

(2011) 03 DEL CK 0422

Delhi High Court

Case No: Criminal Appeal No. 189 of 2010

Jitender @ Kukki and Others

APPELLANT

Vs

State (Govt. of N.C.T. of Delhi)

RESPONDENT

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**Date of Decision:** March 21, 2011**Acts Referred:**

- Arms Act, 1959 - Section 25, 27
- Criminal Procedure Code, 1973 (CrPC) - Section 313, 428
- Penal Code, 1860 (IPC) - Section 307, 323, 34

**Hon'ble Judges:** A.K. Pathak, J**Bench:** Single Bench**Advocate:** R.M. Tufail, Farooq Choudhary and Vishal Sehijpal, for the Appellant; Arvind Gupta, APP, for the Respondent

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**Judgement**

A.K. Pathak, J.

Vide judgment dated 25th January, 2010, Appellants have been convicted under Sections 307/34 IPC by the Trial Court. Each of the Appellant has been sentenced to undergo rigorous imprisonment for seven years with fine of Rs. 10,000/- and in default of payment of fine to undergo simple imprisonment for two months under Sections 307/34 IPC. Appellant Jitender has also been convicted under Sections 25/27 of the Arms Act and sentenced to undergo rigorous imprisonment for two years with fine of `1,000/- and in default of payment of fine to undergo simple imprisonment for fifteen days. Sentences of Jitender @ Kukki have been directed to run concurrently. Benefit of Section 428 Code of Criminal Procedure has also been given to the Appellants.

2. It is this judgment which is under challenge in this appeal.

3. Factual matrix as unfolded is that Jitender @ Kukki, Rajesh Kumar and Ram Kumar @ Babloo are real brothers. Injured Maharaj Singh is their cousin. There was a property dispute pending between the parties before the revenue authorities.

Satender @ Chand and Sanjeev are brothers of Appellants but they were favouring Maharaj Singh in the property disputes. On 21st March, 2005, Maharaj Singh had gone to the office of Tehsildar in connection with the property case. He returned home at about 3 PM and came to know that Jitender @ Kukki had quarreled with Satender @ Chand and Sanjeev in his absence. Accordingly, he went to the house of Appellants to find out as to why they had picked up a quarrel with Chand. Complainant Seema, who is sister of Maharaj Singh, followed him. When she reached at the house of the Appellants, she noticed a verbal altercation going on between Maharaj Singh and the Appellants, namely, Jitender @ Kukki, Rajesh Kumar and Ram Kumar @ Babloo. Sanjeev and Satender @ Chand were also present there. They were supporting Maharaj Singh. After sometime, verbal altercation resulted in scuffling between Appellants on the one hand and Maharaj Singh, Sanjeev and Satender @ Chand on the other. While scuffle was going on, Jitender @ Kukki picked up a double barrel gun from his room and fired at Maharaj Singh twice while uttering "aaj zamin jaydad ke is jhagare ko khatm kar deta haun". Maharaj Singh sustained gunshot injuries on his arm and chest. He was removed to Sant Parmanand Hospital.

4. FIR was registered on the statement of complainant Seema wherein she has narrated the incident in the manner as has been described in para 3 hereinabove. Maharaj Singh was treated for his injuries in Sant Parmanand Hospital by the doctors. Dr. Sameer Kapoor opined the injuries of Maharaj Singh as "dangerous". During the investigation double barrel gun was seized.

5. Maharaj Singh has been examined as PW3. Complainant Seema has been examined as PW12. Satender @ Chand has been examined as PW6. Sanjeev has been examined as PW20. Dr. Alok Kumar Jain has been examined as PW2. He has proved MLC of Maharaj Singh as Ex. PW2/A. Dr. Vipin Rastogi has been examined as PW4. He has proved the opinion regarding the injuries of Maharaj Singh. He has deposed that Dr. Sameer Kapoor had opined the injuries as "dangerous". Investigating Officer has been examined as PW19. These were the material witnesses. Other witnesses are formal in nature, being police officials who were joined with the investigation at one stage or the other stage. After prosecution closed its evidence, statements of Appellants u/s 313 Code of Criminal Procedure were recorded. Case of the Appellants is that of simple denial. They stated that they had been falsely implicated in this case. Appellants took a plea that they were not present at the spot at the time of incident. In support of this plea, they have examined five witnesses in their defence as DW1 to DW5. All these defence witnesses are close relatives of Appellants being their mother, bua, brother-in-law.

