

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble **Justice Prasenjit Biswas**

C.R.A. 222 of 1988

Gour Chandra Bera & Ors

-Versus-

The State of West Bengal

For the Appellants : **Ms. Madhusree Banerjee, *Amicus Curiae***

For the State : **Mr. Avishek Sinha.**

Hearing concluded on : **17.06.2025**

Judgment On : **23.07.2025**

Prasenjit Biswas, J:-

1. The impugned judgment and order of conviction dated 28.05.1988 passed by the learned Additional Sessions Judge, 1st Court, Midnapore in connection with Sessions Trial No. X of January, 1988 is assailed in this appeal.

2. Being aggrieved and dissatisfied with the said impugned judgment and order the present appeal is preferred at the behest of the appellants-convicts.
3. By passing the impugned judgment, these accused persons were found guilty for commission of offence punishable under Section 307/34 of the Indian Penal Code and they were sentenced to undergo rigorous imprisonment for four years each.
4. The case of the prosecution in nutshell is as follows:

“The instant case was started on the basis of a complaint lodged by the de-facto complainant by stating interalia that the relationship between the victim and his brothers was not cordial and a civil case was pending in the Court between them over the land issues. On the date of incident over the issue of share produced, there was exchange of hot words between the brothers and the accused Jagai Bera assaulted the victim, Netai with an iron rod in furtherance of the common intention shared by all accused persons. The victim was removed to the Primary Health Centre for treatment. Over the complaint a case was started by the concerned police station being Kotwali P.S. Case No. 26 dated 25.10.1986 under Section 325/327 Indian Penal Code. After completion of investigation police submitted charge-sheet against the accused persons.”

5. Charge was framed by the Trial Court against the accused persons under Section 307/34 of Indian Penal Code which was read over and explained to them and in reply the accused persons pleaded not guilty and claimed to be tried.
6. In this case, 10 (ten) witnesses were examined by the side of the prosecution and documents were marked as exhibits on its behalf. Neither any oral, nor any documentary evidences were adduced by the side of the defence.
7. During pendency of this appeal two appellants namely, Gour Bera and Jagai Bera died and the instant appeal was stood abated against them.
8. Ms. Madhusree Banerjee, learned *Amicus Curiae*, for the appellant said that there are apparent contradictions and omissions in the statements of the witnesses, cited on behalf of the prosecution. It is said that there is discrepancy as to the alleged time of occurrence which according to the FIR is on or about 12 Hrs, but according to the medical report of PW3, she was assaulted by the victim at 1 P.M. on the very date. It is further said by the learned Advocate that the evidence of the doctor disclosed that the injuries as found by him were possible if the victim falls on any hard and blunt substance and there is nothing in the record to say whether the fall of the victim was on any hard and blunt substance and as per his submission the said fact can be explained in two ways one by assault or fall as the doctor stated in his evidence. The learned Advocate further said that the eye witnesses i.e. PW(s) 2, 3, 7

did not disclose the incident to anybody before they were examined by the Investigating Officer long after the alleged incident. Moreover, none of the neighbors have been examined by the prosecution as a witness to the incident and no reasonable explanation has been given by the side of the prosecution to that extent. The attention of this Court is drawn to the deposition of PW3, the mother of the victim and her medical examination report clearly shows that the victim sustained injury due to fall down consequent on scuffle with accused/appellant no. 2. PW3 came to the spot to rescue his mother. It is assailed by the learned Advocate that PW6, PW2 and PW7 are not the neighbors of the victim, more particularly PW6, Chhatu Rana is a resident of Maheshpur and PW2 and PW7 are the residents of elsewhere. There are immediate neighbors who could see the incident but they are not cited as witness to the prosecution. It was further pointed out by the learned Advocate that the appellants namely, Sovan Kha and Dukha Chalak are the laborers of the appellants nos. 1 and 2 and there is nothing incriminating material against the said appellants no. 3 and 4 for which conviction passed by the learned Trial Court may be sustained. It is further said by the learned Advocate that the learned Trial Judge committed an error by holding that these appellants took part in the incident without any cogent evidence on record. So, the condition to constitute common intention under Section 34 of the Indian Penal Code is not satisfied in this case. In support of his contention, learned

Advocate cited a decision rendered by the Hon'ble Apex Court in the case of **Ramashish Yadav & Ors. -vs- State of Bihar**¹. It is said by the learned Advocate that in the said report, the Apex Court held that the common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts which are absolutely absent in this case. So, it is said that the impugned judgment and order passed by the learned Trial Court may be set aside.

