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BABU RAM AND ANR.
v.
STATE OF U.P. AND ORS.

AUGUST 1, 2002

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[R.C. LAHOTI AND BRIJESH KUMAR, JJ.]

Penal Code: Sections 34, 147, 148, 149, 302 and 325:

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Murder—Act of assault by lathi—Subsequently, act of firing by other accused persons—Caused death of victim—Inference—Held, Absence of direct or circumstantial evidence—Evidence of eye-witnesses confirm that act of assault was over when gun shots were fired at victim—Injuries caused by lathi not enough to cause the death—In such circumstances, inference cannot be drawn that accused were sharing common intention with other accused, and death of the victim was caused due to their concerted action.

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Murder—Simultaneous firing by accused persons—Death of victim—Whether accused were sharing common intention—Held, yes, since shots were fired at victim simultaneously and shot by one of them has fatally hit the victim and caused his death.

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Evidence Act, 1872:

Non-examination of an eye-witness—Effect of—Held, evidence of one eye-witness examined is found to be trustworthy to convict the accused persons—Non-examination of another eye-witness would not cause any infirmity in prosecution case.

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According to the prosecution, in connection with levy of irrigation charges on the users, the tubewell Operator, and tubewell Amin, accompanied by some villagers including deceased and his brother, were surveying the village fields. When they reached the field of the accused a quarrel started between accused and the deceased on the issue of use of tube well. One of the accused exhorted the deceased whereupon two other accused dealt with lathi blows on the deceased who also wielded his lathi in defence. Tubewell Operator and tubewell Amin had slipped away. However, brother of the deceased, PW1 tried to pacify both the parties.

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In the meanwhile, other two accused opened fire aiming at deceased, who after receiving firearm injury, fell down and died on the spot. PW1 lodged F.I.R. of the incident. Police started investigation and dead body of the deceased was sent for post mortem examination. Five accused persons were tried on charges under Sections 302/149, 148 and 147 I.P.C. Trial Court convicted two of the accused for offences under Sections 148 and 302/149 IPC and other three accused were convicted for offences under Section 147 and 302/149 IPC. On appeal, High Court held that one of the accused did not participate in the incident at all, and therefore, there was no unlawful assembly formed by the accused persons. Accordingly it convicted four accused persons under Sections 302/34 IPC and one accused has been completely exonerated and acquitted. Hence these appeals by the four convicted accused.

It was contended for the appellants that PW1 is the brother of the deceased and, therefore, an interested witness; that according to the brother of the deceased, deceased had taken Dal-Roti in breakfast on the fateful day, whereas post-mortem report suggests presence of rice in the intestine as well. It shows that PW1 was not present with the deceased; Tubewell Operator, a Government Servant and an independent eye witness, was not examined, therefore an adverse inference could be drawn against the prosecution; and that there is infirmity in the prosecution as the guns seized from accused was not sent for forensic examination by ballistic experts.

Partly allowing the main appeal filed by the two accused and dismissing the connected appeal filed by another two accused, the Court

HELD: 1.1 The ocular evidence adduced on behalf of the prosecution proves beyond reasonable doubt the prosecution story including the role assigned to each of the accused persons excepting the one who has been acquitted by the High Court. [372-E]

1.2. Evidence of PW1 finds corroboration from the promptly lodged FIR and the medical evidence who is also supported with all force by PW2, a villager and an independent witness and as to whom it is not even suggested why he would tell a lie and implicate the accused persons falsely. PW3, the tubewell Amin has turned hostile. He was declared so and cross-examined by the public prosecutor. However, even PW3 has admitted the presence of the deceased and a dispute having taken place with him during

A the inspection visit of the witness and the use of lathis and gun by the assailants though he did not identify or describe the assailants. He admitted during cross-examination that on the date of incident he had left the place of the incident for fear of his life. He further admitted that he has to perform field duties and he has a fear from the accused persons and, therefore, he was not inclined to give full statement of the incident which
B had occurred. [373-D, F]

