

Neutral Citation No. - 2023:AHC-LKO:46045

A.F.R.

Order Reserved on 24.05.2023

Order Delivered on 14.07.2023

Case :- CRIMINAL REVISION No. - 435 of 2007

Revisionist :- Salik Singh & Another

Opposite Party :- State of U.P.

Counsel for Revisionist :- Sulabh Kr. Srivastava

Counsel for Opposite Party :- G.A

Hon'ble Manjive Shukla,J.

1. Heard Mr. Sulabh Kr. Srivastava, learned counsel for the revisionists and Ms. Mamta Pandey, learned Additional Government Advocate for the State.

2. Revisionists have filed the present revision challenging therein the judgement and order dated 9.03.2007 passed by First Additional Civil Judge, Junior Division/Judicial Magistrate, Gonda in Case No. 622/06/94 [State Vs. Atma Singh (deceased) and Others] whereby revisionists have been convicted for offences punishable under Sections 323, 325 and 504 I.P.C. Revisionists have also challenged the judgement and order dated 19.07.2007 passed by Additional Sessions Judge/Fast Track Court No.-4, Gonda in Criminal Appeal No. 14 of 2007 whereby the aforementioned conviction of the revisionists under Sections 323, 325 and 504 I.P.C. has been converted into conviction under Sections 323/34 and 325/34 I.P.C.

3. Brief facts of the case are that a criminal case was registered as N.C.R. No. 147 of 1992 under Sections 323 and 504 I.P.C. in Police Station Tarabganj, District Gonda. Later on Section 325 I.P.C. was added and after

investigation, police submitted charge-sheet against the accused before the competent court.

4. Charges were framed against accused i.e. Atma, Saliqu, Amar Bahadur and Raj Bahadur under Sections 323/34, 325/34 and 504 I.P.C. All the accused stated before Court that they are not guilty of the charges levelled against them and demanded for trial.

5. During trial, testimony of P.W.-1, Smt. Pushpa, P.W.-2, Heera Devi, P.W.-3, Dr. S.C. Vishwas, P.W.-4, Dr. G.N. Prasad and P.W.-5, Ram Lakhani Tiwari (police personnel) was recorded. Statements of accused were recorded under Section 313 Cr.P.C. and accused also produced D.W.-1, Braj Bahadur Singh and his testimony was also recorded.

6. P.W.-1, Smt. Pushpa deposed that on 3.7.1992 at about 5:00 p.m., she was inside her house in village, Brahdsthan Bouriha, Police Station Tarabganj, District Gonda. She heard a noise of her mother and, thereafter she reached on the spot outside her house and found that all the accused were beating her mother and when she tried to save her, all the accused started beating P.W.-1. P.W.-1 also deposed that '*sahan*' of her house is on eastern side and house of the accused is on northern side of her house. Accused had put '*jhakhra*' on the '*sahan*' land and when her mother went to remove the said '*jhakhra*', all the accused beaten her which resulted in injuries to her mother and when she tried to save her mother, they also beaten her and she also suffered injuries.

7. P.W.-2, Heera Devi deposed that about three and half years ago, accused put '*jhakhra*' on the abadi land in front of her house with an intention to grab the said land and when she went to remove that '*jhakhra*', accused started beating her with 'lathi-danda' and when her daughter, Pushpa came to save her then accused also beaten her and used abusive language. P.W.-2, Heera Devi in her cross-examination admitted that there was a land dispute between the accused and husband of the petitioner. P.W.-2 Heera Devi in her cross-examination also stated that she received six blows of lathi,

fists and kicks. She further stated that her hand got fractured due to blow of lathi given by accused, Raj Bahadur.

8. Besides the testimony of P.W.-1 and P.W.-2, testimonies of other prosecution witnesses were also recorded. Accused in their defense produced D.W.-1, Braj Bahadur Singh and his testimony was also recorded.

9. Learned First Additional Civil Judge (Junior Division)/Judicial Magistrate, Gonda considered the evidence recorded during trial and ultimately found that accused are guilty of offences punishable under Sections 323, 325, 504 I.P.C. and thereby vide judgement and order dated 9.03.2007 convicted them under Sections 323, 325, 504 I.P.C.

10. During the trial, since accused Atma Singh and Raj Bahadur died, therefore, trial stood abated in respect of the said two accused.

11. Trial court sentenced Saliq Ram Singh and Amar Bahadur Singh with three years' rigorous imprisonment and fine of Rs. 1,000/- each under Section 325 I.P.C., one year rigorous imprisonment and fine of Rs. 1,000/- each under Section 323 I.P.C. and rigorous imprisonment of two years and fine of Rs. 1,000/- each under Section 504 I.P.C. Learned trial court further provided that in case of default in deposit of fine, accused will have to undergo six months' imprisonment each and all the sentences will run simultaneously.

