

GUJARAT HIGH COURT

Oswal Danji Tejsi

Vs.

State (Gujarat)

Criminal Appeal No. 121 of 1960 (with Cr. Appeal No. 153 of 1960 and Review Appln. No. 55 of 1960)

(Miabhoy and Mehta, JJ.)

09.08.1960

JUDGMENT

Miabhoy, J.

1. The appellants, who were the accused Nos. 1, 2 and 3 in the trial Court have been convicted by the learned Sessions Judge, Kutch, for the offences under Section 325 read with Section 34 of the Indian Penal Code and each has been sentenced to suffer rigorous imprisonment for two years. The charge against the three appellants was one under Section 302 read with Section 34 of the Indian Penal Code. The prosecution case was that, on or about 21-9-1959 at about 3-30 a.m. in the village Vekara, Taluka Rahpar, District Kutch, in furtherance of their common intention, the accused committed the murder of one Charan Rana Mulu. The deceased Rana was a resident of the village Vekara. His brothers Desar and Samat also resided in the same village. The three accused are brothers. The prosecution case is that they resided at the village Somani-Wandh, which is about half a mile from the village Vekara. On the night of 21-9-59, some crops were standing in the field of the three accused. The prosecution case is that they had gone there for watching the crop in the field. On that night, Rana Mulu went to the ridge of that field for grazing his cattle thereon. The prosecution case is that there was a custom in the village for people to take their cattle for grazing on the ridges of fields. Some of the buffaloes of Rana Mula strayed into the crop of the accused and a part of their crop was damaged. Thereupon, the three brothers came near the ridge and according to the prosecution, there as an exchange of words between Rana and the accused and, thereafter, all the three accused persons attacked the deceased with sticks, one of which was with shod with iron-rings. The prosecution alleges that, at this time, the witness Mera Vala was grazing his bullocks in a hillock nearby. On hearing the abuse and exchange of words, he came to the spot and remonstrated with the accused not to beat Rana but he received threats from the accused No. 1 and, thereupon, he left the place. In all 21 injuries were caused on Rana. Two of these injuries had caused fractures of 3 ribs and as a result, the right lung of Rana was

punctured. Rana after, receiving these injuries went to his brother Desar and informed him of what had happened. Desar called Samat and the latter was also told about this incident. Then Desar went to the Police Station at Rahpar. He reached the place at about 8-45 a.m. and his First Information Report was recorded. The police thought that it was a case of simple hurt and, consequently, registered only a non-cognizable complaint and instructed Desar to take further steps for filing a regular complaint before a Magistrate. According to the prosecution, witness Banasing was called in the morning and Rana also made a dying declaration before him. However, Rana died as a result of the injury on the right lung before any medical treatment could be given to him. The information about his death was sent to Desar, who received it on his way back to the village. Thereupon Desar went back to the Police Station at Rahpar and informed the police about the death of Rana. Thereupon, an offence of murder was registered and the P.S.I. came to the Village on the night of 22-9-1959 and entered into investigation. Ultimately, the police charge-sheeted all the three accused for the offences under Section 302 read with Section 34 of the Indian Penal Code.

2. The case of all the three accused was one of total denial. The accused Nos. 1 and 2 alleged that they were at Ganithar and were not present at the scene of offence or in the village. The accused No. 3 also pleaded alibi. He admitted that he was at the village Somani-Wandh but, according to him, he was not present at the scene of offence when the offence was alleged to have taken place.

3. The learned Sessions Judge accepted the prosecution case that the three accused persons had attacked Rana and caused his death but he took the view that the prosecution had not established as to which of the accused persons had actually caused the fatal injuries. He came to the conclusion that the prosecution had failed to establish that there was a common intention to commit murder. He held that the evidence justified only the view that there was common intention to cause grievous hurt and, on that view, he convicted the accused persons for the offence under Section 325 read with Section 34 of the Indian Penal Code.

(Then after discussing some evidence His Lordship proceeded) :

4-11. Under the aforesaid circumstances, in our opinion, the evidence of witness Mera Vala and the dying declaration before the witness Banasing are reliable pieces of evidence in the case and the learned Sessions Judge was right in acting on that evidence and holding that the prosecution had established that the three accused persons had assaulted Rana with sticks on the night of 21-9-1959.

