

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.170 OF 2013

**RATNISHKUMAR GYANBAHADUR SINGH)
@ LALU THAKUR)...APPELLANT**

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

CRIMINAL APPEAL NO.725 OF 2012

SALIM SHAIKH @ DHILA ALI MOHAMMED)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Ganesh Bhujbal, Advocate for the Appellant in Criminal Appeal No.170 of 2013.

Ms.Nasreen Ayubi, Advocate for the Appellant in Criminal Appeal No.725 of 2012.

Ms.Anamika Malhotra, APP for the Respondent – State in Criminal Appeal No.170 of 2013.

Mr.Prashant Jadhav, APP for the Respondent – State in Criminal Appeal No.725 of 2012.

CORAM : A. M. BADAR, J.

DATE : 9th MARCH 2018

ORAL JUDGMENT :

1 Criminal Appeal bearing no.725 of 2012 is by Salim Shaikh / original accused no.2, whereas, Criminal Appeal No.170 of 2013 is by Ratnishkumar Singh / original accused no.1. By these appeals, they are challenging the judgment and order dated 8th June 2012 passed by the learned Ad-hoc Additional Sessions Judge, Greater Bombay, in Sessions Case No.179 of 2012, thereby convicting both of them of offences punishable under Sections 307 read with 34 and 323 read with 34 of the Indian Penal Code. For the offence punishable under Section 307 read with 34 of the Indian Penal Code, they are sentenced to suffer rigorous imprisonment for 5 years apart from payment of fine of Rs.2,000/-, and in default, to undergo further rigorous imprisonment for 2 months. For the offence punishable under Section 323 read with 34 of the Indian Penal Code, they are sentenced to suffer rigorous imprisonment for 1 year apart from payment of fine of Rs.500/-, and in default, to undergo further rigorous imprisonment for 1 month.

2 Brief facts, leading to the prosecution of appellants/accused, can be summarized thus :

- (a) Appellants/accused as well as injured PW6 Vikas Pandey are residents of the same locality. Injured PW6 Vikas Pandey, on 17th August 2011, at about 5.30 p.m., was proceeding from Goodluck Hair Cutting Saloon located near Durgamata Temple, Sai Niwas Chawl, Mumbai. There was rush of people at that place. While walking, foot of PW6 Vikas Pandey touched body of appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur. Upon that, Ratnishkumar Singh @ Lalu Thakur started hurling abuses at PW6 Vikas Pandey. At that time, appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur was accompanied by appellant/accused no.2 Salim Shaikh and juvenile in conflict with law Mubarak @ Lalu Khan. The juvenile in conflict with law gave fist blow on chest of PW6 Vikas Pandey. Appellant/accused no.2 Salim Shaikh also assaulted him by fist blow on the chest and when he was holding hands of

PW6 Vikas Pandey, appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur gave a blow of knife on right side of chest of PW6 Vikas Pandey.

- (b) PW3 Chandrakant Poojari was witnessing the incident. He attempted to intervene. However, accused persons prevented anybody from intervening in order to save PW6 Vikas Pandey. The prosecution averred that the incident was also witnessed by PW1 Shaila Pandey – mother of the injured, as well as by his aunt PW12 Rachana Pandey and rickshaw driver named Ramsakal Gaud (PW13).
- (c) Injured PW6 Vikas Pandey was taken to Rajawadi Hospital by his father as well as by PW3 Chandrakant Poojari and others. At the said hospital, statement of PW3 Chandrakant Poojari came to be recorded which was treated as the First Information Report (FIR) and accordingly Crime No.361 of 2011 came to be registered with Police Station Powai for offences punishable under Sections 307, 323, 504 read with

34 of the Indian Penal Code as well as under Section 37 read with 135 of the then Bombay Police Act. Routine investigation followed. The prosecution averred that on the basis of voluntary disclosure statement of appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur, weapon of offence, namely, knife, came to be seized in presence of PW10 Baburao Fulare. Clothes of the injured as well as both appellants/accused came to be seized. On completion of investigation, appellants/accused came to be charge-sheeted.

