

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 337 of 2019

ALAMAT KHURESHI @ ALAMAT QUOARICI & ANR.
VS.
STATE OF WEST BENGAL & ANR.

For the Appellant No. 1	: Ms. Manaswita Mukherjee, Adv. (Amicus curia)
For the Appellate No. 2	: Mr. Bikash Kumar Roy, Adv. Mr. Fajlur Rahaman, Adv.
For the State	: Mr. Ranabir Roy Chowdhury, Adv. Mr. Mainak Gupta, Adv.
Hearing concluded on	: 20 th February, 2023
Judgement on	: 23 rd March, 2023

Siddhartha Roy Chowdhury, J.:

1. This appeal assails the judgement passed by learned Additional District and Sessions Judge, 3rd Fast Track Court, Barasat North 24 Parganas in S.T. No. 2(7) 2010. By the impugned judgment learned Trial Court was pleased to hold Amir Hossain @ Khokan Molla and Alamat Khureshi appellants herein, guilty to the charge under Section 307 of the Indian Penal Code and sentenced each of them to suffer Rigorous Imprisonment for seven years and to pay a fine of Rs.10,000/- with a default clause.
2. Briefly stated that on 22nd April, 2006 at about 21.45 hours one Sabed Ali Molla informed the Officer-in-charge of Barasat Police Station

in writing about an incident that allegedly took place on that very day at about 12.10 hours when two persons namely Amir Hossain Molla son of Amar Ali Molla and Alamat Khureshi assaulted his sister Rupban Bibi with knife being instigated by one wife of Nazrul. They also had fire arms with them. It was further disclosed that Khokan was previously arrested over an incident of arson.

3. As the information disclosed offence cognizable in nature, Barasat P.S. Case No. 299 dated 22nd April, 2006 was registered under Sections 326/307/34 of the Indian Penal code. Police took up investigation that culminated into submission of charge sheet against the accused persons under Sections 326/307/34 of the Indian Penal Code. The accused persons stood the trial pleading their innocence.
4. On behalf of prosecution 11 witnesses were examined and learned Trial Court after considering the evidence both oral and documentary, was pleased to pass the judgment impugned.
5. Impeaching the impugned judgement Mr. Fajlur Rahaman, learned Counsel representing the convict/appellant Amir Hossain Molla submits that, the prosecution case cannot be said to have been proved beyond doubt. There is lack of consistency in the testimony of witnesses. According to Mr. Rahaman, admittedly the relationship between the convicts and the victim was not good, rather inimical, therefore, they were falsely implicated. Drawing my attention to the testimony of the victim P.W. 1 Mr. Rahaman submits that, P.W. 1 stated that Amir Hossain assaulted her with 'da' on the right side of her head and also on the right arm and in the back side and the other person tried to push

her down. She raised alarm, and could manage to come to the road, then relative of Amir Hossain took her to hospital. For that reason she became senseless for three days while she was in hospital.

6. Mr. Rahaman submits that P.W. 1 is not getting support from the testimony of the attending Doctor P.W. 11. The Doctor stated that patient was conscious and there was active bleeding. This exaggeration made by the victim strikes at the root of the prosecution case. With full vigor Mr. Rahaman submits that benefit of doubt ought to have been extended to the accused persons on this count, following the settled principle of law that when two views are possible and one that tilts in favour of the accused person should be accepted and benefit of doubt should be extended to him. It is further submitted that, the alleged victim during her cross-examination as P.W. 1 stated that she narrated the incident to the Police Station on the same day of the incident. Daroga babu noted down the same and she put her signature. While the F.I.R. shows that defacto-complainant P.W. 7 set the criminal proceeding into motion by informing the Police Station in writing.

7. The statement recorded by the Daroga babu of the Police Station that contained signature of the victim was not produced before the Court. Had it been produced it would have stated a different story altogether. The prosecution case according to Rahaman, should be disbelieved on that score as well. It is further argued that the victim as P.W. 1 made embellishment while narrating the alleged incident. Whatever she stated before the Court regarding the manner she was allegedly assaulted, she had not said the same to the Investigating

Officer. She did not tell the Investigating Officer that she was assaulted with 'da' by Amir Hossain Molla on the right side of her head and on the back side. The inconsistent statement of the victim is perilous so far the prosecution case is concerned and for such inconsistent testimony, P.W. 1 should not be considered to be a witness who has faith in truth.

