HIGH COURT OF KERALA

Bench: Justices P.B. Suresh Kumar and M.B. Snehalatha

Date of Decision: 4th June 2024

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 304 OF 2017

CRIMINAL APPEAL NO. 490 OF 2017

CRIMINAL APPEAL NO. 665 OF 2017

SHAFFEEK …APPELLANT

VIJITH …APPELLANT

NIYAS @ RIYAS …APPELLANT

VERSUS

STATE OF KERALA …RESPONDENT

Legislation:

Sections 341, 302, 34, and 201 of the Indian Penal Code (IPC)

Section 313 of the Code of Criminal Procedure (Cr.P.C.)

Indian Evidence Act, 1872

Subject: Criminal appeals arising out of convictions for the murder of Baiju, involving the stabbing by Niyas @ Riyas (A1) with assistance from Shaffeek (A3) and Vijith (A2). The main focus is on whether accused 2 and 3 shared a common intention with the first accused to commit the murder.

Headnotes:

Criminal Law – Murder and Common Intention – Sections 341, 302, 34 IPC – Appeal against conviction – Prosecution's case that accused, in furtherance of their common intention, committed the murder of Baiju due to a prior altercation – Trial court convicted A1, A2, and A3 while A4 was acquitted –

High Court finds evidence insufficient to prove common intention by A2 and A3 – Conviction of A1 under Section 302 IPC confirmed – Conviction of A2 and A3 set aside, they are acquitted. [Paras 1-25]

Criminal Law – Evidence – Eye-Witness Testimony – Consistency – PWs 1, 2, and 3 consistently identified A1 as the assailant who inflicted the fatal stab wound – Minor discrepancies in their testimonies regarding ancillary details do not discredit core allegations – Held, evidence credible and reliable in implicating A1 – Insufficient evidence to prove that A2 and A3 shared the common intention to commit the murder. [Paras 10-13, 18-23]

Criminal Law – Motive – Evaluation – Motive for the crime established as an altercation between A1 and the deceased over the former's conduct of making PW1 consume liquor – Evidence shows A1 had motive – Insufficient evidence to suggest motive or participation of A2 and A3 in the common intention. [Paras 16-17]

Criminal Procedure – Juvenile Claim – Evaluation – A3's claim of being a juvenile at the time of the crime found unnecessary to probe further as he was acquitted on grounds of insufficient evidence regarding common intention. [Para 25]

Decision – Conviction and Sentence – Court upholds conviction and life sentence of A1 under Section 302 IPC – A2 and A3 acquitted due to lack of evidence of shared common intention – Prosecution failed to prove beyond reasonable doubt that A2 and A3 shared a common intention with A1 to murder Baiju – Appeals by A2 and A3 allowed, conviction and sentence set aside. [Paras 24-25]

Referred Cases:

- Vayalali Girishan and Others v. State of Kerala, 2016 KHC 204

- Chhota Ahirwar v. State of M.P., (2020) 4 SCC 126

Representing Advocates:

Sri. S.Rajeev for appellant (A1)

Sri. K.K.Dheerendrakrishnan for appellant (A2)

Sri. C.Rasheed for appellant (A3)

Sri. E.C.Bineesh for respondent

JUDGMENT

P.B.Suresh Kumar, J.

These appeals arise from S.C. No.388 of 2012 on the files of the Court of the Additional Sessions Judge-III, Mavelikara. There were altogether four accused in the case. Among the appeals, Criminal Appeal No.304 of 2017 is preferred by the third accused, Criminal Appeal No.490 of 2017 is preferred by the second accused and Criminal Appeal No.665 of 2017 is preferred by the first accused. The fourth accused in the case was acquitted and the appellants stand convicted and sentenced for the offences punishable under Sections 341 and 302 read with Section 34 of the Indian Penal Code (IPC).

