

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.349 of 1993

Against the judgment of conviction and order of sentenced dated 10.06.1993, passed by Sri Mishri Lall Choudhary, 1st Additional District and Sessions Judge, Muzaffarpur in Sessions Trial No. 144 of 1985/52 of 1988 arising out of Saraiya P.S. Case No. 6 of 1984

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1. Sambal Ram, son of Sital Ram
 2. Nanku Ram, son of Sambal Ram
 3. Santu Ram, son of Sambal Ram, all residents of village Repura Rampur Balli, Thaha Saraiya, district Muzaffarpur

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellants : Mr. S.M. Iqbal Hasan Rahmani, Adv.

For the Respondent : Mr. Ajay Mishra, APP

Mr. Amish Kumar Jha, Advocate as *Amicus Curiae*

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 08-04-2015

Under the judgment, dated 10.06.1993, passed, in Sessions Trial No. 144 of 1985/52 of 1988, by learned 1st Additional Sessions Judge, Muzaffarpur, the appellants, Sambal Ram, Nanku Ram and Santu Ram, stand convicted under Section 302 read with Section 34 of the Indian Penal Code. Following their conviction, the accused-appellants have been sentenced to suffer imprisonment for life.

2. The case of the prosecution, as unfolded at the trial, may, in brief, be set out as under:

(i) On 11.01.1984, at about 5.00 PM, when a talk, with regard to the marriage of the daughter of Sogarath Ram, was in progress at Sambal Ram's *bathan*, i.e., the out-house of Sambal Ram, question cropped up with regard to serving of the meals on

the occasion of the marriage. Since accused Sambal Ram had been outcast, Dwarika Ram said that if Sambal Ram and Sogarath Ram would remain together, he (Dwarika Ram) would not take his meal with them. Reacting to the statement so made by Dwarika Ram, accused Sambal Ram started abusing Dwarika Ram and, accompanied by his two sons, namely, accused Nanku Ram and Santu Ram, accused Sambal Ram assaulted Dwarika Ram by means of *sipaha* and *lathis*. When Dwarika Ram's wife, Jharia Devi, and her daughter come forward to save Dwarika Ram from assaults at the hands of the accused, they, too, were assaulted by the accused. On the *hulla* being raised, the co-villagers of Dwarika Ram rushed to the place of occurrence. All the accused, then, took to their heels. Injured Dwarika Ram was carried to State Dispensary, Jhuria, where his statement was recorded, on 12.01.1984, at about 11.00 AM, by a police officer as his *fardbeyan* and treating the said *fardbeyan* as *First Information Report*, Saraiya Police Station Case No. 06 of 1984, under Sections 323/307 of the Indian Penal Code, was registered against accused Sambal Ram, Sital Ram, Nanku Ram and Santu Ram.

(ii) While undergoing treatment, injured Dwarika Ram succumbed to his injuries. Inquest was, therefore, held on Dwarika Ram's dead body, which was also subjected to *post mortem* examination, and, on completion of the investigation, police laid charge *sheet* under Sections 302/34 of the Indian Penal Code, against the accused aforementioned.

3. At the trial, a *charge*, under Section 302 read with Section 34 of the Indian Penal Code, was framed against all the accused aforementioned. To the charge, so framed, all the accused pleaded not guilty.

4. In support of their case, prosecution examined as many as 5 (five) witnesses. The accused were, then, examined under Section 313 (1) (b) of the Criminal Procedure Code and, in their examinations aforementioned, the accused persons denied that they had committed the offence, which was alleged to have been committed by them, the case of the defence being that of denial. No evidence was adduced by the defence.

5. Having, however, arrived at the finding that accused-appellants aforementioned had been proved guilty of the *charge* under Sections 302 read with Section 34 of the Indian Penal Code, the learned trial Court convicted them accordingly. Following their conviction, sentence has been passed against the convicts as mentioned above.

6. Aggrieved by their conviction and the sentence passed against them, the convicts aforementioned have preferred this appeal.

