

A RAJESH KUMAR
v.
STATE OF H.P.
(Criminal Appeal No.639 of 2001)

OCTOBER 3, 2008

B [DR. ARIJIT PASAYAT AND DR. MUKUNDKAM
SHARMA, JJ.]

Penal Code, 1860 – s.302 r/w s.34 and s.326:

C *Common intention – One accused assaulted deceased*
on head with 'darat' (a sharp edged tool) which caused incised
injury – Appellant, the other accused, assaulted deceased on
non-vital parts of body with 'danda' (thick stick) – Incised injury
on head proved fatal – Conviction of Appellant by Courts be-
D *low u/s.302 r/w s.34 with life imprisonment – Propriety of – Held:*
Not proper – Only the injuries on non-vital parts attributed to
Appellant – Besides, after a PW snatched away the 'danda'
from Appellant and threw it, Appellant did not pick it up and
instead ran away from the place of occurrence – s.34 thus had
E *no application so far as s.302 was concerned – Appellant li-*
able to be convicted on basis of injuries inflicted by him –
Appropriate conviction would thus be under s.326 – Custodial
sentence of 3 years would meet the ends of justice.

F *Penal Code, 1860 – s.34 – Applicability of – Discussed.*

Evidence – Witness – Related witness – Appreciation of
– Held: No proposition in law that relatives are to be treated as
untruthful witnesses – Reason to be shown when a plea of par-
tiality is raised to show that the witnesses had reason to shield
G *actual culprit and falsely implicate the accused.*

**According to the prosecution, Appellant and another
accused 'S' assaulted the deceased resulting in his death.
While 'S' hit deceased on his head with a 'darat' (a sharp
edged tool); Appellant, the other accused, assaulted de-**

ceased on other parts of his body with a 'danda'. The deceased received an incised injury on his scalp and five injuries on non-vital parts of his body. The incised injury proved fatal.

The Trial Court held that common intention to cause death of the deceased was clearly established and accordingly convicted appellant and the other accused under ss.302 r/w s.34 IPC and sentenced them to life imprisonment. Hence the present appeal.

Partly allowing the appeal, the Court

HELD:1.1. S.34 IPC has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under s.34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s.34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. [Para 6] [242,G-H; 243,A-C]

1.2. The existence of a common intention amongst

A the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been
B actuated by one and the same common intention in order to attract the provision. [Para 6] [243,D-E]

1.3. S. 34 IPC does not say “the common intention of all”, nor does it say “and intention common to all”. Under the provisions of Section 34 the essence of the liability is
C to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s.34, when an accused is convicted under s.302 read with s. 34, in law it means
D that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of
E the common intention of all or to prove exactly what part was taken by each of them. [Para 9] [243,H; 244,A-C]

1.4. S.34 is applicable even if no injury has been caused by the particular accused himself. For applying s.34 it is not necessary to show some overt act on the
F part of the accused. [Para 9] [244,C-D]

1.5. In the present case, appellant was carrying a lathi and had assaulted on non-vital parts of the body. The Doctor had noticed five injuries except the incised wound on the scalp which are attributable to the assault done by
G danda on non vital parts. The Doctor’s evidence was to the effect that the incised injury was the fatal one. Though the aforesaid aspect cannot always be the determinative of question as to whether s.34 IPC has application, yet in
H the present case it is found that PW 14 took away the lathi

from the appellant and threw it out. Thereafter the only role played according to the prosecution witnesses is that he was running. He did not pick up the lathi which had been thrown up by PW 14 and the prosecution witnesses have accepted that he did nothing thereafter except running. In that view of the matter there is substance in the plea of the appellant that s.34 has no application so far as s.302 is concerned. [Para 5] [242.D-G]

Ashok Kumar v. State of Punjab AIR (1977) SC 109; *Ch. Pulla Reddy and Ors. v. State of Andhra Pradesh* AIR (1993) SC 1899; *Anil Sharma and Others v. State of Jharkhand* (2004) 5 SCC 679; *Harbans Kaur v. State of Haryana* (2005) 9 SCC 195 and *Amit Singh Bhikamsingh Thakur v. State of Maharashtra* (2007) 2 SCC 310 – relied on.

