

REPORTABLE**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 238 OF 2011**

CHHOTA AHIRWARAppellant

versus

THE STATE OF MADHYA PRADESHRespondent

J U D G M E N T**Indira Banerjee, J.**

This appeal is against a judgment and order dated 5th November, 2008 passed by the High Court of Madhya Pradesh at Jabalpur, dismissing Criminal Appeal No.1050 of 1994 filed by the appellant, and upholding the judgment dated 26th August, 1994 passed by the Additional Sessions Judge, District Panna, Madhya Pradesh in Sessions Case No. 13/1993, *inter alia*, convicting the accused appellant of offence under Section 307 read with Section

34 of the Indian Penal Code.

2. The accused appellant was tried by the Sessions Court, on charges under Section 307/34 of the Indian Penal Code, for attempt, with common intent along with the main accused Khilai, to murder the complainant and for instigating the said accused Khilai to fire at the complainant with a country made pistol, in furtherance of a common intent to kill the complainant.

3. In a nutshell, the case of the Prosecution is that, on 22nd October, 1992 at about 11.00 a.m., there was a quarrel between the accused appellant and the complainant, in which the said accused Khilai intervened. The said accused Khilai who had joined the accused appellant and the complainant, took out a country made pistol from the pocket of his trousers, pointed it towards the complainant and fired at the instigation of the accused appellant, who urged the said accused Khilai to kill the complainant. The complainant, therefore, sustained injuries on his forehead near his eye and on his lips and shoulder with splinters from the pistol and started bleeding. It is the further case of the Prosecution, that after the firing, the accused Khilai fled the scene of occurrence and the accused appellant followed him. Immediately thereafter, the complainant reported the incident at the Mohandra Chowki. The report was forwarded to the Simariya Police station where Crime

No.110/1992 was registered.

4. After investigation, Chargesheet was filed against the accused appellant and the main accused Khilai, both of whom pleaded 'Not Guilty' and claimed to be tried. To establish the charges framed against the accused, the Prosecution examined 11 witnesses. The accused appellant did not examine any witness nor did the main accused, Khilai.

5. By a judgment dated 26th August, 1994, the Additional Sessions Judge, Panna held the accused appellant guilty of offence under Section 307/34 of the Indian Penal Code and the main accused Khilai guilty of offence under Section 307 of the Indian Penal Code. By an order of sentence passed on the same day the accused appellant was sentenced to undergo rigorous imprisonment for five years in addition to fine of Rs.1000/-.

6. Being aggrieved by the aforesaid judgment of conviction and order of sentence, the accused appellant appealed to the High Court. The said appeal being Criminal Appeal No. 1050 of 1994 has been dismissed by the judgment and order impugned in this appeal.

7. The accused appellant, the main accused, Khilai, and the complainant were all related. Sunder Lal, father of the main accused Khilai and uncle of the complainant, had given his share of land to the accused appellant for cultivation. There were land disputes between members of the family and in particular between the complainant and the accused appellant.

8. Of the eleven witnesses examined by the Prosecution, the first Prosecution Witnesses (PW-1) only gave evidence of preparation of a sketch map at the place of occurrence and the second Prosecution Witness (PW-2) testified to the receipt of case records in the office of the District Magistrate. The Sixth Prosecution Witness (PW-6) only witnessed the preparation of the site map of the place of occurrence, recovery of an iron splinter and some blood stained clothes and articles. Three witnesses, that is, the 5th, 9th and 10th witnesses (PW-5, PW-9, PW-10) did not support the case made out by the Prosecution and were declared hostile. The ninth and tenth Prosecution Witnesses who were produced to testify to the confession allegedly made by the main accused Khilai in their presence, leading to recovery of the weapon, categorically denied their presence at the time of recovery of the pistol and were declared hostile. They also denied that the main accused Khilai had made any confession. The 11th Prosecution Witness (PW-11) only

testified to the arrest of the accused appellant. The evidence of these witnesses is of no relevance to the guilt of the accused appellant.

