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SHIVA SHANKAR PANDEY & ORS.

v.

STATE OF BIHAR

SEPTEMBER 9, 2002

B

[S. RAJENDRA BABU AND P. VENKATARAMA REDDI, JJ.]

Penal Code, 1860:

C

Sections 302, 149 and 34:

D

Murder—Conviction—Common Object—Prosecution case that accused allegedly committing murder—Some of the accused sharing common intention to commit murder—Prosecution witnesses not giving any account of role of other accused except alleging that accused seen chasing other party with weapons—Trial Court convicting the accused under section 302 read with section 149—High Court upholding the same—On appeal held, section 149 inapplicable since no constructive liability can be fastened on accused persons—Accused sharing common intention convicted under Section 302 read with 34 and other accused acquitted.

E

Conviction under section 302 read with 34 though there was no specific charge under section 34—But accused were aware of the constructive criminal liability fastened on them—Thus no prejudice caused to them.

F

Section 149—Vicarious liability of members of unlawful assembly—Ingredients and scope of—Explained.

G

Criminal Trial :

Appreciation of evidence—Eye-witnesses were inimical to the accused and closely related to deceased—Evidence should be scrutinized with greater care and circumspection.

H

According to the prosecution A-1 injured one M due to enmity between two factions. He fired at M causing him injury from the rifle given to him by A-4; an hour later each of the appellant-accused armed with weapons went to the scene of occurrence. At that juncture A-1 fired a shot from his rifle at M. A 4 and two appellants including A-4 exhorted A-1 to

fire again. He fired two three more shots and M died instantaneously and accused persons dispersed. A-1 was convicted under Sections 302 and 341 IPC and Section 27 of the Arms Act and his SLP was dismissed by this Court. Appellants are the other accused who were convicted under Section 302 read with Sections 149 and 341 IPC by trial court and their conviction was upheld by High Court. Hence these appeals. Disposing of the appeals, the Court

HELD:1.1. Finding of the High Court that in the second part of the occurrence all the appellants had common object to commit murder of the deceased is not sustainable. The version of prosecution witnesses that they had seen each of the accused with weapons in their hands is highly improbable and is not consistent with the admitted course of conduct. It does not inspire confidence and it only reflects an anxiety on their part to implicate as many accused as possible. [174-F; 175-B, G, H]

1.2. Having regard to the fact that the witnesses are closely related persons and there is a history of bitter enmity between the deceased and the accused party, the evidence of PWs 10 and 3 should have been scrutinized with greater care and circumspection as there was every possibility of exaggeration and embellishment. Viewed in this background and going by the state of evidence on record, a reasonable doubt arises on the veracity of prosecution version that each of the appellants armed with weapons went to the scene of occurrence with a view of kill or injure the victim already injured in the course of first incident. [175-C, D]

1.3. The evidence of the deceased's son reveals that as soon as they noticed the accused party chasing them, they ran for safety leaving the cot on which the deceased was being carried at the spot. It is most unlikely that at that moment he could have noticed meticulously who were all following him and which weapon each of them carried. At best, he could have seen at a quick glance some of the accused but not all of them. The son of the deceased (PW 10) assigns the active role only to A-4 and appellant-R apart from the actual assailant A-1. The first two of them are said to have exhorted A-1 to fire. With regard to other appellants, none of the prosecution witnesses gave any account of the role played by any of them. The prosecution evidence is absolutely silent in this regard. No injuries other than those inflicted by fire-arm were found on the deceased. Thus, a serious doubt arises as to the correctness of the prosecution case that each of the accused (excluding A-4 and appellant-R) accompanied A-

A 1 in prosecution of their common object to injure or kill the deceased. The possibility of some of the accused persons being present cannot be ruled out; but on the question as to who were present, it is difficult to eliminate chaff from the grain on an analysis of the evidence. [175-G, H; 176-A-C-G]

