A VIJENDRA SINGH

v.

STATE OF UTTAR PRADESH

(Criminal Appeal No. 1448 of 2010)

B JANUARY 04, 2017

[DIPAK MISRA AND R. F. NARIMAN, JJ.]

PENAL CODE, 1860: ss. 302 r/w s. 34 – Murder – Common intention – Enmity between accused and his family and the C *prosecution witnesses – On the fateful day, murder of nephew of PW 1, at his tube well – PW 2, NS and PW 3 heard sound of gun fire from inside the shed of the tube well – On reaching the place of incident, they saw appellant accused along with others, armed with weapons coming out of the shed – Thereafter, accused fled away – FIR lodged by PW 1 – Medical evidence that death of deceased* D *due to gunshot injury – Conviction u/s. 302/34 and sentenced to rigorous imprisonment for life, by courts below – Thereafter, death of two accused – On appeal, held: Evidence in its entirety clearly shows that the accused persons armed with weapons were present in the shed, they were seen going away and the deceased was found* E *lying in a pool of blood – Accused-appellants had accompanied other accused persons who were armed with gun and they themselves carried lathi and ballam respectively – Carrying of weapons, arrival at a particular place and at the same time, entering into the shed and murder of the deceased attract constructive liability u/s. 34 – No blackening or scorching around the wound, would not belie* F *that the injury was not inflicted by the firing from the gun – Further, the testimony of PWs 1-3 about the incident cannot be discredited – They satisfy the test of scrutiny and cautious approach – Non-examination of certain witnesses would not effect the prosecution case – Thus, order passed by the courts below as regards appellant* G *M upheld – As regards appellant V, he having remained in custody for more than the maximum period, is released from the custody – Juvenile Justice (Care and Protection of Children) Act, 2000 – ss. 7-A, 20(amended) – Juvenile Justice (Care and Protection of Children) Rules, 2007.*

s. 34 – Common intention – Applicability of s. 34 – Held: H

Applicability of s. 34 is a question of fact and is to be ascertained from the evidence brought on record – Common intention can be conceived immediately or at the time of offence and is determined on the facts. A

Evidence – Medical evidence that one gun shot injury attributed to pistol – However, no blackening or scorching around the gunshot wound – Credibility of the prosecution case – Held: Doctor stated that there is no blackening or scorching around the wound, but that would not belie that the injury was not inflicted by the firing from the gun – Doctor opined that the death of the deceased was caused by gunshot injury. B

C

Dismissing Criminal Appeal No.1452 of 2010 and disposing of Criminal Appeal No. 1448 of 2010, the Court

HELD: 1.1 The accused-appellants have been convicted with the aid of Section 34 IPC. It has come in evidence of PW-2 that the accused M was armed with lathi and accused VS was armed with a ballam and they were in the company of other accused. When the evidence in its entirety is studiedly scrutinized, it clearly shows that the accused persons were present in the shed, they were seen going away and the deceased was found lying in a pool of blood. The witnesses specifically stated about the weapons being carried by the accused persons. It was submitted that the prosecution story rests on the gun shot injury but there is no evidence with regard to injury caused by the lathi or ballam. It is relevant to state that cartridges from the spot were recovered and PW-6 Doctor who conducted the post mortem found gunshot wound. There was no blackening or scorching around the wound. True it is that the doctor stated that there was no blackening or scorching around the wound, but that would not belie that the injury was not inflicted by the firing from the gun. He opined that the death of the deceased was caused by gunshot injury. [Para 13] [120-F-G; 121-A] D E F

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1.2 Whether the crime is committed in furtherance of common intention or not, would depend upon the material brought on record and the appreciation thereof in proper perspective. Facts of two cases cannot be regarded as similar. Common intention can be gathered from the circumstances that are brought on record by the prosecution. Common intention can be conceived H

A immediately or at the time of offence. Thus, the applicability of Section 34 IPC is a question of fact and is to be ascertained from the evidence brought on record. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the fact of the case and circumstances of the situation. Whether in a proved situation all B the individuals concerned have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have been developed and thereby intended by all of them, is a question that has to be determined on the facts. [Para 24] [125-D-F]

C 1.3 Absence of any injury caused by a lathi cannot be the governing factor to rule out Section 34 IPC. It is manifest from the evidence that the accused-appellants had accompanied the other accused persons who were armed with gun and they themselves carried lathi and ballam respectively. The carrying of D weapons, arrival at a particular place and at the same time, entering into the shed and murder of the deceased definitely attract the constructive liability as engrafted under Section 34 IPC. [Para 25] [126-B]

1.4 The submission that all the eyewitnesses are related to E the deceased BP and they being interested witnesses, their version requires scrutiny with care, caution and circumspection and when their evidence is scanned with the said parameters, it does not withstand the said test for which the case set forth by the prosecution gets corroded and the principle of beyond reasonable doubt gets shattered, cannot be accepted for PWs-1 F to 3 have deposed in detail about the previous enmity between the parties, their presence at the spot, the weapons the accused persons carried, their proximity to the shed and establishment of the identity of all the four accused. They have also testified as regards the deceased lying in a pool of blood. There is no reason G why they would implicate the appellants for the murder of their relation leaving behind the real culprit. That apart, nothing has been elicited in the cross-examination for which their testimony can be discredited. [Para 26] [126-C-E]

