ROHTAS & ANR. A

v.

STATE OF HARYANA

(Criminal Appeal No. 38 of 2011)

DECEMBER 10, 2020 B

[N.V. RAMANA, SURYA KANT AND ANIRUDDHA BOSE, JJ.]

Code of Criminal Procedure, 1973 – ss.211-224, 386 – Alteration of charges – Permissibility of – Seven accused persons (one of whom died during trial) attacked victim-complainant – Six accused persons (including the three appellants-accused) convicted for offence u/ss.307 r/w s.149; s.148 – Appellants' conviction u/ss.307, 148 upheld by High Court and sentence u/s.307 reduced from seven years to five; other three co-accused persons acquitted – On appeal, held: ss.211-224 dealing with framing of charges in criminal trials, give significant flexibility to Courts to alter and rectify the charges – Courts are free to weigh evidence and determine whether an independent conviction is possible in case group prosecution u/s.149 fails – Appellants did not suffer any adverse effect when the High Court held the three of them individually guilty for attempted murder, without the aid of s.149 – Appellants had previously threatened the complainant with physical harm if he were to attempt to irrigate his fields – Attack was pre-planned and calculated – Each of them individually attacked the complainant with a deadly object in furtherance of the common intention of killing him – Requirements of s.34 established – Offence u/s.307 is clearly made out against each of them – Appellants to be taken into custody to serve the remainder of five-year sentence – Conviction u/s.148 set aside – Penal Code, 1860 – ss.34, 141, 148, 149, 307 – Witness – Sentencing. C D E F

Penal Code, 1860 – ss.34, 149 – Difference between – Discussed. G

Witness – Independent witnesses – Non-examination of – Held: Any adverse inference against the non-examination of independent witnesses needs to be assessed upon the facts and circumstances of each case. H

A **Disposing of the appeals, the Court**

HELD: 1.1 ***Framing of charge and its subsequent alteration***

Before the members of an 'unlawful assembly' can be vicariously held guilty of an offence committed in furtherance of common object, it is necessary to establish that not less than five persons, as mandatorily prescribed under Section 141 read with Section 149 of the IPC had actually participated in the occurrence. It is not uncommon, like in the present facts, when although the number of accused is more than five at the time of charge-sheeting, but owing to acquittals of some of them over the course of trial, the remaining number of accused falls below five. It may be true in such cases, as rightly urged by the appellants that the charge under Section 148 and 149 IPC would not survive. This does not, however, imply that Courts can not alter the charge and seek the aid of Section 34 IPC (if there is common intention), or that they cannot assess whether an accused independently satisfies the ingredients of a particular offence. Sections 211 to 224 of CrPC which deal with framing of charges in criminal trials, give significant flexibility to Courts to alter and rectify the charges. The only controlling objective while deciding on alteration is whether the new charge would cause prejudice to the accused, say if he were to be taken by surprise or if the belated change would affect his defence strategy. The emphasis of Chapter XVII of the CrPC is thus to give a full and proper opportunity to the defence but at the same time to ensure that justice is not defeated by mere technicalities. Similarly, Section 386 of CrPC bestows even upon the appellate Court such wide powers to make amendments to the charges which may have been erroneously framed earlier. Furthermore, improper, or non-framing of charge by itself is not a ground for acquittal under Section 464 of the CrPC. It must necessarily be shown that failure of justice has been caused, in which case a re-trial may be ordered. The contention of the appellants to the contrary is nothing but hyper-technical. Courts are free to weigh the evidence and determine whether an independent conviction is possible in case group prosecution under Section 149 IPC fails. Although both Section

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34 and 149 of the IPC are modes for apportioning vicarious liability on the individual members of a group, there exist a few important differences between these two provisions. Whereas Section 34 requires active participation and a prior meeting of minds, Section 149 IPC assigns liability merely by membership of the unlawful assembly. In reality, such 'common intention' is usually indirectly inferred from conduct of the individuals and only seldom it is done through direct evidence. [Paras 15-17, 22][993-F-H; 994-A-E; 997-C-E]

