Krishna Murthy @ Gunodu vs The State Of Karnataka on 16 February, 2022

Author: Sanjiv Khanna

Bench: Bela M. Trivedi, Sanjiv Khanna

REPORT

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 288 OF 2022
(ARISING OUT OF SPECIAL LEAVE PETITION (CRL.) NO. 6893 OF 2021)

KRISHNAMURTHY @ GUNODU AND OTHERS ... APPELL

VERSUS

STATE OF KARNATAKA ... RESPOND

JUDGMENT

SANJIV KHANNA, J.

Leave granted.

2. This appeal by Krishnamurthy (also described as Krishna Murthy), Gopala and Thimmappa takes exception to the judgment dated 20th February 2021 passed in Criminal Appeal No. 200147 of 2017, whereby the Division Bench of the High Court of Karnataka, Kalaburagi Bench, has affirmed their conviction under Section 302 read with Section 34 and individually for the offences under Sections 447, 504, 506 and 341 of the Indian Penal Code, 1860 (for short, 'IPC').

3. Having examined the evidence in detail, we agree that Krishnamurthy has been rightly convicted under the aforesaid Sections, including Section 302 of the IPC. Testimonies of Channamma (PW-1), Ramanjaneya (PW-4), Dullaiah (PW-6) and Dodda Narasimha (PW-7), all eyewitnesses, implicate Krishnamurthy as the perpetrator who had assaulted the deceased-Venkatarama after he had fallen down. In view of our analysis of the testimonies in the ensuing paragraphs, we have reservations in entirely relying upon the depositions of Dullaiah (PW-6) and Dodda Narasimha (PW-7). But we have no reservation in accepting the depositions of Channamma (PW-1) and Ramanjaneya (PW-4) implicating Krishnamurthy. We have subsequently reproduced the relevant portions of their depositions. Suffice at this stage is to aver that the specific acts attributed to Krishnamurthy are that after Venkatarama had fallen- down, he had kicked and assaulted him on the neck with his legs and

hands. The version on the role of Krishnamurthy deposed by Channamma (PW-1) and Ramanjaneya (PW-4) gets corroboration from the Post-Mortem Report (Exhibit P-6) and the deposition of Dr. Sharanabasava (PW-9) who had conducted the post-mortem. Venkatarama had suffered abraded contusion of reddish blue colour on the neck area and abraded contusion reddish in colour on the left side of the chest. Internal dissection had revealed profuse bleeding over the muscles of the neck surrounding the arteries that were ruptured. The left side ribs 4, 5, 6 and 7 were fractured. The utral part of the stemum was broken into two pieces. The spinal cord at the level of C-5, C-6 and C-7 was contused, edematous and elongated. The cause of death was opined as haemorrhagic shock as a result of multiple injuries.

4. The assault by Krishnamurthy, who though not armed with any weapon, was fearsome, brutal and cruel. He had pinned down and tromped Venkatarama using his legs and hands fracturing four ribs, contusing, and injuring the spinal cord, the chest, and the neck of the deceased. Given that the injuries caused were intended, third limb of Section 300 IPC would get attracted. The post mortem report and deposition of Dr. Sharanabasava (PW-9) prove the cause of death on account of injuries caused in the chest region, asphyxia, and facture of bones. The death was instantaneous, as has been deposed by Channamma (PW-1) and Ramanjaneya (PW-4). The injuries were sufficient in ordinary course of nature to have caused death. The death of Venkatarama is homicidal as a result and direct consequence of the injuries inflicted by Krishnamurthy.

