

(2000) 09 BOM CK 0035
In the Bombay High Court
Case No : Criminal Appeal No. 202 of 1993

Onkar Moatiram Kale and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 07-09-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 165
Evidence Act, 1872 — Section 45, 59
Penal Code, 1860 (IPC) — Section 302, 326

Citation : (2001) 5 BomCR 297 : (2001) CriLJ 4375 : (2001) 1 MhLj 521

Hon'ble Judges : R.K. Batta, J; P.S. Brahme, J

Bench : Division Bench

Advocate : M.R. Daga, for the Appellant; D.B. Yungal, Assistant Public Prosecutor, for the Respondent

Judgement

R.K. Batta, J.—The appellants have been convicted for murder of Ramkrishna u/s 302 read with 34 I.P.C., for causing grievous hurt with dangerous weapon to Nirmala P.W. 2 u/s 326 read with 34 I.P.C. For the offence of murder, they have been sentenced to undergo rigorous imprisonment for life, for offence u/s 326 read with 34 I.P.C., they have been sentenced to undergo rigorous imprisonment for five years and fine of Rs. 2000/- in default R.I., for one year each. Though they have been held guilty for voluntarily causing hurt to P.W. 2 Nirmala u/s 324 read with 34 I.P.C., yet no separate sentence has been imposed. In addition, appellants No. 3 to 5 have also been convicted for causing grievous hurt to Manohar P.W. 5 u/s 325 read with 34 I.P.C. and the said appellants have been sentenced to R.I. for 2 years. Out of the fine recovered, a sum of Rs. 15,000/- has been ordered to be paid to Nirmala P.W. 2 as compensation. The period of detention during the trial has been set off in terms of section 428 Cri. P.C.

2. The appellants challenged their conviction and sentence imposed on them in this appeal. Reference to brief facts of the prosecution case at this stage is necessary in order to appreciate submissions made by the learned advocate for the appellants and the learned A.P.P. Of course detailed reference to the

prosecution evidence shall be necessary at a later stage.

3. The appellants are closely related to each other. Appellant No. 1 Onkar is the husband of appellant No. 8 Baby who is the daughter of appellant No. 4 Domaji. Appellant No. 6 Mathurabai is the wife of appellant No. 4 Domaji. Appellant No. 7 Rekha is the wife of appellant No. 2 Devidas. Appellants Devidas, Waman and Ramdas are brothers and they are sons of appellant Domaji. The appellants and the deceased Ramkrishna lived in the neighbourhood. There is admittedly previous enmity between them. On the earlier day of the incident in question, there was an incident in respect of which deceased Ramkrishna, Manohar P.W. 5 and others have been prosecuted. On the day of the incident i.e. to say 31-8-1991 at about 6.15 a.m. while Ramkrishna was passing in front of the house of appellant No. 4 Domaji, he was assaulted by appellant No. 1 Onkar and appellant No. 2 Devidas. When Nirmala P.W. 2 intervened, she was also assaulted by appellant No. 1 Onkar and appellant No. 2 Devidas. The assault on deceased Ramkrishna and Nirmala P.W. 2 by appellant Onkar and appellant Devidas is stated to be by means of swords. The prosecution case further is that when the assault on deceased Ramkrishna and P.W. 2 Nirmala was made, all the other appellants were present at that time. Appellant No. 3 Waman and appellant No. 4 Domaji had sticks with them and appellant No. 5 Ramdas had iron rod. Appellants No. 6 to 8 had chilly powder and they had thrown chilly powder during the course of the incident. After the assault on deceased Ramkrishna and Nirmala P.W. 2, Manohar P.W. 5 had come to the spot and when he tried to lift deceased Ramkrishna, he was assaulted by appellant No. 2 Devidas and appellant No. 3 Waman by means of sticks and by appellant No. 5 Ramdas by means of iron road. As a result of the assault, Ramkrishna had received eight injuries and he expired as a result of the said injuries on the same day. Nirmala P.W. 2 had also received eight injuries on her person and Manohar P.W. 5 had received four injuries on his person. The incident in question is reported to have been witnessed by Sunita P.W. 1 daughter-in-law of deceased Ramkrishna, Nirmala P.W. 2 wife of the deceased who was injured, Manohar P.W. 5 son of the deceased who was also injured, Khandu P.W. 6 who lives in the neighbourhood, as also Pandurang P.W. 7. Besides the evidence of the eye witnesses, there is evidence relating to recovery of weapons, seizure of clothes of some of the appellants on which blood stains were found.

