ASIF KHAN

v.

STATE OF MAHARASHTRA & ANR.

(Criminal Appeal Nos. 286-288 of 2019)

MARCH 05, 2019

[ASHOK BHUSHAN AND K. M. JOSEPH, JJ.]

Penal Code, 1860:

s. 302 read with s. 34 – Murder – Common intention – Altercation between the parties after which accused no 1 and 2 came back and returned after 10 minutes with deadly weapons-knife with a blade of 15.5 cm, *by which the victim was stabbed resulting in his death – Accused no. 2-appellant held the neck of the victim and accused no 1 stabbed the victim – Trial court convicted the accused no. 1 and 2 for offences punishable u/s. 304 Part II rw s. 34 and others were acquitted – However, the High Court convicted the accused no. 1 and 2 u/s. 302 rw s. 34 – SLP by accused no. 1 dismissed – Appeal by accused no. 2 – Held: Common intention of the accused nos.1 and 2 is fully established by the circumstances and events unfolded in the prosecution story, duly corroborated by the prosecution witnesses – It cannot be said that there was no meeting of minds between accused nos.1 and 2, when they returned with weapon and stabbed the victim – Manner of incident also indicate that both had common intention, thus, the High Court did not commit any error in convicting the accused no.2 u/s. 302/34.*

Dismissing the appeals, the Court

HELD: 1.1 The High Court noticed that the accused Nos.1 and 2 after the first incident went back on a motorcycle and came after 10 minutes with deadly weapon, i.e., knife, which had a blade of 15.5 cm. There can be no doubt about the intention of the accused, who held the neck of the deceased and accused No.1 stabbed. PW5, doctor, who conducted the post-mortem proved in his evidence that the injury was sufficient in the normal course to cause death. The submission of the appellant that injury was not on vital part cannot be accepted. The judgment of the High Court convicting the accused no. 1 u/s. 302 has already been

upheld by dismissing the SLP on behalf of accused no. 1. Thus, there is no reason to take a different view to one taken by the High Court that accused were liable for conviction u/s. 302. [Para 13, 14][894-F-G; 895-D]

1.2 The appellant submitted that there could be no conviction under Section 34 for the appellant since there is no evidence of any pre-planned murder of deceased; and that in the First Information Report, it has mentioned that appellant had held hands of the deceased and in the evidence before the court, it was mentioned that appellant held the neck of the deceased. All the three eye-witnesses, PW1, PW2 and PW4, who appeared before the court have stated that appellant caught hold of the neck of victim and accused No.1 assaulted him by knife. [Para 18][898-A-C]

1.3 Looking into the evidence in the instant case, it is clear that common intention of the accused Nos.1 and 2 is fully established by the circumstances and events unfolded in the prosecution story, duly corroborated by PW1, PW2 and PW4. After altercation took place between accused No.1 and informant, the deceased-brother of informant, came and intervened in the matter, due to which the accused Nos.1 and 2 immediately returned from the spot in a motorcycle and came back after 10 minutes armed with deadly weapon. When both the accused returned after altercation with two brothers-informant and deceased, and came back after 10 minutes armed with weapon, common intention is clearly established and it cannot be said that there was no meeting of minds between accused Nos.1 and 2, when they returned with weapon and stabbed the deceased. The accused No.2 held the neck of the deceased when accused No.1 stabbed him by knife. The manner of incident also indicate that both had common intention, hence, the High Court did not commit any error in convicting the accused No.2 under Section 302 read with Section 34. [Para 28][903-F-H; 904-A, B]

Kulwant Rai v. State of Punjab **(1981) 4 SCC 245;** *Ramesh Vithalrao Thakre and Another v. State of Mahrashtra* **(2009) 17 SCC 438;** *Surain Singh v. State of Punjab* **(2017) 5 SCC 796 – distinguished.**