1.5 There is no material on record to come to the conclusion H that PW-3 could not have accompanied PW-2 while he was going

to the shed near the tube-well. What has been elicited in the cross-examination is that he was not going daily to the tube-well. The Court cannot be oblivious of the rural milieu. No adverse inference can be drawn that he was not going daily and his testimony that he had accompanied PW-2 on the fateful day should be brushed aside. Thus, his evidence is neither doubtful nor create any suspicion in the mind. Thus, the real test is whether the testimony of PWs1 to 3 are intrinsically reliable or not. The same is scrutinized and there is no hesitation in holding that they satisfy the test of careful scrutiny and cautious approach. They can be relied upon. [Paras 28, 29] [127-G-H; 128-A-B]

1.6 It is noticeable from the decision of the trial court and the High Court, reliance has been placed on the testimony of PWs 1 to 3 and their version has been accepted. They have treated PW-2 and PW-3 as natural witnesses who have testified that the accused persons were leaving the place after commission of the offence and they had seen them quite closely. The submission that they were interested witnesses and their implication is due to inimical disposition towards accused persons has not been accepted. It has come out in evidence that witnesses and the accused persons belong to the same village. The submission that non-examination of NS and other two persons who had been referred to by PW-2 affects the prosecution version or creates any doubt in the mind of the Court, cannot be accepted. Such a conclusion is arrived at since the witnesses examined by the prosecution are trustworthy and the court can safely act on their testimony. There is no justification to draw any adverse inference against the prosecution. [Paras 30, 32] [128-C-E; 129-G; 130-A]

1.7 If a person is not present at the spot, the question of common intention does not arise. If the common intention is established, an accused can be convicted. The appellant MS had gone with other accused persons, who were carrying pistols and ballam. He himself was carrying a lathi, and appellant VS was carrying a ballam and accompanying others. Their intention was to go to the shed where the deceased was studying because of availability of the electric light, has been established. Common intention can be gathered from the facts and circumstances and

A **in the instant case, the same is clearly discernable. [Para 34] [130-F-H]**

1.9 A report was called for appellant-VS and he has been found to be a juvenile being 16 years 3 months 10 days old on the date of offence. The said report has gone unchallenged and the B **State, has fairly stated that he was a juvenile on the date of offence. The Court relying on Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 and the amendments introduced in Section 20 of the 2000 Act and the Juvenile Justice (Care and Protection of Children) Rules, 2007, remitted the matter to the Juvenile Justice Board with the observation that if he had** C **been detained for more than the maximum period for which a juvenile may be confined to a special home, the Board would release him from custody forthwith. As the appellant-VS remained in custody for more than the maximum period for which he could have been confined to a special home, while sustaining the** D **conviction, he is released from custody. [Para 36] [131-B-E]**

Pandurang and Ors. v. State of Hyderabad **AIR 1955 SC 216 : [1955] SCR 1083 – relied on.**

Pratap Singh v. State of Jharkhand & Ors. **[2005] 1 SCR 1019**; *Hari Ram v. State of Rajasthan and Anr.* E **(2009) 13 SCC 211 : [2009] 7 SCR 623**; *Suresh Sakharam Nangare v. State of Maharashtra* **(2012) 9 SCC 249 : [2012] 7 SCR 1186** ; *Jai Bhagwan and Ors. v. State of Haryana* **(1999) 3 SCC 102**; *Bijendra Bhagat v. State of Uttarakahand* **(2015) 13 SCC 99**; *Mohan* F *Singh & Anr. v. State of Punjab* **AIR 1963 SC 174 : [1962] Suppl. SCR 848**; *Harshadsingh Pahelvansingh Thakore v. State of Gujarat* **(1976) 4 SCC 640 : [1977] 1 SCR 626**; *Jitendra Singh v. State of Uttar Pradesh* **(2013) 11 SCC 193**; *Lallan Rai and Ors. v. State of Bihar* **(2003) 1 SCC 268 : [2002] 4 Suppl. SCR 188**; G *Goudappa and Ors. v. State of Karnataka* **(2013) 3 SCC 675 : [2013] 4 SCR 547**; *Kirpal and Bhopal v. State of U.P.* **AIR 1954 SC 706**; *Bharwad Mepa Dana and Anr. v. The State of Bombay* **AIR 1960 SC 289 : [1960] SCR 172**; *Hari Obula Reddy and Ors. v. State of Andhra* H *Pradesh* **(1981) 3 SCC 675**; *Kartik Malhar v. State of*

Bihar **(1996) 1 SCC 614 : [1995] 5 Suppl. SCR 239;** *Rana Pratap and Ors. v. State of Haryana* **(1983) 3 SCC 327;** *State of H.P. v. Gian Chand* **(2001) 6 SCC 71;** *Takhaji Hiraji v. Thakore Kubersing Chamansing and Ors.* **(2001) 6 SCC 145;** *Dahari* and Ors. *v. State of U.P* **(2012) 10 SCC 256 : [2012] 8 SCR 1219;** *Manjit Singh and Anr. v. State of Punjab and Anr* **(2013) 12 SCC 746 : [2013] 11 SCR 107;** *Joginder Singh v. State of Haryana* **(2014) 11 SCC 335 : [2013] 11 SCR 446 – referred to.**

