A.F.R.

Neutral Citation No. - 2025:AHC:134249-DB

Reserved on 29.07.2025

Delivered on 08.08.2025

In Chambers

Case :- CRIMINAL APPEAL No. - 2977 of 1984

Appellant :- Vijai @ Babban
Respondent :- State of U.P.
Counsel for Appellant :- G.P.Mathur
Counsel for Respondent :- A.G.A.

Hon'ble Saumitra Dayal Singh,J.
Hon'ble Madan Pal Singh,J.

(Per Hon'ble Madan Pal Singh,J.)

1. The instant criminal appeal is directed against the judgment and order dated 20.10.1984 passed by Ist Additional Sessions Judge, Jhansi, in Sessions Trial No. 35 of 1984 (State Vs. Narendra Kumar & another), arising out of Case Crime No. 510 of 1983, under Sections 302/34 IPC, Police Station -Nawabad, District - Jhansi, whereby the appellant has been convicted under Section 302/34 IPC and sentenced to undergo life imprisonment.

2. Facts giving rise to the present appeal may be summarized as under:-

(i). The prosecution case in brief is that on the basis of Written Report dated 17.12.1983, of the informant Bahadur Shah (P.W.-1), resident of Kapoor Tekari, Police Station Nawabad, District Jhansi, an FIR was lodged stating therein that on 17.12.1983 at about 7.45 PM, he, his brother Bashir Shah and one Mahendra, resident of Narmal School, Kachahary Chauraha were returning to their home via Khushipura. As soon as they reached in front of the house of Khem Chand, they met Narendra Kori son of Mangali and Vijai @ Babban son of Sher Singh, who were coming from Kapoor Tekari. At the same time, Narendra started abusing his brother Bashir Shah and said "Who are you to come between me and Kanti, you are constantly trying to intrude in this matter. I have tried to convince you many times in this matter, yet, you continued". At this, his brother Bashir said that you are

making false allegation against me without any basis and don't try to bully me. Upon which, Vijay responded by saying "Maro Sale Ko". At that moment Narendra drew a knife and gave three-four knife blows to his brother (since deceased), due to which, he became injured and he fell down. The incident was witnessed by Ali Hasan son of Subrati, Manjoor Ahmad son of Ismail and Hazarat son of Noor Shah, resident of Kapoor Tekari and several others. There was enough source of light at the place of occurrence. After causing the incident, Narendra and Vijai @ Babban fled from the place of occurrence brandishing knife, towards village Khushipura. The injured was carried to the Medical College on a two wheeler, where the Doctor declared him dead. Narendra used to visit to the house of Kanti daughter of Karanjoo with bad intentions. Bashir Shah also used to visit the house of Kanti and treated her as his sister. On many occasions, Bashir Shah warned Narendra not to visit the house of Kanti. Due to this very reason, the accused Narendra was having enmity with the deceased and accordingly, killed him. The Written Report was marked as Ex. Ka-1.

(ii). On the basis of teharir submitted by the informant, Case Crime No. 510 of 1983, under Sections 302 IPC, Police Station Nawabad, District Jhansi, was registered against the accused persons and investigation ensued.

(iii). During the course of investigation, panchayatnama was conducted on 18.12.1983, which was marked as Ex. Ka-13 and the body was sent for autopsy.

(iv). The autopsy of the dead body of Bashir Shah was conducted on 18.12.1983 at 12.30 PM at District Hospital, Jhansi, by Dr. D. Saxena. It was marked as Ex. Ka-8.

(v). The investigation was conducted and after preparing the site plan, recorded the statement of witnesses and after completing the other necessary formalities, the Investigation Officer had submitted the charge-sheet against the accused persons on 25.12.1983 under Section 302 IPC, and cognizance

thereupon was taken on 20.01.1984 by the Chief Judicial Magistrate concerned and thereafter the case was committed to the Court of Sessions on 20.01.1984 for trial. The charge-sheet was marked as Ex. Ka-20.

