(2001) 09 GAU CK 0004

Gauhati High Court

Case No: Criminal Appeal No. 210 of 1993

Moijuddin and Others		APPELLANT
	Vs	
State of Assam		RESPONDENT

Date of Decision: Sept. 12, 2001

Acts Referred:

- Penal Code, 1860 (IPC) - Section 34

Citation: (2001) 3 GLT 83

Hon'ble Judges: R.S. Mongia, Acting C.J.; B. Biswas, J

Bench: Division Bench

Advocate: J.M. Choudhury, M.A. Laskar, N. Muhammad, M. Ahmed and B.M. Choudhury, for the Appellant; K. Deka, PP, for the Respondent

Judgement

D. Biswas, J.

This appeal was directed against the judgment and order dated 4.10.1993 passed by Sri MM Sarkar, Sessions Judge, Barpeta, Assam in Sessions Case No. 6/89 convicting the accused appellants u/s 302/34 of the IPC and sentencing them to undergo rigorous imprisonment for life and to pay a fine of Rs.5,000 each, in default, further rigorous imprisonment for three years.

2. We have heard Mr. JM Choudhury, the learned senior counsel for the appellant and also Mrs. K. Deka, learned PP, Assam.

3. The appeal was initially disposed of by a Division Bench of this Court on 23.9.1994 reversing the judgment of the learned Sessions Judge and acquitting the appellants. The Complainant preferred criminal Appeal No. 1899/96 before the Hon''ble Supreme Court. The Hon''ble Supreme Court vide order dated April 4, 2000 set aside the judgment of reversal passed by this Court and remanded the appeal for hearing and disposal afresh. The Hon''ble Supreme Court passed the order of remand with the observation that the High Court had gone into the question of identification of the accused persons in a case where identification is not challenged. On this

background, this court is to proceed with the appeal.

4. The occurrence took place on 15.2.1986 at about 5 P.M. P.W-2 Kayed Ali lodged the FIR on the following day at 9 A.M. before the Officer-in-Charge of Barpeta Police Station. It was alleged that the appellants along with others being armed with various weapons, namely, fala, ballam, etc. attacked the informant and other members of his family. The informant sustained injuries and fell down on the ground. His mother Malanchabibi and uncle Mongla Mia came forward to his rescue. Both of them were also assaulted by fala and ballam (sharp piercing weapons) on their abdomen, back and head. They were removed to Guwahati Medical College Hospital where Malanchabibi and Mongla Mia succumbed to their injuries.

5. On receipt of the FIR a case u/s 448/326/307/34 IPC was registered. Malanchabibi died on 16.2.1986 while Mongla Mia died after 6/7 days. Eventually, on conclusion of investigation, the police submitted charge sheet against 15 persons including the appellants. They were tried u/s 148, 302/149, 323/149 and 324/149 IPC. The Learned Sessions Judge convicted seven persons and acquitted others. This appeal has been preferred by these seven convicts challenging their conviction and sentence. As on today, only five accused persons namely, Moijuddin, Mafijuddin, Hayete Ali, Pashan All and Ajimuddin are before us. two of them being dead.

6. Shri J.M. Choudhury, learned senior counsel for the appellants did not raise any question about the identification of the appellants. The occurrence took place at 5 P.M. and there is no evidence on record to show that it was totally dark and. as such, not possible to recognise the assailants. The defence also did not put any question to any of the witnesses challenging the identification of the assailants. Hence, further deliberation on this question appears to be redundant.

