



2026:AHC:23799-DB

Reserved On :- 21.01.2026

Delivered On :- 04.02.2026

HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 810 of 2010

Subhash

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	: Ambrish Kumar Kashyap, H.C.Saxena, Mukesh Kumar Jha, N.K. Singh, Sukhvir Singh
Counsel for Respondent(s)	: Govt. Advocate

Heard Sri Sukhvir Singh, learned counsel for the appellant; Sri G.N. Kanaujia, learned A.G.A-Ist for State and perused the material on record.

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CRIMINAL APPEAL No. - 690 of 2010

Satish And AnotherAppellant(s)

Versus

State of U.P.Respondent(s)

Counsel for Appellant(s) : H.C.Saxena, N.K. Singh, Ray Sahab Yadav

Counsel for Respondent(s) : Govt. Advocate

Heard Sri Ray Sahab Yadav, learned counsel for the appellant; Sri G.N. Kanaujia, learned A.G.A-Ist for State and perused the material on record.

Court No. - 46

HON'BLE SIDDHARTH, J.

HON'BLE JAI KRISHNA UPADHYAY, J.

(Delivered By Hon'ble Siddharth, J.)

1. The above noted criminal appeals have been preferred against the judgment and order dated 29.01.2010 passed by Additional Sessions Judge, Court No. 1, Farrukhabad in S.T. No. 515 of 1992 (State vs. Banshi and others), convicting and sentencing the appellants under Section 302 IPC for life imprisonment and fine of Rs. 10,000/- each and in default of payment of fine to further undergo rigorous imprisonment of six months.

2. The prosecution case, as per the F.I.R dated 09.10.1990, is that at about 04:30 p.m., the informant was sitting at his door along with co-villagers, Babu Ram, Nanhe and Diwari Lal on 09.10.1990. Banshi and Ram Swaroop of his village had forcibly ploughed his grove and cut trees and the informant had tried to stop them but they did not relent. Due to aforesaid reason accused, Banshi son of Shankar, Satish son of Banshi armed with country made pistol; Subhash son of Banshi armed with licensed single barrel gun; Saroj son of Ram Sewak armed with licensed double barrel gun and Ram Sewak, Raja Ram and Ramveer sons of Bhagwan armed with *farsa* (axe), *bhala* (spear) and *lathi* (logs) came and attacked the informant side. At that time the son of informant, Vivek and Deepak and Ashok and Rajendra Sharma sons of Babu Ram and Deshraj son of Ram Prashad, came on the place of incident and were trying to save the informant. Then Subhash and Saroj fired from their guns and Banshi and Satish fired from country made pistols due to which the son of informant, Vivek Kumar, got injured. On the challenge being made by the persons around and their efforts to nab the accused, they ran away firing. Vivek Kumar, was admitted in Chhibramau Hospital in serious condition and F.I.R was lodged.

3. Initially the F.I.R was lodged on 09.10.1990 as Case Crime No. 456 of 1990 at 08:30 p.m., against 7 accused under Sections- 147, 148, 149, 307 IPC but later the injured, Vivek Kumar son of informant, died during treatment on 02.11.1990 at 03:25 a.m at Lala Lajpat Rai Hospital, Kanpur.

4. Before his death, the dying declaration of injured, Vivek Kumar, was recorded on 09.10.1990 by Tehsildar, Chhibramau, wherein he stated that accused, Subhash, fired on him on 09.10.1990 at about 04:30 p.m. He fell down after suffering the first gun shot injury, thereafter he does not know how many firings were made on him. He stated that he suffered pellet injuries on his body at number of places and Subhash son of Banshi is resident of his village.

5. After his death the investigating officer investigated the case and charge-sheet was submitted against all the seven accused under Sections- 147, 148, 149, 323, 324, 325, 506, 427, 504, 302, 307 IPC on 22.11.1990. The trial court framed charges against accused under Sections 148 and 302 IPC read with Section 149 IPC. The accused denied the charges and sought trial.

6. To prove the prosecution case, the prosecution examined P.W.-1, Kailash Narayan Sharma (informant); P.W.-2, Deshraj Sharma; P.W.-3, Dr. D.K. Dubey; P.W.-4, Dr. R.B. Singh; P.W.-5, Sub-Inspector, Ram Singh; P.W.-6, Sub-Inspector, Prempal Singh; P.W.-7, Devendra Dixit, Additional District Magistrate, Etah and P.W.-8, Retired Sub-Inspector, S.S. Ojha.

