



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (BA) NO. 1097 OF 2024

Kalim Shah Ismail Shah Vs State Of Maharashtra

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr. Anil Mardikar, Senior Counsel with Mr. S.V. Sirpurkar, counsel for applicant.
Mrs. Sneha Dhote, APP for non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 06/02/2025.

1. The applicant came to be arrested on 19/04/2023 in connection with Crime No. 123/2023 registered with Police Station Dahihanda District Akola for the offences punishable under Sections 302, 201, 109, 504, 506, 323 read with Section 34 of the Indian Penal Code, 1860 and Sections 3/25, 7/27 of the Arms Act, 1959.

2. The crime is registered on the basis of a report lodged by Afroz Khan Subedar Khan. On 19/04/2023, on an allegation that on 18/4/2023 at about 8.00 p.m. there was a quarrel between his father and the applicant, after some time, the informant and his elder brother, Firoz Khan Subdar Khan, went to the spot. Thereafter, the applicant's brother, Kadirshaha Ismail Shaha, met them holding a pistol in his hand and started abusing them. The applicant, while pointing towards Firoz, abused and instigated the co-accused to kill the deceased, and thereafter, the co-accused fired a bullet, which hit the

chest of the deceased, and the deceased succumbed to the death. On the basis of the said report, police have registered the crime against the present applicant.

3. Heard Senior Counsel, Mr. Anil Mardikar for the applicant, who submitted that there was a previous enmity between both the families. Out of that, there was a petty quarrel between them, and subsequently, the co-accused Sheikh was holding a pistol in his hand. As far as the present applicant is concerned, his participation is not in the actual assault and firing of the bullet or causing of the death of the deceased. He submitted that as far as the common intention is concerned, there is no meeting of minds between the present applicant and the other co-accused, and therefore, even common intention is not supported against the present applicant.

4. Learned Senior Counsel also invited my attention towards a statement of a witness, namely Wajid Khan Javed Khan, and pointed out that there is variance in the statement of the informant and the said Wajid Khan Javed Khan, who is alleged to be eyewitness of the said incident. He submitted that the FIR does not disclose the presence of this eyewitness on the spot of the incident, but even if it is accepted, there is a variance in these two statements. Thus, considering the statement as it is, no offence is made out against the present applicant, as far as sharing of the common intention is concerned.

5. In support of his contention, learned counsel for the applicant has placed reliance in the following cases;

- a) *Hardev Singh And Anr. vs The State Of Punjab [(1975) 3 SCC 731]* ;
- b) *Dharam Pal and others Vs State of Haryana [(1978) 4 SCC 440]*;
- c) *Sabal Singh and others Vs State of Rajasthan [(1978) 4 SCC 448]*;
- d) *Jasdeep Singh alias Jassu Vs State of Punjab [(2022) 2 SCC 545]*, and submitted that the

common intention postulates the existence of a prearranged plan implying a prior meeting of the mind. It is the intention to commit the crime and the accused can be convicted only if such an intention has been shared by all the accused. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop on the spot when such a crime is committed. In most of the cases it is difficult to procure direct evidence of such intention. In most of the cases, it can be inferred from the acts or conduct of the accused and other relevant circumstances. Therefore, in inferring the common intention under Section 34 IPC, the evidence and documents on record acquire a great significance and they have to be very carefully scrutinized by the court. This is particularly important in cases where evidence regarding development of the common intention to commit the offence graver than the one originally designed, during execution of the original plan, should be clear and cogent.

6. Per contra, learned APP strongly opposed the said application on the ground that during the investigation, it was revealed that it was the present applicant who raised the quarrel with the informant and thereafter started abusing the informant and his father, and the other co-accused came holding the pistol in his hand. It was the present applicant who instigated the other co-accused, and thereafter, the other co-accused fired the bullet. Thus, prima-facie material is sufficient to show the involvement of the present applicant, the offence is of a grievous nature. Considering the gravity of the offence the application deserves to be rejected.

7. Learned APP also placed reliance in the case of *Ram Naresh Vs State of U.P in criminal appeal 3577/2023 decided on 01/12/2023*, wherein the Hon'ble Apex Court held that a reading of Section 34 of the IPC reveals that when a criminal act is done by several persons with a common intention, each of the persons is liable for that act as if it had been done by him alone. Therefore, where participation of the accused in a crime is proved and the common intention is also established, Section 34 IPC would come into play. To attract Section 34 IPC, it is not necessary that there must be a prior conspiracy or premeditated mind. The common intention can be formed even in the course of the incident i.e., during the occurrence of the crime.

8. On hearing both sides and on perusal of the investigation papers, it reveals that out of the previous dispute, the alleged incident has occurred between the informant and the present applicant. As far as the allegation against the present applicant is concerned, which shows that there were abuses on his part to the informant and his father. It further reveals from the investigation papers that when the present applicant was abusing the informant and his father, at the relevant time the other co-accused came at the spot by holding a pistol in his hand, and thereafter, the present applicant instigated him, and on his instigation, the other co-accused fired a bullet, which caused the death of the deceased.

9. It is settled law that the common intention can be formed at the spot itself during the incident. At the same time, it is required to be seen whether there was any previous meeting of the mind between the two persons. As far as the case in hand is concerned, admittedly the present applicant and the other co-accused have not come together. The other co-accused came at the spot subsequently. The statements of the witnesses and the statement of the informant is also at variance. Even considering that involvement of the present applicant is in the incident and was sharing the common intention, but the role of the present applicant is also requires to be looked into. The role of the present applicant is to the extent of instigating the other co-accused. Whether there was a common intention or not, it is a mixed question of

fact and the law that can be established on the basis of the evidence which would be adduced before the court. At this stage, considering the investigation is completed and charge-sheet is already filed, further incarceration of the present applicant is not required, considering the role attributed to him. In view of that, the applicant has made out a case for grant of bail. Hence, the application deserves to be allowed. Accordingly, I proceed to pass the following order:

- a] The criminal application is **allowed**.
- b] The applicant -***Kalim Shah Ismail Shah*** in connection with Crime No. 123/2023 registered with Police Station Dahihanda District Akola for the offence punishable under Sections 109, 302, 504, 506, read with Section 34 of the Indian Penal Code, 1860; 3, 25, 7 and 27 of the Arms Act, 1959, shall be released on bail on executing PR. Bond of Rs. 50,000/- with one solvent surety in the like amount.
- c] The applicant shall attend the Akola City Police Station once in a month on 5th of every month till culmination of the trial.
- d] The applicant shall not enter into the vicinity of Lothkhed, Tah. Akot, District Akola

- e] The applicant shall not induce, threat or promise any witness who are acquainted with the facts of the present case.
 - f] The applicant shall attend the proceedings before the Sessions Court without seeking any exemption unless there are exceptional circumstances.
10. The criminal application is **disposed of**.

[URMILA JOSHI-PHALKE, J.]