2021 INSC 852

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 81 of 2021

Gulab ....**Appellant**

Versus

State of Uttar Pradesh .... **Respondent**

Signature Not Verified
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Chetan Kumar
Date: 2021.12.09
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J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

A Introduction 3

B Submissions 10

C Analysis 13

C.1 Evidence of 'interested witnesses' 13

C.2 Failure to recover the weapon and examine a ballistic expert 16

C.2 Common intention under Section 34 of the IPC 20

D Conclusion 25

A Introduction

1 This appeal arises from a judgment and order dated 19 June 2020 of the Division Bench of the High Court of Judicature at Allahabad in Criminal Appeal No 2172 of 1991. The appeal before the High Court arose from a judgment and order dated 13 November 1991 of the Sessions Judge Banda in Sessions Trial No 266 of 1990 (State Govt v. Idrish and Gulab). Idrish was convicted of an offence punishable under Section 302 of the Indian Penal Code 1860[1]. Gulab, who has moved this appeal, stands convicted under Section 302 read with Section 34 of the IPC and has been sentenced to imprisonment for life. Idrish died during the pendency of the appeal.

2 On 22 November 1989, Shabbir (PW1) submitted a written report to Police Station Mathaundh, District Banda at 10.30 pm as a consequence of which Crime Case No 78 of 1989 was registered under Sections 302 and 34 of IPC against Idrish and the appellant. The written report stated that PW-1's brother Hanifa, who was about 26 years old, was working at the place of Majeed. After work, Hanifa had proceeded to a pond nearby to wash up. PW-1 went to call Hanifa at about 5.00 pm since Hanifa's daughter had taken ill. Idrish who was armed with a 0.315 bore country-made pistol and the appellant who was armed with a lathi came from the side of the Idgaah. The appellant is alleged to have exhorted Idrish stating that the "enemy has been found", as a consequence of which Idrish fired at Hanifa. The bullet is alleged to have hit the chest of Hanifa due to which he collapsed and died.

[1] "**IPC**"

Idrish and the appellant are alleged to have fled towards the village. The written report narrated that about 5 months prior to the incident, Hanifa and Idrish had been involved in a fight and Hanifa was arraigned as an accused in the criminal case. This is alleged to be the motive for his murder. PW-1 stated that the FIR was not lodged earlier due to the fear of the accused and that the written report was lodged after the villagers had arrived. The written report was scribed on 22 November 1989 by one Shabbir Khan at the behest of PW-1. The distance between the place of occurrence and the Police Station is 11 kilometres.

3 The autopsy was conducted by PW-5 on 23 November 1989. The following injuries were noted:

> "i. Abrasion 1 cm x 1cm on the right temporal region 1 cm outer to right eye.
>
> ii. GS wound on Entry 0.8 x 0.8 cm on the front of left side chest, 7 cm below to left nipple at 7 'O' clock position. Margins Inverted, Tattooing, blackening and charring present around the wound in the area of 13 cm x9 cm.
>
> iii. GS wound of Exit 1cm x 1cm on the back of left side chest, communicating to Injury No 2, 10 cm below and medial to inferior angle of left scapula and 3 cm lateral to middle on septum heart and lung perforated. Free and clotted blood about 1 litre present in pleural cavity."

The cause of death was opined to be shock and haemorrhage as a result of ante mortem gunshot injury.

4 After the completion of the investigation, the charge sheet was submitted on 16 December 1989. The charges were framed by the Trial Judge on 4 March 1991.

Idrish was charged for an offence punishable under Section 302 while the appellant was charged under Sections 302 and 34 of the IPC.

5 The prosecution examined three eyewitnesses to prove its case: (1) PW-1 Shabbir, the elder brother of the deceased; (2) PW-2 Saddu, a cousin of the deceased; and (3) PW-3 Iddu, a relative of the deceased. On 13 November 1991, the Sessions Judge, Banda convicted Idrish of an offence punishable under Section 302 and the appellant of an offence punishable under Sections 302 and 34 of the IPC. They were sentenced to imprisonment for life. The judgment of the Sessions Judge was impugned in the appeal being Criminal Appeal No 2172/1991. Idrish died during the pendency of the appeal.

