

PRAKASH
v.
STATE OF MADHYA PRADESH

DECEMBER 1, 2006

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Penal Code, 1860—s.304-II r/w s.34—Murder—Common intention — Deceased unarmed—Chased by accused armed with lathis—As deceased was running, Appellant-accused gave lathi blow on his leg—Deceased fell down whereafter 'B', a co-accused, assaulted him on the head which proved fatal— Conviction of Appellant under s.304 Part-I r/w 34—Justification of—Held, justified —Common intention on the part of Appellant is evident—Evidently lathi blow on leg was given to stop deceased from running —Deceased fell down, which facilitated 'B' to cause injuries on his person, including the fatal injury on his head.

In a murder case, it was alleged by the prosecution that all the accused persons including Appellant armed with sticks (lathis) chased the deceased who was unarmed. As the deceased was running, Appellant gave a lathi blow on his leg on which he fell down whereafter a co-accused ('B') assaulted the deceased on his head. This incident followed an earlier incident on the same day in which the deceased had allegedly assaulted 'B' with lathi.

Trial Court convicted Appellant, 'B' and another accused under Section 302/34 IPC. High Court altered the conviction of Appellant to that under Section 304-II r/w 34 IPC.

In appeal to this Court the conviction of Appellant was challenged on the following grounds viz. 1) that the eye witnesses examined were not reliable; 2) that the ocular evidence was inconsistent with medical evidence; 3) that there was inconsistency between opinions of the two doctors examined on behalf of the prosecution and 4) that in any case, the prosecution cannot be said to have proved common intention on the part of appellant to commit murder of the deceased.

A Dismissing the appeal, the Court

B HELD: 1.1. PW-2 and PW-3 are witnesses to the second occurrence whereas PW-5 and PW-6 are witnesses to both the occurrences. Both the Sessions Judge as also the High Court have relied upon the evidence of the eye-witnesses. There is no reason to differ with their opinion. [912-C-D]

C 1.2. The deceased was a teacher. PWs-5 and 6 were categorical in their statements that in the first occurrence, the deceased had hit 'B' with stick twice. They were separated by some of the prosecution witnesses. At about 5 O' clock, when the witnesses were returning from the Hat, they saw 'B' and three-four other persons chasing the deceased. The witnesses tried to pacify them. They ran to save him, but Appellant and 'B' jumped a hedge and came near the deceased. Appellant is said to have hit the deceased in his leg, whereafter 'B' had assaulted him on the head from behind. They thereafter fled away. PWs-2 and 3 also testified to the aforementioned effect. [912-E-F]

D 2.1. The injuries received by the deceased on his head caused multiple fractures. The intensity with which he was hit is, thus, self-evident. Apart from the injury on head, he suffered injury upon the back on the left side of the shoulder. There was another injury in the middle of left shoulder.

E [913-C-D]

F 2.2. All the eye-witnesses categorically stated that the first assault was made by Appellant. Apparently, he might have done so to immobilize the deceased, whereupon assault on other parts of his body could have been inflicted. Absence of any injury on the leg is not of much significance. It is also not much of significance that PW-17 (Doctor) found only one injury on the person of the deceased. He was brought to the Primary Health Centre on an emergency basis. The head injury was serious in nature. The doctor, therefore, must have given his entire attention only thereto. Only because the said witness in cross-examination stated that he must have examined all the injuries is not of much significance. Homicidal nature of death of the deceased is not dispute. The place, time and date of occurrence is also not in dispute. The fact that PW-17 treated him at the Primary Health Centre is also not in dispute. Similarly, the contents of the post-mortem report are also not in dispute. One, thus, fails to understand as to how some difference in the medical opinions of PW-17 and PW-11 (Autopsy Surgeon) would help the cause of Appellant. [913-D-G]

H

3.1. Section 34 of the Indian Penal Code provides for a vicarious liability. Before a person can be held liable for acts done by another, under the said provision, it must be established that : (i) there was common intention in the sense of a pre-arranged plan between the two; and (ii) the person sought to be so held liable had participated in some manner in the act constituting the offence. [913-H; 914-B]

3.2. The reason why the persons having common intention are deemed to be guilty is that the presence of accomplices gives encouragement, support and protection to the person actually committing an act. For attracting the provisions of Section 34 IPC, the physical presence of the accused at the place of occurrence need not be proved. He may not be present on the actual scene of occurrence. He may, however, stand guard outside the room, or ready to warn his companions. His presence at the place of occurrence in a given situation may be found to be sufficient. He must participate in the commission of the crime, but the same does not mean that some overt act must be attributed on his part. His participation may be in one way or the other at the time crime is actually committed. [914-C, D]

Shiv Prasad Chuni Lal Jain v. State of Maharashtra AIR (1965) SC 264, relied on.

