A

STATE OF U.P.

v.

IFTIKHAR KHAN & ORS.

January 15, 1973

[A. ALAGIRISWAMI, I. D. DUA AND C. A. VAIDIALINGAM, JJ.] B

Constitution of India, 1950, *Art.* 136—*Appeal against acquittal by special leave—Power of the Supreme Court.*

Indian Penal Code (Act 45 *of* 1860), *ss.* 34— *Scope of.*

Criminal law—Practice and Procedure—Duty of Prosecution to examine all witnesses.

C

Sentence—Murder—When accused may be sentenced to imprisonmen for life.

On the day the deceased was murdered, the four accused—two of whom were bitterly inimical to the deceased, the other two being their close associates came together in a body to the shop of deceased. Two of the accused, who had pistols, shot at the deceased. The other two had lathis. No overtact was attributed to them, but there was D nothing to suggest that they did not know that their associates had the pistols. After the shooting, all the four accused ran away together when an alarm was raised. Two brothers of the deceased, were eye witnesses to the occurrence and according to them there were three other persons who witnessed the occurrence. Those three persons however filed affidavits in the Committing Court that they had seen nothing and hence they were not examined as witnesses for the prosecution. According to one of the eye-witnesses the affidavits were false and those E persons filed them because they were afraid of the accused. One of the accused pleaded *alibi* and examined defence witnesses, but that evidence did not rule out the possibility of the particular accused being present at the scene of occurrence, and in fact did not create any reasonable doubt in favour of that accused.

The trial court accepted the evidence of the two eye witnesses. The two accused who took part in the shooting were convicted under s. 302, F I.P.C. and sentenced to death. The other two were convicted under ss. 302 and 34, I.P.C. and were sentenced to imprisonment for life.

The High Court dealing with the matter in appeal as well as under s. 374, Cr. P.C., rejected the evidence of the two eye witnesses characterising them as partisan witnesses.

Allowing the appeal to this Court, G

HELD : (1) The approach of the High Court to the evidence of the eye witnesses was erroneous. [335C]

(a) The High Court did not give a specific finding on the plea of *alibi* of the concerned accused. [337D-E]

(b) It did not consider whether there were any discrepancies in the evidence of the two eye-witnesses, and whether their evidence sounded H true and genuine, but rejected the evidence merely on the ground that they were brothers of the deceased and hence were partisan or interested witnesses. [337E-G]

A (c) It assumed that the evidence of one of them was not acceptable, and therefore the evidence of the other also could not be accepted because the witnesses were brothers. [336H]

(2) In appeals against acquittal by special leave under Art. 136, this Court has power to interfere with findings of fact, no distinction being made between judgments of acquittal and conviction, but this Court will not ordinarily interfere with the appreciation of evidence or B with findings of fact unless the High Court has acted perversely or otherwise improperly on grounds which are plainly untenable or there has been a grave miscarriage of justice, and the view taken by the High Court is clearly unreasonable on the evidence on record. In a reference made by the Sessions Court, under s. 374, Cr. P. C., for confirmation of the sentence of death passed by it, there is a duty on the High Court to independently consider the matter carefully and C examine all relevant and material circumstances; but if the High Court reverses the decision of the trial court on grounds which are plainly fallacious and untenable, and grave injustice has been done, this Court will interfere with the order of the High Court. [335B-C, F-H]

Masalti v. *State of U.P.*, [1964] 8 S.C.R. 133, *Himachal Pradesh Administration* v. *Om Prakash*, A.I.R. 1972 S.C. 975 and *State of Uttar Pradesh* v. *Saman Dass* Criminal Appeal No. 17 of 1971 decided D on 11-1-1972 followed.

(3) For invoking s. 34, I.P.C. against an accused prior concert or a pre-arranged plan has to be established. But as it is difficult to prove the intention of an individual, it has to be inferred from his act, or conduct and other relevant circumstances. The section will be attracted if it is established that the criminal act has been done by any one of the accused persons in furtherance of the common intention. A E common intention—a meeting of minds—to commit an offence and participation in the commission of the offence in furtherance of that common intention invite the application of the section. But participation need not in all cases be by physical presence. In offences *involving physical violence*, normally presence at the scene of offence of the offenders sought to be rendered liable on the principle of joint liability may be necessary, but it is not necessary, to attract the section, that any overt act must be done by the particular accused who was present. F [344-C; 345 A-B]

In the circumstances of this case, the accused with the lathis must be held to be guilty under s. 302 read with s. 34 I.P.C. [344-H]

Pandurang, Tukia and Bhillia v. *The State of Hyderabad*, [1955] S.C.R. 1083, *Krishna Govind Patil* v. *State of Maharashtra*, [1964] 1 S.C.R. 678 and *Jaikrishnadas Manohardas Desai and Another* v. G *The State of Bombay*, [1960] 3 S.C.R. 319 followed.

Mahbub Shah v. *King-Emperor*, [1945] L.R. 72 I.A. 148 and *Barandra Kumar Ghose* v. *The King Emperor*, [1924] L.R. 52 I.A. 40 applied.

(4) Ordinarily, it is the duty of the prosecution to examine all material witnesses essential to the unfolding of the narrative on which the prosecution is based, whether in the result the effect of that testi- H mony is for or against the case of the prosecution. But no purpose would have been served in the present case by insisting on the prosecution examining the others as witnesses, in view of the affidavits filed by them. [338D-E, H]

Habeeb Mohammad v. *The State of Hyderabad*, [1954] S.C.R. 475 and *Sahai Ram & Others* v. *The State of U.P.* Criminal Appeal No. 131 of 1969 decided on 17-11-1972 followed.

