

PETITIONER:
RAMASWAMI AYYANGAR AND ORS.

Vs.

RESPONDENT:
STATE OF TAMIL NADU

DATE OF JUDGMENT 24/03/1976

BENCH:
UNTWALIA, N.L.
BENCH:
UNTWALIA, N.L.
SARKARIA, RANJIT SINGH

CITATION:
1976 AIR 2027 1976 SCR 580
1976 SCC (3) 574

ACT:
Indian Penal Code, S. 34, essence of-Application of S. 34, whether physical presence and actual participation necessary in offences involving physical violence.

HEADNOTE:
Previous enmity between the appellant Ramaswami Ayyangar and the deceased Kaliaperumal resulted in an occurrence, in which Kaliaperumal got seriously injured and died in the hospital. Various charges were framed against the six accused, including those of murder and rioting. The Trial Judge acquitted three of the accused persons, convicted two under S. 302 I.P.C. and one under S. 324.

Cross-appeals were preferred in the High Court; one by the three accused against their convictions, and another by the State, against the acquittals. The High Court convicted all the six accused of the offence of rioting. A-2 to A-6 under S. 302 read with S. 34, A-1 under Ss. 302/149 and 302/109, and A-2 under S. 324. It was contended before this Court that on the facts of the case, the High Court was not justified in interfering with the acquittal of A-1. A-5 and A-6, and that A-2 who did not physically participate in the fatal beating of the deceased, could not be held vicariously liable for the acts of others, and that S. 34 was not applicable to him.

Partly allowing the appeals, the Court

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HELD: (1) In the case of an offence involving physical violence, it is essential for the application of S. 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. [881 C-D]

(2) The "act" spoken of in S. 34 includes a series of acts as a single act. It follows that the words "when a criminal act is done by several persons" in S. 34, may be construed to mean "when criminal acts are done by several persons". The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise. Such presence of those who in one way or the

other facilitate the execution of the common design, is itself tantamount to actual participation in the 'criminal act'. [881 A-B & D]

(3) The essence of S. 34 is simultaneous consensus of the minds of persons participating in the 'criminal action' to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. [881 D-E]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 251 of 1972 and 243 of 1973.

Appeals by Special Leave from the Judgment and order dated 22-9-72 of the Madras High Court in Criminal Appeal No. 369/72 and 976/71.

Debaratea Mookerjee, M. S. K. Sastri and M. S. Narasimhan for the Appellants.

A. V. Rangam and Miss A. Subhashni, for the Respondents.

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The Judgment of the Court was delivered by UNTWALIA, J. Criminal Appeal No. 251 of 1972 has been filed under section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 and Criminal Appeal No. 243 of 1973 is by special leave. In all there are six appellants. It would be convenient to refer to them with reference to their accused number given in the judgment of the Sessions Court. They are as follows:

Accused No. 1 (A-1)-Ramaswami Ayyangar.

Accused No. 2 (A-2)-Vattappan.

Accused No. 3 (A-3)-Kaipillai alias Karuppayyan.

Accused No. 4 (A-4)-Raman.

Accused No. 5 (A-5)-Kathayyan.

Accused No. 6 (A-6)-Kulandaiyan.

The occurrence giving rise to these two appeals took place on Monday the 21st April, 1971 at about 4.00 p.m. at Sivan Koil tank in village Thaduthalkondapuram. In the said occurrence was seriously injured one Kaliaperumal who later died in the Hospital at about 9.00 p.m. the same evening. Another person injured in the occurrence was also named Kaliaperumal, P.W. 1. The prosecution case is that deceased Kaliaperumal was living with his maternal uncle Pichai Konar, P.W. 7 since infancy. A-1 is the Karnam of the village and A-6 is the Government vetti. A-2 and A-3 are brothers, A-4, A-5 and A-6 are also inter-se brothers. A-2 to A-6 worked under A-1. There was enmity between P.W. 7 and the deceased on the one hand and A-1 on the other on account of several causes. The facts showing the enmity between them are stated in the judgments of the courts below and are not necessary to be detailed here. Two days prior to the occurrence Marimuthu, P.W. 10 was driving some cattle, 4 or 5 of them went astray and entered into the Gingillillai (field) belonging to A-1. A-1's men scolded P.W. 10 and the deceased who was informed about the incident by the former at a tea shop. P.W. 1 was also present there. Deceased Kaliaperumal passed on the information to P.W. 7.

