

\$~ R-29 (Part-B)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRIMINAL APPEAL No. 195/2000**

Date of decision: 10th September, 2015

HAIDER ALI

..... Appellant

Through: Mr. Sumeet Verma with Mr. Amit
 Kala, Advs.

Versus

STATE

..... Respondent

Through: Ms Aashaa Tiwari, APP.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J. (ORAL):

1. The appellant Haider Ali, pursuant to the charge sheet filed in an FIR no. 388/1995, police station Kirti Nagar, by the impugned judgment dated 29.11.1999 stands convicted under Section 302 of Indian Penal Code, 1860 (IPC) for murder of Shanti and under Section 307 of IPC for attempt to murder Lal Chand (PW-8). The aforesaid conviction of the appellant Haider Ali is predicated on Section 34 of IPC to hold that the appellant would be equally guilty and liable for the acts of one Dinesh @ Daboo, as they had shared common intention.

2. By Order of sentence dated 30.11.1999, the appellant has been sentenced to undergo imprisonment for life, pay fine of Rs. 10,000/-, in

default, suffer simple imprisonment of one year for the offence under Section 302 read with 34 of IPC; and rigorous imprisonment of five years, fine of Rs. 5000/-, in default, undergo simple imprisonment for six months for the offence under Section 307 read with 34 of IPC.

3. Learned Amicus Curiae appearing for the appellant has submitted that the appellant is not disputing the fact that Lal Chand (PW-8) had suffered knife injuries or the factum that the deceased Shanti had suffered homicidal death as a result of knife injuries inflicted on them as proved by the MLC of Shanti (Mark Ex.PW-1/A) and Post-mortem report (Mark Ex. PW-15/A). He submits that the evidence implicates Dinesh @ Daboo as the sole perpetrator, and there is no evidence to hold that Haider Ali was vicariously liable for the acts individually attributed to Dinesh @ Daboo for Haider Ali did not share common intention.

4. Criminal Appeal No. 200/2000 filed by the Dinesh @ Daboo, has been decided and application under Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 filed by Dinesh @ Daboo has been allowed. The contention that Dinesh @ Daboo was a minor on the date of occurrence has been upheld.

5. Prosecution has not proved the MLC of Lal Chand (PW-8). However, the said Lal Chand in his examination in chief has stated that he was sent to the hospital from the spot *i.e.* bus stand along with the deceased Shanti where he was medically examined and discharged. It is apparent that he did not suffer serious or grievous injuries.

6. Lal Chand (PW-8) in his examination-in-chief on the question of occurrence has deposed :-

“.....On 12.10.1995 at about 8.30 PM I was to go to my house and I with Shanti went to bus stop to fetch a bus. I and Shanti were boarding bus route no. 778.

When one of the accused present in Court whose names are Dinesh and Haider put his legs in my way as a result of which I tumbled and was about to fall down. I somehow managed to board the bus with Shanti. When I was purchasing tickets both accused present in Court started abusing me. An altercation followed and quarrel took place. Both accused grappled with me. I was saved by other passengers as my co-employers were travelling in the bus. I reached near exit gate. Both accused were get down from the bus on the next stop. Both accused tried to pull me down from the bus when it reached next stop. I managed to remain in the bus then one of the accused gave me knife blow on my neck as a result of which I fell down on the seat. I cannot tell who of the accused had given me knife blows because it was dark at that time. When I fell down, Shanti came in front of me and he was given knife blow by one of the accused in his abdomen. The accused who had given me knife blow had given knife blow to Shanti also. Both accused then started running.....”

7. A careful and studied scrutiny of the aforesaid narration would reveal that it consist of three incidents one after the other which took place in the late evening on 12.10.1995. The first incident was at the bus stop, the second inside the bus when abuses were exchanged and lastly at the exit door, when the appellant Haider Ali and Dinesh were de-boarding at the bus. Lal Chand (PW-8) asserts that he had tumbled while standing because Haider Ali or Dinesh had put his leg in his way. Lal Chand (PW-8) has not stated that he knew Haider Ali or Dinesh from before or that they had some reason or cause to deliberately put his or their legs to cause injury or make Lal Chand (PW-8) fall. It appears that Haider Ali, Dinesh and Lal Chand wanted to board a crowded bus. After entering the bus, at the time of purchasing the ticket an altercation took place. As per the statement made by Lal Chand (PW-8), Haider Ali and Dinesh had abused him, grappled

