

Appu Vs. State of Kerala

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Court : Kerala

Decided On : Sep-19-1989

Reported in : 1990CriLJ36

Judge : M.M. Pareed Pillay and; P.K. Shamsuddin, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 120B, 302 and 397; Code of Criminal Procedure (CrPC) , 1974 - Sections 386

Appeal No. : Criminal Appeal No. 550 of 1986

Appellant : Appu

Respondent : State of Kerala

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : A.S.P. Kurup (S.B.), Adv.

Disposition : Appeal dismissed

Judgement :

Pareed Pillay, J.

1. First accused in S.C. 13 of 1986 of the Sessions Court, Kalpattt, is the appellant. He was tried along with A-2 to A-4 under Sections 120-B, 397 and 302 read with Section 34 of the I.P.C. A-1 was found guilty under Section 302 of the

I.P.C. and was sentenced to undergo imprisonment for life. A-2 to A-4 were acquitted.

2. The prosecution case is that A-1 to A-4 in furtherance of their common intention to commit robbery of the amount with Joseph alias Vava (deceased) followed him while he was going to his house after closing his rationshop and assaulted him causing his death. P.W. 1 went to the Police Station and lodged Ext. P1 first information statement. P.W. 33 investigated the case and charge sheeted the accused.

3. Prosecution mainly relies on the oral dying declaration of the deceased as spoken to by P. Ws. 1 to 3. Prosecution also relies on the recovery evidence. P.W. 3 stated that on 24-10-1985 while he was in his shop he saw Joseph with bleeding injuries coming running and standing holding on the parapet wall of the varandah of the shop. P.W. 3 was informed by the deceased that Soman (A-1) and others had stabbed him. Immediately P.W. 3 ran to the wife's house of the deceased and informed the incident to P.W. 1 Baby and Sobastian, After informing them P.W. 3 came back. He was followed by P.W. 1, P.W. 2 and others. It is the evidence of P.W. 3 that P.W. 1 had asked the deceased as to what had happened to him and that he told P.W.1 that he was stabbed by Soman (A-1) and three others. The injuries were bandaged. P.W. 3 brought taxi jeep and the deceased was taken to the hospital. P.W.1 corroborated the evidence of P.W.3 that he was informed about the incident by P.W. 3. P.W.1 deposed that when he was informed by P.W. 3 that Joseph was lying injured he ran to that place along with his brothers and saw Joseph lying in a pool of blood. According to P.W. 1 deceased told him that Soman (A-1) and three others stabbed him and that he (P.W.1) should look after the wife and children of the deceased. P.W.1 testified about the bandaging of the injuries and the removal of the deceased from the place of occurrence to the hospital. P.W.2 is the younger brother of P.W.1. He has corroborated the evidence of P.W.1 regarding the dying declaration.

4. The first information statement Ext. P 1 given by P.W.1 to P.W. 30 Sub Inspector of Vythiri Police Station mentions about the dying declaration implicating A-1 and three others. There is hardly any inconsistency or disparity as between

the version in Ext. P 1 and the one given by P.W.1 before the Court. As there is unassailable evidence with regard to the dying declaration as spoken to by P.Ws. 1 to 3 it cannot at all be said that the trial Court was not justified in placing reliance on the same. The trial Court was perfectly justified in holding that the oral dying declaration as deposed by P.Ws. 1 to 3 can be accepted as good evidence and conviction can be based upon it. In *Lallubhai v. State of Gujarat*, AIR 1972 SC 1776 : (1972 Cri LJ 828) it has been held that conviction can be based on dying declaration and that too even without corroboration. As the evidence with regard to the dying declaration as testified by P.Ws. 1 to 3 suffers from no infirmity and as it is found to be wholly truthful and without any element of embellishment or distortion the trial court was justified in relying on the same.

5. Learned defence counsel submitted that as the trial court has acquitted A-2 to A-4 it cannot be said precisely as to whether the overt act attributed to A-1 was responsible for the death of Joseph and that being the position it cannot be said that he was responsible for the murder. As the dying declaration which was found acceptable implicated A-1 specifically and as it did not disclose the identity of the other three persons the trial court did not rely on it to find A-2 to A-4 guilty. As the evidence of P.Ws. 1 to 3 clearly shows that the deceased revealed A-1's complicity with the crime and as he only stated that three others also joined in the assault and as it has been bound that there is no acceptable evidence with regard to the identity of the three others it is not possible to hold that merely because the identity of the associates of A-1 has not been established A-1 cannot be saddled with criminal liability by invoking Section 34 of the I.P.C. Though the other culprits could not be booked for want of evidence, it is abundantly clear from the dying declaration that A-1 and three others were responsible for the crime. As A-1 and three others jointly assaulted the deceased there undoubtedly existed a common intention among them to cause the death of the deceased. Though the prosecution's definite case is that A-2 to A-4 were also involved in the crime the dying declaration unfolds specifically the identity of A-1 only.

6. As A-1 alone has been convicted by the trial Court and rest of the accused were acquitted on a charge under Section 302 read with Section 34, we have to consider whether the conviction against the appellant-accused could be sustained.

In *Mahbub Shah v. Emperor*, AIR 1945 PC 118 : (46 Cri LJ 689) the Privy Council held that Section 34 of the I.P.C. enacted a principle of joint liability in the doing of a criminal act, that the essence of that liability was to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention and that to invoke the aid of Section 34 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. In a case where more than one person attacked another and the incident has been established, but some accused were acquitted for want of evidence, such accused against whom there is evidence even if their number dwindles to one can be convicted for the principal offence read with the constructive provision. In *Harshad Singh v. State of Gujarat*, AIR 1977 SC 710 : (1977) 1 SCR 626 : (1977 Cri LJ 352) the Supreme Court held thus :

'When a murderous assault by many hands with many knives has ended fatally, it is legally impermissible to dissect the serious ones from the others and seek to salvage those whose stabs have not proved fatal. The circumstance that one man's stab falls on a less or more vulnerable part of the person of the victim is of no consequence to fix the guilt for murder. Section 34, I.P.C. fixes constructive liability in case of community of intent coupled with participatory presence or operation, and even if some of several accused are acquitted but the participating presence of a plurality of assailants is proved, the conjoint culpability for the crime is inescapable.'

