



BAIL SLIP

Nagendran, S/o. Chellappa, Male, Aged about 25 years is released on bail vide the order of this Court, dated 24.05.2017 made in CrI MP (MD) No. 4268/2017 in CrI A (MD) 210/2016.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 24.08.2018

Delivered on : 31.08.2018

CORAM

THE HON'BLE MR. JUSTICE **M.M. SUNDRESH**

AND

THE HON'BLE MR. JUSTICE **N.SATHISH KUMAR**

Criminal Appeal No. 210 of 2016

Nagendran ... Appellant/Accused No. 2

Vs.

State through
The Inspector of Police,
Othakadai Police Station,
Madurai District.
(In Crime No. 514 of 2011)

.. Respondent/complainant

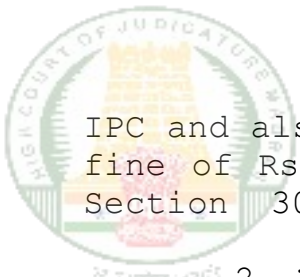
Criminal Appeal is filed under Section 374 of Criminal Procedure Code seeking to call for the records connected with judgment rendered by the Principal Sessions Judge, Madurai, in S.C.No.307 of 2013 dated 25.03.2014, set aside the same and consequently, acquit the appellant.

For Appellant : Mr.R.Alagumani
for M/s.Daniel Manoharan

For respondent : Mr.R.Anandharaj
Additional Public Prosecutor

JUDGMENT**M.M. SUNDRESH, J.**

The accused in S.C.No.307 of 2013 on the file of Principal District and Sessions Court, Madurai, charged for the offences punishable under Sections 342 and 302 read with 34 of Indian Penal Code and thereafter, convicted and sentenced to undergo rigorous imprisonment for one year and a fine of Rs.500/- in default to undergo rigorous imprisonment for three months under Section 342 of



IPC and also sentenced to undergo imprisonment for life and to pay a fine of Rs.25,000/- in default to undergo R.I for six months under Section 302 read with 34 of IPC, is the appellant before us.

2. Prosecution case in a nutshell:

2.1. Karthik, a juvenile in conflict with law, is a friend of the appellant/accused. On 26.10.2011, which was a Deepavali day, at about 9.00 p.m., the deceased Senthilmurugan along with P.Ws.1 to 3, who are his father, mother and wife, were sitting on the door footsteps of their house. There was a power cut and thus, an emergency light was used. At that time, Karthik in a drunken mood was driving a bike bearing Registration No.TN-59-AS 4754 and fell into a nearby ditch. He was taken out by the deceased and P.Ws.1 to 3. Thereafter, he picked up a quarrel with them when the deceased and P.Ws.1 to 3 removed the bike key. At that time, the owner of the bike, one Santhanabharathi came and took the bike key by apologising that such incident would not occur in future. Even thereafter, Karthik was quarreling with the deceased and P.Ws.1 to 3. He threatened the deceased to do away with him and then left. Four of the friends of the deceased came and they made enquiries and the incident was explained to them. At that point of time, both the appellant and Karthik came and shouted. The appellant caught hold of the deceased while Karthik stabbed the deceased on his stomach. Thereafter, both of them ran away leaving M.O.1-blood stained knife on the spot.

2.2. The deceased was taken in a share auto to the Government Hospital, Madurai at about 10.15 p.m., which was the time of occurrence. The deceased was brought to the hospital at 11.00 p.m., wherein the Doctor, on examination, declared him dead. Thereafter, P.W.1 and Kathiravan, who were the friends of the deceased and who were also present in the place of occurrence went to Othakadai police station at 00.45 a.m., on 27.10.2011 and lodged a complaint-Ex.P1. P.W.9, who is the Sub Inspector of Police, registered the complaint in Crime No.514 of 2011 under Sections 342 and 302 IPC under Ex.P7-First Information Report. P.W.13- Inspector of police went to the spot and prepared Ex.P2-Observation Mahazar and Ex.P10-rough sketch. Later, he seized blood stained cement floor M.O.2, sample floor M.O.3 and M.O.1 knife under Ex.P3-seizure mahazar. Thereafter, he prepared Ex.P11-inquest report and sent the seized objects through Form 95 to the Court. He has also sent the dead body to the Government Hospital, Madurai for post mortem along with requisition through police constable. P.W.13 arrested Karthik and appellant at about 5.30 p.m. The confession statement given by Karthik was recorded and Ex.P4 is the admissible portion in the confession of the juvenile in conflict with law. Ex.P13 is the requisition to send the viscera for examination and Ex.P15 is the Viscera Report. The Chemical examination Report and Serologist Report were marked as Exs.P18 and P19 respectively.

