

on bicycles along with others. Abdul Barek died on the spot. Abdul Motin died in the hospital during the course of treatment the same night. Originally there were five named accused persons. Accused nos.3 and 5 have been acquitted giving them the benefit of doubt. We are not informed of any appeal preferred against their acquittals.

3. Shri Gaurav Agrawal, learned counsel for the appellants, submitted that if two of the accused have been acquitted giving them the benefit of doubt on basis of the same evidence, the conviction of the appellants is unjustified and they too are entitled to acquittal on benefit of doubt. There are several inconsistencies in the evidence of the eye witnesses P.Ws. 5, 6, 7 and 9. The occurrence had taken place after darkness had engulfed, making identification doubtful relying on the cross examination of P.W.6. P.W.1 deposed that he had been informed by Babulal and Asgar Ali that the appellants were the assailants. The prosecution has not examined either of them. The eye witnesses have deposed

of assault upon the two deceased by appellants nos.2 and 3 only. There is no allegation that appellant no.1 was armed in any manner or that he also assaulted any one of the two deceased. Thus, there is no material to infer common intention with regard to appellant no.1. Appellants nos.2 and 3 are therefore individually liable for their respective assault upon the two deceased. The recoveries attributed to the appellants has been disbelieved. It was lastly submitted that no charge had been framed under Section 34 IPC.

4. Learned counsel for the State submitted that the eye witnesses P.Ws. 5, 6, 7 and 9 are consistent with regard to the participation of the appellants in the assault. The acquittal of the two co-accused on benefit of doubt can be of no avail to the appellants in view of the nature of evidence available with regard to them. Common intention is clearly established by the fact that the appellants were armed and lay in wait for the two deceased who were accosted while

returning from the market and the assault followed leading to the death of the two.

5. We have considered the submissions on behalf of the parties. The two deceased were returning from the market accompanied by P.Ws. 5, 6, 7 and 9. They were intercepted by the appellants after which the assault followed. Abdul Barek died on the spot. The post mortem report of the deceased was conducted by P.W.8, who found the following injuries on his person:

“During post mortem examination, left leg of the deceased was found amputated at 8 cm above left ankle joint. The wound of the amputated part was incised looking of sizes 6cm. x 4cm. a clean bevelled sharp cut was seen in the both bone of the leg. The muscles, major blood vessels were also damaged through and through. The detached part was also seen with the same injury. The injury was ante mortem in nature. The other organs were found healthy.”

6. Likewise, the post mortem of Abdul Motin was done by P.W.10, who found the following injuries on his person:

“Rigor mortis present on 6th upper and lower limbs. The body was very pale, multiple sharp cuts in 6th lower limbs. The left foot was cut about 1st above the ankle joint and separate from the upper leg and was not found with body at the time of my post mortem examination.

1. Sharp cut in the lower limbs, left leg at about 1” above the ankle joint causing complete detachment of left foot from left leg. Both leg bones, skin, soft tissues and vessels were cut through causing extensive 8 haemorrhages, skin margins. All wounds were sharp and retracted. Muscles, ligaments vessels were also retracted.

2. Sharp cut right leg, about 2” in size at the anterior part at the junction of upper and middle thigh. It was obliquely placed and causing cut in the skin, cut and fracture of right tibia and medial part of calf muscle and vessels and caused bleeding.

3. Another sharp cut in middle thigh of right leg about 2” in size placed in anterior

medial part, outer skin, caused cut and fracture of right tibia, causing sufficient haemorrhage. It is also cut the calf muscles.

4. Sharp cut on the lateral side of the right ankle causing sharp cut obliquely down. It was also about 3½” in size causing about 2/3rd separation of ankle of the right foot. The skin, lower end of fibula ligaments and muscles and vessels and upper part of calcaneus bone was cut through, causing anterior haemorrhage.

All the injuries were ante mortem in nature.

Other organs were found healthy.”

7. A G.D. Entry was made at the North Lakhimpur Police Station at 09.00 PM on 05.08.2005 on oral information by P.W.1 who was the *Gaonburah*, that some unknown persons had assaulted the two deceased, one of whom died on the spot, and the other had been taken to the hospital. A formal F.I.R was lodged on 06.08.2005 at 3:15 PM by the brother of the deceased after the injured was also deceased, naming five accused including the appellants.

8. Charges were framed against the five accused under Sections 147, 341 and 302 IPC. The charge under Section 341 IPC was held not to have been proved against the accused. The Sessions Judge acquitted accused nos. 3 and 5 based on the evidence of P.W.1 and P.W.5 giving them the benefit of doubt with regard to their presence and participation. Since the number of accused persons now fell below five, conviction of the appellants followed under Section 302/34 IPC. The acquittal of the two co-accused in the facts of the case, despite the deposition of the eye witnesses, can be of no avail to the appellants in view of the consistent nature of the evidence available against them. Minor inconsistencies and contradictions in the evidence of the eye witnesses are considered inconsequential. Their evidence on all material aspects are consistent lending credibility to their eye witness account. We find no infirmity in the conviction of the appellants with the aid of Section 34. In ***Karnail Singh vs. State of Punjab***, 1954 SCR 904, it was held as follows:-

“8. ...But if the facts to be proved and the evidence to be adduced with reference to the charge under Section 149 would be the same if the charge were under Section 34, then the failure to charge the accused under Section 34 could not result in any prejudice and in such cases the substitution of Section 34 for Section 149 must be held to be a formal matter.....”

