

A JAGAN SHRAVAN PATIL & ANR.
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 427 of 2009)

B MARCH 3, 2009

**[DR. ARIJIT PASAYAT AND MUKUNDAKAM
SHARMA, JJ.]**

Penal Code, 1860;

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ss. 302, 323/34 – Murder – Prosecution of six accused
–Conviction u/ss. 143, 144, 148, 323 and 302 r/w s.149 IPC
by trial court – High Court convicting only three accused u/
ss. 302, 323/34 – SLP by convicted accused – Dismissed in
D respect of one of the accused – Appeal of the two accused –
Held : Conviction by High Court justified – Evidence sufficient
to fasten guilt on them.

s.34 – Common intention – Applicability – Discussed.

E Appellants (accused Nos. 4 and) alongwith co-
accused were convicted by trial court u/ss. 143, 144, 148,
323 and 302 r/w s.149 IPC. Accused Nos. 1, 2 and 3
together and accused Nos. 4, 5 and 6 together filed two
separate appeals before High Court. High Court acquitted
F all the accused under the provisions they had been
convicted by High Court. But convicted accused Nos. 4,
5 and 6 u/ss. 302, 323/34 holding that these accused
formed common intention at the time of occurrence as
G accused Nos. 4 and 5 helped accused No. 6 in enabling
him to attack the deceased. Special Leave Petition was
filed before this Court by accused Nos. 4, 5 and 6. The
same was dismissed as regards accused No. 6. The
present appeal by accused Nos. 4 and 5.

Dismissing the appeal, the Court

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HELD: 1. The evidence on record in the instant case, is sufficient to fasten the guilt on the accused. In the background facts and in the light of the principles as regards s.34 IPC, appeal is sans merit. [Para 4] [912-E-F]

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2.1. Section 34 IPC has been enacted on the principle of joint liability in the commission 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 u/s 34, if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. [Para 6] [912-G-H; 913-A-B]

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2.2. 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. [Para 6] [913-B-D]

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

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2.3. The existence of a common intention amongst the participants in a crime is the essential element for application of Section 34. It is not necessary that the acts of the several persons charged with commission of an

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A 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 6] [913-D-E]

B 2.4. Section 34 does not say “the common intention of all”, nor does it say “and intention common to all”. Under the provisions the Section, the essence of the liability is to be found in the existence of a common intention animating the accused leading to the commission of a criminal act in furtherance of such
C intention. 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. [Para 7] [913-F-H; 914-A]

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

E 2.5. 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. [Para 7] [914-B]

Case Law Reference:

F AIR 1977 SC 109 relied on Para 6
AIR 1993 SC 1899 relied on. Para 7

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 427 of 2009.

G From the Judgment and Order dated 20.09.06 of the High Court of Bombay, Bench at Aurangabad in Criminal Appeal No. 72 of 2005.

Sunil Kumar Verma for the Appellants.

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Sushil Karanjkar and R.K. Adsure for the Respondent. A

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 Bombay High Court at Aurangabad Bench. Originally the Special Leave Petition was filed by A-4, A-5 and A-6. So far as petition in respect of appellant No.3-Suresh is concerned the same was dismissed by order dated 7.4.2008 and notice was issued only in respect of other two petitioners. B
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3. The present appellants alongwith co-accused persons were tried and convicted by learned II Ad-hoc Additional Sessions Judge, Jalgaon, for the offences punishable under sections 143, 144, 148, 323 and 302 read with Section 149 of the Indian Penal Code, 1860 (in short 'IPC') by order dated 12.10.2004. The accused were sentenced to suffer - (i) RI for one month and fine of Rs.100/- each, in default of suffer RI. for 7 days for offence punishable under section 143 (ii) R.I. for three months and fine of Rs.300/- each, in default to suffer R.I. for 20 days for offence punishable under Section 144; (iii) RI for six months and fine of Rs.500/- in default to suffer RI for one month for offence punishable under Section 148; (iv) R.I. for three months and fine of Rs.300/- each, in default to suffer RI for 20 days, for offence punishable under section 323 read with section 149: and , (v) R.I. for life and fine of Rs.1000/- each, in default, to suffer RI for two months for offence punishable under section 302 read with section 149 of the 1PC The accused were, however, acquitted of the offence punishable under section 37(1)(3) read with section 135 of the Bombay Police Act, 1951. Being aggrieved, accused nos. 1 to 3 filed Appeal No, 697/2004 in the High Court and accused nos, 4 to 6 filed Jail Appeal No: 72/2005. D
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4. Prosecution case in a nutshell is as follows:

Lotan Shrawan Patil (A-1), Jagan (A-5) Abhirnan and Bapu H

A (Since deceased) are brothers. Khushal (A-3) and Sayaji (A-2) are sons of Lotan. Suresh (A-6) and Bharat (A-4) are sons of Jagan. Gorakh (PW 3) and Macchindra (PW 10) are sons and Ashabai Mahajan (PW8) is married to the daughter of Bapu (hereinafter referred to as the 'deceased'). During the relevant period, Ashabai was living with her father. Laxmibai (PW7) is married daughter of Abhiman. Village Mandurne is divided in three portions, namely, old village, Indiranaqar and Beghar Vasti. During the relevant period, A1, 5, and Abhiman were living at Indiranagar and the deceased was living at Beghar Vasti. A-6 was serving as a truck driver and was living with his wife at Nasik. A-5 had a plot of land which adjoins the plot of deceased on the north. There were disputes between the brothers, dividing them in two groups, one of A1 and A5 and the other of Abhiman and the deceased. The deceased was not on speaking terms with A1 and A5 for about seven years. Some time prior to the incident, A-5 started construction of house on his plot in Beghar Vasti by committing encroachment on the plot of the deceased. As a consequence about a month prior to the incident, the deceased had filled up portion of the plinth dug by A-5 on his plot. In addition on 11.7.2003, PW 7 had been to the house of A-5 with her father for demanding repayment of Rs.500/- borrowed from her by A-5 on the occasion. A-5 his wife Bayjabai and A-4 assaulted her. On 12.7.2003, PW 7 went to Police Station. Mehunbare, with PW 3 lodged report against A4, A-5 and Bayjabai. On the basis of this report (Exh.59) non cognizable offence came to be registered and PW 7 was directed to approach the Court of Judicial Magistrate for redressal of her grievance. After the quarrel with PW 7, A-6 was called from Nasik.

G On 13.7.2003 members of the family of deceased got up at 5.30 a.m. as usual. At about 6.30, PW 3 finished his bath and the deceased was brushing his teeth on the ota (raised platform) outside his house. At that time, all the accused came to the house of the deceased and stated abusing him because

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PW 7 had lodged report against A-5 and members of his family. A-6 was armed with axe, A-4 was armed with handle of axe and A-5 was armed with handle of hoe. The accused entered the house and started kicking and fisting the deceased. A-1 was inciting them to eliminate the deceased, assuring them that he would take the responsibility for the consequences. During the assault, A-6 dealt an axe blow on the head of the deceased. As a result, the deceased sustained bleeding injury and fell down. When PW 3 and 10 tried to intervene A-5 dealt blow on the head of PW3 and A-4 dealt blow on the head of PW 10 causing bleeding injuries. Accused no.2 was pelting stones at the victims. A-3 kicked and fisted PW 8 and her mother. He was pushing them backwards and was preventing them from intervening in the quarrel. On the arrival of the neighbours, the accused ran away. PW 10 then brought a Jeep of one Razakseth. The deceased was then taken to the Hospital of Dr. Deore (PW.9) at Chalisgaon for the treatment of compound fracture over frontal region. The Doctor informed Chalisgaon Police Station that a patient has been admitted with the history of assault. However, the Doctor on duty certified in writing that the deceased is unconscious. Therefore, statement of the deceased could not be recorded. The deceased succumbed to the injury about 10.45 a.m. The Police officer then took PW 3 and 10 to the Police Station and recorded complaint of PW 3. On the basis of this complaint (Exh. 48), offence came to be registered against the accused at zero number as the incident had taken place within the jurisdiction of Mehunbare Police Station. The Police officer of Chalisgaon Police Station held inquest on the dead body, prepared Panchnama of Inquest (Exh. 86) and sent the dead body for the post mortem. The injured were also sent to the Municipal Dispensary where Dr. Devising Chavan (PW 2) examined them and issued injury certificate (Exh.45). PW 2 also conducted post-mortem on the dead body. He found that the deceased had suffered compound fracture over central part of the frontal region of the head, of the dimension of 5 cms x 1/2 c. x brain deep, oblique in direction

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A and an abrasion over the elbow joint measuring 2 x ½ cms, oblique in direction, by way of external injuries and internal injury in the form of laceration of frontal region of the brain. The Medical Officer found that the death was caused due to head injury within 4 to 6 hours of the last meal, as the stomach was empty. Accordingly, he issued post-mortem Report (Exh. 43).
B At the mortuary, clothes of the deceased were attached in presence of PW 1, under Seizure Memo (Exh.41). After completing the preliminaries, papers of the investigation conducted by Chalisgaon Police were sent to Mehunbare
C Police Station where offence came to be registered at Crime No.59/2003 for offence punishable under sections 143, 144, 323, 324, 302 read with Sections 149, 504 and 506 IPC and Section 135 of the Bombay Police Act. A.P.I. Yogiraj Shevgan (PW14) took over the investigation of the offence. On
D completion of the investigation the accused were charge-sheeted.

Accused persons pleaded innocence.

E The trial Court on consideration of the evidence on record recorded the conviction as noted above.

F The primary stand before the High Court was that the evidence on record was not sufficient to fasten the guilt on the accused and in any event Section 34 has no application to the facts of the case. The High Court did not accept the stand.

Stand taken before the High Court was reiterated in this appeal.

G 5. Learned counsel for the respondent-State supported the judgment of the High Court.

H 6. Section 34 has been enacted on the principle of joint liability in the commission 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. The Section 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 to be found in the existence of a common intention animating the accused leading to the commission 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

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- A 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
- B 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.

- C 8. If the background facts are considered in the light of the principles set out above, the inevitable conclusion is that the appeal is sans merit, deserves dismissal which we direct.

K.K.T.

Appeal dismissed.