Staphen Senevirathe v. *The King*, A.I.R. 1936 P.C. 289, applied.

(5) Since more than 4 years had passed since the sentence of death was passed and in between, there was an acquittal by the High Court, interests of justice would be served by sentencing the accused to imprisonment for life. [347A-C]

CRIMINAL APPELLATE JURISDICTION : Cr. Appeal No. 252 of 1969.

Appeal by special leave from the judgment and order dated 8th May 1969 of the Allahabad High Court in Criminal Appeal No. 199 of 1969.

O. P. Rana, for the appellant.

Vimal Dave, for respondents Nos. 1 & 3.

C. B. Agarwala, for respondent No. 4.

The Judgment of the Court was delivered by

VAIDIALINGAM, J.—This appeal, by special leave, by the State of U.P. is directed against the judgment and order dated 8-5-1969 in Criminal Appeal No. 199 of 1969 (Referred No. 21 of 1969) allowing the appeal of the four accused, respondents herein, and setting aside the conviction recorded against them by the learned Civil and Sessions Judge, Hardoi, under sections 302 and 302 read with 34 I.P.C.

The four respondents herein were tried by the Civil and Sessions Judge for the offence of committing the murder of Sikander Khan on October 16, 1967. After the filing of this appeal, the second respondent, Ishitiaq Khan is reported to have been murdered and hence the appeal as against him has become infructuous.

In this appeal by the State, we are at present concerned only with Iftikhar Khan, son of Mohammad Hasan, Anwar Khan, son of Mohammad Hussan Khan and Syeed Khan, son of Refiq Hussain Khan, who are respondents one, three and four respectively.

The prosecution case was as follows :

All the respondents and the deceased, Sikander Khan, are residents of village Garni Chand. Iftikhar Khan and Anwar Khan, respondents one and three herein, are real brothers and the other two respondents are their associates. About two years or so, prior to the murder of Sikander Khan, Aqil Khan, a brother of

A respondents of one and three, was murdered. In connection with the said murder, the deceased, Sikander Khan, Ilyas Khan and two or three others were tried. However, they were acquitted about ten months prior to this incident. On October 16, 1967, the day on which Sikander Khan was murdered, a case of attempted murder of Ilyas Khan was pending against respondents one B and two herein. Both of them had been released on bail about a month prior to October 16, 1967. Respondents one and three strongly suspected that Sikander Khan was responsible for the murder of their brother, Aqil Khan, though there has been an acquittal by the court in his favour. On October 16, 1967, at about 8.30 P.M., Sikander Khan was sitting on a cot in front of C his shop and was reading 'Jang Nama'. His brothers, P.Ws one and two, along with one Laddan Khan were also sitting near Sikander Khan listening to the reading of the epic. Respondents one and two armed with country made pistols and respondents three and four armed with lathis came in a body to the place where Sikander Khan was seated. The first and the second respondents D fired shots in quick succession at Sikander Khan. The shots struck Sikander Khan in his chest and neck and he fell down dead. On hearing the alarm of P.Ws one and two, the neighbours came and saw all the accused running away. Sikander Khan, on receiving the gun-shots died on the spot. The first information report was given by P.W. 1 at about 11.35 P.M. and it was recorded by the Head Constable, P.W. 7. The investigation was taken up by E P.W. 8. The respondents surrendered in court on November 4, 1967. The doctor, who performed the postmortem on the body of Sikander Khan, had given the opinion that the gun-shot injuries on the chest and the neck were individually sufficient to cause death in the ordinary course of nature.

F Respondents one and two were tried for the offence of committing the murder of Sikander Khan under section 302. The other two respondents were tried under section 302 read with section 34. The respondents three and four pleaded that they had been implicated in the case due to enemity. The first respondent, apart from adopting the said plea, further set up an *alibi*. G According to him he was an in-patient in the District hospital, Bareilly, from 14-10-1967 to 31-10-1967 and that he was operated upon for hydrocele at the said hospital on 18-10-1967. In view of the fact that he was in the hospital on 16-10-1967, the evidence given implicating him in the murder is false. The prosecution mainly relied on the evidence of P.Ws 1 and 2, the H brothers of the deceased, to prove its case against the accused. The first respondent also examined the doctor of the Bareilly hospital and two nurses working there in support of his plea of *alibi*. The court examined a student nurse working in the same hospital

as C.W. 1. Notwithstanding the fact that P.Ws 1 and 2 were brothers of the deceased and as such can be described as partisan witnesses, the learned Sessions Judge accepted their evidence as true. Regarding the plea of *alibi* set up by the first respondent, the learned Sessions Judge, after consideration of the evidence of P.Ws 1 to 3 as also the evidence of C.W. 1, held that the said plea cannot be accepted. The Court further held that though the first respondent was operated upon for hydrocele on October 18, 1967, the evidence of the doctor and the nurses of the Bareilly hospital establish that it was possible for the first respondent to move about and it was further possible for him to be absent from the hospital on October 16, 1967. In fact the view of the learned Sessions Judge is that the murder of Sikander Khan had been planned and the first Respondent, in order to create the evidence of *alibi,* got himself admitted in the district hospital at Bareilly on the 14th and that he successfully manoeuvred to have the operation originally fixed for October 16, 1967, postponed. By so manoeuvring, the first respondent was able to be in the village on October 16, 1967 and, after committing the murder, he went back to the hospital. In this view, the respondents one and two were convicted under section 302 and sentenced to death. The respondents three and four were also found guilty of murder under section 302, read with section 34 on the finding that they had associated themselves with the other two accused with the common intention of committing the murder of Sikander Khan. However, they were sentenced to undergo imprisonment for life.

