A MANO DUTT & ANR.

v.

STATE OF U.P.

(Criminal Appeal No. 77 of 2007)

FEBRUARY 29, 2012

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[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Penal Code, 1860:

C *ss.302/34 – Murder – Dispute over land – Six accused – Murderous assault on the deceased with lathis – Brother and father of the deceased trying to rescue deceased also received serious injuries – Out of six accused, four convicted u/s.302 r/w s.34 by trial court – One accused died during* D *pendency of the appeal before High Court – High Court upheld the conviction of rest three u/s.302 r/w s.34 – Separate appeal by one convict before Supreme Court already dismissed – On appeal by other two convicts, held: All the accused persons had come prepared, mentally and* E *physically, to assault the deceased and in furtherance to their common intention, had even given exhortation to kill the deceased – This incident was witnessed by natural witnesses, the father/brother of the deceased who also received number of injuries – The defence miserably failed to prove commission of the offence in self-defence – Dispute had not* F *arisen at the spur of the moment as the evidence clearly showed that the accused had gone to the site in question with a common intention and with the preparedness to assault and even kill the deceased – Prosecution was able to prove its case beyond reasonable doubt and has brought home the* G *guilt of the accused u/s.302 r/w s.34.*

s.34 – Applicability of – Held: In the instant case, six accused were charge-sheeted u/s.302 r/w ss.149 and 323 – However, two of the accused were acquitted by trial court and

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remaining were convicted of an offence u/ss.302/34 and 323/34 – High Court acquitted all the accused of offence u/ss.302/34 – One of the accused died during the pendency of that appeal – Because the alleged number of accused having become less than five, nature of the offences were changed from offence u/s.149 to s.34 – In the circumstances of the case, the possibility of presence of all other persons in the appellants' party cannot be excluded – Even where there are less than five persons who are accused, but the facts and the evidence of the case is convincing as in the instant case, where the accused had returned to the place of occurrence with complete preparedness and after giving lalkar had attacked the deceased there, they have to be held liable for commission of the crime – It cannot be ignored that the extent of participation, even in a case of common intention covered u/s.34 would not depend on the extent of overt act – If all the accused have committed the offence with common intention and inflicted injuries upon the deceased in a pre-planned manner, the provisions of s.34 would be applicable to all.

Evidence:

Right of self defence – Held: It is a settled canon of evidence jurisprudence that one who alleges a fact must prove the same – When a person claims exercise of private self-defence, the onus lies on him to show that there were circumstances and occasions for exercising such a right.

Non-explanation of injuries sustained by the accused persons – Effect on prosecution case – Held: The normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused – But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail – Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the Court has to be satisfied of the

A *existence of two conditions: that the injuries on the person of the accused were also of a serious nature; and that such injuries must have been caused at the time of the occurrence in question – Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from*
B *falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be a sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution.*

C *Witnesses:*

Interested witness – Evidentiary value of – Held: When the statement of witnesses, who are relatives, or are parties known to the affected party, is credible, reliable, trustworthy,
D *admissible in accordance with the law and corroborated by other witnesses or documentary evidence of the prosecution, there would hardly be any reason for the Court to reject such evidence merely on the ground that the witness was family member or interested witness or person known to the affected*
E *party.*

Injured witness – Evidentiary value of – Held: Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence,
F *or to involve anybody falsely and in the bargain, protect the real culprit.*

Sole witness – Evidentiary value of – Held: The court can convict an accused on the statement of a sole witness, even
G *if he is a relative of the deceased and thus, an interested party – It is only when the Courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure its defect.*

H **The prosecution case was that the accused persons**

were related to each other. On the fateful day, the victim-deceased was doing earth filling in front of his sariya (a place of tethering cattle). The four accused, 'RD', 'TP', 'RN', 'MD' out of the six named accused came there and asked the deceased not to do earth filling. The deceased told them that it was his land and he would not stop the work of land filling. Thereupon, the deceased called villagers. The matter was discussed with the villagers, all of whom said that the land was that of the deceased and he could carry on with land filling on his own land. After deciding this, the villagers went away and the deceased resumed the filling of the earth. Thereafter all the six accused persons armed with *lathis*, came there and chased the deceased. The deceased was able to run for a short distance away, whereafter all the accused surrounded him. Accused 'RD', 'TP', 'MD' and 'RN' started beating the deceased with their *lathis*. The father of the deceased and his brother rushed towards the deceased to rescue him. They were also beaten up by the accused. The deceased fell down after getting the *lathi* blows. Meanwhile, his wife, 'B' and village Pradhan came there. Pradhan snatched the *lathis* of the four accused, who then fled away from the scene. The deceased sustained serious injuries. The father and the brother of the deceased also sustained injuries. The deceased narrated the incident to PW-3 and based on that FIR was prepared. The deceased died after two days. One of the accused 'RD' had also allegedly lodged a report against the deceased and his father and brothers. After registering the FIR, the Investigating Officer in his report had also stated that the accused 'RD' had sustained some injuries on his person.

The trial court charged the accused with various offences under IPC. Out of the six accused, four were convicted by the trial court under Sections 302/34 and 323/34 IPC. One accused 'RD' died during pendency of

A the appeal before the High Court and all the other accused were acquitted of the offences under Section 323/34 IPC, but convicted for offences under Section 302/34 IPC. The two accused 'MD' and 'RN' filed the instant appeals.

