CR

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

MONDAY, THE 13TH DAY OF JUNE 2022 / 23RD JYAISHTA, 1944

CRL.A NO. 2400 OF 2006

AGAINST THE ORDER/JUDGMENT IN SC 106/2002 OF ADDITIONAL SESSIONS COURT (ADHOC)-II, THODUPUZHA

CP 63/2000 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,THODUPUZHA

APPELLANT/S:

1 AMIR
S/O.MUHAMMED KANNU,THYPARAMBIL VEEDU, MANGATTUKAVALA BHAGOM,, KARIKODE KARA.

2 SHAJI, S/O.HASSAN
AGED 29 YEARS
PLAMOTTIL VEEDU, NEAR MATCH BOX COMPANY,, KEERIKODE, KARIKODE.

BY ADVS.
SRI.SASTHAMANGALAM S. AJITHKUMAR
SRI.DILEEP P.PILLAI
SRI.RENJITH B.MARAR
SRI.T.K.SUJITH

RESPONDENT/S:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,, HIGH COURT OF KERALA, ERNAKULAM.

BY ADV PUBLIC PROSECUTOR

OTHER PRESENT:

SMT.C.SEENA, PP

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 13.06.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

CR

P.V.KUNHIKRISHNAN, J.

Criminal Appeal No.2400 of 2006

Dated this the 13th day of June, 2022

JUDGMENT

This appeal is filed by the accused in S.C.No.106/2002 on the file of the Additional Sessions Judge (Adhoc) II, Thodupuzha. The above case is charge-sheeted by the Circle Inspector of Police, Thodupuzha, against the appellants alleging offences punishable under Sections 341 and 307 read with 34 IPC.

2. When this appeal came up for consideration, the learned counsel for the appellants and the Public Prosecutor submitted that the 1st accused is no more. The learned counsel for the appellants also informed that, to his knowledge, the legal heirs of the 1st appellant/ 1st accused are not interested in proceeding with the appeal. Therefore the appeal against the 1st accused is abated as far as the sentence of imprisonment is concerned. This Court need to consider only the appeal filed by

the 2nd appellant, who is the 2nd accused in this case. (hereafter, the appellants are mentioned as accused Nos.1 and 2 respectively)

3. The prosecution case is that on 10.11.1999, at about 7 pm, accused Nos.1 and 2 were abusing PW2, who is the injured in this case, using foul language just outside the shop of PW7, who is the uncle of PW2. Then, PW2 left the shop and tried to enter his autorikshaw which was parked nearby. At that time, it is alleged that the 2nd accused caught hold of PW2 on his collar and consequently there was a scuffle. Then, the 1st accused, who had a knife hidden on his waist, quickly pulled it out and caused an incised injury on the left side of the chest of PW2. It is further alleged that the 1st accused tried to swing his knife again to cause a second injury, but this was blocked by PW2, and the knife deflected and struck the 2nd accused on his right thigh. It is also alleged that, thereafter, the accused fled from the scene. PW2 was then taken to a hospital where he was given first aid and was then taken to Excelsior Hospital, Thodupuzha, where he was examined at 9.25 pm on 10.11.1999. Ext.P1 First

Information Statement was subsequently recorded and Ext.P10 FIR was registered at 1.00 am.

4. To substantiate the case, the prosecution examined PWs 1 to 15. Exts.P1 to P21 were marked on the side of the prosecution. After going through the evidence and documents, the trial court found that both accused committed the offence under Sections 341 and 307 read with 34 IPC. The accused were sentenced to undergo rigorous imprisonment for 7 years each and to pay a fine of Rs.25,000/- each for the offence punishable under Section 307 read with Section 34 IPC. In default of payment of fine, the accused were directed to undergo rigorous imprisonment for one more year. The accused were further sentenced to undergo simple imprisonment for one month each for the offence under Section 341 read with 34 IPC. The substantive sentences were directed to run concurrently. If the fine is realised, there was a direction to pay the same to PW2 as compensation. Aggrieved by the conviction and sentence, this criminal appeal is filed.

