IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

&

THE HONOURABLE MR.JUSTICE P. V. BALAKRISHNAN

WEDNESDAY, THE 9TH DAY OF APRIL 2025 / 19TH CHAITHRA, 1947

CRL.A NO. 1311 OF 2019

AGAINST THE JUDGMENT DATED 11.10.2019 IN SC NO.933 OF 2014 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT - III, THALASSERY

APPELLANT/ACCUSED NO.2:

N.NOUFAL
AGED 32 YEARS
S/O. ABOOBACKER, NAYIKKAN PALLIKKAVU HOUSE, KUNNUKAI, CHIRRAKKAL AMSOM, KANNUR DISTRICT

BY ADVS.
P.C.NOUSHAD
P.K.ABDURAHIMAN (POOLACKAL KARATCHALI)
E.A.HARIS
SUNNY MATHEW
RENJITH B.MARAR(K/000240/2003)
M.A.AHAMMAD SAHEER(K/829/2013)
MUHAMMED YASIL(K/000989/2017)

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED C.I OF POLICE, VALAPATTANAM POLICE STATION,
THROUGH PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
KOCHI- 682 031

BY SRI. T.R. RENJITH, SENIOR PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 09.04.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J U D G M E N T

Raja Vijayaraghavan, J.

The appellant is the 2nd accused in S.C. No. 933 of 2014 on the files of the Court of Session, Thalassery. In the above case, he faced indictment for having committed offences punishable under Sections 324, 326, 307 and 302 r/w. Section 34 of the IPC. By the impugned judgment dated 11.10.2019, he was found guilty of the offence under Section 302 of the IPC and was sentenced to undergo imprisonment for life and to pay a fine of Rs. 1,00,000/- with a default clause. He was also convicted and sentenced to undergo rigorous imprisonment for a period of three months for the offence under Section 324 of the IPC. The above finding of guilt, conviction and sentence is assailed in this appeal.

Brief Statement of Facts:

2. O.T. Vineesh (deceased) and O.T. Vimal (PW14) were brothers. They were persons owing allegiance to the CPI (M) political party. The accused were allegedly members of the SDPI. According to the prosecution, the deceased, PW14 and their friends, which included PWs 2 and 4, were sitting in

the R.V. Sudheesh Memorial Bus Shelter at Aryanbeth. On 13.05.2009, at about 10.00 p.m., the accused Nos. 1 and 2 reached the spot on a motorbike. The 1st accused was allegedly carrying a sword, and the 2nd accused was riding the bike. The 1st accused got down from the bike and exhorted the 2nd accused to kill the persons who were standing in the shelter. The 1st accused slashed the sword towards the deceased, which he managed to evade. PW14 intervened, and when he blocked, he sustained an injury on his left thumb. The deceased took to his heels. The accused followed him and inflicted a cut injury behind the left knee joint in the popliteal region. When they attempted to inflict further injury, PW14 and one Mohammed Kunhi intervened. The accused then fled the scene by riding away on their bike. While the accused were going back, they saw Jaleesh (PW3), and he was also attacked.

3. The local people who rushed to the spot took the injured in an autorickshaw to the AKG Hospital, Kannur. As the injuries sustained by Vineesh were serious, he was referred to the Baby Memorial Hospital, Kozhikode, where he was declared dead.

Registration of Crime and Investigation

4. On receipt of information about the incident, PW21, the Grade A.S.I. of Police, Valapattanam Police Station, reached the AKG Hospital, Kannur on 14.05.2009. He recorded the statement of PW14, who was undergoing treatment in the said hospital. On the strength of Ext.P19 FIS, Ext.P29 FIR was registered at 2.30 a.m., inter alia, for the offence under Section 307 of the IPC.

5. PW22, the Sub Inspector of Police, Valapattanam Police Station, conducted the inquest over the body of the deceased and prepared Ext.P10 inquest report.