12. The medical evidence shows that there were in all 21 injuries on the person of Rana and that, out of these, two injuries Nos. 14 and 15 were fatal. These two injuries had resulted in the fracture of three ribs and as a result thereof the right lung was punctured. The medical evidence is that this injury on the right lung was the cause of death. That opinion also is that this injury was sufficient in the ordinary course of nature to cause death and that injuries Nos. 14 and 15

were also fatal injuries. Therefore, there is no doubt that the prosecution has established that the deceased died as a result of these two injuries, which were sufficient in the ordinary course of nature to cause death. Therefore, there is no doubt that an offence of murder had taken place.

13. The prosecution admits that there is no evidence to show as to which of the three accused persons caused the two fatal injuries. The prosecution wants to hold all the three accused persons responsible on the principle of joint liability embodied in Section 34 of the Indian Penal Code.

14. The learned Sessions Judge took the view that there was common intention but held that that common intention was not to commit culpable homicide not amounting to murder. According to him, the common intention was to commit grievous hurt, and, on that view, the learned Sessions Judge convicted the three accused persons of the offences under Section 325 read with Section 34, Indian Penal Code. Both the sides have felt aggrieved by this decision of the learned Sessions Judge and preferred appeals.

15. Mr. Bootwala very strenuously contends that this was a case of sudden assault, that there was no common intention and that in any case there was no evidence of such common intention. On the other hand, the prosecution contends that not only there was common intention which animated all the accused persons but that the common intention was not merely to cause grievous hurt but it was at least to cause culpable homicide not amounting to murder. Therefore, the State has preferred an appeal against that part of the order of the learned Sessions Judge which has held the three accused persons guilty only for the offence under Section 325 read with Section 34 of the Indian Penal Code, thus acquitting them of the offence under Section 302 read with Section 34 Indian Penal Code. At the time when this appeal was admitted, the Bench which admitted the same, felt that the sentence which was awarded was not a proper sentence and, consequently, it issued a notice to the three accused persons to show cause why the sentence should not be enhanced and there is thus a Review Application also to be disposed off.

16. Now, the principle underlying Section 34 of the Indian Penal Code is very well known and the law on the subject is now practically settled. That section embodies the principle of joint responsibility in a criminal offence. The essence of the principle of joint liability is to be found in the existence of common intention animating the accused and leading to the commission of a criminal act in furtherance of such intention. In order that Section 34 may apply, first, there must be the formation of common intention, secondly, there must be some act done by one or more persons, and, thirdly, that act must be in furtherance of common intention of all. If all these conditions exist, then the joint responsibility of the persons who entertained the common intention arises.

17. Mr. Bootwala's main contention was that, in order that Section 34 may apply, it is necessary for the prosecution to prove that the criminal act was committed by a specified person or persons. He submitted that, unless this fact was proved, the provisions of Section 34 Indian Penal Code

are not attracted. We cannot agree with this submission. In our judgment, in order that Section 34 Indian Penal Code may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. The language of the section does not bear out this contention. In fact, the section is intended to cover a case where a number of persons act together and, on the facts of the case, it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. In support of his submission Mr. Bootwala relied very strongly upon the case of *Rajaram Raghu Patil v. State, reported in*¹ He relied on the headnote of that case, which is as follows :

"It is therefore elementary that before one of the accused can be convicted of the offence under Section 326 read with Section 34, it must be established that some

¹ AIR 1958 Bom 469

other specified person, whose intention that accused shared, committed the act resulting in causing grievous hurt".

However, these observations of their Lordships have got to be read in the context of the facts, which they were called upon to decide. In that case, three persons were prosecuted for an offence under Section 326 read with Section 34 of the Indian Penal Code. The finding which was recorded was that the accused Nos. 2 and 3 in that case were not guilty and, on that finding, those two accused persons were acquitted. After recording this finding, the learned Sessions Judge proceeded to convict the accused No. 1 for an offence under Section 326 read with Section 34 of Indian Penal Code. Their Lordships observed that, on the finding of the learned Sessions Judge, conviction based on the principle of joint criminal liability could not have been recorded. They observed that the moment the accused Nos. 2 and 3 were acquitted, the only person who was left in the field was accused No. 1 and as there was no other person with him, with whom he could share his intention for committing an offence under Section 326 Indian Penal Code, the principle of joint responsibility could not be applied. We do not think that these observations justify the general proposition that, in a case arising under Section 34 of the Indian Penal Code, it is necessary for the prosecution to prove that a specified or a particular individual committed the crime in respect of which joint liability is sought to be imputed.

