

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 217 of 2012

Arising Out of PS.Case No. -34 Year- 2007 Thana -null District-
EASTCHAMPARAN(MOTIHARI)

Munna @ Munna Mian, S/O Ibrahim Mistry, Resident of Village – Madhopur
Tarsereya, P.S. – Turkaulia, District – East Champaran.

.... Appellant

With

The State of Bihar

.... Respondent

Criminal Appeal (DB) No. 235 of 2012

Arising Out of PS.Case No. -34 Year- 2007 Thana -null District-
EASTCHAMPARAN(MOTIHARI)

Md. Anjar Alam S/O Sheikh Bhola @ Kaish R/O Vill-Semra Belwatia, P.S.
Turkaulia, Distt-East Champaran

.... Appellant

Versus

1. The State of Bihar
2. Manif S/O Ibrahim Mistry R/O Vill-Madhopur Tansariya, P.S. Turkaulia, Distt-East Champaran
3. Md.Shamim S/O Basir Deban R/O Vill-Madhopur Tansariya, P.S. Turkaulia, Distt-East Champaran
4. Sheikh Razeed S/O Sheikh Samsuddin R/O Shankar Sareya Tansariya, P.S. Turkaulia, Distt-East Champaran
5. Javed S/O Sheikh Rajmohammad R/O Shankar Sareya Tansariya, P.S. Turkaulia, Distt-East Champaran
6. Intijarul Haque S/O Zameel Mikhtar R/O Vill-Belbari, P.S.Turkaulia, Distt-East Champaran
7. Bhola S/O Quamrul Haque R/O Vill-Belbari, P.S.Turkaulia, Distt-East Champaran

.... Respondents

Appearance :

(In CR. APP (DB) No. 217 of 2012)

For the Appellant : Mr. Ansul, Advocate.

For the Respondents : Mr. Umakant Shukla, Advocate.

Mr. Rajesh Ranjan No. 1, Advocate.

For the State : Mr. S.C. Mishra, (APP).

(In CR. APP (DB) No. 235 of 2012)

For the Appellant : Mr. Umakant Shukla, Advocate.

Mr. Rajesh Ranjan No. 1, Advocate.

For the Respondents : Mr. Ansul, Advocate.

For the State : Mr. Ashwini Kumar Sinha, (APP).

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CORAM: HONOURABLE MR. JUSTICE V.N. SINHA
and
HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA

C.A.V. JUDGMENT
(Per: **HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA**)
Date: **04-11-2015**

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The sole appellant Munna @ Munna Mian preferred this Criminal Appeal against the judgment dated 1st February, 2012 and order of sentence dated 04.02.2012 passed in Sessions Trial No. 714 of 2008 by the learned Additional Sessions Judge, Fast Track Court-IV, East Champaran, Motihari by which the appellant has been convicted under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life with fine of Rs. 50,000/-. The informant also assailed the same impugned judgment vide Criminal Appeal (DB) No. 235 of 2012 by which six accused persons-respondent no. 2 to 7 of Criminal Appeal (DB) No. 235 of 2012 have been acquitted.

II. The prosecution case, in nut shell as disclosed by P.W. 25 Md. Anjar Alam is that on 03.04.2007 at 08:00 A.M., he and his brother Md. Shahjad the deceased had gone to the house of his relative Md. Tunna, son of Abdul Hasan of Village Madhu Chapra on his bike bearing Registration No. BR05S-8524 to give invitation card of marriage of their brother Md. Chand. They were returning towards NH 28-A at 11:00 A.M. after delivery of invitation card and when they reached near Madhu Chapra railway crossing Md. Shamim riding



on a motorcycle came in front of the motorcycle of the informant and a blue colour Indica car bearing Registration No. DL 3CP-3831 also came and stopped in front of the motorcycle of the informant. Manif and Sheikh Rasid got down from the car and asked his brother Md. Shahjad to come and talk. Md. Shahjad got down from the motorcycle and went by the side of the road to talk with Manif and Rasid. In the meantime, Javed, Md. Umresh, Sheikh Rasid, Intijarul Haque, Bhola and others got down from the car and began to assault his brother with stick, fists and slaps. When the informant tried to save his brother, Munna @ Munna Mian having a knife in his hand threatened the informant. The informant shouted to save his brother. Villagers ran but in the meantime, Md. Shamim fled away with his motorcycle and all other seven accused persons put Md. Shajad down on the ground and Munna @ Munna Mian slit the neck of his brother. The accused persons boarded the car and started fleeing away towards NH-28A, but in the meantime, the police came and intercepted the vehicle and apprehended all the seven accused persons.