6. PW23, the Circle Inspector of Police, Valapattanam Police Station, took over the investigation on 14.05.2009. He went to the scene of the crime and prepared Ext.P11 Scene Mahazar. A pair of chappel and two sheets of a daily by name "Thejus" were seized from the scene. Later, as per Ext.P12 Seizure Mahazar, the clothes worn by PW14 at the time of occurrence were seized. In the course of the investigation, it was revealed that O.T. Vineesh had succumbed to the injuries. Ext.P32 report was submitted incorporating Section 302 of the IPC. PW25, the C.I. of Police, Valapattanam Police Station, took over the investigation

thereafter. He forwarded the items seized to the Forensic Sciences Lab and obtained Ext.P39 report. PW24 took over the investigation on 19.10.2011. He stated that the 2nd accused surrendered before the jurisdictional Magistrate on 02.01.2013. Based on Ext.P33 disclosure statement, MO1 Sword, allegedly used for the infliction of injuries, was seized as per Ext.P6 Mahazar. A motorbike bearing registration No. KL-13-R-7323, which was allegedly used by the assailants to arrive at the scene of crime, was seized as per Ext.P23 Mahazar. Thereafter, the investigation was taken over by PW28, the C.I. of Police, Valapattanam Police Station, who laid the final report before the Court.

7. After following the procedure, the case was committed to the Court of Session. The Sessions Court made over the case to the Additional Sessions Court-III for trial and disposal. The 1st accused had absconded and was not available for trial. When the appellant appeared before the Court, the charge was read over, to which he pleaded not guilty.

Evidence Tendered

8. On the side of the prosecution, 28 witnesses were examined as PWs 1 to 28, and through them Exts. P1 to P43 were exhibited and marked. MOs

1 to 6 were produced and identified. After the close of the prosecution evidence, the incriminating materials arising from the evidence were put to the accused under Section 313(1)(b) of the Code of Criminal Procedure. He denied the circumstances. No evidence was adduced on the side of the defence.

The finding of the trial court:

9. The learned Sessions Judge, on evaluation of the evidence by the prosecution as well as the defence, firstly came to the conclusion that the death of the deceased was a case of culpable homicide amounting to murder and covered by Clause (1) of Section 300 of the IPC. The Court went on to hold that the evidence tendered by PW14, the brother of the deceased, and also an injured witness, is trustworthy and eminently believable. The recovery of MO1, sword, based on the disclosure statement given by the appellant and the presence of blood, was taken to be an additional circumstance to add credibility to the statement of the injured witness, which relates to the involvement of the appellant in the crime. Finally, it was held that the appellant was actively present along with the 1st accused, throughout the incident and that both the accused had acted in furtherance of their common intention. In the light of the above evidence, the Court concluded that the appellant, in furtherance of the common

intention that he shared with the 1st accused, committed the murder and therefore, was guilty of the offence under Section 302 r/w. Section 34 of the IPC.

Contentions of the appellant:

10. Sri. Ranjith Marar, the learned counsel appearing for the appellant, submitted that the finding of guilt arrived at by the learned Sessions Judge cannot be sustained under law. According to the learned counsel, the learned Sessions Judge ought to have rejected the evidence tendered by PW14, as his evidence was full of inconsistencies and discrepancies, and against the original prosecution version. His version as regards the actual occurrence did not tally with the medical evidence. While PW14, in his evidence, stated that only one injury was inflicted by the 1st accused, the wound certificate falsified the said version. He would point out that even with regard to the nature of the weapon used, there are serious inconsistencies. In Ext.P26, what has been stated to the doctor is that the injury was inflicted by some assailants with an axe. The learned counsel would highlight that PWs 1, 2 and 4, who were cited and examined, did not support the prosecution, and this would show that falsification of the incident commenced at the inception itself. The learned counsel would point out that no reliance ought to have been placed on the alleged recovery of

the weapon at the instance of the 1st accused, as the Officer who conducted the recovery failed to follow the procedure. At any rate, the learned counsel submitted that the doctor who conducted the postmortem unequivocally stated that the injury found on the leg was only likely to cause death, and if that be the case, the offence under Section 302 of the IPC would not be attracted. The learned counsel had referred to the observations in **Narayan Raghunath Phadke v. State of Maharashtra**[1], to substantiate his contention.

Submissions of the learned Public Prosecutor:

11. Sri. T.R. Renjith, the learned Public Prosecutor, would invite us to the relevant portion of the evidence tendered by the prosecution witnesses, and it is urged that though PWs 1, 2 and 4 did not wholly support the case of the prosecution, their evidence corroborated the version of PW14 in no small measure. According to the learned Public Prosecutor, being an injured witness, and the brother of the deceased, PW14 would be the last person to shield the actual culprits and falsely implicate the appellant. According to the learned Public Prosecutor, the version of PW14 is consistent, and the overall evidence let in by the prosecution reveals that the appellant shared a common intention with the

[1] [AIR 1994 SC 978]

1st accused to carry out the murder.