Case Law Reference

[2005] 1 SCR 1019	**referred to**	**Para 7**
[2009] 7 SCR 623	**referred to**	**Para 7**
[2012] 7 SCR 1186	**referred to**	**Para 7**
(1999) 3 SCC 102	**referred to**	**Para 7**
(2015) 13 SCC 99	**referred to**	**Para 7**
[1962] Suppl. SCR 848	**referred to**	**Para 8**
[1977] 1 SCR 626	**referred to**	**Para 8**
(2013) 11 SCC 193	**referred to**	**Para 8**
[1955] SCR 1083	**relied on**	**Para 18**
[2002] 4 Suppl. SCR 188	**referred to**	**Para 22**
[2013] 4 SCR 547	**referred to**	**Para 23**
AIR 1954 SC 706	**referred to**	**Para 24**
[1960] SCR 172	**referred to**	**Para 24**
(1981) 3 SCC 675	**referred to**	**Para 26**
[1995] 5 Suppl. SCR 239	**referred to**	**Para 26**
(1983) 3 SCC 327	**referred to**	**Para 27**
(2001) 6 SCC 71	**referred to**	**Para 30**
(2001) 6 SCC 145	**referred to**	**Para 31**
[2012] 8 SCR 1219	**referred to**	**Para 31**
[2013] 11 SCR 107	**referred to**	**Para 31**
[2013] 11 SCR 446	**referred to**	**Para 31**

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1448 of 2010.

From the Judgment and Order dated 13.05.2009 of the High Court of Judicature at Allahabad in Criminal Appeal No. 1019 of 1981.

WITH

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Crl. A. No. 1452 of 2010.

Mukesh K. Giri, Adv. for the Appellant.

R. K. Dash, Sr. Adv., Ms. Archana Singh, Abhisth Kumar, Abhishek Chaudhary, Advs. for the Respondent.

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The Judgment of the Court was delivered by

DIPAK MISRA, J. Present appeals, by special leave, call in question the defensibility of the judgment of conviction and the order of sentence dated 13.05.2009 passed by the High Court of Judicature at Allahabad in Criminal Appeal No. 1019 of 1981 whereby the Division D Bench of the High Court has confirmed the judgment and order passed by the learned IV Additional Sessions Judge, Meerut in Sessions Trial No. 308 of 1979 whereunder the appellants along with two others stood convicted under Section 302 read with Section 34 of the Indian Penal Code (IPC) and visited with the sentence of life imprisonment.

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2. Filtering the unnecessary details, the facts which are necessary to be adumbrated for the adjudication of the instant appeals are that there was enmity between the accused, Dharam Pal and his family on the one side and Charan Singh, PW-1, on the other. Charan Singh, PW-1, Gajpal, PW-2, Tedha, PW-3 and Nepal Singh belong to village Dastoi, F to which the deceased, Badan Pal, the nephew of Charan Singh as well as the accused persons belong. As the prosecution story further unfurls, sometime prior to the occurrence, Gaje Singh, brother of the accused, Dharam Pal, was murdered and Charan Singh, PW-1, along with others had faced trial for his murder and eventually got acquitted. The occurrence leading to the murder of Badan Pal took place in the evening G hours of 26.03.1979. Badan Pal was a student and he used to stay overnight at his tube-well which had a shed in the jungle of village Sarva. On the date of occurrence, he was at the aforesaid tube-well. Gajpal, PW-2, and Nepal Singh in the fateful evening while carrying the meals for Badan Pal, on their way, met Tedha, PW-3, who wanted to irrigate H his fields from the aforesaid tube-well. All of them reached near the

said tube-well about 7.30 p.m. when they heard the sound of a gun fire from inside the "kotha" (shed) of the said tube-well. They reached the place without loss of any time and noticed that all the four accused, namely, Dhani Ram, Dharam Pal, Mahendra and Vijendra, came out of that "kotha". Dhani Ram and Dharam Pal carried pistols, Vijendra was armed with a ballam and Mahendra carried a lathi. On seeing them, they took to their heels. After they reached the place, they found Badan Pal lying dead with bleeding wounds. The aforesaid witnesses identified the accused persons in the light of the electric bulb fixed on the roof of the tube-well as well as in the torch light. A report of the occurrence was prepared by Devendra Singh with the assistance of Charan Singh, PW-1, and was filed at Police Station Kharkhauda. After the criminal law was set in motion, the investigation was conducted by S.I. Rajveer Singh, PW-8, who after recording the statements of some of the witnesses under Section 161 CrPC between 6 a.m. to 8 a.m. on the next day, prepared the panchanama and the sketch map of the spot and collected blood stained and unstained earth as well as two cartridges. These were sealed on the spot and the dead body was sent for postmortem. On 29.03.1979, the investigation was transferred to S.I. V.P. Saxena and he came to learn on 11.04.1979 that all the accused persons except Dhani Ram had surrendered before the Court and had been sent to custody. Dhani Ram was arrested by S.I. V.P. Saxena at Meerut on 19.04.1979. Eventually after concluding the investigation, charge sheet was laid against the accused persons before the concerned Magistrate.

3. After the matter was committed to the Court of Session, charges were framed under Section 302 read with Section 34 IPC against the accused persons on 10.01.1980. The accused persons abjured their guilt and intended to face trial. The prosecution in order to bring home the charges examined 11 witnesses and marked certain documents as exhibits. Defence chose not to adduce any evidence.

