

BENGAI MANDAL @ BEGAI MANDAL

v.

STATE OF BIHAR

(Criminal Appeal No. 1418 of 2004)

JANUARY 11, 2010

**[V.S. SIRPURKAR AND DR. MUKUNDAKAM
SHARMA, JJ.]**

Penal Code, 1860:

ss.304 Part II and 326 r/w s.34 and s.302 r/w s.34 – Appellant and co-accused allegedly entered into house of deceased and poured acid over her, which caused blisters and rashes on her entire body, and ultimately she died – Dying declaration given by deceased – Conviction of appellant under s.302 r/w s.34 – Challenge to – Held: In her dying declaration, deceased imputed acts of entry into her house and physical presence at the time of incident to appellant without anything more – In absence of any active role played by appellant or overt act being done by him, it cannot be said with certainty that he accompanied co-accused to house of deceased with common intention to murder her – Hence, conviction of appellant under s.302 r/w s.34 cannot be sustained – However, appellant did not prevent the co-accused from throwing acid on deceased, which clearly establishes that he intended to cause injury to and also disfigurement of deceased and as such is liable to be punished under s.326 – Also since appellant could be said to be possessing knowledge that throwing of acid is likely to cause death of deceased, case under s.304 part II is also made out – However, since death ensued twenty six days after the incident as a result of septicemia and not as a consequence of burn injuries, and as appellant had already served RI for seven years, quantum of sentence reduced to period already undergone.

A s.34 – Nature, purpose and scope of – Discussed.

B According to the prosecution, since PW-7's sister-in-law had turned down the sexual advances of the appellant-accused and a co-accused, they, with the intent to kill her, entered into her house at night and poured acid over her, which caused blisters and rashes on her entire body, and ultimately she died. The courts below convicted appellant under s.302 r/w s.34 and sentenced him to life imprisonment.

C In appeal to this Court, it was contended that Courts below erred in convicting the appellant under s.302 IPC and if at all a case existed against the appellant, it was under s.304 Part II IPC, for it was the other accused, who had carried the vessel containing the acid and actually
D poured the acid on the deceased causing her death and that there was no overt act on the part of the appellant in the commission of the said offence.

Partly allowing the appeal, the Court

E HELD: 1. The position with regard to s.34 IPC is crystal clear. The existence of common intention is a question of fact. Since intention is a state of mind, it is therefore very difficult, if not impossible, to get or procure direct proof of common intention. Therefore, courts, in
F most cases, have to infer the intention from the act(s) or conduct of the accused or other relevant circumstances of the case. However, an inference as to the common intention shall not be readily drawn; the criminal liability can arise only when such inference can be drawn with a
G certain degree of assurance. [Para 14] [447-E-G]

Girija Shankar v. State of U.P. (2004) 3 SCC 793 and *Vaijayanti v. State of Maharashtra* (2005) 13 SCC 134, relied on.

H 2. On a perusal of the evidence on record, it is found

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that all the prosecution witnesses except the official witnesses namely, PW-8, PW-10 and PW-11 disowned the prosecution case (some completely and some to the extent of the identification of the accused persons). However, what is clearly established from the evidence of prosecution witnesses is that acid was thrown over the deceased on the night intervening 13.07.1996 and 14.07.1996 which caused blisters and rashes on her body and later led to her death. This fact finds corroboration in the dying declaration given by the deceased to PW-11 wherein the deceased has categorically stated that on the night intervening 13.07.1996 and 14.07.1996, the appellant and the co-accused had entered into her house and the co-accused poured a watery substance over her from the pot which the co-accused was carrying in his hand. [Para 15] [448-A-C]

3.1. From the dying declaration given by the deceased, it is clear that it was the other accused who had carried (in his hand) the vessel containing the acid and who had actually thrown its contents i.e. the acid on the deceased. The deceased, in her dying declaration, had attributed the acts of carrying the vessel containing the acid and throwing the contents thereof on her only to the other accused whereas she accused both the accused of demanding illicit body relations with her as also entering into her house. From the dying declaration, it is clearly established that the appellant was present at the time and scene of the offence. [Para 15] [448-C-F]