Ramalingam, P.W. 4 brother of the deceased was taking his bath in the Sivan Koil tank. Kaliaperumal (deceased) also came there saying something against the Karnam. He also started bathing at the north-western corner of the tank. According to the prosecution case, A-1 came there followed by A-2 to A-6. A-2 had a cross-stop (an instrument used in Survey and measurement, perhaps the correct name of the

instrument is cross-staff). A-3 and A-4 were each armed with an Aruval. A-5 had a stick and A-6 was carrying a stick with a spear attached to it. According to the evidence in Court, A-1 told the other accused "Not content to with grazing (his) cattle in my gingilly field, he is also abusing me. Cut him, whatever be the expenses, I will look after that." Thereupon A-4 asked the deceased Kaliaperumal "Why are you abusing the 'Iyer'?" Saying something Kaliaperumal ascended the bank. A-3 and A-4 assaulted him on his head with Aruvals. P.W. 1 ran to separate them when A-2 assaulted him on

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his head with the cross-stop. P.W. 1 attempted to run. Thereupon it is said A-6 obstructed him from running with the help of the stick with spear head. A-4 again cut on the head of Kallaperumal (deceased) with his Aruval. A-2 beat on P.W.'s head with the cross-stop four or five times. P.W. 1 fell down unconscious. P.W. 7 and others took the injured to the Government Dispensary Kodavasal. Dr. Radha Singh, Civil Assistant Surgeon, P.W. 15 examined Kallaperumal deceased at 4.55 p.m. and issued a Wound Certificate. Since his condition was serious he was sent to the Government Hospital, Kumbakonam. P.W. 15 examined the injuries on P.W. 1 at 5.20 p.m. and found as many as nine injuries on his person. As already stated Kaliaperumal died at about 9.00 p.m. Dr. N. Jayaraj, P.W. 18 performed the autopsy over the dead body. As many as 14 injuries were found. The injuries given on the head with Aruval according to the opinions of the Doctors were sufficient in the ordinary course of nature to cause his death.

Various charges were framed against the six accused including that of rioting under section 147 IPC against A-1 and A-5 and section 148 against A-2, A-3, A-4 and A-6. A-1 was further charged under sections 302/149 and sections 302/109. A-2 to A-6 were charged under section 302. An extra charge under section 324 was levelled against A-2 for causing simple hurt to P.W. 1 with the cross-stop, an instrument which had sharp edges. A-6 was also charged under section 341 of the Penal Code for preventing P.W. 1 from escaping. The accused denied their complicity in the occurrence and pleaded not guilty. A-1 took a plea of alibi also and asserted that he had gone to Madras in connection with some marriage negotiations. Two days after the date of occurrence he was arrested at Kumbakonam Railway Station when he alighted from the train on his return from Madras. The Trial Judge acquitted A-1, A-5 and A-6 of all the charges. He convicted A-3 and A-4 under section 302 of the Penal Code and awarded a sentence of life imprisonment to each of them. They were acquitted of the charge under section 148. A-2 was convicted only under section 324 with a sentence of 4 months' rigorous imprisonment and acquitted of all other charges.

A-2, A-3 and A-4 preferred an appeal in the Madras High Court against their conviction and the sentences imposed upon them by the Trial Court. State preferred an appeal against the acquittals of A-1, A-5 and A-6 as also against the acquittal of A-2 of the charge under section 302. It, however, did not prefer any appeal against the acquittal of A-2, A-3 and A-4 of the charge under section 148 of the Penal Code. Yet it is surprising to find that the High Court has convicted all the six accused for the offences of rioting, A-1 and A-5 under section 147 with two years' rigorous imprisonment and A-2, A-3, A-4 and A-6 under section 148 with 3 years' rigorous imprisonment. Conviction of A-3 and A-4 for the offence of murder under section 302

has been maintained with the aid of section 34. High Court has also convicted A-2, A-5 and A-6 under sections 302/34 and awarded each of them life imprisonment. A-1 has been convicted by the High Court under sections 302/149 and 302/109 with sentence

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of life imprisonment under each. Conviction of A-2 under section 324 has been maintained. Hence these two appeals.

