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2024:BHC-NAG:12447-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 263 OF 2021

1) Jayanand s/o Arjun Dhabale,
Age about 51 years,
Occupation – Agriculturist,

2) Niranjan s/o Jayanand Dhabale,
Age about 24 years,
Occupation – Agriculturist,

3) Sau. Ashabai w/o Jayanand Dhabale,
Age about 44 years,
Occupation – Household,

4) Kiran s/o Jayanand Dhabale,
Age about 30 years,
Occupation – Agriculturist. .... **APPELLANTS**

VERSUS

1) The State of Maharashtra,
through Police Station Officer,
Pofali, Tq. – Umarkhed, District
Yavatmal. .... **RESPONDENT**

Mr. S.G. Varshani, Advocate for the appellants,
Mr. A.B. Badar, Addl. Public Prosecutor for the respondent/State.

CORAM : VINAY JOSHI & ABHAY J. MANTRI, JJ.

DATE OF RESERVING THE JUDGMENT : 22-10-2024
DATE OF PRONOUNCEMENT OF THE JUDGMENT : 13-11-2024

ORAL JUDGMENT : (Per : ABHAY J. MANTRI, J.)

This appeal is directed against the judgment and order dated 02-02-2021 passed by the learned Additional Sessions Judge, Pusad (for short- '*the learned Judge*') in Sessions Trial Case No. 51/2015, convicting

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the appellants for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code (for short, "*IPC*") and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.500/- each, in default to suffer rigorous imprisonment for one month each. They are also convicted for an offence punishable under Section 452 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.500/- each, in default to suffer further rigorous imprisonment for one month each.

2. **FACTUAL MATRIX** :

(i) Informant Kishor (PW1) and accused No.1-Jayanand are brothers, and the deceased Sunanda was the widow of their late brother Vijay. Kishor and Sunanda reside adjacent. Accused No.1-Jayanand resides in front of them.

(ii) The incident occurred on 01-05-2015 at about 9-00 a.m. On that day, Kishor and his wife heard Sunanda's hue and cry for help from her house. So, Kishor ran there and saw that accused No.1-Jayanand was holding an axe in his hand, and Sunanda was lying on the ground. She had sustained head injuries, and blood was oozing from the injuries. Accused No.2-Niranjan and accused No.4-Kiran were standing nearby. Accused No.3-Ashabai was saying accused No.1-Jayanand to beat up Sunanda. When the informant Kishor asked accused No.1-Jayanand what he was doing, he told him that Sunanda was practicing black magic on his

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wife and, therefore, she was having body pain. There is no '*Barkat*' (prosperity) in their house. Without killing her, there will be no '*Barkat*' (prosperity). Accused No.1-Jayanand told him not to intervene; otherwise, he would kill him. Therefore, he came out and proceeded towards the house of Police Patil. On the way, he met Gajanan Jadhav and Bhimrao Dhule. He told them about the incident and went to the house of Police Patil. He narrated the incident to the Police Patil and came to the spot of the incident along with the Police Patil. Sunanda was lying on the ground in an unconscious condition.

(iii) He called the auto-rickshaw of Ravindra Dhule (P.W.6). Then he, along with Sahebrao Paikrao and Mahendra Dhule, took Sunanda to the Hospital at Umarkhed in the auto-rickshaw of Ravindra Dhule, where Doctor advised them to take her to Government Hospital, Nanded. Accordingly, they took her to the Government Hospital, Nanded, where she was declared brought dead.

(iv) Afterwards, informant Kishor went to the Pofali Police Station and lodged a report regarding the incident. Accordingly, the offence came to be registered vide Crime No.28/2015 against the accused No. 1 to 4 for the offence punishable under Sections 302 read with Section 34 of the IPC. The investigation was carried out, and during the investigation, Pandurang Shilar was added as accused No.5. Upon completion of the investigation, a charge sheet was filed before the Court against all the accused persons.

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(v) The Charge (Exhibit 17) was framed against all the accused, which was read over and explained to them in the vernacular. To which they pleaded not guilty and claimed to be tried. The defence of the accused persons was that they were not aware of the incident.

(vi) The prosecution has examined in all eleven witnesses to prove the charges. Out of them, P.W. 1-Kishor, P.W.6-Ravindra and P.W. 11-Sarthak are the eyewitnesses. P.W.2-Onkar, P.W.4-Prakash and P.W.7-Ramrao are the panch witnesses on the spot-cum-seizure panchanama, memorandum Statement of accused No.1-Jayanand and recovery of the axe pursuant to the said statement. P.W.3-Subhash and P.W.5-Suraj are examined to demonstrate the relationship between the deceased and the accused persons. P.W.8-Dr. Pratap Chavhan is the Medical Officer. P.W.9- P.I. Sardarsingh and P.W.10- A.P.I. Sadashiv Badikar are the Investigating Officers.

