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DUKHMOCHAN PANDEY AND ORS.

v.

STATE OF BIHAR

SEPTEMBER 25, 1997

B

[G.N. RAY AND G.B. PATTANAİK, JJ.]

*Criminal law :*

*Indian Penal Code, 1860 :*

C

*Sections 302/34 and 325/34—Applicability of—Common intention—Stages at which, can be formed—Held, can be formed previously or on the spot during the progress of the crime—Common intention may develop at the spur of the moment in the course of commission of the offence—However, common intention developed at the spur of the moment formed at the latter stage is distinct from similar intention actuating several persons simultaneously—Existence of common intention in all the persons who made some overt act resulting in the death of some persons, is a question of fact which can be inferred from the circumstances.*

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*Criminal Trial :*

*Wounds and weapons—nature of—Relevant in determining the existence of common intention of persons doing a criminal act—Question of fact.*

F

*Injured witnesses—Uniformity in statements of—Held, not sufficient ground to hold them to be tutored witnesses and discard their evidence, particularly when the Trial Court as well as the High Court had found the same to be reliable corroborating the evidence of the star witness—Penal Code—Sections 302/34 and 147—Trial under.*

G

*FIR—Written by eyewitness—Some embellishment in—On facts, held, not sufficient to reject the entire prosecution case—Penal Code—Sections 302/34 and 147—Trial under.*

H

*Witnesses—Eye witnesses—FIR written by—Some embellishment in such FIR—In the particular facts, held, not sufficient to hold him to be an unreliable witness—Penal Code—Sections 302/34—Trial under.*

*Criminal Procedure Code, 1973 :*

*Section 161—Delay in recording statements of witnesses under—On facts, held, not fatal.*

*Constitution of India :*

*Article 136—Criminal appeal—Reappreciation of evidence—Held, ordinarily Supreme Court does not reappreciate the evidence but is not barred from doing so if interest of justice so demands.*

The prosecution case was that one day when the labourers of informant PW-18 were transplanting paddy on his field, a mob of about 200 people armed with various deadly weapons came to the field and asked the labourers to stop working. On being objected by the informant, PW-18, to such high-handed action of the mob, two persons U-1 and U-2 from the mob directed the mob to kill the labourers. Thereafter two persons from the mob, including the appellant, fired from their respective guns, as a result of which two persons R and A fell down and died. PW-18 hid himself in a nearby field. In the meantime the Police along with the Magistrate camping in the village because of the tension, arrived at the scene of the occurrence when the accused ran away. The Trial Court convicted all the accused persons under Sections 302/149 and 302/34 IPC and sentenced them to imprisonment for life. In addition, some of the accused persons were convicted under Section 147 and rest under Section 148 IPC but no separate sentence was awarded under these Sections by the Trial Judge. On appeal, The High Court on scrutiny of the evidence afresh, set aside the conviction and sentence under Section 302/149 but upheld the conviction on other counts including the conviction and sentence under Section 302/34. Hence this Appeal.

The accused appellants contended that the charge under Section 149 having failed before the High Court and the object of the assembly being to desist the labourers of PW-18 from transplanting the paddy, unless and until it could be established that the assailants developed a common intention at the spur of the moment on the spot of the occurrence to kill the deceased persons, the conviction under Sections 302/34 could not be sustained. They further contended that as the gunshot injuries were not on the vital part of the body, the person alleged to have given the gunshot injuries could not be held liable for the offence of murder.

Partly allowing the appeals, this Court

- A HELD : 1.1. The existence of a common intention between the participants in a crime is an essential element for attracting Section 34 IPC and such intention could be formed previously or on the spot during the progress of the crime. Usually, it implies a prearranged plan which in turn presupposes a prior meeting of mind. But in a given case, such common intention may develop at the spur of the moment in the course of commission of the offence.**
- B But such common intention developed at the spur of the moment is different from a similar intention actuating a number of persons at the same time, and therefore, the said distinction would be relevant in deciding whether Section 34 IPC can be applied to all those who might have made some overt attack on the spur of the moment. The distinction between a common intention and a**
- C similar intention may be fine, but is nonetheless a real one and if overlooked, may lead to miscarriage of justice. [289-G-H; 290-A-C]**

*Kripal and Ors. v. State of Uttar Pradesh*, AIR (1954) SC 706; *Pandurang, Tukia and Bhillia v. The State of Hyderabad*, [1955] 1 SCR 1083; *Mohan Singh v. State of Punjab*, [1962] Supp 3 SCR 848 and *Hardev Singh & Anr. v. The State of Punjab*, [1975] 3 SCC 731, relied on.

- D 1.2. The question, whether all the persons who made some overt attack as a result of which some members of the prosecution party died shared the common intention of the murder of such persons would be a question of fact and it is difficult to give any direct proof of existence of such common intention.**
- E It can only be inferred from circumstances. In other words, unless such common intention is established as a matter of necessary inference from the proved circumstances of the case the accused persons could be individually liable for their respective overt attacks and not for the act done by any other person. The mere fact that the accused persons were armed with some weapons**
- F itself would not be sufficient to attribute common intention to all of them to commit murder particularly when in the instant case the prosecution case itself is that the accused persons came to the field with the sole object of desisting the labourers from continuing with the transplantation operation. Therefore, it would be necessary to examine the weapon of assault, the part of the body on which such assault was committed, the medical evidence indicating**
- G the nature of injuries caused thereby and the ultimate cause of death of the two persons. [250-D-G; 291-B]**