7. We would, therefore, like to examine the evidence on record in order to determine the complicity of the above named five appellants. P. W-1 Jabed Ali is a co-villager who resides within the visible distance from the house of P.W-2 Kayed Ali. From his house he noticed that many people gathered before the house of P.W-2 Kayed Ali and he heard Kitab Ali (acquitted) calling Kayed to come out. Kayed Ali was standing on the varandah of his house but he did not come out. Accused Omar Master (acquitted) dragged out Kayed Ali from his house to the nearby ''Bari'' (enclosed yard) and insisted upon him to point out the boundaries of the disputed land. Kayed expressed his inability to show the boundaries and also told that he would not accept the boundaries if demarcated by the members of the public. Kayed also told that he would, however, accept the boundaries as may be demarcated by a Mandal or Kanango (Revenue Officials). At that point of time Kalimuddin asked for lathi (stick) and , thereafter, Moijuddin Assaulted Kayed Ali with Lathi. Kayed''s mother Malanchabibi intervened arid asked them not to quarrel. Accused Moijuddin dealt a stroke on the waist of Malachabibi. Simultaneously, accused Ajimuddin pierced the chest of Mongla with a "Khappar" when he came there. Accused Rahmat

and Pachan pierced his buttock with a ''Fala''. Accused Hayet struck on the head of Kayed. It would appear that P.W-1 Javed Ali indicted Moijuddin, Ajimuddin, Maifzuddin and Hayel as assailants of P.W-2 Kayed Ali, deceased Malanchabibi and Mongla Mia. This witness supported the evidence of P.W-2 Kayed Ali, the informant in all material points and made incriminating statements against the appellants on trial. It may be mentioned here that P.W-2 Kayed Ali has named Moijuddin and Ajimuddin who had assaulted him causing injuries on his abdomen. He further evinced that when his mother Malanchabibi intervened accused Moijuddin assaulted her with a lathi while accused Ajimuddin assaulted her on the abdomen with a spear. When his uncle Mongla Mia came form the hear by field, he was assaulted by Moijuddin and Mazid and Mofez by spears. Mongla Mia fell down on the ground and the accused Rahmat and Pashan assaulted him on his head. Accused Hayat Ali also assaulted him on his head. He further stated that his mother died at Gauhati Medical College Hospital on the same day while Mongla Mia died after about 10/11 days. This witness was also admitted to the hospital for treatment of the injuries sustained by him in the occurrence.

8. Of the remaining witnesses. P.W-6 and P.W-7 have also seen the occurrence. P.W-6 Omar Ali and P.W-7 Hanif Ali in similar tune with P.W-1 and P.W-2 deposed that accused Omar Maser held Kayed''s hand and asked him to show the boundaries. On refusal, the accused persons started assaulting Kayed Ali. P.W-6 further stated that accused Mafijuddin, Majid Ashan, Pasan, Hayet, Rakmat and others brought out lathis and Tala'' from the house of accused Majid. P.W-2 Kayed Ali also brought a lathi from his house. While this witness was trying to resist Kayed from fighting accused Moijuddin came and struck him on his head with a lathi. He fell down on the ground and was assaulted by Moijuddin on his back. Malanchabibi intervened and resisted them from fighting, but accused Azim struck a Tala'' (spear) blow on her abdomen. In the commotion, this witness did not notice how Mongla Mia sustained injuries on his abdomen. They removed Malanchabibi and Mongla Mia were shifted to Gauhati Medical College Hospital where both of them died.

9. P.W-7 while narrating the genesis of the prosecution case named Mofez. Majid, Hayet Ali, Pashan and Rahmat as the assailants of Kayed, Malanchabibi and Mongla Mia. He deposed that Ajimuddin pierced Malancha on her abdomen with a spear and, when his father Mongla Mia rushed to the place of occurrence from the nearby field, he was assaulted by Mafij and Majid with spears. Hayet Ali hit his father on his head with a lathi while Pasan and Rahmat also took part in the assault.

10. The evidence of P.W-1,2,6 and 7 read together clearly indicate that all the appellants Moijuddin, Mafijuddin, Hayet Ali, Pashan Ali and Ajimuddin took active part in the occurrence which resulted in death of two persons and injuries to P.W-2. The aforesaid witnesses have been cross-examined by the defence at length, but nothing could be brought out of them to discredit their credence. There are, of course, certain aberrations and minor contradictions in their evidence. These

aberrations and contradictions, however, are not to deep seated to adversely affect the prosecution case.