18. Mr. Bootwala urged that common intention must be anterior to the criminal act and that criminal liability can attach only to an act which is committed after the formation of common intention. In support of this, Mr. Bootwala cited the case of *Muklesur Rahman v. The King, reported in*² The observations on which Mr. Bootwala relied were obiter dicta. However, the aforesaid principle is well known and can be accepted as a correct statement of the law on the subject. But Mr. Bootwala's further extension of this principle cannot be accepted as a true statement of law. The extension for which Mr. Bootwala contended was that common intention cannot be formed on the spot and that common intention cannot be inferred from acts committed in the course of the commission of the crime. We cannot accept this broad statement. In our judgment, though common intention implies pre-arranged plan or concert between persons, there

is nothing in the section which requires that pre-arranged plan must come into existence before the acts are done and that it cannot come into existence whilst the acts are being committed and that it cannot be inferred from such acts. Whether there is common intention or not may also be proved by asking the Court to draw an inference from the various acts committed by the accused persons. Whether such an inference should be drawn or not in particular case would depend upon the facts of each case. No hard and fast rule can be laid down on the subject. If there is any evidence that there was a pre-arranged plan or concert, then the case is simple; but if this is not the case and if the prosecution wants the Court to draw an inference from the acts which took place simultaneously with the commission of the crime, then, the problem is a difficult one. But the difficulty of a problem cannot jettison a true principle of law. The difficulty arises because the guilt of the accused is to be inferred from circumstantial evidence and the difficulty is no more or no less than the one which arises in all cases which are dependant upon circumstantial evidence. Therefore, in all such cases, the true rule of law which is to be applied is the rule which requires that guilt is not to be inferred unless that is the only inference which follows from the circumstances of the case and no other innocuous inference can be drawn. If after bearing

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in mind this rule of the appreciation of circumstantial evidence, on the facts of a particular case, the Court can reach the conclusion that the events as they developed indicated a common intention, then, there is no reason why, in law, the Court should be deterred from drawing such an inference.

19. Bearing in mind the aforesaid propositions, the question which arises for our consideration is as to whether there was common intention on the part of the accused persons. In this behalf, the material evidence which requires to be considered is the evidence of the eye-witness Mera Vala. The relevant part of his testimony is that, when he came to the scene of offence, he found that the accused were saying to the deceased that he was daily grazing his buffaloes in their field. He states that, thereupon, Rana stated that he had not allowed his buffaloes to enter the field and further he said that, as the buffaloes had entered the field, the accused could claim damages and take legal steps. He stated that, then, all the three accused began to beat the deceased. The contention of Mr. Bootwala is that this evidence shows that there was only a sudden and simultaneous action on the part of the accused persons without there being any pre-concert or pre-meditation. He contended that all the three accused persons were acting on the spur of the moment and there was no time for them to put their heads together and to determine any particular course of action. On the other hand, the learned Assistant Government Pleader contended, that the events which preceded the combined assaults show that there was a purpose or design amongst the three brothers, which animated them before the joint attack was lodged. He submitted that all three brothers shared a common grievance viz., that Rana had damaged the crops on more than one occasion. He contended that all the three brothers expressed the same feelings and all the three of them rushed upon Rana and belabored him. Therefore, the learned Assistant Government Pleader contended that they had common intention and that that intention was shared by all the three just before the joint attack was made. There is no doubt whatever that

all the three brothers intended to beat Rana. The question is whether that intention was common between them. In order that intention may be common, the test which is applied is whether intention of one was known to the other and shared by that other. The evidence shows that Rana was standing on the ridge of the field and the three brothers were in the field. There was some distance between them and that distance was covered by three brothers before Rana was attacked. All the three brothers were armed with sticks. In the circumstances, in our judgment, when each brother advanced for making an assault on Rana, he knew what the intention of the other brother was and each brother shared the intention of the other. Having regard to the aforesaid circumstances, in our judgment, the only inference which can be drawn is that each of the three brothers was not acting on his own independently of the other but that they were all acting conjointly and together being animated by an intention which one shared with the other.

