PETITIONER:
SHANKARLAL KACHRABHAI AND OTHERS

Vs.

RESPONDENT:
STATE OF GUJARAT

DATE OF JUDGMENT:
21/09/1964

BENCH:
SUBBARAO, K.
BENCH:
SUBBARAO, K.
SHAH, J.C.
SIKRI, S.M.

CITATION:
1965 AIR 1260 1965 SCR (1) 287
CITATOR INFO :
R 1970 SC1266 (13,15)

ACT:
Indian Penal Code (Act 45 of 1860), ss. 34, 301 and 302--Scope of--"Criminal act" in s. 34, meaning of.

HEADNOTE:
Where four persons shot at the deceased with the intention of killing him but under a misapprehension that he was some one else they could be found guilty of an offence under s. 302 of the Indian Penal Code, read with s. 34 of the Code. It would be a case of killing the deceased in furtherance of their common intention to kill the other, and there would not be any necessity to invoke s. 301 of the Code to find them guilty. In fact that section would apply only to cases where there was, no intention to cause the death, or knowledge that death was likely to be caused, of the deceased. [291D-E, H; 292A-B].
Barendra Kumar Ghosh v. Emperor, L.R. 52 I.A. 40 and Mahbub Shah v. King Emperor, L.R. 72 I.A. 148 referred to.

JUDGMENT:
CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 191 of 1962.
Appeal by special leave from the judgment and order dated April 9, 10 and 12 of 1962 of the Gujarat High Court in Criminal Appeal No. 426 of 1961.
A. S. R. Chari, and R. A. Gagrat, for the appellants.
H. R. Khanna, R. H. Dhebar and B. R. G. K. Achar, for the respondent.
The Judgment of the Court was delivered by
Subba Rao J. This appeal by special leave raises an interesting question involving the construction of s. 34, read with s. 301 of the Indian Penal Code.
The appellants who are 11 in number were accused Nos. 1 to 10 and 12 in the Sessions Court, Mehsana. The case of the prosecution may be stated thus : In the village of Aithor there are about 300 houses of Kadva Patidars and about 15 to 20 houses of Leva Patidars. On January 16, 1961, at about 8

P.m. seven persons, who are Leva Patidars, came to the chowk where there is a pan shop cabin of Girdhar Shanker. These seven persons were, Rama Bhupta, Lakha Madha, Hira Punja, Jetha Nagar, Parshottam Prabhuva, Manor Madha and Gova Shiva. At the same-time the 12 accused also came to that place. Accused 1 to 6 were each armed with a muzzle loading gun; accused 7,

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8, 11 and 12 were armed with sticks; accused 9 and 10 were armed with dharias. Accused I to 4 fired their guns and Rama Bhupta fell down and died near the door of the cabin of Girdhar. Accused 5 and 6 fired their guns and Lakha Madha was injured. Accused I fired his gun again and Jetha Nagar received injuries. Accused 5 and 6 fired again and Hira Punja was injured. Accused 7 to 12 were inciting accused 1 to 6 to kill all these persons. Other specific acts were attributed to some of the accused. The learned Sessions Judge held that Rama Bhupta was killed as a result of the firing by accused 1 to 4, that Lakha Madha was injured by the firing by accused 5 and 6, that Jetha Nagar was injured by the firing by accused 1, that Hira Punja was injured by the firing by accused 5 and 6, that accused 12 caused stick injuries to Lakha and that accused 8 caused injury on the tongue of Parshottam Prabhuva. The Sessions Judge also held that the 12 accused constituted an unlawful assembly, but their common intention was not to kill Rama Bhupta but only Madha who was not present in the chowk. He acquitted all the accused under S. 302, read with S. 149, of the Indian Penal Code, but convicted accused I to 4 under s. 302, read with S. 34, of the Indian Penal Code and sentenced them to imprisonment for life and to a fine of Rs. 2,000 each; lie convicted all the accused under s. 324, read with S. 149, of the Indian Penal Code for causing injuries to Hira Punja and others. Accused 5 to 12 were also convicted under S. 326, read with S. 34, and s. 324, read with s. 149 and s. 148, of the Indian Penal Code and they were sentenced to various periods of imprisonment and fine. The accused preferred different appeals against their convictions and sentences and the State of Gujarat filed appeals against the acquittal of accused 5 to 12 under S. 302, read with s. 149, of the Indian Penal Code. The State of Gujarat also filed a criminal revision for enhancing sentences passed against all the accused, but it did not file any appeal against the acquittal of accused I to 4 on the charge under s. 302, read with s. 149, of the Indian Penal Code. The High Court convicted accused I to 4 under s. 302, read with ss. 301 and 34, of the Indian Penal Code and confirmed the sentence of life imprisonment passed on them, but set aside the fine imposed on them. So far as the other accused i.e., accused 5 to 12, are concerned, they were convicted under s. 302, read with ss. 301 and 34, of the Indian Penal Code and also under s. 302, read with S. 149, of the said Code. In the result, the High Court sentenced all the accused to imprisonment for life for the said offences.

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It is common case that if the conviction of accused 1 to 4 tinder s. 302, read with s. 34 and s. 301, of the Indian Penal Code, was set aside, all the accused would have to be acquitted in regard to the major offences. It is also not disputed that if the conviction of accused I to 4 under the said sections was confirmed, the appeal filed by the other accused would fail. The only question, therefore, is whether the conviction of accused I to 4 under s. 302, read with ss. 34 and 301, of the Indian Penal Code, was correct.

