

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Present:

The Hon'ble Justice Tirthankar Ghosh

**C.R.A. 635 of 2019
With
CRAN 3 of 2020**

**Matiur Rahaman & Ors.
-versus-
The State of West Bengal**

For the Appellants : Mr. Milon Mukherjee, Sr. Adv.
Mr. Usof Ali Dewan,
Mr. Asif Dewan.

For the State : Mr. Debasish Roy, Ld. P.P.,
Ms. Sreyashee Biswas,
Ms. Puja Goswami.

Hearing Concluded On : 10.09.2024

Judgement On : 19.11.2024

Tirthankar Ghosh, J.:

The present appeal has been preferred against the judgment and order of conviction and sentence dated 17.09.2019 & 18.09.2019 passed by the Learned Additional District & Sessions Judge, 2nd Court, Jangipur, in Sessions Trial No. 40(09)/2012 arising out of Sessions Case No. 215/12, thereby holding the appellants guilty under Sections 304 Part-II/323/34 of the Indian Penal Code and sentencing them as follows:

- (i) For the offence under Section 304 Part II/34 of the Indian Penal Code - to suffer Rigorous Imprisonment for seven (07)

years and pay a fine of Rs. 5,000/-, in default to suffer Rigorous Imprisonment for three (03) months.

- (ii) For the offence under Section 323/34 of the Indian Penal Code - Rigorous Imprisonment for one (01) year and to pay a fine of Rs. 1,000/-, in default to suffer Rigorous Imprisonment for one (01) month.

Suti Police Station Case No. 62/08 dated 28.02.2008 was registered for investigation under Sections 325/326/308/34 of Indian Penal Code against Matiur Rahaman, Jamirul Sk. and Mahasin Sk. on the basis of information furnished by Abdul Maleque with the Officer-in-Charge of Suti Police Station through Ahiran Outpost. The allegations made in the written complaint were to the effect that the aforesaid accused persons being armed with deadly weapons like lathi, henso etc. attacked Mojaffar Sk., Abu Taher and his father Md. Tofijuddin Sk.. Mojaffar Sk. was assaulted with a henso on his head causing severe injuries and as such he was removed for treatment at Ahiran Hospital. Abu Taher received bleeding injuries on his head due to assault by the accused persons with lathi on his head and was admitted at Ahiran Hospital. It was alleged that Tofijuddin Sk. was assaulted with lathi and henso on his head by the accused persons and as such he sustained severe bleeding injuries and was also admitted at the hospital. While Abdul Khaleque, brother of the complainant, tried to resist the accused person, he was also assaulted with lathi and was threatened not to proceed further.

The genesis of the case related to a land dispute between the informant/ de-facto complainant and as a result of which injuries were inflicted upon his relations for which he was compelled to lodge a complaint at Ahiran Outpost. The complainant stated that the delay in lodging the complaint was because of the time consumed for catering to the needs of treatment of the injured persons.

On receipt of the written complaint on 28.02.2008 at Ahiran Outpost it was forwarded to the Officer-in-Charge, Suti Police Station and after registration of the case, Sub-Inspector Biswabandhu Chattaraj was entrusted with the investigation of the instant case. In course of the investigation, the injured Mojaffar Sk. succumbed to the injuries and as such on conclusion of investigation charge-sheet was submitted before the jurisdictional Court under Sections 323/308/304/34 of the Indian Penal Code.

The learned A.C.J.M., Jangipur on receipt of the charge-sheet and after compliance of the provisions of law was pleased to commit the case to the learned Additional District and Sessions Judge, Jangipur. The learned Additional District and Sessions Judge, Jangipur on 15.09.2012 was pleased to frame charges against the three accused persons under Sections 323/308/304/34 of the Indian Penal Code. The substance of the charges were read over to the accused persons to which they pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 14 witnesses which included P.W.1, Abdul Maleque, Complainant; P.W.2, Abdul Khaleque, injured eye-witness; P.W.3, Tofijuddin Sk. eye-witness; P.W.4, Mobarak Sk., eye-witness; P.W.5, Yusuf Ali (acquaintance) ; P.W.6, Abu Taher, injured eye-witness; P.W.7, Soumen Saha, photographer; P.W.8, Ram Chandra Saha, Constable of Police and seizure witness; P.W.9, Chittaranjan Barik, seizure witness; P.W.10, Kalipada Barman, ASI of Police and seizure witness; P.W.11 Joydeep Roy, ASI of Police who prepared the formal FIR; P.W.12, Dr. Amal Pradhan, doctor of Ahiran P.H.C. who initially treated the deceased; P.W.13 Biswabandhu Chattaraj, Investigating Officer of the case; P.W.14 Dr. Pradip Kumar Misra, Post-mortem doctor;

P.W. 1, Abdul Maleque, is the complainant, who deposed that he lodged the complaint against Matiur Rahaman, Jamirul Sk. and Mahasin Sk. and identified them in Court. He stated that on 27.02.2008 the incident happened at about 3.30 P.M. at the house of Mojaffar Sk. when Matiur Rahaman and his two sons namely Mahasin Sk. and Jamirul Sk. assaulted Mojaffar Sk. with lathi and back side of hansua causing severe injuries on his head and other parts of his body and as a result he sustained severe injury on his person. At the time of assault Mojaffar Sk. raised hue and cry for help and on hearing the same Md. Tofijuddin Sk. (his father), and his brothers namely Adbul Khaleque and Abu Taher (i.e. son of the deceased) rushed to the place of occurrence to rescue the injured/deceased and at that time they were also severely assaulted with lathi and henso which resulted in serious injuries being inflicted upon