C 2.1. It is settled law that non-examination of an eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. An effort should be made at appreciating the worth of such evidence as has been adduced. If the evidence coming from the mouth of the eye-witnesses examined in the case is found to be trustworthy and worth being relied on so as to form safe basis for recording a finding of guilt of the accused persons then non-examination of yet another witness who would have merely repeated the same story as has already been narrated by other reliable witnesses would
D not cause any infirmity in the prosecution case. [373-H; 374-A, B]

E 2.2. The Sessions Court, as also the High Court, have dealt with the testimony of each of the witnesses examined in the case and chosen to place reliance on eye witness account of PW1 and PW2 holding that their testimony could safely be relied on for founding the verdict of guilt. There is no reason to take a different view. [374-D]

F 3. In the connected appeals, both the accused voluntarily surrendered in the Court after a lapse of about 11 days. The guns are licensed guns of these two accused persons. Examination of guns by the ballistic expert after a lapse of 11 days would not have made any material difference. It would have been different if any bullet or pellet would have been found and recovered either from the body of the deceased or from the scene of occurrence in which case the ballistic expert would have been expected to conduct test-fires and determine whether the bullet or pellet was fired from the seized guns or any one of them. But that is not the
G case. The prosecution case is not suffering from any infirmity in so far as the accused appellants are concerned. [374-F, H; 375-A]

H 4.1. The exact position in which the victim was when the guns were fired has not come in prosecution evidence. However, it is certain that accused in the main appeal have not dealt any blow on the person of the

deceased nor they are attributed with any overt act after the guns were fired. According to PW1 and PW2 guns were fired at a point of time when assault by lathis was over. The two guns by the other two accused persons are said to have been fired almost simultaneously. There is no direct or circumstantial evidence available on record for drawing an inference that accused could have, while assaulting deceased with lathis, anticipated that other accused or any one of them would fire at deceased and fatally injure him. The injuries caused by them have resulted in fractures on the body of the deceased. The medical evidence is clear and specific. None of the lathi injuries either individually or collectively were enough to cause the death of the victim. Looking at the narration of incident by eye-witness, it is difficult to draw an inference that the Act which caused the death of the victim was the result of concerted action of accused and they cannot be attributed sharing common intention with other accused to cause the death of the deceased. They can be attributed only with the intention of causing grievous hurt to deceased. Therefore, these accused be held liable for offence punishable under Section 325/34 IPC.

[375-F-H; 376-A, B; 377-C, D]

Mahbub Shah v. Emperor, AIR (1945) PC 118; *Shankar Lal v. State of Gujarat*, [1965] 1 SCR 287 and *Mithu Singh v. State of Punjab*, [2001] 4 SCC 193, relied on.

4.2. Both accused (accused in the connected appeal) were armed with guns and fired at the deceased almost simultaneously. Shot by one of them has fatally hit the deceased. It is clear that both shared the common intention of causing the death of deceased. The trial Court and the High Court have rightly convicted the said accused guilty under Section 302/34 IPC. [377-D-F]

Shankar Lal v. State of Gujarat, [1965] 1 SCR 287, relied on.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 255 of 2001.

Form the Judgment and Order dated 4.11.99 of the Allahabad High Court in Crl.A. No. 2 of 1982.

Yogeshwar Prasad, Ramesh Chandra Mishra Dr. Meera Aggarwal and Swarup Singh for the Appellants.

A Praveen Swarup, Prashant Choudhary and Pramod Swarup for the Respondents.

The Judgment of the Court was delivered

B R.C. LAHOTI, J. Ram Swarup, Raja Ram, Babu Ram, Deshraj and Dularey Prasad, the five accused persons were tried on charges under Section 302/149, 148 and 147 IPC. The Court convicted Ram Swarup and Raja Ram for the offences under Sections 148 and 302/149 IPC and sentenced them to suffer two years' rigorous imprisonment and imprisonment for life respectively. Babu Ram, Deshraj and Dularey were convicted under Section **C** 147 and 302/149 of IPC and sentenced respectively to one year's rigorous imprisonment and imprisonment for life. All the accused persons preferred an appeal before the high Court. The High Court has held the accused Dularey not to have participated in the incident at all and therefore there was no unlawful assembly of the accused persons. Accordingly, Dularey Prasad has been completely exonerated and acquitted. The conviction of all other accused **D** persons in so far as referable to Section 147, 148 and 302/149 IPC has been set aside. Instead Ram Swarup, Raja Ram, Babu Ram, Deshraj have been held guilty of an offence punishable under Section 302/34 of IPC and sentenced to imprisonment for life each. Feeling aggrieved by their conviction as ordered by the High Court, the accused Babu Ram and Deshraj have preferred Criminal **E** Appeal No. 255/2001 and Ram Swarup and Raja Ram have preferred Criminal Appeal No. 256/2001, both by special leave.

