

SUPREME COURT OF INDIA

Komal

Vs.

State of M.P.

Crl.A.No.243 of 2009

(Dr. Arijit Pasayat and Asok Kumar Ganguly JJ.)

09.02.2009

JUDGMENT

Dr.Arijit Pasayat, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Madhya Pradesh High Court at Jabalpur allowing the appeal filed by the State of M.P. upholding the appellant guilty for offence punishable under Section 304 Part I read with Section 34 of the *Indian Penal Code, 1860* (in short the `IPC') and sentencing him to undergo imprisonment for 7 years. However, his acquittal for offences punishable under Sections 147, 148, 302 read with Section 149 IPC was upheld. Eight persons faced trial for alleged commission of offences. Gubdu and Ishwar A-1 and A-2 respectively were charged for commission of offences punishable under Sections 147, 148, 323, 149 and 302 IPC. Rest of the accused persons were charged under Sections 147, 148, 323 read with Section 149 and 302 read with Section 149 IPC. The trial Court recorded conviction and imposed sentences as follows:

“A-2 Ishwar was convicted under Section 302 and sentenced to undergo imprisonment for life and also to pay fine of Rs.500/- and in default to further undergo simple imprisonment for one month. A-4 Komal was found guilty of the offence punishable under Section 323 IPC and was sentenced to pay fine of Rs.500/- and in default to undergo simple imprisonment for one month but was acquitted of the other offences and the other six accused (A-1, A-3, A-5 to A-8) were acquitted of all the charges.

Accused Ishwar preferred Criminal Appeal No.978 of 1992 while the State of M.P. filed Criminal Appeal No.245 of 1993 against the acquittal of seven accused persons.”

3. Prosecution version in nutshell is as follows:

“All the accused are residents of village Doomar, where complainant Shrilal (PW7) father of Daulat (hereinafter referred to as the `deceased') also resided. He is a barber by profession. Although, he is generally engaged for the work of hair cutting, shaving etc., yet he also renders services as an assistant in marriages solemnized in accordance with traditional Hindu order. However, in view of dispute with A1, A3 & A4 as to payment of money for the services rendered, the complainant at the relevant point of time, was not serving as barber to these accused. In turn, they also called another barber namely Ishwar Das, the A2, from another village Purena.

On the auspicious occasion of "Akshay Tritiya" that fell on 19th April, 1988, a number of marriages were proposed to be solemnized in village-Doomar. Shrilal (PW7) was working in the Pangat (community feast) at the residence of one Komal Kachhi. He had deputed his son deceased Daulat to render service in the marriage ceremony organized at the residence of one Balram Ahir. At about 3:00 p.m., when the guests were taking meals at the residence of Bairam, A1 called Daulat through Narayan Singh to a place near Mata ki Madiya (place of worship of the Goddess). A1 and A2 gave Kharerua (piece of wood used in bullock cart) blows on Daulat's head. He fell down and was rendered unconscious. His younger brother Harlal (PW8) immediately went to the house of Komal Kachhi and informed his father Shrilal (PW7) about the incident. Shri and his wife Phoolabai rushed to the spot, where he was also assaulted by A1 and A2 with Kharerua. A3 & A4 wielded lathies on his wife Phoolabai and his younger son Harlal was also struck with lathies by A5 and A8.

Parents and brothers of unconscious Daulat immediately took him to the police station, where Shrilal lodged the first information report (Ex-P/7) Thereupon, a case under Sections 294 341 & 323 read with Section 34 IPC was registered. Daulat and other injured namely, Shrilal, Phoolabai and Harlal were sent to the PHC Bankhedhi for medical examination. Dr. R.C. Agrawal (PWI5), after examining Daulat, referred him to the District hospital, Hoshangabad for admission and treatment and also advised radiological examination of the injury found on the scalp. Pursuant to his advice, Daulat was taken to the District Hospital at Hoshangabad where he succumbed to the injuries on 20.4.1988.

After inquest proceeding, the dead body of Daulat was sent for post mortem that was conducted by Dr. Ashok Kumar Tiwari (PW14). During investigation, the accused were arrested and at their instance respective weapons were recovered. One white shirt worn by the deceased at the time of incident was also recovered and seized. All these articles were sent to the FSL, Sager, along with the ordinary and blood stained soil seized from the spot for chemical examination. Observing bloodstains on all these articles excepting the ordinary earth seized from the spot, the Chemical Examiner forwarded the exhibits to Serologist for further examination. However, the Serologist could only determine presence of human blood on the shirt and the blood stained earth seized from the spot.

The trial Court as noted above convicted A-2 Ishwar and A-4 the present appellant for offence punishable under Sections 302 and 323 IPC respectively for their individual acts and sentenced them as indicated above. No appeal was filed by A-4 Komal against his conviction. Appeal was filed by State before High Court. According to the stand of State before the High Court, the true parameters of Section 149 IPC were not kept in view. The High Court accepted the stand and directed conviction as noted above.”

4. In support of the appeal, learned counsel for the appellant submitted that the High Court having noted at one place that there was no common object, the question of convicting the present appellant for offence relating to section 304 Part I read with Section 34 IPC does not arise. With reference to para 30 of the judgment it is submitted that there is lack of clarity as to what the High Court wanted to observe. The High Court has observed that there was common object and the appellant was not a member of the unlawful assembly. It has been held by the High Court that the present appellant was also convicted for causing injury on the person of Daulat and he has not challenged his conviction. It was pointed out that the trial Court formulated the question as to whether the accused persons in furtherance of their common intention caused injuries on the complainants Shrilal, Phoolabai and Harlal intentionally. There was no evidence that the present appellant caused any injury on the person of Daulat. It was pointed out that the evidence of Shrilal (PW-7) and his son Jagdish (PW-9) was held to be not acceptable.

5. Learned counsel for the respondent-State on the other hand supported the judgment.

6. We find that the High Court has erroneously come to the conclusion about the role of appellant. It was erroneously held that the appellant had caused injury on the person of Daulat. It was nobody's case.

7. Section 34 has been enacted on the principle of joint liability in the commission 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 are 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*¹, 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. 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 commission 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*², 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.

9. It has been categorically held by both the trial Court and the High Court that there was no common object and in any event the present appellant was not a member of any unlawful assembly. Having held so, the High Court ought not to have altered the conviction as recorded by the trial Court. Accordingly, the appeal is allowed. The order of the trial Court vis-à-vis the present appellant is restored and that of the High Court vis-à-vis the present appellant stands quashed. If the appellant has served the sentence as imposed by the trial Court, the bail bonds executed for giving effect to order dated 8.1.2008 shall stand discharged. Otherwise, the appellant shall surrender forthwith to serve the remainder of sentence.

¹*AIR 1977 SC 109*

²*AIR 1993 SC 1899*