4. The trial Court has basically relied upon the evidence of Nirmala P.W. 2 and Khandu P.W. 6. In respect of the evidence of Sunita P.W. 1, it has been stated by the trial Judge at two places that even if her evidence is not taken into consideration, the charges still stand proved against the appellants.

5. Learned Advocate for the appellants has urged before us that the evidence led by the prosecution is not sufficient to prove the offence of murder, nor the said evidence is sufficient to rope in accused/appellants No. 2 to 8 for the offence of murder on the basis of common intention. Learned Advocate for the appellants has further urged that at any rate no case u/s 302 read with 34 I.P.C. is made

out against appellant No. 3 to 8, since no overt act is attributed to the said appellants in so far as murder of Ramkrishna and assault on Nirmala P.W. 2 is concerned. Learned Advocate for the appellant has taken us through the evidence of various witnesses in order to illustrate his submissions and we shall deal with the submissions in this respect while dealing with the evidence of various witnesses. It is also urged by the learned Advocate for the appellant that even in case of appellant No. 1, the doctor who conducted post-mortem on the dead body of Ramkrishna has nowhere stated that the injuries were sufficient in the ordinary course of nature to cause death. It is also submitted that no offence u/s 326 I.P.C. is disclosed in respect of the assault on Nirmala P.W. 2 and likewise no offence u/s 325 I.P.C. is disclosed in so far as the assault on P.W. 5 Manohar is concerned. On the question of common intention, reliance has been placed on a number of judgments of the Apex Court in *Tholan Vs. State of Tamil Nadu*, *Gurdeep Singh v. Jaswant Singh* 1993 S.C.C. 278. *Munna v. State of U.P.* 1993 S.C.C. 798 and *Babubhai Ranchodbhai Patel v. State of Gujrat* 1994 S.C.C. 265.

6. On the other hand learned A.P.P. has urged before us that the evidence on record clearly establishes that all the appellants had entertained common intention to inflict such bodily injuries as are sufficient in the ordinary course of nature to cause death and as such all the appellants are liable for the offence of murder. Likewise it is urged that all the appellants had common intention to cause grievous hurt with dangerous weapons and as such offence u/s 326 I.P.C. in relation to assault on Nirmala P.W. 2 is clearly established. On the question whether the injuries on the person of deceased Ramkrishna were sufficient in the ordinary course of nature to cause death, it is urged by learned A.P.P. that this Court is entitled to look into the evidence for the purpose of determining whether the injuries are sufficient in the ordinary course of nature to cause death and for this proposition reliance is placed on the judgment of the Apex Court in *Brij Bhukhan and Others Vs. The State of Uttar Pradesh*. In addition, after placing reliance on Modi's Medical Jurisprudence and Toxicology, it has been urged that the injuries to the brain and rupture of liver are sufficient to come to the conclusion that the said injuries were sufficient in the ordinary course of nature to cause death, since the said injuries were caused on the vital organs. It is urged that all the appellants had assembled with weapons and appellants No. 6 and 8 with the chilly powder which is a potent weapon to disable the injured from putting up resistance. Relying upon judgments of the Apex Court on the question of common intention, it has been urged that no case is made out for interference and the appeal be dismissed. Reliance has been placed by learned A.P.P. on judgments of Apex Court in *Chinta Pulla Reddy and Others Vs. State of Andhra Pradesh*, and *Vishwanath Shanthamallappa Dhule v. State of Karnataka* AIR 1998 S.C. 246.

