



HIGH COURT OF JUDICATURE AT ALLAHABAD
CRIMINAL APPEAL No. - 1800 of 1988

Khelawan and others

.....Appellant(s)

Versus

State

.....Respondent(s)

Counsel for Appellant(s)	: Ali Hasan, Jai Singh, Vijay Bahadur Yadav
Counsel for Respondent(s)	: A.G.A.

Court No. - 93

**Reserved On 31.8.2026
Delivered On 8.9.2026**

HON'BLE SANTOSH RAI, J.

1. Heard Sri Jawahar Lal Yadav, holding brief of Sri Vijay Bahadur Yadav, learned counsel for appellant nos.1,2; Sri Jai Singh, learned counsel for appellant no.3; Sri Purushottam Maurya, learned AGA for the State and perused the material on record.
2. Three accused appellants have filed the instant appeal in the year 1988, during the pendency of the appeal two of them namely, Khelawan and Ram Bali have already died, hence the appeal qua them has already been abated by this Court in view of Section 394 Cr.P.C. The surviving appellant is only Ramapati. Consequently, this Court is not required to, and does not, examine the correctness of the

conviction and sentence recorded against the said deceased appellants any further, and the findings recorded by the trial court qua them shall not be treated as having merged into any finding of this Court.

3. This criminal appeal has been preferred by the appellant against the judgment and order dated 8.8.1988 passed by the IVth Additional District & Sessions Judge, Jaunpur, in Sessions Trial No.179 of 1986 (State Vs. Khelawan & Ors.), arising out of Case Crime No.11 of 1984, under Section 302 read with Section 34 IPC, Police Station Sarpataha District Jaunpur whereby the appellant has been convicted and sentenced to five years rigorous imprisonment under Section 304 Part II read with Section 34 IPC.

4. The prosecution case, in brief, is that on 7.2.1984, at about 3:00 p.m., a quarrel took place at village Karimpur Bind between Thodai son of Bhorai (father of the complainant Tirath) and the three accused, namely Khelawan, Rambali and the present surviving appellant Ramapati, over the tethering of a bullock. During the course of the said altercation, it is alleged that the accused persons assaulted Thodai with lathi and danda, as a result of which he fell down and died at the spot shortly thereafter. A written report (Ext. Ka-1) was lodged by the complainant Tirath at Police Station Sarpataha, on the basis of which a case under Section 304 IPC was initially registered and, after investigation and post-mortem, a charge-sheet was submitted and the case was committed to the Court of Session, where a charge under Section 302 IPC was framed against all three accused, to which they pleaded not guilty.

5. The post-mortem report (Ext. Ka-11) disclosed, inter alia, a contused wound with fracture of the second and third ribs over the chest, a swelling with fracture of the third and fourth ribs, and certain abrasions on the abdomen and knee. The Medical Officer opined that death was caused due to shock and hemorrhage as a result of the said ante-mortem injuries, and that injury nos.1 and 2 could not have been caused by a fall.

6. The prosecution examined six witnesses: PW-1 Tirath (complainant and alleged eye-witness), PW-2 Chandra Prakash (scribe of the written report), PW-3 Julai Verma, PW-4 R.P. Nirala (Investigating Officer), PW-5 Dr. R.K. Singh (Medical Officer) and PW-6 Constable Lalbihari. PW-2 and PW-3 were declared hostile and were cross-examined by the prosecution with the leave of the Court.

7. The learned trial court, disbelieving the defence version that the deceased had fallen down on account of a bullock breaking loose, held that the injuries found on the deceased were caused by lathi and danda and were attributable to the accused persons. However, on the finding that there was no common intention to kill and no weapon of a lethal nature was used, the trial court altered the offence from Section 302 IPC to Section 304 Part II read with Section 34 IPC and convicted all three accused thereunder, sentencing each to five years' rigorous imprisonment vide judgment dated 08.08.1988.

8. In brief the grounds of appeal are that the conviction of the appellants are against the weight of the evidence on record; no offence is made out against the appellants; the sentence is too severe.

9. Learned counsel for the appellant has assailed the impugned judgment and order of conviction, contending that the learned trial court has failed to appreciate the evidence on record in its correct perspective and has convicted the appellant on the basis of insufficient and unreliable evidence. It is, therefore, submitted that the conviction and sentence recorded by the trial court are unsustainable in law and the appellant deserves to be acquitted.

