

NON-REPORTABLE

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO(s). 2007 OF 2008

EZAJHUSSAIN SABDARHUSSAIN & ANR.Appellant(s)

VERSUS

STATE OF GUJARAT

....Respondent(s)

J U D G M E N T

Rastogi, J.

1. The appellants are assailing their conviction under Section 302 read with section 34 IPC and sentenced to undergo imprisonment for life passed by the learned trial Court and confirmed by the High Court under the impugned judgment.

2. On dismissal of appeal upholding conviction under Section 302 read with Section 34 IPC, accused nos. 1 and 2 have not challenged their conviction and sentence and accused nos. 3 and 4(present appellants) have approached this Court assailing the

said judgment and conviction under Section 302 read with Section 34 IPC.

3. The brief facts necessary for disposal of the appeal are as follows:

According to the case of the prosecution, accused no.1 Iftekharhussain Sabdarhussain was having a long pending civil dispute about his flat with the deceased Mohammad Shakil situated near to the scene of occurrence. On 18th August, 1997 at about 11.00 a.m., Mohammad Shakil(deceased) had operated electric motor for supply of water in the common overhead tank situated on top of the building but at that time since water taps were kept open by accused no. 1 Iftekharhussain Sabdarhussain in his house, the water could not reach to the tank. The request of the deceased Mohammad Shakil to close the tap was not acceptable to accused no. 1 Iftekharhussain Sabdarhussain, due to which altercation took place between accused no. 1 Iftekharhussain Sabdarhussain and deceased Mohammed Shakil and both started shouting at each other. According to the prosecution, after hearing hot altercation, members of the complainant party(Shamimbanu, Adilahmed, Zaidahmed) came there and started abusing the member of their family. At this

stage accused no. 1 Iftexharhussain Sabdarhussain and accused no. 2 Shefakathussain Sabdarhussain went into their house and brought a knife and gupti in their hand and accused nos. 3 & 4(present appellants) caught hold of Mohammad Shakil(deceased) and accused no. 1 Iftexharhussain Sabdarhussain and accused no. 2 Shefakathussain Sabdarhussain gave a knife and gupti blow to deceased Mohammad Shakil(deceased) and accused no. 2 Shefakathussain Sabdarhussain also injured Adilahmed(PW-2) who too was caught hold of by accused nos. 3 & 4(present appellants) and thereafter they left the scene of occurrence, both Mohammad Shakil and Adilahmed (being severally injured) were taken to V.S. Hospital and on receiving telephonic message Mr. Makwana, Police Inspector rushed to the hospital where he came to know that Mohammad Shakil had succumbed to injuries and Adilahmed was admitted in the hospital for treatment and thereafter recorded the complaint of Shamimbanu(PW-1), wife of deceased Mohammad Shakil at 2.00 p.m. and thereafter sent the same to Gaikwad Haveli Police Station for registration of offence. Thereafter, all the four accused were registered in C.R. No.

146/1996 for the alleged commission of offence under Sections 302, 307 read with Section 34 IPC.

4. It may be relevant to note that for the self-same incident happened around 11.00 a.m. in the morning of 18th August, 1997, accused no. 1 Iftexharhussain Sabdarhussain also made a cross complaint that he was residing at House No. 521/4/5 in a small chawl(street) of Saudagar, in Jamalpur area and the present complainant party was living in front of his house and the families are known to each other. On 18th August, 1997 at eleven o' clock in the morning, he was in the bathroom and he had kept the tap on, as his house was to be cleaned. Mohammad Shakil (deceased) came at his house and told him to turn the tap of water off. Accused no. 1 Iftexharhussain Sabdarhussain told to do the same after the cleaning work would finish as he was cleaning his house and not possible for him to off the tap. The members of the complaint party started using abusive language and attacked on him and becoming very excited. He also got excited and used abusive words, then three of them had beaten him with punch and kick and Mohammad Shakil(deceased) had beaten him by pipe blow on the back side by coming from behind. The nearby people had also come. Thereafter, his brother