5. This brings us to the role and acts of Gopala and Thimmappa and whether they can be individually convicted for murder of Venkatarama. We begin by referring to the depositions of Dullaiah (PW-6) and Dodda Narasimha (PW-7), which are verbatim identical, and, therefore, the suspicion that the said witnesses were prompted. However, we would not doubt their presence at the place of occurrence as their presence was natural, they being farmers who were undertaking cultivation in the adjacent fields. On the actual occurrence they both have deposed:

> "While on my way, Venkatarama, his wife, and their son Ramanjineya (sic) were in the land on Gangawara road. Then, accused Thimmappa, 'A' (identity suppressed being a juvenile) were holding Venkataramana's (sic) hands. Accused Gopala was pulling down Venkataramana's (sic) legs and as such he fell down on his back. Then, Gopala, Krishnamurthy assaulted with hands, kicked with legs and attacked with their hands when Venkataramana (sic) had fallen down. At that time, I along with Ramanjineya (sic), Dodda Narasimhalu were present. We did not try to save hence since accused had threatened us not to go near them." Dullaiah (PW-6) and Dodda Narasimha (PW-7) in their cross-examination had vacillated and hesitantly accepted that they did not know as to who amongst the accused 'A' and Thimmappa had held the hands of the deceased and which one had pulled the legs of the deceased making him fall down. They testified that the accused 'Venkatarama' kicked with both legs and assaulted with hands. This statement is erroneous and could well be a typographical error as Venkatarama was the deceased and not an accused. However, it appears from the depositions that one of the accused had kicked with both legs and assaulted the deceased with his hands, a fact affirmatively deposed to by Channamma (PW-1) and Ramanjaneya (PW-4).

6. Channamma (PW-1), in her examination in chief on the occurrence and the acts and role of the accused, has deposed:

> "Accused No.3 Thimmappa and accused No.4 'A' twisted back my husband's both hands and held them. Accused No.2 Gopala pulled my husband down through his leg. Accused No.1 Krishnamurthy stamped my husband's neck with his left leg and jumped upon it." In her cross-examination she denied the suggestion that Thimmappa and 'A', had neither twisted nor held the hands of her husband and Gopala had not pulled him down with his legs. She has also denied that Krishnamurthy had not jumped on her husband's legs and stomped with his legs.
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> Ramanjaneya (PW-4), about twelve years old when his evidence was recorded, avers that he along with his mother and father were at their farm land harvesting and piling up Sajje crop.
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> At about noon, the four accused came to the spot and had threatened their father who had tried to run away. Thereupon:
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> "All the four of them chased him and accused Thimmappa and 'A' held both hands of my father. Accused Gopala held both legs of my father and pulled him. Then, my father pleaded and fell down with his head down. Accused Krishnamurthy kicked with his hands and legs and assaulted heavily on the neck. At that time, when my mother went ahead to save him, all the accused persons threatened to do away with our lives. Then, afraid by the same, we did not go ahead. Accused Thimmappa told that, my father is dead and left and went away."

7. We would accept the versions given by Channamma (PW-1) and Ramanjaneya (PW-4), albeit record that there could be some minor exaggerations. However, what is clearly discernible, and which all eyewitnesses including Dullaiah (PW-6) and Dodda Narasimha (PW-7) accept, is that the accused were unarmed and they did not even have a stick with them. This indicates absence of a premediated attack to murder Venkatarama. Further, the roles attributed to Thimmappa and Gopala are different from the brutal assault leashed by Krishnamurthy after Venkatarama had fallen down. Roles of Thimmappa and 'A', as per the versions given by Channamma (PW-1) and Ramanjaneya (PW-4), were limited to holding and twisting the hands of Venkatarama. Gopala had pulled down the deceased by holding his legs. As per Dullaiah (PW-6) and Dodda Narasimha (PW-7), Gopala and Krishnamurthy had then assaulted Venkatarama, but as per the versions of Channamma (PW-1) and Ramanjaneya (PW-4), only Krishnamurthy had assaulted and not Gopala. All of them in unison state that Thimmappa had not participated in the assault after Venkatarama had fallen down. Given the above discrepancy and for reasons recorded above casting doubt on the versions given by Dullaiah (PW-6) and Dodda Narasimha (PW-7), we accept that it was Krishnamurthy alone who had swung into action, kicked and assaulted the deceased with his hands and legs and stomped with his left leg on his neck. He had also jumped on his chest. The post mortem report and the deposition of Dr. Sharanabasava (PW-9) have attributed the death of the deceased on account of injuries caused by Krishnamurthy. The deceased had not suffered any

fracture on his hands, arms or legs. Thus, we accept that Thimmappa and Gopala had not assaulted Venkatarama after he had fallen down and were not responsible for the injuries suffered by Venkatarama resulting in his death.