6 The following submissions were urged before the High Court in support of the appeal:

(i) There was an unexplained delay of about five and a half hours in lodging the FIR which indicates that the alleged eyewitnesses were not present at the scene of occurrence;

(ii) PWs 1, 2 and 3, the alleged eyewitnesses, were relatives of the deceased and their testimony is liable to be discarded due to contradictions in regard to their presence and the role of the appellant;

(iii) The alleged motive was against Idrish and the appellant has been falsely implicated since no overt act has been assigned to him;

(iv) The appellant has been assigned the role of exhortation which is a weak type of evidence;

(v) The daughter of the deceased was not examined during the trial or even during the investigation which would indicate that the reason for the presence of PW-1 at the spot could not be substantiated; and

(vi) The appellant deserves the benefit of doubt having regard to the "ornamental" role assigned to him.

7 The High Court held that:

(i) PW-1 is stated to have proceeded to the pond to call the deceased as his daughter was unwell;

(ii) The accused did not challenge the proximity of the pond from the house of PW-1;

(iii) PW-1 deposed at the trial that he had been informed by the brother of one Majeed that the deceased had proceeded to the pond. PW-1 was confronted with the absence of such a disclosure in his previous statement during the investigation;

(iv) Not much credence can be attached to the contradiction because PW-1 had informed PW-6, the IO, during the investigation that he had proceeded to the pond after gathering information about the whereabouts of the deceased. The logical inference was that PW-1 first proceeded to the place of Majeed where the deceased worked to inform him about the illness of his daughter. But in the meanwhile,

having come to know that the deceased had already left for the pond as was his daily routine, PW-1 went to the pond. Thus, the presence of PW-1 was established at the scene;

(v) PWs 2 and 3 had their houses near the pond and had gone to relieve themselves near the pond. While returning, they saw the appellant who was armed with a lathi exhorting Idrish who was armed with a 0.315 bore country-made pistol to eliminate the deceased, while the latter was on his upward climb near the pond;

(vi) Though the witnesses may be related to the deceased, that is not sufficient cause to discard their testimonies once their presence at the scene of occurrence was established and they were found to be credible;

(vii) PWs 2 and 3 had their houses nearby and it was not unnatural for them to proceed to the pond to answer a call of nature;

(viii) All the three eyewitnesses were *ad idem* in regard to the mode and manner in which the incident had taken place and the role of the appellant in exhorting Idrish. The presence of the witnesses was duly established as was the distance from which they witnessed the occurrence;

(ix) There was no major discrepancy in the nature of exhortation, the substance of which was that the deceased was an enemy who had to be eliminated;

(x) There was a previous enmity of the appellant with the deceased. Further, the appellant was the nephew of Idrish;

(xi) To attract a conviction with the aid of Section 34 of the IPC, the presence of the appellant with Idrish armed with a lathi and the role attributed to him of exhorting Idrish to commit the murder was sufficient;

(xii) The delay of five and a half hours in lodging the FIR was attributable to the witnesses fearing the accused, which is believable in a rural scenario. The police station was also situated at a distance of 11 kilometres. The occurrence had taken place at about 5.30 pm on a November evening at dusk and PW-1 proceeded to lodge the report at 10.30 pm only after the villagers had assembled. Hence, the delay was satisfactorily explained; and

(xiii) As regards the non-examination of the daughter of the deceased, the IO (PW-6) stated that although he had not physically inquired the girl regarding her illness, he had made inquiries that confirmed that she was ill. The testimony of the IO had not been challenged.

On the above grounds, the High Court dismissed the appeal and confirmed the judgment of the trial Judge.