- H 1.3. According to the doctor who conducted the post-mortem examination on the dead body of A, out of nine injuries two were fatal and were caused by some sharp-pointed weapon and the death was due to shock, haemorrhage and injuries to vital organs. From the nature of injuries**

sustained by the deceased it can reasonably be said that the two fatal injuries could be the result of attack by bhala. From the nature of the injuries and the nature of the weapons of assault used by accused holding lathis and the part of the body of A on which they assaulted, it may not be possible to hold that the accused wielding lathis shared common intention of causing murder of A. For drawing an inference of common intention for the purposes of Section 34, the evidence and the circumstances of the case should establish, without any room for doubt, that a meeting of mind and a fusion of ideas had taken place amongst the different accused and in prosecution of it the overt acts of the accused persons flowed out. Therefore, the conviction of those of the accused persons who were holding lathis, under Sections 302/34 IPC for causing murder of A cannot be sustained and has to be altered to conviction under Sections 325/34 IPC. Although there was no gunshot injuries on the body of A but two of the accused-appellants did, in response to the lalkara, fire the guns in their hands first, whereafter all others assaulted with the respective weapons in their hands. Therefore, the conviction of these two persons as well as that of the bhala-wielding accused appellants under Sections 302/34 and sentence of imprisonment for life thereunder for causing murder of A, has to be upheld. [292-C-H]

1.4. According to the doctor, all the fifteen injuries on the dead body of R were antemortem in nature and four of them were fatal. One fatal and one non-fatal injuries were caused by a sharp-cutting weapon and rest three fatal injuries as well as six other injuries, by some sharp-pointed weapon. Other three injuries (barring an abrasion) were caused by gunshots. Death was due to shock, haemorrhage and injuries on the vital organs. In a case of murder where it is established by satisfactory evidence that all the accused were acting in concert and were associated with each other in causing assault and causing multiple injuries were found on the deceased it leaves no room for doubt that all the accused had shared a common intention to cause death. [295-C-D]

*Aher Pitha Vajshi and Ors. v. State of Gujarat*, AIR (1983) SC 599, relied on.

2. In view of the nature of injuries found on the dead body of deceased R and the weapons of assault in the hands of the accused, it cannot be held that all of them had not shared the common intention of killing R which developed at the spur of the moment in response to the lalkara given by U-1. In fact with deadly weapons in their hands they mercilessly assaulted deceased

A R and as such their conviction under Sections 302/34 is fully justified. Hence, the conviction of all the 12 accused-appellants under Sections 302/34 for causing murder of R and the sentence thereunder are affirmed.

[295-E]

B 3. After a careful scrutiny of the evidence of the star witness, viz., PW-18, it is not possible to hold him to be an unreliable witness. Nor is it possible to hold that he had not seen the occurrence and had merely included the names of the accused persons in the written FIR. No doubt there are certain embellishments and the High Court, therefore, was justified in coming to a conclusion that the FIR was not written at the place of occurrence as stated by PW-18. But on this basis, the entire prosecution case cannot be thrown out particularly when out of 12 witnesses examined on behalf of the prosecution 5 are injured witnesses. These injured witnesses corroborate the evidence of PW-18 with regard to the manner of assault, the place of assault, weapons used by the different accused persons, the persons who assaulted the two deceased persons, the arrival of Magistrate soon after the occurrence, the arrival of the investigating officer at the field, handing over of FIR by PW-18 to the Magistrate. The general comment of the accused-appellants in respect of these injured witnesses is that they repeated in a parrot-like manner as to what had been stated by PW-18. It is not possible to discard their testimony on this ground particularly when the Sessions Judge as well as the High Court after thorough scrutiny of their evidence have held them to be reliable corroborating the evidence of star witness PW-18.

[288-E-H; 289-A-B]

F 4. Ordinarily the Supreme Court, under Article 136 of the Constitution does not reappraise the evidence and the conclusions of the High Court on a question of fact or on appreciation of evidence and they are considered to be final. But at the same time there is no bar for the Supreme Court to reappraise the evidence if the interest of justice so demands. In the present case as many as 47 people out of a mob of 200 persons have been charged and ultimately have been convicted under different Sections of the Penal Code and the conviction is based upon the ocular statements. In that view of the matter it is appropriate for the Supreme Court to examine the evidence for coming to a conclusion as to whether there has been any miscarriage of justice by an apparent erroneous appreciation of the ocular evidence. [286-G]

H CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 197

of 1982.

From the Judgment and Order dated 11.12.81 of the Patna High Court in Crl. A. No. 89 of 1978.

WITH

Criminal Appeal No. 198 of 1982.

U.R. Lalit, K.B.N. Sinha, Ms. Madhu A. Sharan, A. Sharan, (D.N. Goburdhan) for State of Bihar, Ratan Kumar Chaudhary and Anil Kumar Jha for the appearing parties.

The Judgment of the Court was delivered by

**PATTANAİK, J.** Both these appeals arise out of one sessions trial, Sessions Trial No. 125 of 1975 which was disposed of by the learned Additional Sessions Judge, Darbhanga on 30th March, 1978. By the said judgment the accused persons were convicted under Section 302/149 and were sentenced to imprisonment for life. Twenty seven of the accused persons were convicted under Section 147 but no separate sentence was awarded. Rest of the accused persons were convicted under Section 148 IPC but no separate sentence was awarded. Accused Dukhmochan Pandey, Sarbnarain Mishra, Upendra Pandey, Sanjam Pandey, Jainandan Mishra, Kapileshwar Mandal, Bhuvneshwar Mandal, Janak Das, Uttam Pandey, Tapeshwar Pandey, Kameshwar Pandey and Jiwachh Mishra were convicted under Section 302/34 and were sentenced to imprisonment for life. The accused Dukhmochan Pandey, Srabarnarain Mishra, Nawal Kishore Pandey, Shiv Thakur, Jogendra Narain Pandey, Mahendra Narain Pandey, Shiv Shekhar Pandey, Saukhilal Yadav, Amirilal Yadav, Sukhram Mishra, Jainandan Mishra, Bamchandra Pandey and Ramchandra Sharma were convicted under Section 302/34 and were sentenced to undergo rigorous imprisonment for life. In other words while all the accused persons were convicted under Section 302/149, they were also convicted in two groups under Section 302/34, one group for causing murder of Razaullah and the other group for causing the murder of Ahmad Shah. After accused Jiwachh Mishra was convicted under Section 324 and were sentenced to undergo imprisonment for 2 years and accused Upendra Pandey, Sanjam Pandey, Kapileshwar Mandal, Jogeshwar Mandal, Aghanoo Mandal and Janak Das were convicted under Section 323 and were sentenced to undergo imprisonment for one year. In all there were 47 accused persons. On appeal, the Division

