

Suresh And Anr vs State Of U.P on 2 March, 2001

Equivalent citations: AIR 2001 SUPREME COURT 1344, 2001 AIR SCW 1051, 2001 ALL. L. J. 703, 2001 (4) SRJ 183, 2001 (1) LRI 719, 2001 (3) SCC 673, 2001 CALCRILR 270, (2001) 3 JT 336 (SC), 2001 (2) UJ (SC) 961, 2001 (3) JT 336, (2001) 2 PAT LJR 155, (2001) 2 ALLCRILR 677, (2001) 2 ALLCRIR 1020, (2001) 1 CURCRIR 302, (2001) 2 SCALE 363, (2001) 2 CRIMES 108, (2001) 42 ALLCRIC 770, (2001) 2 MADLW(CRI) 695, (2001) 2 MAHLR 613, (2001) 20 OCR 666, 2001 ALLMR(CRI) 1242, (2001) 2 SUPREME 266, (2001) 2 BLJ 421, 2001 SCC (CRI) 601, (2001) 2 RECCRIR 78, (2001) 2 SCJ 481, (2001) 1 UC 678, 2001 CHANDLR(CIV&CRI) 264, (2001) 2 EASTCRIC 50, 2001 (1) ANDHLT(CRI) 198 SC

Bench: R.P. Sethi, B.N. Agrawal

CASE NO.:

Appeal (crl.) 821 of 2000

Appeal (crl.) 160 of 2001

PETITIONER:

SURESH AND ANR.

Vs.

RESPONDENT:

STATE OF U.P

DATE OF JUDGMENT: 02/03/2001

BENCH:

R.P. Sethi & B.N. Agrawal

JUDGMENT:

SETHI, J. for himself and Agrawal, J.

L...I...T.....T.....T.....T.....T.....T.....T...J We agree with the conclusions arrived at by Brother Thomas, J. in his lucid judgment.@@ JJJJJJJJJJJJJJJJJJJ However, in view of the importance of the matter, in so far as the interpretation of Section 34 of the Indian Penal Code is concerned, we have chosen to express our views in the light of consistent legal approach on the subject throughout

the period of judicial pronouncements. For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused sharing such intention.

Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the 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 pre-supposes prior concert, which requires a pre- arranged plan of the accused participating in an offence. Such a pre- concert or pre-planning 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 a spur of 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.

Dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the participation in absence resulting in the ultimate "criminal act". The "act" referred to in latter 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 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. 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 to not 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 pre-conceived result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in *Shatrughan Patar & Ors. v. Emperor* [AIR 1919 Patna 111] held that it is only when a court with some certainty hold that a particular accused must have pre-conceived or pre-meditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.

In *Barendra Kumar Ghosh vs. King Emperor* [AIR 1925 PC 1] the Judicial Committee dealt with the scope of Section 34 dealing with the acts done in furtherance of the common intention, making all equally liable for the results of all the acts of others. It was observed:

".....the words of S.34 are not to be eviscerated by reading them in this exceedingly limited sense. By S.33 a criminal act in S.34 includes a series of acts and, further, "act" includes omissions to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By S.37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'. By S.38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. S.34 deals with the doing of separate acts, similar of diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. S.37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. S.38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

(Emphasis supplied) Referring to the presumption arising out of Section 114 of the Evidence Act, the Privy Council further held:

"As to S.114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition; *Abhi Misser v. Lachmi Narain* [1900 (27) Cal.566]. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. S.114 deals with the case where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitive. Because participation *de facto* (as this case shows) may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus prior abetment can mean nothing else but participation.

The presumption raised by S.114 brings the case within the ambit of S.34.

"(Emphasis supplied) The classic case on the subject is the judgment of the Privy Council in *Mahboob Shah vs. Emperor* [AIR 1945 PC 118]. Referring to Section 34 prior to its amendment in 1870 wherein it was provided:

"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 was done by him alone."

it was noticed that by amendment, the words "in furtherance of common intention of all" were inserted after the word "persons" and before the word "each" so as to make the object of Section clear. Dealing with the scope of Section, as it exists today, it was held:

"Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intention of all' nor does it say 'an intention common to all'. Under the section, the essence of that 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. To provide the aid of S.34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from this act or conduct or other relevant circumstances of the case."

(Emphasis supplied) A Full Bench of the Patna High Court in *The King Emperor vs. Barendra Kumar Ghose* [AIR 1924 Cal. 257] which was later approved by the Privy Council dealt with the scope of Section 34 in extenso and noted its effects from all possible interpretations put by various High Courts in the country and the distinguished authors on the subject. The Court did not agree with the limited construction given by Stephen, J. in *Emperor v. Nirmal Kanta Roy* [1914 (41) Cal.1072] and held that such an interpretation, if accepted, would lead to disastrous results. Concurring with Mookerjee, J. and giving the section wider view Richardson, J. observed:

"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. Salmon* [1880 (6) QBD 79] 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:-

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.