5. Heard Adv.B.Renjith Marar, who is well assisted by

Adv.Arun Poomulli. An argument note prepared by Adv.Arun Poomulli was also filed.

6. PW1 is the first informant in this case. Even though as per his First Information Statement, he saw the incident, he was declared hostile because he deposed before the Court that he had not seen the incident. Through PW1, Ext.P1 FI statement was marked. Exts.P1(a) and P1(b) are the portion of FI Statement marked through PW1. PW2 is the injured and he deposed about the incident in detail. PW3 is also an eye witness, who is the cousin brother of PW5. He also adduced evidence to support the case of PW2, the injured witness. PW4 was cited as an eye witness, but he turned hostile to the prosecution. The portion of Section 161 Cr.P.C. statement of PW4 is marked as Ext.P2. PW5 is the scene mahazar witness and Ext.P3 scene mahazar is marked through PW5. PW6 is a witness to Ext.P4 seizure mahazar by which the shirt and dhoti of the 2nd accused was recovered. But he turned hostile to the prosecution. Ext.P4 is the seizure mahazar and MO4 and MO5 are the shirt and dhoti of the 2nd accused seized as per Ext.P4. PW7 is the father's

brother of PW2. He also cited as an eye witness. But he also turned hostile to the prosecution. Exts.P6 and P7 are the portion of Section 161 Cr.P.C. statement of PW7. PW8 is the Casualty Medical Officer of Excelsior Hosptial, Thodupuzha, who examined the 2nd accused. Ext.P8 is the wound certificate of the 2nd accused. PW9 is the Village Officer through whom Ext.P9 scene plan is marked. PW10 is the Head Constable of Thodupuzha Police Station, who registered Ext.P10 FIR. PW11 is the Investigating Officer who conducted investigation in this case. Ext.P11 is the property list and Ext.P12 is a report submitted by PW11. PW12 is the Casualty Medical Officer, Medical Trust Hospital, Ernakulam, who examined PW2. Ext.P13 is the wound certificate of PW2 and Ext.P14 is the discharge certificate of PW2. PW13 conducted the investigation. Through him Exts.P15, P16 and P17 were marked. Ext.P15 is the seizure mahazar by which MO2 and MO3 dress of the 1st accused was seized. Ext.P16 is the property list and Ext.P17 series are the arrest memo. PW14 is the Circle Inspector of Police who conducted investigation and submitted final report. Ext.P18

chemical analysis report, Ext.P19 charge sheet in the counter case, Ext.P20 certified copy of FIS and Ext.P21 certified copy of the FIR were marked through him. PW15 is the Sub Engineer, KSEB, who examined to state that there was light available at the scene of occurrence. Ext.D1 is the copy of the complaint in S.C.No.540/2006 which is the counter case to this case. These are the evidence available in this case.

7. Admittedly there was a counter case registered in connection with this incident. Ext.D1 is the private complaint filed by the 2nd accused. This was committed to the Sessions Court and the same was numbered as S.C.No.540/2006. The learned Sessions Judge discharged the accused in this case by invoking the power under Section 227 Cr.P.C. on 17.11.2006. Thereafter the present case was heard and disposed of by a separate judgement dated 08.12.2006.

8. The learned counsel for the accused submitted that the trial Judge has not followed the correct procedure to be followed in cases where there is case and counter case. The learned counsel submitted that after discharging the accused in the

counter case, the learned Judge convicted the accused by a separate judgment on a later day. The contention of the accused is that this is against the principle laid down by this Court and the Apex Court. The learned counsel relied on the judgment of the Apex Court in **State of Madhya Pradesh v. Mishrilal [2003 KHC 1662]**. The learned counsel also submitted that even if the prosecution case is accepted, common intention under Section 34 IPC is not fully established by the prosecution. According to the learned counsel, the evidence suggests that 2nd accused did not have a meeting of mind with the 1st accused so as to cause grievous injury to PW2 with the knife. Therefore the contention of the accused is that it is unfair to mulct the liability for the act of the 1st accused upon the 2nd accused. The learned counsel also contended that the existence of right of private defence cannot be entirely ruled out in the present case. According to the learned counsel, such right may emerge out of the facts and circumstances even if it is not specifically pleaded. According to the learned counsel, the defence only needs to prove their case of private defence to the standard of