III. Reason behind the occurrence is that his brother-deceased and Manif had dispute with regard to lending and borrowing of money. On the basis of the aforesaid fardbeyan Piprakothi P.S. Case No. 34 of 2007 was registered under Sections 302 and 34 of the Indian Penal Code against eight accused persons. After investigation



the police submitted the chargesheet. Cognizance for the offence under Section 302 and 34 of the Indian Penal Code was taken. The case of accused Umeresh was separated for enquiry about his juvenility. The case was committed to the court of Sessions. Charge under Section 302 of the Indian Penal Code was framed against Munna @ Munna Mian and other six accused persons under Sections 302 and 34 of the Indian Penal Code.

IV. The prosecution altogether examined 26 prosecution witnesses and out of which P.W. 25 Md. Anjar Alam, P.W. 1 Rajendra Das, P.W. 2 Gaffar Khan, P.W. 3 Akhilesh Kumar, P.W. 4 Rakesh Kumar Rajak are the eye witnesses of the occurrence. P.W. 5 Rabindra Kumar, P.W. 6 Narsingh Baitha arrived on the place of occurrence while the accused persons were fleeing away and apprehended by the police. P.W. 10 Rajendra Ram, P.W. 13 Ajit Kumar came on place of occurrence and on alarm saw that while the accused persons were fleeing away they were apprehended by the police. P.W. 7 Dhanilal Kumar, P.W. 8 Harendra Das and P.W. 11 Vijay Kumar do not support the prosecution case and they were declared hostile. P.W. 14 Md. Tammann, P.W. 15 Modassar Nazar @ Muha, P.W. 17 Md. Mobnin and P.W. 18 Md. Chand the brother of the deceased came on the place of occurrence after getting information of murder of Md. Shajad. P.W. 14 and P.W. 15 are the



seizure list witnesses of recovery of knife, mobiles and stick from car as well as from the possession of the accused persons. They came to know about the occurrence from the informant P.W. 25. P.W. 19 Sheikh Bhola is the father of the deceased and P.W. 20 Shahana Khatoon is the wife of the deceased. They also knew about the occurrence from Md. Anjar Alam, the informant P.W. 25. P.W. 22 Kumod Kumar Srivastava the owner of telephone booth Maa Jagdamba Pay Phone have also been declared hostile. P.W. 23 Dr. Sachidanand Choudhary and P.W. 24 Dr. Afak Ahmad are the doctors who held the autopsy on the dead body of the deceased. P.W. 26 Kamakhya Narayan Singh is the investigating officer of the case.

V. The defence also examined three witnesses D.W. 1 Ali Akbar, D.W. 2 Ali Alam Devan and D.W. 3 Sipahi Ram to prove the alibi of the accused Md. Shamim.

VI. The prosecution has exhibited signature of witness Md. Tammann on seizure list as Exts. 1 and 2, signature of witness Mudassar Nazar @ Muhu on seizure list as Ext. 1/2, signature of Md. Mobin in seizure list as Ext. 1/3, signature of Md. Chand in carbon copy of inquest report as Ext. 1/4, post-mortem report as Ext. 2, fardbeyan as Ext. 3, Marginal report of fardbeyan as Ext. 4, formal F.I.R. as Ext. 5, seizure list as Ext. 6 and self confessional statement as Ext. 7.



VII. The learned trial court appraised the evidence of the prosecution witnesses and found the evidence of the eye witnesses reliable and accordingly convicted one accused Munna @ Munna Mian under Section 302 of the Indian Penal Code and at the same time the learned trial court held that the prosecution has failed to prove the common intention of other accused persons and accordingly acquitted six accused persons from the charge under Section 302/34 of the Indian Penal Code.

VIII. Aggrieved by the conviction and sentence awarded to Munna @ Munna Mian the appellant filed Criminal Appeal (DB) No. 217 of 2012 and the informant being aggrieved by the judgment of the learned trial court acquitting the six accused persons preferred Criminal Appeal (DB) No. 235 of 2012.