The occurrence took place on 14.3.1980 at a both 12.30 p.m. on the outskirts of village Baburahi, P.S. Shahabad, District Hardoi of Utter Pradesh. Shri Krishna, PW1 is the brother of late Mangali who died in the occurrence. **F** It appears that tubewell operator Ram Autar (not examined) and Asharfi Lal, Tubewell Amin, PW3, accompanied by villagers Ram Pal, Shri Krishna and Mangali were taking a round of the village fields for making a survey of such fields as were irrigated from the tubewell in that season so as to make record of the same and levy irrigation charges. When they reached the field of accused Ram swarup. Mangali said that Ram Swarup's fields have been irrigated by tubewell whereas Ram swarup denied the same. Other accused- **G** appellants were present. Accused Deshraj and Babu Ram were armed with lathis. The deceased Mangali also had a lathi with him. The accused Ram Swarup and Raja Ram had licensed guns with them. On Ram Swarup accused vehemently denying his fields having been irrigated, a verbal exchange **H** followed by hot words ensued between late Mangali and accused Ram Swarup.

Dularey exhorted the accused persons whereupon appellant Deshraj and Babu Ram dealt lathi blows on Mangali. Mangali too wielded his lathi in his defence. Ram Autar and Asharfi Lal, PW3 being public servants and obviously not interested in involving themselves in the feud between the private parties thought it better to slip away from the scene and did so. Shri Krishna, PW1 tried to intervene and pacify the parties engaged in altercation. At this point of time appellants Ram Swarup and Raja Ram opened fire with their respective guns aiming at Mangali. Mangali sustained a fire arm injury and fell down. He died on the spot. The dead body was then removed by the villagers to the village.

Shri Krishna, PW1 lodged first information report of the incident at about 2.30 p.m. at police station, Shahabad situated at a distance of little more than two miles from the village. The report was registered by Om Hari Sharma, Sub- Inspector present at the police station. He registered a cognizable offence and commenced investigation. The dead body of the deceased was referred for post-mortem examination which was performed by Dr. U.D. Kapoor, PW5 on 15.3.1980 at 1 p.m. The following injuries were found on the body of the deceased:

1. Firearm wound of entry:- of the size of 2.5cm x 2.5. cm x cranial cavity deep, on the left side of forehead, 2 cm above the outer end of left eyebrow, margins of the wound are lacerated and inverted. Blackening charring present.
2. One firearm wound of exit 4.5 x 3.5. cm x margin are irregular and everted. This wound is communicating with the wound of entry no. (1). The skull bone broken into pieces are visible both form entry and exit wounds.
3. Contusion, 6 cm x 2 cm on the Rt. side of face middle part, just in front of Rt. ear.
4. Abrasion, 3 cm x 2 cm on left cheek
5. Contusion 3 cm x 2 cm on right cheek below right eye
6. Lacerated wound:- 3 cm x 1 cm x bone deep being right eye.
7. Lacerated wound:- 1 cm x 0.5 cm x bone deep on left eye.
8. Lacerated wound:- 1 cm x 0.5 cm x bone deep in the middle of

- A front of Nose. Underlying nasal bone is fractured.
9. Lacerated wound:- 5 cm x 2 cm x bone deep on left side of chin. Underlying bone is fractured.
- B 10. Lacerated wound:- 3 cm x 2 cm x bone deep on Rt. side of chin 6 cm below-Rt. angle of mouth Rt. side mandible bone is fractured
11. Lacerated wound:- 2 cm x 1 cm x muscle deep, in the middle of lower lip.
- C 12. Lacerated wound:- 6 cm x 1 cm x bone deep, on Rt. side of head, 10 cm above the Rt. ear. right parietal bone of skull is fractured.