8 Leave was granted on 25 January 2021. On 26 February 2021, the Court was apprised that the Advocate-on-Record who had entered an appearance on behalf of

the appellant had died on 20 February 2021. Hence a short adjournment was sought to enable the appellant to engage another Advocate-on-Record since notice had been issued on the application for bail. On 15 March 2021, this Court noted that no appearance had been entered on behalf of the appellant. Accordingly, the Supreme Court Legal Services Committee (SCLSC) was directed to engage a panel Counsel to appear on behalf of the appellant. In the meantime, the proceedings were adjourned by a period of four weeks to enable the appellant to make arrangements for being represented by a Counsel of his choice. On 12 April 2021, Mr S Mahendran, who was appointed by the SCLSC sought and was granted an adjournment to contact the appellant who was lodged in jail so as to ascertain the wishes of the appellant. On 26 July 2021, this Court noted that the office report dated 23 July 2021 indicated that the appellant would engage a Counsel through his relatives and did not wish to be represented by *amicus curiae.* Notice was directed to be issued to the appellant through the Superintendent of District Jail Banda intimating him that he would be at liberty to engage a Counsel of his choice within a period of eight weeks. The Standing Counsel for the State of Uttar Pradesh was directed to cause a copy of the notice to be served on the appellant through the Superintendent of District Jail Banda. On 6 October 2021, the Counsel appointed by the SCLSC stated that though the appellant had expressed his desire to engage his own counsel, he had not made any arrangements. The learned Counsel was therefore permitted to contact the appellant through video conferencing at the concerned jail. The Superintendent of the jail was directed to facilitate the video conferencing meeting between Mr S Mahendran and the appellant. On 17

November 2021, the hearing of the proceeding was adjourned. Despite sufficient opportunities having been granted to the appellant since 26 February 2021, no Counsel has been engaged by him and has appeared. We have accordingly heard Mr S Mahendran, the Counsel nominated by the SCLSC. We may note for clarity of the record that Mr S Mahendran has argued the case in a thorough and painstaking manner. During the course of the hearing, he has ably formulated his submissions and taken the Court through the relevant part of the evidentiary record.

B Submissions

9 We have heard Mr S Mahendran, Counsel nominated by the SCLSC for the appellant and Mr Diwakar, Additional Advocate General (AAG) with Ms Ruchira Goel, learned Counsel for the State of Uttar Pradesh.

10 Mr S Mahendran, learned Counsel appearing on behalf of the appellant submits that:

(i) PW-1 deposed that he was present at the scene of occurrence since the daughter of the deceased was ill and he was proceeding to the place of work of the deceased to inform him of the illness;

(ii) The daughter of the deceased was not examined at the trial, which casts doubt on the reason for the purported presence of PW-1;

(iii) PW-1 has been planted as a witness, which is evident from the fact that the FIR which was lodged by him was nearly five and a half hours after the incident;

(iv) PW-1 is the younger brother of the deceased while PW-2 and PW-3 are related to him. All three witnesses being interested, their testimony has to be scrutinized with caution;

(v) There are material inconsistencies in the depositions of the three purported eyewitnesses in regard to the position of the deceased when he was shot. PW-1, in his deposition, indicated that the deceased was standing. PW2 indicated that he was shot while he was sitting, while PW3 stated that the deceased was climbing from the pond;

(vi) The High Court accepted that there was a variation in the statement of the witnesses in regard to the nature of the exhortation given to Idrish by the appellant, but at the same time it relied on the evidence of PW-1, PW-2 and PW-3;

(vii) The evidence of PW-1, PW-2 and PW-3 indicates that there was prior enmity between the deceased and Idrish because of which false implication cannot be ruled out;

(viii) The appellant has been convicted under Section 34 of the IPC but the material on record does not establish a case of common intent; and

(ix) Though there was a gunshot injury, no recovery of the weapon has been made.

