

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 141 of 2018**

- Devkumar @ Deva Vishwakarma, S/o Shri Dayal Lal Vishwakarma, aged about 25 years, R/o Sakin Matpuraina Ayodhaya Nagar, P.S. Tikrapara, District Raipur (C.G.)

---- Appellant

Versus

- State of Chhattisgarh Through Police Station, Bakimagra, District Korba (C.G.)

---- Respondent

For Appellant	:	Ms. Shivali Dubey, Advocate.
For Respondent/State	:	Shri K.K. Singh, G.A.

D.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava & Hon'ble Smt Justice Rajani Dubey

Judgment On Board**21.01.2019****Per Rajani Dubey, J**

This matter was listed for hearing on I.A.No.02/2018, for suspension of sentence and grant of bail. Learned counsel for the appellant submits that the appeal of co-accused Sonu @ Khilendra Kumar in Cr.A.No.701/2017 was heard and allowed in part on the same set of evidence, therefore, this appeal may kindly be heard finally.

02. With the consent of learned counsel for the parties, the matter is heard finally.

03. This appeal is directed against the impugned judgment of conviction and order of sentence dated 30.07.2011 passed by learned Session Judge, Raipur, District Raipur (C.G.), in S.T.No.39/2011 whereby and whereunder, the appellant has been held guilty of commission of offence under Sections 302/34 & 324/34 of IPC and sentenced him to undergo rigorous life imprisonment along with fine of Rs.1,000/- with default stipulation and to undergo R.I. for one year respectively.

02. Brief facts of the case are that on 18.10.2010, at about 8-8.30 pm, deceased Manish and his mother had gone to the shop of Rajendra Kumar @ Raju (PW-1). At that time, accused/appellant Dev Kumar @ Deva, another accused Sonu and juvenile accused Mona Shukla were consuming liquor near the shop of PW-1 and were also hurling abuses, which was objected to by PW-1 and thereafter, by deceased Manish also. However, upon objection being raised by Manish, juvenile accused Mona Shukla slapped him, PW-1 Rajendra Sahu separated them and then Mona Shukla left the said place for his house and immediately thereafter, came back carrying knife in his hand and caused knife injury on the chest of Manish. Further case of the prosecution is that when accused/appellant Deva snatched the said knife and tried to assault Manish with it on his head, Manish fell unconscious. When Anil Dhruv (PW-4) asked accused/appellant Deva not to assault, co-accused Sonu caught hold of Anil Dhruv and then accused/appellant Deva caused him injuries with knife on his arm and waist. While deceased Manish was being shifted to hospital, he expired on the way. As per report lodged by PW-1 Rajendra Kumar, the

incident was witnessed by Manju (PW-2), Anusuiya (PW-3) and Prateek (PW-5). Based on this FIR, offence under Sections 302, 307, 34 of IPC was registered against all the three accused persons. Immediately after registration of FIR, merg intimation (Ex.P/1) was also registered on 18.10.2010 at the instance of PW-1. Inquest over the dead body was prepared vide Ex.P/10 on 18.10.2010. The dead body was sent for postmortem, which was conducted on 19.10.2010 by PW-10 Dr. Shivnarayan Manjhi vide Ex.P/11 who noticed stab wound on the chest over right side just below clavicle bone. In his opinion, the cause of death was haemorrhage and shock as a result of stab injury on chest and that the death was homicidal in nature. Injured Anil Dhruv (PW-4) was also medically examined by PW-7 V.R. Bhagat vide Ex.P/8 and the doctor found cut wound over lower 1/3rd region of anterior aspect of right arm, 3.5 cm x 1 cm x 0.5 cm and stab wound over post-temporal aspect of left hip, 1.5 cm x 0.5 cm x 1 cm deep. The said injuries were caused by sharp edged weapon and were simple in nature. During investigation, memorandum of accused/appellant Devkumar was recorded vide Ex.P/6 and pursuant to which bloodstained knife was seized vide Ex.P/7. As per FSL report (Ex.P/18), blood was found on the said knife. After filing of charge sheet, the trial Court framed charges under Sections 302/34 and 307/34 of IPC against accused/appellant Devkumar and co-accused Sonu. Another accused Mona Shukla being juvenile was tried separately.

03. So as to hold the accused persons guilty, the prosecution

examined 13 witnesses in all. Statements of the accused were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant as also co-accused Sonu as mentioned above. Hence this appeal by appellant Dev Kumar.