7. We shall first deal in detail with the evidence of eye witnesses on record. The first witness examined by the prosecution is P.W. 1 Sunita who is daughter-in-law of the deceased Ramkrishna and P.W. 2 Nirmala. We have already pointed out that the trial Court has not placed much reliance on the testimony of this witness

as at two places the trial Court has stated that even if the statement of Sunita P.W. 1 is not taken into consideration, the prosecution case is still proved through the evidence of Nirmala P.W. 2 and Khandu P.W. 6. Sunita P.W. 1 has stated in her examination-in-chief that on 31-8-1991 at about 6 a.m. she heard call of Ramkrishna "Khandu Wachava Re" and her mother-in-law viz. Nirmala P.W. 2 immediately went outside. Sunita P.W. 2 then heard the noise of her mother-in-law as "Meli Re" upon which she went out. At that time she saw accused Onkar assaulting Ramkrishna with sword and accused Devidas assaulting Nirmala P.W. 2 with sword. She also saw accused Waman and Domaji having sticks and accused Ramdas having iron pipe. She has further stated that accused Waman, Domaji and Ramdas assaulted her-in-laws. However, when she was confronted with her Police statement, she admitted that she had not stated to the Police that Waman, Domaji and Ramdas assaulted her in-laws. Sunita P.W. 1 then states that she saw appellants 6 to 8 throwing chilly powder in the eyes of her in-laws. When confronted with her police statement, she admitted that she had not stated to the police that the three female accused had thrown chilly powder in the eyes of in-laws. There is otherwise no medical evidence to support the prosecution case that chilly powder was thrown by the appellants No. 6 to 8 in the eyes of the in-laws of Sunita P.W. 1. At this stage we would like to point out that even Nirmala P.W. 2 does not say that chilly powder was thrown into her eyes or that of her husband Ramkrishna. P.W. 2 Nirmala has simply stated female accused had thrown chilly powder, where and on whom the chilly powder was thrown and whether the chilly powder had affected anyone on the spot, is not stated anywhere. Reverting back to the testimony of Sunita P.W. 1, she had not only categorically stated in her examination-in-chief but she reiterated during cross-examination that she had gone to the spot after Nirmala P.W. 2. Nirmala P.W. 2 has categorically stated in her deposition that still she was conscious, she had not seen Sunita P.W. 1 on the spot. In this respect P.W. 6 Khandu has also categorically stated that Sunita was at her house, she came to the spot when the quarrel was over and that she did not come to the spot till quarrel was going on. Therefore, though Sunita P.W. 1 does speak of the assault by accused Onkar, yet her presence on the spot appears to be highly doubtful. Her testimony regarding assault is of general nature and she has not given any details of the number of blows, parts of the body on which deceased Ramkrishna and Nirmala P.W. 2 were assaulted. Besides this, she has stated that when she reached her mother-in-law was lying on the ground as also her father-in-law and it is not the prosecution case that they were being assaulted while they were lying on the ground. Therefore, the trial Court had rightly not placed much reliance on the testimony of Sunita P.W. 1 and the trial Court had stated twice that even if her testimony is discarded, the prosecution case is still proved.

8. As we have already pointed out the trial Court had placed reliance on the testimony of P.W. 2 who has been referred to as an eye witness. Nirmala P.W. 2, was admittedly injured in the incident and her presence on the spot is not disputed by the appellants. On the contrary appellant No. 1 in his statement u/s