D All the injuries were ante-mortem. On internal examination, frontal bone under injury nos. 1 and 2 was found to have fractured. Undigested food and pieces of rice were found in the intestine. The cause of death was shock and haemorrhage as a result of the ante-mortem injuries. Dr. Kapoor when examined in the Court stated that after sustaining four to five injuries out of injury nos. 3 to 12 injured would not have remained in standing position and would have fallen down. Injury nos. 3 to 12 were not enough even cumulatively to cause death. So far as injury nos. 1 and 2 are concerned they were caused by one gun shot.

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The ocular evidence adduced on behalf of the prosecution proves beyond reasonable doubt the prosecution story including the role assigned to each of the accused persons excepting Dularey who has been acquitted by the High Court and there is no challenge laid to Dularey's acquittal before us. Shri Krishna, PW1 is the brother of the deceased. His testimony has been criticized by the learned senior counsel for the appellants on two counts mainly. Firstly, it is submitted that Shri Krishna is the brother of the deceased and therefore a witness interested' in prosecution and at the same time there is a background of strained relationship available between the accused and the deceased. Secondly, it is submitted that according to Shri Krishna his brother Mangali, the deceased and he had taken the breakfast which consisted of Dal-Roti but according to post-mortem report the semi digested food in the intestine of the deceased consisted of rice and that shows that Shri Krishna, PW1 was not with the deceased . We have noted this submission but we cannot go that far as the learned counsel for the appellants proposes us to carry inasmuch as we are of the opinion that none of the grounds can be enough for discarding over

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board the testimony of Shri Krishna. His being a relation of the deceased and having strained relationship with the accused persons since before the incident can persuade the Court of facts to be on its guard and be cautious while evaluating the worth of his testimony. So far as the other submission is concerned that has only to be rejected. The post-mortem report states the contents in the stomach of the deceased to be semi-digested food and pieces of rice. The post-mortem report does not say that the contents consisted exclusively of rice only. The doctor conducting the autopsy was not asked any question in this regard by the defence. According to Shri Krishna, PW1 the breakfast consisted of Dal-roti but he has not specifically denied any rice having been served as a part of the breakfast in the morning. It is common knowledge that in Central India rice in small quantity is generally cooked and served along with Dal-roti and rice is not the principal meal or eaten exclusively. We could have appreciated and assigned some weight to the submission of the learned counsel for the appellant if the doctor conducting the autopsy would have been emphatic in saying that the stomach contents of the deceased were rice only while Shri Krishna, PW1 would have been specific in saying or admitting that the breakfast did not have any rice.

The evidence of Shri Krishna finds corroboration from the promptly lodged FIR and the medical evidence. He is also supported with all force by Rampal, PW2, who is a villager and an independent witness and as to whom it is not even suggested why he would tell a lie and implicate the accused persons falsely. Asharfi Lal, PW3, the tubewell Amin has turned hostile. He was declared so and cross-examined by the public prosecutor. However, even Asharfi Lal PW3 has admitted the presence of Mangali, the deceased and a dispute having taken place with him during the inspection visit of the witness and the use of lathis and gun by the assailants of Mangali though he did not identify or describe the assailants. He admitted during cross-examination that on the date of incident he had left the place of the incident for fear of his life. He further admitted that he has to perform field duties and he has a fear from the accused persons and therefore he was not inclined to give full statement of the incident which had occurred.