(vi). That on the basis of evidence collected during investigation, vide order dated 27.04.1984, charges were framed against the appellants under Section 302/34 IPC. The appellants denied the charges and claimed to be tried.

(vii). The prosecution to prove its case had examined P.W.1-Bahadur Shah (informant), P.W.2-Ali Hasan, P.W.3-Mahendra, as witnesses of fact and P.W.4- Yashpal Singh, P.W.5-Dr. D. Saxena and P.W.6-Jaipal Singh as a formal witnesses.

(viii). The prosecution in support of its case had also produced oral as well as documentary evidence, which were marked as follows:

(a) Written Report Ex. Ka-1, **(b)** FIR Ex. Ka-2, **(c)** Postmortem Report Ex. Ka-8, **(d)** Recovery memo of blood stained Bushirt Ex. Ka-9, **(e)** Recovery memo of blood stained soil and plain soil Ex. Ka-11 **(f)** Recovery memo of blood stained Bushirt Ex. Ka-12 **(g)** Report of chemical examiner Ex. Ka-22, **(h)** Panchayatnama Ex. Ka-13 **(g)** Charge-sheet Ex. Ka-20 and **(h)** Site Plan with index Ex. Ka-10.

3. After closing of the prosecution evidence, the statements of the accused persons were recorded under section 313 of the Code of Criminal Procedure, in which, appellant stated that police had implicated him in several false cases in which he got acquitted, due to this animosity, he has falsely been implicated in the present case.

4. Heard Shri Rajiv Lochan Shukla, learned Amicus Curiae, ably assisted by Shri Shashank Pandey, learned counsel for the appellant and Shri L.D. Rajbhar and Mr. Murtaza Ali, learned AGAs for the State.

5. Learned counsel for the appellant mainly argued that the main allegation of causing knife injury to the deceased was against the co-accused Narendra Kumar, against whom the appeal has already been abated. The appellant-Vijai @ Babban was assigned the role of exhortation, only.

6. He next argued that prosecution has failed to establish that the present appellant had shared common intention with the principal offender, which was essential to prove to bring home the charge against the present appellant, of committing the murder of the deceased in furtherance of common intention.

7. He further argued that the presence of the appellant is also not proved beyond reasonable doubt, inasmuch as, had the appellant been there and had shared common intention to commit the murder of deceased, no reason appears why he would not have assaulted the deceased, himself.

8. Lastly, he argued that mere presence of appellant at the spot and utterance of the word (MARO SALE KO) can not reflect common intention. Such type of words are commonly used even in a trivial nature of altercation, which do not necessary suggest an intention to kill the person, rather these words may imply the commission of simple '*marpeet*', particularly, when the prosecution has failed to prove that both the accused reached at the place of occurrence with premeditation of mind.

9. On the other hand, learned A.G.A. appearing for the State has argued that this case revolves around the common intention and sufficient evidence is available on record against the present appellant regarding exhortation upon which, the main accused Narendra, who had preferred Criminal Appeal No. 3113 of 1984 before this Court and during the pendency of the aforesaid Criminal Appeal, he died and appeal filed by him already stands abated vide order dated 08.03.2018.

10. He next argued that the common intention may occur at the spot which had clearly been shown by the overt act of the present appellant. Hence he prayed to dismiss the appeal preferred by the appellant.

11. Before discussing the arguments advanced on behalf of the parties, it is necessary to have a glance on the evidence recorded by the trial court.