B 1.4. It is not safe to convict the accused-appellants by taking recourse to Section 149 I.P.C. However, the presence and active participation of A-4 and appellant-R cannot be doubted. They shared common intention with the main assailant to kill the deceased. Therefore, A-4 and appellant-R are liable to be convicted under Section 302 read with Section 34 I.P.C. Appellants 1,3,4,5 and 6 are acquitted of charges and conviction of A 4 and appellant-R is altered into one under Section 302 read with 34 IPC from Section 302 read with 149 IPC. [177-G; 178-B, D, E]

Umesh Singh v. State of Bihar, AIR (2000) SC 2111, referred to.

D 3. The absence of a specific charge under Section 34 I.P.C. cannot be said to have caused any prejudice to the other two appellants as the facts giving rise to constructive criminal liability were well known to them from the beginning and the case which they had to meet under Section 34 is substantially the same as the prosecution put forward. [178-C]

Bhoor Singh v. State of Punjab, AIR (1974) SC 1256, relied on,

E CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 871-872 of 2000.

From the Judgment and Order dated 3.11.1999 of the Patna High Court in CrI. A. No. 109 of 120/96.

F K.B. Sinha and Ashok Kumar Sharma, for the Appellants.

Saket Singh and B.B. Singh for the Respondent.

The Judgment of the Court was delivered by

G **P. VENKATARAMA REDDI, J.** These appeals are by special leave against the judgment of Patna High Court in two criminal appeals, which were dismissed by the High Court, thereby upholding the conviction by the trial Court. Eight persons including the seven appellants herein, were charged of murdering one Mangalanand Pandey on 18.10.1993. Accused Nos. 2, 3, **H** 5 to 8 are the appellants in Criminal Appeal No. 871 of 2000. Accused No.4

is the appellants in the other appeal. The Special Leave Petition in so far as the accused No.1 Dinesh Pandey, who actually killed the deceased with the shots fired by him, was dismissed by this Court. The said accused was convicted under Sections 302 and 341 I.P.C. and Section 27 of the Arms Act. The remaining seven accused, who are appellants herein, were convicted under Section 302 read with Sections 149 and 341 I.P.C. and sentenced to undergo life imprisonment.

The prosecution case is that on 18.10.1993 at about 5.45 a.m. the deceased Mangalanand Pandey and his brother Ranganath Pandey (PW 2) were putting up a 'machan' (a bamboo platform for holding vegetable creepers) at a place adjacent to the 'dalan' of their house towards the West. The 'dalan' and the cow shed of the appellant Ram Pravesh Pandey was adjacent to the land where the 'machan' was being erected. The eight accused came there and started abusing the deceased and PW 2. At that juncture, the son of the deceased by name Ram Bachan Pandey PW 10 together with his grand father went to the place and advised the accused - appellants not to pick up quarrel. The accused were in the posture of assaulting them. All the three went running to the house of deceased and closed the doors. The accused followed them to the doorway of the house and continued abusing them. Then PW 10 and the deceased shifted to the roof of the house for safety. Thereafter, the accused excepting Mithilesh Pandey and Ramkeshwar Pandey also got into the roof of the house of Srinivas Pandey (A-4) and started pelting stones and brickbats to hit the deceased and his companions. Mithilesh and Ramkeshwar remained in the lane nearby and continued abusing. While so the appellant Srinivas Pandey fetched a rifle from his house and gave it to Dinesh Pandey who fired at the deceased causing injury on the upper portion of his left arm. Then, the deceased together with others came down. The injured person (deceased) was put on a cot and he was being taken by PW 10, PW 2, PW 9 and one Ranganath Tiwari (not examined) for treatment. At about 7.15 a.m., when they came past the 'dalan' of Ram Narayan Pandey (PW 7), the accused, armed with lathis, gandasas and rifles, were rushing towards them uttering the words - 'Maro salon ko'. Seeing them PW 10 and his party fled, keeping the cot on which the injured victim lay, in front of the house of PW 7. PW 10 ran inside a room located near the 'dalan' of Ram Narayan Pandey and started watching the incident through the window. The uncle PW 2 ran towards the village. However, Ranganath Tiwari (not examined) and PW 9 remained there at some distance. Dinesh Pandey (whose SLP was dismissed) fired at the deceased who was lying unconscious on the cot. The appellants Srinivas Pandey and Ram Pravesh Pandey exhorted the accused Dinesh to fire again