Shefakathussain took him to Police Station by rescuing him where he lodged his complaint which was registered at 12.10 p.m. In his complaint, he has not recorded the presence of accused nos. 3 & 4(present appellants) when the alleged incident took place on 18th August, 1997. The complaint of which the cognizance was taken for the offence under Section 302 & 307 read with Section 34 IPC was registered at 2.00 p.m. after the complaint of the accused no. 1 Iftexharhussain Sabdarhussain on which the FIR was registered at the instance of the accused no.1 at 12.10 p.m. and after investigation charge-sheet came to be filed against members of the complainant party.

5. All the four accused faced trial and held guilty on the ocular evidence of PWs 1,2,3 & 4 who are the family members of deceased Mohammad Shakil. No independent witness was examined by the prosecution despite the fact it was a holiday and members reside in the adjacent flats as well. Indisputedly, there is no recovery from the present accused appellants and their clothes were also not recovered in the course of investigation. After the trial, all the four accused persons were held guilty under Section 302 read with Section 34 IPC and the appeal preferred against their conviction and sentence was also

dismissed by the High Court under the impugned judgment dated 29th February, 2008.

6. Learned counsel for the appellants submits that the Courts below have committed a serious manifest error in accepting the testimony of PWs 1,2,3 & 4 who are the interested witnesses in holding their conviction under Section 302 with the aid of Section 34 IPC on the said evidence and further submits that taking the prosecution case on its face value based on the evidence of PWs 1,2, 3 & 4, there may be a case against accused nos. 1 & 2 who could be charged guilty and convicted under Section 302 read with Section 34 IPC as there was an allegation against them that they had stabbed the deceased by a knife and gupti. But so far as present accused appellants are concerned against whom the only allegation was that both of them had caught hold of deceased Mohammad Shakil and never assaulted either the deceased Mohammad Shakil or injured Adilahmed(PW-2) and submitted that an allegation that they caught hold of deceased and facilitated the two other accused persons to commit the crime in absence of any corroborating evidence on record, the finding which has been recorded holding the present accused

appellants guilty of offence under Section 302 read with Section 34 IPC is perverse and not sustainable in law.

7. Learned counsel for the appellants further submits that for the self-same incident, FIR came to be registered at the first instance earlier by accused no. 1 Iftexharhussain Sabdarhussain at 12.10 p.m. Who was the instigator may not be a question to be examined but accused no. 1 Iftexharhussain Sabdarhussain in his complaint has recorded the presence of his brother (accused no. 2 Shefakathussain Sabdarhussain) alone at the time of the alleged offence being committed. The complaint on which the present FIR was registered at the instance of the Shamimbanu(PW 1) wife of deceased Mohammad Shakil was registered at 2.00 p.m. and to settle the personal scores as the civil dispute was long pending between the families, all the male members of their family were implicated and there is no such overt act which would have been attributed to the present appellants. In the absence of any independent witness being examined by the prosecution, which indeed was available as the date of incident being a holiday and good number of families residing in the neighbouring flats, appears to be a case of over

implication to settle their long pending civil disputes in the courts of law.

8. Learned counsel further submits that even from the evidence on record, the presence of the present accused appellants is itself doubtful as the learned trial Court has proceeded on assumption that since it was a holiday on account of Rakshabandhan, their presence cannot be doubted. The presumption in itself could not be considered to be sufficient to implicate present accused appellants of their common intention in committing the commission of offence in holding them guilty with the aid of Section 34 IPC and this has been the manifest error committed in convicting the appellants under Section 302 with the aid of Section 34 IPC.

9. Learned counsel further submits that even the presence of accused appellants together is not sufficient to hold that they shared common intention to commit the offence. It is necessary that the person be known to each other but for prosecuting the common intention, there must be a clear and unimpeachable evidence to justify that inference. There cannot be universal rule applicable to cases of this class which can be laid down as to what presumption may be drawn on any given state of facts.