2.The victim in the case is one Baiju. He suffered a stab injury at about 11.15 p.m on 09.12.2010. Though he was taken initially to KCM Hospital, Nooranad and then to CM Hospital, Pandalam and thereafter to Pushpagiri Medical College Hospital, Thiruvalla, he succumbed to the stab injury on the way to Pushpagiri Medical College Hospital at about 1 a.m. on the following day. A case was registered in connection with the occurrence by Nooranad Police at 8 a.m. on 10.12.2010 based on the information furnished by Shyju,

the younger brother of the deceased and the investigation conducted in the case revealed that it was the accused who caused the death of the victim.

3. The case of the prosecution is that the accused, in furtherance of their common intention to commit murder of Baiju, trespassed into the courtyard of the house of the deceased at about 11.15 p.m. on the date of occurrence and knocked at the door of the house of Baiju. When Shyju came out of the house, the accused told Shyju that they want to talk to Baiju and when Baiju came out of the house accordingly, the accused led him out of the courtyard followed by which, accused 2 and 3 held Baiju from his back by his hands to prevent him from escaping their hold and the first accused inflicted a deep stab injury on the left side of his abdomen using a knife and thereupon, all of them fled away from the scene in a TATA Sumo vehicle bearing No.KL-29/4654. A few hours prior to the occurrence, Baiju questioned the first accused for having taken Shyju to a bar and caused the latter to drink liquor. The said occurrence ensued in an altercation and in the midst of which, Baiju allegedly caused hurt to the first accused by hitting him. The said occurrence is alleged to be the motive for the accused to cause the death of the victim.

4. On the accused being committed to trial, theCourt of Sessions framed charges against accused 1 to 3 for offences punishable under Sections 302, 341 and 449 read with Section 34 IPC and the fourth accused under Section 201 IPC. The accused pleaded not guilty to the charges. Thereupon, the prosecution examined 26 witnesses as PWs 1 to 26 and proved through them 34 documents as Exts.P1 to P34. MOs 1 to 7 are the material objects in the case. Exts.D1 to D12 are the previous statements made by the witnesses which were marked at the instance of the accused. When the incriminating circumstances were put to the accused in terms of the provisions contained in Section 313 of the Code, they denied the same. The Court of Session, thereupon, on a consideration of the evidence on record, held that accused 1 to 3 are guilty of the offences punishable under Sections 341 and 302 read with Section 34 IPC and acquitted the fourth accused of the charge framed under Section 201 IPC. Consequently, accused 1 to 3 were convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.25,000/- each for the offence punishable under Section 302 IPC and to undergo imprisonment for a period of one month for the offence punishable under Section 341 IPC. The accused are aggrieved by their conviction and sentence and hence these appeals.

5. Heard Sri.S.Rajeev for the first accused, Sri.K.K.Dheerendrakrishnan for the second accused, Sri.C.Rasheed for the third accused and the learned Public Prosecutor, Sri.E.C.Bineesh.

6. Elaborate arguments were made by the learned counsel for the accused as also the learned Public Prosecutor. While the attempt of the learned counsel for the first accused was to establish that the prosecution has not adduced satisfactory evidence to prove that it was the first accused who caused the death of the victim, the attempt of the learned counsel for accused 2 and 3 was to establish that the evidence on record is not sufficient to hold that accused 2 and 3 shared a common intention with the first accused, to commit the murder of the victim. The learned counsel for the first accused has also contended that even assuming it was the first accused who inflicted the stab injury on the deceased, it has not been established by the prosecution that the death is a culpable homicide amounting to murder. The learned counsel for the third accused has also submitted that the third accused was a juvenile as on the date of occurrence and therefore, the Court of Session ought not have tried the third accused in connection with the case. The learned Public Prosecutor supported the impugned judgment pointing out that the evidence let in by the prosecution would certainly justify the conviction of the accused and the sentence imposed on them. It is unnecessary to refer to the various arguments advanced by the learned counsel for the accused as also the learned Public Prosecutor at this point as we propose to deal with the same elaborately, in the succeeding paragraphs of this judgment.

7. It is seen that by two separate orders passed on 05.04.2017 and 21.08.2019, this Court suspended the execution of the sentences imposed on accused 2 and 3 and they were enlarged on bail.