1.2 Both the common object and the common intention are traced back to the same evidence, i.e., evaluating the conduct of the accused as narrated by the injured and the eye-witness-his brother (PW-3). A perusal of Section 313 CrPC statement shows that the appellants were expressly confronted with their specific role in the offence: that each of them had individually attacked the complainant with a deadly object in furtherance of the common intention of killing him. This Court, therefore, does not find that the appellants suffered any adverse effect when the High Court held the three of them individually guilty for the offence of attempted murder, without the aid of Section 149 IPC. On facts, an offence under Section 307 IPC is clearly made out against each of the three appellants. The medical experts have in their depositions clearly explicated that the weapons used and the injuries inflicted were more than sufficient to cause death in ordinary course of nature. The appellants made death threats to the complainant on 24.01.1998 and then they used sharp edged weapons the very next day and further declared that they would not rest till they killed the complainant. The recovery of the axe (*kulhari)* from Rohtas, which is on the record as Exhibit-P7, further punches holes in the mask of denial worn by the appellants. That apart, even the requirements of Section 34 of IPC are well established as the attack was apparently pre-meditated. The incident was not in a spur-of-the-moment. The appellants had previously threatened the complainant with physical harm if he were to attempt to irrigate his fields. Their attack on 25.01.1998 was thus pre-planned and calculated. [Paras 23, 24 and 26][997-E-H; 998-A-B; 998-E-F]

2. *Independence of witnesses*

Although it is always ideal that independent witnesses come forward to substantiate the prosecution case but it would be unfair to expect the presence of third-parties in every case at the time of incident, for most violent crimes are seldom anticipated. Any adverse inference against the non-examination of independent witnesses thus needs to be assessed upon the facts and circumstances of each case. In fact, it must first be determined whether the best evidence though available, has been actually withheld by the prosecution for oblique or unexplained reasons. The present crime took place in a private agriculture field and not in the middle of a busy public place. The defence has not claimed that other farmers also gathered at the scene and yet have not been examined. Earlier in the trial they had tried to discredit the ocular testimony of PW-3 by claiming that he might not have been able to witness the incident owing to standing crops in the field. Nonetheless, they expect this Court to believe that there could have been others who witnessed the incident but have deliberately been suppressed by the prosecution. [Paras 27, 28][998-G-H; 999-A-C]

3. *Sentencing and Leniency*

The appellants and their deceased co-accused were all armed with deadly weapons. They surrounded the complainant and in a brutal attack caused him gruesome injuries and disabled him for life. The appellants have not undergone even half of their sentence period. Having enjoyed the more productive part of their lives outside jail cannot be, *per se*, taken as a mitigating factor. This Court does not find any justification to show leniency and reduce the sentence. Given that earlier the appellants had been ordered to serve their two sentences of five years under Section 307 and one year under Section 148 of IPC concurrently, acquittal in the latter would effectively have no impact on their outstanding period of sentence. [Paras 29-31][999-E-G]

4. *Conclusion:*

Both the appeals are found to be without any merit so far

as conviction of the appellants under Section 307 IPC is concerned. However, their conviction under Section 148 is set-aside. Their bail bonds are cancelled and the State of Haryana is directed to take the appellants into custody to serve the remainder of their five-year sentence as awarded by the High Court. [Para 32][999-H; 1000-A]

Amar Singh v. State of Punjab **(1987) 1 SCC 679 – distinguished.**

Kantilal Chandulal Mehta v. State of Maharashtra **(1969) 3 SCC 166;** *Karnail Singh v. State of Punjab* **AIR 1954 SC 204 : [1954] SCR 904;** *Willie (William) Slaney v. State of MP* **AIR 1956 SC 116 : [1955] 2 SCR 1140;** *Chittarmal v. State of Rajasthan* **(2003) 2 SCC 266 : [2003] 1 SCR 49;** *Atmaram Zingaraji v. State of Maharashtra* **(1997) 7 SCC 41:[1997] 3 Suppl. SCR 432;** *Nallabothu Venkaiah v. State of Andhra Pradesh* **(2002) 7 SCC 117 : [2002] 1 Suppl. SCR 606;** *Kumari Shrilekha Vidyarthi v. State of UP* **(1991) 1 SCC 212 : [1990] 2 Suppl. SCR 625 – relied on.**

