

CASE NO.:
Appeal (crl.) 924 of 2001

PETITIONER:
Janak Singh and Anr.

RESPONDENT:
State of Uttar Pradesh

DATE OF JUDGMENT: 19/04/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J

The appellants were convicted for offences punishable under Section 302 read with Section 34 of the Indian Penal Code 1860 (in short the 'IPC') and sentenced to undergo life imprisonment by the Trial Court. They did not get any relief from the Allahabad High Court which by the impugned judgment upheld the conviction and sentence.

The prosecution version as unfolded during trial is as follows:

After death of Durga Singh, each of his three sons became owner of about 30 bighas of land. One of them, Khetrapal (hereinafter referred to as the 'deceased') was issueless. Earlier Khetrapal used to reside with accused Janak Singh and the latter used to cultivate the land which fell to share of Khetrapal also. But about a year or 1-1/2 years prior to the incident in question, Khetrapal started living with Bhuri Singh (PW-1). The land of Khetrapal Singh, which was earlier being cultivated by Janak Singh came into the possession of Bhuri Singh. This was to the disliking of accused Janak Singh. Khetrapal wanted to execute a will in favour of Bhuri Singh. On the date of incident, i.e. 16.10.1979 at about 10 a.m., Khetrapal along with Bhuri Singh (PW-1) and Surjeet Singh (PW-7) were proceeding to Etmadpur Tehsil for execution of the Will and when they reached near the pit, the accused Janak Singh, armed with a country made pistol and accused Sarvesh with a gun arrived there and enquired from Khetrapal whether he was going to execute a will in favour of Bhuri Singh and when Khetrapal replied in affirmative, Janak Singh told that they would not allow him to do so. Thereafter both accused Janak Singh and Sarvesh fired upon Khetrapal who fell down on the ground on receiving gunshot injuries. When Bhuri Singh and Surjeet Singh (PW-7) tried to save Khetrapal, they were also fired upon by the accused persons and they also sustained fire arm injuries. When deceased Khetrapal fell down on the ground accused Sarvesh fired at Khetrapal from his gun, resulting in Khetrapal's instantaneous death. Bhuri Singh (PW-1) then lodged the first information report, which was ascribed by Ram Singh at police station Etmadpur on the same day at 1.30 p.m., the distance of police station being 4 miles from the place of occurrence. On the basis of the written report, chik First Information Report was prepared

by the Head Moharrir, Bihari Ji Yadav and the case was registered in the General Diary. The Station Officer Mahabir Singh took up investigation and interrogated Bhuri Singh and Surjeet Singh at the police station itself and sent both of them to hospital for medical examination with constable Lajja Ram. The investigation was undertaken and on completion thereof charge sheet was placed and accused persons faced trial. To substantiate its accusations the prosecution examined 8 witnesses. Though PWs 1 and 7 were stated to be eyewitnesses who had sustained injuries during the occurrence, PW-7 resiled from the statement given during investigation. So, the prosecution case rested on the testimony of PW-1 the injured eyewitness. The Trial Court found that his evidence was credible and cogent and conviction was made as noted above.

The main stand of the accused persons before the High Court was that evidence of PW-1 did not inspire confidence as it was at a great variance with the medical evidence. Therefore, he being an interested person who would be beneficiary if the accused persons are convicted, without corroboration his evidence should not be acted upon. The specific plea regarding the variation of PW-1's evidence vis-a-vis medical evidence was with reference to distance. According to the doctor, the gun shot which caused injury was fired from a distance of about 3-4 ft. According to PW-1, the distance was about 20-25 ft. The Trial Court noticed that PW-1 was a person who even did not know how to sign and gave thumb impression. His perception of distance being that of a layman, no undue importance should be attached to the estimated distance. Similar plea raised before the High Court also did not find acceptance.

In support of the appeal, Mr. U.R. Lalit, learned senior counsel, submitted that PW-1's evidence is not credible and cogent. The High Court should not have tried to lightly brush aside the inconsistency clearly noticeable between his evidence and that of the doctor who stated that the injuries found in the body of the deceased could be caused if gun shot was done from a short distance. Further, there was no effort made to seize the gun allegedly used by A-2. That would have shown whether the injuries sustained could have been caused by the gun allegedly used by the accused persons. There was no injury on the backside and the only injury noticed on PW-1 was near the eyebrow. It was submitted that Section 34 IPC has no application.

In response, learned counsel for the State supported the judgments and submitted that concurrent findings recorded by the Trial Court and the High Court on analysing the evidence should not be disturbed.

We shall first deal with the plea regarding the alleged inconsistency between the eyewitness version and the medical evidence as to the distance from which the gun was fired. Where direct evidence of the eyewitness is that the accused committed the murder by firing a gun some inconsistency relating to distance based on medical opinion offered would be of no significance whatsoever. (See Karnail Singh and Others v. The State of Punjab (AIR 1971 SC 2119). The view in Karnail Singh's case (supra) was also reiterated in State of Uttar Pradesh v. Sughar Singh and Others. (AIR 1978 SC 191).

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 contents 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.

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:

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

The Section does not say "the common intention of all", nor does it say "and 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.

The legality of conviction by applying Section 34 IPC in the absence of such charge was examined in several cases. In Willie (William) Slaney v. State of Madhya Pradesh (AIR 1956 SC 116) it was held as follows:

"Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant".

The above position was re-iterated in Dhanna etc. v. State of Madhya Pradesh (AIR 1996 SC 2478).

Section 34 IPC has clear application to the facts of the case, and seems to have been rightly and properly applied also.

Though the evidence of PW-1 was assailed on the ground that he is the beneficiary if accused persons are convicted, we find he had sustained injuries. His evidence was carefully analysed by the courts below and we do not find any noticeable discrepancy in his evidence to discard it. The judgments of the Trial Court and the High Court are well-reasoned with conclusions and finding recorded therein supported by ample, concrete and relevant evidence and consequently the conviction suffers from no infirmity to warrant any interference. It is not a fit case where jurisdiction under Article 136 of the Constitution of India needs to be exercised. The appeal is dismissed. The accused persons who are on bail are directed to surrender to custody forthwith to serve remainder of sentence.