

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 25th November, 2017
Decided on: 16th December, 2017

+ **CRL.A. 881/2013**

SHIVA @ UWAN & ORS. Appellants
Represented by: Mr. Pramod Kumar Dubey and
Ms. Namita Wali, Advocates.
versus

STATE Respondent
Represented by: Mr. Amit Gupta, APP for the
State with Inspector Yogesh
Tyagi, PS Paharganj.

+ **CRL.A. 1145/2012**

MANISH @ LULU Appellant
Represented by: Mr. Harsh Prabhakar,
Advocate.
versus

STATE NCT OF DELHI Respondent
Represented by: Mr. Amit Gupta, APP for the
State with Inspector Yogesh
Tyagi, PS Paharganj.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. Appellants Shiva @ Uwan, Vicky and Surjeet all sons of Niranjana in Crl. Appeal No.881/2013 and Manish @ Lulu son of Shyam Singh in Crl. Appeal No.1145/2012 challenge their conviction for offences punishable under Sections 302/307/324/323/452/34 IPC and the order on sentence dated 28th May, 2012 directing them to undergo rigorous imprisonment for life and to pay a fine of ₹5,000/- each for offence punishable under Section 302 IPC;

rigorous imprisonment for a period of seven years and to pay a fine of ₹3,000/- each for offence punishable under Section 307 IPC; rigorous imprisonment for a period of three years and to pay a fine of ₹2,000/- for offence punishable under Section 452 IPC; rigorous imprisonment for a period of one year for offence punishable under Section 323 IPC and rigorous imprisonment for a period of three years for offence punishable under Section 324 IPC.

2. FIR No. 189/2010 was registered under Sections 452/302/307/324/323/34 IPC on the statement of Charan Dass who stated that he was residing with his family at House No. 9626, Gali No.12, Multani Dhanda, Paharganj. On 24th July, 2010 at about 3.30 PM while his son was present at the video game parlour and some children were playing video games, Shiva @ Uwan and Manish came to the shop. They wanted to play the video game to which his son Golu objected and stated that this was the game to be played by children. Both the accused threatened Golu and left the spot stating that they would see him later. He also stated that they had earlier enmity with the accused. Around 11.50 PM Shiva @ Uwan, Manish, Vicky and Bacche @ Kala came to their house. Shiva was armed with an iron rod whereas Manish, Vicky and Bacche had knives in their hands. All four of them started quarrelling with them. Vicky assaulted his daughter Reema by a knife on her left arm. Shiva and Bacche caught hold of his son and Manish gave stab blows on his stomach and neck. Shiva@ Uwan hit the arm of his daughter-in-law Meena with a rod. Complainant was assaulted by Manish, Bacche and Vicky by knives resulting in injuries on the head above the eyes and back. To conceal their offence Shiva @ Uwan hit his

head on the wall and caused injuries to his scalp. He brought his son and daughter-in-law in TSR to the hospital.

3. The rukka was marked to ASI Prithpal Singh who got the MLCs of Charan Dass, Reema, Meena and Golu. MLC of Golu noted 'patient brought dead'. ASI Prithpal also inspected the spot which was found to be bloodstained. After the charge-sheet was filed during the course of trial, prosecution examined 19 witnesses including the injured witnesses Charan Dass @ Pappu as PW-1; Reema as PW-2 and Meena as PW-9. Inder PW-10, brother of Charan Dass was also examined as a witness who reached the spot on being called by the mother of Golu. The appellants did not lead any evidence and stated that they were falsely implicated on the testimony of false and interested witnesses. The Court also examined three witnesses, that is, Dr. Sameer Dhari, Dr. M.P. Chaurasia and Dr. Ashita as CW-1 to CW-3 respectively so as to ascertain the age of Surjeet @ Bacche who took the plea that he was a minor. As per the doctors the age of Surjeet s/o Niranjana was opined to be more than 22 years and less than 25 years on the date of offence.

4. Challenging their conviction learned counsels for appellants contend that Inder PW-10 is an introduced witness. There are material contradictions in the testimonies of the three alleged injured witnesses which ascribed different role to each of the appellants. Hence their testimonies are not reliable and are liable to be rejected. Learned Trial Court did not note the fact that even as per the prosecution case two accused persons caught hold of the deceased and one inflicted injuries on him and convicted the fourth accused also for offence punishable under Sections 302/34 IPC even without any overt act on the part of the fourth accused. Prosecution has changed its

version and the explanation rendered that Shiva inflicted injuries to himself, cannot be accepted. The place of occurrence is outside, in the gali, however, the police has deliberately shown the place of occurrence to be inside the house despite the fact that Charan Dass clearly stated that on the ground floor there was video parlour and the same was locked. The occurrence if at all took place was due to sudden quarrel. In the alternative, thus, it is prayed that the sentence of the appellants be modified to one for offence punishable under Sections 304/34 IPC and they be released on the period already undergone which is more than five years including remissions.

