

STATE OF RAJASTHAN

v.

SHOBHA RAM

(Criminal Appeal No. 592 of 2008 etc.)

JANUARY 16, 2013.

[H.L. DATTU AND RANJAN GOGOI, JJ.]

PENAL CODE, 1860:

s. 302 read with s. 34 – Murder caused by two brothers – Conviction by trial court of both the accused – High Court affirming conviction of appellant and acquitting his brother – Held: Evidence discloses that both accused brothers had an old enmity with deceased over a well – On date of incident deceased was attacked by both accused inasmuch as appellant assaulted the deceased by stones while his brother facilitated execution of common design by sitting on his chest – Judgment of High Court acquitting one of the accused set aside and that of trial court convicting both restored.

s. 34 – Common intention – Explained.

The appellant (A-1) in Crl. A. No. 593 of 2008, along with his brother (A-2) faced trial for an offence punishable u/s 302/34 IPC on the allegation that because of enmity pursuant to a dispute over a well, the accused caused injuries to the brother of PW 1 with stones resulting in his death. The trial court convicted both the accused of the offence charged and sentenced each of them to imprisonment for life. The High Court affirmed the conviction of A-1, but acquitted A-2.

In the instant appeals, State challenged the acquittal of A-2, whereas A-1 challenged his conviction.

Disposing of the appeals, the Court

A HELD: 1.1. PW-6, in his evidence has stated that A-1
was assaulting the deceased with stones and A-2
facilitated execution of the common design by sitting on
the chest of the deceased. Despite cross-examination at
length, PW-6, has maintained his version, thereby, not
B leaving any scope for the defense to elicit anything
against the prosecution witness. Therefore, the evidence
of the said witness is of sterling quality and is reliable
and trustworthy, leaving this Court with no other
C Court declines to interfere with the finding and
conclusion reached by the trial court and affirmed by the
High Court insofar as conviction of A-1 is concerned.
[para 8] [331-G-H; 332-A-C]

D 1.2. A perusal of s.34, IPC would clearly indicate that
there must be two ingredients for convicting a person
with the aid of s. 34 IPC. Firstly, there must be a common
intention; and secondly, there must be participation by
the accused persons in furtherance of the common
E intention. The facts in the instant case in the light of the
evidences on record are that A-1 and A-2 are brothers
having an old enmity with the deceased resulting in a
constant skirmish over the well located in their lands. On
the date of incident, the animosity culminated to an
assault on the deceased by the accused persons when
F A-1 was assaulting the deceased with stones and A-2
remained sitting on his chest. The chain of events gives
a clear picture of the whole incident that had taken place
on that fateful day. Thus, it can be concluded that both
the accused persons had a common intention to assault
G and kill the deceased pursuant to a pre-concerted plan.
[para 11 and 13] [334-F-H; 335-A-B]

H *Nadodi Jayaraman and Others vs. State of Tamil Nadu*
(1992) 3 SCC 161; *Saravanan and Another vs. State of*
Pondicherry 2004 (5) Suppl. SCR 890 = (2004) 13 SCC 238;

Suresh & Anr. vs. State of U.P. 2001(2) SCR 263 = (2001) 3 SCC 673; *Ramaswami Ayyangar and Others vs. State of Tamil Nadu* 1976 Suppl. SCR 580 = (1976) 3 SCC 779; and *Hari Ram vs. State of U.P.* (2004) 8 SCC 146 – relied on

1.4. The judgment and order of conviction and sentence against the accused persons passed by the trial court u/s 302 read with s.34, IPC is confirmed and the judgment and order passed by the High Court in acquitting accused A-2 is set aside. [para 14] [335-D-E]

Case Law Reference:

(1992) 3 SCC 161	relied on	para 10	
2004(5) Suppl. SCR 890	relied on	para 10	
2001 (2) SCR 263	relied on	para 11	D
1976 (0) Suppl. SCR 580	relied on	para 11	
(2004) 8 SCC 146	relied on	para 12	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 592 of 2008.

From the Judgment and Order dated 03.06.2005 of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in D.B. Criminal Appeal No. 130 of 2000.

WITH

Criminal Appeal No. 593 of 2008.

Sushil Kr. Dubey, Milind Kumar, Subhash Sharma and Mahabir Singh for the appearing parties.

The following Judgment of the Court was delivered by

1. These appeals are directed against the judgment and order passed by the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in Criminal Appeal No. 130 of 2000, dated

A 03.06.2005. The High Court, while affirming the judgment of the
 Trial Court in Sessions Case No. 49/99, dated 15.03.2000, has
 convicted Shri Ram - A-1, under Section 302 read with Section
 34 of the Indian Penal Code ("the IPC" for short) and reversed
 the judgment of the Trial Court and acquitted Shobha Ram -
 B A-2. It is the acquittal of A-2, which is called in question by the
 appellant – State of Rajasthan in Criminal Appeal No. 592 of
 2008.