12. P.W.1-Bahadur Shah, the informant in his examination-in-chief had narrated the factum of incident and supported the prosecution version. He deposed that prior to about 7 months at around 07:45 p.m. he along with his brother Bashir Shah was going towards his house from Kachahri Chauraha where Mahendra met them and asked him to accompany them for seeing lightening in Kasai Mandi. The witness along with his brother Bashir Shah and Mahendra proceeded towards their house via Khushipura and on reaching near the house of Khem Chandra in Kapoor Tekari, accused Vijai @ Babban and Narendra met them. Narendra said to his brother Bashir that despite several warnings given by him, he is constantly interfering between him and Kanti, which was refuted by Bashir, who objected and told him not bully him. Thereupon, co-accused Narendra and Vijai @ Babban took out knives and Narendra started inflicting knife blows upon Bashir. On alarm being raised, witnesses Ali Hasan, Manjoor and Hazarat reached the spot. The witnesses could not intervene as Vijai, while brandishing knife said that if anyone will come to intervene the matter, he will kill him. The deceased Bashir fell down in an injured condition and accused persons fled from the place of occurrence. This witness and Mahendra took Bashir Shah to Chakki of Haziji and from there they took Bashir Shah to Medical-College in a taxi, where the doctor declared him dead. A written report (Ex. Ka.1) was got written by Yusuf which is Ex. Ka-1. He further stated that he along with all the witnesses saw the incident in road-side electric light.

13. P.W.2- Ali Hasan in his examination-in-chief has stated the factum of incident and supported the prosecution version and stated that he was returning after electric fitting in the house of one Yakub driver, on the way

he met with Hazrat conductor. As soon as they reached near the house of Manzoor Ahmad, he saw that Narendra and Vijay were arguing with Bashir, saying why he was interfering in his matter with Kanti. On this Bashir replied, he had not interfered in anyone's matter but told him not to bully him. At this Vijay said (AAJ SALE KO JAAN SE MAAR DO). Upon this Narendra drew out his knife at once and started inflicting stab wounds to Bashir and fled towards Khusipura.

14. P.W.3- Mahendra, in his examination-in-chief narrated the factum of incident and supported the prosecution version almost in the same manner as stated by other witnesses of fact and he further stated that he met Bashir and Bahadur and asked them to accompany him to see light on the occasion of Barawafat. As soon as they reached near village Kapoor Tekari, they saw accused Narendra and Babban and at the same time, Narendra asked Bashir why he was interfering in the affairs between him and Kanti. Bashir refuted and said that he is making false allegations against him. Thereupon Babban said "*Sale ko Khatam kar do*". Thereafter, co-accused Narendra took out his knife and gave 3-4 knife blows to Bashir. He also stated that Babban threatened the witnesses not to come forward otherwise they would face dire consequences.

15. P.W.4- Yashpal Singh, in his examination-in-chief stated that on 17.12.1983, he was posted as a Head Moharrir, P.S. Nawabad, District-Jhansi, he wrote the chick F.I.R. Ex. Ka-2 on basis of written report Ex. Ka.1, copy of entry in G.D. regarding the same is Ex. Ka-3, copy of the entry in the G.D. regarding deposition of case property in Sadar Malkhana is Ex. Ka-4, copy of the entry regarding one envelope and one sealed bundle in the G.D.

16. P.W.5- Dr. D. Saxena in his examination-in-chief stated that he was posted as Medical Officer, District Hospital, Jhansi on 18.12.1983 and performed the autopsy of the dead body of the deceased Bashir Shah at 12:30 pm, who was brought and identified by constables Shri Shiv Charan Sharma and Shri Ram Nagar. The deceased was of average built, eyes half

open, fluid coming out of nostrils, rigor mortis well established in lower and upper limbs, p.m. strains present on back of trunk. In the postmortem, he noted the following ante-mortem injuries:

> *1. Stab wound 2 cm x 1 cm x cavity deep x oblique on the left side chest upper part 3-1/2 cm below medial end of left collarbone, 10 cm from left nipple at 10'o' clock position and just touching midline. Margins regular clotted blood present (on exposing sternum upper part shows oblique cut of 2 cm size underneath congestion and right lung cut upper part).*
>
> *2. Incised wound 2 cm x 1 cm x 1 cm x oblique on the left side of chest 4-1/2 cm above left nipple at 10 'o' clock position 9 cm from injury no.1. Margins regular. Clotted blood.*
>
> *3. Stab wound 2-1/2 cm x 1 cm x cavity deep x oblique on left side back upper part 4 cm below post. axillary fold and 18 cm from midline. Margins regular. Bleeding.*
>
> *4. Stab wound 2 cm x 1 cm x cavity deep on the left side of back upper third part x oblique 8 cm medial to injury no.3 and 8 cm from midline. Margins regular. Bleeding.*

As to the immediate cause of death, it was recorded, "shock and haemorrhage" as a result of ante-mortem injuries". The said autopsy report is Ex. Ka-8.

