

(1977) 09 DEL CK 0018

Delhi High Court

Case No: Criminal Appeal No. 119 of 1975

Mohd. Suleman alias Kallu and
Babudin

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Sept. 14, 1977

Citation: (1977) ILR Delhi 660

Hon'ble Judges: Prakash Narain, J; A.B. Rohtagi, J

Bench: Division Bench

Advocate: O.P. Soni, Kamlesh Kumari, Amarjit Singh and P.P. Melhoa, for the Appellant;

Judgement

Avadh Behari Rohatgi, J.

(1) The appellants Mohd. Suleman alias Kallu (we shall call him Kallu) and his brother Babudin were tried by the Additional Sessions Judge for the offence of committing murder of Kamil. Kallu was convicted u/s 302, Indian Penal Code and was sentenced to life imprisonment. Babudin was convicted u/s 302 read with section 34 of the Indian Penal Code. He too was sentenced to imprisonment for life. Both the appellants appeal to this court against their conviction and sentence. The appeal of Mohd. Suleman alias Kallu

(2) Babudin is the elder brother. He is aged 25 years. Kallu is the younger one aged 21 years. Both are residents of House No. 6782 Ahata Kidara, Sadar Bazar, Delhi. Next to their house is house No. 6781 which was purchased by the parents of the deceased Kamil two months prior to the date of the incident resulting in the death of Kamil. Kamil (25 years old), Akil (31 years old) and Shakir (19 years old) are three brothers. In house No. 6781 owned by his parents Shakir, a young boy of 19 years, had started selling bidis and cigarette while sitting on a cot on which he used to spread his wares.

(3) The prosecution case was that the accused Kallu used to purchase bidis and cigarettes from Shakir on credit and a sum of Rs. 20 had become due from him. On

September 11, 1974 at about 1 p.m. Shakir asked Kallu to clear the amount due from him. Kallu instead of discharging the debt as a debt of honour started abusing Shakir. Nothing beyond this happened at that time. But in the evening at about 7.45 p.m. when Akil and Kamil had come to see Shakir the two accused came there. Shakir at that time was taking his meals. Kamil was looking after the business. Kallu accused shouted that he would now settle the account. He caught hold of Shakir. Kamil thereupon intervened. At that time Babudin is alleged to have caught hold of Kamil. Kallu accused who had come armed with a knife which he had concealed in his right hand suddenly stabbed Kamil in his abdomen and also inflicted two more knife blows at Kamil's neck. Kamil started bleeding and at that time his brother Akil removed his tehmad (a sheet of cloth usually worn round the waist) and tied the same around the wound. Kamil was taken to the Willingdon Hospital by Akil where he succumbed to his injuries on September 13, 1974.

(4) At about 8.18 p.m. on September 11, 1974, one Mohd. Azaz gave a report to the Police control room that some quarrel was going on in Ahata Kidara near the Congress office. The control room conveyed the information to the Police Station Sadar Bazar. Sub inspector Mazhar Hussain was deputed to go to the spot for investigation. He arrived at the place of occurrence shortly thereafter accompanied by the head constable Abdul Kalim and constable Deep Chand. There he met Shakir and one Islamuddin at the spot. He recorded the statement of Shakir which constitutes the first information report in this case. He sent the report to the police station. The case was registered at the police station at 9.42 p.m. The investigating officer also prepared a site plan. Thereafter he proceeded to the Willingdon Hospital. With him on the scooter was Islamuddin. The investigating officer met Akil at the hospital. He recorded his statement. Kamil was reported by the doctor to be not in a fit condition to make a statement. Therefore, Mazhar Hussain returned to the place of occurrence and started searching for the accused. Babudin accused was arrested from the compound of Shafiq Memorial Higher Secondary School at about 2.30 a.m. on September 12, 1974. Kallu accused could not be traced on that date. He was arrested on September 13, 1974 from Bara Hindu Rao in front of Bagichi Achheji.

