

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A.189/2012**

% Reserved on: 26.02.2015
Date of decision: 17.04.2015
MUKESH Appellant
Through: Mr. Vivek Sood, Adv.

versus

STATE THR. GOVT. OF NCT OF DELHI Respondent
Through: Mr. Varun Goswami, APP for
the state.

+ **CRL.A.308/2012**

RAKESH Appellant
Through: None.

versus

STATE Respondent
Through: Mr. Varun Goswami, APP for
the state.

+ **CRL.A.726/2012**

ROOP CHAND Appellant
Through: Mr. Rajesh Kumar, Adv.

versus

STATE OF NCT OF DELHI Respondent
Through: Mr. Varun Goswami, APP for
the state.

+ **CRL.A.449/2012**

BAL KISHAN Appellant
Through: Mr. Inderjeet Sidhu, Adv.

versus

STATE GOVT. OF NCT OF DELHI Respondent
Through: Mr. Varun Goswami, APP for

the state.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J.

1. By this common judgment, the abovementioned appeals are being disposed of.

2. The appellants, herein, have been convicted by judgment dated 16.12.2011 by the Additional Sessions Judge-North East, Karkardooma Courts, Delhi, in Sessions Case No.106/2008 arising out of FIR No.253/2008 Police Station Nand Nagri for the offence under Section 302/34 of the Indian Penal Code (IPC for short) for killing one Parveen. By the Order of Sentence dated 21.12.2011, the appellants have been ordered to suffer imprisonment for life for the offence under Section 302/34 IPC, fine of Rs.2,000/- each and in default of payment of fine, to suffer further Rigorous Imprisonment for a period of 3 months.

3. Out of the five accused persons, one R (name withheld) was found to be as a juvenile and his case has been dealt with by the Juvenile Court.

4. The prosecution relies upon eye witness and circumstantial evidence. The prime witnesses stated to have seen the occurrence are Vipin (PW.2), the younger brother of the deceased; and Rajesh Kumar (PW.3), a neighbour.

5. Information was received on 21.05.2008 at Police Station Nand Nagri, vide DD No.31-A from G.T.B. Hospital that a person stabbed after a quarrel, has been admitted in the said hospital. Thereafter, Sub Inspector C.P. Singh, (PW.14) reached the place of occurrence namely Nand Nagri, near Shiv Mandir, where it was learnt that the injured Parveen (deceased) has been taken to G.T.B. Hospital by his brother Vipin (PW.2). The aforesaid Sub-Inspector of Police came to the G.T.B. Hospital and learnt that the injured was declared as “brought dead”. Vipin (PW.2) gave his statement (Ex.PW2/A) in the hospital and the FIR in question was recorded.

6. PW.2 deposed that on 21.05.2008 at about 09:30 p.m., he along with his brother Parveen (deceased) was busy making preparations for *Mata Ki Chowki* at his residence. Parveen had crossed the road to proceed towards Shiv Mandir for drinking water. The appellants and one R came there and started assaulting Parveen. Appellant Rakesh

hurled knife blows. The appellants were muttering that the deceased Parveen must be taught a lesson for having spoken to their sister Tanu (Tanu has appeared as a defence witness DW-8). PW.2 raised an alarm and tried to save his brother. However, the appellants managed to run away. Parveen was seriously injured. Rajesh Kumar, PW.3, (a neighbour of PW.2) came and he along with PW.2 took the injured to the G.T.B. Hospital where he was declared “brought dead”. PW.2 affirmed what was recorded in the FIR (Ex.PW7/A) at the first instance.

7. PW.2, a day after i.e. on 24.05.2008 indicated to the police the place of occurrence. On being asked by the Investigating Agency on 24.05.2008, he gave his clothes which were blood stained as he had taken the deceased to the hospital. PW.2 had asserted that despite raising alarm, nobody from the neighbourhood came forward for help except PW.3.