(vii) After recording the evidence, statements of the accused were recorded under Section 313 of the Criminal Procedure Code. During the statement, they stated that they did not know anything about the incident and did not want to lead any evidence supporting their defence.

(viii) After considering the entire evidence and the material before the Court, the learned Judge held that accused Nos.1 to 4 were guilty of the offence punishable under Sections 302 and 452 of the IPC and sentenced them as aforesaid. However, acquitted all the accused

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persons of the offence punishable under Section 3(2) of the Maharashtra Prevention of Eradication of Human Sacrifice and Other Inhuman Evil and Aghori Practices and Black Magic Act (for short '*The Black Magic Act*') as well as acquitted accused No.5-Pandurang of the offence punishable under Sections 109 and 114 read with Section 302 of the IPC. Hence, this criminal appeal by appellants.

3. **SUBMISSIONS OF THE ADVOCATE FOR THE APPELLANTS** :

(i) Mr. S.G. Varshani, learned Advocate for the appellants, vehemently contended that the accused persons have not committed any offence. However, the learned Additional Sessions Judge misread and misunderstood the evidence, thereby committing a grave error in convicting accused Nos.1 to 4 under Section 302 r/w Section 34 of the IPC. He has taken us through the testimonies of P.W.1-Kishor, P.W.6-Ravindra and P.W.11-Sarthak and submitted that their testimonies are inconsistent and contradictory to each other; hence, their evidence is not helpful to the prosecution to substantiate the guilt of the accused persons. The evidence of the eyewitnesses neither inspires confidence nor corroborates the prosecution case. There are ample omissions and contradictions brought on record. However, the learned Judge brushed it aside and did not consider the same in its proper perspective. As such, the judgment and order passed by the learned Judge deserve to be quashed and set aside.

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(ii) He further canvassed that P.W.1-Kishor had not deposed that P.W.6-Ravindra was present on the spot immediately after the occurrence. But he came on the spot after some time. However, the prosecution has manipulated the statements of P.W.6-Ravindra and P.W 11-Sarthak to support the prosecution case. Their statements were recorded belatedly, which creates doubt about their versions.

(iii) He further propounded that the C.A. Report in respect of the blood group of deceased Sunanda is inconclusive and, therefore, the C.A. Report is not helpful for the prosecution to connect the accused persons to the present crime. However, he has not challenged that the death of deceased Sunanda was homicidal. He also submitted that the prosecution has failed to examine the material witnesses Pooja, Sahebrao Paikrao and Mahendra Dhule. According to the prosecution case, Pooja was present in the house, and Sahebrao Paikrao and Mahendra Dhule, accompanied by P.W.6-Ravindra, came on the spot. Therefore, non-examining the material witnesses leads to drawing an adverse inference against the prosecution case.

Hence, he urged for the acquittal of the accused persons from the charges levelled against them.

4. **<u>SUBMISSIONS OF THE ADDITIONAL PUBLIC PROSECUTOR</u>** :

(i) *Per contra*, Mr. A.B. Badar, learned Additional Public Prosecutor, strenuously argued that the prosecution has examined

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eleven witnesses. Out of them, three are the eyewitnesses who have categorically deposed that accused persons, in furtherance of their common intention, committed the murder of Sunanda and, therefore, the learned Judge has rightly convicted them under Section 302 r/w Section 34 of the IPC. Thus, no interference is required in it. He further submitted that the prosecution had brought the motive to commit the offence on record that deceased Sunanda was practicing black magic against accused No.3-Ashabai. The complaint was filed in that regard, and the police seized the same. He further canvassed that the prosecution had proved the memorandum statement of accused No.1-Jayanand as well as the recovery of the axe at his hands, on which blood stains appeared. Accused No.1-Jayanand failed to explain the appearance of blood stains of humans on his shirt, which was incumbent on him to explain. Therefore, adverse inferences can be drawn.

(ii) He has taken us through the evidence of P.W.1-Kishor, P.W.6-Ravindra and P.W.11-Sarthak and submitted that their evidence inspires confidence. Nothing has been brought on record to disbelieve their versions. Therefore, the conviction of the accused persons is just and proper, and no interference is required. Hence, he prays for the dismissal of the criminal appeal.

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5. Having heard the learned Advocate for the appellants and learned Additional Public Prosecutor for the State, as well as having gone through the impugned judgment and order and the record, at the outset, it emerges that accused persons have been incarcerated since May 2015, i.e. for more than nine years. It also reveals that they have been imprisoned for more than two years, the sentence imposed under Section 452 of the IPC. Besides, during the argument, the appellants have not challenged their conviction under Section 452 of the IPC.