- A** Bench of the Patna High Court by judgment dated 11th of December, 1981 acquitted the accused persons of the charge under Section 302/149 but the conviction of the two groups of accused persons for causing murder of deceased Razaullah and Ahmad Shah under Section 302/34 passed by the learned Additional Sessions Judge and sentence passed thereunder was
- B** upheld. The conviction of different accused persons under Section 148 was upheld and sentence for three years in respect of the same accused persons was awarded. The conviction of 27 accused persons under Section 147 was upheld and sentence of imprisonment for two years was awarded by the High Court. Similarly, the conviction of the accused persons under Section 447 as well as under Sections 323 and 324 IPC of the different accused persons was
- C** upheld but the High Court did not pass any separate sentence under these heads. Those accused persons whose conviction had been upheld by the High Court under Section 302/34 IPC have preferred Criminal Appeal No. 197 of 1982 and the appellants in other Criminal Appeal No. 198 of 1982 are those whose conviction under Section 147 has been upheld by the High Court.
- D** Prosecution case in nutshell is that a dispute arose when informant - Kapileshwar Pandey sent labourers to his field for transplanting paddy seeds. On 25.7.1974 during morning hours while labourers of Kapileshwar Pandey numbering about 20 were transplanting paddy seeds on the field, at about
- E** noon time, a mob of 200 people armed with various deadly weapons came to the field and asked the labourers to stop their work. Kapileshwar Pandey, PW-18 objected to such high-handed action of the mob whereupon accused Uttam Pandey and Upendra Pandey directed the mob to kill the labourers. Soon thereafter accused Dukhmochan Pandey and Sarbnarain Mishra fired from their respective guns as a result of which Razaullah and Ahmed Shah, who were on the field fell down. The informant PW-18 being terribly frightened
- F** ran away to the nearby Janera field and took shelter keeping himself out of the sight of the assailants. He could see the various attacks of different accused persons on the labourers who were on the field. While indiscriminating assault on the labourers was going on somebody cried out that Magistrate with the police has arrived. The accused persons hearing such call ran from the place of occurrence. PW-18 who had taken shelter in the nearby Janera
- G** field then came out and went upon the field where he found two deceased lying injured. Immediately after PW-18's arrival on the field PW's 5 and 13 reached there and they were followed by the magistrate and the armed forces. The informant PW-18 wrote a detailed account of the incident and gave the same to the magistrate, PW-25. It may be stated here that on account of some
- H** tension in the village a magistrate and some armed forces were camping in

the village but on the relevant date of occurrence they were not at the place of occurrence but arrived there soon after coming to know of the incident. PW-6, the village Chowkidar being aware of the tension on the field reported the same to the Hawaldar PW-21 and PW-21 directed the Chowkidar to inform at the police station. Pursuant to the aforesaid direction, PW-6 arrived at the police station at about 11.30 a.m. and gave a report to the officer in-charge, PW-24 who made a station diary entry No. 458. The said PW-24 after making the station diary entry left for the village and reached the place of occurrence at 3 p.m. It is at that point of time the written report given by PW-18 to the magistrate was handed over to him which was treated as the First Information Report and thereafter he took up the investigation. He made the inquest over the two dead bodies and then sent the dead bodies for post-mortem examination. In course of investigation he had also made some seizure, but later on under the order of the supervising authority, PW-26 took over the investigation from him and said PW-26 after completion of investigation submitted the charge-sheet. The accused persons were committed to the court of sessions and stood their trial. The defence put forward by the accused persons was one of denial. The prosecution examined 32 witnesses in all of whom PWs 8, 9, 11, 14 and 15 were injured in course of the occurrence. PWs 7, 9 and 10 are the seizure witnesses. PW-19 is the Deputy Collector who had been deputed to watch post-mortem conducted on the deceased. PW-32 is the doctor who conducted the post-mortem examination. PW-22 established the fact that under the order of the supervising authority investigation was transferred from PW-24 to PW-26. PW-25 is the magistrate and PWs-27, 28 and 29 are the members of the armed force who were in the village camping. The learned Sessions Judge on a thorough scrutiny of the prosecution evidence came to hold that the prosecution has been able to prove the charges against the accused persons beyond reasonable doubt. On appeal, the High Court re-appreciated the entire evidence on record. On such re-appreciation the High Court came to the conclusion that PW-18 was there at the scene of occurrence and had come to the field being accompanied by Razallah. Looking to the F.I.R. which was stated to have been written on the scene of occurrence and was later handed over to the investigating officer, the High Court came to the conclusion that the prosecution story that F.I.R. was written on the place of occurrence itself is obviously incorrect. But merely on that score the High Court did not agree with the submission of the accused persons that the entire case is a concocted one. Thereupon, the court scrutinized the evidence of the eye-witnesses and ultimately came to hold that prosecution case as unfolded through those witnesses implicating the accused persons in the commission of two murders must be held to have

A been established beyond reasonable doubt. In coming to the aforesaid conclusion apart from holding that the ocular statement of the eye-witnesses corroborates each other, court also came to the conclusion that the medical evidence corroborates the prosecution case. An argument advanced on behalf of the accused persons that the prosecution party was the aggressor and came upon the field to dispossess one of the accused persons Sanjam Pandey was rejected by the High Court. According to the High Court a well organized mob fully armed with various weapons indulged in several attacks including gun shots which ultimately resulted in the death of two persons and several other members of the prosecution party were injured. The High Court, however, on scrutiny of the evidence on record came to hold that the object of the unlawful assembly being to stop the labourers from transplanting paddy seeds on the field in question, the conviction under Section 302/149 cannot be upheld and accordingly the said conviction and sentence passed thereunder was set aside. But as stated earlier the conviction on other counts was maintained.

