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SARAVANAN AND ANR.

v

STATE OF PONDICHERRY

NOVEMBER 3, 2004

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[ARIJIT PASAYAT AND C.K. THAKKER, JJ.]

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Penal Code, 1860—Section 304 II read with section 34—Culpable homicide not amounting to murder—Conviction and sentence of three accused—However, others acquitted—High Court upheld the order—SLP of one accused dismissed—Plea of remaining accused that section 34 not applicable—On appeal held: On facts proved that criminal act committed in furtherance of common intention—Medical evidence that head injury sufficient in the ordinary course of nature to cause death—Also there was no motive to cause death—Hence section 34 rightly applied by courts below for convicting accused under section 304 II read with section 34 IPC.

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According to the prosecution, on the fateful day appellants - A3 and A4 dashed against the cycle of PW-1 and abused him. PW-1, PW-2, N and others ignored their conduct and proceeded further but the appellants chased them and prevented PW-1 from proceeding further and picked up a quarrel. A1, A2, A5 and A-6 came there. Appellants assaulted PW1 and PW2. A1 assaulted N, as a result of which N fell down on his back and sustained bleeding injuries and thereafter, died. All accused were charged for commission of offences punishable under sections 147, 323, 341, 302 read with section 149 IPC. Trial court taking note of concession by public prosecutor that there was no motive to cause death of N, observed that no offence was made out under section 302 IPC. It convicted A1, A3 and A4 for offence punishable under section 304 II read with section 34 IPC, however; acquitted A2, A5 and A6 since there was no evidence against them. High Court upheld the order. This Court dismissed the SLP filed by A-1, however; granted leave to A3 and A4. Hence the present appeal.

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Appellants - A3 and A4 contended that courts below erred in applying section 34 and holding the appellants guilty for an offence punishable under Section 304 II read with Section 34 IPC as appellants have not caused any injury to the deceased nor intended to cause his death.

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Respondent - State contended that both the courts were right in invoking Section 34 IPC. A

Dismissing the appeal, the Court

HELD: 1.1. Section 34 IPC enacts that 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 section thus lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is found in the existence of 'common intention' animating the accused leading to the doing of a criminal act in furtherance of such intention. The section is intended to meet a case in which it is difficult to distinguish between the act of individual members of a party and to prove exactly what part was played by each of them. Thus, it is an exception to the general rule of criminal jurisprudence that it is the primary responsibility of the person who actually commits a crime and only that person can be held guilty and punished in accordance with law for his individual act. B C

[894-E-G] D

1.2. From the prosecution case, as believed by trial court as well as by High Court, it is proved that it was a clear case of doing of a criminal act in furtherance of the common intention. It was also in the evidence of the doctor that the head injury was sufficient in the ordinary course of nature to cause death. Further, taking into consideration the concession by the Public Prosecutor that there was no motive to cause death of deceased, the case would not be covered by Section 300 IPC, accused Nos. 1, 3 and 4 were convicted by trial court for an offence punishable under Section 304 II read with Section 34 IPC. Therefore, trial court and High Court committed no error of law by applying Section 34 IPC and convicting and sentencing appellants for an offence under Section 304 II read with Section 34 IPC. Hence, order of trial court and High Court are upheld. [896-F-H; 897-A-B] E F

Barendra Kumar Ghosh v. Emperor, (1924) 52 IA 40: AIR (1925) PC 1; *Gurdatta Mal and Ors v. State of Uttar Pradesh*, AIR (1965) SC 257 and *Afrahim Shiekh and Ors. v. State of West Bengal*, AIR [1964] SC 1263, referred to. G

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1070 of 1999.

From the Judgment and Order dated 20.10.1998 of the Madras High Court in Crl. A. No. 688 of 1991. H

A P.S. Mishra, Manu Shankar Mishra, Tathagat H. Vardhan and T. Raja, with him for the Appellant.