5. The main argument of learned counsels for the appellants is that there are apparent contradictions in the testimonies of the three injured witnesses, that is, Charan Dass, Reema and Meena thus the same cannot be relied and be discarded. It would be thus appropriate to note portions of the testimonies of these witnesses wherein roles are ascribed to each of the appellants:

“PW-1 Charan Das @Pappu S/o Sh. Bhajan Lal, aged 50 years; R/o H. No. 9626, Gali No.12, Multani Dhanda, Pahar Ganj, Delhi.

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At about 11.30/11.45 PM on the same day, I was sitting in my home and watching television, all four accused present in Court today entered in my house. Accused Vicky stabbed my daughter namely Reema with a knife. My son Golu who was also there, objected to the same. At this, my son Golu was caught hold by accused Vicky and accused Manish and Surjeet stabbed my son with a knife on both sides on his stomach. Accused Shiva @ Uwan was having a Iron Rod (Saria) in his hand. He attacked me with the Saria on my head and other accused persons attacked me with knives which they were carrying. Accused Shiva also attacked my daughter-in-law

Meena (Golu's wife) who was in family way with the Saria on her hand. The accused persons killed my son Golu in my presence and also caused injuries upon me, daughter-in-law and my daughter. My daughter Reema ran out of the house."

"PW2: Ms. Reema D/o Sh. Charan Das aged 17 years; R/o H. No. 9626, Gali No.12, Multani Dhanda, Pahar Ganj, Delhi.

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On the same night at about 11.30/12 midnight, all the four accused persons, present in the Court today (correctly identified) came at our house on the 1st floor. Accused Uwan was having rod and accused Manish, Vicky and Baccha were having knives in their hands. Immediately, after entering in our house, all the four accused persons attacked my brother Golu and started beating my brother. When I tried to save him, accused Vicky stabbed me with the knife on my left forearm.

At this stage, the witness has shown the mark of stabbing on her left forearm.

When my Bhabhi namely Meena tried to save my brother, accused Uwan hit her with the rod on her hand. Then accused Uwan and Baccha caught hold of my brother and accused Manish stabbed him with the knife firstly on his stomach and then at the back of his neck. My father was also present there who was also attacked by accused Vicky, Baccha and Manish with knives and rod. Accused Uwan also caused injuries to himself. On hearing our cries, our neighbours gathered there and then all the accused persons fled away from the spot. Thereafter my father, my brother and my bhabhi were taken to the hospital by the neighbours and I was taken by one neighbor to the hospital where my brother was declared 'brought dead'."

"PW-9 Meena w/o late Sh. Golu age 20 years r/o 9626, Gali No.12, Multani Dhanda, Paharganj, Delhi

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On 24.07.2010 at about 3.30 or 4.00 PM, Vicky and Shiva entered into the video game parlour which was being run by my husband on the ground floor of my house. I was also present there at that time. Both Vicky and Shiva forcibly removed the children who were playing video games and they started playing the games. My husband objected and requested them to stop playing as those games are meant for the children. At this both of them left the spot after threatening my husband by saying “tujhe to hum baad mein dekh lenge”.

On the same night at about 12:00 midnight accused Shiva, Vicky, Surjeet and Manish, all present today in Court (correctly identified) entered into our house on the first floor where we were residing. Accused Shiva was carrying iron rod in his hand while the remaining three accused persons were having knives in their hands. Immediately after entering into our house, accused Surjeet and Vicky caught hold of my husband from the hands and accused Manish attacked with a knife and stabbed him in the chest. Thereafter, accused Vicky also attacked on my nanad and caused injuries with knife on her arm. I was beaten by accused Shiva with an iron rod which he was carrying and I sustain injuries on my wrist of right hand. When my father-in-law intervened he was also beaten with iron rods and caused knife injuries which they were carrying. Thereafter all the four accused persons fled away from the spot along with their respective weapons. We took my husband to LHMC in a TSR where he was declared brought dead by the doctors. My statement was recorded by the police.

At this stage ld. APP seeks permission of the court to put leading question to the witness. (Objected to by ld. Defence counsel.) Allowed, subject to the objection which shall be allowed at the time of final disposal.

Q.: Is it correct that accused Shiva and Surjeet had caught hold of my husband and not by Vicky?

Ans: Vicky and Surjeet had caught hold of my husband and not Shiva.

At this stage, learned Addl. PP wants to cross examine the witness as he is resiling from his previous statement made to the police. Heard and allowed.

xxxxxxx *By Sh. Rakesh Mehta-Learned Addl. PP for State.*

It is incorrect to suggest that I had stated to the police that accused Shiva and Surjeet had caught hold of my husband. Confronted with statement Ex. PW-9/PX1 where it is so recorded."

6. It is well settled that minor discrepancies in the testimony cannot take away the substratum of the testimony of injured witness. In an occurrence where there are number of accused even if the eyewitnesses have improved and have not given consistent version regarding the part played by each of the accused that by itself will not be a ground to acquit the accused [See 1994 Supp (3) SCC 653 Navganbhai Somabhai v. State of Gujarat].