4.1. Proof of participation by acceptable evidence in certain circumstances would lead to a conclusion that the accused had a common intention to commit the offence. Presence or absence of community of interests may not be of much significance. Each case, however, has to be considered on its own merit. Facts of each case may have to be dealt with differently. Common intention may develop on the spot. Although a pre-arranged plan and meeting of minds is one of the pre-requisites to infer common intention, a prior concert, however, can be inferred from the conduct of the accused. The role played by him, the injuries inflicted and the mode and manner in which the same was done as also the conduct of all the accused are required to be taken into consideration for arriving at a finding as to whether the accused shared a common intention with others or not. Common intention may have to be inferred also from other relevant circumstances of the case. The totality of the circumstances must be taken into consideration in arriving at such a conclusion. [914-E-G]

4.2. Common intention on the part of Appellant herein is evident.

- A** All the accused were armed with lathis. The deceased was unarmed. He was taken by surprise. He started running, but was chased. The witnesses intervened. They tried to pacify Appellant and the co-accused. They did not pay any heed thereto. They for the purpose of committing the assault even jumped over a hedge. As the deceased was running, evidently a blow on leg was given so as to stop him from doing so. Evidently he fell down,
- B** which facilitated the other accused to cause injuries on his person, including the fatal injury on his head. The circumstances existing herein categorically establish formation of common intention amongst the accused. The appeal is, therefore, dismissed, particularly when Appellant has not been convicted of an offence punishable under Section 302 read with Section 34 IPC, but under Section 304 Part-I of IPC. [917-F-H; 918-A]
- C**

Rana Partap and Others v. State of Haryana, [1983] 3 SCC 327; *Smt. Tripta v. State of Haryana*, AIR (1993) SC 948 and *Ramashish Yadav and Ors. v. State of Bihar*, AIR (1999) SC 3830, distinguished.

- D** *Preetam Singh and Ors. v. State of Rajasthan*, [2003] 12 SCC 594; *Sukumar Roy v. State of West Bengal* [2006] 10 SCALE 512; *Ramjee Rai and Ors v. State of Bihar*, [2006] 8 SCALE 440; *Surendra & Anr v. State of Maharashtra*, [2006] 8 SCALE 469; *Malkhan Singh and Anr. v. State of Uttar Pradesh*, [1975] 3 SCC 311; *Balram Singh and Anr. v. State of Punjab* [2003]
- E** 11 SCC 286; *Ramesh Singh alias Photti v. State of A.P.* [2004] 11 SCC 305; *Ajay Sharma v. State of Rajasthan*, [1999] 1 SCC 174 and *Mithu Singh v. State of Punjab* [2001] 4 SCC 193, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 720 of 2006.

- F** From the final Judgment and Order dated 25-3-2005 of High Court of Madhya Pradesh, Indore Bench, Indore in Criminal Appeal No. 157 of 1997.

Rakesh Kumar, Naveen Kumar, Ranjeet Kumar and Rameshwar Prasad Goyal for the Appellant.

- G** Vishwajit Singh, Philemon Nongbri and Ms. Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

- H** S.B. SINHA, J. Appellant herein has questioned a judgment of

conviction and sentence dated 25.03.2005 passed by the High Court of Madhya Pradesh, Indore Bench, Indore in Criminal Appeal No.157 of 1997, wherein Appellant was found guilty for commission of an offence punishable under Section 304 Part-I read with Section 34 of the Indian Penal Code (IPC) and sentenced to suffer rigorous imprisonment for eight years. The High Court by reason of the said judgment, however, set aside the conviction and sentence of Appellant under Section 302 read with Section 34 IPC.

The incident in question took place on 30.10.1991. At about 01.00 p.m. Badrilal, co-accused, Appellant and Ramprasad (deceased), quarreled on account of damage to the crops by cattles. Allegedly, Badrilal was assaulted by Ramprasad. On the same day at about 05.30 p.m. the deceased was going to the market. When he came near a gate known as 'badi phatak', Appellant together with the said Badrilal and Dinesh chased him with lathis. They were asked not to do so by the witnesses. Despite the same, they did not desist from so doing. Appellant gave him a lathi blow on his leg. Badrilal assaulted him on the parietal region of the deceased. Thereafter, the accused persons along with four others ran away from the spot.

