

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 176 of 2021

Saker Molla @ Shaker Molla & Ors.

VS.

The State of West Bengal

with

CRA 230 of 2021

Mijai Molla @ Mijanur Molla & Ors.

Vs

The State of West Bengal

For the Appellants

In CRA 176 of 2021 : Mr. Sekhar Kr. Basu, ld. Sr. Adv.
Ms. Minoti Gomes,
Mr. Amanul Islam,
Mr. Sourav Mukherjee, Advocates

For the Appellants

In CRA 230 of 2021 : Mr. Prabir Majumder,
Mr. Snehansu Majumder,
Ms. Sangeeta Chakraborty, Advocates

For the State : Mr. Swapan Banerjee
Ms. Purnima Ghosh, Advocates

Heard on : March 15, 2023 & March 17, 2023

Judgement on : March 17, 2023

DEBANGSU BASAK, J.:-

1. Two appeals are taken up for analogous hearing as they emanate out of the same police case resulting in the same judgment of conviction and order of sentence.

2. The appeals are directed against a judgment of conviction dated February 18, 2021 and order of sentence dated February 19, 2021 passed by the learned Additional Sessions Judge, Fast Track Court-II, Krishnagar, Nadia in Sessions Trial No.-IX of December 2008 arising out of Sessions Case no. 101 (8) of 2008.

3. By the impugned judgment of conviction and the order of sentence, the learned Trial Judge found all the appellants in the two appeals guilty under Section 302/34 of the Indian Penal Code, 1860 and imposed a sentence of rigorous imprisonment for life and to pay a fine of Rs.5000/- each, in default to suffer further simple imprisonment for a further period of three months for such offences.

4. Ten persons were convicted and sentenced by the impugned judgment of conviction and the order of sentence. CRA 176 of 2021 was filed by six of such ten convicts while CRA 230 of 2021 was filed by four other convicts.

5. Mr. Sekhar Kumar Basu, learned senior advocate appearing for the appellants in CRA 176 of 2021 (for the sake of

convenience, the appellants in such appeal are referred as the appellants in the first appeal) submits that, the prosecution was unable to prove the charge as against any of the appellants beyond reasonable doubt. He refers to the various facets of the case. He submits that, allegedly the appellants received information over mobile phone. Such factum was not established at the trial. He refers to the various general diary entries made. He submits that, there are discrepancies with regard to movement of the appellants, as appearing from the oral testimonies of the prosecution witnesses.

6. Learned senior advocate appearing for the appellants in the first appeal submits that, there was delay in recording the statements of vital witnesses. The prosecution did not explain the delay in recording of such statements. He relies upon ***AIR 1980 SC 1750 [Bhagwan & Anr. Vs. State of Madhya Pradesh], 1976 SCC (Cri) 596 [State of Orissa vs. Brahmananda Nanda], [AIR 1971 SC 804 [Balakrushna Swain vs. State of Orissa] and (2015) 2 Calcutta Criminal***

Law Reporter (Cal) 882 [Hamid Mondal & Ors. Vs. The State of West Bengal] in support of his contention that, delay in recording of statements of such crucial witnesses renders their statements unworthy of credence and should not be relied upon to convict the accused persons.

7. Learned senior advocate appearing for the appellants in the first appeal submits that, Section 34 of the Indian Penal Code, 1860 creates a deeming fiction by infusing a criminal act constituting an offence committed by one into other, in pursuance of a common intention. The onus is on the prosecution to prove the common intention of the prosecution to the satisfaction of the Court. He submits that there may be an offence without the common intention and in each case Section 34 of the Indian Penal Code, 1860 cannot be attracted. In support of such contention, he relies upon ***AIR 2022 SC 805 (Jasdeep Singh @ Jassu vs. State of Punjab)*** and ***(2022) 3 Supreme 724 (Gadadhar Chandra vs. The State of West Bengal)***.

8. Learned senior advocate appearing for the appellant in the first appeal submits that, prosecution did not adduce any evidence to even remotely indicate that the appellants caused the death of the victim in furtherance of a common intention. In absence of such evidence, Section 34 of the Indian Penal Code, 1860 is not attracted. He contends that, Harej Molla @ Herech Molla and Ajad Molla were not named in the First Information Report and that their names transpires subsequently with the adding of Section 34 of the Indian Penal Code, 1860.

9. Learned senior advocate appearing for the appellants in the first appeal submits that, P.W.-8 who allegedly suffered a bullet injury on his leg claims himself to be an eye-witness. However, the prosecution did not adduce any evidence to indicate or establish the injury in the gunfire suffered by P.W.-8 or that P.W.-8 underwent any medical treatment with regard to such injury. He refers to the evidence of P.W.-3 in cross-examination and submits that, P.W.-3 stated that, P.W.-8 was not treated by any Doctor for his injury. Moreover, P.W.-8 himself admitted in his

cross-examination that on receiving gun shot injury, he did not leave the place of occurrence and remained at the place of occurrence for about 10 minutes. Thereafter he returned home. He admitted that he did not undergo any medical treatment at the local hospital and that he did not show any injury to anybody.