12. We have carefully considered the submissions advanced and have gone through the entire record. We have also perused the judgment rendered by the learned Sessions Judge.

Whether the death of Vineesh was homicidal?

13. We shall now deal with the first question as to whether the death of O.T. Vineesh is homicidal. We find that the prosecution examined PW20, the Chief Medical Officer, who gave evidence that Dr. Sridar, of the AKG Hospital, examined Vineesh on 13.05.2009 at 11:13 p.m., and issued Ext.P26. PW18 was the Casualty Medical Officer, Baby Memorial Hospital, Kozhikode, who had seen Vineesh on 14.05.2009 at 1:45 a.m. and issued Ext.P24 Wound Certificate. He had noted a lacerated wound 10x5 cm on the back of the left knee, with popliteal artery injury. The autopsy over the body was conducted by PW19, the Professor, Head of the Department of Forensic Medicine, Govt. Medical College, Kozhikode. She stated that she noted various injuries on the body. According to her, the fatal injury was Injury No.1, which was a chop-cut injury horizontally placed 2cm below the knee joint. She found that the flexor compartment muscles

of the leg, the popliteal vessels and the accompanying nerve were severed. She noted that the upper end of the fibula was split open. Her opinion was to the effect that the deceased died due to shock and bleeding from the chop-cut injury to the left leg and blunt injuries involving the head. To a pointed question as to whether injury No.1 was sufficient in the ordinary course of nature to cause death, the Forensic Surgeon responded that "it is likely to cause death". She added that Injury No.1 has led to profuse and protracted bleeding and evidence of organ damage and shock, which has resulted in death. In view of the evidence let in by the prosecution, we have no doubt in our mind that the death of O.T. Vineesh was homicidal. We shall deal with the contention of the learned counsel that the offence under Section 302 of the IPC will not be attracted in the facts and circumstances that can be dealt with at a later stage.

Analysis of the evidence let in

14. We shall now deal with the evidence let in by the prosecution.

15. PW1 was cited to prove the occurrence. He stated that he, along with PW14, had gone to Azheekal. When they reached the bus shelter, he found that Vineesh, along with 2-3 friends, were sitting there. He was sitting facing the

East and talking on the mobile phone. When he turned back, he saw that Vineesh had sustained an injury behind his left knee. Vineesh ran towards the East and fell down. The neighbours came to the spot and shifted the injured to the hospital in the autorickshaw owned by one Louji. He followed the autorickshaw on his scooter. On the next day, he came to know that Vineesh had died. He denied that he knew the names of the assailants. The permission of the learned Sessions Judge was sought by the learned Public Prosecutor to invoke Section 154 of the Indian Evidence Act, 1872, and Exts.P1 to P3 contradictions were marked.

16. PW2 stated that his house is situated near the bus shelter at Aryanbeth. According to him, there is a street light in front of the bus shelter. The house of Jalesh (PW4) is situated about 200 meters away. He stated that he had also gone to the bus shelter. At about 10:00 p.m., he, along with Jalesh, went to their respective houses. When they had almost reached the house of PW4, they heard some cries from the direction of the bus shelter. PW4 went back first, and then PW2 followed him. When they reached there, PW4 told him that two persons who had come on a bike had inflicted a cut injury on his leg. When they reached the bus shelter, they found that the deceased was lying on the road

in front of the house of one Ashokan. Vimal (PW14) was also found sitting next to Vineesh. Vimal had sustained an injury on his palm. The deceased, PW14 and PW4, were immediately rushed to the AKG Hospital. Vineesh was referred to a higher centre. On the next day, he came to know that Vineesh had died. He denied that he was aware of the names of the assailants. The permission of the learned Sessions Judge was sought by the learned Public Prosecutor to invoke Section 154 of the Indian Evidence Act, 1872, and Exts.P4 and P5 contradictions were marked.

17. PW3, in his evidence, stated that he received information about the incident involving the death of Vineesh at 10:30 p.m., on 13.05.2009. He was informed that both Vineesh and Vimal had sustained injuries. He immediately reached the scene of the crime and found Vineesh lying with injuries in front of the house of one Geetha. Blood was squirting from the back of his left knee. He stated that Jalesh (PW4) and Vimal (PW14) had also sustained injuries. According to him, PW14 told him that accused Nos. 1 and 2 had come on a motorbike and inflicted injuries. The injured were shifted to the hospital on a bike. He stated that there was a Sodium Vapour Lamp near the junction. According to him, the injured were CPI(M) workers and the assailants were

members of the NDF. He stated that he was also present when the appellant was brought by the police and recovery was effected of MO1 weapon. He identified the signature in Ext.P6 Mahazar and identified MO1 weapon as well.