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Dismissing the appeals, the Court

HELD: 1. The record showed that 'RD' had lodged a complaint of the incident. According to this report, the accused in that complaint (i.e., the deceased and his C family members) had been putting earth on RD's *sariya*, which he had forbade. There was verbal altercation between the parties and then the accused in that complaint (i.e., the deceased) started assaulting him with *lathis* and it was only by raising an alarm that the people D of the village came to the place of occurrence and his life was saved. According to this complaint, he had suffered injuries on his head. This complaint was not proved by 'RD' during the trial. Accordingly, the concurrent view taken by the courts below that this document cannot be E relied in evidence, cannot be faulted with. Furthermore, 'RD' did not examine a single witness in his defence to prove that he was attacked by the deceased and his family members or that they were putting earth at the door of *sariya* of 'RD'. No doubt, 'RD' was subjected to F medical examination by the Medical Officer. He had suffered lacerated wounds on the central and other regions of skull, and had complained of pain in left leg. This would show that 'RD' had suffered some injuries but where and how these injuries were suffered, was for him to establish, particularly when he had taken a specific G stand that the deceased and his family members were at fault and were aggressive. He claims that they had caused serious injuries to his person and this incident happened in the presence of the villagers. It is a settled canon of evidence jurisprudence that one who alleges a H

fact must prove the same. The contention of the appellant cannot be accepted that the prosecution had not explained the injuries on the accused and, therefore, the attack with *lathis* was in exercise of self-defence was a circumstance which created a serious doubt in the story of the prosecution. When a person claims exercise of private self-defence, the onus lies on him to show that there were circumstances and occasions for exercising such a right. In other words, these basic facts must be established by the accused. Just because one circumstance exists amongst the various factors, which appears to favour the person claiming right of self-defence, does not mean that he gets the right to cause the death of the other person. Even the right of self-defence has to be exercised directly in proportion to the extent of aggression. As per the medical report, the injuries on the body of 'RD' were found to be 'simple in nature'. The bone of contention between the parties was the statement of the deceased, that he was filling the earth over some land, which he claimed to be his land; according to the accused, the earth-filling was carried out in front of the door of 'RD'. According to both the parties, the villagers came to the spot. Out of the two versions, the one put forward by the prosecution and the other in the defence of the accused, the version of the prosecution, as was disclosed by the eye-witnesses, is trustworthy, reliable and entirely plausible in the facts and circumstances of the case. The mere fact that the Investigating Officer has not been produced, or that there was no specific explanation on record as to how 'RD' suffered the injuries, would not vitiate the trial or the case of the prosecution in its entirety. It is not always mandatory for the prosecution to examine the Investigating Officer, provided it can establish its case beyond reasonable doubt even in his absence. Where the accused lead no defence, they cannot take benefit of the fact that the prosecution did not examine any

A B C D E F G H

A independent witnesses. The accused would be deemed to have been aware of the consequences in law when they gave a statement admitting the occurrence but attributing aggression and default to the deceased and his family members. [paras 15-17] [705-F-H; 706-A-H; 707-
B A-H]

2. Accused 'TP' was also stated to own a *sariya* and was also allegedly using his *lathi* in self-defence, as according to their story, four persons with the deceased and his family members had attacked them. Strangely,
C 'TP' suffered no injury. These were the circumstances which, examined cumulatively, would provide support to the case of prosecution. The pleas on behalf of the accused/appellants that only family members of the deceased were examined as witnesses and they being
D interested witnesses cannot be relied upon and that the prosecution did not examine any independent witnesses and, therefore, the prosecution has failed to establish its case beyond reasonable doubt were without much substance. There is no bar in law in examining family
E members, or any other person, as witnesses. More often than not, in such cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. Those alone are the people who take the risk of sustaining injuries by jumping into such
F a quarrel and trying to defuse the crisis. Besides, when the statement of witnesses, who are relatives, or are parties known to the affected party, is credible, reliable, trustworthy, admissible in accordance with the law and corroborated by other witnesses or documentary
G evidence of the prosecution, there would hardly be any reason for the Court to reject such evidence merely on the ground that the witness was family member or interested witness or person known to the affected party. There can be cases where it would be but inevitable to
H examine such witnesses, because, as the events

occurred, they were the natural or the only eye witness available to give the complete version of the incident. [Paras 18-19] [708-A-G] A

3. PW5, the doctor who examined the deceased when he was brought to hospital stated that he had examined the father and the brother of the deceased on the fateful day itself and noticed as many as five injuries on the brother of the deceased and four injuries upon the person of the father of the deceased. These injuries were suffered by them from a blunt object. The brother of the deceased was examined as PW2 and his statement was cogent, coherent, reliable and fully supported the case of the prosecution. However, the other injured witness was not examined. Non-examination of the father of the deceased, to which the accused raised the objection, would not materially affect the case of the prosecution. Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain, protect the real culprit. It is wrong to state that the material witness having not been examined and the entire prosecution story being based upon the statements of PW1 and PW2, who were the interested witnesses, the entire prosecution evidence suffered from a patent infirmity in law. Non-examination of any independent witness, in the facts of the instant case was not fatal to the case of the prosecution. The court can convict an accused on the statement of a sole witness, even if he is a relative of the deceased and thus, an interested party. The condition precedent to such an order is that the statement of such witness should satisfy the legal parameters stated by this Court in a catena of judgments. Once those parameters are satisfied and the statement of the witness is trustworthy, cogent and corroborated by other evidence B C D E F G H

A produced by the prosecution, oral or documentary, then the Court would not fall in error of law in relying upon the statements of such witness. It is only when the Courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded *in toto* and no B amount of corroboration can cure its defect. [paras 22-23, 25-26] [710-F-H; 711-A-B; 713-B-G]

Namdeo v. State of Maharashtra (2007) 14 SCC 150: 2007 (3) SCR 939; *Balraje @ Trimbak v. State of* C *Maharashtra* (2010) 6 SCC 673: 2010 (6) SCR 764; *Satbir Singh & Ors. v. State of Uttar Pradesh* (2009) 13 SCC 790: 2009 (3) SCR 406; *Abdul Sayeed v. State of Madhya Pradesh* (2010) 10 SCC 259: 2010 (13) SCR 3; *Anil Phukan v. State of Assam* (1993) 3 SCC 282: 1993 (2) SCR 389 – relied on