All the four respondents appealed to the High Court challenging their conviction and sentence. There was also the reference for confirmation of the sentence of death of respondents one and two. The main findings of the High Court were as follows :

"It is not necessary to give details of enmity that existed between the deceased and the accused. Murders appear to be quite common in the area where the parties live and they resort to such crimes. The two eye witnesses, P.Ws 1 and 2, being the brothers of the deceased are partisan witnesses. These two witnesses have not given proper answers when cross-examined on the point whether the first respondent was in the village from 14th October, 1967. Though there can be some argument whether the first respondent was or was not actually in the hospital from the afternoon of October 16, 1967 till the morning of the next day, yet the evidence shows that he was admitted in the Bareilly hospital on the 14th October and was there on the next day also. He was operated on October 18, 1967. In view of these facts he could not be in the village on the 14th and 15th October, 1967. Hence the evidence of P.W. 2 to the contrary is false. As P.W. 2 has made a false statement with regard to the presence of the first respondent

A in the village on 14th and 15th October, 1967, his brother, P.W. 1, should also be put in the same category, as it is not proper to believe one brother and disbelieve the other. If the two partisan eye witnesses, P.Ws 1 and 2, had made a satisfactory statement, the plea of *alibi* set up by the first respondent has to be viewed with considerable doubt and respondents two and four may not B be entitled to the benefit of the said doubt. As only two shots had been fired, it was possible for the assailants to escape quickly and the theory of the witnesses making a mistake cannot be excluded. It cannot be stated that respondents three and four had the common intention to commit the murder, as villagers in good faith pass on the road in the mid-night carrying lathis. Both respondents C two and three may have had lathis and it is also likely that they may have accompanied the other two respondents, but they may have done so without any knowledge that fire-arms were being carried to commit the murder of Sikander Khan. If the incident has taken place at night making it clear that all persons must have been acting together, it may be held that common D intention of all was to commit the murder. Though it may be that the party of the accused was responsible for the murder, the evidence of the partisan witnesses is not satisfactory and as such all the accused are entitled to the benefit of doubt".

On behalf of the appellant State, Mr. O. P. Rana, learned counsel, attacked the judgment of the High Court on the ground E that before reversing the conviction and sentence passed on the respondents, and acquitting them, the learned Judges have not adverted to the main evidence relied on by the prosecution and, without recording any finding, have accepted the plea of *alibi* set up by the first respondent. The order of acquittal has been passed by the High Court, according to the learned counsel, on mere F conjectures and without any reference to the materials on record. Quite naturally, he pressed before us the various items of evidence relied on by the learned Sessions Judge for convicting the respondents and which have not been taken into account by the High Court.

Mr. D. Mookerjee, learned counsel for the respondents one G and three, pointed out, what according to him were serious discrepancies in the evidence adduced by the prosecution. The counsel urged that though the judgment of the High Court has not elaborately considered and dealt with all those matters, nevertheless they must have been in the minds of the learned Judges of the High Court when they gave the benefit of doubt to the accused and H acquitted them. It was further stressed that the State has not made out a case for this Court, in exercise of its powers under Article 136, to interfere with the decision of the High Court acquitting the accused.

Mr. B. R. Aggarwala, learned counsel appearing for the 4th Respondent, adopted most of the general arguments that have been advanced by Mr. Mookerjee. He particularly stressed that the conviction of the 4th Respondent for an offence under section 302 IPC, with the aid of section 34, is not justified, as there is nothing in the evidence to show that, even if the shooting by Respondents 1 and 2 is accepted, the said criminal act was done by the said accused in furtherance of the common intention of all the four accused. According to him there is no evidence to establish that the criminal act was done in concert or pursuant to a prearranged plan. The counsel drew our attention to the evidence of P.Ws 1 and 2, which at the most, according to him, only establishes that all the accused came together and that they left the place at the same time after the shooting was done by Respondents 1 and 2. Those witnesses do not speak of any overt act done by Respondent 4. He further pointed out that in the first information report given by P.W. 1, there is no reference to the 4th Respondent being armed with a lathi. Both P.Ws 1 and 2 have improved upon this version in the F.I.R. Before the court, they have stated that Respondents 3 and 4 came armed with lathis. But even then, he pointed out, those witnesses did not speak of any further part played by Respondent 4 except that he was in the company of the other accused. The counsel drew our attention to the decision of the Judicial Committee in *Mahbub Shah* v. *King-Emperor*(1) as well as the decision of this Court in *Pandurang, Tukia and Bhillia* v. *The State of Hyderabad*(2) wherein the ingradients necessary for the application of section 34 of the Indian Penal Code have been laid down. In view of the total lack of evidence to establish that the act was done in furtherance of the common intention of all, the counsel urged that the order of acquittal passed by the High Court in favour of the 4th Respondent does not require interference.

We may at this stage mention that the evidence regarding the participation of Respondents 3 and 4, who are both stated to have come with lathis, is the same. Therefore, we will have due regard to the contentions of Mr. Aggarwala, even when the case of the 3rd Respondent is being dealt with by us.

We will later refer to the various aspects that were pressed before us by the learned counsel for the accused.

It must be stated that in view of the approach made by the High Court, by not considering the various items of evidence and recording suitable findings, both the learned counsel found considerable difficulty in supporting the judgment of the High Court,

(1) [1945] L.R. 72 I.A. 148. (2) [1955] S.C.R. 1083.