Mehbub Shah v. Emperor **AIR 1945 PC 118;** *Pandurang and Others v. State of Hyderabad* **AIR 1955 SC 216 : [1955] SCR 1083;** *Mohan Singh and Anr. v. State of Punjab* **AIR 1963 SC 174 : [1962] Suppl. SCR 848;** *Narinder Singh and Another v. State of Punjab* **(2000) 4 SCC 603 : [2000] 2 SCR 1022;** *Raju Pandurang Mahale v. State of Mahrashtra and Another* **(2004) 4 SCC 371 : [2004] 2 SCR 287 ;** *Murari Thakur and Another v. State of Bihar* **(2009) 16 SCC 256 : [2006] 10 Suppl. SCR 988 - referred to.**

Case Law Reference

(1981) 4 SCC 245	**distinguished.**	**Para 15**
(2009) 17 SCC 438	**distinguished.**	**Para 16**
(2017) 5 SCC 796	**distinguished.**	**Para 17**
AIR 1945 PC 118	**referred to.**	**Para 21**
[1955] SCR 1083	**referred to.**	**Para 22**
[1962] Suppl. SCR 848	**referred to.**	**Para 3**
[2000] 2 SCR 1022	**referred to.**	**Para 24**
[2004] 2 SCR 287	**referred to.**	**Para 27**
[2006] 10 Suppl. SCR 988	**referred to.**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 286-288 of 2019.

From the Judgment and Order dated 05.05.2014 of the High Court of Judicature at Bombay, Aurangabad Bench in Criminal Appeal Nos. 225 of 2012, 241 of 2012 and 461 of 2012.

Anurag Kishore, Abhishek Chaudhary, Adarsh Upadhayay, Harshavardhan Jha, Garvesh Kabara, S. P. Vishnu Prasath, Advs. for the Appellant.

Nishant Ramakantrao Katneshwarkar, Anoop Kandari, Mohd. Parvez Dabas, Uzmi Jameel Husain, Shakil Ahmed Syed, Daanish Ahmad Syed, Advs. for the Respondents.

A The Judgment of the Court was delivered by

ASHOK BHUSHAN, J.

1. These appeals have been filed against the judgment of the High Court dated 05.05.2014 dismissing the Criminal Appeals filed by the appellant and allowing the Criminal Appeals of the complainant as well as that of the State of Maharashtra.

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2. As per the prosecution story on 21.10.2010 at about 8 AM in the morning, the complainant was standing at Bazar Pati Chowk and his brother Sardarkha was standing at some distance. At that time, it was alleged that all the accused came there and asked the complainant to allow them to take water from the common well for one day due to load shedding. Complainant refused to give excess water and asked the accused to take water by rotation. At that time, they abused complainant and accused No.1, i.e. Nasibkha assaulted him. His brother Sardarkha who was standing at some distance, intervened. Thereafter, the accused Nos.1 and 2, i.e., Nasibkha and Asifkha went to their house on motorcycle and immediately returned. The accused No.1 challenged Sardarkha to stop him from drawing water. Sardarkha tried to convince him. Accused No.1 assaulted Sardarkha by knife on his right rib and accused No.2 caught hold the neck of Sardarkha. The accused Nos. 3 and 4, i.e., Jabbarkha and Ansarkha punched the complainant. Immediately after the incidents, Sardarkha was taken to Ghati Hospital, Aurangabad by Jeep and complainant and others followed him in another jeep. He was admitted in the hospital at about 10 AM, where the doctor declared him dead.

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3. A First Information Report was lodged on the same day under Sections 302, 323, 504, and 506 read with Section 34 of the Indian Penal Code against all the accused, who were named in the FIR. Accused were arrested on 22.10.2010. On 26.10.2010, accused No.1 gave a memorandum of statement under Section 27 of the Indian Evidence Act and in consequent to the said memorandum weapon was recovered. After completion of the investigation, charge sheet was filed under the aforesaid sections.