12. Learned trial court refused to give benefit of Section 4 of The Probation of Offenders Act, 1958 to both the accused on the ground that they have beaten Smt. Heera Devi and her daughter, Pushpa and have also fractured the bone of Smt. Heera Devi.

13. From perusal of the testimony of P.W.-1 and P.W.-2 and the judgement and order dated 9.03.2007, it appears that neither the prosecution led any evidence in respect of common intention of the accused regarding criminal act nor the trial court could draw inference from the circumstances of the

case regarding common intention of all the accused for committing the crime in question, as such, trial court instead of convicting accused under Sections 323/34, 325/34 and 504 I.P.C., convicted the accused for offences punishable under Sections 323, 325 and 504 I.P.C.

14. The aforesaid judgement and order dated 9.03.2007 passed by First Additional Civil Judge (Junior Division)/ Judicial Magistrate, Gonda in Case No. 622/06/94 was challenged by Saliq Singh and Amar Bahadur Singh by filing an Appeal in the Court of Additional Sessions Judge/ Fast Track Court No. 4, Gonda and the said appeal was registered as Criminal Appeal No. 14 of 2007.

15. Learned Appellate Court considered that the trial court framed charges against the appellants under Section 323/34, 325/34 and 504 I.P.C. and further considered the testimony of P.W.-1 and P.W.-2 recorded during the trial. Learned appellate court passed final order in aforementioned Criminal Appeal No. 14 of 2007 on 19.07.2007.

16. Learned Appellate Court after considering the testimony of P.W.-1 and P.W.-2 recorded during trial, came to conclusion that since all the accused have beaten Smt. Heera Devi and her daughter, Pushpa, therefore, there was common intention of all the accused to commit the crime in question, as such, appellants are liable to be convicted for offences punishable under Sections 323/34 and 325/34 I.P.C. Learned appellate court in its judgement and order dated 19.07.2007 has further recorded a finding that there was a clerical error in judgement and order dated 9.03.2007 passed by the trial court for the reason that the trial court framed charges under Section 323/34 and 325/34 and 504 I.P.C. and keeping in view the circumstances of the case, conviction could not have been done under Sections 323/34, 325/34 and 504 I.P.C. and, therefore, learned Appellate Court vide judgement and order dated 19.07.2007 rectified the said clerical error and convicted the appellants under Sections 323/34 and 325/34 I.P.C. and also maintained the sentence given by the trial court under the aforesaid sections.

17. So far as conviction under Section 504 I.P.C. was concerned, learned Appellate Court on appraisal of the evidence found that the offence punishable under Section 504 I.P.C. is not made out against the appellants, as such, conviction under the said section by the trial court has been set-aside.

18. In the aforesaid circumstances, revisionists have filed the present revision.

19. Learned counsel for the revisionists has submitted that the learned Appellate Court without there being any material on record, could not have recorded a finding that non mentioning of Section 34 I.P.C. along with Sections 323 and 325 I.P.C. in the conviction order dated 09.03.2007 passed by learned trial court, is a clerical error. Learned counsel appearing for the revisionists has vehemently argued that though charges were framed against the accused under Sections 323/34, 325/34 and 504 I.P.C. but since prosecution did not lead evidence to prove common intention of all the accused for commission of crime in question, as such, learned trial court has convicted the accused only under Sections 323, 325 and 504 I.P.C.

20. Learned counsel appearing for the revisionists has vehemently argued that neither P.W.-1 nor P.W.-2 in their testimony have said that there was any common intention of all the accused to commit the crime in question and further no evidence has been led by the prosecution that there was any kind of pre-meeting of minds of all the accused for commission of the crime, therefore, in absence of any evidence led by the prosecution, there was no occasion for the trial court to convict the accused under Sections 323/34 and 325/34 I.P.C., as such, Appellate Court, on presumption that since all the four accused beaten Heera Devi and her daughter, Pushpa, therefore, necessarily there was common intention of all the accused to commit the crime in question, could not have convicted the revisionists under Sections 323/34 and 325/34 I.P.C.

21. Learned counsel appearing for the revisionists has also vehemently argued that P.W.-2 in her testimony has categorically stated that her hand was

fractured due to lathi blow given by accused, Raj Bahadur and, therefore, unless there was any evidence led by the prosecution in respect of the common intention and pre-meeting of minds of all accused for committing the crime in question, there could not have been any occasion for the Appellate Court to convict the revisionists under Sections 323/34 and 325/34 I.P.C.

