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v.

STATE OF KARNATAKA

MAY 11, 2007

B [S.B. SINHA AND MARKANDEY KATJU, JJ.]

Penal Code, 1860—ss. 324 and 34—Death caused of one person—By several accused including appellant-accused—Evidence of eye-witnesses revealing that deceased was chased and assaulted by all the accused— C *Specific role played by the appellant not disclosed—Trial Court acquitting other accused persons in view of absence of their names in FIR and convicting the appellant u/ss 143, 148, 341, 326 and 302 r/w 149 IPC—In appeal against conviction, conviction of appellant only u/s 324 r/w s. 34 and 304 part I r/w s.34—On appeal, held: Appellant is guilty only u/s 324 and not* D *u/s 304, Part I r/w s.34—Appellant cannot be said to have common intention with the other accused—Hence s.34 would not be attracted.*

Appellant-accused alongwith other accused persons were charged u/ss 143, 148, 341, 326, 302, 120B r/w s.149 IPC for causing death of one person. Prosecution case was that when the deceased and PW-4 (an injured eye- E **witness) were going on a motorcycle, they were stopped by the accused persons. Appellant attacked the deceased. While warding off the attack, PW 4 got inured. When the deceased tried to escape, all the accused chased him and assaulted him. Statement of PW-4 was treated as FIR. In FIR 4 accused including the appellant-accused had been named. But in his deposition PW-** F **4 stated that the names of the accused other than the appellant, were taken wrongly. During trial PW-4 (first informant) and PW-5 (eye witness) proved the prosecution case only to the extent of FIR. Trial Court convicted the appellant-accused u/ss 143, 148, 341, 326, 302 r/w s.149 IPC' and acquitted the other accused on the ground that out of the seven accused, apart from the appellant, nobody was named in the FIR. State did not prefer any appeal against** G **acquittal. In appeal against conviction, High Court acquitted the appellant u/s 143, 148 and 341 and convicted him u/s 324 r/w s.34 IPC and also under s. 304, Part I r/w s. 34 IPC. Hence the present cross appeals.**

Partly allowing the appeal of the accused and dismissing that of the State, the Court

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HELD: 1. Appellant cannot be held to be guilty of commission of an offence under Section 304, Part I read with Section 34 IPC. His conviction can be upheld only under Section 324 IPC. [Para 19] [408-D-E] A

Harshadsingh Pahelvansingh Thakore v. *State of Gujarat,* [1976] 4 SCC 640; *Golla Pullanna and Anr.* v. *State of A.P.,* [1996] 10 SCC 223; *State of U.P.* v. *Jhinkoo Nai,* [2001] 6 SCC 503, distinguished B

Baul and Anr. v. *The State of U.P.,* [1968] 2 SCR 450 and *Sukhram s/o Ramratan* v. *State of M.P.,* 1989 Supp 1 SCC 214, relied on

2. A common intention may be developed on the spot. Although a person may not be held guilty for having a common object, in a given situation, he may be held guilty for having a common intention, but such common intention must be shared with others. The recital made in the first information report clearly goes to show that the appellant had sought to attack the deceased while he was on his motorcycle. The attack was warded off by PW-4. He suffered an injury. The deceased thereafter ran to the school building which according to the sketch map drawn by the investigating officer was at a distance of about 120 feet from the main road. The dead body of the deceased was found only on the stair case of the school. The first information report as also the evidence of PWs 4 and 5 reveals that the deceased was chased by all the accused. He was assaulted by all the accused. The specific role played by the appellant has not been disclosed. Whether the appellant alone was responsible for causing the death has also not been stated. [Para 13] [405-G-H; 406-A-B] C D E

3. The deceased suffered as many as 19 injuries. Some injuries were inflicted on vital parts of the body and some were only on the hands and legs. There is nothing on record to show that the appellant inflicted any injury on a vital part of the body of the deceased. In the aforementioned situation, Section 34IPC would not be attracted. [Para 14] [406-C] F

4. The very fact that the appellants have been convicted only under Section 304 Part I IPC, itself suggests that they had no intention to commit the murder of the deceased and, thus, the question of common intention in this case does not arise. [Para 15] [406-E-F] G

5. All the accused, other than the appellant, have been acquitted by the Trial Judge. The State did not prefer any appeal thereagainst. The prosecution, therefore, cannot say that the appellant had any common intention with any other accused persons who were named in the First Information H

Report. The matter might be different where a person is said to have formed common intention with other persons. The prosecution may succeed in obtaining a conviction against the appellant for commission of an offence under Section 34 IPC if the names of the other accused persons and the roles played by them are known. Specific overt act of the accused is not only known but is proved. In this case the first information report was against unknown persons. PW-4, however, retracted his statement raising a plea of mistake on his part in taking the names of three persons. He had also accepted his mistake in naming the assailant. [Para 16] [406-F-H; 407-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 734 of 2006.