C 2. Criminal Appeal No. 593 of 2008 is preferred by Shri
 Ram - A-1, being aggrieved by the order of conviction and
 sentence passed by the Trial Court and confirmed by the High
 Court.

D 3. The facts in brief are: The incident occurred on
 16.02.1999 at about 5.30 p.m. PW-1 - Mohanlal, who is the
 brother of the deceased-Trilokchand had lodged the FIR before
 S.H.O., Police Station Chechat, regarding the alleged assault
 on the deceased by the accused persons. On the fateful day,
 the appellants on account of their past enmity over the well
 located in their lands, formed common intention to cause death
 E of Trilokchand (since deceased) and in furtherance of their
 common intention, they caused injuries to the deceased with
 stones resulting in his death. The FIR was registered and after
 the completion of the investigation, the investigating agency had
 filed a charge-sheet against A-1 and A-2 under Section 302
 F read with Section 34 of the IPC. The accused persons denied
 the charge and pleaded false implication and, therefore, the
 Trial had commenced against both the accused A-1 and A-2.

G 4. During the Trial, the prosecution, in order to prove the
 guilt of the accused persons had examined several witnesses
 including PW-1 and PW-2 Smt. Manoharbai wife of the
 deceased, PW-3 Bhawanishankar, PW-4 Kalulal, PW-6
 Basantilal and other witnesses. Prosecution had projected PW-
 H 2 and PW-6 as eye witnesses to the incident.

5. The Trial Court after appreciating the evidence of the eye witnesses and others, has come to the conclusion that the testimony of PW-2 does not corroborate with the FIR and other material available on record and, therefore, it could be safely concluded that PW-2 had not seen the occurrence of actual incident and therefore, the evidence at the most can only be an hearsay evidence. However, the Trial Court has believed the evidence of PW-6, who, in his evidence, has categorically stated that A-1 was assaulting the deceased with the stones and A-2 was sitting on the chest of the deceased. The Trial Court placing reliance on the evidence of PW-6 has convicted and sentenced the accused persons under Section 302 read with Section 34 of the IPC to suffer imprisonment for life and to pay a fine of Rs.1000/- each, and in default, to undergo simple imprisonment for a further period of six months.

6. Aggrieved by the order of conviction and sentence passed by the Trial Court, the accused persons had filed appeals before the High Court. The High Court has confirmed the conviction and sentence of A-1 passed by the Trial Court. However, the High Court has acquitted A-2, only on the ground that A-2 had not actively participated in the commission of the offence and, therefore, the Trial Court was not justified in convicting A-2 for an offence punishable under Section 302 read with Section 34 of the IPC.

7. It is the correctness or otherwise of the judgment and order passed by the High Court which is called in question by the appellants in this appeal.

8. We will first take up the appeal of A-1. The Trial Court and the High Court has convicted A-1 based on the evidence of the sole eye-witness, namely, PW-6. In order to satisfy ourselves, we have once again carefully analyzed the evidence on record and the conviction of A-1 by the Trial Court with the aid of the sole eye-witness of PW-6. In his evidence PW-6 has stated, A-2 was acting in concert with A-1 in causing the murder

A of the deceased, wherein A-1 was assaulting the deceased
 with stones and A-2 had facilitated the execution of the common
 design by sitting on the chest of the deceased. Despite cross-
 examination at length, PW-6, has maintained his version,
 thereby, not leaving any scope for the defense to elicit anything
 B against the prosecution witness. Therefore, in our opinion, the
 evidence of the said witness is of sterling quality and therefore
 reliable and trustworthy, leaving us with no other alternative but
 to accept his evidence. Therefore, we decline to interfere with
 the finding and conclusion reached by the Trial Court insofar
 C as convicting A-1 is concerned. Therefore, we reject the appeal
 filed by A-1 and confirm the orders passed by the Trial Court
 and the High Court.

D 9. While considering the appeal filed by the State of
 Rajasthan, we have carefully perused the judgment and order
 passed by the High Court. The High Court has acquitted, A-2,
 only on the ground that merely sitting on the chest of the
 deceased rules out the possibility of active participation by A-
 2 in the commission of offence and therefore has acquitted him
 E from the charges under Section 302 read with Section 34 of
 the IPC.