8. Rajesh Kumar (PW.3) corroborated the version of PW.2. He affirmed that the appellants had assaulted the deceased. He categorically asserted that the appellant Rakesh had given knife blows to Parveen. He had arranged a rickshaw and thereafter along with

PW.2, had taken the injured to the hospital. The appellants ran away from there. He accepted that he had not gone to Shiv Mandir with the deceased for drinking water; rather he was taking a walk after dinner. The distance between his house and the place where the deceased was attacked, was about 50 meters. He had seen the appellants running from a distance of about 10 ft. PW.3 had claimed that he was not on visiting terms with the family of the deceased.

9. Having reproduced in brief the testimonies of the two eye-witnesses, we proceed to examine medical evidence.

10. Dr. Arvind Kumar, (PW.6) who conducted the post mortem on the deceased 22.05.2008, noticed the following injuries:

- i. *Incised stab wound of size 2.7 cm. x 0.2 cm. Obliquely placed over back of right side of chest, 10.2 cm. away from mid line, 17 cm. below shoulder tip, cutting underline ribs and entered the chest cavity. Then it pierce the lower lob of right lung through and through. Chest cavity was full of blood. Total depth of wound was 13 cm. The lower lateral angle of wound was sharp. Direction of wound was downward, forward and medially.*
- ii. *Incised stab wound of size 2.8 cm. x 0.2 cm. obliquely placed over lateral aspect of back of right chest. Wound was 14 cm. from mid line and 7.5 cm. below injury no.(1). Lower medial angle of wound was sharp. Wound entered the right chest cavity after cutting underlying ribs. Then it entered the right*

lung lower lob 2 cm. below injury no.(1). Chest cavity was full of blood. Total depth of wound was 11 cm, and direction of wound was forward, medially and slightly downward.

- iii. Incised stab wound of size 3.2 cm. x 0.2 cm. was present over lateral aspect of back obliquely placed, lower later angle of wound was blunt and upper medial angle was sharp. Wound was 13 cm. away from mid line and 3.8 cm. below injury no.(2). Direction of wound was downward, forward and medial and total depth was 12.9 cm.*
- iv. Incised stab wound of size 2.9 cm. x 0.2 cm. obliquely placed over lateral aspect of back 1 cm. below injury no.(3). Upper medial angle of wound was sharp. Direction of wound was downward, forward and medially. Cutting the right kidney. Extra vacation of blood was present on the track.*
- v. Incised stab wound of size 3 cm. x 0.2 cm. obliquely placed over base of neck at lateral 1/3rd of right clavicle, 10 cm. away from mid line. Lower lateral angle of wound was sharp. Track of wound was downward, backward and laterally into the subcutaneous tissue. Total depth of wound was 7 cm.*
- vi. Incised stab wound of size 2.7 cm. x 0.2 cm. obliquely placed over left side of chest, upper lateral angle of wound was blunt and lower medial angle was sharp. Wound was 10 cm. away from mid line and 3 cm. below lateral 1/3rd of left clavicle. Track of the wound was backward, downward and medially. Entered the left chest cavity after cutting the first intercostal muscles at mid clavicular line. Passes through and through proper upper lobe of lung and then passes through and through the arch of aorta. Left chest cavity was full of blood and there was also nick on trachea.*
- vii. Incised stab wound of size 2.5 cm. x 0.2 cm. was present over left inguinal fold, lower angle of wound was sharp. Wound was 7 cm. below and medial to left anterior superior iliac spine and*

2.5 lateral to public symphysis. Track of wound was upward, backward and laterally into the soft tissue. Total depth of wound was 7.9 cm.

- viii. Incised wound of size 1 cm. x 0.2 cm. was present over left side of chest, 14 cm. away from mid line and 20 cm. below anterior aspect of left shoulder.*
- ix. Incised wound of size 3.5 cm. x 0.2 cm. was present over dorsum of left hand.*
- x. Incised wound of size 1.2 cm. x 0.2 cm was present over dorsum of left hand, 1 cm. below to injury no. (9).*
- xi. Reddish abrasion of size 2 cm. x 1 cm. was present on left side back of chest over lower tip of scapula, 13 cm. away from mid line and 9 cm. below from shoulder.*
- xii. Linear reddish abrasion of size 4 cm. x 0.3 cm. was present over left side of face, 4 cm. away from outer end of left eye and 5 cm. away from left ear.*