IX. Learned counsel for the convict-appellant submitted that the prosecution evidence inherently contradicts to each other. P.W. 25 the informant is said to be accompanying his brother, but the accused persons did not assault the informant P.W. 25. P.Ws. 1, 2, 3 and 4 who are said to have come on the place of occurrence have not stated about the manner of occurrence. P.W. 3 and P.W. 4 have stated that while the accused persons were fleeing away they were intercepted by the C.R.P. personnel, but the prosecution has not brought on record any evidence to show that the accused persons were



apprehended by the C.R.P. The manner of arresting of the accused persons on the spot is doubtful. The appellant and others were searching out the deceased for collecting the borrowed money which the deceased had long evaded from repaying and when the appellant and other accused persons arrived at the spot of death the accused persons were arrested.

X. Learned counsel for the appellant further submits that the deceased was having criminal record and he might have been killed in the morning much before the time disclosed by the prosecution witnesses. The doctors, who held autopsy, have opined that the death was caused within 12 hours from the time of post-mortem. The doctors P.W. 23 and P.W. 24 have not stated in the post-mortem report about the contents found in the abdomen of the deceased. The doctors opined after autopsy that the death was within 12 hours and rigor mortis was found all over the body. Thus the prosecution has failed to prove the time of death of the deceased.

XI. On the contrary, learned counsel for the informant contended that there is no contradiction in the evidence of the prosecution witnesses. P.W. 25 the informant has very categorically stated about the time, place and manner of occurrence. P.Ws. 2, 3 and 4 who arrived at the place of occurrence, on crying, have also deposed about the manner of occurrence and the manner of arresting the

accused persons while fleeing away after committing the occurrence.

The learned trial court has rightly held the appellant guilty.

XII. Perused the evidence and the records, P.Ws. 1, 2, 3, 4 and 25 are the eye witnesses of the occurrence. P.W. 25 was accompanying his brother and P.Ws. 1, 2, 3 and 4 are the persons residing in and around the place of occurrence who disclosed that on alarm they came to the place of occurrence, saw the occurrence and the appellants and others while fleeing away were apprehended by the C.R.P. P.W. 25 the informant stated that he and his brother Md. Shahjad came to the village Madhu Chapra at the house of his relative Md. Tunna to give invitation card of marriage of his brother. While returning, when they came near the Madhu Chapra Railway crossing about 11:00 A.M., Md. Shamim riding on a motorcycle came in front of their motorcycle. Other accused persons were also following Md. Shamim on Indica car and stopped the vehicle. P.W. 25 further stated that Md. Rasid and Manif got down from the vehicle asked his brother to come to have talk. While Shahjad was talking with them Intijarul Haque, Javed, Manif and Bhola came near Sahjad and began to assault with fists, slaps and sticks. The informant tried to save but Munna @ Munna Mian showed him knife and threatened to kill. P.W. 25 started crying on such P.Ws. 1, 2, 3, 4 and other witnesses residing in the vicinity of the place of occurrence, came there running but by

that time the appellant and other accused persons put down Shahjad and Munna @ Munna Mian slit his neck. He further disclosed that while the other accused persons were fleeing away Kamakhya Narayan Singh the S.H.O. of Pipra Kothi police station apprehended all the accused persons on the place of occurrence itself, and he made his statement.

XIII. P.W. 1 has stated that at the time of occurrence he was on his cattle shed situated near the railway crossing and came on the place of the occurrence he saw 6-7 persons assaulted the deceased with stick and fists. One person slit the neck of Shahjad from the right side. P.W. 1 arrived at the place of occurrence along with other witnesses and started pelting stones, but all the seven accused persons started fleeing away by Indica car towards railway crossing, but the police came there and arrested the accused persons. P.W. 1 has very categorically stated that he was near the place of occurrence at the time of occurrence. The house of P.Ws. 2, 3 and 4 are also situated near his house and they all came on the place of occurrence. C.R.P. police apprehended the accused persons while the appellant and other accused persons had covered a little distance he also went there and saw the accused persons. P.W. 1 has further stated that when he arrived at the place of occurrence, the appellant and other accused persons have already put the deceased down on the ground. P.W. 2 is



another eye witness and he also disclosed that at the time of occurrence he was cutting bamboo near the place of occurrence and on alarm arrived there and saw the accused persons assaulting the deceased and one of the accused assaulted the deceased with dagger and that person died. P.W. 2 also discussed the same facts about the manner of occurrence and on the point of fleeing away of the accused persons and their being apprehended by the police. P.W. 3 have stated the same facts that while the accused persons were fleeing away after killing Md. Shahjad towards national highway. C.R.P. came and arrested the accused persons and they were kept at the place of occurrence. P.W. 4 has also stated the same facts and disclosed that while C.R.P. was passing through national highway and they saw the occurrence and apprehended the accused persons.