7. P.W.-1 stated before the court that prior to the incident in dispute the accused, Banshi and others had looted his jackfruits regarding which he had filed a complaint which was pending before IInd Additional Sessions Judge, Kannauj. When Vivek was murdered the accused, Banshi and others, had been acquitted in the aforesaid complaint case. On the same day, about one hour prior to the murder of Vivek Kumar, Bashhi and other accused had ploughed his field and felled green mango and jackfruit trees which were two years old. Verbal altercation took place regarding the felling of trees which were planted in the house of brother of informant. Thereafter the informant repeated contents of F.I.R in his statement. He further stated that the accused persons had colluded with the police and therefore he sent complaint to the Superintendent of Police by registered post and application to Additional District Magistrate which were filed and proved before the trial court.

8. P.W.-2, proved that he was sitting with P.W.-1 on the door of his house when the accused persons armed with weapons, described in the F.I.R and the statement of P.W.-1, came and started quarreling. Subhash and Saroj stated that let us finish the daily dispute and then Subhash, Satish, Saroj and Banshi, fired on Vivek and he fell down. The accused persons were tried to be nabbed but they ran away. Thereafter, Vivek was admitted in Chhibramau Hospital and from there taken to Hallet Hospital, Kanpur where he died after 20-22 days.

9. P.W.-3 proved that on 09.10.1990 he examined the injuries suffered by Vivek Kumar and prepared his report. Possibly injuries could have been caused by 04:30 p.m to Vivek Kumar on 09.10.1990 by fire arms.

10. P.W.-4, the autopsy doctor, proved the post-mortem report and ante-mortem injuries suffered by the deceased and stated that the cause of death of Vivek Kumar was shock and hemorrhage and rupture of liver.

11. P.W.-5 is a formal witness who proved the lodging of F.I.R and making of its G.D. entry. He further stated that G.D of this case has been weeded out.

12. P.W.-6, stated that on 09.10.1990 he was posted as Sub-Inspector at police station- Chhibramau and he conducted the investigation of this case. He recorded the statements of the witnesses, prepared a site plan. He recorded the statement of P.W.-1 on 11.11.1990 because he had gone to Kanpur in connection with treatment of his son. P.W.-1 informed that his son had died on 02.11.1990 in Hallet Hospital in Kanpur. He further proved that the implication under Section 307 IPC of the accused was changed to Section 302 IPC. He arrested accused, Satish and Saroj.

13. P.W.-7, proved that on 09.10.1990 he was posted as Tehsildar / Magistrate, District- Chhibramau and he recorded the dying declaration of Vivek Kumar as stated by him. After noting down his dying declaration, he read it over to him and got his thumb impression on the same which he proved before the court.

14. P.W.-8, Retired Sub-Inspector, S.S. Ojha, proved that he noted down the information of death of Vivek Kumar in G.D. No. 16 on 02.11.1990 at the Police Station- Chhibramau. Thereafter, he got the inquest proceedings of the dead body conducted and went to Hallet Hospital with Constable, Prem Kumar and got the formalities of post-mortem conducted. Accused, Banshi and Rajaram, died during the pendency of trial.

15. The statement of accused, Satish, Subhash, Saroj, Ram Saroj and Ramveer, were recorded under Section 313 Cr.P.C who stated that they have been falsely implicated in this case. The accused, Subhash, stated that the informant had filed a case against him and Satish under Sections- 395, 397 IPC wherein they have been acquitted and hence the informant had enmity with them and they have been falsely implicated in this case. Subhash also admitted the statement of Satish.

16. Subhash and Satish filed five documents in support of their defence case. Three documents of consolidation court and Form-23 were filed. F.I.R dated

29.09.1987 which was lodged by Deshraj against Om Prakash, Shri Krishna, Puran and Bhura, under Section 307 IPC was filed (photocopy). Another document regarding in the case of State vs. Ramveer and another, were filed regarding Case Crime No. 523 of 1990 under Sections- 307, 504, 506 IPC in the form of F.I.R and charge sheet. Accused, Satish, filed the copy of judgment dated 30.08.2005 passed in Sessions Trial No. 63 of 1990, State vs. Rampal, under Sections- 395 and 397 IPC wherein the accused were acquitted.