2.3. Based upon the investigation made, a Final Report was



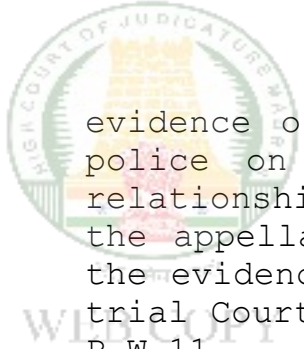
filed on 27.04.2012 under Sections 342 and 302 read with 34 of IPC before the Judicial Magistrate, Melur in P.R.C.No.24 of 2012. It was accordingly committed to the Principal Sessions Court, Madurai, and taken as S.C.No.307 of 2013.

2.4. Before the trial Court, the prosecution examined P.Ws.1 to 14 and marked Exs.P1 to P19 along with M.Os.1 to 8. As Karthik was juvenile in conflict with law, the appellant was proceeded separately.

2.5. P.Ws.1 to 3 are the eye witnesses. P.W.4 was the owner of the M.O.1-knife. He turned hostile by denying M.O.1 as that of his own. P.W.5 is the attesting witness for the observation mahazar and recovery of materials. P.W.6 is the Village Administrative Officer, who speaks about the arrest of the accused at 5.30 p.m., on 27.10.2011. He further speaks about the confession statement given by appellant and Karthik. P.W.7 is the friend of the deceased Senthilmurugan and another eye witness, who saw the occurrence. He also speaks about the power cut and usage of emergency light. P.W.8 is the Police Constable, P.W.9 is the Sub Inspector of police, who registered Ex.P7-First Information Report and P.W.10-Doctor, who did the post mortem and the author of Ex.P8. He also states that brown colour fluid was found with pungent odour on the stomach of the deceased. However, no examination was done to find out the consumption of the liquor as there was no such smell. In his cross examination, he has stated that it is possible to sustain injuries by falling upon the sharp stick, rod or glass piece. P.W.11, who is also the friend of the deceased Senthilmurugan, is stated to have seen the earlier quarrel between the deceased and the accused. P.W.12 is the Head Constable, who received Ex.P7 First Information Report and handed over the same to the Judicial Magistrate No.II, Madurai, who was in-charge of Melur Police Station. P.W.13 is the Investigation Officer, who examined the witnesses and recorded their statements. P.W.14 while he was working as Inspector of Police, Melur, was in-charge of Othakadai Police Station and he perused the case file in Crime No.514 of 2011 and examined the witnesses and obtained final opinion from the doctor, who conducted post mortem. After completion of the investigation, he laid charge sheet against the accused. As Karthik is juvenile in conflict with law, he laid the charge sheet against him in concerned Court. He deposed that there was an intimation from the hospital in writing on 26.10.2011 at about 22.45p.m. However, he feigns ignorance of the time of the receipt.

2.6. When the above incriminating materials were put to the accused under Section 313 Cr.P.C, they denied the same as false. On considering the oral and documentary evidence produced by the prosecution, the trial Court convicted the appellant on all the charges and hence, the appeal.

3. The learned counsel appearing for the appellant would submit that the very occurrence itself is in doubt. Even as per the



evidence of P.W.1, the appellant was found in the custody of the police on 27.10.2011 at about 9.00 a.m. There was no strained relationship between the deceased P.Ws.1 to 3 on the one hand and the appellant on the other. Even as per the evidence of P.W.2, the evidence of P.W.4 has not been taken into consideration by the trial Court. This evidence falsifies the evidence of P.Ws.1 to 3 and P.W.11.