8. In the light of the submissions made by the learned counsel for the parties on either side, the following are the points that arise for consideration:

(1) whether the prosecution has established beyond reasonable doubt that it was the first accused who caused the fatal injury to the victim;

(2) whether the prosecution has established beyond reasonable doubt that accused 1 to 3 shared a common intention to commit the murder of the victim.

(3) whether the prosecution has established beyond reasonable doubt that the offence alleged in the case is culpable homicide amounting to murder;

(4) whether the third accused was a juvenile at the time of occurrence.

9. Although serious arguments were not addressed against the finding rendered by the Court of Session that the case on hand is a case of homicide, it is necessary for us to examine the correctness of the said finding also. PW11 is the doctor who conducted the autopsy of the deceased on 10.12.2010. Ext.P7 is the autopsy certificate. Only two injuries were noticed by PW11 on the body of the deceased at the time of autopsy. Injury 2 among them as described by PW11 in his evidence reads thus:

> 2. Spindle shaped incised penetrating wound 2.6x 1.2cm, gaping, vertically oblique, was seen over the left side of front of abdomen. The wound edges were approximated and measured again and found to be 3.1cm long. The upper end of the wound was rather rounded and the lower end rather sharply cut. The lower end of the wound showed tailing in a downward direction for a length of 0.3cm. The upper inner end of the wound was 2.4cm outer to midline and 30cm below the suprasternal notch. The lower outer end was 2.6cm outer to midline and 33cm below the suprasternal notch. The lower end of the wound was 114cm above the heel level. On dissection the wound showed a track directed inwards, downwards and to the right. Incised perforating wound of the jejunum measuring 3cm, 6cm from the DJ flexure was seen. The aorta showed an incised wound on its anterior surface measuring 2cm in length and involving the full thickness of the wall. The second lumbar vertebra showed a vertical incised wound penetrating 0.7cm into its body. The thickness of the anterior abdominal wall was 2.6cm. The peritoneal cavity contained about 2litres of fluid blood. Retroperitoneal haematoma seen over an area 25x20x3cm, extending bilaterally and into the perinephric regions.

The cause of death of the victim as spoken to by PW11 in his evidence is that the victim died due to injury 2 which is an incised penetrating injury sustained to his abdomen. PW11 also deposed that injury 2 could be produced by MO1 weapon which was shown to him. There was no serious challenge by the accused to the evidence tendered by PW11. In the light of the evidence aforesaid of PW11, we are of the view that the finding rendered by the Court of Session that the case on hand is a case of homicide, is in order.

10. Points (1) and (2): These points can be considered together, for the findings on them are to be arrived at on the same set of evidence let in by the prosecution. PW1 is none other than Shyju, the younger brother of the deceased. PW1 was cited by the prosecution as an eye-witness to the

occurrence. PW1 deposed that at about 11 p.m. on 09.12.2010, the first accused came to his house, knocked at the door and enquired with him, when he came out of the house, as to whether the deceased was there at home. PW1 deposed that when he affirmed that the deceased was at home, the first accused told him that he wants to talk to the deceased. PW1 deposed that he then called the deceased who was sleeping inside and when the deceased came out, the first accused led him to the side of the canal adjoining to their house. PW1 deposed that then accused 2 and 3 caught hold of the hands of the deceased from behind and the first accused, after uttering "ന ഫ്ന ആടക റ യ ട , ന്ന ഭമക മകളൽ വയ കല", took out a knife from his waist and stabbed at the abdomen of the deceased and thereafter all the three accused fled away from the scene in a red TATA SUMO vehicle driven by the fourth accused. It was deposed by PW1 that PW4, a friend of the deceased, was called over telephone and PW4 came forthwith and they took the deceased to KCM hospital. It was also deposed by PW1 that from the said hospital, the deceased was taken to CM hospital and since there was no surgeon in that hospital, the deceased was taken in another vehicle to Pushpagiri Medical College Hospital and that he died on the way to Pushpagiri Medical College Hospital. PW1 also deposed that on the night of the previous day, outside a bar, the deceased warned the first accused that he shall not take along with him his brother, and the quarrel that ensued between them from the said incident is the cause for the occurrence. PW1 affirmed that he gave Ext.P1 First Information Statement and two subsequent statements to the police and he identified all the accused in court. PW1 also identified MO1 knife allegedly used by the first accused to stab the deceased. In the cross-examination of the accused, the suggestion made to PW1 by the learned counsel for accused 1 and 2 was that the deceased suffered the injury in another occurrence that took place at a place called Charummoodu and it is on account of the threat posed by those present at the said place who inflicted injuries on the deceased, that PW1 is giving evidence against the accused. PW1 denied the suggestion.

