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JAVED ALAM

v.

STATE OF CHHATTISGARH AND ANR.
(Criminal Appeal No. 1240 of 2006)

B

MAY 8, 2009

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

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Penal code, 1860:

ss.302 and 302/34 – Conviction under – Of four accused – Eye-witnesses to the incident – Witnesses turning hostile – conviction u/s. 302 of prime accused and of co-accused u/s. 302/34 by courts below – On appeal, held: conviction of prime accused justified – The co-accused are liable to be acquitted as s.34 is not applicable in the facts of the case.

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s.34 – Nature and applicability of – Discussed.

E

Administration of justice – Administration of Criminal Justice – Protection of witnesses – Need for.

Evidence Act, 1872 – s.6 – Rule of Res Gestae – applicability of – Discussed – Doctrine / Principle – Rule of Res Gestae.

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Appellants-Accused were prosecuted for causing death of a girl by crushing her under the jeep they were driving / boarding. Father of the prime accused was also prosecuted u/s. 201 IPC. Trial court convicted the prime accused (who was driving the jeep) u/s. 302 IPC and convicted the three co-accused (who were boarding on the jeep) u/s. 302/34 IPC. Father of prime accused was acquitted. High Court confirmed the conviction order. Hence, the present appeal.

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Dismissing the appeal of the prime accused, while allowing that of the co-accused, the Court A

HELD: 1.1. Prime accused is liable to be convicted. Instant case is a classic case of deficiency in the criminal justice system to protect the witnesses from being threatened by accused. As appears from the record, the witnesses are the classmates of the deceased who were there with her. They backed out from what was stated during investigation. The statement made before the Police during investigation is no evidence. Unfortunately, in cases involving influential people the common experience is that witnesses do not come forward because of fear and pressure. In a brutal manner, the prime accused who was driving the vehicle run over the girl and she lost her life. The trial Court and the High Court have highlighted certain aspects which clearly bring out his guilt. Significant is the evidence of PWs 7 and 8. PW-7 was the girl who accompanied the injured to the hospital and told about the incident to PW-3, the doctor which was recorded in report Ex.P-4 containing the name of PW-7 as the person told about the incident. The evidence of PW-6 shows that PW-7 was sitting with the deceased when the jeep entered the campus. As rightly noted by the High Court something transpired later on which led to the witnesses giving a complete go bye to her earlier version. [Paras 8 and 15] [407-C-G] B
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1.2. More important is the evidence of PW-8 who blurted out during cross-examination some traces of truth which was labeled as unfair and dishonest cross-examination by the appellants. At the end of the ordeal of her evidence she cried and requested the Court not to call her again for evidence since they were disturbed for the entire year. The plight of the girls who were under pressure depicts the tremendous need for witness G

A protection in our country if criminal justice administration has to be a reality. Even close reading of the evidence shows that how she was under tremendous pressure not to speak the truth. [Para 8] [407-G-H; 408-A-B]

B 1.3. Section 6 of the Evidence Act is an exception to the rule of evidence that hearsay evidence is not admissible. The test for applying the rule of res-gastae is that the statement should be spontaneous and should form part of the same transaction ruling out any possibility of concoction. [Para 9] [408-E-F]

C *Vijayavardhan Rao v. State of Andhra Pradesh* AIR 1996 SC 2791, relied on.

D 2.1. Considering the background facts it is clear that Section 34 IPC has no application. There is no evidence, muchless credible, which has been salvaged from the onslaught on the witnesses which suggests that there was any meeting of minds, because everything appears to have happened suddenly. The evidence of PW8 on which the prosecution has placed strong reliance for the purpose of attracting Section 34 IPC gave pre-varicating statements so far as others are concerned, though her statement is sufficient to fasten guilt on the prime accused. [Paras 15 and 16] [410-G-H; 411-A-B]

F 2.2. 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. [Para 12] [409-D-E]

2.3. 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 12] [409-D-G]

2.4. 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. [Para 12] [410-A-B]

2.5. 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. 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 13] [410-D-F]

Ashok Kumar v. State of Punjab AIR 1977 SC 109; Ch. Pulla Reddy and Ors. v. State of Andhra Pradesh AIR 1993 SC 1899 and Chimanbhai Jagabhai Patel v. State of Gujarat and Anr. 2009 (4) SCR 275, relied on.

A Case Law Reference:

AIR 1996 SC 2791 Relied on. Para 9

AIR 1977 SC 109 Relied on. Para 12

B AIR 1993 SC 1899 Relied on. Para 13

2009 (4) SCR 275 Relied on. Para 14

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 1240 of 2006.

C From the Judgment/Order dated 20.3.2006 passed by the
High Court of Chhattisgarh at Bilaspur, in Criminal Appeal No.
716 of 2000.