7. We have heard Mr. S. M. Iqbal Hasan Rahmani, learned Counsel, appearing for the appellants, and Mr. Ajay Mishra, learned Additional Public Prosecution, appearing for the State. We have also heard Mr. Amish Kumar Jha, learned Counsel, appearing as *Amicus Curiae*.

8. While considering the present appeal, it may be noted that according to the evidence of the doctor (PW 5), who had, on 14.01.1984 at 12.30 PM, conducted *post mortem* examination on the dead body of Dwarika Ram at Sadar Hospital, Muzaffarpur, he (PW 5) found following *ante mortem* injuries :

"(i) *There was swelling 2" x ½" on the left side of head, on dissection blood clots were found underneath with 1" long fracture of left temporal bone.*

(ii) *Bruise with swelling 2" x 1" as found on left upper arm*

(iii) *On dissection of chest, lungs looked lived heart- right chamber empty, left chamber partially filled with blood. On dissection of abdomen - stomach was empty, other viscera looked lived, urinary bladder contained 3 ounces of urine, genital normal."*

9. In the opinion of the doctor (PW 5), Dwarika Ram died due to shock and hemorrhage as a result of the *ante mortem* injuries aforementioned caused by hard blunt substance, such as, *sipaha* and *lathi*. It is also the opinion of the doctor (PW 5) that injury No. (i), i.e., injury suffered by the said deceased on his head, was sufficient to cause death in ordinary course of nature.

10. Apart from the fact that findings of the doctor (PW 5) and his opinion with regard to the cause of death of the said deceased have not been disputed by the defence, we, too, notice nothing inherently incorrect or improbable in the evidence

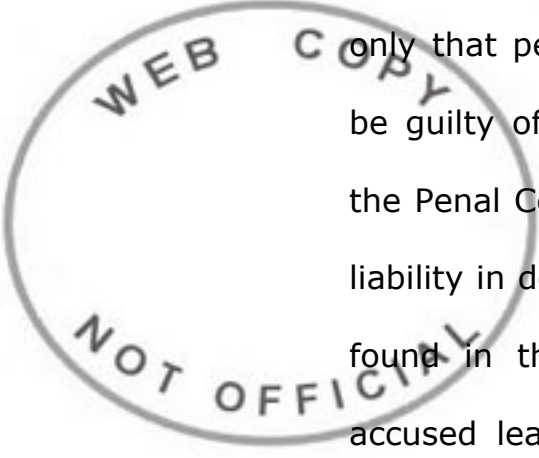
given by the doctor and his (PW 5's) evidence clearly shows that Dwarika Ram died due to the *ante mortem* injuries sustained by him by hard blunt substance.

11. The question, which remains for determination, is: Whether the accused-appellants and/or any of them could have been, on the basis of evidence on record, convicted of the *charge* framed?

12. While dealing with the question posed above, it may be noted that in tune with the evidence of each other, P.Ws. 1, 2, 3 and 4 have deposed to the effect that accused, Sambal Ram and his two sons, namely, Nanku Ram and Santu Ram, had assaulted Dwarika Ram by means of *sipaha* and *lathis* and when the wife and the daughter of Dwarika Ram came forward to save Dwarika Ram from the assaults at the hands of the accused, Dwarika Ram's wife and daughter, too, were assaulted and injured.

13. There is, however, no medical evidence on record indicating that the wife and the daughter of Dwarika Ram had also suffered injuries.

14. Considering the fact that it is with the aid of Section 34 of the Indian Penal Code that all the three accused-appellants have been convicted, it needs to be pointed out that Section 34 of the Indian Penal Code, which embodies the concept of joint liability in doing the criminal act based on common intention. Section 34 of the Indian Penal Code only provides a rule of evidence and does not create a substantive offence. As a general



principle, in a case of criminal liability, it is the primary responsibility of the person, who actually commits the offence, and only that person, who has committed the offence, can be held to be guilty of the offence committed. By introducing Section 34 in the Penal Code, the Legislature has laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention, then, every person, who did the criminal act with that common intention, would be responsible for the offence committed irrespective of the role played in its perpetration.

