

A BALU @ BALA SUBRAMANIAM & ANR.

v.

STATE (U.T. OF PONDICHERRY)

(Criminal Appeal No. 502 of 2007)

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OCTOBER 16, 2015

**[JAGDISH SINGH KHEHAR AND R. BANUMATHI, JJ.]**

*Penal Code, 1860:*

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*ss.325, 326 and 324 – Conviction by trial court, of the appellants-accused alongwith 3 other accused u/ss.302/149 and 148 – For killing one person and for causing injuries to the eye-witnesses – High Court acquitted accused No.3 while altering conviction of other accused to one under ss.302/34, 326/34 and 324/34 – On appeal, held: In view of the consistent version of eye-witnesses, the finding of the courts below that the accused were the assailants, cannot be faulted – However, in the facts of the case, High Court was not right in invoking s.34 IPC as the facts do not give rise to an inference of pre-concert – The acts of the accused are random individual acts done without meeting of minds – Therefore, the appellants-accused can be held liable only for their individual acts – Conviction u/s.302/34 is modified as u/s.325 – Convictions u/ss.324/34 and 326/34 is liable to be set aside.*

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*s.34 – Common intention – Applicability of – Held: Essence of liability u/s.34 is simultaneous conscious minds of persons participating in criminal acts to bring about a particular result – Sharing of common intention gets satisfied when an overt act is established qua each of the accused.*

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*s.34 – Common intention – Proof of – Held: Common intention is seldom capable of direct proof – It is to be inferred*

*from proved circumstances relating to the entire conduct of all the persons and not only from the individual act actually performed – Such inference is to be drawn from the manner of origin of the occurrence; how the accused arrived at the scene; the concert with which attack was made; and from the injuries caused by one or some of them – The act actually committed would be one of the important facts, but not the sole factor – A pre-concert in the sense of a distinct previous plan is not necessary to be proved.*

**Partly allowing the appeal, the Court**

**HELD: 1. Consistent version of PWs 1 and 5 (eye-witnesses) establish presence of the appellants and that they attacked the deceased with sticks. These facts are also substantiated by the evidence of injured witness PW2. Findings recorded by the courts below that the appellants attacked the deceased with sticks, is unassailable. [Para 8] [716-C]**

**2.1 To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that:- (i) there was common intention on the part of several persons to commit a particular crime and (ii) the crime was actually committed by them in furtherance of that common intention. The essence of liability under Section 34 IPC is simultaneous conscious mind of persons participating in the criminal action to bring about a particular result. Minds regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. Common intention implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Common intention is an intention to commit the crime actually committed and each accused person can be convicted**

A of that crime, only if he has participated in that common intention. [Para 10] [716-F-H; 717-A]

B *Mahbub Shah v. Emperor* AIR 1945 PC 118;  
*Shankarlal Kacharabhai and Others vs. State of Gujarat* AIR 1965 SC 1260 : 1965 SCR 287;  
*Ramesh Singh alias photti v. State of A.P. (2004)*  
11 SCC 305 – relied on.

C 2.2 Common intention is seldom capable of direct proof, it is almost invariably to be inferred from proved circumstances relating to the entire conduct of all the persons and not only from the individual act actually performed. The inference to be drawn from the manner of the origin of the occurrence, the manner in which the accused arrived at the scene and the concert with which attack was made and from the injuries caused by one or some of them. The criminal act actually committed would certainly be one of the important factor to be taken into consideration but should not be taken to be the sole factor. [Para 13] [79-C-D]

F 2.3 Under Section 34 IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. The question whether there was any common intention or not depends upon the inference to be drawn from the proving facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted. [Para 14] [719-E-G]