17. P.W. 6- Jaipal Singh, the Investigating Officer was posted as S.H.O. Nawabad, District – Jhansi, in December, 1983. An F.I.R. was lodged in his presence at around 9:30 p.m. The investigation of the case was taken over by him. He went to the place of occurrence alongwith police force, recorded the statements of Bahadur Shah (first informant-P.W.-1), took into possession his blood-stained shirt, fard regarding which was prepared and signed by Head Constable- Bajrang Singh is Ex. Ka-9, got the site-plan prepared by dictating the same to Head Constable Bajrang Singh, signed the same which Ex. Ka-10, on record, took in possession the blood stained and ordinary sample of soil, sealed them separately, the fard regarding which was prepared by Head Constable Bajrang Singh on his dictation Ex. Ka-11, recorded the statements of witnesses Mahendra and others, took in possession blood-stained shirt of witness Mahendra, got it sealed and fard prepared by Head Constable Bajrang Singh on the dictation of this witness

which is Ex. Ka-12, the inquest report of the deceased was prepared by Sri Chandrabali Shukla, SSI, who was posted with him. He is well acquainted with his hand-writing and signatures. This witness proved the autopsy report Ex. Ka-13, challan nash, Photonash**,** sample sealed, letter to R.I., letter to C.M.O., letter regarding clothes of deceased, which are Exs. Ka-14 to Ka-19. Thereafter, on 21.12.1983, he recorded the statements of the accused persons in District Jail and further recorded the statements of other formal witnesses, sent the blood-stained clothes for chemical examination to Agra and after completion of investigation, submitted charge-sheet against accused persons, which was got prepared by Head Constable Bajrang Singh on dictation of the witness which is Ex. Ka-20. This witness also proved the blood stained and ordinary sample of earth as Exs. Ka-9 and Ka-10 and blood-stained shirt of Bahadur Shah, Mahendra as Exs. Ka-1 and Ka-2. In his cross-examination he deposed that he did not think it necessary to show the flour-mill of Hazi Chimman Shah in the site-plan. He did not find any blood on the place of occurrence to the flour-mill of Chimman Shah, and did not enquire about the motive of the incident.

18. We have heard the arguments of learned counsel for the parties and perused the evidence available on record.

19. In the light of arguments advanced on behalf of appellant very short question before us is to see as to whether the present appellant had shared common intention with the principal offender to commit the murder of the deceased and if both the accused reached at place of occurrence after prior meeting of their mind and premeditation.

20. For the application of Section 34 I.P.C, in order to prove the common intention among the offenders, it is essential to establish that there must be prior meeting of their mind and to commit a crime in furtherance of common intention of all.

21. So far as the premeditation of appellant is concerned, we find that all the witnesses of fact categorically deposed that when they were returning

from their work, they met with the accused Narendra and Vijay, who were coming from the other side. None of the witnesses stated that the accused were standing at the place of occurrence and were waiting for the deceased. Further, the witnesses of fact also did not depose that as soon as they reached near the accused, Narendra started dealt knife blows to Bashir. A perusal of examination-in-chief of all the witnesses goes to show that before actual assault was committed by the co-accused Narendra, hot exchange of words had taken place between Narendra and deceased involving a woman who the deceased cared as his sworn sister and who the co-accused used to visit often indicates that there was no premeditation of mind between the present appellant and co-accused.