Dhupa Chamar v. State of Bihar **(2002) 6 SCC 506:[2002] 1 Suppl. SCR 412;** *Subran v. State of Kerala* **(1993) 3 SCC 32 : [1993] 2 SCR 84;** *Nallapareddy Sridhar Reddy v. State of AP* **2020 SCC Online SC 60;** *Subran v. State of Kerala* **(1993) 3 SCC 722 – referred to.**

Mahbub Shah v. King Emperor **AIR 1945 PC 118 – referred to.**

Case Law Reference

(1987) 1 SCC 679	**distinguished**	**Para 12**
[2002] 1 Suppl. SCR 412	**referred to**	**Para 12**
[1993] 2 SCR 84	**referred to**	**Para 12**
(1969) 3 SCC 166	**relied on**	**Para 16**

(1993) 3 SCC 722	**referred to**	**Para 17**
[1954] SCR 904	**relied on**	**Para 19**
[1955] 2 SCR 1140	**relied on**	**Para 20**
[2003] 1 SCR 49	**relied on**	**Para 20**
[1997] 3 Suppl. SCR 432	**relied on**	**Para 20**
[2002] 1 Suppl. SCR 606	**relied on**	**Para 21**
[1990] 2 Suppl. SCR 625	**relied on**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 38 of 2011.

From the Judgment and Order dated 15.03.2010 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 1826-SB/02.

With

Criminal Appeal No. 775 of 2011.

Rishi Malhotra, Dr. Monika Gusain, Advs. for the appearing parties.

The Judgment of the Court was delivered by

SURYA KANT, J.

These two criminal appeals, which have been heard through video conferencing, are directed against the judgment dated 15.03.2010 of the High Court of Punjab and Haryana whereby conviction of Rohtas and Sanjay (appellants in Criminal Appeal No. 38 of 2011) and Bijender (appellant in Criminal Appeal No. 775 of 2011) under Sections 307 and 148 of the Indian Penal Code, 1860 ("IPC") has been upheld, though the sentence of seven years rigorous imprisonment awarded by the Additional Sessions Judge, Sonipat has been reduced to five years, with a fine of Rs. 1,00,000 (Rupees One Lakh) payable as compensation to the victim-complainant.

Facts

2. The brief facts of the prosecution case are as follows. A complaint was lodged with the police by the victim-Ranbir Singh (PW-1) on 26.01.1998 stating that two days ago while on his way to irrigate his agricultural field, he was stopped by Rohtas, Sanjay, Bijender (the present three appellants) and Om Prakash (since deceased) who collectively threatened him with death if he were to return to his fields for irrigation.

The complainant came back to his house and narrated the incident to his family members who while cautioning him against picking a quarrel, asked him to go about his normal routine. On the following day, i.e. 25.01.1998, when the complainant was passing by the *Hudawala* field while on his way to another agricultural plot (known as *Patewala* field), the four accused - Om Parkash, Rohtas, Sanjay and Bijender intercepted him. They started inflicting blows on the complainant's body using axes, thereby causing him to fall down and seriously injuring his legs, hand and head. Another group of three accused persons, comprising Hawa Singh, Virender @ Beero and Rajinder also joined in thrashing the complainant. The assailants further declared that they would not rest till they killed the complainant. Upon hearing the complainant's cries, his brother Balwan (PW-3) who was irrigating a nearby *Budewala* field, rushed to the spot and raised an alarm. Thereafter, all seven accused ran from the spot. Balwan subsequently carried his injured brother to Government Civil hospital at Sonipat for treatment. Owing to the seriousness of multiple injuries, Ranbir was referred to Post Graduate Institute of Medical Sciences at Rohtak (in short, "PGIMS, Rohtak").

3. The jurisdictional police recorded the statement of the injured on 26.01.1998 at PGIMS, Rohtak and formally registered the First Information Report under Sections 307, 323, 325, 506, 148 and 149 of the IPC. All the seven accused were then arrested. Post completion of investigation, they were committed to trial. The Additional Sessions Judge, Sonipat framed two charges; *first,* of rioting with deadly weapons under Section 148, and *second,* of attempt to murder with common object as part of an unlawful assembly under Section 307 read with Section 149 of the IPC. All seven accused pleaded not guilty and claimed trial. During trial, however, Om Prakash died and proceedings against him stood abated on 08.11.2000.