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4. The FIR was lodged by the deceased along with PW3 who transcribed the same at the police station itself. The deceased was seriously injured, but was fully aware of what he was doing and he had no reason to falsely E implicate any person. His father and brother had also been injured in the occurrence. It was specifically recorded in the statement of these witnesses that when the appellant 'MD' and other accused came for the second time, to the place where the deceased was filling the earth F at the *sariya*, they gave a *lalkar* '*Maro sale ko*' and then assaulted him with *lathis*. When he tried to run away, he fell to the ground. The blood-stained earth was collected by the Investigating Officer. Thereafter, the villagers had come and taken the *lathis* away from the accused G persons. The deceased was taken to the police station and then to the hospital, where he died. It is evident that all the accused persons had come prepared, mentally and physically, to assault the deceased and in furtherance to their common intention, had even given a *lalkar* to kill the deceased. This incident was witnessed H

by natural witnesses the father and the brother of the deceased as well as wife of the deceased PW1. When brother/father of the deceased even intervened and tried to protect their son/brother, but in the process, they also received number of injuries, as is clear from the medical evidence produced on record. As per the medical report and statement of PW5, the deceased had suffered a number of injuries and not only three. The collection of the bloodstained earth itself is a relevant piece of evidence and provided the link in the commission and the place of crime. [paras 27-28] [713-G-H; 714-A-E, G-H]

5. Effect of non-explanation of injuries sustained by the accused persons. The normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail. Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the Court has to be satisfied of the existence of two conditions: that the injuries on the person of the accused were also of a serious nature; and that such injuries must have been caused at the time of the occurrence in question. Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be a sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution. PW4 had clearly noticed that injury on the person of the deceased, his father and brother were all caused by a blunt weapon. He had specifically observed that the injuries were sufficient, in the ordinary course of time, to

A cause death and had, in fact, resulted in the death of the deceased. [Paras 29, 30, 31] [716-D-H; 717-A-C]

Rajender Singh & Ors. v. State of Bihar (2000) 4 SCC 298: 2000 (2) SCR 1073; *Ram Sunder Yadav & Ors. v. State of Bihar* (1998) 7 SCC 365; *Vijayee Singh v. Stateo of U.P.* B (1990) 3 SCC 190: 1990 (2) SCR 573 – relied on.

6. The High Court and the trial court recorded reasons for returning the concurrent finding of guilt. The appellant argued that one of the accused, 'RD' who is C now dead had in his statement under Section 313 CRPC stated that the land in between the house of the parties was his and that despite his protest, the villagers were putting earth on that land and when he objected all of them ran after him and started beating him and in view D of this stand the other accused cannot be said to have been involved in the commission of crim. This argument is self serving submission. All the accused were related to each other. Once the plea of self-defence is disbelieved, then a statement of a co-accused under E Section 313 CrPC cannot be of any advantage to the co-accused, as the prosecution has been able to establish its case beyond any reasonable doubt. In the instant case, in the chain of events, nowhere does the plea of self-defence as sought to be raised by the appellant-F accused or other accused, fit in. The defence miserably failed to prove any fact or any need for resorting to commission of the offence in self-defence. The police had charged this accused for an offence under Section 302 read with Section 149 and 323 of the IPC. However, two of the accused were acquitted by the trial court and the G remaining were convicted of an offence under the said Sections 302/34 and 323/34, IPC. The High Court acquitted all the accused of offence under Section 302/ 34 IPC and unfortunately, 'RD' died during the pendency

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of that appeal. Because the alleged number of accused had become less than five, nature of the offences were changed from offence under Section 149 to Section 34, IPC. In face of the acquittal of the two accused, which was not assailed by the State, it must be taken that they were not present. Then remain three accused, 'TD' and the appellants. Thus, in the circumstances of the case, the possibility of presence of all other persons in the appellants' party cannot be excluded. It is also not quite possible that the accused have deposed incorrectly before the Court in regard to the number of persons and their participation. Even where there are less than five persons who are accused, but the facts and the evidence of the case is convincing as in the instant case, where the accused had returned to the place of occurrence with complete preparedness and after giving *lalkar* had attacked the deceased there, they have to be held liable for commission of the crime. It cannot be ignored that the extent of participation, even in a case of common intention covered under Section 34 IPC would not depend on the extent of overt act. If all the accused have committed the offence with common intention and inflicted injuries upon the deceased in a pre-planned manner, the provisions of Section 34 would be applicable to all. [Para 32] [717-D-H; 718-A-H; 719-A]

7. It was not a dispute which arose at the spur of the moment as the evidence clearly showed that the accused had gone again to the site in question with a common intention and with the preparedness to assault and even kill the deceased. Even the site plan clearly showed that all these places, i.e. the land on which the deceased was putting the earth, the house of the accused and that of the deceased were all nearby. This was even fully corroborated by the oral evidence. Thus, on the basis of the documentary and ocular evidence, the prosecution was able to prove its case beyond reasonable doubt and

A **has brought home the guilt of the accused under Section 302 read with Section 34, IPC. [Paras 33] [719-C-E]**

Kartar Singh v. State of Punjab **AIR 1961 SC 1787: 1962 SCR 395 – relied on.**

B *Marimuthu & Ors. v. State of Tamil Nadu* **(2008) 3 SCC 205: 2008 (1) SCR 547 – Distinguished.**

Yunis @ Kariya v. State of M.P. **(2003) 1 SCC 425 – held inapplicable.**

C **Case Law Reference:**

2007 (3) SCR 939	**relied on**	**Para 19**
2009 (3) SCR 406	**relied on**	**Para 20**
D **2010 (6) SCR 764**	**relied on**	**Para 21, 24**
2010 (13) SCR 3	**relied on**	**Para 23**
1993 (2) SCR 389	**relied on**	**Para 26**
E **1962 SCR 395**	**relied on**	**Para 28**
2000 (2) SCR 1073	**relied on**	**Para 30**
(1998) 7 SCC 365	**relied on**	**Para 30**
1990 (2) SCR 573	**relied on**	**Para 30**
F **(2003) 1 SCC 425**	**held inapplicable**	**Para 32**
2008 (1) SCR 547	**Distinguished**	**Para 33**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal G No. 77 of 2007.

From the Judgment & Order dated 21.03.2006 of the High Court of Judicature at Allahabad at Lucknow in Criminal Appeal No. 19 of 1982.

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P.N. Misra, K.K. Tyagi, Iftekhar Ahmad, P. Narasimhan for the Appellants. A

R.K. Gupta, Rajeev Dubey, Kamlendra Mishra for the Respondent.