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2.4 The facts and circumstances of the present case do not indicate that there was common intention to commit murder of the deceased. The attack was not a premeditated one nor was there a prior concert. No doubt, common intention could develop even at the spur of the moment; but in the present case, the way the occurrence took place as depicted by the prosecution, there could not have been common intention between the accused. The totality of the circumstances must be taken into consideration in order to arrive at a conclusion that the appellants had a common intention to commit the offence under which they were convicted. The appellants were not armed and admittedly they are said to have removed sticks from the bullock cart standing nearby and on the exhortation by accused No.1, the appellants have attacked the deceased. There may be similar intention in the minds of the assailants to attack; but it cannot be said that the appellants have acted in furtherance of common intention to attract constructive liability under Section 34 IPC. The facts and circumstances do not give rise to an inference of pre-concert. [Paras 15 and 16] [719-H; 720-A, F-H; 721-A-C]

2.5 The acts of the appellants are random individual acts done without meeting of minds and the appellants can be held liable only for their individual acts. Considering the totality of the circumstances, conviction under Section 302 read with Section 34 IPC is modified as the conviction under Section 325 IPC and the sentence is modified to the period of imprisonment already undergone. [Para 17] [721-F-G]

2.6 No specific overt act is attributed to the appellants in attacking the prosecution witnesses 2, 4 and 5. As the appellants have not shared or acted in

- A furtherance of common intention in the attack of the witnesses and therefore the conviction of the appellants as modified by the High Court under Section 326 read with Section 34 IPC and under Section 324 read with Section 34 IPC cannot be sustained and the same is liable to be set aside. The appellants are acquitted of those charges. [Paras 18-19] [722-A-C, E]

Case Law Reference

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|---|-------------------|------------|----------|
| C | AIR 1945 PC 118   | relied on. | Para 11  |
|   | 1965 SCR 287      | relied on. | Para 11  |
|   | (2004) 11 SCC 305 | relied on. | Para 12. |

- D CRIMINAL APPELLATE JURISDICTION :Criminal Appeal No. 502 of 2007.

From the Judgment and Order dated 15.07.2005 of the High Court of Judicature at Madras in Criminal Appeal No. 113 of 1999

- E P. K. Dey, A. Naqvi, Shreyasi, Chakrabarti, Vijay Pal Singh, Abha R. Sharma for the Appellants.

V. Kanagaraj, V. G. Pragasam, Prabu Ramasubramanian for the Respondent.

- F The Judgment of the Court was delivered by

- G H R. BANUMATHI, J. 1. This criminal appeal is filed against the judgment dated 15.07.2005 passed by the High Court of Judicature at Madras in Criminal Appeal No.113 of 1999, whereby the High Court, while maintaining the sentence, modified the conviction recorded by the trial court qua the accused namely Giri-accused No.1, Seenu @ Srinivasan-accused No.2, Balu @ Bala Subramaniam (Appellant No.1-Accused No.4) and Raja @ Kotti Raja (Appellant No.2-

Accused No.5) as conviction under Section 302 read with Section 34 IPC, Section 326 read with Section 34 IPC and Section 324 read with Section 34 IPC. The High Court acquitted Partheeban-accused No.3 of all the charges.

2. Briefly stated case of the prosecution is that one Natarajan had a quarrel with Seenu @ Srinivasan-accused No.2 in respect of a chit transaction and Kannan-PW2 supported Natarajan and fight ensued between Seenu-accused No.2 and Kannan-PW2 about a week prior to the date of incident i.e. 18.05.1997. In the forenoon, on the day of the incident i.e. on 18.05.1997, Kannan-PW2, Ramesh (deceased) and one Kamalakannan went to the accused in order to settle the dispute amicably. However, during settlement talks, fight ensued between PW-2 and Seenu and Balu attempted to beat PW-2 and Ramesh intervened and beat Balu. Thereafter both parties left the place stating that they could resume settlement talks in the evening. On the evening at about 6.30 P.M., Kannan-PW2, Saravanan-PW3, Suresh-PW5 and Arumugam-PW6 accompanied by Nagarajan went to Sakthi Nagar at Uruliyanpet and were having the settlement talks with the accused. On the mid way, the accused persons were informed that their friend one Anand is being badly cut by the complainant party and the accused questioned them as to how they could attack their man even when settlement talks were going on. So saying, the accused ran towards the place and on seeing PW-1 and Ramesh coming in the opposite direction, Giri-accused No.1 allegedly shouted that Ramesh supports Kannan and that he must be killed and accused No.1 and 2 cut Ramesh with knives on his head and chased him. Partheeban and appellants beat Ramesh on the face with sticks, Giri-accused No.1 again cut Ramesh with knife and Ramesh fell down. When PW-2 intervened to save Ramesh, PW-2 was attacked and he sustained injury on his left hand and PW-2 ran away from the place. Accused No.1

