

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRA-S-2473-SB-2004 (O&M)
Date of decision:28.02.2024

Raj Kumar
.....Appellant

Versus

State of Haryana
...Respondent

CRA-S-2520-SB-2004 (O&M)

Virender and others
....Appellants

Versus

State of Haryana
...Respondent

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. R.A. Sheoran, Advocate for the appellants.

Mr. Jagdish Manchanda, Addl. AG Haryana.

AMAN CHAUDHARY. J.

1. Challenge in the present appeals is to the judgment/order dated 01/02.12.2004, passed by the learned Additional Sessions Judge (Fast Track Court), Bhiwani, whereby appellants were convicted and sentenced as under:

Offence u/s	Imprisonment	Fine	Default sentence
307/34 IPC	RI for ten years	Rs.8000/- each	SI for one year
326/34 IPC	RI for six years	Rs.2000/- each	SI for four months
452/34 IPC	RI for three years	Rs.1000/- each	SI for two months

All the sentences shall run concurrently.

2. Succinctly the facts are that, Manoj Kumar-complainant made a

statement to the police that on 23/24.07.2002, he along with his brother-Baljeet and uncle Dharambir were sleeping on the roof of his house, whereas the other family members were in the courtyard. During the night, hearing the cries, he woke up and saw his uncle sustained injuries and two persons ran away from there. His uncle was rushed to General Hospital, Charkhi Dadri, from where due to serious condition, he was referred to PGIMS, Rohtak. Ruqa was sent to the police station. On basis of the said statement, an FIR came to be registered.

3. After completion of investigation, final report under Section 173 Cr.P.C. was presented in the Court against the accused-appellants. On finding a prima facie case, charges under Sections 307/326/452/34 IPC were framed against them, to which they pleaded not guilty and claimed trial.

4. The prosecution in order to bring home the guilt of the accused examined as many as 14 PWs. On closure of their evidence, statements of the accused were recorded under Section 313 of Cr.P.C. They denied all the incriminating circumstances that appeared against them in the prosecution case while pleading false implication. In defence, they examined six witnesses.

5. The trial Court on analysing the oral as well as documentary evidence led by the parties, convicted and sentenced the appellants as noticed above.

6. Aggrieved appellants are before this Court.

7. Learned counsel for the appellants, contends that the trial Court has committed a grave error while holding the appellant guilty, despite the fact that accused Attar Singh, Raj Kumar @ Billu and Harpal were not named in the FIR and they were also found innocent by the police during investigation. It is on the

application filed under Section 319 CrPC that the trial Court summoned them. The statement of injured-Dharambir was recorded after 28 days by the police. No injury caused by the appellants was declared dangerous to life. The recovery of weapons allegedly used in the crime could also not be connected to the crime of the accused-appellant. The required weightage was not given to the six defence witnesses, as per their statements, accused Attar Singh, Raj Kumar and Harpal were not present at the spot. Lastly and in the alternative, learned counsel prays for taking a lenient view regarding the sentence for it to be reduced to the period already undergone by the appellants, as they are sole breadwinners of their family; poor strata of the society; have the children of marriageable age; not involved in any other case; never misused the concession of bail and have been facing the agony of protracted trial for the last 22 years.

8. Learned counsel for the State on the other hand submitted that the trial Court has analysed the factual position in detail, and the accused have been rightly convicted for offence punishable under Section 307 read with Section 34 of Indian Penal Code. Keeping in view the nature of the injuries sustained, it cannot be said that the sentence is excessive. Thus, he prays for the dismissal of the present appeals. He, however, affirms the non-involvement of the appellants in any other criminal case.

9. Heard the learned counsel on either side and perused the record.

10. It is evident from the record that on basis of the medical ruqa as regards injured Dharambir received, PW-12, ASI Hari Singh went to PGIMS Rohtak on 24.07.2002 and moved an application seeking opinion of the doctor

about fitness of the said injured for making statement but he was not fit for statement. However, complainant Manoj, nephew of the injured, was in the hospital, who got recorded his statement, on basis of which, the FIR in question was registered. Thereafter, on various dates, police made requests and finally his statement was recorded on 20.08.2002.