17. After hearing the rival submissions and going through the trial court and the judgment and order of trial court, we find that the trial court has acquitted three of the named accused, namely, Raja Ram (deceased), Ram Swaroop and Ramveer on the ground that they were assigned the weapons of *farsa*, *bhala*, *kanta* and *lathi* but the deceased was not found to have suffered any injury by the aforesaid weapons. Appellant, Subhash, in Criminal Appeal No. 810 of 2010 and appellants, Satish and Saroj in Criminal Appeal No. 690 of 2010 have been convicted and sentenced to life under Section 302 read with Section 34 IPC by the trial court as they were assigned fire arms.

18. From the evidence on record, the enmity between the parties was proved and the documents regarding previous litigation and implication of each other in criminal cases was proved which has been dealt by the trial court in sufficient detail.

19. We further find that the dying declaration of the deceased was recorded by P.W.-7, Tehsildar / Magistrate and in the dying declaration the deceased made allegation only against the appellant, Subhash. He did not named any other accused in his statement. We have found from the record that the dying declaration was recorded in the presence of doctor and he certified that Vivek Kumar, who was injured at that time was in a fit mental condition to get his dying declaration recorded.

20. The Apex Court in the case of Naeem vs. State of U.P., 2024 SCC Online SC 237 has held that dying declaration can be sole basis of conviction if it inspires the full confidence of the court and the deceased was in fit state of mind at the time of recording of his statement and it was not the result of tutoring, promptly or imagination.

21. Before proceedings further a look at the injury report of the deceased is

necessary. Vivek Kumar, was medically examined by P.W.-3 and following injuries were found on his body :-

(i) gun shot wound and entry of right hand, 15 in number, size 0.2 cm x 0.2 cm skin deep to muscle deep, no blackening and charring.

(ii) gun shot wound size 0.2 cm x 0.2 cm on front and outer aspect of right fire arm, skin of muscle deep three (3) in numbers. No blackening and charring.

(iii) gun shot wound on front of chest and abdomen and upper part of thigh, multiple in number size 0.2 cm x 0.2 cm of different depth.

(iv) gun shot wound multiple in number on left hand forearm, size 0.2 cm x 0.2 cm, skin deep to muscle deep, no charring.

Injury no. 3 was kept under observation and rest of the injuries were found to be simple in nature. All injuries were caused by fire arms. Duration of all injuries were found to be fresh.

22. A bare perusal of the above injury report shows that the deceased suffered four gun shot wounds and he suffered pellet injuries only and no bullet injuries were caused to him. The injuries were caused by pellets of same sizes of 0.2 cm and they appeared to have been caused by a single weapon. The deceased has also named single accused, namely, Subhash, as the author of the aforesaid injuries in his dying declaration. Out of the four pellet injuries, only injury no. 3 proved fatal for life for the deceased. The other three injuries were on non-vital parts of the deceased. Therefore, conviction of all the three appellants for causing the only fatal to the deceased does not appears to be justified.

23. The prosecution case was rendered doubtful when the three accused persons named hereinabove were exonerated, as the weapons attributed to them were not found to have been used in the commission of any offence against the deceased. It is not the prosecution case that, apart from the deceased, namely, Vivek Kumar, any other person sustained even a single injury, much less a *lathi* blow. The common intention attributed to them for coming the alleged offence was also not found to be proved.

24. A very important aspect of this case is that the investigating officer did not recorded the statement of the injured under Section 161 Cr.P.C when he was alive for about 22 days after suffering injuries, the conduct of the

investigating officer of not recording the statement of the injured while he was alive is an important issue which has affected the credibility of prosecution case.