Learned counsel further submits that common intention within the meaning of Section 34 IPC implies a prearranged plan, and to convict the accused of an offence, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. There cannot be a rule of universal application and each case has to be looked into on its own facts and circumstances and in support of his submission, learned counsel has placed reliance on the judgment of this Court reported in **Ramashish Yadav and Others Vs. State of Bihar** 1998(8) SCC 555.

10. Learned counsel for the respondent, on the other hand, while supporting the finding recorded by the learned trial Court and confirmed by the High Court further submits that the presence of the accused appellants stood established from the ocular evidence of PWs 1,2,3 & 4 and all are consistent that both of them caught hold of the deceased Mohammad Shakil in the first instance and thereafter caught hold of the injured Adilahmed(PW-2) and aware of the lethal weapons being brought by other accused persons. They had the common intention not

only to injure deceased but the common intention was to commit murder of the deceased Mohammad Shakil.

11. Learned counsel further submits that the manner in which the offence has been committed and the role being assigned to each of the accused clearly shows that the act was done in furtherance of the common intention of all and each of the accused is liable for the criminal act. The allegation against the present accused appellants that they both caught hold of the hands of the deceased shows that they had the intention to disable the deceased Mohammad Shakil. Moreover, the appellants continued holding the hands of the deceased all along without making any effort to prevent accused no. 1 Iftekharhussain Sabdarhussain and accused no. 2 Shefakathussain Sabdarhussain attacking the deceased, proves the common intention on their part and that can easily be discern from the fact that once accused no. 1 Iftekharhussain Sabdarhussain shouted to beat Adilahmed (PW-2), the present accused appellants left the deceased and caught hold the hands of Adilahmed(PW-2) and facilitated the other accused persons not only to attack the deceased but to injure (PW-2) Adilahmed as well and as both the present appellants have shared the common

intention with other accused persons, they have rightly been convicted under Section 302 read with Section 34 IPC and placed reliance of the judgment of this Court in **Ramesh Singh alias Photti Vs. State of A.P.** 2004(11) SCC 305 and **Goudappa and others Vs. State of Karnataka** 2013(6) SCC 675.

12. Taking assistance thereof, learned counsel for the respondent further submits that the injuries may not be attributed to present accused appellants but both have disabled the deceased Mohammad Shakil and immobilised him thereby facilitating the attack on the deceased as well as on Adilahmed (PW-2). In such circumstances, the action of the appellants in facilitating the attack on deceased Mohammad Shakil and by not preventing accused no. 1 Iftexharhussain Sabdarhussain and accused no. 2 Shefakathussain Sabdarhussain from assaulting the deceased Mohammad Shakil leads to the conclusion that the appellants shared the common intention with accused no. 1 Iftexharhussain Sabdarhussain and accused no. 2 Shefakathussain Sabdarhussain and have rightly been held guilty under Section 302 read with Section 34 IPC in committing the offence and needs no interference by this Court.

13. To appreciate the argument advanced on behalf of the learned counsel for the appellants, it may be possible to first take note to understand the object of Section 34 IPC incorporated in the Indian Penal Code which has been considered in **Ramesh Singh's case**(supra) as under:-

“13. Since common intention essentially being a state of mind can only be gathered by inference drawn from facts and circumstances established in a given case, the earlier decisions involving almost similar facts cannot be used as a precedent to determine the conclusions on facts in the case in hand. This view of ours finds support in a judgment of this Court in *Pandurang v. State of Hyderabad* AIR 1955 SC 216 wherein while considering the applicability of Section 34 IPC this Court held thus :

“But to say this no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time honoured way, ‘the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis’.

As we have said, each case must rest on its own facts and the mere similarity of the facts in one case cannot be used to determine a conclusion of fact in another.”