11. Injuries no. (1), (2), (4) and (6), caused by a sharp cutting weapon, PW.6 opined, were sufficient to cause death in ordinary course of nature individually and collectively. So far as the injuries no. (11) and (12) are concerned, PW.6 has stated that these were the result of impact of a blunt force. In answer to a specific question, PW.6 confirmed that injuries no.(1) to (10) were caused by single edged sharp weapon which could be one and the same weapon or different weapons of same measurements. Injury no. (11) but not (12), in the opinion of PW.6, could have been caused by a fall. The post-

mortem report was proved by PW.6 and marked Ex.PW.6/A.

12. The MLC of the deceased was proved by Dr. P. Yadav, (PW.18) and marked Ex.PW18/A. He affirmed that the deceased was declared “brought dead” when he was brought to casualty ward of G.T.B. Hospital at 10:40 p.m. The MLC was written by one Dr. Sushil and the aforesaid witness, namely PW.18, identified his handwriting and signature as Dr.Sushil had worked under him.

13. Thus, on scrutiny of medical evidence, it is apparent that the same is in consonance with the ocular testimonies of PWs.2 and 3. As noticed 10 injuries by a sharp weapon were suffered by the deceased. The injuries were inflicted over different parts. The manner of assault establishes that the deceased was confronted and assaulted by a sharp weapon a number of times. Assault was a fierce one and would have taken some time. Nature of injuries also reflect, and indicate involvement of several persons.

14. Thus, we are satisfied that the deceased died as a result of homicidal attack at the hands of the appellants.

15. Motive and cause for the said assault is apparent. PW.2 has stated in clear terms that the accused persons were shouting that Parveen would be taught a lesson for he had spoken to their sister Tanu. The appellants Rakesh, Mukesh and Bal Kishan are the first cousins of Tanu. Roop Chand is a friend and neighbour of the cousins of Tanu.

16. For having a complete picture of what happened before the occurrence, we would take on record and exposit what, Tanu (DW.8) had deposed. She accepted and admitted that she knew the deceased as well as PW.2. The deceased used to tease her when she would come out of her house. On being cross examined by the State, she admitted that appellants Rakesh, Mukesh and Bal Kishan are her cousins and they did not like her talking to the deceased. In context of motive, evidence of SI C.P. Singh, (PW.14) assumes importance. PW.14 has deposed that Tanu during the course of the investigation, had accepted that she knew the deceased, which fact was not liked by her brothers. Tanu had affirmed that on 19.05.2008, the deceased had borrowed a pen from her and on 21.05.2008 at about 06:30 p.m. while she was returning from her tuition, she met the deceased near C-1 Park. At

that time, the appellant Rakesh had seen them talking to each other and got infuriated. Rakesh had slapped Tanu and made Tanu return to her home. Tanu has also informed the police that on 21.05.2008, Rakesh, Bal Chand and Mukesh had come to her house. Rakesh, while brandishing a knife, had warned that if Tanu would henceforth speak to Parveen, he would be killed. Appellant Bal Kishan also tried to physically harm Tanu. The appellants left the house, enraged and inflamed.

17. The appellants in their statement recorded under Section 313 of the Code of Criminal Procedure, 1973, have stated that PW.2 used to tease their cousin. This had led to a quarrel. Both the PW.2 (complainant) and the deceased felt humiliated and insulted. Because of this, PW.2 has falsely implicated them in this case.

18. From a holistic reading of what has been stated by the witnesses, it is not difficult to probablise as to the cause, and motive of the occurrence. Appellant Rakesh had spotted Tanu talking to the deceased. This infuriated him. He brought Tanu to her residence. Thereafter, appellants Rakesh, Mukesh and Bal Kishan came and spoke to Tanu on 21.05.2008. Appellant Rakesh was having a knife.

All the three brothers threatened and warned her from meeting the deceased. Thereafter, violent attack took place.

