**(2014) 10 CAL CK 0027**

**Calcutta High Court**

**Case No:** CRA 505 and 528 of 2011

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| Anarul Sk. | APPELLANT |
| Vs | |
| The State of West Bengal | RESPONDENT |

**Date of Decision:** Oct. 30, 2014

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 149, 302, 34

**Citation:** (2015) 2 CHN 601

**Hon'ble Judges:** S. Chatterjee, J; Nishita Mhatre, J

**Bench:** Division Bench

**Advocate:** Rajdeep Majumder, Advocate for the Appellant; Manjit Singh, Public Prosecutor and Anand Keshri, Advocate for the Respondent

**Judgement**

Nishita Mhatre, J.

These appeals are directed against the decision of the Additional Sessions Judge, 2nd Court, Murshidabad at Berhampore, dated 19th July, 2011 in Sessions Sl. No. 469 of 2006, Sessions Trial No. 1 of July, 2007. The Sessions Court has found all the appellants guilty of the offences punishable under Section 302 read with Section 34 of the IPC. Each of them has been convicted and sentenced to suffer rigorous imprisonment for life till death and to pay a fine of Rs. 10,000/- (Rupees ten thousand only) each; in default of payment of fine they have been directed to suffer rigorous imprisonment for a further period of six months.

2. The prosecution alleges that one Yunus Mallick was killed by the appellants on 4th April, 2005 at about 5 a.m. They encircled him and when the accused Anarul Sk. exhorted them to assault and beat Yunus, the appellant Hudai Sk. hit Yunus on the back with a bomb while the appellant Marijul Sk. hurled a bomb aiming at the victim''s hip. Yunus died instantaneously. According to the prosecution the incident had occurred because of the enmity between the Mallick and Sk. families. This arose

because one Sajarul Mallick married Malina Bibi who was earlier married to his maternal uncle Surman Sk. The parties tried to settle their differences. But the Sk. family objected to the return of the couple to the village. Another dispute arose between the two families when Rabiul Mallick and Jadatir Rahaman Sk. were playing carom on 3rd April, 2005. It appears that though the dispute was attempted to be resolved through the village elders, at about 7 p.m. on that day the Sk. family hurled bombs around the house of Mallick family. Fortunately nobody was injured on that day. Their differences ultimately resulted in the death of Yunus Mallick.

3. The appellants were arrested soon after the incident. They were tried by the Sessions Court after the case was committed. As mentioned earlier all of them have been convicted and sentenced by the Sessions Court.

4. To establish its case against the appellants the prosecution has relied on the evidence of 20 witnesses. PWs 1, 2, 4, 5, 11 and 12 are all eye-witnesses to the incident. Each of them has stated that the appellants encircled Yunus at about 5 o''clock in the morning on 4th April, 2005. The appellants were all armed with bombs and country-made fire-arms. All these eye-witnesses have stated that Anarul exhorted the others to assault Yunus. Acting on his instigation, Hudai Sk. and Marijul Sk. hurled bombs at the victim. The bomb thrown by Hudai Sk. landed on the victim''s back and the other bomb landed on the lower part of his hip. PW 12 has mentioned that the bomb hurled by Marijul Sk. had also landed on the victim''s back. None of these witnesses have attributed any specific role to the other appellants Sukurulla Sk., Patal Sk., Rashid Sk. and Mikail Sk. All these witnesses have further stated that the victim was laid in front of Ajahar Mallick''s house which was at a distance of about 75 metres from the place of occurrence as seen from the sketch map drawn by PW 20, the Investigating Officer. These witnesses have been cross-examined at length. However, their testimonies have not been shaken by the defence.

5. PW 3 who is related to both the victim as well as the appellants heard the sound of two bombs being hurled. He rushed out of his house and ran towards the health centre. He saw the appellants running away towards Kuthipara. This witness saw Yunus lying with bomb injuries in front of Sukurulla''s sweetmeat shop. When he reached there, he found some other persons there including PWs 1, 2, 4, 11, 6, 5 and 7. He has stated that PWs 5, 6 and 7 lifted the body of Yunus and placed it in front of Ajahar Mallick''s house, i.e., the father of PWs 4 and 7. PWs 6 and 7 had also heard the sound of the bomb blast. PW 7 is a witness to the seizure of a bomb socket pipe. PWs 8 and 9 are witnesses to the inquest report. PW 9 is the scribe of the FIR. He has stated that he has written the same as dictated by PW 1. PW 10 is the victim''s brother. He reached the spot after he heard the sound of bomb blast. PW 13 is another seizure witness. He has spoken about the seizure of the socket pipe bloodstained earth and controlled earth. PWs 14 and 15 are witnesses to the seizure of clothes. However, there is no indication in their evidence as to whose clothes

were seized. PW 16 received the complaint of PW 1 and registered the FIR. PW 17 is the Autopsy Surgeon. He has described the injuries sustained by the victim. There are no injuries on the front of the body. He has opined that the death of the victim was due to a bomb blast injury and was ante mortem in nature. This witness has negated the possibility of the injuries occurring if the bomb was thrown in front of the victim and reiterated his statement that they could only occur if a bomb was thrown from the rear. The witness has stated that stomach of the victim was filled with food. PW 18 is the Constable who took the body to the morgue. PW 19 interrogated PWs 11 and 12 and recorded their statements under Section 161 of the Cr.P.C. This witness has not corroborated the version of PWs 11 and 12.