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A and 3 chased PW-3 and accused No.2 assaulted and inflicted cut injuries on the head of PW-3. They also inflicted cut injury on Muruganathan-PW4, who was taking bath near a water tap. The witnesses ran away from the place and came back only after some time and they were informed that injured Ramesh  
B was removed from the scene of occurrence by a police constable.

3. Based on the complaint lodged by PW-1, a case was registered against the accused in Crime No.152/1997 under  
C Sections 147, 148, 307 read with Section 149 IPC. Ramesh and other injured witnesses were examined by PW-11-Dr. Baskaran in General Hospital, Pondicherry. On 21.05.1997, Ramesh succumbed to injuries and the case was altered to Section 302 IPC. After due investigation, chargesheet was filed  
D against all the five accused.

4. To substantiate the charges, on behalf of the prosecution, fifteen witnesses were examined. The trial court held that the prosecution has established guilt of the accused  
E beyond reasonable doubt and convicted all the five accused under Section 148 IPC and Section 302 read with Section 149 IPC and various other offences and sentenced them to undergo imprisonment for life and also imposed sentences for other offences. Aggrieved by the verdict of conviction,  
F accused preferred appeal before the High Court. Vide impugned judgment dated 15.07.2005, High Court modified the conviction as aforesaid in para (1) and partly allowed the criminal appeal. Aggrieved, the appellants have preferred this  
G appeal.

5. Learned counsel for the appellants contended that the testimony of PW-2 who is an injured witness is not believable as firstly all the injured witnesses were examined soon after the incident in Government Hospital and they  
H deposed that they were assaulted by unknown persons.

However, PW-2, who was examined after three days, has stated that he was assaulted by accused No.1-Giri and not attributed any overt act to the appellants-accused No.4 and 5. It was further submitted that even as per the prosecution case, the occurrence was due to a sudden fight and that when peace talks were going on between the complainant and the accused party and on being informed that one Anand belonging to accused party was cut by the complainant party, fight ensued between two groups and as the act was not committed in furtherance of the common intention, the High Court erred in convicting the appellants under Section 302 read with Section 34 IPC.

6. Taking us through the evidence on behalf of the respondent, learned Senior Counsel Mr. V. Kanagaraj submitted that on exhortation by Giri-accused No.1, the appellants and other accused attacked deceased-Ramesh and injuries were caused in furtherance of common intention of all the accused would be liable under Section 302 read with Section 34 IPC for the act of committing murder of Ramesh and the appellants have been rightly convicted by the courts below.

7. We have carefully considered the rival contention and perused the impugned judgment and material on record.

8. Prosecution has examined fifteen witnesses out of which PWs 2 to 4 are injured witnesses. PW-3 Saravanan, PW-4 Muruganathan (nephew of accused No.3) did not support the prosecution case and prosecution thus relied upon the evidence of PW1-Murgan and PW5-Suresh and injured witness PW2-Kannan. In his evidence, PW-1 stated that accused No. 1 and 2 attacked Ramesh on his head with knives and accused No. 3 to 5 attacked Ramesh on his face by stick and Ramesh fell down on the road. Suresh-PW5 had also stated that the appellants attacked Ramesh by stick. PW2-

A Kannan, injured witness stated that accused No.1-Giri and  
accused No.2- Seenu attacked Ramesh by knives on his head.  
So far as the overt act of the appellants, PW2-Kannan stated  
that Accused No. 4 and 5 took the wooden stick from a bullock  
B cart standing nearby. PW-2 did not say anything about the  
overt act of the appellants. Though the appellants denied their  
presence at the place of incident and pleaded that a false case  
has been foisted against them, consistent version of PWs 1  
and 5 establish presence of the appellants and that they  
C attacked Ramesh with sticks. Presence of the appellants and  
that they were armed with sticks is also substantiated by the  
evidence of injured witness Kannan-PW2. Findings recorded  
by the courts below that the appellants attacked Ramesh with  
sticks is unassailable.

