
(2018) 01 DEL CK 0408

In the Delhi High Court

Case No : Criminal Appeal No. 86 Of 2013

Dil Bahar Thr. His Parokar Ajmeri Begum

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 17-01-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 397, 394, 411
Code Of Criminal Procedure, 1973 — Section 428

Citation : (2018) 01 DEL CK 0408

Hon'ble Judges : Vipin Sanghi, J;P.S.Teji, J

Bench : Division Bench

Advocate : J.M. Akbar, Inderjeet Sidhu, Aashaa Tiwari

Final Decision : Disposed Of

Judgement

Vipin Sanghi, J

1. The appellant stands convicted for the offence punishable under Section 302/394/34 IPC in addition to the offence punishable under Section 397 IPC and Section 411 IPC vide judgment dated 09.11.2012 passed by the learned ASJ-FTC (Central) Tis Hazari Courts in SC No.01/2010 arising out of FIR 156/2009 registered at PS Old Delhi Railway Station. He has been sentenced vide order dated 23.11.2012 as follows:

"i) For offence punishable under Section 302 IPC, the above named convict is sentenced to Rigorous Imprisonment for life in addition to payment of fine of Rs. 10000/ in default whereof, he shall undergo Simple Imprisonment for 2 years.

ii) For offence punishable under Section 394 IPC, the above named convict is sentenced to undergo Rigorous Imprisonment for 10 years in addition to payment of fine of Rs.5000/ in default whereof, he shall undergo Simple Imprisonment for one year.

iii) For offence punishable under Section 397 IPC, the above named convict is

sentenced to undergo Rigorous Imprisonment for 07 years.

iv) For offence punishable under Section 411 IPC, the above named convict is sentenced to undergo Rigorous Imprisonment for 03 years.

All the sentences shall run concurrently. The convict shall be entitled to benefit of Section 428CrPC."

2. The case of the prosecution, as noticed by the Trial Court, and which is borne out from the charge sheet is that on 05.11.09 at 12.30 AM a call was received from Duty Constable deputed at Aruna Asaf Ali Hospital at PS Old Delhi Railway Station (ODRS) vide DD No. 2A to the effect that one Rakesh Kumar aged 27 years, who had been admitted by Ct. Pawan Kumar (PW-13) has expired at 12.31 AM. Another call was received from Duty Ct. AAA Hospital vide DD No. 3A to the effect that one Rajinder Singh has been admitted in the hospital by Ct. Pawan Kumar. Both DD entries were marked to SI Rajinder Dabas who reached the said hospital and obtained the MLC of Rakesh Kumar wherein the doctor had mentioned history of stab injury in the train, and that the patient was brought dead. As per MLC of Rajinder Singh, doctor had mentioned stab injury in the train and patient was stated to be fit for statement.

3. SI Rajinder Dabas (PW-15) recorded statement of complainant i.e. injured Rajender who stated that on 04.11.09, he took Phus Phus Express from Muradabad at 4.15 PM for Delhi and on his way his friend, i.e. deceased Rakesh also boarded the same train from Kafar Pur. They both were going to Bangalore for recruitment in Army and were to take the train for Bangalore from Nizamuddin Railway Station, Delhi. They got down at Ghaziabad Station and bought the ticket for Nizamuddin Station and at about 10.45 PM they took EMU Shuttle train from Ghaziabad. At about 11.30 PM when the train had stopped just before Yamuna Bridge, two boys aged about 20 to 25 years whipped out their knives. Complainant further alleged that one of the boys took out his mobile make 'Fly' from his shirt's front pocket at knife point and also took out his purse of black colour from the back pocket of his pant containing Rs.3000/- along with other documents.

4. When the complainant requested the boys to return the SIM card, one of the boys abused him and stabbed him in the right thigh. Complainant Rajinder Singh also alleged that the other boy pointed a knife at Rakesh Kumar and took out the mobile phone of Rakesh from his shirt and also asked him to hand over his purse, which Rakesh refused to do. Then the boy who stabbed the complainant told the other boy to 'stab him otherwise he will not give the purse'. Upon this, the said other boy stabbed Rakesh in the stomach and took out the purse. Thereafter, both the boys got down from the train and ran away. When train reached at platform No. 12, one Home guard Ct. Pawan Kumar met them and took them to AAA Hospital in a TSR where Rakesh was declared 'brought dead'. The complainant stated that he can identify both the boys who had stabbed him and Rakesh and looted their mobile phones and purse.