Similarly, the prosecution has not challenged the acquittal of all accused persons for the offence punishable under Section 3(2) of The Black Magic Act, as well as the acquittal of accused No.5-Pandurang under Sections 109 and 114 read with Section 302 of the IPC. The said fact shows that the appellants and the prosecution have no grievance about the order passed by the learned Judge in that regard. The appellants only challenge their conviction under Section 302, read with Section 34 of the IPC. It also appears that the appellants have not seriously challenged the conviction of accused No.1 under Section 302 of the IPC.

<u>CONSIDERATION OF THE SUBMISSIONS AND APPRECIATION OF EVIDENCE</u> :

6. A close analysis of the evidence of prosecution witnesses, more particularly the evidence of P.W.1-Kishor, P.W.6-Ravindra and P.W.11-

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Sarthak, clearly discloses that on the day of the incident at about 9-00 a.m., all the accused persons entered into the courtyard of the deceased Sunanda. The said fact is neither denied nor disputed by the accused persons. It also reveals that Sunanda was lying on the ground in an injured condition, and blood was oozing from the injuries which itself shows that deceased Sunanda was assaulted. Thus, the order of conviction under Section 452 of the IPC recorded by the learned Judge needs no interference, more particularly in the absence of challenge by the appellants in that regard.

7. It is further evident from the evidence of P.W.1-Kishor, P.W.6-Ravindra and P.W.11-Sarthak that accused No.1-Jayanand was holding an axe in his hand and deceased Sunanda was lying on the ground having the injuries on her head, and blood was oozing. The evidence also denotes that accused No.1-Jayanand assaulted the deceased by means of the axe. Moreover, the learned Advocate for appellants has not challenged the death of the deceased Sunanda as homicidal.

8. P.W.8-Dr. Pratap Chavhan, the Government Medical Officer, has proved the Post-Mortem Report (Exhibit 79) and Query Report (Exhibit 81) and categorically deposed that the deceased had sustained eleven external and five internal injuries on her person. The nature of those injuries was antemortem. Injury Nos.1 and 2 in Column No.17

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correspond to injury Nos. 2 and 4 in Column No.19. He categorically deposed that the probable cause of death of deceased Sunanda was due to '*chop injury to her head*'. He also deposed that injuries Nos.1, 2 and 10 in Column No.17 and injuries Nos.2 and 4 in Column No.19 are possible by sharp-edged weapons like an axe, which was recovered from the accused no.1. He also deposed that reddish stains were present over the blade and handle of the axe. His testimony is neither shattered nor shaken during his cross-examination to disbelieve him, but his testimony inspires confidence. Moreover, the doctor has no reason to depose falsely against the accused persons; therefore, there is no reason to disbelieve his testimony in that regard. His testimony shows that the prosecution proves that the deceased died homicidal due to chopping injuries on the head, and said injuries are possible by means of sharp-edged weapon, i.e., an axe (Article-C).

RECOVERY OF THE WEAPON:-

9. The next circumstance is the recovery of the weapon, i.e. Axe (Article-C), in pursuance of the memorandum statement of accused No.1-Jayanand under Section 27 of the Indian Evidence Act.

To prove the recovery of the axe, the prosecution mainly relied on the evidence of P.W.2-Onkar and P.W.10-Sadashiv Badikar, API and the memorandum statement of accused No.1 as well as seizure panchanama of the axe. Both the witnesses have categorically deposed

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that on 03-05-2015, accused No.1 gave a memorandum statement about the concealment of the axe under the cotton stumps (तुराट्या) over the shed situated in the field of informant P.W.1-Kishor, and he was ready to produce. Accordingly, his statement was recorded. Pursuant to the statement, the Investigating Officer, along with accused No.1-Jayanand and panchas, went to the field of P.W.1-Kishor as per the direction of accused No.1-Jayanand. Then, accused No.1-Jayanand showed the place where he kept the axe, took the same from the shed hidden under the cotton stumps (तुराट्या), and produced before them. Accordingly, P.W.10-Sadashiv Badikar, API, seized the same in the presence of the panchas.

During their cross-examination, no incriminating material is brought on record to discard their testimony regarding the axe's recovery pursuant to the statement from the possession of the accused No.1-Jayanand. Therefore, there is no reason to disbelieve the testimonies of P.W.2-Onkar and P.W.10-Sadashiv Badikar, API, in that regard. The evidence of both the witnesses, along with the memorandum statement of accused No.1 and recovery panchanama of the axe, categorically discloses that the prosecution has proved the memorandum statement of accused No.1-Jayanand and recovery of the axe from his possession, as per his memorandum statement.

