

(2000) 07 BOM CK 0047

In the Bombay High Court

Case No : Criminal Appeal No. 47 of 1996

Shankar Budhaji Moundekar and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 31-07-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 221, 313
Penal Code, 1860 (IPC) — Section 141, 147, 148, 149, 302

Citation : (2001) ALLMR(Cri) 135 : (2001) BomCR(Cri) 282 : (2001) 1 MhLj 135

Hon'ble Judges : S.G. Mahajan, J

Bench : Single Bench

Advocate : M.R. Daga, R.M. Daga and N.A. Badar, for the Appellant; K.S. Dhote, Additional Public Prosecutor, for the Respondent

Judgement

S. G. Mahajan, J.—Appellants No. 1 Shankar s/o Budhaji Moundekar, No. 2 Raju s/o Shankar Moundekar, No. 3 Ramrao s/o Kashinath Moundekar and No. 4 Prabhakar s/o Kashinath Moundekar have preferred the instant appeal against the order of conviction and sentence passed against them by the learned Additional Sessions Judge, Nagpur, on 12.1.1996 in Sessions Trial No. 260 of 1989. The offences with which the appellants were charged and convicted are u/s 307 read with section 149, section 147 and section 148 of the Indian Penal Code and each of them was sentenced to suffer R. I. for ten years and to pay a fine of Rs. 300/-, or in default to suffer R. I. for three months more for the offence u/s 307 read with section 149 of the Indian Penal Code to suffer R.I. for one year and to pay a fine of Rs. 100/-, or in default to suffer R.I. for one month more for the offence u/s 147 of the Indian Penal Code and again to suffer R.I. for one year and to pay a fine of Rs. 100/- or in default to suffer R.I. for one month more for the offence u/s 148 of the Indian Penal Code. The substantive sentences of imprisonment were directed to run concurrently.

2. The case of the prosecution is as under : -

(a) Victim Nilkanth Ganpatrao Parate is the resident of Zade Chowk, Lalganj,

Nagpur. He resides there with his wife complainant Laxmibai. Appellant Nos. 1 to 4, who are the original accused Nos. 1 to 4 respectively, are also the residents of the same locality and they reside in the neighbourhood, that is just adjacent to the house of victim Nilkanth. They all are the members of the joint family. One of the accused in this case, namely Kashinath Budhaji Moundekar, who died on 12.6.1990, was also the member of the joint family of the accused-appellants. Victim Nilkanth was running a pan stall. Accused Prabhakar was engaged in the business of selling illicit liquor and accused Ramrao used to help him in that business. Victim Nilkanth and all the accused persons including deceased Kashinath were on inimical terms with each other since prior to the incident and there used to be quarrels between them. The reason behind the quarrels was that accused Prabhakar and Ramrao used to hide liquor bottles near the wall on the rear side of the house of Nilkanth and Nilkanth used to object to the same. At the time of Pola festival just preceding the incident in this case, such quarrel had taken place between the accused persons and Nilkanth. The quarrels used to occur between the womenfolk also of these two families on the count of filling water from the common public water tap situated near their houses. These quarrels between the ladies were also taken up by the male members of these two families.

(b) On 23.2.1989 at about 7.30 to 7.45 p.m., Nilkanth was sitting on a bench in front of his house in the courtyard. Complainant Laxmibai was working in the house. That time, accused Prabhakar and Raju rushed towards Nilkanth. There was an exchange of words between Nilkanth and these two accused. The accused questioned as to why Nilkanth was objecting to the concealment of liquor bottles by them and was destroying their business. Nilkanth strongly opposed. Thereafter accused Prabhakar and Raju caught hold of both the arms of Nilkanth. Accused Shankar, who was armed with a Bhala spear, rushed towards Nilkanth. At the same time, accused Ramrao rushed with a wooden stick on the person of Nilkanth and gave a blow thereof on his head. Accused Shankar hit Nilkanth with spear on his abdomen on left side. Nilkanth managed to rescue himself from the clutches of the accused persons and rushed towards the Chhapari of neighbour named Lanjewar in order to save himself. All the accused pulled Nilkanth out of the Chhapari in the courtyard. Thereafter accused Shankar again dealt a blow of spear to Nilkanth and accused Ramrao gave a stick blow on Nilkanth's shoulder. Complainant Laxmibai, who was working in the house, heard the shouts of Nilkanth and rushed to the spot. She noticed that the accused persons were attacking her husband. She saw accused Shankar giving a blow of spear to Nilkanth and accused Prabhakar and Ramrao catching hold of the arms of Nilkanth. She also saw accused Raju giving a slick blow to Nilkanth. Laxmibai tried to intervene, but the accused persons pushed her and in that process, she also sustained injuries on her left hand between thumb and index finger. Similarly, the father of Nilkanth named Ganpat also ran down there and tried to rescue Nilkanth, but the accused persons pulled him and he also sustained an injury on his right leg.