A saying that the victim was still alive. Dinesh then fired two or three more shots before the accused dispersed. The victim died instantaneously. At about 9.30 a.m. the Sub-Inspector of Police - PW 11 reached the place and recorded the 'Fard Bayan' of PW 10 which is treated as F.I.R. (Exhibit 3). PW 11 inspected the two places of occurrence, seized blood stained earth, brick bats, remains of cartridges etc. and prepared the inquest report. The dead body was sent for post-mortem. The autopsy was conducted by the Medical Officer of Sadar Hospital PW 4 on the same day evening. PW 12 filed the charge sheet. The Additional Sessions Judge Rohtas held the trial after committal and found the accused guilty of the offence with which they were charged.

C The post-mortem report coupled with the deposition of PW 4 reveals that there were lacerated wounds at four spots, namely, posterior lateral aspect of left upper arm resulting in fracture of left humerus, lacerated wound over the right side of 8th inter costal space resulting in the fracture of three ribs and manubrium sterna, lacerated wound on the upper arm right side causing fracture of mid part of humerus and lacerated wound on the left leg mid - part causing fracture of tibia and fibula. The first and second wounds had corresponding circular wounds. Doctor opined that the deceased must have died on account of shock and haemorrhage produced by the above injuries caused by fire arm. In the face of the medical evidence, it is contended that the version of the prosecution cannot be true for two reasons, firstly, the Doctor noticed blackening around the upper left arm where the first injury was caused and the blackening would not have occurred unless the shot was fired from a close range, whereas, according to the prosecution, the accused Dinesh Pandey fired the first shot from the roof of the adjacent house. Secondly, according to the Doctor, the first injury on the upper left arm would have resulted in profuse bleeding at the place where the deceased was shot. However, the I.O., P.W. 11, did not state that he found any blood stains on the roof of the house or the steps of the staircase. Moreover, no blood was found on the cot on which the deceased was alleged to have been laid after coming down from the roof. It is then commented, based on the statement of the Doctor in cross-examination, that the deceased might have gone into shock and fell down at the very spot where he sustained the first injury and therefore, the theory of the deceased getting down the steps cannot be true. The High Court and trial Court examined all these aspects and negatived these contentions. The High Court observed that the distance between the two houses was very short i.e. 3 cubits and, therefore, the possibility of blackening cannot be ruled out. The High Court referred to the statement of H the I.O. that he found blood at the stairs as well as 'Osara' (front portion of

the house) and observed that the mere fact that he did not find blood marks on the roof or steps does not go against the prosecution case. As far as victim walking down the staircase after receiving the injuries, the trial Court adverted to that aspect and observed, relying on the text books on medical jurisprudence, that the injured managing to walk some distance cannot be ruled out. We do not think that the factum of I.O. not recording the presence of blood stains on the roof and the cot is very material. They could as well be attributed to the omissions in the investigation which do not belie the prosecution evidence substantially. None of the above contentions advanced by the learned counsel for the appellant, therefore, merit acceptance.

