ABDUL SAYEED

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 1243 of 2007 etc.)

SEPTEMBER 14, 2010

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Penal Code, 1860:

ss. 302/34 – Prosecution for murder of two persons and for injuries caused to others – Prompt lodging of FIR – Accused named in FIR – Eye-witnesses to the incident – Motive established – Trial court convicting the accused u/ss. 302, 147 and 148 – On appeal High Court acquitting all the accused u/ss. 147 and 148 and convicting the appellants-accused u/s. 302 with the aid of s. 34 – Other co-accused acquitted of all the charges – On appeal, held: In the facts of the case, courts below rightly concluded that the appellants-accused were responsible for the offence.

s. 34 – Common intention – Applicability of – Discussed.

Criminal Trial – Failure to frame proper charge – Effect of – Held: Absence of a charge by itself is not prejudicial, unless the accused is able to establish that defect in framing of the charge has caused real prejudice – There is no bar in law on conviction with the aid of s. 34 IPC in place of s. 149 IPC, if there is evidence to show that the accused shared common intention and no apparent prejudice is shown to have been caused thereby – On facts, it was permissible for High Court to convict the accused u/s. 34 and non-framing the charge thereunder is not fatal to the prosecution – Code of criminal Procedure, 1973 – ss. 215, 216, 218, 221 and 464 – Penal Code, 1860 – ss. 34 and 149.

A *Evidence – Ocular evidence vis-à-vis medical evidence – Held: In case of contradiction between ocular and medical evidence, ocular evidence has greater evidentiary value – But if medical evidence completely rules out the ocular evidence, ocular evidence may be disbelieved – On facts, the* B *discrepancy between the ocular and medical evidence is probable and such discrepancy cannot go in favour of the accused.*

Witness – Injured eye-witness – Evidentiary value – Held: Deposition of such witness to be relied upon unless there are C *strong grounds for rejection thereof on the basis of major contradictions and discrepancies – On facts, evidences of eye-witnesses are reliable as they are corroborated by version of other witnesses.*

D **The 5 appellants, alongwith the other co-accused were prosecuted for having killed two persons and for causing injuries to others. The prosecution case was that on the date of occurrence, some of the accused molested a girl. Her mother complained about the incident to 'C'.** E **He went to the accused persons to advise them and also scolded them. As a result, in the evening, the 17 accused came armed with deadly weapons and attacked 'C'. When his two sons ('S' and PW1) and PWs 2 and 4 came to his rescue, 'S' and PW1 were also attacked by the accused.** F **Both 'C' and 'S' died on the spot. One of the accused died during the investigation and two of them had absconded. 14 accused were put to trial for offences punishable u/ ss. 148, 302 and 323 IPC and in the alternative u/ss. 302/ 149. 324/149 and 323/149 IPC. One of the absconded** G **accused, (appellant-accused 'I'), later surrendered and he was tried separately.**

The trial court convicted accused A-11, A-9, A-6, and A-5 u/s, 148 IPC; A-9 was convicted u/s. 147 IPC, A-9 and

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A-11 were further convicted u/s. 302 IPC for committing murder of deceased 'C'. A-5 and A-6 were convicted u/s. 302 IPC for committing murder of deceased 'S'. A-7 was convicted u/s. 324 IPC for causing injuries to PW1 and A-1 was convicted u/ss. 304 (Part II), 323 and 147 IPC for causing injuries to the deceased 'S'. Accused 'I' was also convicted u/s. 148 and 302 IPC, in the separate trial.

In the appeals filed by the convicted accused, the High Court convicted the 5 appellant-accused u/s. 302/34 IPC, setting aside their conviction u/ss. 147/148 IPC. The other co-accused were acquitted by the High Court. The High Court partly allowed the appeal filed by the State against acquittal of some of the accused u/ss. 302/149 IPC.

On appeal to the Supreme Court, the appellants-accused contended *inter-alia* that the High Court could not have convicted the accused with the aid of s. 34 IPC, having set aside their conviction u/ss. 147/148 IPC and also because no charge was framed u/s. 34 IPC nor any evidence was led to show that the offences were committed in furtherance of common intention; that the injuries caused to the deceased and the injured could not be attributed to the appellants as there was no consistency between the medical evidence and the ocular evidence of the eye-witnesses with regard to the weapon of offence.

Dismissing the appeals, the Court

HELD: 1. In the facts of the instant case, it is evident that the FIR had been lodged promptly within 20 minutes from the time of commission of the offence as the place of occurrence was in close proximity of the Police Chowki and all the appellants along with other co-accused had been named therein. There was an injured

witness. The prosecution has explained the motive that the appellants did not like the intervention of deceased 'C' taking the side of the mother of the girl who had been molested by persons of the accused party. It was several hours after the persons involved in the incident of molestation were scolded by deceased 'C', that the appellants armed with deadly weapons attacked him with motive and in a pre-planned manner. Deceased 'S', when came to rescue his father (deceased 'C'), was also done away with. In the incident, PW.2 also got injured. The courts below after appreciating the evidence on record rightly came to the conclusion that the five appellants had been responsible for the said offences. The testimony of the eye-witnesses had been subjected to searching cross-examination but nothing has been brought on record to discredit the statements of any of the eye-witnesses. [Paras 54] [343-E-H; 344-A-B]

2. The testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an in-built guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein. In the instant case, PW.2 (the injured eye-witness) had given graphic description of the entire incident. His presence on the spot cannot be doubted as he was injured in the incident. His deposition must be given due weightage. His deposition also stood fully corroborated by the evidence of PW.1 and PW.4 (the other eye-witnesses). The depositions so made cannot be brushed aside merely because there have been some trivial contradictions or omissions. [Paras 28 and 29] [333-F-H; 334-A-B]

