

**(2025) 5 ILRA 93
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.05.2025**

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Criminal Appeal No. 495 of 1996

**Sarvesh Kumar Dubey & Anr. ...Appellants
Versus
State of U.P. ...Respondent**

Counsel for the Appellants:

S.N. Shukla, Adil Aziz Khan, Gaurav Misra

Counsel for the Respondent:

Govt. Advocate

A. Criminal Law - Criminal Procedure Code,1973-Section 374(2)-Indian Penal Code,1860-Sections 324 /34, 307/34, 504 & 109-Challenge to –Conviction-The victim was allegedly attacked by the appellants-appellant had demanded Rs. 100- from the victim 10 days prior and had threatened consequences if unpaid, on the incident day, one appellant caught hold of the victim and instigated the other appellant to fire at him-FIR was lodged and victim was medically examined –the fire arm injury was confirmed-PW-1 (Victim) supported the prosecution story and withstood cross-examination-PW-2 (Doctor) confirmed firearm injury-PW3(I.O.) corroborated procedural evidence and filed chargesheet-The court upheld that one appellant namely Sarvesh not only instigated but also actively assisted in the crime by catching hold of the victim-Common intention and abetment were clearly established-The injured witnesses testimony holds high evidentiary value and was found trustworthy even under cross-examination-Conviction can be sustained on the sole testimony of an injured or credible witness-The Court relied on Palakom Abdul Rahiman Case and other

decisions to emphasize the rule of joint liability and common intention u/s 34 IPC.(Para 1 to 23)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Palakom Abdul Rahiman Vs S.H.O., Badiadka P.S., Ker. & anr. (2019) 4 SCC 795
2. St. of Punj. Vs Hakam Singh (2005) 7 SCC 408
3. U.P. Vs Virendra Kr. & ors. , MANU/UP/0911/2008
4. Jodhraj Singh Vs St. of Raj. (2007) 15 SCC 294

(Delivered by Hon'ble Rajnish Kumar, J.)

1. Heard, Ms. Megha Sachan, Advocate holding brief of Shri Adil Aziz Khan, learned counsel for the appellant and Shri Badrul Hasan, learned Additional Government Advocate (here-in-after referred as AGA).

2. This Criminal Appeal under Section 374(2) of Code of Criminal Procedure Code (here-in-after referred as CrPC) has been filed for setting aside the conviction and sentence awarded by the court of IIIrd Additional Sessions Judge, Pratapgarh by means of the judgment and order dated 28.10.1996 passed in Session Trial No. 44 of 1991; State of Uttar Pradesh versus Sarvesh Kumar Dubey and another, under Section 307/34, 504 and 109 of Indian Penal Code (here-in-after referred as I.P.C.), Police Station Lalganj, District Pratapgarh, by means of which the appellant no. 1-Sarvesh Kumar Dubey has been convicted under Section 324 read with Sections 34 and 109 I.P.C. and the appellant no.2-Rajiv Kumar Mishra has been convicted under Section 324 I.P.C.

and they have been sentenced with a punishment of 2 and 1/2 years rigorous imprisonment and Rs. 500 fine and in default of payment of fine, to undergo one month rigorous imprisonment.

3. The appellant no. 2-Rajiv Kumar Mishra died during pendency of the appeal, therefore, the appeal in reference to him had abated by means of the order dated 14.03.2013. Now this appeal survives only by the appellant no. 1-Sarvesh Kumar Dubey.

4. Learned counsel for the appellant submits that the appellant has wrongly and illegally been convicted in the case. As per prosecution itself, the role of the appellant was of instigation only and he has stated in his statement under Section 313 Cr.P.C. that he has been implicated on account of political rivalry, but without considering it, he has been convicted under Section 324 I.P.C. Thus, the impugned judgment and order passed by the learned trial court is not sustainable and liable to be set aside.

5. Per Contra, learned AGA submits that the impugned judgment and order has rightly been passed in accordance with law for the reason that the role of the appellant is not only of instigation but he also caught hold of the victim and raised alarm and asked the other accused to fire and kill him, therefore, he has rightly been convicted under Section 324 I.P.C. read with Sections 34 and 109 I.P.C. Thus, the appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed.