11 On the other hand, Mr Diwakar, learned AAG appearing on behalf of the State of Uttar Pradesh submitted that:

(i) The case rests on direct evidence and the non-examination of two witnesses is irrelevant, once the ocular evidence of PW-1, PW-2 and PW-3 who are credible eyewitnesses is accepted;

(ii) The incident took place at 5.30 pm, while the FIR was lodged at 10.30 pm on the basis of the written report. The police station was admittedly situated at a distance of 11 kilometres from the place of occurrence. There is no delay in lodging the FIR;

(iii) The FIR contains a detailed account of the nature of the incident and spells out the role which is attributed to the appellant;

(iv) PW-1, PW-2 and PW-3 are all consistent in their depositions with respect to the nature of exhortation by the appellant. During the course of cross-examination, no question was put to PW-1 to dispute his presence at the scene of occurrence nor was any question raised regarding the non-examination of the daughter of the deceased and Majeed who is alleged to have informed PW-1 of the whereabouts of the deceased; and

(v) In the course of the statement under Section 313 of the Code of Criminal Procedure 1973[2], the prior enmity with the deceased was specifically drawn to the attention of the accused.

12 On these grounds, it has been urged on behalf of the State that the finding of guilt which was arrived at by the Sessions Judge has been correctly affirmed by the High Court, warranting no interference in appeal.

13 The rival submissions will now be analysed.

C Analysis

C.1 Evidence of 'interested witnesses'

14 In order to substantiate its case, the prosecution relied upon the evidence of three eye-witnesses, PW-1 Shabbir, PW-2 Saddu and PW-3 Iddu. PW-1, who is the brother of the deceased, stated that on the day of the incident, at about 5 pm, he had proceeded to Majeed's house, where the deceased was working to inform him about the illness of his daughter. PW-1 was informed by Majeed's brother – Ahmed that the deceased had gone towards the pond where he saw the deceased. At the same time, Idrish and the appellant were proceeding to the spot from a Masjid. When the deceased stood after cleaning himself, the appellant exhorted Idrish to kill him, declaring him as an enemy. Idrish fired at Hanifa with a 0.315 bore pistol. The bullet hit him on his chest and he fell down and died on the spot. PW-1 stated that the incident was witnessed by Saddu (PW-2), Iddu (PW-3) and Lallu who were

[2] "**CrPC**"

threatened by the accused before they ran away to the village. PW-1 stated that he did not immediately visit the Police Station due to the fear of the accused and eventually lodged his report at 9:30 pm. He also deposed that there was a fight between the deceased and Idrish about five months ago in which the deceased was accused of committing an offence under Section 307 of the IPC.

15 During the course of his cross-examination, PW-1 was questioned in detail about the location of the incident and the position of the deceased when the bullet had hit him. No material inconsistency or contradiction has emerged from the evidence of the eyewitness. PW-2 – Saddu specifically deposed about the proximity of his house from the pond. He furnished a cogent reason to be present at the pond stating that he was freshening up at the pond. During his deposition, PW-2 specifically referred to the role and presence of the appellant being armed with the stick and exhorting Idrish to kill the deceased. PW-3 Iddu has, in similar terms, deposed to the place where the deceased was fired at. PW-3 stated that he was returning home after freshening up. When he reached the pond, he saw the appellant encouraging Idrish to kill the deceased, after which Idrish fired at him and the bullet hit his chest. Having carefully considered the depositions of PWs 1, 2 and 3, there is no material inconsistency regarding the nature or genesis of the incident. All the three witnesses have deposed to (i) the presence of the deceased near the pond; (ii) the presence of the appellant and Idrish at the place of occurrence; (iii) the appellant having exhorted Idrish to kill the deceased; and (iv) Idrish shooting the deceased, as a result of which he sustained an injury on the chest and collapsed on

the spot. It is well-settled in law that the mere fact that relatives of the deceased are the only witnesses is not sufficient to discredit their cogent testimonies. Recently, a two-judge Bench of this Court in **Mohd. Rojali** v. **State of Assam**,[3] reiterated the distinction between "interested" and "related" witnesses. It was held that the mere fact that the witnesses are related to the deceased does not impugn the credibility of their evidence if it is otherwise credible and cogent. Speaking for this Court, Justice M M Shantanagoudar held:

> "13. As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now well-settled that a related witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between "interested" and "related" witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused [internal citations omitted].
>
> …….
>
> 14. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in Dalip Singh v. State of Punjab [Dalip Singh v. State of Punjab, 1954 SCR 145 : AIR 1953 SC 364 : 1953 Cri LJ 1465] , wherein this Court observed: (AIR p. 366, para 26)
>
> > "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means

[3] (2019) 19 SCC 567

> unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person."
>
> 15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent...."