Ramlagan Singh and Ors. v. State of Bihar **AIR 1972 SC 2593;** *Malkhan Singh and Anr. v. State of Uttar Pradesh* **AIR 1975 SC 12;** *Machhi Singh and Ors. v. State of Punjab* **AIR 1983 SC 957;** *Appabhai and Anr. v. State of Gujarat* **AIR 1988 SC 696;** *Bonkya alias Bharat Shivaji Mane and Ors. v. State of Maharashtra* **(1995) 6 SCC 447;** *Bhag Singh vs. State of Punjab* **(1997) 7 SCC 712;** *Mohar and Anr. v. State of Uttar Pradesh* **(2002) 7 SCC 606;** *Dinesh Kumar v. State of Rajasthan* **(2008) 8 SCC 270;** *Vishnu and Ors. v. State of Rajasthan* **(2009) 10 SCC 477;** *Annareddy Sambasiva Reddy and Ors. v. State of Andhra Pradesh* **AIR 2009 SC 2661;** *Balraje alias Trimbak v. State of Maharashtra* **(2010) 6 SCC 673;** *Jarnail Singh v. State of Punjab* **(2009) 9 SCC 719 – relied on.**

3. The position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. In the instant case, a very large number of assailants attacked one person, thus the witnesses cannot be able to state as to how many injuries and in what manner the same had been caused by the accused. In such a fact-situation, discrepancy in medical evidence and ocular evidence is bound to occur. However, it cannot tilt the balance in favour of the appellants. [Paras 36 and 37] [336-C-F]

Ram Narain Singh v. State of Punjab **AIR 1975 SC 1727;** *State of Haryana v. Bhagirath and Ors.* **(1999) 5 SCC 96;** *Thaman Kumar v. State of Union Territory of Chandigarh*

A (2003) 6 SCC 380 *Krishnan v. State* (2003) 7 SCC 56; *Solanki Chimanbhai Ukabhai v. State of Gujarat* AIR 1983 SC 484; *Mani Ram and Ors. v. State of U.P.* 1994 Supp (2) SCC 289; *Khambam Raja Reddy and Anr. v. Public Prosecutor, High Court of A.P.* (2006) 11 SCC 239; *State of* B *U.P. v. Dinesh* (2009) 11 SCC 566; *State of U.P. v. Hari Chand* (2009) 13 SCC 542 – referred to.

4.1 In cases where there are a large number of assailants, it can be difficult for a witness to identify each assailant and attribute a specific role to him. In the instant C **case, a very large number of assailants attacked the two deceased and caused injuries to them with deadly weapons. The incident stood concluded within a few minutes. Thus, it is natural that the exact version of the incident revealing every minute detail, i.e., meticulous** D **exactitude of individual acts cannot be given by the eye-witnesses. [Paras 22 and 25] [330-E; 332-A-B]**

Masalti v. State of Uttar Pradesh AIR 1965 SC 202; *Kallu alias Masih and Ors. v. State of Madhya Pradesh* (2006) 10 E SCC 313; *Viji and Anr. v. State of Karnataka* (2008) 15 SCC 786; *Bhag Singh and Ors. v. State of Punjab* (1997) 7 SCC 712 – relied on.

4.2 However, in the instant case, A-11 as per the F **prosecution was armed with a knife and assaulted the deceased 'C'. A-5, as per the evidence of PW-1, PW-2 and PW-4, attacked the deceased with sword. A-6, as per the evidence of PW-1, used a Gupti for causing injury to the deceased 'S'. A-9 as per the evidence of all the three eye-witnesses, attacked the deceased 'C' with a Farsi.** G **Accused 'I' was armed with a sword and assaulted the deceased 'S'. The trial Court as well as the High Court found the above-mentioned accused persons responsible for having caused injuries to the deceased with the respective weapons mentioned above. [Paras 15,** H **16, 17, 18 and 19] [328-E-H; 329-A-E]**

5. The High Court has rightly proceeded in the matter while setting aside the conviction of the appellants u/ss. 147/148 IPC and convicting them with the aid of Section 34 IPC. Non-framing of charge u/s.34 is not fatal to the prosecution. There is no bar in law to convict the accused with the aid of Section 34 IPC in place of Section 149 IPC, if there is evidence on record to show that such accused shared a common intention to commit the crime and no apparent injustice or prejudice is shown to have been caused by application of Section 34 IPC in place of Section 149 IPC. The absence of a charge under one or the other or the various heads of criminal liability for the offence cannot be said to be by itself prejudicial to the accused, and before a conviction for the substantive offence without a charge can be set aside, prejudice will have to be made out. Such a legal position is bound to be held good in view of the provisions of Sections 215, 216, 218, 221 and 464 Cr.P.C. Thus, unless the accused is able to establish that the defect(s) in framing the charge(s) has caused real prejudice to him; that he was not informed as to what was the real case against him; or that he could not defend himself properly, no interference is required on mere technicalities. [Paras 38, 43 and 53] [336-G-H; 339-E-F; 343-D]

Willie (William) Slaney v. State of Madhya Pradesh **AIR 1956 SC 116 – followed.**

State of Andhra Pradesh v. Thakkidiram Reddy and Ors. **(1998) 6 SCC 554;** *Gurpreet Singh v. State of Punjab* **(2005) 12 SCC 615;** *Ramji Singh v. State of Bihar* **(2001) 9 SCC 528;** *Sanichar Sahni v. State of Bihar* **(2009) 7 SCC 198;** *Dalip Singh and Ors. v. State of Punjab* **AIR 1953 SC 364;** *Malhu Yadav and Ors. v. State of Bihar* **(2002) 5 SCC 724;** *Dhaneswar Mahakud and Ors. v. State of Orissa* **(2009) 9 SCC 307;** *Annareddy Sambasiva Reddy and Ors. v. State of Andhra Pradesh* **AIR 2009 SC 2661 – relied on.**