That there was enmity and bad blood between A-1 and P.W. 7 is not open to any doubt. An occurrence did take place on the date, time and place as given by the prosecution. The manner of occurrence in so far as it relates to the attack on the deceased is concerned by A-2 and A-3 has also been proved to the hilt. The factum of assault by A-2 on P.W. 1 also does not admit of any doubt. But the High Court does not seem to be justified in reversing the order of acquittal recorded by the Trial Court in favour of A-1, A-5 and A-6.

It was claimed by the prosecution that apart from P.W. 1 there were four more eye witnesses to the occurrence namely Govindaswami, P.W. 3, Ramalingam, P.W. 4, Rajagopal, P.W. 5, and Kaliaperumal, P.W. 6. P.Ws 3 and 4 are brothers of the deceased. P.W. 5 is the brother-in-law of P.W. 3. Ext. P-1 is the statement of P.W. 1 before the police on the basis of which the First Information Report was drawn up. On reading this statement as also the evidence of P.W. 1 in Court, the Trial Judge rightly came to the conclusion that P.Ws. 3, 4, 5 and 6 arrived at the scene of occurrence after it had taken place. None of them had witnessed it. It considered the evidence of each witness, viz. P.Ws. 3 to 6, individually and did not rely upon it. In our judgment, the High Court was not right as against the explicit statement and evidence of P.W. 1 in reading P.Ws. 3 to 6 as eye witnesses to the occurrence. It is significant to note that although P.Ws. 3 and 4 were the brothers of the deceased Kaliaperumal but none of them made any attempt to save him from the attack of the assailants. Had they been present at the occurrence surely they would have tried to save their brother, as was done by P.W. 1. We are, therefore, left with the evidence of P.W. 1 alone. Since he was injured in the same occurrence, undoubtedly, his ocular version of the incident is of great value to the prosecution.

The plea of alibi set up by A-1 has not been substantiated at all. The Trial Judge was not right in doubting the prosecution case merely because A-1 had applied for leave on the 18th April-3 days before the occurrence. There was no evidence to show that he was at Madras on the date of occurrence. According to the Investigating Agency, A-1 was arrested not on the Railway platform but near the Railway level crossing of Kumbakonam Railway Station. But the Trial Court was right in saying that the only part attributed to A-1 was the order giving for assault. In the statement Ext. P-1 the only words of order attributed to A-1 are "to cut". In court there was great embellishment and improvement in the evidence of P.W. 1 when he put several sentences in the mouth of A-1 at the time of the alleged order-giving. As already stated, A-1 was the Karnam of the village and even if he was at the back of the assault on the deceased it does not stand to reason that he himself would go to the place of occurrence merely for giving the order for assault. The order, if any, must have been given to the assailants in secret by A-1. He must not have come to the place of occurrence merely for this purpose. We

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are, therefore, of the view that although the High Court in

its judgment purported to keep in front the well-settled principles of law to justify an interference by it with the order of acquittal, it did commit a mistake in the applications of those principles. Conviction of A-1 by the High Court under any count is not justified.

So do we find in the case of A-5 and A-6 that they had not taken any part in the occurrence at all. The alleged obstruction given by A-6 to P.W. 1 when he wanted to run was not believable and has not been believed by the Trial Court. The reasons given by the Trial Court for their acquittal were not such as to justify an interference by the High Court. The view taken by the Trial Court was reasonably possible to be taken.

Coming to the case of A-2 we find that he did assault P.W. 1 with the cross-staff marked Ext. MO-1. This cross-staff, as alleged, has been recovered from the house of A-1. The Trial Court, rightly, did not believe the story of its recovery from his house. But surely A-2 had used the cross-staff for assaulting P.W. 1. A serious question for consideration is whether his conviction under section 302 with the aid of section 34 is justified or not. In this connection we find the statement of P.W. 1 in Ext. P-1 to the following effect:

"Raman too with the aruval in his hand dealt a cut at the front portion of his head. I ran there to prevent it. At that time Vattappan with the string fixed wood he was having in his hand beat on my head."