4. The trial court evaluating the ocular and the documentary evidence brought on record found the accused person guilty of the offence under Section 302 read with Section 34 IPC and sentenced them to suffer rigorous imprisonment for life.

5. The conviction and sentence was challenged before the High Court by all the four accused persons. One of the accused, namely, Dhani Ram expired during the pendency of the appeal before the High

A Court and the appeal qua Dhani Ram stood abated. As far as the other three accused persons, namely, Dharam Pal, Mahendra and Vijendra, were concerned, the High Court concurred with the view expressed by the trial court and resultantly dismissed their appeal. Be it stated here that Dharam Pal has also expired, as has been stated by the learned counsel for the appellant. Be that as it may, there is no appeal at his B instance. The present two appeals have been preferred by the two appellants who are aggrieved by the affirmation of the judgment of conviction and order of sentence by the High Court.

6. We have heard Mr. Mukesh K. Giri, learned counsel for the appellants and Mr. R.K. Dash, learned senior counsel for the State of C U.P.

7. Assailing the conviction, learned counsel for the appellants submits that in the present case, there is no circumstance to infer common intention and as there has been no meeting of minds, the conviction cannot be supported in aid of Section 34 IPC. It is further submitted by D him that the conviction is based on the testimonies of PWs-1 to 3, though Charan Singh, the author of the FIR, who is not an eye witness; that apart, the evidence of PW-2, Gajpal, does not inspire confidence being replete with major contradictions, improvements and embellishments. It is urged that PW-3, Tedda, is a chance witness inasmuch as PW-1 has E himself accepted in his testimony that Tedda's going to the tube-well was not regular. According to Mr. Giri, the testimony of all the principal prosecution witnesses, namely, PWs-1 to 3 are not worthy of credence and they do not inspire confidence and hence, the conviction cannot be founded on their depositions which are definitely not beyond reproach. In this regard he would further urge that they are all related to each F other and, therefore, their testimony has to be scrutinized with immense circumspection and when such a scrutiny is made, they do not reach the pedestal of unimpeachability and hence, on that score alone, their testimonies have to be discarded. Learned counsel would contend that Nepal Singh, who is stated to have accompanied PW-2 and PW-3 has G not been examined and Ram Lal and Kasa who have been stated to have arrived at the tube-well, as per the testimony of PW-2, have also not been examined and they are independent witnesses and their non-examination creates an incurable dent in the version of the prosecution. As per the medical evidence there is only one gunshot injury attributed to pistol supposedly in the hands of Dhani Ram and Dharam Pal (both H

since dead) and none of the injuries on the person of the deceased could be attributed to lathi and ballam which were carried by the present appellants and, therefore, they cannot be made liable for the offence. Referring to the testimony of PW-6, Dr. M.C. Varshney, it is put forth that the said witness has stated that there was no blackening and scorching at the gunshot wound and that belies the prosecution version that the deceased died of gunshot injury. Lastly, it is canvassed that Vijendra Singh was a juvenile on the date of incident and he has remained in custody more than the period that is required of a juvenile to remain at juvenile home. To buttress his submissions, learned counsel for the appellants has drawn inspiration from ***Pratap Singh v. State of Jharkhand & Ors.***[1], ***Hari Ram v. State of Rajasthan and Anr.***[2], ***Suresh Sakharam Nangare v. State of Maharashtra***[3], ***Jai Bhagwan and Ors. v. State of Haryana***[4] and ***Bijendra Bhagat v. State of Uttarakahand***[5].

8. Supporting the judgment of conviction of the trial court that has received the stamp of approval by the High Court, Mr. Dash, learned senior counsel submitted that the accused Mahendra Singh has rightly been convicted and sentenced with the aid of Section 34 IPC and in that regard he has placed reliance upon ***Mohan Singh & Anr. v. State of Punjab***[6] and ***Harshadsingh Pahelvansingh Thakore v. State of Gujarat***[7]. Mr. Dash further submitted that non-examination of certain witnesses in the backdrop of the present case does not affect the prosecution version inasmuch as the witnesses cited by the prosecution clearly established the charge against the accused persons. As regards the appeal preferred by appellant, Vijendra is concerned, learned senior counsel fairly conceded to the claim of juvenility and submitted that this Court may levy fine upon the appellant to be paid as compensation to the family of the deceased in terms of law laid down in ***Jitendra Singh v. State of Uttar Pradesh.***[8]

9. At the outset, it is necessary to mention that the principal witnesses are PW-1 to PW-3 and the trial court as well as the appellate

[1] Criminal Appeal No. 210 of 2005 decided on 2.2.2005
[2] (2009) 13 SCC 211
[3] (2012) 9 SCC 249
[4] (1999) 3 SCC 102
[5] (2015) 13 SCC 99
[6] AIR 1963 SC 174
[7] (1976) 4 SCC 640
[8] (2013) 11 SCC 193