A **6.1 Section 34 IPC carves out an exception from the general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common intention" to commit the offence. The phrase "common** B **intention" implies a pre-arranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the** C **spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different sense from the "same intention" or "similar intention" or "common object". The** D **persons having similar intention which is not the result of the pre-arranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. [Para 45] [339-G-H; 340-A-D]**

Mohan Singh and Anr. v. State of Punjab **AIR 1963 SC** E **174 – referred to.**

6.2 The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this Section gets attracted when a criminal act F **is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the concerned persons had shared a common intention. Undoubtedly, the ingredients of Section 34, i.e., that the accused had acted in** G **furtherance of their common intention is required to be proved specifically or by inference, in the facts and circumstances of the case. [Para 46] [340-E-G]**

Krishnan and Anr. v. State of Kerala ***(1996) 10 SCC 508***; *Harbans Kaur and Anr. v. State of Haryana* **(2005) 9 SCC**

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195; *Hamlet alias Sasi and Ors. v. State of Kerala* (2003) 10 SCC 108; *Pichai alias Pichandi and Ors. v. State of Tamil Nadu* (2005) 10 SCC 505; *Bishna alias Bhiswadeb Mahato and Ors. v. State of West Bengal* (2005) 12 SCC 657; *Gopi Nath @ Jhallar v. State of U.P.* (2001) 6 SCC 62; *Krishnan and Anr. v. State represented by Inspector of Police* (2003) 7 SCC 56; *Girija Shankar v. State of U.P.* (2004) 3 SCC 793; *Virendra Singh v. State of Madhya Pradesh, JT* 2010 (8) SC 319 – relied on.

6.3 Section 34 can be invoked even in those cases where some of the co-accused may be acquitted provided, it can be proved either by direct evidence or inference that the accused and the others have committed an offence in pursuance of the common intention of the group. [Para 51] [342-H; 343-A]

Prabhu Babaji v. State of Bombay AIR 1956 SC 51 – relied on.

6.4 Section 34 intends to meet a case in which it is not possible to distinguish between the criminal acts of the individual members of a party, who acted in furtherance of the common intention of all the members of the party or it is not possible to prove exactly what part was played by each of them. In the absence of common intention, the criminal liability of a member of the group might differ according to the mode of the individual's participation in the act. Common intention means that each member of the group is aware of the act to be committed. [Para 52] [343-B-C]

Case Law Reference:

AIR 1965 SC 202	Relied on	Para 22
(2006) 10 SCC 313	Relied on	Para 23
(2008) 15 SCC 786	Relied on	Para 23

A	(1997) 7 SCC 712	Relied on	Paras 24 and 26
	AIR 1972 SC 2593	Relied on	Para 26
	AIR 1975 SC 12	Relied on	Para 26
B	AIR 1983 SC 957	Relied on	Para 26
	AIR 1988 SC 696	Relied on	Para 26
	(1995) 6 SCC 447	Relied on	Para 26
	(2002) 7 SCC 606	Relied on	Para 26
C	(2008) 8 SCC 270	Relied on	Para 26
	(2009) 10 SCC 477	Relied on	Para 26
	AIR 2009 SC 2661	Relied on	Paras 26 and 42
D	(2010) 6 SCC 673	Relied on	Para 26
	(2009) 9 SCC 719	Relied on	Para 27
	AIR 1975 SC 1727	Referred to	Para 30
E	(1999) 5 SCC 96	Referred to	Para 31
	(2003) 6 SCC 380	Referred to	Para 32
	(2003) 7 SCC 56	Referred to	Para 32
F	AIR 1983 SC 484	Referred to	Para 33
	1994 Supp (2) SCC 289	Referred to	Para 34
	(2006) 11 SCC 239	Referred to	Para 34
	(2009) 11 SCC 566	Referred to	Para 34
G	(2009) 13 SCC 542	Referred to	Para 35
	(1998) 6 SCC 554	Referred to	Para 39
	AIR 1956 SC 116	Followed	Para 40

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(2005) 12 SCC 615	**Relied on**	**Para 41**	A
(2001) 9 SCC 528	**Relied on**	**Para 41**	
(2009) 7 SCC 198	**Relied on**	**Para 41**	
AIR 1953 SC 364	**Relied on**	**Para 42**	B
(2002) 5 SCC 724	**Relied on**	**Para 42**	
(2009) 9 SCC 307	**Relied on**	**Para 42**	
AIR 1963 SC 174	**Referred to**	**Para 45**	
(1996) 10 SCC 508	**Relied on**	**Para 46**	C
(2005) 9 SCC 195	**Relied on**	**Para 46**	
(2003) 10 SCC 108	**Relied on**	**Para 46**	
(2005) 10 SCC 505	**Relied on**	**Para 46**	D
(2005) 12 SCC 657	**Relied on**	**Para 46**	
(2001) 6 SCC 620	**Relied on**	**Para 47**	
(2003) 7 SCC 56	**Relied on**	**Para 48**	E
(2004) 3 SCC 793	**Relied on**	**Para 49**	
JT 2010 (8) SC 319	**Relied on**	**Para 50**	
AIR 1956 SC 51	**Relied on**	**Para 51**	F

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1243 of 2007.

From the Judgment and order dated 12.01.2006 of the High Court of Madhya pradesh at Indore in CRLa No. 1191 of 1998. G

WITH

Criminal Appeal No. 1363-1365 of 2010.

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A Criminal Appeal No. 1399 of 2008.

Fakhruddin, Abdul Karim Ansari, Munawar S. Alam, Raj Kishore Choudhry, Bharat Bhusan, Yusuf, Samant Ahuja, Gulfeeshan Javed, Neeru Sharma, Chitranjali Negi, G.G. Padmakiar Tripathi, Meenu Sharma, Malini Poduval, Ranbir B Singh Yadav, P. Kakra and Rakhi Ray for the Appellant.