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4. All the accused were sent for trial. In the trial, complainant PW1 Kalekhan proved the prosecution case, other eye-witnesses - PW2 Salimkha Abbaskha Pathan and PW4, Ajijkha Sardarkha also proved the prosecution story, PW5, Dr. Navinkumar Varma proved the post-mortem report and PW6 and PW7 were panch witnesses. There were

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other formal witnesses, who deposed before the trial court. The trial court, vide its judgment dated 29.02.2012, after discussing the role of each of the accused came to the following conclusion in Paragraph No. 39:-

> **"39.** There are four accused in the crime and as per the case of the prosecution, they shared common intention to commit offence. If the evidence of prosecution witnesses in this regard is perused, P.W.1, 2 and 4, who are eye-witnesses, categorically stated that accused No.2 caught hold the neck of Sardarkha and accused No.1 inflicted knife blow on right rib. They have stated that accused Nos.3 and 4 were present and they assaulted complainant by fist and blows. There is no evidence that accused Nos.3 and 4 provoked accused Nos.1 and 2 to attack. There is no evidence of any prior concert or meeting of mind of accused Nos.3 and 4 in sharing common intention of accused Nos.1 and 2. Before convicting accused with the aid of Section 34 of Indian Penal Code, it has to be proved that there was pre-arranged plan to commit the offence……"

5. The trial court held that complicity of the accused Nos.1 and 2, i.e., accused Nasibkha and Asif Khan is established. The trial court, however, came to the conclusion that accused Nos.1 and 2 were not guilty of having committed offence under Section 302 read with 34 IPC, however, they can be convicted of having committed the offence punishable under Section 304 Part II read with Section 34, the accused Nos.1 and 2 were sentenced to undergo imprisonment for 10 years and to pay fine of Rs.5,000/-. All the accused were acquitted of the offence punishable under Sections 323, 504 and 506 read with Section 34 of Indian Penal Code. Accused Nos. 3 and 4 were acquitted.

6. Against the judgment of the trial court dated 29.02.2012, accused, the complainant and the State filed appeals. Accused were aggrieved by their conviction under Section 304 Part II, the complainant and the State were aggrieved of acquittal of accused under Section 302 read with Section 34. The High Court after considering the entire evidence on record came to following conclusions in Paragraph No.23 and 30:-

> "**23.** After analytical survey of the prosecution case, there is no doubt in our mind that accused no. 2 Asifkha caught hold neck of deceased Sardarkha and thereupon accused no. 1 Nasibkha made

A a murderous assault by means of knife on deceased Sardarkha. Therefore, accused no. 1 Nasibkha and accused no. 2 Asifkha are held to be guilty of homicidal death of deceased Sardarkha.

30. True it is, they were demanding water for one more day from the first informant, which was refused by him, thereby enraging
B them to hurl abuses and picked up a quarrel with PW 1 Kalekha, which was intervened by the deceased. Refusal of giving water for one more day culminating into giving abuses to PW 1 Kalekha and even quarrel with him, may be most natural, however, on the intervention of the deceased it was pacified. Not only that,
C consistent evidence of the prosecution shows that thereafter both accused no. 1 Nasibkha and accused no. 2 Asifkha left the place on motor cycle.

They arrived at the spot after ten minutes. This period was enough for their cooling in respect of the first incident, however, the
D prosecution evidence shows that after ten minutes, they, not only returned to the spot, but they returned with deadly knife with them. This act on the part of accused nos. 1 and 2 clearly establishes that with premeditation they returned to the spot. They returned to the spot with a specific intention. Further, from the evidence, it is clear that on reaching to the spot, they immediately caught
E deceased Sardarkha and gave knife blow as per the role ascribed to them by the prosecution witnesses. This fact clearly establishes that both the accused nos. 1 and 2 were nursing grudge against the deceased, because at the first instance it was the deceased who rescued PW 1 Kalekha from the quarrel with them."