court has given credence to their evidence. PW-1, Charan Singh, the author of the FIR, has testified that he got the FIR of the incident prepared on the spot itself and then lodged it at Police Station Kharkhauda in the same night by handing over it to the Head Constable Devi Ram, PW-4, who thereafter made entry in the general diary. He has deposed that the accused Dharam Pal, Mahendra and Vijendra are real brothers and they belonged to his own village; that about nine years ago prior to the date of occurrence, Gaje Singh, real brother of the accused, Dharam Pal, was murdered for which he and Hukam Singh, real brother of the deceased Badan Pal, and others were put on trial and eventually they were acquitted. He has stated in his evidence that since then the accused persons brewed enmity against them. It has also come out in his evidence that the deceased was a student of High School and used to stay in the kotha where the tube-well situate for availing the facility of electric light for his studies. PW-2, Gajpal, cousin of the deceased Badan Pal, has clearly stated that he along with his cousin Nepal Singh left the village at about 7 p.m. carrying the meals for Badan Pal, who was staying inside the kotha of the aforesaid tube-well. He has further deposed that Tedha, PW-3, accompanied them and after they reached the place, they heard a sound of gun firing from inside the kotha of the tube-well. He has deposed that he has seen all the four accused persons coming out of the northern side of the said kotha of the tube-well and he had also seen the accused Dhani Ram and Dharam Pal were armed with pistols and the accused Mahendra and Vijendra carried lathi and ballam respectively. He had identified the accused persons because of the electric bulb burning in the kotha and further he had a torch light with him. Though there has been roving cross-examination with regard to him seeing the accused persons coming out of the kotha, nothing has been really elicited to make his testimony impeachable. PW-3, Tedha, has also identified the accused person and supported the testimony of PW-2. That apart, the said witness has lent support to the case of the prosecution and corroborated in each necessary particulars that has been stated by the PW-2. It was contended before the learned trial judge that PW-2 and PW-3 are extremely interested witnesses and further PW-3 was a chance witness. The learned trial judge did not find any substance in the said contention inasmuch as there had been identification of the accused persons, vivid description of the weapons they carried and the recovery. Be it noted that though the pistol was not recovered, two cartridges were recovered from the spot of the occurrence. The learned trial judge arrived at the opinion that the

prosecution had been able to prove the presence of the witnesses PWs 2 and 3 at the place of occurrence and their version with regard to the accused persons committing the murder of the deceased. In appeal it was urged before the High Court that there was no motive on the part of the accused to commit the murder of the deceased; that the trial court has not been circumspect in the scrutiny of the evidence of PWs 2 and 3 who were highly interested witnesses; that there was no justification on the part of PW-2 to carry a torch with him and, in any case, their testimony that they had seen the accused persons was absolutely unacceptable; that the deceased had received only one fire arm injury and the appellants were armed with lathi and ballam and had not assaulted the deceased and, therefore, decision by the learned trial judge to convict them in aid of Section 34 IPC was totally sustainable.

10. On a keen scrutiny of the decision of the High Court, it is evident that it repelled the submissions of the appellants on the ground that lack of motive was too feeble a plea in the circumstance of the case to throw the prosecution case overboard; that it has come in evidence that the accused persons had harboured vengeance against them after their acquittal in the case where they were tried for the offence under Section 302 IPC; that there was no reason why the witnesses who were close relations of the deceased would falsely embroil the accused persons leaving the real culprits; that there is no reason to discard the testimonies of PWs 2 and 3 singularly on the ground that they are related witnesses, for they have stood embedded in their version and there is no inconsistency to discredit them; that there is nothing unusual on the part of PW-2 to carry a torch with him; that the identification of the accused persons by PWs 2 and 3 with the help of electric light and torch has been appositely appreciated by the learned trial judge and there was no reason to dislodge the said finding; that the plea that PW-3 was a chance witness and his presence at the place of occurrence was doubtful did not really commend acceptation, for his testimony was worthy of credence; that nothing tangible could be elicited from the evidence of the witnesses in cross-examination by which the version could be doubted and hence, there is no infirmity or perversity in the finding recorded by the trial court; and that the trial court has not erred in convicting the accused persons in aid of Section 34 IPC. In this regard, the High Court further held that the said provision is only a rule of evidence and does not create a substantive offence. It further opined that the evidence of ocular witnesses had been found to be satisfactory, reliable, consistent and credible by the

A trial court and nothing tangible could be elicited from their evidence in the cross-examination to create any speck of doubt in their version or to treat their testimony as infirm or perverse.

11. Learned counsel for the appellants referring to the authority in ***Suresh Sakharam Nangare*** (supra) would submit that the High Court B has admitted in the impugned judgment that the direct proof of common intention is seldom available and in the present case there is no circumstance that such intention can be inferred without there being evidence of preconcert. Learned counsel for the appellants further criticized the judgment of the High Court submitting that as per deposition of Dr. Varshney, PW-6, who conducted post mortem of the deceased C body, there was no blackening, no scorching present at the gunshot wound, the genesis of the entire prosecution case that the murder took place in kotha of tube-well i.e the gun was shot from close range deserves to be discarded.

12. Learned counsel for the appellants would contend that the D conviction of the appellant Mahendra is not sustainable since none of the injuries on the person of the deceased is attributable to lathi which was supposedly in the hand of Mahendra. Reliance is placed by the learned counsel on the authority in ***Bijendra Bhagat*** (supra) wherein this Court acquitted the accused giving him the benefit of doubt stating E that none of the injuries on the person of the deceased could be attributed to lathi which was supposedly in the hands of the appellant.