11. PW2 is the mother of the deceased. PW2 was also cited by the prosecution as an eye-witness to the occurrence. PW2 also gave evidence as regards the occurrence more or less similar to the evidence tendered by PW1, although there were a few trivial inconsistencies in her evidence as regards the sequence of events and the utterances allegedly made by the first accused. PW2 also identified all the accused and also MO1

knife allegedly used by the first accused. PW3 is the elder sister of PW2 who is residing in a house on the adjacent southern side of the house of the deceased. PW3 was also cited by the prosecution as an eye-witness. PW3 deposed that at the time of occurrence, she was standing in the front courtyard of her house. PW3 also gave evidence as regards the occurrence more or less on the similar lines of the evidence tendered by PWs 1 and 2. As in the case of PW2, there were trivial inconsistencies in the evidence tendered by PW3 also as regards the utterances allegedly made by the first accused. Similarly, as in the case of PW2, PW3 also identified all the accused in court and MO1 knife allegedly used by the first accused.

12. PW4, a friend of the deceased who took the deceased to the hospital, deposed that at about 11.15 p.m., the deceased called him over telephone and told him that the first accused stabbed him, and he rushed to the house of the deceased immediately. When PW4 reached the house of the deceased, according to him, the deceased was lying on the lap of PW2 near the entrance of their house and blood was oozing out from his body. PW4 deposed that he took the deceased first to KCM hospital and after giving first aid there, he was taken to CM hospital and from there to Pushpagiri Medical College Hospital in another vehicle. PW4 also deposed that on the night of the previous day, somebody told the deceased that PW1 was picking up a quarrel with others near a bar at Charummoodu, after consuming liquor and it was the first accused who caused PW1 to drink liquor. It was deposed by PW4 that on receiving the said information, he along with the deceased went to meet the first accused and warned him against the said conduct. PW5 is a neighbour of the deceased who accompanied the deceased in the Scorpio car in which the deceased was taken to Pushpagiri Medical College Hospital. PW5 affirmed the said fact in his evidence.

13. PW7 is an auto rickshaw driver and he deposed that on 09.12.2010, at about 11.30 p.m., he saw a red TATA SUMO car parked on the side of the canal road near Charummoodu junction and the fourth accused was standing near that vehicle at that time. PW7 also deposed that when the auto rickshaw driven by him reached near the said car, he saw accused 1 to 3 rushing towards that car and leaving the place in that car. PW13 is a relative and neighbour of the first accused. PW13 was also a member of the local panchayat. PW13 deposed that he knows the first accused and that on 09.12.2010, at about 9.30 p.m., the first accused came to his house and requested for a knife to cut the cable of his vehicle. PW13 deposed that he

gave MO1 knife to the first accused. In cross-examination, PW13 clarified that he saw the first accused pushing a broken down vehicle and it was for the purpose of cutting its cable, he gave MO1 knife to the first accused.

14. PW15 is the Scientific Assistant attached to the District Police Office, Pathanamthitta. PW15 deposed that he examined the scene of occurrence as directed by his superior officers and collected dark brown coloured soil from the scene of occurrence and handed over the same to the investigating officer for forensic examination. PW21 is the Scientific Assistant attached to the Forensic Science Laboratory, Thiruvananthapuram. PW21 deposed that he collected bloodstains from the TATA Sumo car involved in the subject crime and proved Ext.P13 report prepared by him in this regard. PW25 is the police officer who conducted the investigation in the case. PW25 deposed that during interrogation, the first accused disclosed to him that he has kept a knife at a place near the house of the deceased and that he can hand over the same, if he is taken to that place. It was also deposed by PW25 that when the first accused was taken near the bushes on the side of the canal on the eastern side of the house of the deceased as led by the first accused, he took out from that place MO1 knife and the same was seized by PW25 as per Ext.P4 mahazar. Ext.P4(a) is the disclosure statement given by the first accused which led to the recovery of MO1 knife. PW8 is a taxi driver residing near Charummoodu. PW8 is also a person who had acquaintance with the deceased. PW8 was a witness to Ext.P4 seizure mahazar. PW8 identified his signature in Ext.P4 mahazar and also deposed that MO1 knife was recovered from the side of the canal and the first accused was there at the time of recovery.

15. Ext.P34 is the report of the Forensic Science Laboratory. Item 4 in Ext.P34 report is the dark brown soil and dry grass with dark brown stains collected by PW15 from the scene of occurrence on 10.12.2010 and it is reported in Ext.P34 that it contained human blood.

16. The aforesaid is, in essence, the evidence let in by the prosecution to prove the guilt of the accused. Let us now consider whether the said evidence is sufficient to prove the guilt of the accused as found by the Court of Session. As already noticed, the motive for the crime is the incident that took place a few hours prior to the occurrence outside a bar wherein the deceased warned the first accused that he shall not take along with him his brother, PW1 to consume liquor. PW1 as also PW4 gave evidence regarding the said occurrence. Even though the prosecution alleges

that the said incident ensued in an altercation, in the course of which the deceased caused hurt to the first accused, no evidence was let in by the prosecution to show that the deceased caused hurt to the first accused. But the fact that there was an altercation between the first accused and the deceased a few hours prior to the occurrence in connection with the alleged conduct of the former in causing PW1 to drink liquor has been established satisfactorily by the prosecution. In other words, the evidence let in by the prosecution establishes the motive of the first accused to commit the murder of the victim.

17. The fact that the deceased suffered a stab injury on his abdomen and he succumbed to the said injury, is not in dispute. The dispute pertains to the questions as to who caused the injury and the place of occurrence. As far as the place of occurrence is concerned, the specific case of the prosecution is that the first accused caused the stab injury on the deceased just outside the house of the deceased by the side of the canal, whereas, the case of accused 1 and 2 is that the deceased suffered the fatal injury at a place called Charummoodu. As regards the scene of occurrence, except the suggestion made by the learned counsel for accused 1 and 2 to PW1, there is nothing on record which indicates that the occurrence took place at Charummoodu. The consistent evidence given by PWs 1 to 3 is that the occurrence took place by the side of the canal near the house of the deceased. The said evidence has been corroborated by the report of the Forensic Science Laboratory. It is stated in Ext.P34 that the dark brown soil and dry grass with dark brown stains collected by PW15 from the scene of occurrence, namely, the side of the canal adjoining the house of the deceased on 10.12.2010, contained human blood. The oral testimony of PWs 1 to 3 together with Ext.P34 report, establish beyond reasonable doubt that the occurrence took place by the side of the canal near the house of the deceased.

18. As regards the assailants, as already noticed, the evidence tendered by PWs 1 to 3, the eye-witnesses is more or less consistent. Of course, the evidence is not consistent as regards who called PW4 to the scene and also as regards the utterances alleged to have been made by the first accused, which according to us, is not very material in the context of considering the question as to who were the assailants. The learned counsel for the first accused vehemently argued that while it was asserted by PW1 that it was he who called PW4 to the scene to take the