Ramprasad was removed to the Primary Health Centre. He was examined by Dr. K.K. Sharma (PW-17). He thereafter succumbed to the injuries, whereupon post-mortem on his dead body was conducted by Dr. Ravinder Choudhry (PW11). Death was opined to have occurred on account of multiple fractures of parietal bone of the deceased.

The prosecution examined 19 witnesses before the learned Sessions Judge. The defence also examined 3 witnesses. While others were acquitted, Appellant, Badrilal and Dinesh were convicted under Section 302/34 IPC. Dinesh admittedly has expired. Appeal preferred by Badrilal and Appellant, as noticed hereinbefore, have been disposed of by the High Court by reason of the impugned judgment.

The learned counsel appearing on behalf of Appellant, would submit :

- (1) Eye-witnesses examined on behalf of Appellant are not reliable;
- (2) Ocular evidence is inconsistent with medical evidence;
- (3) There is inconsistency between the opinions of the two doctors examined on behalf of the prosecution, namely, Dr. K.K. Sharma (PW-17) and Dr. Ravinder Choudhry (PW-11); and
- (4) In any view of the matter, the prosecution cannot be said to have

A proved common intention on the part of Appellant herein to commit murder of deceased Ram Prasad.

B We have noticed hereinbefore that on the same day there had been two incidences. In the first one, Badrilal was assaulted by the deceased and in the second one, the deceased was assaulted upon having been chased by the accused persons.

C Hiralal (PW-2), and Mangilal (PW-3) are witnesses to the second occurrence whereas Laxminarayan (PW-5) and Rameshchandra (PW-6) are witnesses to both the occurrences. Apart from the said witnesses, the prosecution relied also upon the evidence of Bhimsingh (PW-8).

D Both the learned Sessions Judge as also the High Court have relied upon the evidence of the eye-witnesses. We have been taken through the depositions of the said witnesses. We do not see any reason to differ with their opinion. We would, however, deal with the prosecution evidence and the materials brought on records while adverting to the question of forming common intention of the accused.

E The deceased, Ramprasad was a teacher. PWs-5 and 6 were categorical in their statements that in the first occurrence, the deceased had hit Badrilal with stick twice. They were separated by some of the prosecution witnesses. At about 5 O' clock, when the witnesses were returning from the Hat, they saw Badrilal, Dinesh and two-three other persons chasing the deceased. The witnesses tried to pacify them. They ran to save him, but Prakash and Badrilal jumped a hedge and came near the deceased. Appellant is said to have hit the deceased in his leg, whereafter Badrilal had assaulted him on the head from behind. They thereafter fled away. PWs-2 and 3 also testified to the aforementioned effect. PW-2 was the first person to bring water from a shop and gave it to the deceased after he had fallen down.

F PW-17 in his deposition stated that upon examining the deceased he had noticed the following injuries on his person :

G "i. A bruise 2 x 2 inches upon frontal portion of Head. The said injury would have been caused by and blunt but hard material. Considering the seriousness of the injury, I referred him to M.Y. Hospital, Indore. The injury had been received within 6 hours."

H The Autopsy Surgeon, Dr. Ravinder Choudhry (PW-11), on the other

hand, found the following injuries on the person of the deceased :

- i. A contusion hembresion 2.4x2 cm. upon left parietal region of the head, which colour was reddish brown.
- ii. A contusion 3.1 x 2 cm. upon the back on the left side of the shoulder.
- iii. A contusion of 3.8 x 2 cm. in the middle of left shoulder (front side), which colour was reddish brown.
- iv. Haematoma was present upon the Head.”

The injuries received by the deceased on his head caused multiple fractures. The intensity with which he was hit is, thus, self-evident. Apart from the injury on head, he suffered injury upon the back on the left side of the shoulder. There was another injury in the middle of left shoulder. Submission of the learned counsel is two-fold : (i) no injury on the leg was found; and (ii) the injuries found by PW-11 and PW-17 are somewhat inconsistent.

All the eye-witnesses categorically stated that the first assault was made by Appellant. Apparently, he might have done so to immobilize the deceased, whereupon assault on other parts of his body could have been inflicted.