F 7. The High Court did not approve the reasoning of the trial court that there was no intention of the accused to kill the deceased. The High Court allowed the appeals of the State and the complainant and convicted the accused Nos.1 and 2 under Section 302 read with Section 34 IPC. The criminal appeals filed by the accused were dismissed. Acquittal of accused Nos.3 and 4 was confirmed. Aggrieved against the judgment of
G the High Court, these appeals have been filed.

8. This Court heard the Special Leave Petition on 06.02.2015 and dismissed the Special Leave Petition qua petitioner No.1, i.e. Nasibkhan. Notice was issued in the Special Leave Petition insofar as petitioner No.2, i.e., Asif Khan is concerned. These appeals, thus, are considered
H only on behalf of Asif Khan.

9. Learned counsel for the appellant submits that an altercation took place between the parties and consequent to that incident has happened due to sudden fight between the parties and there was no intention on the part of the accused to kill the deceased. He submits that at best the conviction could have been recorded only under Section 304 Part II as has been held by the trial court. He further submits that with regard to appellant, in the First Information Report, although it is alleged that appellant hold hands of the deceased but in the evidence, it is sought to be stated that appellant held the neck of the deceased. Learned counsel for the appellant further submits that there could be no conviction under Section 34 for the appellant since there is no evidence of any pre-planned murder of deceased. Learned counsel for the appellant has placed reliance on judgments of this Court in **Kulwant Rai Vs. State of Punjab, (1981) 4 SCC 245; Ramesh Vithalrao Thakre and Another Vs. State of Mahrashtra, (2009) 17 SCC 438** and **Surain Singh Vs. State of Punjab, (2017) 5 SCC 796**.

10. Learned counsel for the State refuting the submission of the counsel for the appellant contends that High Court has rightly convicted the appellant under Section 302 read with Section 34 as after the first incident, when there was altercation between the parties, accused Nos.1 and 2 went back on the motorcycle and returned after 10 minutes with deadly weapon, i.e., knife, by which the deceased was stabbed. The appellant held the neck of the deceased and accused No.1 stabbed the deceased. The crime was committed by accused Nos.1 and 2 with common intention, hence they have been rightly convicted under Section 302. It is submitted that present is not a case for conviction under Section 304 Part II, as the accused after first incident returned and came back with deadly weapon and with intention to kill has stabbed the deceased. All the eye-witnesses have proved the prosecution case.

11. We have considered the submissions of the learned counsel for the parties and have perused the records.

12. The first submission of the learned counsel for the appellant is that, at best, the present was a case for conviction under Section 304 part II and it was not a case for conviction under Section 302. The High Court has elaborately considered the evidence to find out as to whether conviction in the present case ought to have been under Section 302 or under Section 304 Part II as held by the trial court. The consideration of the High Court in Paragraph Nos. 23 and 30 have already been extracted

A above. With regard to observation of trial court that it is not proved that accused had intention to kill the deceased, the High Court held following in Paragraph Nos.33 and 34:-

> "**33.** In the present case, the learned trial court has observed in its judgment paragraph 43 and recorded a finding that, there was an
B intention on the part of accused nos. 1 and 2 to cause injury to the deceased, however, the learned court below in one breath gives reasoning that, from the material on record, it does not appear that the intention of the accused was to kill the deceased; however, in the next breath, the learned Judge reasoned that, accused no. 1 was armed with knife, blade of which itself was 15.5 cm. in length,
C and therefore, the accused should have been aware that if he stabbed the deceased, he may be acting in such a manner that the injury he caused is likely to cause death, and still the learned court below has acquitted accused nos. 1 and 2 under Section 302 of the Indian Penal Code.
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D **34.** This appreciation on the part of learned court below, in our view, is perverse. Once the intention is established, and in the light of medical evidence and existence of the injury found on the dead body of Sardarkha, there is no escape but to record a finding of guilt against the accused nos. 1 and 2 for having committed the offence under Section 302 of the Indian Penal code.
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E The learned counsel for accused nos. 1 and 2 found it very difficult and could not bring their case in any of the Exceptions of Section 300 of the Indian Penal Code."