Coming to the eye witnesses, the trial Court believed the evidence of PW 3 wife of the deceased, as far as the first part of the incident is concerned but was not inclined to place reliance on her evidence vis-a-vis the final attack on the deceased. The trial Court disbelieved the evidence of PW 2. The evidence of PW 10, the informant and PW 1 was accepted by the trial Court as well as the High Court. The High Court believed the evidence of all these eye witnesses in toto. It is contended before us that the eye witnesses whose evidence was accepted are closely related to the deceased and independent witnesses whose presence at the spot has been established were either not examined or they were tendered. This, according to the learned counsel for the appellants, makes it unsafe to act on the testimony of these interested witnesses, especially in the background of enmity between the deceased and the accused party. This contention on deeper scrutiny does not hold good. Amongst independent witnesses, only Ranganath Tiwari was not examined. However, PW 9 Satyendra Pandey, who allegedly carried the cot of the victim, was examined; but, the prosecution tendered him for cross-examination by the accused. So also, PW 7 Ram Narain Pandey, at whose house the cot was left out after seeing the accused and in whose house PW 10 had hidden, was examined, but he turned hostile. At the same time, he gave certain details of attack. As commented by the trial court after referring to various aspects, the possible witnesses were apparently won over by the accused. In these circumstances, the kith and kin of the deceased have become the main witnesses. Their presence at the time and place is quite natural and cannot be doubted. True, their evidence has to be scrutinized with greater caution especially in the background of enmity that gripped the two factions. Viewed in this light, it cannot be said that the trial Court and the appellate Court have committed any error in coming to the conclusion, based on the evidence of PW 10 (son of the deceased) and PW 3 (wife of the deceased) that the deceased was fired at by Dinesh Pandey in the company of some of

A the accused. It appears to us that the prosecution case is broadly true, though in regard to implication of many of the appellants as members of unlawful assembly, the said prosecution witnesses have come forward with a version which gives room for doubt. That aspect will be discussed later.

B As far as PW 1 is concerned, there is considerable force in the comment of the learned counsel for the appellant that his presence was highly improbable. PW 1 who was returning from his field was supposed to have halted at the place of occurrence (in front of Ram Narain Pandey's house) and observed the details of occurrence at close quarters, undeterred by the commotion and the risk of being assaulted by the accused party. PW1's evidence ought to have been doubted for that reason. Even eschewing the evidence of PW 1, the evidence of PWs 10 and 3 is still there to support the main part of the prosecution case.

D Whether the conviction of all or any of the appellants for the offence of murder can be sustained by invoking Section 149 IPC is the next question which has been vehemently argued before us. The anatomy and ingredients of Section 149 have been laid bare and its functional parameters set down in a series of pronouncements of this Court. Vicarious liability of the members of unlawful assembly arises where the offence is committed by another member or members of unlawful assembly if the commission of such offence is the common object of that assembly OR if the members of the unlawful assembly E knew that the offence of the nature committed was likely to be committed though the common object may be something different. It is worth recapitulating the exposition of law in a recent decision of this Court in *Umesh Singh v. State of Bihar*, AIR (2000) SC 2111. One of us (Rajendra Babu, J.) speaking for the Court summarized the scope and implications of the provision as under:

F "Vicarious liability, we may state, as rightly contended for the State by Shri B.B. Singh relying upon the decisions of this Court in *Shamshul Kanwar v. State of U.P.*, [1995] 4 SCC 430 and *Bhajan Singh v. State of U.P.*, [1974] 3 SCC 89 extends to members of unlawful assembly only in respect of acts done in pursuance of the common object of the unlawful assembly or such offences as the members of the unlawful assembly are likely to commit in the execution of that common object. An accused whose case falls within the terms of Section 149, I.P.C. as aforesaid cannot put forward the defence that he did not with his own hand commit the offence in prosecution of the common object of the unlawful assembly or such as the members

of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he had joined. It is not necessary in all cases that all the persons forming an unlawful assembly must do some overt act. Where the accused had assembled together, armed with guns and lathis, and were parties to the assault on the deceased and others, the prosecution is not obliged to prove which specific overt act was done by which of the accused. Indeed the provisions of Section 149, I.P.C. if properly analysed will make it clear that it takes an accused out of the region of abetment and makes him responsible as a principal for the acts of each and all merely because he is a member of an unlawful assembly. We may also notice that under this provision, the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge can reasonably be intended (sic, inferred) from the nature of the assembly, arms or behaviour, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise. ”

Though the legal position is well settled, in its actual application to the facts of a given case, difficulties do arise. It is not an easy task to draw a parallel between two cases. The presence or absence of even a single material fact or circumstance may make a world-of difference in reaching the ultimate conclusion.