9. Mr. Avishek Sinha, learned Advocate on behalf of the State submits that there is nothing material in the record for which the impugned judgment and order of conviction passed by the learned Trial Court may be interfered with. The attention of this Court is drawn by the learned Advocate to the FIR lodged by the de-facto complainant wherein it is stated that when Gour Bera ordered to murder Netai Bera and then these two appellants no. 3 and 4 namely Sovan Kha and Dukha Chalak caught hold the victim at the veranda of his house and assaulted him with fists and blows with a view to murder him and Jagai Bera assaulted the victim with an iron rod on his head, back and shoulder with an intention to murder him and as a result the victim sustained serious injuries. He was taken to De Para Hospital and the doctor gave him six stitches on his head and opined that the injury is

¹ (1999) 8 SCC 555

serious and deadly in nature. It is said that the contentions of the FIR get support from the evidence of PW1, wherein PW1 stated that he was reported by the victim Netai, Chatu Rana and Mir Sadek that the accused Jagai and Gour ordered these appellants nos. 3 and 4 to assault the victim Netai. The Appellants No(s) 3 and 4 are the labourers of the other two accused persons namely, Gour Bera and Jagai Bera. The attention of this Court is drawn to a specific statement made by this PW1 wherein he stated that the victim Netai was murdered on 04.01.1987 and a case is pending over the death of Netai against the accused persons. It is further said by the learned Advocate that PW2, one of the witnesses stated that the relationship amongst Bera brothers was strained over the landed property and on the relevant date and time these appellants no. 3 and 4 namely, Sovan, Dhuka were there and they encircled the victim.

- 10.** The learned Advocate for the State further drawn attention of this Court to the deposition of PW7, another eye witnesses where in he stated that his house is in the vicinity of Beras and he saw the accused Jagai to hit Netai with an iron rod on the head resulting in his fall on the ground and after his falling down, victim Netai was assaulted on the back and he saw the appellants Dukha and Sovan caught hold the victim. It is said by the learned Advocate that PW10 at the time of giving deposition before the Court stated that these appellants Sovan and Dukha caught hold the victim and he was hit with an iron rod by

the accused Jagai. So, it is said by the learned Advocate that there was a consensus of minds of all the appellants participating in the criminal action to bring about a particular result. As per submission of the learned Advocate Section 34 of the Indian Penal Code does not create any distinct offence but it lays down the principle of constructive liability stipulating that the act must be done in furtherance of the common intention. In support of his contention, he cited two decisions rendered by the Hon'ble Apex Court in case of **Sanjay Puran Bagde & Anr. -vs- State of Maharashtra**² and in case of **Parasa Raja Manikyala Rao & Anr. -vs.- State of A.P.**³. So, it is said by the learned Advocate that the prosecution has been able to prove its case beyond all reasonable doubt and the involvement of these appellants with the alleged offence cannot be ruled out. It is said that PW2, PW6 and PW7 who are the witnesses to the incident corroborated the story of the prosecution and there is nothing in the record for which their evidences can be disbelieved. So, it is said by the learned Advocate that the instant appeal preferred by the appellants-convicts may be dismissed and the impugned judgment and order of conviction passed by the learned Trial Court may be upheld.