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SEIZURE OF CLOTHES OF ACCUSED NO.1-JAYANAND :

10. Another circumstance is about the seizure of the clothes of accused No.1-Jayanand. The prosecution mainly relied on the evidence of P.W.2-Onkar and P.W.10- API Sadashiv Badikar and the seizure memo (Exhibit 56) of the clothes of the accused. Both the witnesses have categorically deposed that after the arrest of the accused No.1, P.W.10- Sadashiv Badikar, API, seized the clothes on his person under the seizure memo. The said clothes were having blood stains. Nothing has been brought on record to discard their testimonies on the point of recovery of the clothes. The seizure memo is at Exhibit 56.

A perusal of the seizure memo reveals that a blue colour shirt (Article-A) and greyish colour pants with blood stains were seized and sealed under the seizure memo in the presence of the panchas. Moreover, while replying to the answer to question No.65 while recording a statement under Section 313 of the Criminal Procedure Code, accused No.1 has not denied the recovery of the clothes on his person and seizure of the same under the panchanama. But he replied that he did not know about the same. Also, during the cross-examination, the defence did not challenge the recovery of the clothes of accused No. 1 Jayanand. Thus, the prosecution has proved the recovery of the blood-stained clothes of accused No.1-Jayanand under the seizure memo (Exhibit 56).

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SEIZURE OF CLOTHES OF DECEASED SUNANDA :

11. To prove the seizure of the clothes of deceased Sunanda, the prosecution has relied upon testimonies of P.W.7-Ramrao and P.W.10-API Sadashiv Badikar. Both the witnesses have categorically deposed that on 02-05-2015, Police Constable Chandre produced the blood-stained clothes of deceased Sunanda with MLC and inquest panchanama before the Investigating Officer P.W.10-Badikar and panchas. Accordingly, the same were seized under the seizure panchanama (*Exhibit 74*). During cross-examination, nothing has been brought on record to disbelieve their testimonies. Therefore, there is no reason to discard the evidence of both these witnesses. The evidence of both these witnesses categorically depicts that the Investigating Officer has recovered, seized, and sealed the blood-stained clothes of deceased Sunanda in the presence of the panchas under the seizure memo (Exhibit 74).

C. A. REPORTS :-

12. Apart from the above, the prosecution has relied on the C.A. Reports (Exhibits 30, 31 and 32). A perusal of the C.A. Reports reveal that the blood group of the deceased Sunanda could not be determined and, as a result, was inconclusive. The blood group of accused No.1-Jayanand was detected as a "*B*" group. Likewise, the blood of blood group "*A*" was detected on the saree, blouse, petticoat, hair bow, earth,

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bangle pieces and **blade and handle of the axe**. (which was recovered from A-1 Jayanand) However, blood group of the blood on the shirt of accused No.1-Jayanand could not be determined as the result was inconclusive. But the report denotes that the said blood was of human.

13. It is pertinent to note that accused No.1-Jayanand has not explained how human blood was detected on his shirt. It was incumbent on accused No. 1 Jayanand to explain how the blood stains appeared on his shirt. Failing to explain the said fact leads to drawing adverse inferences against him.

14. Even though, as per the C.A. Reports, the blood group of the deceased could not be determined. However, the blood found on the clothes of the deceased was of "*A*" group. Similarly, blood from blood group "A" is detected on the blade and handle of the axe. Besides, in the absence of any evidence on record to demonstrate that the blood of any other person fell on the clothes of the deceased, it would be proper to draw an inference that the blood oozing from the injuries sustained by the deceased must have fallen on her clothes. These facts lead to drawing an inference that the blood of the deceased might have been of "A" blood group; else, the question of detection of the blood of "A" blood group on the clothes of the deceased and other articles which were

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recovered from the spot as well as on the person of deceased Sunanda and seized from the possession of the accused does not arise at all.

As discussed above, it is also evident that the axe with blood stains was recovered from the possession of accused No.1-Jayanand. It was incumbent on him to explain the appearance of the blood stains on the blade and handle of the axe, but he failed to do so.

15. The learned Judge, while recording the findings about the C.A. Reports, has erred in observing that there is no evidence that the clothes of the accused have blood stains of the blood of the deceased. However, the said finding appears contrary to the evidence on record, as discussed above. We have already observed that the blood of the "A" group was detected on the clothes of the deceased and the blade and handle of the axe. The accused has not explained the appearance of the blood stains of blood of the "A" group on the axe. Likewise, the blood of the "A" group was determined on the clothes of the deceased, which were recovered immediately after the occurrence of the incident. Therefore, though the result of the analysis of the blood group of the deceased was inconclusive, these articles categorically denote that the blood of the deceased must be of the group "A". Had it been the fact that the deceased did not have blood group "A", then a question of spotting of the blood of "A" group on her clothes, the spot of incident

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and the blade and handle of the axe would not have arisen at all. As the blood group of accused No.1 was determined as the "B" group. Thus, we are not in agreement with the findings recorded by the learned Judge in that regard. However, the learned Judge rightly observed that motive is not an important factor while analysing direct evidence.