8. The underlying basic assumption or foundation in criminal law is the principle of personal culpability. A person is criminally responsible for act or transactions in which he is personally engaged or in some other way had participated. However, there are various modes and capacities in which a person can participate in a crime. He can instigate, be a facilitator or otherwise aid execution of a crime. Section 34 IPC incorporates the principle of shared intent, that is, common design between the two perpetrators, which makes the second or other participants also an equal or joint perpetrator as the main or principal perpetrator1. The question which arises is whether Thimmappa 1 We have used the said terms for want of a better phrase. Section 34 IPC does not postulate such distinction and Gopala can be attributed common intention under Section 34 IPC to commit murder under Section 300 or even offence under Section 304 IPC.

9. In Suresh and Another v. State of Uttar Pradesh,2 R.P. Sethi, J.

in his concurring judgment (for himself and B.N. Agarwal, J.) on the question of common intention has observed:

> "38. Section 34 of the Penal Code, 1860 recognises the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.
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> 39. The dominant feature for attracting Section 34 of the Penal Code, 1860 (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the 2 (2001) 3 SCC 673 ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

> 40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code.

The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in SatrughanPatar v. Emperor held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied."

10. Appropriate at this stage would be reference to an earlier decision of this Court in Afrahim Sheikh and Others v. State of West Bengal3, which referred to with approval the following quote on the expression "act" explained by Judicial Commissioner in Barendra Kumar Ghosh v. The King-Emperor4:

> 3 AIR 1964 SC 1263 4 ILR (1925) 52 Cal. 197 "criminal act means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone i.e. a criminal offence".

This "criminal act" under Section 34 IPC, it was held, applies where a criminal act is done by several persons in furtherance of common intention of all. The criminal offence is the final result or outcome but it may be through achievement of individual or several criminal acts. Each individual act may not constitute or result in the final offence. When a person is assaulted by a number of accused, the "ultimate criminal act" normally will constitute the offence which finally results or which may result in death, simple hurt, grievous hurt, etc. This is the final result, outcome or consequence of the criminal act, that is, action or act of several persons. Each person will be responsible for his own act as stipulated in Section 38 IPC. However, Sections 34 and 35 expand the scope and stipulate that if the criminal act is a result of common intention, every person, who has committed a part of the criminal act with the common intention, will be responsible for the offence. It was accordingly held in Afrahim Sheikh and Ors. (supra) as under:

> "8. ...Provided there is common intention, the whole of the result perpetrated by several offenders, is attributable to each offender, notwithstanding that individually they may have done separate acts, diverse or similar. Applying this test to the present case, if all the appellants shared the common intention of severely beating Abdul Sheikh and some held him down and others beat him with their weapons, provided the common intention is accepted, they would all of them be responsible for the

> whole of the criminal act, that is to say, the criminal offence of culpable homicide not amounting to murder which was committed, irrespective of the part played by them. The common intention which is required by the section is not the intention which s. 299 mentions in its first part. That intention is individual to the offender unless it is shared with others by a prior concert in which case Sections 34 or 35 again come into play. Here, the common intention was to beat Abdul Sheikh, and that common intention was, as we have held above, shared by all of them. That they did diverse acts would ordinarily make their responsibility individual for their own acts, but because of the common intention, they would be responsible for the total effect that they produced if any of the three conditions in s. 299, I.P.C. applied to their case. If it were a case of the first two conditions, the matter is simple. They speak of intention and s. 34 also speaks of intention.
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> 9. The question is whether the second part of s. 304 can be made applicable. The second part no doubt speaks of knowledge and does not refer to intention which has been segregated in the first part. But knowledge is the knowledge of the likelihood of death.