22. I have considered submissions advanced by learned counsel for the revisionists, learned A.G.A. for the State and have also perused the record of the Trial Court as well as record of the Appellate Court.

23. For arriving at a conclusion, it is necessary for this Court to have a look over Section 34 I.P.C. which is extracted as under:

“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.”

24. A bare perusal of the aforesaid Section 34 I.P.C., it is patently manifest that the said section will come into play only when there existed common intention of all the accused for a criminal act.

25. Before a person can be held liable for offence done by another under provisions of Section 34 I.P.C., it must be established that there was common intention in the sense of a pre-arranged plan between accused and the person sought to be held liable had participated in some manner in the act constituting the offence. Unless both common intention and participation are present, Section 34 I.P.C. cannot be applied.

26. The Hon’ble Supreme Court in its judgement and order rendered in the case of *Sheodan and others Vs. The State of Rajasthan* reported in *1974 CRI. L. J. 234 (V 80 C 91)* has held that inference of common intention should never be reached unless it is necessary inference deducible from the circumstances of the case. The presence of accused at the scene of the offence and their running away after occurrence without further materials or

without direct evidence of prior concert cannot be said to be incompatible with innocence of accused. Relevant portion of the aforesaid judgement is extracted as under:-

5. Then remains the case of the remaining two accused Amilal and Kishanlal. In the first information report it was only stated that these persons had challenged Roopram while he was on camel's back. In the course of trial the prosecution has improved its case by introducing a material fact that they exhorted Sheodan to fire at Roopram. This was never the allegation in the first information report. Moreover as to the exhortation the evidence of the eye-witnesses is not uniform. Roopram injured has of course deposed to the exhortation by the witnesses to Sheodan to fire at him but Kaniram P.W. 2 and Chuniram P.W. 3 had only stated that only Kishanlal exhorted Sheodan to fire at Roopram and Amilal was only standing having a lathi in his hand. All the witnesses have said that the accused were standing in the lane. They have not deposed as to whether they had come together and at what time they had come in the lane. The learned Addl. Sessions Judge had rightly discarded the version of exhortation prior to the firing by these two accused persons. He, however, has held them guilty on the basis of circumstances which were relevant in his opinion to make out a case under Section 34, I.P.C. against these accused persons. The first circumstance pointed by the learned Addl. Sessions Judge is that Kishanlal and Amilal were with accused Sheodan at the time of the occurrence in the lane and that their presence was not usual and in his opinion they were awaiting Roopram so that he could be availed of. It may be true that all the accused persons were in the lane at the time of the occurrence. But it cannot be said that their presence was unusual. They were the residents of the same village which was a small village and it cannot be said to be unusual to be present in a village lane which was meant for the use of the villagers. The learned Addl. Sessions Judge has entered into the realm of conjecture when he has observed that they were awaiting Roopram so that he could be availed of. This is merely a guess based on no material on the record. The presence of these persons in the lane cannot be said to be incompatible with their innocence. The second circumstance pointed out by the learned Addl. Sessions Judge is that both these accused went away from the scene of occurrence with accused Sheodan. It is not in the evidence that they had come together or in a body. It is true that the witnesses have deposed that when some neighbours had arrived at the spot all the three ran away towards the south. The learned counsel for the State emphasized on this circumstance and stated that it was a relevant and sufficient circumstance to show that they had a preconcert and shared the common intention to cause injury to Roopram. In that connection, the learned counsel for the State relied on Mamand v. Emperor, AIR 1946 PC 45=(47 Cri LJ 344) and State v. Iftikharkhan, AIR 1973 SC 863 = (1973 Cri LJ 636). On the other hand, Mr. Kashinath Joshi has sought to distinguish these two cases relied on in Pandurang v. State of Hyderabad, AIR 1955 SC 216=(1955 Cri LJ 572) and Banwari v. State of U. P., AIR 1962 SC 1198 = (1962 (2) Cri LJ 278). In AIR 1946 PC 45=(47 Cri LJ 344) their Lordships of the Privy Council took the fact of running away together as one of the considerations to establish a common intention. But that was not the sole circumstance but there was much more than that. In that case there was evidence that all the three accused came together. There was also evidence

