

A NOOR MOHAMMAD MOHD. YUSUF MOMIN

v.

STATE OF MAHARASHTRA

March 24, 1970

B [M. HIDAYATULLAH, C.J., A. N. RAY AND I. D. DUA, JJ.]

Criminal law—Difference between conspiracy, common intention and abetment—Indian Penal Code, (Act 45 of 1860), ss. 34, 109 and 120B—Scope of.

C Four accused were charged with the offences under s. 120-B (conspiracy to commit murder) and s. 302 read with s. 34. The fourth accused was also charged under s. 302 read with s. 109 for the offence of abetting the murder committed by the other three accused. The accused 2 to 4 were related to one another while the first accused was a servant of the brother of the second accused. There were constant disputes between the fourth accused and the deceased over a right of passage and the right to tap water. The day before the murder the fourth accused, went to the house of the deceased and exhorted his companions, one of whom was the second accused, to kill the deceased. On the next day (the day of the murder) the fourth accused threatened to kill the deceased and later, accompanied by the 1st and 2nd accused, followed the deceased when he went out at about 10 p.m. Fifteen minutes after the deceased was thus seen being followed by the accused, the deceased was stabbed. The third accused tried to persuade the two constables who were proceeding towards the scene when they heard the disturbance that nothing untoward had happened, but the constables proceeded to the scene, and, on noticing the wounded body of the deceased, chased and caught the first accused and recognised the second accused who had escaped. One of the constables lodged the first information against the accused 1 to 3. The fourth accused was absconding and after he was arrested, all the accused were put up for trial. The High Court convicted the first accused under s. 302 I.P.C., and accused two to four for offences under s. 120-B and s. 302 read with s. 34, I.P.C. The fourth accused was also convicted for the offence under s. 302 read with s. 109.

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In appeal by special leave to this Court by the fourth accused, this Court examined the evidence, contrary to its usual practice, as it was represented that the evidence did not support the conclusion of the High Court, and

G HELD : The evidence clearly established the complicity of the appellant in the murder of the deceased, and the charges under s. 302 read with s. 109 I.P.C. and of conspiracy were fully supported by the evidence. As regards the charge under s. 302 read with s. 34, though, it was highly probable that at the time of the actual murder the appellant was either present with the other three co-accused or was somewhere nearby, the evidence did not establish beyond reasonable doubt his presence at or near the spot when the murder was actually committed, and therefore, he must be given the benefit of doubt in regard to that charge.

H Section 34 embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. *Participation in the commission of the offence in furtherance of the common intention invites its application.*

Section 109, on the other hand, may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission.

Criminal conspiracy is a substantive offence under s. 120-B I.P.C. It differs from the other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment, the substantive offence of criminal conspiracy is wider in amplitude than abetment by conspiracy as contemplated by s. 107 I.P.C. Conspiracy from its very nature is hatched in secrecy and it is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming, but like other offences it can be proved by circumstantial evidence. Surrounding circumstance and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact, because of the difficulties of having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by any one of them in reference to their common intention after the same is entertained becomes, according to the law of evidence relevant for proving both conspiracy and the offences committed pursuant thereto. [124 B-H]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 24 of 1968.

Appeal by special leave from the judgment and order dated December 13, 14, 1967 of the Bombay High Court in Criminal Appeal No. 380 of 1966.

A. S. R. Chari and *A. G. Ratnaparkhi*, for the appellant.

G. L. Sanghi and *S. P. Nayar*, for the respondent.

The Judgment of the Court was delivered by

Dua, J. In this appeal by special leave we are only concerned with the conviction of one out of four accused persons jointly tried for the murder of one Mohd. Yahya. The appellant Noor Mohammed Mahamed Yusef Momin, accused no. 4, in the trial court was jointly tried with three others in the court of the second Additional Sessions Judge, Thana on the following three charges :

"That you accused nos. 1 to 4 on or about the 16th day of April, 1965 at Bhiwandi entered into an agreement to commit the murder of Mohamed Yahya and that the same illegal act was done in pursuance of the said agreement and thereby you committed an offence punishable under section 120B of the Indian Penal Code and within my cognizance.

"That you accused nos. 1, 2 and 3 on or about the 17th day of April, 1965 at about 11 p.m. at Bhiwandi

A in furtherance of common intention of you all and accused no. 4 to commit the murder of the deceased Mahamed Yahya did commit his murder by intentionally causing his death by assaulting him by knife and thereby committed an offence punishable under s. 302 read with s. 34 of the Indian Penal Code and within my cognizance.

