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**(2005) 4 MPHT 422**

**Madhya Pradesh High Court (Indore Bench)**

**Case No:** Criminal Appeal No"s. 944 and 965 of 1998

Manoj alias Balkrishna

APPELLANT

Vs

State of M.P.

RESPONDENT

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**Date of Decision:** July 11, 2005

**Acts Referred:**

- Evidence Act, 1872 - Section 32(1)
- Penal Code, 1860 (IPC) - Section 302, 304, 307, 326, 34

**Citation:** (2005) 4 MPHT 422

**Hon'ble Judges:** S.L. Kochar, J; Ashok Kumar Tiwari, J

**Bench:** Division Bench

**Advocate:** A. Saraswat, R.K. Trivedi, for Deepu, for the Appellant; G. Desai, Dy. A.G., for the Respondent

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### **Judgement**

S.L. Kochar, J.

By this common judgment, both the aforesaid appeals are being decided as they arise of the same judgment by the Trial Court.

2. Both the appellants stood convicted for the offence punishable under Sections 302 and 302/34, Indian Penal Code and each of them is sentenced to suffer imprisonment for life with fine of Rs. 500/- and in default of payment of fine to suffer additional S.I. for two months by judgment dated 15-7-98 passed by the learned Addl. Sessions Judge, Ujjain in Sessions Trial No. 261/96. Being aggrieved by that judgment, the appellants have preferred this appeal.

2. The facts of the prosecution case in short as unfolded before the Trial Court were that Jaswant Mali was carrying on the business of fruit (grape) vendor on a Thela at Sanjay Market, Ujjain. On 5-6-96 at 4.40 PM near his Thela, nephew of appellant Manoj, carrying on the business as fruit (Water Melon) vendor on a Thela, was cleaning the place by a swab-stick (Jhadu). The complainant objected to the act of cleaning the place saying that

the dust was spreading over the grape. On this, the appellant Manoj came there armed with a knife along with his friend Deepu. Suspecting fear, the complainant ran away in the nearby Bhang-gnota porch. He was chased by the appellants and was caught by appellant Deepu and appellant Manoj dealt a knife blow on his right side stomach as a result of which his intestines came out. He was rescued by his brother Barik alias Bhupendra, Mangu and Rajesh. The accused persons fled away from the spot. Raja, a vegetable vendor and brother of the deceased took him to the hospital in an auto-rickshaw. Bindukhan (P.W. 10), a compounder in the Civil Hospital, Ujjain gave a telephonic message to Police Madhavnagar, Ujjain which was recorded in Rojnamcha Sanha (Ex. P-15) whereupon the Sub-Inspector Lohare (P.W. 15) reached at the hospital. Dehati Nalishi is Ex. P-16, which was registered at P.S. Madhavnagar. Ex. P-17 is the First Information Report reduced into writing by H.C. Ramesh Sharma (P.W. 8) whereupon the offence u/s 307/34, IPC was registered at Cr. No. 281/96. Police prepared the spot map (Ex. P-1). Dying declaration of the injured Jaswant was got recorded by Naib Tehsildar K.L. Meena vide Ex. P-7. The appellants were arrested vide memos Ex. P-2 and P-3. Knife was seized vide Ex. P-5. During treatment, injured Jaswant expired in the hospital on 13-6-96, information whereof was given to the police vide Ex. P-18. Autopsy on the dead body was conducted by Dr. Salil Bhargava (P.W. 11). His post-mortem examination report is Ex. P-19. According to Dr. Salil Bhargava, deceased died because of bleeding from injury on peritoneum resulting into shock and haemorrhage. The mode of death was syncope. According to this medical expert, the injuries were sufficient in the ordinary course of nature to cause death and the deceased met a homicidal death. The clothes of the deceased were also seized vide Ex. P-21 and were sent for Chemical Examination. The FSL report is Ex. P-23.

3. After due investigation, police filed charge-sheet against the appellants. The appellants denied the charges and claimed trial. Their plea was that they have been falsely implicated. To establish its case, the prosecution examined as many as fifteen witnesses while the appellants did not examine any witness in defence. The learned Trial Court, finding the appellants guilty of the offence charged, convicted and sentenced them as indicated hereinabove.

4. Learned Counsel for the appellants have not and could not dispute the homicidal death of the deceased Jaswant for which there is ample evidence of medical expert P.W. 6 Dr. Prahlad Bhargava, P.W. 7 Dr. Jitendra Bhatnagar and P.W. 11 Autopsy Surgeon Dr. Salil Bhargava. Learned Counsel for the appellants have submitted that the appellant Deepu could not be convicted with the help of Section 34 of the Indian Penal Code for sharing common intention of the appellant Manoj for commission of the offence of murder of Jaswant and he at the most could be attributed with the knowledge of causing grievous injury by knife to the deceased Jaswant by co-accused Manoj, whereas the learned Counsel for the appellant Manoj has submitted that the incident occurred all of a sudden on a trivial issue of cleaning the place for stationing the thela of this appellant, by his nephew and in that dispute, on a spur of moment and heat of passion the appellant dealt

a solitary blow without aiming any particular part of the body of the deceased. But, the blow unfortunately landed at the vital part, i.e., right side abdomen and the deceased died in the hospital after eight days. Therefore, according to the learned Counsel for the appellant Manoj, this appellant would be responsible for committing the offence punishable u/s 304 (Part II), Indian Penal Code.