(5) There are three eye witnesses in this case. They are Shakir, Islamuddin and Akil. These three eye witnesses have supported the version of the prosecution on all material points. Shakir was present at the occurrence. His statement was recorded by the police on September 11, 1974. His statement in court was much to the same effect. He narrated the events they had happened. He was cross-examined at length. Nothing valuable was brought out to discredit his testimony.

(6) Islamuddin is the landlord of Akil. He was present on the occasion. In his evidence he deposed that on September 11, 1974, at about 7.45 or 8 p.m. he had gone to Ahata Kidara to see his friend Abdul Sattar. While he was passing through the lane he saw Kallu accused catching hold of Shakir from his collar and saying

"now I will pay your money". When Kamil tried to rescue Shakir Babuddin caught hold of Kamil from back and Kallu who was having a knife concealed in his right hand stabbed Kamil in the abdomen. Akil took off his tehmad and tied the same around Kamil's wound. Both the accused then ran away from the place of occurrence with the knife.

(7) Akil took Kamil to the hospital. After the incident Islamuddin went to his friend's house. When he returned from there he found the police present at the place of occurrence. The police recorded the statement of Shakir in his presence. His statement was also taken by the police. Then the police took him to Willingdon Hospital. There Akil's statement was recorded. From the hospital the investigating officer and Islamuddin returned to the place of occurrence. Islamuddin joined Mazhar Hussain in the search for the accused. Similar is the statement of Akil. He had taken his injured brother to the hospital. In the medico legal report it is clearly mentioned that Kamil was brought by his brother Akil to the hospital at about 8.25 p.m.

(8) The learned judge reviewed the whole of the evidence. He found the testimony of these three eye witnesses fully trustworthy. Counsel has taken us through their statements. We see no reason to disbelieve the direct evidence of these witnesses. The presence of Shakir and Akil at the spot is quite natural. Nor is the presence of Islamuddin improbable. That he is the landlord of Akil is not a ground for disbelieving him. A great deal of criticism was leveled against his testimony on the ground that he was the landlord of Akil and Therefore should not be believed. It was said that since admittedly he went to see his friend and spent there sometime with him it is not probable that he witnessed the occurrence or accompanied the police. We have read his statement with care. We are not persuaded to hold that he is not a witness of truth. His name is mentioned in the FIR. We are of opinion that he is an independent witness and the trial judge was right in placing reliance on his testimony.

(9) There is yet another important piece of evidence which establishes the guilt of the accused Kallu. On September 16, 1974, the day on which remand was to expire Kallu was interrogated by the police. At that time he made a disclosure statement that he had thrown the knife in the bushes near Idgah and could point out the place and get the knife recovered. This statement (Ex. PH) was recorded in the presence of two witnesses Abdul Rahim and Allah Rakha. Allah Rakha in his statement said that in his presence Kallu accused stated "he be accompanied and he can point out the knife". Thereafter the accused led the police party including the two witnesses to the place and got the "knife recovered from the bushes. This evidence is admissible u/s 27 of the Evidence Act. This discovery of a relevant fact is in consequence of the information received from a person accused of an offence while he was in police custody. u/s 27 only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded.

The expression "the fact discovered" used in section 27 includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this : See *Palukuri Kotayya v. Emperor*, Air 1947 Pc 67 and [Udai Bhan Vs. The State of Uttar Pradesh](#), . This part of the statement of accused "he be accompanied and he could point out the knife" was the immediate and direct cause of the discovery. Therefore, this portion is admissible u/s 27 of the Evidence Act. The discovery of the knife shows that the accused Kallu had himself thrown the knife in the bushes. If a fact is actually discovered in consequence of the information given by the accused, it affords some guarantee of truth of that part of the information which was the clear, immediate and proximate cause of the discovery: See [Mohmed Inayatullah Vs. The State of Maharashtra](#), .