8. Relying upon the judgement of Hon'ble Apex Court pronounced in ***Sunil Kumar Sambhudayal Gupta (Dr.) and others Vs. State of Maharashtra*** reported in **(2010) 13 SCC 657**. Mr. Rahaman submits that, where the witness in his statement under Section 161 Cr.P.C. has not disclosed certain facts but meets the prosecution case first time before the Court, such version lacks credence and is liable to be discarded.
9. It is further argued that recovery of weapon is doubtful therefore prosecution case cannot be said to have been proved beyond doubt. Drawing my attention to the testimony of P.W. 5 in contradistinction to the testimony of the P.W. 10, Mr. Rahaman argues that Riajur Rahaman Molla made an embellishment to support the case of prosecution and thus his testimony should not be taken into consideration. According to Mr. Rahaman, when witness makes two inconsistent statements in the evidence either at one stage or at two stages, testimony of such witness becomes unreliable and unworthy of credence and no conviction can be based on the evidence of such witness.
10. Mr. Rahaman, learned Counsel, in order to buttress his point relies upon judgement of Hon'ble Apex Court pronounced in the case of ***Suraj Mal Vs. State of Delhi*** reported in **Laws (SC) 1979 2 69; Hari**

Om @ Hero Vs. State of Uttar Pradesh reported in **(2021) 4 SCC 345;**
Ram Kumar Pandey Vs. State of Madhya Pradesh reported in **(1975)**
3 SCC 815.

11. I have perused the impugned judgements as aforesaid. It is the settled principle of law that prosecution is to prove the case beyond reasonable doubt but same rigor is not required to prove the case as far as defence is concerned.
12. It is also settled principle of law of precedent that in order to use a judgment as a precedent the fact of the case decided and the fact of the case at hand must be in *pari materia*. In this regard we can rely upon the judgement of Hon'ble Apex Court pronounced in ***Padmausundara Rao (Dead) & Ors vs. State of Tamil Nadu & Ors.*** reported in **AIR 2002 SC 1334.**
13. *Sunil Kumar Sambhudayal (supra)* was decided in the backdrop of an incident which resulted into registering a case under Sections 498A/306/34 of the I.P.C. The judgment pronounced in Ram Kumar Prasad (Supra) is based on the principle that in case of appeal against the acquittal the order of Appeal Court should not interfere with the acquittal merely because it can take one of the two reasonable possible views which favours the conviction.
14. In *Hariom* (Supra) Hon'ble Apex Court was pleased to decide the issue that springs from the provision of Section 118 of the Evidence Act read with Section 396 of the Code of Criminal Procedure, the expert's opinion, test identification parades etc. which is factually different from

the case at hand. Therefore, the aforesaid judgments are of no help to Mr. Rahaman, learned Counsel for the appellant no. 2.

15. Ms. Manaswita Mukherjee, learned counsel for the convict Alamat Khureshi submits that prosecution has failed to prove beyond doubt any overt act committed by the appellant Alamat Khureshi. Drawing my attention to the written information that led to recording of F.I.R. Ms. Mukherjee submits that in the written information the defacto complainant stated that Alamat Khureshi together with Amir Hossain Molla assaulted his sister Rupban Bibi @ Rubi with a knife and fled away while the victim as P.W. 1 stated that she was assaulted by Amir Hossain Molla with a 'da' on the right side of her head, cheek and on the right arm and also on the back side and the other person tried to push her down on the earth. P.W. 2 Tanjura Bibi did not say anything about Alamat Khureshi. According to P.W. 5 the convicts while running down the road, armed with pistol threatened him with dire consequences. P.W. 6 Sahanara Khatun stated that it was Amir Hossain who showed her a pistol but she did not make any whisper about Alamat Khureshi. Sabed Ali Molla was a post occurrence witness who could not say anything about the role played by Alamat Khureshi. P.W. 8 Tajuddin Molla stated that both the accused persons assaulted Rukban Bibi with chopper. P.W. 9 Ajijur Rahaman Molla did not say anything about the role played by Alamat Khureshi. P.W. 10 Investigating Officer was not an eye witness to the occurrence and the attending Doctor P.W. 11 was not told by the victim about the specific role played by Alamat Khureshi.

