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SUPREME COURT OF INDIA
Bench: Justices Hrishikesh Roy and Satish Chandra Sharma
Date of Decision: 2nd May 2024
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1509 OF 2010

MADHUSUDAN & ORS. ...APPELLANT(S)
VERSUS
THE STATE OF MADHYA PRADESH ...RESPONDENT(S)

Legislation:
Sections 302, 307, 323, 34, 147, 148, 149 of the Indian Penal Code (IPC)

Subject: Criminal appeal challenging the conviction under Sections 302, 307, 323 read with Section 34 IPC for murder and assault.

Headnotes:

Criminal Law – Conviction Under Section 34 IPC – Appellants convicted for murder and assault – Conviction based on common intention under Section 34 IPC – Prosecution's failure to prove common intention and individual roles in crime – Independent witnesses turned hostile and weapons not chemically tested [Paras 1-25].

Section 34 vs. Section 149 IPC – Common Intention vs. Common Object – Significant distinction between the two – Common intention requires prior meeting of minds and active participation, whereas common object pertains to mere membership of an unlawful assembly – Court finds lower courts mechanically applied Section 34 without establishing common intention [Paras 14-19].

Decision: Appeal allowed – Conviction under Sections 302, 307, and 323 IPC set aside – Appellants acquitted due to lack of evidence proving common intention and connection of weapons to crime – Appellants' bail bonds discharged [Paras 20-25].

Referred Cases:

- Virendra Singh v. State of M.P., (2010) 8 SCC 407
- Chittarmal vs. State of Rajasthan, (2003) 2 SCC 266
- Mala Singh v State of Haryana, (2019) 5 SCC 127
- Rohtas v. State of Haryana, (2021) 19 SCC 465
- Jasdeep Singh Alias Jassu vs. State of Punjab, (2022) 2 SCC 545

Representing Advocates:

Mr. Awadhesh Kumar Singh, Advocate for Appellant Nos. 1 and 3
Mr. R.K. Kapoor, Advocate for Appellant No. 2
Mr. Nachiketa Joshi, Additional Advocate General for the State

O R D E R

1. Heard Mr. Awadhesh Kumar Singh, learned counsel appearing for appellant Nos. 1 and 3. Mr. R.K. Kapoor, learned counsel appears for appellant No. 2. The State is represented by Mr. Nachiketa Joshi, learned Additional Advocate General.

2. The present appeal is filed to challenge the impugned judgment dated 23.06.2009 passed in Criminal Appeal No. 1288 of 2000 whereunder the Indore Bench of the High Court of Madhya Pradesh found the appeals to be devoid of merit and accordingly upheld the judgment of conviction passed against the appellants on 23.11.2000 in the ST No. 458 of 1998. The appellants were convicted under Section 302 read with Section 34 IPC. With the aid of Section 34 of the IPC, they were also convicted under Sections 307 and 323 of IPC and appropriate sentence for such conviction including life sentence, has been awarded against all the three accused.

3. On 17.07.1998, the FIR No. 294 of 1998 was registered at the Juni Police Station, Indore. The FIR indicated that at about 8:00 p.m. on 17.07.1998, while Mohan (PW-12) was taking food in his house, he heard commotion and saw the accused Ram Kripal with a sword in his hand, Babbu with a knife, Sanjay and Madhusudan with lathis and the fifth accused Rampratap with a sword. They asked Kishan why his brother urinated in front of their house. Although Kishan apologised for his brother's act, the accused continued to abuse him. When this was opposed, the accused Ram Kripal gave a sword

blow to ShriKishan (PW-6) which caused injuries on the chest region. At that time, Mohan, Gopal (the deceased), Murliram (PW-1) and Kanhaiyalal (PW-5) intervened. At that stage, the accused Ramprakash gave a sword blow to Gopal which caused injury near his elbow and thumb. The accused Babbu @ Omprakash gave knife blow on the stomach of Gopal. Accused Madhusudan gave a sword blow to Mohan (PW-12) on his head. The accused group also inflicted injuries on Kanhaiyalal (PW-5) and Murliram (PW-1). The incident was stated to have been witnessed by three ladies – Durgabai, Ashabai and Rekhabai.

4. On the basis of the crime that was registered under Sections 307, 294, 147, 148 and 149 of IPC, the investigation was carried out and charges were framed against the five accused for commission of offence under Sections 148, 302/149, 307/149 and 323/149 of the IPC.

5. The trial was conducted against four accused i.e., Sanjay, Madhusudan, Ram Kripal and Ramprakash. The fifth accused Babbu @ Omprakash was not part of this trial process since he was absconding.

6. The learned trial court ordered for acquittal of the accused Sanjay of all the charges. The acquittal was also ordered for the remaining three accused for the offence under Section 148 IPC. However, drawing support from the provisions of Section 34 of the IPC, all three were convicted for the offences under Sections 302, 307 and 323 respectively.

7. The above judgment of the First Additional Sessions Judge, Indore rendered on 23.11.2000 came to be affirmed on appeal by the High Court vide the impugned judgment dated 23.06.2009 leading to the present proceedings.

8. The learned counsel for the appellants would point out that the judgment of conviction cannot be sustained on account of discrepancies in the evidence of the eye-witnesses and also on account of the omission of the prosecution to connect the accused with acceptable material evidence with the crime. The appellants counsel would rely on the testimonies of PW-1, PW-2, PW-5, PW-6 and PW-12, who are said to be the eye-witnesses to point out that each of them have attributed the fatal knife injury on the deceased Gopal to Babbu @ Om Prakash. The learned counsel would also highlight that there is inconsistency on whether a lathi or a sword was used by the accused Ram Kripal and the accused Ramprakash and Madhusudan. In the FIR, sword is attributed to all three accused whereas for the accused Ramprakash, the PW-

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1, PW-5, PW-6 testified that he was wielding a lathi. Likewise, for the accused, Madhusudan, a lathi is attributed by PW-1, PW-2, PW-6 and PW-12.

9. Insofar as the accused Ram Kripal is concerned, he is stated to have caused injuries to ShriKishan (PW-6) but not to deceased. Dr. Pramender Singh Thakur (PW-14) who examined the dead body of Gopal noticed the following injuries on the deceased: -

"i) A lacerated transversed wound of 2.5 cm x 1 cm on the left side of the forehead 1 cm above the eyebrow.

ii) Contused abrasion over left side of forehead nearlateral angle of left eye 1.5 cm x 1.0 cm transversed.

iii) Contused abrasion over interior surface of leftupper arm 5 cm below shoulder up 8 cm x 2 cm.

iv) Contused abrasion over anterior surface of leftupper arm 3 cm below above mentioned upper arm 3 cm below above mentioned injury No.(iii) 2.5 cm x 0.2 cm.

v) Incised wound over lateral surface of lower 1/3rdof left upper arm, obliquely transverse 6 cm x 4 cm x 5 cm, tissues cut including bone cut at the region lower border shown bruised wound at the lower portion of the injury. Bone cut corresponding place shown wound in an area of 3.0 cm x 2.0 cm x 2.0 cm.

vi) Contusion abrasion on the left lower portion ofback 2.o cm x 1.0 cm.

vii) Contused lacerated wound on lateral surface ofleft thigh 6.0 cm above left knee, vertical 3.0 cm x 1.0 cm.

viii) Surgically stitched wound present on abdomen,vertical, extending from just below the central bone of the chest to 5.0 cm below the naval 19.0 cm x 5.0 cm abdominal contra deep. 20 stitches were present over wound. All the parts of wound were neat and clean.

ix) Incised wound on back of base of left thumb,obliquely vertical 4 cm x. 1 cm and muscle deep."

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10. According to Dr. Thakur (PW-14), the injuries 5, 7, 8 and 9 were inflicted with sharp edged weapons and the other injuries were with hard and blunt weapons. The PW-14 said that the death was the result of multiple injuries inflicted on the victim.

11. The specific case of the learned counsel for the appellants is that there is no indication by the Prosecution about which accused inflicted which injury upon the deceased. Accordingly, it is argued that unless common intention as defined under Section 34 of the IPC is proved, the conviction of the accused cannot be sustained. In support of such contention, the learned counsel would point out that the initial charge of the common object contemplated under Section 149 of the IPC, was given up by the Prosecution and therefore it is not a case of every member of the unlawful assembly being held guilty of the offence committed in pursuance of the common object. Instead, since the conviction is with the assistance of Section 34 of the IPC, the common intention of all accused is required to be proved. But in the present case, no attempt was made by the Prosecution to prove the common intention to sustain the conviction.

12. According to the learned counsel for the appellants, the trial Court framed the question relating to only common object and the issue of common intention never cropped up during the trial. Therefore, neither the Prosecution nor the defence had any occasion to address the issue of common intention under Section 34 of the IPC.

13. Another specific argument is raised on the failure of the Prosecution to connect the weapons of the offence with the crime as the recovered weapons were not subjected to any chemical test and only on the basis of visual scrutiny on the condition of the recovered weapons, the Court reached the adverse conclusion against the accused. It is then argued that all the independent witnesses PW-7 (Mukesh), PW-9 (Ashok), PW-13 (Dashrath) and PW15 (Manoj) turned hostile and the recovery of the weapons is accepted by the learned trial court only on the basis of the evidence of the IO Kailash Kumar Sharma (PW-20).

14. We have given our thoughtful consideration to thecontentions raised by the respective counsel. Before examining the facts, a reiteration of the significant distinction between “common object” and “common intention” would be apposite. Both the trial Court as well as the High Court, it is seen, had

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mechanically applied Section 34 in place of Section 149 without any discussion on this aspect. The trial court has equated "common object" with "common intention", while analyzing the role of the accused and failed to give any reasons in support of the altered conviction.

15. There is a significant distinction between Section 34 andSection 149 of IPC. Section 34 requires active participation and prior meeting of minds whereas Section 149 assigns liability merely by membership of an unlawful assembly and has a wider scope than Section 34 IPC. The Supreme Court in *Virendra Singh v. State of M.P*[1] noted the differences as under:

"46(i) Section 34 does not by itself create any specific offence, whereas Section 149 does so;

(ii) Some active participation, especially in crimeinvolving physical violence, is necessary under Section 34, but Section 149 does not require it and the liability arises by reason of mere membership of the unlawful assembly with a common object and there may be no active participation at all in preparation and commission of the crime;

(iii) Section 34 speaks of common intention, butSection 149 contemplates common object which is undoubtedly wider in its scope and amplitude than intention; and

(iv) Section 34 does not fix a minimum number ofpersons who must share the common intention, whereas Section 149 requires that there must be at least five persons who must have the same common object."

16. In *Chittarmal vs. State of Rajasthan*[2], this Court examined the distinction and similarity between Section 34 and 149 of IPC and also the circumstances when both Sections are simultaneously applicable. The Court analyzed the earlier decisions on the issue and made the following pertinent observations:-
"14. It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections

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[1] (2010) 8 SCC 407
[2] (2003) 2 SCC 266

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deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a prearranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is a substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of Section 149 is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. (See Barendra Kumar Ghosh v. King Emperor [AIR 1925 PC 1 : 26 Cri LJ 431], Mannam Venkatadari v. State of A.P. [(1971) 3 SCC 254 : 1971 SCC (Cri) 479 : AIR 1971 SC 1467], Nethala Pothuraju v. State of A.P. [(1992) 1 SCC 49 : 1992 SCC (Cri) 20 : AIR 1991 SC 2214] and Ram Tahal v. State of U.P. [(1972) 1 SCC 136 : 1972 SCC (Cri) 80 : AIR 1972 SC 254])"

17. The above position was again reiterated in *Mala Singh v State of Haryana*[3] where this Court set aside the alteration of charge from Section 302 r/w Section 149 to Section 302 r/w 34 IPC. It was noted that the evidence on record regarding charge of common object was inadequate to prove common

[3] (2019) 5 SCC 127

intention. The Supreme Court further observed that the "proof" of "common intention" is necessary to alter conviction.