13. High Court has also noticed that the accused Nos.1 and 2 after the first incident went back on a motorcycle and came after
F 10 minutes with deadly weapon, i.e., knife, which had a blade of 15.5 cm. There can be no doubt about the intention of the accused, who held the neck of the deceased and accused No.1 stabbed. PW5, Dr. Naveenkumar Varma, who conducted the post-mortem proved in his evidence that Injury No.17 was sufficient in the normal course to
G cause death. Learned counsel for the appellant submitted that the injury, which was caused on right flank region in right hypochondric region was not on a vital part. The High Court while considering the injury has made following observations:-

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"The said injury is mentioned at column 17 in the postmortem report Exh. 56, duly proved by Dr. Navinkumar Varma (PW 5). According to column no. 20 of postmortem report Exh. 56, right 9th rib cut from lower margin in 0.5 cm. area cut ends shows infiltration staining.

The doctor also noted haematoma on right flank region around stab injury dark red in colour. Liver stab wound of 3 x 0.3 x 11 cm. in right lobe of liver, which he mentioned in column no. 21 of postmortem report.

According to autopsy surgeon Dr. Varma, the cause of death is, shock and haemorrhage due to stab injury to liver. The doctor found that the injury was antemortem."

14. The submission of the appellant that injury was not on vital part cannot be accepted. It is further to be noted that judgment of the High Court convicting the accused No.1 under Section 302 has already been upheld by dismissing the Special Leave Petition on 06.02.2015 on behalf of Nasib Khan. We, thus, do not find any reason to take a different view to one taken by the High Court that accused were liable for conviction under Section 302. In **Kulwant Rai (supra)**, one dagger blow was given in epigastrium area. This Court noted that there was no altercation, there was no premeditation and the case was of a hit and run. In the above circumstances, the court held that it was a case, which fall under Section 304 Part II, in paragraph No.3, following has been held:-

"3. When the matter was before the High Court it was strenuously urged that in the circumstances of the case para 1 of Section 300 would not be attracted because it cannot be said that the accused had the intention to commit murder of the deceased. In fact, that is conceded. More often, a suggestion is made that the case would be covered by Para 3 of Section 300 of the Indian Penal Code in that not only the accused intended to inflict that particular injury but the injury intended to be inflicted was by objective medical test found to be sufficient in the ordinary course of nature to cause death. The question is in the circumstance in which the offence came to be committed, could it ever be said that the accused intended to inflict that injury which proved to be fatal. To repeat, there was an altercation. There was no premeditation. It was something like hit and run. In such a case, Para 3 of Section 300

A would not be attracted because it cannot be said that the accused intended to inflict that particular injury which was ultimately found to have been inflicted. In the circumstances herein discussed, it would appear that the accused inflicted an injury which he knew to be likely to cause death and the case would accordingly fall under Section 304 Part II, Indian Penal Code."

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15. The above case is clearly distinguishable since present is a case where accused Nos.1 and 2 after first incident, in which there was altercation with the informant and deceased, returned back on motorcycle and came back after 10 minutes alongwith weapon, hence the above judgment is not applicable. Coming to case relied on by appellant, i.e., C **Ramesh Vithalrao Thakre (supra).** In the above case, the accused had previous enmity with one Ashok and they have gone to inflict injury on Ashok. Sister of Ashok, Rekha came in between and she received single injury on her chest. In the above circumstances, this Court held that case will fall under Section 304 Part II of IPC. In Paragraph Nos. D 9 and 11, following has been held:-

> **"9.** There is no denying the fact that one single injury was caused to the deceased by Ramesh when Rekha intervened to save her brother Ashok from being assaulted. The primary target of Ramesh was Ashok, who got saved when Rekha received the injury on her chest. After causing the single injury to Rekha, it is the E prosecution case itself, that Ramesh did not cause any other injury to Rekha nor even to Ashok, PW 1.
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> **11.** We, accordingly set aside the conviction and sentence of Ramesh for the offence under Sections 302/34 IPC and instead find him guilty for the offence under Section 304 Pt. II IPC and F sentence him to five years' rigorous imprisonment and a fine of Rs. 4000. In default of payment of fine, the appellant shall suffer rigorous imprisonment for a period of one year. The fine shall be paid within three months and on realisation shall be paid to the mother of the deceased, PW 2, Janabai."