19. On behalf of the appellants, several grounds have been raised to demolish the prosecution version. To list them:

- i. PW.2 being an interested witness cannot be wholly relied upon;
- ii. The presence of PW.3 on the spot at the relevant time is debatable;
- iii. Non joining of any independent person of the locality made the prosecution case redolent with doubt and suspicion;
- iv. Necessary persons like the rickshaw puller whose services were used by PW.2 and PW.3 for reaching the injured to the hospital has not been examined;
- v. Blood stained clothes of PW.2 and PW.3 have been collected by the police after several day of the occurrence, thereby completely delinking the aforesaid fact with the nature of crime;
- vi. Non-recovery of weapon of assault i.e. knife; and

vii. Last but not the least inconsistencies in the deposition of the witnesses interse.

20. We have taken note of the consistent eye-witnesses account of PW.2 and PW.3 who have deposed how the deceased Parveen was repeatedly assaulted by a knife. A close relative of the deceased does not, merely because of his relationship, lose the status of a truthful witness. A close relative, who has seen the occurrence, would be reliable and his testimony ought not to be undermined. In fact, for all practical purposes, there is a guarantee of truth in such statements as they would not like to give any safe passage to the assailants. His testimony must be thoroughly and meticulously perused and scrutinised, and if found to be credible and truthful, then only can it be accepted for conviction. In the present case, PW.3 fully corroborates and affirms the narration of PW.2 regarding the occurrence and perpetrators. Medical evidence also supports the ocular testimonies.

21. The presence of PW.3 at the place of occurrence cannot be doubted as he was the only person who assisted PW.2 in taking the injured to the hospital. We have found no reason to disbelieve his testimony as he is neither inimically deposed towards the appellants

nor favourably inclined towards the prosecution.

22. PW.2 and PW.3 while deposing before the Trial Court have stated categorically that despite the call made by PW.2, no one turned up to help either PW.2 or the deceased. We cannot turn away our gaze from the current societal norm, and for that matter, PW.3 is only a public witness.

23. Even otherwise it is a settled position of law that what is important, is the quality of evidence and not the quantity of evidence. The rickshaw puller could have only thrown light on the fact that the deceased was taken to the hospital by PWs.2 and 3 and nothing beyond. The said fact has been deposed by the said witnesses. Evidence of the rickshaw puller, who had to be first located, was not that material. This would not support the prosecution case.

24. No doubt, the Investigating Officer should have immediately asked for the blood stained clothes, but this lapse does not compel us to reject the prosecution case. These were irregularities in the investigating process which have to be analysed along with the incriminating circumstances. This failure, does not cast a doubt on the

truthfulness and credibility of the prosecution version, even in a remote way. Similarly, minor contradictions in the testimonies of PW.2 and PW.3 are inconsequential; rather they are natural. In Krishna Pillai Sree Kumar and Anr. vs. State of Kerala, AIR 1981 SC 1237, the Supreme Court has observed that the prosecution evidence could suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. What is the actually required to be seen is whether such inconsistencies etc. go to the root of the matter or whether they pertain to insignificant aspects thereof. Minor contradictions with respect to the width of road etc. do not have any bearing on the facts of the case.

25. The knife which was used by appellant Rakesh, has not been recovered. It has been urged by the defence that on this score, the prosecution case deserves to be thrown overboard. The position of law in this regard is very clear. In Lakshmi vs. State of U.P. (2002) 7 SCC 198, it has been held that it is not an inflexible rule that the weapon of assault must be recovered. The Supreme Court did not accept as a general and broad proposition of law that in case of non recovery of the weapon of assault, the whole prosecution case gets torpedoed. In

State of Rajasthan vs. Arjun Singh, (2011) 9 SCC 115, the Supreme Court has again held that “..... mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place.” The Supreme Court in Mritunjoy Biswas vs. Pranab alias Kuti Biswas and another, (2013) 12 SCC 796, observed that where unimpeachable ocular testimony, supported by medical evidence is available, non recovery of the weapon of assault is of no advantage to the accused.