(c) Nilkanth fell unconscious in the courtyard of his house with bleeding injuries. The accused persons fled. Complainant Laxmibai removed Nilkanth to Mayo Hospital, Nagpur. Nilkanth was admitted in the hospital. While complainant Laxmibai was in the hospital itself, A.S.I. Ramadhar Pande recorded her report. A.S.I. Pande gave a requisition to the House Officer of the hospital seeking permission to record the statement of Nilkanth. However, the permission was refused to him on the ground that the patient was unfit. A.S.I. Ramadhar Pande also issued a letter to the Special Executive Magistrate, Nagpur, for recording the dying declaration of Nilkanth. On the basis of the oral report of complainant Laxmibai, that was recorded in the hospital, A.S.I. Ramadhar Pande registered the crime at Serial No. 116/89 u/s 307 read with section 34 of the Indian Penal Code. A requisition was also given by A.S.I. Ramadhar Pande to the Casualty, Mayo Hospital, Nagpur, for the medical examination of complainant Laxmibai and the father of Nilkanth named Ganpath.

(d) During the same night, i.e. the night intervening 23.2.1989 and 24.2.1989, at about 1.00 a.m. (of 24.2.1989) P.S.I. More visited the spot of occurrence and drew the spot panchanama. The blood stains were noticed at different places on the spot. The samples of blood-mixed earth as well as sample earth were collected during the preparation of the spot panchanama.

(e) Injured Nilkanth was examined medically by Dr. Jiwtode. He was operated upon in the same night. On examination, Dr. Jiwtode noticed the following injuries on the person of Nilkanth :

(1) Stab wound, left iliac fossa, 3" x 2" x cavity deep, jejunum part collapsed obliquely placed, bleeding present.

(2) Incised wound, multiple on scalp, obliquely placed, parietal occipital region, obliquely placed 1" x 1/4" x 1/4th".

(i) Left parietal region 1" x 1/2" x 1/4th".

(ii) Right parietal region 1/2" x 1/2" x 1/4th".

(3) Incised wound, left leg, medial size medial 1/3rd, 1" x 1/2" x 1" obliquely placed, blood clots present.

(4) Incised wound left shoulder 2" x 1/2" x 1/2" obliquely placed, no acute bleeding present.

On internal examination, the corresponding damage was noticed as under :

There was through and through cut in the Jejune loop about 1 foot from Diaphragmatic Plexus, several tears present at Diaphragmatic Plexus, minimum hemoperitoneum present.

(f) On 24.2.1989, the dying declaration of injured Nilkanth was recorded by the Special Executive Magistrate Shri Gaikwad. On the same day, P.S.I. Patil gave a requisition to the House Officer, Mayo Hospital, Nagpur, seeking permission to

record the police statement of Nilkanth. On according such permission by the House Officer, the statement of Nilkanth came to be recorded by police. After such statement was recorded, it was revealed that the offence under sections 147, 148 and 149 was attracted and, therefore, section 34 was replaced by these sections in the crime that was registered earlier. The investigation was then handed over to A.P.I. Gaikwad.

(g) On 26.2.1989, deceased-accused Kashinath and accused Shankar, Raju and Ramrao were arrested. On 2.3.1989, accused Shankar, while in the custody of the police, gave an information about the spear that was hidden in his house behind the staircase. The memorandum of his version came to be recorded in presence of panchas at 11.00 a.m. Soon thereafter, accused Ramrao, who was also in the custody of the police, gave an information about the stick hidden in his house. The memorandum of his version also came to be recorded in presence of panchas at 11.10 a.m. Both the accused undertook to produce the respective weapons. Thereafter A.P.I. Gaikwad along with police staff, panchas and accused proceeded for recovery. Accused Shankar led panchas and police to his house, went inside and produced the spear by taking it out from the place behind the staircase. The same was seized by A.P.I. Gaikwad and the recovery panchanama was drawn. Similarly, accused Ramrao led the panchas and police to his house, went inside and produced the wooden stick that was hidden behind the sewing machine in the house. The same was seized by A.P.I. Gaikwad and the recovery panchanama was drawn accordingly.

(h) Accused Shankar and Ramrao were thereafter referred to Mayo Hospital for the collection of the samples of their blood. The blood samples were collected accordingly and were received from the hospital. On 16.5.1989, the clothes of injured Nilkanth brought by the concerned Police Constable from the hospital came to be seized on the production thereof. All the seized articles including the clothes of injured, blood samples of accused Shankar and Ramrao and the weapons, i.e. Bhala spear and wooden stick, were referred to Chemical Analyser, Nagpur, for examination. The Chemical Analyser's report was received. In spite of strenuous efforts, accused Prabhakar, who was absconding, could not be traced. On completion of the investigation, the charge-sheet was put up in the Court of Chief Judicial Magistrate, Nagpur, in absence of accused Prabhakar. The learned Chief Judicial Magistrate, Nagpur, committed the case to the Court of Session for the trial of the accused persons vide order dated 27.6.1989.

