

Kinaram Das and ors. Vs. the State

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Court : Guwahati

Decided On : May-20-1954

Judge : Bam Labhaya and Deka, JJ.

Appellant : Kinaram Das and ors.

Respondent : The State

Judgement :

Bam Labhaya, J.

(1) The four appellants in this case were Jointly tried by the Additional Sessions Judge, Lower Assam Districts. The trial was with the aid of a Jury. The verdict of the Jury was unanimous. In consequence of the verdict, all the four appellants, namely, (1) Kinaram Das (2) Sanchitram Das (3) Uttamchandra Das and (4) Bhebel Koch, were found guilty and convicted Under Section 304, Part I, IPC read with Section 34, IPC They were sentenced to different periods of imprisonment ranging from two to six years, Sanchit Das, appellant No, 2, was further found guilty Under Section 323, I.P.C. The conviction for this offence was for causing hurt to Ningnaram. All the four appellants have jointly appealed from their convictions and sentences.

(2) Shortly stated, the prosecution case was that on 13-12-51, Bengaram Keot (deceased) was reaping paddy in his own field. His brother, Ningnaram (P.W. 1) was also in his land and reaping his paddy. The field of the accused was close to

the field of the deceased and his brother. All the four accused also were reaping paddy. It was towards the evening when Bengaram (deceased) decided to go back home. He untied his bullocks. One of these bullocks strayed into the pulse field of Kinaram accused. Bengaram followed the bullock in order to take it out of the field of Kinaram. Noticing this, Kinaram (accused) abused Bengaram (deceased). Witnesses from the prosecution side have admitted that Bengaram (deceased) also abused Kinaram. There was thus exchange of abusive language.

Kinaram ordered the three accused to come and beat the deceased. He himself had a bamboo stick in his hand. The other three came 'hulabaris', Sanchit (accused) is said to have dealt the first blow on the head of Benga with his 'hulabari' Benga fell down. Kinaram, Uttamchandra Das and Bhebela Koch then dealt several blows to Bengaram (deceased), according to the prosecution version. Bengaram became unconscious. He was bleeding. His brother, Ningnaram, came running from his field to the place where his brother was assaulted. He was also beaten by the accused, as a result of which, he sustained some injuries. He raised the alarm. Bengaram's mother-in-law, Mt. Bhaderi (P.W. 2) who was in her court-yard, came out. At the trial, it was staged that Manik Patwari and one Nanda also were in the neighbourhood and were attracted to the scene of the occurrence.

Bengaram was carried home. He died next morning. His dead body then was taken to the Ha jo Police Station at a distance of six miles from the village of the deceased, Ningnaram, his brother, lodged the 'Ejahaar'.

The accused all pleaded not guilty. They disowned all responsibility for what had happened. All that they stated was that they were falsely Implicated. The very occurrence was denied.

(3) Only Sanchitram was found guilty of causing hurt to Ningnaram though his case was that he had been assaulted by all the four. The three other accused were acquitted of this charge of causing hurt to Ningnaram, but all the accused were found guilty of participation in the assault on Bengaram, deceased. The common intention, according to the verdict of the Jury, that was attributed to them was thus of causing culpable homicide not amounting to murder, which would fall

Under Section 304, Part I, I. P, C. The correctness of the conviction has been assailed on several grounds.

(4) Mr. Ahmed first tried to bring to our notice certain discrepancies appearing in the statements of prosecution witnesses. His case was that these discrepancies were either not brought to the notice of the Jury or at least they were not brought out in the summing up in a pointed manner. This, according to him, could easily lead to an error in the verdict. The discrepancies pointed out are not material. They are on minor points; they are extremely few. The prosecution version is very simple. It is that Kinaram (accused), after exchanging abusive language with the deceased, called his companions to come and beat the deceased, and they participated in it. The only point is what, if any, particular injuries were caused by any of the accused. On this point, the prosecution version is lacking in details. From the stage of the First Information Report up to the final stage when the witnesses were examined at the trial, no attempt was made by the prosecution witnesses to ascribe or attribute particular blows or injuries to any of the accused other than Sanchitram. About him, it is said that he gave the first blow. His lathi blow landed on the head of Bengaram. The medical evidence is that this injury resulted in the death of the deceased; it caused the fracture. The minor contradictions, in these circumstances, would not amount to any serious misdirections, nor could it be said that they have caused any error in the verdict or any failure or miscarriage of justice.

