SHISHPAL @ SHISHU A

v.

THE STATE (NCT OF DELHI)

(Criminal Appeal No. 1053 of 2015)

JULY 11, 2022 B

[ABHAY S. OKA AND M. M. SUNDRESH, JJ.]

Penal Code, 1860 – ss.302, 34 – Murder – Victim-deceased and PW4 were standing in the queue before the liquor store – A2 (not before the Supreme Court) attacked the victim by knife while appellants-accused caught hold of victim – All accused dragged the victim from the queue of liquor and committed the offence u/s 302 r/w s.34 of IPC – Trial Court held them guilty of the offence charged and the same was confirmed by the High Court – Out of three accused two (A1 and A3) have presented the appeal – Held: Both Courts below have made reliance upon the non-cooporation on the part of the accused to undergo the test identification parade by drawing an adverse inference – However, the prosecution witness had already been exposed to the accused in the police station, furthermore, test identification parade is only a part of investigation and not much role can be attributed to it – Prosecution does not have adequate material to fasten the liability as per s.34 of IPC on the accused persons – Version of prosecution may not be correct and thus cannot be relied on fully – Prosecution failed to establish the case beyond reasonable doubt – Conviction set aside. C D E

Allowing the appeals, the Court F

HELD: This Court is unable to come to the conclusion that the conviction rendered by both the Courts can be sustained in the eye of law. Both the Courts made reliance upon the non-cooperation on the part of the accused to undergo the test identification parade by drawing an adverse inference. Unfortunately, the evidence available on record was not looked into as the witnesses had already been exposed to the accused in the police station. After all, the test identification parade is only a part of an investigation, and therefore, nothing more can be attached to it. It is the duty of the prosecution to prove its case G H

beyond reasonable doubt. Both the Courts have fixed the onus on the accused. The High Court after seriously doubting the evidence of PW1 should have extended the benefit of doubt as the evidence of PW3 ought not to have been accepted for the reasons stated above. The evidence as deposed by the prosecution witnesses itself would demonstrate that the version of the prosecution may not be correct. If the reasoning of the High Court is accepted, even then, the offence under Section 302 IPC may not be made out. However, this Court does not wish to go into the said issue as this Court believes that the prosecution has not been able to sustain the charge as against these appellants, framed under Section 302 read with Section 34 IPC. There has to be adequate material to fasten the appellants on the basis of constructive liability as Section 34 IPC is nothing but a rule of evidence. [Para 14][286-F-H; 287-A-C]

Tarseem Kumar v. Delhi Admn. **(1994) 3 Supp SCC 367;** *Rajesh Yadav and Anr. v. State of Uttar Pradesh* **2022 SCC OnLine SC 150;** *Vadivelu Thevar v. State of Madras* **[1957] SCR 981;** *Jasdeep Singh Alias Jassu v. State of Punjab* **(2022) 2 SCC 545 – relied on.**

Case Law Reference

[1957] SCR 981	**relied on**	**Para 7**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1053 of 2015.

From the Judgment and Order dated 28.05.2014 of the High Court of Delhi at New Delhi in Criminal Appeal No. 768 of 2011.

With

Criminal Appeal No. 81 of 2018.

Siddharth Yadav, Avinash Sharma, Mrs. K. Sarada Devi, Advs. for the Appellant.

Jayant K. Sud, ASG, Ms. Neela Kedar Gokhale, Rajan Kumar Chourasia, Kartik J., Randeep Sachdeva, Rajeev Wassan, Rajat Nair, Gurmeet Singh Makker, B. V. Balaram Das, Advs. for the Respondent.

The Judgment of the Court was delivered by

M. M. SUNDRESH, J.

1. These two appeals have been filed by A1 and A3 respectively to overturn the conviction sentencing them for life for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short 'IPC') by the learned Additional Sessions Judge (East) FTC: E-Court, Karkardooma Court, Delhi, as confirmed by the Division Bench of the High Court of Delhi. Of the three accused convicted, only two are before us. The overt act attributed as against these two accused on the basis of Section 34 IPC being identical, we deem it appropriate to pass a common order.

2. On 10.01.2010 at about 8.00 pm, the deceased and PW4 were standing in the queue before a liquor shop. A-2 (not before us) attacked the deceased by causing a single injury with a knife while the appellants caught hold of him. All the accused reportedly dragged the deceased from the queue of the liquor shop and committed the offence they were charged with.

3. Before the trial Court, the prosecution examined 22 witnesses as against 8 by the defence. PW1 is stated to be the wife of the deceased, though there was a candid admission that her first marriage was not dissolved legally. It is her version that all the accused came to the house of the deceased, one of them, namely, the appellant in Criminal Appeal No. 1053 of 2015 (A-1), went inside the house and made inquiries about the whereabouts of the deceased in an agitated manner. A-1 told her that he was Amit (A-2). Thereafter, they left the place, found the accused, and committed the offence. She identified A-1 as A-2. It is her further deposition that she did see A-1 and A-2 in the police station on 12.01.2010 when her statement was recorded. Though she went to the place of occurrence on being informed, she was not seen in the hospital by P.W.11, the Investigation Officer, who initiated the investigation, despite his presence in the hospital till 9.15 pm. It is her further evidence that she did make a call to the police station by using the cellphone owned by PW5, who incidentally turned hostile.