3. The learned 6th Additional Sessions Judge, Nagpur, framed the charge of the aforesaid offences (i.e. of the offences under sections 147, 148 and section 307 read with section 149 of the Indian Penal Code) showing accused No. 1 as Shankar s/o Budhaji Moundekar, No. 2 as Raju @ Rajiv s/o Shankar Moundekar, No. 3 as Ramrao s/o Kashinath Moundekar and No. 4 Prabhakar s/o Kashinath Moundekar as absconding. This charge was framed on 5.8.1994. In this charge, Kashinath s/o Budhaji Moundekar was not shown as an accused probably because in the year 1991, one of the accused reported to the Court that accused

Kashinath had expired. However, before framing this charge, the case against Kashinath s/o Budhaji Moundekar was not abated. Again although the charge was for the offences under sections 147, 148 and section 307 read with section 149 of the Indian Penal Code, the number of accused participating in the commission of the offence was not shown as five. There was only a reference to four accused in this charge as the persons participating in the commission of offence. There was no reference to the participation of the deceased accused Kashinath.

4. Then on 2.8.1995, the absconding accused Prabhakar s/o Kashinath Moundekar was produced before the Court of Session. On his production, the learned Additional Sessions Judge, Nagpur, altered the charge. In this charge, deceased Kashinath s/o Budhaji Moundekar was also shown along with the other four accused as a person, participating in the commission of offence and the number of participants thus was correctly shown as five. The charge was read over and explained to accused Nos. 1 to 4 (who are the present appellants) and the accused pleaded not guilty. On the same date, earlier to the framing of charge, the case against accused Kashinath was abated.

5. The defence of accused persons was of denial. From the suggestions made to the prosecution witnesses during their cross-examination and from the answers given by the accused persons to the questions recorded during their examination u/s 313 of the Criminal Procedure Code, the defence of the accused persons, as is revealed, was that at the relevant time they were not present at home, they had already gone for work and they were yet to return home. The further contention of the accused persons was that injured Nilkanth was engaged in the business of selling illicit liquor and on the date of incident, one of his customers assaulted him and ran away, but the accused persons were falsely implicated. The accused persons also claimed enmity with the family of Nilkanth on the count that there used to be quarrels between the womenfolk of these two families over the question of filling water from the common water tap, in addition to this, accused Shankar also claimed enmity with Nilkanth, contending that Nilkanth was displeased as accused Shankar did not accompany him in gambling.

6. The learned Additional Sessions Judge recorded the evidence and heard the submissions made on behalf of respective sides. She relied on the testimony of the prosecution witnesses Laxmibai and Nilkanth and found that the evidence of these witnesses was corroborated by medical evidence. She also discarded the defence of the accused persons that some other customer assaulted Nilkanth and the present accused were falsely implicated. While arriving at this conclusion, the Judge was of the opinion that the identity of the accused persons as the assailants was established. Taking the view that the offences with which the accused persons were charged were made out, the learned Judge convicted the accused persons of the concerned offences. While awarding the sentence, the Judge found that the assault on Nilkanth was a brutal one and the circumstances did not warrant a lenient view. She accordingly passed the sentence upon the

accused persons as aforesaid. This order of conviction and sentence is impugned in this appeal.

7. The learned counsel for the accused-appellants canvassed that sections 147, 148 and 149 are not attracted in this case as the persons participating in the commission of offence are only four in number. The definition of "Rioting" is given in section 146 of the Indian Penal Code. It speaks that whenever force or violence is used by an unlawful assembly or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting. Punishment for rioting is provided in section 147 of the Indian Penal Code. The members of unlawful assembly, who are guilty of rioting, being armed with deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, are liable u/s 148 of the Indian Penal Code. Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly, in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. Thus the requirement of the offences under sections 147, 148 and some other substantive offence read with section 149 of the Indian Penal Code is that there should be an unlawful assembly. As per section 141 of the Indian Penal Code, an assembly of five or more persons is designated an unlawful assembly if the common object of the persons composing that assembly is as enumerated in either of the Clauses First to Fifth given in that section. Thus an unlawful assembly always consists of five or more persons. If the number of persons involved in the offence is less than five, none of the abovesaid offences is attracted.

8. It is not necessary that the number of accused before the Court must be five or more. What is required is the number of persons forming the assembly, which is to be designated as an unlawful assembly, must be five or more. Even if the number of accused before the Court is less than five, but the members of assembly are five or more, it can be regarded as an unlawful assembly, if the conditions laid down in section 141 of the Indian Penal Code about the common object of such assembly are fulfilled. Sometimes some members of assembly are unknown. Sometimes some members forming the assembly are dead subsequently. Sometimes some members are absconding and are not before the Court at the time of trial. Thus even if the number of accused persons actually facing the trial before the Court is less than five, but the number of persons in the assembly, which is to be designated as unlawful assembly, is five or exceeds five in total, the abovesaid sections are attracted.