preponderance of probabilities. It is also contended by the learned counsel for the accused that the weapon used for committing the offence was not recovered. The same will probabilise the case of defence is the contentions raised by the counsel. The learned counsel also relied on the following judgment namely, **Jai Bhagwan & Others v. State of Haryana [1999 KHC 474]**, **Krishna & Another v. State of U.P. [2007 KHC 3794]**, **Salim Zia v. State of U.P. [1979 KHC 41]** and **Ajim Yusufbhai Suryamemon v. State of Gujarat [2017 KHC 4346]**.

9. The learned Public Prosecutor on the other hand submitted that there are ample evidence to convict the accused in this case. The Public Prosecutor submitted that the evidence of PW2 is corroborated by the evidence of PW3. The Public Prosecutor also submitted that the medical evidence is consistent with the ocular evidence adduced by the prosecution and therefore, there is nothing to interfere with the conviction and sentence imposed by the trial court.

On hearing the arguments advanced by either side, the following

points are framed for determination in this appeal:

(1) In a case and counter case, if the trial court is of the opinion that the counter case is to be discharged, what is the procedure to be followed?

(2) Whether there is a common intention shared by the 2nd accused with the 1st accused for convicting the 2nd accused under Section 307 r/w 34 IPC.

(3) Whether the 2nd accused committed the offence under Section 341 IPC.

Point No.1

It is a settled position that, when there are two criminal cases related to the same incident, they should be tried and disposed of by the same Court one after other and the judgments must be pronounced separately but on the same day. Such cases in which two different versions of the same incident resulting in two different criminal cases are commonly referred to as "case and counter case". The Apex Court in ***Sudir v. State of M. P [2001 KHC 166]*** observed like this:

"9. It is a salutary practice, when two criminal cases

relate to the same incident, they are tried and disposed of by the same Court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called "case and counter case" by some High Courts and "cross cases" by some other High Courts. Way back in nineteen hundred and twenties, a Division Bench of the Madras High Court (Waller and Cornish, JJ.) made a suggestion (In Re Goriparthi Krishtamma - 1929 Madras Weekly Notes 881) that "a case and counter case arising out of the same affair should always, if practicable, be tried by the same court; and each party would represent themselves as having been the innocent victims of the aggression of the other".

10. Close to its heels Jackson, J. made an exhortation to the then Legislature to provide a mechanism as a statutory provision for trial of both cases by the same Court (vide Krishna Pannadi v. Emperor (AIR 1930 Mad. 190)). The learned Judge said thus:

"There is no clear law as regards the procedure in counter cases, a defect which the Legislature ought to remedy. It is a generally recognised rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished".

11. We are unable to understand why the Legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code. The practical reasons for adopting a procedure that such cross cases shall be tried by the same Court can be summarized thus: (1) It staves off the danger of an accused being convicted before his whole case is

before the Court. (2) It deters conflicting judgments being delivered upon similar facts; and (3) In reality, the case and the counter case are, to all intents and purposes, different or conflicting versions of one incident.

12. In fact, many High Courts have reiterated the need to follow the said practice as a necessary legal requirement for preventing conflicting decisions regarding one incident. This Court has given its approval to the said practice in Nathi Lal and Others v. State of U.P. & Anr. (1990 (Supp) SCC 145). The procedure to be followed in such a situation has been succinctly delineated in the said decision and it can be extracted here:

"We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross cannot be looked into. Nor can the Judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced

by the same learned Judge one after the other".

13. How to implement the said scheme in a situation where one of the two cases (relating to the same incident) is charge sheeted or complained of, involves offences or offence exclusively triable by a Court of Sessions, but none of the offences involved in the other case is exclusively triable by the Sessions Court. The Magistrate before whom the former case reaches has no escape from committing the case to the Sessions Court as provided in S.209 of the Code. Once the said case is committed to the Sessions Court, thereafter it is governed by the provisions submitted in Chap.18 of the Code. Though, the next case cannot be committed in accordance with S.209 of the Code, the Magistrate has, nevertheless, power to commit the case to the Court of Sessions, albeit none of the offences involved therein is exclusively triable by the Sessions Court. S.323 is incorporated in the Code to meet similar cases also. That Section reads thus: "If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provisions of Chap.18 shall apply to the commitment so made".