6. Brothers of Appellants, PW20 Sanjeev and PW6 Satender @ Chand, as per the prosecution, were eye witness to the incident, inasmuch as Appellants had even scuffled with them. However, they have not supported the prosecution case. They were declared hostile and cross-examined by the learned Additional Public

Prosecutor but nothing could be elicited from them which could go in favour of prosecution. However, PW3 Maharaj Singh and PW12 Seema have fully supported the prosecution case. They have narrated the incident in line with the prosecution story as set out in the FIR except with minor improvements about role of Rajesh and Ram Kumar @ Babloo of giving exhortation and catching hold. Trial Court has found their testimonies to be trustworthy, reliable, credible and sufficient enough to reach a definite finding that Jitender @ Kukki had fired at Maharaj Singh twice with the double barrel gun resulting in "dangerous" injuries to him. His this act attracted the ingredients of Section 307 IPC. Trial Court was also of the view that Appellants Rajesh Kumar and Ram Kumar @ Babloo were sharing common intention with Jitender @ Kukki, inasmuch as Rajesh exhorted that Maharaj Singh was the root of quarrel between them over the property disputes and he be finished that day. Defence taken by the Appellants that they were not present at the spot was disbelieved since in the cross-examinations of PW3 and PW12 their presence was not disputed, inasmuch as suggestion was given that Maharaj Singh had beaten Rajesh after picking up quarrel with him.

7. During the course of arguments, challenge to the conviction of Appellant Jitender @ Kukki u/s 307 IPC has been given up on merits. Learned Counsel has confined his arguments as regards to the applicability of Section 34 IPC qua Appellants Rajesh and Ram Kumar @ Babloo. He has vehemently contended that Appellants were not aggressors. They had not gone to the house of Maharaj Singh armed with weapons so as to cause injuries on his person. It is Maharaj Singh who had come to the house of Appellants and picked up a quarrel with them. Initially, a verbal altercation took place between them over the property dispute which led to scuffling between them. In the heat of the moment, it appears that Jitender @ Kukki had picked up a gun lying in the room and fired at Maharaj Singh. Appellants were not armed with any weapon. They did not play any overt act. They did not give any exhortation nor caught hold of Maharaj Singh as per the FIR. Statements made by PW3 and PW12 attributing role to Rajesh Kumar of giving exhortation is nothing but material improvement and cannot be read against him. Similar is the contention with regard to the allegation of "catching hold" leveled by PW3 Maharaj Singh while deposing in the court. In nutshell, his contention is that Rajesh and Ram Kumar @ Babloo cannot be convicted u/s 307 IPC by taking aid of Section 34 IPC in the facts and circumstances of this case. Reliance has been placed on [Devi Lal and Another Vs. The State of Rajasthan](#), [Dajya Moshya Bhil and Others Vs. State of Maharashtra](#), [Vencil Pushpraj v. State of Rajasthan](#) 1991 CrL.J. 452 and [Ramashish Yadav and Others Vs. State of Bihar](#),

8. Per contra, learned APP has contended that common intention can develop on the spur of the moment. It is not necessary that only those assailants who attack on a person in a pre-arranged plan would attract Section 34 IPC. It is contended that PW3 Maharaj Singh has categorically stated that Appellants had scuffled with him; thereafter Ram Kumar @ Babloo caught hold of his right hand and twisted it, while