(10) The evidence of Abdul Rahim and Allah Rakha who were witnesses of the discovery was accepted by the learned Additional Sessions Judge. Though their evidence was severely criticised by the counsel for the accused we find nothing in their testimony which would enable us to hold that they ought not to be believed- These witnesses had gone to the police station to meet their acquaintance who was employed there. There is nothing improbable in this. We are of opinion that the trial judge was right in admitting the statement of the accused as legal evidence u/s 27 of the Evidence Act for no part of it is inculpatory.

(11) Counsel for the accused submitted that recovery of the knife should be looked upon with suspicion as the statement was made by Kallu on the day the remand was to expire. Kallu was arrested on September 13, 1974. He made the disclosure statement on September 16, 1974. There is nothing to show that the court would not have further remanded Kallu to police custody for remand can be up to a total period of 14 days.

(12) Counsel for the accused made two other points. Firstly, it was suggested that Kallu acted in self-defense as he was being attacked by Kamil with a knife. It was said that Kallu snatched the knife from the hands of Kamil and then stabbed Kamil. The trial court did not accept this defense. Nor do we. The plea of self-defense is not borne out by the evidence and appears to us as the flimsiest excuse for attacking Kamil.

(13) Secondly, it was said that when Kallu was arrested on September 13, 1974, an injury was found in his palm. This, it was submitted, was suggestive of the fact that Kallu had acted in self-defense. This argument is as hollo as the other. Kallu was not arrested at the spot. He was arrested after two days. The trial court has rightly held that it was not for the prosecution to explain how the injury was caused on the person of Kallu. It may as well have been a self-inflicted injury. It was a simple injury between the thumb and the forefinger. We do not think that it is a fact worth attaching any importance.

(14) We are, Therefore, of the view that Mohd. Suleman alias Kallu was rightly convicted by the learned Additional Sessions Judge u/s 302, Indian Penal Code. We uphold his conviction and sentence and dismiss his appeal.

(15) So far as the appeal of Babudin is concerned we pronounced our judgment at the conclusion of the hearing on August 31, 1977. Disagreeing with the trial judge we acquitted Babudin giving him the benefit of doubt. We have separately given our reasons for his acquittal in the pages that immediately follow this reserved judgment. Appeal of Babudin.

(16) Now we turn to the appeal of Babudin. Babudin was also convicted by the trial judge u/s 302 read with section 34, Indian Penal Code. So far as Babudin is concerned we are not in agreement with the learned Additional Sessions Judge that he shared a common intention with Kallu to kill Kamil. For our disagreement with him we have two reasons. In the first place we find that the evidence regarding the participation of Babudin in the quarrel is conflicting. Islamuddin Public Witness 2 in his examination-in-chief deposed:

"I saw Kallu accused present in court catching hold of Shakir from his collar and he uttered the words that now he would be paid his money. Kamil who was present there rescued Shakir Babudin, accused present in court caught hold of Kamil from his back. Kallu who was having a knife concealed in his right hand stabbed Kamil in his abdomen and on his neck."

But when he was cross-examined he gave a different version. He said:

"WHEN I reached the place of occurrence Kamil was intervening and was trying to save Shakir while Shakir was being held by Babudin by his collars. Kamil was at that time standing."

The question is : What precise role did Babudin play in the fight ? " Was it Kallu or Babudin who held Shakir by the collar ? On this point we find the evidence of witnesses conflicting. If Shakir was held by Babudin by the collar it was not possible for Babudin to hold Kamil in his grip as is the case of prosecution. The trial judge did not notice this discrepancy in evidence and proceeded on the hypothesis that it was Kallu who caught hold of Shakir by his collar and when Kamil tried to intervene to save his brother, Babudin stepped forward and caught Kamil in his grip. Finding Kamil locked in the arms of Babudin Kallu struck the fatal blow in the abdomen of Kamil. If this had been the evidence of the witnesses in the case uniformly there was something to be said for the view taken by the trial judge. But we cannot accept his view as we find that the witnesses' evidence is discrepant on this point.