(5) The important contention raised by Mr. Ahmed is that the facts and the circumstances of this case do not attract the applicability of Section 34. He has argued that so far as the application of Section 34 is concerned, the charge did not give a correct exposition of the law; it was not complete and essential facts bearing on its applicability were not stated to the Jury. This misdirection, he urges, had led to an apparent error in the verdict, and is fatal to it. He also challenges the validity of the convictions Under Section 304, Part I, I. P. O.

(6) Section 34, IPC lays down 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 words of the section 'when a criminal act is done by several persons' refer to the act complained of. What is necessary for the application of Section 34 is that a criminal act should be done by several persons, in furtherance of the common intention of all. The 'act' includes acts, several persons have to engage in the transaction. If the result of the acts forming part of the transaction is an offence and if several acts have been committed in furtherance of the common intention of all, each one is responsible for any act done in the same manner as if the act was done by him alone.

The learned Additional Sessions Judge explained the meaning or the significance of Section 34, Penal Code, to the Jury in that part of the charge where he was dealing with the abstract propositions of law. He explained to them the requirements of Sections 299, 300, 302 and 304, IPC. When dealing with Section 34, IPC he observed as follows: 'It does not prescribe any substantive punishment by itself but helps in allocating the responsibilities of certain criminal act which is done by more than one accused in combination and in pursuance of the common intention of all. To invoke the aid of this section, the criminal act must be done by the persons in pursuance of the common intention shared by all, in which case alone all the persons may be liable. Furtherance of common design is a condition precedent for affecting the persons who took part in the commission of the crime. The existence of common intention being the sole test of joint responsibility, it must be proved what the common intention was, and that the common act for which the accused is sought to be made responsible, was acted upon in furtherance of common intention.' He added that the presumption of common intention may not be too readily applied or pushed too far. The statement of the legal position in the abstract may not be open to any serious objection, but when considering the applicability of Section 34, IPC to the facts and the circumstances of the case, the learned Judge again repeated the abstract propositions without bringing W the notice of the Jury how those propositions should be applied to the facts of the case. Dealing with this question in relation to the facts of the case, he observed:

All the witnesses have stated that all these four accused persons participated. They have given details as to which accused took what part. The evidence is that Kinaram was armed with a bamboo piece called 'targon' and the rest with 'hulabaris'. You have seen the 'hula-baris', Exts. I to IV. It is at this stage that I should like to draw your attention to Section 34, IPC. If you find that the prosecution has succeeded in establishing that these four persons acted in the way alleged in furtherance of their common intention, then they will all be equally liable.

Further on he proceeded to observe that 'If you happen to hold that it has succeeded in so proving, then you will have to see how far their presence was in furtherance of the common intention to cause the death of Benga. Common intention always presupposes a preconceived plan. This pre-conceived plan might spring up very suddenly. It does not mean that the assailants should conspire together in a formal way some time before an occurrence takes place. In this particular case, if you accept the prosecution case that at Kinaram's order the other three accused persons came armed with hulabaris, then you will have to see whether this conduct of these four accused persons was the conduct of four assailants to cause the death of Benga. If you find with reference to the evidence and circumstances that their common intention was to cause the death of Benga, then they would all be liable for causing the death of Benga constructively with the aid of Section 34, IPC' (7) What the learned Judge did not indicate to the Jury was that the charge itself did not state what the common intention was. What was stated in the charge was that 'you on or about the 13th day of December 1951 at Ketakibari all joined together in furtherance of common intention of all and committed culpable homicide not amounting to murder.' The implication of the charge may well be that the common intention was the commission of culpable homicide not amounting to murder. But that was really the act complained of and it had to be stated that it was in furtherance of their common intention, which was not stated. In his charge, the learned Judge referred to the common intention at one place only. He said that the intention was to cause death. There is naturally no direct evidence on this point. The learned Judge, when directing the Jury to consider whether the common intention of the assailants was to cause the death of Benga, stated only that this had to be ascertained with reference to the

evidence and the circumstances. What evidence and what circumstances had a bearing on the point were not stated. All that we have got from the prosecution evidence is that Kinaram asked others to beat the deceased. The allegation also is that they participated in beating. A blow given by Sanchitram resulted in the death. It was for the learned Judge to put to the Jury whether from these circumstances they could come to the conclusion that there was really a community of intention to cause death, assuming that that was the common intention which the prosecution intended to attribute to the accused.