The Judgment of the Court was delivered by B

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment and order dated 21st March, 2006 of the High Court of Judicature at Allahabad, Lucknow Bench, which had partially accepted the appeal by acquitting C the accused persons of the offence under Section 323 read with Section 34 of the Indian Penal Code, 1860 (hereafter, 'IPC'), but affirmed the imposition of life imprisonment for the offence under Section 302 read with Section 34, IPC as awarded by the learned trial court vide its judgment dated 6th D January, 1982. The trial court had found the four accused Ram Dutt (now dead), Thakur Prasad, Mano Dutt and Ram Narain guilty of an offence under Section 302, read with Section 34, IPC and also offence under Section 323, read with Section 34, IPC and had awarded them life imprisonment for the first E offence and a fine of Rs.1,000/- for the second, in default of which, to undergo rigorous imprisonment for three months.

2. This is a case where the incident, on 22nd October, 1977, which resulted in the death of Siya Ram, is admitted between the parties. The primary question that falls for F determination is, as to which of the parties was the aggressor, besides determining the merits of the contentions raised on behalf of the appellant. Before noticing the prosecution version, we may notice that in the present case, six accused were charged and tried for an offence under Sections 302 and 323, G both read with Section 34 IPC. Learned trial court, vide its judgment dated 6th January, 1982 had acquitted accused Sher Bahadur and Jagdish, while it convicted Ram Dutt, Thakur Prasad, Mano Dutt and Ram Narain for both the afore-stated offences. During the pendency of the appeal before the High H

A Court, Ram Dutt died and the Court convicted the other accused vide its judgment under appeal.

3. Thakur Prasad had filed a separate appeal challenging the said judgment of the High Court, being SLP (Crl.) No.3929 of 2006 titled *Thakur Prasad* v. *State of U.P.* which came to be dismissed by order of this Court dated 18th August, 2006. In other words, the conviction of the accused Thakur Prasad under Section 302 read with Section 34 IPC attained finality. However, vide the same order, this Court granted leave to appeal in the case of Mano Dutt and Ram Narain. This is how the present appeal has come up for final hearing before us.

4. The case of the prosecution is that Mano Dutt, Ram Narain and Jagdish are real brothers while Ram Dutt and Thakur Prasad are their cousins. On 22nd October, 1977 during day time, Siya Ram was doing earth filling in front of his *sariya* (a place of tethering cattle). The four accused, namely, Ram Dutt, Thakur Prasad, Ram Narain and Mano Dutt out of the six named accused had come there and asked Siya Ram not to do earth filling. Siya Ram told them that it was his land and he would not stop the work of land filling. Thereupon, Siya Ram called certain villagers. The matter was discussed with the villagers, all of whom said that the land was that of Siya Ram and he could carry on with land filling on his own land. After deciding this, the villagers went away and Siya Ram resumed the filling of the earth. Accused Ram Dutt, Thakur Prasad, Mano Dutt, Ram Narain, Jagdish and Sher Bahadur, armed with *lathis*, came there and chased Siya Ram. They said that they would finish Siya Ram. Siya Ram was able to run for a short distance away, whereafter all the accused surrounded him in front of the house of one Fateh Mohmad. Accused Ram Dutt, Thakur Prasad, Mano Dutt and Ram Narain started beating Siya Ram with their *lathis*. The father of Siya Ram, Nankoo and brother Salik Ram rushed towards Siya Ram to rescue him. Accused Sher Bahadur and Jagdish intercepted them in front of one Chiddan's door and beat them with their *lathis*. Siya

Ram fell down after getting the *lathi* blows. Siya Ram raised alarm, but still these accused persons continued to beat him and in the meanwhile, Smt. Sangam Devi, Bhurey and Pradhan came there. The Pradhan snatched the *lathis* of the four accused, who then fled away from the scene. Siya Ram sustained serious injuries. Nankoo and Salik Ram also sustained injuries. Pradhan and the other villagers took the injured to the Police Station.

5. The incident was narrated in the form of a report of occurrence, by the deceased Siya Ram, who was in an injured state at that time. The same was transcribed by Panna Lal Pandey, PW3 and submitted to the Police Station, where a First Information Report (hereafter, 'FIR') Exhibit Ka7 was prepared.

6. On this statement, the officer present at the police station had registered a case under Section 308, IPC and the investigation was taken over by C.R. Malviya. During investigation, C.R. Malviya recorded the statements of a number of witnesses as well as sent Siya Ram to the hospital. Siya Ram succumbed to his injuries on 24th October, 1977 at about 8.00 a.m. in the District Hospital, Faizabad. Upon his death, the offence was converted to one under Section 302, IPC. The Investigating Officer visited the spot, recovered blood-stained earth, Ex. Ka-8 and prepared the site plan, Ext. Ka-9 and examined various witnesses. After completion of the investigation, the charge sheet was filed before the court of competent jurisdiction. The trial Court vide its order dated 30th July, 1980 charged the accused with offences under Sections 147, 304/149 and 323/149. However, subsequently, the charge was amended and all the accused were charged with offences under Sections 302/149-147 and 323/149, IPC. The accused pleaded not guilty and faced trial before the Court of Sessions. As already noticed, out of the six accused, four were convicted by the trial court. One accused, namely Ram Dutt, died during pendency of the appeal before the High Court and all the other

A accused were acquitted of the offences under Section 323/34 IPC, but convicted for offences under Section 302/34 IPC. For the reasons afore-recorded in the present appeal, we are only concerned with the two accused, namely Mano Dutt, and Ram Narain.

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7. The prosecution had examined Smt. Sangam Devi, PW-1 (wife of the deceased), Salik Ram, PW-2 (injured witness). Panna Lal Pandey, PW-3 (scribe of Siya Ram's statement) and two doctors, Dr. S.N. Rai (P.W.-4) and Dr. Surya Bhan Singh (P.W. 5), besides examining the formal witnesses.