5. On the basis of said statement of Rajinder Singh, the case in hand was registered. During the course of investigation, SI Rajinder Dabas seized the clothes of injured Rakesh (since deceased) and blood sample of the deceased. Investigation was later transferred to Insp. Bharat Singh, SHO PS ODRS. IO got conducted post-mortem and seized the blood sample given to him by autopsy surgeon and also prepared rough site plan at the pointing out of injured Rajinder Singh.

6. During the course of investigation, IMEI numbers of the looted mobile phones were obtained as 356853030037586 of mobile No. 9917593978 of injured Rajinder Singh, and 355727023536674 of mobile No. 9759824464 of deceased Rakesh. The IMEI numbers were put on search and it was revealed that one mobile No. 9873084750 is running on IMEI No. 356853030037580 of injured Rajinder. Ownership of 9873084750 was obtained from Vodafone as of one Jitender (PW-4) S/o Om Prakash R/o T-43, T huts, Chander Puri, Kailash Nagar, Delhi. One other mobile No. 9910677863 was found running on the IMEI No. 355727023536670 of deceased Rakesh. Ownership of 9910677863 was obtained from Airtel as of one Attaullah (PW-3) S/o Safiullah R/o 2797, Gali No. 4, Kailash Nagar, Delhi.

7. The aforesaid Jitender was interrogated and he revealed that on 06.11.09 he had bought one mobile phone of coffee colour make Fly for Rs. 1500/ from one Anees S/o Mohd. Rahis, who told him that he will give the papers later and when Anees did not give him papers of mobile phone, he returned the phone to Anees on 14.11.09. He also produced his SIM card which was seized and his statement was recorded.

8. Attaullah was also interrogated and he revealed that on 14.11.09 he had used one mobile phone of black colour make "Nokia-1680" given to him by one Anees. However, he returned the phone in the evening of 14.11.09 since Anees failed to produce any document pertaining to the said mobile phone. He used his SIM No. 899110090714981407 H2 in that mobile phone and his mobile number was 9910677863. Attaullah produced his SIM card and same was seized and his statement was recorded.

9. On 20.11.09 accused Mohd. Anees and Dil Bahar were apprehended and one mobile phone make "Nokia-1680" black colour without SIM card, bearing IMEI No. 355727023536674 was recovered from the possession of accused Dil Bahar. He disclosed that he had looted this phone from two persons after stabbing one of them on the night of 4/5.11.09 from a train.

10. One mobile phone make "Fly" model O-8200 coffee colour without SIM card bearing IMEI No. 356853030037586 was recovered from possession of accused Mohd. Anees. He also disclosed that he had looted this phone from two persons on the night of 4/5.11.09 from a train. Both the recovered phones were seized and accused Dil Bahar and Mohd. Anees were arrested. Their detailed disclosure statements were recorded. They also named one Rashid @ Shakir as one of their

associate, stating that he was with them on 04.11.09. Both the accused persons identified the place of occurrence. Accused Dil Bahar refused to participate in the TIP proceedings.

11. During the course of investigation, accused Rashid @ Shakir was arrested on 03.12.09. At his instance one black purse of raxine on which 'Woodland' was written was recovered from the bushes near the place of occurrence. Complainant Rajinder Singh correctly identified accused Rashid during the TIP proceedings.

12. The accused Mohd. Anees was declared juvenile and was directed to be produced before the concerned Juvenile Board for trial in accordance with law. The appellant was, however, found to be above 18 years of age at the time of commission of the offence. The appellant was charged for offences punishable under Section 302/34 IPC, 394/397 IPC and 411 IPC for having been found in possession of stolen mobile phone, namely, Nokia 1680 belonging to the deceased Rakesh. Accused Mohd. Anees was charged for offence punishable under Section 411 IPC for having been found in possession of mobile phone belonging to complainant Rajinder Singh. Both the accused pleaded not guilty and claimed trial when the aforesaid charges were read over and explained to them.