5. In opposition, learned Dy. Advocate General Shri Desai, appearing for the State has submitted that at the initial place of verbal altercation on account of cleaning the place by the nephew of the appellant Manoj, the appellant Manoj tried to assault the deceased by knife. At that juncture the deceased Jaswant ran away to save himself, but both the appellants chased the deceased and the appellant Deepu caught him chasing after some distance. Thereafter, the appellant Manoj dealt a knife blow on the right side of abdomen of Jaswant which proved fatal. Learned Counsel submitted that both the appellants shared common intention to commit murder of Jaswant and in furtherance thereof, caused fatal injury resulting into the death of the deceased. Therefore, both the appellants have rightly been convicted under Sections 302 and 302/34, Indian Penal Code respectively.

6. Having heard learned Counsel for the parties and after perusing the entire record, we are of the considered view that there is overwhelming evidence about participation of the appellants for causing injury to the deceased Jaswant resulting into his death in the hospital after eight days. The prosecution has examined as eye-witness P.W. 4 Bhupendra and P.W. 9 Mangu. P.W. 4 Bhupendra alias Pappu has stated specifically in Para 2 in his deposition that he and deceased Jaswant were living like brothers. Therefore, on assumption of being brothers, the police written in the case diary statement his father's name as Pirulal where as his father's name is Jeevanlal. This fact has not been disputed by the defence before this Court. The name of this witness Bhupendra (P.W. 4) is mentioned in the Dehati Nalishi (Ex. P-16) recorded at the instance of the deceased and the same is admissible u/s 32(1) of the Evidence Act as Dying Declaration of the deceased, because the deceased died as a result of injury caused to him by appellant Manoj and this Dehati Nalishi (Ex. P-16) is describing the whole incident of causing injury to deceased by appellant Manoj while the appellant Deepu caught hold of the deceased.

7. P.W. 9 Mangu is also the eye-witness. He is an independent witness. He was also a vendor and having his thela of grape in vegetable market at Freeganj where the appellant Manoj and deceased were also having their respective Thelas. Both the eye-witnesses have described the incident and in their deposition, nothing has come out to discard their testimony as eyewitnesses of the incident. The name of this witness Mangu is also mentioned in the Dehati Nalishi (Ex. P-16) recorded by the Sub-Inspector Shri R.R. Lohare (P.W. 15) and on the basis of this Dehati Nalishi, First Information Report (Ex. P-17) was registered by P.W. 8 Head Constable Ramesh Sharma.

8. The dying-declaration of deceased (Ex. P-7) was also recorded by the Executive Magistrate Naib Tehsildar Shri Meena (P.W. 12). This dying-declaration was recorded in the presence of Dr. P.W. 6 Prahlad Bhargava. Dr. Prahlad Bhargava has deposed that before recording of the dying-declaration by P.W. 12 Naib Tehsildar K.L. Meena, he examined the deceased and found him to be conscious as well as in fit condition to give statement. At portion mark A to A on Ex. P-7, this witness has given certificate of fitness. Thereafter Naib Tehsildar Shri Meena started recording dying-declaration of the deceased and in this also the deceased has described the whole event about quarrel on account of cleaning the place by the nephew of appellant Manoj. Thereafter, Manoj chased him and in the Bhang Ghota Porchhe, was caught by appellant Deepu and appellant Manoj dealt a knife blow on right side of abdomen of Jaswant. In this dying declaration the deceased also mentioned the name of eye-witness amongst whom, Mangu (P.W. 9) was examined by the prosecution. The deceased had also mentioned the name of P.W. 4 Bhupendra who brought him to the hospital.

9. We have examined thoroughly the dying declaration (Ex. P-7), Dehati Nalishi (Ex. P-16) and the statement of eye-witness P.W. 4 Bhupendra alias Pappu and P.W. 9 Mangu and the contents of dying declaration and the statements of eye-witnesses are in one line without having any major deviation which may prove fatal to the prosecution case. During the course of arguments, no such discrepancy has been pointed out by the defence Counsel. The statement of Dr. P.W. 6 Prahlad Bhargava is showing that he had examined the deceased and found that his intestines were coming out. He also treated him. This doctor has proved the Bed Head Ticket (Ex. P-8), (Ex. P-9) and P-10 and P-11. He has also proved his Certificate given before recording of the dying declaration (Ex. P-7). He also operated upon the deceased alongwith Dr. Tanwar and found cut of intestines at six places. P.W. 7 Dr. Jitendra Bhatnagar attended the deceased first in point of time in the District Hospital at Ujjain and found incised wound at right side of abdomen. He immediately admitted the injured Jaswant in the hospital and provided First Aid to the patient. Thereafter, he referred the case to Resident Surgical Officer. After the death, post-mortem was performed by Dr. P.W. 11 Salil Bhargava, who also found stitched wounds at right side abdomen and on internal examination, he found damage to peritoneum.