15. Common intention essentially being a state of mind, it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases, it has to be inferred from the acts, such as, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered from the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made and the nature of injury caused by one or some of them. The contributory acts of the persons, who are not responsible for the injury, can be further inferred from the conduct after the attack. In this regard, even an illegal omission, on the part of such an accused, can indicate the sharing of the common intention. In other words, the totality of circumstances must be taken into

consideration in arriving at the conclusion whether the accused had the common intention to commit the offence. [See **Noor Mohammed Yusuf Momin, (AIR 1971 SC 885) : 1971 Cri LJ 793**. See also **Ramesh Singh alias Photti v. State of A. P., (2004 AIR SCW 3682) : 2004 Cri LJ 3354** and **Pandurang Tukia and Bhillia v. State of Hyderabad, reported in (1955) 1 SCR 1084 : 1955 Cri LJ 572**].

16. What Section 34 of the Indian Penal Code envisages 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. Existence of a common intention amongst the participants in a crime is the essential element for application of Section 34 of the Indian Penal Code. 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 provisions of Section 34 of the Indian Penal Code. (See **State of M. P. v. Deshraj, reported in 2004 Cri LJ 1415 : (AIR 2004 SC 2764)**).

17. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proven facts of the case and the proven circumstances. In order to bring home the charge of common intention, the prosecution has to establish, by evidence,

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 of the Indian Penal Code, be it pre-arranged or at the spur of the moment; but it must necessarily be before the commission of the crime. (See **Deshraj** (supra)).

18. In fact, in **Deshraj** (supra), the Supreme Court has held as follows:

"The true contents of 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.

6. This section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of S. 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 to 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 v. State of A. P., AIR 1993 SC 1899 : (1993 Cri LJ 2246). 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.”

(Emphasis is added)

19. *Common intention and same or similar intention* are often misunderstood. Mere participation of all the accused persons, in an occurrence of assault, even if believed, may not necessarily signify prior concert of mind or pre-arranged plan having developed at the spot of incident. In a given case, several persons can simultaneously attack a man and each one may individually inflict separate fatal blows and yet none may have the common intention required by Section 34 of the Indian Penal Code, if there is no evidence of prior meeting of minds. In such a case,

each would be individually liable for whatever injury one causes, but none could be vicariously convicted for the act of any of the others. The courts are required to take care of the facts and circumstances of each individual case based on legal evidence, and must not get confused in distinguishing *same or similar intention* from *common intention*. It has, now, been settled that the partition, which divides their bounds, is often very thin; nevertheless the distinction is real and substantial and, if overlooked, it will result in miscarriage of justice. The plan need not be elaborate nor is a long interval of time required. It could arise and be formed suddenly. But there must be pre-arrangement and pre-meditated concert.

20. In Mahabub Shah v. Emperor, reported in **AIR (32) 1945 Privy Council 118**, the Privy Council held,

"Common intention within the meaning of S.34 implies a pre-arranged plan. To convict the accused of an offence applying S.34 it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is no doubt difficult if not impossible to procure direct evidence to prove the intention of an individual; it has to be inferred from his act or conduct or other relevant circumstances of the case. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and

substantial, and if overlooked will result in miscarriage of justice. The inference of common intention within the meaning of the term in S.34 should never be reached unless it is a necessary inference deducible from the circumstances of the case."

21. The Supreme Court, in **Pandurang and others v.**

State of Hyderabad (AIR 1955 SC 216), on the point of common intention, held thus:

"In the case of Section 34, it is well established that a common intention pre-supposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder





however clearly an intention to kill could be proved in his case. The partition which divides their bounds is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example, when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, to have the same intention independently of each other, e.g., the intention to rescue another, and, if necessary, to kill those who oppose.