05. Counsel for the appellant submits as under:

(i) that main accused in the present case is Mona Shukla who had caused stab injury on the chest of the deceased.

(ii) that active involvement of the co-accused Sonu is though there, but as per evidence available on record, no role has been assigned to the present appellant for causing death of the deceased.

(iii) that the appellant has been convicted with the aid of Section 34 of IPC but considering the fact that the incident occurred all of a sudden without premeditation, Section 34 of IPC is not attracted against the appellant.

(iv) that eyewitnesses to the incident PW-1 Rajendra Kumar, PW-2 Manju Dhangar, PW-3 Anusuiyabai, PW-4 Anil Kumar Dhruv and PW-5 Prateek Dubey have improved while deposing in the Court and have assigned role of the appellant also whereas in their diary statements they have not deposed so.

(v) even if the entire prosecution case is taken as it is, considering the facts and circumstances of the case and the role attributed to the

appellant, he can only be convicted under Section 324/34 of IPC for voluntarily causing hurt by knife to Anil Dhruv (PW-4).

(vi) that the appeal (CRA No.701/2011) of co-accused Sonu arising out of the same judgment of conviction and order of sentence has been partly allowed by this Court vide judgment dated 17.08.2017 and he has been released. The case of the present appellant is identical to that of the case of co-accused, therefore, the present appeal may also be allowed in part on the same set of evidence.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel as under:

(i) that after consuming liquor all the three accused persons were hurling abuses and when it was objected by deceased Manish, he was done to death by juvenile accused Mona Shukla by causing him knife injury on his chest and in commission of the said crime, he was actively facilitated by the other accused persons.

(ii) had there been any intention on the part of the accused/appellant to pacify the dispute, he would have caught hold of juvenile accused Mona Shukla, thereby preventing him from making assault on the deceased instead of holding the deceased.

(iii) that minor contradictions in the statements of the witnesses are required to be ignored considering the fact that the incident occurred in a very short span of time.

(iv) that taking into consideration the manner in which the offence took place and the role played by the appellant, his conviction with the aid of Section 34 of IPC is strictly in accordance with law.

(v) that the manner in which the deceased was done to death for no

fault on his part makes it clear that it is nothing but a sheer case of *dadagiri* by the accused persons and as such, no leniency is required to be shown to them.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-1 Rajendra Kumar, an eyewitness to the incident, who lodged FIR (Ex.P/2), has stated that he knew the accused persons and also the deceased and injured Anil Dhruv (PW-4). On the date of incident i.e. 18.10.2010 in between 8 and 8.30 pm when he was in his shop, deceased Manish and his mother came to his shop. At that time, the accused persons were consuming liquor near his shop and hurling abuses. He objected to it first and then deceased Manish also asked the accused persons not to use such abusive language. On this, juvenile accused Mona Shukla slapped Manish and then there was scuffle between the two. They were separated by mother of Manish, Anusuiya and himself. Then Mona Shukla left the said place and immediately thereafter came back armed with knife and assaulted with it on the chest of deceased Manish. He has stated that while Mona Shukla was assaulting the deceased, other accused persons were holding the deceased. He has stated that accused/appellant Deva took out the knife from the chest of the deceased and while he was trying to assault on the head of the deceased, the deceased fell down unconscious. He has further stated that when Anil Dhruv (PW-4) intervened in the matter, he too was assaulted by one of the accused as a result of which he sustained injuries on his waist and hand. Thereafter, while the deceased was being taken to hospital, he expired

on the way.

In cross-examination he has denied the suggestion that accused Deva intervened in the matter and caught hold of the deceased to pacify the dispute and has clarified that accused Deva had snatched the knife and was trying to cause injury with it on the head of the deceased. He has further stated that he did inform the police while recording diary statement that when Mona Shukla was assaulting the deceased, other accused persons were holding the deceased and if the same is not recorded therein, he can not tell the reason. He has denied the suggestion that the co-accused Sonu did not take part in commission of the offence and has stated that he saw the co-accused Sonu holding the deceased. However, he has again stated that the co-accused Sonu has not caused any injury and that he was holding the deceased while intervening. Here it is pertinent to mention that nothing specific has been stated against appellant Dev Kumar.

