



NON-REPORTABLE
IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO(s). 725 OF 2012

PALAKOM ABDUL RAHIMAN

...Appellant(s)

VERSUS

**THE STATION HOUSE OFFICER
BADIADKA POLICE STATION,
KERALA & ANR.**

....Respondent(s)

WITH

CRIMINAL APPEAL NO(s). 727 OF 2012

J U D G M E N T

Rastogi, J.

1. The present appeals arise out of the judgment dated 16th November, 2007 passed by the High Court of Kerala in Criminal Appeals convicting the accused appellants(accused no. 1 and accused no. 3) for offence under Section 302 read with Section 34 IPC and also under Section 324 IPC and sentenced to undergo rigorous imprisonment for life.

2. The accused persons faced trial for double murder of a father and son (Assainar & Abdul Rahiman) and causing grievous injuries to PW-2 Mohammed, son of deceased Assainar. That in all, 11 persons were initially charge-sheeted including appellants for offence punishable under Section 143, 148, 323, 324, 325 and 302 IPC read with Section 149 IPC. There was separate charge against accused nos. 1 and 3 for offence under Section 302 read with Section 34 IPC yet alternate charge against accused no. 3 under Section 302 IPC.

3. After analysing the evidence, learned trial Court convicted accused nos. 1 and 3 along with other accused persons for offence under Section 143, 148, 323, 324 read with Section 149 IPC and for 302 read with Section 149 IPC and sentenced them to rigorous imprisonment for life vide judgment dated 31st July, 2006. Accused nos. 1, 2 & 3 preferred joint appeal against the impugned judgment of the learned trial Court and the High Court of Kerala after due appraisal of the evidence on record, found all the three accused guilty and convicted them under Section 302 read with Section 34 IPC and sentenced to undergo rigorous imprisonment for life vide impugned judgment dated 16th November, 2007.

4. Accused no. 2 died at the later stage and accused nos. 1 and 3 have preferred their appeals to this Court against the impugned judgment.

5. To unfold the case of the prosecution, the incident alleged to have occurred around 2.15 p.m. on 5th December, 1995 in front of the Madrassa building situated in the premises of Bardar Masjid, Belincha, Kumbadage village. The fateful day being Friday, almost all the male members of Jamayath had assembled for prayer. PW-2 Mohammed reached at the mosque around 11.30 a.m. and was entrusted with the duty to bring the new Katheeb Mohammed Musliyar. The Katheeb had given a letter with amorous overtones to one Mimuna. On the basis of the majority opinion, the masjid committee terminated the services of earlier Katheeb of the mosque. At 1.45 p.m., the prayer speech was over. There was a dispute between the committee members who were in favour of the removal of earlier Katheeb and those who opposed. Just after the prayer, new Katheeb made a brief religious discourse. Afterwards, people began dispersing. PW-2 requested them to remain there and decide whether the new Katheeb was fit or not. In spite of the request made, some people left the place and around 40 persons including the accused

remained in the mosque. PW-1 made a declaration that the action of the old Katheeb was not proper. At that time, accused no. 1 and accused no. 3(appellants herein) along with other persons were standing in a group. PW-1 again said that the old Katheeb was not terminated in accordance with his personal wish but as decided by the committee. Seeing that situation was getting tense, PW-1's brother caught PW-1 and escorted him to the door and both went out. Behind them PW-2 and his father and brother came out of the mosque. Behind PW-2 and others, the accused persons also came out in a group. PW-2's father and younger brother hurried along the front courtyard of the madrassa to reach the road abutting on the eastern boundary of the compound. Accused no. 2 who was just approaching the courtyard of the madrassa suddenly exhorted raising his voice "There they go! Why simply watch? Go and stab." Immediately accused no. 1 dashed at PW-2's father Assainar and stabbed him right on his back with the dagger. Assainar-on receipt of the stab swayed on his unsteady steps and finally fell down. Seeing the incident, PW-2's brother Abdul Rahiman came running to the spot and threw a stone at accused no. 1. It struck him on his chest. When Abdul Rahiman reached near, accused no. 1

stabbed him also on the left side of his neck. Seeing this, PW-2 hugged accused no. 1 from behind. Seeing that accused no. 1 was in the grips of PW-2, accused no. 3 dashed to the spot with a dagger stabbed Abdul Rahiman on his hand. Abdul Rahiman fell down. Accused no. 2 came running to the spot and he with the dagger in his hand stabbed PW-2 on his back. In the fateful incident, the Assainar and Abdul Rahiman, father and brother of PW-2 and PW-4 who were the ocular witnesses of the incident succumbed to the injuries.