11. P.W-3 Dr. H. Sharma held the post-mortem examination on the dead body Mongla Mia. His findings are as follows:-

(1) A healed wound with stitch mark 4 cm. long over the deep of the right shoulder placed anteroposteriorly lip.

(2) A healed abrasion (Seab fallen) 4 cm. Sized over the right shoulder on superior part of the above injury.

(3) A spindly shaped punctured wound 3 x 1 x 4 cm on the lateral part of the let buttock 4 cm behind the anterior superior iliac spine, margins show bevelling and directed down wards and are lined by pus and granulation tissues.

(4) A spindle shaped wound 3 x 1 x 2 cm on the left buttock in its middle pail 3 cm. Below the iliac crest. margins show pus and lined by granulation (issues.

(5) A punctured wound 4 x 2 cm. Thoracic cavity deep transversely in the sixth intercostals space 4 cm below the right Nipple, the lateral end of the wound has extended as an abrasion. 2.5 cm long. The margins are covered with pus and unhealthy granulation tissues on either side marks of stitches are seen, but the wound is gaping. The wound is directed from the right lateral side towards the left in the same horizontal plane. The wound has pierced the inferior mediastinum and inferior surface of the lower lobe of the left lung. The right lung is also pierced in lateral surface in the lower lobe through and through. The injuries on both lungs are caused by the same thrust of injury no. 5.

(6) A healed wound 4 cm long in the middle of the vertex place obliquely contusion around the wound in the layers of the scalp present. Other areas pale.

(7) A semiliner shaped fracture of the right parietal bone, with depressed surface measuring 2.5 cm underneath injury No.6 above.

INTERNAL FINDINGS:

Both sides pleurae are lined by small pyogenic Foci, adherent to wall and thickened pleural cavity contains pale looking blood 600 ml. on the right side and 900 ml. on the left side respectively. The right long found collapsed and lower lobe punctured as already mentioned. The visural surface shows plenty of pyogenic Foci on the surface. The left long is collapsed and adherent to the thoracic wall and punctured as already described. The surface line by multiple pyogenic Force. The other internal organs were healthy and pale. Stomach was empty. There was no disease or deformity in the muscles of bone."

In his opinion the cause of death was exhaustion resulting from empyema thoracis.

12. P.W-4 Dr. BC Roy performed the post-mortern examination on the dead body of Malanchabibi. He found the following injuries:-

"One stab wound in the lateral part of left hypochondrium of the abdomen, 5 cm below the left coastal margin and 11 cm left and above from the Umbilicus. The wound measures 4 x 2 cm in the Middle part. Abdominal cavity deep. The wound is spindle shaped margins are clean cut, blood clots are adherent to the wound. The track of the wound directs down-wards, inwards and medially towards the mid-line in the abdominal cavity in piercing. The mesenteries blood vessels are cut at the side of the wound. Surrounding the wound mesenteries are contused. Blood clots are adherent. The abdominal cavity was full of blood and blood clots. Intestinal lobes are seen bulging through the wound.

(2) Contused 3 x 2 cm in the middle of the rectus muscles in mid-line 2 cm above the Umbilicus.

Peritoneal cavity was full of blood and blood clots measured up to two liters. Stomach is healthy and empty. Heart is also healthy and its chambers are empty. The other internal organs, thorax, abdomen and cranial cavity are healthy and pale looking. The organs of generation is healthy but empty."

In his opinion the cause of death is haemorrhage and shock sustained from the stab injuries.