V.G. Pragasam, for the Respondent .

The Judgment of the Court was delivered by

B **THAKKER, J.** The present appeal by special leave is directed against the judgment and order dated October 20, 1998 passed by the High Court of Judicature at Madras in Criminal Appeal No. 688 of 1991 confirming the order dated September 30, 1991 of the Principal Sessions Judge, Pondicherry in Sessions Case No. 12 of 1991 convicting accused Nos. 1, 3 and 4 for an offence punishable under Section 304 II read with Section 34 of the Indian Penal Code ("IPC" for short) and directing all of them to undergo rigorous imprisonment for two years.

D Briefly stated, the prosecution case was that on June 3, 1990 at about 9.50 p.m., after closing the exhibition stall PONTEX, deceased Nadamuni, PW 1 Subramanian, PW2 Thangavel, and their co-workers Ramalingam and Mohan were going on their cycles on Pandy-Villianur Road and took a turn in the round tanna at the junction of Cuddalore Road. Just at that time, Saravanan (A3) and Natarajan (A4) - appellants herein, came on a cycle from Cuddalore Road, that is, from South to North and they dashed against the cycle of **E** Ramalingam (PW1). Saravanan (A3) then abused Ramalingam (PW1) in filthy language. Notwithstanding abuses, PW1, PW2 and the deceased proceeded towards West on Pandy-Villianur Road and as they were nearing Swadeshi Cotton Mills, A3 and A4 came on the northern side of the road in the wrong direction from east to west near the main gate of Swadeshi Cotton Mills where there was a passage in the barricade for the pedestrians for crossing the road. **F** Through that passage, A3 and A4 came near the complainant party and picked up a quarrel. The accused left the cycle on the other side of the road. It was alleged that A3 fisted PW1 on his cheek and pelted a stone at him which caused injury to PW1. PW2 came to him rescue, but he was also assaulted by A4. At that time, A1, A2, A5 and A6 came to the spot and **G** A1 used violence on deceased Nadamuni. It was alleged that due to beating, deceased Nadamuni fell down on his back and sustained bleeding injuries. Seeing the same, the accused ran away. Nadamuni was shifted to hospital and within half an hour of his admission in the hospital, he died. PW14, Ravikumar, SI, Pondicherry obtained a complaint (EX.P1) from PW1 and registered a case being Crime No. 147 of 1990 under Sections 147, 341, 323, 302 read with **H** Section 149 IPC against A1 to A6. An inquest over the dead body of Nadamuni

was conducted and the body was sent for post-mortem. PW11 Dr. Balaraman A conducted the autopsy and found on the person of the deceased Nadamuni one abrasion of 1.5 c.m. x 1 c.m. over forehead near hair margin, 2 cms to the left of mid line; one contusion of 4 x 3 cms. over the inner aspect of right fore arm; one multiple small abrasion over right knee joint; one abrasion of 1 x 1 cm. over left knee joint. Transversely placed lacerated injury of 5 x 1 cm. bone deep present over back of head in the mid-line. According to his report, the B patient died of head injury. He opined that the injuries found on the dead body were ante mortem in nature and were possible if the victim fell on rough surface. He also stated that injury no.5 (head) injury was sufficient to cause death in the ordinary course of nature.