4. The ingredients of Section 34 of I.P.C., are not available and proved. The owner of the vehicle has not been examined. Even according to the case of the prosecution, there was only an emergency light used. It cannot be used for more than an hour. Mere an act of caught hold *per se* would not attract Section 34 of I.P.C. P.W.14, though accepted the information received from the hospital, has not given any reason for withholding it. Therefore, prior intimation was deliberately suppressed, which was given much earlier to Ex.P1-complaint. Strangely, neither the accident register was marked nor the concerned Doctor was examined. There was no blood stain found on any of the witnesses. If the appellant has caught hold of the deceased, there cannot be any stab on the front upper part of the abdomen. To buttress his submission, reliance has been made on the judgment of the Apex Court in **UNION OF INDIA AND OTHERS VS. SADHA SINGH (2000 Criminal Law Journal 15)**.

5. The learned Public Prosecutor would submit that there are eye witnesses available. P.Ws.1 to 3 and P.W.7 cannot be stated to be interested witnesses. Thus, no interference is required.

6. Before going into the factual matrix involved, let us understand the scope and ambit of Section 34 of the Indian Penal Code.

7. Section 34 of IPC.

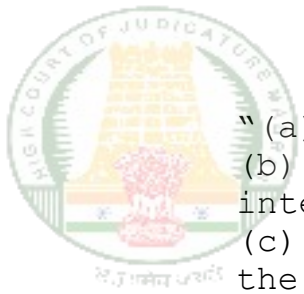
7.1. Section 34 of IPC was drafted by Lord Macaulay. The original section as it stood was as follows:

"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."

7.2. In 1870 an amendment was brought forth as a consequence to the observation by Sir Barnes Peacock, C.J. In **R.V.GORA CHAND GOPE ((1866) 5 Suth WR (Cri) 45)**, by which "in furtherance of the common intention" was added.

7.3. Section 34 I.P.C. is not a substantive or distinct offence. It is a rule of evidence fixing a vicarious, constructive and joint liability and thus, it lays down the rule for the criminal acts performed by plurality of persons. It carves out an exception to the general law.

7.4. There are three mandatory requirements to attract Section 34 I.P.C., which are as follows:



- "(a) Criminal act is done by several persons;
(b) Such act is done in furtherance of the common intention of all; and
(c) Each of such persons is liable for that act in the same manner as if it were done by him alone."

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7.5. A common intention is not akin to same or similar intention. There is a difference between a common and similar or same intention. This intention has to be shared by all the accused to attract conviction. This can be achieved by consensus of mutual by the participants in a criminal action.

7.6. A specific overt act is not required qua an accused rather what is required is the existence of the element of participation in the crime. Such a participation may be bordering on facilitation, aid or assistance. However, in an act involving a physical injury or violence, the presence of an accused is required to attract Section 34 I.P.C. A mere presence itself would be sufficient, though there may not be any physical participation as such. In other words such a presence would tantamount to an active participation. Therefore, a participation may be active or passive depending upon the facts. This prior concert can be determined from the conduct either during the course of action or at the time of the final act. Thus, even it is possible to hold the existence of meeting of minds at the spur of the moment, it should nevertheless be proved accordingly. To attract Section 34 of I.P.C., evidence has to be seen as a whole. There is no direct evidence that is required. Since it attracts vicarious or constructive liability, both the mental element with an intention to commit offence and accused's participation in one form or other qua the crime are required.

7.7. *Barendra Kumar Ghosh v. King Emperor* [AIR 1925 PC 1] :

".....the words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, 'act' includes omissions to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'. By Section 38, when several persons are engaged or concerned in the commission of a



criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

7.8. *Mehbub Shah v. King- Emperor* [AIR 1945 PC 148]:

"....Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intentions 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 accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused 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 accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan."



7.9. Rambilas Singh & Ors. v. State of Bihar [(1989) 3 SCC 605]:

"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 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."

7.10. Krishnan & Another. v. State of Kerala [(1996) 10 SCC 508]:

"15. Question is whether it is obligatory on the part of the prosecution to establish commission of overt act to press into service section 34 of the Penal Code. It is no doubt true that court likes to know about overt act to decide whether the concerned person had shared the common intention in question. Question is whether overt act has always to be established? I am of the view that establishment of a overt act is not a requirement of law to allow section 34 to operate inasmuch this section gets attracted when "a criminal act is done by several persons in furtherance of common intention of all". What has to be, therefore, established by the prosecution is that all the concerned persons had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: res ipsa loquitur."