26. We take notice of the fact that witnesses who have been examined on behalf of the defence to prove the alibi of the accused persons have made inconsistent statements which have made them highly unreliable. Appellant Roop Chand has put forth 4 witnesses viz., Sh. Om Prakash, Sh. Atam Prakash Gupta, Sh. Shiv Bahadur, Sh. Ram Dayal, who have been examined as defence witnesses 1 to 4 respectively, in order to establish and substantiate his plea of alibi. DW 1 (Om Prakash) has stated that he had gone to the house of Appellant Roop Chand at about 8:45 PM and remained there till 9:30

PM. On 21.05.2008, DW 3 (Shiv Bahadur) has stated that on the said date, he had gone to the house of Accused Roop Chand to deliver the invitation for the marriage of his daughter. He further stated that he reached there at 6:00 PM and remained there till 10:30 PM, stating that Appellant Roop Chand was present there for the entire duration. DW 4 (Ram Dayal) who is the father of the Appellant Roop Chand has stated that he came home at 4:00 PM and thereafter Appellant Roop Chand remained home till next morning. However, DW 2 (Atam Prakash Gupta) has stated that he had called Appellant Roop Chand to sit at his shop at 9:15 PM and thereafter the Appellant Roop Chand sat at his shop for 15-20 minutes and left at 9:30 PM. Similarly, appellant Bal Kishan, has examined DW 5 (Manoj Malhotra), DW6 (Dharmveer) and DW 7 (Smt. Gomti Devi) for proving his alibi. DW5 has stated that on the day of incident Appellant Bal Kishan came to his shop at 9:30 am and left the shop at 10:00 pm. DW6 who is the uncle of Bal Kishan stated that on the day of incident, i.e. 21/05/2008, Bal Kishan left home for his work at 9:00 am and returned home at 10:00 pm. Thereafter Bal Kishan left for his mother's house at Nand Nagri. DW.7 (Smt. Gomti Devi) who is mother of Bal Kishan has stated that

her son came at 11:00 pm to meet her. DW.7 has further stated that after taking dinner Appellant Bal Kishan went to sleep. The versions of DWs do not appear to be consistent and it becomes apparent that the defence witnesses are not stating the truth. In the Binay Kumar Singh vs. State of Bihar: (1997) 1 SCC 283, the Supreme Court has held that the burden of proving an alibi is entirely on the accused and strict proof is required for establishing an alibi, but the accused has failed to prove the same.

27. Learned counsels appearing for the appellants Mukesh, Bal Kishan and Roop Chand have laid great emphasis on absence of any “charge” under Section 34 of the IPC. They submit that they could not have been convicted for the offence under Section 302 by taking aid of Section 34 of the IPC. It was canvassed that out of the 12 injuries, only 2, namely nos.(11) and (12) have not been caused by any sharp cutting weapon, but by the impact of blunt force. Thus, at best only these two injuries can be attributed to the said appellants, who were unarmed and had not given knife blows. In the absence of any evidence or even allegation that the appellants Mukesh, Roop Chand and Bal Kishan were armed, much less a sharp edged weapon, it

would be wrong to assume that they had entertained a similar/same intention of hurling knife injuries which ultimately led to Parveen's death. It was argued that assuming, that all of them had gone with the appellant Rakesh to teach the deceased a lesson unarmed, all that could be presumed is that they had gone there only with the purpose of admonishing or threatening the deceased. Common intention would possibly be limited to mild use of force so as to instil an element of fear in the mind of the deceased.

28. Learned counsels in support of their submission on this issue drew the attention of the court to the judgments in *Manoj alias Bhau And Others vs. State of Maharashtra*, (1994) 4 SCC 268; *State of Uttar Pradesh vs. Preetam And Others*, (2011) 11 SCC 286; *Khambam Raja Reddy And Another vs. Public Prosecutor, High Court of Andhra Pradesh*, (2006) 11 SCC 239; *Ajay Sharma vs. State of Rajasthan*, (1999) 1 SCC 174; *Matadin And Another vs. State of Maharashtra*, (1998) 7 SCC 216; *State of U.P. vs. Farid Khan And Others*, (2005) 9 SCC 103 and *Jainul Haque vs. State of Bihar*, (1974) 3 SCC 543.