² **(2022) 18 SCC 53**

³ **(2003) 12 SCC 306**

- 11.** I have considered the rival submissions advanced on behalf of both the parties. I have also perused the other materials relating to this case.
- 12.** PW1, Lakhikanto Darpaik, the de-facto complainant stated in his evidence that on 25.10.1986 at about 11/12 noon, there was a confrontation between victim Netai on one side and accused Bera brothers on the other and he was reported by the victim Netai, Chhoto Rana and Mir Sadek that the accused Jagai and Gour ordered these appellants nos. 3 and 4 Shovan and Dhuku to assault the victim, Netai and these appellants no(s) 3 and 4 are the labourers of the accused Gour and Jagai and at the orders these appellants jumped upon the victim and thereafter the accused Jagai hit Netai (victim) on the back side of the head, neck and back with iron rod. This PW1 who lodged the FIR at the police station is not a witness to the incident and it appears from his testimony that he heard the incident from the victim Netai and he took him to De Para Primary Health Centre and thereafter he went to the police station and lodged the written complaint. But PW4 Dr. Alok Mukherjee, the Medical Officer of the said Health Centre has stated in his evidence that the victim was brought to the health centre by Moniram Singh, Nalini Ranjan De and others which is contrary to the statement of PW1 and this PW4 did not state that the victim was brought to the primary health centre by PW1. Moreover, Maniram Singh and Nalini Ranjan De were not cited as witnesses to the prosecution. PW1 stated that he contested an election of local Gram

Panchayet as an independent candidate but was unsuccessful and he lodged the written complaint at the police station. Although, the victim was taken to the health centre in conscious condition by PW1 but at the time of his admission in the health centre neither the victim nor this PW1 and other persons who escorted the victim did not disclose to the attended Medical Officer (PW4) that these appellants assaulted the victim and the alleged incident was done in furtherance of common intention of all the accused persons to murder the victim. This PW1 further said that they did not make any attempt to apprehend the accused persons and immediately after the incident he did not send any person to Kotwali Police Station to lodge the complaint.

- 13.** In this case, there are only three witnesses to the occurrence namely, PW2, Mir Sadek, PW6, Chhatu Rana and PW7, Ismail Kha. This PW2 in his evidence has stated that the assault was witnessed by Islam (PW7), Dhukha (one of the appellants), Ram Lakshman Pandey (PW8). So, in this situation doubt has been created regarding the presence of PW7, PW6 and PW8 at the place of occurrence.
- 14.** PW6, Chhatu Rana is one of the eye witnesses to the incident who stated in his evidence that these appellants Dhukha and Sovan were moving there and Gour threatened with a gun and Mir Sadhek (PW2) and Ismail (PW7) also witnessed the assault. In cross-examination, this PW6 stated that he was a resident of village Maheshpur which is adjacent to village Sankhadanga and in his statement before the police

this witness did not state that the purpose of his visit to Sankhadanga was to see the condition of paddy in the field. Same as PW2, this PW6 did not disclose the incident to anybody before they were examined by the Investigating Officer long after the alleged incident. Moreover, this PW6 admitted that he took loan of Rs. 800/- from the accused Gour and there was a 'salish' over the non payment of the debt and in that 'salish' he was forced to repay the amount. So, there was a previous rivalry in between this witness and the accused Gour (already expired) over the issue of taking loan of Rs. 800/-.

15. PW7, Ismail Kha another witness to the incident as cited by the prosecution who stated in his evidence that these appellants no. 3 and 4 namely, Sovan and Dhuku are the labourers of Bera brothers. This PW7 further stated that at his alarm, Chhatu Rana (PW6) and Mir Sadak (PW2) rushed to the place of assault and the victim was removed to the health centre. But in cross-examination, this PW7 stated that in his statement to the police he did not state that Sadek (PW2) and Chhatu Rana (PW6) also witnessed the assault. So, what this witness said in his deposition that was for the first time regarding presence of PW2 and PW6 before the Trial Court. I have already said that these eye witnesses i.e. PW(s) 2, 6 and 7 did not disclose the incident to anybody before they were examined by the Investigating Officer. PW6, Chhatu Rana is a resident of different Mouza, Maheshpur and PW2 and PW7

are not the neighbours of the victim to witness the occurrence when the immediate neighbours to the victim could not see it.

