



A.F.R.

Court No. 55

JAIL CRIMINAL APPEAL NO. 5048 of 2004

SURYA KANT AND OTHERS..... APPELLANTS

VERSUS

STATE OF U.P.RESPONDENT.

Hon'ble Vinod Prasad, J.
Hon'ble Virendra Singh, J.

(Delivered By The Bench)

The three sibling agnate brothers Surya Kant, Mani Kant and Chandra Kant were tried by Sessions Judge, Saharanpur in S.T. No. 143 of 2003 (State Vs. Surya Kant and others) for offences under Sections 302/34 and 307/34 I.P.C. relating to P.S. Titro, District Saharanpur. Finding their guilt established to the hilt for offences under Sections 302/34 and 323/34 I.P.C., trial Judge convicted them for the aforesaid offences and sentenced them to life imprisonment with fine of Rs. 5,000/- and in default of payment of fine to under go six months further rigorous imprisonment on the first count and six months R.I. on the second count. All the three appellant brothers have questioned the legality and sustainability of their said convictions and sentences in this court by filing the instant appeal.

Prosecution allegations against the appellants, as was disclosed in the written report Ext. Ka 1 and subsequently stated during the trial by the informant P.W. 1 Vikash Sharma are that Aatma Ram had three sons Shiv Charan, Hari Om and Devi Chand. Informant Vikash Sharma is the son of Shiv Charan and the deceased Ashwani Kumar was the son of Hari Om. Devi Chand has sustained injuries in the incident in question. Hari Om had sale proceeds of his sold *berseem due* to appellant Surya Kant, who kept on dilly dallying said payment.

Causa causans of the occurrence was that on 15.7.2002 at 7.30 p.m. Ashwani Kumar(deceased) a youth of 18 years, along with Vikash Sharma, informant went to the house of appellant Surya Kant asking for the said payment. Affronted by the demand, which the appellant took to be a temerity, they firstly vetuparised the deceased and the informant and then accosting them Surya Kant and Chandra Kant picked up knives and Mani Kant picked up a *sariya*. Two of the Appellants armed with knives ripped the body of the deceased with seven stab and incised wounds with their knives. Mani Kant however, assaulted informant and Devi Chand only. Hue and cry raised by the informant and the other witnesses, attracted many people at the spot on which accused persons made their escape good. Murderous assault had imbibed the area with terror stricken psychosis and the local inhabitants had pulled down their shutters, windows and had closed their doors. When the informant was transporting injured to P.H.C. Gangoh for medical help Ashwani Kumar yielded to sustained injuries and lost his life. Written FIR Ext. Ka 1, was got scribed by Satish Kumar by the informant, who after covering a distance of 9 kms, lodged it at police station Titro on the same day at 9.20 p.m.

Constable Fakir chand, P.W. 6 registered Ext. Ka 1, prepared the chik FIR Ext. Ka 6 and the G.D. entry Ext. Ka 7 and entrusted the investigation to S.I. Sri Jaivir Singh Rathi, P.W. 7. Commencing investigation, I.O. proceeded for the spot, conducted inquest on the dead body of the deceased in the night itself from 10 pm to 11.30 pm, prepared the inquest report(Ext. Ka 8) and other necessary documents of chalan Lash, photo lash, letter to RI and to CMO. etc(Ext. Ka9 to Ka 12) and dispatched the sealed dead body to the mortuary for autopsy examination through constables Sanjay Kumar and Rishipal. Station officer K.K. Kanaujiya, PW9, meanwhile reached at the spot and hence continued investigation was conducted by him, who first of all interrogated the informant and recorded his 161

Cr.P.C. statement and thereafter collected the blood stained and plain earth (Material Ext.1 and 2), from the spot and prepared its recovery memo Ext. Ka 13. Conducting spot inspection S.O. prepared the site plan Ext. Ka 14. On 19.7.2002 I.O. K.K. Kanaujiya P.W. 9, copied the postmortem examination report and injury reports. The three appellants were arrested by the R.P.F. On 18.7.2002 for breaching provisions of Railways Act and were lodged in jail. The second I.O. S.O. Kanaujia got this information on 23.7.2002 and therefore he interrogated the appellants inside district jail and on the basis of their disclosure statements and at their pointing out recovered weapons of assault on 1.8.2002 and prepared its recovery memos Ext. Ka 15 to Ext. Ka 17. Concluding investigation, PW9 S.O. K.K. Kanaujia charge sheeted the appellants on 4.8.2002, vide charge sheet Ext. Ka 19. During the course of the investigation, I.O. had sent for forensic science examination blood stained cloths etc. and its examination report dated 18.11.2002 has been proved by him as Ext. Ka 20.

Autopsy on the dead body of the deceased Ashwani Kumar was conducted on 16.7.2002 at 4.00 p.m. by Dr. A.C. Sharma, P.W. 5, who has proved his post mortem examination report as Ext. Ka 5. Autopsy examination report indicate that the deceased was 18 years of age having an average built muscular body. Rigor mortise had passed off from his upper limbs and was present in the lower limbs. His both eyes were closed. Doctor has noted following ante mortem injuries on the corpse of the deceased:-

"1. Incised wound 1cm x 0.3cm x muscle deep just above the left eye brow.

2. Stab wound 2.5cm x 1.5cm x the chest cavity deep on front of left side of chest, 1.5cm below left nipple, directing inwards and medially.

3. Stab wound 2.5cm x 1.5cm x chest cavity deep on front of left

side of chest, 1.5cm below injury no. 2 directing medially.

4. Stab wound 2.5cm x 1.5cm x chest cavity deep on the lateral aspect of left side of chest , 11cm lateral to left nipple directing towards right.

5. Stab wound 2.5cm x 1.5 cm x chest cavity deep on postero lateral aspect of left side of chest just lateral to scapula, 12cm distal to accomion.

6. Stab wound 2.7 cm x 1.5 cm x abdominal cavity deep on the antero lateral aspect of abdomen just below rib cage 13 cm from umbilicus.

7. Incised wound 4.5 cm x 2cm x muscle deep behind left elbow joint. "

Doctor has further noted that muscle,ribs, pleura on the left side underneath injuries no. 2,3,4 and 5 were cut and one liter of blood was present in pleural cavity. Right side lung was cut underneath injuries no. 3 and 4 and pericardium was cut under injury no. 2. There was a cut of 0.7 x 0.3 x 1cm deep in the mayocardium of left ventricle, and chambers of heart were empty. Muscles and peritoneum under injury no. 6 were cut. 200 gms of semi digested food was present in the stomach and intestines contained gases, fluid and fecal matter. In the opinion of the doctor cause of deceased death was shock and hemorrhage as a result of sustained ante mortem injuries Nos. 2, 3, 4, 5 and 6.

Injured informant was medically examined the same night 16.7.2002 at 0.25 a.m. at PHC Gangoh, by doctor R.K. Goel PW4 and following two injuries were detected on his torso:-

"(1) Linear Abrasion 6cm x 1 cm on the dorsal aspect of lower part of Rt. Forearm, Colour of abrasion bright red.

(2) Linear Abrasion 10 cm x 1.5 cm on the torso lateral surface of upper of ½ Rt. Thigh , colour of abrasion bright red. "

Both the above injuries were simple in nature, caused by hard

and blunt object and were fresh in nature. Medical examination report of the informant is Ext.Ka 4 which has been proved by PW 4.

Devi Chand, another injured was medically examined the same night at 12.40 a.m. at the same PHC by the same doctor PW 4, who has proved his medical examination report Ext. Ka 2. The said injured had following injuries on his person:-

"1. Linear abrasion 12 cm x 1.5.cm .. surface of middle of Rt. Thigh, colour of abrasion bright red cum tenderness & swelling in the underlying area.

2. Linear Abrasion 8cm x 2cm on the rt. Thigh colour of abrasion bright red cum marked tenderness and swelling in the underlying area.

3. Linear abrasion 8cm x 1.5 cm on the Superficial surface of right shoulder region colour of abrasion bright red.

4. Irregular Abrasion 2cm X 1 cm on the Rt. parital region cum swelling and tenderness in the under lying area.

5. Well defined swelling 3 cm x 2 cm on the right frontal region is tender to touch."

Doctor has noted all injuries to be fresh and were caused by hard and blunt object. He had kept injury no. 2 under observation as rest of the injuries were simple in nature. He had also advised x-ray of left joint cum thigh. X-ray examination report of the this injured vide Ext Ka 3 indicate no fracture being sustained by the victim and hence none of his injury was greivous in nature.

After the charge sheet was laid in the Court, appellants were summoned by the Magistrate and their case was committed to the court of sessions for trial. Sessions Judge, Saharanpur on 17.4.2003, charged the appellants under Sections 307/34 and 302/34 I.P.C. which charges where denied by the accused who all claimed to be tried.

Prosecution in an endeavour to establish the charge examined

nine prosecution witnesses out of whom P.W. 1 Vikash Sharma (informant), Devi Chand (injured eye witness) and Thath Singh P.W. 3 were the witnesses of facts. Rest of the prosecution witnesses Dr. R.K. Goel P.W. 4, Dr. A.C. Sharma P.W. 5, Sri Fakir Chand P.W. 6, Jaivir Singh Rathie P.W. 7, Rishipal P.W. 8 and K.K. Kanauiya P.W. 9 were the formal witnesses to support fact witnesses.

In his deposition before the trial court informant PW 1 narrated the same prosecution story as was mentioned by him in Ext. Ka 1. He was cogent, reliable and unhesitant in deposing that the immediate motive for the cause of murder was demand of Rs. 250/= by the informant and the deceased from the accused appellants at their house. Appellants Surya Kant and Chandra Kant had picked up the knives and both of them had caught hold of both the hands of the deceased and both had knifed the deceased body by stabbing him repeatedly, whereas appellant Mani Kant had assaulted the informant and the injured from his iron rod. He had not endeavoured to assault the deceased at all. He has proved the date, time and place of the incident. PW 1 has further deposed that the deceased was a student at the time of the incident and the uncle of the deceased had told him that he can take some money from him and get himself admitted in the school. He has further deposed that they had gone to PHC Gangoh on a tractor, when the deceased had lost his life and PW 3 Thath Singh had also witnessed the murder. He has further deposed that he and the deceased had reached at the spot from north side. This witness was searchingly cross examined at the topography of the spot and his house but nothing material could be elicited from him in that respect. He had denied the alibi of the appellant accused by stating that they all live in the village of the incident itself. He had further disclosed that he had remained in the hospital for two days and was discharged on the second day in the evening. Regarding omissions in his interrogative statement PW 1 has

offered an acceptable explanation by stating that since the investigating officer did not question him on those aspects therefore he had not mentioned those facts in his 161 Cr.P.C. statement. He had denied the suggestion that the deceased was murdered in the night at 10-11 p.m. and he had falsely implicated the appellants because of political rivalry in connivance with the investigating officer.

Devi Charan, PW 2, who is an injured witness has countenanced the prosecution case farther and has supported PW 1 informant on all material aspects of the occurrence. He had disclosed that deceased was his real nephew and his brother master Hari Om had sold *Barseem* to appellant Surya Kant about which RS. 250/= were due of the sale proceeds. He had deposed that he was indisposed since last three or four days and, since homeopathic medicine did not cure him, he had gone to the chemist shop of Arvind for purchasing medicines and hearing the altercation he had reached the spot, where he had witnessed the assault made by the accused. He has established the presence of Thath Singh, PW 3, Radhey Shyam and other co villagers and had further testified that, when he tried to intervene he was also assaulted with *Saria* and had sustained five or six *Saria* injuries. He has showed his ignorance regarding vocations of the accused persons. He has denied suggestion that to show his presence he had got a sham medical examination report prepared and he had not seen the incident. PW 3 Thath Singh has also divulged the same story as that of PW 1 and 2 and has supported them well in his depositions.

The trial Judge believed prosecution witnesses of facts and finding of guilt of the appellants established to the hilt convicted and sentenced them as is mentioned above. Hence this appeal questioning the impugned judgment.

We have heard Sri V.P. Srivastava, learned Senior Counsel assisted by Sri Raghuraj Kishore Advocate in support of this appeal

and Mrs. Raj Laxmi Sinha, learned AGA in opposition.

Learned Senior Counsel contended before us that section 34 I.P.C. has no applicability on the facts alleged by the prosecution as there was no common intention to murder the deceased and hence section 34 I.P.C. can not be pressed into consideration to convict the appellants. Elaborating the said contention it was submitted that the incident occurred at the spur of the moment in the midst of heated argument without any premeditation hence there was no comity of intention nor common intention to commit deceased murder. It was therefore suggested that conviction of all the appellants with the aid of section 34 I.P.C. is not sustainable and deserves to be set aside. It was urged that each of the appellant was liable for his individual act and therefore section 34 should not be applied in the present fact scenario. It was vehemently harangued that Mani Kant did not share the common intention of causing death of the deceased with other accused and consequently his conviction under Section 302/34 I.P.C. and imposed sentence thereunder cannot be countenanced and must be set aside. Alongwith aforesaid submission, learned counsel for the appellants also meekly addressed us on other factual aspects of the matter but at last conceded that so far as the two other appellants Surya Kant and Chandra Kant are concerned, opinion of the trial judge and their conviction and sentence do not suffer from any infirmity either in law or on facts.

Learned AGA, per contra submitted that Section 34 will be applicable fully as all the three persons were present at the spot and they all assaulted simultaneously. In her submission, the common intention to commit the murder of the deceased was writ large on the record and, therefore, the appeal is bereft of merits and deserves to be dismissed.

We have considered the rival contentions and have gone through the evidence of record. The texts of evidences of three

witnesses of fact Vikash Sharma P.W. 1, who is an informant injured, Devi Chand, who is also an injured and an eye witness of the incident and that of Thath Singh P.W. 3, who had seen the incident, are of unimpeachable nature. Their evidence does not suffer from any inherent defect at all nor counsel for the appellants could bring to our notice any such defect. PW 1 and PW 2 are close relatives of the deceased and they themselves are injured in the incident and therefore there was no reason for them spare the real murderers who had assaulted them. There was no enmity between the deceased and the appellants prior to the present incident nor any such defence has been suggested by the accused to the witnesses during their cross examination. Immediate causa causans was asking of residue of sale proceeds by the deceased and the informant on the fateful day of the incident. Deceased was a student and was to get admission in the educational institution and therefore he required fees for that purpose. His uncle had told him to get money due from the appellants to deposit fees. This allegation of the prosecution could not be shattered by the defence at all and therefore motive for committing the crime is well established by the prosecution evidences. In respect of actual assault none of the fact witnesses made any deviation from the version mentioned in Ext. Ka 1. During the trial they only stated those very facts in detail and therefore we find nothing in their depositions to discredit their evidences. Trustworthiness of their deposition and truthfulness of the manner of their testimonies is convincing, clear and cogent. Even though they were subjected to searching cross examination but the accused have not been able to shake the credibility of their evidences at all. Thus in our view presence of all the appellants at the spot is well established along with their participation in the incident which is well perceptible from prosecution evidences. Learned counsel for the appellants also failed to point out any circumstance which can erode prosecution

evidences from its credence. All of them steadfast the test of cross examination and we find their statements to be truthful, unblemished and confidence inspiring.

Now coming to the only worth considering submission of the appellants counsel which has been mooted before us is as to whether section 34 I.P.C. is applicable on the facts of the present case or not?

Analyzing and cogitating over the said submissions and judging it in the light of the evidences on record especially those of fact witnesses we find much substance in the said submission of the appellants counsel for the following reasons.

Firstly that there was no enmity between rival sides and even in respect of money demand no incident prior to the present one ever happened. Money was due to appellant Surya Kant only and not to other appellants and hence rest of the two appellants had no motive to commit the crime. It was the deceased and the informant who had gone to the house of the appellants demanding payment of balance amount. Neither Mani Kant nor Chandra Kant had any thing to do with said payment. While money was demanded an altercation ensued between accused, deceased and the informant. Deceased had a muscular body and was in the prime of his youth. He was a student and he had gone to the house of the appellants for the purpose that the balance payment be made good. In such fact situation likelihood of tirade turning ugly is quite possible. Altercation must have been loaded with words of temerity or *faux pas* which must have affronted two other appellants Chandra Kant and Mani Kant. During course of that heated verbal onslaught, it is alleged that all of a sudden two of the appellants picked up knives but appellant Mani Kant picked up only a blunt object. There was no challenge call nor there was any instigation to murder the deceased. No sooner than picking up the weapons that all the appellants launched an assault

on the prosecution side. While two of the appellants assaulted the deceased but Mani Kant did not even endeavour to beat him. There is no evidence on record to even remotely suggest that Mani Kant had the same intention as that of his other two brothers. He must have felt insulted because of tiradic altercation and therefore his reaction was that of only to cause hurt to the prosecution side. He had no idea at all that two of his brothers will act in such a manner as to murder the deceased. Injuries inflicted by him on the informant and Devi Chand also does not suggest that he had an intention to commit murder. As noted above all the injuries were abrasions and were simple in nature and consequently the force which was applied by appellant Mani Kant does not indicate his sharing of common intention to launch a murderous assault. Force applied by him while wielding his lathi was so meager that it did not even cause contusion or lacerated wound. No doubt injured persons must not be static to suffer assault but total absence of any such injury can also be not lost sight of. For the applicability of section 34 I.P.C. sharing of common intention is sine qua non. Without such sharing of intention section 34 I.P.C. has got no applicability. Intention to be shared has to be present from prior to the incident or it can even develop at the spur of the moment. So far prior concert of mind is concerned that can be proved by leading evidence for census-id-idem for which there is complete absence of evidence on record. Incident happened all of a sudden without any pre-meeting of minds and therefore it is difficult to conclude that all the appellants shared the same intention with each other. In this respect reference to some of the decisions by the apex court will be appropriate and therefore we refer some of those judgments herein below.

In the decision of **Badruddin versus State of U.P: AIR 1998 SC 3243** apex court has held as under:-

" *In the instant case, it is stated that the deceased alone was*

assaulted by Nizamuddin with knife and Siddiqui with lathi. The appellant dealt blows with lathi not to the deceased but to other witnesses. There is no direct evidence of common intention. There is no case nor evidence of exhortation by him or of the fact that with a view to keep the said witnesses away from interfering and to facilitate Nizamuddin to kill the deceased the appellant assaulted the said witnesses. Having regard to the facts and circumstances of the case, it is not possible to arrive at the conclusion that the appellant and others shared common intention to kill the deceased Shaukat Ali. Consequently, we are unable to sustain the conviction of the appellant for the offence under Section 302/34, IPC. However, on the facts, we confirm the conviction and sentence under Section 323/34, IPC awarded by the Courts below. As the appellant has already served out the sentence for the offence convicted, therefore, he is directed to be released forthwith unless he is required to be detained in any other case"

In **Ram Tahal versus State of U.P.: AIR 1972 SC 254** it has been held as under:-

"There is no doubt that a common intention should be anterior in time to the commission of the crime showing a pre-arranged plan and prior concert, and though, it is difficult in most cases to prove the intention of an individual, it has to be inferred from the act or conduct or other relevant circumstances of the case. This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one or some of them, the acts done by others to assist those causing the injuries the concerted conduct subsequent to the commission of the offence for instance that all of them had left the scene of the incident together and other acts which all or some may have done as would help in determining the common intention. In other words, the totality of the

circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted. This Court had in Krishna Govind Patil's case, (1964) 1 SCR 678 = (AIR 1963 SC 1413) already referred to earlier, held that the pre-arranged plan may develop on the spot during the course of the commission of the offence but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so before a Court can convict a person under Section 302 or S. 304 read with S. 34 of the I.P.C. it should come to a definite conclusion that the said person had a prior concert with one or more persons named or un-named for committing the offence."

In **Sewa Ram and others versus State of U.P.: AIR 2008 SC 682** apex court had held as under :-

" Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of the section

is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab [1977(1) SCC 746] the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision. "

The representative case in this respect is **Jagannath versus State of M.P.:2007 SC (Supp) 905**. In the said decision it has been held as under:-

"13. A common intention may be developed on the spot, but the same must not only be developed but also must be shared with the other accused.

14. Concededly, the occurrence took place all of a sudden. The act of theft on the part of the accused persons was complete. They had been taking away the wood. They were followed by the deceased and PW-11. They must have been obstructed from taking away the wood by them as the same were in their possession. It was at that juncture the deceased was said to have been assaulted by Prabhudayal and Dhan Singh. In a situation of this nature where the accused persons had acted at the spur of the moment having regard to the altercations which had preceded the incident, in our opinion, it is difficult to lead to the conclusion that Prabhudayal and the appellant had developed a common intention of causing death of the deceased. If the statements of the prosecution witnesses PWs 2, 11 and 12 are to be believed, they acted almost at the same time. We may notice that the third accused Dhan Singh has been acquitted. The State has not preferred any appeal there against. The High Court

has also convicted Prabhudayal under Section 302 of the Indian Penal Code holding that the same was his individual act. In this situation, we are of the opinion that it is difficult to uphold the contention of Ms. Makhija that the appellant is guilty under Section 302/34 of the Indian Penal Code."

In the case of **Ramashish Yadav and others versus State of Bihar:1999 SC 3830** it has been held as under :-

"3. Coming to the question of applicability of Section 34 for the murder of Tapeswar, we find from the evidence of the three eye-witnesses that while Ram Pravesh Yadav and Ramanand Yadav caught hold of Tapeswar, accused Samundar Yadav and Sheo Layak Yadav came with gandas and gave blows on the head of Tapeswar, as a result of which Tapeswar died. Section 34 lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feature of Section 34 is the element of participation in action. The common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a pre-arranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be a pre-arrangement or premeditated concert. This being the requirement of law for applicability of Section 34, IPC, from the mere fact that accused-Ram Pravesh Yadav and Ramanand Yadav came and caught hold of Tapeswar, whereafter Samundar Yadav and Sheo Layak Yadav came with gandas in their hands and gave blows by

means of gandasa, it cannot be said that the accused Ram Pravesh Yadav and Ramanand Yadav shared the common intention with accused Samundar Yadav and Sheo Layak Yadav. Consequently, accused Ram Pravesh Yadav and Ramanand Yadav cannot be held guilty of the charge under Section 302/34, IPC but accused Samundar Yadav and Sheo Layak Yadav did commit the offence under Section 302/34, having assaulted deceased Tapeswar on his head by means of gandasa on account of which Tapeswar died. The accused-Ram Pravesh Yadav and Ramanand Yadav are, therefore, acquitted of the charges levelled against them and they be set at liberty forthwith."

In the instant appeal all the appellants were empty handed when the verbal exchange of war started. In the midst of such wordly duel that the appellants picked up arms and started assaulting without any pre-consensus. One of the appellant Mani Kant did not make any endeavour to assault the deceased from his weapon (*sariya*). During the course of the trial, the witnesses have also testified that Mani Kant appellant did not make any assault on the deceased albeit he had assaulted the informant and Devi Chand causing them simple injuries. In view of such categorical depositions by fact witnesses we find it highly unsafe to bring the case of that appellant Mani Kant within the ambit of section 34 I.P.C. and anoint him with the common intention to commit murder of deceased and thereby convict him under Section 302/34 I.P.C. As noted above for the applicability of Section 34 I.P.C., meeting of minds (*census-Id-Idem*) is *sine quo non*, which was absent in case of Mani Kant appellant. His case therefore falls apart from the purview of sections 302/34 I.P.C. So far other two appellants Surya Kant and Chandra Kant are concerned there are positive trustworthy credible evidences on record well supported by depositions of formal witnesses that each of them had caught hold of one hand of deceased and both of

them had repeatedly stabbed him on vital parts of his body causing him fatal injuries. Each of them, therefore, definitely developed and shared the common intention to murder the deceased, at the spot, at the spur of the moment.

For rest of the arguments advanced before us it was conceded by the counsel for the appellants subsequently that they are unwarranted and will not affect the out come of this appeal and therefore we eschew them from a detailed discussion and only observe this much that those were raised only to be mentioned as those submissions are wholly unmerited. Case laws relied up by the appellants counsel **Shambhoo Singh Vs. State of Rajasthan 2008 (11) SCC 637** is altogether on different facts .In that case apex court found that it was a case of sudden fight and there was mutual provocation and in such a view offence was diluted to be one under culpable homicide not amounting to murder. That is not the situation before us. Here appellants themselves had started the assault on unarmed persons on a very trivial issue. Moreover the merciless manner in which empty handed deceased was assaulted by the two appellants Surya Kant and Chandra Kant and the venomous manner of his stabbing clearly projects the intentions haboured by those two appellants, which squarely falls in more than one category of section 300 I.P.C. More over present is not a case of sudden fight.

Another decision **Daya Shankar Vs. State of M.P.: AIR 2009 SC 1426** is also of no help to the appellants who were armed with knives. The facts of that case had a different texture altogether. After noting peculiarity of facts Apex Court opined that Section 34 I.P.C. had got no applicability on the facts of that case. In this respect, we would like to refer paragraph 9 of the aforesaid judgment, which is as follows:-

"The evidence of PWs 2 and 3 did not attribute any overt act to the appellant. The mere fact that he was in the company of the

accused who were armed would not be sufficient to attract Section 34 I.P.C. It is undisputed that appellant was not armed and he had no animosity with the deceased. This position is also accepted by the prosecution. Additionally, the stand that he pulled the leg of the deceased has not been established."

The above referred portion makes a distinguishable distinction between the present appeal with that case.

Coming to the last decision **Lachman Singh Vs. State of Haryana: 2006 Cr. L.J. 4041**, we find that the said judgment again does not help present appellants. Paragraph 8 of the aforesaid judgment creates a distinction between the facts of the present appeal with that decision and hence we reproduce said para below:-

"8. In the present appeal stands taken before the High Court were reiterated by the learned counsel for the parties. We find that the evidence of the witnesses, more particularly, injured witnesses have been carefully analysed by the Trial Court and the High Court. There is no discrepancy of any vital nature which will affect credibility of the witnesses. There is no doubt that some minor discrepancies are noticed. But that does not in any way dilute the otherwise cogent evidence of injured witnesses about the role played by two of the accused persons i.e. Lachman Singh and Dev Singh. So far as the bullets not matching the seized gun is concerned, the trial Court and High Court have dealt with this aspect in great details. As rightly submitted by learned counsel for respondent-State, recovery of the gun was made on being pointed out by the accused. To draw a red herring he pointed out to a different gun, so that the plea as presently urged can be taken. We, however, find that the evidence is inadequate so far accused Randhir Singh is concerned. It was prosecution case that he had thrown brickbats which caused injury on Vikram Singh (PW?7). But the same is clearly ruled out by the doctor's evidence to the effect that none of the injuries can be

caused by brickbats. Additionally, his role of presence at the spot has not been established by any cogent and credible evidence. Therefore, conviction so far as he is concerned, cannot be sustained in the appeal filed by him i.e. Criminal Appeal No. 350 of 2005 is allowed."

At this point we also note that it is the prosecution case at the trial that Surya Kant and Chandra Kant did not assault informant and injured Devi Chand at all. They only stabbed the deceased wielding their knives. They even did not attempt to cause hurt to any of the person from the prosecution side. Since they did not share common intention to cause hurt their conviction under section 323/34 I.P.C. also is illegal and unwarranted. However both of them did share common intention to murder the deceased for which they have been convicted and sentenced.

Summing up our discussion we find that section 34 has no application in the case of appellant Mani Kant and his convictions and sentences under Section 302/34, and 323/34 I.P.C. is indefensible and can not be affirmed, instead he is liable to be convicted under section 323 I.P.C. simpliciter for causing simple hurt to the informant PW1 and Devi Chand PW2. Similarly conviction and sentence of rest of the two appellants Surya Kant and Chandra Kant under section 323/34 I.P.C. also can not be sustained and they are liable to be acquitted of that charge. However their conviction under section 302/34 I.P.C. and imposed sentence of life imprisonment with fine of Rs. 5000/= and in default of payment of fine to undergo six months further imprisonment have been correctly recorded and in that respect their this appeal is meritless and deserves rejection.

Instant appeal is therefore partly allowed. Appellant Mani Kant is acquitted of charges under section 302/34, 323/34 I.P.C. and instead he is convicted under section 323 I.P.C. simpliciter. He had already remained in jail for for nearly two months and ten days and

since the incident occurred seven years ago and the maximum sentence awarded on him under section 323/34 was only six months, therefore in our view period of imprisonment already undergone by him will meet the ends of justice. Conviction and sentence of other two appellants Surya Kant and Chandra Kant under section 323/34 I.P.C. is also hereby set aside and they are acquitted of the said charge but their conviction and sentence under section 302/34 I.P.C. is hereby maintained and to that extent their this appeal is dismissed.

Appellant Mani Kant is on bail. He need not surrender. His personal bond is canceled and sureties discharged.

Appellants Surya Kant and Chandra Kant are already in jail. They shall remain in jail to serve out remaining part of their sentence.

Let a copy of this order be transmitted to trial Judge for his intimation.

Dt.31.8.2009
AKG/-5048/04