A NAND KISHORE

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 437 of 2005)

JULY 07, 2011

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[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Penal Code, 1860 – s. 302/34 – Conviction under – Quarrel between parties over recovery of dues by victim from C *co-accused – Co-accused caught hold of victim and main accused stabbed him whereas appellant-accused pelted stones at victim resulting in the death of the victim – Conviction of three accused u/s. 302/34 and sentenced to life imprisonment by courts below – Appeal before Supreme* D *Court dismissed as regards the main accused and co-accused – Conviction of appellant – Challenge to – Held: As regards the appellant, there is definite documentary, ocular and medical evidence, and statement of defence witness to repel the plea of the appellant that he had been falsely* E *implicated – Knife was recovered in furtherance to the disclosure statement made by main accused and injuries on the body of the victim were inflicted by the knife – Discrepancies between the statements of the alleged eye witnesses as well as the medical evidence does not affect the* F *prosecution case – All the three accused had a common intention in the commission of brutal crime – Thus, prosecution has been able to establish the charge beyond reasonable doubt – Conviction of appellant u/s. 302/34 upheld.*

G *s. 34 – Common intention – Application of s. 34 – General principles – Explained.*

According to the prosecution, the victim had to recover some amount from 'M'. When the victim went to recover the said amount from 'M', a quarrel took place and

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'M' along with 'D' and appellant-'N' killed the victim. PW-1, complainant witnessed that M had held the arms of the victim and 'D' was stabbing him with knife and 'N' was pelting stones at him. The victim later succumbed to his injuries. Investigation was carried out. A knife was recovered on the disclosure of 'D' and bricks and clothes of the deceased were also recovered. The Sessions Judge convicted 'D' for an offence under Section 302 IPC while 'M'and the appellant-'N' were convicted for an offence under Section 302/34 and each of them were awarded life sentence with fine. The High Court upheld the order. Therefore, the accused filed Special Leave Petition before the Supreme Court. This Court dismissed the SLP filed by 'M' and 'D'. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1. On facts, all the three accused had a common intention in commission of the said brutal crime. Each one of them participated though the vital blows were given by 'D'. But for 'M' catching hold of arms of the deceased probably the death could have been avoided. The appellant showed no mercy and continued pelting stones on the deceased even when he collapsed to the ground. The prosecution has been able to establish the charge beyond reasonable doubt. [Para 16] [1168-E-G]

2.1. PW1, complainant had clearly stated that 'D' had inflicted the injuries upon the body of the deceased with a knife. According to Investigating officer-PW8 and PW2, the said knife was recovered by Panchnama of recovery. However, PW1 did not specifically state in the court that the knife was recovered by going to the house of the accused. There is some element of difference between these statements but it in no way amounts to a material contradiction or discrepancy which has caused any prejudice to the accused. PW1 in his examination stated

A that after arrest of 'D', the police had questioned him and he had told them about the knife which was recovered. However, he stated that he does not remember the exact place from where the recovery was made due to lapse of time. However, with certainty he stated that a panchnama B was prepared and it was signed. In his cross examination he categorically stated that the knife was recovered before him when he was called in Kotwali and he had seen that knife in kotwali and the knife had been recovered before the statement of 'D' was recorded'. This C evidence of the witness has to be read in conjunction with the statement of PW8 and PW 2. Upon such reading recovery of the knife from the house of the accused is established. The doctor referred to various injuries on the body of the deceased including abrasions and small cuts D which could have been a result of pelting of stones by the appellant upon the deceased even after he had fallen on the ground. [Para 9] [1162-D-H; 1163-A-B]