We shall now proceed to consider whether on the facts established in this case, Section 149 IPC should be made applicable to the accused-appellants. As seen from the factual narration above, broadly, two incidents took place within a time gap of about an hour or so: the first one was at the open terrace of the house of the deceased. The appellants except Mithilesh Pandey and Ram Keshwar Pandey gathered on the roof of the adjacent house of Srinivas Pandey (appellant in Criminal Appeal No. 872/2000) and started pelting stones at the deceased and his companions. After sometime, Srinivas Pandey suddenly brought a fire-arm from his house and handed over to Dinesh Pandey who fired at the deceased causing injury to him on the right scapula. The second part of the incident took place about an hour later i.e. at 7.15 a.m. near the

A court-yard of Ram Narayan Pandey (PW 7) when PW 10 with the help of PW 2, PW 9 and another person was carrying his injured father laid on a cot. to the hospital. On noticing the accused running towards them with offensive cries, they left the cot near the 'dalan' of Ram Narayan Pandey and ran to save themselves. PW 10, the informant, hid himself in the house of Ram Narayan Pandey and he was watching the incident from there. The accused, according to the prosecution witnesses, were armed with lathis, gandasas and rifles/pistol. At that juncture Dinesh Pandey (whose SLP was dismissed) fired a shot from his rifle. On exhortation by appellants Ram Parvesh Pandey and Srinivas Pandey, Dinesh Pandey fired some more shots. After ensuring that the victim was dead, the accused party retreated.

C In the sequence of events that had happened the question is whether all the appellants proceeded to the spot of occurrence to attain the common objective of putting an end to the life of Manglanand Pandey and the act of Dinesh Pandey in killing the deceased with the fire-arm was only a culmination of that objective. On the point of sharing common object the High Court

D quite rightly recorded a categorical finding that the appellants did not have the common object to kill the deceased when the incident at the roof of the house took place. The High Court observed that when Srinivas Pandey (one of the appellants) brought a rifle and handed it over to Dinesh Pandey, who immediately fired at the deceased, it could be said that none other than Srinivas Pandey and Dinesh Pandey shared the common intention to commit the murder. If so, did the common object to do away with the deceased develop thereafter? On this aspect, this is what the High Court had to say:-

F "It is the second part of the occurrence which clearly suggests that all the appellants had common object to commit murder of the deceased because when after receiving injury inflicted on the left shoulder of the deceased by appellant Dinesh Pandey he was being carried on a cot for treatment, all the appellants variously armed with rifle, garasa and lathi chased him and compelled the informant and his companions to leave the cot carrying his father near the dalan of Ram Narayan Pandey and to run away from that place and thereafter appellant

G Dinesh Pandey fired one shot from his rifle at the deceased. Appellants Sri Niwas Pandey and Ram Pravesh Pandey then said to the appellant Dinesh Pandey that the deceased was still alive on which appellant Dinesh Pandey again fired two-three shots on the deceased causing his death and thereafter all the appellants fled away. This subsequent conduct of the appellants in chasing the informant party when the

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deceased was being carried on cot for treatment variously armed with rifle, garasa and lathi and thereafter commission of murder of deceased by appellant Dinesh Pandey by firing from his rifle, causing death of deceased, clearly suggests that all the appellants had common object to commit the murder of the deceased." A