Mahbub Shah v. Emperor AIR (1945) Privy Council 118 – referred to.

2. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused. No evidence has been led in this regard. [Para 11] [244,E-F]

3. The appellant has to be convicted on the basis of injuries inflicted by him. Accordingly the appropriate conviction would be under s.326 IPC and custodial sentence of three years would meet the ends of justice. [Para 12] [244,F-G]

CASE LAW REFERENCE

AIR (1977) SC 109	relied on	Para 6	
AIR (1945) Privy Council 118	referred to	Para 8	G
AIR (1993) SC 1899	relied on	Para 9	
(2004) 5 SCC 679	relied on	Para 10	
(2005) 9 SCC 195	relied on	Para 10	
(2007) 2 SCC 310	relied on	Para 10	H

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 639 of 2001

From the final Judgment and Order dated 14.12.2000 of
the High Court of Himachal Pradesh, Shimla in Criminal Ap-
B peal No. 415 of 1998

Shiva Pujan Singh for the Appellant.

J.S. Attri and Naresh K. Sharma for the Respondent.

The Judgment of the Court was delivered by

C **DR. ARIJIT PASAYAT, J.** 1. Challenge in this appeal is to
the judgment of the Division Bench of the Himachal Pradesh
High Court holding the appellant and one Surjit Singh guilty of
offence punishable under Section 302 read with Section 34 of
the Indian Penal Code, 1860 (in short the 'IPC') and each sen-
D tenced to imprisonment for life and to pay a fine of Rs.5,000/-
with default stipulation. By order dated 19.2.2001, the Special
Leave Petition was dismissed qua Surjit Singh.

2. Prosecution version leading to the trial is as follows:

E Both the accused are brothers. They and Ravinder Kumar
(hereinafter referred to as the 'deceased') were the residents
of Village Nangal Jarialan, Tehsil Amb District Una. On
17.01.1998, the deceased had gone to Nangal Jarialan mar-
ket for purchasing some articles where he met Adesh Kumar
F (PW-14) and Raghubir Singh (PW-15). PW-14 told them that
he wanted to go to some secluded place away from the market
for excreting. PW-15 and deceased accompanied PW-14 on
his scooter who drove it towards the rivulet. He stopped the
scooter at the road side and went towards the shrubs in the
G nallah. The deceased and PW-15 remained standing near the
scooter waiting for the arrival of PW-14 who returned after some
time. In the meanwhile, both the accused happened to pass
through the place on a tractor bearing registration No.PB-07-
D-6173. They saw the deceased standing on the road side.
H They stopped the tractor and pounced upon the deceased by

wielding a 'Drat' and 'Danda'. Surjit Singh hit the deceased on the head with the 'Drat' and Rajesh Kumar assaulted with 'Danda' and gave blows on other parts of the body. The deceased started wailing whereas PWs.14 and 15 were bewildered. PW-14 was able to over power Rajesh Kumar and in the process the deceased managed to get himself freed from the clutches of the accused. He ran towards the field in order to save his life with bleeding injuries. But he could manage to go up to a distance of few feet, and fell down and became unconscious.