7.11. Surendra Chauhan v. State of M.P. [(2000) 4 SCC 110]:

"11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the



criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. (Ramaswami Ayyangar v. State of T.N. (1976) 3 SCC 779) The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. (Rajesh Govind Jagesha v. State of Maharashtra (1999) 8 SCC 428). To apply Section 34 IPC 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 will 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. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

7.12. Gopi Nath @ Jhallar v. State of U.P. [(2001) 6 SCC 620]:

"8. As for the challenge made to the conviction under Section 302 read with Section 23 IPC, it is necessary to advert to the salient principles to be kept into consideration and often reiterated by this Court, in the matter of invoking the aid of Section 34 IPC, before dealing with the factual aspect of the claim made on behalf of the appellant. Section 34 IPC has been held to lay down the rule of joint responsibility for criminal acts performed by plurality or persons who jointed together in doing the criminal act, provided that such commission is in furtherance of the common intention of all of them. Even the doing of similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such



persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action - be it that it was not overt or was only covert act or merely an omission constituting an illegal omission. The Section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a pre-concerted or pre-arranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case."

7.13. *Ramesh Singh @ Photti v. State of A.P. [(2004) 11 SCC 305]:*

"12. 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 crime can be held guilty. By introducing Section 34 in the Penal Code the legislature 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 share which he had in its perpetration."

7.14. *NAND KISHORE VS. STATE OF MADHYA PRADESH ((2011) 12 Supreme Court Cases 120):*

<https://hcservices.ecourts.gov.in/hcservices/>

"20. A bare reading of this section shows that the section could be dissected as follows:



- (a) Criminal act is done by several persons;
- (b) Such act is done in furtherance of the common intention of all; and
- (c) Each of such persons is liable for that act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court in determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 IPC must be done by several persons. The emphasis in this part of the section is on the word "done". It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity.

21. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally i.e. he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between "common intention" on the one hand and "mens rea" as understood in criminal jurisprudence on the other. Common intention is not alike or identical to mens rea. The latter may be coincidental with or collateral to the former but they are distinct and



different.

22. Section 34 also deals with constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. If the common intention leads to the commission of the criminal offence charged, each one of the persons sharing the common intention is constructively liable for the criminal act done by one of them. (Refer to Brathi v. State of Punjab.)

23. Another aspect which the court has to keep in mind while dealing with such cases is that the common intention or state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any predetermined plan to commit such an offence. This will always depend on the facts and circumstances of the case."

7.15. SHYAMAL GHOSH V. STATE OF WEST BENGAL ((2012) 4 MLJ (Cr1.) 368) :

64. Upon analysis of the above judgments and in particular the judgment of this Court in the case of Dharnidhar v. State of Uttar Pradesh and Others [(2010) 7 SCC 759], it is clear that Section 34 IPC applies where two or more accused are present and two factors must be established i.e. common intention and participation of the accused in the crime. Section 34 IPC moreover, involves vicarious liability and therefore, if the intention is proved but no overt act was committed, the Section can still be invoked. This provision carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others, if he had the common intention to commit the act. The phrase 'common intention' means a pre-oriented plan and acting in pursuance to the plan, thus, common intention must exist prior to the commission of the act in a point of time. The common intention to give effect to a particular act may even develop at the spur of moment between a number of persons with reference to the facts of a given case."



"15. Ordinarily, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had the common intention to commit the offence. The words "common intention" implies a pre-arranged plan and acting in concert pursuant to the plan. It must be proved that the criminal act was done in concert pursuant to the pre-arranged plan. Common intention comes into force prior to the commission of the act in point of time, which need not be a long gap. Under this section a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of the crime showing a pre-arranged plan and prior concert. The common intention may develop in course of the fight but there must be clear and unimpeachable evidence to justify that inference. This has been clearly laid down by this Court in the case of Amrik Singh & Ors. v. State of Punjab 1972 CrLJ 465 (SC).

16. 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. Undoubtedly, it is difficult to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. Therefore, in order to find whether a person is guilty of common intention, it is absolutely necessary to carefully and critically examine the entire evidence on record. The common intention can be spelt out only from the evidence on record.

17. Section 34 is not a substantive offence. It is imperative that before a man can be held liable for acts done by another, under the provisions of this section, it must be established that there was common intention in the sense of a pre-arranged plan between the two and the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this section cannot apply.