22. In so far as the deposition of witnesses regarding active role of present appellant is concerned, upon deeper scrutiny of the testimony of the witnesses, we find that in the written report submitted by the informant who also claims himself as an eye witness, has not mentioned any active role of the present appellant except the role of exhortation. Neither any role of having caused knife blows assigned to him nor any role of threatening the witnesses has been assigned while brandishing a knife. P.W.-1 has assigned the role of the present appellant (in his deposition), which is not mentioned in the written report submitted by him. Although the F.I.R. is not an encyclopedia, but such details must find place in F.I.R. That deficiency goes to the root of the case. That role assigned to the present appellant was not a such of nature that could be ignored by the informant while submitting his written report. Thus, giving the role of whipping out his knife and threatening the witnesses and other witnesses is not free from all doubt. That deposition made in Court is not corroborated from the FIR. It is a material improvement made at the trial.

23. As to the presence of the present appellant at the spot is concerned, we find that presence of the appellant could not be doubted in any manner as all the witnesses of fact categorically stated that they had seen the appellant along with main offender. But mere presence of the appellant at the spot is

not sufficient to establish common intention of the appellant. Moreover, in view of the testimony of P.W. -2, who deposed in his cross-examination that Vijay @ Babban used to say that he will marry to Kanti, whereas Narendra had an illicit relationship with Kanti. Therefore, it is not possible that Vijay would have shared any common intention with Narendra to kill Bashir, simply based on the saying that '***the enemy of an enemy is a friend***.' On this premise also, it does not appear reliable that the Vijay, would have gone to commit the murder of the deceased in furtherance of a common intention shared with Narendra.

24. One another aspect, on which we are reluctant to believe on the theory of prosecution that the present appellant had a common intention to commit the murder of Bashir, is that the present appellant had not assaulted the deceased, even though he was also carrying a knife as alleged by the prosecution witnesses. If the act of committing the murder of the deceased was to be done solely by Narendra, it may not be believed that the present appellant had shared common intention with the co-accused. Though in some circumstances, facilitation by one accused to other, may be in furtherance of common intention but in the present case the role of facilitation which is alleged to have been given to the present appellant could not be proven free from doubt. Thus, we are of view that the presence of present appellant on spot is proved but we are not inclined to accept that the present appellant had shared any common intention to commit the murder of the deceased, from before the two parties met up, by chance.

25. Now the question before us is, whether the act of exhortation of the appellant Vijay @ Babban is leading to the doing of a criminal act in furtherance of common intention. To appreciate the issue, it will be apt to refer the law laid down by Hon'ble Supreme Court in this regard.

In **Pandurang VS State Of Hyderabad, 1955 1 SCR 1083**, Hon'ble Supreme Court in para 34 and 35 of its judgment has held as under:

> *"34. In the present case, there is no evidence of any prior meeting. We know nothing of what they said or did before the attack-not even immediately before. Pandurang is not even of the same caste as the*

others. Bhilia. Tukia and Nilia are Lambadas, Pandurang is a Hatkar and Tukaram a Maratha. It is true prior concert and arrangement can, and indeed often must be determined from subsequent conduct as; for example, by a systematic plan of campaign unfolding itself during the course of the action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or a meeting together subsequently. But, to quote the Privy Council again,

"the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case".

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". (Sarkar s Evidence, 8th edition, page 30).

35. The learned counsel for the state relied on - Mamand v. Emperor , AIR 1946 PC 45 (C), because in that case the accused all ran away and their Lordships took that into consideration to establish a common intention. But there was much more than that. There was evidence of enmity on the part of the accused who only joined in the attack but had no hand in the killing; and none on the part of the two who did the actual murder. There was evidence that all three lived together and that one was a younger brother and the other a tenant of the appellant in question. There was evidence that they all ran away together: not simply that they ran away at the same moment of time when discovered, but that they ran away together.

As we have said, each case must rest on its own facts and the mere similarity of the facts in one case cannot be used to determine a conclusion of fact in another. In the present case, we are of opinion that the facts disclosed do not warrant an inference of common intention in Pandurang's case. Therefore, even if that had been charged, no conviction could have followed on that basis. Pandurang is accordingly only liable for what he actually did."