9. The 8th Prosecution Witness (PW-8) who had been working as Assistant Surgeon at the Primary Health Centre, Mohandra described the wounds found on the body of the complainant and opined that the injuries were caused by splinters from a firearm. In cross examination he said that no splinters were found from the injury during examination. The evidence of this witness suggests that the injuries could have been caused by firing a pistol. He ruled out the possibility of the injury having been caused as a consequence of explosion of stone. At the highest, the evidence of PW-8 establishes that a pistol was fired, as a result of which the complainant sustained injuries. The possibility of the injuries being sustained while cleaning the pistol was not ruled out by this witness. This witness has also not said anything relevant to the guilt of the accused appellant.

10. The 7th Prosecution Witness (PW-7) was the Investigating Officer, who deposed that he had sent the report of the incident to the Simaria Police Station on the basis of which criminal case No.110/1992 under Section 307/34 of the Indian Penal Code had been registered and had examined the complainant, Prem Shankar

Kateha (PW-4), Sabbu Chourasia and Bharat and had seized blood stained clothes, articles etc. from the place of occurrence.

11. There is nothing in the evidence of PW-1, PW-2, PW-5, PW-6, PW-7, PW-8, PW-9, PW-10 and PW-11 to establish the guilt of the accused appellant. The complainant, a cousin of the main accused Khilai, and an injured witness deposed as the 3rd Prosecution Witness (PW-3). PW-3 stated that on 22nd October, 1992, at about 11.00 O'Clock, when he was going to Khareja from his house, the accused appellant stopped him on the way and told him not to cultivate his land. The main accused Khilai also came and intervened, whereupon the complainant told the main accused Khilai, not to interfere and to go home, as he was in no way concerned with the dispute between the complainant (PW-3) and the accused appellant.

12. The complainant (PW-3) deposed that on being told to go home, the main accused Khilai took out a pistol from the right pocket of his pants and pointed it at him. The complainant (PW-3) told the main accused Khilai not to open fire, whereupon the accused appellant urged the main accused Khilai to kill the complainant (PW-3). Thereafter, the main accused, Khilai fired the pistol, causing injury to the complainant with the splinters. The complainant (PW-3) further stated that the incident took place in

the presence of Prem Shankar Kateha who desposed as the fourth witness for the Prosecution (PW-4) who was there at the place of occurrence and also in the presence of Sabbu Chourasia who had been selling oil and Bharat Kateha who had been helping in arranging the cans of oil.

13. According to the complainant (PW-3), the aforesaid three persons, Prem Shankar Kateha (PW-4), Sabbu Chourasia and Bharat Kateha challenged the main accused Khilai, whereupon Khilai fled towards the bus stand and the accused appellant followed him running.

14. From the evidence of the complainant (PW-3), it transpires that when heated arguments were going on and the complainant (PW-3) urged the main accused not to interfere as he was in no way concerned, the main accused Khilai took out a pistol from the pocket of his trousers and pointed it towards the complainant (PW-3). When the complainant (PW-3) told the main accused Khilai not to fire, the accused appellant exhorted the accused Khilai to kill the complainant. The complainant (PW-3) said that the main accused Khilai, thereafter, fired at him.

15. The evidence of the complainant (PW-3) indicates the existence of serious disputes between the appellant and the

accused, and/or the immediate members of their respective families. In his cross-examination the complainant (PW-3) admitted that one year before the incident his uncle Sunder Lal, that is, father of the main accused Khilai, had filed an application against the complainant (PW-3) and his father Asha Ram at Tehsil office, Pawai regarding the land in dispute. The complainant (PW-3) deposed that at the time of the incident his uncle Sunder Lal had given his share to the accused appellant on 'Batai' for cultivation. He stated that the share of his uncle Sunder Lal, which was given to the accused appellant on 'Batai', was adjacent to his share of land. The complainant (PW-3) also admitted in cross-examination that on the basis of a report filed by the main accused, Khilai, and his father Sunder Lal, a case has been registered under the complainant (PW-3) and his younger brother Buttu in the court of Judicial Magistrate, Pawai under Sections 379 and 447 of the Indian Penal Code. The case was filed before the incident. The complainant (PW-3) also admitted that there were several other cases between the complainant (PW-3) and/or members of his immediate and the accused appellant as also members of the accused appellant's family which were still pending at the time of the incident.

16. It is not in dispute that the accused appellant neither carried arms nor opened fire. The accused appellant is alleged to have instigated the opening of fire. In cross-examination the complainant (PW-3) admitted that he had not in his statement to the police under Section 161 of the Cr.PC stated anything about any instigation by the accused appellant to the main accused Khilai.

