @ Manu Bangali not only went with others to the place of occurrence but he also took active part
F while accused Dallip Chand gave the blows to the deceased.

For the above reasons we are of opinion that the High Court erred in allowing the appeal of accused Manmohan Das @ Manu Bangali. We, therefore, convict accused Manmohan Das @ Manu Bangali under Section 302/34 IPC.

G Regarding accused - respondent Arjuna Das Agarwal we find from the evidence on record that this accused neither went inside the house of the deceased nor took any part in the commission of the murder. He only instigated by shouting at the other accused persons. There is nothing in evidence to show that due to his instigation more blows were given by the accused persons. Therefore, no inference can be drawn that this accused-respondent
H had common intention of causing death of the deceased or that he actually

participated in the criminal act. Therefore, High Court rightly acquitted this accused. A

For the reasons stated above the appeal filed by the State is partly allowed. The appeal against the order of acquittal of Arjun Das Agarwal is dismissed and appeal against the order of acquittal of Manmohan Das @ Manu Bangali is allowed and the said order is set aside. He is convicted under Section 302/34 IPC and sentenced to undergo rigorous imprisonment for life. He shall be taken in custody forthwith to undergo the remaining part of the sentence. B

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Appeal partly allowed. C