them. Mobarak Sk. along with others of the locality witnessed the incident. The witness stated that the dispute arose over the issue of using pathway which was exclusively owned and possessed by the deceased Mojaffar Sk. The accused persons used the pathway forcibly which was resisted by Mojaffar Sk. and as a result the accused persons being aggrieved attacked and injured the deceased. Initially, the injured persons were taken to Kadua Phanri by a trolley wherefrom they were sent to Ahiran T.O.P. The Police authority sent them to Ahiran B.P.H.C. for medical treatment and thereafter they were admitted in the hospital. In course of treatment of Mojaffar Sk. he became senseless on 28.02.2008. A complaint was lodged before Ahiran Town Outpost for which there was a delay as the complainant was busy in the hospital. The complaint was drafted by one Brojen Das as per his instruction as he could not draft the same being mentally depressed due to the incident. However, he signed the complaint which was identified by him, he also identified the signature of the draftsman and the same was admitted in evidence. He deposed that after the complaint was lodged Police came at Arihon hospital at about 10.30 A.M. when his cousin Mojaffar Sk. succumbed to injury at the hospital. The witness was cross-examined on behalf of the accused persons when he replied that he narrated the incident earlier to the doctor and accepted the fact in the written complaint and as such he did not state that the accused persons assaulted with the back side of henso. He also replied in cross-examination that the accused persons have been using the pathway for last one year prior to the date of incident pertaining to which the dispute arose. He replied to a specific

question regarding the status of the injured at the time of the incident, the witness narrated that after being assaulted Mojaffar Sk. fell down on the ground and the other three injured persons namely Md. Tofijuddin, Abdul Khaleque and Abu Taher sat on the ground. The witness also replied that Mobarak, Yusuf and others whose name he could not recollect assisted them for lifting Mojaffar Sk. to rickshaw van as well as other injured for taking them to hospital. On a clarification sought for from the witness by the Court it was answered that 8-10 injuries including head injuries were seen on the person of Mojaffar Sk.

P.W.2, Abdul Khaleque, identified the accused persons in Court and proceeded to narrate that on 27.02.2008 the incident happened at about 3.00 P.M., adjacent to the north of Mojaffar's house on his land. On the date of the incident, Mojaffar restrained the accused persons from using passage as his family members and his wife were binding bidi at that place and that the accused persons did not pay any heed to his request. Being aggrieved the accused persons reacted by coming back being armed with henso and lathi and assaulted them. Matiur was armed with henso and others armed with lathi. Matiur assaulted Mojaffar with the back side of the henso inflicting two blows on his head. He identified the weapons which were marked as material exhibit. He continued to depose that police recovered the weapons on 29.02.2008 as per identification of the accused and as such he signed the seizure list which was prepared by the Police Officer. He identified his signature which was admitted in evidence. He further proceeded to narrate that on hearing the hue

and cry of Mojaffar he went to rescue him and as a result he sustained bleeding injury being assaulted by Jamirul and Mahasin. He further stated that along with Tofijuddin Sk., Abu Taher also sustained injury in the incident, thereafter they were taken by a trolley van to Ahiran B.P.H.C. for medical treatment. Mojaffar died at the hospital at about 10.30 A.M. Police arrived at the Hospital and prepared an inquest report over the dead body of Mojaffar where he also signed, he identified his signature which was admitted in evidence. In cross-examination he replied that he met with the police authority on 29.02.2008 and prior to that at the hospital when the inquest report was prepared. He accepted the fact in cross-examination that he was not aware regarding the dag number of the area but replied that the area falls within the mouza of Bohutoli. On a suggestion advanced on behalf of the accused persons he denied that Matiur was admitted at the hospital and that Matiur did not sustain injury on his head at the time of the incident.

P.W. 3, Tofijuddin Sk., is injured and an eye-witness who identified the accused persons in Court as Matiur Rahaman, Jamirul Sk. and Mahasin Sk. He narrated the incident of 27.02.2008 and continued to depose that at about 3.00 P.M. in the vacant land of Mojaffar the incident happened when the accused persons used the pathway belonging to Mojaffar and at that time Mojaffar resisted by saying that they should not use the way as the female persons were sitting there. Being aggrieved the accused persons threatened him and thereafter being armed with henso and lathi, Mahasin came out of his house and assaulted Mojaffar severely, Matiur assaulted with the henso on

back side of his head. The witness along with Abu Taher and Khaleque went to rescue Tofijuddin from the clutches of the accused at that time they were also assaulted by the accused persons. Mojaffar was lying on the ground in a severe bleeding condition and thereafter he was taken to Kendua Bit house when Police advised them to take the injured to Ahiran with a four-wheeler car for medical treatment and as such, Mojaffar was taken to Ahiran B.P.H.C. where he was admitted for medical treatment. He, along with the other injured persons, were also treated at the hospital. In course of treatment, the doctor at the time of treating the wound of Mojaffar discovered that Mojaffar lost his senses and he could not regain his sense. On 28.02.2008 Mojaffar died at the hospital at about 10.30 a.m. He was present when police came and inspected the dead body of the deceased and found different types of injuries on his body. Police prepared a report wherein he affixed his LTI. He was interrogated by the police in connection with the case in course of investigation where he narrated the facts. In cross-examination, he stated that Mojaffar was his nephew and the house of Mojaffar and the accused persons were situated adjacently. He further stated that Mojaffar and his house are in the same premises. His house and the house of Mojaffar are situated at dag no. 1212 at Bohutali Mouza and the land which he stated earlier is recorded as Aman land. Witness also replied in cross-examination that he along with Mojaffar purchased the land from Nojibulla and they had a registered deed. On further cross-examination in respect of the incident, he denied the suggestions which were advanced that

there were no injuries sustained or that the deceased Mojaffar was not injured in course of the incident which took place on 27-02-2008 at about 3 P.M.