2.2. The evidentiary value of a statement should normally be appreciated in its correct perspective, E attendant circumstances and the context in which the statement was made. As far as the alleged discrepancy with regard to recovery of knife is concerned, it is not possible for the court to attach undue importance to this aspect. The court has to form an opinion about the F credibility of the witness and record a finding as to whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of G credibility. Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements, as the same may be elaborations of the statement made by the witness earlier. Irrelevant details which do not in any way corrode the credibility of a H

witness cannot be labelled as omissions or contradictions. The omissions which amount to contradictions in material particulars, i.e., materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. The knife was recovered in furtherance to the disclosure statement made by 'D'. The recovery memo which was duly proved in accordance with law, according to the medical evidence given by PW5, and the statement of the investigating officer, PW8, clearly show that knife was recovered from the house of 'D' and the injuries on the body of the deceased were inflicted by the knife. Thus, these alleged discrepancies can hardly be of any advantage to the accused. [Para 9] [1163-C-H; 1164-A-B]

State Represented by Inspector of Police v. Saravanan and Anr. (2008) 17 SCC 587: 2008 (14) SCR 405; *Arumugam v. State* (2008) 15 SCC 590: 2008 (14) SCR 309; *Mahendra Pratap Singh v. State of Uttar Pradesh* (2009) 11 SCC 334: 2009 (2) SCR 1033 – relied on.

2.3. Witness 'R' was given up as the prosecution felt that he would be hostile to the case of the prosecution but 'S' himself was examined by the accused as its own witness. Once 'S' was examined as witness of the defence, the objection taken by the appellant that the court should draw adverse inference from non-examination of these witnesses loses its legal content. DW1, though appeared as witness for the defence, supported the case of the prosecution resulting in his being declared as a hostile witness by the counsel appearing for the accused. Therefore, the statement of DW1 could be and has rightly been relied upon by the Sessions Judge while convicting the accused of the offence. The statement of DW1 has fully corroborated the statement of PW1. He stated that there were nearly 20 to 30 houses in that Mohalla and denied the suggestion made to him by the defence counsel that he had not seen

A anything on the fateful day and was not witness to the occurrence. He also, specifically, denied the suggestion that he was related to the family of the deceased. In his cross-examination, he clearly stated that 'M' had caught hold of both the hands of the deceased and 'D' had given
B blows on the chest of the deceased by a knife and 'N' had pelted stones on the deceased. He also stated that he had taken the deceased to the hospital along with PW1. Confronted with this evidence, the appellant can hardly even attempt to argue that there is no definite evidence
C on record to prove the commission of the offence by the appellant. There is definite documentary, ocular and medical evidence and more definitely statement of defence witness itself to repel the plea of the appellant that he has been falsely implicated in the case. [Para 10]
D [1164-C-H; 1165-A]

3.1. The three ingredients of Section 34 IPC are that the criminal act is done by several persons; that such act is done in furtherance of the common intention of all; and that each of such persons is liable for that act in the same
E manner as if it were done by him alone would guide the court in determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence.
F Once criminal act and common intentions are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 IPC must be done by several persons. The emphasis in this part of the Section is on
G the word 'done'. It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with
H the aid of Section 34 must, therefore, be a participant in

the joint act which is the result of their combined activity. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally, i.e., he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between 'common intention' on the one hand and 'mens rea' as understood in criminal jurisprudence on the other. Common intention is not alike or identical to mens rea. The latter may be co-incidental with or collateral to the former but they are distinct and different. [Para 11] [1165-B-H; 1166-A-E]

3.2. Section 34 also deals with constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. If the common intention leads to the commission of the criminal offence charged, each one of the persons sharing the common intention is constructively liable for the criminal act done by one of them. [Para 12] [1166-F-G]

Brathi alias Sukhdev Singh v. State of Punjab (1991) 1 SCC 519: 1990 (2) Suppl. SCR 503 – referred to.