(8) In 'Mahbub Shah v. Emperor' AIR 1945 PC 118 (A), the import and significance of the words 'common intention' was explained by their Lordships of the Privy Council. It was a case also of a sudden quarrel. It was held that common intention within the meaning of Section 34 implied a pre-arranged plan. It was necessary to prove for the application of Section 34, IPC that the criminal act was done in concert pursuant to a pre-arranged plan. It was recognised that it would be difficult, if not impossible, to procure direct evidence to prove the intention of individuals or groups. This intention could be inferred from acts or conduct or relevant circumstances. But what was emphasised was that care had to be taken not to confuse same or similar intention with common intention. The line that divided the two is apparently very thin. But the distinction was regarded as real and substantial. It was pointed out that if the distinction is overlooked, it will result in miscarriage of Justice in some cases. Caution was also given to the effect that the inference of common intention within the meaning of the term in Section 34, should not be reached unless it is a necessary inference deducible from the circumstances of the case.

(9) The knowledge and the consciousness of the distinction between the same or similar intention and the common intention is essential particularly in cases where the occurrence is sudden. In cases where there is premeditation, some kind of preconcerted action, some previous design, and several persons combine and act together, they may easily be deemed to be intending the natural consequences of their combined acts. If 3 or 4 persons lie in ambush for some enemy, and they are armed with dangerous weapons, and when the enemy appears on the scene, they attack him and he is hacked to pieces or reduced to pulp, and they do not leave

the scene of occurrence until they are sure that he is dead as mutton, there can be absolutely no difficulty in holding that the common intention of all was to commit murder. That would be an extreme case and there could be extreme cases on the other side too, and the case on this extremity would be where there is a sudden quarrel without any premeditation; where there is no previous design for killing or for murder or even for assault, but something happens and tempers flare up and then several persons engage in a transaction, Which ends in an offence or offences. In such cases, it may not be easy to find if there was any common intention and, if there was, what was that common intention.

In such cases there is commonly a cry for assistance or a call for assault or the doing of a certain act which is criminal. Now the person who asks for assistance or who gives a certain direction or a certain order, cannot possibly be sure of the reaction of others. All. those who come may come with different designs and different intentions. If they immediately engage in the transaction, it will be an extremely difficult task to discover whether they had any common intention, from their acts alone. They do not have any chance of disclosing their mind to the others.

The circumstances in 'Mahbub Shah's case (A)' were very similar. It was Quasim Shah in that case who shouted out for help. Wali Shah and Mahbub Shah came up. They had guns in their hands, and when Allah Dad and Hamid Ulla tried to run away, Wali Shah and Mahbub Shah came in front of them and Wali Shah fired at Allah Dad who fell down dead and Mahbub Shah fired at Hamidulla, causing injuries to him. Mahbub Shah was convicted Under Section 302 read with Section 34, I. P, Code, as a result of his causing the death of Allah Dad. Their Lordships declined to uphold the conviction. Both Mahbub Shah and Wali Shah were armed. Both used the fire-arms against two different members of the opposite party. They were called by Quasim Shah who sought their help. Quasim Shah and Mahbub Shah both were not held responsible for the death of Allah Dad who was fired at by Wali Shah. Their Lordships found it necessary to emphasise the distinction between the same and common Intention in view of the circumstances of the case. Both had fire-arms, the intention was the same or similar, but it was found that it was not common.

This case is no authority for the proposition that common intention cannot be formed suddenly; it may be formed immediately before the occurrence commences, and it may not be proved by circumstantial evidence. All the circumstances taken together may point to the common intention even if there is no direct evidence. But the distinction between common intention and the same intention cannot be lost sight of, particularly in cases where the occurrence takes place on the impulse of the moment without any previous concert or design. It is this aspect of the matter which was not brought to the notice of the Jury and, in fact, the learned Judge himself did not fully have it in his mind. It was not possible in these circumstances, for the Jury to consider properly whether Section 34 could apply, nor could it be expected from them that they would be able to come to a correct conclusion in the absence of the precise statement of the law. The charge on the point being inadequate, we have got to examine the question whether, in the circumstances of this case, common intention to cause the death of Benga could be attributed to the appellants.

(10) Mr. Medhi has argued that there is no manner of doubt that Kinaram ordered the other three appellants to come and beat the deceased. They came with 'hulabaris' and participated in the assault on the deceased. He argues that even if there was no previous common intention or design to cause death, the fact that there was a common intention to beat the deceased suffices for the application of Section 34, by reason of the fact that one, out of the party, in furtherance of the common intention of beating, gave a blow that proved deadly. In support of the proposition, he has relied upon - 'State v. Hira Dube' : AIR1952 Pat135 , and also on - 'Bashir v. State' : AIR1953 All668 . In both cases, he has been able to point to some observations which apparently seem to support his contention. These cases, however, are clearly distinguishable on facts. In : AIR1952 Pat135 ', the deceased left his house in the early morning intending to go to another place. According to the prosecution, the two appellants followed and overtook him at a certain point and assaulted him with lathis'. The post mortem examination disclosed that the deceased was given some 6 or 7 or even more blows with lathis. One of the blows was on the head and caused fracture of the skull, to which the deceased succumbed the same day at the Police Station. The reason given by the deceased for the assault in his statement made some time before his death was that about