13. While the trial was in progress, Mohd. Anees pleaded guilty for the offence punishable under Section 411 IPC and on the basis of the evidence led on record against him, he was convicted for offence punishable under Section 411 IPC vide judgment dated 02.02.2012. Accordingly, the trial proceeded only in respect of the appellant Dil Bahar.

14. The prosecution examined several witnesses - the most important being Rajender Singh, the eye witness who was examined as PW-1. He deposed that on 04.11.2009, he boarded passenger train namely 'phus phus express' for Delhi from Moradabad, UP. He also deposed that he had to catch another train to Bangalore from Delhi i.e. from Nizamuddin Railway Station. His friend Rakesh was also accompanying him. Both of them got down at Ghaziabad Railway Station for boarding a EMU train for reaching Nizamuddin Railway Station as they came to know that 'phus phus express' was not going to Nizamuddin Railway Station. The complainant further deposed that they boarded EMU Train from Ghaziabad at about 10:45 PM and when the train reached near old Yamuna Bridge, it stopped there, and when the train had halted there, two boys aged about 20-25 years old entered in the compartment and both of them took out knives and both of them asked them to handover whatever they were carrying by brandishing their knives. One of those boys had taken out some papers and his mobile phone make 'FLY' from the front pocket of his shirt and thereafter the same boy had taken out his wallet from the pocket of his pant. He further deposed that when he requested the said boy to handover the sim card of his mobile phone, the said boy stabbed him below his waist on the right side, while the second boy had taken out make 'NOKIA 1680' and some papers from the

front pocket of the shirt of the deceased. He further deposed that when this boy tried to take out the wallet of his friend Rakesh from the pocket of his pant, he resisted. At this, the boy who had taken his mobile and wallet told him "yeh aise nahien dega. Maar iske chaaku." At this, the said boy stabbed his friend Rakesh in his stomach and his wallet was taken out. After robbing them, both the boys fled away. This witness further deposed that when the train reached at Old Delhi Railway Station, he informed the incident to a policeman who was present at the platform. On seeing the condition of his friend, he along with the said policeman took him to Aruna Asaf Ali Hospital in a TSR where he was declared brought dead. The statement of this witness was recorded by the police in the Police Station vide Ex.PW-- 1/A. PW-1 correctly identified the appellant/ accused Dil Bahar as the person who had stabbed and robbed him, and also instigated the other boy i.e. his co-accused. PW-1 also identified mobile phone make 'FLY' IMEI No.356853030037586 coloured brown with battery bearing to be same which belongs to him, which is Ex.P1. The witness further identified the second mobile phone of black colour make "NOKIA" model 1680 to be that of his deceased friend Rakesh bearing IMEI No.355727023536674 which is Ex.P2.

15. Pawan Kumar who was working as constable with BHG and was posted at platform No.12 of Old Delhi Railway Station on the intervening night of 4-5.11.2009 was examined as PW-13. He deposed that on the intervening night of 04-05.11.2009 he was posted at platform No.12 of Old Delhi Railway Station from 10 PM to 6 AM. At about 11:45 PM one shuttle EMU train from the side of Ghaziabad came there. One person who was himself injured came towards him carrying another person who was also in injured condition. He further deposed that the injured told him that both of them had got down from the said train and told him that they sustained injuries at the hands of two persons who had robbed mobile phone and wallet and had caused injuries to them. PW-13 further deposed that the said person revealed his name as Rajinder, and the name of other person he was carrying, as Rakesh. He also correctly identified the complainant before the court. He also deposed that he took both of them to Aruna Asaf Ali Hospital in TSR, where doctor declared injured Rakesh as brought dead, while injured Rajinder who had sustained injuries on his thigh was given treatment. After some time, SI Rajinder Dabas along with one head constable also reached at the hospital.