313 Cri. P.C. has admitted that Ramkrishna's wife Nirmala had come there and caught hold of his waist and his sword hit against her legs. Nirmala P.W. 2 has stated that she heard screaming of her husband "Khandu Wachava Re" and hearing the same she rushed out. She saw accused Onkar assaulting her husband with sword. She has further stated that accused Devidas rushed towards her with sword and assaulted her with it. According to her Waman, Domaji and Ramdas were present there. Accused Waman and Domaji had sticks and accused Ramdas had pipe. She also states that female accused threw chilly powder. In her cross-examination she stated that when she reached the assault was in progress on her husband Ramkrishna. She was not able to tell the number of blows given to her husband but she has stated that the assault was continuous one after the other and the hands and the legs of her husband were already injured. She has stated that when she reached the spot, accused Devidas rushed towards her and assaulted her. It is thus natural that she was not able to concentrate on the assault of her husband due to which she was not able to give the number of blows given to her husband and even otherwise when she had reached the spot, her husband was already being assaulted and the assault was in progress. According to P.W. 2. Nirmala she fell down after she was assaulted. She says she was assaulted on hand, leg and chest. The testimony of this witness during the cross-examination could not be shaken and this witness has stood the test of cross-examination. From her evidence it stands proved that accused Onkar had assaulted her husband Ramkrishna with sword. It also stands proved from her evidence that accused Devidas had assaulted her with sword.

9. We shall now deal with the testimony of Khandu P.W. 6. The trial Court found that to some extent he has been won over. He stated that he heard the screaming of Ramkrishna "Khandu Dhaware" upon which he went to the spot and saw that accused Onkar was assaulting Ramkrishna with sword and Nirmala was lying in pool of blood. In the examination-in-chief he stated that he did not know who assaulted her. He, however, speaks of the presence of accused No. 2 Devidas and accused No. 4 Domaji on the spot and according to him nobody else was present there. He further stated that Devidas was having pipe and he had driven away the accused when Manohar came and Manohar was assaulted by accused Devidas, Domaji and Onkar. However, in his examination-in-chief itself he admitted that he saw accused Devidas assaulting Nirmala with sword. He also admitted that he has stated before the J.M.F.C. that Nirmala was assaulted by Devidas with sword. He confirmed that the statement made by him before the Magistrate was correct. Nevertheless in his cross-examination he stated that Devidas was having steel pipe and he was not having sword. There is no doubt that this witness has been won over by the defence as a result of which he had suppressed the truth. Nevertheless it does not mean that the testimony of such witness has to be discarded or cannot be relied upon. It is clear that the Court has to separate chaff from the grain. From the evidence of Khandu P.W. 6, it is established that accused No. 1 Onkar was assaulting Ramkrishna with sword and accused Devidas had assaulted Nirmala P.W. 2 with sword. Thus the evidence of

Khandu P.W. 6 corroborates the testimony of Nirmala P.W. 2 in so far as assault by accused No. 1 Onkar and by accused No. 2 Devidas on Nirmala P.W. 2 is concerned.

10. Another witness to whose evidence not much credence is given by the trial Court is P.W. 7. Pandurang. This witness was also won over by the defence and was declared hostile. This witness has stated that he saw Onkar assaulting Ramkrishna with sword. When Nirmala came there, she was also assaulted by Onkar with sword. During cross-examination by Public Prosecutor, he had admitted that he has stated before the Police and the Magistrate that Nirmala was assaulted by Devidas with sword. However, he has stated that he had made a false statement before the police and the Magistrate. It is rather unfortunate that the trial Judge has not instituted any proceeding against this witness who blatantly tells the Court that he had made a false statement before the Police and the Magistrate. He had admitted during further cross-examination that he did not make any complaint to the Magistrate about any pressure exerted by the Police to make a false statement. The reason is apparent since he had admitted that on the day of his deposition, he had come along with the accused. He was thus won over by the accused. However, his testimony that he saw Onkar assaulting Ramkrishna with sword and that he had stated before the Police as well as before the Magistrate that Nirmala was assaulted by Devidas with sword stands duly proved.

