SUPREME COURT OF INDIA

Nagaraja

Vs.

State of Karnataka

Crl.A.No.2067 of 2008

(S.B. Sinha and Cyriac Joseph JJ.)

18.12.2008

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. Appellant (Accused No.3) along with Suresh (Accused No.1) and Ranganatha (Accused No. 2) was charged with for commission of offence punishable under Section 302 read with Section 34 of the *Indian Penal Code* (for short, `IPC') on the accusation that they had due to previous ill-will, in furtherance of their common intention, caused the death of one Venkatesh (`the deceased'). Accused No. 1 assaulted the deceased with an iron rod on his head and other parts of the body and accused Nos. 2 and 3 assaulted him with fists and kicks and, thus, caused hurt and voluntarily caused his death and thereby committed an offence punishable under Section 302 read with Section 34 of the IPC.

3. A wine shop commonly known as `Nandi Wines' is situated at Nandi village behind Yoganandeshwara Temple. Appellant was an employee of the said shop. Accused No.2 was supplier of wine to the said shop and accused No. 1 was a customer thereof.

> "Deceased was an agriculturist. He ordinarily used to return home at 7:00 p.m. However, on the date of incident, i.e., on 13.10.2000, he did not return to his house.
>
> P.W.1- Munegowda, the brother of the deceased, on being asked by his mother at about 8.30 p.m. went out to search for him and after finding him sitting in the `circle', returned home. But the deceased did not come back. Again at about 10'O clock in the night, P.W. 1 went in search for him. When he reached near `Nandi wines', he found the accused persons were quarrelling with the deceased. Accused No. 1 assaulted the deceased with an iron rod on the back of his head; accused no. 3 - appellant herein, kicked him and accused no. 2 gave fist blows on his face. Deceased was found to have sustained injuries. He was taken to Government Hospital of Chickballapur. The Doctor sent information thereabout to P.W.13 Thimarayappa, who was working as

Head Constable and was the Station House Officer of Chickballapur Rural Police Station, at the relevant time at 12.00 midnight on 13.10.2000. He immediately went to the Hospital and recorded the statement of P.W.1. He returned to the police station and registered the said complaint in Crime No. 230/2000, for the offence punishable under Sections 323, 324 and 307 of the IPC; he prepared FIR and sent the same to the jurisdictional court. Thereafter, as advised by the Doctor, deceased was taken to NIMHANS at Bangalore. He expired on the next day."

4. The First information Report was lodged by the P.W.1, the brother of the deceased. Another witness Munivenkategowda claiming to be an eyewitness, examined himself as P.W. 2. Manjunatha (P.W. 3) and K. Srinivas (P.W. 7) were also present at the time of the incident. A general allegation was made that there was some previous ill-will between the parties.

5. Indisputably, the deceased used to take drink occasionally. He (P.W.1) could not state the reason as to whether the accused persons had any animosity with the deceased. He admitted that he had not lodged any complaint with regard to the earlier incident.

6. The learned trial judge convicted all the accused persons for commission of an offence punishable under Section 302 read with Section 34 of the IPC.

7. They preferred an appeal before the High Court. By reason of the impugned judgment, the same has been dismissed.

8. This Court issued a limited notice only in respect of the present appellant with regard to the nature of offence.

9. Mr. Basava Prabhu S. Patil, learned Counsel in support of this appeal raised the following contentions:

"i. The learned single judge as also the High Court failed to consider that the prosecution witnesses did not make any statement as regards the formation of any common intention amongst the accused so as to hold them guilty for commission of offence punishable under Section 302 read with Section 34 of the IPC.

ii. All the witnesses merely stated that the appellant had only kicked the deceased and he was wholly unarmed.

iii. The recovery of an iron rod is said to have been made only from accused No. 1 and not from the other accused.

iv. Prosecution has failed to prove any tangible motive and only a general statement was made that there was some previous ill-will between the parties.

v. The accused persons being not related, cannot be said to have any common intention to cause the said offence."

10. Ms. Anitha Shenoy, learned counsel appearing on behalf of the State, on the other hand, would contend that the common intention must be held to have been formed at the spur of the moment. It was urged that as both the courts below have arrived at a concurrent finding of fact in regard thereto the impugned judgment should not be interfered with. According to the learned counsel, the accused were not strangers but employees of the same Wine Shop and, thus, they must be presumed to have acted in concert. It was furthermore submitted that they came together and ran away together which demonstrates that they had a common intention to kill the deceased.