- (d) The learned trial court framed and explained Charge to appellants/accused. They abjured their guilt and claimed trial. In order to bring home the guilt to appellants/accused, the prosecution has examined in all 14 witnesses. The defence of appellants/accused was that of total denial. According to them, they are falsely implicated in the crime in question and the witnesses are having inimical disposition against them. After hearing the parties, the learned trial

court, by the impugned judgment and order dated 8th June 2012, was pleased to convict both appellants/accused for offences punishable under Section 307 read with 34 as well as Section 323 read with 34 of the Indian Penal Code and they are accordingly sentenced, as indicated in the opening paragraph of this judgment.

3 I have heard Shri Bhujbal and Ms.Ayubi, the learned advocates appearing for appellants/accused. They vehemently argued that evidence of the prosecution is discrepant and untrustworthy. PW1 Shaila Pandey, who claims to be an eye witness to the incident in question, is falsified by her sister-in-law PW12 Rachana Pandey. Evidence of the First Informant PW3 Chandrakant Poojari is also not trustworthy because though he claims to have taken the injured to the hospital, the prosecution has not seized his clothes which might have been stained with blood. This witness was not in a position to state as to who had accompanied the injured to the hospital. Evidence of PW2 Chhaya Poojari came to be criticized by pointing out her admission in the

cross-examination to the effect that she had not seen the actual acts of accused persons. The learned advocate further argued that though recovery of knife is shown to have been made at the instance of appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur, the same cannot be treated as a relevant fact because there is no evidence to connect that knife with the crime in question. It is further argued that considering the evidence adduced by the prosecution, alleged common intention is not established, and therefore, the learned trial court ought not to have convicted appellants/accused persons with the aid of Section 34 of the Indian Penal Code.

4 As against this, the learned APP supported the impugned judgment and order by contending that common intention can be formed at a spur of moment and the same needs to be inferred from the role played by each accused person in commission of the crime. As evidence on record suggests that appellant/accused no.2 Salim Shaikh was holding hands of the injured, he had, infact, facilitated the co-accused to give blow of

knife on chest of the victim. This, according to the learned APP, indicates common intention shared by both appellants/accused in commission of the crime. The learned APP further argued that minor discrepancies in evidence of the prosecution need to be discarded as those indicate truthfulness of witnesses in disclosing the facts witnessed by them after a gap of period of about one year.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings including oral as well as documentary evidence adduced by the prosecution. According to the prosecution case, both appellants/accused persons along with the juvenile in conflict with law, in furtherance of their common intention, attempted to commit murder of PW6 Vikas Pandey by assaulting him by means of a knife near Durgamata Temple, located at Sai Niwas Chawl, Niti, Powai, in Mumbai. Section 34 of the Indian Penal Code recognizes the principle of vicarious liability in criminal jurisprudence and makes each person liable for the act in the same manner, as if it were done by him alone, if the

prosecution establishes that the said act is done by several persons in furtherance of their common intention. It is, thus, clear that, common intention implies prearranged plan and acting in concert pursuant to such prearranged plan. The common intention to bring about a particular result may develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on a spur of moment on the spot, it must, however, be anterior in point of time to the commission of offence showing a prearranged plan and prior concert. To constitute common intention, it is necessary that intention of each one of the appellants be known to the rest of them and shared by them. It is very difficult to prove even the intention of an individual. However, despite such difficulty, the prosecution is obliged to lead evidence of facts, circumstances and conduct of accused persons from which such common intention can be safely gathered. With these requirements of making a person vicariously liable for the criminal act of the another, let us examine the case in hand.

6 As the case is in respect of commission of an attempt to commit murder of PW6 Vikas Pandey, let us at the outset examine his evidence in detail. PW6 Vikas Pandey has stated that on 17th August 2011, at about 5.30 p.m., he was proceeding by Goodluck Hair Cutting Saloon located near Durgamata Mandir. There was rush of people. Both appellants/accused along with the juvenile in conflict with law were standing in front of the said saloon. While walking, as deposed by PW6 Vikas Pandey, his foot touched the body of appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur. Upon that, appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur started hurling abuses. Then, firstly, the juvenile in conflict with law gave a fist blow on his face. Thereafter, appellant/accused no.2 Salim Shaikh gave a fist blow on his chest. The injured PW6 Vikas Pandey further deposed that then appellant/accused no.2 Salim Shaikh held his neck and pushed him towards the wall of one room. Thereafter, appellant/accused no.2 Salim Shaikh held his hand and pushed him towards backside. Appellant/accused no.1 Ratnishkumar