3.3. While dealing with such cases, the common intention or state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any pre-determined plan to commit such an offence. This will always depend on the facts and circumstances of the case, like in the instant case the

A deceased, all alone and unarmed went to demand money from 'M' but 'M', 'D' and the appellant got together outside their house and as is evident from the statement of the witnesses, they not only became aggressive but also committed a crime and went to the extent of stabbing him
B over and over again at most vital parts of the body puncturing both the heart and the lung as well as pelting stones at him even when he fell on the ground. But for their participation and a clear frame of mind to kill the deceased, 'D' probably would not have been able to kill
C the deceased. The role attributable to each one of them, thus, clearly demonstrates common intention and common participation to achieve the object of killing the deceased. In other words, the criminal act was done with the common intention to kill the deceased 'M'. The trial
D court rightly noticed that all the accused persons coming together in the night time and giving such serious blows and injuries with active participation shows a common intention to murder the deceased. Thus, the conclusions arrived at by the trial court and the High Court would not
E call for any interference. [Para 13] [1166-H; 1167-A-E]

Shivalingappa Kallayanappa and Ors. v. State of Karnataka 1994Supp. (3) SCC 235; *Jai Bhagwan and Ors. v. State of Haryana* (1999) 3 SCC 102 – referred to.

Case Law Reference:

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2008 (14) SCR 405	Relied on.	Para 9
2008 (14) SCR 309	Relied on.	Para 9
2009 (2) SCR 1033	Relied on.	Para 9
1990 (2) Suppl. SCR 503	Referred to.	Para 15
1994 Supp. (3) SCC 235	Referred to.	Para 14
(1999) 3 SCC 102	Referred to.	Para 15

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
H No. 437 of 2005.

From the Judgment & Order dated 26.8.2004 of the High Court of Judicature of Madhya Pradesh, Jabalpur, bench at Gwalior in Criminal Appeal No. 21 of 1999.

T.N. Singh for the Appellant.

Vikas Bansal (for Vibha Datta Makhija) for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of the High Court of Judicature of Madhya Pradesh at Jabalpur dated 26th August, 2004 affirming the judgment of the Sessions Judge, Datia, Madhya Pradesh dated 30th December, 1998 convicting all the three accused (appellants/petitioners herein) for an offence under Section 302 read with Section 34 of the Indian Penal Code (IPC) awarding life sentence to each one of them with a fine of Rs.2,000/- each in default thereto to undergo rigorous imprisonment for three years.

2. We must notice that vide order dated 28th May, 2005, the Special Leave Petition in respect of Petitioner Nos.2 and 3, namely, Mahesh Dhimar and Dinesh Dhimar had already been dismissed. Thus, we have to consider the present appeal only in respect of Appellant No.1, namely, Nand Kishore.

3. The learned counsel appearing on behalf of appellant No.1, while impugning the judgment under appeal contended that :

A. the prosecution has not been able to prove its case beyond reasonable doubt. In fact, there is no direct evidence to sustain the conviction of the accused. It is further argued that on the contrary, there are serious contradictions between the statements of the alleged eye-witnesses as well as the medical evidence. The accused, thus, was entitled to benefit of doubt and consequent acquittal.

A B. In any case, the appellant could not have been convicted at all for an offence under Section 302 read with Section 34 IPC as he had no common intention with other accused. It is further submitted that he shared neither participated in the B commission of the crime nor was he carrying any weapon. On the cumulative reading of the evidence, the ingredients of Section 34 IPC are not satisfied and, therefore, conviction of the appellant is vitiated in law.

C 4. In order to examine the merit or otherwise of these contentions, it would be useful for us to refer to the necessary facts giving rise to the present appeal.

The incident took place on 18th June, 1997 in the night at about 9-9.30 p.m. at Christian Ka Pura, Bangar Ki Haveli. D Some young boys of the vicinity informed the complainant, Brij Kishore Bidua, who was later examined as PW1 that a quarrel has taken place between Mahavir, the deceased, and Mahesh Dhimar near the house of Mahesh Dhimar. Upon receiving this information, Brij Kishore, along with Sunil Badhaulia, went E running to the Christian Ka Pura where they saw that Mahesh Dhimar was holding both the arms of Mahavir and Dinesh Dhimar was stabbing him with knife in the chest on the left side and Nand Kishore was also pelting stones at him. After receiving these injuries, Mahavir collapsed to the ground. As per the F witnesses even after Mahavir fell, Nand Kishore kept pelting stones on him and then they ran away from the site. Brij Kishore and Sunil carried Mahavir to the hospital on their scooter where the doctor examined him and declared him brought dead. It is the case of the prosecution that Mahavir had some dues to G recover from Mahesh Dhimar and to recover that money, Mahavir had gone to Mahesh Dhimar but the fight occurred and without any resistance from Mahavir, all the three accused killed him in the manner afore-referred.