16. According to Ms. Mukherjee when prosecution fails to give a coherent narrative as to the role played by Alamat Khureshi, learned Trial Court ought to have extended benefit of doubt to record an order of acquittal so far as the convict appellant Alamat Khureshi is concerned.
17. It is trite law to say that law does not require the establishment of an overt act to allow Section 34 of the I.P.C. to operate in as much as the section gets attracted when the criminal act is done by several persons in furtherance of their common intention. Therefore prosecution is under obligation to establish that both the accused persons/appellants had shared a common intention and they acted in furtherance of such common intention.
18. In this regard we can gainfully rely upon the judgment of Hon'ble Apex Court pronounced in the case of **SURENDRA CHAUHAN V. STATE OF M.P.** reported in **(2000) 4 SCC 110**, Hon'ble Apex Court held that 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 the offence. If a 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. Referring to its earlier judgment this Court held:-

"11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous

consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them.

(Ramaswami Ayyangar v. State of T.N. (1976) 3 SCC 779) The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. (Rajesh Govind Jagesha v. State of Maharashtra (1999) 8 SCC 428). To apply Section 34 IPC 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. If a 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 a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

19. In **GIRIJA SHANKAR V. STATE OF U.P.** reported in **(2004) 3 SCC 793**, Hon'ble Apex Court held:-

"Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done

in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same is if each of them has done it individually by himself. The existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision."

20. Mr. Ranabir Roy Chowdhury, learned Counsel representing the State submits that, the testimony of P.W. 1 undoubtedly suffers from exaggeration but after careful consideration of the same there would be no difficulty in finding a ring of truth around the statement made by the victim on oath before the learned Trial Court. The exaggeration per se cannot be said to have the potential to raze the entire prosecution case to the ground. Drawing my attention to the testimony of P.W. 1 Mr. Roy Chowdhury, learned Counsel further submits that admittedly the incident took place on 22nd April, 2006 around 12.00 noon inside the

room of the victim. After being assaulted by the convicts the victim was taken to hospital by the relative of appellant Amir Hossain Molla. She was attended by the Doctor at 12.30 P.M. and the Doctor was told by the victim that she was physically assaulted with chopper by Alamat Molla, Khokan Molla and others. The Doctor found multiple gaping sharp cut wounds on the right side of scalp and face measuring about 4" X 1" and 3" X 1" and the patient was conscious with active bleeding. The F.I.R. was registered on that very date but at about 21.45 hours, long after the victim was taken to hospital, attended by Doctor and advised for admission in female surgical ward.

21. The proximity between the incident of assault and statement of victim P.W. 1 before the doctor P.W. 11 rules out the possibility of contamination of any kind. The narrative of P.W. 1 that she was assaulted by the appellant no. 2 when getting support from the testimony of P.W. 11, learned Trial Court was absolutely justified in recording the order of conviction. According to Mr. Roy Chowdhury, the testimony of witnesses other than P.W. 1 and P.W. 11 may be ignored for the simple reason that none of them witnessed the incident.

22. Perused the evidence on record. The victim of this case is the sole witness to the occurrence and there is exaggeration in her testimony. But the question that calls for consideration is whether such exaggeration is on material particular, making the testimony of P.W. 1 utterly absurd or not. People love to romanticize and it is the inherent nature of every human being. The victim of the case is no exception. The Court while appreciating the evidence should not lose sight of realities of

life and cannot afford to take a stand ignoring the same. Some discrepancy is bound to be there in every criminal trial, which should not weigh with the Court so long it does not materially affect the prosecution case.