14. Later, the distinction between Section 149 & Section 34 IPC has been examined by the Constitution Bench of this Court in

Mohan Singh Vs. State of Punjab AIR 1963 SC 174 as follows:-

13. That inevitably takes us to the question as to whether the appellants can be convicted under Section 302/34.

Like Section 149, Section 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34.

In some ways the two Sections are similar and in some cases they may overlap. But, nevertheless, the common intention which is the basis of Section 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-in-concert and necessarily postulates the existence of a pre-arranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which Section 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. It is now well-settled that the common intention required by Section 34 is different from the same intention or similar intention.

As has been observed by the Privy Council in *Mahbub Shah v. King Emperor* I.L.R. (1945) IndAp 148 common intention within the meaning of Section 34 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 and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.

15. The essence of the joint liability during the criminal act in furtherance of such common intention has been discussed by a two-Judge Bench of this Court in **Ramashish Yadav and Others**(supra) wherein it was held as under:-

“...Section 34 lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feature of Section 34 is the element of participation in action. The common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a pre-arranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be pre-arrangement or premeditated concert.”

16. It is clear from the principles laid down that however similar the facts may seem to be in a cited precedent, the case in hand should be determined on facts and circumstances of that case in

hand only and the mere similarity of the facts in one case cannot be used to determine the conclusion of the fact in another. Common intention being the state of mind can be gathered by inference drawn from the facts and circumstances established in a given case. The cases involving almost similar facts and circumstances cannot be used as precedent to determine the conclusions on facts in the case in hand.

17. Taking note of the law as laid down and as understood by us, it will be apposite to take note of the facts of the case as to whether prosecution has been able to establish beyond reasonable doubt the sharing of common intention to commit the murder of deceased Mohammad Shakil by the accused appellants.

18. It has come on record that there was a long pending civil dispute in reference to a flat nearby between the parties and other families were residing in the housing colony and between 11.00 a.m. and 11.15 a.m. in the morning of 18th August, 1997, when the altercation took place between accused no. 1 Iftekharhussain Sabdarhussain and deceased Mohammad Shakil because of the supply of water, both parties started abusing each other. Accused no. 1 Iftekharhussain Sabdarhussain was also

injured in the alleged incident and he also reported his complaint at 12.10 p.m. on which FIR was registered and after investigation, charge-sheet was filed. Although after the trial, the complainant party was acquitted vide judgment dated 18th August, 1999. Accused no. 1 Iftexharhussain Sabdarhussain in his complaint recorded the presence of his brother (accused no. 2 Shefakathussain Sabdarhussain). The complaint on which the FIR was registered at the instance of complainant Shamimbanu (PW-1), wife of the deceased Mohammad Shakil was at 2.00 p.m., apart from the presence of accused nos. 1 Iftexharhussain Sabdarhussain & accused no. 2 Shefakathussain Sabdarhussain, the names of accused no. 3 & 4 (present appellants) were also added but no overt act have been attributed to the present appellants and their presence could be recorded with an allegation that both of them caught hold of the deceased Mohammad Shakil having common intention in facilitating the other accused persons to stab the deceased Mohammad Shakil by knife and gupti who have been convicted with the present accused appellants under Section 302 read with Section 34 IPC.

19. That all the four prosecution witnesses, i.e. PWs 1,2,3 & 4 are the interested witnesses being the members of the same

family who are living in front of the family of the accused having their civil dispute pending for a long time and this fact cannot be ruled out that after they came to know that the FIR has been registered at the instance of accused no. 1 Iftekharhussain Sabdarhussain against the complainant party, they have tried to entangle all the male members of the accused party and since no injury could be attributed to the accused appellants, the allegation was levelled against them that the accused appellants caught hold of the deceased Mohammad Shakil and Adilahmed(PW-2) with the common intention facilitated by the accused in committing the crime. There is no independent witness in the calendar of witness to support the prosecution and it being a holiday on account of Rakshabandhan, at least when they were residing in a multi-storey building, number of families must have been residing. There is no incriminating material which has been placed by the prosecution to have their presence at the time of commission of crime and to caught hold of the deceased Mohammad Shakil and (PW-2) Adilahmed and even their clothes were not recovered in support of the ocular evidence of the interested witnesses, their presence being a holiday do not inspire confidence.