At about 10 p.m. the same day Brij Kishore, the brother H of the deceased Mahavir, lodged a report in the Police Station

at Kotwali Datia where a criminal case No.175/97 under Section 302 read with Section 34 IPC was registered. This was investigated by the Investigating Officer who, during investigation, prepared or caused to be prepared post mortem report, site plan, recovered a knife on the disclosure of Dinesh, recovered bricks, took sample of soil soaked in blood and clothes of the deceased. These things were sent to the forensic science laboratory for examination. After completing the investigation, challan was filed against all the accused persons. They were tried by the Court of competent jurisdiction. The Sessions Judge, Datia, by a detailed and well reasoned judgment dated 30th December, 1998, convicted accused Dinesh for an offence under Section 302 IPC while the other two accused, namely, Nand Kishore and Mahesh Dhimar were convicted for an offence under Section 302 read with Section 34 IPC and sentenced them as aforestated. This judgment was unsuccessfully assailed by the accused before the High Court which dismissed the appeal declining to interfere either with the judgment of conviction or the order of sentence.

5. Dissatisfied from the concurrent judgments of the courts, the accused has filed the present appeal.

6. The statements of PW1, Brij Kishore, Dr. P.K. Srivastava, PW5 and PW8, Narendra Singh, (Investigating Officer) have to be examined in some detail.

7. PW1 is the eye-witness to the occurrence and while fully supporting the case of the prosecution, he stated that Mahesh Dhimar's house was about 100 ft. away from the place of occurrence. He narrated the above facts and stated that Rajendra and Sunil had also reached the spot following him and they had witnessed the occurrence. They took the deceased to the hospital where he was declared brought dead. This witness did not refer to any animosity between the deceased and the accused. PW8 has referred to the entire investigation, various recovery memos as well as registration of the FIR (Exhibit P1). Statement of PW1 is corroborated with the report of Exhibit P1.

A 8. Dr. P.K. Srivastava, PW5, stated that on 19th June, 1997 at around 7.00 O'clock in the morning, he had examined the dead body of the deceased and there were incised wounds on his body on the left side of the chest, right thigh, in the heart in left lung and 11-12 other lacerated scratches and internal B wounds etc. According to him, injury on the heart caused death and the deceased had died round about 10-14 hours before the post mortem examination.

9. There are two main discrepancies which have been highlighted on behalf of the appellant to claim the benefit of C doubt. Firstly, that according to the doctor, there were nearly 16 wounds on the body of the deceased, while the eye-witnesses have referred to just two blows by accused Dinesh Dhimar on the left side of the deceased; and secondly that the injuries were stated to have only been caused by a sharp D weapon. Brij Kishore (PW1) had clearly stated that Dinesh had inflicted the injuries upon the body of the deceased with a knife. According to Investigating officer (PW8) and Munna Lal (PW2), the said knife was recovered by Panchnama of recovery (Ex. P-6). However, PW1 did not specifically state in the Court that E the knife was recovered by going to the house of the accused. There is some element of difference between these statements but it in no way amounts to a material contradiction or discrepancy which has caused any prejudice to the accused. These so-called discrepancies can easily be explained and F have been dealt with in the judgment under appeal appropriately. In his examination in which PW1 has stated that after arrest of Dinesh, the police had questioned him and he had told them about the knife which was recovered. However, he stated that he does not remember the exact place from G where the recovery was made due to lapse of time. He, however, with certainty states that a *panchnama* was prepared and it was signed. In his cross examination he categorically stated "the knife was recovered before me when I was called in Kotwali by Vermaji and I had seen that knife in kotwali and the knife had been recovered before the statement of Dinesh H was recorded'. This evidence of the witness has to be read in