P.W.4, Mobarak Sk. is an eyewitness who identified the accused in Court and deposed that on 27-02-2008 at about 3.00 P.M. the incident happened at the land of Mojaffar and at the time of assault he reached at the place of occurrence. He categorically stated that the accused persons assaulted Mojaffar with henso and lathi and as a result Mojaffar sustained injuries. He identified the weapons being henso and lathi which the accused persons used at the time of assaulting the injured and the same were admitted as material exhibit. He also deposed that he signed the seizure list and identified his signature therein which was also admitted in evidence. He had been to Ahrion Hospital when Mojaffar died and was interrogated by the police authority in connection with the case. In cross-examination, he replied that the incident happened on 27-02-2008 and the seizure was made on 29-02-2008. He was interrogated by the police at Ahrion Hospital and apart from signing the seizure list he also narrated the incident before the police authority, which occurred in his presence. On a specific query from the accused persons in cross-examination, the witness replied that he did not see Matiur and Jamirul at the hospital but he had seen the other injured persons in this case namely Mojaffar, Tofijuddin, Abdul Khaleque and Abu Taher who were admitted at the hospital. He also replied in cross-examination that his house is situated at a distance of about 3/4 houses away from the place of occurrence.

P.W.5 is Yusuf Ali, an acquaintance, who deposed that he knew Matiur Rahman, Jamirul Sk. and Mahasin Sk. and identified them in Court. He deposed that the incident took place on 27-02-2008 at about 2 p.m. on the vacant land of Mojaffar's house in front of his house at village Bartala (Bohutali). According to him, the accused persons used the land of Mojaffar as a pathway, which was resisted by Mojaffar and as a consequence the accused person being armed with henso and lathi attacked Mojaffar. The accused Matiur Rahman hit on the head of Mojaffar with the back side of henso and on hearing hue and cry his son Abu Taher and Tofijuddin came to the spot to rescue him when the accused persons also assaulted them, thereby inflicting injury. On hearing such hue and cry, the local people rushed to the spot when the accused persons fled away. All the three injured were taken to the police outpost of Kadua and thereafter they were sent to Ahiran police camp and the police sent them to Ahiran hospital for treatment. They were admitted at the hospital and on the next day at about 10.00 a.m. Mojaffar expired in the hospital. In cross-examination, he replied that he was all along with the injured at Kadua police outpost, Ahiran police camp and Ahiran hospital. He met with the police officer in the same police camp after death of Mojaffar at Ahiran hospital. He also replied that he narrated the incident to police officer at hospital and also at police camp and his statement was reduced to writing but he did not sign the same. On a specific query, he denied that during interrogation, he did not state to the police that accused Matiur Rahaman hit

on the head of Mojaffar with back side of henso. He also denied the fact that Mojaffar was not the owner of the land of place of occurrence.

P.W.6, Abu Taher, is an injured and eye-witness who identified the accused Matiur Rahaman, Jamirul Sk. and Mahasin Sk. in Court. He deposed that the incident took place on 27.02.2008 at about 3.00 P.M. on the vacant land which was in front of their house at village Bartala. At that time, all the three accused were using the land when his father Mojaffar asked him not to use the land as a pathway. The accused person as a consequence attacked his father with henso, lathi etc. The accused Matiur Rahaman hit on the head of his father Mojaffar with the reverse side of the henso as a result of which his father sustained bleeding injury on his head and fell down on the ground. Then he along with his uncle Abdul Khaleque and his grandfather Tofijuddin rushed to the spot to rescue his father when the accused person started assaulting them. Thereafter, village people rushed to the place of occurrence when the accused person left the place. His father was taken to Kadua beat house by their own trolley. He was taken to Ahiran police camp by a vehicle as per instruction of police. Police advised them to take his father to Ahiran hospital immediately. Accordingly, he was taken to the hospital where he expired on the next day i.e. on 28-02-2008 at about 10.30 a.m. Police held inquest over the dead body of his father at Ahrion hospital and obtained his signature on the report. He identified his signature on the inquest report which was admitted in evidence. In cross-examination he replied that Abdul Maleque lodged a written complaint with the police before death of his father at Kadua beat house. He

was not aware of the contents of the complaint and he did not make any statement about the incident to the police at the beat house. His uncle made a statement to the police authorities and he was not present at the time of the post-mortem examination. On a specific suggestion being advanced, he denied the fact of the incident of assault of not having taken place and also denied the manner in which henso was used for inflicting injuries. The witness also denied the fact that Matiur one of the accused was admitted to hospital.

P.W. 7, Soumen Saha, is a private photographer who reported that on 28-02-2008 at about 12.30/1 p.m. he took five snaps of a dead body at Ahiran hospital as per instruction of the Inspector-in-Charge, Ahiran Outpost by digital camera. He produced the said five photographs of the dead body which were marked as material exhibits. According to him, police seized those photographs under a seizure list in his presence. He identified his signature on the carbon copy of the said seizure list which was admitted in evidence.

P.W.8, Ram Chandra Saha, is a constable who was attached at the relevant point of time to Ahiran Police Outpost. He deposed that on 28-02-2008 the Investigating Officer Biswabandhu Chattaraj seized five copies of photographs in his presence from the photographer Soumen Kumar Saha and he signed in the seizure list. He identified his signature on the carbon copy of the seizure list which was admitted in evidence.

P.W. 9, is Chittaranjan Barik who deposed that 4-5 years ago one day police seized some wearing apparel of a deceased in his presence under a seizure list. He signed the same and he identified his signature on the seizure list which was admitted in evidence.

P.W. 10, Kalipada Barman, is ASI of Police who was attached to Ahiran Outpost as a Constable on the relevant date of the incident i.e. 28-02-2008. He deposed that on that day the then Inspector in-Charge namely Biswabandhu Chattaraj seized one blood-stained pillow, one blood-stained lungi, one blood-stained napkin under a seizure list in his presence. He identified his signature in the seizure list which was admitted in evidence. In cross-examination he was asked as to whether the seized alamats were produced where he categorically stated that the alamats were not before him in court on the same date.