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16. The above case is clearly distinguishable since in that case, they had not gone to inflict injury on the deceased sister of Ashok rather they had gone to inflict injury on Ashok and since she intervened to save her brother and got assaulted, it was not pre-planned. But, in the present

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case accused Nos.1 and 2 after first incident, returned back on motorcycle and came back after 10 minutes alongwith weapon, hence the above judgment is not applicable. The third case relied by the learned counsel for the appellant **Surain Singh (supra)** was a case where this Court held conviction under Section 304 Part II on the ground that attack was not premeditated and preplanned. In Paragraph Nos. 21 and 23, following has been held:-

> **"21.** In the instant case, it is evident from the materials on record that there was bitter hostility between the warring factions to which the accused and the deceased belonged. Criminal litigation was going on between these factions. It is also proved from the material on record that the attack was not premeditated and preplanned. Both the parties were present in the Court of Executive Magistrate, Faridkot at the relevant time with regard to the proceedings under Sections 107/151 of the Code. When the appellant-accused objected to the presence of a member of the opposite side, the scuffle started between the parties which resulted into death of two persons. The conduct of the appellant-accused that he at once took out his kirpan and started giving blows to the opposite party proves that the attack was not premeditated and it was because of the spur of the moment and without any intention to cause death. The occasion for sudden fight must not only be sudden but the party assaulted must be on an equal footing in point of defence, at least at the onset.
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> **23.** Thus, if there is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not intention to cause murder and bodily injury then the same would fall under Section 304 Part II. We are inclined to the view that in the facts and circumstances of the present case, it cannot be said that the appellant-accused had any intention of causing the death of the deceased when he committed the act in question. The incident took place out of grave and sudden provocation and hence the accused is entitled to the benefit of Section 300 Exception 4 IPC."

17. The above case is also clearly distinguishable and not applicable in the facts of the present case.

A 18. Now, we come to conviction of the appellant under Section 34. The submission made by the appellant is that there could be no conviction under Section 34 for the appellant since there is no evidence of any pre-planned murder of deceased. Insofar as the submission of the learned counsel for the appellant that in the First Information Report, it has mentioned that appellant had held hands of the deceased and in B the evidence before the Court, it was mentioned that appellant held the neck of the deceased. All the three eye-witnesses, PW1, PW2 and PW4, who appeared before the Court have stated that Asif Khan caught hold of the neck of Sardarkha and accused No.1 assaulted him by knife. Paragraph No. 4 of the examination-in-chief of PW1 is as follows:-

C "**4.** After sometime they came back. At that time accused No.1 told me that how you will not allow me to take more water, I will see you. At that time accused No.2 Asifkhan caught hold neck of Sardarkhan and accused No.1 Nasibkhan assaulted him by knife on the right side of his stomach……"

D 19. In the cross-examination, PW1 again stated that accused No.2 caught hold of neck of his brother. The evidence of PW2 and PW4 is also consistent that Asif Khan caught hold the neck of Sardarkha and accused No.1 assaulted Sardarkha on his right rib by knife. Whether, in the facts of the present case and the evidence on record, the appellant could be convicted under Section 302 with aid of Section 34 is a question E to be answered.

20. The test for applicability of Section 34 in a fact situation of an offence has been clearly and categorically laid down by this Court. Section 34 of IPC provides as follows:-

F **34. Acts done by several persons in furtherance of common intention.—** 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.