Singh @ Lalu Thakur slapped him on his cheek and then he took out a knife concealed under his shirt and gave a blow of that knife on his chest. As per version of this witness, PW3 Chandrakant Poojari came forward to rescue him. However, appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur warned others not to come forward. Thereafter, the assailants ran away. This witness has identified appellants/accused while in the dock and also identified his seized clothes. From cross-examination of this witness it is elicited that his foot touched body of appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur while walking. He admitted in his cross-examination that he did not remember who had taken him to the hospital and at that time he was in semiconscious condition.

7 PW6 Vikas Pandey is an injured witness. He has suffered serious injuries in the incident in question. As such, it is not possible to infer that such an injured witness will spare the real culprits and substitute them with innocent persons. There are no such reasons apparent in his cross-examination to infer false

implication of any other person. In cross-examination of the injured PW6 Vikas Pandey nothing is brought on record to discredit his version in respect of the incident. As indicated, PW6 Vikas Pandey has stated that while he was being assaulted, PW3 Chandrakant Poojari came forward to rescue him. Let us now see what PW3 Chandrakant Poojari, who is the First Informant in the case, is telling about the incident. It is in evidence of PW3 Chandrakant Poojari – owner of Goodluck Hair Cutting Saloon that on 17th August 2011, he was sitting on the platform of his shop. At that time, PW6 Vikas Pandey, so also both appellants/accused as well as the juvenile in conflict with law came. He witnessed appellant/accused no.2 Salim Shaikh catching hold of hands of PW6 Vikas Pandey and appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur inflicting a blow of knife on right side of chest of PW6 Vikas Pandey. PW3 Chandrakant Poojari deposed that he went forward to intervene and to separate them but the accused persons were restraining others from coming forward to help the victim. Thereafter, his wife came and he as well as his wife PW2 Chhaya

Poojari took injured PW6 Vikas Pandey to Rajawadi Hospital, where his statement Exhibit 19 came to be recorded by police.

8 From cross-examination of this witness, the defence has brought on record that the distance between the platform where PW3 Chandrakant Poojari was sitting and the Durgamata Temple is just 9 feet. Similarly, as seen from the cross-examination of this witness, the distance between the Durgamata Temple and his saloon is 16 feet. House of this witness is near Durgamata Temple. His saloon is in the front portion of his house. This witness, as seen from his cross-examination, was knowing injured PW6 Vikas Pandey as well as the assailants since their childhood. His cross-examination further reveals that he was in separate auto rickshaw and injured PW6 Vikas Pandey with his father was in a separate auto rickshaw. Nothing is elicited from cross-examination of this witness which would throw doubt on his testimony regarding the mode and manner of happening of the incident in question. This witness, as seen from the material elicited from his cross-examination, was just at a distance of about

6 or 7 feet from the place of incident. His presence on the scene of occurrence was natural as he was sitting on the platform in front of his house. Evidence of this witness indicates that the front portion of his house was being used for housing the Hair Cutting Saloon. The incident took place in front of his house as well as the Durgamata Temple located in front of the house of this witness. As such, this witness had every occasion to be there on the spot of the incident and to witness the incident from close proximity.

9 Cross-examination of PW3 Chandrakant Poojari shows that on one occasion, parked motorcycle of appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur was damaged and therefore, appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur hurled abuses. It is also seen from cross-examination of this witness that appellant/accused no.2 Salim Shaikh had beaten pet dog of this witness. With this, it is attempted to demonstrate that this witness had grudge against both appellants/accused. Even if it is assumed that PW3 Chandrakant Poojari may not be sharing cordial relations with appellants/accused, his evidence

regarding the incident cannot be doubted, particularly when injured PW6 Vikas Pandey is also stating about presence of this witness on the spot and an attempt by this witness to intervene during happening of the incident. The incident took place in slum area and minor incidents of abusing and beating the dog in such locality cannot prompt the residents of the locality to falsely implicate another in serious crime, like the one in hand. Suffice to state that evidence of PW3 Chandrakant Poojari is fully trustworthy and acceptable. It is duly corroborated by the FIR lodged by him on the day of the incident itself.