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8. Dr. Surya Bhan Singh, PW-5 had examined Salik Ram when he was brought to the hospital on the evening of 22nd October, 1977 at about 4.30 p.m. He had noticed lacerated bone-deep wound, 3 cm x 0.5 cm, on the frontal region of the

D scalp, from which blood was oozing. The doctor described the injuries on the body of the deceased as follows:-

"(1) Lacerated wound mark 3 cm x 0.5 cm on the left side of head on the parietal region.

E

(2) Bruise 9 cm x 1.5 cm in the left scapula region.

(3) Bruise 12 cm x 1.5 cm in the right scapula region of scalp.

F

(4) Bruise 9 cm x 2 cm in the right scapular region of scalp.

(5) Bruise 19 cm x 2 cm in the right scapular region of scalp."

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9. This very doctor had examined Salik Ram, son of Nankoo and had noticed as many as five injuries on his body. He had also examined Nankoo and noticed four injuries on his person. The injuries on the bodies of Nankoo and Salik Ram both were found to be simple injuries and were caused with blunt

H object like lathi, while Siya Ram was transferred to the

specialist for obtaining expert opinions on his injuries and for his treatment. A

10. After the death of Siya Ram on 24th October, 1977, the post-mortem on the body of the deceased was performed by Dr. S.N. Rai, PW-4, who noticed four ante-mortem injuries as follows:- B

"(1) Lacerated wound 2.5 cm x ¾ cm x bone deep, on Rt. side head, 6.5 cm above the eyebrow of right eye.

C

(2) Lacerated wound 2.5 cm x 1 cm x bone deep injures 1-2 cm on the left side of the head.

(3) Contusion 6 cm x 4 cm in the right side of the face involving whole orbital area.

D

(4) Diffused, swelling on the Rt. Side of head parietal region."

11. Upon internal examination of the body of the deceased, he also found the following internal injuries:- E

"1. Comminuted fracture in the area of 11.5 cm x 10 cm on the right Parietal Region of the skull.

2. Comminuted fracture in the area of 6.5 cm x 6.5 cm in the frontal Bone was found. F

3. Comminuted fracture in the area of 10 cm x 4 cm on the left side of temporo parietal Region was found.

4. Large quantity of blood was accumulated on the right side of head between skin and bone." G

12. The doctor stated that, in his opinion, the cause of death was a shock due to ante-mortem injuries and loss of blood. He specifically stated that all the injuries are possible H

A by blows of *lathis*. In his cross-examination, he clearly stated that these injuries are ordinarily sufficient to cause death.

13. It needs to be noticed that one of the appellants, namely Ram Dutt, had also allegedly lodged a report against the B deceased Siya Ram, injured Nankoo, and two other sons of Nankoo, i.e., Salik Ram and Ram Dhiraj. After registering the FIR, the Investigating Officer in his report had also stated that the accused Ram Dutt had sustained some injuries on his person.

C 14. The conviction of the accused and the impugned judgment have been challenged *inter alia*, but primarily, on the following grounds:-

(i) The prosecution did not examine the material witnesses D like the investigating officer as well as other witnesses who, as per the case of the prosecution, were actually present at the time of occurrence of the incident.

(ii) According to the prosecution, PW-1 and PW-2 both are eye-witnesses but they are the widow and brother of the E deceased, and therefore, are interested witnesses and their statement cannot be relied upon by the Court.

(iii) The accused persons themselves had lodged a counter report against the deceased, PW-2 and other relations F of the deceased, alleging attack/aggression. This was not a counter blast but a true and correct happening of events as reported by the accused, against the complainants, in which the accused Ram Dutt had suffered injuries. For these reasons, the accused should be entitled to the benefit of doubt and G consequently, to an order of acquittal.

(iv) Even if the entire prosecution story is assumed to be correct, even then it does not constitute an offence under Section 302, IPC. In the facts and circumstances of the case, at the worst, the accused could be held guilty of an offence H punishable under Section 304, Part-I, IPC.

(v) The deceased had only three injuries, therefore, on the one hand, the story that six accused had assaulted him with *lathis* even when he was lying on the ground is not physically possible and on the other hand, the prosecution has failed to explain the injuries suffered by Ram Dutt, accused. Thus, it creates a specific doubt in the story of the prosecution.

(vi) Lastly, it is contended that the dismissal of the other Special Leave Petition filed by Thakur Prasad does not have any bearing on the fate of the present appeal, inasmuch as the Court is vested with wide powers in terms of Section 38, IPC, to deal with the case of the present appellants on distinct and different footing. Even if Thakur Prasad's conviction for an offence under Section 302 read with Section 34 IPC has attained finality, the appellants may still be acquitted.

15. We have already noticed that the incident in question is admitted. According to the accused, the fight was started by the deceased and his relations and they had exercised their right of private self-defence, to protect themselves. To the contrary, according to the witnesses of the prosecution as well as according to the version given by the deceased, the accused were aggressive and had attacked the deceased and his family members after deliberately planning to assault and kill them. It is not a case where the circumstances, even remotely, can be construed to have satisfied the ingredients of self-defence. We may examine few of the circumstances in this case. From the record, it appears that Ram Dutt had lodged a complaint of the incident that took place on 22nd October, 1977 at about 12.00 p.m. According to this report the accused in that complaint (i.e., the deceased and his family members) had been putting earth on Ram Dutt's *sariya*, which he had forbade. There was verbal altercation between the parties and then the accused in that complaint (i.e., the deceased herein) started assaulting him with *lathis* and it was only by raising an alarm that the people of the village came to the place of occurrence and his life was saved. According to this complaint, he had suffered injuries on his head.