P.W.11, Joydeep Roy, is ASI of Police who was posted on 28-02-2008 at Suti Police Station. On that day, according to him, the Inspector-in-Charge of Ahiran Police Outpost received a complaint from one Abdul Maleque and the same was forwarded to him through constable Upen Kisku. He identified his signature and handwriting as he worked with him. The receiving endorsement of his signature on the written complaint on his identification was admitted in evidence. He further deposed that after receiving the written complaint, he started Suti P.S. Case No.62/2008 dated 28-02-2008 under Sections 325/326/308/34 of the Indian Penal Code against three FIR named accused persons. He filled up the formal FIR which was duly signed by him. The same

being identified was admitted in evidence. He further stated that at the relevant point of time Ranjan Sinha was Officer-in-Charge of Suti Police Station who endorsed the case to Biswabandhu Chattaraj for investigation. He identified the handwriting and signature of the then Officer-in-Charge, Suti Police Station as he worked with him and as such the same was admitted in evidence. In cross-examination he replied that FIR and other relevant documents were sent to the learned A.C.J.M, Jangipur from Police Station through messenger. He also deposed that the FIR was not sent on the same day when it was registered, to the Court of the Learned A.C.J.M. Jangipur.

P.W.12, Dr. Amal Pradhan, deposed that on 27.02.2008 he was posted as B.M.O.H. in Ahiran P.H.C. under Suti-I. On that day, he medically examined one Mojaffar Sk., aged about 50 years and he on examination, found the following injuries:

“1. Two cut injuries on scalp on left temporal region. Injuries size 2’X ½’ History of vomiting following head trauma.”

The injury report was prepared by him and the same as such was admitted in evidence. In cross-examination, he replied that he prepared many injury reports and on further query, he explained that cut injuries meant incised injuries which are caused by sharp cuts. He also replied that he was aware about henso which has one sharp side and another side of which is blunt.

P.W. 13, Biswabandhu Chattaraj is the investigating officer of the case who deposed that during investigation, after perusing the FIR, he visited the place of occurrence, prepared a rough sketch map with index, which contained his signature and the same being identified was admitted in evidence. He also examined the available witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure. He arranged for post-mortem examination of the dead body of Mojaffar Sk. and the dead body was sent to Jangipur Sub-Divisional Hospital, Morgue. He collected the post-mortem examination report, the injury reports of two injured victims, namely Tofijuddin and Abu Taher Sk. from Ahiran B.P.H.C. He also seized articles like blood stained pillow, blood stained lungi, blood stained Gamchha, henso under proper seizure list which was identified by him and admitted in evidence. The witness proceeded to state that he seizes articles like lathi and one henso (offending weapons) under proper seizure lists, which contained his signature. He identified his signature in the seizure list, which was marked as exhibit. He also identified his signature in the seizure list by which the photographs were seized, the same was also marked in evidence. He further narrated that he arrested two FIR named accused persons, Jamirul Sk. and Mahasin Sk. and after completion of investigation, he submitted charge-sheet against three FIR named accused persons under Section 323/308/304/34 of the Indian Penal Code. He identified all the accused persons who were present in Court. In cross-examination, he replied that he did not send any articles for clinical examination and admitted that there was a land dispute. On a query, he said

that Abdul Khaleque did not state to him that he was assaulted by the accused Jamirul Sk. and Mahasin Sk. On further query, during cross-examination, he deposed that Tofijuddin Sk. did not state before him the exact phrase that Matiur assaulted Mojaffar on his head. He also replied in cross-examination that he received copy of the FIR at Ahiran Outpost and started investigation from there.

P.W.14, Dr. Pradip Kumar Mishra, is the post-mortem doctor who deposed that he performed post-mortem examination of Mojaffar Sk. in connection with Suti P.S. UD case number 7/2008, dated 28.02.2008 under Sections 325/326 IPC and Suti P.S. case number 62/2008. During post-mortem examination, he found the following:

“Fresh lacerated injury 3"X2" and 1/2 "- depth over left side of vault of head. Injury repaired blood oozing out of wound. Depressed fracture of left parital bone-3-1/2" and 2 1/2" just below the scalp injury. Meninges torn Defuse haemorrhage in entire left cerebral hemisphere. More haemorrhage under line the fracture bone. Slight haemorrhage in right cerebral hemisphere.”

He opined that the immediate cause of death was due to neurogenic and haemorrhagic shock of the injuries which were anti-mortem in nature and manner of injury was homicidal which was to be confirmed after corroborating with the circumstantial evidence. He identified his signature in the post-mortem report which was prepared by him and the same as such were admitted in evidence. In cross-examination, he replied that sharp weapon

necessarily causes cut or incised injury while blunt weapon causes lacerated injury. He further replied that on clinical examination, he found injury on the left side of vault of head and on dessection he found depressed fracture on left parietal bone. He further proceeded to explain that depressed fracture is the continuation of scalp injury on vault of head.

Learned senior advocate appearing on behalf of the appellants submitted that the prosecution case would reflect that the vital or fatal blow was inflicted by Matiur Rahaman and that too with the backside of henso. So far as the other two appellants, Jamirul Sk and Mahasin Sk are concerned, no act has been complained against them by the prosecution witnesses for inflicting injuries upon the deceased Mojaffar Sk. The prosecution evidence of assaulting Abu Taher, Abdul Khaleque and Md. Tofijuddin Sk is devoid of any merits as the prosecution failed to produce any material or medical evidence in support of such allegations relating to injuries sustained by the aforesaid persons. It has been emphasized by the appellants that the oral and documentary evidence fails to make out any case against Jamirul Sk and Mahasin Sk.. Learned senior advocate in order to substantiate his contention proceeded to state that only on the basis of oral evidence as injuries inflicted upon three of the prosecution witnesses cannot be believed, the whole of the case as such must be scrutinized in a manner so that the participation of the two appellants namely, Jamirul Sk and Mahasin Sk are viewed from the perspective that what were their participation, if any, when the injuries were inflicted upon the deceased Mojaffar Sk. Learned advocate further submitted that it would not be

out of place to consider the background wherein differences arose because of usage of a pathway and the family of the deceased as well as that of the appellant on this issue had a regular dispute. Thus, there is every possibility of the appellant No. 2 and 3 being falsely implicated as they were sons of the appellant No.1. So far as the applicability of Section 34 of the Indian Penal Code is concerned the appellants emphasized that they had no role to play in the death of Mojaffar and unnecessarily they have been foisted with allegations of common intention by imbibing the concept of vicarious liability. In order to substantiate his argument, the appellants relied upon the following judgments:

Reference was made to Shishpal –Vs. – State (NCT of Delhi), (2022) 9 SCC 782 and attention was drawn to paragraph 14 which states:

“14. Both the appellants have been charged only based upon the rule of evidence available under Section 34IPC. Section 34 does not constitute an offence by itself, but creates a constructive liability. The foundational facts will have to be proved by the prosecution. Not only the occurrence, but the common intention, has to be proved beyond reasonable doubt. In Jasdeep Singh v. State of Punjab [Jasdeep Singh v. State of Punjab, (2022) 2 SCC 545 : (2022) 1 SCC (Cri) 526] this Court considered the scope of Section 34IPC as follows : (SCC pp. 554-56, paras 17-27)

“17. We shall first go back into the history to understand Section 34IPC as it stood at the inception and as it exists now.

<i>Old Section 34IPC</i>	<i>New Section 34IPC</i>
<i>‘34. Each of several persons liable for an act done by all, in like</i>	<i>‘34. Acts done by several persons in furtherance of common intention.—</i>

<i>manner as if done by him alone.— 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 were done by him alone’</i>	<i>When 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 were done by him alone.’</i>
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18. On a comparison, one could decipher that the phrase “in furtherance of the common intention” was added into the statute book subsequently. It was first coined by Barnes Peacock, C.J. presiding over a Bench of the Calcutta High Court, while delivering its decision in *R. v. Gorachand Gope* [*R. v. Gorachand Gope*, 1866 SCC OnLine Cal 16] which would have probably inspired and hastened the amendment to Section 34IPC, made in 1870. The following passage may lend credence to the aforesaid possible view : (SCC OnLine Cal)

‘It does not follow that, because they were present with the intention of taking him away, that they assisted by their presence in the beating of him to such an extent as to cause death. If the object and design of those who seized Amordi was merely to take him to the thannah on a charge of theft, and it was no part of the common design to beat him, they would not all be liable for the consequence of the beating merely because they were present. It is laid down that, when several persons are in company together engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention. It is also said, although a man is present when a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a principal merely because he did not endeavour to prevent it or to apprehend the felon. But if several

persons go out together for the purpose of apprehending a man and taking him to the thannah on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, it appears to me that those who have to deal with the facts might very properly infer that they were all assenting parties and acting in concert, and that the beating was in furtherance of a common design. I do not know what the evidence was, all that I wish to point out is, that all who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals.'

19. Before we deal further with Section 34IPC, a peep at Section 33IPC may give a better understanding. Section 33IPC brings into its fold a series of acts as that of a single one. Therefore, in order to attract Sections 34 to 39IPC, a series of acts done by several persons would be related to a single act which constitutes a criminal offence. A similar meaning is also given to the word "omission", meaning thereby, a series of omissions would also mean a single omission. This provision would thus make it clear that an act would mean and include other acts along with it.

20. Section 34IPC creates a deeming fiction by infusing and importing a criminal act constituting an offence committed by one, into others, in pursuance to a common intention. Onus is on the prosecution to prove the common intention to the satisfaction of the court. The quality of evidence will have to be substantial, concrete, definite and clear. When a part of evidence produced by the prosecution to bring the accused within the fold of Section 34IPC is disbelieved, the remaining part will have to be examined with adequate care and caution, as we are

dealing with a case of vicarious liability fastened on the accused by treating him on a par with the one who actually committed the offence.

21. What is required is the proof of common intention. Thus, there may be an offence without common intention, in which case Section 34IPC does not get attracted.

22. It is a team effort akin to a game of football involving several positions manned by many, such as defender, mid-fielder, striker, and a keeper. A striker may hit the target, while a keeper may stop an attack. The consequence of the match, either a win or a loss, is borne by all the players, though they may have their distinct roles. A goal scored or saved may be the final act, but the result is what matters. As against the specific individuals who had impacted more, the result is shared between the players. The same logic is the foundation of Section 34IPC which creates shared liability on those who shared the common intention to commit the crime.

23. The intendment of Section 34IPC is to remove the difficulties in distinguishing the acts of individual members of a party, acting in furtherance of a common intention. There has to be a simultaneous conscious mind of the persons participating in the criminal action of bringing about a particular result. A common intention qua its existence is a question of fact and also requires an act "in furtherance of the said intention". One need not search for a concrete evidence, as it is for the court to come to a conclusion on a cumulative assessment. It is only a rule of evidence and thus does not create any substantive offence.

24. Normally, in an offence committed physically, the presence of an accused charged under Section 34IPC is required, especially in a case where the act attributed to the accused is one of instigation/exhortation. However, there are exceptions, in particular, when an offence consists of diverse acts done at different times and places. Therefore, it has to be seen on a case-to-case basis.

25. The word “furtherance” indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion.

26. There may be cases where all acts, in general, would not come under the purview of Section 34IPC, but only those done in furtherance of the common intention having adequate connectivity. When we speak of intention it has to be one of criminality with adequacy of knowledge of any existing fact necessary for the proposed offence. Such an intention is meant to assist, encourage, promote and facilitate the commission of a crime with the requisite knowledge as aforesaid.