09. PW-2 Smt. Manju Dhangar, mother of the deceased, another eyewitness to the incident, while supporting the prosecution case has stated that on the date of incident she had gone to the shop of PW-1 along with her son Manish, the accused persons were consuming liquor opposite to the shop and were using abusive language. When it was objected by Manish, he was first slapped by juvenile accused Mona, there was scuffle between them and immediately thereafter Mona went to his house, brought a knife in his hand and caused knife injury to deceased Manish on his chest. The incident was also witnessed by her sister Anusuiya, Dilip, Narsingh, Anil, Bittu and Prateek. She has further stated that while assault was being made by

juvenile accused Mona on the chest of the deceased, both the other accused persons were holding Manish. Accused/appellant Deva then took out the knife and while he was trying to assault with it on the head of the deceased, the deceased fell down unconscious. When Anil Dhruv tried to intervene in the matter, he was also caused injury by accused/appellant Deva by knife on his hand.

In cross-examination she has stated that she did inform the police in her diary statement that both the accused persons i.e. co-accused Sonu and accused/appellant Deva were also assaulting the deceased and while assault was being made by Mona, they had caught hold of the deceased but if same is not recorded in her diary statement she cannot tell the reason.

10. PW-3 Smt. Anusuiya Bai, eyewitness to the incident, has stated that after hearing the cries when she came out of her house, she saw the accused persons holding deceased Manish and accused Mona caused stab injury on the chest of the deceased. She has stated that when one Bhuru intervened in the matter, he too was caused injury with knife on his hand. She has stated that she did inform the police that she saw the accused persons i.e. appellant Deva and the co-accused Sonu holding the deceased while assault was being made by accused Mona and if the said fact is not there in her diary statement, she cannot tell the reason. She has denied the suggestion that the appellant had not caught hold of the deceased.

11. PW-4 Anil Kumar Dhruv, injured eyewitness, has stated that when he was going towards the house of his friend, he saw that the accused persons were beating Manish near Rajendra Kirana Stores,

he objected to the same, whereupon co-accused Sonu caught hold of him from behind and then appellant Deva caused him injury by a knife as a result of which he suffered injuries on his hand and waist. He has further stated that he saw the deceased lying on the floor with injury on his chest. He has denied the suggestion that co-accused Sonu was trying to intervene in the matter to pacify the dispute.

12. PW-5 Prateek Dubey is also an eyewitness to the incident. He has stated that hearing the cries when he along with others reached the spot, he saw that Mona first slapped Manish and at that time both the accused persons were hurling abuses and mother of Manish was intervening in the matter. Then Mona went to his house, brought a knife and assaulted with it on the chest of Manish. Appellant Deva snatched knife from Mona and tried to assault on the head of Manish, however, Manish fell down. When Anil Dhruv intervened in the matter, co-accused Sonu caught hold of him from behind and shouted "*maro*" and then appellant Deva caused injuries to Anil on his hand and waist. He has stated that he did inform the police that while appellant Deva was assaulting Manish, he was caught hold by co-accused Sonu but if the same is not recorded in his diary statement, he cannot tell the reason.

13. PW-6 Hemant Sahu is a witness of memorandum of accused Devkumar Ex.P/6 and seizure Ex.P/7 of knife. PW-7 V.R. Bhagat medically examined injured Anil Dhruv (PW-4) vide Ex.P/8 and noticed cut wound over lower 1/3rd region of anterior aspect of right arm, 3.5 cm x 1 cm x 0.5 cm and stab wound over posttemporal aspect of left hip, 1.5 cm x 0.5 cm x 1 cm deep. In his opinion, the said injuries were caused by sharp edged weapon and were simple in nature. He also

examined the weapon of offence knife and opined that the injuries suffered by the injured could be caused by the said weapon vide Ex.P/9. PW-8 Om Prakash Soni, Patwari, prepared the spot map Ex.P/4. PW-10 Dr. Shivnarayan Manjhi conducted postmortem on the body of the deceased on 19.10.2010 vide Ex.P/11 and noticed stab wound on the chest over right side just below clavicle bone. The said injury was caused by sharp edged weapon and was sufficient in the ordinary course of nature to cause death. In his opinion, the cause of death was haemorrhage and shock as a result of stab injury on chest and that the death was homicidal in nature. He also examined the seized knife sent to him and opined that the injuries sustained by the deceased could be caused by the said weapon. PW-13 JP Pathak, investigating officer, has duly supported the prosecution case.