4. Though the evidence of PW1 was taken note of in favour of the prosecution by the trial court, the High Court raised serious doubts, especially with respect to the identification made with respect to A1 and A2. The High Court further held that there was no reason for the accused

to go into the house of the deceased, in which case motive has not been established.

5. PW2 is the member of the family of the deceased. He denied recording of his statement and stated that his thumb impression was taken on a blank paper by the police. With the permission of the Court, he was cross-examined by the prosecution. However, his statement that Nitin (PW4) was with him from 7.00 pm to 10.00 pm on the date of occurrence i.e. 10.01.2010 was not impeached and so also his further statement that both of them went to sleep thereafter.

6. PW3 is the sterling witness of the prosecution upon whom much reliance has been made by both the Courts. He was cross-examined by the prosecution on the only issue *qua* A-1, on his presence. This witness is a seasoned one as he has deposed at least on seven occasions in favour of the police and also admitted to have received a certain amount of money. Obviously, he is well-known to the police having a shop just opposite the police station. This part of the evidence was also not questioned by the prosecution. It is the evidence of PW3 that he saw A-2 and A-3 dragging the deceased, while A-2 has stabbed him. Thus, there was a categorical denial of the presence of A-1. Contrary to the case of the prosecution, he has stated that both the accused ran away on foot. The further testimony of this witness is that the deceased is a known pick pocket and the occurrence happened because he picked the pocket of the accused. This is also in variance with the theory projected by the prosecution. Certainly, we do not find the evidence of this witness trustworthy. He is obviously a stock witness, and therefore cannot be relied upon, particularly when "reputation is a fact" under Section 3 of the Indian Evidence Act. We believe, both the Courts ought not to have placed reliance on the testimony of PW3 who happens to be the sole eye-witness. We wish to place reliance upon the judgment of this court in ***Tarseem Kumar*** v. ***Delhi Admn., 1994 Supp (3) SCC 367*****:**

> **"18.** The only remaining circumstance to be dealt with is the alleged disclosure made by the appellant and recovery of bloodstained clothes belonging to the appellant at his instance. In view of Section 27 of the Evidence Act, there was no difficulty in accepting this evidence and to consider the same along with other circumstances if proved beyond all reasonable doubt. But the unfortunate feature of the present case, which has also been noticed by the trial court, is that many witnesses who can be said

to be the stock witnesses of the police, have been produced on behalf of the prosecution to prove important circumstances. In this background the court has to be very cautious about the investigation done by the police in this case. The circumstance regarding the recovery of the bloodstained clothes belonging to the appellant, on the disclosure made by him, has to be examined in the background of the witnesses like PW 9, PWs 8 and 30, PWs 2 and 3, on whom it is difficult to place any reliance for the reasons mentioned above. It is not possible to hold that the vital links of the prosecution case which are necessary to be proved before a finding can be recorded, that the chain of evidence is complete, have been proved beyond reasonable doubt. If the evidence of PWs 2 and 3 are rejected, then the main circumstantial evidence that the appellant was in exclusive possession of the room in question and he had got the pit dug by PWs 2 and 3 in which the dead body of the victim was found in the night of 18-10-1974, shall be deemed to have not been proved."

7. Even assuming that the testimony of PW3 can be relied upon in part, in the absence of any corroboration with any other evidence, it will be unwise to convict the appellants on that basis alone. In this connection, a reference can be made to the decision of this Court in ***Rajesh Yadav and Anr.*** v. ***State of Uttar Pradesh, 2022 SCC OnLine SC 150***, wherein the classical decision rendered by this Court in the case of ***Vadivelu Thevar*** v. ***State of Madras, 1957 SCR 981*** on the appreciation of evidence under such circumstances has been taken note of,

"Appreciation of Evidence:

20. We have already indicated different classification of evidence. While appreciating the evidence as aforesaid along with the matters attached to it, evidence can be divided into three categories broadly namely, (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. If evidence, along with matters surrounding it, makes the court believe it is wholly reliable qua an issue, it can decide its existence on a degree of probability. Similar is the case where evidence is not believable. When evidence produced is neither wholly reliable nor wholly unreliable, it might require corroboration, and in such a case, court can also take note of the contradictions available in other matters. The aforesaid principle of law has been enunciated in the celebrated

A decision of this Court in Vadivelu Thevar v. State of Madras, 1957 SCR 981:

> "In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section
B 134 of the Indian Evidence Act has categorically laid it down that "no particular number of witnesses shall in any case, be required for the proof of any fact". The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact to call any particular number of witnesses. In England,
C both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in Sarkar's Law of Evidence — 9th Edn., at pp. 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions
D to the general rule recognized in s.134 quoted above. The section enshrines the well-recognized maxim that "Evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to
E be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only
F could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such
G a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses
H may be forthcoming to testify to the truth of the case for the

prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way — it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court, equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have, therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution."