14. The above Section does not make an inroad into S.209 because the former is intended to cover cases to which S.209 does not apply. When a Magistrate has committed a case on account of his legislative compulsion by S.209, its cross case, having no offence exclusively triable by the Sessions Court, must appear to the Magistrate as one which

ought to be tried by the same Court of Sessions. We have already adverted to the sturdy reasons as to why it should be so. Hence, the Magistrate can exercise the special power conferred on him by virtue of S.323 of the Code when he commits the cross case also to the Court of Sessions. Commitment under S.209 and 323 might be through two different channels, but once they are committed their subsequent flow could only be through the stream channelised by the provisions contained in Chap.18."

10. The desirability that a case and counter case be tried by the same Court and same judge is a practice followed based on the decisions of this Court and the Apex Court. In ***State of M P v. Mishrilal and others [2003 KHC 1662],*** also, the above point was considered in detail, in paragraph 8, by the Apex Court. It will be better to extract paragraph 8 of the above judgement.

"8. In the instant case, it is undisputed, that the investigating officer submitted the challan on the basis of the complaint lodged by the accused Mishrilal in respect of the same incident. It would have been just fair and proper to decide both the cases together by the same Court in view of the guidelines devised by this Court in Nathilal's case (supra). The cross cases should be tried together by the same Court irrespective of the nature of the offence involved. The rational

behind this is to avoid the conflicting judgments over the same incident because if cross cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments. In the instant case, the investigating officer submitted the challan against both the parties. Both the complaints cannot be said to be right. Either of them must be false. In such a situation, legal obligation is cast upon the investigating officer to make an endeavour to find out the truth and to cull out the truth from the falsehood. Unfortunately, the investigating officer has failed to discharge the obligation, resulting in grave miscarriage of justice."

11. In ***Maydeen A.T and Another v. Assistant Commissioner, Customs department [2021 KHC 6676]*** also, the Apex Court considered this point. The relevant portion of the above judgment is extracted hereunder:

"25. So far as the law for trial of the cross cases is concerned, it is fairly well settled that each case has to be decided on its own merit and the evidence recorded in one case cannot be used in its cross case. Whatever evidence is available on the record of the case only that has to be considered. The only caution is that both the trials should be conducted simultaneously or in case of the appeal, they should be heard simultaneously. However, we are not concerned with cross - cases but are concerned with an eventuality of two separate trials for the commission of the same offence (two complaints for the same offence) for two sets

of accused, on account of one of them absconding."

12. In the light of the above quoted decisions and other decisions of this Court and the Apex Court, it is well settled that, as far as case and counter cases are concerned, each case has to be decided on its own merit and the evidence is to be recorded in one case cannot be used in its cross case. The only caution is that, both trials should be conducted one after the other. The practical reasons for adopting a procedure that counter cases shall be tried by the same Court is summarized in ***Sudir's case*** (supra). The same is extracted hereunder:

(1) It staves off the danger of an accused being convicted before his whole case is before the Court.

(2) It deters conflicting judgments being delivered upon similar facts.

(3) In reality, the case and counter case are, to all intents and purpose, different or conflicting versions of one incident.

13. Therefore, the reason for trying the case and counter case by the same judge simultaneously one after other is mainly due to the above reasons. In this particular case, the learned

judge discharged the accused in the counter case which was registered as SC No.540/2006 as per order dated 17.11.2006 in Crl.M.P. No.5422/2006. The main reason for discharging the accused is that there is a long delay in filing the counter case. Thereafter the main case (SC No.106/2002) was disposed of as per judgment dated 08.12.2006, which resulted in the filing of this appeal.