Approving the judgments of the Privy Council in Barendra Kumar Ghose and Mahboob Shah's cases (supra) a three Judge@@ JJJ Bench of this Court in Pandurang & Ors. v. State of@@ JJJJJJJJJJJJJ Hyderabad [AIR 1955 SC 216] held that to attract the applicability of Section 34 of the Code the prosecution is under an obligation to establish that there existed a common intention which requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of all. This Court had in mind the ultimate act done in furtherance of the common intention. In the absence of a pre-arranged plan and thus a common intention even if several persons simultaneously attack a man and each one of them by having his individual intention, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section. In a case like that each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any or the other. The Court emphasised the sharing of the common intention and not the individual acts of the persons constituting the crime. Even at the cost of repetition it has to be emphasised that for proving the common intention it is necessary either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference and "incriminating facts must be incompatible with the innocence of the accused and incapable of explanation or any other reasonable hypothesis". Common intention, arising at any time prior to the criminal act, as contemplated under Section 34 of the Code, can thus be proved by circumstantial evidence.

5

In a case where the deceased was murdered by one of the two accused with a sharp edged weapon at 10.30 p.m. while he was sleeping on a cot in his house while the other accused, his brother, without taking part stood by with a spear in his hand to overcome any outside interference with the attainment of the criminal act and both the accused ran away together after the murder, this Court in *Lalai alias Dindoo & Anr. v. State of U.P.* [AIR 1974 SC 2118] held that these facts had a sufficient bearing on the existence of a common intention to murder.

In *Ramaswami Ayyangar & Ors. v. State of Tamil Nadu* [AIR 1976 SC 2027] this Court declared that Section 34 is to be read along with preceding Section 33 which makes it clear that the "act" mentioned in Section 34 includes a series of acts as a single act. The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise. Even a person not doing any particular act but only standing guard to prevent any prospective aid to the victims may be guilty of common intention. However, it is essential that in case of an offence involving physical violence it is essential for the application of Section 34 that such accused must be physically present at the actual commission of crime for the purposes of facilitating accomplishment of "criminal act" as mentioned in that section. In *Ramaswami's case* (supra) it was contended that A2 could not be held vicariously liable with the aid of Section 34 for the act of other accused on the grounds: firstly he did not physically participate in the fatal beating administered by co-accused to the deceased and thus the "criminal act" of murder was not done by all the accused within the contemplation of Section 34; and secondly the prosecution had not shown that the act of A2 in beating PW was committed in furtherance of the common intention of all the three pursuant to a pre-arranged plan. Repelling such an argument this Court held that such a contention was fallacious which could not be accepted. The presence of those who in one way or the other facilitate the execution of the common design itself tantamounts to actual participation in the "criminal act". The essence of Section 34 is simultaneously consensus of the minds of persons participating in the criminal action to bring about a particular result. Conviction of A2 under Section 302/34 of the Code in that case was upheld.

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"Question is whether it is obligatory on the part of the prosecution to establish commission of overt act to press into service section 34 of the Penal Code. It is no doubt true that court likes to know about overt act to decide whether the concerned person had shared the common intention in question. Question is whether overt act has always to be established? I am of the view that establishment of a overt act is not a requirement of law to allow section 34 to operate inasmuch this section gets attracted when "a criminal act is done by several persons in furtherance of common intention of all". What has to be, therefore, established by the prosecution is that all the concerned persons had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: *res ipsa loquitur*."

7

After referring to Mahboob Shah's case (supra) this Court in Mohan Singh & anr. vs. State of Punjab [AIR 1963 174] observed, it is now well settled that the common intention required by Section 34 is different from the same intention or similar intention. The persons having similar intention which is not the result of pre-concerted plan cannot be held guilty for the "criminal act" with the aid of Section 34. Similarly the distinction of the words used in Section 10 of the Indian Evidence

Act "in reference to their common intention" and the words used in Section 34 "in furtherance of the common intention" is significant. Whereas Section 10 of the Indian Evidence Act deals with the actions done by conspirators in reference to the common object, Section 34 of the Code deals with persons having common intention to do a criminal act.

In State through Superintendent of Police, CBI/SIT vs. Nalini & Ors. [1995 (5) SCC 253] Brother Thomas,J. in his judgment dealt with such a proposition in paras 107 and 108.

However, in this case on facts, the prosecution has not succeeded in proving that A3 Pavitri Devi shared the common intention with the other two accused persons, one of whom was her husband and the other her brother. It has come in evidence that when the witnesses reached on the spot, they found the said accused standing on the road whereas the other accused were busy committing the crime inside the house. The exaggerated version of PW3 regarding the participation of Pavitri Devi by allegedly catching hold of his mother's hair cannot be accepted as PWs 1 and 2 have not supported the aforesaid version. The High Court was, therefore, justified in holding that Pavitri Devi, A3 did not share the common intention with the other accused persons. By her mere presence near the place of occurrence at or about the time of crime in the absence of other evidence, direct or circumstantial, cannot hold her guilty with the aid of Section 34. But in case the prosecution had succeeded in proving on facts of her sharing of common intention with A1 and A2, she could not be acquitted of the charge framed against her only on the ground that she had actually not done any overt act. The appeal of the State filed against Pavitri Devi has no merit and has thus rightly been dismissed by Brother Thomas,J.