6. On 6.12.1997 at 10 AM, PW-21 Doctor attached to the Taluk Headquarters Hospital, Kasargod, conducted postmortem over the dead body of Assainar with the following injuries:-

“1.An incised wound over inter scapular region, right side, close to mid line, 4 X 1 X 4 cm.

2. Beneath the first injury ribs 5th and 6th ribs were found fractured.

3.Injury nos. 1 extended to heart and there was an incised wound measuring 1.5 X 0.5 X 1 cm to the heart. The instrument with which the victim was stabbed had entered the heart.

PW-21 Doctor opined that the victim died of bleeding from heart and because of the fracture of the ribs. The injuries noticed by her was the result of a single stab.”

7. On 6.12.1997 from 10.45 AM onwards, PW-21 Doctor conducted post mortem examination over the dead body of Abdul Rahiman and noticed the following anti-mortem injures:-

“1. An incised wound, oblique, 4 cm X 1 cm X 3.5 cm over the left supra clavicular region.

2. An incised wound measuring 3 cm X 2.5 cm X 4 cm over the left scapular region.

3. An abrasion measuring 3 cm X 1 cm X 0.5 cm on the right side of forehead.

It was seen that injury no. 1 resulted in the total severance of the left carotid artery. Injury no. 2 reached the left lung. There was a through and through injury over the apex of the left lung. There was fracture on 3rd and 4th ribs posteriorly, just lateral to the mind clavicular line. It was also the continuation of the second incised wound referred above. PW-21 opinioned that the injuries nos. 1 and 2 were caused by two separate stabs. The 3rd injury(aberration) could be the result of fall on the ground. Injury no. 1 was sufficient in the ordinary course of nature to cause death. It is extremely difficult to arrest bleeding when the carotid artery is injured. Exhibit P-16 is the relevant post mortem certificate.”

8. The prosecution in support of its case recorded the statements of PW-1 to PW-25 and also placed on record Exhibits P-1 to P-38 with material objects MO-1 to MO-14 and both accused no. 1 and accused no. 3 in their statement recorded under Section 313 CrPC took the stand that no such incident had taken place as alleged by the prosecution.

9. The learned trial Court and also the High Court has confirmed the guilt of both the accused persons (accused no. 1 and accused no. 3)(appellants herein). The learned trial Court convicted the accused appellants for the offence under Section 302 read with Section 149 IPC and also under Section 143, 148, 323, 324 read with Section 149 IPC. On appeal being preferred by accused appellants, the High Court found both of them guilty for the offence punishable under Section 302 read with Section 34 IPC and also under Section 324 IPC.

10. Learned counsel for the accused no. 3(Palakom Abdul Rahiman) submits that prosecution solely rested on the theory that the offences were committed by the unlawful assembly in prosecution of the common object of the unlawful assembly, and once the theory of unlawful assembly did not find favour, the accused at least could not have been convicted with the aid of Section 34 especially when the prosecution story was that he came into action subsequent to the alleged overt acts by other accused persons. Learned counsel further submits that the finding which has been recorded by the High Court that “we are of the opinion that accused nos. 1, 2 and 3 are guilty of offence under Section 302 read with Section 34 IPC as they shared

common intention to do away with the Assainar and Abdul Rahiman. Their overt acts also proved by witnesses” is erroneous and there was no corresponding injury in the post-mortem report which was alleged to have been inflicted by him which proved that the allegation against him was false and he was falsely implicated by the prosecution and submits that in the light of the principles laid down by this Court in **Suresh & Anr. Vs. State of U.P.** 2001(3) SCC 673, his conviction with the aid of Section 34 was not sustainable and there was no occasion for common intention as the only overt act alleged against him was causing a stab injury on the deceased Abdul Rahiman, which was proved to be false by the medical evidence. When the prosecution has failed to explain the injuries on accused nos. 1, 2 and 7 which in turn did not prove that the incident occurred not as narrated by the prosecution and there was deliberate attempt on the part of the prosecution to distort the course of events.