A 16. Firstly, this complaint had not been proved by Ram Dutt during the trial. Accordingly, the concurrent view taken by the courts below, that this document cannot be relied in evidence, cannot be faulted with. Furthermore, Ram Dutt did not examine a single witness in his defence to prove that he B was attacked by the deceased and his family members or that they were putting earth at the door of Ram Dutt's *sariya*. No doubt, Ram Dutt was subjected to medical examination by the Medical Officer vide Ex.Kha 1. It was noticed that he had suffered lacerated wounds on the central and other regions of C skull, and had complained of pain in left leg. This would show that Ram Dutt had suffered some injuries but where and how these injuries were suffered, was for him to establish, particularly when he had taken a specific stand that the deceased and his family members were at fault and were aggressive. He claims that they had caused serious injuries to D his person and this incident happened in the presence of the villagers. It is a settled canon of evidence jurisprudence that one who alleges a fact must prove the same. It is also his case that the prosecution has not explained the injuries on his person and, therefore, the argument impressed upon the Court is that the E attack with *lathis* was in exercise of self-defence and the failure of the prosecution to explain injuries on the person of Ram Dutt is a circumstance which creates a serious doubt in the story of the prosecution. We are not impressed with this contention primarily for the above reasons and also because of the fact F that if the police was not investigating into the complaint, Ram Dutt was not helpless or remediless in law. He could have filed an application before the concerned Magistrate in accordance with the provisions of Code of Criminal Procedure, 1973 (Cr.P.C.) for directing the police to investigate and even to G summon the accused in that complaint. But none of the accused, including Ram Dutt, took any of the steps available to them in law. When a person claims exercise of private self-defence, the onus lies on him to show that there were circumstances and occasions for exercising such a right. In H other words, these basic facts must be established by the

accused. Just because one circumstance exists amongst the various factors, which appears to favour the person claiming right of self-defence, does not mean that he gets the right to cause the death of the other person. Even the right of self-defence has to be exercised directly in proportion to the extent of aggression.

17. As per the medical report, the injuries on the body of Ram Dutt were found to be 'simple in nature'. On the other hand, we have a complete version of the prosecution, duly supported by witnesses, out of which PW1 and PW2 are eye-witnesses to the occurrence. The bone of contention between the parties was the statement of the deceased, that he was filling the earth over some land, which he claimed to be his land; according to the accused, the earth-filling was carried out in front of the door of Ram Dutt. According to both the parties, the villagers came to the spot. Out of the two versions, the one put forward by the prosecution and the other in the defence of the accused, the version of the prosecution, as has been disclosed by the eye-witnesses, is trustworthy, reliable and entirely plausible in the facts and circumstances of the case. The mere fact that the Investigating Officer has not been produced, or that there is no specific explanation on record as to how Ram Dutt suffered these injuries, would not vitiate the trial or the case of the prosecution in its entirety. These claims of the accused would have been relevant considerations, provided the accused had been able to establish the other facts alleged by them. It is not always mandatory for the prosecution to examine the Investigating Officer, provided it can establish its case beyond reasonable doubt even in his absence. The present case certainly falls in the latter class. Where the accused lead no defence, they cannot take benefit of the fact that the prosecution did not examine any independent witnesses. The accused would be deemed to have been aware of the consequences in law when they gave a statement admitting the occurrence but attributing aggression and default to the deceased and his family members.

A 18. Accused Thakur Prasad is also stated to own a *sariya* and was also allegedly using his *lathi* in self-defence, as according to their story, four persons with the deceased and his family members had attacked them. Strangely, Thakur Prasad suffered no injury. These are the circumstances which, B examined cumulatively, would provide support to the case of prosecution.

19. Another contention raised on behalf of the accused/ appellants is that only family members of the deceased were examined as witnesses and they being interested witnesses C cannot be relied upon. Furthermore, the prosecution did not examine any independent witnesses and, therefore, the prosecution has failed to establish its case beyond reasonable doubt. This argument is again without much substance. Firstly, there is no bar in law in examining family members, or any other D person, as witnesses. More often than not, in such cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. Those alone are the people who take the risk of sustaining injuries by jumping into such a quarrel and trying to defuse the crisis. E Besides, when the statement of witnesses, who are relatives, or are parties known to the affected party, is credible, reliable, trustworthy, admissible in accordance with the law and corroborated by other witnesses or documentary evidence of the prosecution, there would hardly be any reason for the Court F to reject such evidence merely on the ground that the witness was family member or interested witness or person known to the affected party. There can be cases where it would be but inevitable to examine such witnesses, because, as the events occurred, they were the natural or the only eye witness available G to give the complete version of the incident. In this regard, we may refer to the judgments of this Court, in the case of *Namdeo v. State of Maharashtra*, [(2007) 14 SCC 150]. This Court drew a clear distinction between a chance witness and a natural witness. Both these witnesses have to be relied upon subject H to their evidence being trustworthy and admissible in

accordance with the law. This Court, in the said judgment, held as under:

> **"28.** From the aforesaid discussion, it is clear that Indian legal system does not insist on plurality of witnesses. Neither the legislature (Section 134 of the Evidence Act, 1872) nor the judiciary mandates that there must be particular number of witnesses to record an order of conviction against the accused. Our legal system has always laid emphasis on *value*, *weight* and *quality* of evidence rather than on *quantity*, *multiplicity* or *plurality* of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. The bald contention that no conviction can be recorded in case of a solitary eyewitness, therefore, has no force and must be negatived.
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> **29.** It was then contended that the only eyewitness, PW 6 Sopan was none other than the son of the deceased. He was, therefore, "highly interested" witness and his deposition should, therefore, be discarded as it has not been corroborated in material particulars by other witnesses. We are unable to uphold the contention. In our judgment, a witness who is a relative of the deceased or victim of a crime cannot be characterised as "interested". The term "interested" postulates that the witness has some direct or indirect "interest" in having the accused somehow or the other convicted due to animus or for some other oblique motive."

20. It will be useful to make a reference of another judgment of this Court, in the case of *Satbir Singh & Ors. v. State of Uttar Pradesh,* [(2009) 13 SCC 790], where this Court held as under:

> **"26.** It is now a well-settled principle of law that only

A because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case. If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be
B based thereupon. Furthermore, as noticed hereinbefore, at least Dhum Singh (PW 7) is an independent witness. He had no animus against the accused. False implication of the accused at his hand had not been suggested, far less established."

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21. Again in a very recent judgment in the case of *Balraje @ Trimbak v. State of Maharashtra* [(2010) 6 SCC 673], this Court stated that when the eye-witnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they
D would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The Court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful
E analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.