C.D. Singh, Bhupendra Pratap Singh, Sunny Chaudhary, Shanshank Shekhar Parihar and Sakshi Kakkar for the Respondent.

C The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. All the aforesaid appeals have been filed against the common judgment and order dated 12.1.2006, of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal Nos.1191 of 1998; 1210 of 1998; and 281 D of 2001 by which the appellants have been convicted under Sections 302/34 of the Indian Penal Code, 1860 (hereinafter called IPC) for committing the murders of Chand Khan and Shabir Khan, while setting aside their conviction under Sections 147 and 148 IPC awarded by the Trial Court. E

2. Facts and circumstances giving rise to these appeals are that on 16.8.1994 at about 7.50 p.m., F.I.R. No.1/1994 under Sections 302, 147, 148, 149 and 307 IPC was lodged at Police Station Mandai Chowk Sarangpur, Madhya Pradesh, according F to which 17 accused including 5 appellants armed with deadly weapons came from the mosque way; stopped Chand Khan and started beating him with weapons with an intention to kill him. After hearing the hue and cry made by Chand Khan, his wife Zaira Banu, sons Shabir (deceased), Anees (PW.1), and G Ashfaq (PW.2), and brother Usman Ali (PW.4) came running to the place of occurrence and after seeing the incident, they were so scared that they could not muster the courage to intervene immediately. After some time Zaira Banu, Shabir and Ashfaq tried to rescue Chand Khan. Shabir was also assaulted, he was seriously injured and died on the spot. Ashfaq (PW.2), H

and his mother Zaira Banu also got injuries on their persons at the hands of the accused. A

3. The Investigating Officer sent the dead bodies for post-mortems which were conducted by Dr. R.P. Sharma (PW.3). In his opinion, the cause of death of both Chand Khan and Shabir was excessive hemorrhage resulting in injuries to brain and lungs. Ashfaq (PW.2) was also examined medically. After completing the investigation, out of the seventeen accused, fourteen were put to trial for offences under Sections 148, 302 and 323, in the alternative 302/149, 324/149 and 323/149 IPC. One Nanhe Khan @ Abdul Wahid died before commencement of trial. One accused namely, Rais S/o Mumtaz is still absconding. While Iqbal @ Bhura, appellant, had also absconded, but afterwards he surrendered and was tried separately. The appellants and the other accused denied the charges and pleaded that they were falsely implicated and claimed trial. The prosecution examined 12 witnesses including Anees (PW.1), Ashfaq (PW.2) and Usman Ali (PW.4), as eye-witnesses. The other relevant witnesses were Dr. R.P. Sharma (PW.3) who conducted the post-mortems on the bodies of the deceased, Ramesh Kumar Dubey (PW.7) and Rajmal Sharma (PW.8) who had investigated the case. The appellants examined 4 witnesses in defence. B C D E

4. After conclusion of the trial, the Special Additional Sessions Judge, Shajapur, convicted Abdul Sayeed (A.11), Mumtaz Khan (A.9), Rafiq (A.6) and Rais (A.5) under Section 148 IPC and awarded a sentence of 3 years' imprisonment to each; Mumtaz (A.9) was sentenced to 2 years' imprisonment under Section 147; Mumtaz (A.9) and Abdul Sayeed (A.11) were sentenced to Rigorous Imprisonment for life and fine of Rs.2000/- under Section 302 IPC for committing murder of Chand Khan; Rais @ Toun (A.5) and Rafiq (A.6) were sentenced to Rigorous Imprisonment for life and fine of Rs.1000/- under Section 302 IPC for committing murder of Shabir; Sayeed (A.7) was convicted under Section 324 IPC F G H

A and given 2 years Rigorous Imprisonment for causing injuries to Ashfaq (PW.2); Hanif Khan (A.1), was convicted under Sections 304 Part-II, 323 and 147 IPC for causing injuries to Shabir. Iqbal alias Bhura, appellant also got convicted in separate Sessions Trial No.190/94 vide judgment and order B dated 11.1.2001, under Sections 148 and 302 IPC and was awarded Rigorous Imprisonment of 3 years and life imprisonment respectively along with certain fines.

5. All the said convicts filed Criminal Appeal Nos.1191/98; 1210/98; 1233/98; and 281/2001 before the High Court of C Madhya Pradesh. The State of Madhya Pradesh also filed Criminal Appeal No.1447/98 against the acquittal of some of the accused for offences under Sections 302/149, 324/149 and 323/149 IPC. As all the appeals related to the same incident, the High Court disposed of all the appeals by the common D judgment and order dated 12.1.2006 wherein the appellants had been convicted as mentioned hereinabove, i.e., under Sections 302/34 IPC setting aside their conviction under Sections 147/148 IPC. The High Court allowed Criminal Appeal No.1191/98 with regard to the other co-accused, Hanif Khan, E Bashir Khan, Sayeed and Aslam. The appeal filed by the State of Madhya Pradesh was partly allowed. Hence, these appeals.

6. All these appeals have arisen from the same incident and have been filed against the common judgment of the High F Court and thus, are being heard together.

7. Shri Fakhruddin, learned Senior counsel, Shri Ranbir Singh Yadav and Ms. Rakhi Ray, learned counsel appearing for the appellants, have submitted that in case the High Court had set aside the conviction of all the appellants and other co-G accused under Sections 147/148 IPC, question of convicting them with the aid of Section 34 IPC did not arise, even otherwise no charge under Section 34 IPC was framed by the Trial Court; nor any evidence had been led to show that offences had been committed by the appellants in furtherance

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of a common intention. Essential ingredients of Section 34 IPC, i.e., that a common intention was shared, has not been established by the prosecution. More so, the weapons allegedly used for committing the offences by the appellants do not tally with the ocular evidence of the eye-witnesses. Therefore, injuries caused to the deceased and other injured persons cannot be attributed to the appellants. Conviction under Sections 302/34 IPC is unwarranted and thus, the appeals deserve to be allowed.