G 21. The judgment of Privy Council in **Mehbub Shah Vs. Emperor, AIR 1945 PC 118** has elaborately considered the ingredients under Section 34 and the said judgment of Privy Council has been relied on and approved by this Court time and again. The Privy Council in above case laid down that under Section 34, the essence of that liability is to be found in the existence of a common intention animating the H accused leading to the doing of a criminal act in furtherance of such intention. In Paragraph No.13, following has been laid down:-

"**13.** In 1870, it was amended by the insertion of the words "in furtherance of the common intention of all" after the word "persons" and before the word "each," so as to make the object of the section clear. 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 prearranged 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."

22. In **Pandurang and Others Vs. State of Hyderabad, AIR 1955 SC 216**, Justice Vivian Bose, speaking for the Bench considered the ingredients of Section 34 and relying on Privy Council judgment in **Mehbub Shah Vs. Emperor (supra)** laid down following in Paragraph Nos. 32 to 34:-

"32. As we have just said, the witnesses arrived at a time when the beating was already in progress. They knew nothing about what went before. We are not satisfied that Tukaram is proved to have done anything except be present, and even if it he accepted that Nilia aimed a blow at Ramchander's thigh he was so half hearted about it that it did not even hit him; and in Pandurang case, though armed with a lethal weapon, he did no more than inflict a comparatively light head injury. It is true they all ran away when the eye-witnesses arrived and later absconded, but there is nothing to indicate that they ran away together as a body, or that they met afterwards. Rasikabai says that the "accused" raised

their axes and sticks and threatened her when she called out to them, but that again is an all embracing statement which we are not prepared to take literally in the absence of further particulars. People do not ordinarily act in unison like a Greek chorus and, quite apart from dishonesty, this is a favourite device with witnesses who are either not mentally alert or are mentally lazy and are given to loose thinking. They are often apt to say "all" even when they only saw "some" because they are too lazy, mentally, to differentiate. Unless therefore a witness particularises when there are a number of accused it is ordinarily unsafe to accept omnibus inclusions like this at their face value. We are unable to deduce any prior arrangement to murder from these facts.

33. Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: *Mahbub Shah* v. *King Emperor*. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: *Barendra Kumar Ghosh* v. *King- Emperor* and *Mahbub Shah* v. *King-Emperor*. As Their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".

34. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary

meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose."

23. The Constitution Bench of this Court in **Mohan Singh and Anr. Vs. State of Punjab, AIR 1963 SC 174** had again reiterated the ingredients of Section 34. Constitution Bench has also relied on and approved the Privy Council judgment in **Mehbub Shah Vs. Emperor (supra)** noticing the essential constituents of vicarious liability under Section 34, Justice Gajendragadkar speaking for the Bench laid down following in Paragraph No.13:-

"**13**.....The essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34. In some ways the two sections are similar and in some cases they may overlap. But, nevertheless, the common intention which is the basis of Section 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-in-concert and necessarily postulates the existence of a prearranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which Section 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. It is now well-settled that the common intention required by Section 34 is different from the same intention or similar intention. As has been observed by the Privy Council in *Mahbub Shah* v. *King-Emperor*[4] common intention within the meaning of Section 34 implies a pre-arranged

A 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 and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.

B 24. The principles as noticed above have been reiterated time and again. We may refer to the judgment of this Court in **Narinder Singh and Another Vs. State of Punjab, (2000) 4 SCC 603**, the facts in the above case has been noticed in Paragraph No.5 of the judgment, which are to the following effect:-

