6Þ IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1657 OF 2007

Arun .....Appellant

Versus

State by Inspector of Police,
Tamil Nadu. .....Respondent

JUDGMENT

B.Sudershan Reddy, J.

1. The appellant has preferred this appeal under Section 379 of the Code of Criminal Procedure read with provisions of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 impugning the judgment and order of the Madurai Bench of Madras High Court in Criminal Appeal (MD) No. 279 of 2005 whereby the High Court reversed the judgment of acquittal against the appellant, who was tried along with seven other co-accused, recorded by the Additional Sessions Judge, (Fast Track No. 2) Trichirapalli in Sessions Case No. 149 of 2004. The High Court accordingly convicted the appellant for the offence punishable under Section 302 read with 34 of the Indian Penal Code (IPC) and sentenced to undergo imprisonment for life.

2. The prosecution case, in brief, is that Venkatesan Seshastripuram (the deceased) was living together with his wife Sripriya (PW-1), mother Padmaja (PW-2) and other family members at No. 15/1A, Seahadri Road, Srirangam. The deceased was in the business of pharmaceuticals. On 22.10.2003, at about 8.45 p.m. the deceased came back to his house from the work in drenched condition. He took out the cash from his shirt pocket, kept the same on the sofa and went to the computer room and after changing clothes took his meal. After having food the deceased along with his wife (PW-1) and mother (PW-2) were watching television programme. At that time two

men came and stood at the entrance of the house. The deceased got up from his chair and moved towards them asking as to why they have entered the house. Immediately the person who was standing to the right of P.W. 1 shot the deceased with the gun. The deceased fell down on the floor. Thereafter, the two men ran away. P.W. 1 and P.W. 2 raised hue and cry. P.W.1 went to her senior father-in-law's house and informed Vamsidhar (PW-3) about the incident. P.W. 3 immediately with the help of P.W. 1 took the deceased to Srirangam Dhanvandhri Hospital. Doctor Murali (PW-17) gave first aid treatment to the deceased and having regard to the grievous nature of injuries advised to take the victim to the Kavery Medical Centre for further treatment. The victim was accordingly taken to the Kavery Medical Centre. PW 3 informed the incident to the Srirangam Police Station over phone. Sub-inspector Bharth Srinivasan (PW-25) attached to Srirangam Police Station based on the complaint of Sripriya (PW-1) issued first information report and registered a case in crime No. 724 of 2003 under Sections 452, 307 IPC and Section 3 read with 25 of the Indian Arms Act.

3. After completion of the investigation, the police filed charge sheet under Sections 120-B, 398, 449, 302/34 IPC and section 3 read with 25 (1-B) (a) of the Indian Arms Act against the appellant and seven other co-accused. The prosecution in all examined 26 witnesses (PW-1 to PW-26) and got marked 36 documents in evidence. The prosecution also produced material objects which were marked as M.O. 1 to 26. The statement of the accused appellant under Section 313 Cr.P.C. was recorded in which he abjured the guilt and claimed trial.

4. It may also be noted that according to the prosecution, there was a conspiracy amongst A-1 to A-8 and pursuant to the same the appellant (A-5) and A-4 attempted to commit robbery and in furtherance of their common intention A-4 shot the deceased.

5. The learned Sessions Judge upon appreciation of evidence available on record found A-4 guilty of the offence punishable under Section 302 IPC and the High Court confirmed the same in appeal.

He did not prefer any further appeal before this Court. So far as the appellant is concerned, the Sessions Judge found him guilty of the offences punishable under Section 398 and 457 (1) IPC and found him not guilty of the charge under Section 120-B, 449, 302 read with 34 IPC as well as under Section 3 read with 25 (1-B) (a) of the Indian Arms Act. Rest of the accused were acquitted of all the charges. The State as well as the appellant preferred appeals against the verdict of the Sessions Judge.

6. Hence, this appeal by the appellant challenging the correctness of the judgment of the High Court convicting him for the offence punishable under Section 302 read with 34 IPC.

7. Shri S. B. Sanyal, learned senior counsel appearing for the appellant submitted the High Court committed serious error in reversing the well considered judgment of the Sessions Court without properly appreciating the evidence available on record. There is no specific allegation as such made against the appellant or any evidence to establish that any criminal act was done by him in furtherance of common intention. There being total absence of evidence the conviction of the appellant with the aid of Section 34 is unsustainable. The learned senior counsel further submitted that there is no evidence of any pre-meditation between appellant and A-4 and therefore, the appellant cannot be convicted under Section 302 with the aid of Section 34 IPC. It was submitted that the High Court committed a serious error in coming to the conclusion that the murder was the intention of both the appellant as well as A-4 to enter into the premises of the deceased. The submission was that this view taken by the High Court is totally contrary to the case set up by the prosecution. The learned counsel further submitted that the High Court all together made out a different case contrary to the prosecution story of robbery to enter into the house. The High Court without any evidence found that the appellant along with A-4 trespassed into the house of the deceased with an intention to kill the deceased.

