

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.141 of 2003

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Binod Tatwa, Son of Late Narain Prasad Tatawa, Resident of Mohalla – Chhoti Bazar, P.S. – Khaje Kallan, District – Patna.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ashok Kumar, Adv.
Mr. Shankar Choudhary, *Amicus Curiae*
For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 19-01-2018

Though learned counsel for the appellant is present, however to assist the Court on the law point involved in this case, Mr. Gauri Shankar Choudhary, present in the Court, is appointed as *Amicus Curiae*.

2. By way of the present appeal, sole appellant seeks to challenge the judgment of conviction and order of sentence passed by Shri Satya Narayan Singh, Addl. Sessions Judge, Patna (FTC -5), Patna, by which the appellant was held constructively liable for the act of co-accused Munna Tatawa, and was convicted under Section 307 of the Indian Penal Code (in short the “IPC”) with the aid of Section 34 of the IPC and sentenced to undergo R.I. for 05 years.

3. Prosecution case as per the informant Lakhan Prasad (P.W. 7) recorded by S.I. Shri R. N. Jha, Khajakalan police station at Patna



City Hospital, in short is that on 15.08.1990 at 10.30 P.M., Munna Tatawa co-accused and appellant Binod Tatawa, who were in drunken condition were abusing the informant, on which his father came and on protest being made by them, co-accused Munna Tatawa, who was carrying a *katar* (dagger) stabbed the father of informant in his abdomen.

4. On the basis of the aforesaid fardbeyan, F.I.R was registered against the co-accused Munna Tatawa and appellant Binod Tatawa.

5. Upon submission of charge-sheet, cognizance of the offence was taken and the case was committed to the court of Sessions, which ultimately came to the file of Shri Satya Narayan Singh, Addl. Sessions Judge, Patna (FTC -5), Patna, for trial and disposal.

6. To prove its charges, prosecution has examined altogether eight witnesses. They are;- P.W. 1- Rajaram Mahto, P.W. 2 - Arun Kumar Singh, P.W. 3 – Jagdish Pd., P.W. 4- Laljee Mistry, (victim), P.W. 5- Patia Devi, P.W. 6 – Santosh Kumar Sukala, P.W. 7- Lakhan Pd. (informant) and P.W. 6- Madan Mohan Dubey, Medical Officer, who examined the injuries of victim (P.W. 4).

7. Defence of appellant as per the statement under Section 313 Cr.P.C. and as per trend of cross examination, is of false implication and of innocence.

8. It appears that co-accused Munna Tatawa was absconding



during Trial as such Trial of the present appellant was separated from the Trial of Munna Tatawa and the Trial Court after conclusion of Trial held the appellant constructively liable for the offence and convicted him under Section 307/34 of the IPC and sentenced him as above.

9. In this case, it is an admitted fact that on the date of alleged occurrence, co-accused Munna Tatawa and appellant Binod Tatawa were abusing the informant and his father, for which, there was a hot exchange of words between the parties, in which co-accused Munna Tatawa become furious and evidence shows that he went inside his house and brought a dagger and, thereafter, stabbed the father of informant in his abdomen, causing serious injury to him and, therefore, a question arises as to whether the appellant can be held constructively liable for the offence done by the co-accused Munna Tatawa.

10. Submission of learned counsel for the petitioner is that it is an admitted fact that on the alleged date of occurrence, there was wordy altercation between the parties, in which co-accused Munna Tatawa brought a dagger from his house and stabbed the father of informant, in which appellant had no role to play, he was only present at the place of occurrence along with the said co-accused Munna Tatawa, though he was involved in wordy altercation and it is also evidence



from the materials available on record that the appellant did not carry any weapon at that time there is no evidence that he was also carrying the common intention to assault the victim (P.W. 4) and the occurrence took place on the spur of moment, as there is nothing to prove that they were pre-determined to commit such an offence and appellant in any manner exhorted the co-accused to commit such an offence and participated in the act done by co-accused Munna Yadav and, therefore, there is no application of Section 307/34 of the IPC, so far appellant is concerned and he cannot be held guilty for the act done by another person and the Trial Court without appreciating all these facts, convicted the appellant under Section 307/34 of the IPC, which is out and out perverse and if allowed to maintain, the same would result in travesty of justice.

11. Per contra, learned counsel for the respondent –State supported the finding of guilt recorded by learned Trial Court and argued that there are consistent evidence available on record that both accused and appellant were involved in the wordy exchange, which took ugly turn and co-accused Munna Tatawa brought a dagger from his house and stabbed the father of informant causing serious injury to him and, therefore, prosecution has succeeded in proving the common intention of appellant and co-accused Munna Tatawa and, therefore, there is no infirmity in the impugned judgment of trial court and conviction of



appellant under Section 307/34 of the IPC is just and proper.