14. It is a well settled principle that, at the stage of framing charge, the Court is not expected to resolve to the exercise of weighing the materials available in golden scales. There are several decisions on this point from the Apex Court and this Court. The decision of this Court in ***Baby M.K.v. M/s. Shan Finance Private Limited and Another [2006 (4) KLT 594]*** which is referred by the learned judge while discharging the accused in the counter case itself shows this basic principle. It will be beneficial to extract the relevant portion of the above judgment:

> *"6. It is also trite by now that at the stage of S.239/240, a Court is not expected to resort to the exercise of weighing the*

materials available in golden scales. If allegations even if accepted in toto, do not reveal or constitute a charge and there is no possibility or probability of conviction being entered, any court worth its salt will have to hold that the charge is groundless and consequently that there are no grounds for presenting that the accused has committed any offence. Meticulous evaluation of the acceptability of the materials or consideration of the probable defence is not necessary, but it will have to be shown that the charges are of substance and that it can at least be presumed that the indicate has committed an offence."

15. The discharge order passed in Sessions case No.540/2006 is not seen in the lower court records. Therefore, this Court directed the Registry to get a copy of the same. The same was obtained from the lower Court. A perusal of the same will show that the learned Judge was persuaded to discharge the accused in the counter case mainly for the reason that there is delay in filing the counter case. That alone is not a reason to discharge an accused at the stage of Section 227 Cr.P.C. I am not in a position to accept the same. Since the discharge order is

not impugned in this appeal, I donot want to make any further observation. But when a Sessions court tries a case and counter case, the trial court cannot take such flimsy stand to discharge the accused in the counter case and thereafter proceed with the main case. It will only defeat the procedure laid down by this Court and the Apex Court on the trial of the case and counter case. I am sorry to say that, the learned judge tried to avoid the trial of the counter case by discharging the accused in it on a flimsy ground. This type of short cut methods should be avoided by the trial courts while dealing with case and counter cases. The reason to prescribe such a procedure by this Court and the Apex Court in case and counter case is to avoid conflicting decisions. Even in a fit case, if the trial court feels that the accused in the counter case is to be discharged, it is desirable to pass such orders along with the judgment in the main case, especially in cases where the counter case is committed after the trial in the main case is started. In other situations in which both cases are committed together and came up for consideration together, the Court should conduct a hearing at the stage of framing charge in

both cases, and the charge can be framed in one case if the Court thinks so and a discharge order can be passed in the other case if it is a deserving case, but it should be on the same day by the same judge. The order should be separate and should pronounce one after the other. In such situation also, it is desirable to pass a speaking order while framing charge in the main case separately while passing the discharge order in other case. Suppose the counter case is discharged by a presiding officer and thereafter he was transferred or retired from service after superannuation, the successor judge will have to decide the main case. At that stage there is a chance for a conflicting decision also. Moreover, the trial court ought not have taken a cut short method by discharging the accused in counter case and proceeding with the main case to defeat the principle laid down by this Court and apex court regarding the procedure to be adopted in case and counter cases. The present one is the best example by which the trial court defeated the procedure to be followed in case and counter case by a short cut method. Usually the main case will be tried first, and after the trial the counter

case will be started. In a situation where the trial of the main case is over and thereafter the counter case committed and the trial court is of the opinion that this is a case to be discharged under Section 227 of the Cr.P.C., the matter can be heard at that stage itself and order of discharge can be passed along with the decision in the main case, one after other. Such a procedure should be followed unless there are other practical difficulties to proceed like that. The intention for laying down such a procedure for the trial of case and counter case is considered by the Apex Court and this Court in several judgments and the trial court should follow such a procedure strictly. Since the discharge order in the counter case is not challenged here, I donot want to make any further observation and I leave it there.