17. The Sessions Court has apparently proceeded on the basis that PW-4, eye witness to the incident had corroborated the evidence of the complainant (PW-3). The Sessions Court however overlooked certain serious discrepancies between the evidence of PW-4 and the evidence of the complainant (PW-3) with regard to the alleged role of the accused appellant. While the complainant (PW-3), himself the injured witness, has deposed that the accused appellant exhorted the main accused Khilai to kill him, after the main accused Khilai had pointed the pistol at the complainant (PW-3), PW-4 had deposed that on being told by the accused appellant to beat the complainant (PW-3), the main accused Khilai took out the pistol from the right pocket of his pant and fired.

18. From the evidence of PW-4 it also transpires that the accused-appellant and the complainant (PW-3) were quarrelling over a land related dispute. The accused appellant asked the complainant (PW-3) not to go to the field, whereupon the complainant retorted that

the land belonged to his grandparents, and that no one could stop him from going there. The heated quarrel, with raised voices, attracted attention and about 50/60 villagers gathered at the place of occurrence. The main accused, Khilai, who was cycling by the place of occurrence, stopped and asked the complainant, PW-3 why he was going to the field whereupon the accused appellant told the main accused Khilai that the complainant would not easily give up and urged the main accused to beat him. At this point, the main accused Khilai took out the pistol from his pocket.

19. PW-5, who was declared hostile has confirmed that there was an altercation between the complainant and the accused appellant. According to this appellant, the main accused Khilai came and intervened. The main accused Khilai hurled abuses at the complainant, took out his pistol from his pocket and threatened to kill the complainant if he went to the field. Thereafter the main accused went to the back of the house, after which the sound of firing was heard. PW-5 did not say that the accused appellant instigated the main accused Khilai to shoot.

20. It is not in dispute that the accused appellant did not open fire. The Prosecution has alleged that it was the main accused Khilai who had fired from his pistol and injured the complainant. The question is whether, having regard to the facts established by

the Prosecution, the appellant could have been held guilty of offence under Section 307 by invocation of Section 34 of the Indian Penal Code.

21. It is a settled principle of criminal law that only the person who actually commits the offence can be held guilty and sentenced in accordance with law. However, Section 34 lays down a principle of joint liability in a criminal act, the essence of which is to be found in the existence of common intention, instigating the main accused to do the criminal act, in furtherance of such intention. Even when separate acts are done by two or more persons in furtherance of a common intention, each person is liable for the result of all the acts as if all the acts had been done by all of these persons.

22. Section 34 is only a rule of evidence which attracts the principle of joint criminal liability and does not create any distinct, substantive offence as held by this Court in ***B.N. Srikantiah vs. Siddiah*** reported in ***AIR 1958 SC 672***; ***Bharwad Mepa Dana and Anr. Vs. State of Bombay*** reported in ***AIR 1960 SC 289*** and other similar cases. To quote Arijit Pasayat, J. in ***Harbans Kaur and Another vs. State of Haryana*** reported in ***(2005) 9 SCC 195***; the distinctive feature of Section 34 is the element of participation in action.

23. Common intention can only be inferred from proved facts and circumstances as held by this Court in ***Manik Das & Ors. vs. State of Assam*** reported in ***AIR 2007 SC 2274***. Of course, as held in ***Abdul Mannan vs. State of Assam*** reported in ***(2010) 3 SCC 381***, the common intention can develop during the course of an occurrence.

24. Section 34 is only attracted when a specific criminal act is done by several persons in furtherance of the common intention of all, in which case all the offenders are liable for that criminal act in the same manner as the principal offender as if the act were done by all the offenders. This Section does not whittle down the liability of the principal offender committing the principal act but additionally makes all other offenders liable. The essence of liability under Section 34 is simultaneous consensus of the minds of persons participating in the criminal act to bring about a particular result, which consensus can even be developed at the spot as held in ***Lallan Rai & Ors. vs. State of Bihar*** reported in ***(2003) 1 SCC 268***. There must be a common intention to commit the particular offence. To constitute common intention, it is absolutely necessary that the intention of each one of the accused should be known to the rest of the accused.