22. As per PW5, Dr. Surya Bhan Singh, he had examined
F Salik Ram Yadav as well as Nankoo on 22nd October, 1977 itself and noticed as many as five injuries on Salik Ram and four injuries upon the person of Nankoo. He stated that the deceased was the son of Nankoo, while Salik Ram was his brother. These injuries were suffered by them from a blunt
G object. Salik Ram was examined as PW2 and his statement is cogent, coherent, reliable and fully supports the case of the prosecution. However, the other injured witness, Nankoo, was not examined.

23. In our view, non-examination of Nankoo, to which the

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accused raised the objection, would not materially affect the case of the prosecution. Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain, protect the real culprit. We need not discuss more elaborately the weightage that should be attached by the Court to the testimony of an injured witness. In fact, this aspect of criminal jurisprudence is no more *res integra*, as has been consistently stated by this Court in uniform language. We may merely refer to the case of *Abdul Sayeed v. State of Madhya Pradesh* [(2010) 10 SCC 259], where this Court held as under:

> **"28.** The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Vide *Ramlagan Singh v. State of Bihar*, *Malkhan Singh v. State of U.P.*, *Machhi Singh v. State of Punjab*, *Appabhai v. State of Gujarat*, *Bonkya v. State of Maharashtra*, *Bhag Singh*, *Mohar v. State of U.P.* *(SCC p. 606b-c)*, *Dinesh Kumar v. State of Rajasthan*, *Vishnu v. State of Rajasthan*, *Annareddy Sambasiva Reddy v. State of A.P.* and *Balraje v. State of Maharashtra*.]
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> **29.** While deciding this issue, a similar view was taken in *Jarnail Singh v. State of Punjab*, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

A "*28.* Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In
B *Shivalingappa Kallayanappa v. State of Karnataka* this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and
C discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

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

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact
G that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the
H injured witness should be relied upon unless there are

strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein." A

24. To the similar effect is the judgment of this Court in the case of *Balraje @ Trimbak* (supra).

25. Another argument with regard to appreciation of evidence is that the material witness having not been examined and the entire prosecution story being based upon the statements of PW1 and PW2, who are the interested witnesses, the entire prosecution evidence suffers from a patent infirmity in law. B C

26. Again, we are not impressed by this contention, primarily for the reasons afore-recorded. Furthermore, it may also be noticed that non-examination of any independent witness, in the facts of the present case, is not fatal to the case of the prosecution. The Court can convict an accused on the statement of a sole witness, even if he was a relative of the deceased and thus, an interested party. The condition precedent to such an order is that the statement of such witness should satisfy the legal parameters stated by this Court in a catena of judgments. Once those parameters are satisfied and the statement of the witness is trustworthy, cogent and corroborated by other evidence produced by the prosecution, oral or documentary, then the Court would not fall in error of law in relying upon the statements of such witness. It is only when the Courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded *in toto* and no amount of corroboration can cure its defect. Reference in this regard can be made to the judgment of this Court, in the case of *Anil Phukan v. State of Assam* [(1993) 3 SCC 282]. D E F G

27. Now we may examine as to the place and manner in which the incident occurred. It is a very important aspect of this case that the FIR itself was lodged by the deceased along with PW3 Panna Lal Pandey who transcribed the same at the police station itself. The deceased was seriously injured, but was fully H

A aware of what he was doing and he had no reason to falsely implicate any person. His father and brother had also been injured in the occurrence. It is specifically recorded in the statement of these witnesses that when the appellant Mano Dutt and other accused came for the second time, to the place
B where the deceased was filling the earth at the *sariya*, they gave a *lalkar* '*Maro sale ko*' and then assaulted him with *lathis*. When he tried to run away, he fell to the ground near the house of one Fateh Mohd. The blood-stained earth was collected from the front of Fateh Mohd. doors by the Investigating Officer vide
C Ext. Ka-8. Thereafter, the villagers had come and taken the *lathis* away from the accused persons. The deceased was taken to the police station and then to the hospital, where he died on 24th October, 1977. It is evident that all the accused persons had come prepared, mentally and physically, to assault
D the deceased and in furtherance to their common intention, had even given a *lalkar* to kill the deceased. This incident was witnessed by natural witnesses Nankoo and PW2 Salik Ram, as well as PW1 Smt. Sangam Devi. Nankoo and Yadav even intervened and tried to protect their son/brother, but in the process, they also received number of injuries, as is clear from
E the medical evidence produced on record. During the course of argument, the learned counsel for the appellant tried to take advantage of the fact that the deceased ought to have suffered a number of injuries, if six people had, at the same time, attacked him with *lathis*, but he had actually received only three
F injuries. Thus, the story of the prosecution was improbable.

28. We have no hesitation in rejecting this argument, primarily for the reason that, as per the medical report and statement of PW5 Dr. Surya Bhan Singh, the deceased had
G suffered a number of injuries and not only three. The collection of the bloodstained earth itself is a relevant piece of evidence and provides the link in the commission and the place of crime. In the case of *Kartar Singh v. State of Punjab* [AIR 1961 SC 1787] this Court took the following view:

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"**13.** It follows therefore that the finding of the courts below that the appellant's party formed an unlawful assembly and that the appellant is constructively liable of the offences under ss. 302 and 307 IPC, in view of Section 149, is correct.

14. The second contention that in a free fight each is liable for an individual act cannot be accepted in view of the decision of this Court in *Gore Lal v. State of U.P.* This Court said in that case:

> "In any event, on the finding of the court of first instance and of the High Court that both the parties had prepared themselves for a free fight and had armed themselves for that purpose, the question as to who attacks and who defends is wholly immaterial,"

and confirmed the conviction under Section 307 read with Section 149 IPC It may, however, be noted that it does not appear to have been urged in that case that each appellant could be convicted for the individual act committed by him. When it is held that the appellant's party was prepared for a fight and to have had no right of private defence, it must follow that their intention to fight and cause injuries to the other party amounted to their having a common object to commit an offence and, therefore, constituted them into an unlawful assembly. The injuries they caused to the other party are caused in furtherance of their common object. There is then no good reason why they be not held liable, constructively, for the acts of the other persons of the unlawful assembly, in circumstances which makes s. 149 IPC, applicable to them.