11. Learned counsel for accused no. 1(G. Moideenkutty) submits that the charge against accused nos. 1 and 3, i.e. charge under Section 302 read with Section 149 IPC stood concluded with the finding of the learned trial Court that “accused no. 1 and accused no. 3 were not propelled into action by any common

intention to murder Assainar and Abdul Rahiman. The murders were committed with the common object of the unlawful assembly. Therefore, the offence under Section 302 read with Section 34 IPC is not established against accused no. 1 and accused no. 3” and, since the same was not challenged before the High Court by the State, Section 34 IPC was no more available. After the finding has been recorded by the High Court holding that there was no unlawful assembly, at least the accused appellants could not have been convicted under Section 302 with the aid of Section 34 IPC.

12. Learned counsel further submits that even if the case of the prosecution is taken on its face value, it may fall within the exception of Section 300 IPC and may not travel beyond Section 304 Part I IPC and both the accused persons have undergone a sentence of 9 years deserves the indulgence of this Court.

13. Per contra, learned counsel for the State submits that from the evidence adduced by the prosecution and the attending circumstances of the case, the prosecution has been able to prove the common intention of the accused appellants in the commission of crime and the High Court has rightly convicted

both the accused persons under Section 302 with the aid of Section 34 IPC.

14. We have considered the rival contentions and perused the impugned judgment and the material placed on record.

15. At the outset, it may be noticed that both accused nos. 1 and 3 (appellants herein) were charge-sheeted for offences under Section 302 read with Section 149 IPC and there was also a separate charge against both of them under Section 302 read with Section 34 and yet another separate charge against accused no. 3 under Section 302 IPC apart from offences punishable under Section 143, 148, 323, 324, 325 IPC. After analysing the evidence on record, the learned trial Court convicted both the accused appellants for offence under Section 302 read with Section 149 IPC but on reappraisal of the evidence on record, the High Court confirmed their guilt but convicted both of them under Section 302 read with Section 34 IPC.

16. On going through the evidence of PW-1, though he was declared hostile, the motive is proved. He had signed Exhibit P-1 (F.I. statement) confirming that his statement was correctly recorded. He had stated that the incident started when the accused party questioned regarding the termination of Katheeb.

Therefore, the genesis of the incident as well as the motive was proved by PW-1. The alleged incident occurred around 2.15 p.m. on 5th December, 1995 and statement of PW-1 was recorded at 3.00 p.m. and immediately the FIR came to be registered. According to him, the accused persons who questioned the termination of services of Katheeb, were having weapons(dagger) with them.

17. Coming to the evidence of PW-2, the ocular witness, who suffered serious injuries and Exhibit P-8-is his wound certificate which was proved by PW-9 the Doctor. Exhibit P-8 wound certificate shows the following injuries:

1. Contused swelling in between the eye brows measure 2" X 2".
2. Incised wound 2" X 1/2 " X 3" bleeding over the back-interscapular area.
3. Swelling over the Rt. Angle of mandible present.
4. Bleeding from the mouth-Abrasions over the lower lip. Loose Rt. Lower incisor +2.
5. Bleeding from the nose seen.

CT scan shows Rt. Frontol lobe contusion with thin sundural Haematome.

Exploration of chest stab at the (L) interscapular area done-wound 2" X ½" X 3

deep-obliquely cutting the deeper muscle but not entering the plural cavity-Bleeders contused & closed in layers.

18. From the evidence of the prosecution, it can easily be discerned that the accused persons including accused nos. 1 and 3 and the complainant party including deceased persons and PW-2 and PW-4 alongwith others came to the mosque and after the prayer was over, a clash occurred regarding the dispute of removal of Katheeb. All the persons including accused nos. 1 and 3 who were standing in the mosque, after the prayer was over, started questioning PW-1 regarding the removal of earlier Katheeb. Both the deceased Assainar and Abdul Rahiman were supporting the action in removing the earlier Katheeb and when they were about to leave the mosque, accused no. 2 exhorted to stab which was heard by PW-2 and PW-4. According to PW-2, accused no. 2 called out and stated, "there they go! Why simply watch? Go and stab" and at this spur of moment, common intention was developed and accused no. 1 and accused no. 3 who were having daggers with them, stabbed deceased Assainar and Abdul Rahiman.

19. A careful analysis and appraisal of the evidence on record establish the presence of accused no. 1 and accused no. 3 at the time of occurrence with sharp edged weapon(dagger) with accused no. 2 who was also armed with sharp edged weapon, and had shared common intention with accused no. 2 of causing bodily injuries to the deceased Assainar and Abdul Rahiman which were sufficient in the ordinary course of nature to cause death of the deceased.