29. In the aforesaid cases, referred to by the appellants, benefit of doubt was given by the Courts as no overt act was ascribed to them. It

is trite that each case depends on its own set of facts and the facts of one case cannot be stated to be exactly similar to that of the other case. Question of common intention is answered with reference to the factual matrix of a particular case. It is a matter of inference.

30. In the case in hand, it stands established that appellants Mukesh, Bal Kishan and Roop Chand accompanied Rakesh to the place of occurrence. It is true that PW.2 and PW.3 did not see them armed with knife and other weapons. But in the process of assault, according to the eye-witnesses, Rakesh hurled several knife blows resulting in as many as 10 sharp edged weapon injuries. It was a deliberate assault and attack. It is difficult not to perceive and accept that common intention was missing and absent. Nature and extent of injuries, the preparation and the predetermined manner in which the deceased was assaulted, would reflect common intention. It is not necessary to establish common intention, by showing that each one of them were armed.

31. What distinguishes Section 34 from Section 149 is that Section 34 of the IPC refers to common intention, whereas Section 149 cares for common object. Common intention of the Appellant persons can

be formed even during the course or just before the assault and it is not at all necessary that such intention should pervade the minds of the accused right from the beginning. The fact that several stab wounds were found on the person of the deceased does make us believe that “the common intention” was entertained by the appellants in consummating their act of revenge. During the period of assault, the aforementioned three appellants did not run away or desist appellant Rakesh from assaulting by knife. The deceased suffered as many as 12 injuries, 10 out of which, as has been noted, were by a sharp cutting weapon. Thus, the deceased could not run away or was not allowed to escape. The presence of the three appellants at the place of occurrence had the impact and consequences. It can be stated with almost certainty that the presence of Mukesh, Bal Kishan and Roop Chand alongwith Rakesh made the attack fatal, and foreclosed any chance to flee and save oneself. Thus, all the appellants had and shared the common intention.

32. Learned counsel for the State, while stoutly opposing such submissions, has rightly referred to Suresh and Anrs. vs. State of U.P., AIR 2001 SC 1344. In the aforesaid case, the Supreme Court,

elucidated Section 34, as to when it can be invoked. It was held:-

“Looking at the first postulate pointed out above, the Appellant who is to be fastened with liability on the strength of Section 34, IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-Appellant in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32, IPC. So the act mentioned in Section 34, IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-Appellant to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34, IPC cannot be invoked for convicting that person. In other words, the Appellant who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34, IPC.”

33. In paragraphs 41 onwards of Suresh (supra), the Supreme Court took note of the earlier decisions on the subject which are instructive.

“The classic case on the subject is the judgment of the Privy Council in Mahboob Shah vs. Emperor: AIR, 1945 PC 118:

(1945 (46) Crl LJ 689). Referring to Section 34 prior to its amendment in 1870 wherein it was provided:

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

it was noticed that by amendment, the words "in furtherance of common intention of all" were inserted after the word "persons" and before the word "each" so as to make the object of Section clear. Dealing with the scope of Section, as it exists today, it was held:

"Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intention of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the Appellant leading to the doing of a criminal act in furtherance of such intention. To provide the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the Appellant persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the Appellant of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has

to be inferred from this act or conduct or other relevant circumstances of the case."

(Emphasis supplied)

42. *Full Bench of the Patna High Court in The King Emperor vs. Barendra Kumar Ghose: AIR1924 Cal 257: (1924 (25) Crl.LJ 817) which was later approved by the Privy Council dealt with the scope of Section 34 in extenso and noted its effects from all possible interpretations put by various High Courts in the country and the distinguished authors on the subject. The Court did not agree with the limited construction given by Stephen, J. in Emperor v. Nirmal Kanta Roy 1914 ILR 41 Cal 1072: (AIR1914 Cal 901(2): 1914 (15) Crl LJ 460) and held that such an interpretation, if accepted, would lead to disastrous results. Concurring with Mookerjee, J. and giving the section wider view Richardson, J. observed:*

"It appears to me that section 34 regards the act done as the united act of the immediate perpetrator and his confederates present at the time and that the language used is susceptible of that meaning. The language follows a common mode of speech. In R. v. Salmon 1880 (6) Q80 79 three men had been negligently firing at a mark. One of them -it was not known which - had unfortunately killed a boy in the reach of the mark. They were all held guilty of manslaughter. Lord Coleridge, C.J. said: -'The death resulted from the action of the three and they are all liable'. Stephen, J. said:- 'Firing a rifle' under such circumstances 'is a highly dangerous act, and all are responsible; for they unite to fire at the spot in question and they all omit to take any precautions whatever to prevent danger.