8. On the other hand, Shri C.D. Singh, learned counsel appearing for the State, has vehemently opposed the appeals contending that not framing the charge under Section 34 IPC is not fatal to the prosecution and the High Court has rightly convicted the appellants under Sections 302/34 IPC. Seventeen persons came to the spot armed with deadly weapons with a common intention to kill Chand Khan. They surrounded Chand Khan and started causing injuries to him. In such a fact-situation the eye-witnesses may not describe exactly what role had been played by an individual assailant. If there are small omissions in the depositions of the eye-witnesses, the same require to be ignored. The injured witnesses have to be relied upon and even in case there is some conflict between the ocular evidence and medical evidence, the ocular evidence has to be preferred. Therefore, the appeals lack merit and are liable to be dismissed.

9. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

10. As mentioned hereinabove, 17 persons had allegedly participated in the crime. As per the prosecution, on the date of occurrence, i.e., 16.8.1994 at about 11 A.M., one Kamla Bai, daughter of Dev Karan, neighbour of informant Anees (PW.1) was molested by Munim Khan and Mumtaz Khan (accused/ appellant) in the fields of Faqir. Smt. Gora Bai, mother of Kamla Bai, complained to Chand Khan with regard to the said incident.

A Chand Khan (since deceased), went to advise the uncle of Munim Khan and Pappu alias Chote Khan in this regard and scolded them. He also gave one slap to one of the accused. The appellants and other co-accused did not like the conduct of Chand Khan and in the evening the appellants and the co-
B accused committed the offence mentioned hereinabove. In fact, this had been the motive for commission of the offence.

11. Out of the seventeen accused, ten stood acquitted by the courts below. One of them is still absconding. One had died
C prior to the commencement of the trial. Only five accused/ appellants have been convicted by the High Court. Therefore, we are concerned only with the cases of these appellants. Making reference to any of the other co-accused at this stage would not serve any purpose.

D 12. As per the Autopsy Report (Ex.P/7-A), prepared by Dr. R.P. Sharma (PW.3) in respect of Chand Khan, the following external injuries were noticed:-

1. Incised wound on head at occipital region, 1.5 cm
E x 1 x bone deep with fracture.

2. Incised wound on right parietal region 2.5 cm x ½ x bone deep fracture of right parietal bone, clotted blood on cerebral membrane.

F 3. Incised wound on left leg 10 cm x 2 cm upto bony region of Tibia.

4. Stab wound on left side of chest between 3rd and 4th rib deep upto lung 1.5 cm x ½ cm x deep upto
G left lung puncture.

5. Incised wound on left arm of posterior surface 5 cm x 2 cm x ½ cm.

6. Lacerated wound over the left eye 1 cm x ½ cm x
H ¼ cm.

In the opinion of the doctor grievous injures to vital organs i.e. head and lungs caused excessive haemorrhage which resulted in death.

13. Dr. R.P. Sharma (PW.3) also performed Autopsy on the body of Shabir Khan and gave Post-Mortem Report Ex.P/8-A. In this report he duly noted the external injuries as under:-

1. Incised wound on head at right frontal level to right ear underneath frontal bone fracture.
2. Incised wound over the left parietal region 4, ½" x bone deep .
3. One lacerated wound over the occipital region ½" x ¼" x ¼".
4. Stab injury on the right side chest 1" x ¼" x ¼".
5. Stab injury on the right side chest 1" x ½" x deep upto lung.
6. Incised wound on left shoulder 2, ½" x ½" x ½".
7. Incised wound on right arm ½" x ½" x ½".
8. Incised wound on right arm 1" x ¼" x ¼".

The Autopsy Surgeon opined that on account of grievous injury to vital parts i.e. head and chest caused excessive haemorrhage which resulted in coma and death. Cause of death was Syncope.

14. Dr. M.K. Vashistha (PW.5) the Medical Specialist at Biaora, examined Ashfaq (PW.2) and prepared the report (Ex.P.10), according to which, he had sustained four injuries as under:

1. Incised wound 1 x 1/6 x 1/6 cm right side of the neck.

A 2. One bruise red 3 x 1 cm on the left arm.

3. Patient had complained of pain in the left leg but there was no external injury.

4. Abrasion on hip size ½ x ½ cm. The injuries were
B simple.

15. So far as Abdul Sayeed (A.11) is concerned, as per the prosecution he had a knife of 8" and assaulted Chand Khan. It is evident from the evidence of Anees (PW.1), Ashfaq (PW.2)
C and Usman Ali (PW.4) that Chand Khan received cut injuries and stab wounds as found by Dr. R.P. Sharma (PW.3). As per the medical report, his left lung was found punctured due to a stab wound. The knife used in the crime was recovered by the Investigating Officer at the instance of the said appellant. He
D has also caused injury to Ashfaq (PW.2), an eye-witness. In view of the above, the trial Court as well as the High Court reached the conclusion that he was one of the accused persons responsible for the death of Chand Khan.

16. So far as Rais alias Toun (A.5) is concerned, as per
E the evidence of Anees (PW.1), Ashfaq (PW.2) and Usman Ali (PW.4) when Shabir (since deceased), came to save his father Chand Khan, Rais Khan (A.5) attacked Shabir with sword. Dr. R.P. Sharma (PW.3) who examined Shabir deposed that the injuries suffered by Shabir were the result of the use of the
F weapon assigned to Rais alias Toun as well as other co-accused. Rais alias Toun had the sword which resulted these wounds. The trial Court as well as the High Court have found Rais responsible for killing Shabir.