Both the accused fled away from the scene of the occurrence on the tractor before other persons could reach at the scene of occurrence. On hearing about the incident Shri Harnam Singh (PW-16), President, Gram Panchayat, Nangal Jarialan, came at the spot with numerous other persons. PW-14 informed the police at Police Station, Gagret about the incident. He also brought Dr. Baldev (PW-20) a private medical practitioner from the village who examined the deceased and advised that the deceased be immediately taken to the hospital. The deceased was thereafter taken to Civil Hospital, Gagret. The mother of the deceased Smt. Jamna Devi (PW-1) after being informed about the incident, reached at Civil Hospital, Gagret at about mid night. The deceased succumbed to his injuries on the same day. Dr. Bhardwaj (PW-11) medically examined the deceased on the same day at about 8.40 P.M., in Primary Health Centre, Gagret. He noticed that the deceased was unconscious and was not responding. He found the following injuries on the person of the deceased;

1. An incised wound on the scalp present on the occipital and parietal area 5 cms. Long. The margins were regular and smooth. There was no fresh bleeding oozing out of the wound. This wound was 2cms. Deep.
2. Bruise mark 2 cm x 2 cm present on the mastoid area of right pinna.

- A 3. Lacerated wound on left hand between the index finger and fourth finger. It was not bleeding.
4. Two lacerated injuries on the right leg. One injury was 1 cm x 1/2 cm with irregular margins. It was irregular margins. It was present 8 cms below patella of right leg. Second injury was 1 cm x 2 cm with irregular margins present 6 cms below the first one.
- B 5. Lacerated wound 2cms. long skin deep present on the left forearm on the dorsal aspect of the hand.
- C Dr. N.K.Bhardwaj advised shifting of the deceased to District Hospital, Una for X-ray and further treatment. He had stitched the wound on the head of the deceased and due to stitching the margins of the wound had become irregular. He issued medico legal certificate Ex. PF/1. According to the opinion of Dr.
- D Bhardwaj the injury on the head of the deceased was sufficient to cause his death in ordinary course of the nature. Dr. Bhardwaj also opined that the injury on the head of the deceased could be caused by 'Drat' and other injuries found on the body of the deceased could have been inflicted by bamboo stick.
- E Shri Kailash Chand (PW-22) who at the relevant time was posted as Station House Officer, Police Station, Gagret recorded the information received by him from PW-11 Dr. N.K. Bhardwaj in daily diary register, a copy of which was marked Ext. PQ. He immediately rushed to the hospital and recorded
- F the statement (Ext. PJ) of PW-14 which was sent to Police Station, Gagret for registration of the case, on the basis of which First Information Report No.12/98 came to be registered. The F.I.R. later on transferred to Police Station, Amb marked (Ext. PT) because during the investigation the place where the occurrence took place was found within the jurisdiction of Police
- G Station, Amb. The post mortem of the dead body of Ravinder Kumar was conducted by Dr. S.P. Kanwar (PW13), Medical Officer, District Hospital, Una who found the following injuries on his body;

H

1. There was a lacerated wound 6 cm x 2 cm x bone deep on the vault of the skull. It was on the occipito-parietal region transversely placed. It was situated 6" from the left pinna and 5 1/2" from the right pinna and 9 1/2" posterior to the root of the nose. Underlying bone of the skull had sustained depressed fracture of the wound. A B
2. There was contused lacerated wound 2 cm x 1 cm x 1.5 cm on anterior aspect of the right leg, 6" above the medial malleolus.
3. An abrasion 3 cm x 1 cm on the middle of the right leg on the antero medial aspect. It was reddish brown in colour. C
4. A contused lacerated wound 3 cm x 2 cm x 1 cm on the cleft between the 4th & 5th fingers of the left hand. D
5. There were multiple abrasions on the medial aspect of the left fore-arms and wrist, which were reddish in colour. E
6. There was contused lacerated wound 1cm x 0.5 cm x 0.5 cm. on the proximal 1/3rd of the right forearm on the medial aspect.