9. In the instant case, the charge was rightly framed by the learned Additional Sessions Judge for the offences under sections 147, 148 and section 307 read with section 149 of the Indian Penal Code. The charge was framed on considering the documents of prosecution. At the time when the charge was framed, the

documents before the Court were the oral report lodged by Laxmibai, the dying declaration of victim Nilkanth and the statement of Nilkanth recorded by police. In the dying declaration, the victim has mentioned five assailants, namely Kashinath, Shankar, Prabhakar, Ramrao and Raju. The dying declaration was not proved at trial and it is thus unexhibited. The reason behind not proving the dying declaration appears to be that the victim survived and, therefore, the declaration no more remained to be a dying declaration. However, at the time of framing the charge, the dying declaration was before the Court. In the statement of P.W. Nilkanth, that was recorded by police, again the names of all the above five persons are there as the persons assembled. Thus this document was also there before the Court at the time of framing the charge. However, in the oral report lodged by Laxmibai with police, which is at Exhibit 52, only four persons are named as assailants. There is no mention of the name of deceased Kashinath in this report. So as per this report, only four persons, who are the present accused-appellants, were involved in the commission of offence. Although Kashinath was not before the Court as an accused since he expired in the year 1990 itself, his participation in the offence along with the accused-appellants was alleged by P.W. Nilkanth in his dying declaration as well as in the statement before police. So nothing wrong was committed by the learned Judge while framing the charge of the offences under sections 147, 148 and section 307 read with section 149 of the Indian Penal Code.

10. However, the problem is with the conviction for those offences. In my opinion, the learned Additional Sessions Judge erred in convicting the accused-appellants of the offences under sections 147, 148 and 149 of the Indian Penal Code. For conviction at the trial, what is required is the proof. The fact that the persons involved in the offence were the members of unlawful assembly, was required to be proved by evidence. The prosecution ought to have proved that the assembly was consisting of five or more persons. The Court could not go merely by documents. It is to be seen what is the evidence as regards the number of persons involved in the commission of offence, P.W. Laxmibai categorically deposed before the Court that she noticed that four persons attacked her husband. She has given the names of all the four accused in her evidence. Nowhere she deposed that deceased Kashinath also participated in the commission of offence. Not only that, his presence is not even alleged by Laxmibai in her evidence. So her evidence unequivocally shows that only four persons, who are the accused in this case, were the participants. P.W. Nilkanth Parate, who is the victim and injured in this case, has also specifically named only four accused in his evidence as the persons participating in the offence. In his evidence, he has nowhere deposed any role having been played by deceased Kashinath. Not only that, he has not even alleged the presence of Kashinath on the spot, in his evidence. While convicting the accused, finding them guilty, the Court has to go by evidence. The dying declaration, on the basis of which the charge was framed, is an unproved document. The statement before police is also not a substantive piece of evidence. So the contents of these two documents

attributing the participation in the offence to deceased Kashinath, though could be considered at the time of framing charge, could not have formed the basis of conviction in respect of the offences under sections 147, 148 and 149 of the Indian Penal Code, since nothing about the participation or even about the presence of Kashinath was proved or even alleged in the evidence making the total number of persons involved in the commission of offence as five. Obviously, the dying declaration could not be read in evidence. The statement recorded by police can be used only for proving contradictions or omissions. Since no contradiction in respect of the role alleged to have been played by deceased Kashinath was brought on record by the prosecution during the evidence of Nilkanth, that part of his statement recorded by police cannot be read. As already stated above, since there is no averment in the oral report made by Laxmibai in respect of deceased Kashinath, this document is also not of any avail to the prosecution for arriving at the conclusion that the accused persons were the members of unlawful assembly. It also cannot be said that since Kashinath was dead, the witnesses did not depose his name and, therefore, the assembly of five persons is to be presumed. No such allowance can be made. Had it been a fact that deceased Kashinath was also involved in the commission of offence, the abovesaid witnesses, i.e. complainant Laxmibai and P.W. Nilkanth, while narrating the incident during the course of evidence, would have surely described his role. The fact that they did not utter even a single word about any role having been played by deceased Kashinath or even about his presence on the spot, would necessarily raise an inference that deceased Kashinath was not present on the spot and was not involved in the commission of offence in any manner. Thus even as per the own allegations of the prosecution witnesses in their evidence, only four persons were involved in the commission of offence. The offences under sections 147, 148, and 149 of the Indian Penal Code are, therefore, not attracted and the conviction of the accused-appellants of those offences would not sustain.