27. The existence of common intention is obviously the duty of the prosecution to prove. However, a court has to analyse and assess the evidence before implicating a person under Section 34IPC. A mere common intention per se may not attract Section 34IPC, sans an action in furtherance. There may also be cases where a person despite being an active participant in forming a common intention to commit a crime, may actually withdraw from it later. Of course, this is also one of the facts for the consideration of the court. Further, the fact that all accused charged with an offence read with Section 34IPC are present at the commission of the crime, without dissuading themselves or others might well be a relevant circumstance, provided a prior common intention is duly proved. Once again, this is an aspect which is required to be looked into by the court on the evidence placed before it. It may not be required on the part of the defence to specifically raise such a plea in a case where adequate evidence is available before the court.””

Appellate relied upon Gulab –Vs. - State of U.P., (2022) 12 SCC 677 and drew the attention of the Court to paragraph 27 which is as follows:

“27. *Emphasising the fundamental principles underlying Section 34, this Court held that:*

27.1. *Section 34 does not create a distinct offence, but is a principle of constructive liability.*

27.2. *In order to incur a joint liability for an offence there must be a prearranged and premeditated concert between the accused persons for doing the act actually done.*

27.3. *There may not be a long interval between the act and the premeditation and the plan may be formed suddenly. In order for Section 34 to apply, it is not necessary that the prosecution must prove an act was done by a particular person.*

27.4. *The provision is intended to cover cases where a number of persons act together and on the facts of the case, it is not possible for the prosecution to prove who actually committed the crime.”*

Reliance was placed on Uggarsain -Vs. – State of Harayana & Ors., (2023) 8 SCC 109 and paragraphs 10, 11, 12 and 16 were relied upon which states as follows:

“10. *This Court has, time and again, stated that the principle of proportionality should guide the sentencing process. In Ahmed Hussein Vali Mohammed Saiyed v. State of Gujarat [Ahmed Hussein Vali Mohammed Saiyed v. State of Gujarat, (2009) 7 SCC 254 : (2009) 3 SCC (Cri) 368 : (2009) 8 SCR 719] it was held that the sentence should “deter the criminal from achieving the avowed object to (sic break the) law,” and the endeavour should be to impose an “appropriate sentence.” The Court also held that imposing “meagre sentences” “merely on account of lapse of time” would be counterproductive. Likewise, in Jameel v. State of U.P. [Jameel v. State of U.P., (2010) 12*

SCC 532 : (2011) 1 SCC (Cri) 582 : (2009) 15 SCR 712] while advocating that sentencing should be fact dependent exercises, the Court also emphasised that : (Jameel case [Jameel v. State of U.P., (2010) 12 SCC 532 : (2011) 1 SCC (Cri) 582 : (2009) 15 SCR 712] , SCC p. 535, para 15)

“15. ... law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.”

(emphasis supplied)

11. Again, in *Guru Basavaraj v. State of Karnataka* [Guru Basavaraj v. State of Karnataka, (2012) 8 SCC 734 : (2012) 4 SCC (Civ) 594 : (2013) 1 SCC (Cri) 972 : (2012) 8 SCR 189] the Court stressed that : (SCC p. 744, para 33)

“33. ... It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order”

(emphasis supplied)

and that sentencing includes “adequate punishment”. In *B.G. Goswami v. Delhi Admn.* [B.G. Goswami v. Delhi Admn., (1974) 3 SCC 85 : 1973 SCC (Cri) 796 : (1974) 1 SCR 222] , the Court considered the issue of punishment and observed that punishment is designed to protect society by deterring potential offenders as well as prevent the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law-abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of

punishment thus play their due part in judicial thinking while determining the question of awarding appropriate sentences.

12. *In Sham Sunder v. Puran [Sham Sunder v. Puran, (1990) 4 SCC 731 : 1991 SCC (Cri) 38 : 1990 Supp (1) SCR 662] , the appellant-accused was convicted under Section 304 Part I IPC. The appellate court reduced the sentence to the term of imprisonment already undergone i.e. six months. However, it enhanced the fine. This Court ruled that sentence awarded was inadequate. Proceeding further, it opined that : (SCC p. 737, para 8)*

“8. ... The court in fixing the punishment for any particular crime should take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of the offence. The sentence imposed by the High Court appears to be so grossly and entirely inadequate as to involve a failure of justice. We are of opinion that to meet the ends of justice, the sentence has to be enhanced.”

(emphasis supplied)

This Court enhanced the sentence to one of rigorous imprisonment for a period of five years. This Court has emphasised, in that sentencing depends on the facts, and the adequacy is determined by factors such as “the nature of crime, the manner in which it is committed, the propensity shown and the brutality reflected” [Ravada Sasikala v. State of A.P. [Ravada Sasikala v. State of A.P., (2017) 4 SCC 546 : (2017) 2 SCC (Cri) 436 : (2017) 2 SCR 379]]. Other decisions, like : State of M.P. v. Bablu [State of M.P. v. Bablu, (2014) 9 SCC 281 : (2014) 6 SCC (Cri) 1 : (2014) 9 SCR 467] ; Hazara Singh v. Raj Kumar [Hazara Singh v. Raj Kumar, (2013) 9 SCC 516 : (2014) 1 SCC (Cri) 159 : (2013) 5 SCR 979] and State of Punjab v. Saurabh Bakshi [State of Punjab v. Saurabh Bakshi, (2015) 5

SCC 182 : (2015) 2 SCC (Cri) 751 : (2015) 3 SCR 590] too, have stressed on the significance and importance of imposing appropriate, “adequate” or “proportionate” punishments.