Point Nos.2 and 3

16. It is a settled position that the common intention, essentially being a state of mind, is very difficult to prove because of the difficulties in procuring direct evidence. Therefore it has to be inferred from the act like the conduct of the accused or other relevant circumstances of the case. The inference can

be gathered from the manner in which the accused arrived at the scene and mounted the attack, the determination and concert with which the attack was made and from the nature of injury caused by one or more of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In other words, the totality of circumstances must be taken into consideration in arriving at a conclusion, whether the accused had the common intention to commit an offence of which they could be convicted (see ***Balvir Singh and others v. State of M P [2019 KHC 6190]***). Although both Sections 34 and 149 of the IPC are modes of apportioning vicarious liability on the individual members of a group, there exists a few important differences between these two provisions. Section 34 of Indian Penal Code requires active participation and a prior meeting of minds whereas Section 149 IPC assigns liability merely by membership of the unlawful assembly. (See **Rohtas and Another v. State of Haryana [2020 (6) KHC 728]**). In

Jai Bhagwan and others v. State of Hariyana [1999 KHC 474] the Apex Court observed like this:

> *"10. To apply S.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, S.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, S.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."*

17. Therefore, if the common intention is proved, but there is no overt act attributed to the individual, Section 34 will be attracted as essentially it involves vicarious liability. But if participation of the accused in the crime is proved and the common intention is absent, Section 34 is not attracted. In **Bhaba Nanda Sarma and others v. State of Assam**

[1977 KHC 703] the Apex Court considered Sections 34 and 38 of Indian Penal Code. It will be better to extract paragraph 4 of the above judgment here:

> *"4. The attract the application of S.34 it must be established beyond any shadow of doubt that the criminal act was done by several persons in furtherance of the common intention of all. In other words, the prosecution must prove facts to justify an inference that all the participants of the act had shared a common intention to commit the criminal act which was finally committed by one or more of the participants. S.38 of the Penal Code says:- "Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act."*
>
> *In Afrahim Sheikh v. State of West Bengal, 1964 (6) SCR 172: AIR 1964 SC 1263 Hidayatullah J., as he then was, has pointed out that it was possible to apply the ingredients of S.34 in relation to the commission of an offence under S.304, Part II, even though death is caused with the knowledge of the persons participating in the occurrence that by their act death was likely to be caused. The sharing of the common intention, as pointed out in that case, is the commission of the act or acts by which*

death was occasioned. With reference to S.38, the learned Judge observed at p. 178 (of SCR): (at p. 1267 of AIR): "That is to say, even though several persons may do a single criminal act, the responsibility may vary according to the degree of their participants. The Illustration which is given clearly brings out that point.

xxxx xxxx xxxx

Lastly S.38 provides that the responsibility for the completed criminal act may be of different grades according to the share taken by the different accused in the completion of the criminal act, and this section does not mention anything about intention common or otherwise or knowledge."

18. In **R. v. Mendez and another [2010 (EWCA) Crim 516]** the Court of Appeal in England and Wales observed like this:

"Held – In case of joint enterprise liability for murder where the common purpose was not to kill but to cause serious bodily harm, D was not liable for the murder of V, if the direct cause of V's death was a deliberate act by P – "deliberate act" meaning deliberate and not by chance rather than referring to any consideration of P's intention as to the consequences

-which was of a kind (a) unforeseen by D and (b) likely to be altogether more life-threatening than acts of the kind intended or foreseen by D. It would not be just that D should be found guilty of the murder of V by P if P's act was of a different kind from, and much more dangerous than, the sort of acts which D had intended or foreseen as part of the joint enterprise. In the instant case, the Judge had failed to direct the jury on the central issue in a sufficiently clear and balanced way. Accordingly, the convictions for murder were unsafe and would be quashed."

19. Section 34 of the Indian Penal Code states that when a criminal act is done by several persons in furtherance of the common intention of all, each person is liable for that act in the same manner, as if it were done by him alone. Section 38 of the Indian Penal Code says that where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Section 38 IPC is applicable, where several persons are engaged or concerned in the

commission of a criminal act. In such a situation, those persons may be guilty of different offences by means of that act. In such situation, Section 34 has no application at all. Therefore, the question to be decided in this case is whether the 2nd accused in this case is guilty of the offence under Section 307 read with 34 IPC. In this case, there is no evidence to show that there is a meeting of minds between the 1st and the 2nd accused as to what should be done to PW2. There is no evidence to show that the 1st and 2nd accused had an intention to commit murder of PW2. Moreover, there is no evidence in this case to show that the 2nd accused was aware of the fact that there was a knife hidden in the waist of the 2nd accused. Moreover, in Ext.P1 FI Statement given by PW1, a different story is narrated by him. PW1 was turned hostile to the prosecution. In the FI Statement PW1 clearly stated like this:

> “…….എന്നിട്ട് നാസർ (PW2) ഓടിക്കുന്ന ഓട്ടോറിക്ഷയിലേക്ക് കയറാനായി പോകുമ്പോൾ ഷാജി (A2) നാസറിന്റെ (PW2) ഷർട്ടിന്

> കൂട്ടിപിടിച്ച് നിർത്തി. അപ്പോഴേക്കും അമീർ (A1) ഇത് കണ്ടുകൊണ്ട് അടുത്തേക്ക് വന്നു. ഷർട്ടിൽ നിന്ന് പിടിവിടുവിക്കുവാനായി നാസർ (PW2) ശ്രമിച്ചു. അമീർ (A1) അടുത്തേക്ക് ചെല്ലുന്നതു കണ്ട 'അമീർ (A1) ഇക്കാര്യത്തിൽ ഇടപെടേണ്ടതില്ല' എന്ന നാസർ (PW2) പറഞ്ഞു. ഉടനെ അമീർ (A1) അവന്റെ എളിയിൽ കരുതിയിരുന്ന കത്തിയെടുത്ത് നാസറിനെ (PW2) ഒന്ന് കുത്തി……."

A completely different version is given by the other witnesses in the evidence. PW1, the maker of FIS, turned hostile to the prosecution and denied all the versions in the FI Statement. Therefore, there is a statement in the First Information Statement, which was given immediately after the incident. From the above statement itself is clear that there is no meeting of minds between the 1st and the 2nd accused regarding the infliction of fatal injury to PW2 by the 1st accused. Of course, the statement in the FI statement has no legal validity because the maker of the same turned hostile to the prosecution. Even then there is no admissible evidence to show that there was a common intention between the 1st and 2nd accused. But there is uniform version from PW2 and PW3 that the 2nd accused wrongfully

restrained PW2. In such circumstances, in my opinion, there is no common intention or meeting of minds between the 1st and the 2nd accused. Therefore, the 2nd accused cannot be convicted under Section 307 read with 34 IPC. But there is strong evidence to show that the 2nd accused wrongfully restrained PW2. Therefore, the conviction imposed on the 2nd accused under section 341 IPC is perfectly justified. The trial court imposed a sentence of simple imprisonment for one month and a fine under Section 341 read with 34 IPC on the 2nd accused. The incident in this case happened in the year 1999. Now about 24 years have passed. Moreover, a perusal of the impugned judgment in this appeal will show that the 2nd accused has undergone pre trial detention for about 21 days. In such circumstances, the substantive sentence imposed on the 2nd appellant/ 2nd accused can be reduced to a fine and a fine of Rs.500/-, which is the maximum that can be imposed under Section 341 IPC, on the 2nd appellant / 2nd accused with a default

sentence.

20. As I observed in the beginning, the 1st accused died pending this appeal. Legal heirs of the 1st accused are not interested in proceeding with the appeal. Therefore, in the light of the Full bench decision of this Court in **Pazhani v. State of Kerala [2017 (1) KHC 173]** the sentence of imprisonment is abated. Since there is a fine imposed by the trial court on the 1st accused, the appeal shall be consigned to the record room for other purposes mentioned by the Full Bench in **Pazhani's case (supra)**.

Therefore, this Criminal Appeal is allowed in part.

1. The sentence of imprisonment imposed on the 1st appellant/ 1st accused is abated, however, the appeal of the 1st accused shall be consigned to the record room for other purposes mentioned in **Pazhani's case (supra)**.

2. The 2nd appellant/ 2nd accused is not guilty under Section 307 read with 34 IPC and he is acquitted for

the said offence.

3. The conviction imposed on the 2nd appellant/ 2nd accused under Section 341 IPC is confirmed, but the sentence is reduced to Rs.500/-. In default of payment of fine, the 2nd appellant/ 2nd accused will undergo Simple Imprisonment for one week.

Sd/-

P.V.KUNHIKRISHNAN
JUDGE

das
JV
DM