WITH

D Crl. No. 1241 of 2006 and 1242 of 2006.

Ranjit Kumar, Surendra Kumar, B.S. Jain, Ajay Veer
Singh, Nitin Jain and Dr. Vipin Gupta for the Appellant.

E Dr. Manish Singhvi, Atul Jha and Dharmendra Kumar
Sinha for the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Challenge in these appeals
F is to the judgment of a Division Bench of the Chhattisgarh High
Court, Bilaspur upholding the conviction of the appellants for
offence punishable under Section 302 read with Section 34 of
the Indian Penal Code, 1860 (in short the 'IPC'). By the
impugned judgment, the High Court upheld the conviction of
G appellant Samar Vijay Singh for offence punishable under
Section 302 IPC for committing the murder of Ku. Preeti
(hereinafter referred to as the 'deceased') on 3.12.1998 in
Government Girls College Campus, Ambikapur by running over
her a jeep. The co-accused appellants Javed, Raj Kumar and
H Ganesh were convicted under Section 302 read with Section

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34 IPC for causing death of Ku. Preeti in furtherance of their common intention with the appellant Samar Vijay Singh. Co-accused Ranvijay Singh, father of accused Samar Vijay and owner of the jeep was acquitted of the charge under Section 201 IPC.

2. Prosecution case is that on 3.12.1998 Ku. Preeti Srivastava, a student of B.A. final in Govt. Girls College, Ambikapur was sitting with Ku. Vijaylaxmi Mishra (PW-7), Ku. Seema Mishra (PW-8) and Ku. Nisha Thakur (PW-17) in the campus of the College since the second period was free. Her bag and tiffin were kept by the side of the road. Many other girls were basking in the sun inside the campus. At about 10:45 A.M., a jeep driven by Samar Vijay Singh suddenly entered the college campus and crushing the bag and the tiffin of Ku. Preeti Srivastava underneath, went ahead. Accused Rajkumar Tiwari, Javed Alam and Ganesh Kashyap were accompanying Samar Vijay Singh in the jeep. Seeing her tiffin and bag crushed by the jeep, Ku. Preeti Srivastava decided that she would stop the jeep on its return and ask the driver to make good the loss suffered. When the jeep returned, Ku. Preeti stopped the jeep, stood in front of it and asked accused-appellant Samar Vijay Singh to repair the tiffin and bag for her. Hearing this, the occupants of the jeep including the driver started laughing. The girls noticed that the occupants of the jeep were calling each other by names and thereby learnt that Samar Vijay Singh, the driver of the jeep was accompanied by Rajkumar Tiwari, Javed Alam and Ganesh Kashyap. Appellant Samar Vijay Singh asked Ku. Preeti to get out of his way failing which, threatened to crush her under the jeep. However, Ku. Preeti stood firm and did not budge. Accused Rajkumar Tiwari, Javed & Ganesh asked Samar Vijay Singh to crush Ku. Preeti if she did not give way. Upon this, Samar Vijay Singh moved the jeep ahead and pushed Ku. Preeti who fell down. When the girls were about to move for picking up Preeti, Samar Vijay Singh reversed and then accelerated the jeep ahead, crushing Preeti's head under the jeep in the process and ran away with the co-appellants.

A Ku. Vijaylaxmi PW-7, threw a stone at the jeep, which hit the bumper of the jeep. She noted down the number of the jeep in her palm as M.P. 27-1962 Lalita Yadav PW-6, attempted to catch hold of one of the appellants but she was pushed and fell down. Ku. Vijaylaxmi noticed that the jeep had a sticker
 B "Vote for the Congress" on the back number plate.

The girls got frightened and informed Asst. Professor Smt. Archana Singh (PW-9) and Asst. Professor Smt. Pratibha Singh PW-10 about the incident who along with Ku. Lalita Yadav (PW-6), Ku. Vijaylaxmi (P.W.7), Ku. Kumudini Kerkatta
 C (PW 4) & Ku. Urmila Paikra (PW-5) took the injured Ku. Preeti to the District Hospital, Ambikapur. Clerk Tarachand Sahu PW-11 of the Girls College reached the spot thereafter and on being instructed by the Principal lodged the F.I.R. Ex.P-12 at 11.00
 D a.m. in Police Station, Ambikapur to Assistant Sub-Inspector B.N. Singh (PW-31)

After investigation charge sheet was filed.