Moreover, Sections 34, 35 and 37 must be read together, and the use in section 35 of the phrase 'each of such persons who joins in the act' and in section 37 of the phrase, 'doing any one of those acts, either singly or

jointly with any other person' indicates the true meaning of section 34. So section 38 speaks of 'several persons engaged or concerned in a criminal act'. The different mode of expression may be puzzling but the sections must, I think, be construed as enunciating a consistent principle of liability. Otherwise the result would be chaotic.

To put it differently, an act is done by several persons when all are principals in the doing of it, and it is immaterial whether they are principals in the first degree or principals in the second degree, no distinction between the two categories being recognised.

This view of section 34 gives it an intelligible content in conformity with general notions. The opposing view involves a distinction dependent on identity or similarity of act which, if admissible at all, is wholly foreign to the law, both civil and criminal, and leads nowhere."

43. Approving the judgments of the Privy Council in Barendra Kumar Ghose (AIR 1925 PC 1: 1925 (26) Cri LJ 431) and Mahboob Shah's (AIR 1945 PC 118: 1945 (46) Cri LJ 689) cases (supra) a three Judge Bench of this Court in Pandurang and Ors. v. State of Hyderabad, AIR 1955 SC 216: (1955 Cri LJ 572) held that to attract the applicability of Section 34 of the Code the prosecution is under an obligation to establish that there existed a common intention which 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 all. This Court had in mind the ultimate act done in furtherance of the common intention. In the absence of a pre-arranged plan and thus a common intention even if several persons simultaneously attack a man and each one of them by having his individual 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. 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 or the other. The Court emphasised the sharing of the common intention and not the individual acts of the persons constituting the crime. Even at the cost of repetition it has to be emphasised that for proving the common intention it is necessary either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference and "incriminating facts must be incompatible with the innocence of the Appellant and incapable of explanation or any other reasonable hypothesis". Common intention, arising at any time prior to the criminal act, as contemplated under Section 34 of the Code, can thus be proved by circumstantial evidence.

44. xxxxxxxx

45. xxxxxxxx

46. xxxxxxxx

47. *In Ramaswami Ayyangar v. State of Tamil Nadu AIR 1976 SC 2027: (1976 Cri LJ 1563) this Court declared that Section 34 is to be read along with preceding 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 that in case of an offence involving physical violence it is essential for the application of Section 34 that such Appellant must be physically present at the actual commission of crime for the purposes of facilitating accomplishment of "criminal act" as mentioned in that section. In Ramaswami's case (AIR 1976*

SC 2027: 1976 Cri LJ 1563) (supra) it was contended that A2 could not be held vicariously liable with the aid of Section 34 for the act of other Appellant on the grounds: firstly he did not physically participate in the fatal beating administered by co-Appellant to the deceased and thus the "criminal act" of murder was not done by all the Appellant within the contemplation of Section 34; and secondly the prosecution had not shown that the act of A2 in beating PW was committed in furtherance of the common intention of all the three pursuant to a pre-arranged plan. Repelling such an argument this Court held that such a contention was fallacious which could not be accepted. 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. Conviction of A2 under Section 302/34 of the Code in that case was upheld.

48. In Rambilas Singh and Ors. v. State of Bihar, AIR 1989 SC 1593 : (1989 Cri LJ 1782) this Court held (Para 7):

"It is true that in order to convict persons vicariously under Section 34 or Section 149 IPC, it is not necessary to prove that each and everyone 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 Appellant was or were done in furtherance of the common intention of all the Appellant or in prosecution of the common object of the members of the unlawful assembly."