15. Even if the finding that there were more than five persons in the appellant's party be wrong, we are of opinion that the facts found that the appellant and his companions who were convicted had gone from the village

armed and determined to fight, amply justified the conclusion that they had the common intention to attack the other party and to cause such injuries which may result in death. Darshan had two incised wounds and one punctured wound. Nand Lal had two incised wounds and one punctured wound and two abrasions. The mere fact that Kartar Singh was not connected with the dispute about the plot of land is not sufficient to hold that he could not have formed a common intention with the others, when he went with them armed. The conviction under ss. 302 and 307 read with s. 149, can be converted into one under ss. 302 and 307 read with s. 34 IPC

16. We, therefore, see no force in this appeal and accordingly dismiss it."

29. The question, raised before this Court for its consideration, is with respect to the effect of non-explanation of injuries sustained by the accused persons. In this regard, this Court has taken a consistent view that the normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail. Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the Court has to be satisfied of the existence of two conditions:

(i) that the injuries on the person of the accused were also of a serious nature; and

(ii) that such injuries must have been caused at the time of the occurrence in question.

30. Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood,

the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be a sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution. Reference in this regard can be made to *Rajender Singh & Ors. v. State of Bihar*, [(2000) 4 SCC 298], *Ram Sunder Yadav & Ors. v. State of Bihar*, [(1998) 7 SCC 365, and *Vijayee Singh v. Stateo of U.P.* [(1990) 3 SCC 190].

31. PW4 had clearly noticed that injury on the person of the deceased, Salik Ram Yadav and Nankoo were all caused by a blunt weapon. He had specifically observed that the injuries were sufficient, in the ordinary course of time, to cause death and had, in fact, resulted in the death of the deceased.

32. The High Court and the trial court have recorded reasons for returning the concurrent finding of guilt. The learned counsel for the appellant strenuously argued that one of the accused, namely Ram Dutt, who is now dead, had in his statement under Section 313 Cr.P.C., stated that the land in between the house of the parties was his and that despite his protest, Salik Ram, Siya Ram, Ram Dhiraj and Nankoo were putting earth on that land when he again objected, all of them ran after him, rounded him up at the door of Fateh Mohd. and started beating him. Thakur Prasad, cousin of Ram Dutt, came and in response, wielded the *lathi* in his defence. To similar effect is the statement of Thakur Prasad. In view of this stand, the other accused cannot be said to have been involved in the commission of the crime. This argument is a self-serving submission. All the accused are related to each other. Once the plea of self-defence is disbelieved, then a statement of a co-accused under Section 313 CrPC cannot be of any advantage to the co-accused, as the prosecution has been able to establish its case beyond any reasonable doubt. In the present case, in the chain of events, nowhere does the plea of self-defence as sought to be raised by the appellant-accused or other accused, fit in. The defence has miserably failed to

A prove any fact or any need for resorting to commission of the offence in self-defence. To begin with, the police had charged this accused for an offence under Section 302 read with Section 149 and 323 of the IPC. However, two of the accused were acquitted by the trial court and the remaining were B convicted of an offence under the said Sections 302/34 and 323/34, IPC. The High Court acquitted all the accused of offence under Section 302/34 IPC and unfortunately, Ram Dutt died during the pendency of that appeal. Because the alleged number of accused had become less than five, nature of the C offences were changed from offence under Section 149 to Section 34, IPC. In face of the acquittal of the two accused, which was not assailed by the State, it must be taken that they were not present. Then remain three accused, Thakur Dass and the present appellants. Thus, in the circumstances of the case, D the possibility of presence of all other persons in the appellants' party cannot be excluded. It is also not quite possible that the accused have deposed incorrectly before the Court in regard to the number of persons and their participation. Even where there are less than five persons who are accused, but the facts E and the evidence of the case is convincing as in the present case, where the accused had returned to the place of occurrence with complete preparedness and after giving *lalkar* had attacked the deceased there, they have to be held liable for commission of the crime (Refer : *Kartar Singh vs. State of Punjab*, AIR 1961 SC 1787). The learned counsel for the F respondent-State also relied upon the judgment in the *Yunis @ Kariya v. State of M.P.* [(2003) 1 SCC 425] to contend that an overt act on the part of one of the accused is immaterial when his presence, as part of the unlawful assembly, is established. This case was for an offence under Section 302/149 IPC and, G therefore, would not squarely apply to the present case as it has been held by the Court that the accused was not constituting an unlawful assembly of five or more persons. However, it cannot be ignored that the extent of participation, even in a case of common intention covered under Section 34 IPC would not H depend on the extent of overt act. If all the accused have

committed the offence with common intention and inflicted injuries upon the deceased in a pre-planned manner, the provisions of Section 34 would be applicable to all.

33. The learned counsel had also relied upon the judgment of this Court in *Marimuthu & Ors. v. State of Tamil Nadu* [(2008) 3 SCC 205] to contend that this was a fight at the spur of the moment and the conviction of the appellants could be converted into that under Section 304, Part I of the IPC. This judgment is distinguishable on facts and has no application to the present case. It was not a dispute which arose at the spur of the moment as the evidence clearly shows that the accused had gone again to the site in question with a common intention and with the preparedness to assault and even kill the deceased. Even the site plan, Ex.Ka9 clearly shows that all these places, i.e. the land on which the deceased was putting the earth, the house of Fateh Mohd., the house of the accused and that of the deceased were all nearby. This is even fully corroborated by the oral evidence. Thus, on the basis of the documentary and ocular evidence, we are fully satisfied that the prosecution has been able to prove its case beyond reasonable doubt and has brought home the guilt of the accused under Section 302 read with Section 34, IPC.

34. Having come to the above finding, we do not consider it necessary to dwell on the question as to what is the effect in law of dismissal of Thakur Prasad's Special Leave Petition by this Court, vide Order dated 18th August, 2006.

35. What shall be the correct interpretation of Section 34 with reference to Section 38 IPC, in view of the facts of the present case, or even otherwise, is left undecided.

36. For the reasons afore-recorded, this appeal is dismissed.

D.G. Appeal dismissed.