13. The ante-mortem injuries found on the dead body of Mongla Mia and Malanchebibi clearly establish that the evidence of the eye witnesses, namely, P.W-1, P.W-2, P.W-6 and P.W-7 do not suffer from any embellishment. P.W-8 Shri Prabhat Chetia, S.I. of Police who had investigated the case did admit suggestion given by the defence during the course of cross-examination that P.W-2 Kayed Ali did not name Ajimuddin, Moijuddin and Mofijuddin as the assailant of Mongla Mia. However, I.O. was not confronted with any contradiction with regard to the evidence of P.W-1 Jabed Ali who is a dis-interested eye witness to the occurrence. Javed Ali has fully supported the evidence of P.W-3, 6,7. The omission proved with regard to the evidence of P.W-2 Kayed Ali in the facts and circumstances of the case cannot obviate the evidence of other eye witnesses. The totality of the evidence of the prosecution witnesses when considered along with the injury report clearly establish the complicity of the appellants.

14. The defence examined two witnesses in order to show that the prosecution party intruded upon their land where the alleged occurrence took place. The evidence of D.W.2, Copyist working in the office of the Sub-Registrar, Barpeta who had proved the execution of the Sale Deed and the evidence of D.W.2, the Office Assistant in the office of Chief Judicial Magistrate who had proved that the process was issued in C.R. Case. No.58/87 against P.W-2 and 14 others for commission of offence u/s 147/448/324/323/34 IPC do not cast any adverse reflection on the prosecution case. The case was filed at the instance of one Kalim Uddin, father of

appellant No.4 Pasan Ali in deference to the final report submitted by the Police in Barpeta Police Station Case. No.90/85. Nothing was urged further as to what had happened to the aforesaid complaint case. But the fact remains that the police had submitted final report in the matter. D.W.3 Md. Mazmal Haque speaks of the sale deed and the possession of the land by the two accused persons over which the occurrence took place. The evidence of this witness do not show that the deceased and other members of their family committed trespass on the land in occupation of the appellants and in protection thereof the appellants had to retaliate.

15. In the instant case the occurrence has been proved in which two persons have been killed. Eye witnesses have also unerringly indicted the appellants. The Learned Sessions Judge has convicted the accused Moijuddin, Azimuddin, Mozid, Mofoz, Rahmat, Pasan and Hayed u/s 302 read with Section 34 IPC. In addition, the Learned Sessions Judge also convicted accused Moijuddin and Azimuddin u/s 323 IPC for causing hurt to P.W-2 Kayed Ali. Choudhury, Learned Senior Counsel for the appellants challenged the conviction of the accused persons with the aid of Section 34 IPC on the ground that intention, if any, could be the elimination of P.W-2 Kayed Ali and not his mother and uncle. According to him, the deceased persons intervened in the matter and sustained the injuries and, hence, the element of ''intention'' cannot be imported to convict the appellants u/s 302 IPC read with Section 34 IPC.

16. Section 34 IPC lays down the principle of joint responsibility in the commission of a criminal Act. Existence of a common intention is the essence of that liability. Common intention implies acting in concert to the existence of a pre-arranged plan to be proved either from conduct or from circumstances or from any incriminating fact. Plan need not be elaborate. There must be pre-arrangement and pre-meditated concern. In a recent judgment in Suresh and Anr. v. State of U.P. AIR 2001 SCW 1051, the Hon''ble Supreme Court has dealt with the scope and ambit of Section 34 IPC. It would appear from the said judgment that act constituting an offence must be in furtherance of common intention. Where common intention cannot be gathered from the evidence on record, the Court must proceed to determine the culpability of the accused persons on the basis of their individual role played in the commission of the criminal offence. In the instant case, death of Malanchebibi and Mongla Mia have been committed when they had intervened in the matter to protect P.W-2. They were attacked and assaulted and eventually they died. It happened so suddenly that it would not be permissible to attribute any pre-arrangement and pre-mediated concert. Therefore, conviction of the appellants u/s 302 IPC with the aid of Section 34 IPC, in our opinion, cannot be sustained. In this case, we are of the considered opinion that each of the appellants would be individually liable for whatever injury they had caused, but none of them would be vicariously liable for conviction for the act of any of the others.