From the Final Judgment and Order dated 13.09.2005 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 359 of 2005.

WITH

Criminal Appeal No. 733 of 2006.

S.N. Bhat, N.P. S. Panwar and D.P. Chaturvedi for the Appeliant.

Anil Kr. Mishra, Sanjay R. Hedge, Vikrant Yadav and Amit Kumar Chawala for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. These appeals arise out of a judgment and order dated 13.09.2005 passed by a Division Bench of the High Court of Karnataka at Bangalore in Criminal Appeal No. 359 of 2005.

2. Appellant with six others was charged for commission of offences under Sections 143, 148, 341, 326, 302, 120B read with Section 149 of the Indian Penal Code for causing death of one Udaya Kumar (deceased) on 19.10.2003.

3. The case of prosecution is as under.

19.10.2003 was a Sunday. The deceased and Sudhakar Bollaje (PW-4) were going on a motorcycle from Krishnapura to Ganeshpur. Allegedly, the motorcycle was stopped near Block No. II of village Kattipalla by a boy aged about 20 years. Appellant herein together with Siraj, Jubaid and Iqbal

accompanied by 2-3 persons surrounded the motorcycle. They were armed with swords and cricket bats. Nooruddin, appellant herein, attacked the deceased with a sword, which he was carrying. PW-4 attempted to prevent it and in the process sustained an injury on his left hand. Udaya jumped from the motorcycle and ran towards the playground of the school. While he was climbing on the steps of the school, the appellant and his associates chased him and attacked him with swords and bats. PW-4 was also hit by a sword on his leg. He escaped and ran away.

4. PW-4 allegedly met one Ashok Shetty (PW-11) who examined himself as PW-11. They went to Suratkal Padmavathi Hospital wherein he was admitted. An information was sent to the police station. Statement of PW-4 was recorded. It was treated to be a First Information Report. However, a tense situation came into being. Even an inquest could not be conducted immediately.

5. In his statement before the police, PW-4 took the names of Siraj, Jubaid and Iqbal. However, in his deposition, he stated that he had taken their names wrongly. According to him, the real culprits are the appellant herein and Accused Nos. 2 to 7. All the accused were arrested on 21.10.2003. Some weapons were allegedly recovered.

6. In view of the question involved herein, it is not necessary for us to notice the evidence of the prosecution witnesses examined on behalf of the State. It is suffice to say that the learned Trial Judge *inter alia* on the premise that out of seven accused, apart from the appellant, nobody was named in the First Information Report, recorded a judgment of acquittal. Appellant herein was convicted under Sections 143, 148, 341, 326, 302 read with Section 149 of the Indian Penal Code. The State did not prefer any appeal against the said judgment of acquittal. An appeal was preferred against the judgment of his conviction before the High Court by the appellant. By reason of the impugned judgment, the High Court allowed the said appeal. The High Court found the appellant guilty under Section 324 read with Section 34 of the Indian Penal Code and sentenced him to rigorous imprisonment for one year and also under Section 304, Part I read with Section 34 sentenced him to undergo rigorous imprisonment for eight years.

7. Both the appellant and the State are before us.

8. With a view to appreciate the question involved, we may notice the first information report.

A PW-4, the first informant and PW-5, Balakrishan who was also an eye-witness proved the prosecution case only to the extent of the First Information Report. The State in their respective examinations in chief only proved the contents of the first information report.

9. It is also relevant to mention that there were two cricket playgrounds. B The incident occurred when a cricket match was being played on one of the grounds. Appellant was, however, said to be on the other ground. According to PWs 4 and 5, a quarrel ensued resulting in injury being caused to Imthiyaz by the deceased and PW-4, whereafter they were assaulted by others. It has not been disputed that Imthiyaz suffered an injury. It was proved by PW-C 17 Dr. Hemalatha and the following injuries were noticed:

> "Obliquely running lateral cut lacerated wound measuring 14 x 5 cms., over the right scapula skin deep exposing the muscle underneath. Wound covered with prulent discharge. Edges of the wound show granulation. Age of the injury is 50 to 58 hours and that he was D referred to major hospital for further treatment."