18. PW4 is an injured witness. He stated that he is residing 180 meters away from the bus shelter. Vineesh was his friend. According to him, on 13.05.2009, he, along with Vineesh, was sitting in the bus shelter from 7:30-9:30 p.m. Vimal (PW14), Mammoonjikka, and Shiju (PW2) were with them. He left the bus shelter along with PW2, and when he was about to reach his house, he heard a sound from the direction of the bus shelter. They went back, and he noticed a bike parked on the side of the road, and two people sitting on the bike. He then felt something striking on his leg, and blood was oozing out from under his right knee. They saw Vineesh lying with injuries in front of the house of Geetha. The injured was shifted to the hospital, and he was declared dead later. Since he did not support the prosecution in full, permission of the learned Sessions Judge was sought by the learned Public Prosecutor to invoke Section 154 of the Indian Evidence Act, 1872, and Exts.P7 to P9 contradictions were marked.

19. PW5 is an attestor to Ext.P10 Inquest and PW6 is an attestor to

Ext.P11 Mahazar. PW7 reached the place of occurrence after the incident. The clothes of the deceased kept in the house of Geetha were handed over to the police, and the same was recorded in Ext.P12 Seizure Mahazar. PW9 is the Scientific Assistant, attached to the Regional Forensic Science Laboratory, Kannur. He deposed that he visited the place of the occurrence and collected blood stains for the purpose of analysis. PW10 is the Assistant Chemical Examiner who issued Ext.P15 report of analysis.

20. PW14 is the younger brother of the deceased. He stated that on 13.05.2009, at about 7:30 p.m., he had reached the bus shelter. At that time, PW2 Shyju, Rajesh, Jalesh, and Vineesh were present with him. Just prior to the incident, Jalesh and Shyju had gone towards Jalesh's house. There was a fluorescent lamp as well as a street light in front of the bus shelter and light was emanating from the same. At that time, Manaf and the appellant arrived on a motorcycle from the Kunnumkai direction. The bike was stopped near the bus shelter, and Manaf jumped off the motorcycle, wielding a sword. He exhorted the appellant to "do away with" the three people present at the scene. Manaf then inflicted a cut injury with the sword, which Vineesh managed to evade. When Manaf attempted to strike again, PW14 intervened and blocked the blow with his

hands, thereby sustaining an injury on his left thumb. Thereafter, Manaf and Noufal attacked his brother and inflicted a cut injury on the back of his leg. Vineesh tried to flee towards his house through the eastern side of the bus shelter. When the assailants again attempted to attack Vineesh, PW14 and Muhammed Kunhi intervened and blocked them. The accused then fled the scene on their motorcycle in the direction of Jalesh's house. PW14 further stated that when he raised an alarm, neighbours gathered at the scene. The injured were rushed to AKG Hospital in an autorickshaw. Vineesh was subsequently taken to Baby Memorial Hospital, where he was pronounced dead. PW14 identified his signature in Exhibit P19 (First Information Statement). He also identified MO2 (shirt) and MO3 (pants) as the clothes worn by him at the time of the occurrence. He confirmed that he was aware of the identity of the accused as they resided in the same locality. He identified MO1 (sword) as the weapon used by the accused for inflicting the injuries. According to him, the accused were SDPI workers, and the attack was politically motivated, as the deceased and PW14 were affiliated with the CPI(M). In cross-examination, PW14 stated that he was present at the bus shelter from 7:30 p.m. to 10:30 p.m. He added that the First Information Statement was furnished at 1:30 a.m., and explained that he was in a disturbed state of mind, having been shaken by the brutal

assault on his brother. This was the explanation he offered for certain omissions in his previous statements. It was brought out in cross-examination that he had earlier stated the accused arrived on the bike at 9:45 p.m. He reiterated that the sword was seen in the hands of Manaf, and that injuries were inflicted on both Vineesh and Vimal by Manaf. It was further elicited that only one injury was inflicted by Manaf on both PW14 and Vineesh.