23. The proximity between the time of incident and examination of the injuries sustained by victim with history of assault by the doctor P.W. 11 undoubtedly guarantees the existence of truth in what was stated by victim. Exaggeration or omission, as pointed out by Mr. Rahaman is of no consequence. The injured witness cannot be thrown overboard because of the exaggeration, she made. Testimony of P.W. 1 inspires confidence. It is correct that statement of victim before the Investigating Officer differs from her testimony before the Court. But coherent with the statement she made to doctor, which was her maiden statement regarding the incident.

24. Hon'ble Apex Court in **ALAMGIR VS. STATE** reported in **AIR 2003 SC 282** held:-

".....The second limb pertains to the statement under [Section 161 Cr.P.C.](#) Admittedly, this piece of evidence was not available in the statement of the witness under [Section 161 Cr.P.C.](#), but does it take away the nature and character of the evidence in the event, there is some omission on the part of the police official. Would that be taken recourse to as amounting to rejection of an otherwise creditworthy and acceptable evidence the answer, in our view, cannot but be in the negative."

25. It is true she stated that she was unconscious for 72 hours while in hospital. But Doctor found her conscious. Does that affect the case of

prosecution? In my opinion, the answer would be no. Exaggeration per se do not render the evidence brittle. It can always be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touch stone of credibility. I do not find any discrepancy in the testimony of P.W. 1 and P.W. 11 on material particulars. P.W.1 did not say anything that runs counter to what she stated against the assailant. Therefore, I do not find any merit in the submission that benefit of doubt should be given as there are two views.

26. Thus, I do not find any reason to impeach the judgment passed by Learned Trial Court so far the appellant convict Amir Hossain Molla is concerned.

27. In this case the incident took place at 12 noon of 22nd April 2006. P.W. 1 was taken to hospital immediately thereafter and she was attended by the Medical Officer on duty at 12.30 P.M. P.W. 11 Doctor stated that the patient was conscious with active bleeding. She narrated the names of the assailant. She was advised admission in Female Surgical Ward. Almost after 9 hours, police case was registered and while adducing evidence, P.W. 7 the defacto complainant stated to have lent his signature on blank paper. Thus content of the information given to police after 9 hours does not deserve much importance.

28. However, considering the incoherent statement made by prosecution witnesses in their narrative as to the role played by convict Alamat Khureshi, I am inclined to hold that prosecution has failed to prove beyond doubt that Alamat Khureshi acted in furtherance of

common intention that he shared with the appellant no. 2 Amir Hosaaain. Such failure shrouds the case of prosecution with veil of doubt so far the culpability of Alamat Khureshi is concerned. Therefore, extending benefit of doubt I record an order of acquittal as against Alamat Khureshi.

29. However, considering the nature of injury sustained by the victim, I am of the view that the accused Amir Hosaaain should be held guilty for committing offence within the meaning of Section 324 of the I.P.C. and not under Section 307 of the I.P.C. The convict cannot be said to have any intention to cause murder of the victim, he had ample opportunity to commit such crime and he could have landed blow on the vital part of the body of the victim instead of landing the blow on the arm or scalp or face. I am of the view that the convict Amir Hosaaain should be held to have committed offence within the meaning of Section 324 of the I.P.C. and not under Section 307 of the I.P.C. in absence of any evidence to justify the provision of Section 320 of the Indian Penal Code.

30. Under such circumstances, I am inclined to modify the sentence imposed upon the convict by learned Trial Court. Instead of serving out sentence for seven years, I am inclined to direct that the appellant Amir Hosaaain @ Khokan Molla to suffer rigorous imprisonment for three years for committing offence under Section 324 of the I.P.C. and to pay fine of Rs. 15000/-, in default to suffer further imprisonment for six months, subject to the provision of Section 428 of the Code of Criminal Procedure. Consequently the appeal succeeds but in part.

31. The order of conviction imposed against Amir Hossain Molla appellant no. 2 stands modified and the order of conviction passed

against Alamat Khureshi is reversed and he is acquitted. He be set at liberty and discharged from bail bond subject to execution of a bail bond under Section 437A of Cr.P.C. for six months.

32. Let a copy of the judgement along with the Lower Court Record be sent to the learned Trial Court for information and necessary action.
33. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)