In Re: Basappa and ors.

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Court : Karnataka

Decided On : Sep-18-1950

Reported in : AIR1951Kant1; AIR1951Mys1

Judge : Medapa, C.J. and ;Mallappa, J.

Acts : Evidence Act, 1872 - Sections 1, 3 and 114; Indian Penal Code (IPC), 1860 - Sections 34 and 149; Code of Criminal Procedure (CrPC) , 1898 - Sections 367

Appeal No. : Criminal Appeal No. 38 of 1949-50

Appellant : In Re: Basappa and ors.

Advocate for Def. : Adv. General

Advocate for Pet/Ap. : Maloor Subba Rao, Adv.

Disposition : Appeal allowed

Judgement :

1. This is an appeal against the judgment in Shimoga Sessions Case 3 of 49-50 in which the appellants have been convicted of an offence under Section 302, Penal Code, and sentenced to transportation for life.

2. According to the prosecution case, the accused and others entered, on the night of 13-12-1948, a building known as Tudekoppada Mutt which is at a distance of a few miles from Sagar and committed offences of house-breaking and robbery, in

the course of which one Puttasamiah an inmate of the house was murdered. P. W. 9 Shiviah, to whom the Mutt belongs, was residing in it with the other members of his family and a few relatives had also come in connection with some ceremony. On the night of 13-12-1948, P. W. 9 Shiviah and some of the members of his family had gone to Sagar to see a circus. He and one Karibasiah remained at Sagar, while the other members of the family returned to the Mutt. Early in the morning, his son-in-law Lingamurti came to Sagar and told him about the house-breaking, robbery and murder that had taken place in the night and a complaint Ex. P-13 was filed before the Police. P. W. 10 Lingamurthi himself is not aware of what happened that night as he was sleeping in the upstairs of the building, while the incident took place in the downstairs. P. W. 11 Gangadhariya who was also sleeping in another portion of the house was not also awake when the incident happened. The evidence of P. W. 20 Kalyanaiya son-in-law of Shiviah and of his wife P. W. 21 Annapoornamma are not of much help, as, though they refer to the jewels that she had kept under a pillow having been removed, the accused had left her room before they could see them. The evidence of P. W. 22 Gangamma and P. W. 23 Neelamma is of much more importance as they saw the culprits snatching away a suit case from the hands of Gangamma after a tussle. As they were using torchlight, Gangamma has been able to identify accused 1 and 2 as the persons who did so. It may be added that she identified the accused in an identification parade held, later on, by the Amildar P. W. 3. It has to be stated here that Gangamma has also deposed that just before the accused entered the hall in which she was sleeping she heard the sound of some ore being beaten outside. Pattasamiah was found with injuries on his forehead and neck and he died a little later. On the complaint to the police referred to above, the Police Officers came and an inquest was held over the dead body of the said Puttasamiah and the body was subjected to post mortem examination by the doctor P. W. 2. According to the evidence of this doctor, death was due to haemorrhage in the brain and injury to the brain and shock, as a result of severe injury and fractures of skull bones.

3. All that is necessary to add for consideration in this case is that there is some evidence of certain articles said to have been stolen, being traced to the possession of the accused. We do not like to express any opinion in respect of the offence of robbery, as the accused have yet to undergo a trial in respect of that

offence, and it is particularly so as we find that the evidence on record does not justify the conviction of any of the accused or all of them of the offence of murder, even if all the evidence on record is accepted as true. It may be taken that accused 1 and 2 along with others entered the building and removed some of the valuable articles and that one or more of them caused the death of Puttasamiah. The point for consideration is whether there is any evidence to show whether all the accused or any one or more of them can be convicted of the offence of murder. There is no direct evidence to show who out of the accused and their companions committed the murder. It is contended that as the accused 1 and 2 at any rate, were seen entering the hall in which P. Ws 22 and 23 were sleeping and actually assaulted them and committed the offence of robbery by snatching away the small suit case held by Gangamma, it must be taken that it is they who murdered Puttaeamiah. This does not necessarily follow. Circumstantial evidence must be such as to lead only to one possible inference leading to the conviction of the accused and if any other inference consistent with the innocence of the accused on that point is possible, a conviction cannot be based on such circumstantial evidence. In this case, it is quite possible that a person other than accused 1 and 2 be laboured Puttasamiah, while accused 1 and 2 were engaged in committing theft. There is neither circumstantial nor direct evidence to show, who it is that committed the murder of Puttasamiah. Assuming that some of the stolen articles are traced to the possession of any of the accused, it does not follow that he murdered the deceased. As observed in Pattamudasetty v. Govt. of Mysore:

'Before a presumption of murder can be drawn against the accused from the mere unexplained possession of an article shown to have belonged to the deceased, there must be evidence to show that the particle recovered from the accused was not only in the possession of the deceased at the time of murder but also that it could not have been transferred from the deceased to the accused except by the person being murdered.'