D 9. In the facts and circumstances of the case, whether  
the High Court was right in finding that the appellants acted in  
furtherance of common intention in committing murder of  
Ramesh and whether the High Court was right in attributing  
E constructive liability to the appellants while convicting them  
under Section 302 read with Section 34 IPC is the point falling  
for consideration.

F 10. To invoke Section 34 IPC, it must be established that  
the criminal act was done by more than one person in  
furtherance of common intention of all. It must, therefore, be  
proved that:- (i) there was common intention on the part of  
several persons to commit a particular crime and (ii) the crime  
was actually committed by them in furtherance of that common  
G intention. The essence of liability under Section 34 IPC is  
simultaneous conscious mind of persons participating in the  
criminal action to bring about a particular result. Minds  
regarding the sharing of common intention gets satisfied when  
an overt act is established qua each of the accused. Common  
H intention implies pre-arranged plan and acting in concert

pursuant to the pre-arranged plan. Common intention is an intention to commit the crime actually committed and each accused person can be convicted of that crime, only if he has participated in that common intention.

11. The classic case on the subject is the judgment of the Privy Council in *Mahbub Shah v. Emperor*, AIR 1945 PC 118, wherein it was held as under:-

“... Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say “the common intentions of all” nor does it say “an intention common to all”. Under the section, the essence of that 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. To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.”(Underlining added)

Reiterating the above principles laid down by the Privy Council in *Mahbub Shah's* case, in *Shankarlal Kacharabhai and Others vs. State of Gujarat*, AIR 1965 SC 1260, this Court

A held that the criminal act mentioned in Section 34 IPC is the result of the concerted action of more than one person and if the said result was reached in furtherance of the common intention, each person is liable for the result as if he had done it himself.

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12. In *Ramesh Singh alias photti v. State of A.P.*, (2004) 11 SCC 305, this Court held as under:-

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“12. ... As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held guilty. By introducing Section 34 in the Penal Code the legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principle of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is

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very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered from the manner in which the accused arrived at the scene and mounted the attack, the determination and concert with which the attack was made, and from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this

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regard even an illegal omission on the part of such  
accused can indicate the sharing of common intention.  
In other words, the totality of circumstances must be taken  
into consideration in arriving at the conclusion whether  
the accused had the common intention to commit an  
offence of which they could be convicted. (See *Noor  
Mohammad Mohd. Yusuf Momin v. State of  
Maharashtra, (1970) 1 SCC 696*)" (Underlining added)

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13. Common intention is seldom capable of direct proof,  
it is almost invariably to be inferred from proved circumstances  
relating to the entire conduct of all the persons and not only  
from the individual act actually performed. The inference to be  
drawn from the manner of the origin of the occurrence, the  
manner in which the accused arrived at the scene and the  
concert with which attack was made and from the injuries  
caused by one or some of them. The criminal act actually  
committed would certainly be one of the important factor to be  
taken into consideration but should not be taken to be the sole  
factor.

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14. Under Section 34 IPC, a pre-concert in the sense of  
a distinct previous plan is not necessary to be proved. The  
common intention to bring about a particular result may well  
develop on the spot as between a number of persons, with  
reference to the facts of the case and circumstances of the  
situation. The question whether there was any common  
intention or not depends upon the inference to be drawn from  
the proving facts and circumstances of each case. The totality  
of the circumstances must be taken into consideration in  
arriving at the conclusion whether the accused had a common  
intention to commit an offence with which they could be  
convicted.