D Mr. U.R. Lalit, the learned Senior counsel appearing for the appellants in Criminal Appeal No. 197 of 1982 contended that the star witness of the prosecution is Kapileswar Pandey, PW-18 and his evidence is unbelievable and shaky and could not be relied upon. So far as the other eye-witnesses are concerned according to Mr. Lalit they have merely repeated the incident in a parrot like manner and the very fact that each of them have mentioned the name of the accused persons in the same chronology is enough to hold that they are the tutored witnesses and as such no reliance can be placed on them. The further argument advanced by Mr. Lalit is that if two of the appellants had gun with them and both of them simultaneously fired the gun as stated by the prosecution witnesses but they have not been able to indicate as to whose gun shot hit which deceased, the conviction of these appellants dividing in two groups and making each member responsible for death of one of the deceased is wholly unsustainable. According to Mr. Lalit the delayed examination of the prosecution witnesses under Section 161 Cr. P.C., the finding that the FIR was not written at the place of occurrence as alleged by PW-18, the number of injuries on the deceased do not commensurate with the number of accused persons alleged to have assaulted the deceased, all taken together creates sufficient doubt in the prosecution case, and therefore, the accused persons are entitled to get the benefit of doubt. Mr. Lalit also urged that the charge under Section 149 having failed and the object of the assembly being to desist the labourers transplanting paddy seeds, unless and until it is established that the assailants developed a common

intention at the spot of occurrence to kill the two persons the conviction under Section 302/34 cannot be sustained. According to the learned counsel it is, therefore, necessary for the prosecution to establish that the so called attacks by each of the accused persons was with intention to kill so that it can be concluded therefrom that a common intention to kill the deceased developed at the spur of the moment. Judged from this angle if some of the accused persons assaulted the deceased after they fell down after receiving the gun shot, by means of lathi not on vital part of the body of the deceased but on the leg or some other part where minor injuries have been found by the doctor then such of the accused persons cannot be convicted by taking recourse to Section 34 with the main offence under Section 302 IPC. The learned counsel had also urged that the gun shot injuries are not on the vital part of the body, and therefore, the persons who have been alleged to have given the shot injuries can't be held liable for the offence of murder.

The learned counsel for the appellants in Criminal Appeal No. 198 of 1982 also attacked the impugned judgment on all the grounds urged by Mr. Lalit appearing for the appellants in Criminal Appeal No. 197 of 1982 and in addition contended that the appellants in Criminal Appeal No. 198 of 1982 have been found to be mere present with the mob, armed with lathies and have not committed any attack, consequently their conviction under Section 147 IPC and sentence passed thereunder is not sustainable in law.

Mr. Sinha, the learned senior counsel for the respondent on the other hand submitted that there are as many as 12 witnesses examined on behalf of the prosecution of whom PWs 8, 9, 11, 14 and 15 were injured in course of the incident and when two courts of fact have already scrutinized the evidence and have come to the conclusion that the prosecution case has been proved beyond reasonable doubt it would not be appropriate for this Court to re-appreciate the evidence and come to its own conclusion. The learned counsel further contended that no doubt it is true that initial object of the unlawful assembly was to desist the persons on the field from ploughing or from undertaking any agricultural operation. But at the spot when PW-1 gave a lalkar to finish up the Mukhiya and others, a common intention developed at the spur of the moment. Consequently, all those who participated in the overt attack which ultimately resulted in the death of two persons Razaullah and Ahmed Shah would be liable under Section 302/34 and the High Court, therefore, was fully justified in convicting them thereunder and sentencing them to imprisonment for life. According to the learned counsel the fact that a common intention developed at the spur of the moment is

A established from the evidence of PWs 1, 2, 8, 9 and 14. Commenting upon the argument of Mr. Lalit that Kapileshwar Pandey being the main target it is difficult to believe that Kapileshwar Pandey kept himself hidden in the nearby Janera field and yet no accused person followed him, the learned counsel for the State urged that when Kapileshwar Pandey found himself to be the main target of attack it is but natural for him to run away from the spot and hide himself at a place available in the vicinity and accordingly Kapileshwar Pandey did hide himself in the nearby Janera field. Such conduct on the part of Kapileshwar is only most probable conduct of a man under the circumstances and the High Court was justified in believing the evidence of said Kapileshwar.

B So far as the argument advanced on account of delay in recording the statements of witnesses by the investigating officer the learned counsel urged that the materials on record fully establish that the initial investigating officer was partial and was not conducting the investigation fairly on account of which the investigation was transferred from him to some other man under the orders of the supervising authority and under such circumstances the alleged delay in recording the statement of the witnesses under Section 161

C Cr. P.C. will not vitiate the prosecution case. The learned counsel also urged that no doubt the accused persons have been acquitted of the charge under Section 302/149 and no appeal has been preferred therefrom but when a mob of 200 persons came armed with deadly weapons and several members of the mob started attacking the persons on the field the second part of Section 149

D gets attracted, and therefore, the accused persons will be convicted thereunder. Since no prejudice is caused to the accused persons and since they are initially charged under Section 302/149 it would be within the powers of this Court to convict them under Section 302/149 even in the absence of an appeal against the order of acquittal of the said charge. The rival contentions require a careful examination of the materials on record.