3.2. In her dying declaration, the deceased has imputed the acts of entry into her house and physical presence at the time of the incident to the appellant without anything more. No other overt act save as mentioned above has been imputed to the appellant by the deceased. It has also not come in evidence that the appellant tried to gag her mouth or overpower the

- A deceased in any other manner so as to facilitate the pouring of acid on her by the co-accused. Had the appellant shared an intention common with the co-accused to kill the deceased by throwing acid on her, it would have been manifest in his conduct which would
- B certainly have been something more than him being just a mute spectator to the whole incident. [Para 16] [448-G-H; 449-A-C]

- 4.1. In absence of any active role played by the appellant or overt act being done by him, it cannot be said
- C with certainty that the appellant had accompanied the co-accused to the house of the deceased with a common intention to murder the deceased. In view thereof, the conviction of the appellant under s.302 r/w s.34 IPC cannot be sustained. [Para 17] [449-C-D]

- D 4.2. However, keeping in mind the facts that the deceased had turned down the sexual advances made by the appellant and that he had accompanied the co-accused who was carrying a vessel containing acid in his
- E hand at the dead of the night and in an unearthly hour, it can be said with certainty that the appellant had the intention to inflict bodily harm on the deceased otherwise the appellant would not have accompanied the co-accused to the house of the deceased. Since the
- F appellant was present at the scene of occurrence and simply watched the co-accused throwing acid on the deceased without preventing the co-accused from doing so, it clearly establishes that the appellant had intended to cause injury to and also disfigurement of the deceased and as such is liable to be punished under s.326 IPC. Also
- G since the appellant could be said to be possessing knowledge that the throwing of acid is likely to cause death of the deceased, a case under s.304 part II is also made out. The appellant has already served rigorous imprisonment for a period of seven years. Considering

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the facts that the death ensued after twenty six days of the incident as a result of *septicemia* and not as a consequence of burn injuries, the period already undergone by the appellant would be sufficient to meet the ends of justice. [Para 18] [449-E-H; 450-A-B]

Case Law Reference :

(2004) 3 SCC 793 relied on Para 12

(2005) 13 SCC 134 relied on Para 13

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1418 of 2004.

From the Judgment & Order dated 20.05.2004 of the High Court of Judicature at Patna in Criminal Appeal No. 505 of 2000.

Anil K. Chopra (N.P.) and Anagha S. Desai (A.C.), for the Appellant.

Gopal Singh for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. By this appeal, the present appellant seeks to challenge the judgment and order dated 20.05.2004 passed by the Patna High Court, whereby the High Court upheld the conviction and sentence passed against the appellant by the trial Court. The trial Court had by its judgment dated 24.07.2000 and order dated 25.07.2000 convicted the appellant and sentenced him to undergo imprisonment for life under Section 302 read with Section 34, RI for a period of seven years under Section 326 read with Section 34, RI for a period of three years under Section 452 and RI for a period of three years under Section 324 IPC.

2. The facts necessary for the disposal of the present appeal and as presented by the prosecution may be set out at this stage. On 14.07.1996 at 6 a.m., Shrikant Mahto, brother-

- A in-law of the deceased (PW-7) gave a fard-e-bayan to the Assistant Sub-Inspector of Police wherein he stated that on 13.07.1996 after having his supper, he had gone to sleep at his darwaza (open space in front of the house). Pramila Devi, the deceased was sleeping inside the house with her son Sonu Mahto. At about 2.30 in the night, PW-7 woke up on hearing the cries of the deceased and rushed inside to find out what was happening. PW-7 saw that the deceased was lying on the ground and was tossing about on the ground. PW-7 picked up the deceased and found that the entire body and clothes of the deceased had burnt. PW-7 further noticed that blisters and rashes were erupting all over the body of the deceased and that she was writhing in pain.