B In the alternative you accused no. 4 on 17th of April, 1965 at Bhiwandi abetted the commission of the offence of murder of Mahamed Yahya by accused nos. 1 to 3 which offence was committed in consequence of your abetment and that you thereby committed an offence punishable under sections 109 and 302 of the Indian Penal Code and within my cognizance."

C The trial court convicted Mohd. Taki Haji Hussein Momin, accused no. 1 under s. 302, I.P.C. and sentenced him to imprisonment for life. He was acquitted of the other charges. His three co-accused were acquitted of all the charges. Accused no. 1 appealed to the Bombay High Court against his conviction whereas the State appealed against the acquittal of the other three. The High Court, after considering the evidence on the record, upheld the conviction of accused no. 1 and reversed the order of acquittal of the other three. Accused nos. 2, 3 and 4 (Chinwa @ Ahmed Hessian Momin, Abdul Rahamen Bacchu Momin, and Nur Mahamed Mahamed Yusef Momin respectively) were held guilty of the offence under s. 120-B, I.P.C. as also of the offence under s. 302, read with s. 34, I.P.C. Accused no. 4 was in addition held guilty of the offence under s. 302 read with s. 109, I.P.C. Accused nos. 2, 3 and 4 were sentenced to imprisonment for life both under s. 120-B, I.P.C. and s. 302 read with s. 34, I.P.C. Accused no. 4, appellant in this Court, was also separately sentenced to imprisonment for life for the offence under s. 302 read with s. 109, I.P.C. Incidentally it may be mentioned that Jaitunbi, widow of the deceased Mohd. Yahya, had also appealed to the Bombay High Court challenging the acquittal of accused nos. 2, 3 and 4 on all charges and of accused no. 1 on the charges other than that of murder under s. 302, I.P.C. This appeal which was treated as an application under s. 417(3), Cr. P.C. was held not to be maintainable.

As already indicated, this Court granted special leave only to the appellant who was accused no. 4 in the trial court.

H Before narrating the prosecution story the *inter se* relationship of the accused persons may be stated. Abdul Rehman Bacchu Momin, accused no. 3, is the husband of the sister of the appellant Noor Mohammed's wife. Chinwa *alias* Ahmed Hessian

Momin, accused no. 2, is the brother of Kallu, who is the son-in-law of the appellant, accused no. 4. Mohd. Taki, accused no. 1, is the servant of Kallu. All these persons are the residents of the same place and the deceased Mohd. Yahya was a close neighbour of the appellant. According to the prosecution there were constant disputes between the appellant and the deceased over the right of passage and the right to tap water, and it is not disputed that both sides had made reports and counter-reports with the police against each other. The climax reached on April 16, 1965 in the morning at 7 O' clock. On that day Mohd. Yahya, when going out of his house, found that there was a heap of earth and a cot belonging to the appellant obstructing his way. A cow belonging to the appellant was also standing in the passage. In order to clear his way the deceased picked up a stone and hurled it at the cow. This offended the appellant and he in retaliation threw a glass which he was holding towards the deceased and also abused him. The deceased reported this incident to the police station. The appellant also went to the police station and made a counter-complaint against the deceased. When the deceased and the appellant had gone to the police station the two wives of the appellant abused Jaitunbi, wife of the deceased, with the result that Jaitunbi also went to the police station to lodge a report. But this report was not recorded. A little later, the wives, sisters and children of the appellant again abused Jaitunbi and pelted stones at her. Jaitunbi went to the police station again to lodge a complaint, the same day at about 10 a.m. When the deceased was lying on a cot in his house the appellant came up to the door of the former's house asking him to get down. On enquiry by the deceased as to why he should get down the appellant replied that he would serve the deceased with his last tea. At that time the appellant was accompanied by four or five persons including Chinwa, accused no. 2. It is said that all of them abused the deceased. Chinwa, accused no. 2, held a knife in his hand which he is stated to have opened by pressing the button and as he tried to enter the house of the deceased, the latter's daughter, Noorjahan, went by the back door to the police station to lodge a complaint. This part of the story is not admitted by the accused. On Noorjahan's complaint the police came to the spot in a van and after interrogating the persons present the police party took with them accused nos. 2 and 3. The appellant is stated to have offered to reach the police station himself a little later.