10. Admittedly, injuries on the person of Imthiyaz were not explained. A plea was taken in that behalf, in their respective examinations, under Section 313 of the Code of Criminal Procedure, by the appellant and Imthiyaz. Whereas presence of the appellant is disputed, presence of Imthiyaz is, thus, E not disputed. Despite the same, Imthiyaz has been acquitted.

11. The High Court acquitted the appellant under Sections 143 and 148 of the Indian Penal Code. He has also been acquitted for commission of an offence under Section 341 of the Indian Penal Code.

F The High Court while agreeing with the findings of the learned Trial Judge opined that the appellant was one of the persons who had participated in the attack on Udaya and Sudhakar Bollaje and that the blow was given by Accused No. 1 with a sword. It, however, was observed that he had no intention to kill. PW-10 categorically stated that the quarrel arose while G playing the game. Although PW-10 was declared hostile, the High Court opined:

> "As regards the alleged murder of Sri Udaya, it is submitted by the learned counsel for the appellant that the circumstances as disclosed by P.W.10 and as could be deduced indicate the possibility of a H quarrel between the deceased and P.W.4 on the one side and the

alleged culprits on the other side and since the deceased and P.W.4 could have been armed, it would be an incident where in a sudden fight in the heat of moment, fatal injury could have been caused to Udaya. If it is so, the murder would fall either under section 326 of the IPC, or under exception (4) of section 300 of the IPC. As we observed above, particularly, considering the evidence of P.W.10, the possibility of Udaya and P.W.4 coming on the ground is more and in all probability a quarrel started between Udaya and P.W.4 on the one side and the accused No. 1 and others on the other side. The injuries suffered by accused No. 2 indicate that possibility, and the injuries sustained by Udaya and P.W.4 can be considered as injuries caused by the appellant/ accused No. 1 and his companions in a sudden fight and in the heat of moment. The circumstances do not show that undue advantage was taken by accused No. 1. The act though rash was in the heat of the moment and it squarely falls under Exception (4) of Section 300 of the IPC, and consequently the death of Udaya by the act of accused No. 1 and others would amount to culpable homicide not amounting to murder. Having regard to the circumstances disclosed and the fact that the accused No. 1 and his companions used swords, it cannot be said that the attack was not with the intention of killing Udaya. Consequently, the act falls under Part I of Section 304 of IPC and not under section 302 of the IPC."

Offences under Sections 120-B, 143, 148 and 341 of the Indian Penal Code have not been proved.

12. Section 34 of the Indian Penal Code reads as under:

"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."

13. A common intention may be developed on the spot. Although a person may not be held guilty for having a common object, in a given situation, he may be held guilty for having a common intention, but such common intention must be shared with others. The recital made in the first information report which has been noticed by us herein clearly goes to show that the appellant had sought to attack the deceased while he was on his motorcycle. The attack was warded off by PW-4. He suffered an injury. The

A deceased thereafter ran to the school building which according to the sketch map drawn by the investigating officer was at a distance of about 120 feet from the main road. The dead body of Udaya was found only on the stair case of the school. The first information report as also the evidence of PWs 4 and 5 reveals that the deceased was chased by all the accused. He was assaulted by all the accused. The specific role played by the appellant has not been disclosed. Whether the appellant alone was responsible for causing the death has also not been stated.

14. The deceased suffered as many as 19 injuries. Some injuries were inflicted on vital parts of the body and some were only on the hands and legs. There is nothing on record to show that the appellant inflicted any injury on a vital part of the body of the deceased. In the aforementioned situation, in our opinion, Section 34 of the Indian Penal Code would not be attracted.

15. Reliance has been placed by Mr. Hegde on *Harshadsingh Pahelvansingh Thakore* v. *State of Gujarat,* [1976] 4 SCC 640 which has also been noticed by this Court in *Golla Pullanna and Anr.* v. *State of A.P.,* [1996] 10 SCC 223 and *State of U.P.* v. *Jhinkoo Nai,* [2001] 6 SCC 503. The said decisions are not attracted in this case. In the said cases, common intention had been held to have been proved. Therein, this Court was dealing with the offence of murder. As the common intention to commit the said offence was established, individual roles played by each of the accused were held to be of not much significance. The very fact that the appellants have been convicted only under Section 304 Part I of the Indian Penal Code itself suggests that they had no intention to commit the murder of the deceased and, thus, the question of common intention in this case does not arise.