Jitender @ Kukki caught hold of him by his collar and Rajesh started slapping him. Rajesh also exhorted that Maharaj Singh be finished that day, at which Jitender @ Kukki fired gun shots. PW2 Seema has also deposed about the exhortation given by Rajesh Kumar to finish Maharaj Singh. According to him, Rajesh as well as Ram Kumar @ Babloo had played overt act. This itself shows that they were sharing common intention with Jitender @ Kukki to cause such injuries on the person of Maharaj Singh and had knowledge of the fact that had victim died by such injuries they would be guilty of committing murder. In nutshell, his contention is that Trial Court has rightly convicted Rajesh and Ram Kumar @ Babloo u/s 307 IPC with the aid of Section 34 IPC.

9. I have considered the rival contentions of both the parties, scrutinized the statements of PW3 and PW12 and perused the judgments, reliance whereupon has been placed. In the FIR, complainant had not assigned role of exhortation and catching hold to Rajesh and Ram Kumar @ Babloo. In the FIR, PW12 had stated that after Maharaj Singh returned from the court he came to know that Jitender @ Kukki had quarreled with Satender @ Chand in his absence. He went to the house of Jitender @ Kukki to enquire from him as to why he had quarreled with Satender @ Chand. She also followed him. When she reached there she found Jitender @ Kukki, Rajesh and Ram Kumar @ Babloo quarrelling with Maharaj Singh, Sanjeev and Satender @ Chand. Initially, a verbal altercation took place between them which later on resulted in scuffling between Maharaj Singh, Sanjeev and Satender @ Chand on the one hand and the Appellants Jitender @ Kukki, Rajesh Kumar and Ram Kumar @ Babloo on the other. In the meanwhile, Jitender @ Kukki brought out a double barrel gun from his room and fired at Maharaj Singh twice by saying that he would finish the root of property disputes that day. FIR was registered immediately after the incident on the statement of eye-witness PW12 Seema. In the FIR she did not allege that Rajesh had given exhortation and Ram Kumar @ Babloo had caught hold of hand of Maharaj Singh. Statement to this effect was made by her for the first time in the court. Overt acts of Rajesh and Ram Kumar @ Babloo, as given by PW12 are material improvements made by her and have to be ignored. The version of PW3 Maharaj Singh is also contrary to FIR with regard to the overt acts played by Rajesh and Ram Kumar @ Babloo and has to be overlooked. From the overall testimonies of PW3 and PW12 it can be deduced that some property dispute was going on between the Appellants and Maharaj Singh. Brothers of Appellants, namely, Sanjeev and Satender @ Chand had been supporting Maharaj Singh in the said dispute. On 21st March, 2005 Maharaj Singh had gone to the office of Tehsildar in connection with the property disputes. After he returned home from the court, at about 3 PM he came to know that Jitender @ Kukki had quarreled with Satender @ Chand in his absence. Thereafter, he went to the house of Appellants to find out as to why Jitender @ Kukki had quarreled with Satender @ Chand earlier in the day. Verbal altercation broke out between them which resulted in scuffling between Appellants on the one hand and Maharaj Singh, Sanjeev and Satender @ Chand on

the other. While scuffle was going on, Jitender @ Kukki all of a sudden picked up a double barrel gun and fired twice at Maharaj Singh causing dangerous injuries to him. From the facts narrated above it is clear that initially all the Appellants were unarmed. They were present in their house. They had not gone to the house of Maharaj Singh with pre-meditated concert to launch an assault on him. In the heat of the moment Jitender @ Kukki picked up a gun and fired at Maharaj Singh. It was his individual act.

10. In [Vaijayanti Vs. State of Maharashtra](#), Supreme Court has held that Section 34 of the Indian Penal Code envisages that "when a criminal act is done by several persons in furtherance of the common intention, each of such persons is liable for that act, in the same manner as if it were done by him alone". The underlying principle behind the said provision is joint liability of persons in doing of a criminal act which must have found in the existence of common intention of enmity in the acts in committing the criminal act in furtherance thereof. The law in this behalf is no longer res integra. There need not be a positive overt act on the part of the person concerned. Even an omission on his part to do something may attract the said provision. But it is beyond any cavil of doubt that the question must be answered having regard to the fact situation obtaining in each case. In [Krishnan and another Vs. State of Kerala](#), Supreme Court held that for the purpose of invoking Section 34 IPC, prosecution must establish that all the accused persons had shared common intention which may be inferred by reason of overt act qua each of the accused.