16. SI Rajender Singh Dabas was examined as PW-15. He, inter alia, deposed that on receipt of DD No.2A & 3A on 05.11.2009, he along with HC Jagdish reached at Aruna Asaf Ali Hospital and collected MLC of one Rakesh Kumar and Rajinder Singh. He also seized the pulandas of the clothes of the deceased vide seizure memo Ex.PW-10/A and that of injured Rajinder vide seizure memo Ex.PW-10/B and also recorded statement of injured Rajinder Ex.PW-1/A and got the case registered through HC Jagdish. He further deposed that after registration of FIR Insp.Bharat Singh - to whom further investigation was handed over, directed HC Jagdish to preserve the dead body of the deceased at Subzi Mandi Mortuary. Thereafter he along with Insp.Bharat Singh and injured Rajinder

reached at the place of incident i.e. Railway Line Kailash Nagar, Chanderpuri as pointed out by the injured, and at the instance of injured Insp.Bharat prepared site plan of the place of incident.

17. PW-18 Inspector Bharat Singh, inter alia, corroborated the statement of PW-15 SI Rajender Singh Dabas. The call detail records of the mobile phone numbers of the complainant Rajender Singh PW-1 and the deceased Rakesh were collected by PW-18. On the basis of those CDRs, IMEI numbers of both the mobile phones was detected and those mobile phones were kept on surveillance. On the basis of IMEI number, the mobile phone of complainant Rajender Singh was found being used by one Jitender, using the SIM card of Vodafone. On 19.11.2009, the said Jitender was found present in his house and was interrogated with regard to mobile phone of injured Rajender. As per IO/Insp. Bharat Singh (PW-18), on the basis of mobile phone of deceased Rakesh, it was found being used by one Attaullah (PW-3) R/o 2797, Gali No.4, Chanderpuri, Kailash Nagar.

18. Jitender, who was found to be using the mobile phone of the complainant PW-1 Rajinder Singh was also examined as PW-4. He deposed that accused Anees (already convicted) offered to sell mobile phone make "Fly" on 06.11.2009 for Rs.1500/ and he asked Anees to produce documents of the said mobile phone. At this, Anees assured him that he will bring the documents within 8-9 days and the mobile phone may be kept by him. PW-4 further deposed that he used the said mobile phone by sim card having No.9873084750. On 14.11.2009, since the accused Anees failed to produce any document of the said mobile phone, he returned the mobile phone to accused Anees and kept the sim card with him. The said sim card was taken into police possession vide seizure memo Ex.PW4/A.

19. Ataullah, the person found using the mobile phone of the deceased Rakesh was examined as prosecution witness as PW-3. He revealed that he had purchased that phone from accused Mohd. Anees on 14.11.2009 for Rs.1200/-, however, he did not like the phone. The said sim card of Airtel was taken into police possession vide seizure memo Ex.PW-3/A. PW-18 also deposed that on 20.11.2009, on the basis of secret information Mohd.Anees and Dil Bahar @ Babu were apprehended. One mobile phone of black colour make "Nokia" was recovered from right side pocket of his wearing pant. On checking the IMEI number of that mobile phone, it was tallied with the mobile phone of deceased Rakesh. The said mobile was taken into police possession and seized vide seizure memo Ex.PW-9/A. Accused Dil Bahar was arrested vide arrest memo Ex.PW-9/E and his disclosure statement Ex.PW-9/C was recorded wherein he disclosed about his other associate namely Rashid @ Shakir @ West Indies (Juvenile). IO/ Insp. Bharat Singh further deposed that on 22.12.2009 he reached the place of incident along with SI Mahesh Kumar (PW-8) and Insp. Anand Singh (PW-6) and, SI Mahesh Kumar (PW-8) prepared scaled site plan at his instance.

20. The witness from the mobile service company Israr Babu was examined as

PW-14, who established that mobile phone number 9759824464 was subscribed in the name of the deceased Rakesh Kumar. His customer application form was also produced and exhibited as PW-14/A. The call detail records of the said mobile phone for the period from 01.11.2009 to 04.11.2009 were exhibited as PW-14/B. The prosecution examined one Tara Chand as PW-7, who deposed that he has given his voters identity card to the complainant PW-1 Rajender Singh and on that basis Rajender Singh PW-1 had obtained the mobile phone connection No.9917593978.