11. While parting with the discussion on this point, one more fact has conspicuously come to my notice. The learned Additional Sessions Judge convicted the accused-appellants of both the offences, that is to say the offence u/s 147 of the Indian Penal Code as well as the offence u/s 148 of the Indian Penal Code. The accused cannot be punished simultaneously for both these offences. As per section 147 of the Indian Penal Code, whoever is guilty of rioting shall be punished with imprisonment of either description for a term, which may extend to two years, or with fine, or with both. As per section 148 of the Indian Penal Code, whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. Thus the punishment for simple rioting is provided in section 147 of the Indian Penal Code, whereas the punishment for rioting for a person, who is armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, is provided in section 148 of the Indian Penal Code. The person will be liable for one of these

two offences. If the person is not armed with any weapon described in section 148 of the Indian Penal Code, he will be liable to be punished u/s 147 only. But if he is armed with such weapon, he will be liable to be punished u/s 148 of the Indian Penal Code. He cannot be convicted twice for the same offence of rioting. However, this discussion is not material in view of the fact that the offences under sections 147, 148, and 149 of the Indian Penal Code do not survive since the same are not attracted.

12. Once the offences under sections 147, 148 and 149 of the Indian Penal Code go away, it has to be seen whether the offence u/s 307 of the Indian Penal Code is made out against any accused individually and whether the accused other than who are individually liable for the said offence, are liable u/s 34 of the Indian Penal Code. Section 34 of the Indian Penal Code provides that when a criminal act is done by several persons in furtherance of the common Intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essence of section 34 of the Indian Penal Code is the participation in a criminal action with a common intention. The common intention implies a pre-arranged plan. Of course, sometimes the common intention can develop on the spur of moment also. But such common intention should necessarily precede the action. The common intention can be inferred from the conduct of the accused persons or the other circumstances. The participation in the act in any manner other than doing the principal act, is held liable in the same manner as in the case of a person doing, the principal act. Thus if one person assaults the victim and another catches his hold or facilitates such assault by any other mode, such other person is also liable in the same manner u/s 34 of the Indian Penal Code. When there is a common intention the person participating in the action knows the result of the principal act of another.

13. Now the evidence of the prosecution witnesses on the point as to who did which act and who participated in which manner may be gone into. It may also be ascertained whether the acts alleged and proved against the accused raise an inference about the common intention. At first the evidence of Laxmibai may be dealt with, since she is the complainant in this case. The evidence of P.W. Laxmibai is that at the relevant time, she was working in the house and on hearing the shouts of her husband, she rushed out from the house. She noticed that four persons attacked her husband. As per this witness, accused Shankar was holding a spear in his hand and he assaulted her husband with spear. The witness further testified that two of the accused, namely Prabhakar and Ramrao had caught hold of her husband and accused Raju was holding the stick in his hand and he gave a stick blow to her husband. As per this witness, accused Shankar gave a spear blow on the right side abdomen of her husband, which caused the bleeding injury and he then again gave another spear blow on the back of her husband. Her husband fell unconscious in the courtyard and with the help of one Jagdish Zade, she called the rickshaw and took her husband to Mayo Hospital. Nagpur.

14. The evidence of P.W. Nilkanth Parate, who is the victim in this case, is that at the time of incident, he was sitting on a bench in front of his house in the courtyard. At that time, accused Prabhakar and accused Raju rushed towards him. There was a hot exchange of words. The above accused were asking the witness as to why was he objecting to the concealing of liquor by them and why was he destroying their business and they said that they had come to see him. P. W. Nilkanth further testified that accused Prabhakar and accused Raju caught hold of both of his hands and that time, accused Shankar rushed towards him with a spear in his hand and accused Ramrao rushed with a wooden stick in his hand. The further assertion of the witness is that accused Ramrao gave a slick blow on his head and accused Shankar gave a blow of spear on the left side at the lower end of ribs and upper end of his abdomen. The further contention of the witness is that he rushed towards the Chhapari of his neighbour Shri Lanjewar in order to save himself and then all the accused, namely Prabhakar, Raju, Shankar and Ramrao pulled him out of the Chhapari in the courtyard. Accused Shankar gave a second blow of spear to him near umbilicus towards left side. The injury caused thereby was through and through, which reached his back near waist. The further version of P.W. Nilkanth is that accused Ramrao gave one stick blow on his left shoulder. The witness further deposed that he fell down. According to him, meantime when his wife had rushed to save him, the accused persons pushed her.

15. Now it may be seen how far the allegations made by the prosecution witnesses in their evidence against each of the accused in regard to the acts done by them, are made out.

16. P.Ws. Laxmibai and Nilkanth both categorically deposed that accused Shankar inflicted the blows of spear on the person of Nilkanth. The evidence of these witnesses shows that the blow of spear was given on the abdomen of Nilkanth and the evidence of P.W. Nilkanth further shows that through and through injury was caused. The evidence of Dr. Jiwtode shows that a stab wound was caused on the left iliac fossa, incised wound (multiple) was caused on the scalp on parietal occipital region, another incised wound was caused on right parietal region, again an incised wound was caused on left leg and lastly, an incised wound was caused on left shoulder of P.W. Nilkanth. All the above injuries were clean cut. Dr. Jiwtode also noticed corresponding internal damage to injury No. 1 in the form of through and through cut in Jejunely. In the opinion of Dr. Jiwtode, the injuries were possible by a weapon mostly with sharp edges on both the sides and pointed, viz. spear. The evidence of P.Ws. Laxmibai and Nilkanth on the point of blow of spear given by accused Shankar on the abdomen of P.W. Nilkanth is consistent in material particulars and the same is corroborated by medical evidence as detailed above. Although the evidence of P.W. Laxmibai shows that she reached the place where P.W. Nilkanth was being assaulted, after a short while, the quarrel was still going on and she witnessed accused Shankar giving a blow of spear to Nilkanth. There is no reason to distrust the evidence of P.Ws. Laxmibai and Nilkanth on the above point. The defence of the accused