11. We shall now refer to the other evidence on the record as against accused No. 1 Onkar and accused No. 2. Devidas. This evidence is in nature of the recovery of weapons at the instance of accused Onkar and accused Devidas as well as seizure of their clothes upon which blood stains were found. P.W. 8. Sk. Abbas Sk. Hussain has stated that accused Onkar disclosed his intention to produce the sword which he had kept concealed in his house and accused Devidas had also disclosed his intention to produce the sword which he had kept concealed in the house. Later on they followed Onkar who took them to his house and Onkar produced the sword which was kept in the second room behind the door. The sword was blood stained. Likewise accused Devidas took the panchas and the police party to the house of Waman Domaji Ingole. Accused Devidas then went to the roof of the house and produced the sword which was kept under dry-sticks. The sword was blood stained. The swords were sent to the Chemical Analyser. Sword Article 1 was recovered at the instance of appellant Onkar and sword Article 2 was recovered at the instance of accused No. 2 Devidas. It may be mentioned here that even Dr. Tekam had found blood stains on both the swords. The Chemical Analyser found that Article 1 was stained with blood on blade which has human blood and of "A" group. The blood group of deceased Ramkrishna was "A" group as can be seen from the report of the chemical analyser in respect of clothes Articles 7 to 9 of the deceased and besides that there is also evidence of Dr. Dilip Tekam P.W. 13 that the blood group of Ramkrishna was "A" group. Thus the assault by the accused No. 1 Onkar on deceased Ramkrishna is not only proved through the evidence of eye

witnesses Nirmala P.W. 2 and Khandu P.W. 6 and Pandurang P.W. 7 but also by the report of chemical analyser. Likewise on the sword Article 2 recovered at the instance of accused Devidas, the chemical analyser found blood on the sword though the blood group was not conclusive. This evidence thus also connects accused No. 2 Devidas regarding assault on Nirmala P.W. 2.

12. The prosecution had examined P.W. 9 Rahematkha regarding seizure of the clothes. P.W. 9 Rahematkha has stated that accused Rekha had produced one Pyjama and one Baniyan which were blood stained and the same were seized on 2-9-1999. On the same day one Nehru shirt was seized from accused Onkar which also was blood stained. Likewise one open shirt was seized from accused Devidas which was also blood stained. The panch identified the said articles. The same were sent to chemical analyser. The report of the chemical analyser shows that Articles 1 and 2 of Exh. 3 and Exh. 4 which belonged to accused Devidas were having human blood stains of "B" group. The blood group of Nirmala P.W. 2 is "B" group since her blood Exh. 17 was sent for grouping. The presence of the blood stains of the "B" group which are of Nirmala P.W. 2 therefore, links accused Devidas with the assault on her which further supports the oral evidence of P.W. 2 Nirmala and P.W. 6 Khandu and P.W. 7 Pandurang. The shirt of accused Onkar which is Exh. 5 also had human blood stains of "B" group which also proves the presence of Onkar on the spot. Thus, the involvement of accused Onkar and accused Devidas in the incident is duly established by cogent and trustworthy evidence on record.

13. The question which is now required to be examined is whether accused Devidas can be convicted on the strength of section 34 in so far as the murder of Ramkrishna is concerned. Before dealing with this question, we shall deal with argument advanced by learned advocate for the appellant that the Medical Officer P.W. 13 Dilip Tekam has not stated in his deposition that the injuries on the person of deceased Ramkrishna are sufficient in the ordinary course of nature to cause death. Dr. P.W. 13 Dilip Tekam had examined deceased Ramkrishna and he had found eight injuries on his person. The medical report of deceased Ramkrishna is as under :-

Ramkrishna died on the same day at 1.45 p.m. and P.W. 13 Dr. Dilip Tekam had performed post mortem on the next day. He found that the liver was ruptured. According to him cause of death was shock due to severe haemorrhage due to injuries to vital organs like brain and liver and due to multiple fractures. He further deposed that injuries No. 4 and 7 correspond to injury on brain and liver. The injury to the liver was rupture 3" in length 1 and 1/2" deep on right lobe. Though the doctor had not stated whether the injuries were sufficient in the ordinary course of nature to cause death or not, yet the cause of death was stated to be shock due to severe haemorrhage due to injuries to vital organs like brain and liver and due to multiple fractures. In this respect learned A.P.P. has relied upon the judgment of the Apex Court in *Brij Bhukhan v. State of U.P.* (supra) wherein it has been held that although the medical evidence does not