16. Alternatively, Learned Advocate Mr. Varshani has submitted that Section 34 of the IPC does not attract against accused Nos.2 to 4, as the prosecution has not established a prior concert or prearranged plan to kill deceased Sunanda. Likewise, the evidence on record does not show that accused persons, in furtherance of their common intention, committed the crime. No evidence in that regard has been brought on record. Therefore, mere contention of the prosecution about the common intention *per se* may not attract Section 34 of the IPC.

To buttress his submissions, the learned Advocate has relied upon the following decisions of the Hon'ble Apex Court: (1) ***Gadadhar Chandra V. State of West Bengal, (2022) 6 SCC 576***, (2) ***Jai Bhagwan and others V. State of Haryana, AIR 1999 SC 1083***, and (3) ***Jasdeep Singh @ Jassu V. State of Punjab in Criminal Appeal No.1584/2021*** and connected appeals, decided on 07-01-2022.

Hence, he urged for acquitting appellants Nos. 2 to 4 from the charges of section 302 r/w 34 of the IPC.

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17. Having considered the evidence of PW8 M.O. Dr. Chavhan with P.M. Report, which categorically demonstrates that the deceased met with homicidal death. Moreover, the learned Advocate for appellants has not challenged the death of the deceased Sunanda as homicidal. In such an eventuality and taking into consideration submissions of the learned Advocate for the appellants, the moot question that arises before us is,

'Who is the author for committing the death of the deceased Sunanda? Whether the authorship of the injuries proved fatal to the life of deceased Sunanda noted in the P. M. report can be ascribed to accused No.1-Jayanand solely or accused Nos.2 to 4, in furtherance of their common intention, assisted accused No.1, are also responsible for committing death of deceased Sunanda.'

18. Before analysing the evidence on the said point/question, we would like to reproduce Section 34 of the IPC to understand it, which thus reads as follows:

> ***"34. Acts done by several persons in furtherance of common intention*** *– 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."*

A bare reading of this section reveals that -

(i) A criminal act is done by two or more than two persons (several),

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(ii) Such act is done in furtherance of the common intention of all, and

(iii) participation of each accused in the commission of the offence,

(iv) Each of such persons is liable for that in the same manner as if it were done by him alone.

In other words, these ingredients would guide the court in determining whether the accused is liable to be convicted with the aid of Section 34 of the IPC. While the first three are the acts that are attributable and have to be proved as actions of the accused, the fourth is the consequence. According to Section 34 IPC, the criminal act must be done by several persons. Similarly, every individual member of the entire group charged with the aid of Section 34 of the IPC must, therefore, be a participant in the joint act resulting from their combined activity. It is to be noted that Section 34 of the IPC is not a substantive offence.

19. Before we deal further with Section 34 of the IPC, a peep at Section 33 of the IPC may give a better understanding. Section 33 of the IPC brings into its fold a series of acts as that of a single one. Therefore, in order to attract Sections 34 to 39 of the IPC, a series of acts done by several persons would be related to a single act that constitutes a criminal offence. A similar meaning is also given to the word ‘omission’, meaning a series of omissions would also mean a

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single omission. This provision would thus make it clear that an act would mean and include other acts along with it.

20. The Hon'ble Apex Court in the case of **Jasdeep** (*supra*), in paras 21 to 24, 26 to 28 has observed as under.

> *"21. Section 34 of the IPC creates a deeming fiction by infusing and importing a criminal act constituting an offence committed by one into others in pursuance to a common intention. Onus is on the prosecution to prove the common intention to the satisfaction of the court. The quality of evidence will have to be substantial, concrete, definite and clear. When a part of evidence produced by the prosecution to bring the accused within the fold of Section 34 of the IPC is disbelieved, the remaining part will have to be examined with adequate care and caution, as we are dealing with a case of vicarious liability fastened on the accused by treating him at par with the one who actually committed the offence.*
>
> *22. What is required is the proof of common intention. Thus, there may be an offence without common intention, in which case Section 34 of the IPC does not get attracted.*
>
> *23. It is a team effort akin to a game of football involving several positions manned by many, such as defender, mid-fielder, striker, and keeper. A striker may hit the target, while a keeper may stop an attack. The consequence of the match, either a win or a loss, is borne by all the players, though they may have their distinct roles. A goal scored or saved may be the final act, but the result is what matters. As against the specific individuals who had impacted more, the result is shared between the players. The same logic is the foundation of Section 34 of the IPC which creates shared liability on those who shared the common intention to commit the crime.*
>
> *24. The intendment of Section 34 of the IPC is to remove the difficulties in distinguishing the acts of individual members of a party, acting in furtherance of a common intention. There has to be a simultaneous conscious mind of the persons participating in the criminal action of bringing about a particular result. A common intention qua its*

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existence is a question of fact and also requires an act "in furtherance of the said intention". One need not search for a concrete evidence, as it is for the court to come to a conclusion on a cumulative assessment. It is only a rule of evidence and thus does not create any substantive offence.