20. Other than the allegation that the accused persons caught hold of deceased Mohammad Shakil, there is no other instigating action or overt act attributed to the present accused appellants actively participating in the commission of crime as alleged and from the conduct of the accused persons, it seems that there was no meeting of minds to form of pre-arranged plan. It is true that it can be developed at the spur of the moment but there must be pre-arrangement and pre-meditated concert which is the requirement of law for applicability under Section 34 IPC and from the case of the prosecution, the mere fact that accused appellants caught hold of deceased Mohammad Shakil facilitating the other accused persons to come with a knife and gupti and gave blows, it cannot be said that the accused appellants shared common intention with the other accused persons keeping note of the fact that in the complaint which was in the first instance registered for the alleged incident by accused no. 1 Iftekharhussain Sabdarhussain, he only recorded the presence of accused no. 2 Shefakathussain Sabdarhussain but the time when the complaint was registered at the instance of the present offence by the Shamimbanu (PW-1) at 2.00 p.m., the present accused appellants were also intentionally implicated. Certainly

it creates a doubt of their false implication and their presence from the prosecution evidence on record appears to be clouded with suspicion and in our considered view, the present appellants cannot be held guilty of the offence under Section 302 with the aid of Section 34 IPC.

21. The judgment relied upon by the learned counsel for the respondents in **Ramesh Singh's case**(supra) was a case where as per the case of prosecution, there was a death in the family of A-2. They wanted certain "samagri" for the funeral. On 30th April, 1998 at about 11.00 am, since the deceased refused to give some samagri, they became annoyed and accused persons went away and came back together at about 11.45 a.m. and called the deceased out of the house and while the two accused persons were holding the hands of the deceased, the other accused stabbed the deceased on his chest. They came with a common intention and equally participated in the commission of crime. However, in the instant case, there was no pre-arrangement of mind and altercation took place between accused no. 1 Iftekharhussain Sabdarhussain with the deceased Mohammad Shakil who was accompanied with accused no.2 Shefakathussain Sabdarhussain and family members of deceased and in

furtherance thereof, accused no. 1 Iftekharhussain Sabdarhussain and accused no. 2 Shefakathussain Sabdarhussain brought a knife and gupti and stabbed the deceased. No presumption can be drawn of common intention by implicating the accused appellants under Section 34 IPC.

22. Another judgment of this Court referred by the learned counsel for the respondent in **Goudappa and Others**(supra). It was a case where the accused persons were armed with lethal weapons assembled at one place and the moment the deceased came out of the house to spit, one of the accused started abusing him and the other accused persons held the deceased and facilitated the other accused to give the fatal blow and made no effort to prevent him from assaulting the deceased and their common intention clearly emanates from the criminal act in furtherance of the intention which in the instant case may not be of any assistance. As already observed, there cannot be a universal rule in laying down the principles of existence of common intention of prior meeting or meetings with pre-arranged plan. It has to be proved either from the conduct or circumstances of any incriminating facts which is missing in the instant case.

23. In our considered view, the High Court has committed a manifest error in holding the appellants guilty under Section 302 read with Section 34 IPC for participating in the commission of crime. The appellants deserve to be acquitted of the charges filed against them by giving them benefit of doubt.

24. The appeal is accordingly allowed and the impugned judgment of the High Court qua the appellants is set aside and since the appellants are already on bail, their bail bonds stand discharged.

.....J.
(A.M. KHANWILKAR)

.....J.
(AJAY RASTOGI)

NEW DELHI
February 15, 2019