11. In his statement Dharambir s/o Bhawana Ram while appearing as PW1 had specially deposed that on the intervening night of 23/24.7.2002, four persons namely Attar s/o Mardu Ram, Buli alias Raj Kumar s/o of Arjun, Binder came to the spot, whereas Harpal s/o Laxman was standing near the tractor trolley, parked in front of his house. Binder gave one axe blow on his neck and another on left hand, which cut his two fingers. Attar caused a knife blow on the right shoulder, due to which his bone was cut, whereas Buli @ Raj Kumar gagged his mouth.

12. PW-2 Dr.Sanjay Fotedar, Senior Resident, Department of Chest and TB, PGIMS, Rohtak, who examined injured Dharambir, found the following injuries on his person:

- “1. Incised wound of size 8x5 c.m. present on the anterior aspect of neck extending from 2 c.m. right of mid line up to the anterior border of left sternocleidomastoid muscle, larynx cut at the level of vocal cords, fresh bleeding present.
2. Incised wound of size 5x3 c.m. present on anterior aspect of right shoulder, fresh bleeding was present.
3. Stab injury of size 3x1 c.m. present below the medial 1/3 of right clavicle, fresh bleeding was present with incised wound of size 6 x 3 c.m. extending from later margin of injury No.3.
4. Index and middle fingers of left hand amputated with under lying bone exposed, fresh bleeding was present.”

After preparing the MLR patient was referred to ENT Specialist for the management of injury No.1, Surgeon Specialist for injuries No.2 and 3 and Ortho Specialist for injury No.4. Kind of weapon used was sharp...”

13. PW-13, Dr.Avinash Kumar, Senior Resident, ENT, PGIMS, Rohtak deposed that, "On that day patient Dharambir son of Bhagana was admitted in PGIMS Rohtak vide CR No.273649. The patient was referred from Bhiwani hospital. I have treated the patient as ENT Specialist. The patient was admitted with alleged history of assault. Patient had a cut throat wound of the size of 8x5 cm in the anterior part of neck. It was deep wound up to the posterior pharyngeal wall. Thyrohyoid membrane was torn and thyroid was found exposed. Vocal cords were visible. Immediate tracheostomy was done and wound was repaired under general anesthesia. Ryle's tube was put in. Patient was given one unit of blood transfusion alongwith one unit of haemixal. On 25.7.2002 on the police request Ex.PQ I opined the injuries of the person of Dharambir is dangerous to life.... Since patient had other injuries also so orthopedics opinion and general surgeon's opinion were also sought for. Patient remain admitted for about three months.... Oesophagoscopy was done on 5.10.2002."

14. PW14 Dr.Kanupriya, Radiologist, PGIMS, Rohtak, who radiologically examined injured Dharambir Siongh, found the following injuries on his body:

1. X-ray right shoulder-fracture right clavicle seen.
2. X-ray left hand-amputation of 2nd and 3rd fingers at proximal phalanges.
3. X-ray chest-Trachea shifted to right. Heart size normal. Non homogenous opacity right upper and mix zones. Homogenous opacity right base obscuring right C.P.Agle- right pleural effusion.
4. STN (AP and lateral) -air seen in the soft tissues of neck.

15. Section 307 Indian Penal Code reads :

"Attempt to murder - Whoever does any act with such intention

or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned."

16. The two essentials for attracting Section 34 IPC are, (a) the criminal act consisting of a series of act should have been done by more than one person (b) doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of common intention of all such person. Hon'ble the Supreme Court in **Suresh and another vs. State of U.P., reported in (2001) 3 SCC 673** had widened the scope of Section 34 and held thus:

"37. However, in view of the importance of the matter, in so far as the interpretation of Section 34 of the Indian Penal Code is concerned, we have chosen to express our view in the light of consistent legal approach on the subject throughout the period of judicial pronouncements. For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused sharing such intention.

38. Section 34 of the Indian Penal Code recognises the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention

presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

39. The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in **Satrughan Patar v. Emperor** held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted

in concert with others in order to bring about that result, that Section 34 may be applied."

17. In the facts of the present case, PW-2, Dr.Sanjay Fotedar has categorically opined that the injuries were caused with sharp edged weapon, which stands corroborated as per the opinion Ex. PQ, given by Dr. Avinash Kumar, and the injuries sustained by the injured Dharambir were declared to be dangerous to life, he was having a cut throat deep wound in the anterior part of the neck.

18. Further, ASI Hari Singh PW-12 stated that he interrogated accused Virender alias Binder vide memo Ex.PS and recovered axe (Kulhari) vide memo Ex.PD, attested by witnesses.