6. I have considered the submissions of learned counsel for the parties and perused the records.

7. As per prosecution story, Pradeep Kumar Tiwari son of Radhey Shyam

Tiwari, resident of Hadirahi Police Station Lalganj, District Pratapgarh submitted a handwritten application dated 16.12.1988 to the Kotwal Sahib of Kotwali Lalganj, District Pratapgarh stating therein that Sarvesh Kumar Dubey son of Ram Manohar Dubey, resident of Kothar Mangole had demanded Rs. 100 from him 10 days ago and when he did not pay the amount to him, he was displeased with him and said if you will not pay, it will cost you dear. On the said date at 5 P.M., he was going to Sagra Bazar from his house, when Sarvesh Kumar Dubey and Rajiv Kumar Mishra, resident of Paharpur (Dakinahan Ka Purwa), Police Station Sangipur, District Pratapgarh met him and Sarvesh Kumar Dubey due to aforesaid displeasure and enmity abused him and asked co-accused Rajiv Kumar Mishra to fire and to kill him. He raised alarm. On raising alarm, Rameshwar Prasad Tiwari son of Vishwa Nath Tiwari, Harish Chandra Tiwari son of Munnu Tiwari and others reached there and chased Rajiv and Sarvesh but both of them fled away. It was further alleged that he has received fire arm injury of 'Katta' in his abdomen. On the basis of said written complaint, the First Information Report (here-in-after referred as "FIR") was lodged, which is Exhibit Ka-3 and the case was registered under Sections 307, 504 of I.P.C. in Crime No. 396 of 1988 against the aforesaid accused(s). The complainant was sent for medical examination. He was examined by Superintendent/In-Charge, up-graded P.H.C. Lalganj on 18.12.1888 at 11:00 P.M. and according to Exhibit Ka-2, the following injuries were found on his body:-

“Gun shot wound of entry 0.5cmx0.5cmx1cm deep as far easily probed going downwards and outwards on left side Abdomen lower part 6 cm out

from umbilicus at 40' Clock position abraded colter around the wound is present. Oozing of blood present. Tattooing present.”

8. During investigation, memo of taking into possession of coat, baniyan, lungi and bushirt was prepared, which is Exhibit Ka-5. Site plan was prepared by the Investigating Officer on 22.02.1988, which is Exhibit-Ka-6. After completion of investigation, chargesheet dated 13.02.1989 under Sections 307, 504 I.P.C. was filed as Exhibit Ka-7 against the aforesaid two accused(s).

9. The case was committed to the court of session. Therefore, the charge was framed against the surviving appellant-Sarvesh Kumar Dubey under Section 307/34, 504 and 109 I.P.C. and against the deceased appellant-Rajiv Kumar Mishra under Section 307 I.P.C. on 27.04.1991. The appellants denied the charge and claimed to be tried.

10. Prosecution examined Pradeep Kumar Tiwari as P.W. 1, Dr. P.N. Singh as P.W. 2 and Investigating Officer Rajendra Prasad Singh as P.W. 3. After completion of prosecution evidence, statement of accused under Section 313 Cr.P.C. was recorded. Accused Sarvesh Kumar Dubey denied the charge and said that uncle of Pradeep Kumar Tiwari was candidate for Gram Pradhan Election and he was with rival candidate and due to this enmity, he has been falsely implicated. The deceased appellant-Rajiv Kumar Mishra also denied the charge and stated that due to election enmity, he has been falsely implicated. Thereafter, after hearing learned counsel for the parties, the appellants were convicted and sentenced as disclosed above. Being aggrieved with the same the instant criminal appeal has been filed.

11. P.W. 1-Pradeep Kumar Tiwari, who is a witness of fact and injured person stated that both the accused are 'Badmas Type' persons. On 16.12.1988, he was going from Sagra Bazar to his house, when he reached north to Sagra Bagh near Lal Gupta Khet, then accused(s) Sarvesh and Rajiv met him; accused Sarvesh asked have you brought the money, then he said he had no money and he will not pay. When this talk was going on, he stopped Sarvesh to not abuse him, then he caught hold him from back and raised alarm; then Sarvesh exhorted to fire as he does not pay the money, "Mar do sale ko goli paisa mangne par nahin deta hai." On his instigation, the deceased appellant-Rajiv Kumar Mishra took out 'Katta' from pocket of his pant and fired. He received 'Katta' injury in left side of his abdomen and fell down. Thereafter, the accused persons were running away then on raising alarm, Rameshwar Prasad, Harish Chandra and other village people reached there, and they had taken him to a doctor who advised for lodging of F.I.R., then his father, his grandfather and other people took him to the police station where he filed FIR. He was taken to hospital by police for medical examination and on the next day, X-Ray was made in District Hospital, Pratapgarh. He further stated that when accused(s) demanded Rs. 100/- from him, he told them that he had got no money, then he asked him to take money from others and if you will not pay, it will cost him dear. Since he had not paid money, therefore, he was attacked. The witness was cross-examined on three dates, in which also he supported the prosecution story.

