

CASE NO.:
Appeal (civil) 1254 of 2006

PETITIONER:
Manik Das AND Ors.

RESPONDENT:
State of Assam

DATE OF JUDGMENT: 31/05/2007

BENCH:
Dr. Arijit Pasayat & D.K. Jain

JUDGMENT:
JUDGMENT

DR. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of the Division Bench of the Gauhati High Court dismissing the appeal filed by the appellants. The appeal was directed against the judgment dated 31.8.2004 passed by learned Additional Sessions Judge convicting the appellants for offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') and sentencing each to undergo imprisonment for life and to pay a fine of Rs. 2000/- with default stipulation.

2. Background facts in a nutshell are as follows:

On 27th December, 2000, at about 11.00 a.m., one Probin Das, brother of Anil Das (hereinafter referred to as the 'deceased') made a complaint to the officer in charge of the Teok Police Station that at about 6 a.m. on the same day Shri Manik Das s/o Late Duti Das, Shri Bimal Das S/o Sh. Manik and Das Shri Dipak Das s/o Shri Manik Das along with two others assaulted his brother Shri Anil Das with spears thereby severely injuring him while he was ploughing the field. He also stated that deceased-Anil Das was taken to the Kakajan hospital for treatment but he died there. Accordingly, a case no. 35/2000 dated 27.12.2000 was registered under Sections 147 and 302 IPC.

3. On 4th January, 2001, nearly a week after the alleged incident, the statements of Phukan Das (PW-1) and Kunmoni Borah (PW-7), the alleged eyewitnesses were recorded by the Judicial Magistrate, Ist Class, Jorhat under Section 164 of the Code of Criminal Procedure, 1973 (in short the 'Cr. P.C.'). On 13th May, 2002 charge sheet No. 45 of 2002 was filed against the appellant herein in respect of offences punishable under Sections 147 and 302 IPC. By order dated 27th October, 2003, the case was committed by the learned SDJM(S), Jorhat, to the Court of the Sessions Judge, Jorhat for trial of offences under Sections 302 read with Section 147 IPC. On 13th November, 2003, the learned Additional Sessions Judge, Jorhat framed charge under Section 302 read with Section 34 IPC against the accused.

4. Trial Court, as noted above, convicted the accused, which was affirmed by the High Court.

5. Primary stand of learned counsel for the appellants is that Section 34 has no application to the facts of the case. In order to bring in application of the said provision personal presence of the accused at the place of occurrence has to be established. According to him this has not been done. It is pointed out that PWs. 3 & 7 are stated to be eye witnesses and PWs. 5 & 6 are stated to be witnesses who saw accused persons running away from the place of occurrence. Their presence was to be established. This has not been done. It is submitted that the so called eye witnesses have stated about the assaults made by the accused persons. Their

statements were recorded in terms of Sections 164 Cr. P.C. They are related to the deceased and, therefore, their evidence has to be discarded. Though PW-3 named all the accused persons, PW-1 named only four of them. The post mortem report shows injuries at various parts of the body of the deceased. It is thus submitted that Section 34 has no application and in any event those persons whose names did not figure in the FIR should not have been convicted.

6. In response, learned counsel for the State submitted that the testimony of the eye witnesses is clear and cogent. Merely because they are related to the deceased, that are related to the deceased, that cannot be a ground to discard their evidence. There is no variation in the statements made during investigation and the evidence in Court. PWs. 3 & 7 who are eye-witnesses categorically described in detail the role of each of the accused persons.

7. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true content of the Section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar v. State of Punjab*, AIR (1977) SC 109, the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

8. As it originally stood the Section 34 was in the following terms:

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

9. 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 object of Section 34 clear. This position was noted in *Mahbub Shah v. Emperor*, AIR (1945) Privy Council 118.

10. The Section does not say "the common intention of all", nor does it say "and the intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch. Pulla Reddy and Ors.*

v. State of Andhra Pradesh, AIR (1993) SC 1899, Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.

11. It is to be noted that the injuries found on post mortem, report correspond to the version given by the eye witnesses. Both PWs. 3 & 7 categorically named four persons. In addition PW 3 has named the fifth accused. Though PW 7 has not named the fifth accused persons specifically, but he has stated about the presence of another accused.

12. In that background it cannot be said that the prosecution has failed to establish its accusations. Both the trial court and the High Court have analysed the evidence in great detail and found the same to be clear and cogent. That being so there is no merit in this appeal which is accordingly dismissed.