deceased to the hospital, the version of PWs 2 and 3 on the said point was that it was the deceased who called PW4 to the scene. Similarly, it was argued by the learned counsel for the first accused that the version of PW1 was that PW4 came to the scene when he was called over telephone, whereas the version as regards the said point of PW3 was that since PW4 could not be contacted over telephone, PW1 went to the house of PW4 to bring him down. According to the learned counsel, in the light of the said anomalies, it is not safe to place reliance on the evidence tendered by PWs 1 to 3. The argument is unacceptable. First of all, PW1 did not depose that he called PW4 to the scene of occurrence. Instead, what PW1 deposed was only that "തടർ യ ടന കടക രൻ ഹ#ദറനന യ% ണൽ വളച. ട ൻ ക റമ വന." The said evidence cannot be said to be inconsistent with the evidence tendered by PWs 2 and 3 that it was the deceased who called PW4. Of course, a further reading of the evidence of PW3 would show that since PW4 could not be contacted over telephone, PW1 went to the house of PW4 to bring him down. We do not think that merely on account of the said reason, the evidence tendered by PWs 1 to 3 is liable to be rejected. As already noticed, the aforesaid three witnesses have categorically deposed that on 09.12.2010, the first accused came to the house of the deceased, led the deceased to the side of the canal adjoining the house of the deceased and stabbed at his abdomen. There is absolutely no reason, on the facts and circumstances of the case, to disbelieve that part of the evidence tendered by PWs 1 to 3. It was vehemently argued by the learned counsel for the first accused that going by the sequence of events spoken to by PW1, there is absolutely no chance for PWs 2 and 3 to be present at the scene at the time when the alleged stabbing took place. Even assuming there is a doubt whether PWs 2 and 3 were present at the time when the first accused stabbed the deceased, the same is irrelevant inasmuch as there is absolutely no reason to doubt the veracity of the evidence tendered by PW1 that it was the first accused who inflicted the fatal injury. It is all the more so since, there is no reason to think that PW1 would not have been present with the deceased at the time of occurrence, as the altercation between the deceased and the first accused ensued on account of him, and also since it was he, who brought the deceased who was sleeping inside their house to converse with the first accused.

19. The learned counsel for the first accused placing reliance on the decision of a Division Bench of this Court in Vayalali Girishan and Others v. State of

Kerala, 2016 KHC 204, strongly contended that the identification of the first accused by the witnesses was not proper and it was against the dictum in the said case. From the facts of the case on hand, it can be inferred that the first accused had close acquaintance with PW1. Even the very motive alleged in the case is that the first accused caused PW1 to drink liquor and it is on account of the said reason, the deceased who was the elder brother of PW1 picked up quarrel with the first accused and it is the said incident which motivated the first accused to cause the death of the victim. In a case of this nature, according to us, in the absence of any contention for the first accused that he had no prior acquaintance with PW1, the identification of the first accused by the witnesses was irrelevant.

20. It was also contended vehemently by the learned counsel for the first accused that there is suppression of material evidence by the prosecution, which casts a serious doubt as regards the veracity of the prosecution case. To bring home the said point, it was pointed out by the learned counsel that the case of the prosecution is that the deceased was first taken by PW4 and others to KCM hospital and from there to CM hospital, Pandalam and from there to Pushpagiri Medical College Hospital. It was argued that though it has come out in evidence that the deceased was given first aid at KCM hospital and treated at CM hospital, the medical records in the said two hospitals should have certainly been produced by the prosecution and had they been produced in court, it would have certainly given light to the fact as to who caused the fatal injury to the deceased. According to the learned counsel, inasmuch as the said documents were not brought on record, the Court of Session ought not have convicted the accused. Of course, the medical records, if any, in the said hospitals ought to have been produced by the prosecution. But merely for the reason that the medical records of the said hospitals have not been produced, in the light of the other overwhelming evidence in the case which establishes that it was the first accused who caused the fatal injury to the deceased, we do not think that the nonproduction of the medical records in a case of this nature, is fatal to the prosecution case. Needless to say, the finding rendered by the Court of Session as regards the first accused who caused the stab injury to the deceased, is perfectly in

order.

21.The sole contention urged by the learned counsel for the second accused and the main contention urged by the learned counsel for the third

accused, is that even if it is admitted that the said accused have accompanied the first accused, there is absolutely no material to indicate that they shared a common intention with the first accused to cause the death of the victim. As noticed, PWs 1 to 3 deposed in their evidence that it was while accused 2 and 3 were holding the hands of the deceased from behind that the first accused inflicted the stab injury on the abdomen of the deceased. According to the learned counsel for accused 2 and 3, the said part of the evidence tendered by PWs 1 to 3 cannot be believed at all inasmuch as such a case was absent in the First Information Statement. According to the learned counsel, if that part of the evidence is eschewed, the only evidence against them is that they were also present when the first accused inflicted the stab injury to the deceased. It was the argument of the learned counsel that from the mere presence of accused 2 and 3 at the scene of occurrence, it cannot be inferred that they shared a common intention with the first accused to cause the death of the victim.