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At the outset it must be stated that ordinarily this Court under Article 136 of the Constitution does not re-appreciate the evidence and the conclusions of the High Court on a question of fact or on appreciation of evidence are considered to be final. But at the same time there is no bar for this court to re-appreciate the evidence if the interest of justice so demands. In the case

G in hand as many as 47 people out of a mob of 200 persons have been charged and ultimately have been convicted under different sections of the penal code and the conviction is based upon the ocular statement. In that view of the matter we thought it appropriate to examine the evidence ourselves for coming to a conclusion as to whether there has been any miscarriage of justice by

H an apparent erroneous appreciation of the ocular evidence. From the aforesaid

stand point the evidence in the case may be scrutinized. As it appears, PW-18 is the star witness in this case. Since it is he who could see the incident from the beginning to the end after hiding himself in the nearby Janera field and was the first person to arrive on the spot after the accused persons left the field when somebody cried that the Magistrate is coming with the force. PW-18, Kapileshwar was the Mukhiya of the village having been so elected on 5.7.1962. According to his evidence he went to the field accompanied by deceased Razaullah at 11 a.m. on 25.07.1974 and while the labourers started working on the field he sat on the southern corner of the field. At 12 noon a mob of about 200 persons armed with Gun, Bhala, Gadasa, Bow-arrow and Lathi reached the field of whom he could see Dukhmochan Pandey and Sarbnarain holding guns in their hands; Soukhilal Yadav, Amirilal Yadav, Sukhram Mishra, Jainandan, Ram Chander Pandey, Ram Chandra Sharma, Tapeswar, Kameshwar Pandey and Jiwachch Mishra had Bhalas in their hands; Nawal Kishore Pandey, Shiv Narain Thakur, Yogendra Narain Pandey, Mahendra Narain and Shiv Shekhar Pandey had Gandasa in their hands. Kalimuddin Mian, Suleman Mian, Shamsul Mian, Chandeshwar Thakur, Horilal Kapar and Ram Preeti Mishra had gone with arrows in their hands. He could identify all the accused persons who stood charged by name and he knew their place of residence. As soon as the mob reached the place Uttam Pandey and Upendra Pandey told the labourers to stop the work. The said witness, PW-18 and the labourers said that the work will not be stopped and on this Uttam Pandey and Upendra Pandey gave the order to finish all the persons belonging to the party of PW-18. On such order of Uttam Pandey and Upendra Pandey, Dukhmochan Pandey and Sarbnarain fired their guns which hit Razaullah and Ahmed Shah and both of them fell down. PW-18 ran away to the nearby Janera field and keeping himself out of the sight of the accused persons he could see what was happening to the labourers engaged by him for carrying out the transplantation operation Saikhilal, Amirilal, Sukhram Jainandan, Ram Chandra Pandey and Ram Chandra Sharma assaulted Razaullah with Bhala; Shiv Narain Thakur and Nawal Kishore Thakur assaulted Razaullah with Gadasa on his neck; and Yogendra Narain Pandey, Mahendra Narain Pandey and Shiv Shekar assaulted Razaullah with Gandasa. After Razaullah fell down Tapeswar Pandey, Kameshwar and Jiwachch assaulted Ahmed Shah with Bhala. Jugeshwar Mandal, Kapileshwar Mandal, Aghnu Mandal, Janak Das, Sanyam Pandey and Upendra Pandey assaulted him with lathi. Uttam Pandey by sitting on the person of Ahmed Shah pressed him hardly. They were assaulting Ahmed with Bhala. Kapileshwar Mandal, Jugeshwar Mandal, Aghnu Mandal, Janak Das, Sanyam Pandey and Upendra Pandey assaulted Bibi Julekha Khatoon and SK. Hadia with lathi. Kalimuddin Mian, Suleman Mian,

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- A Shamsul Mian, Horil Kapar Chandeshwar Thakur and Rampreet Mishra were shooting arrows. Mr. U.R. Lalit, the learned senior counsel contented that this PW-18 admittedly being inimical with the accused persons his evidence requires a stricter scrutiny for being accepted. According to the learned counsel the Mukhiya was the main target and rest of the injured persons were merely labourers of Mukhiya who were busy in transplantation operation on the field. Mukhiya could not have escaped from the clutches of the accused persons who according to the prosecution case hid himself when a mob of 200 persons came and then again said Mukhiya could not have seen the entire occurrence in a sitting position. The learned counsel also urged that even if it is assumed that he could see the incident from the Janera field he could not have been able to narrate the incident in a graphic manner in which he narrated. It is in this connection, Mr. Lalit also urged that the High Court itself on consideration of the entire material has come to a finding that this witness claimed to have written the FIR at the spot itself. But a very look at the FIR makes the story impossible and obviously therefore the FIR had not been written on the field. This finding, according to the learned counsel, lends corroboration to the submission that PW-18 has not witnessed the occurrence and came to the place much later and handed over a written FIR to the Magistrate which was later on given to the police. The counsel also urged that a reading of the evidence of PW-18 would indicate that he was neither on the field at the time of occurrence nor has seen the occurrence but has been able to rope in the accused persons by giving their names in the written FIR. We have carefully scrutinized the evidence of PW-18 and considered the comments of Mr. Lalit impeaching his credibility but having examined the evidence of said PW-18 we are not in a position to hold him to be an unreliable witness neither we are in a position to hold that Kapileswar had not seen the occurrence and has merely included the names of the accused persons in the written FIR. No doubt there has been certain embellishments and the High Court, therefore, was justified in coming to a conclusion that the FIR was not written at the place of occurrence as stated by PW-18. But on that basis the entire prosecution case cannot be thrown out particularly, when out of 12 witnesses examined on behalf of the prosecution 5 are the injured witnesses PWs 8, 9, 11, 14 and 15. These injured witnesses corroborate the evidence of PW-18 with regard to the manner of assault, the place of assault, weapons used by different accused persons, the persons who assaulted the two deceased persons, the arrival of the Magistrate soon after the occurrence, the arrival of the investigating officer at the field, handing over of FIR by Kapileshwar to the Magistrate. The general comment of Mr. Lalit in respect of these injured witnesses is that they repeated in a parrot like