- 16.** PW3, Smt. Rajani Bera who happens to be the mother of the deceased appellants Gour Bera and Jagai Bera as well as the victim. This witness was declared hostile by the prosecution and cross-examined her. In such cross-examination, by the prosecution this PW3 stated that the victim Netai was removed to hospital for his treatment by the accused Jagai and others. In cross-examination by the side of the defence this PW3 stated that the courtyard is not visible from the outside. It is further said by this witness (PW3) that PW6 Chhatu Rana is an inhabitant of village Dharmarana and the said village is about a mile from their village. PW3 further stated in his evidence that on the date of incident at about 1 P.M. when she was selling paddy to Babrubahan, the victim appeared there and assaulted her with fists and blows and gagged her and the accused persons came to rescue her and at that time Netai fell down on the ground and sustained injury.
- 17.** PW4, Alok Mukherjee examined the victim and issued injury report. The injury report is marked as exhibit in this case. It is said by this PW4 that the patient was brought by Maniram Sing, Nalini Ranjan De and others. I have already said that PW1 in his evidence has stated that he took the victim to the hospital which is contrary to the statement of this PW4. Moreover, the said Maniram Sing and Nalini Ranjan De were not cited as witnesses to the prosecution. In cross-

examination, this witness said that the injury report issued by him does not disclose whether the victim was referred to the Sadar Hospital or not. It is said by this witness in examination-in-chief that the patient was brought conscious and most probably he forgot to ask him about the cause of injury. There is nothing in the injury report about the cause of injury sustained by him. Although, the victim was conscious he did not disclose to the doctor about the persons who allegedly assaulted him. Neither this victim nor PW1 who escorted the victim to the Health Centre did not disclose the names of these appellants against whom allegation is that they had assaulted the victim.

- 18.** PW8, Ram Lakshman Pandey witness to the seizure was declared hostile by the prosecution and cross-examined him. In his cross-examination by the defence, this witness said that he figured as a witness to the search and seizure of the gun and live cartridges and police took charge of the gun and live cartridges from the wife of the accused Gour. This witness further said that he did not witness any assault but witness in respect of recovery of gun.
- 19.** PW10, S.I. Goutam, I.O. of the case stated that he did not seize any weapon of offence in this case. PW6 stated in his cross-examination that he was interrogated by the police after 12/15 days of the incident. PW6 did not state in his deposition that he disclosed the incident to any person before he was interrogated by the Investigating Officer. PW10 stated that he examined Mir Sadek (PW2) on 1st November, 1986

and Ismail (PW7) on 27th December, 1986. PW2 and PW7 have also not stated in the deposition that they have narrated the incident to any other person before they were examined by the I.O. PW(s) 2, 6 and 7 who were examined by the I.O. respectively on seven days, 15/20 days and 62 days after occurrence and PW10 has admitted in his cross-examination that in the case diary it was not specifically mentioned that in spite of best efforts the witnesses were not available for examination under Section 161 of the Code of Criminal Procedure. The learned Trial Judge committed an error by not taking into consideration that these witnesses i.e. PW(s) 2, 6 and 7 did not disclose the incident to anybody before they were examined by the I.O. long after the alleged incident. So, where the sole eye witnesses did not disclose the name of the assailant for a considerable period after happening of the alleged incident is a very serious infirmity which affects the credibility of the evidences of the witnesses.

- 20.** It appears from the FIR that the alleged time of occurrence was mentioned therein is 11 or 12 Hrs but according to the medical report of PW3 she was assaulted by the victim at 1 PM on the very date and when the said medical certificate is not challenged by the prosecution then there could not have any occurrence at 11 or 12 Hrs. These appellants no. 3 and 4 were convicted with the aid of section 34 of Indian Penal Code. PW1 has stated in his evidence that the accused Jagai and Gour ordered these appellants no. 3 and 4 who are the

labourers of the deceased appellants no. 1 and 2 to assault the victim and at the orders these appellants Sovan and Dhuku jumped upon the victim, Netai but PW6 in his evidence has stated that these appellants were moving there. In order to charge accused persons under Section 34 (common intention) of the Indian Penal Code, it must be established that the accused had pre-planned the act and shared a common intention, so for convicting the accused with the aid of Section 34 of Indian Penal Code. The prosecution must establish prior meetings of minds. It must be established that all the accused had pre-planned and shared a common intention to commit the crime with the accused who has actually committed the crime which has to be proved/established that the criminal act has been done in furtherance of the common intention of all the accused persons.