G 17. So far as Rafiq (A.6) is concerned, as per the evidence of Anees (PW.1), Ashfaq (PW.2) and Usman Ali (PW.4), Rafiq used a Gupti for committing the crime. Injuries caused with the Gupti were found by Dr. R.P. Sharma (PW.3) on the body of Shabir. The Gupti used by Rafiq was 18" in length and 1-1/2" in thickness and it was sharp like a knife. The trial Court as
H

well as the High Court recorded the specific finding that the wound found on the body of Shabir was by plying Gupti and this was done by appellant Rafiq on Shabir (deceased). A

18. So far as Mumtaz Khan (A.9) is concerned, as per the evidence of all the three eye-witnesses, he was holding a Farsi and had beaten Chand Khan. There was a cut wound on the head of Chand Khan due to which the bone of the occipital region cracked and Dr. R.P. Sharma (PW.3) deposed that he had found the skull wound which resulted in cracking of the skull. The trial Court as well as the High Court, after appreciating the entire evidence on record came to the conclusion that Mumtaz Khan took an active part in beating Chand Khan, due to which he died spontaneously. B C

19. So far as Iqbal alias Bhura is concerned, as per the evidence of Anees (PW.1), Ashfaq (PW.2) and Usman Ali (PW.4), he had a sword and assaulted Shabir and the injury caused by him has been duly supported by the medical evidence. The trial Court convicted him vide judgment and order dated 11.1.2001 in a separate trial. The trial Court and the High Court found him guilty for committing murder of Shabir. D E

20. Ashfaq (PW.2) has stated that all the accused surrounded his father and attacked him with their weapons from all sides. He has named Rais alias Toun, Mumtaz Khan, Abdul Sayeed and Iqbal alias Bhura. It is also evident from his deposition that while running away from the place of occurrence they mocked him and said: *"however many of you come, we will see the end of you."* This shows that there was a common intention. Ashfaq has also explained how he had been injured. Anees (PW.1) has also deposed regarding the participation of all the five appellants and has explained what weapons they were carrying and how they had caused injuries to his father and brother. He has deposed that Chand Khan was killed by Abdul Sayeed and Mumtaz Khan and Shabir by Iqbal alias Bhura, Rais alias Toun and Rafiq. Usman Ali (PW.4), has named all the appellants along with the other co-accused who F G H

A have been acquitted by the Courts below and has given full details of the incident. He also deposed that while causing the injuries, the culprits were shouting *"kill them kill them"*. He denied the suggestion that the appellants had not caused injury to Shabir and also denied the suggestion that Iqbal was not B present there at the time of incident. He also denied the suggestion that Mumtaz Khan and Abdul Sayeed did not cause any injury to Chand Khan with Farsi and knife respectively.

21. It has strenuously been argued on behalf of the appellants that the injuries found on the person of victims could C not be caused with the weapons alleged to have been with the appellants and the same cannot be in consonance with the ocular evidence of Anees (PW.1), Ashfaq (PW.2) and Usman Ali (PW.4). Thus, appellants are entitled for the benefit of doubt as there is clear cut contradiction between the ocular and D medical evidence.

Identification in a Crowd of Assailants:

22. In cases where there are a large number of assailants, E it can be difficult for a witness to identify each assailant and attribute a specific role to him. In *Masalti v. State of Uttar Pradesh,* AIR 1965 SC 202, this Court held as under:-

"Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of F *murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be* G *necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be* H *unreasonable to contend that because the other weapons*

carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not." [Emphasis added]

23. A similar view was taken by this Court in *Kallu alias Masih & Ors. v. State of Madhya Pradesh,* (2006) 10 SCC 313; and *Viji & Anr. v. State of Karnataka,* (2008) 15 SCC 786 observing that in such a case it is not possible that all the witnesses may specifically refer to the acts of each assailants.

24. In *Bhag Singh & Ors. v. State of Punjab* (1997) 7 SCC 712, while dealing with a similar contention, this Court observed:

"It is a general handicap attached to all eyewitnesses, if they fail to speak with precision their evidence would be assailed as vague and evasive, on the contrary if they speak to all the events very well and correctly their evidence becomes vulnerable to be attacked as tutored. Both approaches are dogmatic and fraught with lack of pragmatism. The testimony of a witness should be viewed from broad angles. It should not be weighed in golden scales, but with cogent standards. In a particular case an eyewitness may be able to narrate the incident with all details without mistake if the occurrence had made an imprint on the canvas of his mind in the sequence in which it occurred. He may be a person whose capacity for absorption and retention of events is stronger than another person. It should be remembered that what he witnessed was not something that happens usually but a very exceptional one so far as he is concerned. If he reproduces it in the same sequence as it registered in his mind the testimony cannot be dubbed as artificial on that score alone."

A 25. In the instant case, a very large number of assailants attacked Chand Khan and Shabir (deceased), caused injuries with deadly weapons to them. The incident stood concluded within few minutes. Thus, it is natural that the exact version of the incident revealing every minute detail, i.e., meticulous
B exactitude of individual acts cannot be given by the eye-witnesses.

Injured Witness

26. The question of the weight to be attached to the
C evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes
D with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness". (Vide *Ramlagan Singh & Ors. v. State of Bihar,* AIR 1972 SC 2593; *Malkhan Singh & Anr.*
E *v. State of Uttar Pradesh,* AIR 1975 SC 12; *Machhi Singh & Ors. v. State of Punjab,* AIR 1983 SC 957; *Appabhai & Anr. v. State of Gujarat,* AIR 1988 SC 696; *Bonkya* alias *Bharat Shivaji Mane & Ors. v. State of Maharashtra,* (1995) 6 SCC 447; *Bhag Singh & Ors.* (supra); *Mohar & Anr. v. State of Uttar*
F *Pradesh,* (2002) 7 SCC 606; *Dinesh Kumar v. State of Rajasthan,* (2008) 8 SCC 270; *Vishnu & Ors. v. State of Rajasthan,* (2009) 10 SCC 477; *Annareddy Sambasiva Reddy & Ors. v. State of Andhra Pradesh,* AIR 2009 SC 2261; *Balraje alias Trimbak v. State of Maharashtra,* (2010) 6 SCC
G 673).