10 The prosecution has examined PW1 Shaila Pandey – mother and PW12 Rachana Pandey – aunt of the victim PW6 Vikas Pandey as eye witnesses to the incident. Cross-examination of PW1 Shaila Pandey shows that nothing had happened in her presence. Evidence of PW12 Rachana Pandey shows that when she and PW1 Shaila Pandey, on being informed about the incident, went to the spot, she found PW6 Vikas Pandey in an injured condition, whereas appellant/accused no.1 Ratniskumar Singh @

Lalu Thakur holding a knife and appellant/accused no.2 Salim Shaikh holding hands of injured PW6 Vikas Pandey. This part of evidence of PW12 Rachana Pandey in respect of the post event happening corroborates the version of injured PW6 Vikas Pandey that he was assaulted by means of a knife by appellant/accused no.1 Ratniskumar Singh @ Lalu Thakur.

11 PW13 Ramsakal Gaud is rickshaw driver. This witness has stated that on 17th August 2011, at about 5.30 p.m., he was at the saloon shop near Durgamata Temple. When he was standing at the saloon, he heard commotion. He saw appellant/accused no.2 Salim Shaikh holding hands of PW6 Vikas Pandey and appellant/accused no.1 Ratniskumar Singh @ Lalu Thakur giving a blow of knife on chest of PW6 Vikas Pandey. This witness, as seen from his cross-examination, knows family of injured PW6 Vikas Pandey from the year 1990. However, the reason of knowing the family of the injured is that this witness is a resident of the same locality. His cross-examination reveals that he also know appellant/accused no.2 Salim Shaikh. Evidence of this

witness further shows that the distance between Hair Cutting Shop and Durgamata Temple is just 15 to 20 feet. Though this witness may be termed as a 'chance witness', close scrutiny of evidence of this witness does not show that he has not witnessed the incident in question. There is nothing in his cross-examination to disbelieve his version about witnessing the incident in question.

12 PW2 Chhaya Poojari is wife of PW3 Chandrakant Poojari. This witness, in her cross-examination, has candidly accepted the fact that she could not see the actual acts of each assailant as they all were surrounded by various persons from the locality. However, evidence of this witness goes to show that both appellants/accused as well as the juvenile in conflict with law were assaulting injured PW6 Vikas Pandey. This witness has deposed that she has seen the knife in the hands of appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur. Evidence of this witness is consistent and she has not indulged in any exaggeration. She has stated what she could see at the time

of happening of the incident. Thus, evidence of this witness also indicates that injured PW6 Vikas Pandey was assaulted by both appellants/accused along with the juvenile in conflict with law.

13 Spot panchnama at Exhibit 26 is also indicating the situation prevalent on the scene of occurrence. The spot of incident was in front of Durgamata Temple and as seen from evidence of PW3 Chandrakant Poojari, Durgamata Temple is just 9 feet away from his house where his Hair Cutting Saloon is also located. Thus, the description of the spot of the incident reflected from the spot panchnama is lending assurance to the testimony of PW3 Chandrakant Poojari that he had seen the incident from close proximity.

14 The cumulative effect of evidence of these witnesses is to the effect that because of touching of foot of injured PW6 Vikas Pandey to the body of appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur, the incident took place all of a sudden. Initially, appellant/accused no.2 Salim Shaikh gave fist blow on the chest

of injured PW6 Vikas Pandey and pushed him on the wall by holding his hands. Then, appellant/accused no.2 Salim Shaikh pushed him at the backside and thereupon, appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur after slapping injured PW6 Vikas Pandey took out a concealed knife and gave a blow thereof on the chest of injured PW6 Vikas Pandey. This is the version regarding the incident by injured PW6 Vikas Pandey. What PW3 Chandrakant Poojari has stated about the incident is that appellant/accused no.2 Salim Shaikh caught hold of hands of injured PW6 Vikas Pandey and appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur inflicted blow of the knife. Considering the testimony of injured PW6 Vikas Pandey, this evidence of PW3 Chandrakant Poojari cannot be construed to mean that while appellant/accused no.2 Salim Shaikh was holding hands of injured PW6 Vikas Pandey, appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur inflicted blow of knife on chest of PW6 Vikas Pandey. Hands of PW6 Vikas Pandey were held by appellant/accused no.2 Salim Shaikh in order to push him at the backside. Thereafter, the incident of appellant/accused no.1