16. *The impugned judgment, in this Court's opinion, fell into error in not considering the gravity of the offence. Having held all the accused criminally liable, under Section 304 Part II read with Section 149IPC and also not having found any distinguishing feature in the form of separate roles played by each of them, the imposition of the “sentence undergone” criteria, amounted to an aberration, and the sentencing is for that reason, flawed. This Court is, therefore, of the view that given the totality of circumstances (which includes the fact that the accused have been at large for the past four years), the appropriate sentence would be five years' rigorous imprisonment. However, at the same time, the court is cognizant of the fact Krishan and Bramhajit served more than that period. Therefore, the impugned judgment, as far as they are concerned, is left undisturbed. Consequently, the sentence of Raju, Parveen, Sunder s/o Amit Lal, Sandeep, Nar Singh, and Sunder s/o Rajpal is hereby modified; they are hereby sentenced to undergo rigorous imprisonment for five years. They shall surrender and serve the rest of their sentences within six weeks from today.”*

Reference was made to the judgment of the Hon'ble Apex Court in Indrapal Singh –Vs. - State of U.P., (2022) 4 SCC 631 and attention of the Court was drawn to the following paragraphs:

“16. *Suresh [Suresh v. State of U.P., (2001) 3 SCC 673 : 2001 SCC (Cri) 601] , is also a case under Section 302 read with Section 34 IPC. This Court relied upon the judgments of the Privy Council in Barendra Kumar Ghosh [Barendra Kumar Ghosh v. King Emperor, 1924 SCC OnLine PC 49 : (1924-25) 52 IA 40 : AIR 1925 PC 1] and Mahbub Shah v. King Emperor [Mahbub Shah v. King Emperor, 1945 SCC*

OnLine PC 5 : (1944-45) 72 IA 148 : AIR 1945 PC 118] and also a three-Judge Bench decision of this Court in Pandurang v. State of Hyderabad [Pandurang v. State of Hyderabad, AIR 1955 SC 216 : 1955 Cri LJ 572] in the said case. This Court opined that to attract the applicability of Section 34 IPC the prosecution is under an obligation to establish that there existed a common intention which requires a prearranged plan. That 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. In the absence of a prearranged plan and thus a common intention, even if several persons simultaneously attack the man each one of them would be individually liable for whatever injury he caused and none could be vicariously convicted for the act of any or the other. Thus, 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 accused and incapable of explanation or any other reasonable hypothesis.

31. As far as the submission of the learned counsel for the appellant-accused vis-à-vis Surender Pal Singh is concerned, we do not think that though in the complaint no overt act has been expressly attributed to Surender Pal Singh as such, it cannot be ignored that PW 1 as well as PW 2 have categorically stated in their evidence that Inder Pal Singh and Surender Pal Singh fired shots with their weapons and killed Atar Singh and Shiv Pal Singh. PW 2, another eyewitness, has also stated that Inder Pal Singh and Surender Pal Singh began firing at Atar Singh and Shiv Pal Singh with bore .315 rifle and semi-barrel gun respectively. It is also established that Surendra Pal Singh was also carrying a half gun (Addhi gun). This consistent testimony of PW 1 and PW 2 demolishes the case sought to be made out against Surender Pal Singh. It is also noted that the FIR clearly mentioned that Rajbahadur

Singh accompanied by the three appellants who were carrying firearms, came to the field of the informant PW 1 and on the exhortation of Rajbahadur Singh (Accused 1), the other accused fired from the respective firearms (rifles). In the circumstances, we are not persuaded to take a different view of the matter vis-à-vis Surender Pal Singh than what has been taken by the High Court. Hence, it cannot be said that no overt act could have been attributed vis-à-vis Surender Pal Singh.”

Learned advocate for the State opposed the contentions of the appellants and submitted that the deposition of all the eye-witnesses along with post-occurrence witnesses reflected that Matiur Rahaman inflicted the fatal blow on the head of the deceased with the backside of the henso. The same has been corroborated by PW3, PW5 and PW6 who are eye-witnesses and deposed that all the appellants were all along together. Although mere presence do not constitute common intention in causing any incident, however, as all the appellants in the present case proceeded together through the private pathway of the deceased and on being resisted they returned to their house and came out with weapons such as henso and lathi the same would reflect common intention in commission of the incident/offence. To this effect in order to fortify her argument learned advocate for the State relied upon *Gulab -Vs. - State of U.P., (2022) 12 SCC 677* and relied upon the same paragraph 27 which was referred to by the appellants.

Reference was made to *Indrapal Singh v. State of U.P.*, (2022) 4 SCC 631 and it was submitted that similar view has been expressed by the Hon'ble Apex Court as in the case of *Gulab* (supra).

Ms Biswas, learned advocate appearing on behalf of the State further submitted that as the involvement of the present appellants have been found to be overwhelming in the facts and circumstances of the case it would be an aberration if the sentence so imposed by the learned trial Court is reduced to the sentence already undergone. To that effect learned Advocate relied upon *Uggarsain -Vs. – State of Harayana & Ors.*, (2023) 8 SCC 109 and referred to the same paragraphs as that of the appellants.

Before proceeding further with the merits of the appeal, it would be apposite to record that in course of hearing of the appeal, it was pointed out that the appellant No.1, who was in custody, was granted remission. To that effect, it was pointed out by the learned advocate for the State by way of submitting a report prepared by the Inspector-in-charge, Suti police station, which includes documents prepared by the Superintendent, Berhampore Central Correctional Home, which reflected the order passed by the Governor:-

“.....in exercise of the power conferred by section 432 of the Code of Criminal Procedure , 1973, and Article 161 of the Constitution of India, the Governor is pleased hereby to remit the unexpired portion of the aforesaid sentence of imprisonment and fine passed upon the above named convict Motiur Rahaman (Reg.No.3-487-19-CT), and to direct his immediate release from custody.”

Records reflect that Appellant No.1 Matiur Rahaman was sentenced to rigorous imprisonment for seven years under Section 304 Part II /34 of the Indian Penal Code on 19.09.2019 by the Learned Additional District and Session Judge, First Class, 2nd Court, Jangipur, Murshidabad, in connection with the Sessions Trial no. 40(09)/2012. The report of the Superintendent reflects that pursuant to the aforesaid order passed by the Principal Secretary to the Governor of West Bengal on 16th October, 2023, Appellant No. 1 was released from Berhampore Central Correctional Home on 18th October, 2023. So the sentenced served by the appellant No.1 was about 4 years when he was granted remission and released from custody.