(17) Secondly, we cannot subscribe to the theory of common intention propounded by the trial judge. We must remember that in the day at 1 p.m. it was Shakir who had demanded his money and Kallu had abused him. Kamil was not in the picture at all at that time. Therefore, when Kallu and Babudin reached the place of occurrence in

the evening one can confidently assume that they had gone there to settle scores with Shakir who had offended Kallu in the day by demanding money. But it so happened that Kamil was present there at that time when the accused Kallu tried to catch hold of Shakir. Kamil thereupon rushed to save his brother Shakir. At that point Babudin intervened and caught hold of Kamil and then instead of inflicting a blow to Shakir Kallu struck the fatal blow in the abdomen of Kamil. That Babudin had the common intention to kill Kamil cannot be inferred from the circumstances. Everything happened at the spur of the moment. It happened in a flash. Babudin did not incite. He did not exhort. He had no knowledge. He could not anticipate the impending doom of Kamil. Nor was he armed. He cannot, Therefore, be held liable for the unforeseen and unauthorised act of Kallu. The slaying of Kamil was not a joint enterprise. It was an unforeseen event.

(18) If in a crime requiring means read one of the parties goes beyond what was agreed upon, then the other is not liable for the unforeseen consequences of the unauthorised act. In an old English case decided in 1697 three soldiers went to rob an orchard. Two climbed a pear tree while the third stood at the gate with a drawn sword. When the owner's son intervened, the sentinel stabbed and killed him. Holt, C.J." held that he was guilty of murder, but that the other two were innocent. It would have been otherwise if they had all set out with a common intention to oppose interference with deadly force : (1976) Foster 353 (cited in Smith and Hogan : Criminal Law (2nd ed.) p. 88 (4).

(19) The murder of Kamil was not within the contemplation of Babudin at all and, Therefore, he is not responsible for the death which resulted from the fatal stab would inflicted by Kallu. Kallu, it appears to us, went beyond Babudin's expectations and the slaying of Kamil was, Therefore, outside the scope of concerted action. It was an act outside the common purpose. It was beyond the common design. Looking squarely at the whole train of events, it is difficult to say that Babudin was engaged on the joint enterprise when Kallu stabbed Kamil. This was an unforeseen departure from the concerted action. It was a new and independent enterprise. Babudin could not have such a foresight as to contemplate the murder of Kamil of whose presence even at the spot he was totally unaware.

(20) The important thing to notice is that it was Shakir who was the target of both the accused. Kamil's appearance on the scene was unexpected. With regard to his presence the two accused could not have pre-planned or pre-arranged. The crucial circumstance is that the plan must precede the act Constituting the offence. As was said in [Rishideo Pande Vs. State of Uttar Pradesh](#), :-

"THE common intention referred to in S. 34 presupposes a prior concert, a prearranged plan i.e. a prior meeting of minds. This docs not mean that there must be a long interval of time between the formation of the common intention and the doing of the act. It is not necessary to adduce direct evidence of the common intention. Indeed, in many cases it may be impossible to do s-o. The common

intention may be inferred from the surrounding circumstances and the conduct of the parties."

(21) Did Babudin share a common intention? This is the question to be decided. Before one can share a common intention one must intend to do an act. I know of no better judicial interpretation of "intention" or "intent" than that given in a civil case by Asquith J. (*Cunleffe v. Goodman* (1950) 2 Kb 237 when he said at page 253:

"AN "intention" to my mind connotes a state of affairs which the party intending"-1 will call him X-docs more than merely contemplate : it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, by his own act of volition."

(22) Now Babudin could not contemplate and much less decide to kill Kamil. He could not have foreseen that Kamil will be present in the house and that he and Kallu will be able to kill him. Kamil did not live in that house. This is proved in evidence. He was there by chance or one might say as ill-luck would have it. If there was any pre-concert between Kallu and Babudin it could well have been to murder Shakir. Shakir was the object of Kallu's fury. He was the subject of his wrath. He had given offence to Kallu in the day by demanding money.