8. The learned counsel for the State supported the judgment of

the High court.

9. We have considered the submissions made during the course of hearing of the appeal and perused the evidence available on record.

10. Before we proceed to deal with the submissions it may be necessary to recapitulate the findings of the High Court that appellant did not enter the house of the deceased to commit robbery and accordingly reversed the findings of the trial court. The State did not prefer any further appeal so far as that finding recorded by the High Court is concerned.

11. The High Court held that even though pre-meditation between the appellant and A-4 has not been proved but the very fact, the appellant entered the premises along with A-4 armed with pistol itself establishes that he entered the premises in furtherance of common intention to murder the deceased.

12. In the circumstances, two questions arise for our consideration, namely: whether the appellant entered the premises armed along with A-4, who killed the deceased? Secondly, even if he entered the premises armed, will that by itself establish common intention to commit murder?

13. There are two eye witnesses to the occurrence. P.W. 1 is none other than the wife of the deceased. She stated in her evidence that she along with her husband and mother-in-law after finishing her evening meal was watching Television in the house. At that time A-4 and A-5(later identified) having entered the house stood at the entrance. The deceased on seeing both of them moved towards them asking them as to what they wanted and immediately A-4 shot her husband with a pistol in his hand. The bullet injured on the left side rib area. Thereafter both the appellant and A-4 fled away from the scene of occurrence. This is what she stated even in the first information report.

14. PW-2 while narrating the incident more or less gave the same version but however, stated that both the appellant as well as A-4 were carrying pistols. But in the cross-examination she expressed her

ignorance to whether both of them were carrying lethal weapons.

15. PW-26, the Investigating Officer in his evidence admitted that PW-2 did not make any statement during inquiry that both the persons who had entered her house were carrying guns. In the circumstances it becomes highly doubtful as to whether the appellant herein was also carrying a pistol and entered into the house of the deceased.

16. The trial court upon appreciation of the evidence found that the appellant did not trespass into the house of the deceased along with A-4 with intention to kill and accordingly acquitted the appellant of the charge under Section 302 read with 34 IPC. The High Court reversing the findings of the trial court found the appellant guilty of the charge on the basis that the appellant along with A-4 trespassed into the house of the deceased in furtherance of their common intention to kill the deceased. That is not the case of the prosecution.

17. The case of the prosecution was that the appellant along with A-4 with an intention to commit the dacoity had trespassed into the house of the deceased, the deceased had resisted them and out of fear of being over powered A-4 shot the deceased with pistol due to which the deceased sustained grievous injuries leading to his ultimate death. There is no allegation against the appellant that he along with A-4 trespassed into the house of the deceased in furtherance of their common intention to commit murder of the deceased. The common intention according to prosecution was to commit dacoity which is held not proved.

18. It is true that appellate court has full power to review, re-appreciate and re-consider the evidence upon which the order of acquittal is founded and its power to review and re-appreciate the evidence and come to its own conclusion is not controlled by any provisions of the Code of Criminal Procedure, 1973. This Court in more than one case cautioned that an appellate court, however, must

always bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of innocence is further reinforced, reaffirmed and strengthened by the trial court. If two reasonable views are possible on the basis of the evidence on record and one favourable to the accused has been taken by the trial court, it ought not to be disturbed by the appellate court. [See: Chandrappa Vs. State of Karnataka (2007) 4 SCC 415].

19. In the present case the High Court in our considered opinion ought not to have disturbed the order of acquittal recorded by the trial court exonerating the appellant of the charge under Section 302 read with 34 IPC. There is no evidence available on record that appellant along with A-4 entered into the house of the deceased armed with pistol. The evidence of PW-2 that the appellant was also armed with pistol is highly doubtful for she admitted in the cross-examination stating that she was not sure as to whether both the accused were carrying weapon. The first information report and evidence of PW-1 and Investigating Officer, PW-26 do not support the half-hearted and vague statement of P.W-2. It would be unsafe to rely upon the evidence of PW-2.

20. Second question that arises for our consideration that even if the appellant entered the premises armed, will that by itself establish common intention to commit murder? Is there any evidence available on record that a common intention developed at the spur of moment to commit the offence of murder?