12. In cross-examination, P.W. 1 stated that he was wearing Tahmad, baniyan, shirt and coat. When he left his house it was dark and it was moonlight. He had gone Sagra for medicine for his child. He had purchased medicines from Vinaya

Medical Stores and reached Sagra Bazar at about 07:15. He further stated that in Sagra Bazar, Rajiv demanded money from him. At that time, there was no other person. He was sitting in the shop of Rajiv Kumar Mishra, when Sarvesh Kumar called him and as he reached near him, Rajiv demanded Rs. 100 at around 11 and 11:30 but he replied from where he will pay. He got no money. Then he said if you will not pay money, it will cost you dear. It took only one minute in this conversation. When Sarvesh caught hold him from back and exhorted 'Mar do sale ko aesa mauka phir nahin milega', then he raised alarm and people of abadi reached there because he had become unconscious. The attack was made upon him in the field at a distance of two hand from the chak-road. He gained conscious after one hour. He can not say what happened in between this one hour. He gained conscious when he reached Sagra. He prepared FIR at Lalganj Chauraha, which is at a little distance from police station. He went to police station as he thought that it is necessary to file FIR. Thus, P.W. 1, who is injured, has proved the charge against the accused appellant and nothing can be extracted from him in cross-examination, which may raise any doubt about his testimony.

13. P.W. 2-Dr. P. N. Singh, Superintendent of up-graded P.H.C. Lalganj has proved the medical examination report. He stated that on 16.12.1988 at 11 P.M., he conducted the medical examination of Pradeep Kumar Tiwari brought by Constable Ram Shanka Yadav. He further stated that injury, at the time of examination, was fresh and it was of fire arm and might have been caused by 'Katta' on 16.12.1988. He further stated that it might be caused by a distance of four feet, from round is made. X-Ray was

performed by him in the P.H.C. in the X-Ray machine, which was available to him. No 'chharra' was found in it. He further stated that it is not necessary that by close firing 'chharra' could be inside. Thus, P.W. 2 proved the injuries suffered by the complainant i.e. P.W. 1. in the incident.

14. P.W. 3- Rajendra Prasad Singh, Sation Officer, Jalalpur, District Jaunpur has proved chick report, chargesheet and site plan as well as the recovery memo. Thus, the incident as well as injury suffered by the complainant in the said incident has been proved. Accordingly, the charge is proved.

15. In view of above, charge on the appellant no. 1-Sarvesh Kumar Dubey is not only of instigation for fire but he also committed an overt act by caught hold of the complainant, therefore, the appellant has rightly been convicted under Section 324 read with Sections 34 and 109 I.P.C. and punished with the sentence provided under Section 324 I.P.C.

16. Section 324 I.P.C. provides voluntary causing hurt by dangerous weapon or means and punishment for it. Section 109 I.P.C. provides that whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence. The explanation appended to Section 109 I.P.C. provides that an act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment. Section 34 I.P.C. provides that when a criminal act is done

by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

17. In view of above, since the offence under Section 324 I.P.C. in the case in hand has been committed in furtherance of common intention on the instigation/abetment by the appellant, who not only instigated/abetted the other accused but also assisted him by his overt act of catching hold of the informant/injured, therefore, he was also liable to be punished for the same offence. Thus, he also has rightly been convicted and the sentence has also rightly been awarded to him. This Court does not find any illegality or error in the findings recorded by the learned trial court, after considering the evidence of P.W. 1, P.W. 2 and P.W. 3 and on the basis of the material on record, even if there are minor discrepancies in their evidence which is possibly due to time lapse in incident and evidence. This Court does not find any illegality or error in the impugned judgment and order, which may call for any interference by this Court.