16. We have noticed hereinbefore that all the accused, other than the appellant, have been acquitted by the learned Trial Judge. The State did not prefer any appeal thereagainst. The prosecution, therefore, cannot say that the appellant had any common intention with any other accused persons who were named in the First Information Report. The matter might be different where a person is said to have formed common intention with other persons. The prosecution may succeed in obtaining a conviction against the appellant for commission of an offence under Section 34 of the Indian Penal Code if the names of the other accused persons and the roles played by them are known. Specific overt act of the accused is not only known but is proved. In this case the first information report was against unknown persons. PW-4, however, retracted his statement raising a plea of mistake on his part in

taking the names of three persons. He had also accepted his mistake in naming his assailant. Whereas in the first information report, he named Siraj, in a subsequent statement, he named one Imran.

17. In *Baul and Anr* v. *The State of U.P.*, [1968] 2 SCR 450 : AIR (1968) SC 728, it was held:

> "7. No doubt the original prosecution case showed that Sadhai and Ramdeo both hit the deceased on the head with their lathies . One is tempted to divide the two fatal injuries between the two assailants and to hold that one each was caused by them. If there was common intention established in the case the prosecution would not have been required to prove which of the injuries was caused by which assailant. But when common intention is not proved the prosecution must establish the exact nature of the injury caused by each accused and more so in this case when one of the accused has got the benefit of the doubt and has been acquitted. It cannot, therefore, be postulated that Sadhai alone caused all the injuries on the head of the deceased. Once that position arises the doubt remains as to whether the injuries caused by Sadhai were of the character which would bring his case within Section 302. It may be that the effect of the first blow became more prominent because another blow landing immediately after it caused more fractures to the skull than the first blow had caused. These doubts prompt us to give the benefit of doubt to Sadhai. We think that his conviction can be safely rested under Section 325 of the Indian Penal Code, but it is difficult to hold in a case of this type that his guilt amounts to murder simpliciter because he must be held responsible for all the injuries that were caused to the deceased. We convict him instead of Section 302 for an offence under Section 325 of the Indian Penal Code and set aside the sentence of imprisonment for life and instead sentence him to rigorous imprisonment for seven years."

18. Yet again in *Sukhram s/o Ramratan* v. *State of M.P.*, [1989] Supp 1 SCC 214, the law has been stated in the following terms:

> "10. There is another aspect of the matter which has also escaped the notice of the High Court when it sustained the conviction of the appellant under Section 302 read with Section 34 and Section 436 read with Section 34 IPC while acquitting accused Gokul of those charges.

A Though the accused Gokul and the appellant were individually charged under Sections 302 and 436 IPC they were convicted only under the alternative charges under Section 302 read with Section 34 and Section 436 read with Section 34 IPC by the Sessions Judge. Consequently, the appellant's convictions can be sustained only if the High Court had sustained the convictions awarded to accused Gokul also. B Inasmuch as the High Court has given the benefit of doubt to accused Gokul and acquitted him, it follows that the appellant's convictions for the two substantive offences read with Section 34 IPC cannot be sustained because this is a case where the co-accused is a named person and he has been acquitted and by reason of it the appellant C cannot be held to have acted conjointly with anyone in the commission of the offences. This position of law is well settled by this Court and we may only refer to a few decisions in this behalf vide *Prabhu Babaji* v. *State of Bombay, Krishna Govind Patil,* v. *State of Maharashtra and Baul* v. *State of U.P."*

D 19. Appellant, therefore, cannot be held to be guilty of commission of an offence under Section 304, Part I read with Section 34 of the Indian Penal Code. His conviction can be upheld only under Section 324 of the Indian Penal Code.

20. The appeal filed by the appellant is allowed to the aforementioned E extent and that of the State is dismissed. While setting aside the conviction under Section 304, Part I read with Section 34 of the Indian Penal Code, his conviction under Section 324 of the Indian Penal Code is upheld. As the appellant has already undergone the sentence imposed upon him by the High Court, he is directed to be set at liberty, unless wanted in connection with F any other case.

K.K.T. Appeal No. 734/2006 partly allowed and Appeal No. 733/2006 dismissed.