3. The deceased told PW-7 that the appellant herein and one Mahendra Mahto (accused no. 1) had entered into the house carrying a vessel in his hand and had thrown its contents over her as a result of which her entire body and clothes were burnt. The deceased further informed PW-7 that the appellant and the accused no.1 would try to stop the deceased on her visit to market or work and ask for sexual favour. The deceased further told that she had turned down their advances and for that reason they had thrown acid over her to burn her body with the intent to kill her.

4. On hearing the commotion, some villagers assembled there and went out to look for the appellant and the accused no.1, who were seen fleeing towards the east. The deceased was taken to the hospital. At the hospital also, the deceased stated that acid was thrown over her by the appellant and the accused no. 1. After treatment at the District hospital at Purnea for a few days, the deceased was sent back to her home where she finally died on 10.08.1996.

5. On the basis of the aforesaid fard-e-bayan, an F.I.R. under Sections 302, 326, 448, 323 read with Section 34 IPC was registered on the same day at 1 p.m.

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6. After completion of the investigation, the police submitted a charge-sheet against the appellant and accused no.1. On the basis of the aforesaid charge sheet, the trial Court framed charges under the Section 302 read with Section 34, Section 326 read with Section 34, Section 452 and Section 324 IPC against the appellant and the accused no. 1 to which they pleaded not guilty and claimed to be tried.

7. At the trial, the prosecution examined 11 witnesses and exhibited several documents in support of its case. On conclusion of the trial, the trial Court by its judgment dated 24.07.2000 and order dated 25.07.2000 convicted the appellant and accused no. 1 to undergo imprisonment for life under Section 302 read with Section 34, RI for a period of seven years under Section 326 read with Section 34, RI for a period of three years under Section 452 and RI for a period of three years under Section 324 IPC. All the sentences were directed to run concurrently.

8. Aggrieved by the decision of the trial Court, the appellant herein and the accused no. 1 filed two separate appeals before the Patna High Court. By a common judgment and order dated 20.05.2004, the Patna High Court upheld the decision of the trial Court and dismissed the said appeals.

9. The counsel appearing on behalf of the appellant strongly contended before us that the High Court as well as the trial Court had erred in convicting the appellant under Section 302 IPC and if at all a case existed against the appellant, it was under Section 304 part II IPC, for it was accused no. 1 who had carried the vessel containing the acid and actually poured the acid on the deceased causing her death. The counsel further submitted that there was no overt act on the part of the appellant in the commission of the said offence.

10. The counsel appearing on behalf of the respondent-State, on the other hand, supported the decisions of the courts below.

A 11. Before dwelling into the evidence on record and addressing the rival contentions made by the parties, we wish to reiterate the precise nature, purpose and scope of Section 34 IPC.

B 12. In *Girija Shankar v. State of U.P.* (2004) 3 SCC 793, this Court, while bringing out the purpose and nature of Section 34 IPC observed in para 9, as follows:

C “9. 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

D 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

E 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

F 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* 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

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identically similar. The acts may be different in character, A
but must have been actuated by one and the same
common intention in order to attract the provision."

13. In *Vaijayanti v. State of Maharashtra* (2005) 13 SCC
134, this Court, observed in para 9, as follows: B

"9. Section 34 of the Indian Penal Code envisages that
"when a criminal act is done by several persons in
furtherance of the common intention of, each of such
persons is liable for that act, in the same manner as if it
were done by him alone". The underlying principle behind C
the said provision is joint liability of persons in doing of a
criminal act which must have found in the existence of
common intention of enmity in the acts in committing the
criminal act in furtherance thereof. The law in this behalf
is no longer *res integra*. There need not be a positive overt D
act on the part of the person concerned. Even an omission
on his part to do something may attract the said provision.
*But it is beyond any cavil of doubt that the question must
be answered having regard to the fact situation obtaining
in each case.*" E

(emphasis supplied)

14. Thus, the position with regard to Section 34 IPC is
crystal clear. The existence of common intention is a question
of fact. Since intention is a state of mind, it is therefore very F
difficult, if not impossible, to get or procure direct proof of
common intention. Therefore, courts, in most cases, have to
infer the intention from the act(s) or conduct of the accused or
other relevant circumstances of the case. However, an inference
as to the common intention shall not be readily drawn; the G
criminal liability can arise only when such inference can be
drawn with a certain degree of assurance.