conjunction with the statement of PW8 and PW 2. Upon such reading recovery of the knife from the house of the accused is established. Further, the doctor has referred to various injuries on the body of the deceased including abrasions and small cuts which could have been a result of pelting of stones by Nand Kishore upon the deceased even after he had fallen on the ground. While rejecting the contention with respect to the second alleged discrepancy, it must be borne in mind that the Court has to examine the statement of a witness as a whole. The Court may not be in a correct position to arrive at any final conclusion while only reading or relying upon a sentence in the statement of a witness that too by reading it out of context. The evidentiary value of a statement should normally be appreciated in its correct perspective, attendant circumstances and the context in which the statement was made. As far as the alleged discrepancy with regard to recovery of knife is concerned, it is not possible for the Court to attach undue importance to this aspect. The court has to form an opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations *per se* do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements, as the same may be elaborations of the statement made by the witness earlier. "*Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions.*" The omissions which amount to contradictions in material particulars, i.e., materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: *State Represented by Inspector of Police v. Saravanan & Anr.* [(2008) 17 SCC 587], *Arumugam v. State* [(2008) 15 SCC 590] and *Mahendra Pratap Singh v. State of Uttar Pradesh* [(2009) 11 SCC 334]. The knife was recovered in furtherance to the disclosure statement made by Dinesh Dhimar. The recovery memo which

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A was duly proved in accordance with law, according to the medical evidence given by PW5, and the statement of the investigating officer, PW8, clearly show that knife was recovered from the house of Dinesh Dhimar and the injuries on the body of the deceased were inflicted by the knife. Thus, B these alleged discrepancies can hardly be of any advantage to the accused.

10. Another very significant aspect of this case is that the prosecution had not examined Rajendra and Sunil as prosecution witnesses and this issue was raised on behalf of C the defence that the Court should draw adverse inference from non-examination of these witnesses. Witness Rajendra was given up as the prosecution felt that he would be hostile to the case of the prosecution but Sunil himself was examined by the accused as its own witness. Once Sunil was examined as D witness of the defence, the objection taken by the appellant loses its legal content. DW1, though appeared as witness for the defence, supported the case of the prosecution resulting in his being declared as a hostile witness by the counsel appearing for the accused. Therefore, the statement of DW1 E could be and has rightly been relied upon by the learned Sessions Judge while convicting the accused of the offence. The statement of DW1 has fully corroborated the statement of PW1. He stated that there were nearly 20 to 30 houses in that *Mohalla* and denied the suggestion made to him by the F defence counsel that he had not seen anything on the fateful day and was not witness to the occurrence. He also, specifically, denied the suggestion that he was related to the family of the deceased. In his cross-examination, he has clearly stated that Mahesh Dhimar had caught hold of both the hands of the deceased and Dinesh Dhimar had given blows on the G chest of the deceased by a knife and Nand Kishore had pelted stones on the deceased. Lastly, he also stated that he had taken the deceased to the hospital along with PW1. Confronted with this evidence, the appellant can hardly even attempt to argue that there is no definite evidence on record to prove the H

commission of the offence by the appellant. There is definite documentary, ocular and medical evidence and more definitely statement of defence witness itself to repel the plea of the appellant that he has been falsely implicated in the case. A

11. Now, we would examine whether the conviction of the appellant under Section 302 with the aid of Section 34 by the courts is sustainable in law or not. For the application of Section 34 IPC, it is difficult to state any hard and fast rule which can be applied universally to all cases. It will always depend upon the facts and circumstances of the given case whether the persons involved in the commission of the crime with a common intention can be held guilty of the main offence committed by them together. Provisions of Section 34 IPC come to the aid of law while dealing with cases of criminal offence committed by a group of persons with common intention. Section 34 reads as under : B C D

> "34. Acts done by several persons in furtherance of common intention.—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." E