10. Learned AGA, per contra, supported the impugned judgment and submitted that the three accused, being close relatives (son, father and grandfather), reached the spot together and participated jointly in the altercation with the deceased; the presence of the appellant at the spot, abusing and associating himself with the assault, is itself sufficient material to infer common intention under Section 34 IPC, which does not require that each accused must individually strike a blow. Minor variations or embellishments in the cross-examination of a rustic, natural witness like PW-1 ought not to be given undue weight so as to demolish an otherwise consistent and truthful version regarding the joint assault, more so when the FIR, lodged without delay, also implicates all three accused. The trial court has already extended a benefit to the accused by declining to convict them under Section 302 IPC and instead convicting them under the lesser offence of Section 304 Part II IPC, and has imposed a moderate sentence of five years' rigorous imprisonment; there is no illegality or perversity in the impugned judgment warranting interference in appeal.

11. I have given my anxious consideration to the rival submissions and have gone through the record, including the depositions of the witnesses and the impugned judgment.

12. PW-1 Tirath is the sole witness projected by the prosecution as an eye-witness to the occurrence. However, in his cross-examination, PW-1 has categorically admitted that he was not present on the spot from the inception of the incident and reached the spot only upon hearing the commotion. He has further stated in cross-examination that it was the accused Rambali alone who inflicted two to three lathi blows upon the deceased, while the appellant Ramapati was merely standing nearby and hurling abuses. This material admission by the sole eye-witness completely exculpates the appellant of any overt act of assault.

13. PW-2 Chandra Prakash and PW-3 Julai Verma, examined by the prosecution to corroborate the occurrence, were declared hostile and did not support the prosecution case regarding assault by the appellant. Their evidence, at best, establishes that a quarrel took place and that the deceased sustained fatal injury, but does not connect the appellant with any specific assaultive role.

14. There is no reliable material on record to show that the appellant Ramapati shared any common intention or knowledge, within the meaning of Section 34 IPC, with the other co-accused to commit culpable homicide. It is undisputed on record that the appellant was not armed with any weapon, lathi or danda, at the time of occurrence.

15. Although the post-mortem report confirms that death occurred on account of ante-mortem injuries, in the

absence of any reliable evidence connecting the appellant with the actual infliction of those injuries, constructive or joint liability under Section 34 IPC cannot be fastened upon him merely because he was present at the scene along with the other two accused.

16. The sole eye-witness has assigned a specific injury-causing role to the co-accused Rambali alone, and no injury, overt act, or blow has been attributed to the surviving appellant Ramapati by any witness examined during trial.

17. PW-1 himself has stated that he was working in his field at the inception of the incident and reached the spot only thereafter; and that in his examination-in-chief he made a general, omnibus statement that "all the accused persons" caused injury, which stands substantially diluted and contradicted by his own specific admission in cross-examination regarding the individual role of Rambali. Such omnibus, general allegations, unsupported by any specific overt act, cannot form a safe basis for conviction, particularly where liability is sought to be fastened with the aid of Section 34 IPC.

18. It is well settled that common intention under Section 34 IPC presupposes a prior meeting of minds and requires the existence of a pre-arranged plan, which may be inferred from the conduct of the accused and the circumstances of the case, but such inference must be based on cogent and convincing evidence and not on mere conjecture. Mere presence of a person at the scene of occurrence, without any overt act or other evidence indicating his participation in the criminal act, is not sufficient to fasten constructive liability upon him.

Something more, such as active participation, encouragement with knowledge, or a demonstrable act in furtherance of the common intention, must be shown.

19. In **Suresh & Anr. Vs. State of U.P. (2001) 3 SCC 673**, the Hon'ble Supreme Court held as under:-

"The dominant feature for attracting Section 34 IPC Is the element of participation in absence resulting in the ultimate "criminal act". For appreciating the ambit and scope of Section 34, the preceding Sections 32 and 33 have always to be kept in mind. Under Section 32 acts Include illegal omissions. Section 33 defines the "act" to mean as well a series of acts as a single act and the word "omission" denotes as well a series of omissions as a single omission. The "act" referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an Interpretation is accepted, the purpose of Section 34 shall be rendered Infuctuous. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that Individual act law takes care of making such accused responsible under the other provisions of the Code. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention.

(Paras 53, 39 and 40)

39. The dominant feature for attracting Section 34 of the Penal Code, 1860 (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an

interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

*40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in *Satrughan Patar v. Emperor* [AIR 1919 Pat 111 : 20 Cri LJ 289] held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.*

53. For appreciating the ambit and scope of Section 34, the preceding Sections 32 and 33 have always to be kept in mind. Under Section 32 acts include illegal omissions. Section 33 defines the "act" to mean as well a series of acts as a single act and the word "omission" denotes as well a series of omissions as a single omission. The distinction between a "common intention" and a "similar intention" which is real and substantial is also not to be lost sight of. The common intention implies a prearranged plan but in a given case it may develop on the spur of the moment in the course of the commission of the offence. Such common intention which developed on the spur of the moment is different from the similar intention actuated by a number of persons at the same time. The distinction between "common intention" and "similar intention" may be fine but is nonetheless a real one and if overlooked may lead to miscarriage of justice."