13. As is evincible, the accused-appellants have been convicted with the aid of Section 34 IPC. It has come in evidence of PW-2 that the accused Mahendra was armed with lathi and accused Vijendra Singh F was armed with a ballam and they were in the company of other accused. When the evidence in its entirety is studiedly scrutinized, it clearly shows that the accused persons were present in the shed, they were seen going away and the deceased was found lying in a pool of blood. The witnesses specifically stated about the weapons being carried by the accused persons. The submission is that the prosecution story rests on the gun G shot injury but there is no evidence with regard to injury caused by the lathi or ballam. It is relevant to state here that cartridges from the spot have been recovered and PW-6 Doctor who conducted the post mortem had found gunshot wound of entry eight in number in an area of 6 cm x 5 cm on the right side of neck just above the clavicle and lower part of H neck. The dimensions of the wound ranged from 1 cm x 0.15 cm to

0.5 cm x 0.5 cm x bone deep. There was no blackening or scorching around the wound. True it is that the doctor has stated that there is no blackening or scorching around the wound, but that will not belie that the injury was not inflicted by the firing from the gun. He has opined that the death of the deceased was caused by gunshot injury.

14. The heart of the matter is whether Section 34 IPC would be attracted to such a case or not. In this regard, we may refer to certain authorities as to how this Court has viewed the concept of "common intention" and thereafter reflect upon how it is applicable to the case at hand.

15. Mr. Giri has drawn our attention to paragraph 10 of the authority in ***Jai Bhagwan*** (supra). It reads as follows:-

> "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 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 common intention. It has to be inferred from the facts and circumstances of each case."

16. He has also relied on the decision in ***Suresh Sakharam Nangare*** (supra). In the said case, the Court after referring to Section 34 IPC opined that a reading of the above provision makes it clear that to apply Section 34, 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. It further makes clear that if common intention is proved but no overt act is attributed to the 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 common intention is absent, Section 34 cannot be invoked.

17. In the said case, the Court after analyzing the evidence opined that there is no material from the side of the prosecution to show that the appellant therein had any common intention to eliminate the deceased because the only thing against the appellant therein was that he used to associate himself with the accused for smoking ganja. On this factual

A score, the Court came to hold that the appellant could not be convicted in aid of Section 34 IPC.

18. In this regard, we may usefully refer to a passage from the authority in ***Pandurang and Ors. v. State of Hyderabad***[9]. The three-Judge Bench in the said case adverted to the applicability and scope of
B Section 34 IPC and in that context ruled that:-

> "32. ... It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: *Mahbub Shah* v. *King Emperor*[10]. Accordingly there
> C must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would
> D be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: *Barendra Kumar Ghosh* v. *King Emperor*[11] and *Mahbub Shah* v. *King Emperor (supra)*.
> E As Their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".
>
> F 33. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily
> G formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of

[9] AIR 1955 SC 216
[10] AIR 1945 PC 118
H [11] AIR 1925 PC 1

each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose." A

19. And, again:-

"34. ... But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". (*Sarkar's Evidence*, 8th Edn., p. 30)." B C

20. In this context, we may refer with profit to the statement of law as expounded by the Constitution Bench in ***Mohan Singh*** (supra). In the said case, the Constitution Bench has held that Section 34 that deals with cases of constructive criminal liability provides that if a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for the act in the same manner as if it were done by him alone. It has been further observed that the essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. The common intention in question animates the accused persons and if the said common intention leads to commission of the criminal offence charged, each of the person sharing the common intention is constructively liable for the criminal act done by one of them. The larger Bench dealing with the concept of constructive criminal liability under Sections 149 and 34 IPC, expressed that just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34. In some ways the two sections are similar and in some cases they may overlap. The common intention which is the basis of Section 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-in-concert and necessarily postulates the existence of a prearranged plan and that must mean a prior meeting of minds. It would be noticed D E F G H

A that cases to which Section 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. Thereafter, the Court held:-

> "It is now well-settled that the common intention required by Section
B 34 is different from the same intention or similar intention. As has been observed by the Privy Council in *Mahbub Shah* v. *King-Emperor (supra)* common intention within the meaning of Section 34 implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal
C act was done in concert pursuant to the pre-arranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case."

21. In ***Harshadsingh Pahelvansingh Thakore*** (supra), a three-Judge Bench, while dealing with constructive liability under Section 34
D IPC has ruled thus:-

> "Section 34 IPC fixing constructive liability conclusively silences such a refined plea of extrication. (See *Amir Hussain* v. *State of U.P.*[12]; *Maina Singh* v. *State of Rajasthan.*[13]) Lord Sumner's classic legal shorthand for constructive criminal liability, expressed
E in the Miltonic verse "They also serve who only stand and wait" *a fortiori* embraces cases of common intent instantly formed, triggering a plurality of persons into an adventure in criminality, some hitting, some missing, some splitting hostile heads, some spilling drops of blood. Guilt goes with community of intent coupled
F with participatory presence or operation. No finer juristic niceties can be pressed into service to nullify or jettison the plain punitive purpose of the Penal Code."

22. In ***Lallan Rai and Ors. v. State of Bihar***[14] the Court relying upon the principle laid down in ***Barendra Kumar Ghosh*** (supra) has
G ruled that the essence of Section 34 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result.