16 The evidence on the record has been carefully evaluated by the Sessions Judge as well as the High Court. There is no basis to discredit the presence of the three eye-witnesses and nothing has been elicited in the course of the cross-examination to doubt their presence. The non-examination of the daughter of the deceased who was allegedly unwell cannot be construed to be a circumstance that is fatal to the prosecution's case once the ocular evidence of PWs 1, 2 and 3 is consistent and credible. The nature of the injuries found to have been sustained by the deceased is consistent with the account furnished by the eyewitnesses.

C.2 Failure to recover the weapon and examine a ballistic expert

17 The deceased had sustained a gun-shot injury with a point of entry and exit. The non-recovery of the weapon of offences would therefore not discredit the case of the prosecution which has relied on the eyewitness accounts of PWs 1, 2 and 3.In **Sukhwant Singh** v. **State of Punjab**[4], Dr A S Anand (as the learned Chief Justice then was) speaking for a two-judge Bench held:

[4] (1995) 3 SCC 367

> "21. There is yet another infirmity in this case. We find that whereas an empty [*sic*] had been recovered by PW 6, ASI Raghubir Singh from the spot and a pistol along with some cartridges were seized from the possession of the appellant at the time of his arrest, yet the prosecution, for reasons best known to it, did not send the recovered empty [*sic*] and the seized pistol to the ballistic expert for examination and expert opinion. Comparison could have provided link evidence between the crime and the accused. This again is an omission on the part of the prosecution for which no explanation has been furnished either in the trial court or before us. **It hardly needs to be emphasised that in cases where injuries are caused by firearms, the opinion of the ballistic expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent**."
>
> (**emphasis supplied**)

The above extract which has been relied upon by the learned Counsel for the appellant emphasises that in a case where injury has been caused by a firearm, the opinion of the ballistic expert is of considerable importance where <u>both</u> the firearm and the crime cartridge had been recovered during the investigation. Failure to produce the expert opinion in such a case affects the creditworthiness of the prosecution case.

18 However, a three-judge Bench of this Court, in **Gurucharan Singh** v. **State of Punjab**[5], has analysed the precedents of this Court and held that examination of a ballistic expert is not an inflexible rule in every case involving use of a lethal weapon.

[5] (1963) 3 SCR 585

Speaking through Justice P B Gajendragadkar (as the learned Chief Justice then was), this Court held:

> "41. It has, however, been argued that in every case where an accused person is charged with having committed the offence of murder by a lethal weapon, it is the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which, and in the manner in which, they have been alleged to have been caused; and in support of this proposition, reliance has been placed on the decision of this Court in Mohinder Singh v. State [(1950) SCR 821] . In that case, this Court has held that where the prosecution case was that the accused shot the deceased with a gun, but it appeared likely that the injuries on the deceased were inflicted by a rifle and there was no evidence of a duly qualified expert to prove that the injuries were caused by a gun, and the nature of the injuries was also such that the shots must have been fired by more than one person and not by one person only, and there was no evidence to show that another person also shot, and the oral evidence was such which was not disinterested, the failure to examine an expert would be a serious infirmity in the prosecution case. **It would be noticed that these observations were made in a case where the prosecution evidence suffered from serious infirmities and in determining the effect of these observations, it would not be fair or reasonable to forget the facts in respect of which they came to be made. These observations do not purport to lay down an inflexible Rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. In what cases the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case.**

> Therefore, we do not think that Mr Purushottam is right in contending as a general proposition that in every case where a firearm is alleged to have been used by an accused person, in addition to the direct evidence, prosecution must lead the evidence of a ballistic expert, however good the direct evidence may be and though on the record there may be no reason to doubt the said direct evidence."
>
> (**emphasis supplied**)

19 Similarly, a two-judge Bench of this Court in **State of Punjab** v. **Jugraj Singh**[6] had noticed that surrounding circumstances in the prosecution case are sufficient to prove a death caused by a lethal weapon, without a ballistic examination of the recovered weapon. The Court, speaking through Justice R P Sethi, had noted:

> "18. In the instant case the investigating officer has categorically stated that guns seized were not in a working condition and he, in his discretion, found that no purpose would be served by sending the same to the ballistic expert for his opinion. No further question was put to the investigating officer in cross-examination to find out whether despite the guns being defective the fire pin was in order or not. In the presence of convincing evidence of two eyewitnesses and other attending circumstances we do not find that the non-examination of the expert in this case has, in any way, affected the creditworthiness of the version put forth by the eyewitnesses."

20 The present case is not one where despite the recovery of a firearm, or of the cartridge, the prosecution had failed to produce a report of the ballistic expert. Therefore, the failure to produce a report by a ballistic expert who can testify to the fatal injuries being caused by a particular weapon is not sufficient to impeach the credible evidence of the direct eye-witnesses.

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[6] (2002) 3 SCC 234

C.2 Common intention under Section 34 of the IPC

21 Section 34 of the IPC provides that:

> "34. 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."

22 The well-established principle underlying the above provisions emerges from the decision of Justice Vivian Bose in **Pandurang, Tukia and Bhillia** v. **The State of Hyderabad**[7] where it was held:

> **"**33. Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It 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 them all: Mahbub Shah v. King Emperor [72 IA 148 at 153 and 154]. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same 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 because there was no prior meeting of minds to form a pre-arranged plan. 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 of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: Barendra Kumar Ghosh v. King-Emperor [72 IA 148 at 153 and 154] and Mahbub Shah v. King-Emperor [52 IA 40 at 49] . As Their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".
>
> **34. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a**

[7] 1955 SCR (1) 1083

> **given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived.** But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose."
>
> (**emphasis supplied**)

23 In **Virendra Singh** v. **State of Madhya Pradesh**[8] , Justice Dalveer Bhandari, speaking for a two-judge Bench explained the ambit of the words "in furtherance of the common intention of all":

> "15. Ordinarily, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had the common intention to commit the offence. The words "common intention" imply a prearranged plan and acting in concert pursuant to the plan. It must be proved that the criminal act was done in concert pursuant to the prearranged plan. Common intention comes into force prior to the commission of the act in point of time, which need not be a long gap. Under this section a preconcert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of the crime showing a prearranged plan and prior concert. The common intention may develop in course of the fight but there must be clear and unimpeachable evidence to justify that inference. This has been clearly laid down by this Court in *Amrik Singh* v. *State of Punjab* [(1972) 4 SCC (N) 42 : 1972 Cri LJ 465] ."

[8] (2010) 8 SCC 407

24 Emphasizing the fundamental principles underlying Section 34, this Court held that:

(i) Section 34 does not create a distinct offence, but is a principle of constructive liability;

(ii) In order to incur a joint liability for an offence there must be a pre-arranged and pre-mediated concert between the accused persons for doing the act actually done;

(iii) There may not be a long interval between the act and the pre-meditation and the plan may be formed suddenly. In order for Section 34 to apply, it is not necessary that the prosecution must prove an act was done by a particular person; and

(iv) The provision is intended to cover cases where a number of persons act together and on the facts of the case, it is not possible for the prosecution to prove who actually committed the crime.

25 These principles have been adopted and applied in another two judge Bench decision of this Court in **Chhota Ahirwar** v. **State of Madhya Pradesh**[9]. Justice Indira Banerjee speaking for the two-judge Bench observed:

> "26. To attract Section 34 of the Penal Code, no overt act is needed on the part of the accused if they share common intention with others in respect of the ultimate criminal act, which may be done by any one of the accused sharing such intention [see *Asoke Basak* [*Asoke Basak* v. *State of Maharashtra*, (2010) 10 SCC 660 : (2011) 1 SCC (Cri) 85] , SCC p. 669]. To quote

[9] (2020) 4 SCC 126

> from the judgment of the Privy Council in the famous case of *Barendra Kumar Ghosh* [*Barendra Kumar Ghosh* v. *King Emperor*, 1924 SCC OnLine PC 49 : (1924-25) 52 IA 40 : AIR 1925 PC 1] , "they also serve who stand and wait".
>
> 27. Common intention implies acting in concert. Existence of a prearranged plan has to be proved either from the conduct of the accused, or from circumstances or from any incriminating facts. It is not enough to have the same intention independently of each other."