A bare reading of this section shows that the section could be dissected as follows :

(a) Criminal act is done by several persons;

(b) Such act is done in furtherance of the common intention of all; and F

(c) Each of such persons is liable for that Act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court is determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once criminal act and common intentions are proved, then by fiction of law, criminal G H

A liability of having done that act by each person individually would arise. The criminal act, according to Section 34 IPC must be done by several persons. The emphasis in this part of the section is on the word 'done'. It only flows from this that before a person can be convicted by following the provisions of Section B 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of C their combined activity. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally, i.e., he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into D serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between 'common intention' E on the one hand and '*mens rea*' as understood in criminal jurisprudence on the other. Common intention is not alike or identical to *mens rea*. The latter may be co-incidental with or collateral to the former but they are distinct and different.

F 12. Section 34 also deals with constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. If the common intention leads to the G commission of the criminal offence charged, each one of the persons sharing the common intention is constructively liable for the criminal act done by one of them. {Refer to *Brathi alias Sukhdev Singh v. State of Punjab*, [(1991) 1 SCC 519]}.

13. Another aspect which the Court has to keep in mind H while dealing with such cases is that the common intention or

state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any pre-determined plan to commit such an offence. This will always depend on the facts and circumstances of the case, like in the present case Mahavir, all alone and unarmed went to demand money from Mahesh but Mahesh, Dinesh and Nand Kishore got together outside their house and as is evident from the statement of the witnesses, they not only became aggressive but also committed a crime and went to the extent of stabbing him over and over again at most vital parts of the body puncturing both the heart and the lung as well as pelting stones at him even when he fell on the ground. But for their participation and a clear frame of mind to kill the deceased, Dinesh probably would not have been able to kill Mahavir. The role attributable to each one of them, thus, clearly demonstrates common intention and common participation to achieve the object of killing the deceased. In other words, the criminal act was done with the common intention to kill the deceased Mahavir. The trial court has rightly noticed in its judgment that all the accused persons coming together in the night time and giving such serious blows and injuries with active participation shows a common intention to murder the deceased. In these circumstances, the conclusions arrived at by the trial Court and the High Court would not call for any interference.

14. The learned counsel appearing for the appellant had relied upon the judgment of this Court in the case of *Shivalingappa Kallayanappa & Ors. v. State of Karnataka* [1994 Supp. (3) SCC 235] to contend that they could not be charged or convicted for an offence under Section 302 with the aid of Section 34 IPC. The said judgment has rightly been distinguished by the High Court in the judgment under appeal. In that case, the Supreme Court had considered the role of each individual and recorded a finding that there was no common object on the part of the accused to commit murder. In that case, the court was primarily concerned with the common object falling within the ambit of Section 149, IPC. In

A fact, Section 34 IPC has not even been referred to in the afore-referred judgment of this Court.

15. Another case to which attention of this Court was invited is *Jai Bhagwan & Ors. v. State of Haryana* [(1999) 3 SCC 102]. B In that case also, the Court had discussed the scope of Section 34 IPC and held that common intention and participation of the accused in commission of the offence are the ingredients which should be satisfied before a person could be convicted with the aid of Section 34 IPC. The Court held as under:

C "**10.** To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (*i*) common intention and (*ii*) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the D individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a E common intention. It has to be inferred from the facts and circumstances of each case."

16. The facts of the present case examined in light of the above principles do not leave any doubt in our minds that all the three accused had a common intention in commission of F this brutal crime. Each one of them participated though the vital blows were given by Dinesh Dhimar. But for Mahesh catching hold of arms of the deceased probably the death could have been avoided. Nand Kishore showed no mercy and continued pelting stones on the deceased even when he collapsed to the G ground. The prosecution has been able to establish the charge beyond reasonable doubt.

17. The judgments of the courts below do not suffer from any legal infirmity or appreciation of evidence. While finding no merit in the appeal, we dismiss the same.

H D.G. Appeal dismissed.