In the Sessions Court also he deposed:

"Thereupon, Accused No. 3 immediately cut on the head of Kaliyaperumal in the front portion with the aruval he was having in his hand. I ran to separate them. Immediately Accused No. 2 beat on my head with M.O. 1.....

Then accused number 2 beat on my head with M.O. 1, 4 or 5 times. I fell down unconscious. After some time, President Kaliyaperumal, Rajagopal, Mani alias Rajagopal, Ramalingam, Govindaswami-these persons came there.

From the evidence of P.W. 1 corroborated as it is from his statement in Ext. P-1 it is clear that P.W. 1 wanted to save Kaliyaperumal- the deceased, from the murderous attack by A-3 and A-4. A-2 was standing as a guard and did not allow P.W. 1 to protect the deceased. A-2 went to the length of assaulting P.W. 1 and making him fall down unconscious.

It is contended that A-2 cannot be held vicariously liable with the aid of s. 34 for the act of A-3 and A-4, for two reasons: Firstly, he did not physically participate in the fatal beating administered by A-3 and A-4 to the deceased and thus the "criminal act" of murder was not done by all these three accused within the contemplation of s. 34, the act committed by A-2 in regard to the beating of P.W. 1 being a different and separate act of A-2. Secondly, it has not been shown that the act of A-2 in beating P.W. 1 was committed in

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furtherance of the common intention of all the three, pursuant to a pre-arranged plan.

The contention is fallacious and cannot be accepted. Section 34 is to be read along with the preceding s. 33 which makes it clear that the "act" spoken of in s. 34 includes a series of acts as a single act. It follows that the words "when a criminal act is done by several persons" in s. 34, may be construed to mean "when criminal acts are done by several persons". The acts committed by different confederates in the criminal 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 execution of the common design. Such a person also commits an "act" as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of s. 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common, design, is itself tantamount to actual participation in the 'criminal act'. The essence of s. 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. In the case before us, A-2 obviously, was acting in concert with A-3 and A-4 in causing the murder of the deceased, when he prevented PW 1 from going to the relief of the deceased. Section 34 was therefore fully attracted and under the circumstances A-2 was equally responsible for the murder of the deceased. Under these circumstances we think the High Court was justified in convicting A-2 for the offence of murder of Kaliyaperumal with the aid of section 34 of the Penal Code. There was absolutely no difficulty in maintaining the convictions of A-3 and A-4 for the murder of Kaliyaperumal with the aid of section 34 because both had mercilessly assaulted him with Aruvals on the vital parts of the body. In the case of A-2 also it is quite legitimate to hold that he had shared the common intention of A-3 and A-4 in the commission of the murder of Kaliyaperumal.

The conviction of none of the accused for the offence of rioting can be maintained either in law or on facts. In the view which we have expressed above that the High Court was not justified in reversing the acquittals of A-1, A-5 and A-6, there were only 3 left in the party of the assailants. Moreover the State did not file any appeal, as

882 stated already, against the acquittal of A-2, A-3 and A-4 under section 148 of the Penal Code. That being so, they could not be convicted for having formed an unlawful assembly for any criminal common object. None could be convicted, therefore, under sections 147 or 148. Section 149 could not be pressed into service against any.

In the result we allow both the appeals in part, restore the order of acquittal recorded in favour of A-1 viz., Ramaswami Ayyangar, A-5 Kathayyan and A-6 Kulandaiyan acquitting them of all the charges, set aside the conviction of the remaining accused under sections 147 and 148 of the Penal Code and maintain the convictions of A-2 Vattappan, A-3 Kaipillai alias Karuppayyan, A-4 Raman under section 302/34 with the sentence of life imprisonment to each. We also maintain the conviction of A-2 under section 324 Indian Penal Code with the concurrent sentence of 4 months' rigorous imprisonment under the said count.

M.R.

Appeals partly allowed.

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