6. PW 20 is the Investigating Officer. He has held the inquest and drawn the sketch map showing the position where the incident had occurred. This witness also does not corroborate the versions of PWs 2 and 4 with respect to the assault on the victim.

7. Mr. Rajdeep Majumder, the learned Counsel appearing for the appellants, urged that the testimony of the eye-witnesses should not be believed because they were all related to the victim. He pointed out that all these witnesses belong to the Mallick family, except for PW 12. The learned Counsel then submitted that if these witnesses were in fact eyewitnesses as claimed by them, they would have sustained injuries because of the bomb blast. He submitted that not a single witness either chased or apprehended the appellants. Therefore, according to him the testimonies of these eye-witnesses are doubtful. Mr. Majumder therefore, submitted that their testimonies must be discarded. He has relied on the judgment in the case of The State of Rajasthan Vs. Shri Teja Singh and Others, where it has been held that as there was a lack of corroboration of the evidence of the alleged eye-witnesses who were interested witnesses being related to the deceased, it was not proper to convict the accused on this basis.

8. The learned Counsel for the State urged that it is not mandatory that the evidence of interested witnesses or the relatives of the victim is to be discarded or ignored in every case. He submitted that when the evidence of relatives is assessed by the Court and is found to be credible it must be accepted. He relied on the judgment in the case of Ashok Rai Vs. State of U.P. and Others, the Supreme Court has held if the evidence of an interested witness is intrinsically good, it can be accepted without any corroboration. However, it was necessary to scrutinise the testimony of interested witnesses carefully and as a matter of prudence such testimony should be corroborated.

9. Mr. Majumder then urged that since PWs 19 and 20 had not corroborated the versions of the eye-witnesses, it is doubtful whether the witnesses had actually seen the assault or had described it in the manner that the incident had occurred. He pointed out that the eye witnesses had not revealed certain facts to these witnesses who were the Investigating Officers in this case at the earliest opportunity available

to them. The learned Counsel submitted that the evidence of these witnesses is full of embellishments and therefore ought not to be believed.

10. As we have mentioned earlier, the testimony of the eye-witnesses need not be discounted even if PWs 19 and 20 have not corroborated the version of PWs 2, 11 and 12. The testimonies of PWs 2, 11 and 12 are corroborated by PWs 1, 4 and 5. Therefore, there is a little doubt that all these witnesses PWs 1, 2, 4, 5, 11 and 12 were eye-witnesses to the incident.

11. The learned Counsel for the State submitted that even if the evidence of all the other witnesses is discarded, the testimony of PW 1 is sufficient to convict the appellants. He has relied on the judgment of the Supreme Court in the case of Shyam Veer Singh Vs. State of U.P. and Others where the Supreme Court has held that it is not the quantity, multiplicity or plurality of the witnesses, but emphasis must be laid on the value, weight and quality of the evidence. It has been held in this judgment that even a single witness is sufficient to convict the accused if he is wholly reliable witness.

12. As stated earlier the testimony of the six eye-witnesses is believable. There is nothing on record to suggest that their version of the incident is untrustworthy. It is true that PWs 19 and 20, the Police Officers, have not corroborated the testimonies of PW 2, 11 and 12. They have denied that these witnesses, while recording their statements under Section 161 of the Cr.P.C., had narrated the incident in the same manner as they had in their evidence before the Court. However, the evidence of PW 1 cannot be disparaged or dispensed with on this ground. PW 1 is the victim''s brother. Though he is related to the victim, he has candidly narrated the incident. Had this witness wanted to ascribe a role to each of the appellants, he could have done so by implicating each of them. However, he has mentioned that bombs were hurled only by Hudai Sk. and Marijul Sk. at the incitement of Anarul Sk. Had he been tutored he could easily have said that the other appellants had also assaulted or fatally wounded the victim. There is no specific act attributed to the other appellants although they were armed with bombs and country-made fire-arms. We find that the testimony of PW 1 and the other eye-witnesses is credible and believable. It has a ring of truth to it and is innately believable.