21. Dr. S. Lal was examined as PW-2, who had conducted the post-mortem of the dead body of the deceased Rakesh. The post-mortem is Ex.PW-2/AB. The witness opined the cause of death as Hemorrhagic shock due to ante-mortem stab injury to abdomen and sufficient to cause death in ordinary course of nature. The injury was found to be recent in duration and could be caused by single sharp edged weapon sufficient to cause death in ordinary course of nature. Time since death was opined as 12 to 18 hours. So far as the MLC of the complainant (PW1) is concerned, the same was exhibited as Ex.PW12/A. The stab injury of the complainant (PW1) was opined as "simple". The prosecution examined three other formal witnesses, namely Ved Prakash, Duty Officer as PW-5, who registered the FIR PW-5/A on the basis of Rukka, PW-6 Inspector Anand Singh who accompanied, inter alia, PW-18 Inspector Bharat Singh and Mahesh Kumar PW-8 to the place of incident and took measurements of the place. He also collected the CDRs. HC Ram Kumar was examined as PW-9, who joined the investigation of the case along with Inspector Bharat Singh and SI Rajinder Dabas PW-15.

22. The learned ASJ relied upon the testimony of Rajender Singh PW-1, the eye-witness, who also correctly identified the accused/ appellant as the person who has robbed him and the deceased at knife point. PW-1 had deposed that the appellant/accused was the person who had stabbed and robbed him, and had also instructed the co-accused Rashid to stab his friend, i.e. the deceased Rakesh. PW-1 correctly identified the mobile phone of Make Nokia Model No.1680 bearing IMEI No.355727023536674 as one belonging to deceased Rakesh. The Trial Court also relied upon the evidence led by the prosecution which connected the mobile phone number of the deceased, with the deceased. The recovery of the mobile phone of the deceased Rakesh Kumar at the instance of the accused/ appellant Dil Bahar was held to be established from the statement of PW-9 and PW-15, which was corroborated by the statement of PW-18.

23. All these witnesses consistently deposed that on 20.11.2009, on receipt of secret information accused Dil Bahar @ Babu was apprehended from near Mazar near Railway Line, Chanderpuri, Kailash Nagar, Delhi. These witnesses correctly identified accused Dil Bahar and also mobile phone make "Nokia" model 1680 which was recovered from the right side pocket of his wearing pant on the said date. The witnesses further deposed that on checking the IMEI number of the said mobile phone, it was found tallying with the mobile phone of deceased

Rakesh and the same mobile phone was seized vide seizure memo Ex.PW-9/A. The arrest memo of accused Dil Bahar records the place of arrest being near Mazar near Railway Line, Chanderpuri, Kailash Nagar, Delhi.

24. The trial court rejected the argument raised by the defence that the last digit of IMEI number of the mobile number make "Nokia 1680" recovered from the possession of the appellant Dil Bahar is different from the IMEI number mentioned in the charge-sheet and the CDR; the place of occurrence was uncertain and unestablished by the prosecution witnesses; the MLC (Ex.PW-12/A) recorded by the examining doctor recorded, "alleged history of stab injury within train at ODRS at around 11.30 p.m. yesterday as per statement by patient"-contradicting the case of the prosecution with regard to the place of occurrence of the incident; that the accused was not supplied with the copy of the site plan (Ex.PW-18/A); and there was variance in number of case diaries recorded during the course of investigation. The trial court while establishing the guilt of the appellant, inter alia, observed as follows:

"It has already come on record by way of deposition of PW1 complainant Rajender Singh that accused Dil Bahar caused hurt on the person of complainant while committing robbery along with other co-accused (who is juvenile) and thus committed offence under Section 394/34 IPC. It has further been established from the deposition of PW-1 that the accused Dil Bahar had stabbed him below his waist on the right side and injuries were sustained by the complainant PW-1. The deposition of PW-1 stands corroborated by way of MLC of injured Rajender Singh Ex.PW-12/A. Further, as regards the injuries upon the person of Rajender Singh, it has come in the deposition of PW-1 that both the accused including Dil Bahar were armed with knives and accused Dil Bahar used that knife to cause injuries upon his person.

In view of the said deposition of the complainant and the MLC Ex.PW-12/A and since it has been established that the accused used a knife for causing the said injuries. The injuries sustained by complainant Rajender Singh were opined to be simple in nature. Thus the testimony of the injured complainant (PW-1) becomes extremely relevant. Despite lengthy cross-examination by learned defence counsel the deposition of PW-1 remained unimpeached. The Hon'ble Supreme Court in a judgment titled as State of UP Vs. Naresh & Ors. reported as 2011 CrL.J. 2162 while dealing with the deposition of an injured witness observed that, "The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the

offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein."