14. Close scrutiny of the evidence makes it clear that on 18.10.2010 in between 8 and 8.30 pm the accused persons were consuming liquor near the shop of PW-1 Rajendra Kumar and were hurling abuses. At that point of time, deceased Manish along with his mother (PW-2) went to the shop of Rajendra Kumar (PW-1). The accused persons were first asked by PW-1 and thereafter by deceased Manish not to use such abusive language. On this, juvenile accused Mona slapped Manish and there was scuffle between them which was intervened by PW-1, PW-2 and PW-3 Anusuiya Bai (sister of PW-1) and thereafter Mona went back to his house and returned with knife and caused stab injury on the chest of Manish. When Anil Dhruv (PW-4) came to their rescue, he too was assaulted by the accused persons. The incident was witnessed by PW-1 Rajendra, PW-2 Manju, PW-3 Anusuiya, PW-4 Anil Dhruv and

PW-5 Prateek. Thus complicity of the accused/appellant in commission of the offence stands proved beyond all reasonable doubt.

15. Now the question which arises for consideration of this Court is whether conviction of the appellant for the offence under Section 302 with the aid of Section 34 of IPC is in accordance with law and in conformity with the evidence on record.

16. The ingredients of Section 34 are that there should be criminal act i.e. either committing the act or omitting to commit the act, which is an offence under IPC, that criminal act is done by more than one person and that criminal act is done in furtherance of common intention of all, meaning thereby that the persons should have decided in advance about the commission of the act and every one of them have acted keeping in mind that common intention.

17. In the present case, though all the eyewitnesses including the injured (PW-4) have stated in the Court that while knife injury was being caused by juvenile accused Mona on the chest of deceased Manish, both the other accused persons i.e. Deva (the appellant herein) and Sonu (co-accused) were holding the deceased but none of them have stated so in their statements recorded under Section 161 of Cr.P.C. The FIR was lodged promptly just about half an hour of the incident by PW-1 Rajendra Kumar wherein also he has not stated that the appellant was holding the deceased at time of assault being made by juvenile accused. PW-13 GP Pathak, investigating officer, who recorded the diary statements of the witnesses has admitted the fact that none of the witnesses had ever stated that the appellant and other co-accused Sonu were holding the deceased when he was being

assaulted by juvenile accused with knife. The omission of this material fact right from the lodging of FIR till recording of diary statements of the eyewitnesses, including mother of the deceased, and disclosure of the same for the first time in the Court, raises a serious doubt on the case of the prosecution in respect of involvement of the appellant in commission of murder of the deceased. This apart, PW-1 Rajendra Kumar, in para-9 of his evidence has stated that the appellant and co-accused did not take part in commission of murder and the co-accused Sonu was also holding the deceased like them with a view to pacifying the dispute.

18. Thus, if the act of the accused/appellant is seen in light of provisions of Section 34 of IPC, it is difficult to hold him guilty of commission of murder with the aid of this section for the reason that there is nothing on record to suggest that the appellant was sharing common intention with other accused persons. As already discussed above, the incident occurred all of a sudden when the accused persons including the appellant were consuming liquor and the same was objected to by PW-1 and then by deceased Manish and thereafter, juvenile accused Mona Shukla went back to his house, returned with knife and inflicted injury on the chest of the deceased. As such, it cannot be said that the accused persons had a pre-arranged plan to commit murder of the deceased and with that common intention they were consuming liquor near the shop of PW-1, were waiting for arrival of the deceased and then one of them went to his house, came back with knife and caused fatal blow to the deceased resulting in his death. Rather from the evidence it appears that on objection being raised by

the deceased, juvenile accused Mona Shukla being under the influence of liquor got so furious that at the very moment he intended to kill Manish (deceased) and with that intention having brought a knife from his house he caused injury on his vital part chest with it. Being so, the appellant can, by no stretch of imagination, be said to be sharing common intention of committing murder of the deceased with other co-accused persons and his conviction under Section 302/34 of IPC is liable to be set aside.

19. As regards conviction of appellant Dev Kumar under Section 324/34 of IPC, as per the evidence of injured Anil Kumar Dhruv (PW-4) and eyewitness Prateek Dubey (PW-5), it is evident that the appellant only caused injury to PW-4 with knife and medical evidence also lends due support to the evidence of eyewitnesses according to which corresponding injuries were noticed on the person of PW-4 which were simple in nature. Thus, considering the evidence of the eyewitnesses coupled with the medical evidence, his conviction under Section 324/34 of IPC being based on proper appreciation of the evidence on record, is hereby affirmed.

20. In the result, the appeal is allowed in part. While maintaining conviction and sentence of the appellant under Section 324/34 of IPC, he is acquitted of the charge under Section 302/34 of IPC. He is reported to be in jail, therefore, he be set free forthwith if not required in any other case.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge