REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1144 OF 2009

Mala Singh & Ors. ...Appellants

Versus

State of Haryana ...Respondent

J U D G M E N T

Abhay Manohar Sapre, J.

1. This appeal is filed by the three accused persons against the final judgment and order dated 11.02.2008 passed by the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No.65-DB of 1999 whereby the Division Bench of the High Court allowed the appeal in respect of eight accused persons and acquitted them from the charges under Sections 148,

302/149, 323/149 and 506/149 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") but dismissed the appeal in respect of the three accused persons (appellants herein) and convicted them under Section 302/34 IPC instead of Section 302/149 IPC.

2. In order to appreciate the controversy involved in this appeal, it is necessary to set out the facts in detail hereinbelow.

3. Eleven (11) accused persons (hereinafter referred to as "A-1 to A-11") were tried for the offences punishable under Sections 148, 302/149, 323/149 and 506/149 IPC for committing murder of one lady - Mahendro Bai in Sessions Case No.19 of 1997.

4. Additional Sessions Judge, Faridabad, by judgment/order dated 04.12.1998, convicted all the accused (A-1 to A-11) under Sections 148, 302/149, 323/149 and 506/149 IPC and accordingly sentenced them to undergo life imprisonment apart from imposing

other lesser sentences. The Additional Sessions Judge held that the prosecution was able to prove the case against all the accused persons (A-1 to A-11) beyond reasonable doubt and, therefore, all of them deserve to be convicted accordingly.

5. All the accused persons, namely, Ranjit Singh (A-1), Boor Singh (A-2), Puran Singh (A-3), Balwant Singh (A-4), Inder Singh (A-5), Bagga Singh (A-6), Mala Singh (A-7), Phuman Singh(A-8), Kashmiro (A-9), Laxmi Bai(A-10) and Taro Bai(A-11) were sentenced to suffer rigorous imprisonment for six months under Section 148 IPC, rigorous imprisonment for life and to pay a fine of Rs.2,000/- (Rs.Two Thousand) under Section 302/149 IPC, in default of payment of fine to further undergo rigorous imprisonment for six months, rigorous imprisonment for three months under Section 323/149 IPC and rigorous Imprisonment for six months under

Section 506/149 IPC. All the sentences were to run concurrently.

6. All the accused persons (A-1 to A-11) felt aggrieved by their conviction and sentence and they filed one common criminal appeal in the High Court of Punjab & Haryana at Chandigarh (Criminal Appeal No.65-DB of 1999).

7. By impugned order, the High Court allowed the appeal in respect of the eight accused persons, namely, A-1 to A-6, A-10 & A-11 and acquitted them from all the charges whereas dismissed the appeal in respect of three accused persons, namely, A-7 to A-9 and accordingly upheld their conviction by taking recourse to Section 34 IPC. In other words, the High Court upheld the conviction under Section 302 read with Section 34 IPC in place of 302/149 IPC.

8. The three accused persons, namely, Mala Singh(A-7), Phuman Singh(A-8) and Kashmiro(A-9), who

suffered the conviction/sentence felt aggrieved by the aforesaid order of the High Court and they filed the present appeal by way of special leave in this Court.

9. So far as the order of the High Court, which resulted in acquittal of eight accused, namely, A-1 to A-6, A-10 and A-11 is concerned, the State did not challenge their acquittal order and, therefore, this part of the order of the High Court has now attained finality.

10. We are, therefore, not required to examine the legality and correctness of this part of the impugned order by which eight co-accused (A-1 to A-6, A-10 and A-11) were acquitted.

11. Learned counsel for the appellants, at the outset, stated that so far as appellant No.1 - Mala Singh (A-7) is concerned, he expired during pendency of the appeal. The appeal of Mala Singh (A-7) (appellant No.1 herein) therefore, stands abated. His appeal is accordingly dismissed as having abated.

12. We are, therefore, now concerned with the case of two accused persons, namely, Phuman Singh(A-8) [appellant No.2 herein] and Smt. Kashmiro(A-9) [appellant No.3 herein].

13. In other words, now we have to examine in this appeal as to whether the High Court was justified in upholding the conviction and the sentence of appellant No.2 (A-8) and appellant No.3 (A-9).

14. In order to examine this question, it is necessary to set out the prosecution case in brief hereinbelow.

15. The death of Mahendro Bai occurred as a result of some disputes between the members of one family. One group consisted of one branch of brothers, their sons and the wives whereas the other group consisted of another branch of brothers, their sons and the wives. The dispute was in relation to the ownership and possession of an ancestral property of the family members, i.e., one agricultural land.

16. One Mehar Singh had six brothers. They owned 22 killas of land. This land was orally partitioned amongst all the brothers 30 years back and each brother was cultivating his share. Mehar Singh then purchased some other land measuring 2 ½ acres in the same area. His three brothers–Mala Singh (A-7), Bagga Singh (A-6) and Inder Singh (A-5) then started demanding their share in this 2 ½ acres of land from Mehar Singh which he refused saying that it was not an ancestral land and, therefore, no need to partition. This became the cause of dispute among the brothers.

17. On 21.09.1996 at around 12 noon, Mehar Singh, Mal Singh (son of Mehar Singh), Mahendro Bai (wife of Mal Singh-daughter in law of Mehar Singh), Dara Singh (son of Mehar Singh) and Palo Devi (wife of Dara Singh) were sitting on the land (field) and talking to each others then, Mala Singh (A-7), Inder Singh (A-5) , Bagga Singh (A-6) Boor Singh (A-2), Balwant Singh (A-4), Puran

Singh (A-3), Ranjit Singh (A-1), Phuman Singh (A-8), Taro Bai (A-11) and Kashmiro(A-9) came there with weapons (lathi, country made pistol, sword, ballaum) in their hands.

18. Mala Singh (A-7) gave "Lalkara" saying that they should be taught lesson for non-partitioning the land and be finished. This led to a fight between the two groups resulting in death of Mahendro Bai and also causing injuries to Mehar Singh and Palo Bai.

19. This led to registration of the FIR (Ex-PN/2) by Dara Singh followed by the investigation. The statements of several persons were recorded, evidence was collected, post-mortem report of the deceased was obtained, weapons were seized, FSL report was obtained which led to arrest of the aforementioned eleven persons.

20. The charge-sheet was filed against all the 11 accused persons (A-1 to A-11). The case was then

committed to the Sessions Court for trial. The prosecution examined as many as 14 witnesses. All the accused persons (A-1 to A-11) were examined under Section 313 of the Criminal Procedure Code, 1973 (hereinafter referred to as "Cr.P.C.). They denied their involvement in the crime.

21. By judgment/order dated 04.12.1998, the Additional Sessions Judge convicted all the 11 accused persons (A-1 to A-11) under Sections 148, 302/149, 323/149 & 506/149 IPC, as detailed above, which gave rise to filing of the criminal appeal by all the 11 accused persons (A-1 to A-11) in the High Court.

22. As mentioned above, the High Court acquitted eight accused persons (A-1 to A-6, A-10 & A-11) from all the charges by giving them benefit of doubt but upheld the conviction of the present three appellants (A-7 to A-9) under Section 302/34 IPC instead of 302/149 IPC, which was awarded by the Additional Sessions Judge.

Against this order of the High Court, the three accused persons (A-7 to A-9) have felt aggrieved and filed this appeal after obtaining the special leave to appeal in this Court.

23. Heard Mr. Karan Bharihoke, learned *amicus curiae*, Mr. Sunny Choudhary, learned counsel for the appellants-accused persons and Mr. Atul Mangla, learned Additional Advocate General for the respondent-State.

24. Learned counsel for the appellants (accused persons A-7 to A-9) while assailing the conviction and sentence of the appellants submitted that the High Court erred in upholding the conviction of the appellants. His submission was that the High Court should also have acquitted the appellants herein along with other eight co-accused persons. Learned counsel urged that, in any case, the High Court erred in

upholding the appellants' conviction and sentence under Section 302/34 IPC.

25. Learned counsel urged that it was not in dispute that the appellants along with other eight co-accused were originally charged and eventually convicted also for an offence punishable under Section 302 read with Section 149 IPC. With this background, when the matter was carried in appeal at the instance of all the eleven accused persons challenging their conviction, the only question, which fell for consideration before the High Court, was whether the conviction of all the 11 accused persons under Section 302/149 is justified or not.

26. Learned counsel urged that the High Court was, therefore, not justified in altering the charge from Section 302 read with Section 149 IPC to Section 302 read with Section 34 IPC *suo moto* and then was not justified in upholding the conviction and that too only

qua three accused persons (appellants herein) and acquitting other eight co-accused.

27. In other words, his submission was that once the charges were framed under Section 302/149 IPC against all the 11 accused persons which resulted in their conviction under Section 302/149 IPC, the Appellate Court had no jurisdiction to *suo moto* alter the charges and convict the appellants under Section 302/34 IPC without giving them any opportunity to meet the altered charge and simultaneously acquitting remaining eight co-accused from the charge of Section 302/149 IPC.

28. Learned counsel urged that assuming that the Appellate Court had the jurisdiction to alter the charges *qua* the appellants (A-7 to A-9) only, yet, in his submission, there was no evidence adduced by the prosecution to split the charges only against the present

appellants under Section 34 IPC for upholding their conviction under Section 302 IPC.

29. In substance, the submission was against the splitting of the charges at the appellate stage by the High Court for convicting the appellants under Section 302/34 IPC and acquitting the remaining eight co-accused persons under Section 302/149 IPC but not extending the similar benefit of acquittal to the appellants herein.

30. The last submission of the learned counsel was that, in a case of this nature, the Appellate Court having acquitted the eight co-accused should have examined the role of each accused (appellants herein) in the crime. The reason being, when no case under Section 149 IPC was held made out *qua* all the accused persons inasmuch as when eight co-accused stood acquitted under Section 302/149 IPC by the High Court and when there was no evidence to sustain the plea of Section 34

against the three appellants, the only option available to the Appellate Court was to examine the role of each appellant individually in the crime in question.

31. It was, therefore, his submission that if the role of the present two appellants is examined in the commission of the crime then it is clear that the death of Mahendro Bai occurred on account of gun shot injury hit by Puran Singh (A-3) who stood acquitted and Farsa injury inflicted by Mala Singh (A-7), who has since died, and not on account of the injury caused by the present two appellants.

32. Learned counsel pointed out from the evidence that so far as appellant No.2 - Phuman Singh (A-8) and appellant No. 3-Kashmiro (lady) (A-9) is concerned, both individually hit the deceased with lathi which caused one simple injury on the right hand and other on left cheek of the deceased and that too before others could inflict the fatal injuries to the deceased.

33. It was, therefore, his submission that in these circumstances, appellant Nos. 2 and 3 could at best be convicted for an offence punishable under Section 324 IPC but not beyond it keeping in view the law laid down by this Court on such question in **Mohd. Khalil Chisti** vs. **State of Rajasthan & Ors.** (2013) 2 SCC 541.

34. Lastly, it was urged that since both these appellants (A-8 & A-9) have already undergone around seven years of jail sentence and were also released on bail in the year 2009 by this Court and both still continue to be on bail for the last 10 years, the ends of justice would be met, if both the appellants are awarded the jail sentence of "already undergone" under Section 324 IPC with any fine amount.

35. Mr. Karan Bharihoke, learned *amicus curiae* brought to our notice the legal position, which apply in this case and argued ably by pointing out the evidence and how the legal principle laid down by this Court

apply to the case at hand. He also submitted his written note.

36. In reply, learned Additional Advocate General for the respondent (State) supported the impugned order and urged that the same be upheld calling for no interference.

37. Having heard the learned counsel for the parties and learned *amicus curiae*, we are inclined to allow the appeal finding force in the submissions urged by the learned counsel for the appellants as detailed below.

38. Four questions arise for consideration in this appeal-first, whether the High Court was justified in convicting the appellants under Section 302 read with Section 34 IPC when, in fact, the initial trial was on the basis of a charge under Section 302 read with Section 149 IPC ?

39. Second, whether the High Court was justified in altering the charge under Section 149 to one under

Section 34 in relation to three accused (appellants herein) after acquitting eight co-accused from the charges of Section 302/149 IPC and then convicting the three accused (appellants herein) on the altered charges under Section 302/34 IPC?

40. Third, whether there is any evidence to sustain the charge under Section 34 IPC against the three accused (appellants herein) so as to convict them for an offence under Section 302 IPC ?

41. And Fourth, in case the charge under Section 34 IPC is held not made out for want of evidence and further when the charge under Section 149 is already held not made out by the High Court, whether any case against three accused persons (appellants herein) is made out for their conviction and, if so, for which offence ?

42. Before we examine the facts of the case, it is necessary to take note of the relevant sections, which

deal with alter of the charge and powers of the Court/Appellate Court in such cases.

43. Section 216 of Cr.P.C. deals with powers of the Court to alter the charge. Section 386 of Cr.P.C. deals with powers of the Appellate Court and Section 464 of Cr.P.C. deals with the effect of omission to frame, or absence of, or error in framing the charge. These Sections are quoted below:

> **"216. Court may alter charge.**
>
> **(1) Any Court may alter or add to any charge at any time before judgment is pronounced.**
>
> **(2) Every such alteration or addition shall be read and explained to the accused.**
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> **(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.**
>
> **(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to**

prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction had been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

386. Powers of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction

subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper;

Provided that the sentence shall not be enhanced unless the accused has had an

opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

464. Effect of omission to frame, or absence of, or error in, charge.

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

44. Combined reading of Sections 216, 386 and 464 of Cr.P.C. would reveal that an alteration of charge where no prejudice is caused to the accused or the prosecution is well within the powers and the jurisdiction of the Court including the Appellate Court.

45. In other words, it is only when any omission to frame the charge initially or till culmination of the proceedings or at the appellate stage results in failure of justice or causes prejudice, the same may result in vitiating the trial in appropriate case.

46. The Constitution Bench of this Court examined this issue, for the first time, in the context of old Criminal Procedure Code in a case reported in **Willie (William) Slaney** vs. **State of M.P.** (AIR 1956 SC 116).

47. Learned Judge Vivian Bose J. speaking for the Bench in his inimitable style of writing held, "*Therefore, when there is a charge and there is either error or omission in it or both, and whatever its nature, it is not to be regarded as material unless two conditions are fulfilled both of which are matters of fact: (1) the accused has 'in fact' been misled by it 'and' (2) it has occasioned a failure of justice. That, in our opinion, is reasonably plain language.*"

48. In **Kantilal Chandulal Mehta** vs. **State of Maharashtra & Anr.** (1969) 3 SCC 166, this Court again examined this very issue arising under the present Code of Criminal Procedure with which we are concerned in the present case. Justice P. Jaganmohan Reddy, speaking for the Bench after examining the scheme of the Code held *inter alia* "*In our view the Criminal Procedure Code gives ample power to the courts*

to alter or amend a charge whether by the trial court or by the appellate court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him."

49. Now coming to the question regarding altering of the charge from Section 149 to Section 34 IPC read with Section 302 IPC, this question was considered by this Court for the first time in the case of **Lachhman Singh & Ors.** vs. **The State** (AIR 1952 SC 167) where Justice Fazl Ali speaking for the bench held as under:

> **"It was also contended that there being no charge under section 302 read with section 34 of the Indian Penal Code, the conviction of the appellants under section 302 read with section 149 could not have been altered by the High Court to one under section 302 read with section 34, upon the acquittal of the remaining accused persons. The facts of the case are however such that the**

accused could have been charged alternatively, either under section 302 read with section 149 or under section 302 read with section 34. The point has therefore no force."

50. This question was again examined by this Court in **Karnail Singh & Anr.** vs. **State of Punjab** (AIR 1954 SC 204) wherein the learned Judge Venkatarama Ayyar,J. elaborating the law on the subject held as under:

"(7) Then the next question is whether the conviction of the appellant under section 302 read with section 34, when they had been charged only, under section 302 read with section 149, was illegal The contention of the appellants is that the scope of section 149 is different from that of section 34, that while what section 149 requires is proof of a common object, it would be necessary under section 34 to establish a common intention and that therefore when the charge against the accused is under section 149, it cannot be converted in appeal into one under section 34. The following observations of this court in Dalip Singh v. State of Punjab, AIR 1953 SC 364 were relied on in support of this position :-

"Nor is it possible in this case to have recourse to section 34 because the appellants have not been charged with

> **that even in the alternative and the common intention required by section 34 and the common object required by section 149 are far from being the same thing."**

It is true that there is substantial difference between the two sections but as observed by Lord Sumner in Barendra Kumar Ghosh v. Emperor, AIR 1925 PC 1, 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.

We do not read the observations in Dalip Singh v. State, of Punjab(1) as an authority for the broad proposition that in law there could be no recourse to, section 34 when the charge is only under section 149. Whether such recourse can be had or not must depend on the facts of each case. This is in accord with the view taken by this court in Lachhman Singh v. The State (1), where

the substitution of section 34 for section 149 was upheld on the ground that the facts were such

> **"that the accused could have been charged alternatively either under section 302 read with section 149, or under section 302read with section 34."**

51. The law laid down in **Lachman Singh** (supra) and **Karnail Singh** (supra) was reiterated in **Willie (William) Slaney** (Supra) wherein Justice Vivian Bose speaking for the Bench while referring to these two decisions held as under:

> **"(49). The following cases afford no difficulty because they directly accord with the view we have set out at length above. In Lachman Singh v. The State, AIR 1952 SC 167, it was held that when there is a charge under section 302 of the Indian Penal Code read with section 149 and the charge under section 149 disappears because of the acquittal of some of the accused, a conviction under section 302 of the Indian Penal Code read with section 34is good even though there is no separate charge under section 302 read with section 34, provided the accused could have been so charged on the facts of the case.**
>
> **The decision in Karnail Singh v. The State of Punjab, AIR 1954 SC 204 is to the**

same effect and the question about prejudice was also considered."

52. This principle of law was then reiterated after referring to law laid down in **Willie (William) Slaney** (Supra) in the case reported in **Chittarmal** vs. **State of Rajasthan** (2003) 2 SCC 266 in the following words:

"14. It is well settled by a catena of decisions that section 34 as well as section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre- concert. Though there is substantial difference between the two sections, 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. Thus, if several persons numbering five or more, do an act and intend to do it,

both sections 34 and section 149 may apply. If the common object 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 it does involve a common intention then the substitution of section 34 for section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non applicability of section 149 is, therefore, no bar in convicting the appellants under section 302 read with section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. (See Barendra Kumar Ghosh Vs. King Emperor: AIR 1925 PC 1; Mannam Venkatadari and others vs. State of Andhra Pradesh :AIR 1971 SC 1467; Nethala Pothuraju and others vs. State of Andhra Pradesh : AIR 1991 SC 2214 and Ram Tahal and others vs. State of U.P. : AIR 1972 SC 254)"

53. In the light of the aforementioned principle of law stated by this Court which is now fairly well settled, we have to now examine the evidence of this case with a view to find out as to whether the High Court was justified in convicting appellant Nos. 2 and 3 herein for commission of offence of murder with the aid of Section

34 IPC which was initially not the charge framed against the appellants herein by the Sessions Judge.

54. Having perused the entire evidence and legal position governing the issues arising in the case, we have formed an opinion that the appeal filed by appellant Nos. 2 and 3 deserves to be allowed and the conviction of appellant Nos. 2 and 3 deserves to be altered to Section 324 IPC. This we say for the following reasons:

55. First, once eight co-accused were acquitted by the High Court under Section 302/149 IPC by giving them the benefit of doubt and their acquittal attained finality, the charge under Section 149 IPC collapsed against the three appellants also because there could be no unlawful assembly consisting of less than five accused persons. In other words, the appellants (3 in number) could not be then charged with the aid of Section 149

IPC for want of numbers and were, therefore, rightly not proceeded with under Section 149 IPC.

56. Second, keeping in view the law laid down by this Court in the cases referred *supra*, the High Court though had the jurisdiction to alter the charge from Section 149 IPC to Section 34 IPC *qua* the three appellants, yet, in our view, in the absence of any evidence of common intention *qua* the three appellants so as to bring their case within the net of Section 34 IPC, their conviction under Section 302/34 IPC is not legally sustainable.

57. In other words, in our view, the prosecution failed to adduce any evidence against the three appellants to prove their common intention to murder Mahendro Bai. Even the High Court while altering the charge from Section 149 IPC to Section 34 IPC did not refer to any evidence nor gave any reasons as to on what basis these three appellants could still be proceeded with under

Section 34 IPC notwithstanding the acquittal of remaining eight co-accused.

58. It was the case of the prosecution since inception that all the eleven accused were part of unlawful assembly and it is this case, the prosecution tried to prove and to some extent successfully before the Sessions Judge which resulted in the conviction of all the eleven accused also but it did not sustain in the High Court.

59. In our view, the evidence led by the prosecution in support of charge under Section 149 IPC was not sufficient to prove the charge of common intention of three appellants under Section 34 IPC though, as mentioned above, on principle of law, the High Court in its appellate jurisdiction could alter the charge from Section 149 to Section 34 IPC.

60. Section 34 IPC does not, by itself, create any offence whereas it has been held that Section 149 IPC

does. As mentioned above, the prosecution pressed their case since inception and accordingly adduced evidence against all the accused alleging that all were the members of unlawful assembly under Section 149 IPC and not beyond it. The Sessions Court, therefore, rightly framed a charge to that effect.

61. If the prosecution was successful in proving this charge in the Sessions Court against all the accused persons, the prosecution failed in so proving in the High Court.

62. The prosecution, in our view, never came with a case that all the 11 accused persons shared a common intention under Section 34 IPC to eliminate Mahendro Bai and nor came with a case even at the appellate stage that only 3 appellants had shared common intention independent of 8 co-accused to eliminate Mahendro Bai.

63. When prosecution did not set up such case at any stage of the proceedings against the appellants nor adduced any evidence against the appellants that they (three) prior to date of the incident had at any point of time shared the "common intention" and in furtherance of sharing such common intention came on the spot to eliminate Mahendro Bai and lastly, the High Court having failed to give any reasons in support of altered conviction except saying in one line that conviction is upheld under Section 302/34 IPC in place of Section 302/149 IPC, the invoking of Section 34 IPC at the appellate stage by the High Court, in our view, cannot be upheld.

64. True it is that “Lalkara” was given by Mala Singh - appellant No.1 (since dead) but it was not to eliminate Mahindrao Bai - the deceased.

65. Learned counsel for the respondent(State) was not able to point out any evidence that the appellants

ever shared common intention to eliminate Mahendro Bai independent of acquitted eight accused. We are, therefore, unable to find any basis to sustain the conviction of the appellants under Section 302 read with Section 34 IPC for want of any evidence of the prosecution.

66. Now we come to the next issue. It has come in evidence that Mala Singh(A-7) hit with a Farsa and Puran Singh(A-3) fired gun shot which hit Mahendro Bai. As per post-mortem report, Mahendro Bai died due to gun shot injury. So far as the role of appellant Nos. 2 and 3 in the crime is concerned, both hit single blow - one on hand and other on cheek of Mahendro Bai prior to other two accused-Mala Singh and Puran Singh inflicting their assault on her.

67. As per post-mortem report, both the assault made by the appellant Nos. 2 and 3 caused simple injury to Mahendro Bai which did not result in her

death and nor could result in her death. (see injury Nos. 2 and 3 in the evidence of PW-3 Dr. P.S. Parihar)

68. In a case of this nature, when there is a fight between the two groups and where there are gun shots exchanged between the two groups against each other and when on evidence eight co-accused are completely let of and where the State does not pursue their plea of Section 149 IPC against the acquitted eight accused which attains finality and where the plea of Section 34 IPC is not framed against any accused and where even at the appellate stage no evidence is relied on by the prosecution to sustain the charge of Section 34 IPC *qua* the three accused appellants independent of eight acquitted co-accused and when out of two main accused assailants, one has died and the other is acquitted and lastly, in the absence of any reasoning given by the High Court for sustaining the conviction of the three appellants in support of alteration of the charge, we are

of the considered view that the two appellants are entitled to claim the benefit of entire scenario and seek alteration of their conviction for commission of the offence punishable under Section 324 IPC simplicitor rather than to suffer conviction under Section 302/34 IPC, if not complete acquittal alike other eight co-accused.

69. We are, therefore, of the considered opinion that appellant Nos. 2 and 3 could at best be convicted for an offence punishable under Section 324 IPC and not beyond it on the basis of their individual participation in the commission of the crime.

70. Learned counsel for the appellants then stated that out of the total jail sentence awarded, appellant Nos. 2 and 3 has already undergone around seven years of jail sentence when both were released on bail by orders of this Court on 07.07.2009. So far as the appellant No. 3 is concerned, she is an aged lady.

71. Taking into consideration the fact that the appellants Nos. 2 and 3 have already undergone seven years of jail sentence and appellant No. 3 is an aged lady and is also on bail for the last 10 years and that both did not breach any condition of the bail in last the 10 years, we are inclined to allow the appeal and while setting aside the conviction and sentence of the appellant Nos. 2 and 3 under Section 302/34 IPC, convert their conviction under Section 324 IPC and sentence them to what they have "already undergone" and impose a fine of Rs.10,000/- on each appellant and in default in payment of fine, to further undergo three months' simple imprisonment.

72. In other words, the appellants (Nos.2 & 3) need not undergo any jail sentence than what they have already undergone provided each of the appellants deposit Rs.10,000/- as fine amount within three months from the date of this order else both the

appellants will have to undergo three months simple imprisonment in default of non-deposit of fine amount.

73. Before parting, we place on record a word of appreciation for the valuable services rendered by Mr. Karan Bharihoke *amicus curiae* appointed by this Court. He argued the case ably and fairly and also filed effective written submissions, which enabled us to examine the issue involved in this appeal properly.

74. The appeal thus succeeds and is allowed in part. The impugned order is modified to the extent indicated above.

.....J.
(ABHAY MANOHAR SAPRE)

.....J.
(R. SUBHASH REDDY)

New Delhi,
February 12, 2019