4. The prosecution examined twelve witnesses to establish the accused's guilt, which included the victim-complainant - Ranbir Singh (PW-1) and his brother and only eye-witness - Balwan (PW-3). The complainant very effectively corroborated his earlier version. He remained firm during cross-examination and categorically stated that ***"Om Parkash, Rohtas, Sanjay and Bijender and after a minute Beero, Hawa Singh and Rajinder came there. All the accused attacked me with their respective weapons."*** He further mentioned that ***"Om Parkash gave two axe blows on my head while Rohtas inflicted***

A ***uncounted injuries on my right leg... Sanjay gave two-three axe blows on my left leg... Bijender gave one axe blow on the palm of my left hand.***" It is relevant to be noticed here that the complainant was candid enough to admit in his cross-examination that *"**when the accused Rajinder, Hawa Singh and Beero when arrived at the scene of occurrence, I have already suffered all the injuries on my person....** [sic]"*

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5. Eye-witness, Balwan (PW-3) stated on oath that on 25.01.1998 he was irrigating *Budewala* field which he had taken on lease basis. At about 12PM he heard noise towards the passage and after running in that direction he witnessed that *"**Om Parkash, Rohtas, Sanjay and Bijender armed with axes were causing injuries to my brother/ Ranbir.**"* Like the injured-complainant, Balwan (PW-3) also gave a detailed account of the assault and consequent injuries on the body of Ranbir. Despite strong suggestions by the defence counsel on the unlikelihood of him having seen the incident, Balwan unequivocally replied that *"**I saw the accused causing injuries to my brother from distance of about half killa...**"*.

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6. Dr. Suman Mathur (PW-4), who had medico-legally examined the injured soon after the occurrence, lead the medical evidence. She found the following seven injuries on various parts of the complainant's (PW-1) body:

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"*1. Lacerated Wound 7 cm x 2 cm x bone deep on the lower 1/ 3rd of right side. Bone exposed muscle and tendons were crushed. Fresh bleeding was present and was advised x-ray.*

2. Lacerated Wound 3 cm x 2 cms x bone deep present on the right ankle foot. Advised x-ray.

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3. Lacerated Wound 3 cms x 2 cms x bone deep on the front and middle of left leg. Advised x-ray left leg.

4. Lacerated Wound 3 cms x 2 cms x muscle deep present on the dorsum of the left leg.

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5. Lacerated Wound 3 cms x 3 cms x skin deep on the palmer aspect of left leg. Advised x-ray.

6. Lacerated Wound 5 cms x 2 cms x scalp deep on the left parieto temporal region 5 cms above the left ear. Advised x-ray.

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7. Lacerated Wound 2 cms x 2 cms x scalp deep on the right parieto temporal region. Advised x-ray."

7. The Orthopaedic Surgeon, Dr Ajay Goel (PW-10), deposed that he was posted as Registrar in the Department of Orthopaedics, X-Ray and Emergency Wing, at PGIMS Rohtak when he attended to the complainant and diagnosed him with fracture of both the lower bones in both of his legs, along with vascular and nerve injuries. External bilateral legs were affixed and vascular repair was carried out on 26.01.1998. But, upon deterioration of the complainant's condition, the lower portion of his right leg (below the knee) was amputated on 01.02.1998. The need for this amputation and its correlation with the initial set of injuries inflicted by the accused, was elucidated by Dr SS Lochab (PW-12), who was posted as Head of Department of Cardiothoracic and Vascular Surgery at PGIMS, Rohtak. He explained the damage caused to the tibial arteries and how the massive blood loss had endangered the complainant's life. The Investigating Officer, S.I. Parkash Chand (PW-6) and other formal police witnesses too deposed to substantiate the prosecution case.

8. The six-surviving accused in their statement under Section 313 of Code of Criminal Procedure, 1973 ("CrPC") claimed that they were falsely implicated on account of local village politics. They also led defence evidence and produced Dr Varsha (DW-1) posted then as the Medical Officer, Civil Hospital, Sonipat who had found injuries on Om Prakash (deceased) and Sanjay (present appellant) during a medico legal examination on the day after the incident.