12. Heard the rival parties.

13. On close scrutiny of entire evidence available on record, it appears that there are consistent evidence that on the point that on the alleged date of occurrence, there was hot exchange of words between the parties and when father of informant came out to protest and tried to stop them from abusing, co-accused Munna Tatawa went inside his house and brought a dagger and stabbed the father of informant in his abdomen due to which he sustained serious injury and evidence of Doctor (P.W. 8) shows following injuries.

“Sharp cut 3”X3”X2” whole layer of abdomen muscles were divided, large gut was out with punctured wound, age of the injury was opined 30 to 60 minutes old, which was caused by sharp cutting weapon and was found to be dangerous to life”.

14. Evidence of witnesses did not disclose any overt act against the present appellant nor any extortion/abatement. As a matter of fact, except allegation of hot exchange of words, there is absolutely nothing against the appellant to show the he was pre- concert of mind or he carried common intention rather it is an admitted fact that co-accused Munna Tatawa inflicted dagger blow to the father of informant. In this context, learned *Amicus Curiae* has drawn the attention of this Court towards the Judgment of Hon’ble Supreme



Court in the case of **Abdul Sayeed v. State of Madhya Pradesh**, reported in **(2010) 10 Supreme Court Cases 259**, in which the Hon'ble Court dealing with the similar issues as in the case in hand held in para – 45 under:-

“45. There is no bar in law on conviction of the accused with the aid of Section 34 IPC in place of Section 149 IPC if there is evidence on record to show that such accused shared a common intention to commit the crime and no apparent injustice or prejudice is shown to have been caused by application of Section 34 IPC in place of Section 149 IPC. The absence of a charge under one or the other or the various heads of criminal liability for the offence cannot be said to be by itself prejudicial to the accused, and before a conviction for the substantive offence without a charge can be set aside, prejudice will have to be made out. Such a legal position is bound to be held good in view of the provisions of Sections 215, 216, 218, 221 and 464 of Code of Criminal Procedure, 1973. (Vide: Dalip Singh & Ors. v. State of Punjab, AIR 1953 SC 364; Malhu Yadav & Ors. v. State of Bihar, (2002) 5 SCC 724; Dhaneswar Mahakud & Ors. v. State of Orissa, (2009) 9 SCC 307; and Annareddy Sambasiva Reddy & Ors. v. State of Andhra Pradesh, AIR 2009 SC 2661).”

And also held in para 49 as follows:-

“49. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the “common intention” to commit the offence. The phrase “common intention” implies a pre-arranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different sense from the “same intention” or “similar intention” or “common object”. The persons having similar intention which is not the result of the prearranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. (See Mohan Singh & Anr. v. State of Punjab, AIR



1963 SC 174).”

16. Similarly, the Hon’ble Apex Court in the case of **Virendra Singh v. State of Madhya Pradesh** reported in (2010) 8 Supreme Court Cases 407 held in para 42 to 44 as under:-

42. The dominant feature of section 34 is the element of intention and participation in action. This participation need not in all cases be by physical presence. Common intention implies acting in concert.

43. The essence of section 34 IPC is a simultaneous consensus of the minds of the persons participating in criminal action to bring about a particular result. Russel in his celebrated book “Russel on Crime” 12 th Edn. Vol. 1 indicates some kind of aid or assistance producing an effect in future and adds that any act may be regarded as done in furtherance of the ultimate felony if it is a step, intentionally taken for the purpose of effecting that felony. It was observed by Russel that any act of preparation for the commission of felony is done in furtherance of the act.

44. Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a pre-arranged and premeditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the pre-meditation and though the plan may be formed suddenly. In order that section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with section 34.

17. In the case in hand, too, there is nothing to prove that on the alleged date of occurrence appellant carried common intention with the co-accused Munna Tatawa to commit such an offence and, therefore, relying on the above two precedents, this Court safely



conclude that for the act done by the co-accused Munna Tatawa, appellant cannot be held guilty.

18. Resultantly, this appeal is allowed. Judgment of conviction and order of sentence passed by Shri Satya Narayan Singh, Addl. Sessions Judge, Patna (FTC -5), Patna, in Trial No. 279 of 1991, is hereby set aside.

19. As the appellant is on bail, he is discharged from liability of bail bond.

(Vinod Kumar Sinha, J)

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AFR/NAFR	AFR
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