The recovery of the mobile phone of deceased Rakesh and injured Rajender Singh also stand established from the deposition of PW-9 HC Ram Kumar and PW-18 Insp. Bharat Singh. The said mobile phones were also correctly identified by the complainant PW-1 when he stepped into the witness box. Thus, having regard to the material on record and the above discussion, I find that the offence punishable under Section 411 IPC also stands proved against accused Dil Bahar."

25. The trial court then proceeded to consider whether the appellant/accused Dil Bahar could be convicted for the offence under Section 302 IPC with the aid of Section 34 IPC. The trial court convicted the appellant for the offence under Section 302 IPC read with Section 34 IPC by relying on the deposition of PW-1 Rajender Singh, who stated that the appellant/accused Dil Bahar told the co-accused that, "yeh aise nahin dega. Maar iske chaaku"-when the deceased Rakesh had resisted the accused Rashid from taking out his wallet from the pocket of his pant. The trial court relied upon the decision of the Supreme Court in *Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh*, 1991 CrL.J. 2653.

26. Argument advanced by the learned counsel for the appellant was that the role attributed to the appellant was that he asked his co-accused to take the purse of the deceased and, with a view to commit the robbery, stab him. It was further argued that there was no intention of the appellant to commit the murder of the deceased. Rather the intention was to commit the robbery for which he has already been convicted, and with the aid of Section 34 IPC, he could not be convicted for the offence punishable under Section 302 IPC.

27. To deal with this contention of the counsel for the appellant, we have gone through the evidence available on record. The complainant/injured Rajinder Singh (PW1) has specifically deposed during his testimony that on the day of incident, appellant along with his co-accused entered the train compartment and both of them took out their knives. Both of them asked the complainant and deceased to handover whatever they were having. The appellant took out some papers and his mobile phone from the front pocket of his shirt, and thereafter the appellant took out wallet from his pant. The appellant stabbed him below his waist when PW2 asked the appellant to hand over his sim card. Thereafter, co-accused took out mobile phone and some papers from the shirt pocket of the deceased. When co-accused tried to take out the wallet of the deceased, the deceased resisted. He categorically stated that the appellant asked his co-accused "yeh aise nahin dega. Maar iske chaaku" (he will not hand over in this way. Stab him). On this, the co-accused gave knife blow on the stomach of the deceased, and his wallet was taken out.

28. From the testimony of the only eye witness of the incident i.e. PW1, it has come on record that the appellant and his co-accused were intent upon robbing

the complainant and deceased on the point of knife. It has also come on record that the complainant (PW1) was given knife blow on his thigh by the appellant, and when deceased resisted the robbery of his wallet, co-accused gave knife blow in his stomach. From the evidence and circumstances brought on record, it is apparent that the intention of the appellant was to commit the robbery, in pursuance of which he gave knife blow to the complainant (PW1) and then asked his co-accused to give blow to the deceased to take out his wallet. The intention of the appellant to commit the armed robbery is thus, very much present in the instant case.

29. However, on appreciation of the evidence, we are of the considered view that it cannot be said that the appellant shared the intention with the co-accused to commit the murder of the deceased. There is no evidence or circumstance from which it can be said that on the day of incident, the appellant had the intention to commit the murder of the deceased. Pertinently, when he injured the complainant (PW-1), he had used the knife such that PW-1/complainant suffered only "simple" injury, as recorded in his MLC vide Ex.PW12/A. PW-12 Dr.Priya Ranjan, CMO, AAA Govt. Hospital deposed that the injured complainant (PW-1) was referred after giving first aid. Thus, it appears that the appellant gave the knife blow for the purpose of intimidating the complainant (PW-1) into surrendering before the accused, and not for the purpose of causing fatal or serious injuries. When he exhorted the co-accused to attack the deceased with the knife, his exhortation has to be viewed in the light of his own conduct qua the complainant (PW-1). Thus, he could not be said to have shared the intention with the co-accused to give a fatal knife blow to the deceased. The appellant asked his co-accused to give the knife blow to the deceased for the same purpose as the appellant did, i.e. to intimidate the deceased into surrender, so that the purse of the deceased could be taken out without resistance. It was the act of the co-accused, and not that of the appellant, when he gave knife blow on the stomach of the deceased which resulted into his death. The same was not the act of the appellant, and the appellant could not be said to have shared with the co-accused the intention to give a fatal knife blow to the deceased.