Ratnishkumar Singh @ Lalu Thakur taking charge of the victim took place and then the victim suffered the blow of knife of appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur. For applicability of Section 34 of the Indian Penal Code, the acts of accused persons may be different in character, but those must have been actuated by one and the same common intention in order to attract the principle of vicarious liability. In the case in hand, the incident triggered because of touching of foot accidentally. Assault on injured PW6 Vikas Pandey was sudden. It was started without sharing common intention of commission of murder of injured PW6 Vikas Pandey by the assailants. The assault was without premeditation and it took place spontaneously. As such, there was no question of forming and sharing common intention by exchange of thoughts between appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur and appellant/accused no.2 Salim Shaikh. Even there is nothing on record to indicate that appellant/accused no.2 Salim Shaikh was knowing that appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur was possessing a knife, as evidence of the prosecution

indicates that the same was kept concealed by appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur. In this view of the matter, there is no case for common intention and the appellants/accused cannot be convicted with the aid of Section 34 of the Indian Penal Code. Each of the appellants/accused, as such, will be liable for their own acts. Therefore, the judgment in the matter of **Lallan Rai and Others vs. State of Bihar**¹ cited by the learned APP, is of no assistance to the prosecution case.

15 Evidence of the prosecution, as such, establishes the fact that appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur had assaulted injured PW6 Vikas Pandey by means of a knife. The part of the body chosen for inflicting the blow was the chest. Injured PW6 Vikas Pandey was then taken to Rajawadi Hospital, Mumbai, where he was treated by PW14 Dr.Niket Gandhi. Evidence of this witness, which is duly corroborated by the contemporaneous medical record i.e. Injury certificate at Exhibit 51 shows that injured PW6 Vikas Pandey was having a punctured wound over right side of chest of size 3 x 2 cm on right

1 AIR 2003 Supreme Court 333

7th intracostal space. There was bleeding in pleural cavity. As deposed by PW14 Dr.Niket Gandhi, general condition of PW6 Vikas Pandey was poor and he had suffered breathlessness. Cross-examination of this witness reveals that intracostal drainage tube was required to be applied for draining out blood as well as air in order to avoid happening of Hemothorax.

16 The author of injury on chest of the injured is appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur. Considering the seat of injury and weapon used for causing injury, the intention of appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur is writ large. The bodily injury which was intended and infact caused by appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur was sufficient in the ordinary course of nature to cause death of a person. Because of medical intervention, life of injured PW6 Vikas Pandey was saved. Thus, the prosecution has established overt act with requisite intent by appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur but the same was an independent act and therefore, appellant/accused no.1

Ratnishkumar Singh @ Lalu Thakur is liable for conviction for the offence punishable under Section 307 of the Indian Penal Code.

17 Evidence on record shows that appellant/accused no.2 Salim Shaikh had assaulted injured PW6 Vikas Pandey by means of fist blow. This act on the part of appellant/accused no.2 Salim Shaikh makes out the offence punishable under Section 323 of the Indian Penal Code. In this view of the matter, the appeal needs to be partly allowed with the following order :

ORDER

- i) The appeals are partly allowed.
- ii) Conviction of appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur is modified from the one punishable under Section 307 read with 34 of the Indian Penal Code to the offence punishable under Section 307 of the Indian Penal Code.
- iii) The sentence imposed on appellant/accused no.1 Ratnishkumar Singh @ Lalu Thakur by the learned trial court is maintained.

- (iv) Conviction and resultant sentence for the offence punishable under Section 307 read with 34 of the Indian Penal Code on appellant/accused no.2 Salim Shaikh is quashed and set aside.
- (v) Instead, appellant/accused no.2 Salim Shaikh is convicted of the offence punishable under Section 323 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for 1 year apart from payment of fine of Rs.500/-, in default, to undergo further rigorous imprisonment for 1 month.
- vi) Conviction and resultant sentence of both the appellants for the offence punishable under Section 323 read with 34 of the Indian Penal Code recorded by the learned trial court is quashed and set aside.
- vii) The appeals stand disposed of in above terms.

(A. M. BADAR, J.)