persons that some customer hit P.W. Nilkanth and the accused persons are falsely implicated, is without any basis. There could be none other than accused Shankar hitting victim Nilkanth with a spear. Though it was a dark on the place of occurrence and P.W. Laxmibai admitted in her cross-examination that because of the darkness, it was difficult to know who came and who went, the evidence of P.W. Nilkanth clearly shows that a tube light was burning at that place. The evidence also shows that there are some houses situated near the spot, so the light from those houses also could reach the place of occurrence. P.Ws. Laxmibai and Nilkanth could very well recognize the accused persons as they were acquainted with them being the neighbours and the persons having enmity with them. So the fact that accused Shankar gave a blow of spear on the abdomen of P.W. Nilkanth and caused through and through injury, is established. There might be some contradictions on the point of number of blows of spear inflicted on the abdomen of Nilkanth but the same are minor. The other injuries on the person of Nilkanth were incised wounds. The discussion as to the author of those injuries shall be made subsequently in due course at the relevant places.

17. Now about the participation of other accused persons. Before going into the evidence on this point, one thing needs a mention. There are some contradictions and omissions in the oral report lodged by P.W. Laxmibai and the statement of P.W. Nilkanth recorded by police. Since the Investigating Officer, who recorded the statements of witnesses, was not examined by the prosecution, the prosecution may say that the contradictions and omissions are not proved. However, it was the duty of the prosecution to produce the Investigating Officer, who recorded the statements of the witnesses, for evidence. Had he been examined by the prosecution and had the defence failed to put up the abovesaid contradictions and omissions to the said Investigating Officer, then the accused persons could not have taken advantage of the contradictions and omissions. But here the prosecution itself has failed to produce the said Investigating Officer for evidence. So the benefit in respect of the abovesaid contradictions and omissions must go to the accused persons. However it does not mean that the entire prosecution evidence would go away.

18. Now we may take the acts alleged by P.Ws. Laxmibai and Nilkanth in their evidence against the other accused one by one.

(a) P.W. Laxmibai deposed that she noticed that four persons attacked her husband. In this respect, she gave the details. She stated that two of the accused persons, namely Prabhakar and Ramrao had caught hold of her husband. However, this is an omission in the oral report lodged by her with police while in Mayo Hospital, Nagpur. Laxmibai admitted during her cross-examination that she did not state to the police that accused Prabhakar and accused Ramrao had caught hold of her husband.

(b) P.W. Laxmibai further deposed that accused Raju was holding a stick in his hand and he gave a blow of that stick to her husband. The fact that accused Raju gave a stick blow to the husband of P.W. Laxmibai, is omitted by her in the oral

report Exhibit 52. But this omission was not put up to the witness. However, since the document oral report is exhibited, the same can be read. Otherwise also, there is no injury of stick on the person of Nilkanth. All the injuries on the person of Nilkanth are either stab or incised wounds and they were caused with sharp weapon. There is no contusion or laceration, which could be caused by stick.

(c) No doubt P.W. Laxmibai has deposed that when she rushed outside the house on hearing the shouts of her husband, she noticed that four persons attacked her husband. But her evidence in cross-examination shows that in the beginning of the incident, she was inside her house. She admitted that at the time of incident, she was in the middle room of her house. She also admitted that when she came out of the house, a number of people had gathered there. She further admitted that when she saw the incident, her husband had fallen down. However, in the next breath, she volunteered that at that time accused Shankar was giving a blow of spear to Nilkanth. Thus the evidence of P.W. Laxmibai inculpates accused Shankar only and her evidence as regards the role played by accused Shankar stands the test of cross-examination.

(d) P.W. Nilkanth deposed that when he was sitting on a bench in front of his house in the courtyard, accused Prabhakar and accused Raju rushed towards him and there was hot exchange of words. They questioned him as to why he was objecting to the concealing of liquor by them and they said that they had come to see him. There is no reason why this piece of evidence of P.W. Nilkanth should be distrusted.

(e) P.W. Nilkanth further deposed that accused Prabhakar and accused Raju caught hold of both of his hands. However, this is an omission in the statement of P.W. Nilkanth recorded by police.

