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**(2002) 10 SC CK 0065**

**In the Supreme Court Of India**

**Case No : Crl.A. No.-001299-001300 / 2001**

Nandu Rastogi @ Nandji Rastogi and Another

APPELLANT

Vs

State of Bihar

RESPONDENT

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**Date of Decision : 01-10-2002**

**Acts Referred:**

Arms Act, 1959 — Section 27  
Penal Code, 1860 (IPC) — Section 302, 34

**Citation :** (2003) 1 ACR 662 : AIR 2002 SC 3443 : (2003) 1 ALT(Cri) 270 :  
(2002) 3 BLJR 2479 : (2003) 1 CHN 88 Supp : (2002) CriLJ 4698 : (2002) 7 JT  
551 : (2002) 7 SCALE 177 : (2002) 8 SCC 9 : (2002) 3 SCR 30 Supp

**Hon'ble Judges :** N. Santosh Hedge, J;B. P. Singh, J

**Bench :** Division Bench

**Advocate :** P.S. Mishra, Vishnu Sharma, S. Chandrashekhar, Upendra Mishra,  
Gaurav Agrawal and Prashant Kumar, for the Appellant; B.B. Singh and Kumar  
Rajesh Singh, for the Respondent

**Final Decision :** Allowed

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## Judgement

B.P. Singh, J.—The appellants in these appeals, namely, Nadu Rastogi @Nandji Rastogi and Bal Mukund Rastogi are brothers. They along with one Jagdish Chamar and Mohan Singh were put up for trial before the 2nd Additional Sessions Judge, Rohtas at Sasaram, who found the appellants and Jagdish Chamar guilty of the offence under Section 302/34 IPC and u/s 27 of the Arms Act but acquitted Mohan Singh. They were sentenced to undergo imprisonment for life u/s 302/34 IPC and to undergo rigorous imprisonment for one year u/s 27 of the Arms Act. They preferred the appeals before the High Court but by a common judgment and order, the High Court dismissed the appeals and affirmed their conviction and sentence. Three special leave petitions were preferred before this Court but since Jagdish Chamar did not surrender to his sentence, his special leave petition was dismissed by order dated 3rd December, 2001 while special leave to appeal was granted to the appellants herein.

2. The informant Shyam Mohan Rastogi, PW.4 is the uncle of the appellants being

the cousin of this father. The deceased Shankar Rastogi was the son of the informant PW.4. It is alleged that in an occurrence which took place at about 7.00 p.m. on 12.11.1985 he was shot dead by appellant Nadu Rastogi. It is the case of the prosecution that the three accused, along with two unknown persons, came armed with country made pistols and perpetrated the crime. According to the prosecution the background in which this occurrence took place and which also discloses the motive for the offence is that the informant PW.4 owned a house which he sold to one Braj Kishore Rastogi who in turn sold the said house to appellant Nandji Rastogi. Manjoor Ansari. PW.1 was the tenant of a shop in that building, but Nandji Rastogi was pressurising him to vacate the premises. Shankar, (deceased) son of the informant took the side of Manjoor Ansari and declared that he will not permit Nandji Rastogi to forcibly evict him. He even threatened that he may challenge the sale of the house by his father since his father had no legal authority to sell his share in the house. It appears from the evidence on record that Manjoor Ansari is on good terms with the informant and his family members and continued to occupy the shop premises even on the date of occurrence.

3. The case of the prosecution as disclosed in the First Information Report lodged by PW.4 at 8.00 p.m. on 12th November, 1985, soon after the occurrence, is that at about 5.00 p.m. the informant was sitting in his shop, namely, Shankar Stores, along with his tenant Ayodhya Tiwari, PW.5 when Nandji Rastogi came there and warned the informant to caution his son that he should not interfere in his matters. He threatened that if he did not do so his son may be killed. So saying, he went away threatening the informant with dire consequences. At about 6.45 p.m. electricity supply was cut off when he was sitting in his shop along with one Shambhu Lal, his son Mukund, Manjoor Ansari, PW.1 and Shankar Rastogi (deceased) his son. Since it was the diwali day, candles and earthen lamps were lit in his shop and elsewhere. 15 minutes later appellant Nandji along with his brother appellant Bal Mukund Rastogi, accused Jagdish Chamar and two other unknown persons entered his shop armed with country made pistols. Nandji and Jagdish caught hold of his son and took him inside to the residential apartment which is just behind the shop, at gun point. When the informant and others wanted to intervene, they were prevented by appellant Bal Mukund Rastogi and his companion who stood guard with country made pistols in their hands. They threatened them to keep quiet. After Shankar Rastogi was taken inside the house by Nandji Rastogi, Jagdish Chamar and one other unknown person, he heard the report of gun fire followed by crying of women inside the house. An alarm was raised and the accused fled away threatening them. When he went inside he found his son bleeding and unconscious. People who had gathered there took the deceased to Kudra Hospital where he was declared dead.