21. In the present case, the appellant alone was charged for the offence punishable under Section 302 read with 34 IPC and whereas A-4 has been charged for the offence punishable under Section 302 IPC. Section 34 IPC which is nothing but rule of evidence provides that 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. The burden lies on prosecution to prove that actual participation of more than one person for commission of criminal act was done in furtherance of common intention of all at a prior concert. However, it is not required for the prosecution to establish that there was a prior conspiracy or pre-meditation, common intention can be found in the course of occurrence. In the present case, the question is whether the appellant shared any common intention and if so, with whom? Neither there is any charge nor evidence against A-4 that he committed the murder of the deceased in furtherance of common intention shared with A-4. The trial court as well as the appellate court found A-4 guilty for the offence punishable under Section 302 IPC only. There is no third person involved with whom the appellant could have shared common intention. PW-1 and 2 in their evidence did not attribute any overt or covert act as against the appellant. No circumstances were brought on record from which it could be reasonably inferred that the appellant shared common intention with A-4 and in turn, A-4 committed the murder of the deceased in furtherance of such common intention. There is no evidence that there was a prior meeting of mind developed at the spur of moment and A-4 shot the deceased in furtherance of such common intention resulting in death.

22. According to the evidence of PW-1 the appellant did not indulge in any overt or covert act except be present at the scene of occurrence. It is true that both of them ran away from the scene of occurrence after A-4 shot the deceased with a pistol in his hand. Even if it be accepted that he was armed with a pistol no reasonable inference could be drawn on the proven facts that he shared common intention with A-4 to commit the offence of murder.

23. It is well established that commission of a criminal act by several persons in furtherance of the common intention of all pre-supposes a prior meeting of mind. The classic statement of law is to be found in Pandurang, Tukia and Bhillia v. The State of Hyderabad

[(1955) SCR 1083] in which Bose J. speaking for the Court observed:

> "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 a: Mahbub Shah v. King-Emperor [(1945) L.R. 72 I.A. 148, 153, 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 [(1924) L.R.52 I.A. 40, 49] and Mahbub Shah v. King-Emperor. 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."
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> 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 by-standers to help him kill a 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 premediatated 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".

24. In the present case, there is no evidence of any prior meeting of minds. We know nothing of what they said or did before the attack. It is in the evidence that on being asked by the deceased as to why they entered the house and as to what they wanted; A-4 immediately shot the deceased with the pistol in his hand. Obviously, this was an impulsive act of A-4 and both the courts rightly found that he was guilty for the offence of committing murder of the deceased punishable under Section 302 IPC but the High Court committed a serious error in holding the appellant vicariously liable for the criminal act of A-4.

It is nowhere suggested that appellant indulged in any overt or covert act as such based on which any inference of common

intention could be drawn.

25. Section 34 is only a rule of evidence and does not create a substantive offence. In Barendra Kumar Ghosh v. King Emperor, AIR 1925 PC 1, the Privy Council has pointed out:

> "Section 34 deals with doing of separate acts, similar or diverse by several persons, if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself."

26. In Hardev Singh and another v The State of Punjab [(1975)3 SCC 731)] this Court observed that "the common intention must be to commit the particular crime, although the actual crime may be committed by any one sharing the common intention. Then only others can be held guilty." In this case murderous assault on deceased by A-4 was his individual act. There is no evidence suggestive of any common intention to commit the murder. Circumstances are completely lacking compelling us to draw any inference that A-4 and A-5 together shared common intention to commit the murder and in furtherance of such common intention A-4 shot dead the deceased.

27. In Dharam Pal and Ors. v State of Haryana [(AIR 1978 SC 1492)] this Court laid down the test when Section 34 IPC is applicable and held:

> "It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf.
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> A criminal Court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constrictively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with

> any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender. (emphasis supplied)

28. In Brijlala Pd. Sinha v. State of Bihar [(1998)5 SCC 699] this Court in clear and categorical terms laid down that "unless a common intention is established as a matter of necessary inference from the proved circumstances, the accused persons will be liable for their individual act and not for the act done by any other person. For an inference of common intention to be drawn for the purposes of Section 34, the evidence and the circumstances of the case should establish, without any room for doubt, that a meeting of minds and a fusion of ideas had taken place amongst the different accused and in prosecution of it, the overt acts of the accused persons flowed out as if in obedience of the command of a single mind. If on the evidence, there is doubt as to the involvement of a particular accused in the common intention, the benefit of doubt should be given to the said accused person."