25. Section 161 Cr.P.C. provides for the examination of witness by police. Sub Section (1) provides that any police officer making an investigation under this Chapter, may examine orally any person supposed to be acquainted with the facts and circumstances of the case and such person shall be bound to answer truly all questions relating to such case under Sub Section (2). Under Sub Section (3) the police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the same. Section 161 Cr.P.C. is extracted here-in-below:-

"161-Examination of witnesses by police:- (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3)The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

Provided that statement made under this sub-section may also be recorded by audio-video electronic means"

26. A Coordinate Bench of this Court, in the case of **Gopal Krishna versus State, AIR 1964 All 481**, has observed that if it is obvious that though the police is not bound to make a record of the statement of the witnesses under Section 161 as a matter of obligation, but it is their duty to do so, when the witness is a material witness for unfolding the prosecution story.

27. We find that had the investigating officer recorded the statement of injured before he died the role of other accused than Subhash could have

been ascertained.

28. The argument of the counsel for the appellant, Subhash, in Criminal Appeal No. 810 of 2010 that the defence of the appellant has been prejudiced because of non-recording of the statement of statement of deceased under Section 161 Cr.P.C is bereft of merit. It is settled law that the statement of the witness recorded under Section 161 Cr.P.C by the investigating officer can be used for purpose of contradicting the witnesses in cross examination as to his previous statement recorded by the investigating officer by drawing his attention to those parts of the statement which are used for contradicting him. However, in the present case, the injured died before his statement could be recorded in court and therefore no benefit of this argument and number of judgments cited by the learned counsel for the appellant in this regard will help him.

29. We find that the appellants, Satish and Saroj, have been convicted and sentenced in this case with the help of section 34 IPC only because of earlier enmity between the parties. The enmity is a double edged weapon and can be used to falsely implicate the accused too.

30. If common intention is proved but no overt act is attributed to the individual accused Section 34 IPC will be attracted as it involves vicarious liability, but when participation of accused in the crime is proved and common intention is absent. Section 34 IPC cannot be invoked. There is requirement of proving of pre-arranged plan and it pre-supposes prior concert i.e., prior meeting of minds. Common intention means pre-oriented plan and acting in pursuance of the same. It must exist prior to commission of act in a point of time. The burden of proving the commission of offence by more than two accused due to common intention is always on the prosecution. In this case the aforesaid burden was not discharged by the prosecution.

31. In the case of ***Mahboob Shah V. Emperor (1945)*** the Privy Council laid down the following principles relating to the application of Section 34 I.P.C. :-

"(i) The essence of liability under Section 34 is to be found in the existence of a common intention leading the accused to commit an offense in furtherance of such intention.

(ii) To connect several accused together under Section 34, it must be

shown that one of the accused committed an offense in furtherance of the common intention and only then liability for the crime may be imposed on any one of the persons in the same manner as if the acts were done by him alone.

(iii) Common intention pre-arranged plan and to convict the accused of an offense applying the section it should be proved that criminal act was done in concert according to the pre-arranged plan.

(iv) In most cases it is very difficult, if not impossible, to procure direct evidence to prove the intention of the person and it has to infer from the conduct of the person and other relevant circumstances of the case.

(v) The inference of a common intention as provided under Section 34 of the Indian Penal Code should never be reached unless there exist such compelling circumstances and such common intention is a necessary inference deductible from the circumstances of the case.

(vi) Care must be taken not to confuse same intention with common intention, even though the line separating the two is very thin, but yet they are two different concepts and for attaching liability under Section 34 of the Indian Penal Code, the common intention is a necessary pre-requisite along with committing an offense in furtherance of such common intention."

32. In the case of **Jai Bhagwan V/S State of Haryana 1999 AIR(SC) 1083**, the Apex Court held in Para 11:-

"11. 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 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 common intention is absent, Section 34 cannot be invoked. In every case it is not possible to have direct evidence of common intention. It has to be inferred from the facts and circumstances of each case."

33. In the case of **Krishnamurthy @ Gunodu and Others Vs. State of Karnataka 2022 0 Supreme(SC) 268** it was observed by the Apex Court in Para Nos. 18 and 19:-