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[12] (1975) 4 SCC 247

[13] (1976) 2 SCC 827

H [14] (2003) 1 SCC 268

23. In ***Goudappa and Ors. v. State of Karnataka***[15] the Court has reiterated the principle by opining that Section 34 IPC lays down a principle of joint liability in doing a criminal act and the essence of that liability is to be found in the existence of common intention. The Court posed the question how to gather the common intention and answering the same held that the common intention is gathered from the manner in which the crime has been committed, the conduct of the accused soon before and after the occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and from the nature of the injury caused by one or some of them and for arriving at a conclusion whether the accused had the common intention to commit an offence of which they could be convicted, the totality of circumstances must be taken into consideration.

24. The aforesaid authorities make it absolutely clear that each case has to rest on its own facts. Whether the crime is committed in furtherance of common intention or not, will depend upon the material brought on record and the appreciation thereof in proper perspective. Facts of two cases cannot be regarded as similar. Common intention can be gathered from the circumstances that are brought on record by the prosecution. Common intention can be conceived immediately or at the time of offence. Thus, the applicability of Section 34 IPC is a question of fact and is to be ascertained from the evidence brought on record. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the fact of the case and circumstances of the situation. Whether in a proved situation all the individuals concerned therein have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have been developed and thereby intended by all of them, is a question that has to be determined on the facts. (See : ***Kirpal and Bhopal v. State of U.P.***[16]). In ***Bharwad Mepa Dana and Anr. v. The State of Bombay***[17], it has been held that Section 34 IPC is intended to meet a case in which it may be difficult to distinguish the acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. The principle which the Section embodies is participation in some action with

[15] (2013) 3 SCC 675
[16] AIR 1954 SC 706
[17] AIR 1960 SC 289

A the common intention of committing a crime; once such participation is established, Section 34 is at once attracted.

25. In the case at hand, it is contended that there is no injury caused by lathi or ballam. Absence of any injury caused by a lathi cannot be the governing factor to rule out Section 34 IPC. It is manifest from B the evidence that the accused-appellants had accompanied the other accused persons who were armed with gun and they themselves carried lathi and ballam respectively. The carrying of weapons, arrival at a particular place and at the same time, entering into the shed and murder of the deceased definitely attract the constructive liability as engrafted under Section 34 IPC.

C

26. It is next contended by Mr. Giri, learned counsel for the appellants that all the eyewitnesses are related to the deceased Badan Pal and they being interested witnesses, their version requires scrutiny with care, caution and circumspection and when their evidence is scanned with the said parameters, it does not withstand the said test for which D the case set forth by the prosecution gets corroded and the principle of beyond reasonable doubt gets shattered. The aforesaid submission, as we perceive, has no legs to stand upon, for PWs-1 to 3 have deposed in detail about the previous enmity between the parties, their presence at the spot, the weapons the accused persons carried, their proximity to the E shed and establishment of the identity of all the four accused. They have also testified as regards the deceased lying in a pool of blood. There is no reason why they would implicate the appellants for the murder of their relation leaving behind the real culprit. That apart, nothing has been elicited in the cross-examination for which their testimony can be discredited. In this regard reference to a passage from ***Hari Obula*** F ***Reddy and Ors. v. State of Andhra Pradesh***[18] would be fruitful. In the said case, a three-Judge Bench has ruled that it cannot be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the G evidence of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. It is worthy to note that there is a distinction

H [18] (1981) 3 SCC 675

between a witness who is related and an interested witness. A relative is a natural witness. The Court in ***Kartik Malhar v. State of Bihar***[19] has opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

27. Mr. Giri, learned senior counsel for the appellant has also impressed upon us to discard the testimony of PW-3, Tedda, on the ground that he is a chance witness. According to him, his presence at the spot is doubtful and his evidence is not beyond suspicion. Commenting on the argument of chance witness, a two-Judge Bench in ***Rana Pratap and Ors. v. State of Haryana***[20] was compelled to observe:-

> "We do not understand the expression "chance witnesses". Murders are not committed with previous notice to witnesses, soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed on a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witnesses" is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are "chance witnesses", even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence."

28. Tested on the anvil of the aforesaid observations, there is no material on record to come to the conclusion that PW-3 could not have accompanied PW-2 while he was going to the shed near the tube-well. What has been elicited in the cross-examination is that he was not going daily to the tube-well. We cannot be oblivious of the rural milieu. No adverse inference can be drawn that he was not going daily and his testimony that he had accompanied PW-2 on the fateful day should be

[19] (1996) 1 SCC 614
[20] (1983) 3 SCC 327

A brushed aside. We are convinced that his evidence is neither doubtful nor create any suspicion in the mind.

29. Thus, the real test is whether the testimony of PWs1 to 3 are intrinsically reliable or not. We have already scrutinized the same and we have no hesitation in holding that they satisfy the test of careful B scrutiny and cautious approach. They can be relied upon.