(Emphasis supplied)

49. Again a three Judge Bench of this Court in State of U.P. v. Iftikhar Khan and Ors. (1973) 1 SCC 512: (AIR 1973 SC 863 : 1973 Cri LJ 636) after relying upon the host of

judgments of Privy Council and this Court, held that for attracting Section 34 it is not necessary that any overt act must be done by a particular accused. The section will be attracted if it is established that the criminal act has been done by one of the Appellantpersons in furtherance of the common intention. If this is shown, the liability for the crime may be imposed on any one of the person in the same manner as if the act was done by him alone. In that case on proof of the facts that all the four Appellantpersons were residents of the same village and AppellantNos.1 and 3 were brothers who were bitterly inimical to the deceased and AppellantNos.2 and 4 were their close friends, AppellantNos.3 and 4 had accompanied the other two Appellantwho were armed with pistols; all the four came together in a body and ran away in a body after the crime coupled with no explanation being given for their presence at the scene, the Court held that the circumstances led to the necessary inference of a prior concert and pre-arrangement which proved that the "criminal act" was done by all the Appellantpersons in furtherance of their common intention.

50. In Krishnan and Anr. v. State of Kerala (1996) 7 JT (SC) 613: (1996 AIR SCW 3754 : AIR 1997 SC 383 : 1996 Cri LJ 4444) this Court even assuming that one of the appellants had not caused the injury to the deceased, upheld his conviction under Section 302/34 of the Indian Penal Code holding.

51. In Surender Chauhan v. State of M.P. (2000) 4 SCC 110 : (2000 AIR SCW 1005 : AIR 2000 SC 1436: 2000 Cri LJ 1789) : this Court held that 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 Appellantin the commission of the offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability.

52. xxxxxxx

53. After referring to Mahboob Shah's case (AIR 1945 PC 118 : 1945 (46) Cri LJ 689) (supra) this Court in Mohan Singh and anr. vs. State of Punjab [AIR 1963 SC 174] : (1963(1) Cri LJ 100) observed, it is now well settled that the common intention required by Section 34 is different from the same intention or similar intention. The persons having similar intention which is not the result of pre-concerted plan cannot be held guilty for the "criminal act" with the aid of Section 34. Similarly the distinction of the words used in Section 10 of the Indian Evidence Act "in reference to their common intention" and the words used in Section 34 "in furtherance of the common intention" is significant. Whereas Section 10 of the Indian Evidence Act deals with the actions done by conspirators in reference to the common object. Section 34 of the Code deals with persons having common intention to do a criminal act."

34. In Dhanna etc. vs. State of Madhya Pradesh, JT 1996 (6) SC 652, it has been held that even if charge under Section 34 of the IPC is not framed; it could be taken in aid if the circumstances so exist. The ratio is found in the following quotations.

"8. Legal position on this aspect remained uncertain for a time after this court rendered a decision in Nanak Chand v. The State of Punjab. 1955 (1) SCR 1201. But the doubt was cleared by a constitution bench of this court in Willie Slaney v. State of M.P., AIR 1956 SC 116. Where this court observed at para 86, thus:

"Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common

object or a common intention; and the charge is a rolled-up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant."

9. It is, therefore, open to the court to take recourse to Section 34 of IPC even if the said section was not specifically mentioned in the charge and instead Section 149 IPC has been included. Of course a finding that the assailant concerned had a common intention with the other Appellantis necessary for resorting to such a course. This view was following by this court in later decisions also, (Amar Singh v. State of Haryana. AIR 1973 SC 2221. Bhoor Singh and Anr. v. State of Punjab, AIR 1974 SC 1256). The first submission of the learned counsel for the appellant has no merit."

35. In the present case, there is not a scintilla of doubt with regard to the participation of the appellants in the crime and thereby fulfilling their intention.

36. Thus from the aforementioned discussions, we are not in any doubt that the appellants shared common intention and accordingly

along with Rakesh are guilty of the charge of murder. We do not find any reason to reverse the judgment and findings the Trial Court.

37. As a result, the appeal is dismissed.

38. Trial Court record to be returned.

(ASHUTOSH KUMAR)
Judge

(SANJIV KHANNA)
Judge

APRIL 17, 2015
ab