4. After investigation four persons were put up for trial including the appellants, Jagdish Chamar and one Mohan Singh, who was acquitted by the trial court. The defence of the appellants was that no such incident as alleged took place and that they had been falsely implicated on account of some dispute over a common wall.

Suggestions were put to some of the witnesses that a dacoity took place in the house of the deceased and in the course of that dacoity the deceased was shot dead.

5. PWs. 1 to 5 are the witnesses examined by the prosecution to prove its case. PW.6 Dr. Shyam Sunder Singh is the doctor who performed the post-mortem examination on the body of the deceased at 10.00 a.m. on 13th November, 1985. The post mortem report and his evidence leaves no manner of doubt that Shankar Rastogi met a homicidal death. This was not even challenged by the appellants. PW.7 is the investigating officer.

6. PW.1 Manjoor Ansari deposed that he was sitting with Shambhu Lal, his son Mukund Lal, Shankar (deceased) and the informant in the shop of the informant when 4-5 persons came armed with country made pistols. He identified the appellants and Jagdish Chamar. Nandji Rastogi, Jagdish Chamar and one unknown accused took Shankar to the residential portion of the premises from the shop where he was sitting. The residence of the informant is behind the shop in the same building. The remaining two persons namely Bal Mukund Rastogi and one unknown accused prevented them from intervening in the matter. Soon thereafter he heard the sound of gun fire and thereafter the accused fled. Kamla Rastogi, PW.2, mother of deceased Shankar and wife of the informant came out and informed them that Nandji had shot dead her son. This witness claims to have gone inside the house and seen Shankar lying injured. He was removed to the hospital where he was declared dead.

7. Kamla Rastogi, PW.2 is the mother of the deceased. She has stated that she was in the kitchen when her grand son aged about 10-11 years came and told her that dacoits had entered the shop. She rushed towards the shop but on the way she saw Nandu and Jagdish holding her son, while one unknown person was standing behind them. Nandu fired from his pistol injuring Shankar who fell down on the spot. She thereafter came out, met her husband and informed him, but prevented him from going inside on account of fear. She also met Manjoor Ansari, Shambhu Lal and his son Mukund Lal etc. from whom she learnt that they were prevented from going inside by appellant Bal Mukund Rastogi and another person.

8. Mrityunjay Singh, PW.3 deposed that he was having tea at a tea stall nearby when the lights went off. Soon thereafter he heard the report of gun fire and rushed towards the house of the informant. He saw 5 persons coming out of the house of the informant armed with country made pistols. Out of them, he identified the appellants and Jagdish Chamar.

9. Shyam Mohan Rastogi, informant in his deposition fully supported the facts mentioned by him in the First Information Report. He further stated that while he was trying to enter his house he was hit by an unknown accused on his head with the butt of the pistol. He further stated that Ayodhya Tiwari, PW.5 and Mrityunjay Singh, PW.3 came soon after the incident. He also informed the Court that

Shambhu Lal and his son Mukund Lal were not willing to depose as witnesses in the case.

10. The last important witness Ayodhya Tiwari, PW.5 deposed about the incident which took place at 5.00 p.m. in which Nandji Rastogi had threatened the informant warning him to caution his son, the deceased. At the time when the firing took place he was in his room. He resided in the house of the informant. When he heard the report of gun fire he wanted to come out of the house, but on seeing 5 persons coming out and running away, he did not stir out of his room immediately. Later he came out and was told by Mrityunjay Singh, PW.3, the wife of Manjoor, and the parents of the deceased about the occurrence. He had identified the appellants and Jagdish Chamar.

11. Though the trial court and the High Court have undertaken a critical scrutiny of the evidence on record with the help of counsel for the parties, we have also read the entire evidence. There is hardly anything in the cross-examination of the witnesses which may cast a doubt on the truthfulness of the testimony. Their credibility has not been impeached. They are natural witnesses and have deposed in a forthright manner. There is no reason for us to interfere with the findings recorded by the trial court and the High Court.