9. Analysing this substantial ocular and medical evidence, the learned Additional Sessions Judge, Sonipat negated the defence's objection against reliance on testimony of PW-3, for he being related to the complainant or that the medical evidence did not reconcile with the ocular evidence. The trial Court noted that an 'unlawful assembly' with a common object had caused serious injuries to the complainant. All the six accused were consequently convicted for the offence under Section 307 read with Section 149 of the IPC (with sentence of seven years rigorous imprisonment) and also under Section 148 of the IPC (with an additional one year's concurrent imprisonment).

10. The High Court, in appeal, re-appraised the entire evidence and took further notice of the complainant's admission that three of the

A accused, namely Rajinder, Hawa Singh and Beero @ Virender, had arrived at the scene of occurrence after he had already suffered injuries from the other accused. Sensing the possibility that the late-arriving accused might have been named only to widen the net and settle past scores, the High Court extended the benefit of doubt to Rajinder, Hawa Singh and Beero @ Virender and acquitted them of all charges. As regards the present three appellants - Rohtas, Sanjay and Bijender, the High Court found no ground to interfere with their conviction, though it reduced the quantum of sentence under the charge of Section 307 IPC from seven years to five, with a combined additional fine of Rs 1,00,000 (Rupees One Lakh) to be paid to the victim-complainant (PW-1).

C 11. These three remaining convicts, namely, Rohtas and Sanjay (jointly) and Bijender have assailed their conviction and sentence through these two criminal appeals.

***Contentions**:*

D 12. We have heard learned counsel for the appellants at considerable length and have perused the record in-depth. There are three principal contentions which have been raised on behalf of the appellants. *First*, it was urged that the minimum number of persons required to constitute an 'unlawful assembly' and concomitantly sustain any charge under Section 149 IPC is five. Given that three of the original E seven accused have been acquitted by the High Court, the conviction for attempt to murder as part of an unlawful assembly could not survive. In support, learned counsel for the appellants relied upon ***Amar Singh v. State of Punjab***[1]**,** and ***Dhupa Chamar v. State of Bihar***[2]**.** Further reliance was placed on ***Subran v. State of Kerala***[3], to urge that the F case should not be converted to one under Section 307 IPC simplicitor at an advanced stage. *Second,* the prosecution story was highly doubtful as Balwan (PW-3) was an interested witness and no other independent witness had been examined. *Third* and finally, it was urged alternatively that the appellants after having undergone some part of their sentence were enlarged on bail by this Court almost a decade back, and it would G not serve the ends of criminal justice to return them to jail at this juncture. The sentence thus ought to be reduced to the period already undergone by the appellants.

[1] (1987) 1 SCC 679.
[2] (2002) 6 SCC 506.
H [3] (1993) 3 SCC 32.

13. Although learned State Counsel did not appear on the date of final hearing, but the respondent's stand on the intermittent dates of hearing has been in total contrast to that of the appellants. The prosecution case proceeds on the premise that there is an attempt to murder, involving seven persons with a common intention and prior meeting of minds. The emphasis of the State as usual is that no lenient view ought to be taken in light of the nature of injuries.

Analysis:

14. We have given our thoughtful consideration to all the issues raised on behalf of the appellants. We *first* deem it appropriate to avert to the contention whether a charge framed with the assistance of Section 149 IPC can later be converted to one read with Section 34 IPC or even a simplicitor individual crime? *Second,* whether lack of independent witnesses to a violent crime would undermine the prosecution case and whether closely related witnesses can be relied upon in such instances? And *third,* whether leniency ought to be shown to the present appellants given the extended period of liberty which they have enjoyed since being released on bail?