18. The Hon'ble Supreme Court, in the case of **Palakom Abdul Rahiman vs. Station House Officer, Badiadka Police Station, Kerala and another; (2019) 4 SCC 795**, held that true purport of Section 34 I.P.C. is that if two or more persons intentionally do an act jointly, the position of law is just the same as if each of them have done it individually. The relevant paragraphs 22 and 23 are extracted hereinbelow:-

"22. The true purport of Section 34 IPC is that if two or more persons intentionally do an act jointly, the position

of law is just the same as if each of them have done it individually, The process of law is intended to meet a situation in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention as held by this Court in Chinta Pulla Reddy v. State of A.P.³ and Girija Shankar v. State of U.P.⁴

23. The application of principles enunciated in Section 34 IPC, when an accused is convicted under Section 302 read with Section 34 IPC, in law means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. As was observed by this Court in Chinta Pulla Reddy case³, Section 34 is applicable even if no injury has been caused by the particular accused himself. Applicability of Section 34 has been considered by this Court in Girija Shankar case⁴ as follows: (SCC p. 797. para 9)

"9. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the

accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them had done it individually by himself. As observed in Ashok Kumar v. State of Punjab, the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision."

19. Similar view has been taken by the Hon'ble Supreme Court in the case of **State of Punjab vs. Hakam Singh; (2005) 7 SCC 408**.

20. A Division Bench of this Court, in the case of **State of Uttar Pradesh vs. Virendra Kumar and others; MANU/UP/0911/2008**, held that it is not the presence or absence of witnesses, which should be the determining factor. The court has to see whether the evidence produced by the prosecution is credible and worthy of reliance. The attitude of the trial court in suspecting the prosecution version, merely because, the independent witnesses were not produced, is unwarranted and unjustified. The court should examine the evidence which has been produced, and draw appropriate conclusion. It has further been held that while evaluating the evidence by the trial court, resort must be made to the 'coherence Theory of Law' as propounded by A. Peczevik in his

book on 'Law and Reason', University of Lund Sweden with a preface by J.C. Hage.

21. The Hon'ble Supreme Court, in the case of **Jodhraj Singh vs. State of Rajasthan; (2007) 15 SCC 294**, has held that conviction can even be based on testimony of a single witness and if upon consideration of the evidence and material on record, it is found that the common intention on the part of the appellant exists, he can also be convicted for the same offence. The relevant paragraphs 14 to 17 are extracted hereinbelow:-

"14. It is trite that only because a witness, for one reason or the other, has, to some extent, resiled from his earlier statement by itself may not be sufficient to discard the prosecution case in its entirety. The courts even in such a situation are not powerless. Keeping in view the materials available on record, it is permissible for a court of law to rely upon a part of the testimony of the witness who has been declared hostile.

15. The appellant was seen in the company of the other accused. Sufficient materials have been brought on records to establish that he participated in commission of the offence. All the accused persons came together in a tempo. They were armed with various weapons. They assaulted the deceased. The learned Sessions Judge as also the High Court found existence of a motive for commission of the offence. They left the place of occurrence together. It may be that the ultimate cause of death was found to be an assault by stone on the head of the deceased which is said to be the act of Bhupendra but only by reason thereof existence of the common intention on the part of the appellant cannot be said to be absent.

16. Reliance by the learned counsel for the appellant on Mithu Singh v.

*State of Punjab*⁴ [(2001) 4 SCC 193] is misplaced. Therein, no overt act was attributed to the appellant therein. The court found that no evidence was brought on records as against him, save and except ipse dixit on the part of the witnesses. This Court, in the aforementioned fact situation, opined:

"6. To substantiate a charge under Section 302 with the aid of Section 34 it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of both. Common intention has to be distinguished from same or similar intention. It is true that it is difficult, if not impossible, to collect and produce direct evidence in proof of the intention of the accused and mostly an inference as to intention shall have to be drawn from the acts or conduct of the accused or other relevant circumstances, as available. An inference as to common intention shall not be readily drawn; the culpable liability can arise only if such inference can be drawn with a certain degree of assurance. At the worst Mithu Singh, accused-appellant, knew that his co-accused Bharpur Singh was armed with a pistol. The knowledge of previous enmity existing between Bharpur Singh and the deceased can also be attributed to Mithu Singh. But there is nothing available on record to draw an inference that the co-accused Bharpur Singh had gone to the house of the deceased with the intention of causing her death and such intention was known to Mithu Singh, much less shared by him. Simply because Mithu Singh was himself armed with a pistol would not necessarily lead to an inference that he had also reached the house of the deceased or had accompanied the co-accused Bharpur Singh with the intention of causing the

death of Gurdial Kaur. In our opinion, an inference as to Mithu Singh, accused-appellant having shared with Bharpur Singh a common intention of causing the murder of the deceased Gurdial Kaur cannot be drawn. His conviction under Sections 302/34 IPC cannot be sustained and must be set aside."