Since the accused persons abjured guilt the trial was held. Prosecution examined 39 witnesses. Learned Sessions Judge
 E acquitted Ranvijay Singh for want of evidence and convicted rest of the accused persons as noted above. The basis of conviction was as follows:

F 1. Testimony of Ku. Lalita Yadav PW-6, Ku. Nisha (PW-17), Ku. Seema Misra (PW-8), Dr. M.L Beatrice (PW-3), Dr. A.K. Jain (PW-33) proving that Ku. Preeti died a homicidal death.

G 2. Statements made by Ku. Lalita Yadav PW-6 and Ku. Vijaylaxmi PW-7, as forming part of res-gestae under Section-6 of the Evidence Act to Shri R. N. Shrivastava PW-32 on his reaching the hospital disclosing the names of the driver of the jeep as Samar Vijay Singh and the occupants of the Jeep as Rajkumar Tiwari, Javed and
 H Ganesh.

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3. Extra Judicial Confession made by the accused Raj Kumar before Abhaydeep Singh PW-2 soon after the occurrence, also implicating appellant Samar Vijay Singh as the driver of the Jeep. A

4. Testimony of Ku. Seema PW-8 especially in para 34 and 35 showing the three occupants of the Jeep had asked the driver Samar Vijay to run the girl over in case she didn't give way and Samar Vijay surging the jeep ahead crushed Preeti's head underneath. B

5. Testimony of Arvind Gaur, Assistant Professor, P.G. College, Ambikapur PW-12 showing that Ganesh Kashyap, a student of B.Com 1st year ' B' section was absent from class on 03-12-1998. C

6. Testimony of Professor Rajesh Srivastava, P.G. College, Ambikapur PW-18 showing that on 3.12.1998 Samar Vijay Singh and Raj Kumar Tiwari, students of B.Com. 1st year Section-'A' were absent from class (10 A.M. to 10:40 A.M.). D

7. The fact of surrender by accused Javed and Ganesh in Police Station Ambikapur on 04-12-1998 vide Ex. P-74 and 75. E

8. (i) Seizure of Jeep No. M.P.-27-B-1068 from, in front of the house of appellant Samar Vijay. F

(ii) Merg intimation Ex. P-19 by Mariam Tirki PW-16 showing the number of the Jeep as M.P. -27-B-1068.

(iii) Testimony of Z.A. Abbasi PW-37 R.T.O. Office Ambikapur proving ownership of Ranvijay Singh Tomar over Jeep M.P.-27B-1068. G

(iv) Admission by Ranvijay Singh Tomar of the seizure of Jeep M. P. 27-B-1068, in reply to Question No.218 in examination under Section-313 of Cr. P.C." H

A 3. Stand of the appellants before the High Court was that
there was no legal evidence on record to substantiate the
conviction and sentence. No common intention of the
occupants to cause the death of Kr. Preeti was established by
the prosecution. Seema Misra (PW-8) had stated that the driver
B of the jeep wanted to get away as fast and, therefore, offence
if any committed by the driver would not travel beyond Section
304 IPC. The act was nothing but a rash and negligent act
without any intention to kill the deceased. The High Court did
not accept the stand and upheld the conviction.

C 4. In support of the appeals, learned counsel for the
appellants re-iterated the stand taken before the High Court. It
is to be noted that there were purportedly four eye witnesses.
They are PWs 6, 7, 8 and 17. The occurrence took place around
10.45 a.m. on 3.12.1998 and the FIR was lodged immediately
D by PWs 4 and 5 around 11.00 a.m. The deceased breathed
her last at about 12.10 p.m. The vehicle according to the
prosecution version was being driven by Samar Vijay Singh
and rest of the occupants were other co-accused persons. It is
stated that identity of the accused persons has not been
E established. There is no Test Identification Parade. Names
were not mentioned in the inquest or in the FIR. The accused
persons were not known earlier and Section 6 of the Indian
Evidence Act, 1872 (in short the 'Evidence Act') has no
application. PWs 9 and 10 had not told the names. The role of
F A-3 was not established. A1, A2 and A4 were the students of
the same college and one of the accused was 18 years on the
date of occurrence. There was no enmity or motive or any
intention to kill Ku. Preeti and in any event place of occurrence
was not established and the occurrence took place, even if the
prosecution case is accepted, at the spur of moment. There is
G no evidence to show any meeting of mind.

5. It is pointed out that most of the so called eye witnesses
resiled from their statements made during investigation. The
Court has accepted the identification by PWs 8 and 17 and in
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answer to the statement recorded under Section 313 of the Code there was really no definite answer.

6. The question of res-gestae has no application as the name given for the first time is proved in the Court. Res Gestae was not in the police statement. So far as Article D-7 is concerned paint is similar to that of jeep which is scratched.