In view of these incidents Jaitunbi apparently felt somewhat frightened and advised her husband, deceased Mohd. Yahya, to go to Bombay to avoid further clashes with the appellant. Mohd. Yahya, acting on his wife's advice, went away to Bombay but

- A** returned on the evening of April 17, 1965 bringing with him some female guests. In those days an *Urus* was being held near Par Naka and it appears that it was to attend this *Urus* that the female guests came with him. Seeing Mohd. Yahya back from Bombay, the appellant asked his nephew Latif, who was sleeping on a cot outside the house, to go in, loudly uttering that a dead
- B** body was to be kept on that cot. The deceased who had reached home at about 9.30 P.M. a little later went out to a *pan* shop near the Navyug Hotel. The deceased accompanied by two unidentified persons followed him. Soon after, Mohd. Yahya was stabbed with a knife and this news reached his house. At the Par Naka two constables, Bhika Bahiram and Suvarnasing, who
- C** were on duty in connection with the *Urus*, on learning of some disturbance near the Navyug Hotel and noticing some commotion, proceeded to the lane where a crowd had collected. On the way, accused no. 3 told them that nothing untoward had happened; but the two constables nevertheless proceeded further and reached the spot where Mohd. Yahya was lying in injured condition. Someone from the upper storey of a house nearby shouted that
- D** the assailants were running away. Constable Bhika Behiram asked Suvarnasing to attend to the injured person and he himself chased the two persons trying to escape. He caught Mohd. Taki, accused no. 1, in a lane near the municipal office. The other person who could not be caught was identified by Bhika Bahiram as Chinwa, accused no. 2, who was known to him.
- E** Suvarnasing in the mean time, feeling that Bhika Bahiram would need his help also followed him and found him grappling with Mohd. Taki. Both the constables over-powered Mohd. Taki, who had a knife in his pocket and whose clothes were blood-stained. Mohd. Taki was brought back to the place where Mohd. Yahya was lying injured. Mohd. Yahya was taken to the hospital in
- F** a bullock cart but he expired soon thereafter. In the report lodged by constable Bhika Bahiram, the names of accused nos. 1 and 2 were mentioned and accused no. 3 was described as an old man with moustaches, wearing a *lungi*. The appellant was not arrested, though his statement was recorded during the investigation on April, 19, 1965. He appears to have absconded soon thereafter and was arrested on June 18, 1965.
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The case against the appellant is to be considered in the background of the order of conviction against the other three co-accused which has become final, this Court having declined special leave against their conviction.

- H** The High Court, on a consideration of the entire evidence, came to the conclusion that all the accused (nos. 1 to 4) had hatched a plan to commit the murder of Mohd. Yahya after his return from Bombay and it was in pursuance of that conspiracy

that he was murdered on the night of April 17, 1965. The appellant, along with accused nos. 2 and 3, was also held guilty of an offence under s. 302 read with s. 34, I.P.C. He was further held guilty of an offence under s. 302 read with s. 109, I.P.C. The appellants' conviction on all these counts is challenged in this Court.

So far as s. 34, I.P.C. is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application. Section 109, I.P.C. on the other hand may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission. Turning to the charge under s. 120-B, I.P.C. criminal conspiracy was made a substantive offence in 1913 by the introduction of Chapter V-A in the Indian Penal Code. Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by s. 107, I.P.C. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offences committed pursuant thereto. In the present case the High Court, after referring to the evidence of Laxmibai, (P.W. 7) and Hari Chavan (P.W. 13) (whom

A that court expressly described as independent witnesses) and also of Murlidhar (P.W. 12), expressed its opinion in these words :

B "All this evidence would show that at least since
C the 16th of April, 1965 the accused nos. 2, 3, and 4
D were acting in concert and had something common in
E their mind. It would also show the presence of the
F accused no. 2 with a knife at the incident of the 16th
G April, 1965 and his threatening the deceased with the
H knife and the acts and words used by the accused no. 4 Mohammad Noora inspiring the accused no. 2 and some other persons who were with him to beat and kill Mohammad Yahya, the subsequent utterances of the accused no. 4 when the deceased returned from Bombay on the night of the 17th of April, 1965, the following of the deceased Mohammad Yahya by the accused no. 4 alongwith two persons when Mohammad Yahya went out to have a pan, the death of Mohammad Yahya soon thereafter, then running of the four persons from the scene of the offence the accused no. 3 misleading the police constable with respect to the incident, the accused nos. 1 and 2 running away from the scene of the offence eluding the police constables, the accused no. 1 being caught after some struggle near the Municipal Office and found with his clothes stained with blood and having a knife in his shirt pocket, all these circumstances, taken together, would show that the accused nos. 1 to 4 must have met previously before causing of the injuries to deceased and must have hatched out a plan of causing the death of the deceased or causing at least grievous injuries to the deceased. Otherwise the presence of all the four accused near the scene of the offence at the time the incident occurred cannot be satisfactorily explained. The accused no. 4 had known that the deceased had returned from Bombay and the ominous words he used while asking his nephew Lateef to get down from the cot would suggest that he had still in mind that idea of doing away with the deceased and must have collected the other colleagues of his to carry out the plan which must have been hatched out prior to the incident. That inference can reasonably be drawn from the circumstances established in the case and it is in pursuance of that pre-planning to do away with the deceased, all the four accused must have followed the deceased when he went out that night and the deceased was stabbed by at least some of these accused persons."