17. The evidence on record shows that the accused Moijuddin apart from assaulting P.W-2 Kayed Ali by a lathi also assaulted Malanchabibi on the waist. This has been supported by other eye witnesses. The learned sessions Judge has also held him guilty u/s 323 IPC along with appellant Ajimuddin. Therefore, the conviction of Moijuddin u/s 302 IPC read with Section 34 IPC cannot be sustained. However, his conviction u/s 323 would continue.

18. P.W-1 evinced that accused Mafijuddin pierced the chest of Mongla with a Khappar (spear). Injury No.5 proved by P.W-3 Dr. Sharma is relatable to this assault. Therefore, accused Mafijuddin''s conviction u/s 302 IPC has to be sustained since he had the knowledge that by doing such act he was likely to cause death of Mongla Mia.

19. P.W-1 Javed Ali stated that Hayet Ali struck a blow on the head of Kayed Ali. Hayet Ali also assaulted Mongla Mia when he fell down on the ground after being assaulted by Mojid and Mafij by spears. The nature of injury caused on Kayed Ali and the weapon used have not been spelt out by P.W-1 and 2. P.W-7 Hanif, however, stated that Hayet Ali had hit Mongla Mia on his head by a lathi. The learned sessions Judge has not convicted Hayet Ali u/s 323 IPC for assaulting Mongla Mia, deceased and Kayed Ali, P.W-2 Hayet Ali is liable for his individual act only. Injury No.7 i.e. fracture of the right partial bone found by the doctor is relatable to the assault caused by accused Hayet Ali. The man who was already on the ground after being assaulted by spear was assaulted by this accused on a vital part of his body with a lathi causing fracture injury. He had the knowledge that by causing such injury on the vital part of the body of Mongla Mia was likely to cause his death. Hence, he is liable for conviction u/s 302 IPC independent of Section 34 IPC.

20. P.W-1 Javed Ali, stated that accused Pashan All pierced a fala (spear) in the buttock of Mongla. P.W-2 stated that accused Pashan Ali inflicted injury on the head of Mongla Mia. P.W-7 Hanif Ali also supported P.W-1 and 2. This act of launching an attack on the person already injured and lying on the ground by piercing his buttock by a spear shows that the accused appellant also had the knowledge and intention necessary for causing the offence of murder.

21. The accused Ajimuddin has been indicated by P.W-1, 2,6 and 7 who is full unison deposed that accused Ajirnuddin pierced Malanchabibi''s abdomen with a spear. This witness has also been convicted under Sections 302/34 and 323 IPC. In our considered opinion, the conviction of this accused u/s 302 IPC and u/s 323 IPC can be sustained even without the aid of Section 34 IPC.

22. In the result the appeal is partly allowed. The appellants Mofijuddin, Pashan Ali, Hayet Ali and Ajimuddin stand convicted u/s 302 IPC for causing death of Malanchabibi and Mongla Mia. In addition, the conviction of appellant Ajimuddin u/s 323 IPC is also sustained. The appellant Moijuddin is acquitted of the charge u/s 302/34 IPC but his sentence u/s 323 IPC is hereby maintained.

23. Shri Choudhury, learned counsel argued that accused Pashan Ali and Hayete Ali were minors on the day of occurrence. It appears that if we go by the statement given by them u/s 313 CrPC they were 12 and 16 years old respectively at the time of occurrence. This plea was not taken before the learned sessions Judge during the course of trail and no evidence has been adduced to show that they were minor at the relevant time. The plea of minority at this belated stage cannot be taken up for consideration. Hence, question of heir trial by the Juvenil Court or giving them any benefit because of their alleged minority does not arise.

The record be sent to the learned Sessions Judge for necessary action in accordance with the provisions of law. In so far accused Moijuddin is concerned, if he has already undergone the period of sentence imposed u/s 323 IPC, he shall not be sent to jail.