7. It is also re-iterated that the evidence on record does not make out a case under Section 34 IPC.

8. It is a classic case of deficiency in the criminal justice system to protect the witnesses from being threatened by accused. As appears from the record, the witnesses are the classmates of the deceased who were there with her. As appeared from the evidence of witnesses they backed out from what was stated during investigation. The statement made before the Police during investigation is no evidence. Unfortunately, in cases involving influential people the common experience is that witnesses do not come forward because of fear and pressure. In a brutal manner, the accused Samarvijay Singh who was driving the vehicle run over the girl and she lost her life. The trial Court and the High Court have highlighted certain aspects which clearly bring out the guilt of accused Samarvijay Singh. Significant is the evidence of PWs 7 and 8. PW-7 was the girl who accompanied the injured to the hospital and told about the incident to PW-3, the doctor which was recorded in report Ex.P-4 containing the name of Ku. Vijaylaxmi PW-7 as the person told about the incident. The evidence of PW-6 Lalita Yadav shows that PW-7 was sitting with the deceased when the jeep entered the campus. As rightly noted by the High Court something transpired later on which led to the witnesses giving a complete go bye to her earlier version. More important is the evidence of PW-8 who blurted out during cross examination some traces of truth which was labeled as unfair and dishonest cross examination by learned counsel for the appellants. At the end of the ordeal of her evidence she cried and requested the Court not to call her again for evidence

A since they were disturbed for the entire year. The plight of the girls who were under pressure depicts the tremendous need for witness protection in our country if criminal justice administration has to be a reality. Even close reading of the evidence shows that how she was under tremendous pressure

B not to speak the truth. In reply to question No.27 she said that she did not see the occupants. That is nothing, because in answer to the next question she said that there were four boys in the jeep. Question No.34 is very significant. It was specifically asked to the witness as to whether the occupants of the jeep

C were asking Samarvijay Singh, the driver of the jeep to run the girl over if she did not give way. Answer was that the boys had said so but afterwards. In answer to question No.35 she said that Samar surged the jeep ahead, crushed the head of Preeti and went away. She had admitted that the boys were laughing in the jeep and had said to Samar that if the girl did not give

D way he should run the girl over. She had answered in the affirmative by stating 'yes' to a specific question No.35 clearly meaning that crushing Preeti's head Samar had surged the jeep forward.

E 9. Section 6 of the Evidence Act is an exception to the rule of evidence that hearsay evidence is not admissible. The test for applying the rule of res-gastae is that the statement should be spontaneous and should form part of the same transaction ruling out any possibility of concoction. In *Gentile*

F *Vijayavardhan Rao v. State of Andhra Pradesh* (AIR 1996 SC 2791) it was held in para 15 as follows:

G "Section 6 of the Evidence Act and some of the succeeding Sections embody the rule of admission of evidence relating to what is commonly known as res-gestae. They are in the nature of exception to 'hearsay' rule. Section-6 permits proof of collateral statements which are so connected with the facts in issue as to form part of the same transaction. Whether the statement made by a

H witness was a part of the same transaction or not is to be

considered in the light of the circumstances of each case. A
The principle is that it should be so intimately connected
with the fact in issue as to be a spontaneous utterance
inspired by the excitement of the occasion or a
spontaneous reaction thereof, there being no opportunity
for deliberately fabricating the statement. In other words, B
the statement which is a part of res-gestae does not
narrate a past event, but it is the event itself speaking
through a person thus excluding the possibility of any
design behind it.”

10. The reason indicated by the High Court dismissing the C
appeal before it qua accused Samarvijay Singh has no merit
and is dismissed.

11. The other question is applicability of Section 34 IPC.

12. Section 34 has been enacted on the principle of joint D
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 E
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 F
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, G
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 H
is just the same as if each of them has done it individually by

A 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
 B 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 13. 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
 D 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
 E 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.
 F For applying Section 34 it is not necessary to show some overt act on the part of the accused.

G 14. The above position has been highlighted in *Chimanbhai Jagabhai Patel v. State of Gujarat & Anr.* (SLP (Crl.) 352 of 2008 disposed of on 16th March, 2009).

H 15. There is no evidence, muchless credible, which has been salvaged from the onslaught on the witnesses which suggests that there was any meeting of minds, because everything appears to have happened suddenly. The evidence of PW8 on which the prosecution has placed strong reliance

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for the purpose of attracting Section 34 IPC gave pre-varicating statements so far as others are concerned, though her statement is sufficient to fasten guilt on Samar Vijay Singh. A

16. Considering the background facts it is clear that Section 34 has no application. That being so, while dismissing the appeal filed by Samarvijay Singh, the conviction recorded qua other accused persons has to be set aside which we direct. They shall be released from custody forthwith unless required to be in custody in connection with any other case. B

K.K.T.

Appeal disposed of. C