27. While deciding this issue, a similar view was taken in, *Jarnail Singh v. State of Punjab,* (2009) 9 SCC 719, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier
H judgments held as under:-

"Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In *Shivalingappa Kallayanappa v. State of Karnataka,* 1994 Supp (3) SCC 235, this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

In State of U.P. v. Kishan Chand, (2004) 7 SCC 629, a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana, (2006) 12 SCC 459). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

28. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an in-built guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

29. Ashfaq (PW.2) had given graphic description of the

A entire incident. His presence on the spot cannot be doubted as he was injured in the incident. His deposition must be given due weightage. His deposition also stood fully corroborated by the evidence of Anees (PW.1) and Usmal Ali (PW.4). The depositions so made cannot be brushed aside merely because B there have been some trivial contradictions or omissions.

Medical Evidence versus Ocular Evidence

30. In *Ram Narain Singh v. State of Punjab,* AIR 1975 SC 1727, this Court held that where the evidence of the witnesses C for the prosecution is *totally* inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecution's case and unless reasonably explained it is sufficient to discredit the entire case.

D 31. In *State of Haryana v. Bhagirath & Ors.,* (1999) 5 SCC 96, it was held as follows:-

"The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, E *the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is* F *more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the* G *particular subject."* [Emphasis added]

32. Drawing on *Bhagirath's case* (supra.), this Court has held that where the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses H

to exclude the eyewitnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant". Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities can not be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation. (Vide *Thaman Kumar v. State of Union Territory of Chandigarh,* (2003) 6 SCC 380; and *Krishnan v. State,* (2003) 7 SCC 56).

33. In *Solanki Chimanbhai Ukabhai v. State of Gujarat,* AIR 1983 SC 484, this Court observed,

> *"Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."* [Emphasis added]

34. A similar view has been taken in *Mani Ram & Ors. v.*

A *State of U.P.*, 1994 Supp (2) SCC 289; *Khambam Raja Reddy & Anr. v. Public Prosecutor, High Court of A.P.*, (2006) 11 SCC 239; and *State of U.P. v. Dinesh,* (2009) 11 SCC 566.

35. In *State of U.P. v. Hari Chand,* (2009) 13 SCC 542, this Court re-iterated the aforementioned position of law and B stated that,

> "In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy."

C 36. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony D improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.

E 37. In the instant case as referred to hereinabove, a very large number of assailants attacked one person, thus the witnesses cannot be able to state as how many injuries and in what manner the same had been caused by the accused. In such a fact-situation, discrepancy in medical evidence and F ocular evidence is bound to occur. However, it cannot tilt the balance in favour of the appellants.

38. It has been canvassed on behalf of the appellants that there was no charge framed under Section 34 IPC by the trial G Court and appellants and other co-accused have been charged under Section 147/148 IPC. All of them have been acquitted for the said charges. Thus, it was not permissible for the High Court to convict the appellants with the aid of Section 34 IPC. Non-framing of charge is fatal to the prosecution. Thus, the H appellants are entitled for acquittal on this ground alone.

Effect of Failure to frame proper charges

39. In *State of Andhra Pradesh v. Thakkidiram Reddy & Ors.*, (1998) 6 SCC 554, this Court considered the issue of failure to frame the proper charges. observing as under:

> *"10. Sub-section (1) of Section 464 of the Code of Criminal Procedure 1973 ('the Code', for short) expressly provides that no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. Sub-section (2) of the said section lays down the procedure that the court of appeal, confirmation or revision has to follow in case it is of the opinion that a failure of justice has in fact been occasioned. The other section relevant for our purposes is Section 465 of the Code; and it lays down that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the proceedings, unless in the opinion of that court, a failure of justice has in fact been occasioned. It further provides, inter alia, that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."*

The Court further held that in judging a question of prejudice, as of guilt, the court must look to the substance of the matter and not to technicalities, and its main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to

A be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. In the said case this Court ultimately came to the conclusion that despite the defect in the framing of charges, as no prejudice had been caused to the accused, no
B interference was required.

40. A Constitution Bench of this Court in *Willie (William) Slaney v. State of Madhya Pradesh,* AIR 1956 SC 116, considered the issue of failure to frame charges properly and the conviction of an accused for the offences for which he has
C not been charged and reached the conclusion as under:-

> "86. ... In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a
D conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. ....
>
> 87. ... If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If the seriousness of the omission is of a lesser degree, it
E will be an irregularity and prejudice by way of failure of justice will have to be established."

41. This Court in *Gurpreet Singh v. State of Punjab,* (2005) 12 SCC 615, referred to and relied upon its earlier judgments
F in *Willie (William) Slaney* (supra) and *Thakkidiram Reddy* (supra), and held that unless there is a failure of justice and thereby the cause of the accused has been prejudiced, no interference is required if the conviction can be upheld on the evidence led against the accused. The Court should not
G interfere unless it is established that the accused was in any way prejudiced due to the errors and omissions in framing the charges against him.

A similar view has been re-iterated by this Court in *Ramji*

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Singh v. State of Bihar, (2001) 9 SCC 528; and *Sanichar Sahni v. State of Bihar,* (2009) 7 SCC 198.