followed and Lal Chand (PW-8) was able to save himself with the help of fellow passengers, who were co-workers. Lastly, Dinesh and Haider Ali, while getting down from the bus at the next stop had pulled Lal Chand (PW-8), but latter had managed to remain inside the bus. At that stage, and suddenly without any warning, one of the accused gave a knife blow on his neck. Lal Chand (PW-8) fell down on the seat. Lal Chand (PW-8) could not initially identify and state whether Haider Ali or Dinesh had given the said knife blow. After Lal Chand (PW-8) had fallen down, Shanti (the deceased) came in front and received a knife blow in his stomach, indicating that the knife blow was perhaps directed towards PW-8, but had injured Shanti (the deceased). As per the examination-in-chief reproduced above one of the accused had given knife blows. Conspicuously, Lal Chand (PW-8) while referring to the acts of the perpetrator when the knife injuries were inflicted, is absolutely silent and mute about the role of the other and how the second person had behaved. Lal Chand (PW-8) when cross-examined by the Additional Public Prosecutor, had identified the person who had given knife blows as Dinesh and not present appellant *i.e.* Haider Ali. This part of the testimony of Lal Chand (PW-8) reads:-

“It is correct that after I was given knife blow I had caught accused Haider Ali. Present in the court. It is correct that accused Dinesh present in the court had given me knife blows and to Shanti. It is correct that when Dinesh was running away he was chased by the police and was caught and brought back to bus stand. It is correct that accused Haider Ali present in court was also arrested by the police at bus stand and then I was sent to Hospital.”

8. Lal Chand (PW-8) has averred that Dinesh had run away from the spot and was arrested after about half an hour because the police had

brought his brother to the police station. Haider Ali was arrested by the police at the bus stand i.e. the spot itself. In the testimony of Lal Chand (PW-8), conspicuously and significantly no role or act at the time of physical violent assault is assigned to Haider Ali. Knife blows were inflicted on Lal Chand (PW-8) and the deceased Shanti by Dinesh. It is not asserted or stated that Haider Ali had caught hold of Lal Chand (PW-8) or had pushed Shanti-the deceased or caught hold of Shanti (deceased). No verbal statement at the time of stabbing, before or afterwards is also attributed to Haider Ali. Haider Ali may have had a quarrel, exchanged abusive words or even grappled with Lal Chand (PW-8), but he did not participate actively or otherwise, when the knife blow was given to Lal Chand (PW-8) or to Shanti (deceased). He was not a passive participant. Use of knife and inflicting of blows was all of a sudden and out of the blue in which the perpetrator who had given the blows had taken out and used the knife. The other person i.e. the appellant Haider Ali, in spite of the earlier quarrel or grapple had distanced himself and was not a participant, though present at the spot. Shanti-the deceased, we also record, was not involved in the grapple with the appellant, Dinesh and Lal Chand (PW-8).

9. In ***Rajesh Govind Jagesha versus State of Maharashtra***; (1999) 8 SCC 428, it was observed that for section 34 IPC to apply, apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 could be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. Further in every case, it may not be possible to have direct

evidence of a common intention and the same may have to be inferred from the facts and circumstances of each case.

10. In *Tukaram Ganpat Pandare versus State of Maharashtra*; AIR 1974 SC 514, the Supreme Court reiterated that Section 34 lays down the rule of joint responsibility for a criminal act performed by a plurality of persons. Criminal sharing, overt or covert, by active presence or by distant direction, making out a certain measure of jointness in the commission of the “act” is the essence of Section 34. In some cases mere distance from the scene of crime may not exclude the culpability of the offence.

11. Earlier in *Ramaswami Ayyangar versus State of T.N.*, AIR 1976 SC 2027, the Supreme Court has held that Section 34 is to be read along with proceeding Section 33 which makes it clear that the “act” mentioned in Section 34 includes a series of acts as a single act. The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise. Even a person not doing any particular act but only standing guard to prevent any prospective aid to the victims may be guilty of common intention. However, it is essential for the application of Section 34 in case of an offence involving physical violence that the accused charged must be physically present at the actual commission of crime for the purposes of facilitating accomplishment of “criminal act” as mentioned in that section. The presence of those who in one way or the other facilitate the execution of the common design itself tantamounts to actual participation in the “criminal act”. The essence of Section 34 is simultaneously consensus of the minds of persons participating in the criminal action to bring about a particular result.

12. Reference on the said aspect can be made to ***Lal Chand versus Emperor***; AIR 1931 Lah 523, wherein, it has been observed:-

“Section 34 laying down the constructive and joint liability for acts done in furtherance of common intention has no application to acts committed in the course of sudden quarrel without any common intention amongst the accused.”