26. The word "furtherance" indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion.

27. There may be cases where all acts, in general, would not come under the purview of Section 34 of the IPC, but only those done in furtherance of the common intention having adequate connectivity. When we speak of intention, it has to be one of criminality with adequacy of knowledge of any existing fact necessary for the proposed offense. Such an intention is meant to assist, encourage, promote and facilitate the commission of a crime with the requisite knowledge as aforesaid.

28. The existence of common intention is obviously the duty of the prosecution to prove. However, a court has to analyse and assess the evidence before implicating a person under Section 34 of the IPC. A mere common intention per se may not attract Section 34 of the IPC sans an action in furtherance. There may also be cases where a person, despite being an active participant in forming a common intention to commit a crime, may actually withdraw from it later.

(*Emphasis supplied*)

21. In the Case of **Gadadhar Chandra** (*supra*), the Supreme Court observed that -

"As consistently held by this court, common intention contemplated by Section 34 of IPC pre-supposes prior concert. It requires meeting of minds. It requires a pre–arranged plan before a man can be vicariously convicted for the criminal act of another. The criminal act must have been done in furtherance of the common intention of all the accused. In a given case, the plan can be formed suddenly. In the present case, the non–examination of two crucial eye witnesses makes the prosecution case about the existence of a prior concert and pre-arranged plan extremely doubtful."

(*Emphasis supplied)*

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In the case of **Jai Bhagwan and others** (*supra*), the Supreme Court observed that -

> *"10. To apply Section 34, IPC, apart from the fact that there should be two or more accused, two factors must be established : (i) common intention and (ii) participation of the accused in the commission of an offence. If common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability, but if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of common intention. It has to be inferred from the facts and circumstances of each case."*
>
> (*Emphasis supplied)*

22. In addition, it is to be noted that Section 34 of the IPC is not a substantive offence. It is imperative that before a man can be held liable for acts done by another under the provisions of this section, it must be established that there was common intention in the sense of a prearranged plan between the two and the persons sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this section cannot apply.

23. Apart from that, a person is responsible for his own acts. A person can also be vicariously responsible for the acts of others if he had a common intention to commit the acts. The vicarious or constructive liability under Section 34 of the IPC can arise only when

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two conditions stand fulfilled, i.e. mental element or **the intention to commit a criminal act conjointly with another** or others, and **the other is actual participation** in one form or the other in the commission of the crime.

24. The common intention postulates **the existence of a prearranged plan implying a prior meeting of 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 the point of time to the commission of the crime, but it 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 of the IPC, the evidence and the documents on record acquire great significance, and the court must carefully scrutinise them. This is particularly important in cases where evidence regarding the development of the common intention to commit the offence is greater than the one originally designed during the execution of the original plan.

25. In the light of the settled legal principles of law, we have to examine the facts of the present case, i.e. we have to ascertain whether

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accused Nos.2 to 4 can be convicted under Section 302 of the IPC with the aid of Section 34 as the learned Judge while appreciating the evidence in paragraphs 62 to 65 of the judgment has held them guilty for the offence punishable under Section 302 read with Section 34 of the IPC.

26. The learned Judge, without considering the mandate laid down by the Hon'ble Apex Court in catena of judgments as well as the ingredients of Section 34 of the IPC, has erred in observing that the evidence of P.W.1-Kishor, P.W.6-Ravindra and P.W.11-Sarthak shows that 'on the day, place and time accused Nos.1 to 4 had made preparation for assaulting Sunanda, entered her house and accused No.1-Jayanand repeatedly assaulted her with axe and accused Nos.2 to 4 in furtherance of their common intention helped accused No.1 to commit the said offence.'

27. As observed in the decision of *Jasdeep Singh @ Jassu* (supra), it was incumbent on the Judge to carefully scrutinize the evidence to vicariously held liable to be convicted with the aid of Section 34 of the IPC that there was the common intention in the sense of a prearranged plan between the two and the persons sought to be so held liable had participated in same manner in the act constituting the offence unless common intention and partition both are present, this section cannot apply.