10. Now, we have to examine the evidence available on record as well as the contentions of the learned Counsel for the appellants whether the appellant Deepu could be held liable vicariously with the aid of Section 34 of the Indian Penal Code for causing injury to the deceased by appellant Manoj. The common intention u/s 34, Indian Penal Code is not by itself an offence. But, it creates a joint and constructive liability for the crime committed in furtherance of such common intention and for establishing the vicarious liability of appellant Deepu for causing injury to deceased by co-appellant Manoj the prosecution has to establish the fact of premeditation, pre-meeting of mind and pre-plan between both the appellants for commission of crime. In the present case, there is no evidence for establishing these facts. The dispute arose in a trivial issue of cleaning the place where

the appellant Manoj was going to put his Thela of water- melon and during this dispute, he took out a knife and tried to assault the deceased whereupon the deceased ran away. The deceased was chased by both the appellants and after some distance he was caught by appellant Deepu and appellant Manoj dealt a solitary blow at his right side of abdomen. Both the appellants were having no previous enmity with the deceased. The appellant Manoj got engaged on account of objection being raised by the deceased and thereafter, appellant Manoj tried to assault the deceased by knife. That shows that he wanted to cause injury to deceased by knife but, not with an intention to commit his murder. At that juncture the deceased ran away and the appellants in the same transaction in quick succession chased the deceased and on a spur of moment caused one knife blow by appellant Manoj to deceased. During this entire transaction, there was no talk between the appellants. Therefore, on the basis of these circumstances, the appellant Deepu, at the most could be held responsible for having knowledge that the co-accused Manoj could cause grievous injury by knife, and when the appellant Deepu caught the deceased Jaswant, the appellant Manoj dealt a blow by knife which proved fatal. The deceased did not meet and instantaneous death and there was no repetition of blow by appellant Manoj. In the light of this evidence available on record the appellant Deepu at the most could be held liable for sharing common intention with the appellant Manoj for causing grievous injury by knife to deceased. Therefore, we are of the opinion that the conviction of the appellant is not sustainable u/s 302/34, Indian Penal Code, but he could very well be convicted u/s 326 read with Section 34 of the Indian Penal Code.

11. "The essence of Section 34 is simultaneous, consensus of minds of persons participating in criminal act to bring about a particular result. Such consensus can be developed at the spot. (See: [Ramaswami Ayyangar and Others Vs. State of Tamil Nadu](#), . But, in the present case, there is no evidence that the appellants were having simultaneous, consensus of mind to commit a particular crime like murder. The appellant Manoj also acted in a spur of moment in a heat of passion and caused a solitary injury. There is no material available on record to show that he was having intention to commit murder of deceased. The back drop of the events shows that he annoyed on account of objection being raised by the deceased for cleaning the place and under the said annoyance tried to assault the deceased by knife. Therefore, he can not be attributed the intention of committing murder of deceased, but he could be attributed knowledge that his act was likely to cause death or to cause such bodily injury as was likely to cause death. Therefore, he would be responsible for commission of culpable homicide not amounting to murder punishable u/s 304 (Part II), IPC.

12. Resultantly both the appeals are allowed in part.

The conviction of the appellant Manoj u/s 302, Indian Penal Code is set aside and the same is altered to one u/s 304 (Part II), Indian Penal Code and the appellant is sentenced to the period already undergone with fine of Rs. 3,000/-. In default of payment of fine, he shall suffer additional R.I. for one year, because the record shows that appellant Manoj remained in jail during trial from 9-6-96 to 17-10-96 and pending this appeal from 15-7-98

till this date. Thus, he has completed more than seven years jail sentence.

The conviction of the appellant Deepu for the offence u/s 302/34 is set aside and instead he is convicted u/s 326/34, Indian Penal Code. At the time of the incident, this appellant was 17 years of age. In this appeal his jail sentence has been suspended on 14-1-2000. Thus, he has already suffered jail sentence of one year, nine months and 20 days. Therefore, he is sentenced to the period already undergone with payment of fine of Rs. 5,000/-. In default of payment of fine, he shall suffer additional R.I. for two years.

13. Out of the amount of fine so deposited or realised, Rs. 7,000/- shall be paid as compensation to the legal heir of the deceased Jaswant. The appellant Deepu through his Counsel directed to appear before the Trial Court on 18-8-2005 to deposit the amount of fine failing which the Trial Court shall take appropriate action in accordance with the law under intimation to this Court. On deposit of amount of fine, his bail bonds shall stand discharged. The jail authorities be informed accordingly.

14. Let a copy of this judgment alongwith the record of the Trial Court be sent immediately to that Court for compliance. The original judgment be retained in the record of Cr. A. No. 965/98 and a copy thereof be placed in the record of Cr. A. No. 944/98.