It is true, prior concert and arrangement can, and indeed often must, be determined from subsequent conduct as, for example, by a systematic plan of campaign unfolding itself during the course of the action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or a meeting together subsequently. But the inference of common intention should never be reached unless it is a necessary



inference deducible from the circumstances of the case.

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis".

22. Bearing in mind the principles governing the concept of joint liability as Section 34 of the Indian Penal Code envisages, when we turn to the facts of the present case, what attracts our eyes, most prominently, is that though three persons, namely, accused-appellants, Sambal Ram, Sital Ram and Nanku Ram, were claimed to have assaulted the said deceased by *sipaha* and *lathis* repeatedly, injury, consistent with this description of occurrence, was not found on the dead body of Dwarika Ram inasmuch as Dwarika Ram was found to have sustained only one injury on his head and a bruise with swelling on his left arm. In fact, Dwarika Ram's stomach was found empty and no injury was

found to have been caused to the stomach, whereas the witnesses claimed that Dwarika Ram had been assaulted on his abdomen too.

23. Coupled with the above, it is also worth pointing out that the evidence, on record, clearly shows that the assault on Dwarika Ram was not premeditated; rather, the assault on Dwarika Ram took place at the spur of the moment, when Dwarika Ram refused to have meals with Sambal Ram and Sogarath Ram if both of them happened to dine together.

24. In the case at hand, on careful scrutiny of the evidence of the P.Ws 1 to 4, we find no cogent evidence to hold that even at the spot, common intention had developed amongst the accused persons. The participation of all the accused persons in the offence is found to be doubtful.

25. The evidence on record is, thus, wholly deficient for the purpose of holding that Dwarika Ram was assaulted in furtherance of common intention to cause his death.

26. So Situated, it becomes abundantly clear that without determining as to who had given the fatal blow on Dwarika Ram's head, none of the accused-appellants could have been convicted of the offence of *murder*. In the case at hand, when there was no cogent and clinching evidence as to who had assaulted Dwarika Ram on his head and caused the fatal injury, none of the accused-appellants could have been convicted of *murder*, more so, when the evidence on record completely belies the description of the occurrence as deposed to by the witnesses.

27. What is, now, of paramount important to note is that the learned trial Court has relied upon the contents of the First Information Report as the *dying declaration* of Dwarika Ram. As already pointed out above, though it had been the case of the prosecution that while undergoing treatment at Sadar Hospital, Muzaffarpur, injured Dwarika Ram gave a statement to police, on 12.01.1984, at 11.00 AM, the same was treated as the First Information Report, sadly enough, this first information has not been proved on record. In fact, the Investigating Officer has not been examined.

28. Thus, the First Information Report having not been proved, the contents thereof could not have been treated as the dying declaration of Dwarika Ram. Reliance, therefore, placed by the learned trial Court, on a statement, said to have been made by Dwarika Ram, was wholly illegal.

29. As a necessary corollary to what we have concluded above, it clearly falls that the prosecution could not adduce cogent, clear, reliable and sufficiently safe evidence warranting conviction of the accused-appellants.

30. At any rate, in the face of the evidence on record and the law we have discussed above, there is no escape from the conclusion that no offence of murder was proved to have been committed by the accused-appellants in furtherance of their common intention nor was it proved as to who was the one, who had given the fatal blow on the head of Dwarika Ram resulting into

his death. The conviction of the accused-appellants, under Section 302 with the aid of Section 34 of the Indian Penal Code, is, thus, wholly untenable in law.

31. In the result and for the foregoing reasons, we allow this appeal. The impugned conviction of the accused-appellants and the sentences passed against them by the judgment and order, under appeal, are hereby set aside. The accused-appellants are held not guilty of the offence, which they stand convicted of, and they are hereby acquitted of the same.

32. Since the accused-appellants are on bail, their bail bonds are hereby cancelled and their sureties shall stand accordingly discharged.

33. Let the Amicus Curiae be paid a fee of Rs. 5,000/-.

34. Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court, along with the Lower Court Records.

(I. A. Ansari, J.)

(Gopal Prasad, J.)

A.F.R.

S.A./Kundan

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