20. The true purport of Section 34 IPC is that if two or more persons intentionally do an act jointly, the position of law is just the same as if each of them have done it individually. The process of law is intended to meet a situation in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention as held by this Court in **Chinta Pulla Reddy and others Vs. State of Andhra Pradesh** 1993 Supp(3) SCC 134 and **Girija Shankar Vs. State of U.P.** 2004(3) SCC 793.

21. The application of principles enunciated in Section 34 IPC, when an accused is convicted under Section 302 read with Section 34 IPC, in law means that the accused is liable for the act

which caused death of the deceased in the same manner as if it was done by him alone. As was observed by this Court in **Chinta Pulla Reddy and others case**(supra), Section 34 is applicable even if no injury has been caused by the particular accused himself. Applicability of Section 34 has been considered by this Court in **Girija Shankar's case**(supra) as follows:-

“ Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar v. State of Punjab* (1977) 1 SCC 746, the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different

in character, but must have been actuated by one and the same common intention in order to attract the provision.”

22. It goes without saying that it would depend on facts of each case as to whether Section 34 or Section 149 or both the provisions are attracted. The non-applicability of Section 149 IPC is no bar in convicting the accused persons under Section 302 IPC read with Section 34 IPC provided there is evidence which discloses commission of offence in furtherance of common intention and this Court had an occasion to consider the scope of Section 34 IPC and Section 149 IPC in **Birbal Choudhary alias**

Mukhiya Jee Vs. State of Bihar 2018(12) SCC 440 as follows:-

“There cannot be any quarrel about the law laid down in the aforesaid judgments where subtle distinction is drawn between Section 34 and Section 149 IPC which deal with “common intention” and “common object” respectively. At the same time, it is also clarified that it would depend on the facts of each case as to whether Section 34 or Section 149 IPC or both the provisions are attracted. It is also held that non-applicability of Section 149 IPC is no bar in convicting the accused persons under Section 302 IPC read with Section 34 IPC, if the evidence discloses commission of offence in furtherance of common intention of them all. From the facts of the present case, we are satisfied that the courts below have rightly concluded that there was a common intention in committing the offence of kidnapping for ransom, by all the convicted persons.”

23. In our considered opinion, both the appellants (accused no. 1 and accused no. 3) shared the common intention with accused no. 2 by causing bodily injuries to the deceased which were sufficient in the ordinary course of nature to cause death of Assainar and Abdul Rahiman. Section 34 is, therefore, clearly attracted to the case of accused no. 1 and accused no. 3 even though the injuries assigned to him (accused no. 3) may not be on the vital part of the body of the deceased, the conviction of accused no. 1 and accused no. 3 for the offence under Section 302 read with Section 34 IPC is, therefore, well merited and the sentence of rigorous imprisonment for life imposed upon them is justified.

24. The submission of the learned counsel for the appellants that once the common object has not been established then they would not have been convicted with the aid of Section 34 IPC is without substance for the reason that both the accused persons were charged with Section 302 read with Section 149 IPC and also under Section 302 read with Section 34 IPC in alternate. In the present case, the prosecution has been able to establish the common intention of the accused persons for their overt acts in

commission of crime and they have been rightly held guilty for offence under Section 302 read with Section 34 IPC.

25. The further submission of the learned counsel for the appellants that even if the case of the prosecution is taken on its face value, it may fall within the exception of Section 300 IPC and may not travel beyond Section 304 Part I IPC is without substance for the reason that prosecution has been able to establish from the evidence on record beyond reasonable doubt their common intention and their overt act in the commission of crime. The act of either of the accused appellants would not fall under any of the exceptions of Section 300 IPC as urged by the learned counsel for the appellants.

26. From the analysis, we are satisfied that the appellants in furtherance of common intention committed an act of murder of deceased Assainar and Abdul Rahiman and the High Court under the impugned judgment has rightly held both the appellants guilty for offence under Section 302 read with Section 34 IPC.

27. Consequently, both the appeals fail and are accordingly dismissed.

28. Since both the accused appellants (Palakom Abdul Rahiman and G. Moideenkutty) are on bail, their bail bonds stand

cancelled. They are directed to surrender forthwith and serve the life sentence in terms of the impugned judgement dated 16th November, 2007 passed by the High Court.

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

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

.....**J.**
(AJAY RASTOGI)

NEW DELHI
April 09, 2019