21. PW15 was the Motor Vehicle Inspector at Kannur. He deposed before the Court that the first accused is shown as the registered owner of the bike bearing registration No. KL-13-R-7323. PW16 is the Village Officer at Chirakkal, who prepared Ext.P22 site plan.

Analysis:

22. The question is whether, based on the above evidence, the incident can be stated to have been proved. PWs 1, 2, 4 and PW14 were examined to prove the involvement and active participation of the appellant in the incident. Except for PW14, the other witnesses did not support the case of the prosecution. However, we find that PW1 stated in his evidence that the deceased, PW14, himself and his friends had assembled in the bus shelter and

they were together. He, however, stated that he was on his phone and did not see the specific act of the injuries being inflicted. PW2 stated that he had come to the bus shelter along with PW14 and sat there with others, including the deceased. Just prior to the incident, PW2 and PW4 left the place and went in the direction of the house of PW4. It was then that they heard a commotion, and they returned back and found the deceased lying on the ground with injuries. PW3 supported the versions of PW1 and PW2. He stated that when he came to the spot, Vineesh was lying on the ground with injuries. He even stated that PW14 made a contemporaneous statement that the injuries were inflicted by Noufal and Manaf. PW4 is an injured witness. PW4 was also present in the bus shelter with the deceased and PW14. He stated that he left the scene with PW2 just prior to the incident. When he was about to reach his house, he heard the commotion. When he returned, he saw two people sitting on a bike parked on the roadside. Though he did not identify the accused, he stated that he felt something on his right leg, and blood started flowing out. He also stated that when he returned, the deceased was found lying on the ground with injuries. PW20, the Chief Medical Officer, AKG Hospital, stated in his evidence that Dr. Sandhya, who was no longer in the hospital, had examined PW4 on 13.05.2009 at 22.44 hours and had issued Ext.P27 wound certificate. A lacerated injury with

dimensions 4x4 cm was found on the middle third of the right leg. In other words, though PW1, PW2 and PW4 did not support the case of the prosecution in its entirety, their version would reveal that PW1 to 4, PW14 and the deceased were together at the bus shelter, and this probablises the version of PW14 and they had also spoken about the events before and after the incident.

23. In **Sat Paul v. Delhi Admn.**[2], while interpreting Section 154 of the Indian Evidence Act, the Hon'ble Apex Court observed that in criminal cases, if a witness is cross-examined and contradicted with the leave of the court, their entire testimony is not to be disregarded as such. It is for the Judge to assess whether the witness has been completely discredited, or whether portions of their testimony remain reliable. If the credibility of the witness is not wholly undermined, the Judge may, with due caution, accept and act upon the trustworthy portions of their evidence. However, where the witness is found to be entirely unreliable, their testimony must be discarded in its entirety.

24. In the present case, the witnesses have corroborated the version of PW14 with regard to the events that unfolded immediately after the incident, as well as the sequence of events that transpired thereafter. However, for reasons

[2] (1976) 1 SCC 727

best known to them, these witnesses did not stick to their earlier statement as regards the incident. However, the presence of PW14 at the scene of the crime stands clearly established through the evidence of PW1 to PW4, as well as his own deposition. Furthermore, the testimony of PW20 confirms that PW14 was examined by Dr. Sandhya at 22:44 hours on 13.05.2009. The doctor had noted a lacerated wound measuring 5 x 0.3 cm over the dorsal aspect of the left thumb, which she opined was likely a defensive injury and caused by MO1. The fact that PW14 sustained injuries while attempting to protect his brother from the brutal attack lends significant credence to his version of events. After receiving medical treatment, his statement was recorded by the police, wherein PW14 clearly named the assailants. The FIR reached the jurisdictional court promptly on 14.05.2009 at 10.20 a.m. Notably, even in the FIS, PW14 had specifically and unequivocally implicated both the accused. All the witnesses, including PW14, have consistently deposed regarding the presence of ample lighting at the scene, thereby ruling out any possibility of mistaken identity.

25. One of the contentions raised by the learned counsel is the failure to mention the name of the assailants in the accident register cum wound certificate issued by the doctors attached to the AKG Hospital. The immediate

objective of the medical professional is to render medical aid to the injured and not to write down the name of the assailants, as stated by the persons who brought the injured to the hospital. When the deceased was seen by the doctor, his pulse was feeble, his BP was not readable, and his pupils were not reacting to light. He was referred to a higher centre to make an attempt to save his life. Moreover, in the FI statement lodged within four hours of the incident, that too when PW14 was undergoing treatment in the hospital, the name of the assailants was mentioned. In that view of the matter, the mere non-mentioning of the name of the accused in the accident register cum wound certificate issued by the Doctor will not affect the credibility of the version of the informant.