42. There is no bar in law on conviction of the accused with the aid of Section 34 IPC in place of Section 149 IPC if there is evidence on record to show that such accused shared a common intention to commit the crime and no apparent injustice or prejudice is shown to have been caused by application of Section 34 IPC in place of Section 149 IPC. The absence of a charge under one or the other or the various heads of criminal liability for the offence cannot be said to be by itself prejudicial to the accused, and before a conviction for the substantive offence without a charge can be set aside, prejudice will have to be made out. Such a legal position is bound to be held good in view of the provisions of Sections 215, 216, 218, 221 and 464 of Code of Criminal Procedure, 1973. (Vide: *Dalip Singh & Ors. v. State of Punjab,* AIR 1953 SC 364; *Malhu Yadav & Ors. v. State of Bihar,* (2002) 5 SCC 724; *Dhaneswar Mahakud & Ors. v. State of Orissa,* (2009) 9 SCC 307; and *Annareddy Sambasiva Reddy & Ors. v. State of Andhra Pradesh,* AIR 2009 SC 2661).

43. Thus, the law on the issue can be summarised to the effect that unless the accused is able to establish that the defect(s) in framing the charge(s) has caused real prejudice to him; that he was not informed as to what was the real case against him; or that he could not defend himself properly, no interference is required on mere technicalities.

44. If the instant case is examined in the light of the aforesaid settled legal propositions we do not find any force in the submissions made on behalf of the appellants.

Section 34 IPC

45. The aforesaid conclusion takes us to the issue raised by the appellants as to whether appellants could be convicted with the aid of Section 34 IPC.

A Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common intention" to commit the offence. The phrase "common intention" implies a pre-arranged B plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case C and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different sense from the "same intention" or "similar intention" or "common object". The persons having similar intention which is not the result of the pre-arranged plan cannot be held guilty of the D criminal act with the aid of Section 34 IPC. (See *Mohan Singh & Anr. v. State of Punjab*, AIR 1963 SC 174).

46. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this Section E gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the concerned persons had shared a common intention. (vide : *Krishnan & Anr. v. State of Kerala,* (1996) 10 SCC 508; and F *Harbans Kaur & Anr. v. State of Haryana,* (2005) 9 SCC 195).

Undoubtedly, the ingredients of Section 34, i.e., that the accused had acted in furtherance of their common intention is required to be proved specifically or by inference, in the facts G and circumstances of the case. (Vide: *Hamlet alias Sasi & Ors. v. State of Kerala,* (2003) 10 SCC 108; *Pichai* alias *Pichandi & Ors. v. State of Tamil Nadu,* (2005) 10 SCC 505; and *Bishna alias Bhiswadeb Mahato & Ors. v. State of West* H *Bengal,* (2005) 12 SCC 657).

47. In *Gopi Nath @ Jhallar v. State of U.P.,* (2001) 6 SCC 620, this court observed as under: A

> "8.....Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action — be it that it was not overt or was only a covert act or merely an omission constituting an illegal omission. The section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a pre-concerted or pre-arranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case." B C D E

48. In *Krishnan and Anr. v. State represented by Inspector of Police,* (2003) 7 SCC 56, this court observed that applicability of Section 34 is dependent on the facts and circumstances of each case. No hard and fast rule can be made out regarding applicability or non-applicability of Section 34. F

49. In *Girija Shankar v. State of U.P.,* (2004) 3 SCC 793, it is observed that Section 34 has been enacted to elucidate the principle of joint liability of a criminal act: G

> *"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* H

A *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*
B *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*
C *proved circumstances." [Emphasis added]* (Emphasis added)

50. In *Virendra Singh v. State of Madhya Pradesh,* JT 2010 (8) SC 319, this Court observed that:

D "Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a pre-arranged and
E pre-meditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the pre-meditation and though the plan may be formed suddenly. In order that section 34 IPC may apply, it is not necessary that the prosecution
F must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together
G actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Section 34."

51. Section 34 can be invoked even in those cases where some of the co-accused may be acquitted provided, it can be
H proved either by direct evidence or inference that the accused

and the others have committed an offence in pursuance of the common intention of the group. (vide: *Prabhu Babaji v. State of Bombay,* AIR 1956 SC 51).

52. Section 34 intends to meet a case in which it is not possible to distinguish between the criminal acts of the individual members of a party, who act in furtherance of the common intention of all the members of the party or it is not possible to prove exactly what part was played by each of them. In the absence of common intention, the criminal liability of a member of the group might differ according to the mode of the individual's participation in the act. Common intention means that each member of the group is aware of the act to be committed.

53. In view of the aforesaid discussion, we are of the considered opinion that the High Court has rightly proceeded in the matter while setting aside the conviction of the appellants under Sections 147/148 IPC and convicting them with the aid of Section 34 IPC.

Sum up:

54. In view of the above, it is evident that an FIR had been lodged promptly within 20 minutes from the time of commission of the offence as the place of occurrence was in close proximity of Police Chowki and all the appellants along with other co-accused had been named therein. There had been an injured witness. The prosecution has explained the motive that the appellants did not like intervention of Chand Khan taking side of Kamla Bai who had been molested by persons of the accused party. Several hours after the lodging of the complaint by Chand Khan in that incident, the appellants attacked Chand Khan with motive in a pre-planned manner armed with deadly weapons and caused injuries. Shabir Khan, son of Chand Khan when came to rescue his father was also done away with. In the incident, Ashfaq (PW.2) also got injured. The courts below after appreciating the evidence on record rightly came to the

A conclusion that the five appellants had been responsible for the said offences. The testimony of these witnesses had been subjected to searching cross-examination, but nothing has been brought on record to discredit the statement of either of the eye-witnesses.

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55. In view of the above, we are of the view that the instant case does not present special features warranting review of the impugned judgment. Thus, there is no cogent reason to interfere with the impugned judgment and order dated 12.1.2006 passed by the High Court of Madhya Pradesh. The appeals C lack merit and are accordingly dismissed.

K.K.T. Appeals dismissed.