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36. Referring to the facts of this case, the short question which arises for adjudication in this appeal is whether the appellant Virendra Singh can be convicted under section 302 with the aid of section 34 IPC. Under the Indian Penal Code, the persons who are connected with the preparation of a crime are divided into two categories: (1) those who actually commit the crime, i.e. principals in the first degree; and (b) those who aid in the actual commission, i.e. principals in the second degree. Law does not make any distinction with regard to the punishment of such persons, all being liable to be punished alike.

37. Under the Indian Penal Code, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had a common intention to commit the acts or if the offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly, then also he can be vicariously responsible. Under the Indian Penal Code, two sections, namely, sections 34 and 149, deal with the circumstances when a person is vicariously responsible for the acts of others.

38. The vicarious or constructive liability under section 34 IPC can arise only when two conditions stand fulfilled, i.e., the mental element or the intention to commit the criminal act conjointly with another or others; and the other is the actual participation in one form or the other in the commission of the crime.

39. The common intention postulates the existence of a pre-arranged plan implying a prior meeting of the minds. It is the intention to commit the crime and the accused can be convicted only if such an intention has been shared by all the accused. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop on the spot when such a crime is committed. In most of the cases it is difficult to procure direct evidence of such intention. In most of the cases, it can be inferred from the acts or conduct of the accused and other relevant circumstances. Therefore, in inferring the common intention under section 34 IPC, the evidence and documents on record acquire a great significance and they have to be very carefully scrutinized by the court. This is particularly important in cases where evidence regarding development of the common intention to commit the offence graver, then, the one originally



designed, during execution of the original plan, should be clear and cogent.

40. The dominant feature of section 34 is the element of intention and participation in action. This participation need not in all cases be by physical presence. Common intention implies acting in concert.

41. The essence of section 34 IPC is a simultaneous consensus of the minds of the persons participating in criminal action to bring about a particular result. Russel in his celebrated book "Russel on Crime" 12th Edn. Vol. 1 indicates some kind of aid or assistance producing an effect in future and adds 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. It was observed by Russel that any act of preparation for the commission of felony is done in furtherance of the act.

42. Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a pre-arranged and pre-meditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the pre-meditation and though the plan may be formed suddenly. In order that section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. 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. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with section 34."

9. In **RAMASHISH YADAV AND OTHERS V. STATE OF BIHAR ((2000) Criminal Law Journal 12)**, while dealing with the cases of caught hold of the deceased by the accused, the Apex Court has held held that such an act by itself would not attract Section 34 of IPC. The following paragraph would be apposite:

"3. Coming to the question of applicability of section 34 for the murder of Tapeswar, we find from the evidence of the three eye witnesses that while Ram Pravesh Yadav and Ramanand Yadav caught hold of



Tapeswar, accused Samundar Yadav and Sheo Layak Yadav came with gandasa and gave blows on the head of Tapeswar, as a result of which Tapeswar died, section 34 lays down a principle of joint liability in the doing of a criminal act. The absence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feature of section 34 is the element of participation in action. The common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a prearranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of mind may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be pre-arrangement or premediated concert. This being the requirement of law for applicability of section 34 IPC, from the mere fact that accused Ram Pravesh Yadav and Ramanand Yadav came and caught hold of Tapeswar, whereafter Samundar Yadav and Sheo Layak Yadav came with gandasa in their hands and gave blows by means of gandasa, it cannot be said that the accused Ram Pravesh Yadav and Ramanand Yadav shared the common intention with accused Samundar yadav and Sheo Layak Yadav."

10. Keeping the abovesaid principle in view, let us analyse the evidence available on record. First, let us see the evidence of P.Ws.14 and 13. P.W.14 has stated that the intimation was sent from the hospital on 26.10.2011 at about 22.10 p.m. Strangely this document has not been marked. It is only in the cross-examination, P.W.11 speaks about it. He further goes on to state that he did not know as to when it was obtained. Thus, the evidence of P.W.14 coupled with the failure to mark the Accident Register and examination of its author would create a strong suspicion on the case of the prosecution.

11. P.W.13 has categorically stated that the appellant and Karthik were arrested on 27.10.2011 at about 5.30p.m. However, P.W. 1 has deposed that he has seen the appellant in the police station on 27.10.2011 at 9.00a.m. This factor also makes the Court to suspect the version of the prosecution.