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28. On careful scrutiny of the testimonies of P.W.1-Kishor, P.W.6-Ravindra and P.W.11-Sarthak, it reveals that P.W.1-Kishor in his testimony, categorically deposed that when he heard the hue and cry of Sunanda, he ran there and saw that accused No.1-Jayanand was holding an axe in his hand and Sunanda fell on the ground in injured condition. She had sustained head injuries, and blood was oozing from it. Accused No.2- Niranjan, and Accused No.4-Kiran, were standing there. He has not deposed that they have assisted accused No.1-Jayanand. He also categorically deposed that after some time, he called P.W.6-Ravindra to take the injured Sunanda to hospital. During his cross-examination, he categorically admitted that he, along with Police Patil, returned to the house of Sunanda. At that time, they did not find the accused persons there. After that, the auto-rickshaw of P.W.6-Ravindra Dhule reached near Sunanda's house within five to six minutes. The said evidence of P.W.1-Kishor itself denotes that when P.W.6-Ravindra reached the spot, the accused persons were not present there or at the time of occurrence of the incident or immediately thereafter except him; no one was present there. However, P.W.6-Ravindra, in his testimony, deposed that he heard the shouts from the house of Sunanda, and he along with Sahebrao Paikrao and Mahendra Dhule, went to the house of Sunanda and from the door of the house of Sunanda they saw that accused No.1-Jayanand was assaulting on the

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head of Sunanda by means of axe and accused No.4-Kiran was holding right hand and accused No.2-Niranjan was holding the left hand of deceased Sunanda. During his chief- examination, he admitted that P.W.1-Kishor was already standing there. It is pertinent to note that P.W.1-Kishor, who was present at the spot immediately after the occurrence of the incident, has not deposed anything about the assault on the head of Sunanda by means of axe by accused No.1-Jayanand or holding of hands of Sunanda by accused No.2-Niranjan and accused No.4-Kiran. The version of P.W.6-Ravindra appears inconsistent and contrary to the evidence of P.W.1-Kishor. As per the prosecution case, immediately after the occurrence of the incident, P.W.1-Kishor reached there, then he went to Police Patil, and after he and Police Patil reached there, none of the accused persons were present on the spot. After that, P.W.6-Ravindra came there along with an auto rickshaw.

29. In addition, the prosecution has failed to examine the other two witnesses, Sahebrao Paikrao and Mahendra Dhule, who were accompanied by P.W.6-Ravindra at the spot of the incident.

30. It is to be noted that immediately after the incident, P.W.1-Kishor lodged the report. In the first information report, it is not stated that P.W.6-Ravindra was on the spot immediately after the occurrence of the

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incident. But in the first information report, he categorically stated that when Sunanda became unconscious, he called P.W.6-Ravindra with an auto rickshaw and took the injured Sunanda to the hospital along with Sahebrao Paikrao and Mahendra Dhule. Had it been the fact that P.W.6-Ravindra was present at the spot of the incident, then the question of calling him with an auto rickshaw would not have arisen. Similarly, P.W.6-Ravindra categorically admitted the presence of P.W.1-Kishor before him at the place of the incident. It also seems that the statement of P.W.6-Ravindra was recorded by police five days after the incident when, admittedly, he was present in the village. Similarly, P.W.11-Sarthak has not deposed about the presence of P.W.6-Ravindra at the place of the incident. Likewise, on perusal of the statement of P.W.11-Sarthak under Section 164 of the Criminal Procedure (Exhibit 110), it only discloses that accused No.1-Jayanand was holding an axe, and he assaulted Sunanda by means of an axe and other accused Nos.2 to 4 were also beaten to deceased Sunanda. He has not stated in his statement that accused Nos.2 to 4 were holding hands of deceased Sunanda.

31. Thus, on a close and critical examination of the evidence on record, we are of the considered opinion that the evidence on record fully established that on 01-05-2015 at about 9-00 a.m., accused No.1-Jayanand caused multiple injuries on the vital parts of the deceased

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Sunanda and committed her murder by means of axe and concealed the blood-stained axe under the cotton stumps over the shed in the field of informant Kishor. Accused No.1-Jayanand also failed to explain the blood stains that appeared on his seized clothes. Therefore, we have no hesitation in holding that the prosecution has proved the charge levelled against accused No.1-Jayanand under Section 302 of the IPC.

However, the material discrepancy appears in the testimony of P.W.1-Kishor, P.W.6-Ravindra and P.W.11-Sarthak about the role played by accused Nos.2 to 4. Therefore, it creates doubt about the role played by accused Nos.2 to 4 at the time of the occurrence of the incident. The second aspect of the matter is that P.W.1-Kishor, P.W.6-Ravindra and P.W.11-Sarthak categorically deposed that accused No.3-Ashabai was present there and saying to beat Sunanda by uttering words "मारा मारा" Whether the said utterance of the words amounts to assist accused No.1-Jayanand in furtherance of common intention to kill deceased Sunanda.