that they all ran away together in a body. In AIR 1973 SC 863=(1973 Cri LJ 636) also there was evidence that the accused had come together at the time of occurrence and they were close associates and they had run away together in a body after the shooting was over. The facts of the particular case cannot be applied indiscriminately to hold the persons guilty. The case must rest on its facts and the mere similarity of facts in one case cannot be used to determine a conclusion of fact in another. In the present case excepting that the accused were present in the lane at the time of the occurrence and that they had ran away after the shooting there is no conclusive circumstance to establish that the accused had a prior concert and shared the common intention to cause the injury to Roopram. It has not been proved that the accused were close associates of Sheodan nor it has been proved that they had come together. It is of course true that they had after the shooting run away towards the south but it is not the suggestion of the prosecution that they had run in a body i.e. together. Their running away after the shooting cannot be a conclusive circumstance incapable of being explained on other hypothesis. The running away simultaneously after the shooting could have been motivated by the instinct of saving themselves from the villagers who could have thought that these two accused persons were also party to the incident. It will be profitable to extract the observations made in Pandurang's case AIR 1955 SC 216= (1955 Cri LJ 572) which throw considerable light on the controversy before me-

"In the present case there is no evidence of any prior meeting we know nothing of what they said or did before the attack-not even immediately before..... But to quote the Privy Council again. The inference of common intention should never be reached unless it is necessary inference deducible from the circumstances of the case'. But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of cases. At bottom, it is a question of fact in every case and, however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis."

Bearing the principle laid down by their Lordships of the Privy Council and as approved by the Supreme Court, in mind, there is no room for doubt to say that there is no direct evidence of prior concert and the circumstantial evidence is not such which necessarily establish the conclusion of the guilt of these two accused persons. The presence of these persons on the spot and their running away after the shooting without further materials cannot be said to be incompatible with the innocence of these accused persons as already stated above. The learned Additional Sessions Judge was also not right when he used the omission of these accused to intervene as a relevant circumstance against them. There was one fire by Sheodan and question of intervention could not have arisen. On the other hand their omission to commit violence or show of criminal force is a circumstance in the facts of this case in their favour. Consequently, it cannot be said that the case against these two accused is proved beyond any manner of doubt."

27. Hon'ble Supreme Court in its judgement rendered in the case of ***Parichhat and Others v. The State of M.P., AIR 1972 Supreme Court 535*** has held that in absence of any evidence of prior meeting of minds and any pre-arranged plan or of participation of accused persons in the fight in question they cannot be convicted with the aid of Section 34. The prosecution must prove that the criminal act has been done in concert pursuant to the pre-arranged plan. Mere proof that some accused persons were with the main accused who inflicted fatal injury on the deceased will not attract the applicability of Section 34.

28. Relevant portion of the aforesaid judgement passed by the Hon'ble Supreme Court is reproduced as under:-

“20. The Sessions Court disbelieved that the appellants Sunnu and Sitaram had instigated the appellant Gangu to give a ballam blow to Kashiram. The appellants Parichhat, Sunnu and Sitaram did not beat or strike anyone. Common intention within the meaning of Section 34 of the Indian Penal Code implies pre arranged plan. There being no evidence of a prior meeting of minds and any prearranged plan or of participation of Sunnu and Sitaram in the fight they could not be convicted with the aid of Section 34 of the Indian Penal Code. Parichhat could not be said to have common intention with Gangu to cause the death of Kashiram and Parichhat could not be convicted with the aid of Section 34 of the Indian Penal Code. If they wanted to dispossess Damru and if they went there to dispossess Damru and if Gangu killed Kashiram and appellants Parichhat, Sunnu and Sitaram could not be brought within the common intention of killing Kashiram. No such pre-arranged plan has been proved. It has also not been proved that any criminal act has been done in concert pursuant to the pre-arranged plan. Several persons can simultaneously attack a man and each can have the same intention, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by Section 34 of the Indian Penal Code because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of murder.

22. Section 34 of the Indian Penal Code will not be attracted unless first it is established that a criminal act was done by several persons, second, that there was a common intention and a pre-arranged plan to commit an offence and third that there was participation in the commission of the offence in furtherance of that common intention. The High Court was wrong in convicting the appellants Parichhat, Sunnu and Sitaram under Section 326 read with Section 34 of the Indian Penal Code. Their convictions are set aside. The High Court in setting aside the acquittal of Parichhat, Sunnu and Sitaram should have considered the enmity between Dharam Ballabh and

Parichhat, the case instituted by Durji against Dharam Ballabh, the allegations made by Parichhat against Dharam Ballabh, the hostile and unsympathetic attitude of Ram Lakhan Sharma in investigating the complaint of Durji against Dharam Ballabh. If the appellants could not be convicted under Sections 147, 447 and 302 read with Section 149 of the Indian Penal Code and they were acquitted the acquittal could not be set aside by the High Court unless the Sessions Court in acquitting the accused was palpably wrong or took an erroneous view or committed grave injustice. The setting aside of the acquittal by the High Court was itself erroneous and wrong. The High Court was also wrong in convicting the appellants under Section 326 read with Section 34 of the Indian Penal Code. Merely remaining with Gangu at the time of cutting the crop will not justify any application of Section 34 of the Indian Penal Code with regard to the murder of Kashiram.”