30. The next plank of argument of Mr. Giri is that since Nepal Singh who had been stated to have accompanied PW-2 and PW-3 has not been examined and similarly, Ram Kala and Bansa who had been stated to have arrived at the tube-well as per the testimony of PW-2, C have not been examined, the prosecution's version has to be discarded, for it has deliberately not cited the independent material witnesses. It is noticeable from the decision of the trial court and the High Court, reliance has been placed on the testimony of PWs 1 to 3 and their version has been accepted. They have treated PW-2 and PW-3 as natural witnesses who have testified that the accused persons were leaving the place after D commission of the offence and they had seen them quite closely. The contention that they were interested witnesses and their implication is due to inimical disposition towards accused persons has not been accepted and we have concurred with the said finding. It has come out in evidence that witnesses and the accused persons belong to the same village. The E submission of Mr. Giri is that non-examination Nepal Singh, Ramlal and Kalsa is quite critical for the case of the prosecution and as put forth by him, their non-examination crucially affects the prosecution version and creates a sense of doubt. According to Mr. Giri, Nepal Singh is a material witness. In this regard we may refer to the authority in ***State of H.P. v. Gian Chand***[1] wherein it has been held that non-examination of a material F witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find G whether the witnesses are available for being examined in the court and were yet withheld by the prosecution. The Court after so holding further ruled that it is the duty of the court to first assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on and deserves acceptance, then non-

H [1] (2001) 6 SCC 71

examination of any other witnesses available who could also have been examined but were not examined, does not affect the case of the prosecution.

31. In ***Takhaji Hiraji v. Thakore Kubersing Chamansing and Ors.***[22], it has been held that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand, if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable, the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. In ***Dahari and Ors. v. State of U.P***[23], while discussing about the non-examination of material witness, the Court expressed the view that when he was not the only competent witness who would have been fully capable of explaining the factual situation correctly and the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution. Similar view has been expressed in ***Manjit Singh and Anr. v. State of Punjab and Anr.***[24] and ***Joginder Singh v. State of Haryana***[25].

32. Tested on the aforesaid parameters, we are unable to accept the submission of Mr. Giri that non-examination of Nepal Singh and other two persons who had been referred to by PW-2 affects the prosecution version or creates any doubt in the mind of the Court. We arrive at such a conclusion since the witnesses examined by the prosecution are trustworthy and the court can safely act on their testimony. There is no justification in the instant case to draw any adverse

[22] (2001) 6 SCC 145
[23] (2012) 10 SCC 256
[24] (2013) 12 SCC 746
[25] (2014) 11 SCC 335

A inference against the prosecution.

33. Mr. Giri, learned counsel for the appellants laying stress on the absence of injury caused by lathi on the person of the deceased has urged that the appellant- Mahendra Singh cannot be convicted in aid of Section 34 IPC. In that regard, he has commended us to the authority in B ***Bijendra Bhagat*** (supra). Learned counsel has drawn inspiration from paragraph four of the said decision. The relevant part of the said paragraph is as follows:-

> "... According to the witnesses these two accused were also armed with country-made pistols. The injuries suffered by the C deceased are incised wounds and one firearm injury. However, none of the injuries on the person of the deceased could be attributed to the lathi which was supposedly in the hands of the appellant. Undoubtedly, three injuries on the person of Sanjay Kumar could be caused by a hard and blunt object. But having gone through the testimony of the witnesses and the other materials D on record, the presence of the appellant and his involvement in the incident clearly appears to be doubtful. We, therefore, deem it appropriate to give the appellant benefit of doubt. ..."

34. Relying on the same, it is contended by Mr. Giri that when there is no lathi blow on the person of the deceased as noticeable from E the post mortem report, the appellant- Mahendra Singh deserves to be acquitted. The passage that has been commended to us has to be correctly appreciated. In that case, the Court has referred to injury caused on the person of the deceased and noticed how the injury was caused but the reason for acquittal is that the presence of the appellant F therein and his involvement in the incident appeared to the Court to be doubtful. If a person is not present at the spot, the question of common intention does not arise. As has been held in ***Pandurang*** (supra), if the common intention is established, an accused can be convicted. We have already discussed the role attributed to the appellant- Mahendra Singh by the prosecution. He had gone with other accused persons, who were G carrying pistols and ballam. He himself was carrying a lathi. Similarly, accused-appellant Vijendra Singh was carrying a ballam and accompanying others. Their intention was to go to the shed where the deceased was studying because of availability of the electric light, has been established. Common intention can be gathered from the facts H and circumstances and in the instant case, the same is clearly discernable

and hence, the decision in ***Bijendra Bhagat*** (supra) is of no assistance to the appellant. A

35. In view of the aforesaid analysis, we do not find any merit in Criminal Appeal No. 1452 of 2010 preferred by Mahendra Singh and the same is, accordingly, dismissed.

36. As far as appellant-Vijendra Singh is concerned, a report was called for and he has been found to be a juvenile being 16 years 3 months 10 days old on the date of offence. The said report has gone unchallenged and Mr. Dash, learned senior counsel appearing for the State, has fairly stated that he was a juvenile on the date of offence. Mr. Giri has commended us to the authority in ***Hari Ram*** (supra). We find that the Court relying on Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 and the amendments introduced in Section 20 of the 2000 Act whereby the proviso and Explanation were added to Section 20 and the Juvenile Justice (Care and Protection of Children) Rules, 2007, remitted the matter to the Juvenile Justice Board with the observation that if he had been detained for more than the maximum period for which a juvenile may be confined to a special home, the Board shall release him from custody forthwith. In the case at hand, as the appellant-Vijendra Singh remained in custody for more than the maximum period for which he could have been confined to a special home, while sustaining the conviction, we release him from custody forthwith. B C D E

37. Consequently, Criminal Appeal No. 1452 of 2010 is dismissed and Criminal Appeal No. 1448 of 2010 is disposed of treating the appellant-Vijendra Singh as a juvenile and directions issued in that regard as stated hereinbefore.

Nidhi Jain Appeals disposed of. F