18. A reference to the recent Three Judge Bench decision in*Rohtas v. State of Haryana*[4], would also aid us on the issue. It was noted that there could be shortfall of five accused needed for conviction under Section 149, due to acquittals. In such a situation, the Court has the flexibility to alter the charge and seek aid of Section 34 IPC. The Court's relevant observations are extracted: -

> "17. This does not, however, imply that courts cannot alter the charge and seek the aid of Section 34IPC (if there is common intention), or that they cannot assess whether an accused independently satisfies the ingredients of a particular offence. Sections 211 to 224 CrPC which deal with framing of charges in criminal trials, give significant flexibility to courts to alter and rectify the charges. The only controlling objective while deciding on alteration is whether the new charge would cause prejudice to the accused, say if he were to be taken by surprise or if the belated change would affect his defence strategy. [Nallapareddy Sridhar Reddy v. State of A.P., (2020) 12 SCC 467 : (2020) 4 SCC (Cri) 162, paras 16-21] The emphasis of Chapter XVII CrPC is thus to give a full and proper opportunity to the defence but at the same time to ensure that justice is not defeated by mere technicalities. Similarly, Section 386CrPC bestows even upon the appellate court such wide powers to make amendments to the charges which may have been erroneously framed earlier. Furthermore, improper, or non-framing of charge by itself is not a ground for acquittal under Section 464CrPC. It must necessarily be shown that failure of justice has been caused, in which case a retrial may be ordered. [Kantilal Chandulal Mehta v. State of Maharashtra, (1969) 3 SCC 166 : 1970 SCC (Cri) 19]"

19. While it is true that it is permissible for Courts toalter charges, it can only be done by careful analysis of evidence in the case. It is most essential to identify the ingredients of "common intention", before implicating any accused with the aid of Section 34 IPC. The existence of common intention in a given case must necessarily be established by the Prosecution with relevant evidence. The Court also has the responsibility to analyze and assess the evidence before convicting a person with the aid of Section 34 of the IPC. Importantly,

[4] (2021) 19 SCC 465

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a mere common intention *per se* may not attract Section 34 IPC without action in *furtherance of* such common intention[5].

20. In the present matter, the Court while altering the charge from Section 149 to Section 34 IPC omitted to furnish any reasons. Importantly no charge under Section 34 of the IPC was laid against the accused by the Prosecution. But when the charge under Section 149 IPC was dropped, the trial Court decided to conveniently alter the charge and with the aid of Section 34 IPC, ordered for conviction of the accused under Sections 302, 307 and 323 IPC respectively.

21. The case materials nowhere indicate that the Court intended to alter the charge and it is unlikely that the altered charge was formally framed, read out, and explained to the accused. A Court may alter or add to any charge before judgment is pronounced but when charges are altered, opportunity must be given under Section 217 of the CrPC, both to the Prosecution and the defence, to recall or re-examine witnesses in reference to such altered charges. More importantly, in case, charges are altered by the Court, reasons for the same must be recorded in the judgment.

22. In the present case, the accused could not be treated to be members of any unlawful assembly for attraction of vicarious liability for all the members of the unlawful assembly, for acts done in common object. Therefore, in order to sustain the conviction with the aid of Section 34 of the IPC, the Prosecution was required to establish common intention of the accused. Unfortunately, the common intention of the appellants was never established by the prosecution to connect them with the crime charged. Moreover, there was no discussion by the Court on the aspect of common intention.

23. As noted earlier, the deceased (Gopal) died of multiple injuries and so far as the evidence of the eye-witnesses is concerned, the accused Ram Kripal is shown to have caused injury to ShriKishan (PW-6) but not to the deceased Gopal.

24. Likewise, the Prosecution failed to establish for the other two appellants (Ramprakash and Madhusudan) as to which injury is inflicted by which accused on the deceased, which resulted in the death. In fact, in the absence of any chemical examination of the recovered lathis and swords, the

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[5] **Jasdeep Singh Alias Jassu vs. State of Punjab (2022) 2 SCC 545**

connection of the weapons with the crime is also not established. Moreover, all the recovery witnesses have turned hostile.

25. Looking at the aforenoted deficiencies in the prosecution case, we are persuaded to hold that the appellants are entitled to benefit of doubt and their conviction is unsustainable. The appeal is accordingly allowed ordering acquittal of the accused.

The appellants bail bonds stand discharged.

26. Pending application(s), if any, stand closed.

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