XIV. P.W. 26 is the investigating officer of the case and he disclosed that on 03.04.2007 he had gone to depose in Sessions Trial No. 299 of 2005 and he was returning to police station with the armed forces at about 11:30 a.m. while he was passing through N.H. 28A, he heard alarm of some people coming from Madhu Chapra railway crossing and saw one Indica car going towards N.H. 28A. People were chasing, on suspicion he got the Indica car stopped. The people chasing disclosed that the criminals were inside the car and they were fleeing away after committing murder of a person. He asked



the armed forces to surround the Indica car and the persons sitting inside the car. P.W. 25, thereafter, went to the place of occurrence and found the dead body of a person. Md. Anjar Alam P.W. 25 came there and disclosed about the occurrence that his brother Md. Shahjad was killed by all the persons sitting in the car. P.W. 26 informed the police station and he recorded the statements of the informant. On appraisal of the evidence of the eye witnesses and P.W. 26, the investigating officer of the case, it is evident that P.W. 26 was accompanied with armed forces who apprehended the accused persons fleeing away on car. It appears that P.Ws. 1, 2 and 3, who have disclosed that the accused persons were apprehended by C.R.P. assuming the armed forces to be of C.R.P.F. Evidently P.Ws. 1, 2 and 3 are the common villagers, they in common parlance called Armed force as C.R.P.F. Therefore, the submissions of the learned counsel for the appellant that the evidence of the witnesses are contradictory *sans merit* and not at all acceptable rather the witnesses are coherent and there appears no contradictions in the evidence of the witnesses with regard to the manner and the way of arresting of the accused persons by the armed forces.

XV. Learned counsel for the appellant further submitted that according to the prosecution case the deceased Md. Shahjad was killed at about 11:00 A.M., but the doctor who held autopsy on the

dead body of the deceased found the rigor mortis all over the body. The rigor mortis usually starts setting after 2-4 hours and it covered the entire dead body in around 12 hours. The doctor P.W. 23 has found that the rigor mortis was found all over the body and death was within 12 hours from the time of autopsy. Autopsy was held at 04:30 P.M and thus there appears that the death might have been caused around 04:00-05:00 A.M. and not at 11:00 A.M. and it creates serious doubt about the prosecution case.

XVI. The medical evidence does not support the allegations made by the informant P.W. 25 and other witnesses who have stated that the deceased was assaulted by seven persons with fists, slaps and sticks. The post-mortem report shows minor bruise except the fatal wound and it does not correspond to the evidence that eight persons assaulted the deceased before the fatal blow given by knife/chhura at neck.

XVII. P.W. 23 Dr. Sachidanand Choudhary held the autopsy on the dead body of the deceased and found following ante-mortem injuries on the body of the deceased : -

External Examination:-

- (i). Incised wound 2"x1"xsoft tissue deep over front and right side of upper part of neck below mandible.
- (ii). Abrasion 2"x1" over front of right knee.

(iii). Bruise 1½”x1” over back.

Internal Examination :-

Head and Neck – Brain and its meninges were found pale. Blood and Blood clot was present in subcutaneous and muscle of neck. Externus mastoid, muscle, trachea, large vessels on right side of neck were cut.

Abdomen – All abdominal viscera were pale and intact.

Cause of Injury- No. (i) sharp cutting substance. No. (ii) and No. (iii) caused by hard and blunt substance.

The cause of death is haemorrhage and shock due to injury no. 1. The doctor further opined that the death was within 12 hours.

XVIII. P.W. 24 Dr. Afak Ahmad was the observer under whose supervision the post-mortem was held. The doctor has stated that he did not mention about the contents of the stomach as he did not find it necessary and he mentioned all the essential ingredients causing death of the deceased. P.W. 23 has stated that setting of rigor mortis also depends on the weather and climate. It firstly starts from head and neck and mandible thereafter on upper limbs and later on lower limbs and after 12 hours it starts vanishing from the lower limbs.