15. With the aforesaid legal position in mind, we have
considered the submissions made by the counsel for the parties H

- A and also scrutinized the evidence available on record before us. On a perusal of the evidence before us, we find that all the prosecution witnesses except the official witnesses namely, PW-8, PW-10 and PW-11 disowned the prosecution case (some completely and some to the extent of the identification of the accused persons). However, what is clearly established from the evidence of prosecution witnesses is that acid was thrown over the deceased on the night intervening 13.07.1996 and 14.07.1996 which caused blisters and rashes on her body and later led to her death. This fact finds corroboration in the dying declaration given by the deceased to PW-11 wherein the deceased has categorically stated that on the night intervening 13.07.1996 and 14.07.1996, accused no.1 and the appellant had entered into her house and accused no.1 poured a watery substance over her from the pot which the accused no.1 was carrying in his hand. The dying declaration given by the deceased comes as an important piece of evidence as it throws light on the role played by each of the accused persons at the time of the incident. After a careful reading of the dying declaration, what comes out to the fore is that it was accused no. 1 who had carried (in his hand) the vessel containing the acid and who had actually thrown its contents i.e. the acid on the deceased. The deceased, in her dying declaration, had attributed the acts of carrying the vessel containing the acid and throwing the contents thereof on her only to accused no. 1 whereas she accused both the accused no.1 and the appellant of demanding illicit body relations with her as also entering into her house. From the dying declaration as on record before us, it is clearly established that the appellant was present at the time and scene of the offence. However, what needs to be ascertained is whether the appellant herein shared an intention common with the accused no.1 so that he may be convicted under Section 302 IPC by invoking the aid of Section 34 IPC.

16. To find answer to this question, we need to revert back to the dying declaration of the deceased. In her dying declaration, the deceased has imputed the acts of entry into

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her house and physical presence at the time of the incident to the appellant without anything more. No other overt act save as mentioned above has been imputed to the appellant by the deceased. It has also not come in evidence before us that the appellant tried to gag her mouth or overpower the deceased in any other manner so as to facilitate the pouring of acid on her by the accused no.1. Had the appellant shared an intention common with the accused no.1 to kill the deceased by throwing acid on her, it would have been manifest in his conduct which would certainly have been something more than him being just a mute spectator to the whole incident.

17. Thus, in absence of any active role played by the appellant or overt act being done by the appellant, it cannot be said with certainty that the appellant had accompanied the accused no.1 to the house of the deceased with a common intention to murder the deceased. In view thereof, the conviction of the appellant under Section 302 read with Section 34 IPC cannot be sustained.

18. However, keeping in mind the facts that the deceased had turned down the sexual advances made by the appellant and that he had accompanied the accused no.1 who was carrying a vessel containing acid in his hand at the dead of the night and in an unearthly hour, it can be said with certainty that the appellant had the intention to inflict bodily harm on the deceased otherwise the appellant would not have accompanied the accused no.1 to the house of the deceased. Since the appellant was present at the scene of occurrence and simply watched the accused no.1 throwing acid on the deceased without preventing the accused no.1 from doing so clearly establishes that the appellant had intended to cause injury to and also disfigurement of the deceased and as such is liable to be punished under Section 326 IPC. Also since the appellant could be said to be possessing knowledge that the throwing of acid is likely to cause death of the deceased, a case under Section 304 part II is also made out. The appellant has

- A already served rigorous imprisonment for a period of seven years. Considering the facts that the death ensued after twenty six days of the incident as a result of septicemia and not as a consequence of burn injuries, we are of the considered view that the period already undergone by the appellant would be
- B sufficient to meet the ends of justice. We, therefore, partly allow the appeal to the aforesaid extent and direct that the appellant be released forthwith if not wanted in connection with any other case.

B.B.B.

Appeal partly allowed.