Girija Shankar vs State Of U.P on 4 February, 2004

Equivalent citations: AIR 2004 SUPREME COURT 1808, 2004 (3) SCC 793, 2004 AIR SCW 810, 2004 ALL. L. J. 683, 2004 (1) ACE 736, (2004) 15 ALLINDCAS 79 (SC), 2004 (2) SRJ 316, 2004 (2) SLT 231, (2004) 2 JT 140 (SC), (2005) 2 PAT LJR 308, (2004) 18 INDLD 305, (2004) 1 SUPREME 876, (2004) 1 CRIMES 337, (2004) 1 ALLCRIR 732, (2004) 2 ALLCRILR 273, (2004) 48 ALLCRIC 758, (2004) 1 CURCRIR 323, (2004) 1 RECCRIR 839, (2004) 27 OCR 676, (2004) 2 SCALE 205, (2004) 1 UC 444, 2004 SCC (CRI) 863, (2004) 2 EASTCRIC 379, (2004) 1 CHANDCRIC 277, 2004 (1) ANDHLT(CRI) 292 SC

Author: Arijit Pasayat

Bench: Doraiswamy Raju, Arijit Pasayat

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           CASE NO.:
Appeal (crl.)  1034 of 1997

PETITIONER:
Girija Shankar

RESPONDENT:
State of U.P.

DATE OF JUDGMENT: 04/02/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:
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J U D G M E N T ARIJIT PASAYAT,J.

The appellant questions his conviction for offence punishable under Section 302 read with Section 34, Section 307 read with Section 34 and Section 394 of the Indian Penal Code, 1860 (in short 'the IPC').

Trial Court had convicted the appellant and 3 others who faced trial with him for the offences relatable to Sections 302 and 307 read with Section 34; and Section 394 IPC. Each was sentenced to undergo imprisonment for life for the first offence and for the other two offences 5 years imprisonment on each count. All the four accused persons preferred appeal before the High Court. During pendency of the appeal before the High Court two of them, namely, Iqbal Sankar and Jungli (A-3 and A-4 respectively) died and the appeal stood abated so far as they are concerned. The conviction and sentence were maintained so far as the appellant and A-1 Devi Shankar are

concerned. It is pointed out that the SLP filed by A-1 Devi Shankar has been dismissed by this Court.

Prosecution version and the stand taken by the accused during trial are essentially as follows:

> Arun Singh, H.P. Tewari (PWs 1, 3 respectively) and the deceased were coming after seeing the fair at Bhuvreshwar and were going back to their village. On the way, near the village Bhawalia at about 7.30 p.m. when the sun had set, they felt the need to some Bedi and went to purchase it. The weather was cloudy and there was drizzling. They entered in village and purchased the Bedi from a shop and decided not to go further to their village, as it was dark and rain had started falling, they decided to stay at the house of Raj Bahadur Singh (PW-5), whom (PW-3) claimed to know.
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> In the meantime, the accused persons saw them and thought they are criminals. They shouted that being notorious should be beaten. The deceased and PWs 1, 3, and 5 replied that they were innocent villagers and had decided to stay in the house of PW-5 because of rain. So, saying they proceeded towards the (PW-5). After they had gone few steps, suddenly A-1 fired two shots, one of which hit the deceased and other hit PW-3. When PWs 1 and 3 and the deceased shouted, many villagers including PW-5 came there. There was exchange of hot words and A-2, A-3 and A-4 assaulted PW-
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> 3. A-3 removed gold ring and watch of the deceased. The gun of Harihar Prasad Tewari (PW-3) was snatched away by A and it was deposited next day in the police station.

Seven witnesses were examined to further the prosecution version. Three of them i.e. Arun Singh (PW-1), H.P. Tewari (PW-3) and R.B. Singh (PW-5) claimed to be eyewitnesses. The Trial Court found the evidence of the eyewitnesses to be credible, cogent and accordingly convicted and sentenced as noted above. The High Court did not find any infirmity in the conclusions of the Trial Court to warrant interference.