A though it must be stated in fairness to them that they tried their very best to do so.

We have earlier broadly indicated the views expressed by the High Court. It must be remembered that the High Court was dealing, apart from an appeal by the convicted accused, also with B a reference made by the learned Sessions Judge under section 374, Criminal Procedure Code, for confirmation of the sentence of death passed on respondents one and two for an offence of murder. As pointed out by this court in *Masalti* v. *State of U.P.*,(1) under such circumstances there was a duty on the High Court to independently consider the matter carefully and to examine all C relevant and material circumstances. A perusal of the judgment of the High Court gives the unfortunate impression that this principle has not been borne in mind.

Before we refer to the evidence on record as well as the contentions of Mr. Mookerjee, it is desirable to clear the ground regarding the powers of this Court under article 136 to interfere D with the orders of acquittal passed by the High Court. It has been strenuously pressed before us by Mr. Mookerjee that unless the conclusion reached by the High Court is such that no Tribunal will come to, this Court will not interfere with the order of acquittal, while exercising power under Article 136. It is true that this Court will interfere in the circumstances mentioned by Mr. E Mookerjee, but that is not the only circumstance under which interference will be warranted. There are several other circumstances under which interference may and has been made by this Court. We will refer to some of those circumstances presently.

It is now well established that in appeals against acquittal by F special leave under Article 136, this Court has no doubt powers to interfere with findings of fact, no distinction being made between judgments of acquittal and conviction. It has also been held that this Court will not ordinarily interfere with the appreciation of evidence or on findings of fact unless the High Court has acted perversely or otherwise improperly or there has been a grave miscarriage of justice. It has been further held that where this G Court found that grave injustice has been done by the High Court on grounds which are plainly untenable and the view taken by the High Court is clearly unreasonable on the evidence on record, a case for interference is made out. The recent decisions of this Court on this aspect laying down the above principles are to be found in *Himachal Pradesh Administration* v. *Om Prakash*(2) H and *State of Uttar Pradesh* v. *Samman Dass*.(3)

(1) [1964] (8) S.C.R. 133.
(2) A.I.R. 1972 S.C. 975.
(3) Criminal Appeal No. 17 of 1971 decided on 11-1-1972.

A Bearing in mind the above principles, we will now refer to the material evidence on record. The evidence of P.W. 1, brother of the deceased, is to the following effect :—

He first narrated the reasons for the enmity between the accused and Sikander Khan. At about 8.30 P.M. on October 16, 1967, B his brother, the deceased Sikander Khan, was sitting opposite to his shop and reading 'Jang Nama'. P.W. 1 and his brother, P.W. 2, were also with the deceased listening to the reading of the epic. Suddenly the four accused came together to the place where Sikander Khan was sitting. The respondents one and two, who were armed with pistols, fired a shot each at Sikander Khan. The C shots hit Sikander Khan in the chest and in the neck and he fell down dead. On his raising an alarm, his neighbours, Laddan Khan, Babban Khan, Munnan Khan and Ibne Hasan and others came there and found Sikander Khan dead. When respondents three and four came with the other accused, they had lathis with them. After the shooting, all the accused ran away. He gave D the first information report at about 11.35 P.M. which was recorded by P.W. 7. The evidence of P.W. 2 is also substantially to the same effect. Surprisingly, P.Ws 1 and 2 have not been cross-examined, when they spoke of enmity between Sikander Khan and the accused.

E In the first information report, after referring to the murder of Aqil Khan and other matters, P.W. 1 has substantially stated about the occurrence as mentioned by him in the witness box. He referred to the presence of his brother, P.W. 2, as also the villagers referred to in his evidence as having come to the scene immediately after the shots were fired.

F It is no doubt true that both P.Ws 1 and 2 are the brothers of the deceased. This aspect has been taken into account by the learned Sessions Judge and he has considered their evidence to be truthful. But when we come to the High Court, there is neither an analysis nor proper consideration of the evidence of these two eye witnesses. The learned judges of the High Court stated that G they are partisan witnesses. True it is that they are partisan witnesses being the brothers of the deceased. The reason given by the High Court for rejecting the evidence of those witnesses is that P.W 2 has made a false statement with regard to the presence or absence of Iftikhar Khan in the village on the 14th and 15th October, 1967. It is the further view of the High Court that when H the evidence of P.W. 2 is not being accepted, the evidence of P.W. 1 also cannot be accepted, as both brothers must be placed in the same category. This line of reasoning, in our opinion, is erroneous.