Can it be said that when three or four persons start beating a man with heavy lathis, each hitting his blow with the common intention of severely beating him and each possessing the knowledge that death was the likely result of the beating, the requirements of s. 304, Part II are not satisfied in the case of each of them? If it could be said that knowledge of this type was possible in the case of each one of the appellants, there is no reason why s. 304, Part II cannot be read with s. 34. The common intention is with regard to the criminal act, i.e., the act of beating. If the result of the beating is the death of the victim, and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act, i.e., beating, there is no reason why s. 34 or s. 35 should not be read with the second part of s. 304 to make each liable individually."

11. Accordingly, to attract applicability of Section 34 IPC, the prosecution is under an obligation to establish that there existed a common intention before a person can be vicariously convicted for the criminal act of another. The ultimate act should be done in furtherance of common intention. Common intention requires a pre-arranged plan, which can be even formed at the spur of the moment or simultaneously just before or even during the attack. For proving common intention, the prosecution can rely upon direct proof of prior concert or circumstances which necessarily lead to that inference. However, incriminating facts must be incompatible with the innocence of the accused and incapable of explanation by any other reasonable hypothesis. By Section 33 of IPC, a criminal act in Section 34 IPC includes omission to act. Thus, a co-perpetrator who has done nothing but has stood outside the door, while the offence was committed, may be liable for the offence since in crimes as in other things "they also serve who only stand and wait". Thus, common intention or crime sharing may be by an overt or covert act, by active presence or at distant location but there should be a measure of jointness in the commission of the act. Even a person not doing a particular act but only standing as a guard to prevent any prospective aid to the victim may be guilty of common intention. 5 Normally, however, in a 5 See Tukaram Ganpat Pandare v. State of Maharashtra, (1974) 4 SCC 544 case of offence involving physical violence, physical presence at the

place of actual commission is considered to be safe for conviction but it may not be mandatory when pre-arranged plan is proved and established beyond doubt. Facilitation in execution of the common design may be possible from a distance and can tantamount to actual participation in the criminal act. The essence and proof that there was simultaneous consensus of mind of co- participants in the criminal action is however, mandatory and essential.6 In Krishnan and Another v. State of Kerala,7 it has been observed that an overt act is not a requirement of law for Section 34 IPC to operate but prosecution must establish that the persons concerned shared the common intention, which can be also gathered from the proved facts.

12. In Suresh's case (supra), this Court also examined whether a passive co-perpetrator can be liable under Section 34 IPC. This case quotes with approval the following passage from the judgment of Richardson, J. in King Emperor v. Barendra Kumar Ghose8:

> "It appears to me that Section 34 regards the act done as the united act of the immediate perpetrator and his confederates present at the time and that the language used is susceptible of that meaning. The language follows a common mode of speech. In R. v.
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> 6 See Ramaswami Ayyangar v. State of Tamil Nadu, (1976) 3 SCC 779 7 (1996) 10 SCC 508 8 AIR 1924 Calcutta 257 Salmon three men had been negligently firing at a mark. One of them — it was not known which — had unfortunately killed a boy in the rear of the mark. They were all held guilty of manslaughter. Lord Coleridge, C.J., said: 'The death resulted from the action of the three and they are all liable.' Stephen, J., said: 'Firing a rifle' under such circumstances 'is a highly dangerous act, and all are responsible; for they unite to fire at the spot in question and they all omit to take any precautions whatever to prevent danger'.

Moreover, Sections 34, 35 and 37 must be read together, and the use in Section 35 of the phrase 'each of such persons who joins in the act' and in Section 37 of the phrase, 'doing any one of those acts, either singly or jointly with any other person' indicates the true meaning of Section 34. So Section 38 speaks of 'several persons engaged or concerned in a criminal act'. The different modes of expression may be puzzling but the sections must, I think, be construed as enunciating a consistent principle of liability. Otherwise the result would be chaotic.