Absence of any injury on the leg, in our opinion, is not of much significance. It is also not much of significance that PW-17 found only one injury on the person of the deceased. He was brought to the Primary Health Centre on an emergency basis. The head injury was serious in nature. The doctor, therefore, must have given his entire attention only thereto.

Only because the said witness in cross-examination stated that he must have examined all the injuries, in our opinion, is not of much significance. Homicidal nature of death of the deceased is not dispute. The place, time and date of occurrence is also not in dispute. The fact that PW-17 treated him at the Primary Health Centre is also not in dispute. Similarly, the contents of the post-mortem report are also not in dispute. We, thus, fail to understand as to how some difference in the the medical opinions of PW-17 and PW-11 would help the cause of Appellant.

Section 34 of the Indian Penal Code provides for a vicarious liability. It reads as under :

A “S. 34. When a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for that act in the same manner as it were done by him alone.”

B Before a person can be held liable for acts done by another, under the said provision, it must be established that : (i) there was common intention in the sense of a pre-arranged plan between the two; and (ii) the person sought to be so held liable had participated in some manner in the act constituting the offence.

C The reason why the persons having common intention are deemed to be guilty is that the presence of accomplices gives encouragement, support and protection to the person actually committing an act. For attracting the provisions of Section 34 IPC, the physical presence of the accused at the place of occurrence need not be proved. He may not be present on the actual scene of occurrence. He may, however, stand guard outside the room, or ready to warn his companions. His presence at the place of occurrence in a given situation may be found to be sufficient. He must participate in the commission of the crime, but the same does not mean that some overt act must be attributed on his part. His participation may be in one way or the other at the time crime is actually committed. [See *Shiv Prasad Chuni Lal Jain v. State of Maharashtra*, AIR (1965) SC 264].

E Proof of participation by acceptable evidence in certain circumstances would lead to a conclusion that the accused had a common intention to commit the offence. Presence or absence of community of interests may not of much significance. Each case, however, has to be considered on its own merit. Facts of each case may have to be dealt with differently. Common intention may develop on the spot. Although a pre-arranged plan and meeting of minds is one of the pre-requisites to infer common intention, a prior concert, however, can be inferred from the conduct of the accused. The role played by him, the injuries inflicted and the mode and manner in which the same was done as also the conduct of all the accused are required to be taken into consideration for arriving at a finding as to whether the accused shared a common intention with others or not. Common intention may have to be inferred also from other relevant circumstances of the case. The totality of the circumstances must be taken into consideration in arriving at such a conclusion

H In *Preetam Singh and Ors. v. State of Rajasthan*, [2003] 12 SCC 594,

a Bench of this Court in the fact of the case opined that the appellants therein developed a common intention, which was clearly evident from their conduct therein. They might not have intended to kill the deceased, but definitely intended to silence him by inflicting injuries. This Court held that the nature of injuries inflicted by two of them may be a circumstance to be taken into account to infer common intention to kill the deceased. But having regard to the fact situation involved therein, held that common intention was actually to commit an offence punishable under Section 304 Part I IPC.

In *Sukumar Roy v. State of West Bengal*, [2006] 10 SCALE 512, one of us (Katju, J.), opined :

“From the evidence it is clear that the deceased and his men were unarmed and there was no provocation on their part. It also seems that the deceased and the appellant are co-sharer in the land being plot No.743. There is no evidence on record to show that the deceased and his men assaulted the appellant and his family members. Hence, in our opinion the conviction under Section 304 Part I read with Section 34 IPC was fully justified.”

[See also *Ramjee Rai and Ors. v. State of Bihar*, (2006) 8 SCALE 440; and *Surendra & Anr. v. State of Maharashtra*, (2006) 8 SCALE 469]...

Reliance has been placed by the learned counsel on *Malkhan Singh and Anr. v. State of Uttar Pradesh*, [1975] 3 SCC 311, wherein the accused who were two in number were riding on a cycle, but only one of them fired a shot. This Court held that the accused was only an innocent companion and the fact that he had accompanied the principal accused in running away after the incident was found to be immaterial.

Reliance placed on *Rana Partap and Ors. v. State of Haryana*, [1983] 3 SCC 327 is misplaced, as on the facts involving therein, common intention to commit murder was found to have not been established. However, common intention to cause grievous hurt was proved. The said opinion was arrived at although the circumstances of the case clearly established the existence of the common intention, but the evidence was not clear; and that the appellants therein had not said anything to indicate that they intended the deceased to be done away. Such a opinion was arrived at with “some hesitation”, holding:

“.....It is one of those borderline cases where one may with equal justification infer that the common intention was to commit

A murder or to cause grievous injury.....”