say that any one of the injuries on the body of the deceased was sufficient to cause death in the ordinary course of nature, yet it is open to the Court to look into the nature of the injuries found on the body of the deceased and infer from them that the assailants intended to cause death of the deceased. A reference to Modi's Medical Jurisprudence and Toxicology, 21st Edition at page 331, shows that ruptures usually involve the right lobe and in rupture of the liver death occurs immediately from shock and haemorrhage or it may occur within 48 hours. Thus the injuries to the vital organs like brain and liver resulting in haemorrhage would be sufficient in the ordinary course of nature to cause death. Therefore, we do not find any merit in the submission of the learned advocate for the appellant in this behalf.

14. Coming to the question of common intention, a number of rulings have been cited on the other side and we shall refer to the same. Learned advocate for the appellant has relied upon Tholan v. State of Tamil Nadu (supra) wherein it is held that only one blow with knife was given and the incident occurred on the spur of moment and this authority is not much help.

15. In Gurdeep Singh v. Jaswant Singh (supra) on the facts of the said case it was held that the co-accused did not share common intention of the main accused as though they had come armed with weapons, they had not caused any injury on any vital part of the deceased. Hence their conviction was altered to section 304 Part II I.P.C. Though the accused had no intention to cause death, yet he had knowledge that the injury caused by him was likely to cause death of the deceased.

16. In Munna v. State of U.P. (supra) it was held that fatal knife blow was inflicted on abdomen by appellant 1 while appellant 2 was holding the deceased and appellant No. 2 despite being armed with a razor did not choose to use the same. The evidence on record was to the effect that the appellant had no idea that his brother would take out the knife and cause the fatal injury to the deceased. It is in these circumstances that it was held that it was difficult to attribute to him a common intention to kill the deceased and convict him with the aid of section 34. It was further pointed out that at the most since appellant knew that his brother was carrying a weapon, one could infer that he shared common intention to cause grievous hurt u/s 326 r/w section 34 I.P.C.

17. In Babubhai Ranchodbhai Patel v. State of Gujrat (supra) it was held that the accused had inflicted knife injury which proved to be fatal. However, the co-accused who had inflicted one simple injury, was not held to have common intention with the main accused and the conviction of the co-accused was altered from section 302 read with 34 to section 326 I.P.C. In this case the Apex Court has taken into consideration the fact that it was a sudden affair and the co-accused had inflicted only a simple injury.

18. On the other hand the learned A.P.P. had relied upon the case of Ch. Pula Reddy v. State of A.P. (supra) wherein out of six accused, A-2 was present on the

night of the occurrence with a knife along with A-1, who was also armed with a knife, and had shared the common intention with A-1 of causing bodily injuries to the deceased which were sufficient in the ordinary course of nature to cause the death of the deceased. The evidence on record was that A-1 and A-2 had come armed with knives and were standing towards head of the cot armed with knives and A-1 had stabbed twice on the chest of the deceased. In these circumstances, section 34 I.P.C. was held to be attracted to the case of A-2 even though he did not by himself cause any specific injury to the deceased.

19. In *Vishwanath Shanthamallappa Dhule v. State of Karnataka* (supra) it was held that one of the accused had given axe blow and the other co-accused had only raised his axe but taking into account that both the accused came together and as the co-accused had raised his axe, he was liable to be convicted u/s 300 read with 34 I.P.C.

20. The law on the applicability and scope of section 34 I.P.C. was laid down way back by the Supreme Court in *Pandurang, Tukia and Bhillia Vs. The State of Hyderabad*, and it is considered necessary to quote the following observations of the Apex Court in this behalf :

"In the case of 3.34 it is well established that a common intention presupposes prior concert. 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. Accordingly there 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 be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; & 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. 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. 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 formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough to have the same intention independently of each other, e.g. the intention to rescue another, and, if necessary to kill those who oppose. It is true, prior concert and arrangement can, and indeed often must, be determined from subsequent conduct as, for example, by a systematic plan of campaign unfolding itself during the course of the action which would only be referable to prior concert and

prearrangement, or a running away together in a body or a meeting together subsequently. But the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. 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 "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis".