two months earlier he had given evidence for the prosecution in a case instituted by one Mt. Lakhia a woman, against one of the two appellants and a relative of the other. In the circumstances of this case, it could be inferred that the two persons who were responsible for the murderous assault came with a common intention. There was no direct evidence about what that common intention was. Both had lathis and they used them generously, and the result was death. They could be presumed to intend the consequences of their acts, and common intention to cause death could be attributed to them; there was previous design and premeditation; they followed him and caught him and killed him. It was not a case of a sudden occurrence. At page 137 in the last para of the Judgment, the learned Judge observed:

It is, I think, Quite clear that an act may be done by one of several persons in furtherance of the common intention of them without each one of them having intended to do the particular act in exactly the same way as an act may be done by one member of an unlawful assembly in prosecution of the common object which the other members of the unlawful assembly did not each intend to be done. In order to determine the common intention and to determine also whether a particular act was done in furtherance of that common intention, regard must be had not solely to the particular act, but to all the acts that were done.

If two or three of several men proceed to assault another man with their fists, and if suddenly one of the by-standers joins in the affray and pulls out a knife and stabs him fatally, it might well be said that the stabbing was not part of the criminal act in which all of them had joined, but was the individual act of the man- Who used the knife. Where, however, two men, each armed with lathis, set out in pursuit of another and overtake and assault him, each of them striking several blows, it seems to me quite impossible to argue that any particular blow was not struck in furtherance of the common intention.

Here, common intention was gathered from the result and very correctly. It was stated that if common intention was beating, every blow given there was in furtherance of that common intention. But, from this it may not follow, as a rule of general application, that if the intention is beating and if one of the party has used

a deadly weapon, of which the others were not aware or had intentionally caused death which was not intended by others, the mere fact that death occurred would suffice for fastening constructive liability on all.

(11) The Allahabad case is distinguishable- on the same ground. The facts were similar to the Patna case and very different from the facts of the present case. In this case, Angan and Majid had a joint field in the neighbourhood of the fields of Bashir. On 31-3-50, Angan and Majid reaped the crops of the field and stored them in the field. Bashir and his sons were at that time reaping crops Of their field. When next day Angan and Majid went to their field, they found that some of their crops were missing. So, they questioned the appellant and his sons, who were in their field, about the missing crops. This offended the appellant and his sons who abused Majid and Angan and rushed at them with 'lathis' and beat them. Angan, on getting two blows with 'lathi' stood apart, while Majid was struck and knocked down with lathis by the appellant and his sons. The witnesses turned up and the appellant and his sons left off the beating. Majid died on account of shock and haemorrhage resulting from the injury to the head. He had received 9 injuries, out of which 6 were contused wounds inflicted on the head. The skull bones were fractured on account of the injuries on the head. Whoever inflicted the injuries which caused the fracture of the skull, must be held guilty of the offence of murder because he must have intended the natural consequences of his act.

It was found (para. 25 of the judgment at page 678) that the accused formed the common intention of assaulting Majid with 'lathis'. The appellant gave the order and he and his sons at once, in concert, attacked him with lathis. Each of the assailants shared the intention to beat with the others. Not only each had the intention to beat Majid, but each also acted in concert with the same purpose in view. It does not matter in the least if they formed the common intention immediately before beating Majid. All the blows were inflicted in furtherance of the common intention. The result of the acts done by all was the commission of the offence of murder. The appellant was, therefore, convicted Under Section 302, IPC Now, here no doubt the occurrence took place suddenly. There was no premeditation or preconcert, as in the Patna case. But there is this difference in the circumstances of the case that all had participated and no less than nine

injuries were caused. It was not known who gave the fatal blow. There was belabouring or beating of the man till he was dead, and that circumstance does certainly afford an indication of the intention of the party. In a particular case, it may be found from the injuries inflicted and from the conduct of the accused that they had the common intention to kill, even though the occurrence may be sudden. But the principle that was laid down in this case was that

the criminal act for which all the conspirators are sought to be made liable Under Section 34 must be connected with the common intention. It must have been done, while, or for the purpose- of, executing or carrying out the common intention. If it is extraneous to the common intention or is done In opposition to it, or is not required to be done at all for carrying out the common intention, it cannot be said to be in furtherance of it. Whether an act is in furtherance of the common intention or not, depends upon the common intention and the nature of the act. It is an incident of fact, and not of law.