11. The High Court in its impugned judgment proceeded on the basis that all the accused persons were employees of Nandi Wine Stores. However, the prosecution itself in support of its case examined Bachegowda (P.W. 4), the owner of Nandi Wine Stores, who in his deposition had stated that only appellant was working with him as a cashier, whereas accused No.1 was a customer and the accused No. 2 was a supplier.

"He was not present at the place of occurrence on the said date. He was not a witness to the occurrence. Prosecution has not brought on records any evidence to show that the accused persons had a common intention to commit the murder of deceased. It has not been shown that even otherwise they were bearing any common grudge against the deceased. Evidently, both the accused No. 1 and the deceased were customers of the said Wine shop. They might have picked up some quarrel. At the time when the occurrence took place, appellant being an employee of the said shop the question of his coming to the place of occurrence together with the other accused did not arise. The evidence of prosecution witnesses, particularly P.Ws. 1 and 2, on which both the courts below have relied upon, even if taken at their face value, would merely show that it was the accused No. 1 who had assaulted the deceased with an iron rod; appellant was said to have only kicked the deceased."

12. A general statement was made that about a month prior to the incident, when the deceased had gone to Nandi Wine shop, a quarrel between him and the accused persons took place. According to P.W. 1, at that point of time, accused persons had threatened the deceased. From whom he had heard thereabout has not been disclosed.

13. Indisputably, P.W.1's his house was situated at about one furlong from the place of occurrence. He came to the place of occurrence in search of his brother. He failed to bring any material on record as to on what basis he arrived at the conclusion that accused persons had formed a common intention.

14. Ms. Shenoy may also not be correct in contending that all the accused persons ran way together. P.W. 2 deposed that they went in different directions. Appellant, according to P.W.1, ran towards the Wine shop. Thus, it is not a case where all the accused came together and ran away together. A bald statement said to have been made by him that the accused

No.1 while assaulting the deceased had exhorted that they would not leave him till he died, cannot be a ground to hold that the same by itself is demonstrative of the fact that appellant - accused No. 3 also had a similar intention. Admittedly, no weapon was recovered at the instance of appellant. He was wholly unarmed. On the basis of the voluntary statement made by the accused No.1 alone, an iron rod was recovered.

15. We are not concerned herein as to whether the said iron rod was the weapon of assault. Having regard to the quality of evidence that the prosecution had led, in our opinion, it is difficult to come to the conclusion that all the accused persons had a common intention to commit the murder of the deceased.

> For invoking the provisions of Section 34 of the IPC, at least two factors must be established; (1) common intention, and (2) participation of the accused in the commission of an offence.

16. For the aforementioned purpose although no overt act is required to be attributed to the individual accused but then before a person is convicted by applying the doctrine of vicarious liability not only his participation in the crime must be proved but presence of common intention must be established. It is true that for proving formation of common intention, direct evidence may not be available but then there cannot be any doubt whatsoever that to attract the said provision, prosecution is under a bounden duty to prove that participants had shared a common intention. It is also well settled that only the presence of the accused by itself would not attract the provisions of Section 34 of the I.P.C. Other factors should also be taken into consideration for arriving at the said conclusion. Accused persons were not related to each other; they did not have any family connection; they have different vocations. It has not been established that they held any common animosity towards the deceased.

> "A general and vague statement made by one of the prosecution witnesses would not prove motive. It may be true that the common intention may develop suddenly at the spot but for the said purpose, the genesis of the occurrence should have been proved. The prosecution has failed to establish why and how a quarrel has started. The prosecution even has not proved as to why the accused No. 1 was carrying the iron rod even before the quarrel with the deceased started or as to whether the appellant was aware of this. It has also not been shown that he along with other accused persons came to assault the deceased. Appellant ordinarily was expected to be at his work place only. His presence at the spot, therefore, has sufficiently been explained."

17. In *Rishideo Pande vs. State of Uttar Pradesh*[1], this Court held:

> "2 The main point urged by Sri Umrigar who appears in support of this appeal is that Section 34, I. P. C., has been wrongly applied to the facts of this case. The meaning, scope and effect of Section 34 have been explained on more than one occasion by the Privy Council and by this Court. It will suffice only to refer to the last decision of this Court in the case of -- *'Pandurang v. The State of Hyderabad'*[2], (A) pronounced on 3-12-1954. It is now well settled that the common intention referred to

in Section 34 presupposes prior concert, a pre-arranged plan, i.e., a prior meeting of minds. This does not mean that there must be a long interval of time between the formation of the common intention and the doing of the act. It is not necessary to adduce direct evidence of the common intention. Indeed, in many cases it may be impossible to do so. The common intention may be inferred from the surrounding circumstances and the conduct of the parties. Sri Umrigar submits that there is nothing on the record from which a common intention on the part of Rain Lochan and the appellant to murder Sheomurat can be properly inferred."