29. Neither Smt. Heera Devi (P.W.-2) nor her daughter, Pushpa (P.W.-1) in her testimonies have deposed that there was any pre-arranged plan of accused regarding commission of crime in question nor there was any common intention of all the accused to commit the crime. I find that prosecution even did not lead any evidence to prove that there was common intention of all the accused or there was pre-meeting of minds of all the accused for committing the crime in question.

30. In absence of any evidence led by the prosecution or even any attempt by the prosecution to prove that there was common intention of all the accused or pre-meeting of minds for committing the crime in question, the Appellate Court on its own could not have drawn the inference that there was common intention of all the accused for committing the crime in question.

31. In the aforesaid judgements rendered by the Hon'ble Supreme Court, it has been categorically held that for roping the accused for the crime with the help of Section 34 I.P.C., prosecution must lead evidence to prove that there was common intention of all the accused to commit the crime whereas in the present case prosecution did not lead any evidence and there is nothing in the testimony of P.W.-1 and P.W.-2 regarding common intention of all the accused and pre-meeting of minds or any pre-arranged plan in respect of commission of crime, as such, Appellate Court while adding Section 34

I.P.C. in conviction of revisionists under Sections 323 and 325 I.P.C. has committed an illegality.

32. In view of the aforesaid discussion and reasoning, conviction of the revisionists under Section 323 I.P.C. read with Section 34 I.P.C. and Section 325 I.P.C. read with Section 34 I.P.C. is set-aside and conviction of the revisionists done by the trial court vide judgement and order dated 9.03.2007 under Sections 323 and 325 I.P.C. is upheld.

33. So far as the order of the Appellate Court exonerating revisionists/appellants under Section 504 I.P.C. is concerned, the same is hereby upheld.

34. Learned counsel appearing for the revisionists has also argued that if the conviction of revisionists under Sections 323 and 325 I.P.C. is upheld then they are entitled for protection of Section 4 of The Probation of Offenders Act, 1958 as prior to said conviction, they have not been convicted for any offence by any competent court of law.

35. Learned counsel appearing for the revisionists has also submitted that the learned Appellate Court has refused to grant benefit of Section 4 of The Probation of Offenders Act, 1958 without considering all the facts and circumstances and only for the reason that Smt. Heera Devi and her daughter, Pushpa have suffered injuries, the benefit of Section 4 of The Probation of Offenders Act, 1958 has been denied.

36. Learned counsel appearing for the revisionists has also submitted that the crime in question took place on 3.07.1992 and two accused including Raj Bahadur by whose lathi blow, hand of Smt. Heera Devi was fractured, have already died and since then about more than 30 years have elapsed and there is no offence committed by the revisionists, therefore, in the facts and circumstances of the case, at this stage, revisionists are entitled for benefit of Section 4 of The Probation of Offenders Act, 1958.

37. I have considered submissions advanced by learned counsel for the revisionists in respect of the protection under Section 4 of the Probation of Offenders Act, 1958 and from the facts and circumstances of the case, I find that the crime in question took place in the year 1992 and since then, 30 years have elapsed and neither there is any offence committed by the revisionists nor they have been convicted for any offence. Even prior to the crime in question, revisionists have not been convicted for any offence. I also find that Raj Bahadur, by whose lathi-blow, hand of Smt. Heera Devi was fractured, has already died and another convict, Atma Singh has also died. Both the revisionists, as on date, are of age more than 60 years.

38. In the entire facts and circumstances, I am of the view that revisionists are entitled for benefit of Section 4 of The Probation of Offenders Act, 1958 and, therefore, instead of sentencing the revisionists under Section 325 I.P.C. with rigorous imprisonment of three years and fine of Rs. 1,000/- each and under Section 323 with rigorous imprisonment of one year and fine of Rs. 1,000/- each, they shall file two bonds to the tune of Rs. 20,000/- coupled with personal bonds to the effect that they shall not commit any offence and shall be of good behaviour and shall maintain peace during the period of one year. If there is breach of any of the aforesaid conditions, revisionists will subject themselves to undergo sentence before the Magistrate as per Rules. The aforesaid bonds shall be filed by the convicts within two months from the date of this judgement.

39. Revision is partly allowed regarding sentence of the revisionist.

40. Let record of trial court & appellate court along with certified copy of this order be sent to the court concerned for necessary information and compliance.

Order Date:- 14.07.2023

A. Mandhani