A The plea of *alibi* set up by the first respondent will be considered by us later. But it is necessary to refer to the answers given in the cross-examination of P.Ws 1 and 2 to consider whether the approach made by the High Court for rejecting their evidence is justified. We find that the cross-examination of these two witnesses is very scanty. The only suggestion made to P.W. 1 was B whether Iftikhar Khan had been admitted to some hospital at Bareilly on the day of occurrence, namely, October 16, 1967. His answer was that the suggestion is not correct. There is no further question put to this witness regarding the respondent one having been admitted in the hospital, the duration of his stay in the hospital or his discharge from the hospital. P.W. 2 in cross- C examination has stated that he had seen Iftikhar Khan all along in the village on the day of occurrence and for three or four days before the occurrence. This must be the answer obviously to a question whether the witness had seen Iftikhar Khan in the village on the day of the occurrence and also during the three or four days before October 16, 1967. No further questions have been D put to this witness. It is on the basis of the answer given by P.W. 2 that the High Court has rejected, not only his evidence but also the evidence of P.W. 1. In our opinion, the approach made by the High Court is erroneous, especially when we do not find any positive finding by the court that the first respondent was in the hospital on October 16, 1967. The High Court's rejection E of their evidence has been substantially on the ground that, they being the brothers of the deceased, were partisan witnesses and, therefore, their evidence is unworthy of credence. Here again, the learned Judges have committed an error. It is no doubt true that when the court has to appreciate the evidence given by witnesses who are partisan or interested, it has to be very careful in F weighing their evidence. Some of the points to be taken into account will be whether or not there are discrepancies in the evidence; whether or not the evidence strikes the court as genuine; whether or not the story disclosed by the evidence is true. In our opinion, it is unreasonable to reject the evidence given by the witnesses merely on the ground that they are partisan or interested G witnesses. Judicial approach has to be very cautious in dealing with such evidence. The High Court has not given due consideration to these aspects also when rejecting the evidence of P.Ws 1 and 2. This also answers the contentions of Mr. Mookerjee that the evidence of P.Ws 1 and 2, who are partisan witnesses, has been rightly rejected by the High Court.

H

Mr. Mookerjee next pointed out that the non-examination by the prosecution of the persons mentioned in the first information report and who, according to the prosecution, have seen the occur-

rence, must have weighed with the High Court in rejecting the interested testimony of P.Ws 1 and 2. He further stressed that there was a duty on the part of the prosecution to have examined those persons who have witnessed the occurrence irrespective of the nature of the evidence that they may give before the court. On the other hand, he pointed out that those persons, who can be called independent witnesses, have been kept back and only the brothers of the deceased have been examined and the prosecution must bear the consequences of such evidence not having been accepted by the court.

The counsel further urged that the non-examination of those persons, mentioned in the first information report, who have seen the occurrence, has prejudiced the accused and, therefore, their conviction, by the trial court, based merely on the testimony of P.Ws 1 and 2, who are none else than the brothers of the deceased, cannot be considered to have been arrived at after a fair trial.

It is no doubt true that, as pointed out by this Court in *Habeeb Mohammad* v. *The State of Hyderabad*(1), it is the duty of the prosecution to examine all material witnesses essential to the unfolding of the narrative on which the prosecution is based, whether in the result the effect of that testimony is for or against the case of the prosecution. In the said decision, the observations made to the same effect by the Judicial Committee in *Stephen Seneviratne* v. *The King*(2) have been quoted with approval. To a similar effect is also the recent decision in *Sahaj Ram & Others* v. *The State of U.P.*(3).

After giving due consideration to the above contentions of Mr. Mookerjee, we are of the opinion that, in the particular circumstances of this case, there was justification for the non-examination of Laddan Khan, Babban Khan, Ibne Hasan and Munnan Khan. From the evidence of the investigating officer, P.W. 8, it is seen that the statements were recorded by the police from the above persons on the morning of October 17. 1967. P.W. 1 in his chief examination had stated that Laddan Khan, Babban Khan and Ibne Hasan had seen the murder of his brother, Sikander Khan. It is his further evidence that though they had seen the murder, yet due to fear of the accused persons they had filed a false affidavit on April 16, 1968, before the Committing Magistrate that they had seen nothing. So far as we could see, there is no cross-examination of P.W. 1 on this point. When these three persons had filed affidavits before the Committing Magistrate that they had seen nothing, it serves no purpose to insist on the prose-

(1)]1954] S.C.R. 475. (2) A.I.R. 1936 P.C. 289.
(3) Criminal Appeal No. 131 of 1969 decided on 17-11-1972.

A cution examining them as witnesses. So far as Munnan Khan is concerned, he is the uncle of P.Ws 1 and 2 and the deceased and the evidence of P.Ws 1 and 2 is that he came running to the scene when an alarm was raised. His evidence would not have carried the matters further because he had come only after the actual shooting had taken place. His evidence is not essential to B the unfolding of the prosecution case; and as much he was not a material witness. Therefore, this criticism regarding the non-examination of the said four persons has to be rejected.

The main plea of the first respondent was that on the date of C the occurrence he was in the Bareilly hospital and, therefore, the evidence of the prosecution witnesses regarding his participation in the murder is false. All the four accused surrendered before the Magistrate on November 4, 1967. On the said date, the first respondent filed a statement before the Magistrate to the effect that on the date, when the murder is alleged to have taken place, D namely, October 16, 1967, he was already in the District hospital, Bareilly from October 14, 1967 to October 31, 1967, and that he was also operated upon for hydrocele in the meanwhile. According to him, he was in the hospital during the entire period from October 14, 1967 to October 31, 1967. If this is established, there can be no doubt that his acquittal by the High Court will be E justified. Again if he was in the hospital on October 16, 1967, the evidence given by the witnesses regarding the participation in the crime of not only the first respondent but also of the other respondents, will have to be viewed with greater care and caution *i.e.* whether their evidence can be considered to be true even regarding the participation of respondents two to four. But the F question is whether on the evidence it can be held that the first respondent was in the hospital on October 16, 1967.

