

AIZAZ & ORS.

v.

STATE OF U.P.

(Criminal Appeal No. 193 of 2005)

AUGUST 12, 2008

[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM  
SHARMA, JJ.]

*Penal Code, 1860:*

*s. 302 r/w s. 34 and s. 307 r/w s. 34 – Prosecution under – Of four accused – Eye-witnesses to the occurrence – Motive established – Conviction of all the accused by trial court – High Court acquitting one accused and confirming conviction of others – On appeal, held: Conviction justified – Evidence of prosecution witnesses are reliable.*

*s. 34 – Common intention – Applicability of – Held: Liability under the provision is attracted when there is participation in a criminal act in furtherance of common intention – Participation need not be physical – Mere presence at the scene of occurrence would not attract the provision – Common intention must be proved – Though common intention may develop on the spot, it must be anterior in point of time to the commission of offence showing pre-arranged plan and prior concert – Common intention is distinct from similar intention.*

*Words and Phrases – ‘Common intention’ and ‘Furtherance’ – Meaning of in the context of s. 34 IPC.*

**The three appellants-accused alongwith another co-accused faced trial for murder and attempt to murder of one person. The motive for the alleged act was that the deceased and the appellant were on inimical terms as the deceased was doing *pairvi* in a criminal case against one of the accused. The occurrence was seen by the eye-wit-**

A nesses. Trial Court convicted all the four accused u/s 302  
r/w s. 34 and u/s. 307 r/w s. 34 IPC. High Court acquitted  
A-4 while upheld the conviction of others.

B In appeal to this court appellants contended *interalia*  
that s. 34 IPC has no application so far A-2, A-3 are is con-  
cerned.

Dismissing the appeal, the Court

C HELD: 1. In view of the factual scenario in the back-  
drop of the principles of law, the appeal is sans merit. The  
evidence of PWs. 1, 2 & 3 is clear and cogent. The trial  
court and the High Court have analysed the evidence in  
great detail and have come to hold that the same has cre-  
dence and appear to be truthful. Nothing infirm could be  
D pointed out to warrant rejection of the evidence. There-  
fore the trial Court and High Court were justified in plac-  
ing reliance on the evidence of PWs. 1, 2 & 3. [Paras 5  
and 8] [22,D; 19,E-F]

E 2.1 Leading feature of Section 349 PC is the element  
of participation in action. The essence of liability under  
this Section is the existence of a common intention ani-  
mating the offenders and the participation in a criminal  
act in furtherance of the common intention. The essence  
is simultaneous consensus of the minds of persons par-  
F ticipating in the criminal action to bring about a particular  
result. [Para 6] [20,C-D]

*Ramaswami Ayyanagar and Ors. v. State of Tamil Nadu*  
AIR 1976 SC 2027 – referred to.

G 2.2 The participation need not in all cases be by  
physical presence. In offences involving physical vio-  
lence, normally presence at the scene of offence may be  
necessary, but such is not the case in respect of other  
offences when the offence consists of diverse acts which  
may be done at different times and places. The physical  
H presence at the scene of offence of the offender sought

to be rendered liable under this Section is not one of the conditions of its applicability in every case. Before a man can be held liable for acts done by another, under the provisions of this Section, it must be established that (i) there was common intention in the sense of a pre-arranged plan between the two, and (ii) the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this Section cannot apply. [Para 6] [20, D-E]

2.3 'Common intention' implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Under this Section a pre-concert 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 offence showing a pre-arranged plan and prior concert. Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bonds is often very thin, nevertheless the distinction is real and substantial, and if overlooked will result in miscarriage of justice. [Para 7] [20,G-H; 21.A-C]

*Amrit Singh and Ors. v. State of Punjab* 1972 Cr.L.J. 465 SC – relied on.

*Krishna Govind Patil v. State of Maharashtra* AIR 1963 SC 1413 – referred to.

2.4 To constitute common intention, it is necessary that intention of each one of the offenders be known to the rest of them and shared by them. The prosecution must lead evidence of facts, circumstances and conduct of the accused from which their common intention can be safely gathered. The totality of the circumstances must

A be taken into consideration in arriving at a conclusion  
 whether the accused had a common intention to commit  
 offence for which they can be convicted. The facts and  
 circumstances of cases vary and each case has to be de-  
 B act is in furtherance of the common intention is an inci-  
 dent of fact and not of law. Mere presence of a person at  
 the time of commission of an offence by his confeder-  
 ates is not, in itself sufficient to bring his case within the  
 purview of Section 34, unless community of designs is  
 C proved against him [Para 7] [21,C,D,F-G; H; 22,A]

*Magsogdan and Ors. v. State of U.P.* AIR 1988 SC 126;  
*Bhaba Nanda Barma and Ors. v. The State of Assam* AIR 1977  
 SC 2252 – relied on.

D *Malkhan and Anr. v. State of Uttar Pradesh* AIR 1975 SC  
 12; *Shankarlal Kacharabhai and Ors. v. The State of Gujarat*  
 AIR 1965 SC 1260 – referred to.