22. It is trite in criminal jurisprudence, that only a person who actually commits an offence, is liable to be punished. However, Section 34 lays down a principle of joint liability in a criminal act, the essence of which is to be found in the existence of a common intention. Even when separate acts are done by two or more persons in furtherance of a common intention, each person is liable for the result of all the acts, as if all the acts had been done by all these persons. Section 34 is only a rule of evidence which attracts the principle of joint criminal liability and does not create any distinct substantive offence. The distinctive feature of Section 34 is the element of participation in action and intention of each one of the accused should be known to the rest of the accused. Mere participation is not sufficient to attribute common intention. Common intention can be inferred from proved facts and circumstances and the same can develop during the course of an occurrence or at the spot. This section does not whittle down the liability of the principal offender committing the principal act but additionally makes all other offenders liable. The question whether the prosecution has established common intention in a given case has to be decided on the basis of the proved facts. In other words, the prosecution is required to prove a premeditated intention of all the accused. Section 34 of the Indian Penal Code, is really intended to meet a case in which it is difficult to distinguish between the acts of individual members of a party and prove exactly what part was played by each of them. To attract Section 34 of IPC, no overt act is needed on the part of the accused if they

share common intention with others in respect of the ultimate criminal act, which may be done by any one of the accused sharing such intention. Common intention implies acting in concert. Existence of a prearranged plan has to be proved either from the conduct of the accused, or from circumstances or from any incriminating facts. It is not enough to have the same intention independently of each other [See Chhota Ahirwar v. State of M.P., (2020) 4 SCC 126].

23.According to the learned Public Prosecutor, inasmuch as it has come out in evidence that accused 2 and 3 accompanied the first accused to the house of the deceased and they held the hands of the deceased from behind while the first accused inflicted a stab injury on the abdomen of the deceased, nothing more is required to infer a common intention shared between the three of them to cause the death of the victim. On the peculiar facts of this case, we have doubts in our minds as to whether accused 2 and 3 shared a common intention with the first accused to cause the death of the victim. The relevant portion of Ext.P1 First Information Statement reads thus:

“ര ത 11.00 മണയടകട ഞങശ൪ എല വര0 ഉറങ ൻ കടന. ര ത 11.15 മണയ ടകട കതകന ആയര തടവളക ശബ0 യകട. ഞ ൻ എഴയ റ ന കതക തറന യന ക യ; ശ൪ മളൻ ന സ നൽക ത കണ. "നന യ?@ഷനനനയ ട , അവനന ഒ വളന , ഒര ക ര@0 പറ നനE " എയ ട പറഞ. ഞ ൻ അകതക റ യ?@ഷനന വളചണർത. യ?@ഷൻ നവള യJക ഇറങ വ യ; ശ൪ "ന എന അടക റ യ ട , നന ഞ ൻ ഭമ ൽ വയ കതല" എന പറഞനക E യ?@ഷനനയ0 വളചനക E പടഞ റവശമള കന ൽ യറ ഡൻനറ അടയതക യപ കത കണ. ഞ ന0 യ?@ഷന പറനക ന ന. അയ; യPക0 അമയ0 അപറനത വടനJ വല@മയ0 മറ0 നവളയJക ഇറങ വന. കന Jന ഭ ഗത മളൻ നസനന കട നത കരമളയലള ബ?ത0 ചനകര പളയനട പറകവശത ത മസക ഷ%ക0 അവനട നൽക ത കണ. കന ൽ യറ ഡൻനറ അടനതത ഉടനന നസ യ?@ഷന എതനര നനനക E "ന ഞങനള തല ൻ വളർയട " എന പറഞനക E അ ളനട ഇട;ന പറകൽ നന0 ഒര പ ത എടത യ?@ഷന വ റത ആഞ ഒ കത.” Deviating from the stand taken in Ext.P1 statement, PW1 deposed that accused 2 and 3 held the hands of the deceased from behind while the first accused inflicted stab injury on him. It is not safe, according to us, to place reliance on the said improvement