30. It is a settled law that the common intention to commit a criminal act depends upon the circumstances. The circumstances brought on record do not make out the present case to convict the appellant for commission of murder of the deceased with the aid of Section 34 of the IPC.

31. In the case of *Hira Lal Malik v. State*, 1977 CriLJ 1921, the Supreme Court observed that :

"38.Common intention is a state of mind of an accused which can be inferred objectively from his conduct displayed in the course of commission of crime as also prior and subsequent attendant circumstances. Mere participation in the crime with others is not sufficient to attribute common intention to one of others involved in the crime. The subjective element in common intention therefore should be proved by objective test. It is only then one accused can be made

vicariously liable for the acts and deeds of the other co-accused." (emphasis supplied)

32. The Supreme Court in the case of *Ramesh Singh @ Photti v. State of A.P.*, (2004) 11 SCC 305, has extensively dealt with the scope of Section 34 of the IPC. It was observed that :

"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 34IPC 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. (See *Noor Mohammad Yusuf Momin* AIR 1971 SC 855).

Since common intention essentially being a state of mind and can only be gathered by inference drawn from facts and circumstances established in a given case, the earlier decisions involving almost similar facts cannot be used as a precedent to determine the conclusions on facts in the case in hand. This view of ours finds support in a judgment of this Court in *Pandurang Tukia and Bhillia Vs. State of Hyderabad*, {1955 (1) SCR 1083} wherein while considering the applicability of Section 34 IPC this Court held thus:-

"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 Edn., p. 30)."

33. In a recent judgment of this Court in the case *Nand Kishore v. State of Madhya Pradesh*, (2011) 12 SCC 120, this Court discussed the ambit and scope of Section 34 Indian Penal Code as well as its applicability to a given case, as under:

"20. A bare reading of this section shows that the section could be dissected as follows:

- (a) Criminal act is done by several persons;
- (b) Such act is done in furtherance of the common intention of all; and
- (c) Each of such persons is liable for that act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court in determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 Indian Penal Code must be done by several persons. The emphasis in this part of the section is on the word "done". It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity."

34. In view of the above discussion, we are of the view that to establish a case under section 34 IPC, prosecution has to prove beyond all reasonable doubt that the appellant had the knowledge of the intention of his co-accused, and they voluntarily shared the said intention. The prosecution has to establish that in furtherance of the said intention, the appellant committed certain overt act which was responsible for the murder of the deceased. It is not that any and every act done during the course of attack on the deceased would indicate that the appellant shared the common intention, and only such overt act may be relevant which indicate that the appellant also shared the intention to cause the death of the deceased. In the absence of such material, the court cannot come to the conclusion that the appellant also shared the common intention of the co-accused merely on the basis of the appellant robbing the complainant; causing a

simple injury to the appellant, and; asking the co-accused to take the purse/ money of the deceased. Hence, the prosecution has failed to make out a case of conviction of the appellant for the offence punishable under Section 302 IPC with the aid of Section 34 IPC. Consequently, the appellant is hereby acquitted for the offence punishable under Section 302/34 IPC and sentence awarded to him for the said offence is hereby set aside.

35. So far the conviction of the appellant for the offences punishable under Section 394/34, 397 and 411 IPC is concerned, there is ample evidence on record that on the day of incident, the appellant committed the robbery of mobile phone and wallet of the complainant (PW1) on the point of a deadly weapon i.e. knife, and caused injuries on his person with knife. It has also been well established on record that robbed mobile phone was recovered from the possession of the appellant for which he has been convicted under Section 411 IPC. This Court does not find any fault in the findings arrived at by the trial court with regard to conviction of the appellant under Section 394/34, 397 and 411 IPC. Therefore, the conviction and sentence of the appellant for the said offences is hereby upheld.

36. Appeal is disposed of accordingly.