26. As regards the reliability of an injured eyewitness who also happens to be related, the law is well settled and precedents abound. Reference may usefully be made to **Brahm Swaroop v. State of U.P** [3]wherein it was observed as follows:

> 28. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with an in-built guarantee of his presence at the scene of the crime and is

[3] (2011) 6 SCC 288

unlikely to spare his actual assailant(s) in order to falsely implicate someone.

27. **Jagdish Prasad and Ors. v. Bawan**[4] and in **Sunil Kumar v. State Govt. Of Nct Of Delhi**[5]**,** the Apex Court followed the celebrated judgment in **Vadivelu Thevar v. The State of Madras** [6] case and held that as a general rule, the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Indian Evidence Act, 1872. But, if there are doubts about the testimony the courts will insist on corroboration. It is for the court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. We are of the view that the evidence tendered by PW14 has a ring of truth and is cogent, credible and trustworthy.

28. Another contention advanced by the learned counsel is the alleged incongruity in the time at which PW14 and the deceased reached the AKG

[4] 1995 SCC (Cri) 160
[5] (2003) 11 SCC 367
[6] AIR 1957 SC 614

Hospital. As per Ext.P26, it is recorded that the deceased was seen by the doctor attached to the AKG Hospital at 11:13 p.m. on 13.05.2009, whereas, according to Ext.P27 (wound certificate in respect of PW4) and Ext.P28 (wound certificate in respect of PW14), the injured were seen by the doctor at 22:44 hours. This discrepancy was highlighted by the learned counsel to suggest that the deceased may have sustained injuries in a subsequent incident, and not in the manner alleged by the prosecution. This contention, however, does not merit acceptance. The defence failed to confront this alleged discrepancy during the examination of the relevant witnesses, including the medical professionals. No questions were put to the investigating officer either. It is plausible that the doctors at AKG Hospital first initiated resuscitative measures in an attempt to save the life of the deceased, and only upon failing to do so, shifted the seriously injured Vineesh to a higher centre. In the absence of a serious probe seeking explanation for this discrepancy in time, no advantage can be claimed by the appellant. In view of the unimpeachable testimony of PW14, which we find no reason to disbelieve, the purported inconsistency projected by the defence is devoid of merit and is liable to be ignored.

29. The next contention advanced by the learned counsel is that the

appellant has not been attributed with any overt act and hence the finding of guilt arrived at against him for the offence of murder cannot be sustained. He would point out that it is the admitted case of the star witness of the prosecution that the cut injury was inflicted by Manaf on both the deceased and PW14. We find that as per the prosecution, the accused had arrived at the scene on a motorbike ridden by the appellant. The 1st accused was carrying a sword which was about half a meter long. PW14 stated that when the accused No. 1 jumped out of the bike he exhorted that all three standing there be done away with. After inflicting the cut injury, the accused left the spot on their bike. The sequence of events would reveal that the accused were acting in furtherance of their common intention

30. In **Surendra Chauhan v. State of M.P.**[7], the Apex Court held that 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 the offence. If a 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. It was held as under in paragraph 11 of

[7] [(2000) 4 SCC 110

the judgment:

> "11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. (Ramaswami Ayyangar v. State of T.N. [(1976) 3 SCC 779) The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. (Rajesh Govind Jagesha v. State of Maharashtra [(1999) 8 SCC 428) 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 a 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 a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a

> common intention. It has to be inferred from the facts and circumstances of each case."

31. In **Krishnan and Another v. State of Kerala**[8], the Apex Court reiterated the position by stating as follows:

> 15. Question is whether it is obligatory on the part of the prosecution to establish commission of overt act to press into service Section 34 of the Penal Code. It is no doubt true that the court likes to know about an overt act to decide whether the person concerned had shared the common intention in question. Question is whether an overt act is always to be established? I am of the view that establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch as this section gets attracted when 'a criminal act is done by several persons in furtherance of the common intention of all'. What has to be, therefore, established by the prosecution is that all the persons concerned had shared th` e common intention. Court's mind regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: res ipsa loquitur.