C **"5.** On 6-11-1989 Gurdev Singh with his son Hardip Singh (PW 2) was going on a bicycle to Village Jagatpur in order to withdraw the money from his account in the Cooperative Bank there. Hardip Singh was pedalling the cycle while Gurdev Singh was sitting on its carrier. Around 12 o'clock when they reached the metalled road near the field of one Gurmej Singh, resident of Jagatpur, they D saw the appellants sitting near a tree. They got up and intercepted Gurdev Singh and Hardip Singh. Both got down from their cycle. Appellant Narinder Singh proclaimed that they would teach Gurdev Singh a lesson as he had not vacated the office of Granthi of the Gurudwara as per their demand. He grabbed Gurdev Singh by his arms while the second appellant Ravinder Singh alias Khanna E took out a gatra kirpan, which he was wearing and stabbed Gurdev Singh with the gatra kirpan on the left side of his neck. Gurdev Singh after receiving the kirpan-blow fell down……"

25. The role assigned was that he grabbed Gurdev Singh by his F arms while the second appellant stabbed Gurdev Singh with kirpan. In Paragraph No.5, following has been stated:-

"**5. ……**He grabbed Gurdev Singh by his arms while the second appellant Ravinder Singh alias Khanna took out a gatra kirpan, which he was wearing and stabbed Gurdev G Singh with the gatra kirpan on the left side of his neck. Gurdev Singh after receiving the kirpan-blow fell down……"

26. This Court in Paragraph No.16 of the judgment held that both the appellants had committed the murder of Gurdev Singh. It was held that it is not material to bring the case under Section 34, as to who inflicted the fatal blow, following was laid down in Paragraph No.16:-

H

> **"16.** ……Both the appellants committed the murder of Gurdev Singh, Granthi in furtherance of their common intention. It was submitted by Mr Gupta that Narinder Singh could not have been convicted with the aid of Section 34 as this section is nowhere mentioned in the impugned judgment. Mention of the section in the judgment is not the requirement of law to convict a person. If the ingredients of the offence are present, conviction can be made. It is not material to bring the case under Section 34 IPC as to who, in fact, inflicted the fatal blow. The High Court has rightly interfered in the matter and sentenced the appellants accordingly."

27. To the same effect is the judgment of this Court in **Raju Pandurang Mahale vs. State of Mahrashtra and Another, (2004) 4 SCC 371.** Another judgment, which is relevant for the present case is the case of **Murari Thakur and Another Vs. State of Bihar, (2009) 16 SCC 256.** In the above case, the main plea of the accused was that he had caught the legs of the deceased whereas third accused cut him with his sharp edged weapon. In paragraph No.7, following was laid down:-

> **"7.** We agree with the view taken by the High Court and the trial court that the accused had committed murder of deceased Bal Krishna Mishra after overpowering him in furtherance of their common intention on 26-8-1998 at 4 p.m. No doubt it was Sunil Kumar, who is not before us, who cut the neck of the deceased but the appellants before us (Murari Thakur and Sudhir Thakur) also participated in the murder. Murari Thakur had caught the legs of the deceased and Sudhir Thakur sat on the back of the deceased at the time of commission of this murder. Hence, Section 34 IPC is clearly applicable in this case."

28. When we look into the evidence in the present case, in light of the principles as enunciated above, it is clear that common intention of the accused Nos.1 and 2 is fully established by the circumstances and events unfolded in the prosecution story, duly corroborated by PW1, PW2 and PW4. After altercation took place between accused No.1 and informant, the deceased, who was brother of informant came and intervened in the matter, due to which the accused Nos.1 and 2 immediately returned from the spot in a motorcycle and came back after 10 minutes armed with deadly weapon. When both the accused returned after altercation with two brothers – informant and deceased and came

back after 10 minutes armed with weapon, common intention is clearly established and it cannot be said that there was no meeting of minds between accused Nos.1 and 2, when they returned with weapon and stabbed the deceased. The accused No.2 held the neck of the deceased when accused No.1 stabbed him by knife. The manner of incident also indicate that both had common intention, hence, High Court did not commit any error in convicting the accused No.2 under Section 302 read with Section 34.

29. We, thus, do not find any merit in the appeals, the appeals are dismissed.

Nidhi Jain Appeals dismissed.