(i) Framing of charge and its subsequent alteration

15. The primary attack on the judgment of the High Court by learned counsel for the appellants is on a question of law, which although seems interesting at first but turns out to be superficial upon a deeper consideration. The oversight regarding Section 148 and 149 of the IPC as highlighted by the appellants is indeed inescapable. Before the members of an 'unlawful assembly' can be vicariously held guilty of an offence committed in furtherance of common object, it is necessary to establish that not less than five persons, as mandatorily prescribed under Section 141 read with Section 149 of the IPC had actually participated in the occurrence. It is not uncommon, like in the present facts, when although the number of accused is more than five at the time of charge-sheeting, but owing to acquittals of some of them over the course of trial, the remaining number of accused falls below five. It may be true in such cases, as rightly urged by the appellants that the charge under Section 148 and 149 IPC would not survive.

16. This does not, however, imply that Courts can not alter the charge and seek the aid of Section 34 IPC (if there is common intention), or that they cannot assess whether an accused independently satisfies

A the ingredients of a particular offence. Sections 211 to 224 of CrPC which deal with framing of charges in criminal trials, give significant flexibility to Courts to alter and rectify the charges. The only controlling objective while deciding on alteration is whether the new charge would cause prejudice to the accused, say if he were to be taken by surprise or if the belated change would affect his defence strategy.[4] The emphasis B of Chapter XVII of the CrPC is thus to give a full and proper opportunity to the defence but at the same time to ensure that justice is not defeated by mere technicalities. Similarly, Section 386 of CrPC bestows even upon the appellate Court such wide powers to make amendments to the charges which may have been erroneously framed earlier. Furthermore, C improper, or non-framing of charge by itself is not a ground for acquittal under Section 464 of the CrPC. It must necessarily be shown that failure of justice has been caused, in which case a re-trial may be ordered.[5]

17. The contention of the appellants to the contrary is nothing but hyper-technical. It deserves mention that the extracts of ***Subran v. State*** D ***of Kerala (supra)*** as relied upon by the appellants' counsel have been subsequently recalled and substituted by the bench in review jurisdiction.[6] The amended version makes clear that acquittal in ***Subran (supra)*** was not because of improper framing of charges but on facts. In that case, the injuries attributed to the accused failed to satisfy the necessary ingredients of the relevant provision when his role was assessed E individually. Indeed, such is the right approach. Courts are free to weigh the evidence and determine whether an independent conviction is possible in case group prosecution under Section 149 IPC fails.

18. In another case relied upon by the appellants, i.e. ***Amar Singh v. State of Punjab (supra)***, this Court in the penultimate paragraph notes F that ***"Apart from the fact that the appellants cannot be convicted under Sections 148 and 149 IPC, it is difficult to convict them on any charge on the basis of the evidence of PW5."***This shows that acquittal was based not merely upon failure by the prosecution to fulfil the requirements of Section 149 IPC, but because even independently G no substantive offence was found to have been committed.

19. In fact, the law on this point has continuously been delved into and reiterated by this Court from time to time. A three-Judge Bench of

[4] Nallapareddy Sridhar Reddy v. State of AP, 2020 SCC OnLine SC 60, ¶ 16-21.
[5] Kantilal Chandulal Mehta v. State of Maharashtra, (1969) 3 SCC 166.
H [6] (1993) 3 SCC 722.

this Court in ***Karnail Singh v. State of Punjab***[7]***,*** held that:

> *"8. It is true that there is substantial difference between the two sections but as observed by Lord Sumner in Barendra Kumar Ghosh v. Emperor I.L.R. 52 Cal. 197, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under section 149 overlaps the ground covered by section 34. If the common object which is the subject-matter of the charge under section 149 does not necessarily involve a common intention, then the substitution of section 34 for section 149 might result in prejudice to the accused and ought not therefore to be permitted.*
>
> ***But if the facts to be proved and the evidence to be adduced with reference to the charge under section 149 would be the same if the charge were under section 34, then the failure to charge the accused under section 34 could not result in any prejudice and in such cases the substitution of section 34 for section 149 must be held to be a formal matter."***
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> *(emphasis supplied)*

20. The above-extracted position of law was further concretised in ***Willie (William) Slaney v. State of MP***[8] and by the majority in ***Chittarmal v. State of Rajasthan***[9]***.*** The permissibility of convicting an accused individually under a simplicitor provision after group conviction with the aid of Section 149 of IPC fails, was further explored in ***Atmaram Zingaraji v. State of Maharashtra***[10]***,*** wherein this Court held that:

> *"4. The next question that falls for our determination is whether, after having affirmed the acquittal of all others, the High Court could convict the appellant under Section 302, I.P.C. (simpliciter). The charges framed against the accused (quoted earlier) and the evidence adduced by the prosecution to bring them home clearly indicate that according to its case, the nine persons arraigned before the trial Court - and, none others, either named or unnamed (totalling minimum five or*

[7] AIR 1954 SC 204.
[8] AIR 1956 SC 116, ¶ 49.
[9] (2003) 2 SCC 266, ¶ 14.
[10] (1997) 7 SCC 41.