25. Mere participation in crime with others is not sufficient to attribute common intention. The question is whether, having regard to the facts and circumstances of this case, it can be held that the Prosecution established that there was a common intention between the accused appellant and the main accused Khilai to kill the complainant. In other words, the Prosecution is required to prove a premeditated intention of both the accused appellant and the main accused Khilai, to kill the complainant, of which both the accused appellant and the main accused Khilai were aware. Section 34 of the Indian Penal Code, is really intended to meet a case in which it is difficult to distinguish between the acts of individual members of a party and prove exactly what part was played by each of them.

26. To attract Section 34 of the Indian Penal Code, no overt act is needed on the part of the accused if they share common intention with others in respect of the ultimate criminal act, which may be done by any one of the accused sharing such intention [see ***Ashok Basha (2010) SCC 660 (669)***]. To quote from the judgment of the Privy Council in the famous case of ***Barendra Kumar Ghosh*** reported in AIR 1925 Privy Council 1, “they also serve who stand and wait”.

27. Common intention implies acting in concert. Existence of a prearranged plan has to be proved either from the conduct of the accused, or from circumstances or from any incriminating facts. It is not enough to have the same intention independently of each other.

28. The question in this case is, whether the Prosecution has been able to establish a pre-arranged common intention between the accused appellant and the main accused Khilai to kill the complainant in pursuance of which the accused Khilai open fired from his pistol. The answer to the aforesaid question has to be in the negative for the following reasons:

(i) A quarrel broke out between the accused appellant and the complainant. When the accused appellant tried to prevent the complainant from going to the field, the complainant insisted on doing so. While the quarrel was going on, the main accused Khilai arrived at the spot and intervened whereupon the complainant told him off, saying he should go home as he was in no way concerned with the dispute. At this, the main accused Khilai brought out a pistol from his right pant pocket and aimed it at the complainant.

(ii) There is no evidence to establish any pre-arrangement to converge at the place of occurrence. The circumstances established

suggest that intervention by the main accused Khilai was by chance. The main accused Khilai chanced to stop as he was passing by the place of occurrence when the accused appellant and the complainant were quarrelling.

(iii) As per the evidence of the complainant, who is a injured witness, when the complainant told the main accused Khilai not to intervene and to go home, Khilai reacted by taking out the pistol from his right pant pocket and pointing it at the complainant. The pistol was taken out by the main accused and pointed at Khilai, without any instigation from the accused appellant.

(iv) Even if it is accepted that the accused appellant uttered the words attributed to him by the complainant (PW-3) in his evidence, this seems to have been done on the spur of the moment. Pre-arrangement is not established.

(v) As observed above, there are some notable discrepancies between the evidence of the complainant (PW-3) and PW-4 which raise serious doubts with regard to the truth and/or accuracy of their evidence particularly in view of the enmity and pre-existing family disputes between the parties.

(vi) Even though PW-5 may have been declared hostile, his evidence is not to be rejected with in its entirety. This witness also confirmed that there was an altercation between the accused appellant and the complainant, in which the main accused Khilai intervened, took out his pistol and aimed it at the complainant. These facts are corroborated by PW-3 (the Complainant) and PW-4. This witness however stated that the main accused Khilai took out his pistol and threatened to kill the complainant. He did not say that the accused appellant urged the main accused, Khilai to shoot.

29. Even though there may be some evidence that the main accused took out a pistol and opened fire, the Prosecution has miserably failed to establish any common, premeditated or prearranged intention jointly of the accused appellant and the main accused Khilai to kill the complainant, on the spot or otherwise. The Prosecution has also failed to prove that the pistol was fired at the exhortation of the accused appellant. In our considered view, the Sessions Court and the High Court both fell in error in convicting the accused appellant.

30. For the reasons discussed above, the appeal is allowed. The judgment and order of the High Court under appeal, confirming the judgment and order of the conviction of the Sessions Court as also the judgment and order of the Sessions Court are set aside, as

against the accused appellant. The accused appellant is acquitted and directed to be set free forthwith. It is made clear that this Court has not considered the merits of the conviction of the main accused Khilai and the appeal, if any, filed by the main accused Khilai shall be decided on its own merits.

.....J
(INDIRA BANERJEE)

.....J
(S. RAVINDRA BHAT)

**FEBRUARY 06, 2020
NEW DELHI**