To put it differently, an act is done by several persons when all are principals in the doing of it, and it is immaterial whether they are principals in the first degree or principals in the second degree, no distinction between the two categories being recognised.

This view of Section 34 gives it an intelligible content in conformity with general notions. The opposing view involves a distinction dependent on identity or similarity of act which, if admissible at all, is wholly foreign to the law, both civil and criminal, and leads nowhere."

13. At this stage, we would like to refer to an old judgment of a Division Bench of the Allahabad High Court in the case of Bashir v. State9, which by giving examples explains the scope and significance of

the words “in furtherance” used in Section 34 of the 9 AIR 1953 All 668 IPC in the following manner:

> “18. The use of the words “in furtherance” suggests that Section 34 is applicable also where the act actually done is not exactly the act jointly intended by the conspirators to be done, otherwise, the words would not be needed at all. The common intention can be to do one act and another act can be done in furtherance of the common intention. It may be a preliminary act necessary to be done before achieving the common intention; or it may become necessary to do it after achieving the common intention or it may be done while achieving the common intention. Going to the spot in a motor car is an act in furtherance of the common intention to commit a crime there; but if while going there the driver runs over and kills a pedestrian, the collision is merely incidental and the running aver of the pedestrian is not in furtherance of the common intention. If, however, a conspirator who wishes to commit a crime involving violence against X is impeded by Y and throws Y aside in order to get at X, the attack upon Y is made in furtherance of the common intention; see Russell on Crime, pages 557 and 558.” The aforesaid quotation emphasizes that it is essential that each co-perpetrator should have necessary intent to participate or otherwise have requisite awareness or knowledge that the offence is likely to be committed in view of the common design. It also follows that in some cases merely accompanying the principal accused may not establish common intention. A co-perpetrator, who shares a common intention, will be liable only to the extent that he intends or could or should have visualized the possibility or probability of the final act. If the final outcome or offence committed is distinctly remote and unconnected with the common intention, he would not be liable. This test obviously is fact and circumstance specific and no straitjacket universal formula can be applied. Two examples quoted in Bashir's case (supra) are relevant and explain the widest and broad boundaries of Section 34 IPC and at the same time warn that the ambit should not be extended so as to hold a person liable for remote possibilities, which were not probable and could not be envisaged. The examples also bring out the distinction between the criminal acts and the intent of a co-perpetrator; and the actual offence committed by the principal or main perpetrator.
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> 14. In Surendra Chauhan v. State of Madhya Pradesh,10 it has been observed:
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> “11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. (Ramaswami Ayyangar v. State of T.N.) The existence of a common intention can be inferred from the attending circumstances of the case and the

> conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. (Rajesh Govind Jagesha v. State of Maharashtra) To

10 (2000) 4 SCC 110 apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established : (i) common intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

15. In Mithu Singh v. State of Punjab,11 this Court acquitted Mithu Singh under Section 302 read with Section 34 IPC, but upheld his conviction under Section 27 of the Arms Act, 1959 observing that inference as to common intention should not be readily drawn; culpable liability can arise only if such inference can be drawn with a degree of assurance. In the facts of the said case, it was observed that the required degree of assurance was missing. At the same time, it was observed that while examining the question of common intention, the court should be conscious and aware that it is difficult, if not impossible, to collect and produce direct evidence and in most cases inference as to the intention shall be drawn from the acts and conduct of the accused and other relevant circumstances as available. The entire observation or ratio of this Court has to be kept in mind.

11 (2001) 4 SCC 193

16. In Rajesh Kumar v. State of Himachal Pradesh,12 this Court had elucidated and laid down the following principles as applicable to Section 34 IPC:

> "13. 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 contents of the Section are 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." After referring to the facts in Rajesh Kumar (supra), the 12 (2008) 15 SCC 705 conviction was converted from Section 302 IPC to one under Section 326 IPC highlighting the factual position that the accused in question had assaulted the victim by a danda on a non-vital part.