(f) In the course of narration of incident, P.W. Nilkanth stated that accused Shankar rushed towards him with a spear, accused Ramrao rushed with a wooden stick in his hand and gave a blow of stick on his head. The fact that accused Ramrao rushed towards Nilkanth with a wooden stick and gave a blow of stick on his head, seems to be an omission in the statement of P.W. Nilkanth recorded by police. However, this omission was not put up to P.W. Nilkanth. Still this version of Nilkanth cannot be taken as reliable as there was no injury on the head of Nilkanth, which could be caused by a stick. As already observed above, the injuries on the head of Nilkanth were all incised wounds and there was no contusion or laceration. So the story that accused Ramrao gave a stick blow on the head of Nilkanth stands falsified. Those injuries must have been caused by accused Shankar.

(g) During the course of evidence, P.W. Nilkanth deposed that after accused Shankar gave a blow of spear on his abdomen, he rushed towards the chhapari of his neighbour Shri Lanjewar in order to save himself and then all the accused persons, namely Prabhakar, Raju, Shankar and Ramrao, pulled him out of the

chhapari in the courtyard. The perusal of the statement of P.W. Nilkanth recorded by police shows that there is an omission in respect of some of the accused about pulling him out of the chhapari. In the statement before police, P.W. Nilkanth has stated only two names. He stated that accused Shankar and accused Raju pulled him from the house of Lanjewar by catching hold of his hands. He omitted to state that accused Prabhakar and accused Ramrao also pulled him out of the chhapari of Shri Lanjewar. Thus the omission is about Prabhakar and Ramrao. The fact that only accused Shankar and accused Raju pulled Nilkanth from the house of Lanjewar, is, therefore, established. The evidence of P.W. Nilkanth shows that thereafter also, accused Shankar gave a blow of spear on the umbilicus region on left side and it was a through-and-through blow.

(h) P.W. Nilkanth further deposed that after such blow of spear was given by accused Shankar, Ramrao again gave one stick blow on his left shoulder. This also seems to be an omission in the statement of P.W. Nilkanth recorded by police, but it was not put up to the witness in his cross-examination. However, again it may be seen that the injury on the shoulder of Nilkanth is an incised wound and it could not have been caused by a stick. So it is reasonable to infer that the injury on the shoulder of P.W. Nilkanth was also caused by accused Shankar and not by accused Ramrao. The story that accused Ramrao gave a blow of stick on the shoulder of Nilkanth is thus falsified.

(i) During the course of narration of facts in the evidence, P.W. Nilkanth deposed that meantime his wife had rushed near him from the house and the accused persons pushed her. The version of P.W. Laxmibai is also that when she intervened the assault, the assailants pulled her and that time she received the injury between the thumb and index finger of her left hand. In the report Exhibit 52, Laxmibai stated that when she went to separate the quarrel, she sustained injury between the fingers of her left hand. She did not specifically state in her report that the assailants pulled her. But the sustaining of injury indicates that there must be a resistance when she tried to intervene. On the basis of the above evidence of P.Ws. Nilkanth and Laxmibai read as a whole, one will find that all the four accused removed the_ obstacle of Laxmibai in the process of assault on Nilkanth.

19. On the point of participation of the accused persons in the criminal act with a common intention, the learned counsel for the accused-appellants cited *Sambhu Bora and another v. State of Assam*,. In this cited case, the two accused were tried on the charge of murder. One of the accused was charged u/s 302 read with section 34 of the Indian Penal Code and the allegations against him were that he was having a spade in his hands, but none of the injuries found on the person of the deceased could be attributed to a beating or spade blow by blunt side of the spade or any incised wound caused by sharp end of the spade. It was held that the accused should be given benefit of doubt and his conviction was liable to be set aside.

20. On the other hand, the learned Additional Public Prosecutor cited *Maqsoodan and others v. State of U.P.*. The ratio of this case is that the common intention is a question of fact. It is subjective. But it can be inferred from the facts and circumstances. The circumstances considered in this cited case were that the appellants were twelve in number. All of them were armed with deadly weapons. They were together. There was an order by someone, "kill, kill", when all of them simultaneously attacked the deceased and the prosecution witnesses. After the occurrence, the appellants left together and they were later arrested from the same place. It was observed that the High Court rightly held that the appellants caused the injuries with the common intention and was justified in convicting the appellants u/s 302 read with section 34 of the Indian Penal Code.