29. There is no dispute with the proposition that the common intention can develop and manifest itself at the spur of moment. But the question for consideration is, whether there is any evidence in the present case to indicate that in fact such a common intention was developed between appellant and A-4 and in furtherance of such shared common intention A-4 committed the murder of the deceased. The evidence of PW-1 and PW-2 does not suggest that any such common intention developed on the spur of moment leading to the murder of deceased by A-4. In the circumstances, it would be unsafe to convict the appellant for the offence punishable under Section 302 with the aid of Section 34 IPC.

30. In Suresh and another v. State of U.P. [(2001)3 SCC 673] this Court after referring to number of its earlier judgments and the judgments of the Privy Council observed that " it is difficult to conclude that a person, merely because he was present at or near the

scene without doing anything more, without even carrying a weapon and without even marching alongwith the other assailants, could also be convicted with the aid of Section 34 IPC for the offence committed by the other accused." In the present case, the FIR shows that at about 9.15P.M. the appellant and A-4 entered the house and stood there; on seeing them, the deceased got up from his chair and moved towards them "asking them who are they" whereupon A-4 shot the deceased causing bleeding injury due to which deceased fell down, the appellant and A-4 ran away towards the street. The contents of the FIR and the evidence of PW-1 and PW-2 read together make it clear that the appellant was not armed as erroneously held by the High Court. In the circumstances, it would be impossible to draw any inference that A-4 committed murder in furtherance of common intention shared by the appellant. In fact, neither there is any charge nor any evidence even as against A-4 that he shared common intention along with the appellant to commit murder of the deceased. There must be more than one person to share common intention to commit criminal act for attracting the applicability of Section 34 IPC. It is clear from the evidence that A-4 did not act conjointly with the appellant in committing the murder. If he did not act conjointly with the appellant, the appellant could not have acted conjointly with A-4.

31. On consideration of the evidence and the material available on record and in the light of the legal principles referred to hereinabove, it is clear that the accusations made against the appellant making him constructively liable for the criminal act of murder committed by A-4 with the aid of Section 34 IPC were not established. So far as the present appellant is concerned, there is no evidence whatsoever available on record to show sharing of any common intention.

32. We accordingly affirm the judgment of the trial court acquitting the appellant of the offence punishable under Section 302 read with Section 34 IPC. Consequently, the judgment of the High Court convicting the appellant under section 302 read with Section 34

IPC is set aside. We however, affirm the conviction of the appellant under Section 457 (1) IPC. The trial court as well as the High Court convicted the appellant for the offence punishable under Section 457 (1) IPC and sentenced to undergo rigorous imprisonment for a period of 2 years and to pay a fine of Rs. 500/-, in default, to further undergo rigorous imprisonment for a period of 6 months. No effort has been made before us challenging the conviction of the appellant under Section 457 (1) IPC. We, accordingly, confirm the conviction and sentence of the appellant under Section 457 (1) IPC imposed by the courts below. The appellant however, had already undergone the sentence. Since there is no appeal preferred by the State as against the judgment of the High Court acquitting the appellant of other charges the same is not interfered with.

33. The appeal is accordingly partly allowed. The appellant be set at liberty forthwith unless required to be in custody in connection with any other case.

.....J.
(Lokeshwar Singh Panta)

.....J.
(B. Sudershan Reddy)

New Delhi;
December 11,2008.

ITEM NO.1A COURT NO.4 SECTION IIA
(For Judgment)

RECORD OF PROCEEDINGS
SUPREME COURT OF INDIA

CRIMINAL APPEAL NO. 1657 OF 2007

ARUN Appellant(s)

VERSUS

STATE BY INSPECTOR OF POLICE, TAMIL NADU Respondent(s)

Date: 11/12/2008 This matter was called on for pronouncement of Judgment today.

For Appellant(s) Mr. S. Mahendran,Adv.

For Respondent(s) Mr. S. Thananjayan,Adv.

Hon'ble Mr. Justice B. Sudershan Reddy pronounced the Judgment of the Bench comprising of Hon'ble Mr. Justice Lokeshwar Singh Panta and His Lordship.

The judgment of the Trial Court acquitting the appellant of the offence punishable under Section 302 read with Section 34 I.P.C. is affirmed and, consequently, the judgment of the High Court is set aside and the appeal is partly allowed in terms of the signed judgment. However, the conviction of the appellant under Section 457(1) of the I.P.C. is affirmed.

The appellant be set at liberty forthwith unless required in custody in connection with any other case.

(A.S. BISHT) (INDU SATIJA)
COURT MASTER COURT MASTER

(Signed reportable judgment is placed on the file)