A *more persons) - formed the unlawful assembly. Consequent upon the acquittal of the other eight the appellant could not be convicted with the aid of Section 149, I.P.C., more particularly, in view of the concurrent findings of the learned Courts below that the other eight persons were not in any way involved with the offences in question.*

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5. The same principle will apply when persons are tried with the aid of Section 34, I.P.C. In the case of Krishna v. State of Maharashtra [1964]1SCR678 , a four Judge Bench of this Court has laid down that when four accused persons are tried on a specific accusation that only they committed a murder in furtherance of their common intention and three of them are acquitted, the fourth accused cannot be convicted with the aid of Section 34, I.P.C. for the effect of law would be that those who were with him did not conjointly act with the fourth accused in committing the murder.

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6. In either of the above situations therefore the sole convict can be convicted under Section 302, I. P. C. (simpliciter) only on proof of the fact that his individual act caused the death of the victim. To put it differently, he would be liable for his own act only. ***In the instant case, the evidence on record does not prove that the injuries inflicted by the appellant alone caused the death; on the contrary the evidence of the eye-witnesses and the evidence of the doctor who held the post-mortem examination indicate that the deceased sustained injuries by other weapons also and his death was the outcome of all the injuries. The appellant, therefore, would be guilty of the offence under Section 326, I.P.C. as he caused a grievous injury to the deceased with the aid of jambia (a sharp-cutting instrument).****"*

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(emphasis supplied)

G *21. This position of law has finally been summed up very succinctly in* **Nallabothu Venkaiah v. State of AndhraPradesh**[11]*:*

"24. Analytical reading of catena of decisions of this Court, the following broad proposition of law clearly emerges; (a) ***the conviction under Section 302 simpliciter without aid of***

H [11] (2002) 7 SCC 117.

Section 149 is permissible if overt act is attributed to the accused resulting in the fatal injury which is independently sufficient in the ordinary course of nature to cause the death of the deceased and is supported by medical evidence; (b) wrongful acquittal recorded by the High Court, even if it stood, that circumstance would not impede the conviction of the appellant under Section 302 r/w Section 149 I.P.C. (c) charge under Section 302 with the aid of Section 149 could be converted into one under Section 302 r/w Section 34 if the criminal act done by several persons less than five in number in furtherance of common intention is proved.”

(emphasis supplied)

22. Although both Section 34 and 149 of the IPC are modes for apportioning vicarious liability on the individual members of a group, there exist a few important differences between these two provisions. Whereas Section 34 requires active participation and a prior meeting of minds, Section 149 IPC assigns liability merely by membership of the unlawful assembly. In reality, such ‘common intention’ is usually indirectly inferred from conduct of the individuals and only seldom it is done through direct evidence.[12]

23. Applying these settled principles to the facts of the present case, it may be seen that both the common object and the common intention are traced back to the same evidence, i.e., evaluating the conduct of the accused as narrated by the injured and the eye-witness. Further, a perusal of Section 313 CrPC statement shows that the appellants were expressly confronted with their specific role in the offence: that each of them had individually attacked the complainant with a deadly object in furtherance of the common intention of killing him. We, therefore, do not find that the appellants suffered any adverse effect when the High Court held the three of them individually guilty for the offence of attempted murder, without the aid of Section 149 IPC.

24. We have no doubt that on facts, an offence under Section 307 IPC is clearly made out against each of the three appellants. The medical experts have in their depositions clearly explicated that the weapons used and the injuries inflicted were more than sufficient to cause death in ordinary course of nature. The appellants made death threats to the

[12] Mahbub Shah v. King Emperor, AIR 1945 PC 118, pp. 153-154.