In view of the aforesaid the present appeal is restricted to Jamirul Sk and Mahasin Sk. The genesis of the case as is reflected relates to usage of pathway which was used by the accused persons and the land belonged to the deceased. The consistent case of the prosecution from the complaint, inquest report and deposition of Court reflects that on the relevant date of the incident all the accused persons/appellants assaulted Mojaffar Sk. and others. From the evidence of PW1, Abdul Maleque, it is seen that dispute arose over the issue of using pathway which was exclusively owned and possessed by the injured/deceased Mojaffar and the accused persons forcibly used such land as a pathway. The same was resisted by the deceased Mojaffar Sk and as a result, the accused persons being aggrieved, attacked the deceased and his family members. The evidence of PW2 also reflects that the deceased restrained the accused persons and asked them not to use the passage as his family members

and wife were binding Biri at that place. But the accused persons did not pay any heed to such requests and returned back being armed with henso and lathi. PW3 being an eyewitness claimed that appellant no.3 was armed with a sharp cutting weapon /henso and Matiur assaulted Mojaffar with the backside of henso on his head. PW4 is a post-occurrence witness but he corroborated the evidence to the extent that they were in the habit of using the land of the deceased as a pathway. PW6 has claimed to be an injured witness who stated that all the three accused persons were using their land when his father Mojaffar asked them not to use the same, as a consequence of which they returned back to their home and within close proximity of time returned back with a sharp cutting weapon and sticks. The witness is an eye-witness and he narrated that appellant no.1 hit on the head of his father with the reverse side of henso and when he and his grandfather along with another went to rescue his father at that time all the accused persons assaulted them. They were also taken to hospital.

The Hon'ble Apex Court in the judgment of Jasdeep Singh alias Jassu – Vs. – State of Punjab, (2022) 2 SCC 545 was pleased to explain the provisions of Section 34 of the Indian Penal Code, paragraphs 22 to 26 are relevant which are as follows:

“22. *It is a team effort akin to a game of football involving several positions manned by many, such as defender, mid-fielder, striker, and a keeper. A striker may hit the target, while a keeper may stop an attack. The consequence of the match, either a win or a loss, is borne*

by all the players, though they may have their distinct roles. A goal scored or saved may be the final act, but the result is what matters. As against the specific individuals who had impacted more, the result is shared between the players. The same logic is the foundation of Section 34 IPC which creates shared liability on those who shared the common intention to commit the crime.

23. *The intendment of Section 34 IPC is to remove the difficulties in distinguishing the acts of individual members of a party, acting in furtherance of a common intention. There has to be a simultaneous conscious mind of the persons participating in the criminal action of bringing about a particular result. A common intention qua its existence is a question of fact and also requires an act “in furtherance of the said intention”. One need not search for a concrete evidence, as it is for the court to come to a conclusion on a cumulative assessment. It is only a rule of evidence and thus does not create any substantive offence.*

24. *Normally, in an offence committed physically, the presence of an accused charged under Section 34 IPC is required, especially in a case where the act attributed to the accused is one of instigation/exhortation. However, there are exceptions, in particular, when an offence consists of diverse acts done at different times and places. Therefore, it has to be seen on a case-to-case basis.*

25. *The word “furtherance” indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion.*

26. *There may be cases where all acts, in general, would not come under the purview of Section 34 IPC, but only those done in furtherance of the common intention having adequate connectivity. When we speak of intention it has to be one of criminality with adequacy of knowledge of any existing fact necessary for the proposed offence. Such an*

intention is meant to assist, encourage, promote and facilitate the commission of a crime with the requisite knowledge as aforesaid.”

On an assessment of the evidence the act of the accused after being aggrieved for the resistance offered by the deceased for using his land as a pathway is corroborated by the eyewitnesses as well as the post-occurrence witnesses. It has also surfaced in evidence that on the first occasion when the deceased resisted all the three accused persons were present, they went back to their home and within close proximity of time returned back with henso/sharp-edged weapon and lathi/stick. Thus, the presence of all the three accused/appellants at the time of the incident is in no manner ruled out. The fact of allowing them or in the alternative, the appellants intended to establish the right of usage of pathway over the land of the deceased is evident from the deposition of the witnesses. Thus, the reaction or anger which arose is set out from such factual circumstances, as such, the intent to establish their dominance by using force and reacting to the resistance of the deceased is established from the evidence on record.

Having considered the same, I am of the view that the prosecution has been able to establish the issue relating to common intention and as such, the appellants No. 2 and 3 are guilty of offence under Section 304 Part II read with Section 34 of the Indian Penal Code so far as their participation in the illegal act is concerned.

It is a fact that the vital blow which was inflicted upon the deceased was by Matiur Rahaman and the appellants No. 2 and 3 are responsible only for the common intention which they shared in the process.

Thus, having regard to the nature of their participation in the commission of the offence and as a rule of proportionality, I am of the opinion that the sentences imposed upon the appellant Nos. 2 and 3 under Section 304 Part II/34 of the Indian Penal Code be reduced to two years. So far as the sentence under Sections 323/34 is concerned, the same is not interfered with. Both the sentences as held by the learned Trial Court would run concurrently.

Accordingly, Criminal appeal No. 635 of 2019 is disposed of with the sentence under Sections 304 Part II/34 of IPC being modified.

The appellant nos. 2 and 3 are on bail, their bail bonds are cancelled. They are directed to surrender before the jurisdictional Court and serve out the sentences as directed above.

As the appellant no.1, Matiur Rahaman has served out the sentence and as his sentence has been remitted under Article 161 of the Constitution of India, the appeal preferred by him has not been dealt with on merits.

Pending connected application(s), if any, are also disposed of.

Department is directed to send back the TCR immediately. A copy of the judgment be forwarded to the learned Trial Court immediately for compliance regarding the directions given above.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Tirthankar Ghosh, J.)