The above finding of the High Court, in our considered view, is not sustainable. Having regard to the fact that the witnesses are closely related persons and there is a history of bitter enmity between the deceased and the accused party, as revealed from the FIR coupled with the evidence of PW 10, we feel that the evidence of PWs 10 and 3 should have been scrutinized with greater care and circumspection as there was every possibility of exaggeration and embellishment. Viewed in this background and going by the state of evidence on record, a reasonable doubt arises on the veracity of prosecution version that each of the appellants armed with weapons went to the scene of occurrence with a view to kill or injure the victim already injured in the course of first incident. The prosecution evidence is to the effect that Ram Parvesh Pandey, Vijoy Shankar Pandey, Ram Keshwar Pandey and Awadesh Pandey were having lathis, Mithlesh Pandey and Srinivas Pandey were armed with Gandasas, Shiv Shankar Pandey was having a country made pistol and Dinesh Pandey, the actual assailant, was armed with a rifle. Though such account was given with an apparent precision by PWs 10 and 3 (apart from PW 1 - whose presence is doubtful), their evidence does not inspire confidence and it only reflects an anxiety on their part to implicate as many accused as possible. PW 10 is supposed to have observed the accused with the weapons while they were advancing towards the prosecution party carrying the victim on the cot. According to PW 10, when they reached the spot near the 'dalan' of Ram Naryana Pandey, they heard the noise 'maro maro' from behind. Then, he looked back and noticed the accused with the weapons in their hands. However, his evidence also reveals that as soon as they noticed the accused party chasing them, they ran for safety leaving the cot at the spot. PW 10 further states that he hid himself in a room adjacent to the 'dalan' of Ram Naryan Pandey. Going by this version it is most unlikely that he would have noticed at that moment each of the accused with weapons in their hands. Such a leisurely observation was highly improbable and would not be consistent with the admitted course of conduct. PW 10 himself stated that "due to fear we put the cot on the ground and I entered into a room and my uncle ran away towards the village". Such a person stricken with fear anxious to run for safety could not have noticed meticulously who were all following him and which weapon each of them carried. At best, he could have seen at H

- A a quick glance some of the accused, but not all of them. It was even more difficult to identify each one of the weapons being carried by the chasing party. At that juncture and distance, PW 10 could have only made a random observation and noticed some of the accused and others advancing towards them with some weapons which were patently visible. When that is the probable scenario, PW 10 comes forward with a highly artificial version of
- B having seen each of the accused carrying a particular weapon in his hand. In this state of things, we must find some assurance from other facts and circumstances appearing from the evidence on record in order to fasten constructive liability on the appellants under Section 149. But, there is none. When we take stock of the happenings at the scene of occurrence as revealed
- C by the evidence of PW 10 who was watching from a window of adjacent house, the active role is assigned only to Srinivas Pandey and Ram Pravesh Pandey apart from the actual assailant Dinesh Pandey. The first two of them are said to have exhorted Dinesh Pandey to fire. With regard to others, it is significant to note that PW 10, or for that matter any other prosecution witness, did not give any account of the role played by any of them. The
- D prosecution evidence is absolutely silent in this regard. No injuries other than those inflicted by fire-arm were found on the deceased. May be, overt acts need not be there. But, the fact remains that nothing was said about the conduct or utterances of any of the accused other than the three. If they had seen any other accused at the scene of offence at the time of actual attack,
- E they could have pinpointed the same instead of being content with an omnibus allegation that the accused were seen chasing them with weapons. Only the role played by actual assailant and his two companions who exhorted him to fire are brought out in the evidence of PW10 and PW3. On a cumulative consideration of all these factors, a serious doubt arises as to the correctness
- F of the prosecution case that each of the accused (excluding Srinivas Pandey and Ram Pravesh Pandey) accompanied Dinesh Pandey in prosecution of their common object to injure or kill the deceased. The possibility of some being present cannot be ruled out; but, who they are is the question. On this aspect, it is difficult to eliminate chaff from the grain on an analysis of the evidence. The anxiety on the part of the prosecution to implicate as many
- G members of the opposite faction as possible is quite apparent. Unfortunately, the evidence of material witnesses especially that of PW10, had not been critically and carefully examined by both the Courts despite the fact that the witnesses were prone to exaggerate or distort the facts in view of enmity and close relationship. The crucial aspects, as discussed above, escaped the attention
- H of the High Court.