XIX. The contentions of the learned counsel for the



appellant is of no substance and cannot be accepted as it cannot be said that in all weather rigor mortis starts setting in after 4-6 hours. In hot and humid condition the rigor mortis starts setting in after 2 hours of the death and it covers the whole body within six hours. The occurrence took place in the month of April and the climate of April in the area of East Champaran is hot and humid. The dead body left at the place of occurrence itself for hours under Sun and, therefore, there was every possibility that the rigor mortis started setting early and covered whole body within 5-6 hours. From the evidence of the doctor, I find that the medical evidence fully corroborates the ocular versions of the prosecution. The doctor found one incised wound on the right side of the neck just below the mandible and two abrasion and bruise. The prosecution witnesses have stated that firstly the deceased was assaulted with fists, slaps and sticks and, thereafter, he was put down on the ground and fatal blow was given by the appellant Md. Munna @ Munna Mian. The blow with fists and slaps may not have caused any such injuries except the assault made by stick. Only one stick and dagger was recovered on the basis of the confession made by the appellant on the spot itself from the Indica car.

XX. Learned counsel for the appellant further submitted that the inquest report shows that the deceased was bearing pant and vest whereas P.W. 2 in his deposition stated that the deceased was

bearing pant and shirt and P.W. 25 has stated that his brother deceased was bearing pant and one Vest (Banyan) thereon. According to the prosecution case, the deceased had gone to the house of his relative and it is not natural conduct that the deceased and his brother had gone to the house of his relative in informal dress.

XXI. It is further submitted that much reliance has been placed as the learned Sessions Judge accepted the confession of the appellant although there was no discovery of new facts. Section 27 of the Evidence Act is exception to the general rule making the extra-judicial confession before the police admissible. The accused persons and the appellant were apprehended on the spot in presence of many of persons and they were chased forcing them to flee away. The appellant had no time to conceal the weapon of crime. It is further submitted that the facts of recovery of dagger and sticks were not from the appellant under Section 313 of the Code of Criminal Procedure and the same cannot be relied upon to hold the appellant guilty. It is also submitted that no test identification parade was held as the appellant and respondents 2 to 7 were not acquainted with the prosecution witnesses except P.W. 25.

XXII. On the face of the facts and the evidence on record, I find no substance in the submissions as it has come that the residence of the deceased and P.W. 25 is situated just 3-4 kms. away



from the place of occurrence. In the village side, usually people use to visit the house of his relative in a very informal dress. The inquest report also shows that the deceased was clad in pant and vest (banyan). Same is the evidence of P.W. 23 and other witnesses. P.W. 25, the investigating officer of the case has stated that on being apprehended the appellant confessed his guilt and put his thumb impression on his confession. The appellant has disclosed that he kept concealed the stick and dagger in the Indica car. In pursuance thereof the dagger and stick were recovered.

Section 27 of the Evidence Act clearly says that provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

XXIII. P.W. 26 the investigating officer of the case has stated in his evidence that when the accused persons including the appellant Md. Munna @ Munna Mian was apprehended he confessed his guilt and disclosed that the arms used in the killing of the deceased Md. Shahjad were kept concealed in the Indica car and in pursuance

thereof the blood stained dagger was recovered. The seizure list (Ext. 6) was prepared. P.W. 15 Modessar Nazar @ Muhu who arrived at the place of occurrence on being informed also disclosed about the confession of the accused in his presence and recovered blood stained knife and stick from the Indica car.

XXIV. The statement recorded under Section 313 of the Code of Criminal Procedure of Md. Munna @ Munna Mian the appellant it appears that he was confronted with the question that one mobile phone was recovered from his possession and on search of Indica car two bamboo sticks and blood stained knife were recovered. The accused simply denied the question, but did not give any explanation. Therefore, the submissions of the learned counsel for the appellant is not confronted with the recovery of blood stained knife is of no substance. P.W. 25 has categorically stated in his evidence that he identified all the accused persons. In cross-examination, he reiterated the facts that he was acquainted with the accused persons from before. P.Ws. 1, 2, 3 and 4 have also stated about the identification of the accused on being apprehended by the police immediately after the occurrence and even in court all the witnesses have identified the accused persons, therefore, question of holding of test identification parade does not arise and non-holding of test identification parade is not at all fatal to the prosecution case.