manner as to what have been stated by Kapileshwar, PW-18. We are unable to discard their testimony on this ground particularly when the learned Sessions Judge as well as the High Court after thorough scrutiny of their evidence have held them to be reliable corroborating the evidence of star witness PW-18. In our considered opinion, therefore, the prosecution story as unfolded through the evidence of PWs 8, 9, 11, 14 15 and 18 cannot be doubted. Mr. Lalit in course of his argument no doubt had contended that the witnesses were examined by the police under Section 161 Cr. P.C. after 5 or 6 days of the incident and no satisfactory explanation for the delay in recording their statement has been put forward by the prosecution. Though delayed examination of witnesses by the investigating agency in certain cases may create a doubt in the mind of a court for accepting the testimony of the witnesses, but in the case in hand it is apparent that the initial investigating officer has not been fair enough in investigating into the offence as a result of which under the orders of the supervising officer the investigation was transferred to another officer who after taking charge of the investigation recorded the statement of these witnesses. Such explanation for delay in recording the statement of vital witnesses has been held to be a sufficient explanation and we do not find any justifiable ground to interfere with that conclusion. In this view of the matter the next question that arises for consideration is whether in accordance with the prosecution case itself the common object of the mob being to desist the labourers from carrying on the transplantation operation on the field and not to commit murder of any member of the prosecution party particularly the deceased Razaullah and Ahmed Shah and the charge under Section 302/149 having failed, can it be concluded that some of accused persons developed a common intention at the spot to kill two deceased persons and in furtherance of the said common intention they went on assaulting the deceased persons who ultimately succumbed to the injuries they sustained. From the prosecution evidence there cannot be in dispute and in fact the courts below have come to the finding that a mob of 200 persons came armed with different weapons with object of preventing the prosecution party from carrying on the transplantation operation on the field.

The existence of a common intention between the participants in a crime is an essential element for attracting Section 34 of the Indian Penal Code and such intention could be formed previously or on the spot during the progress of the crime. Usually, it implies a pre-arranged plan which in turn pre-supposes

- A a prior meeting of mind. But in a given case such common intention may develop at the spur of the moment in course of the commission of offence. But such common intention which developed at the spur of the moment is different from a similar intention actuated a number of persons at the same time, and therefore, the said distinction must be borne in mind which would be relevant in deciding whether Section 34 of the Indian Penal Code can be applied to all those who might have made some overtattack on the spur of the moment. (See *Kripal and Others v. State of Uttar Pradesh*, AIR (1954) S.C. 706, *Pandurang, Tukia and Bhillia v. The State of Hyderabad*, [1955] 1 SCR 1083, and *Mohan Singh v. State of Punjab*, [1962] Supp 3 SCR 848. The distinction between a common intention and a similar intention may be fine,
- B
- C but is nonetheless a real one and if overlooked, may lead to miscarriage of justice. In the case of *Hardev Singh and another v. The State of Punjab*, [1975] 3 SCC 731, the original target of attack was one Kewal Singh who received only some simple injuries having been caused to him by accused Harjinder Singh and Piara Singh. But in course of the incident accused Hardev Singh gave a kirpan blow on the head of Tej Kaur and question of consideration was whether all the accused persons can be held guilty for the offence of murder of said Tej Kaur with the aid of Section 34 of the Indian Penal Code.
- D This Court held that the assault on Tej Kaur by accused Hardev Singh was his individual act and consequently other accused persons cannot be held guilty of the offence under Section 302/34 for the murder of said Tej Kaur. The question, whether all the persons who made some overtattack as a result of which some members of the prosecution party died shared the common intention of the murder of such persons would be a question of fact and it is difficult to give any direct proof of existence of such common intention and can only be inferred from circumstances. In other words, unless such common intention is established as a matter of necessary inference from the proved circumstances of the case then the accused persons could be individually liable for their respective overt attacks and not for the act done by any other person. The mere fact that the accused persons were armed with some weapons itself would not be sufficient to attribute common intention of all of them to commit murder particularly when in the case in hand the prosecution case itself is that the accused persons came to the field with the sole object of desisting the labourers from continuing with the transplantation operation. Mr. Sinha, learned senior counsel appearing for the respondent had urged that every person is presumed to know the natural consequences of his own act and therefore pursuance to the call being given to kill the persons of Mukhiya whereafter the accused appellants having assaulted the two deceased
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- H persons with different weapons in their hands, it must be held that they had

developed the common intention of murdering Ahmed Shah and Razaullah and as such their conviction under Section 302/34 is wholly justified. As has been stated earlier whether all those who are said to have been armed with some weapons and alleged to have assaulted the deceased, shared the common intention of murdering deceased has to be found out from the facts and circumstances established and found. In other words, it would be necessary to examine as to the weapon of assault, on the part of the body on which such assault was committed, the medical evidence indicating the nature of injuries caused thereby and the ultimate cause of death of the two persons.