It was submitted by the learned counsel for the appellants that Ram Autar, an independent eye witness present at the scene of occurrence according to prosecution case and a government servant has not been examined, and therefore, an adverse inference should be drawn against the prosecution. It is settled law that non-examination of an eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a

- A** stroke of pen. An effort should be made at appreciating the worth of such evidence as has been adduced. If the evidence coming from the mouth of the eye-witnesses examined in the case is found to be trust worthy and worth being relied on so as to form safe basis for recording a finding of guilt of the accused persons than non examination of yet another witness who would have merely repeated the same story as has already been narrated by other
- B** reliable witnesses would not cause any dent or infirmity in the prosecution case. In the case at hand we additionally find from the testimony of Asharfi Lal that in spite of being a government servant and not involved in local village disputes he is afraid of deposing against the accused persons and there is substance in the submission of the learned counsel for the State that
- C** Ram Autar if tendered in the witness box would have followed the same track as was chosen by Asharfi Lal, PW3.

- The Sessions Court as also the High Court have dealt with the testimony of each of the witnesses examined in the case and chosen to place reliance on eye witness account of Shri Krishna and Ram pal holding that their
- D** testimony could safely be relied on for founding the verdict of guilt. We find no reason to take a different view. Thus, we agree with the High Court and the Sessions Court in holding that in the occurrence Babu Ram and Deshraj caused injuries on the person of deceased Mangali by lathis. We also agree with the finding arrived at that Ram Swarup and Raja Ram were armed with guns and both of them fired shots at the deceased Mangali. One of the shots
- E** hit Mangali causing a wound of entry and a wound of exit.

- It was submitted by the learned counsel for the appellants that the guns seized from Ram Swarup and Raja Ram should have been sent for forensic examination by ballistic experts and the failure of the prosecution to do so
- F** is another infirmity in the prosecution case. In this case the occurrence had taken place on 14.3.1980. Accused Ram Swarup and Raja Ram voluntarily surrendered in the Court and were arrested on 25.3.1980 i.e. after a lapse of about 11 days. The guns are licensed guns of the two accused persons Examination of guns by the ballistic expert after a lapse of 11 days would not have made any material difference. It would have been different if any bullet
- G** or pellet would have been found and recovered either from the body of Mangali or from the scene of occurrence in which case the ballistic expert would have been expected to conduct test-fires and determine whether the bullet or pellet was fired from the seized guns or any one of them. But that is not the case before us.

- H** We do not find the prosecution case suffering from any infirmity in so

far as the accuse appellants before us are concerned.

What remains to be examined is the nature of offence committed by the accused persons. The High Court has rejected the prosecution case to the extent of participation of Dularey, the fifth accused. Thus, there was no unlawful assembly and the question of holding any of the accused persons guilty with the aid of Section 149 IPC does not arise. The High Court has held all the accused- appellants guilty of offence punishable under Section 302 read with Section 34 of the IPC. It has to be seen whether all the accused persons can be attributed with common intention to cause the death of Mangali.

The prosecution case itself is that there was no prior meeting of the minds of all the four accused- appellants. The villagers including the prosecution witness and some of the accused persons were accompanying the officials of tubewell irrigation department for the purpose of surveying the irrigated fields and in this process they reached the field of accused Ram Swarup. Feelings mounted and verbal exchange got heated resulting in wilding of weapons like lathis and guns at the spur of the moment. Villagers in our country are routinely accompanied by lathis. The guns were licensed guns and it cannot be said that Ram Swarup and Raja Ram had deliberately taken the guns with them with the previous idea of utilizing the weapons in the unfortunate incident which was certainly not pre-conceived and pre-meditated. The wielding of lathis by Babu Ram and Deshraj is the earlier part of the incident. While Babu Ram and Deshraj inflicted lathi blows. Mangali, the deceased also wielded his lathi though in his defence as stated by Shri Krishna, PW1 Mangali fell down. It was at a point of time when Mangali was about to fall down or was falling down or had already fallen when Ram Swarup and Raja Ram fired. The exact position in which the victim was when the guns were fired has not come in prosecution evidence. However, what is certain is that Babu Ram and Deshraj have not dealt any blow on the person of the deceased nor they are attributed with any overt act after the guns were fired. According to PW1 and PW2 guns were fired at a point of time when assault by lathis was over. The two guns by the two accused persons are said to have been fired almost simultaneously. In short so far as the assault by Babu Ram and Deshraj is concerned it had come to an end before the guns were fired; howsoever negligible may be the intervening gap. There is no direct or circumstantial evidence available on record for drawing an inference that Babu Ram and Deshraj could have, while assaulting Mangali with lathis, anticipated that Ram Swarup and Raja Ram or any one of them would fire at Mangali and fatally injure him. We cannot hold Babu Ram and Deshraj