*Oxford English Dictionary*; 'Russel on Crime' 12<sup>th</sup> Edn.  
 Vol.I pp.487 – referred to.

E **Case Law Reference**

AIR 1976 SC 2027 Referred to Para 6

1972 Cr.L.J. 465 SC Relied on Para 7

F AIR 1977 SC 2252 Relied on Para 7

AIR 1988 SC 126 Relied on Para 7

AIR 1963 SC 1413 Referred to Para 7

AIR 1965 SC 1260 Referred to Para 7

G AIR 1975 SC 12 Referred to Para 7

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal  
 No. 193 of 2005

H From the final Judgment and Order dated 24.11.2003 of

the High Court of Judicature at Allahabad in Criminal Appeal A  
No. 1349 of 1981

Ratnakar Dash and J.C. Gupta, Dharm Singh and Rajesh  
for the Appellant.

T.N. Singh, Rajeev Dubey and Kamendra Mishra for the B  
Respondent.

The Judgment of the Court was delivered by

**Dr. ARIJIT PASAYAT, J.** 1. Appellants call in question le- C  
gality of the judgment rendered by a Division Bench of the  
Allahabad High Court upholding the conviction of the appellants  
for offence punishable under Section 302 of the Indian Penal  
code, 1860 (in short the 'IPC'). So far as the appellant Aizaz-  
A1 is concerned, the High Court also upheld his conviction for  
offence punishable under Section 307 read with Section 34 IPC. D  
The other two appellants were found guilty of offence punish-  
able under Section 302 read with Section 34 IPC and Section  
307 read with Section 34 IPC. It is to be noted that four persons  
faced trial. Though the learned VIIth Additional Sessions Judge,  
Meerut found A-1 to A-4 guilty, the High Court directed acquittal  
of Imlak (A-4). E

2. Background facts as projected by prosecution in a nut-  
shell are as follows:

All the four accused are inter related and they lived in vil- F  
lage Ikla Rasoolpur, police station Parichhatgarh, district Meerut.  
Informant of the case Bashir Mohammed (P.W.1) as well as  
Ismail (hereinafter referred to as the 'deceased') also lived in  
the same village. About 2½ years earlier to the date of occur-  
rence i.e. 4.11.1979 one Riazu disappeared from the village  
and could not be traced out. A case was registered at the po- G  
lice station against appellant Aizaz and others in which the de-  
ceased was doing pairvi. The appellants had asked the de-  
ceased several times not to appear as a witness in that case or  
to do pairvi of the case. Ismail did not agree to it due to which  
the appellants bore enmity with him. H

A In Ikla Rasoolpur, there is a school, namely, Deni Islami  
Madarsa. A committee consisting of villagers of Ikla Rasoolpur  
and village Khanpur used to manage the affairs of the school.  
The deceased and the informant were members of the com-  
mittee. There was some dispute regarding the post of Treas-  
urer. Therefore, a meeting was to take place on 4.11.1979 in  
B village Siyal. The appellants as well as the villagers of Ikla  
Rasoolpur knew about the said meeting. On the date of occur-  
rence, i.e. 4.11.1979 the deceased Ismail and informant Bashir  
C Mohammad started from village Ikla Rasoolpur for attending  
the meeting on a motor cycle. The deceased was driving the  
motor cycle while the informant was a pillion rider. At about 12  
noon when they reached near the field of Prakash Khazoori there  
was a turning of the road. The deceased slowed down the speed  
of the motor cycle. At that very time, all the four accused per-  
sons emerged from the field of Prakash. Appellants Aizaz,  
D Ahmad Hasan and Jan Alam who were armed with country made  
pistols fired towards the informant and the deceased on exhor-  
tation of Imlak. Imlak was armed with spear. The gun shot did  
not hit either the deceased or the informant. However, the de-  
ceased became panicky and motor cycle fell down on the road.  
E The deceased left the motor cycle and his chappal and ran from  
the field of Khairati towards the village. All the four accused per-  
sons chased him. Informant, Bashir Mohammad also ran to-  
wards them raising cry for help. After pursuing the deceased  
for about 100 yards, the accused persons caught hold of the  
deceased and pushed him to the ground. The three appellants  
F pushed him to the ground, while appellant Aizaz fired at the de-  
ceased, on the neck. Yakooob (P.W.2), Ian Mohammad (P.W.3)  
and one Hafizuddin alias Fauju and Sahimuddin came over  
there. The accused persons thereafter went away in the south-  
ern direction. Ismail died instantaneously and blood had also  
G fallen at the place. Bashir Mohammad prepared a written re-  
port at the place of occurrence. He went to the police station on  
cycle and lodged it at the police station Parichhatgarh on  
4.11.1979 at 1.00 P.M. The distance of the police station from  
the place of occurrence is three kilometers. FIR was registered  
H and investigation was undertaken.