19. A conviction under Section 307 may be justified if it can be adequately demonstrated that intent coupled with an overt act was executed. Infliction of bodily injury capable of causing death is not necessary. While the intention of the accused may be inferred from the nature of the injury inflicted, it may also be deduced from other circumstances, sometimes without any consideration to the actual wounds. A distinction has been made under the section, between the act of the accused and the consequences. The Court must assess whether the act was carried out with intention or knowledge as per the circumstances outlined in the section, irrespective of the outcome. For an attempt to be considered criminal, it is not obligatory for it to be penultimate. Execution of an act along with the presence of intent, is sufficient.

20. The section certainly makes a distinction between the act of the accused and its result. The court is required to see whether the act, irrespective of its result, was done with the intention or knowledge and in the circumstances

mentioned in the section. It is not even important that the criminal act in order to be an attempt should be a penultimate act. It is sufficient in law if there is present an intent coupled with some overt act in execution thereof. [See: Sarju Prasad vs. State of Bihar (AIR 1965 Supreme Court 843), State of Maharashtra vs. Viram Bhim Patel (1983) 2 SCC 28), Girijashanker vs. State of U.P. ((2004) 3 SCC 793), Bappa vs. State of Maharashtra ((2004) 6 SCC 487 and Bipin Bihari vs. State of M.P. ((2006) 8 SCC 799)].

21. As regard the plea of alibi taken by the accused Attar Singh, Raj Kumar and Harpal, a gainful reference can be made to the judgment of Hon'ble the Supreme Court in **Binay Kumar Singh vs. State of Bihar**, 1997 AIR(SC) 322, wherein it has been observed and held thus:

“We must bear in mind that alibi is not an exception (special or general) envisaged in the Penal Code, 1860 or any other law. It is only a rule of evidence recognized in S.11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (A) given under the provision is worth reproducing in this context:

“The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant.”

The Latin word alibi means “elsewhere” and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be

considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the Court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide *Dudh Nath Pandet v. State of Uttar Pradesh*, (1981) 2 SCC 166: AIR 1981 SC 911; *State of Maharashtra v. Narsingrao Gangaram Pimple*, AIR 1984 SC 63)”

22. By relying on the aforesaid judgment in **Kamal Prasad vs. State of Chhattisgarh**, (2023) 10 SCC 172, the Apex Court has laid down the following principles regarding plea of alibi and held thus:

“24. The principles regarding the plea of alibi, as can be appreciated from the various decisions [*Dhananjoy Chatterjee v. State of W.B.*, (1994) 2 SCC 220 : 1994 SCC (Cri) 358; *Binay Kumar Singh v. State of Bihar*, (1997) 1 SCC 283 : 1997 SCC (Cri) 333; *Jitender Kumar v. State of Haryana*, (2012) 6 SCC 204 : (2012) 3 SCC (Cri) 67; *Vijay Pal v. State (NCT of Delhi)*, (2015) 4 SCC 749 : (2015) 2 SCC (Cri) 733; *Darshan Singh v. State of Punjab*, (2016) 3 SCC 37 : (2016) 1 SCC (Cri) 702; *Mukesh v. State (NCT of Delhi)*, (2017) 6 SCC 1 : (2017) 2 SCC (Cri) 673; *Pappu Tiwary v. State of Jharkhand*, (2022) 17 SCC 664 : 2022 SCC OnLine SC 109] of this Court, are:

24.1. It is not part of the General Exceptions under IPC and is instead a rule of evidence under Section 11 of the Evidence

Act, 1872.

24.2. This plea being taken does not lessen the burden of the prosecution to prove that the accused was present at the scene of the crime and had participated therein.

24.3. Such plea is only to be considered subsequent to the prosecution having discharged, satisfactorily, its burden.

24.4. The burden to establish the plea is on the person taking such a plea. The same must be achieved by leading cogent and satisfactory evidence.

24.5. It is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the spot of the crime. In other words, a standard of “strict scrutiny” is required when such a plea is taken.

25. We notice that the defendants have laid certain evidence attempting to indicate their presence being at a place other than the spot of commission of the offence. The statements of four witnesses, namely, Sonchand DW 1; Jageshwar Prasad DW 2; Ramadheen DW 3; and Parsu Das DW 4 form part of record. However, DW 3 testifies to the whereabouts of accused Sandas and DW 4 does so for accused Anand Ram, both of whom the present case does not concern as the appellants before us are Kamal Prasad (A-3), Shersingh (A-6) and Bhavdas (A-9).