26 In **Dhanpal** v. **State (NCT of Delhi)**[10], the appellant had exhorted a co-accused to kill the deceased. The exhortation was not repeated by the eyewitnesses in identical terms. Further, it was also alleged that there was no neutral witness since all the eyewitnesses were related to the deceased and there was a delay in lodging the FIR. Justice Aniruddha Bose speaking for the two judge Bench of this Court observed:

> "8. There are sufficient materials, however, to establish that the three appellants had returned together to the place of occurrence and attacked the deceased victim with Dhanpal exhorting to kill Ajay. They had grappled the victim and said Kamal inflicted multiple injuries on him with the knife. On the basis of evidence disclosed, the trial court and the High Court found that there was prior meeting of minds of all the four convicts and all the three appellants had intention common with that of Kamal. On this point, the ratio of the judgment of this Court in Asif Khan v. State of Maharashtra [Asif Khan v. State of Maharashtra, (2019) 5 SCC 210 : (2019) 2 SCC (Cri) 484] is relevant. In an earlier case, Rajkishore Purohit v. State of M.P. [Rajkishore Purohit v. State of M.P., (2017) 9 SCC 483 : (2017) 3 SCC (Cri) 749] , it has been held that to establish common intention to cause murder, overt act or possession of weapons by all the accused persons is not necessary. In Richhpal Singh Meena v. Ghasi [Richhpal Singh Meena v. Ghasi, (2014) 8 SCC 918 : (2014) 6 SCC (Cri) 424] , the ratio is that in the event the nature of the assault is such that the target person is likely to die from the injuries resulting

[10] (2020)5 SCC 705

> therefrom, the accused must be deemed to have known the consequences of his act.
>
> …..
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> 11. We find the approach of the trial court and the High Court in appeal was proper in dealing with the discrepancies pointed out on behalf of the appellants. The delay in registering the FIR has been explained properly and judgment of conviction cannot fail for that reason. It is a fact that the eyewitnesses were known to the deceased and there was no neutral witness. But for that factor alone we cannot exonerate the appellants, particularly since the court of first instance and the first appellate court have already examined the evidence and given their findings in favour of prosecution. We do not find any error in the judgment of conviction and order of sentence so far as the appellants are concerned. All the three appeals are dismissed."

Recently in **Sandeep** v. **State of Haryana**[11], a two-judge Bench of this Court held that an exhortation given by an accused immediately before a co-accused fired a shot killing the deceased would prove his involvement in the crime beyond reasonable doubt. Accordingly, this Court upheld the conviction of the accused under Sections 302 and 34 of the IPC.

27 The evidence on the record clearly establishes a common intention in pursuance of which the appellant exhorted Idrish to kill the deceased. The prosecution is not required to prove that there was an elaborate plan between the accused to kill the deceased or a plan was in existence for a long time. A common intention to commit the crime is proved if the accused by their words or action indicate their assent to join in the commission of the crime. The appellant reached the spot with a lathi, along with Idrish who had a pistol. The appellant's exhortation was crucial to the commission of the crime since it was only after he made the

[11] 2021 SCC OnLine SC 642

statement that the enemy has been found, that Idrish fired the fatal shot. The role of the appellant, his presence at the spot and the nature of the exhortation have all emerged from the consistent account of the three eye-witnesses.

D Conclusion

28 In the above facts and circumstances, there is no merit in the appeal, the appeal shall accordingly stand dismissed.

29 Pending application(s), if any, shall stand disposed of.

…………………………………...............................J.
[Dr Dhananjaya Y Chandrachud]

…………………………………...............................J.
[A S Bopanna]

…………………………………...............................J.
[Vikram Nath]

New Delhi;
December 09, 2021