32. As discussed above, the mere presence of accused Nos.2 to 4 on the spot or uttering the words to beat her as "मारा मारा" does not invoke the ingredients of section 34 of the IPC to commit her murder. On perusal of the evidence on record, it does not reflect that there was a

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prior concert, nor does the evidence on record denote that accused Nos.2 to 4 were aware of the fact that accused No.1-Jayanand had the intention to kill the deceased Sunanda. Similarly, no evidence was brought on record to infer that accused Nos.2 to 4 formed a common intention at the spot with accused No.1-Jayanand to commit the murder of deceased Sunanda. Therefore, merely uttering the words "मारा मारा" does not show that in furtherance of common intention, accused No.3-Ashabai had uttered the words "मारा मारा".

33. The question is whether uttering the words "मारा मारा" would constitute an offence punishable under Section 34 of the IPC. The said utterance of the words may have been made only to beat.

34. Thus, in our considered view, the learned Judge ought to have disbelieved the testimony of P.W.6-Ravindra in so far as the role attributed by the accused No.2 to 4. As such, the absence of evidence about the existence of a prior concert and prearranged plan between accused No. 1 and accused No. 2 to 4, ingredients of section 34 of the IPC, do not apply. There is no evidence on record to hold that accused Nos.2 to 4 were aware that accused No.1-Jayanand had the intention to murder deceased Sunanda. Consequently, the evidence as is available on record is not sufficient enough to hold that Section 34 of the IPC is attracted against the accused No. 2 to 4 when specifically testimonies of

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P.W.6-Ravindra and P.W.11-Sarthak do not inspire confidence to attract Section 34 of the IPC against accused Nos.2 to 4. Section 34 of the IPC will be attracted if the participation of accused Nos.2 to 4 in the crime is proved and the common intention of accused Nos.2 to 4, along with accused No.1-Jayanand, to commit the murder of deceased Sunanda is proved, but in the absence of the same would not attract Section 34 of the IPC.

35. However, in this case, the prosecution has not succeeded in proving that accused Nos.2 to 4 had shared a common intention with accused No.1-Jayanand. The mere presence of accused Nos.2 to 4 at the place of occurrence at or about the crime, in the absence of direct or circumstantial evidence, we cannot hold them guilty with the aid of Section 34 of the IPC.

36. Thus, the evidence on record does not show that the prosecution has proved two conditions as enumerated above to attract Section 34 of the IPC against accused Nos.2 to 4. Therefore, we are of the view that the findings recorded by the learned Judge are contrary to the evidence on record. The learned Judge has not considered the ingredients of Section 34 of the IPC or the law laid down by the Hon’ble Apex Court in various decisions and has recorded the findings based on conjectures and surmises. Which are not sustainable in the eyes of the law and

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same are liable to be set aside to the extent of applicability of Section 34 of the IPC against accused Nos.2 to 4, and to that extent, the findings are required to be quashed and set aside.

37. As a result, we are of the opinion that the prosecution has proved the charge against accused No.1-Jayanand under Section 302 of the IPC. Hence, we maintain the findings of the trial Court to the extent of holding accused No.1-Jayanand guilty of the offence punishable under Section 302 of the IPC. However, the prosecution has failed to prove the common intention as contemplated under Section 34 of the IPC, i.e. presupposes prior concert, meeting of minds or prearranged plan before a man can be vicariously convicted for the criminal act of another. Hence, the prosecution has failed to prove the ingredients of Section 34 of the IPC against accused Nos.2 to 4, who have been implicated only with the aid of Section 34 of the IPC. Hence, we answer the point partly in the affirmative to the extent of accused No.1 and negative to the extent of accused No. 2 to 4.

We also maintain the conviction of the appellant Nos.1 to 4 under Section 452 of the IPC, which they have already undergone.

Therefore, the appeal must succeed partly to that extent.

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38. In the result, we pass the following order :

(i) The appeal is partly allowed.

(ii) Appellant No.2-Niranjan Dhabale, appellant No.3-Ashabai Dhabale and appellant No.4-Kiran Dhabale are hereby acquitted of the offence punishable under Section 302 read with Section 34 of the IPC.

(iii) Appellant Nos.2 to 4 shall be released forthwith from jail if not required in any other crime or case.

(iv) The fine amount, if any, deposited by appellant Nos.2 to 4 for the offence under Section 302 read with Section 34 of the IPC be refunded to them.

(v) The criminal appeal to the extent of appellant No.1-Jayanand Dhabale is dismissed. The rest of the judgment and order is intact.

(ABHAY J. MANTRI, J.) **(VINAY JOSHI, J.)**

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