It may be stated that for causing murder of Ahmed Shah accused Dukhmochan Pandey, Uttam Pandey, Kameshwar Pandey, Jiwacch Mishra, Sarabnarain Mishra, Janak Das, Sanjam Pandey, Upendra Narain Pandey, Tapeswar Pandey, Jainandan Mishra, Jugeshwar Mandal, Kapileshwar Mandal have been convicted under Section 302/34. Witnesses have established that Dukhmochan Pandey was holding a gun, Uttam Pandey was holding a Lathi, Kameshwar Pandey was holding a Bhala, Jiwacch Mishra was holding a Bhala, Sarbnarain Mishra was holding a Gun, Janak Das was holding a Lathi, Sanjam Pandey was holding a Lathi, Upendra Narain Pandey was holding a Lathi, Tapeswar Pandey was holding a Bhala, Jainandan Mishra was holding a Bhala, Jugeshwar Mandal was holding a Lathi and Kapileshwar Mandal was holding a Lathi. The Doctor, who conducted the post-mortem examination on the dead body of Ahmed Shah, PW-32, found the following injuries on him:

“On the same date at 4 P.M. I held P.M. examination on the body of Ahmed Shah S/o. Hakim Shah of the same and found as follows:

1. Perforating injury  $\frac{3}{4}$ " x  $\frac{1}{2}$ " x chest cavity almost transverse in the second right intercostal space anteriorly.
2. Perforating injury 2" x  $\frac{1}{2}$ " x chest cavity almost transverse in the foweth right intercosteral space anteriorly.
3. Lacerated injury  $\frac{1}{4}$ " long across the right lip.
4. Both the incisors and one canine teeth in I got lower jaw broken.
5. Two teeth on upper left jaw and four teeth on right upper jaw broken. (Two incisors, one canine and one premolar).

- A 6. One abrasion  $\frac{1}{2}$ " x  $\frac{1}{2}$ " on right shoulder.
7. One abrasion 1" x  $\frac{1}{2}$ " chest right side, upper part.
8. One abrasion 1" x  $\frac{1}{4}$ " on mid of back right side.
- B 9. Second and fourth ribs were cut anteriorly. They were spounder to injuries Nos. 1 and 2. Intercostal muscles abo cut. Pheera cut 2 inches long at place on right side anteriorly. There was a cut in the upper lobe of the right lung, anteriorly...3" x 1" x 1". The middle lobe had abodone cut  $\frac{3}{4}$ " x 1" anteriorly. Chest cavity was full of blood and blood clots, almost faint. Both chambers of heart were empty."

C According to the doctor injuries Nos. 1 and 2 were vital caused by some sharp pointed weapon and death is due to shock, haemorrhage and injuries to vital organs. From the nature of injuries sustained by the deceased it can reasonably be said that the two fatal injuries Nos. 1 and 2 could be the result of attack by Bhala. The lacerated injury across the right lip, breaking of both the incisors and one canine teeth in right jaw, breaking of two teeth on upper left jaw and four teeth on right upper jaw, abrasion found on right shoulder, abrasion found on right side chest and abrasion found on the mid of back right side could be caused by lathi. From the nature of the injuries found on the dead body of deceased Ahmed Shah and the nature of the weapons of assault used by accused holding lathies namely accused Uttam Pandey, Janak Das, Sanjam Pandey, Upendra Narain Pandey, Jogeshwar Mandal and Kapileshwar Mandal, and the part of the body of Ahmed Shah on which they assaulted, it may not be possible to hold that they shared common intention of causing murder of Ahmed Shah. For an inference of common intention being drawn for the purposes of Section 34, the evidence and the circumstances

D of the case should establish, without any room for doubt, that a meeting of minds and a fusion of ideas had taken place amongst different accused and in prosecution of it the overt acts of the accused persons flowed out. As has been stated earlier the prosecution case itself is, they came to prevent the labourers from continuing the transplantation operation but at the spur of the moment on account of certain lalkara being given by some of the accused

E persons, persons armed with weapons started assaulting the deceased. But from mere assault even not on vital parts of the body which ultimately resulted in causing some minor injuries, it may not be sufficient to establish beyond reasonable doubt that they also shared a common intention of causing murder of deceased Ahmed Shah. In this view of the matter, the conviction

F of appellants Uttam Pandey, Janak Das, Sanjam Pandey, Upendra Narain

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Pandey, Jogeshwar Mandal and Kapileshwar Mandal under Section 302/34 IPC for causing murder of deceased Ahmed Shah cannot be sustained and the same is set aside, instead they are convicted under Section 325/34 IPC. sentenced to undergo rigorous imprisonment for five years. It is no doubt true that there is no gun shot injury on him but it is Dukhmochan Pandey and Sarbnarain Mishra who on being ordered by Uttam Pandey fired the guns in their hands first, whereafter all others assaulted with the respective weapons in their hands. That being the position, Dukhmochan Pandey and Sarbnarain Mishra also could be held liable under Section 302/34 and have been rightly convicted by the courts below.

For causing death of Razaullah the following 12 accused persons have been convicted under Section 302/34 IPC :

- |                           |       |   |
|---------------------------|-------|---|
| 1. Dukhmochan Pandey      | A-1   |   |
| 2. Shiv Narain Thakur     | A-3   |   |
| 3. Shivshekhar Pandey     | A-6   | D |
| 4. Sarabnarain Mishra     | A-8   |   |
| 5. Sukhram Mishra         | A-10  |   |
| 6. Saukhilal Yadav        | A-15  | E |
| 7. Naval Kishore Pandey   | A-17  |   |
| 8. Jogendra Narain Pandey | A-18  |   |
| 9. Mahendra Narain Pandey | A-21  | F |
| 10. Ramchandra Pandey     | A-25  |   |
| 11. Jainandan Mishra      | A-35  |   |
| 12. Amiri Lal Yadav       | A-46" | G |

Of these accused persons Dukhmochan Pandey was holding a Gun, Shiv Narain Thakur was holding a Gadasa, Shivshekar Pandey was holding a Gadasa, Sarabnarain Mishra was holding a Gun, Sukhram Mishra was holding a Bhala, Saukhilal Yadav was holding a Bhala, Naval Kishore Pandey was holding a Gadasa, Yogendra Narain Pandey was holding a Gandasa,