17. In Arun v. State by Inspector of Police, Tamil Nadu,13 reference was made to the decision in Hardev Singh and Another v. State of Punjab14 and benefit was given to one of the accused as he did not act conjointly with others in committing the murder. This Court referred to Dharam Pal and Others v. State of Haryana,15 on the test which should be applied to invoke and convict a co-accused under Section 34 IPC. We also deem it appropriate to reproduce the said test:

> "14. It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf.
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> 15. A criminal court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person 13 (2008) 15 SCC 501 14 (1975) 3 SCC 731 15 (1978) 4 SCC 440 accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender."

18. Section 34 IPC makes a co-perpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section 34 to apply there should be common intention between the co-perpetrators, which means that there should be community of purpose and common design or pre-arranged plan. However, this does not mean that co-perpetrators should have engaged in any discussion, agreement or valuation. For Section 34 to apply, it is not necessary that the plan should be pre-arranged or hatched for a considerable time before the criminal act is performed. Common

intention can be formed just a minute before the actual act happens. Common intention is necessarily a psychological fact as it requires prior meeting of minds. In such cases, direct evidence normally will not be available and in most cases, whether or not there exists a common intention has to be determined by drawing inference from the facts proved. This requires an inquiry into the antecedents, conduct of the co- participants or perpetrators at the time and after the occurrence.

The manner in which the accused arrived, mounted the attack, nature and type of injuries inflicted, the weapon used, conduct or acts of the co-assailants/perpetrators, object and purpose behind the occurrence or the attack etc. are all relevant facts from which inference has to be drawn to arrive at a conclusion whether or not the ingredients of Section 34 IPC are satisfied. We must remember that Section 34 IPC comes into operation against the co-perpetrators because they have not committed the principal or main act, which is undertaken/performed or is attributed to the main culprit or perpetrator. Where an accused is the main or final perpetrator, resort to Section 34 IPC is not necessary as the said perpetrator is himself individually liable for having caused the injury/offence. A person is liable for his own acts. Section 34 or the principle of common intention is invoked to implicate and fasten joint liability on other co-participants. Further, the expression/term "criminal act" in Section 34 IPC refers to the physical act, which has been done by the co-perpetrators/participants as distinct from the effect, result or consequence. In other words, expression "criminal act" referred to in Section 34 IPC is different from "offence". For example, if A and B strike Lathi at X, the criminal act is of striking lathis, whereas the offence committed may be of murder, culpable homicide or simple or grievous injuries. The expression "common intention" should also not be confused with "intention" or "mens rea" as an essential ingredient of several offences under the IPC. Intention may be an ingredient of an offence and this is a personal matter. For some offences, mental intention is not a requirement but knowledge is sufficient and constitutes necessary mens rea. Section 34 IPC can be invoked for the said offence also [refer Afrahim Sheikh and Ors. (supra)]. Common intention is common design or common intent, which is akin to motive or object. It is the reason or purpose behind doing of all acts by the individual participant forming the criminal act. In some cases, intention, which is ingredient of the offence, may be identical with the common intention of the co-perpetrators, but this is not mandatory.

19. Section 34 IPC also uses the expression "act in furtherance of common intention". Therefore, in each case when Section 34 is invoked, it is necessary to examine whether the criminal offence charged was done in furtherance of the common intention of the participator. If the criminal offence is distinctly remote and unconnected with the common intention, Section 34 would not be applicable. However, if the criminal offence done or performed was attributable or was primarily connected or was a known or reasonably possible outcome of the preconcert/contemporaneous engagement or a manifestation of the mutual consent for carrying out common purpose, it will fall within the scope and ambit of the act done in furtherance of common intention. Thus, the word "furtherance" propounds a wide scope but should not be expanded beyond the intent and purpose of the statute. Russell on Crime, (10th edition page 557), while examining the word "furtherance" had stated that it refers to "the action of helping forward" and "it indicates some kind of aid or assistance producing an effect in the future" and that "any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony." An act which is extraneous to the common intention or is done in opposition to it and is not required to be

done at all for carrying out the common intention, cannot be said to be in furtherance of common intention [refer judgment of R.P. Sethi J. in Suresh (supra)].