Such is not the position here.

17. In *Vaijayanti Vs. State of Maharashtra*⁵, [(2005) 13 SCC 134], as regards formation of common intention, this Court opined: (SCC p. 138, para 9)

"Section 34 of the Indian Penal Code envisages that "when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons, is liable for that act, in the same manner as if it were done by him alone". The underlying principle behind the said provision is joint liability of persons in doing of a criminal act which must have found in the existence of common intention of enmity in the acts in committing the criminal act in furtherance thereof. The law in this behalf is no longer *res integra*. There need not be a positive overt act on the part of the person concerned. Even an omission on his part to do something may attract the said provision. But it is beyond any cavil of doubt that the question must be answered having regard to the fact situation obtaining in each case."

22. In view of above and considering the overall facts and circumstances of the case and the evidence adduced, this Court does not find any illegality or error in the impugned judgment and order, which has been passed after considering and evaluating the evidence and material on record in accordance with law by reasoned and speaking order. The appeal has been filed on misconceived and baseless grounds.

23. The appeal is, accordingly, dismissed.

(2025) 5 ILRA 100

**APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2025**

BEFORE

**THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MADAN PAL SINGH, J.**

Criminal Appeal No. 538 of 2021
Connected with
Criminal Appeal No. 461 of 2021

Ramdev **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:
Om Narayan Pandey, Vindesh Kumar

Counsel for the Respondent:
G.A., Sandeep Kumar Dubey

(A) Criminal Law - Circumstantial evidence - Last seen theory - Indian Penal Code, 1860 - Sections 302, 201 & 120-B - Admissibility of secondary evidence (photostat copy) - Indian Evidence Act, 1872 - Sections 63 & 65 - Forensic Science Laboratory report - Chain of custody - Reliability of family members as last seen witnesses - Strong suspicion cannot take the place of proof - Chain of circumstantial evidence must be complete - Prosecution must prove its case beyond reasonable doubt - Mere suspicion or incomplete chain of events is insufficient for conviction - last seen theory not sufficient where significant time gap exists and independent corroboration is absent. (Paras - 28, 31, 35-39, 44-62, 55, 58, 61, 62)

Deceased last allegedly seen with accused-appellants - delay in lodging FIR - prosecution rested on circumstantial evidence and "last seen" theory - recovery memo of weapon

exhibited as secondary evidence - forensic evidence questioned - conviction by trial court - appeal against conviction. (Paras - 3-25)

HELD: - Prosecution could not prove its case against accused-appellants beyond reasonable doubt. Trial court erred in reliance on "last seen" testimonies and incomplete chain of circumstances. Conviction based on suspicion unsustainable. Impugned conviction and sentence set aside. Accused Ram Dev to be released forthwith unless wanted in any other case. Accused Laddan, on bail, not required to surrender. Bail bond discharged. (Paras - 62-65)

Appeals allowed. (E-7)

List of Cases cited:

1. Kaliya Vs St. of M.P., (2013) 10 SCC 758
2. St. of Goa Vs Pandu Rang Mohite , AIR 2009 SC 1066
3. Sharad Birdhichand Sarada Vs. St. of Maha., (1984) 4 SCC 116

(Delivered by Hon'ble Madan Pal Singh, J.)

Preliminary

1. Both the criminal appeals are directed against the impugned judgment and order dated 7th December, 2020 passed by the Additional Sessions Judge/POCSO Act, Court No.43, Shahjahanpur in Sessions Trial No. 487 of 2011 (State Vs. Laddan and Another) under Sections 302, 201 and 120-B I.P.C. arising out of Case Crime No. 107 of 2011, Police Station-Jalalabad, District-Shahjahanpur, whereby accused-appellants Ram Dev and Laddan have been convicted for the offence under Section 302/34 and 201 of I.P.C. and have been sentenced to rigorous imprisonment for life along with Rs.20,000/- fine for committing the offence under Section 302/34 I.P.C.; in default of payment of fine to further undergo three months additional