21. These observations of the Apex Court were followed in a subsequent judgment of the Apex Court in *Rishideo Pande Vs. State of Uttar Pradesh*, . In this case it was held by the Apex Court that even where it is true that the appellant convicted u/s 302 read with section 34 I.P.C. did not inflict any blow on the deceased, yet if it is found that he shared the common intention to kill him and actually participated in the criminal act by being present on the spot armed with his lathi, then in the eye of the law, he is as much guilty of the whole criminal act as is his co-accused who actually dealt the fatal blow on the sleeping man.

22. In *Lalai @ Dindoo and Another Vs. State of U.P.*, it was held that the deceased was murdered by one of the two accused with a gandasa while he was sleeping on a cot in his own Mandai, while the other accused, his brother, without taking part in the assault stood by with a spear in his hand so as to overcome any outside interference with the attainment of their object and both of the accused ran away together after the murder, it was held that these facts had a sufficient bearing on the existence of common intention to murder.

23. Therefore, the crucial question which is required to be decided in such matters is whether there is common intention which may be as a result of prearranged plan or which may even develop on the spot. The conclusion relating to common intention would depend upon facts and circumstances of each case. In the case under consideration, the accused Onkar and accused No. 2 Devidas are brother-in-laws inter se, accused No. 1 Onkar is married to the sister of Devidas. They had both came together with swords in their hands, while accused No. 1 Onkar started assaulting deceased Ramkrishna, accused No. 2 Devidas started assaulting Nirmala who came to intervene. The act of Accused No. 2 in assaulting Nirmala P.W. 2 was with a view that assault which was being carried on by accused No. 1 Onkar was not interfered with. The accused succeeded in their design to kill Ramkrishna. Even though accused No. 2 Devidas did not himself assault Ramkrishna, yet it is clear from the facts and circumstances that he shared common intention with accused No. 1 Onkar to cause such bodily injury to him which was sufficient in the ordinary course of nature to cause death. Therefore, the conviction of appellants No. 1 and 2 for the murder of

Ramkrishna u/s 302 read with 34 I.P.C. cannot be interfered with.

24. Coming to the case of appellants 1 and 2 common intention vis-a-vis the injuries caused to Nirmala P.W. 2, the evidence on record is that the injuries to her were caused by Accused No. 2 Devidas as also Accused No. 1 Onkar who in fact admits the same in his statement u/s 313 Cr.P.C. The Trial Court has convicted the appellants No. 1 and 2 u/s 326 read with 34 I.P.C. On the person of Nirmala P.W. 2, Dr. Dilip Tekam P.W. 13 found eight injuries. The medical report of the injuries is as follows:

The injuries No. 1, 2 and 4 are incised wounds and fractures said to have been caused by sharp weapon. The other injuries namely injury Nos. 3, 5, to 7 are also incised wounds. Since the injuries are caused by sharp weapon viz. sword in this case, the conviction of the appellants u/s 326 read with 34 I.P.C. in so far as appellants No. 1 and 2 is concerned is well founded and does not call for any interference.

25. Coming now to the question of common intention on the part of the other appellants, we find that appellants No. 6 to 8 did not share any such intention. The prosecution case is that they were having chillies with them and they had thrown chillies. Though one of the witnesses had stated that the chillies were thrown in the eyes of in-laws but there is no medical evidence on record that the chillies were thrown in the eyes of Ramkrishna or Nirmala P.W. 2. The involvement of appellants No. 6 to 8 either for murder of Ramkrishna or for causing grievous hurt to Nirmala P.W. 2 or to cause grievous hurt to Manohar P.W. 5 is not established. We are, therefore, of the opinion that no evidence whatsoever is disclosed against appellants No. 6 to 8 and they are entitled to acquittal in respect of offences with which they were charged.