In *Smt. Tripta v. State of Haryana*, AIR (1993) SC 948, whereupon also reliance was placed by the learned counsel for the appellant, the deceased died after fifteen days. Only a lacerated wound on the left side of scalp was found. Appellant therein who was a lady went to the deceased to question as to why he had transferred his lands. It was held that the reply of the deceased must have irked her, and the main accused had started assaulting the deceased. Having regard to the role played by the lady as also keeping in view the fact that the deceased died after fifteen days, it was held that no case under Section 302/34 IPC was made out against her particularly in view of the fact that she had no role to play in causing injuries to other persons present there, although the main accused had assaulted them.

Reliance placed on *Ramashish Yadav and Ors. v. State of Bihar*, AIR (1999) SC 3830, in our opinion is again not apposite. Common intention was not found to have been formed having regard to the fact situation obtaining therein. We do not think that the said decision has any application in the instant case.

In *Balram Singh and Another v. State of Punjab*, [2003] 11 SCC 286, distinguishing *Ramashish Yadav* (supra), this Court opined that although the appellants therein did not assault the deceased, the fact that they were armed and the manner in which they prevented PWs 1 and 2 from protecting their father by causing them grievous injuries also showed that the attack on PWs 1 and 2 was aimed at ensuring that the deceased was done away with, and the deceased did not get sufficient protection and on that premise Section 34 of IPC was invoked.

In *Ramesh Singh alias Photti v. State of A.P.*, [2004] 11 SCC 305, referring to *Ramashish Yadav* (supra) and two other decisions, namely, *Ajay Sharma v. State of Rajasthan*, [1999] 1 SCC 174 and *Mithu Singh v. State of Punjab*, [2001] 4 SCC 193, it was held :

“A reading of the above judgments relied upon by the learned counsel for the appellants does indicate that this Court in the said cases held that certain acts as found in those cases did not indicate the sharing of common intention. But we have to bear in mind that the facts appreciated in the above judgments and inference drawn have been so done by the courts not in isolation but on the totality of the circumstances found in those cases. The totality of circumstances

could hardly be ever similar in all cases. Therefore, unless and until the facts and circumstances in a cited case is in *pari materia* in all respects with the facts and circumstances of the case in hand, it will not be proper to treat an earlier case as a precedent to arrive at a definite conclusion. This is clear from some judgments of this Court where this Court has taken a different view from the earlier cases, though basic facts look similar in the latter case. For example, if we notice the judgment relied upon by the learned counsel for the respondent i.e. the case of *Hamlet alias Sasi v. State of Kerala* (supra), this Court held that the fact that one accused held the deceased by his waist and toppled him down while the other accused attacked him with iron rods and oars was held to be sufficient to base a conviction with the aid of Section 34 IPC. The fact of holding the victim is similar in the cases of *Vencil Pushpraj* and *Hamlet alias Sasi* (supra) but the conclusions reached by this Court differ because the circumstances of the two cases were different. In *Nandu Rastogi alias Nandji Rustogi and Anr. v. State of Bihar* (supra) this Court held that to attract Section 34 IPC it is not necessary that each one of the accused must assault the deceased. It was held in that case that it was sufficient if it is shown that they had shared the common intention to commit the offence and in furtherance thereof each one of them played his assigned role. On that principle, this Court held that the role played by one of the accused in preventing the witnesses from going to the rescue of the deceased indicated that they also shared the common intention of the other accused who actually caused the fatal injury.”

Common intention on the part of Appellant herein is evident. All the accused armed with lathis. The deceased was unarmed. He was taken by surprise. He started running, but was chased. The witnesses intervened. They tried to pacify Appellant and the co-accused. They did not pay any heed thereto. They for the purpose of committing the assault even jumped over a hedge. As the deceased was running, evidently a blow on leg was given so as to stop him from doing so. Evidently he fell down, which facilitated the other accused to cause injuries on his person, including the fatal injury on his head.

We, therefore, are of the opinion that the circumstances existing herein categorically establish formation of common intention amongst the accused.

A The appeal is, therefore, dismissed, particularly when Appellant has not been convicted of an offence punishable under Section 302 read with Section 34 IPC, but under Section 304 Part-I of IPC.

B.B.B.

Appeal dismissed.

B