In support of his plea of *alibi*, the first respondent had examined the Medical Officer, D.W. 1, and two nurses, D. Ws 2 and 3 working in the said hospital. As the name of another G person was also mentioned by D.Ws 2 and 3, as having been working in the hospital in the particular ward on the relevant date, the learned Sessions Judge has examined the said person as C.W. 1. D.W. 1 no doubt refers to the first respondent having been admitted as an indoor patient in the district hospital, Bareilly, on October 14, 1967. But he has stated that the operation of the H said accused for hydrocele, which had been fixed originally on October 16, 1967, did not take place and that he was actually operated on October 18, 1967. But the point to be noted from the evidence of this witness is that he cannot say on oath that on

October 16, 1967, the first respondent was present in the hospital all along. He has also stated that on October 16, 1967, the first respondent might have been in a fit position to move about and that there is no signature of the said accused in the records of the hospital on October 16, 1967. D.W. 2 claims to be the sister-in-charge of the hospital on October 16, 1967. She has stated that she was on duty from 7.00 A.M. to 12.00 A.M. and again from 4.00 P.M. to 8.00 P.M. on October 16, 1967. It is her further evidence that she can say from memory that on October 16, 1967, the first respondent, Iftikhar Khan, whom she is able to recognise by sight, was in the hospital. In view of this statement, quite naturally, she was very severely cross-examined by the prosecution. She had admitted in cross-examination that there is no record to say that she was on duty in the hospital on October 16, 1967 and that there is also no record to show that she counted the patients and satisfied herself that the first respondent was in the hospital. Even in cross-examination she has stated that she counted the number of patients at 4.00 P.M. on October 16, 1967, in the presence of CW 1. But she is prepared to admit that the operation, which was scheduled to take place on October 16, 1967, was postponed because the operation fee was not paid by the first respondent. She has wound up her evidence by stating that all the answers given by her on December 18, 1968, regarding the presence of the first respondent in the hospital on October 16, 1967, were from her memory. To a specific question by the Court, this witness has further stated that it is only on the basis of memory that she was saying that she took charge of the patients on October 16, 1967, at 4.00 P.M. along with the student nurse, Sharma, CW 1. She has admitted that in the 'Day and Night' register, which appears to have been produced before the court, it has not been noted that CW 1 came on duty at 4.00 P.M. on October 16, 1967. DW 3, another staff nurse, working in the hospital, has stated that she may have been on duty on October 16, 1967, from 7.00 A.M. to 4.00 P.M. But on seeing the first respondent in the dock, she has stated that she is not sure if the same person was admitted for operation of hydrocele in the hospital. In fact, in an answer to a question put by the court, she has admitted that she cannot say if the first respondent was in her ward at any time, even between 7.00 A.M. and 4.00 P.M. on October 16, 1967.

Coming to CW 1, she has categorically denied that she was ever put in-charge of the ward on October 16, 1967, and she has also denied having made any counting of patients and that at 4.00 P.M. and in the company of DW 2. She has also stated that she cannot say if the first respondent was an indoor patient

A in the hospital on October 16, 1967. From the above evidence, it is evident that it is only DW 2 who has stated that the 1st Respondent-accused was in the hospital on October 16, 1967, from morning till 8.00 P.M. If he was in the hospital at 8.00 P.M., it is evident that he could not have been present at the scene of occurrence at 8.30 P.M. That much is accepted by the prosecu-
B tion.. But the learned Sessions Judge has dis-believed the evidence of DW 2. Her evidence, as mentioned earlier, is purely a guess work and from memory. There are no records produced from the hospital to corroborate her evidence that the first respondent was in the hospital on October 16, 1967. In fact, CW 1, in whose company the counting of patients is stated to have been done by
C DW 2, finally contradicts the latter. DW 3 does not support DW 2. The High Court, while considering the evidence of the Medical Officer, DW 1, does not express its opinion as to the truthfulness or otherwise of DW 2 except saying that nurses have to work at very great speed in the hospitals and that they can also make mistakes. It is a bit difficult to appreciate in what context
D this observation has been made by the High Court. It is no doubt true that from the evidence of DW 1, the Medical Officer, it is evident that the first respondent was admitted in the hospital on October 14, 1967. Though there is no clear evidence, one way or the other, it is very likely that he was in the hospital also on October 15, 1967. But the evidence of DW 1 is clear to the effect that
E he cannot speak of the first respondent having been in the hospital on October 16, 1967. DW 3 and CW 1 did not state that the first respondent was in the hospital on October 16, 1967. DW 1 is also positive when he says that the operation, which was scheduled to take place on October 16, 1967, was postponed to October 18, 1967 and that the first respondent was in a position
F to move about on the former date. These circumstances clearly show that it was possible for the first respondent to be absent from the hospital on October 16, 1967. None of the witnesses examined by the defence have stated that once a person has been admitted to the hospital, he cannot leave the hospital under any circumstances till he is discharged. Nor do they say that any particular
G patient can leave the hospital only with their permission. Admittedly, none of the witnesses spoke about any permission having been asked for on given to the first respondent to be absent from the hospital. In view of these facts, it is reasonable to infer that because of the very minor ailment that the first respondent had, it was possible for him to leave the hospital on October 16, 1967,
H and to be absent throughout the day or, at any rate, in the evening. To conclude on this aspect, the evidence of the defence witnesses does not rule out the possibility of the first respondent being ab-

sent from the hospital and his being found at the scene of occurrence as spoken to by the eye witnesses.

Mr. Mookerjee no doubt urged that the High Court might have been influenced by the fact that the evidence of the defence witnesses creates a lot of doubt about the participation of the first respondent in the crime. We are prepared to agree that if the said evidence really raises a reasonable doubt in the mind of the court regarding the participation in the crime by the first respondent, that doubt must be resolved in his favour. In this context, it is pertinent to quote the following observations in the decision in *Himachal Pradesh Administration* Vs. *Om Prakash*(1) :

> "The benefit of doubt to which the accused is entitled is reasonable doubt—the doubt which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind which fights shy—though unwittingly it may be—or is afraid of the logical consequences, if that benefit was not given; or as one great Judge said it is 'not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism".