A accused-appellants sharing common intention with Ram Swarup and Raja Ram to cause the death of Mangali. They can be attributed only with the intention of causing grievous hurt to Mangali. The injuries caused by them have results in fractures on the body of the deceased. The medical evidence is clear and specific. None of the lathi injuries either individually or collectively were enough to cause the death of the victim.

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In *Mahbub Shah v. Emperor*, AIR (1945) PC 118, *Sir Madhavan Nair* so stated the law as to common intention, speaking for their Lordship of the Privy Council:-

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“.....the essence of that liability is to be found in the existence of a common intention animating the accuse leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of S.34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all, if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a prearranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arrange plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual, in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.”

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Following the above said statement of law, this court held in *Shankar Lal v. State of Gujarat*, [1965]1 SCR 287:-

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“The criminal act mentioned in S. 34 of the Indian Penal Code is the result of the concerted action of more than one person, if the said result was reached in furtherance of the common intention, each person is liable for the result as if he had done it himself.”

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Thus, it is clear that in order to hold an accused guilty of criminal act by reference of Section 34 of the IPC the Court should be able to draw an inference that the result reached was the consequence of the concerted action of the person said to be held liable, recently, this Court has held in *Mithu Singh v. State of Punjab*, [2001] 4 SCC 193:-

“Common intention has to be distinguished from same or similar intention. It is true that it is difficult, if not impossible, to collect and produce direct evidence in proof of the intention of the accuse and mostly an inference as to intention shall have to be drawn from the acts or conduct of the accused or other relevant circumstances, as available. An inference as to common intention shall not be readily drawn, the culpable liability can arise only if such inference can be drawn with a certain degree of assurance.”

Looking at the narration of incident by the eye witnesses it is difficult to draw an inference that the act, which caused the death of the victim was the result of the concerted action of Babu Ram and Deshraj. They cannot be attributed with sharing common intention to cause the death of Mangali with Ram Swarup and Raja Ram. Babu Ram and Deshraj can therefore be held liable only for offence punishable under Section 325 read with Section 34 of IPC.

So far as Ram Swarup and Raja Ram are concerned both were there armed with guns. Both have fired at the deceased Mangali and almost simultaneously. Shot by one of them has fatally hit the deceased. It is clear that both shared the common intention of causing the death of Mangali. In *Shankar Lal'* case (supra), it was held that if four accused with common intention to kill someone were shooting at him they were certainly doing a criminal act in furtherance of the common intention to kill him within the meaning of Section 34. If such shooting results in the death of the persons aimed at all are liable to be convicted under Section 302 read with Section 34 of IPC. The trial Court and the High Court have not, therefore, erred in holding the accused Ram Swarup and Raja Ram guilty under Section 302/34 IPC.

For the foregoing reasons, Criminal Appeal No. 256/2001 filed by Ram Swarup and Raja Ram is dismissed. Their conviction under Section 302 read with Section 34 IPC is maintained. They shall serve out the sentence as passed by the Trial Court and upheld by the High Court.

Criminal Appeal No. 255 of 2001 filed by Babu Ram and Deshraj is partly allowed. The conviction of these accused/appellants under Section 302/34 IPC and the sentence of imprisonment for life passed on each of them is set aside. Instead they are held guilty of offence punishable under Section 325/34 IPC. Each one of the accused is sentenced to undergo rigorous

A imprisonment for a period of three years and also to pay a fine of Rs. 1,000 and in default of the payment of fine to undergo simple imprisonment for three months each. These two appellants were directed to be released on bail. They shall surrender to their bail - bond to serve out the remaining part of sentence subject to adjustment under Section 428 Cr. P.C.

B S.K.S. Criminal Appeal No. 255/2001 partly allowed.
Criminal Appeal No. 256/2001 dismissed.