F 10. The nuances of Section 34 of the IPC has been
 explained by this Court in several decisions, but we will only
 refer to the decision in the case of *Nadodi Jayaraman and*
Others vs. State of Tamil Nadu [(1992) 3 SCC 161] and
Saravanan and Another vs. State of Pondicherry [(2004) 13
 SCC 238]. In the case of *Nadodi Jayaraman and others*
 (Supra), the Court has observed:-

G “ 9. Section 34 of IPC enacts that when a criminal
 act is done by several persons in furtherance of the
 common intention of all, each of such persons, is liable for
 that act in the same manner as if it were done by him alone.
 The section thus lays down a principle of joint liability in
 H the doing of a criminal act. The essence of that liability is

found in the existence of "common intention" animating the accused leading to the doing of a criminal act in furtherance of such intention. The section is intended to meet a case in which it is difficult to distinguish between the act of individual members of a party and to prove exactly what part was played by each of them. It, therefore, enacts that once it is found that a criminal act has been committed by several persons in furtherance of the common intention of all, each of such persons is liable for the criminal act as if it were done by him alone. It is thus an exception to the general rule of criminal jurisprudence that it is the primary responsibility of the person who actually commits a crime and only that person can be held guilty and punished in accordance with law for his individual act.

15. It is thus clear that the criminal act referred to in Section 34 IPC is the result of the concerted action of more than one person if the said result was reached in furtherance of the common intention and each person must be held liable for the ultimate result as if he had done it himself. "

11. A perusal of Section 34 of the IPC would clearly indicate that there must be two ingredients for convicting a person with the aid of Section 34 of the IPC. Firstly, there must be a common intention and secondly, there must be participation by the accused persons in furtherance of the common intention. If the common intention is proved, it may not be 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 be arising out of the same common intention in order to attract the provision. The said principle is reiterated in a three-judge bench decision in *Suresh & Anr. vs. State of U.P.* [(2001) 3 SCC 673] and *Ramaswami Ayyangar and Others vs. State of Tamil Nadu* [(1976) 3 SCC 779], wherein the court has stated that the acts committed by different confederates in the criminal

- A action may be different, but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim or to otherwise facilitate the commission of crime. Such a person also commits an “act” as much as his co-
- B participants actually committing the planned crime. In the case of an offence involving physical violence, the person who instigates or aids the commission of the crime must be physically present and such presence of those who in one way or the other facilitate the execution of the common design, is
- C itself tantamount to actual participation in the ‘criminal act.’

12. Insofar as common intention is concerned, it is a state of mind of an accused which can be inferred objectively from his conduct displayed in the course of commission of crime and also from prior and subsequent attendant circumstances. As

D observed in *Hari Ram vs. State of U.P.* [(2004) 8 SCC 146], the existence of 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. Therefore, in order to bring home

E 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 before a person can be vicariously convicted for the

F act of the other.

13. The facts in the present case in the light of the evidences on record are that, A-1 and A-2 are brothers having an old enmity with the deceased resulting in a constant skirmish over the well located in their lands. On the said date of incident,

G the animosity culminated to an assault on the deceased by the accused persons when the deceased was nearing his land. It has come in the evidence of PW-6, that A-1 was assaulting the deceased with stones and A-2 was sitting on the chest of the deceased. The aforesaid chain of events gives a clear picture

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of the whole incident that had taken place on that fateful day. A
The evidence of, PW-6, when seen in entirety and in its proper
perspective, we can conclude that both the accused persons
i.e. A-1 and A-2 had a common intention to assault and kill the
deceased person with A-2 as a participant in the crime with
the intention of lending weight to the commission of an offence B
pursuant to a pre-concerted plan. In our opinion, the High Court
was not justified in coming to the conclusion that merely
because A-2 was sitting on the chest of the deceased person,
the said accused person is entitled for the benefit of doubt and
thereby an acquittal. In our opinion, the reasoning and C
conclusion reached by the High Court is against the well settled
legal principles.

14. In the result, while allowing the appeal of the appellant-
State of Rajasthan (Criminal Appeal No.592 of 2008), we D
dismiss the appeal filed by Shri Ram – A-1 (Criminal Appeal
No.593 of 2008) and confirm the judgment and order of
conviction and sentence against the accused persons so
passed by the Trial Court under Section 302 read with Section E
34 of the IPC and set aside the judgment and order passed
by the High Court in acquitting accused A-2. We further direct
that the Accused A-2 Shobha Ram shall surrender forthwith
to serve out the remaining period of sentence. The Trial Court is
directed to send the compliance report to this Court within one
month's time from the date of receipt of a copy of this F
judgment. Registry shall send back the lower court records with
a copy of this judgment to the Trial Court forthwith for
information and necessary action.

Ordered accordingly.

R.P.

Appeals disposed of. G