13. The learned Counsel also pointed out that on the basis of the sketch map, the victim was assaulted between the grocery shops of Sukurulla and Nasmal Sk. He submitted that they would have been the best witnesses to the incident but they have not been examined. This submission of Mr. Majumder is without merit. There is no material on record to prove that these shops were open at 5 o''clock in the morning. Moreover Sukurulla was one of the accused in this case.

14. The next circumstance which, according to Mr. Majumder, establishes that the incident did not occur as the prosecution has described is the improbability of the presence of PWs 5, 6 and 7 at the spot. They claimed that they carried the body of

the victim, but did not have any bloodstains on their clothes. This circumstance is not very relevant to ascertain whether the victim''s death was homicidal and the appellants'' responsibility for the same. The learned Counsel then submitted that instead of taking the injured victim to the closest hospital he was laid outside Ajahar Mallick''s house and therefore, he could have died because of the failure on the part of the eye-witnesses to ensure that the injuries were treated immediately. No such suggestion was put to the prosecution witnesses. This is merely a conjecture of the learned Counsel which is of no consequence as the post mortem report depicts the bomb injuries as the cause of death.

15. The learned Counsel also submitted that the FIR was not produced before the Court within 24 hours and therefore, should not be believed. This submission is also unacceptable as it is not borne out from the record.

16. It has been argued by Mr. Majumder that the common intention between the appellants has not been proved by the prosecution as the allegation was that only two persons hurled the bombs. Therefore, according to him if the others had no role to play, there cannot be any common intention of the appellants to kill the deceased. He has relied on the judgments in the case of Hardev Singh and Another Vs. The State of Punjab, , Harjit Singh and Others Vs. State of Punjab, , Ajay Sharma Vs. State of Rajasthan, , Surat Singh and Another Vs. State of Punjab, , Mohinder Singh and Another Vs. State of Delhi, to fortify his submissions.

17. The learned counsel for the State, has relied on the judgment of the Supreme Court in the case of Virendra Singh Vs. State of Madhya Pradesh, to submit that Section 34 of the IPC constitutes the constructive liability of all the accused persons and therefore whatever their role in the crime, they are equally guilty as those who actually carried out the intention of the others. It has been submitted by Mr. Majumder that there was no common intention between the appellants. He pointed out that actions of only two of the appellants cannot be implicate the others by the use of Section 34 of the IPC. According to him, there was no common intention of the appellants to kill the victim and therefore, the conviction of all the appellants is not sustainable.

18. In the classic case of Pandurang, Tukia and Bhillia Vs. The State of Hyderabad, it was observed that the common intention presupposes that there is prior concert. In order to make a person vicariously liable for a criminal act of another, there must be a prearranged plan and the act should have been done in furtherance of the common intention of all the accused. It was observed that when several persons simultaneously attack the victim, though each can have the same intention, i.e., to kill the victim and each one individually inflicts a separate fatal blow, none of them would have the common intention required by Section 34 of the IPC because there was no prior meeting of minds to form a pre-arranged plan. Though each would have individually liable for the injury caused by him, none could be vicariously convicted for the act of any of the others. If the prosecution cannot prove that the

part played by him was a vital one then that accused person cannot be convicted of the murder. However, clearly his intention to kill could be proved by the prosecution. The Supreme Court has observed that such a pre-arrangement need not be elaborated. It could be formed constantly. However, there must be a meeting of minds. Such prior concert often has to be determined from the subsequent conduct which may include a running away together in a body or a meeting together subsequently. The Supreme Court cautioned that the inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case. In the case of Arun v. State by Inspector of Police, Tamil Nadu reported in (2009) 3 SCC (Cri) 1097, the Supreme Court referred to Pandurang''s case (supra) and observed that Section 34 IPC is only a rule of evidence and does not create a substantive evidence. The Supreme Court referred to its earlier judgment in the case of Dharam Pal and Others Vs. State of Haryana, where the Court has observed as thus:

"14. 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.

15. 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 constructively 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."

19. In the case of Virendra Singh v. State of Madhya Pradesh (supra) the Supreme Court referred to some of its earlier judgments including Pandurang''s case (supra) with respect to law of Section 34 of the IPC. The Court observed that vicarious of constructive liability under Section 34 IPC can arise only when two conditions are fulfilled, namely, the mental element or the intention to commit the criminal act conjointly with another or others; and the actual participation in one form or the other in the commission of the crime. The Court observed that a person can be convicted only if it is shown that the intention to commit crime is shared by all the

accused. The common intention should be anterior in point of time to the commission of the crime, but may also develop on the spot when such a crime is crime, but may also develop on the spot when such a crime is committed. The evidence of such intention has to be inferred from the acts of conduct of the accused and other relevant circumstances because it is difficult to procure direct evidence. The Court then observed thus:

37. Under the Penal Code, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had a common intention to commit the acts or if the offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly, then also he can be vicariously responsible. Under the Penal Code, two sections, namely, Sections 34 and 149, deal with the circumstances when a person is vicariously responsible for the acts of others.