13. In ***Shreekantiah Ramayya Munipalli versus State of Bombay***; AIR 1955 SC 287 it was held:

“It is true there must be some sort of preliminary planning which may or may not be at the scene of the crime and which may have taken place long beforehand, but there must be added to it the element of physical presence at the scene of occurrence coupled with actual participation which, of course, *can be of a passive character such as standing by a door, provided that is done with the intention of assisting in furtherance of the common intention of them all* and there is a readiness to play his part in the pre-arranged plan when the time comes for him to act.”

14. Similarly in ***Rambilas Singh versus State of Bihar***; AIR 1989 SC 1593, it is elucidated:

“It is true that in order to convict persons vicariously under S. 34 or S. 149 IPC, *it is not necessary to prove that each and every one of them had indulged in overt acts*. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly.”

15. Section 34 IPC has been enacted on the principal of joint liability in the doing 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 common intention” of the persons who joins 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 minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be if pre-arranged or on the spur of the moment, but it must necessarily be before the commission of the crime. The true precept of the 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 Vs. State of Punjab* reported in 1997 (1) SCC 746 the existence of a common intention amongst the participants in a crime is the essential elements 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. The Section does not say “the common intentions of all” nor does it say “an 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 doing of a criminal “act” in furtherance of such intention.

16. In Crl.A. No.429/2013, *Babloo @ Babu versus State*, decided on 10th May, 2013, it has been observed:-

“15.We must remember that Section 34 comes into operation against the co-perpetrators because they have not committed the principal or main act, which is undertaken /performed or is attributed to the main culprit or perpetrator. Where an accused is the main or final perpetrator, resort to Section 34 is not necessary as the said perpetrator is himself individually liable for having caused the injury/offence. A person is liable for his own acts. Section 34 or the principle of common intention is invoked to implicate and fasten joint liability on other co-participants. Further, the expression/term “criminal act” in Section 34 IPC refers to the physical act, which has been done by the co-perpetrators/participants as distinct from the effect, result or consequence

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.....Common intention is common design or common intent, which is akin to motive or object. It is the reason or purpose behind doing of all acts by the individual participant forming the criminal act. In some cases, intention, which is ingredient of the offence, may be identical with the common intention of the co-perpetrators, but this is not mandatory.

16. Section 34 IPC also uses the expression “act in furtherance of common intention”. Therefore, in each case when Section 34 is invoked, it has to be examined whether the criminal offence charged was done in furtherance of the common intention of the participator. If the criminal offence is distinctly remote and unconnected with the common intention, Section 34 would not be applicable, but if the criminal offence was done or performed is attributable, is primarily connected or was a known or reasonably possible outcome of the preconcert/ contemporaneous engagement or a manifestation of the mutual consent for carrying out common purpose, it will fall within the

scope and ambit of the act done in furtherance of common intention. Thus, the word “furtherance” propounds a wide scope but the same should not be expanded beyond the intent and purpose of the statute. *Russell on Crime*, 10th edition page 557, while examining the word “furtherance” had stated that it refers to “the action of helping forward” and “it indicates some kind of aid or assistance producing an effect in the future” and that “any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony.” An act which is extraneous to the common intention or is done in opposition to it and is not required to be done at all for carrying out the common intention, cannot be said to be in furtherance of common intention. [Refer judgment of R.P. Sethi J. in *Suresh versus State of U.P.*, (2001) 3 SCC 673]. ”

17. In view of the aforesaid factual situation it cannot be said that Haider Ali had shared a common intention with Dinesh, who had inflicted the knife blows. Mere presence of Haider Ali at the earlier quarrel/grapple in which no sharp weapon was used or even displayed would not result or help us in drawing the inference that he had shared common intention or that act of stabbing was in furtherance of common intention. Haider Ali may have had a grievance or grouse against Lal Chand (PW-8), but this would not show sharing of common intention with Dinesh, when the latter in an apparent and sudden burst of anger hurled the blow and inflicted injuries upon Lal Chand (PW-8) or by mistake or otherwise, inflicted knife blow on a third person called Shanti-the deceased. The said infliction would be beyond the contours of “the furtherance of common intention” in the facts of this case. In view of the aforesaid position, we do think it has been established that the appellant Haider Ali had shared common intention, as Dinesh was the perpetrator who had committed the offence. Dinesh alone would be solely

responsible for his acts. Conviction of Haider Ali, cannot be sustained with aid and by applying the principle of common intention under section 34 IPC.

18. In view of the aforesaid discussion, we allow the present appeal and set aside the conviction of the appellant under Section 307 and 302 of IPC by invoking section 34 of IPC. Bail bond furnished by the appellant is discharged. Copy of this judgment will be sent to the trial Court.

(SANJIV KHANNA)
JUDGE

(R.K.GAUBA)
JUDGE

SEPTEMBER 10th, 2015
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