18. Yet again in *Chikkarange Gowda and Ors. v. State of Mysore*[3], this Court held:

"10. So far back as 1873, in *Queen v. Sabed Ali*[4], it was pointed out that Section 149 did not ascribe every offence which might be committed by one member of an unlawful assembly while the assembly was existing, to every other member. The section describes the offence which is to be so attributed under two alternative forms: (1) it must be either an offence committed by a member of the unlawful assembly in prosecution of the common object of that assembly; or (2) an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object.

In *Barendra Kumar Ghosh v. Emperor*[5], the distinction between Sections 149 and 34, Penal Code was pointed out. It was observed that Section 149 postulated an assembly of five or more persons having a common object, namely, one of those objects named in Section 141, and then the doing of acts by members of the assembly in prosecution of that object or such as the members knew were likely to be committed in prosecution of that object. It was pointed out that there was a difference between common object and common intention ; though the object might be common, the intention of the several members might differ. The leading feature of Section 34 is the element of participation in action, whereas membership of the assembly at the time of the committing of the offence is the important element in Section 149. The two sections have a certain resemblance and may to a certain extent overlap, but it cannot be said that both have the same meaning."

19. Yet again in *Mohan Singh v. State of Punjab*[6], this Court held:

"13. That inevitably takes us to the question as to whether the appellants can be convicted under s. 302/34. Like s. 149, section 34 also deals with cases of constructive criminal liability. It provides that where 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. The essential constituent of the vicarious criminal liability prescribed by s. 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 s. 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 s. 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 pre- arranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which s. 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 s. 34 is different from the same intention or similar intention."

20. Even a past enmity by itself, in our opinion, may not be a ground to hold for drawing any inference of formation of common intention amongst the parties.

21. We may, however, hasten to add that the question as to whether common intention was formed for commission of an offence or not would depend upon the facts of each case. {See *Nishan Singh v. State of Punjab*[7]}

22. Recently in *Bhanwar Singh & ors. vs. State of M.P.*[8], this Court held:

"45. It would also be instructive to look at the following observations made in *Gurdatta Mal v. State of UP*[9], in the context of Sections 34 and 149 IPC:-

> "It is well settled that Section 34 of the Indian Penal Code does not create a distinct offence: it only lays down the principle of joint criminal liability. The necessary conditions for the application of Section 34 of the Code are common intention to commit an offence and participation by all the accused in doing act or acts in furtherance of that common intention. If these two ingredients are established, all the accused would be liable for the said offence... In that situation Section 96 of the Code says that nothing is an offence which is done in the exercise of the right of private defence. Though all the accused were liable for committing the murder of a person by doing an act or acts in furtherance of the common intention, they would not be liable for the said act or acts done in furtherance of common intention, if they had the right of private defence to voluntarily cause death of that person. Common intention, therefore, has relevance only to the offence and not to the right of private defence. What would be an offence by reason of constructive liability would cease to be one if the act constituting the offence was done in exercise of the right of private defence."

23. For the aforementioned reasons, we are of the opinion that appellant cannot be held guilty for commission of offence punishable under Section 302 read with Section 34 of the IPC. The very fact that the appellant was unarmed and must be presumed to have been performing his duties at his place of employment, it cannot be said that he had formed any kind of common intention at the spot to murder the deceased. Some incident might have

taken place and he might have formed a common intention to teach a lesson to the deceased. He might be guilty for commission of offence punishable under Section 323 of the IPC and not for commission of offence punishable under Section 302 read with Section 34 of the IPC. He is sentenced to the period already undergone.

The appeal is allowed accordingly. The appellant is on bail. The bail bonds shall stand discharged.

[1]*AIR 1955 SC 331*
[2]*AIR 1955 SC 216*
[3]*AIR 1956 SC 731*
[4]*20 Suth W R (Cr) 5 (A)*
[5]*52 Ind App 40: (AIR 1925 PC 1) (B)*
[6]*AIR 1963 SC 174*
[8]*2008 (7) SCALE 633*
[9]*AIR 1965 SC 257*