12. Mr. P.S. Mishra, Senior Advocate, appearing for the appellants submitted that the grand child of the informant, who first came and reported to his grand mother Kamla Rastogi that the deceased had entered the shop was not examined by the prosecution. In our view the failure of the prosecution to examine the grandchild of the informant does not in any manner adversely affect the prosecution case, particularly when a large number of witnesses who are found to be reliable have supported the case of the prosecution. The fact that the accused had reasons to be unhappy with the conduct of the deceased and his father cannot be disputed and in fact, earlier in the evening Nandji Rastogi had administered a warning to the informant in the presence of Ayodhya Tiwari, P.W.5. The First Information Report was lodged promptly at 8.00 p.m. on the same day and there was therefore no opportunity for the prosecution to concoct a false case. The deceased was shot dead in the residential apartment which was just behind the shop where male members of the family were sitting. The actual killing was witnessed by the mother of the deceased PW.2, which is only natural because she was inside the house preparing sweets to celebrate the Diwali festival. The evidence on record, therefore, leaves no room for doubt that relations between appellants on the one hand and the informant and his son on the other were strained. On the date of occurrence the appellants along with Jagdish Chamar and two unknown persons came to the shop of the informant and while Bal Mukund Rastogi and one unknown accused prevented the informant and others from intervening by threatening them with pistols. Nandu Rastogi, Jagdish Chamar and the other unknown accused took Shankar Rastogi to the residential apartment just behind the shop, where he was shot dead by Nandu Rastogi which was witnessed by Kamla Rastogi, PW.2, the mother of the deceased.

13. Learned counsel for the appellants could not persuade us to accept the case of the defence that no such occurrence took place and that Shankar Rastogi was killed in the course of dacoity. There is no evidence whatsoever to support the defence case which must be rejected.

14. He then submitted that in any event so far as Bal Mukund Rastogi is concerned there is no allegation that he took part in the assault. He submitted that his false implication cannot be ruled out. In any event it is submitted that his conviction with the aid of Section 34 IPC is not justified in the facts and circumstances of the case. He relied upon two decisions of this Court in *Parshuram Singh Vs. State of Bihar*, and *Suresh and Another Vs. State of U.P.*, . These decisions do not help the defence. In *Parshuram Singh (supra)* this Court gave to two of the accused persons the benefit of doubt having regard to the peculiar facts and circumstances of that case. Against one of the accused in that case of allegation was that he exhorted the others to kill the deceased and though he himself was armed with lathi he did not take any part in the assault. The Court found that the surrounding circumstances of the case did not ensure the confidence that he made such an exhortation. Apart from not using the weapon, which was handy with him, there appeared no reason for him to take up the leadership of the gang as he had no quarrel with the deceased. As regards the other accused to whom the benefit of doubt was extended, the Court found that it was highly improbable that he would have refrained from using the inherently lethal weapon like the pistol which was in his possession if he shared the common intention. In our view the decision in *Parshuram Singh's* case rests on its own peculiar facts and no principle of law can be culled from that decision which may be of any assistance to the appellants in this case.

15. Shri P.S. Mishra then drew our attention to paragraph 23 of the judgment in *Suresh v. State of U.P. (supra)* wherein it has been observed that to attract Section 34 IPC two postulates are indispensable : (1) The criminal act (consisting of a series of acts) should have been done not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons. He also drew our attention to the discussion in the judgment about the difference between a "common intention" and "similar intention". It has been observed by this Court that to attract the applicability of Section 34 of the Code the prosecution is under an obligation to establish that there existed a common intention which requires a pre-arranged plan, because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention. The Court observed:

"Section 34 of the Indian Penal Code recognizes the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The

section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly. It is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such reconvert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case."

16. In the facts of the case the Court found that Pavitri Devi accused No. 3 could not be held guilty of the offence of murder with the aid of Section 34 since she was merely standing on the road when the incident happened. Her mere presence without doing anything more, without even carrying a weapon and without even matching along with other assailants did not attract Section 34 IPC.

17. The facts of this case are quite different. Appellants along with three others came armed with country made pistols. They came together, and while two of them stood guard and prevented the prosecution witnesses from intervening three of them took the deceased inside and one of them shot him dead. Thereafter they fled together. To attract Section 34 IPC it is not necessary that each one of the accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate acts, similar or diverse. The facts of this case are eloquent and the role played by Bal Mukund Rastogi of preventing the prosecution witnesses from going to the rescue of the deceased was the role played by him with a view to achieve the ultimate objective of killing Shankar Rastogi. We, therefore entertain no doubt that all the five persons who came to the shop of the informant had a common intention to commit the murder of Shankar Rastogi and they acted pursuant to a prearranged plan. The facts clearly are consistent only with the hypothesis of their acting in furtherance of a common intention. They have, therefore rightly been convicted with the aid of Section 34 IPC.

18. We, therefore find no merit in the appeals which are dismissed.