made by PW1 while giving evidence. If that be so, the fact established in the case is only that accused 2 and 3 were present at the scene of occurrence when the first accused inflicted a stab injury on the abdomen of the deceased. The pointed question therefore, is whether, from the mere presence of accused 2 and 3 at the scene, could it be inferred that accused 2 and 3 shared a common intention with the first accused to cause the death of the victim. First of all, as already noticed, the motive for the crime established in the case is only that of the first accused. There is nothing on record to indicate that accused 2 and 3 were present at the scene of altercation that took place between the first accused and the deceased prior to the occurrence. Be that as it may, as specifically deposed by PW1, MO1 with which the first accused inflicted the stab injury on the deceased, was one hidden by the first accused in his waist. There is nothing on record to indicate that accused 2 and 3 were aware of the fact that the first accused carried a knife with him while they proceeded along with him to the house of the deceased. In this context, it is relevant to refer to the evidence tendered by PW13, the relative and neighbour of the first accused from whom the first accused obtained MO1 knife. PW13 also, has no case that at the time when the first accused obtained the knife a few hours prior to the occurrence, accused 2 and 3 were with the first accused. In the aforesaid circumstances, it is difficult according to us, to hold on the facts beyond reasonable doubt that accused 2 and 3 shared a common intention with the first accused to cause the death of the victim. Needless to say, accused 2 and 3 are entitled to the benefit of doubt. Points are answered accordingly.

24.Point (3): The argument advanced by the learned counsel for the first accused is that there is no medical evidence in the case to show that the injury inflicted by the first accused on the abdomen of the deceased is an injury which is sufficient in the ordinary course of nature to cause death, to attract the offence punishable under Section 302 IPC. According to the learned counsel, in the absence of any formal opinion given by the doctor who conducted the post-mortem examination to that effect, it can only be held that the homicide is only culpable homicide not amounting to murder and in that case, the accused is liable to be punished only under Section 304 IPC. First of all, the question whether the injury inflicted is an injury which is sufficient in the ordinary course of nature to cause death is a finding to be rendered by the court on the facts of each case, especially when the evidence that is expected from the doctor is only their opinion. Of course, for arriving at such a finding, the opinion of the doctor is relevant. But, merely for the reason that

the doctor who was examined in the proceedings did not depose that the injury intended and inflicted by the assailant is sufficient in the ordinary course of nature to cause death, it cannot be contended that the court cannot arrive at the conclusion that the homicide is a murder. We take this view since in terms of clause “Thirdly” of Section 300 IPC, what is to be seen by the court in a case of this nature is as to whether the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death and only the court would be competent to render a finding on that issue, for the same is rendered on a consideration of various factors including the nature of weapon used, the part of the body in which injury is caused etc. There would be instances like one shooting another with a gun at point blank, one cutting the throat of another using a sharp knife etc., on one hand and instances where injuries suffered by the victims are such that one cannot, without the opinion of a medical expert, hold that the nature of injury is such that it is sufficient in the ordinary course of nature to cause death. No doubt, in the latter category of cases, the opinion of the doctor would be relevant, but we cannot agree to the proposition that in the former category of cases, such opinion is mandatory. Even assuming that the facts disclosed would only show that it is a case of culpable homicide not amounting to murder, punishable under Section 304 IPC, inasmuch as death is caused with the intention of causing such bodily injury as is likely to cause death, the case would fall only under Part I of Section 304 IPC and even in that case, the punishment imposed on the first accused namely life imprisonment is provided for. The point is answered accordingly.

25.Point (4): In the light of the finding rendered by this Court that the prosecution has failed to prove its case that accused 2 and 3 shared common intention with the first accused to cause the death of the deceased, it is unnecessary to probe into this point. In the result, Crl.Appeal No.665 of 2017 is dismissed confirming the conviction and sentence of the first accused and Crl.Appeal.Nos.490 of 2017 and 304 of 2017 are allowed setting aside the conviction of accused 2 and 3 and acquitting them of the charges levelled against them.