All the accused were charged for commission of offences punishable C under Sections 147, 323, 341, 302 read with Section 149 IPC. Taking note of concession by the learned Public Prosecutor, that there was no evidence against A2, A5 and A6, the trial court acquitted them. With regard to A1, A3 and A4, the trial court observed that the evidence of PW1 showed that A3 and A4 dashed against his cycle near Venkata Subba Reddiar statue, but D ignoring that conduct, PW1, PW2, deceased Nadamuni and others proceeded towards west. A3 and A4 gained entry through the wicket gate in the barricade on the southern side of the road leading east to west and prevented PW1 from proceeding further. A3 fisted on PW 1's jaw. A3 and A4 assaulted PW1 and PW2 and A1 joined them and assaulted Nadamuni on his abdomen who E fell down on the road with his face upwards and sustained bleeding injury on the back side of his head. According to PW11, Dr. Balaraman, injury No. 5 sustained by deceased Nadamuni was sufficient to cause the death in the ordinary course of nature. He further opined that the injury could have been caused by a fall on the rough surface with the face upwards. PW1 and PW2 F also stated that the deceased was assaulted by A1. The trial court observed that as there was no motive to cause death of deceased Nadamuni as conceded by the Public Prosecutor, no offence under Section 302 IPC was made out. Hence, the trial court convicted A1, A3 and A4 for the offence punishable under Section 304 II read with Section 34 IPC and sentenced them accordingly.

Finding no legal infirmity in the order passed by the trial court, the High G Court dismissed the appeal preferred by A1, A3 and A4 and confirmed the judgment of the trial court. Special Leave Petition preferred by A1 was dismissed by this Court vide order dated July 13, 1999. Leave, however, was granted to A3 and A4. The present appeal is thus by A3 and A4. H

A We have heard the learned counsel for the parties.

B Mr. P.S. Mishra, learned senior counsel for the appellants stated that before the High Court three points were urged regarding variance between medical evidence and ocular evidence; identification of accused and delay in lodging the First Information Report. He, however, expressly stated at the Bar that he does not press any of the points before this Court. It may be recalled that on October 11, 1999 when the special leave petition was placed for hearing, it was dismissed so far as petitioner No. 1 (original accused No.1) was concerned and leave was granted to appellants before us.

C The main contention by the learned counsel before us is that in the facts and circumstances of the case, both the courts below have committed an error in applying Section 34 IPC and holding the appellants guilty for an offence punishable under Section 304 II read with Section 34 IPC. Since Section 34 could not have been invoked against the appellants, the order of conviction and sentence deserves to be set aside.

D Mr. V.G. Pragasam, learner counsel for the State, on the other hand, submitted that both the courts were right in invoking Section 34 IPC and no grievance could be made against such a finding.

E Section 34 IPC enacts that 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 section thus lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is found in the existence of 'common intention' animating the accused leading to the doing of a criminal act in furtherance of such intention. The section is intended to meet a case which
F it is difficult to distinguish between the act of individual members of a party and to prove exactly what part was played by each of them. It, therefore, enacts that once it is found that a criminal act has been committed by several persons in furtherance of the common intention of all, each of such persons is liable for the criminal act as if it were done by him alone. It is thus an
G exception to the general rule of criminal jurisprudence that it is the primary responsibility of the person who actually commits a crime and only that person can be held guilty and punished in accordance with law for his individual act.

H In the leading case of *Barendra Kumar Ghosh v. Emperor*, (1924) 52 IA 40 : AIR (1925) PC 1, the appellant was charged under Section 302 read with

Section 34 IPC for murder of a Post Master. The evidence disclosed that while the Post Master was in the office counting money, three persons of whom appellant was one, fired pistols at him asking him to hand over cash. The trial Judge directed the Jury that if they were satisfied that the Post master was killed in furtherance of the common intention of all the three, the appellant could be held guilty of murder whether or not he had fired the fatal shot. The appellant was accordingly convicted. Being aggrieved by such conviction, the appellant approached the Privy Council. It was contended on behalf of the prisoner that he was outside the room. He was in the courtyard and was frightened. He did not participate in the crime and hence, he could not have been convicted for an offence punishable under Section 302 IPC by invoking Section 34 IPC. The contention was, however, negatived. It was held that once it is established that an act was committed in furtherance of the common intention of all, Section 34 could be attracted and all could be held liable irrespective of their individual act.