20. When we apply the aforesaid principles relating to applicability of Section 34 IPC to the facts of the present case, we feel that Thimmappa and Gopala are entitled to the benefit of doubt on the ground that it cannot be with certainty held that they had common intention, viz. the injuries inflicted by Krishnamurthy on Venkatarama after he had fallen down. They did not participate thereafter by physically assaulting or causing any injury to Venkatarama. They did not facilitate and help Krishnamurthy in the assault he perpetuated. We have no grounds to accept that they could have preconceived the brutal assault by Krishnamurthy who had put his knees on the neck and jumped on the chest of the deceased to cause the injuries resulting in his death. We cannot hold that these two accused could have premeditated the result which ensued when Krishnamurthy behaved and acted in the manner he did. Clearly, they had not joined Krishnamurthy when he had acted and have stood by. There is nothing to indicate that their acts, that is, holding the hands and pulling the legs of the deceased making him fall down, were done in furtherance of the common intention that Krishnamurthy would thereupon put his leg on the neck of the deceased, crushed his chest and fracture the ribs. We would, in favour of the appellants Thimmappa and Gopala, hold that their acts cannot be primarily connected with the violence perpetuated by Krishnamurthy. Given the acts attributed to Thimmappa and Gopala, the assault by Krishnamurthy and the resultant outcome were unexpected. We are also not prepared to hold that these two accused should have known the final outcome, or it was known to them, or it was a reasonably possible outcome of the preconcert/ contemporaneous engagement or a manifestation of mutual consent for carrying out a common purpose. We, therefore, would not hold them guilty for the offence under Section 300 or even Section 299 of the IPC on the ground that they shared common intention as understood on application of Section 34 IPC.

21. Consequently, we convert their conviction to that under Section 323 read with Section 34 IPC and we would sentence them to the maximum sentence specified therein of one year. We also uphold the conviction of Thimmappa and Gopala for individual offences under Sections 447, 504, 506 and 341 IPC and the sentences imposed under the aforesaid Sections, which are up to three years of rigorous imprisonment and fine with default stipulations.

22. Before concluding, we would like to mention the secondary argu-

ment raised by the appellant that juvenile ‘A’ was acquitted from all the charges and hence, the appellants are entitled to acquittal on the ground of parity. This contention is to be rejected in view of Sections 40 to 44 of the Evidence Act, 1872. In particular, Section 43 states judgments other than those mentioned in Sections 40 to 42 are irrelevant unless the existence of that judgment, order or decree is a fact in issue or is relevant under some other provisions of this Act. We have decided this appeal based on the evidence adduced and led by the prosecution in the chargesheet in ques- tion. We cannot decide this appeal based on the evidence and material led by the prosecution in the proceedings against the ju-

venile 'A' which were independent and separate proceedings. Evi- dence, reasoning and findings recorded therein are not in appeal before us.

23. As Thimmappa and Gopala are on bail and have not undergone the sentence, they shall surrender within a period of one month from today. In case they do not surrender, the police will take coercive steps for their arrest to undergo the remaining sentence. The sentence awarded to Krishnamurthy would be modified to life imprisonment without any further stipulation. The direction that life imprisonment shall be till the end of natural life to imply that Krishnamurthy shall not be entitled to premature release/remission in accordance with the applicable policy is set aside. There is no reason and justification for this condition to be imposed. The sentences as awarded to the appellants will run concurrently. The appellants would be entitled to the benefit of Section 428 of the Code of Criminal Procedure, 1973.

24. The appeal is, accordingly, partly allowed in the aforesaid terms.

.....J. (SANJIV KHANNA) .....J. (BELA M. TRIVEDI) NEW DELHI;

FEBRUARY 16, 2022.