32. In that view of the matter, the contention of the learned counsel that the appellant could not have been roped in with the aid of Section 34 of the IPC cannot be accepted.

[8] [(1996) 10 SCC 508

33. Now we come to the contention advanced by the learned counsel that if it is taken that the occurrence stands proved, the offence, if any, proved against the appellant would not fall within the purview of Section 302 of the IPC. According to him, only an offence under Section 326 of the IPC was made out. PW19, the doctor who conducted the autopsy, stated that the fatal injury was Injury No.1, which was a chop-cut injury horizontally placed 2 cm below the knee joint. The other injuries noted by the Doctor are contusions and abrasions. PW14 in his evidence stated that the 1st accused, after getting down from the bike ridden by the appellant, inflicted one cut injury on his brother on the back side of his left leg. The doctor noted that the flexor compartment muscles of the leg, the popliteal vessels and the accompanying nerve were severed, and the upper end of the fibula was split open. Her opinion was to the effect that the deceased died due to shock and bleeding from the chop-cut injury to the left leg and blunt injuries involving the head. That injury might have been sustained when the deceased had fallen down. However, we find that the learned public prosecutor had put a specific question to the doctor as to whether injury No 1 was sufficient in the ordinary course of nature to cause death. PW19 responded by saying that the injury was only likely to cause death.

34. Going by the definition of Culpable Homicide as defined under Section 299 of the IPC and Murder as defined under Section 300 of the IPC, one may note that there is no radical difference between them. The cause of death is common to both offences. There must necessarily be criminal intention or knowledge in both cases. The act which caused the murder is the act of the offender in each case. The true difference lies in the degree. In the case of murder, there will be the presence of a greater intention or knowledge of the fatal result than in the case of culpable homicide. This difference is attempted to be emphasised by the four clauses describing the offence under Section 300 of the IPC.

35. In a case under Section 302 of the IPC, what Courts have to see is whether the injury was caused with the intention of causing death or whether the injuries were sufficient in the ordinary course of nature to cause death or to cause such bodily injuries as the accused know to be likely to cause death although death was ultimately due to supervention or some other cause. It is not necessary for the application of Clause (3) of Section 300 of the IPC that the injury must be such as would make it impossible for the injured to escape death. All that is required is that the injury intended must be such as would in the

ordinary course of nature be sufficient to cause death. Obviously, there is a fine distinction between "a bodily injury likely to cause death" and "a bodily injury sufficient in the ordinary course of nature to cause death". The difference between clause (b) of Section 299 and clause (3) of Section 300 of the IPC is one of the degree of probability of death resulting from the intended bodily injury. It is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 of the IPC conveys the sense of probable as distinguished from a mere possibility. The words "bodily injury … sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature. (See also **Thangaiya v. State of Tamil Nadu**[9])

36. There may be a case in which even though the injury was sufficient in the ordinary course of nature to cause death, the injured may escape death, but if he dies as a result of such an injury, the offence would be covered by Clause (3) of Section 300 of the IPC and be murder. If, however, the injury inflicted is of such a nature that it is only likely to cause death and would not in

[9] 2005 SCC 9 650

the ordinary course of nature be sufficient to cause death, they can only be attributed with the knowledge that the infliction of bodily injury was likely to cause death.

37. In view of the discussion above, and taking note of the facts of the instant case and the role attributed to the appellant, we hold that the offence committed by the appellant is one which is punishable under Section 304 Part II r/w. Section 34 of the IPC and not under Section 302 r/w. Section 34 of the IPC.

Conclusion

38. In the result, we allow this appeal but only to the extent that instead of Section 302 of the IPC, the appellant shall stand convicted for the offence of culpable homicide not amounting to murder punishable under Section 304 Part-II of the IPC and sentenced to undergo Rigorous Imprisonment for seven (7) years and to pay a fine of Rs. 1,00,000/- (Rupees One lakh only) and in default of payment of fine, to undergo Rigorous Imprisonment for six months. The conviction and sentence passed for the offences under Section 324 r/w Section 34 of the IPC is upheld. The sentences shall run concurrently. If the fine is realized, Rs. 90,000/- shall be given to PW14.

The appeal is disposed of in the above terms in modification of the judgment passed by the learned Sessions Judge.

Sd/-

RAJA VIJAYARAGHAVAN V,
JUDGE

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Sd/-

P.V. BALAKRISHNAN,
JUDGE

APM