XXV. Mr. Ansul, learned counsel appearing for the respondents in Criminal Appeal (DB) No. 235 of 2012 has submitted that the learned Sessions Judge has rightly held that the prosecution has failed to prove the common intentions of respondent nos. 2 to 7 and acquitted them. The respondents were not armed with deadly weapons. It has come that the accused persons and the deceased were on inimical term for repayment of loan amount. The respondents are alleged to have assaulted the deceased with fists and slaps. Only one accused-appellant Md. Munna @ Munna Mian is said to have slit the neck of the deceased causing his death. The attending circumstances showed that there was no pre-concert of mind for killing the accused. Md. Shamim the respondent no. 3 fled away from his motorcycle when the scuffle started and he did not even touch the body of the deceased, therefore, their acquittal does not warrants any interference.

XXVI. Mr. Umakant Shukla, the learned counsel for the informant has submitted that all the accused persons including the sole appellant have prior concert of mind and they travelled from their house to the place of occurrence on an Indica car finding the deceased all alone they all assaulted the deceased and in pursuance of pre-concert of mind one of the accused slit the neck of the deceased. The learned Sessions Judge has not given any reasoning to come to the conclusion that the prosecution did not prove common intentions of

the accused persons and the judgment of acquitting is fit to be set aside.

Section 34 of the Indian Penal Code says that the acts done by several persons in furtherance of common intention – when a criminal act is done by several persons in furtherance of common intention of all each person, is liable for that act in the same manner as if it were done by him alone.

As this Section lays down a principle of vicarious liability in doing of a criminal act. The essence of that liability is to be found in existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. Section 34 of the Indian Penal Code contemplates the doing of an act by several persons in furtherance of common intention, the basic ingredients to constitute the constructive liability under this provisions would arise only on fulfillment of firstly; there must be common intention to commit a criminal act and secondly there must be participation by all the

persons in doing such act in furtherance of that intention. Even if a person does not commit any overt act he can be vicariously liable if it is proved that the act done by others is done in pursuance of such common intention.

XXVII. The Supreme Court in the case of *Hira Lal Mallick and Others Vs. The State of Bihar* reported in 1977 (4) SCC 44 held in paragraph 5 and 6 of the judgment as follows:-

5. Ordinarily, the vernier scale of a man's mens rea is the pragmatic one of the reasonable and probable consequences of his act. The weapon he has used, the situs of the anatomy on which he has inflicted the injury and the like, are inputs. If that be the mental standard of the turpitude, the offender's faculty of understanding becomes pertinent. Man is a rational being and law is a system of behavioral cybernetics where noetic niceties, if pressed too far, may defeat its societal efficacy. So, except in pronounced categories, which we will advert to presently, the intent is spelt out objectively by the rough-and-ready test of the prudent man and not with psychic



sensitivity to retarded individuals. Viewed in this perspective, the materials present in the case, especially the medical evidence, shows that this young offender armed himself like his brothers with a cutting instrument and set upon the victim using the sword on his neck. The autopsy evidence discloses that the injuries caused by the appellant were not the lethal ones; but multiple sword cuts on the neck of a man, leave little room for doubt in the ordinary run of cases as to the intent of the assailant. When three persons, swords in hand, attack a single individual, fell him on the ground and strike on his neck and skull several times with a sharp weapon, it is not caressing but killing, in all conscience and commonsense. The turpitude cannot be attenuated and the inference is inevitable that the least the parties sought to execute was to endanger the life of the target person. In this light, the malefic contribution of the appellant to the crime is substantially the same as that of the other two.

6. When a crime is committed by the



concerted action of a plurality of persons constructive liability implicates each participant, but the degree of criminality may vary depending not only on the injurious sequel but also on the part played and the circumstances present, making a personalized approach with reference to each. Merely because of the fatal outcome, even those whose intention, otherwise made out to be far less than homicidal, cannot, by hindsight reading, be meant to have had a murderous or kindred mens rea. We have, therefore, to consider in an individualised manner the circumstances of the involvement of the appellant, his nonage and expectation of consequences. When a teenager, tensed by his elders or provoked by the stone-hit on the head of his father, avenges with dangerous sticks or swords, copying his brothers, we cannot altogether ignore his impaired understanding, his tender age and blinding environs and motivations causatory of his crime.