38. The vicarious or constructive liability under Section 34 IPC can arise only when two conditions stand fulfilled i.e. the mental element or the intention to commit the criminal act conjointly with another or others; and the other is the actual participation in one form or the other in the commission of the crime.

39. The common intention postulates the existence of a prearranged plan implying a prior meeting of the minds. It is the intention to commit the crime and the accused can be convicted only if such an intention has been shared by all the accused. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop on the spot when such a crime is committed. In most of the cases it is difficult to procure direct evidence of such intention. In most of the cases, it can be inferred from the acts or conduct of the accused and other relevant circumstances. Therefore, in inferring the common intention under Section 34 IPC, the evidence and documents on record acquire a great significance and they have to be very carefully scrutinised by the court. This is particularly important in cases where evidence regarding development of the common intention to commit the offence graver than the one originally designed, during execution of the original plan, should be clear and cogent.

40. The dominant feature of Section 34 is the element of intention and participation in action. This participation need not in all cases be by physical presence. Common intention implies acting in concert.

41. The essence of Section 34 IPC is a simultaneous consensus of the minds of the persons participating in criminal action to bring about a particular result. Russell in his celebrated book Russell on Crime, 12th Edn., Vol. 1 indicates some kind of aid or assistance producing an effect in future and adds that any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony. It was observed by Russell that any act of preparation for the commission of felony is done in furtherance of the act.

42. Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a prearranged and premeditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the premeditation and though the plan may be formed suddenly. In order that Section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Section 34.

20. Considering the evidence in the present case there is no doubt that all the accused had the common intention of killing the victim. They were all armed with bombs and country-made fire-arms. They continued to be present while Hudai Sk. and Marijul Sk. hurled the bombs. All the appellants fled from the scene of offence together. Their conduct both before and post the incident leaves no manner of doubt that they are vicariously liable for the acts of Hudai Sk and Marijul Sk.

21. The next submission of Mr. Majumder is that Anarul only exhorted the other appellants to assault the victim and therefore his role is not the same as the others. He has relied on the judgments of the Supreme Court in the case of Parshuram Singh Vs. State of Bihar, and Hiralal Mallick Vs. The State of Bihar, . In the case of Parshuram Singh (supra) the Supreme Court observed that if there was only an exhortation made by one of the accused persons then that person may not necessarily have the common intention of killing the victim. The Court observed had that been so then the person who exhorts others to kill the victim would not refrain from using the weapon which was in his possession. This judgment, in our opinion, does not absolve Anarul Sk. from his complicity in the crime. It is true that he exhorted others and all the other appellants acted on his instigation. However, it is equally true that he was carrying weapons and did not restrain any of the other appellants when they hurled bombs at the victim. Therefore, this judgment is of no assistance to the appellants.

22. The learned Counsel has also submitted that the words used by Anarul Sk. "ei salake maar" could either mean kill him or hit him. He has relied on the judgment of the Supreme Court in the case of Mohan Singh and Another Vs. State of M.P., where the words which are similar to the words used by Anarul Sk. were considered by the Supreme Court. It was held that in such a case the benefit of the interpretation of the word must be given to the accused. This judgment has no application in the present case. Anarul was aware that all the appellants were carrying bombs and country made fire arms. He knew what the import of the words used by him was

and was also aware of the effect they would have on his associates. The intention was certainly to kill the victim.

23. The next argument of the learned Counsel for the appellants that there was no intention on the part of the appellants to kill the victim as is evident from the injuries sustained and therefore, the appellants are liable for a lesser punishment, if at all. He urged that considering the nature of the injuries sustained by the victim it was obvious that even assuming that it was found that the appellants had in fact injured the victim, there was no intention on their part to kill him. He drew our attention to the fact that all the injuries sustained by the victim are on the non-vital parts of the body and therefore, the appellants ought not to have been convicted under Section 302 read with Section 34 of the IPC. This submission of the learned Counsel is untenable. The intention to commit a culpable homicide is evident from the fact that two bombs were hurled at the victim. The appellants had a long standing feud with the family of the victim and had planned to accost him and kill him. Though the injuries were mainly on the back and the hip they were sufficient to kill the victim instantaneously.

24. We have scanned the impugned judgment of the Sessions Court. It has marshalled the facts and weighed the evidence before it in the proper perspective. There is therefore no need to differ with the judgment of the Sessions Court. The conviction and the sentence in respect of all the appellants is upheld.

25. The appeal is dismissed.

26. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.