A 8. PW4 is the minor brother of the deceased. The evidence of PW2, as discussed by us, is in stark contrast to the present witness. Even otherwise, this witness is not an eye-witness. His presence is also doubtful for the reason that even he was not seen in the hospital by PW11, the police officer who started the investigation. There is no material to substantiate the evidence that he has been threatened subsequently. B This witness goes to the extent of saying that Vipin, who is produced before the Court and shown to him, is not his real brother, though his mother admits it. We may also note that he has stated in his cross-examination that he did see A1 and A2 in the police station either on 11.01.2010 or 12.01.2010 and the police told him that it is they who killed C his brother. Suffice it to state that the evidence of this witness does not inspire confidence.

9. PW5 is the witness whose cellphone was used to make a call to the police station. He has deposed that after two to three months, his signatures were obtained on a blank paper and thus, he was declared D hostile. It is to be noted that PW5 also denies the presence of PW1 at the place of occurrence and so also PW4.

10. PW6 is the brother of A1. It is his car which is stated to have been used by the accused, who fled away by travelling in the said vehicle after the occurrence. He too turned hostile and in any case, the evidence E of PW3 itself is contrary to the case of the prosecution, as it is his evidence that they ran away on foot.

11. PW11 is the Investigating Officer who began the investigation. This witness, as stated earlier, has not seen any of the relatives of the deceased, including PWs 1, 2 and 4 in the hospital, despite his presence F in the hospital from 8.50 pm to 9.15 pm. Not only that, he has initially deposed even in his chief-examination, that the eye-witness was one Tirath Ram, father of PW3. Though this witness is part of the investigation, the evidence rendered actually helps the case of the defence, notwithstanding his re-examination by the prosecution through which he changed his version that it was PW3 who was the eye-witness.

G 12. PW20 is the Investigating Officer, who took up the investigation from PW11. He along with PW9 speaks about the recovery made in pursuance of the arrest of A1 and A2. No independent witness was made to sign the recovery *mahazar*. We are conscious of the fact that law does not require such a procedure to be adopted at all times. However,

H

the strong suspicion is due to the fact that the knife used by A2 was recovered from the place of A1 and both of them were taken to the place on their statement made under Section 27 of the Indian Evidence Act. Thus, the so called recovery raises a serious doubt, inuring to the benefit of the defence.

13. Both the appellants have been charged only based upon the rule of evidence available under Section 34 of the IPC. 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 alias Jassu*** v. ***State of Punjab, (2022) 2 SCC 545*** this Court considered the scope of Section 34 IPC as follows:

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

Old Section 34 IPC	New Section 34 IPC
"***34. Each of several persons liable for an act done by all, in like 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"	"3***4. Acts done by several persons in furtherance of common intention.***—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."

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 34 IPC, 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

A 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 34 IPC, a peep at Section 33 IPC may give a better understanding. Section 33 IPC brings into its fold a series of acts as that of a single one. Therefore, in order to attract Sections 34 to 39 IPC, 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 34 IPC 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 34 IPC 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 34 IPC 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 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.

A 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
B 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
C 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 34 IPC. A mere common intention per se may not attract Section 34 IPC, sans an action in furtherance. There may also be cases where
D 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 34 IPC are present at the commission of the
E 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
F plea in a case where adequate evidence is available before the court."

14. Applying the said principles, we are unable to come to the conclusion that the conviction rendered by both the Courts can be sustained in the eye of law. Both the Courts made reliance upon the
G non-cooperation on the part of the accused to undergo the test identification parade by drawing an adverse inference. Unfortunately, the evidence available on record was not looked into as the witnesses had already been exposed to the accused in the police station. After all, the test identification parade is only a part of an investigation, and therefore, nothing more can be attached to it. It is the duty of the prosecution to
H prove its case beyond reasonable doubt. Both the Courts have fixed the

onus on the accused. The High Court after seriously doubting the evidence of PW1 should have extended the benefit of doubt as the evidence of PW3 ought not to have been accepted for the reasons stated above. The evidence as deposed by the prosecution witnesses itself would demonstrate that the version of the prosecution may not be correct. If the reasoning of the High Court is accepted, even then, the offence under Section 302 IPC may not be made out. However, we do not wish to go into the said issue as we believe that the prosecution has not been able to sustain the charge as against these appellants, framed under Section 302 read with Section 34 IPC. There has to be adequate material to fasten the appellants on the basis of constructive liability as Section 34 IPC is nothing but a rule of evidence.

15. On the above analysis, we are inclined to set aside the conviction rendered by the learned Additional Sessions Judge (East) FTC: E-Court, Karkardooma Court, Delhi as confirmed by the Division Bench of the High Court of Delhi. The appeals stand allowed and the appellants are directed to be set at liberty.

Ankit Gyan
(Assisted by : Aarsh Choudhary, LCRA)

Appeals allowed.