XXVIII. The common intentions on the part of the accused persons has to be gathered from the facts and the attending



circumstances of a particular case, it is necessary to advert relevant evidence of the prosecution in order to find out whether the accused persons had common intention to kill the deceased Md. Shahjad. P.W. 25 has stated in his fardbeyan that the reason of the occurrence is that his brother and Manif had dispute with regard to lending and borrowing money. Md. Chand P.W. 18 and P.W. 19 Sheikh Bhola the brother and father of the deceased respectively have also stated the facts that Manif had some dispute with regard to lending and borrowing of money with the deceased. From the evidence of P.W. 25, it is evident that when P.W. 25 with his brother Shahjad the deceased were returning, the accused persons came in front of his motorcycle and firstly Manif and Sheikh Rasid came and called his brother Shahjad the deceased for talk. In the meantime, the appellant and other respondents also came and began to assault his brother with stick, fists and slaps. At that point of time the appellant Md. Munna @ Munna Mian did not take out the dagger rather they all assaulted the deceased with fists, slaps and stick. During the course of that scuffle the respondents put down Shahjad, the deceased on the ground and only, thereafter, when P.W. 25 went to save his brother Md. Munna @ Munna Mian took out dagger and threatened the informant. Soon thereafter, Md. Munna @ Munna Mian slit the neck of Shahjad, the deceased causing his death on the spot. The attending facts and



circumstances show that although the accused persons travelled to the place of occurrence on a car and a motorcycle in search of the deceased to collect money, but they were not armed with any lethal or deadly weapon. Had there been intention on the part of the respondent 2 to 7 to kill the deceased they would have been armed with lethal weapon and immediately after seeing the accused they would have pounced on him in furtherance of their common intention to kill. The doctor P.W. 23 in the post-mortem report found only one abrasion on knee and another bruise on back and those injuries said to have been caused by other acquitted respondents were not fatal to the deceased. But the learned Sessions Judge while coming to the conclusion that prosecution has not proved common intention of the accused, has not given any reasoning much less the sound reasoning on the point of common intention on the part of the accused persons. But, from this attending facts and evidence on record, it is evident that the accused persons had pre-concert of mind to assault the deceased for recovery of money. It was the only act of Md. Munna @ Munna Mian who took out dagger and slit the neck of the deceased killing him on the spot. Therefore, the respondent 2 to 7 are not liable to be convicted under Sections 302 and 34 of the Indian Penal Code but they are liable to be convicted under Sections 323 and 34 of the Indian Penal Code as the appellant and the respondents have pre-concert of mind to assault

the deceased so that he may return the money. It was the solitary act of Munna @ Munna Miyan that he slit the neck of the deceased.

XXIX. Md. Shamim the respondent no. 3 has taken plea of alibi and he got three witnesses examined. The witnesses examined on his behalf have stated that Md. Shamim had come and stayed in the night at the house of his relatives to hand over the marriage card of his brother, but the evidence of the witnesses does not inspire confidence and the prosecution witnesses has very categorically proved that it was he who firstly came on a motorcycle at the place of occurrence followed by other accused persons in a car and he fled away when the accused persons started assaulting the deceased and the villagers came on the place of occurrence.

XXX. In the result, we do not find any merit in the Criminal Appeal (DB) No. 217 of 2012 and uphold the judgment and order of conviction of appellant Md. Munna @ Munna Mian under Section 302 of the Indian Penal Code and at the same time we partly allow Criminal Appeal (DB) No. 235 of 2012 and convict the respondent nos. 2 to 7 under Section 323 and 34 of the Indian Penal Code and sentenced the respondent nos. 2 to 7 for rigorous imprisonment for one year with a fine of Rs. 1000/- each and in default of payment of fine two months of simple imprisonment. The appellant and respondents are on bail, their bail bonds are cancelled

and they are directed to be taken into custody to serve out their remaining sentence.

(Prabhat Kumar Jha, J.)

I agree.
V. N. Sinha, J.

(V. N. Sinha, J.)

KKSINHA/-
N.A.F.R.

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