A Mahendra Narain Pandey was holding a Gandasa, Ramchandra Pandey was holding and Bhala, Jainandan Mishra was holding a Bhala and Amiri Lal Yadav was holding a Bhala. Doctor, PW-32, found the following injuries on the dead body of Razaullah :

- B "1. Incised injury 8" x ½", some what elliptical in shape on lower part of back of head, just on the lower part of the accipebal bone.
2. Punctured injury ¾" x ¼" x 4/4" an 1" below the lobule of the left ear.
- C 3. Perforating injury antori.....third left inter costal space.....downwards medially.
4. Perforating injury ½" x ¼" x abdominal cavity on men, left side, upper part.
5. Perforating injury ½" x ¼" x abdominal cavity on abdomen, left side, front aspect.
- D 6. Oblique punctured injury 2" x 1/4" x 1" on right arm anteriorly.
7. abrasion ½" x ½" below right eye.
8. Incised 4" x ½" x boale on left knee.
- E 9. Compound fracture of tibia and fibula, lower third, left leg.
10. Almost round hole ½" x ¼" approximately x bone with lacerated markings on left leg lower part (would of entrance).
- F 11. Lacerated injury 1" x ½" on the left foot below medial malicoli wound of exit.
- Probe was made to enter through injury No. 11, if came out through injury No. 11. Lower part of fibia and fibula were found cross bed on opening the injured part. Injury No. 10 was situated anteriorly on the lower part of the left leg.
- G 12. Lacerated injury ½" x ½" x 1" on right leg, lower part, medially.
13. Punctured injury ½" x 1/8" x ¼" on right ankle joint anteriorly.
14. Punctured injury ¾" x ¼" x bone on right foot anteriorly.
- H 15. Punctured injury ¾" x 1/6" on sole of the left foot.

Third Rib on left side was found cut anteriorly, intercostal muscles of the third left space was also.....dimension as per injury No. 3 Pleura also cut for 2" in length anteriorly. Chest clot blood and blood clot, approximately a pland of the left lung cut 3" x ½" x 1" anteriorly. Heart, chambers were empty, each, situated anteriorly and another laterally. Stomach was performed in nortolateral surface along the greater curvature size 1/6" x 1/6" x stomach cavity. Some gruel was found inside the stomach and a little out of the stomach. Spleen was also punctured, about 1/6" in diameter on the front aspect depth being ¼". Abdominal cavity had also little ceslection of blood and blood clotal."

All these injuries according to doctor were ante-mortem in nature and injuries No. 1, 3, 4 and 5 were fatal. The doctor also stated that injuries Nos. 1 and 8 could be caused by sharp cutting weapon. Injuries No. 9, 10 and 11 were caused by gunshot. Injuries No. 2, 3, 4, 5, 6, 12, 13, 14 and 15 caused by some sharp pointed weapon and death was due to shock, haemorrhage and injuries on the vital organs. In a case of murder where it is established by satisfactory evidence that all the accused were acting in concert and were associated with each other in causing assault and multiple injuries were found on the deceased it leaves no room for doubt that all the accused had shared a common intention to cause death (see *Aher Pitha Vajshi and others v. State of Gujarat*, AIR (1983) SC 599. In view of the nature of injuries found on the dead body of deceased Razaullah and the weapons of assault in the hands of the accused, it would be difficult to hold that all of them had not shared the common intention of killing the Razaullah which developed at the spur of the moment on being ordered by Uttam Pandey. In fact with deadly weapons in their hands they mercilessly assaulted deceased Razaullah and as such their conviction under Section 302/34 is fully justified.

So far as Criminal Appeal No. 198 of 1982 is concerned the appellants have been convicted under Section 147 IPC and in view of number of eye-witnesses to the occurrence many of whom are injured witnesses and those witnesses having been believed by the learned Sessions Judge as well as by the High Court and while discussing their evidence in the other appeal we have also believed their testimony, we see no infirmity in conviction and sentence passed against the appellants in this appeal, and therefore, the said appeal is dismissed.

In the net result, therefore, the conviction of appellants Uttam Pandey, Janak Das, Sanjam Pandey, Upendra Narain Pandey, Jogeshwar Mandal and Kapileshwar Mandal under Section 302/34 IPC for causing murder of Ahmed

- A** Shah and the sentence passed thereunder is set aside, instead they are convicted under Section 325/34 and they are sentenced to undergo rigorous imprisonment for five years. The conviction of other accused persons namely Dukhmochan Pandey, Kamleshwar Pandey, Jiwacch Mishra, Sarabnarain Mishra, Tapeshwar Pandey and Jainandan Mishra under Section 302/34 IPC for causing murder of Ahmed Shah and the sentence passed thereunder is affirmed.
- B** The conviction of all the 12 accused persons, namely, Dukhmochan Pandey, Shiv Narain Thakur, Shivshekhar Pandey, Sarabnarain Mishra, Sukhram Mishra, Saukhilal Yadav, Naval Kishore Pandey, Yogendra Narain Pandey, Mahendra Narain Pandey, Ramchandra Pandey, Jainandan Mishra and Amiri Lal Yadav under Section 302/34 for causing murder of SK Razaullah and sentence passed thereunder is affirmed. Their conviction and sentence on other counts remain unaltered. Criminal Appeal No. 197 of 1982 is partly allowed to the extent indicated above. The conviction and sentence of the appellants in Criminal Appeal No. 198 of 1982 is affirmed. Criminal Appeal No. 198 of 1982 is dismissed.
- C**
- D** The accused - appellants who are on bail are directed to surrender to serve the balance period of sentence and in case they fail to surrender steps may be taken for their arrest to serve the sentence.

R.K.S.

Appeals allowed.