21. As already discussed above, what is required to be seen is whether the accused persons, besides the accused doing the principal act, participated in the criminal act in one or the other way with a common intention. From the discussion made above, even on considering the omissions, the facts proved are that accused Prabhakar and Raju initially came on the scene of occurrence and raised a quarrel, questioning the victim as to why he was objecting to the concealing of liquor by them. Not only that, but they threatened victim Nilkanth that they had come to see him. Thus they declared their intention, which was followed by the act of accused Shankar, who inflicted a blow of spear on the abdomen of Nilkanth. When Laxmibai came to the rescue of her husband, the accused persons pulled her. Of course, Laxmibai did not state in her oral report Exhibit 52 that the accused persons pulled her. But she stated in the said report that when she intervened and tried to separate the quarrel, she sustained the injury on the dorsal portion of finger of her left hand. However, it may be seen that the F.I.R. need not incorporate each and every detail since it is given with a view to set the police machinery in motion. In the instant case, the circumstances indicate that the report was lodged hurriedly because the victim was facing the critical condition and subsequently he was also operated upon. The evidence of P.W. Laxmibai has to be read coupled with the evidence of P.W. Nilkanth, who deposed specifically that when his wife had rushed near him from the house, the accused persons pushed her. Again the evidence of P.W. Nilkanth after taking into account the omission about accused Prabhakar and Ramrao in his statement before police shows that when he had been to the chhapari of his neighbour Shri Lanjewar, accused Shankar and Raju pulled him out. The evidence on record shows that thereafter also, a blow of spear was given by Shankar to Nilkanth. Although the fact that some of the accused gave the stick blows to victim Nilkanth, is not established, the facts and circumstances detailed above clearly show that all the other accused participated in the commission of offence in one or the other way along with accused Shankar who did the principal acts of giving spear blows. Otherwise also, the number and nature of injuries on the person of the victim clearly indicate that without the assistance of the other accused, such severe injuries could not be inflicted. The facts and circumstances detailed above also indicate the common intention on the part of the other

accused. The principal act of inflicting spear blows was done by accused Shankar and the other accused facilitated the commission of that act by participating in one or the other way. Hence, they are liable u/s 34 of the Indian Penal Code.

22. As already stated above, the charge framed by the learned Additional Sessions Judge was under sections 147, 148 and section 307 read with section 149 of the Indian Penal Code, The question would be, after the charge of offences under sections 147, 148 and 149 of the Indian Penal Code goes away, whether the accused concerned can be convicted with the aid of section 34 of the Indian Penal Code, when no charge in that respect was framed. In this connection, it will be useful to refer to section 221 of the Criminal Procedure Code, which speaks:

"Section 221. (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

Again a reference may be made to the decision in *Karnail Singh and another v. State of Punjab*,. The following observations are relevant :

"Though there is substantial difference between section 34 and section 149, the sections also to some extent overlap and it is a question to be determined on the facts of each case whether the charge u/s 149 overlaps the ground covered by section 34.

If the common object which is the subject-matter of the charge u/s 149 does not necessarily involve a common intention, then the substitution of section 34 for section 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge u/s 149 would be the same if the charge were u/s 34, then the failure to charge the accused u/s 34 could not result in any prejudice and in such cases the substitution of section 34 for section 149 must be held to be a formal matter."

In this cited case, it was held on the facts that there could be no difference between the object and intention with which the offence in question was committed and hence the conviction u/s 302 read with section 34, when they had been charged only u/s 302 read with section 149, was not illegal. In the instant case, although it can be said that the learned Trial Judge ought to have framed an alternative charge against accused Nos. 2, 3 and 4 for the offence u/s

307 read with section 34 of the Indian Penal Code, the failure on the part of the Judge in that respect would not cause any prejudice to these accused because the text of the charge u/s 307 read with section 149 of the Indian Penal Code framed in this case shows the participation of all the accused in the commission of offence with common intention.

23. As a result of the whole discussion made above, I hold that the conviction of the accused-appellants in respect of the offences under sections 147 and 148 of the Indian Penal Code is liable to be set aside. Further, since the offence u/s 149 of the Indian Penal Code does not survive, instead of section 307 read with section 149 of the Indian Penal Code, accused Shankar would be liable to be convicted of the offence u/s 307. Indian Penal Code and accused-appellant No. 2 Raju, accused-appellant No. 3 Ramrao and accused-appellant No. 4 Prabhakar would be liable to be convicted of the offence u/s 307 read with section 34 of the Indian Penal Code. Looking to the nature of the injuries on the person of the victim, the accused-appellants would not deserve leniency. But considering the fact that practically all the male members of the family are in jail, the punishment of rigorous imprisonment for ten years inflicted upon all the four accused seems to be somewhat harsh. The sentence shall therefore be reduced suitably.

23. In the result, the appeal is partly allowed. The order of conviction and sentence passed against the accused-appellants for the offences under sections 147 and 148 is quashed and set aside. The order of conviction of the offence u/s 307 read with section 149 of the Indian Penal Code passed against the accused-appellants, so far as section 149 of the Indian Penal Code is concerned, is set aside and further the order of conviction in respect of accused-appellant No. 1 Shankar is altered to section 307, Indian Penal Code and that in respect of accused-appellants No. 2 Raju @ Rajiv, No. 3 Ramrao and No. 4 Prabhakar is altered to section 307 read with section 34 of the Indian Penal Code. The sentence of rigorous imprisonment for ten years with a fine of Rs. 300/- or in default to suffer rigorous imprisonment for three months more passed upon each of the accused is substituted by the sentence to suffer rigorous Imprisonment for eight years. The period undergone by the accused appellants in detention shall be set-off against the term of imprisonment. Fine, if paid, shall be refunded.