After completion of the investigation charge sheet was filed and since accused persons pleaded innocence, they were put on trial. Before trial Court the primary stand of accused was that the prosecution has suppressed the genesis of the occurrence. The evidence of PWs 1, 2 & 3 according to them did not inspire confidence. In any event, it was submitted that Section 34 has no application so far as the A2 and A4 are concerned. The trial Court did not accept these contentions and recorded conviction. Before the High Court in appeal the stands were reiterated. The High Court found that the evidence was inadequate so far as A4 is concerned, but confirmed the conviction so far as the appellants are concerned.

3. In support of the appeal, it is submitted that the occurrence essentially took part in two stages. Even if there was any animosity between A1 and the deceased, A2 and A3 had nothing to do with him. Additionally in the second part also there was no use of any weapons by appellants Nos. 2 & 3. The only allegation against them is that they held the deceased and fell him on the ground.

4. Learned counsel for the respondent-State on the other hand supported the judgment of the trial court and the High Court.

5. The evidence of PWs. 1, 2 & 3 is clear and cogent. The trial court and the High Court have analysed the evidence in great detail and have come to hold that the same has credence and appear to be truthful. Nothing infirm could be pointed out to warrant rejection of the evidence. Therefore the trial Court and High Court were justified in placing reliance on the evidence of PWs. 1, 2 & 3.

6. Coming to the plea relating to Section 34 the Section really means that if two or more persons intentionally do a common thing jointly, it is just the same as if each of them had done it individually. It is a well recognized canon of criminal jurisprudence that the Courts cannot distinguish between co-conspirators, nor can they inquire, even if it were possible as to the part taken by each in the crime. Where parties go with a common

A purpose to execute a common object each and every person becomes responsible for the act of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. All are guilty of the principal offence, not of abetment only. In a combination of this kind a mortal stroke, though given by one of the parties, is deemed in the eye of law to have been given by every individual present and abetting. But a party not cognizant of the intention of his companion to commit murder is not liable, though he has joined his companion to do an unlawful act. Leading feature of this Section is the element of participation in action. The essence of liability under this Section is the existence of a common intention animating the offenders and the participation in a criminal act in furtherance of the common intention. The essence is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result (See *Ramaswami Ayyanagar and Ors. v. State of Tamil Nadu* (AIR 1976 SC 2027)). The participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence may be necessary, but such is not the case in respect of other offences when the offence consists of diverse acts which may be done at different times and places. The physical presence at the scene of offence of the offender sought to be rendered liable under this Section is not one of the conditions of its applicability in every case. Before a man can be held liable for acts done by another, under the provisions of this Section, it must be established that (i) there was common intention in the sense of a pre-arranged plan between the two, and (ii) the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this Section cannot apply.

7. 'Common intention' implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Under this Section a pre-concert 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 offence showing a pre-arranged plan and prior concert. (See *Krishna Govind Patil v. State of Maharashtra* (AIR 1963 SC 1413). In *Amrit Singh and Ors. v. State of Punjab* (1972 Cr.L.J. 465 SC) it has been held that common intention pre-supposes prior concert. Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bonds is often very thin, nevertheless the distinction is real and substantial, and if overlooked will result in miscarriage of justice. To constitute common intention, it is necessary that intention of each one of them be known to the rest of them and shared by them. Undoubtedly, it is a difficult thing to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. But however difficult may be the task, the prosecution must lead evidence of facts, circumstances and conduct of the accused from which their common intention can be safely gathered. In *Magsogdan and Ors. v. State of U.P.* (AIR 1988 SC 126) it was observed that prosecution must lead evidence from which the common intention of the accused can be safely gathered. In most cases it has to be inferred from the act, conduct or other relevant circumstances of the case in hand. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether the accused had a common intention to commit offence for which they can be convicted. The facts and circumstances of cases vary and each case has to be decided keeping in view of the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law. In *Bhaba Nanda Barma and Ors. v. The State of Assam* (AIR 1977 SC 2252) it was observed that prosecution must prove facts to justify an inference that all participants of the acts had shared a common intention to commit the criminal act which was finally committed by one or more of the participants. Mere presence of a person at the time of commis-

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- A sion of an offence by his confederates is not, in itself sufficient to bring his case within the purview of Section 34, unless community of designs is proved against him (See *Malkhan and Anr. v. State of Uttar Pradesh* (AIR 1975 SC 12). In the Oxford English Dictionary, the word "furtherance" is defined as 'action of helping forward'. Adopting this definition, Russel says that "it indicates some kind of aid or assistance producing an effect in future" and adds 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. (Russel on Crime 12<sup>th</sup> Edn. Vol.I pp.487 and 488). In *Shankarlal Kacharabhai and Ors. v. The State of Gujarat* (AIR 1965 SC 1260) this Court has interpreted the word "furtherance" as 'advancement or promotion'.

8. When the factual scenario is analysed in the backdrop of the principles of law set out above, the inevitable conclusion is that the appeal is sans merit, deserves dismissal, which we direct.

K.K.T.

Appeal dismissed.