

[2009] 5 S.C.R. 309

SRIPATHI & ORS.

v.

STATE OF KARNATAKA
(Criminal Appeal No. 418 of 2002)

MARCH 4, 2009

**[DR. ARIJIT PASAYAT, HARJIT SINGH BEDI AND
ASOK KUMAR GANGULY, JJ.]**

Penal Code, 1860 – s. 304 (Part II) r/w s. 34 – Deceased succumbed to stab injuries inflicted by accused on account of quarrel – Co-accused had caught hold of deceased – Conviction by High Court u/s.304 (Part II) r/w s.34 – Justification of – Held: Evidence of eye witnesses cogent and trustworthy – Ocular evidence not at variance with medical evidence – Conviction of main accused does not call for interference – However, evidence not specific as regard role played by other accused – Conviction of other accused by application of s. 34 not correct.

The question which arose for consideration in this appeal was whether the High Court was justified in convicting the appellants for offence punishable u/s. 304 (Part II) read with s. 34 IPC.

Disposing of the appeal, the Court

HELD: 1.1 As regard the plea about variance between medical evidence and ocular evidence, even on an casual reading of the evidence it cannot be said that the ocular evidence was at variance with the medical evidence. The High Court analyzed the medical evidence and the ocular evidence to conclude that the evidence of the eye witnesses was cogent and trustworthy. On going through the evidence it is satisfied that the conclusion of the High Court does not suffer from any infirmity. [Paras

A **6 and 7] [312-A-C]**

1.2. As regard the plea of applicability of s.34 IPC, the evidence is not very specific as regards the role played by A.1, A.2 and A.3. It is the prosecution version that A.4 had the knife in his pocket which he suddenly brought out and stabbed the deceased. The conviction of the appellant nos. 1, 2 and 3 by application of s.34 IPC not correct. However, the conviction as regard A.4 is well founded and no interference is called for. [Paras 8 and 11] [312, 313-G-H; 314-A-B]

Ashok Kumar vs. State of Punjab AIR 1977 SC 109 and Ch. Pulla Reddy and Ors. vs. State of Andhra Pradesh AIR 1993 SC 1899, referred to.

D **Case Law References:**

AIR 1977 SC 109 Referred to. Para 8

AIR 1993 SC 1899 Referred to. Para 9

E CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 418 of 2002.

From the Judgment & Order dated 30.8.2001 of the High Court of Karnataka in Criminal Appeal No. 326/1996.

F Shanth Kr. Mahale, Harisha S.R. Hebbar and Rajesh Mahale for the Appellant.

S.R. Hegde, A. Rohen Singh, Vikrant Yadav, Amit Kr. Chawla and Nishant Mishra for the Respondents.

G The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Heard learned counsel for the appellant and learned counsel for the State.

H 2. Challenge in this appeal is to the judgment of the Division Bench of the Karnataka High Court upsetting the

judgment of acquittal recorded by learned Sessions Judge, Bidar in SC No. 8/93. Each of the appellants was convicted for offence punishable under Sec.302 read with Sec.34 of the Indian Penal Code (in short the 'IPC').

3. The prosecution version, as unfolded during the trial, is that on 22/9/1992 at about 8.15 p.m., in the course of an altercation, Pandit (A.4) inflicted a stab injury on the abdomen of one Jagannath (hereinafter referred to as the deceased). The other three accused persons caught hold of different parts of the body of the deceased on being told to do so by the accused No.4 Pandit. The First Information Report was lodged at about 11.30 p.m. The trial Court, on consideration of the evidence of the witnesses came to hold that the prosecution has not been able to establish the accusations. The State preferred an appeal after obtaining leave in terms of Sec.378 of the Code of Criminal Procedure, 1973 (in short 'the Code'). The High Court noticed that there were five eye witnesses to the occurrence, namely, PW.1, PW.5, PW.6, PW. 7 and PW.8. The last named witness was the widow of the deceased. The High Court on analyzing the evidence came to hold that the acquittal as recorded was unsustainable and accordingly allowed the State's appeal and convicted each of the accused persons in terms of Sec.304 Part II read with Sec.34 IPC. Accordingly each of the accused was sentenced to undergo rigorous imprisonment for four years.

4. The primary stand of the appellant was that Sec.34 has no application to the facts of the case. In any event the ocular evidence is at variance with the medical evidence.

5. Learned counsel for the State supported the judgment of the High Court and submitted that though this case is one where Sec.302 IPC has clear application, the High court has taken a liberal view and has convicted the accused persons under Sec.304 Part II read with Sec.34 IPC.

A 6. Coming to the plea about variance between medical
evidence and ocular evidence, it is to be noticed that even on
an casual reading of the evidence it cannot be said that the
ocular evidence was at variance with the medical evidence. The
B High court has analyzed the medical evidence and the ocular
evidence to conclude that the evidence of the eye witnesses
PW.1, PW.5, PW.6, PW.7 and PW.8 was cogent and
trustworthy and therefore held that the trial court's conclusions
were unsustainable.

C 7. We have gone through the evidence and are satisfied
that the conclusion of the High Court do not suffer from any
infirmity.

D 8. Coming to the plea regarding the applicability of Sec.34
IPC, we find that the evidence is not very specific as regards
the role played by A.1, A.2 and A.3. It is the prosecution version
that A.4 had the knife in his pocket which he suddenly brought
out and stabbed the deceased.

E 9. 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
F 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 form the circumstances appearing from the
proved facts of the case and the proved circumstances. In order
G 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

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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 vs. 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.

10. 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 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. vs. 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.

11. The conviction of the appellant Nos. 1,2 and 3 by application of Sec.34 IPC does not appear to be in order. However, the conviction as recorded so far as A.4 is concerned,

- A is well founded and no interference is called for. In the result, the appeal filed by A.1, A.2 and A.3 (Sripathi, Mallikarjun, Sanjaya) stands allowed while that of Pandit (A.4) stands dismissed. A.4, who is on bail pursuant to the order dated 22/3/2002, shall surrender to custody forthwith to serve the remainder of sentence, if any. The bail bonds in respect of the other appellants shall stand discharged because of their acquittal by the present order.
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12. The appeal is disposed of accordingly.

C N.J.

Appeal disposed of.