9. P.W. 1 is not an eye witness to the occurrence. The fact that both Babul Ali and Asgar Ali have not been examined by the prosecution is considered irrelevant in view of the evidence of the Investigating Officer P.W. 12 when confronted by the prosecution, he denied that P.W.1 had ever made any such statement to him during investigation.

10. P.W. 5 was an eye witness accompanying the two deceased. He deposed that there was sufficient light at the time of occurrence for identification. In his cross examination he deposed that appellant no.1 stopped the two deceased after which appellant no.2 assaulted Abdul Barek on the leg with a sharp cutting weapon. The second deceased, Abdul Motin tried to flee after he was injured by

appellant no.3, but was chased by the accused and caught near the house of Mamud Ali at which point of time the witness ran away fearing for his own safety. Later he learnt that the two persons had been deceased.

11. Similarly, P.W.6, 7 and 9 deposed that appellant no.1 stopped the deceased, appellant no 2 assaulted deceased Abdul Barek with a '*Dao*', who died on the spot. Appellant no.3 assaulted Abdul Motin and injured him. The injured tried to flee from the place of occurrence. He was chased by the accused persons and caught near the house of Mamud Ali where he was brutally assaulted. He was then dragged to the spot where Abdul Barek was lying. The injured was taken to the hospital and died the same night. The deposition of P.W.6 in his cross examination with regard to darkness affecting identification is inconsequential in view of the consistent evidence of P.Ws. 5, 7 and 9 that it was evening time after sunset but not dark, making identification in the dusk possible. In any event, it is apparent that the

parties were known to each other from before and therefore identification in the dusk cannot be doubted.

12. We therefore find no reason to doubt the presence and assault on the two deceased by appellant nos.2 & 3 to grant them acquittal on any benefit of doubt or parity with the acquitted accused, merely because no appeal has been preferred.

13. That leaves for our consideration the submission of Shri Agrawal that appellant no.1 is entitled to acquittal as he cannot be said to have shared any common intention with appellants nos.2 and 3 and who are liable for their individual acts. Common intention consists of several persons acting in unison to achieve a common purpose, though their roles may be different. The role may be active or passive is irrelevant, once common intention is established. There can hardly be any direct evidence of common intention. It is more a matter of inference to be drawn from the facts and circumstances of

a case based on the cumulative assessment of the nature of evidence available against the participants. The foundation for conviction on the basis of common intention is based on the principle of vicarious responsibility by which a person is held to be answerable for the acts of others with whom he shared the common intention. The presence of the mental element or the intention to commit the act if cogently established is sufficient for conviction, without actual participation in the assault. It is therefore not necessary that before a person is convicted on the ground of common intention, he must be actively involved in the physical activity of assault. If the nature of evidence displays a pre-arranged plan and acting in concert pursuant to the plan, common intention can be inferred. A common intention to bring about a particular result may also develop on the spot as between a number of persons deducible from the facts and circumstances of a particular case. The coming together of the accused to the place of occurrence, some or all of whom may be armed, the manner of assault, the active or passive

role played by the accused, are but only some of the materials for drawing inferences.

14. In ***Ramaswami Avyangar vs. State of T.N.***, (1976) 3

SCC 779, in order to establish common intention it was

observed as follows :-

“12.... 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, for instance, one may only stand guard to prevent any person coming to the relief of the victim, or may otherwise facilitate the execution of the common design. Such a person also commits an “act” as much as his coparticipants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of Section 34 that the person who instigates or aids the commission of the crime 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....”

15. In ***Nandu Rastogi vs. State of Bihar***, (2002) 8 SCC 9, with regard to the inference for common intention this Court observed as follows :-

“17.... They came together, and while two of them stood guard and prevented the prosecution witnesses from intervening, three of them took the deceased inside and one of them shot him dead. Thereafter they fled together. To attract Section 34 IPC it is not necessary that each one of the accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate acts, similar or diverse....”

16. In ***Surender Chauhan vs. State of Madhya Pradesh***, (2000) 4 SCC 110, it was noticed that absence of a positive act of assault was not a necessary ingredient to establish common intention observing :-

“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....”

17. A similar view was taken in ***Nand Kishore vs. State of Madhya Pradesh***, (2011) 12 SCC 120.

18. Coming to the facts of the present case, the appellant no.1 lay in wait along with the other two appellants who were armed. Appellant no.1 stopped the two deceased who were returning from the market. The assault commenced after the deceased had halted. That there was some dispute with regard to money is apparent from the evidence of the witnesses. Abdul Barek died on the spot as a result of the brutal assault. Abdul Motin was injured in the first assault upon him by appellant no.3, after which he tried to flee. Appellant no 1 along with the other accused chased him,

caught hold of him near the house of Mamud Ali where he was brutally assaulted. Abdul Motin was then dragged by the accused persons to the place where Abdul Berek lay motionless. To our mind no further evidence is required with regard to existence of common intention in appellant no.1 to commit the offence in question. We, therefore, find no reason to grant any benefit to appellant no.1 on the plea that there is no role or act of assault attributed to him, denying the existence of any common intention for that reason.

19. Resultantly, we find no reason to interfere with the conviction and sentence of the appellants. The appeal is dismissed.

.....**J.**
[R.F. NARIMAN]

.....**J.**
[NAVIN SINHA]

.....**J.**
[INDIRA BANERJEE]

NEW DELHI
SEPTEMBER 30, 2020.