

**SUPREME COURT OF INDIA**

Laxmanji

Vs.

State of Gujarat

Crl.A.No.....of 2008

(Dr. Arijit Pasayat and Dr. Mukundakam Sharma JJ.)

05.12.2008

**JUDGMENT**

**Dr.Arijit Pasayat,J.**

1. Leave granted.

2. Challenge in this appeal is to the judgment of the Division Bench of the Gujarat High Court upholding the conviction of the accused appellant nos. 1 to 3. Four persons faced trial and the trial court directed acquittal of accused No. 4. All the accused persons were charged for commission of offence punishable under Section 302 read with Section 34 of the *Indian Penal Code, 1860* ( in short 'IPC'). Three appeals were filed before the High Court. Two of them were by accused No.1 (Criminal Appeal No. 259/99) and the other Criminal Appeal No. 301 of 1999 by accused nos. 2 and 3. Criminal Appeal 380/1999 was preferred by the State questioning acquittal of original accused No.4.

3. The prosecution version as unfolded during trial is as follows:

4. On 26/10/1997, at around 15.30 hours, Nainaben,daughter of deceased -Bhamraji, had gone to fetch water from a nearby public tap. As there was no supply of water in the said tap at the relevant point of time, Nianaben went to the house original accused No. 3, which was situated in the neighbourhood of her house, to fetch the same. While Nainaben was fetching water, original accused Nos. 1,2 and 3 and some other persons began to tease Nainaben. Therefore, Nainaben returned to her house.

5. After returning to her house, Nainaben informed about the said incident to her father deceased Bhamarji. As a result thereof, the deceased-Bhamraji went to the house of original accused No. 3 and warned them not to repeat such thing in future. Thereafter, the deceased left the house of original accused No. 3.

6. Sometime later, all the four accused persons went to the house of deceased- Bhamraji and during that time, original accused No. 1 was having a "Rampuri" -knife, original accused No.

4 was having a stick while the two other accused persons, i.e. original accused Nos. 2 and 3, were unarmed. Original accused Nos. 2 and 3 caught hold of the deceased while original accused No. 1, who was having a knife, inflicted knife blows on the right hand side region of the abdomen as also the thigh region of the deceased. As a result thereof, the deceased fell down and all the accused persons fled the scene of offence. Thereafter, the deceased was taken to Sardarnagar Police Station in an Auto- rickshaaw. At that time, the P.S.I. of Sardarnagar Police Station, Kanaksing Bhulabhai Rathod, advised that the deceased be taken to the Civil Hospital, Ahmedabad for necessary treatment. Accordingly, the deceased was taken to Civil Hospital, Ahmedabad, where he was given necessary treatment.

7. On the basis of information given case was registered for offence punishable under Section 326 read with Section 34 IPC. Subsequently the dying declaration of the deceased was sought to be recorded. But before the dying declaration could be recorded the deceased succumbed to injuries on 27.10.1997. Therefore Section 302 IPC was added to the complaint. After investigation, charge sheet was filed. Since the accused persons abjured guilt, trial was held. The trial court believed the evidence placed on record and convicted the accused nos. 1, 2 and 3 while directed acquittal of accused No. 4. As noted above three appeals were filed before the High Court.

8. The High Court dismissed all the appeals. When the matter was placed for grant of leave to file appeal, the petition was dismissed qua Chandan singh accused No. 1. Therefore present appeal relates to other two accused persons. Learned counsel for the appellants submitted that A 2 was not armed. It is therefore submitted that the appellant cannot be held guilty of offence punishable under Section 302 read with Section 34 IPC. Learned counsel for the State on the other supported the judgment.

9. The basic question arises for consideration is whether Section 34 can be applied so far as the appellants are concerned.

10. The factual scenario as noted above goes to show that the appellant cannot be attributed any common intention to cause the murder of the deceased. In order to bring a case under Section 34 it is not necessary that there must be a prior conspiracy or pre- meditation. The common intention can be formed in the course of occurrence. To apply Section 34 apart from the fact that there should be two or more accused, two factors must be established :(i) common intention and (ii) participation of accused in the commission of an offence. If common intention is proved but no overt act is attributed to the individual accused, section 34 will be attracted as essentially it involves vicarious liability. But if participation of the accused in the crime is proved and common intention is absent, section 34 cannot be invoked. (See *Jai Bhagwan Vs. State of Haryana*<sup>1</sup>).

11. In the background facts, the appropriate conviction would be Section 326 read with Section 34 IPC. Custodial sentence of three years would meet the ends of justice. The appeal is allowed with the above observation.

<sup>1</sup>AIR 1999 SC 1083