11. In Devi Lal's case (supra), Supreme Court has held that u/s 34 IPC when a criminal act is done by several persons in furtherance of the common intention of all each of such persons is liable for that act in the same manner as if it were done by him alone. The words "in furtherance of common intention of all" are a most essential part of Section 34 of the Indian Penal Code. It is common intention to commit the crime actually committed. This common intention is anterior in time to the commission of the crime. Common intention means a pre-arranged plan. In Dajya Moshya Bhil's case (supra), Supreme Court has held that in order to attract Section 34 IPC it is not sufficient to prove each of the participating culprits had the same intention to commit the crime, what is the requisite ingredient of Section 34 IPC is that each must share intention of the other Appellants. In Ramashish Yadav's case (supra), Supreme Court has held that Section 34 IPC lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feature of Section 34 is the element of participation in action. The common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a pre-arranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct

of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed on the spur of the moment but there must be pre-arrangement or pre-meditated concert.

12. In the facts of the present case, no such evidence has come on record that Rajesh and Ram Kumar @ Babloo were sharing common intention with Jitender @ Kukki in launching murderous assault on Maharaj Singh. They were not the aggressor party. Appellants had not gone to the house of Maharaj Singh armed with weapons in order to level murderous assault on him. It is the other way round; Maharaj Singh had come to the house of the Appellants, he had come to their house to enquire as to why Jitender @ Kukki had fought with Satender @ Chand earlier in the day. It appears that a verbal altercation took place between Appellants and Maharaj Singh and thereafter both the parties started scuffling with each other and while scuffle was going on, Jitender @ Kukki went into his room and took out his double barrel gun and fired twice at Maharaj Singh. In these facts, it cannot be said that the assault was pre-meditated. There appears no meeting of mind between the Appellants, in the peculiar facts of the present case. The act committed by Jitender @ Kukki was his individual act for which Rajesh and Ram Kumar @ Babloo cannot be held responsible. Accordingly, conviction of Rajesh Kumar and Ram Kumar @ Babloo u/s 307 IPC taking aid of Section 34 IPC is set aside. However, sufficient evidence has come on record that they had scuffled with Maharaj Singh and the persons supporting him. Their this act would certainly amount to causing simple hurt to them. Accordingly, Appellants Rajesh and Ram Kumar @ Babloo are convicted u/s 323 IPC. Their sentences are reduced to one year which period they have already undergone. They be released if not wanted in any other case.

13. Conviction of Jitender @ Kukki u/s 307 IPC and Sections 25/27 of the Arms Act are affirmed. Learned Counsel for the Appellants has contended that the incident is an offshoot of a property dispute between the family members; Appellant Jitender @ Kukki has no previous criminal record; he is a married man having one son aged about 12 years; incident took place on spur of moment for which he has already suffered incarceration for about 34 months, therefore, he be released on the sentence already undergone by him. As against this, learned APP has contended that Appellant Jitender @ Kukki had fired twice with a double barrel gun aiming at Maharaj Singh, resulting in dangerous injuries to him. Offence being serious in nature, he is not entitled to any leniency. Keeping in mind the totality of the facts and circumstances of the case, sentence of Appellant Jitender @ Kukki is reduced to five years from seven years u/s 307 IPC. Sentence awarded by the Trial Court under the Arms Act is maintained. Both the sentences shall run concurrently. Benefit of Section 428 Code of Criminal Procedure is also given to the Appellant.

14. Appeal is disposed of in the above terms.

15. A copy of this order be sent to Superintendent Jail for due compliance and serving it on the Appellants.