(emphasis supplied)

26. In case of **Jainul Haque vs State Of Bihar, AIR 1974 SC1651**, Hon'ble Supreme Court in para 8 of its judgment has held as under:

"*The evidence of exhortation is, in the very nature of things, a weak*

piece of evidence. There is quite often a tendency to implicate some person, in addition to the actual assailant by attributing to that person an exhortation to the assailant to assault the victim. Unless the evidence in this respect be clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant."

(emphasis supplied)

27. In **Surendra Chauhan VS State Of M. P. , (2000) 4 SCC 110**, Hon'ble Supreme Court in para 11 of its judgment has held as under:

"11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. Ramaswami Ayhangar & Ors. v. State of Tamil Nadu2. The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. Rajesh Govind Jagesha v. State of Maharashtra3. To apply Section 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 a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

(emphasis supplied)

28. In **Suresh and another vs State Of U.P. (2001) 3 SCC 673**, Hon'ble Supreme Court in para 24 of its judgment has held as under:

"24. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34, IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32, IPC. So the act mentioned in Section 34, IPC need not be an overt act, even an illegal

omission to do a certain act in a certain situation can amount to an act, e. g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34, IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34, IPC. "

(emphasis supplied)

29. In general, principle of criminal law is that the person who commits the offence be held guilty. Yet, section 34 of Indian Penal Code introduces joint liability. The essence of joint liability is in existence of a common intention connecting all the accused to the doing of a criminal act, in furtherance of such common intention. Upon existence of common intention being established, individual acts of t he principal offenders, in the actual occurrence, looses relevance. All participants who may act with that common intention would become equally liable for the offence committed. Common intention essentially is a state of mind. Therefore, it is very difficult to procure direct evidence to prove its existence. Hence, in majority of cases it has to be inferred from the overt or covert act, other relevant circumstances of the case and conduct of the accused in the totality of circumstances of the case. In this regard gainfully, para 12 of the judgment of apex court in the case of **Ramesh Singh @ Photti VS State Of A. P. AIR 2004 (SC) 4545**, is reads as under:

"12. To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Indian Penal Code. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to guilty. By introducing Section 34 in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act

is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases 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 by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some 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 this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted."

(emphasis supplied)

30. In **Nagaraja Vs. State of Karnataka (2008) 17 SCC 277**, the Supreme Court examined two factors considered to be necessary ingredients of Section 34 IPC. In that regard, it was observed as below:

*"**17.** We are not concerned herein as to whether the said iron rod was the weapon of assault. Having regard to the quality of evidence that the prosecution had led, in our opinion, it is difficult to come to the conclusion that all the accused persons had a common intention to commit the murder of the deceased.*

***18.** For invoking the provisions of Section 34 IPC, at least two factors must be established; (1) common intention, and (2) participation of the accused in the commission of an offence. For the aforementioned purpose although no overt act is required to be attributed to the individual accused but then before a person is convicted by applying the doctrine of vicarious liability not only his participation in the crime must be proved but presence of common intention must be established. It is true that for proving formation of common intention, direct evidence may not be available but then there cannot be any doubt whatsoever that to attract the said provision, prosecution is under a bounden duty to prove that the participants had shared a common intention. It is also well settled that only the presence of the accused by itself would not attract the provisions of Section 34 IPC. Other factors should also be taken into consideration for arriving at the said conclusion. The accused persons were not related to each other; they did not have any family connection; they have different vocations. It has not been established that they held any common animosity towards the deceased."*

(emphasis supplied)

31. From the law laid down in the above referred cases it can be deduced that evidence of exhortation is a weak piece of evidence. There is quite often a tendency to implicate some person, in addition to the actual assailant by ascribing to that person role of an exhortation to the assailant to assault the deceased by alleging his presence after accompanied with role of exhortation. Unless the evidence in this respect is clear, cogent and reliable, conviction may not be recorded against the person alleged to have exhorted the actual assailant, unless attending circumstances proven by the prosecution also establish either a covert or overt act or omission as may convince the Court as to existence of common intention.