7. In *Jagir Singh v. State of Punjab*, AIR 1968 SC 43 : (1968 Cri LJ 89) the Supreme Court observed that though it was not known which particular person or persons gave fatal blow it was clear that murder was committed by six culprits including A & B in furtherance of common intention of all and so each of them was liable for murder as though it had been committed by him alone. Supreme Court held that the two appellants were rightly convicted of the offence under Section 302 read with Section 34 of the I.P.C. In *Jagir Singh's* case contention of the accused was that in a case where six named persons, A, B, C, D, E and F were charged under Section 302 read with Section 34 of the I.P.C. for committing the murder of G and the evidence is directed to establish that the said six persons

have taken part in the murder and it is not known who gave the fatal blow, on the acquittal of C, D, E and F the remaining two accused A and B cannot be convicted of the offence under Section 302 read with Section 34. It was further contended that unless the court can find that other unidentified assailants together with A and B took part in the murder, A and B must be acquitted of the offence under Section 302 read with Section 34. Rejecting the above argument the Supreme Court held thus:

'But if the court, on a proper appraisal of the evidence finds that there were six assailants, the witnesses were mistaken as to the identity of C, D, E and F, and four unknown culprits together with A and B took part in the murder in furtherance of the common intention of all, the court can convict A and B of the offence under Section 302 read with Section 34. Though it is not known who gave the fatal blow, each of the assailants including A and B is responsible for the murder as if it was committed by him alone.'

Section 34 has been enacted to meet a situation where members of a party acted in furtherance of the common intention of all but it was difficult to establish exactly the part played by each of them. Section 34 envisages participation in some action with the intention of committing a crime. In a case where such participation is established the section is at once attracted. There may be case where a person was assaulted by two or more persons and the identity of one alone was established before the Court. Nevertheless participation of one or more accused was proved. In such a case, on the ground that there is no evidence as to which of the accused caused the fatal injury, the accused against whom there is unassailable evidence regarding his participation in the crime cannot be let off, overlooking Section 34 of the I.P.C.

8. In *Sukh Ram v. State of U.P.*, (1974) 2 SCR 518 : (1974 Cri LJ 354) two of the three named accused were acquitted. The question arose whether the third accused could be convicted with the aid of Section 34. In that case three persons were tried for an offence under Section 302 read with Section 34 of the I.P.C. The Sessions Judge acquitted one of the accused while the High Court acquitted another but the conviction and sentence entered against the third one was

confirmed. The charge specifically mentioned that the murder was committed by the three accused named therein. Before the Supreme Court it was contended that after the acquittal of two of the three accused by the Courts below, the appellant could not be convicted with the aid of Section 34 of the I.P.C. The Supreme Court dismissed the appeal and held that in view of the unambiguous evidence tendered by the prosecution in the Sessions Court no prejudice can be said to have been caused to the appellant by reason of his conviction under Section 302 read with Section 34, I.P.C. even though the two other accused specifically named in the charge had been acquitted. Thus the legal position is that merely because some of the accused were acquitted for want of evidence the accused against whom there is legal evidence can be convicted invoking Section 34 of the I.P.C. and the easy course of acquittal cannot be adopted by the Court on the ground that co-accused were acquitted.

9. It has next to be considered as to whether in a case where one accused alone was convicted whereas all the co-accused were acquitted it will be open to the appellate Court to convict him with the aid of Section 34 of the I.P.C. Indisputably the High Court while hearing an appeal against conviction can scan the evidence and weigh the probabilities. The High Court can evaluate the evidence and analyse the same. It is open to the High Court to accept the evidence rejected by the trial Court. It is equally open to the High Court to reject the evidence accepted by the trial Judge. As Section 34 does not constitute a substantive offence it cannot be held logically that there can be any such thing as an acquittal under this section. A finding of acquittal is visualized only in the context of a charge for a substantive offence. -A finding regarding absence or presence of the common intention partakes essentially of the nature of a finding of fact. Such a finding regarding Section 34 cannot be treated beyond the purview of the Appellate Court. The powers conferred on the Appellate Courts under Section 386 of the Criminal P. C. would well include within their ambit the right to alter a finding as to the existence of common intention or the absence thereof. An Appellate Court whilst entertaining an appeal against conviction is entitled to apply the provisions of Section 34 where the trial Court has expressly held otherwise though the accused persons were charged with a substantive offence read with Section 34 and the State has not moved by way of appeal against such a finding.

10. As Section 34 of the I.P.C. does not constitute a substantive offence the power of the appellate Court to arrive at a contrary finding regarding the absence of common intention cannot be equated with the reversal of a finding of acquittal on a substantive crime. The interdict of the reversal of acquittal is not even faintly attracted in the context of the application or otherwise of Section 34 of the I.P.C. Thus in a case where some of the accused have been acquitted it is still open to the appellate Court to decide whether Section 34, I.P.C. could be invoked so far as the remaining accused is concerned.

On a consideration of the entire evidence, we hold that the appellant (A1) is liable to be convicted under Section 302 read with Section 34 of the I.P.C. He is accordingly convicted under Section 302 read with Section 34 of the I.P.C. The sentence entered against him by the trial Court is hereby confirmed. Criminal Appeal stands dismissed.

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