The Judicial Committee observed that the distinction between two types of offenders (i) principals in the first degree, that is, who actually commit the crime; and (ii) principals in the second degree, that is, who aid in commission of the crime, as found in English law has not been strictly adhered to in India. In the circumstances, according to their Lordships, Section 34 would be attracted provided that it is proved that the criminal act was done by several persons in furtherance of the common intention of all.

Dealing with the argument on behalf of the appellant that he had not fired any shot, the Judicial Committee observed that if two men tie a rope round the neck of third man and pull opposite ends of the rope till he is dead, each can be held liable for the ultimate act, i.e. death of the victim. If the contention of behalf of the appellant would be upheld that each should be held liable for his act only, each can successfully contend that the prosecution had not discharged the onus inasmuch as nothing more was proved against each of them, than an attempt to kill which might or might not have succeeded. " Thus both will be acquitted of murder, and will only be convicted of an attempt, although the victim is and remains a murdered man." Referring to Sections 33, 34, 37 and 38 IPC, it was held that even if the appellant did nothing as he stood outside the door, he could be held liable. It is to be remembered that in crimes as in other things "they also serve who only stand and wait."

The principle in *Barendra Kumar Ghosh* had been reiterated by Indian

A courts including this Court in several cases. In *Gurdatta Mal and Ors. v. State of Uttar Pradesh*, AIR (1965) SC 257, it was observed by this Court that Section 34 IPC contemplates the doing of an act by several persons in furtherance of common intention. The constructive liability under this provision would arise if the following two conditions are fulfilled:-

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- (1) There must be common intention to commit a criminal act; and
 - (2) There must be participation of all the persons in doing of such act in furtherance of that intention.

If these two ingredients are established, all the accused would be liable for the offence which has been committed.

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In *Afrachim Sheikh and Ors. v. State of West Bengal*, AIR (1964) SC 1263, this Court stated that no doubt a person is only responsible ordinarily for what he does and Section 38 IPC ensures that. But the law in Section 34 as also in Section 35 IPC declares that if the criminal act is the result of the common intention, then every person who did the criminal act with such intention would be responsible for the total offence irrespective of the share which he had in its perpetration.

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It is thus clear that the criminal act referred to in Section 34 IPC is the result of the concerted action of more than one person if the said result was reached in furtherance of the common intention and each person must be held liable for the ultimate result as if he had done it himself.

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We have, therefore, to see whether the death of deceased Nagamuni had been caused by the appellants in further of common intention to kill him. If it is so, the appellants cannot escape the liability contenting that Section 34 IPC had no application as no injury had been caused by the appellants to deceased Nagamuni or they had not intended to cause death of deceased Nagamuni. As observed hereinabove and believed by the trial court as well as by the High Court, present appellants (A3 and A4) came on cycle from Cuddalore Road and took up a quarrel with PW1, PW2 and deceased Nagamuni. Though the deceased and PW1 and PW2 ignored the assault and proceeded further, the appellants chased them towards the west on Pandy-Villianur Road and took up a quarrel again. A1 came there alongwith others and used violence and injuries were caused to deceased Nagamuni due to which he ultimately died. It was thus a clear case of doing of a criminal act in furtherance of the common intention. It was in the evidence of Dr. Balaraman

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that injury No.5 was sufficient in the ordinary course of nature to cause death.

Taking into consideration the concession by the learned Public Prosecutor that the case would not be covered by Section 300 IPC, accused Nos. 1, 3 and 4 were convicted by the trial court for an offence punishable under Section 304 II read with Section 34 IPC. In our opinion, by applying Section 34 IPC and convicting appellants for an offence under Section 304 II read with Section 34 IPC, no error of law has been committed either by the trial court or by the High Court.

We, therefore, see no reason to interfere with the order. The conviction and sentence recorded by the trial court and confirmed by the High Court are legal and in accordance with law and the appeal deserves to be dismissed.

The appeal stands dismissed accordingly. The accused, who are on bail shall surrender forthwith and serve out the remaining period of their custodial sentence.

N.J.

Appeal dismissed.