4. It was contended that the accused are under any circumstances liable under Section 34, Penal Code. According to Section 34;

'When a criminal act is done by several persons in furtherance of the common intention of all, each of such parsons is liable for that act in the same manner as if it were done by him alone.'

This section states when, a person who does one of a series of acts, done by several persons amounting to an offence, is liable to be punished for that offence, though what he did by himself does not amount to that offence. If, for instance, two or more persons as in this case, enter a house with the common intention of committing theft and only one of them is lucky in finding the jewels and removes them in furtherance of the common intention, every one of them is liable to be convicted of the offence of theft as if he alone removed the jewels. Does it mean that if one of them finds a man waking up and hits him so hard that he dies as a result of that injury, every one of his companions is liable for the offence? It would be so if the murder was intended by all of them and if; was committed in furtherance of their common intention though the act was done by only one of them. Park J. told the jury in Duffey's and Hunt's case, (1830) 1 Lewin 194: (168 E. R. 1009):

'If three persons go out to commit a felony, and it one of them, unknown to the other, puts a pistol in his pocket and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding 'it happened, while they were engaged with him In the felonious act for which the want out,'

It is however clear that, if the persons went out to commit theft and it is in evidence that one of them openly carried a loaded gun all of them must be deemed to have intended that murder should be committed in the course of their committing theft. Every one of them is liable for murder if one of them commits murder in furtherance of their common intention of committing murder though they did not by any act of their own commit the murder. This is what is intended by Section 34, as is clear by the wording of that section.

5. Before the section could be applied to a particular case, it must be shown first that a criminal act was done by several persons, secondly that all of them intended that the criminal act should be committed and lastly that the criminal act was done

in furtherance of the common intention. As defined by Section 83 : 'the word 'Act' denotes as well, a series of acts as a single act.' The word 'Act' in Section 34 contemplates a series of acts though done by several persons. As observed in Harihar Singh v. Emperor, A. I. R. (13) 1926 Pat. 182 : (26 Cr. L. J. 1498) :

'The question whether a particular criminal act may be properly held to have been 'done by several persons' within the meaning of the section cannot be answered regardless of the facts of the case. In order to convict a person for an offence with the aid of the provisions of Section 34 it is not necessary that that person should actually with his own hand commit the criminal act. If several persons have the common intention of doing a particular criminal act and if in furtherance of that common intention all of them join together and aid or abet each other in the commission of the act, then although one of these persons may not actually with his own hand do the act, but if he helps by his presence or by other acts in the commission of the act, he would be held to have done that act within the meaning of Section 34.'

6. The words 'in furtherance of the common intention of all' were added to Section 34 by Act XXVII [27] of 1870. All the same even without those words, which expressly lay down when a person is liable for an act not done by him, no doubt was felt that he is liable only when he along with the person who committed the act intended that it should be committed. Deciding the case in 1866 reported in Queen v. Gorachand Gope, 5 W. R. (Cr.) 45 : (Beng. L. R. Sup. Vol. 443), Sir Barnes Peacock C. J., with whom Trevor J. and Norman J., concurred held in dealing with this section even before the above words were added to Section 34 that :

'When several persons are in company together engaged is one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the other, commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention.'

7. It may be added that even in cases where a number of persons who intended to commit an offence joined together in committing that offence and one of them committed also an offence not shown to have been intended by all of them, the other persons cannot be held liable for the offence which was not intended by

them to be committed. In Queen Empress v. Dinabaidya, 19 Mad. 483 :

'Where three persons assaulted the deceased and gave a beating in the course of which one of the persons struck the deceased a blow on the head which resulted in death held : That in the absence of proof that the parsons had the common intention of inflicting injury likely to cause death, they could not be convicted of murder.'

The observation of an American Jurist relied on by Mayne in his commentary on Penal Code referred to by Mahmood J., in Empress v.Dharam Rai, 1887 A. W. N. 236, is as follows : 'If the wrong done was a fresh and independent wrong, springing wholly from the mind of the doer, the other is not criminal therein, merely because when it was done he was intending to be a partaker with the doer in a different wrong.'