It is thus clear that the question whether there was a common intention and the act complained of was done in furtherance of the common intention, is a question of fact dependent on the circumstances of each case. In the present case, Sanchitram has been found to be responsible for the first blow on the head. What happened after that, the prosecution witnesses cannot describe with any degree of certainty. All that is said is that the three others participated in the assault. This is all the information they can give on what happened afterwards. Only two other injuries were caused. They are extremely minor. These are on the elbow. Benga did not die as a result of these injuries. Even Sanchitram, seeing that the deceased had fallen down, desisted from giving any other blow. If Sanchitram intended to cause death, he would not have stopped hitting when the deceased fell down. He felt that he had already done more than was necessary and the others, if they participated, have not caused any serious injury. From the fact of the injuries alone or even from the consequence of the assault alone, it may not be inferred necessarily that the intention was to cause death.

This aspect of the matter also has been brought out in the Allahabad case on which the learned Government Advocate has relied. It was observed that

the common intention should be inferred from the whole conduct of all the persons concerned and not only from an individual act actually done. As the criminal act done is not to be assumed to be in furtherance of the common Intention, it follows that the common intention is not to be inferred exclusively from the criminal act done.

It was further observed that the criminal act done will certainly be one of the factors to be taken into consideration, but should not be taken to be the sole factor. Besides proving that certain criminal act was done, the prosecution has to prove the existence of common intention and that the criminal act was done in furtherance of it. These are two independent facts, and one is not to be assumed or inferred exclusively from the other. In view of this proposition, with which we respectfully agree, It may be said that while even in cases of a sudden quarrel, it may be possible to gather a certain common intention attributable to all, it cannot be said as a matter 'of law that in all cases, even though the occur-'rence is sudden, any particular act of a member of the party would, by itself, or exclusively form the basis of the conclusion about the common intention of all.

(12) In this case, there was absolutely no enmity between the parties. The trouble arose from the straying of the bullocks in the field of the accused and the subsequent exchange of abuse. These facts, coupled with the conduct of the accused at the time of the occurrence, incline us to the conclusion that, no one of the appellants, including Sanchitram, had the intention to kill. Not only there is no reasonable basis for a finding that there was a common intention to kill Benga, deceased, we also do not think the evidence in this case is adequate for a finding that Sanchitram himself intended it. All that could be said is that he gave a blow on a vital part of the body of the deceased. The weapon used must have been used with some force. Fracture was caused. He must have known that the blow he was giving would result in death, This case, therefore, so far as he is concerned, would attract the applicability of Section 304, Part II. But there is no evidence which would lead us to the conclusion that he had the intention for causing death or that his intention was shared by others. All the four appellants would, therefore, be responsible for their own acts.

So far as Sanchitram is concerned, he has been convicted Under Section 304, Part I, read with Section 34, I. P. Code. The conclusion arrived at above is that he is responsible only for his own acts and the applicability of Section 34 is not attracted. His conviction is, therefore, converted into one Under Section 304, Part II, IPC He has been sentenced to four years' rigorous imprisonment. The sentence errs on the side of leniency, even Under Section 304, Part II. If he had been guilty Under Section 304, Part I, or Under Section 302, IPC the sentence should have been much heavier. In the circumstances of the case, we do not propose to enhance the sentences. The State Government has not moved for enhancement. The sentence, though lenient, is not nominal; it is substantial and, therefore, we refrain from considering the question of enhancement. His conviction and sentence are maintained.

(13) In regard to others, the prosecution case is that they have also participated in the assault. Mr. Ahmad has argued that there are only two injuries which may possibly be attributed to them, and, if others besides Sanchitram had participated, there should have been other injuries. The argument is not conclusive. Blows may have been given which did not leave any mark, Marks of minor injuries could disappear and may not have been noticed, as Benga's body was examined after his death. The fact that there were only two Injuries, does not necessarily conflict with the prosecution version. They have been found to have participated in the assault, and we see no reason to differ from that finding. They could be held guilty only Under Section 323, I. P. Code. The convictions of all the three are converted into those Under Section 323, IPC They have been in Jail since their convictions on 29-9-53. We consider that the imprisonment already undergone constitutes sufficient punishment for the offence for which they have been found responsible. The unexpired portions of their sentences are remitted. They shall be released forthwith. The appeal is allowed to the extent indicated above.

Deka, J.

(14) I agree.