In our opinion, the evidence of the defence witnesses does not create any reasonable doubt, even in favour of the first respondent.

In the case before us, the learned Sessions Judge has convicted the first respondent for an offence under section 302. The 3rd and 4th respondents were convicted under section 302 read with section 34 of the Indian Penal Code for having associated themselves, armed with lathis, with the other accused with the common intention of committing the murder of Sikander Khan.

This is the convenient stage to deal with the contention of Mr. Aggarwala, learned counsel for the 4th Respondent, that even if the presence of his client at the time of the occurrence is proved the evidence has not established that the criminal act was done by Respondents 1 and 2 in furtherance of the common intention of all the four accused. As this relates also to the 3rd Respondent, the question is whether section 34 can be applied in the case of the said two Respondents. As we have already indicated, the evidence regarding the participation of Respondents 3 and 4 is common. Hence, if the contention of Mr. Aggarwala regarding the non-applicability of section 34 with respect to the 4th Respondent is accepted, the same will apply to the 3rd Respondent also.

(1) A.I.R.1972 S.C.975.

A As pointed out by the Judicial Committee in *Mahbub Shah* v. *King-Emperor*(1), to invoke the aid of section 34 IPC it must be shown that the criminal act complained against, was done by any one of the accused persons in the furtherance of the common intention of all. If this is shown, anyone of the accused persons may be made liable for the crime, in the same manner B as if the act were done by him alone. To convict an accused of an offence, applying section 34, it is necessary to establish that the criminal act was done in concert pursuant to a pre-arranged plan. It is also to be borne in mind that it is difficult, if not impossible, to procure direct evidence to prove the intention of a person. Therefore courts, in most cases, have to infer the intention C from the Act or the conduct of a particular person or from the other relevant circumstances of the case. It is also to be remembered, as emphasised by the Judicial Committee, that 'the inference of common intention, within the meaning of the term in section 34, should never be reached unless it is a necessary inference deducible from the circumstances of the case'.

D The above principles have been reiterated by this Court in *Pandurang, Tukia and Bhillia* v. *The State of Hyderabad*(2). It has also been stated in the said decision that there is no special rule of evidence for applying section 34 and "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 deter- E mine 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".

F In *Krishna Govind Patil* v. *State of Maharashtra*(3), the principle has again been reiterated that before a court convicts a person under section 302 read with section 34, it has to record a definite finding that the said person had prior concert with one or more other persons, armed or unarmed, for committing the said G offence. In *Jaikrishnadas Manohardas Desai and Another* v. *The State of Bombay*(4) it has been held that "the essence of liability under section 34 is to be found in the existence of a common intention animating the offenders leading to the doing of a criminal act in furtherance of the common intention and presence of the offender sought to be rendered liable under section 34 is H not, on the words of the statute, one of the conditions of its appli-

(1) [1945] L.R. 72 I.A. 148. (2) [1955] S.C.R. 1083.
(3) [1964] 1 S.C.R. 678. (4) [1960] S.C.R. 309.

cability." As explained by Lord Sumner in *Barendra Kumar Ghose* v. *The King Emperor*,(1) "the leading feature of section 34 of the Indian Penal Code is 'participation' in action. To establish joint responsibility for an offence, it must of course be established that a criminal act was done by several persons; the participation must be in doing the act, not merely in its planning. A common intention—a meeting of minds—to commit an offence and participation in the commission of the offence in furtherance of that common intention invite the application of section 34. But this participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence of the offenders sought to be rendered liable on the principle of joint liability may be necessary, but such is not the case in respect of other offences where the offence consists of diverse acts which may be done at different times and places".

Having due regard to the various decisions referred to above, the question is whether the evidence in the case before us establishes that the shooting of Sikander Khan by Respondents 1 and 2 was done in furtherance of the common intention of all the four accused. The evidence of PWs 1 and 2 is to the effect that all the four Respondents are residents of the same village and Respondents 1 and 3, who are brothers, are bitterly inimical to Sikander Khan, the deceased. Respondents 2 and 4 are their close friends. There is evidence regarding murder of a brother of Respondent 1 and the acquittal of the deceased after trial in connection with that murder. The evidence is also to the effect that Respondents 1 and 2 were on bail at the material time, having been convicted by the Trial Court in connection with an attempt to murder one, Ilyas Khan, who was a close associate of the deceased. These facts have not been challenged by the accused in the cross-examination of PWs 1 and 2. Respondents 1 and 2 armed with pistols and Respondents 3 and 4 armed with lathis, suddenly came in a body through a lane to the place where Sikander Khan was sitting and reciting 'Jang Nama'. Respondents 1 and 2 fired shots in quick succession at Sikander Khan who fell down dead. Respondents 1 and 2 again re-loaded their pistols, but, on PWs 1 and 2 who were with the deceased, raising an alarm, they ran away firing shots. All the four accused ran away together.

When Respondents 3 and 4 were examined by the court under section 342, their only answer was that they had been implicated due to enmity of the witnesses. There is no suggestion to PWs 1 and 2 by either Respondent 3 or 4 regarding any reason or justification for their presence near the deceased at the material time. If once the evidence of PWs 1 and 2 is accepted, as we are inclined

(1) (1924) I.L.R. 52 I.A. 40, 52.