- 21.** It is profitable to quote the observation of the Hon'ble Apex Court in case of **Constable 907 Surendra Singh -vs.- State of Uttarakhand** with **Ashad Singh Negi-vs- State of Uttarakhand**⁴ wherein Hon'ble Apex Court held at paragraph 30, inter alia, that:

“30. By now it is a settled principle of law that for convicting the accused with the aid of Section 34 of the IPC the prosecution must establish prior meetings of minds. It must be established that all the accused had preplanned and

⁴ (2025) 5 SCC 433

shared a common intention to commit the crime with the accused who has actually committed the crime. It must be established that the criminal act has been done in furtherance of the common intention of all the accused. Reliance in support of the aforesaid proposition could be placed on the following judgments of this Court in the cases of:

- i) Ezajhussain Sabdarhussain and another v. State of Gujarat;***
- ii) Jasdeep Singh alias Jassu v. State of Punjab;***
- iii) Gadadhar Chandra v. State of West Bengal (supra) and***
- iv) Madhusudan and others v. State of Madhya Pradesh.”***

22. From the facts and circumstances of this case that the attack was not a pre-meditated one, nor was a prior concert. There must be similar intention in the minds of the assailants to attack but from the materials on record as well as from the evidences of the witnesses to the prosecution it would not appear that these appellants being the labourers of the deceased appellants no. 1 and 2 have acted in furtherance of common intention to attract constructive liability under Section 34 of the Indian Penal Code. Moreover, in my view that the facts and circumstances do not give rise to an inference of pre-concert.

The prosecution has also failed to bring any materials on record to show that there had been any pre-concert or pre-arranged plan so as to hold these appellants no. 3 and 4 Sovan and Dhuku had any common intention to commit the alleged offence. It is, therefore, not a case when a common intention amongst the accused persons can be said to have existed either from the beginning or was formed at the spur of the moment. Exhortation furthermore by itself is not enough to prove common intention on the part of these appellants no. 3 and 4. Therefore, no inference can be drawn that these appellants had any intention of causing injury to the victim or that they actually participated in the criminal act. I have already said that Section 34 of the Indian Penal Code implies acting in concert existence of a pre-arranged plan which is to be proved either from the conduct or from circumstances or from any incriminating facts. It requires a pre-arranged plan and pre-supposes prior concert. Therefore, there must be prior meetings or minds. The prior concert or meeting or minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. There is no doubt that this can be developed at this spur of moment but there must be pre-arranged or pre-mediated concert which is absolutely absent in this case.

- 23.** In **Ramashish Yadav and Ors (supra)** the Hon'ble Apex Court held that Section 34 of Indian Penal Code lays down a principle of joint liability

in the doing of criminal Act and the essence of that liability is to be found in the existence of common intention that the accused leading to the doing of criminal act in furtherance of such intention. The common intention implies act in concert existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts.

- 24. In Parasa Raja Manikyala Rao & Anr. (supra)** the Hon'ble Apex Court reiterated that common intention implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan and under this Section a pre-concert in the sense of distinct previous plan is not unnecessary to be proved the act, intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. It is held by the Apex Court that though common intention may develop on the spot, it must however, be anterior in point of time to the commission of offence showing a prearranged plan and prior concert and in order to prove an act was done in furtherance of the common intention. The prosecution must prove facts to justify an inference that all participants of the acts had shared a common intention to commit the criminal act which was finally committed by one or more participants. Mere presence of a person at the time of commission of an offence by his confederate is not, in itself sufficient to bring his case within the purview of Section 34.

25. In view of the above facts and discussion made above I am opinion that the impugned judgment and order of conviction passed by the learned Trial Court dated 28.05.1988 is not sustainable under the eye of law and accordingly the same is liable to be dismissed.
26. Thus, the instant appeal be and the same is hereby **allowed**.
27. The impugned judgment and order of conviction passed by the learned Trial Court dated 18.05.1988 in connection with Sessions Trial No. X of January, 1988 by the learned Additional Sessions Judge, 1st Court, Midnapore is hereby set aside.
28. These appellants are on bail. They are discharged from bail bonds and be set at liberty if they are not wanted in connection with other case.
29. Let a copy of this order along with T.C.R. be sent down to the Trial Court immediately.
30. Urgent Photostat certified copy of this order, if applied for, be given to the parties on payment of requisite fees.

(Prasenjit Biswas, J.)