8. It may be added that Section 34 deals with the liability of persons who had a common intention when an illegal act is committed in furtherance of that common intention. Knowledge that an offence is likely to be committed is not what is contemplated in Section 34. While this section deals with the liability of persons when an offence is committed in furtherance of a common intention to commit that act, Section 149 deals with the liability of persons in respect of an offence when they had the knowledge of there being a likelihood of its being committed in prosecution of their common object. That section does not deal with common intention to commit the offence. In effect, the common object with which it deals may be one which is lawful, while the common intention contemplated by Section 34 is with reference to the committing of a criminal act. It may be observed that Section 34 does not deal with the liability of persons for an offence likely to be committed in the course of what was intended by them, but deals with only the liabilities of the persons who intended to commit a criminal act, when that act is committed. It may be further added that even in a case where an offence is committed by one person another person who was with him at the time the offence was committed cannot be punished, though he had a similar intention, that is because, the section deals with the liability of persons for a criminal act done in furtherance of a common intention.

9. This takes us to the third point i.e., what is the significance of the words 'In furtherance of the common intention,' in Section 34. Before it could be said that an act was done in furtherance of a common intention, it is clear that there must have been a pre-arranged plan or common design to commit the act prior to its commission. It is not sufficient if, at the time, the act is committed persons present think alike and intend that the act should be committed. The point is made clear by the decision reported in Mahbub Shah v. Emperor . In that case their Lordships were dealing with a case in which when one Quasim Shah who was struck by Allah Dad cried for help, Walli Shah and Mahbub Shah came in front of Allah Dad and Hamidullah and Wali Shah fired at Allah Dad causing his death while Mahbub Shah fired at Hamidullah causing him some injuries. It was observed as follows:

'To invoke the aid of Section 34 successfully it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle it is clear to their Lordships that common intention within the meaning of the section 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.

Their Lordships are prepared to accept that the appellant and Wali Shah had the same intention, viz., the intention to rescue Quasim if need be by using the guns and that, in carrying out this intention, the appellant picked out Hamidullah for dealing with him and Wali Shah, the deceased, but where is the evidence of common intention to commit the criminal act complained against, in furtherance of such intention Their Lordships find none. Evidence falls far abort of showing that the appellant and Wali Shah ever entered Into a pre-meditated concert to bring about the murder of Allah Dad in carrying out their intention of rescuing Quasim Shah. Care must be taken not to confuse same or similar intention with common intention; 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. In their Lordships view, the inference of common intention within the meaning of the term is Section 34 should never be reached unless it is a

necessary inference deducible from the circumstances of the case. That cannot be said about the inference sought to be deduced from the facts relied on by the High Court in distinguishing the case of the appellant from that of Ghulam Quasim.'

10. It may be that, though there may not be a pre-arranged plan to commit a major offence when some men start with a pre-arranged plan to commit a minor offence, the conduct of the men may show that in the course of their committing the minor offence they came to an understanding to commit the major offence and a common intention of committing that offence came to existence. If the major offence was committed in furtherance of their common intention it is clear that each is liable for the offence as if he himself committed it. The decision in In re, Nachimuthu Goundan, A. I. R. (34) 1947 Mad. 259 : (48 Cr. L. J. 123) clearly supports this view.

11. As observed in Mahbub Shah v. Emperor :

'It is difficult If not impossible to procure direct evidence to prove the Intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.'

As could be expected in cases of this kind there is no direct evidence to show that the accused entered the house with a pre-arranged plan to commit murder or that they came to any such understanding prior to the murder as in the case referred to In re, Nachimuthu Goundan, A. I. R. (34) 1947 Mad. 259 : (48 Cr. L. J. 123), There is no evidence to show that any of the culprits carried a gun or even a club, before they entered the house. There is nothing in the conduct of the accused or in the other circumstances of the case to show that the accused had the common intention of committing murder. The result is that the conviction of the accused for an offence under Section 302, Penal Code, cannot stand. The appeal is allowed and the conviction and sentence of the accused of an offence under Section 303, Penal Code, are set aside.

12. The accused will be treated as undertrial prisoners and sent to Shimoga to undergo the trial in respect of the other charged in the connected case.

13. We would like to make an observation as regards weighing of evidence in criminal cases in which more than one accused are involved. The Court has to deal with the case of each accused separately and has to ascertain and give a finding as regards the act or acts proved to have been committed by each of the accused. It has to see whether what is proved in respect of each accused amounts to an offence. If one accused is being punished for what it has to state how he becomes responsible for the act of the other. It is the failure to consider the case of each accused separately that has ended in the lower Court convicting the accused in the manner it has done.