A complainant on 24.01.1998 and then they used sharp edged weapons the very next day and further declared that they would not rest till they killed the complainant. It manifests the appellant's intention to inflict bodily injury knowing fully that such injuries would ordinarily lead to the complainant's death. The recovery of the axe (kulhari) from Rohtas, which is on the record as Exhibit-P7, further punches holes in the mask of denial worn by the appellants.

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25. The gravity of the injuries is beyond doubt. Not only were there seven injuries, some of which were deep cuts on vital parts of the body including on the head (above the ear); but the appellants broke all the bones in the complainant's feet below the knee. Most appallingly, the injuries have led to amputation of an entire limb, leaving the complainant permanently disabled. This by itself shows the very likely possibility of the complainant dying if not for the timely intervention of PW-3 and appropriate medical care by PGIMS Rohtak. Given such extreme injuries, we can fathom no rhyme or reason for either the complainant (PW-1) or his brother, Balwan (PW-3) to falsely implicate the appellants and allow the actual culprits to go scot-free. On the contrary, the candour of PW-1 and the responses of PW-3 inspire confidence and provide undoubtable explanation of the incident.

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26. That apart, even the requirements of Section 34 of IPC are well established as the attack was apparently pre-meditated. The incident was not in a spur-of-the-moment. The appellants had previously threatened the complainant with physical harm if he were to attempt to irrigate his fields. Their attack on 25.01.1998 was thus pre-planned and calculated. There is nothing on record to suggest that the complainant caused any provocation. Specific roles have been attributed to each of the appellants by the injured and the solitary eye-witness, establishing their individual active participation in the crime.

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(ii) Independence of witnesses

27. It is true that the duty of the prosecution is to seek not just conviction but to ensure that justice is done.[13] The prosecution must, therefore, put forth the best evidence collected in the course of investigation. Although it is always ideal that independent witnesses come forward to substantiate the prosecution case but it would be unfair to expect the presence of third-parties in every case at the time of incident,

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H [13] Kumari Shrilekha Vidyarthi v. State of UP, (1991) 1 SCC 212.

for most violent crimes are seldom anticipated. Any adverse inference against the non-examination of independent witnesses thus needs to be assessed upon the facts and circumstances of each case. In fact, it must first be determined whether the best evidence though available, has been actually withheld by the prosecution for oblique or unexplained reasons.

28. The present crime took place in a private agriculture field and not in the middle of a busy public place. The defence has not claimed that other farmers also gathered at the scene and yet have not been examined. This shows that the appellants have in fact been blowing both hot and cold with their arguments. Earlier in the trial they had tried to discredit the ocular testimony of PW-3 by claiming that he might not have been able to witness the incident owing to standing crops in the field. Nonetheless, they expect this Court to believe that there could have been others who witnessed the incident but have deliberately been suppressed by the prosecution.

(iii) Sentencing and Leniency

29. This leaves us to explore the equitable considerations and plea of consequential reduction in sentence as has been pleaded by learned counsel on behalf of the appellants. We have objectively considered this prayer. We, however, cannot be oblivious of the fact that the appellants and their deceased co-accused were all armed with deadly weapons. They surrounded the complainant and in a brutal attack caused him gruesome injuries and disabled him for life.

30. The appellants have not undergone even half of their sentence period. Having enjoyed the more productive part of their lives outside jail cannot be, per se, taken as a mitigating factor. Any misplaced sympathy with the appellants is likely to cause injustice to the victim of the crime. We, therefore, do not find any justification to show leniency and reduce the sentence.

31. Given that earlier the appellants had been ordered to serve their two sentences of five years under Section 307 and one year under Section 148 of IPC concurrently, acquittal in the latter would effectively have no impact on their outstanding period of sentence.

Conclusion:

32. As a sequel to the above discussion, both the appeals are found to be without any merit so far as conviction of the appellants

A under Section 307 IPC is concerned, and are dismissed accordingly. However, their conviction under Section 148 is set-aside. Their bail bonds are cancelled and the State of Haryana is directed to take the appellants into custody to serve the remainder of their five-year sentence as awarded by the High Court.

Divya Pandey Appeals disposed