If the facts as stated by the High Court are correct, perhaps, the inference drawn by the High Court may be right and the conviction under Section 302 read with Section 149 IPC might not have been faulted. Even if the appellants have not done any overt acts or otherwise taken active part, knowledge under the second part of Section 149 could possibly be attributed to them. But, there is a difficulty in accepting the factual account given by PW 10 and others insofar as it relates to the accused other than the actual assailant and his two active companions. There is any amount of doubt in regard to the presence and participation of the accused other than the three referred to above.

Before closing the discussion on this aspect, we must also advert to the evidence of PW 3, who is the wife of the deceased. In this regard PW 3's evidence too does not inspire confidence. She too would not have been in a position to observe each of the accused carrying a particular weapon, even assuming that the actual act of killing by Dinesh Pandey with his fire arm could have been noticed by her from the place where she was remaining. According to the version of PW3 she was at a culvert about "10 full steps" behind those carrying the cot when she heard the cries of the accused. On noticing the accused coming from behind, she states she hid herself and came to the spot where the cot lay only after the accused left the scene. In that panicky state of mind, her impulsive reaction was only to seek a place of hiding rather than standing at the spot and observing the movements of the accused and the weapons they carried. Her evidence that she had seen each of the accused carrying particular weapon is, therefore, highly doubtful. Her evidence in this regard is no better than that of PW 10-th informant. In fact, the trial Court was not inclined to believe the evidence in regard to the second and final incident on the ground that she made certain improvements and embellishments. But, the High Court omitted to discuss them.

In the light of the above discussion it is not safe to convict the accused-appellants by taking recourse to Section 149 I.P.C. However, the presence and active participation of Srinivas Pandey and Ram Pravesh Pandey cannot be doubted. As far as Srinivas Pandey is concerned it is he who went and fetched the fire-arm and gave it to Dinesh Pandey when they were on the roof of his house thereby leading to the first shoot-out of the deceased. It is a clear pointer that he shared the common intention with Dinesh Pandey to kill the deceased. Again, at the time of second incident, he played active role in exhorting Dinesh Pandey to fire at the deceased. Ram Pravesh Pandey is another accused who exhorted Dinesh Pandey to open fire at the deceased

- A saying that he was still alive. His presence in the immediate company of the assailant and the role played by him could be watched by PW 10 just as he had seen Dinesh Pandey using his rifle to hit the deceased. He too can be said to have shared common intention with the main assailant and Srinivas Pandey to kill the deceased. Therefore, we are of the view that Srinivas Pandey and Ram Pravesh Pandey are liable to be convicted under Section 302 read with Section 34 I.P.C..
- B The absence of a specific charge under Section 34 I.P.C. cannot be said to have caused any prejudice to the two appellants as the facts giving rise to constructive criminal liability were well known to them from the beginning and the case which they have to meet under S. 34 is substantially the same as the prosecution put forward. The ruling of this Court in *Bhoor Singh v. State of Punjab*, AIR (1974) SC 1256 is quite relevant in this context.
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Accordingly, the Criminal Appeal No. 871 of 2000 is allowed in so far as Appellant Nos. 1, 3, 4, 5 and 6 are concerned. The said appellants are acquitted of the charges. The appeal in regard to Ram Pravesh Pandey stands dismissed. The Criminal Appeal No. 872 of 2000 filed by Srinivas Pandey is also dismissed. However, we alter the conviction of these two accused, namely, Ram Pravesh Pandey and Srinivas Pandey, into one under Section 302 read with 34 IPC instead of Section 302 read with 149 IPC.

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N.J.

Appeals disposed of.