A to do, the presence of the four accused together at the time of the occurrence stands clearly established. It is true that for invoking section 34 against the accused, prior concert or a pre-arranged plan has to be established. But as it is difficult to prove the intention of an individual, it has to be inferred from his act, or con-
B duct and other relevant circumstances. It is in evidence that Respondents 1 and 3 are bitterly inimical to Sikander Khan and that Respondents 2 and 4 are their close associates. There is also evidence about the murder of the brother of the 1st Respondent and the deceased, Ilyas Khan and certain others being tried for that offence as also their acquittal in the said case. The evidence
C is also further to the effect that the 1st and 2nd Respondents made an attempt to murder Ilyas Khan by shooting him with a pistol some months before the incident. The said two accused were prosecuted and convicted by the Sessions Court. But about twenty days before the murder of Sikander Khan, both Respondents 1 and 2 had been released on bail pending their appeal. It was at that
D time that this murder took place. These statements made by PWs 1 and 2 have not been challenged by the 3rd and 4th Respondents. There is also no suggestion to the witnesses that Respondents 1 and 2 had hidden their pistols and they drew them out suddenly when they shot at the deceased. It is no doubt true that there is no evidence regarding any over tact having been done by Respon-
E dents 3 and 4 at the time when Sikander Khan was shot at. It is not necessary, to attract section 34, that any overt act must be done by the particular accused. The section will be attracted if it is established that the criminal act has been done by anyone of the accused persons in furtherance of the common intention. If this is shown—and in this case we are satisfied that it has been
F so shown—the liability for the crime may be imposed on anyone of the persons in the same manner as if the act were done by him alone. Their accompanying Respondents 1 and 2, who were armed with pistols, in the background spoken to by PWs 1 and 2, they themselves being armed with lathis and all the four coming together in a body and running away together in a body after the
G shooting was over, coupled with no explanation being given for their presence at the scene, lead to the necessary inference of a prior concert and pre-arrangement and that the criminal act was done by Respondents 1 and 2 in furtherance of the common intention of all. Therefore, Respondents 3 and 4 will have to be held liable for the crime in the same manner as if the act were
H done by any one of them alone. In view of the circumstances mentioned above, in our opinion, Respondents 3 and 4 have to be held guilty under section 302 read with section 34.

The High Court has reversed the finding of conviction on grounds, which are wholly untenable. The view of the High Court that the accused must be given the benefit of doubt, is wholly unreasonable and is not warranted by the materials on record. The High Court, without a proper consideration of the evidence of PWs 1 and 2, has acquitted the accused. The said evidence clearly shows that the first respondent committed the murder of Sikander Khan by shooting him with a pistol. That evidence also establishes, as held by us, the participation of Respondents 3 and 4 so as to make them liable under section 302 read with section 34. The High Court has stated that the villagers pass on the road at 8.30 PM with lathis and, therefore, there was nothing unusual in the 3rd and 4th Respondents being found with lathis. This is an observation made by the High Court without any reference to the evidence on record. There is a further observation that the said Respondents may have accompanied Respondents Nos. 1 and 2 without any knowledge that they were carrying fire-arms with a view to commit the murder of Sikander Khan. This observation clearly shows that the High Court has not given any consideration to the evidence on record. We have earlier held that Respondents 3 and 4 are guilty under section 302 read with section 34 and, therefore, the acquittal by the High Court of these Respondents is absolutely unjustified.

The fact that the High Court was also dealing with a reference under section 374 of the Code of Criminal Procedure, particularly regarding Respondents 1 and 2, and as such had a duty to appraise the evidence for itself for arriving at its own independent conclusion, does not stand in the way of this Court interfering with the order of the High Court when it reverses the decision of the Trial Court on grounds, which are plainly fallacious and untenable. Though this Court does not, in an appeal under Article 136, normally reappraise the evidence and interferes with the assessment of that evidence by the High Court, in the case on hand, grave injustice has been done by the High Court interfering with the decision of the Trial Court on grounds, which are plainly untenable. The view taken by the High Court is clearly unreasonable on the evidence on hand. Therefore, there is ample justification for this Court interfering with the decision of the High Court.

In our view, the evidence in this case was sufficient to justify the conviction of the first Respondent for the offence of murder under section 302 and of the 3rd and 4th Respondents for an offence under section 302 read with section 34.

Then the question is regarding the sentence. The 3rd and 4th Respondents were sentenced to imprisonment for life by the

A Sessions Judge. That sentence will be allowed to stand. The first Respondent, Iftikhar Khan, son of Mohammad Hasan, was sentenced to death by the learned Sessions Judge. Though this is a pre-eminently fit case for the imposition of the sentence of death, the question is whether this Court should impose the said sentence on him now. The trial of the accused was over in January 1969 B and the first Respondent was sentenced to death by the Civil and Sessions Judge on January 14, 1969. We are now in 1973. In between, the High Court had acquitted him and set him free. Under those circumstances, we are of the view that the interest of justice would be adequately met by sentencing him to imprisonment for life for the offence under section 302 I.P.C.

C In the result, we set aside the judgment and order of the High Court acquitting Respondents Nos. 1, 3 and 4 and the appeal is allowed. We convict the 1st Respondent for the offence under section 302 and sentence him to undergo imprisonment for life. We further convict the 3rd and 4th Respondents for the offence under section 302 read with section 34 and sentence them to D undergo imprisonment for life.

There will be no order on the appeal so far as the 2nd Respondent, Ishitaq Khan, son of Mukhtar Khan, is concerned, as it has become infructuous due to his having been murdered during the pendency of the appeal.

V.P.S. *Appeal allowed.*