(23) It is true that Babudin was not a silent spectator, as the trial court has said. True it is that he was an active participant. He held Kamil in his arms. Kallu stabbed him when he was not free to move. But the question is one of common intention. A silent spectator can be as much guilty of the whole criminal act as the one who actually deals the fatal blow provided he shares a common intention. As Lord Sumner said :

"EVEN if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and waif ".

[*Barendra Kumar Ghosh v. King Emperor* Air 1925 Pc I 6. Even the mere presence of a confederate criminal at the scene of the crime may be sufficient to attract the provision of section 34. where the crime is committed in furtherance of common intention.

(24) "COMMON intention" necessarily implies a pre-arranged plan. In other words there must be a prior meeting of the minds of the criminals and a plan formed among them to perpetrate a particular crime. Common intention which is the basis of the principle laid down by section 34 implies action-in-concert and this in turn postulates the existence of a pre-arranged plan [See [Mahabir Gope Vs. State of Bihar](#)]. But it is not necessary that there should be any long gap of time, in fact any gap of time, between the formation of the common intention and the actual execution thereof. In other words, a common criminal intention may develop suddenly even after the fight has begun [See [Krishna Govind Patil Vs. State of](#)

[Maharashtra, \].](#)

(25) It seems to us that to say that the two accused are guilty of murder when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has acted in a way which the other party to that common design could not suspect is something revolting to our sense of justice. On evidence we find that Kallu in a moment of passion decided to kill and killed Kamil. It was a sudden action. It was not an agreed joint enterprise on which the two accused had embarked. If one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of the unauthorised act. The essence of the joint liability u/s 34 is the existence of a common intention [See [Chikkarange Gowda and Others Vs. State of Mysore](#),]. In the circumstances of this case we are unable to infer a common intention on the part of Babudin. He is, Therefore, entitled to be acquitted altogether.

(26) To constitute common intention it is necessary that the intention of each of the accused is known to the others and is shared by them. Duffey's and Hunt's case (1830) 168 E.R. 1009 and R. V. James Caton (1874) 12 CC C 624, (624, 625) (12). Before a court can convict a person u/s 302 read with section 34, Indian Penal Code, it should come to a definite conclusion that the said person had prior concert with one or more other persons for committing the said offence. (See Krishna v. State of Maharashtra, supra at page 1415).

(27) Applying these principles what we find is that Kamil tried to intercede on behalf of Shakir. Babudin prevented him from doing so by holding him. In that sudden fight Kallu stabbed Kamil. This act was not in advancement or promotion of the common intention. The act of the co-culprit Kallu which constituted the offence fell outside the scope of the common intention of the culprits and hence section 34 was not attracted.

(28) Anything which is within the ambit of the concerted arrangement is the responsibility of each party who chooses to enter into the criminal purpose. This principle of vicarious liability does not apply where the co-accused acts outside the scope of concerted action. [R v. Anderson and Morris (1966) 2 All E.R. 644. If we apply this rule of law to the facts of this case we find that as the fight developed Kallu in a paroxysm of rage decided to kill Kamil and killed him. But Babudin never contemplated that that was going to be done. He never intended it. It is true that he must have known that Kallu was carrying a knife but it was intended to be used against Shakir. This is clear if we see the facts in their true perspective. Kallu's words right at the beginning : "Now I will make the payment" are clearly suggestive of the animus against Shakir and none else. He had offended Kallu in the day. That Kamil was killed because of any family feud is not the prosecution case.

(29) It appears to us that this is a case of misapplication of section 34, Indian Penal Code. The death of Kamil was not caused in furtherance of a common intention. We cannot in the circumstances of this case hold that Babudin shared the common intention with Kallu to kill Kamil. We must, Therefore, hold that Babudin is entitled to the benefit of doubt. Accordingly, we allow his appeal, set aside his conviction and acquit him of the charge brought against him.

(30) At the conclusion of the hearing in the appeal of Babudin we pronounced the judgment and ordered his release immediately. Now we have given our reasons.