The High Court also believed the evidence of Noorjehan (P.W. 11) and Jaitunbi, (P. W. 5). In its opinion though these two

witnesses were, to a certain extent, interested their evidence appeared to it to be natural and its tenor did not show that they were deposing falsely. On a consideration of the entire material on the record the High Court felt that all the four accused persons must have hatched a plan to commit the murder of Mohd. Yahya after his return from Bombay and it was in pursuance of this conspiracy that Mohd. Yahya was murdered on the night of April 17, 1965. The court took into account the facts that accused no. 1 was caught after some chase near the scene of occurrence, accused no. 2 was identified though he made good his escape, accused no. 3, who was also identified by description, tried to mislead the police constables, and that accused no. 4 was seen following the deceased just before the murder with two or three persons. On this material the High Court upheld the appellant's conviction.

Under Art. 136 of the Constitution this Court does not normally proceed to review and appraise the evidence for itself and the conclusions of the High Court on questions of fact on appreciation of evidence are considered to be final. This is so even if this Court were to feel that a different view of the evidence is possible. But in this case, as it was represented that the evidence on the record does not support the conclusion of the High Court and that grave and substantial injustice had been caused, we undertook to go into the evidence, with the help of the counsel for the parties, to satisfy ourselves if there is any sufficient ground for interference on appeal by special leave. Hari Chavan, (P.W. 13), has deposed that on April 16, 1965 at about 10.30 a.m. the appellant, while standing near the steps of Mohd. Yahya's house, exhorted three of his companions, one of whom was accused no. 2 who had a knife in his hand, to beat the deceased, the actual words used being, "Beat him : Kill him : I shall look to the consequences". This evidence is corroborated by Laxmibai, (P.W. 7) and both of these witnesses have been believed by the High Court. Laxmibai (P.W. 7) actually saw the appellant with the two others following the deceased about 15 or 20 minutes before the murder. We are unable to find any cogent ground for disagreeing with the High Court. On this evidence not only animus on the part of the appellant but also instigation by him must be held to be fully established. This evidence would also support the charge of criminal conspiracy against the appellant. Indeed, the evidence of Jaitunbi (P.W. 5) and Noorjehan (P.W. 1) also shows that the appellant on April 16, 1965 and on the evening of April 17, on Mohd. Yahya's return from Bombay and a short time before his murder, openly gave expression to his strong feelings of animosity against the deceased which leaves little doubt that he was thinking of doing away with Mohd. Yahya's life. The admitted strained relations between the parties which reached the climax on April 16, 1965 and the evidence just discussed, in our opinion, clearly

- A** establishes the complicity of the appellant in the murder of the deceased. The charges under s. 302 read with s. 109, I.P.C. and of conspiracy are thus fully supportable on the evidence. In regard to the charge under s. 302 read with s. 34, I.P.C. also Jaitunbi (P.W. 5) has deposed that on the date of the occurrence at about 9.30 p.m. the appellant asked his nephew Latif who was sleeping on the cot outside to go inside the house because a dead body was to be kept on that cot. Thereafter it is in the evidence of Laxmibai (P.W. 7), that the appellant accompanied by two persons followed the deceased when the latter went to the *Pan* shop. About 20 minutes later the news of Mohd. Yahya's murder reached his house. From this evidence it seems highly probable that at the time of the actual murder of Mohd. Yahya the appellant was either present with the other three co-accused or was somewhere nearby. But this evidence does not seem to be enough to prove beyond reasonable doubt his presence at the spot in the company of the other accused when the murder was actually committed. For, it may be that after leaving the house he stayed away and the persons actually taking part in the murder were only the other three co-accused. We are, therefore, inclined to give to the appellant the benefit of doubt in regard to the charge under s. 302 read with s. 34, I.P.C. This would, however, be of little practical benefit to the appellant because he has already been given the lesser sentence. This appeal is, therefore, accepted only to the extent that the appellant's conviction under s. 302 read with s. 34 is set aside. In all other respects this appeal fails and is dismissed.
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R.K.P.S.

Appeal allowed in part.