"18. Section 34 IPC makes a co-perpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section 34 to

apply there should be common intention between the co-perpetrators, which means that there should be community of purpose and common design or pre-arranged plan. However, this does not mean that co-perpetrators should have engaged in any discussion, agreement or valuation. For Section 34 to apply, it is not necessary that the plan should be pre-arranged or hatched for a considerable time before the criminal act is performed. Common intention can be formed just a minute before the actual act happens. Common intention is necessarily a psychological fact as it requires prior meeting of minds. In such cases, direct evidence normally will not be available and in most cases, whether or not there exists a common intention has to be determined by drawing inference from the facts proved. This requires an inquiry into the antecedents, conduct of the co-participants or perpetrators at the time and after the occurrence. The manner in which the accused arrived, mounted the attack, nature and type of injuries inflicted, the weapon used, conduct or acts of the co-assailants/perpetrators, object and purpose behind the occurrence or the attack etc. are all relevant facts from which inference has to be drawn to arrive at a conclusion whether or not the ingredients of Section 34 IPC are satisfied. We must remember that Section 34 IPC comes into operation against the co-perpetrators because they have not committed the principal or main act, which is undertaken/performed or is attributed to the main culprit or perpetrator. Where an accused is the main or final perpetrator, resort to Section 34 IPC is not necessary as the said perpetrator is himself individually liable for having caused the injury/offence. A person is liable for his own acts. Section 34 or the principle of common intention is invoked to implicate and fasten joint liability on other co-participants. Further, the expression/term "criminal act" in Section 34 IPC refers to the physical act, which has been done by the co-perpetrators/participants as distinct from the effect, result or consequence. In other words, expression "criminal act" referred to in Section 34 IPC is different from "offence". For example, if A and B strike Lathi at X, the criminal act is of striking lathis, whereas the offence committed may be of murder, culpable homicide or simple or grievous injuries. The expression "common intention" should also not be confused with "intention" or "mens rea" as an essential ingredient of several offences under the IPC. Intention may be an ingredient of an offence and this is a personal matter. For some offences, mental intention is not a requirement but knowledge is sufficient and constitutes necessary mens rea. Section 34 IPC can be invoked for the said offence also [refer Afrahim Sheikh and Ors. (supra)]. Common intention is common design or common intent, which is akin to motive or object. It is the reason or purpose behind doing of all acts by the individual participant forming the

criminal act. In some cases, intention, which is ingredient of the offence, may be identical with the common intention of the co-perpetrators, but this is not mandatory.

19. Section 34 IPC also uses the expression "act in furtherance of common intention". Therefore, in each case when Section 34 is invoked, it is necessary to examine whether the criminal offence charged was done in furtherance of the common intention of the participator. If the criminal offence is distinctly remote and unconnected with the common intention, Section 34 would not be applicable. However, if the criminal offence done or performed was attributable or was primarily connected or was a known or reasonably possible outcome of the preconcert/contemporaneous engagement or a manifestation of the mutual consent for carrying out common purpose, it will fall within the scope and ambit of the act done in furtherance of common intention. Thus, the word "furtherance" propounds a wide scope but should not be expanded beyond the intent and purpose of the statute. Russell on Crime, (10th edition page 557), while examining the word "furtherance" had stated that it refers to "the action of helping forward" and "it indicates some kind of aid or assistance producing an effect in the future" and that "any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony." An act which is extraneous to the common intention or is done in opposition to it and is not required to be done at all for carrying out the common intention, cannot be said to be in furtherance of common intention."

34. In view of the above consideration, we are of the view that the witnesses of the prosecution only proved prior litigation between the parties, but not any pre-planning and meeting of minds to prove the common intention of all accused to commit the alleged crime in furtherance of common intention.

35. Therefore, we are of the view that the appellants, Satish and Saroj, in Criminal Appeal No. 690 of 2010 are entitled to benefit of doubt since the prosecution has not proved their common intention in causing the offence in dispute. The prosecution has not proved its case beyond reasonable doubt against them. Because of old enmity and suspicion, they appear to have been implicated along with three other co-accused, who have already been acquitted by the trial court, who were also implicated with the help of sentence 34 IPC in this case.

36. However, the conviction and sentence of appellant, Subhash in Criminal Appeal No. 810 of 2010 is upheld. Appellants, Satish and Saroj, are on bail. Their bail bonds are cancelled and sureties are discharged. They need no

surrender.

37. The *Criminal Appeal No. 810 of 2010 is dismissed* while *Criminal Appeal No. 690 of 2010 is allowed*.

38. Let the trial court record be returned along with copy of this judgment to the trial court.

February 4, 2026

Rohit

(Jai Krishna Upadhyay,J.) (Siddharth,J.)