32. To invoke Section 34 IPC two factors must be established : (i) common intention and (ii) participation of the accused in the commission of an offence. To fasten the liability u/s 34 IPC performance of an act or omission (whether overt or covert), is indispensable. If no such act or omission is done by a person, even if he has common intention (in his mind) with the others for the accomplishment of the crime, Section 34, IPC cannot be invoked to successfully convict that person. In other words, the accused who only keeps the common intention in his mind, but does not commit any act or omission, cannot be convicted with the aid of section 34, IPC. To ascertain common intention, totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the such intention to commit an offence of which he could be convicted.

33. In **Matadin etc. Vs. State of Maharashtra (1998) 7 SCC 216**, the accused Matadin was similarly charged with exhorting the main accused Ram Singh with use of words “Maaro Saale Ko”. Thereupon the main accused Ram Singh took out his knife and assaulted the victim. In that context, it was observed as below:

> *“9. However, the case of Matadin would appear to stand on a different footing. It was submitted that when he exhorted his fellows by saying “maro sale ko”, he did not intend that the deceased should be killed. It was submitted that there was no*

premeditation, no enmity and Matadin never intended to cause death of the deceased…..

…

11. The courts below have not found that the language which Matadin used exhorting his fellows was used in such a tone as to exhort them to kill Ashok or to cause grievous hurt to him by using dangerous weapons or means. When the words "maro sale ko" are used, it could mean "to beat" or even "to kill" a person. Though the witnesses have stated that these words were used by Matadin in an abusive way, but from that it could not be said that he exhorted his fellows to kill Ashok….."

(emphasis supplied)

34. In **State of Orissa Vs. Arjun Das Aggarwal (1999) 8 SCC 154**, the Supreme Court dealt with a similar question. There the accused was held guilty for murder-with the aid of common intention. Later, he was acquitted by the High Court as the only role assigned to him was-standing on the road, he instigated the assailants. In that case, it was held that:

"26. Regarding accused-respondent Arjun Das Agrawal we find from the evidence on record that this accused neither went inside the house of the deceased nor took any part in the commission of the murder. He only instigated by shouting at the other accused persons. There is nothing in evidence to show that due to his instigation more blows were given by the accused persons. Therefore, no inference can be drawn that this accused-respondent had the common intention of causing death of the deceased or that he actually participated in the criminal act. Therefore, the High Court rightly acquitted this accused."

(emphasis supplied)

35. Also, in of **Parshuram Singh v. State of Bihar (2002) 8 SCC 16**, the Sessions Court convicted all the 11 persons accused under Section 302 read with Section 149 (besides some other lesser offences). The High Court convicted them for the offence under Section 302 read with Section 34 IPC, although the High Court confirmed the conviction of the offences under Sections 147 and 148 etc. of the Indian Penal Code, 1860, also. After hearing the parties and going through the evidence as well as the reasoning given by the two courts for convicting the appellants, the Supreme Court held:

***"5.** Nonetheless, we have to evaluate the role played by A-1 Rameshwar Singh and A-4 Parshuram Singh in order to ascertain whether they would have entertained a common intention to murder the deceased. Neither of them had inflicted any injury on the deceased. A-1 Rameshwar Singh had a lathi with him*

and in spite of that he did not choose to give even a minor assault on the deceased. All that is said against him is that he ordered the killing of the deceased. It is not shown that A-1 had any particular reason for taking up the leadership of the gang. On the other hand the genesis of the quarrel was the dispute regarding the timber tree which stood on the boundary of the lands belonging to A-3 on the one side and the deceased on the other. For convicting a person merely on the basis of the oral statement made at the spot, the Court must have other surrounding circumstances to ensure the confidence that he made such an exhortation. If A-1 had really any intention to participate in the occurrence, much less any common intention to murder the deceased, it is difficult for us to conceive as to why he did not use the weapon which was handy with him then."

