

A DAYA SHANKAR
v.
STATE OF M.P.
(Criminal Appeal No. 105 of 2009)

B JANUARY 20, 2009

[DR. ARIJIT PASAYAT AND ASOK KUMAR
GANGULY, JJ.]

C *Penal Code, 1860:*

C s.302 r/w s.34 – Conviction under – Applicability of s.34
challenged – Held: No overt act attributed to appellant – Mere
fact that he was in company of accused who were armed not
D sufficient to attract s.34 – Appellant was not armed and had
no animosity with deceased – Stand that he pulled the legs
of deceased was not established – Appellant not guilty by
application of s.34.

s.34 – Common intention – Nature and applicability of.

E Prosecution case was that the deceased had eloped
with the sister of A-2 and performed marriage with her.
They started living in some other village and returned to
his village a month before the incident. On the fateful day,
when deceased went to the fields to answer to call of
F nature, A-2 armed with sword, A-3 armed with axe along
with A-1 (appellant) and A-4 reached there. Appellant and
A-4 pulled the legs of deceased and threw him on the
ground. Deceased fell on the crops in the field. A-2
G assaulted the deceased by sword on the chest and then
placed his sword on the chest of the deceased. On
account of beatings, the deceased died. The Trial Court
convicted the accused persons under s.302 r. w. s.34 IPC.

H Before the High Court, the basic stand was that the
prosecution failed to prove common intention on the part

of the appellant and therefore, s.34 IPC had no application; and that merely because the appellant had accompanied other accused persons, that was not sufficient to warrant presumption of common intention.

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. 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. [Para 7] [391-B-G]

Ashok Kumar v. State of Punjab AIR 1977 SC 109, relied

A on.

1.2. The section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of s.34 the essence of the liability is 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 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 the common intention of all or to prove exactly what part was taken by each of them. For applying s.34 it is not necessary to show some overt act on the part of the accused. [Para 8] [391-H; 392-A-D]

Ch.Pulla Reddy and Ors. v. State of Andhra Pradesh AIR 1993 SC 1899, relied on.

2. The evidence of PWs 2 and 3 did not attribute any overt act to the appellant. The mere fact that he was in the company of the accused who were armed would not be sufficient to attract s.34 IPC. It is undisputed that appellant was not armed and he had no animosity with the deceased. This position is also accepted by the prosecution. Additionally, the stand that he pulled the leg of the deceased has not been established. In the peculiar facts of the case, therefore, it would be appropriate that the appellant cannot be held guilty by application of s.34 IPC. [Paras 9 and 10] [393-E-G]

Case Law Reference:

AIR 1977 SC 109

relied on

Para 7

H

AIR 1993 SC 1899**relied on****Para 8****A**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 105 of 2009.

From the final Judgment and Order dated 6.7.2006 of the
High Court of Madhya Pradesh at Jabalpur in Crl. Appeal No.
639 of 1993.

Mulkh Raj Vij for the Appellant.

Siddhartha Dave, Jemtiben and Vibha Datta Makhija, for
the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division
Bench of the Madhya Pradesh High Court upholding the
conviction of the appellant for offence punishable under Section
302 read with Section 34 of the Indian Penal Code, 1860 (in
short the 'IPC') as was awarded by learned Additional Sessions
Judge, Panna, in Sessions Trial No.15/1992.

3. Prosecution version as unfolded during trial is as
follows:

On 30th November, 1991 at about 5.00 p.m. Ram Kishore
(hereinafter referred to as the 'deceased') was murdered in an
agricultural field. First Information Report was lodged by Manik
Lal at Police Station, Pawal in the evening at about 7.00 p.m.
Offence was registered as Crime No.124/91 under Section
302/34 IPC. Deceased had eloped with Lalli, sister of
Ramcharan (A-2) and both of them had performed court
marriage. The court marriage was registered and Lalli was
living with Ramkishore. The appellant was having enmity with
deceased on account of aforesaid incident. Deceased after
eloping with Lalli was living in some other village and returned

A to his village a month before the incident. Ramkishore had gone to answer the call of nature in the evening on 30.11.1991 at about 4.30 p.m. towards the agricultural field of Gadka. Around 5 p.m. Phulla (A-3) armed with axe, Ramcharan (A-2) armed with sword alongwith Dayashankar (A-1) and Munni Lal (A-4) went to the field of Gadaka. Munni Lal and Dayashankar were barehanded. Phulla gave axe blow on the head of deceased. Thereafter, Dayashankar and Munnilal, the co-accused pulled the legs of deceased and threw him on the ground. Ram Kishore fell on the crops in the field. Ramcharan assaulted the deceased by sword on the chest. Then he placed his sword on the chest of the deceased. On account of beating he died. Police after receiving information of the commission of crime carried out the investigation, arrested the accused persons and filed the challan on 3.1.1992 before the Court of Judicial Magistrate. Case was committed to the Court of Sessions Judge. Trial Court framed charges under Section 302/34 IPC against the accused persons. After recording the evidence the trial Court convicted the accused persons for offence under Sections 302 read with Section 34 IPC and sentenced them as afore-noted.

E Before the High Court the basic stand was that the prosecution failed to prove common intention on the part of the appellants and, therefore, Section 34 had no application. The individual act of the appellant should have been considered. F Merely because the appellant had accompanied other accused persons, that cannot be sufficient to warrant presumption of common intention.

G 4. Learned counsel for the State submitted that the eye witnesses PWs 2 and 3 had described the act of each of the appellants and the role ascribed to the appellant was that he pulled the leg of the deceased as a result of which deceased fell in the field of Masur crop and thereafter he was assaulted by other accused persons. The appeal was dismissed accepting the stand of the State.

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5. Learned counsel for the appellant re-iterated the stand taken before the High Court and submitted that Section 34 IPC has no application. A

6. Learned counsel for the State on the other hand supported the judgment. B

7. 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. C
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8. The Section does not say "the common intention of all", H

A nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is 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 Section 34, when an accused is convicted under Section 302 read 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 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), Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.

9. The evidence of PWs 2 and 3 did not attribute any overt act to the appellant. The mere fact that he was in the company of the accused who were armed would not be sufficient to attract Section 34 IPC. It is undisputed that appellant was not armed and he had no animosity with the deceased. This position is also accepted by the prosecution. Additionally, the stand that he pulled the leg of the deceased has not been established.

10. In the peculiar facts of the case therefore it would be appropriate that the appellant cannot be held guilty by application of Section 34 IPC. His conviction is accordingly set aside. He be set at liberty forthwith unless required to be in custody in connection with any case.

11. The appeal is allowed.

D.G.

Appeal allowed.

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