20. In *Lallan Rai & Ors. Vs. State of Bihar* (2003) 1 SCC 268, the Hon'ble Supreme Court held as under:-

"22. The above discussion in fine thus culminates to the effect that the requirement of statute is sharing the common intention upon being present at the place of occurrence. Mere distancing himself from the scene cannot absolve the accused — though the same however depends upon the fact situation of the matter under consideration and no rule steadfast can be laid down therefor."

21. In **Jasdeep Singh @ Jassu Vs. State of Punjab (2022) 2 SCC 545**, the Hon'ble Supreme Court has affirmed the principles regarding Section 34 IPC as laid down in the abovementioned cases.

22. In the present case, the entire edifice of the prosecution case, insofar as it seeks to connect the appellant with the assault, rests upon the testimony of PW-1 Tirath, since PW-2 and PW-3 have been declared hostile and do not support the prosecution version regarding the appellant's role. It is significant that PW-1 himself, in his cross-examination, has candidly admitted that he was not present on the spot from the very inception of the occurrence, and that he had been working in his field and reached the spot only upon hearing the commotion. More importantly, he has specifically stated that it was the co-accused Rambali who inflicted two to three lathi blows upon the deceased, while the appellant was only standing and abusing. This is a specific and material admission by the sole witness upon whom the prosecution rests its case, and it operates directly in favour of the appellant.

23. Where the sole witness to an occurrence himself assigns a specific and individuated role of assault to one accused while categorically excluding another accused from the actual act of assault, it would not be safe or judicially permissible to nevertheless convict the excluded accused on an omnibus, general allegation appearing elsewhere in the same witness's testimony, or on the theory of constructive liability alone. The prosecution cannot be permitted to rely selectively on the general part of a witness's statement while ignoring the specific,

favourable admissions elicited from the same witness in cross-examination.

24. It is also undisputed that no weapon was recovered from, or attributed to, the appellant Ramapati, and that no injury on the person of the deceased has been specifically linked to any act of the appellant. The post-mortem report, though establishing that death was homicidal and caused by lathi/danda blows, and indeed stands negated by the specific admission of PW-1 attributing the assault to Rambali alone and not by appellant Ramapati.

25. This Court finds that the learned trial court, while examining the culpability of the accused under Section 34 IPC, proceeded to convict all three accused on a common, undifferentiated finding, without separately appreciating the specific and exculpatory admission made by PW-1 in cross-examination qua the appellant. Such an omnibus approach, without an individualised assessment of the role of each accused, particularly in the face of a specific exculpatory admission by the sole witness, is not sustainable in law.

26. Mere abusing, or mere presence at the spot along with persons who assault the victim, without anything further to indicate a shared intention to cause the injuries that resulted in death, falls short of the standard required to bring home a charge with the aid of Section 34 IPC. On the facts of the present case, this Court is of the view that the prosecution has failed to prove, beyond reasonable doubt, that the appellant Ramapati shared the common intention, or had the requisite knowledge, to commit the offence for which he has been convicted.

27. For the reasons recorded above, this Court is satisfied that the conviction of the appellant Ramapati under Section 304 Part II read with Section 34 IPC is not sustainable and is liable to be set aside. He is entitled to the benefit of doubt.

28. The appeal is **allowed**.

29. The judgment and order dated 8.8.1988 passed by the IVth Additional District & Sessions Judge, Jaunpur, in Sessions Trial No.179 of 1986, convicting and sentencing the appellant Ramapati under Section 304 Part II read with Section 34 IPC, is set aside qua the appellant Ramapati. The appellant Ramapati is **acquitted** of the charge.

30. If the appellant Ramapati is in custody, he shall be released forthwith, unless wanted in connection with any other case. If he is on bail, his bail bonds and sureties furnished earlier during trial/appeal stands discharged.

31. Let trial court record along with copy of this judgment be transmitted within one week to the court concerned for information and necessary compliance.

32. The Registrar (Compliance) is also directed to serve a copy of this order **within 48 hours** by FAX/e-mail to the trial court through District & Sessions Judge concerned for compliance.

(Santosh Rai,J.)

September 08, 2026
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