In the appeal Mr. Chari, learned counsel for the

appellants, contends that accused I to 4 could not be convicted under s. 302, read with s. 34, of the Indian Penal Code, as there was no common intention to kill Rama, but Rama was killed under the mistake that he was Madba. l A mistake by one or other of the accused, the argument proceeds, cannot possibly be "in furtherance of the common intention" of the accused. He further argues that the provisions of s. 301 of the Indian Penal Code cannot be invoked in the circumstances of the case.

To appreciate the argument of the learned counsel it would be convenient at this stage to note exactly the finding given by the High Court. The High Court found that the common intention of the accused was to kill Madha, that accused 1 to 4 shot at Rama mistaking him for Madha, as Rama had dressed himself in the habiliments similar to those in which Madha used to dress himself and, therefore, the accused shot at Rama under the mistaken belief that be was Madha. Section 34 of the Indian Penal Code reads

> "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."

Section 34 was subject of judicial scrutiny in innumerable cases. The expression "in furtherance of the common intention of all" was not in the original section, but was inserted in the section by S. 1 of Act XXVII of 1870. The Judicial Committee in Barendra Kumar Ghosh v. Emperor(1) defined the expression "criminal act" in the said section thus:

> "A criminal act means that united criminal behaviour which results in something for which an individual
> (1) (1924) I.L.R. 52 Cal. 197 (P.C.) : L.R. 52 I.A. 40
> 290 would be punishable if it were all done by himself alone,that is, in a criminal offence."

The Judicial Committee in Mahbub Shah v. King-Emperor(1) laid down the following ’conditions for its application:

> "To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."

It is, therefore, clear that the criminal act mentioned in s. 34 of the Indian Penal Code is the result of the concerted action of more than one person; if the said result was reached in furtherance of the common intention, each

person is liable for the result as if he had done it himself. The question is what is the meaning of the expression "in furtherance, of the common intention". The dictionary meaning of the word "furtherance" is "advancement or promotion". If four persons have a common intention to kill A, they will have to do many acts in promotion or prosecution of that design in order to fulfill it. Some illustrations will clarify the point. Four persons intend to kill A, who is expected to be found in a house. All of them participate in different ways. One of them attempts to enter the house, but is stopped by the sentry and he shoots the sentry. Though the common intention was to kill A, the shooting of the sentry is in furtherance of the said common intention. So s. 34 applies. Take another illustration. If one of the said accused enters the room where the intended victim usually sleeps, but somebody other than the intended victim is sleeping in the room, and on a mistaken impression he shoots him. The shooting of the wrong man is in furtherance of the common intention and so S. 34 applies. Take

(1) L.R. 72 I.A. 148, 153.

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a third variation of the illustration. The intended victim has a twin brother who exactly resembles him and the accused who is entrusted with the part of shooting the intended victim, on a mistaken impression, shoots the twin brother. The shooting of the twin brother is also in furtherance of the common intention. Here also s. 34 applies. If that much is conceded we do not see any justification why the killing of another under a mistaken impression of identity is not in furtherance of the common intention to kill the intended victim. When the accused were shooting at Rama believing him to be Madha, they were certainly doing a criminal act in furtherance of the common intention which was to kill Madha. They killed Rama because they believed that they were shooting at Madha. Mr. Chari argues, how can a mistake committed by one of the accused be in furtherance of a common intention ? For it is said that to commit a mistake was not a part of the common intention of the accused. But the question is not, as we have pointed out, whether the committing of a mistake was a part of the common intention, but whether it was done in furtherance of the common intention. If the common intention was to kill A and if one of the accused kills B to wreak out his private vengeance, it cannot possibly be in furtherance of the common intention for which others can be constructively made liable. But, on the other hand if he kills B bona fide believing that he is A, we do not see any incongruity in holding that the killing of B is in furtherance of the common intention. We, therefore, hold that without the aid of s. 301 of the Indian Penal Code it can be held that when accused I to 4 shot at Rama they shot at him in furtherance of their common intention to kill Madha.

Now let us see the impact of S. 301 of the Indian Penal Code on s. 34 thereof. Section 301 reads:

> "If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

This section deals with a different situation. It embodies what the English authors describe as the doctrine of transfer of malice or the transmigration of motive. Under the section if A intends to kill B, but kills C whose death he neither intends nor knows himself to be likely to cause, the intention to kill C is by law
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attributed to him. If A aims his shot at B, but it misses B either because B moves out of the range of the shot or because the shot misses the mark and hits some other person C, whether within sight or out of sight, under S. 301, A is deemed to have hit C with the intention to kill him. What is to be noticed is that to invoke s. 301 of the Indian Penal Code A shall not have any intention to cause the death or the knowledge that he is likely to cause the death of C. In the instant case this condition is not complied with. The accused shot at a particular person with the intention of killing him though under a misapprehension of his identity. In that case, all the ingredients of ss. 299 and 300 of the Indian Penal Code are complied with. The aid of s. 301 of the Indian Penal Code is not called for. We are, therefore, of the opinion that s. 301 of the Indian Penal Code has no application to the present case.

For the foregoing reasons we hold that all the accused are liable under s. 302, read with s. 34, of the Indian Penal Code. If we reach this conclusion, it is conceded that no other point arises in this appeal. The appeal fails and is dismissed.

Appeal dismissed.
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