12. P.W.2 in her evidence says that the appellant was in good terms with her. If that is the case, there was no reason for the



appellant to come along with the deceased with prior intention to commit the offence. There is no material to hold that there was prior meeting of mind or act in concert between the accused. To be noted, at the time of first occurrence, even according to the prosecution, the appellant was not available. Therefore, in order to attract Section 34 of IPC., the common intention as required in law has not been proved by the prosecution.

13. It is the case of the prosecution that the appellant and Karthik came, shouted and committed the offence. It is improbable that two persons have attacked the deceased in the presence of so many others, who were associated with the deceased. The postmortem Report also says that there was a single stab injury on the front upper part of the abdomen. If the appellant had caught hold of the deceased, certainly he would have also got injured and the attack must have been on the lower part of the abdomen. P.W.10 also speaks about the existence of injury. The post mortem Report in Ex.P9 shows that the stomach of the deceased contained 200 ml brown colour fluid with pungent odour. However, no examination of viscera was done on this aspect.

14. The occurrence was stated to have been done when there was a power cut. It was seen by the witnesses through the emergency light. Though they have taken the deceased to the hospital, their dresses did not contain any blood stain. P.W.4, who is the owner of M.O.1 also specifically denied the same and thus contradicted the evidence of P.Ws.1 to 3 and 7.

15. Inasmuch as we are not able to accept the evidence of P.W.13 with respect to the arrest, particularly, in the light of the evidence of P.W.1 when he had seen the appellant in the police station at about 9.00 a.m, on 27.10.2011, the confession statement made and the consequential recovery also cannot be accepted. Further, there is no explanation for the non-examination of the owner of the bike Santhanabharathi and one Kathiravan, who accommodated P.W.1 to the police station and drafted Ex.P1 on his instruction.

16. The trial Court has merely relied upon the evidence of P.Ws.1 to 3, 7 and 11 without considering the various aspects discussed above. It has also not considered the scope and ambit of Section 34 of IPC insofar as the existence of the common intention is concerned.

17. We are dealing with a case, where there was a prior incident which was discussed by the deceased, P.Ws.1 to 3 along with the friends of the deceased at the time of the occurrence. There is absolutely no material available to implicate the appellant within the ambit of Section 34 of IPC and even, if there is any, the same is not proved in accordance with law. Thus, we are not able to concur with the decision of the learned trial Judge.

<https://hcservices.ecourts.gov.in/hcservices/>



18. In the result, the conviction and sentence imposed on the appellant/accused Nagendran vide judgment dated 25.03.2014 in Sessions Case No.307 of 2013 on the file of the Principal Sessions Judge, Madurai, are set aside, and the criminal appeal is allowed. The appellant/accused Nagendran is acquitted of the charges under Sections 342, 302 read with 34 of IPC and the fine amount if any paid, shall be refunded to him. The appellant/ accused Nagendran is directed to be released forthwith, unless his custody is required in connection with any other case.

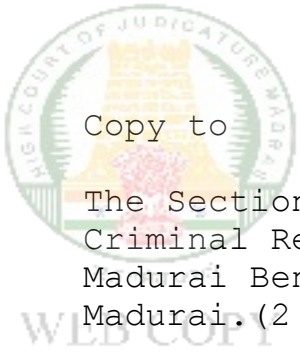
Sd/
Assistant Registrar (Crl Side)

/True copy/

Sub Assistant Registrar (CS-IV)

To

- 1.The Principal Sessions Judge,
Madurai.
- 2.The Judicial Magistrate,
Melur.
- 3.The Chief Judicial Magistrate, Madurai.
- 4.The Chief Metropolitan Magistrate, Chennai.
- 5.The Inspector of Police,
Othakadai Police Station,
Madurai District.
- 6.The Superintendent, Central Prison, Madurai.
- 7.The Superintendent of Police, Madurai.
- 8.The District Collector, Madurai.
- 9.The Director General of Police,
Mylapore, Chennai-4.
- 10.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



Copy to

The Section Officer,
Criminal Record Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+1cc to Mr.R.ALAGUMANI, Advocate, SR.No. 81850

Criminal Appeal No.210 of 2016
31.08.2018

RAA
KK/RSK/SAR-4/11.09.2018/17P-14C