In support of the appeal, learned counsel for the appellant submitted that no role has been ascribed to the appellant so far as death of deceased is concerned. It is the prosecution case itself, that appellant and the two accused persons who have died during appeal before High Court assaulted only PW-3 with lathies. Devi Shankar fired shots one of which hit the deceased, and the other PW-3. So far as accusations relating to Section 394 IPC are concerned, there is no evidence that the appellant snatched gun of PW-3 or in any manner facilitated snatching. Even the snatching of the ring is attributed to somebody else. In any event, Section 34 would have no application to the case at hand.

Per contra, learned counsel for the State submitted that all the four accused persons questioned the propriety of the presence of the deceased and the eyewitnesses in the village in the dark and thinking that they were persons of ill-repute who had come to the village for the purpose of decoity, they were assaulted. Therefore, Section 34 was clearly applicable. Similar, was the submission

respect of snatching of the gun from PW-3 which was deposited with the police on 25.9.1978 i.e. the day following the day of occurrence.

It is noticed that neither the Trial Court nor the High Court assigned any reason for applying Section 34 IPC. On surmises and conjectures, it was observed by the Trial court that though there was no direct evidence showing pre-concert or earlier meeting of mind, the possibility of it having developed at the spot cannot be ruled out. For coming to such conclusion, there was neither any direct or circumstantial evidence. So far as the High Court is concerned, it appears that no definite finding has been recorded. The specific plea of the accused-appellant before it that Section 34 is not applicable.

Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true concept of Section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab (AIR 1977 SC 109), the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

The Section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in Ch. Pulla Reddy and Ors. v. State of Andhra Pradesh (AIR 1993 SC 1899), Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.

The evidence on record does not show that the accused persons shared the common intention to kill the deceased. It is accepted that the first reaction after questioning the deceased and PWs 1 and 2 was that they were criminals, notorious and should be beaten. No further act is attributed. They even did not chase them. It is also accepted that after they had gone some distance A-1 fired the gun twice. It appears from the evidence of PWs 1 and 3 that A-1 was also armed with lathi. There is no evidence to show that other accused persons were aware that he was also carrying a gun or that he intended to use it. The Trial Court having accepted that there was no evidence of any type to show pre-concert came to a hypothetical conclusion that it may have developed at the spot. There is no material to support the conclusion. The High Court unfortunately did not specifically deal with this aspect. The inevitable conclusion is that the appellant cannot be convicted in terms of Section 302 read with Section 34 IPC.

That brings us to the question regarding the legality of conviction under Section 307 IPC read with Section 34 IPC. PW-3 has sustained, as noted in the injury report, serious injuries on different parts of his body. It has been established by the evidence of PW-3; an injured witness and other eyewitnesses that he was assaulted by the appellant and the other accused persons. Learned counsel for the appellant submitted that the injuries which can be attributed to the appellant were not of very serious nature, and the most serious injury was the one which PW-3 sustained on account of the firing by A-1. We find that PW-3 had sustained 11 injuries. Though injury no.1 was attributed to fire arm, there were two other injuries which were considered to be very serious.

Section 307, IPC reads :

> "Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned."

To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

This position was highlighted in State of Maharashtra v. Balram Bama Patil and Ors. (1983 (2) SCC 28).

When the factual background is considered in the background of true ambit of Section 307, the inevitable conclusion is that the appellant has been rightly convicted under Section 307 read with Section 34 IPC.

Coming to the question whether Section 394 would have any application to the facts of the case, it is an admitted case of the prosecution that the snatching of the gun and the other articles were not attributed to the appellant and also Section 34 was not pressed into service for the accusations. That being so, the conviction under Section 394 IPC so far as the appellant is concerned cannot be maintained. The conviction is accordingly set aside.

In the ultimate, conviction under Section 307 read with Section 34 IPC and sentence imposed by Trial Court and affirmed by High Court need no interference and are confirmed.

Appeal is allowed to the extent indicated above.