26. xx xx

27. In our considered view, both these defence witnesses do not conclusively establish the plea of alibi, based on the principle of preponderance of probability as their statements stand unsupported by any other corroborative evidence. Not only that, no reason stands explained in such testimony for A-9 having travelled from Bhalesur to Sundri in order to go to Sandi Bazar. It is a matter of record that A-9 is a resident of Bhalesur where he resided with his family. He owned farms in Sundri. The family of A-9 was not examined to substantiate the claim of such travel. For those reasons, we cannot believe the version testified to by DW 1 and DW 2. We also cannot ignore that all 3 primary witnesses of the prosecution i.e. PW 3, PW 16, and PW 17 have categorically deposed the presence of the appellant convicts at the spot of the crime and such a statement could not be shaken in cross-examination.

28. We find that for the plea of alibi to be established, something other than a mere ocular statement ought to have

been present. After all, the prosecution has relied on the statement of eyewitnesses to establish its case against the appellant convicts leading to the unrefuted conclusion that appellant convicts were present on the spot of the crime and had indeed caused injuries unto the deceased as also PW 3 with lathis and tabbal on various and vital parts of their bodies.”

23. Reverting to the case in hand, accused Attar Singh examined DW1 Rajinder Singh and DW2 Satbir Singh, who had deposed that on the intervening night of 23/24.7.2004, Attar Singh was with them after the Kaaz ceremony of death of his aunt, but in cross-examination, accused could not tell the name of his aunt and when she had died. Regarding accused Raj Kumar, that he had gone alongwith his family to Haridwar as per the statements of DW3, Mukesh, DW4 Subhash and DW5, Bharat Lal but none, who had gone with him from his family was produced to substantiate the same. Further DW6 Vijay Singh deposed that accused Harpal Singh, was watching a video film with Maha Singh, Attar Singh, Parvesh and him, but it only remained his self serving statement only.

24. The statement of the injured-eye witness inspires confidence, as has categorically deposed the role of the accused and the injuries inflicted upon him by them. Thus, it is held that the accused have failed to prove their plea of alibi. It has been held in **Balu Sudam Khalde vs. State of Maharashtra**, 2023 SCC OnLine SC 355 that, “in assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their

evidence. In respect of both these considerations, circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence”.

25. With regard to the allegations of false involvement, the trial Court rightly observed that, “It is not disputed that civil litigation is pending between the complainant party and the accused party. It is not disputed that pendency of litigation is double edged weapon. The accused persons have motive to inflict injury upon the complainant party or the complainant party has motive to falsely implicate the accused person.” The injured-eye witness withstood the test during the lengthy cross-examination and his testimony qua the manner of occurrence could not be shaken and his account was duly corroborated by medical evidence. In this regard, profitable reference can be made to **Abdul Sayeed vs. State of Madhya Pradesh** (2010) 10 SCC 259 wherein Hon’ble the Supreme Court held that, “The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. “Convincing evidence is required to discredit an injured witness.” Although in the present case, the investigating agency had been negligent in conducting the investigation, yet the prosecution has been successful

in proving its case beyond the shadow of reasonable doubt.

26. Having evaluated the matter and as a fall out thereof, this Court finds there to be no reason to interfere in the well reasoned judgment passed by the trial Court, the appeal thus, hereby dismissed. However, insofar as, the sentence part is concerned, no doubt, as noticed by the trial Court injuries inflicted on the victim were of serious nature, but considering the mitigating circumstances of the appellants, end of justice would be served, if the sentence of rigorous imprisonment is reduced from 10 years to 6 years under Section 307/34 IPC with the fine already imposed. Accordingly, the conviction of the appellants is affirmed but the order of sentence is modified to the aforesaid extent. Since the appellants are on bail, their bail-bonds are canceled and they shall be arrested forthwith to undergo the remaining punishment.

27. Appeals stand disposed of accordingly.

28. Photocopy of this order be placed on the file of the connected case.

(AMAN CHAUDHARY)
JUDGE

28.02.2024
Hemant

Whether speaking/reasoned	:	Yes / No
Whether reportable	:	Yes / No