(emphasis supplied)

36. In **Vaijayanti v. State of Maharashtra (2005) 13 SCC 134**, the appellant, a lady, had been convicted for alleged commission of an offence under Section 302 read with Section 34 of the Penal Code, 1860, the Apex Court while acquitting the appellant held that:

> ***"16.*** *The High Court, therefore, in our opinion, was not correct in arriving at a finding that the appellant had shared the common intention with other accused for commission of the crime because she not only gave an exhortation and chased the deceased but also did not do anything to prevent the other accused persons from committing the crime. The last reasoning of the High Court, in our opinion, was misconceived. The High Court arrived at the conclusion that the appellant chased the accused for some time which would lead to an inference that the accused might not have chased the deceased all the way. The High Court was furthermore not correct in arriving at a finding that a case has been made out that common intention was developed on the spur of the moment. Apart from the fact that no such case had been out by the prosecution at the trial stage, the fact situation obtaining herein also does not lead to such inference.*
>
> *(emphasis supplied)*

37. The decision in the case of **State of Uttar Pradesh Vs. Farid Khan (2005) 9 Supreme Court Cases 103**, relied by the learned AGA rather than helping the prosecution story is found to be consistent to the principle discussed above. In that regard, we note that the Supreme Court discussed the issue as below:

> ***"7.*** *All the three respondents were found guilty by the Sessions Court for the offence of murder punishable under Section 302 read with Section 34. The evidence of the three eyewitnesses proves that A-1 Saghir, s/o Zakkan Khan stabbed on the chest of the deceased whereas A-2 Amir Ahmad and A-3 Farid Khan caused injuries on the back and legs of the deceased. The post-mortem report shows that the deceased Khurshid Mian sustained two injuries on the chest whereas the injuries on the right thigh above knee joint and the inner aspect of right ankle were very*

small in nature and these injuries must have been caused by A-2 Amir Ahmad and A-3 Farid Khan.

8. *Having regard to the nature of the involvement of A-2 Amir Ahmad and A-3 Farid Khan, it is difficult to believe that they shared a common intention to cause the death of Khurshid Mian. If at all, they committed an offence punishable only under Section 324 read with Section 34. Conviction of A-2 and A-3 for the offence of murder under Section 302 read with Section 34 IPC is set aside. After conviction by the Sessions Court and earlier as under-trials, these accused had been in jail for some period. The imprisonment undergone by them would be sufficient to meet the ends of justice for the offence under Section 324 read with Section 34 IPC."*

38. As discussed above, the only role assigned to the present appellant is of general exhortation, which is a weak piece of evidence as has been held by the Hon'ble Apex Court, in the case law cited above. On such a weak piece of evidence, the accused cannot be convicted for such a heinous offence on the test-beyond reasonable doubt. Accordingly, the conviction and sentence awarded by the trial court deserves to be set aside.

39. Accordingly, the appeal is allowed. The conviction and sentence awarded by the trial court vide order dated 20.10.1984 passed by Ist Additional Sessions Judge, Jhansi, in Session Trial No. 35 of 1984 (State Vs. Narendra Kumar & another), arising out of Case Crime No. 510 of 1983, under Sections 302/34 IPC, Police Station -Nawabad, District – Jhansi, is set aside. The appellant is acquitted from the charges levelled against him. The appellant is in jail. He be released forthwith, in case, he is not required in some other case. The appellant is directed to furnish bail bonds in compliance of Section 437-A Cr.P.C. to the satisfaction of the Court concerned within one month from today.

40. Copy of this judgment along with original record of Court below be transmitted to the Court concerned for necessary compliance. Compliance report be submitted to this Court at the earliest. Office is directed to keep the compliance report on record.

41. Shri Rajiv Lochan Shukla, learned Amicus Curiae assisted by Shri Shashank Pandey appearing on behalf of the appellant has rendered his valuable assistance to the Court. He be paid Rs. 25,000/- towards fee for the able assistance provided by him, in hearing of the present appeal.

Order Date :- August 8th, 2025
Prajapati RK

(Madan Pal Singh, J.)

I agree.

(Saumitra Dayal Singh, J.)