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15. In the light of the above principles, considering the  
present case, in our view, the facts and circumstances do not

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- A indicate that there was common intention to commit murder of Ramesh. On 18.05.1997 in the forenoon, there were settlement talks which did not materialise and therefore they left the place stating that they could resume settlement talks in the evening. On the evening at about 6.30 P.M., PW2-Kannan,
- B PW3-Saravanan, PW5-Suresh, Arumugam and Nagarajan went to Sakthi Nagar and resumed settlement talks. At that time, one person belonging to the accused party came and informed that at the corner of lane, Anand-friend of the accused party was cut by the person who came for the settlement talks.
- C On hearing the same, Giri-Accused No.1 and Seenu-Accused No.2 questioned the complainant party as to how they could attack their man even when settlement talks were going on and so saying accused No.1 and 2 took their knives which they were hiding behind their back and accused No. 3 to 5
- D took sticks from a cart standing nearby attacked PWs 2, 3 and 5. At that time Ramesh and his uncle PW-1 Murgan were coming in the opposite direction and on seeing them accused No.1-Giri pointing out to Ramesh, exhorted others saying that
- E Ramesh belonged to Kannan party and that he be cut and by so saying accused No.1-Giri cut Ramesh on his head with knife and Seenu-Accused No.2 also attacked Ramesh with knife. The appellants and Partheeban-Accused No.3 have also attacked Ramesh with sticks on his face.
- F 16. Facts and circumstances of the case show that the attack was not a premeditated one nor was there a prior concert. Initially settlement talks were on and fight started only when the accused party was informed by their person that
- G Anand was cut by complainant party and thus the incident arose suddenly. No doubt, common intention could develop even at the spur of the moment; but in the present case, the way the occurrence took place as depicted by the prosecution, there could not have been common intention between the accused.
- H The totality of the circumstances must be taken into

consideration in order to arrive at a conclusion that the appellants had a common intention to commit the offence under which they were convicted. The appellants were not armed and admittedly they are said to have removed sticks from the bullock cart standing nearby and on the exhortation by accused No.1-Giri, the appellants have attacked Ramesh. There may be similar intention in the minds of the assailants to attack; but it cannot be said that the appellants have acted in furtherance of common intention to attract constructive liability under Section 34 IPC. The facts and circumstances, in our view, do not give rise to an inference of pre-concert.

17. For conviction of an offence read with Section 34 IPC, it is necessary that there should be a finding as to the common intention of the participants. Though the High Court has modified the conviction from Section 302 read with Section 149 IPC, as Section 302 read with Section 34 IPC, the High Court has not recorded any finding as to how the appellants shared the common intention to establish their constructive liability to sustain the conviction under Section 302 read with Section 34 IPC. The appellants are said to have attacked Ramesh with sticks on his face. Ramesh sustained nasal bone fracture probably due to the attack on the face. But this cannot be said to be an act in furtherance of common intention to commit the murder of Ramesh along with accused No.1 and 2. They are random individual acts done without meeting of minds and in our view, the appellants can be held liable only for their individual acts. Considering the totality of the circumstances, conviction of the appellants under Section 302 read with Section 34 IPC cannot be sustained and the same is modified as the conviction under Section 325 IPC and the sentence is modified to the period of imprisonment already undergone.

18. For attacking the witnesses PW2-Kannan, PW4-Muruganathan and PW5-Suresh, the appellants were convicted

- A by the trial court under Section 326 read with Section 149 IPC and under Section 324 read with Section 149 IPC which was modified by the High Court. No specific overt act is attributed to the appellants in attacking the prosecution witnesses 2, 4 and 5. As the appellants have not shared or acted in furtherance
- B of common intention in the attack of the witnesses and therefore the conviction of the appellants as modified by the High Court under Section 326 read with Section 34 IPC and under Section 324 read with Section 34 IPC cannot be sustained and the same is liable to be set aside.

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19. Conviction of the appellants Balu (A-4) and Raja(A-5) under Section 302 read with Section 34 IPC is modified as conviction under Section 325 IPC and they are sentenced to undergo imprisonment to the period already undergone. Their

D conviction under Section 326 read with Section 34 IPC and under Section 324 read with Section 34 IPC is set aside and the appellants are acquitted of those charges. The appeal is partly allowed to the extent indicated above. The appellants are on bail. Their bail bonds shall stand discharged.

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Kalpana K. Tripathy

Appeal Partly allowed.