After investigation charge sheet was placed. Since the accused persons denied their involvement in the offence, trial was held. Twenty three witnesses were produced to further the prosecution version. The trial court held that the evidence of the eye witnesses, more particularly PWs 14 & 15, clearly established that common intention of the accused persons was to cause death of the deceased. Accordingly conviction was recorded. Before the High Court it was submitted that the evidence of PWs 14 & 15 do not inspire confidence. In any event so far as the present appellant is concerned Section 34 IPC has no application. The High Court did not find any substance in the aforesaid stand and dismissed the appeal. Both Surjit H

A Singh and the present appellant filed special leave petition. Special Leave petition was dismissed so far as the Surjit Singh is concerned, as noted above. f

B 3. In support of the appeal Mr. Shiva Pujan Singh learned counsel for the appellant submitted that the prosecution version even if accepted in its totality does not make out a case for application of Section 302 IPC read with Section 34 IPC.

C 4. Learned counsel for the State on the other hand submitted that the conduct of the accused before and after the occurrence clearly shows the existence of common intention for the murder of the deceased. h

D 5. It is to be noted that according to the prosecution case Surjit Singh was armed with drat and appellant with danda and Surjit Singh hit the deceased with the drat. So far as the appellant is concerned he was carrying a lathi and had assaulted on non-vital parts of the body. The Doctor had noticed five injuries except the incised wound on the scalp which are attributable to the assault done by danda on non vital parts. The Doctor's evidence was to the effect that the injury No. 1 was the fatal one. y

E Though the aforesaid aspect cannot always be the determinative of question as to whether Section 34 IPC has application, yet in the present case we find that PW 14 took away the lathi from the appellant and threw it out. Thereafter the only role played according to the prosecution witnesses is that he was running.

F He did not pick up the lathi which had been thrown up by PW 14 and the prosecution witnesses have accepted that he did nothing thereafter except running. In that view of the matter there is substance in the plea of learned counsel for the appellant that Section 34 has no application so far as Section 302 is concerned. +

G

H 6. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by ~

another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar v. State of Punjab* (AIR 1977 SC 109), the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

7. As it originally stood, Section 34 was in the following terms:

“When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone.”

8. In 1870, it was amended by the insertion of the words “in furtherance of the common intention of all” after the word “persons” and before the word “each”, so as to make the object of Section 34 clear. This position was noted in *Mahbub Shah v. Emperor* (AIR 1945 Privy Council 118).

9. The Section does not say “the common intention of all”, nor does it say “and intention common to all”. Under the provi-

A sions of Section 34 the essence of the liability is to be found in
the existence of a common intention animating the accused lead-
ing to the doing of a criminal act in furtherance of such intention.
As a result of the application of principles enunciated in Sec-
tion 34, when an accused is convicted under Section 302 read
B with Section 34, in law it means that the accused is liable for the
act which caused death of the deceased in the same manner
as if it was done by him alone. The provision is intended to
meet a case in which it may be difficult to distinguish between
acts of individual members of a party who act in furtherance of
C the common intention of all or to prove exactly what part was
taken by each of them. As was observed in *Ch. Pulla Reddy
and Ors. v. State of Andhra Pradesh* (AIR 1993 SC 1899), Sec-
tion 34 is applicable even if no injury has been caused by the
particular accused himself. For applying Section 34 it is not
D necessary to show some overt act on the part of the accused.

10. The above position was highlighted recently in *Anil
Sharma and Others v. State of Jharkhand* [2004 (5) SCC 679],
in *Harbans Kaur v. State of Haryana* [2005(9) SCC 195] and
Amit Singh Bhikamsingh Thakur v. State of Maharashtra
E [2007(2) SCC 310].

11. There is no proposition in law that relatives are to be
treated as untruthful witnesses. On the contrary, reason has to
be shown when a plea of partiality is raised to show that the
witnesses had reason to shield actual culprit and falsely impli-
F cate the accused. No evidence has been led in this regard.

12. The appellant has to be convicted on the basis of inju-
ries inflicted by him. According to us the appropriate conviction
would be under Section 326 IPC and custodial sentence of three
G years would meet the ends of justice.

13. The appellant who has been released on bail shall sur-
render to custody forthwith to serve remainder of sentence, if any.

14. The appeal is allowed to the aforesaid extent.

H B.B.B.

Appeal partly allowed.