26. Coming now to the appellants No. 3, 4 and 5, the evidence on record is that appellant No. 4 Domaji and appellant No. 3 Waman were having sticks in their hands and appellant No. 5 Ramdas had iron rod with him. They did not take part in the main incident nor assaulted deceased Ramkrishna or Nirmala P.W. 2. Nirmala P.W. 2 has in her deposition stated that they were present with weapons. Khandu P.W. 6 states that after the main incident, he had driven away the accused and when Manohar came, he was assaulted by accused Devidas, Domaji and Onkar. However, Manohar who was actually assaulted does not say that he was assaulted by accused Onkar or accused Devidas. Manohar P.W. 5 on the other hand stated that accused Waman, Domaji and Ramdas assaulted him with pipe and sticks. Accused Waman and accused Domaji were having sticks and accused Ramdas was having steel pipe. P.W. 13 Dr. Tekam found four injuries on the person of Manohar. His medical report is as under :---

According to Dr. P.W. 13 Dr. Dilip Tekam, injury No. 1 was suspected fracture. No further evidence is led by the prosecution to confirm the finding of the suspected fracture. The evidence of Manohar P.W. 5 who is injured is sufficient to hold appellant Nos. 3, 4 and 5 guilty for offence u/s 324 read with 34 I.P.C. since one

of the viz. Ramdas was carrying iron pipe which is a dangerous weapon. The attack and the resulting injuries on Manohar P.W. 5 was in furtherance of common intention of all the three appellants. However, in the facts and circumstances of the case, no common intention could be attracted to them either to kill Ramkrishna or to cause grievous hurt to Nirmala P.W. 2. Though they were present with the weapons, neither they assaulted deceased Ramkrishna with the said weapons nor Nirmala P.W. 2 who came to intervene. The assault by these appellants on Manohar was much after the main incident was over. Hence the conviction of these appellants with the help of section 34 I.P.C. regarding murder of Ramkrishna and grievous hurt to Nirmala P.W. 2 cannot be sustained.

27. For the aforesaid reasons, the appeal is partly allowed. The convictions and sentence of appellant Nos. 1 and 2 u/s 302 read with 34 I.P.C. and u/s 326 read with 34 I.P.C. are confirmed and maintained, except to the extent of in default of payment of fine of Rs. 2000/-, the appellant Nos. 1 and 2 shall suffer further R.I. for three months. The sentences u/s 302 read with 34 I.P.C. and u/s 326 read with 34 I.P.C. shall run concurrently. The conviction and sentence of appellants No. 3 to 8 u/s 302 read with 34 I.P.C. and for offence u/s 326 read with 34 I.P.C. are set aside. The conviction and sentence of appellants No. 3 to 5 u/s 325 read with 34 I.P.C. is set aside but instead they are held guilty u/s 324 read with 34 I.P.C. However, it is to be noted that appellant No. 3 Waman has already undergone imprisonment of two years and as such we are of the opinion that imprisonment already undergone would serve the ends of justice. In so far as appellants No. 4 and 5 are concerned, they have been in detention from 31-8-1991 to 31-12-1991 and from 5-6-1993 to 21-6-1993. Taking into consideration the said fact and the incident took place about nine years ago, we are not inclined to send them in jail once again but we are of the opinion that in addition to the detention already undergone by them, fine of Rs. 6000/- each should be imposed on them. In default of payment of fine of Rs. 6000/- each, they shall undergo R.I. for nine months. The appellants No. 4 and 5 are granted one month's time to deposit the fine in the trial Court. In case the fine is not deposited within one month, the Sessions Judge shall take coercive steps to enforce imprisonment in default of payment of fine. If fine is recovered, it shall be paid to Nirmalabai P.W. 2.

28. The appeal is accordingly allowed to the aforesaid extent.