7. In the decision reported as (2011) 4 SCC 324 State of U.P. vs. Naresh the Supreme Court discussing the evidentiary value of the testimony of an injured witness and reiterating its earlier decision observed:

"27. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and

place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein.”

8. No doubt, Charan Dass in his examination-in-chief stated that Vicky and Manish caught hold of Golu and Surjeet stabbed him with knife on both the sides of his stomach. However, Reema and Meena in their testimonies are clear that Shiva @ Uwan was one of the accused who caught hold of Golu and Manish stabbed him. Meena is emphatic that Vicky and Surjeet caught hold of her husband and Shiva hit her with a rod when she moved forward to save her husband. There is also consistency in the statements of all the three injured witnesses that when Meena ran to help her husband, she was hit by a rod by Shiva and when Reema tried to save her brother, Vicky stabbed her with a knife on her left arm. In the melee where every member of the family is being assaulted, some confusion is bound to arise in the testimonies of the witnesses qua role of each accused. However, from the consistent testimonies of the witnesses it is clear that Shiva @ Uwan was one of the accused who caught hold of the deceased and Manish gave stab blows to the deceased. The witnesses are also consistent on the point that when Charas Dass tried to intervene he was attacked by all the accused by rods and knives. The version of the witnesses is also corroborated by their MLCs. The confusion in the role of the two other accused qua Golu, however, does not absolve them of the offence punishable under Section 302

read with Section 34 IPC for the reason all the four accused came to the house of the deceased armed with weapons and committed the offences with a common intention. The common intention to commit the murder of Golu is also writ large from the fact that when the other family members i.e. Charan Dass, Reema and Meena tried to save Golu, they were all assaulted denying help to Golu.

9. In (1996) 10 SCC 508 Krishnan Vs. State of Kerala dealing with the law on applicability of Section 34 of IPC the Supreme Court observed:

“15. Question is whether it is obligatory on the part of the prosecution to establish commission of an overt act to press into service Section 34 of the Penal Code. It is no doubt true that the court likes to know about an overt act to decide whether the person concerned had shared the common intention in question. Question is whether an overt act has always to be established? I am of the view that establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch as this section gets attracted when “a criminal act is done by several persons in furtherance of the common intention of all”. What has to be, therefore, established by the prosecution is that all the persons concerned had shared the common intention. Court’s mind regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: res ipsa loquitur.”

10. In (2006) 13 SCC 165 Sham Shankar Kankaria vs. State of Maharashtra it was held:

“15. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the

application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in Chinta Pulla Reddy Vs. State of A.P. [1993 Supp (3) SCC 134 : 1993 SCC (Cri) 875 : AIR 1993 SC 1899], Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.”

11. In (2012) 9 SCC 249 Suresh Sakharam Nangare vs. State of Maharashtra it was held:

“21. Since the conviction of the appellant is based only with the aid of Section 34 IPC, it is useful to refer the same:

“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.”

A reading of the above provision makes it clear that to apply Section 34, apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of the accused in the commission of an offence. It further makes clear that if common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked. In other words, it

requires a prearranged plan and presupposes prior concert, therefore, there must be prior meeting of minds.”

12. Learned counsel for the appellants have assailed the testimony of Inder PW-10 on the ground that he was an introduced witness however, the testimony of PW-10 who is living in the neighbourhood and was called is relevant only because he is the witness of the last seen having seen all the four appellants running out of the house of Charan Dass, thus corroborating the version of the three injured witnesses who speak about the presence of appellants.

13. The fact that the four accused came armed and trespassed into the house of deceased and injured not only Golu but other family members clearly shows that the fight did not take place on a sudden quarrel and it was a pre-meditated fight. The appellants cannot take benefit of the exception to Section 302 IPC and claim conviction under Section 304 IPC.

14. Learned counsel for the appellants have contended that as per the FSL report no blood was detected from the concrete, earth control recovered from the house. Thus the alleged offence, if any, took place outside i.e. in the gali. Even if the earth control were not sent as sample, from the photographs taken after the incident it is evident that the incident took place within the house and blood is found both on the first floor and the ground floor of the house. Merely because some portion of the ground floor was closed being the video parlour does not fortify the claim of the appellants that the incident took place outside in the gali.

15. Weapons of offence have been recovered at the instance of the appellants and vide subsequent opinion Ex.PW-8/B the postmortem doctor opined that having examined the knife recovered from Manish the

possibility of injuries mentioned in the postmortem report having been caused by the said weapon cannot be ruled out, which further corroborates the version of the injured eye witnesses.

16. Consequently the conviction of appellants for the offences punishable under Sections 302/307/324/323/452/34 IPC and the order on sentence are upheld.

17. Appeals are dismissed.

18. Trial Court Record be sent back.

19. Copy of judgment be sent to the Superintendent, Tihar Jail for updation of record and communication to the appellants.

(MUKTA GUPTA)
JUDGE

(NAVIN CHAWLA)
JUDGE

DECEMBER 16, 2017
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