20. The next question is as to what the common intention was. The learned Assistant Government Pleader very fairly conceded that the common intention was not to commit murder. He conceded that the offence which had taken place was the offence, of culpable homicide not amounting to murder. He contended that the inference should be drawn from the facts of the case that the common intention of the three brothers was to beat Rana, with a knowledge that the blows given by them would probably result in the death of Rana and, therefore, the offence which was committed was the one under Section 304, Part II, read with Section 34 of the Indian Penal Code. He specially relied upon the fact that, in all 21 injuries were caused on Rana and that some of these injuries were on the vital parts of the body like the head and the thoracic region. On the other hand, Mr. Bootwala contended that a great majority of these injuries were on the non-vital parts of the body, such as, thigh, knee, arm and leg. He contended that if really their intention was to kill or to cause fatal injuries, it is hardly probable that there should be such a small number of serious injuries on only a few vital parts of the body, when three persons were attacking together. In our judgment, in order to discover the true common intention of the parties, all the circumstances and not merely a few should also be taken into account and, among such circumstances is the one that, out of 21 injuries, only 2 injuries were fatal. The probability is that those two injuries were caused with an iron-ringed stick. Only one out of the three culprits was armed with such a stick. Having regard to the paucity of the number of fatal injuries, it would not be proper to say that the three accused persons were necessarily actuated with an intention of causing the death of Rana. In the alternative, the learned Assistant Government Pleader contended that, in any case, there was common intention to cause a serious or grievous injury or injuries. In our judgments this would be not only a proper and reasonable inference but the only inference to draw in the circumstances of the case. Having regard to the fact that three ribs of the deceased were broken and a parietal bone was fractured and an iron-ringed stick was used, it would not be proper to draw an inference that the common intention was only to cause simple hurt. In our judgment, the proper and reasonable inference would be that the common intention was to cause grievous hurt. Mr. Bootwala contended that, as quite a majority of the injuries were simple in nature, the common intention must be to cause simple hurt and not grievous hurt. It is true that a number of these injuries is simple but, in our judgment, when the three brothers

assaulted the deceased with sticks and one of them had an iron-ringed stick, they could not have intended to cause only simple hurt, specially when all of them attacked Rana jointly and the total number of blows which were inflicted to the deceased was 21 in number, some of them being on vital parts of the body. Therefore, in our judgment, the proper and only inference to be drawn from the facts of the present case is that the common intention of the three brothers was to cause grievous hurt to the deceased and grievous hurt was actually caused by one of the three brothers in furtherance of common intention.

21. The learned Assistant Government Pleader contended that, in that view of the case, the proper section that would apply would not be Sec, 325 Indian Penal Code but it would be Section 326 Indian Penal Code. He contended that the accused No. 1 had an iron-ringed stick, which is a dangerous weapon, which was likely to cause death if used as a weapon of offence. He contended that, when one of the three brothers was armed with such a stick, their common intention must be presumed to be of causing grievous hurt with such a stick. In our judgment, this submission is proper.

22. For the aforesaid reasons, we have come to the conclusion that the offence which has been committed by all the three accused persons is the one under Section 326 read with Section 34 of the Indian Penal Code, and, accordingly, the appeal of all the three accused will be dismissed and the appeal of the State will be partially allowed inasmuch as the conviction under Section 325 read with Section 34 of the Indian Penal Code will be changed into one under Section 326 read with Section 34 of the Indian Penal Code.

23. The question that survives is one of sentence. In our opinion, a distinction must be drawn between the case against the accused No. 3 and that against the accused Nos. 1 and 2. The accused No. 3 is a young lad of 19 years of age. He was in the company of the elder members of the family. It is not improbable that he acted as he did on that night because the two elder members of the family decided to participate in the crime. It is not improbable that he was influenced by those two elder persons. In these circumstances, we would not change the order of sentence passed in his case. As regards the sentence of accused Nos. 1 and 2, we think, three years' rigorous imprisonment would, meet the ends of justice.

24. For the above reasons, the appeal of all the three accused is dismissed and that of the State is partially allowed. No orders are passed on the Review Application. The conviction of all the three accused persons is changed into Section 326 read with Section 34 of the Indian Penal Code and the sentence against accused No. 3 is retained intact and that against accused Nos. 1 and 2 is changed into sentence of rigorous imprisonment for three years.

Order accordingly.