10. Learned senior advocate for the appellants in the first appeal submits that, the conduct of P.W.-8 subsequent to the receipt of the so-called bullet injury is unnatural and abnormal. He contends that, regarding the evidences of P.W.-3, P.W.-4, P.W.-5, P.W.-6, P.W.-8 and P.W.-19 conjointly, they express a shadow of doubt of every incident of gunfire in which the victim allegedly was killed. He submits that, if the claim of gunshot injury is to be believed then, that it remains unexplained as to why P.W.-8 did not undergo any medical treatment or as to why he did not mention his injury to anybody.

11. Learned senior advocate appearing for the appellants in the first appeal submits that, the evidence led by the prosecution

casts a shadow of doubt with regard to the place of occurrence. He submits that it is doubtful as to whether the incident of murder did indeed take place in front of house of Mahat Sheikh. He refers to the deposition of various prosecution witnesses in this regard.

12. Learned senior advocate appearing for the appellants in the first appeal submits that, the plausible motive that the prosecution sought to offer at the trial that there was a long standing disputes over land between the accused persons and the deceased and his associates was without any basis. He refers to the discrepancies of the oral testimonies of various prosecution witnesses in this regard.

13. Learned senior advocate appearing for the appellants in the first appeal submits that, the investigation was conducted in a perfunctory manner. The Investigating Officer, P.W.-19, stated in his cross-examination that he proceeded to the place of occurrence on the basis of source information. The source information was communicated to the Officer-in-Charge of Police

Station which was diarized as G.D.E. no. 1523 dated June 25, 2007. P.W. -19 admitted that he did not seize the General Diary. No explanation was furnished by him as to why he failed to seize such an important piece of evidence when such General Diary Entry led the foundation of the instant case. However, G.D.E no.1523 dated June 25, 2007 was adduced as exhibit-12. The evidence of second Investigating Officer, P.W. 16, also did not seize the General Diary.

14. Learned senior advocate appearing for the appellants in the first appeal submits that, it is claimed by the prosecution that, P.W.-13 informed the police over mobile phone regarding the incident. Such mobile phone was not seized. Non-seizure of the mobile phone of P.W.-13 casts a shadow of doubt on the evidence of P.W.-13 and P.W.-19.

15. Learned senior advocate appearing for the appellants in the first appeal submits that, during the course of investigation, appellants seized an empty cartridge and iron pipe which was claimed to be used in causing the death of the victim. He refers

to the evidence of P. W.-19 and submits that, P.W.-19 admitted in his cross-examination that he did not send the empty cartridge and the iron pipe to any expert for examination. He refers to the other portion of the evidence of P.W.-19. He relies upon **1976 SCC (Cri.) 671 [Lakshmi Singh vs. State of Bihar]** and submits that, despite materials being present and technology being available, failure of the prosecution to bring on record important evidence belies the very edifice of the prosecution and rendered the case unworthy of acceptance.

16. Learned senior advocate for the appellants in the first appeal submits that, the First Information Report was registered on June 25, 2007 and the same was produced before the Court of the Learned Magistrate on June 28, 2007. There was delay of about three months in dispatching the First Information Report. No explanation was adduced by the prosecution in respect of such delay.

17. Mr. Prabir Majumder, learned advocate appearing for the four appellants in CRM 230 of 2021 (for the sake of convenience

such appellants are referred to as the appellants in the second appeal) adopts the submissions and contentions advanced on behalf of the appellants of the first appeal. He submits that, Jamshed Seikh, appellant no. 3 in CRA 230 of 2021 was not named in the First Information Report. The maker of the written complaint being P.W.-1, did not name the appellant no. 3 in the second appeal, while P.W-1 was deposing before the Trial Court.

18. Learned senior advocate appearing for the appellants in the first appeal as also the learned advocate appearing for the appellants in the second appeal submits jointly that, since the prosecution failed to establish the charges as against the appellants beyond reasonable doubt, the appellants in the two appeal should be acquitted.

19. Learned advocate for the State submits that, there are eye-witnesses who established all of the appellants to be involved in the assault and murder of the victim. She refers to the testimonies of the eye-witnesses. She submits that the testimonies of the eye-witnesses are sufficient to implicate each

of the appellants in the incident of assault and murder of the victim. She refers to the postmortem report of the victim as well as the testimony of the Doctor conducting the postmortem on the dead body of the victim. She submits that, the victim was brutally murdered. The postmortem Doctor opined that the death was homicidal in nature and was the result of the injuries suffered by the victim. Therefore, according to her, the prosecution was able to prove the charges of murder as against each of the appellants, beyond reasonable doubt. Therefore, she submits that, the impugned judgment of conviction and order of sentence should be upheld.

20. A written complaint dated June 25, 2007, was lodged by P.W.1 with the police. In such written complaint he stated that, there was an altercation and conflict between the victim, his other brother and himself with appellants and some other supportive villagers. In respect of such conflict, such accused persons often threatened the victim, his other brother and himself with murder. He stated that on June 25, 2007 at about

9:30 a.m. in the morning, when the victim, a brother of him was going to the field at Shalbari to give tiffin to the labourers at field, the victim came on the road in front of the house of Mahat Sheikh and at that time, seven persons that he named, congregated to attack the victim with fire arms, sharp cutting weapons and explosives. He stated that, first the victim was shot at several portions of his body then was assaulted with sharp cutting weapons at different portions of the body, and thereafter, the accused persons started hurling bomb. During such incident one bullet struck the leg of his nephew being P.W.8.

21. The written complaint of P.W.1 was registered as a First Information Report by the police on June 25, 2007, under Sections 302/326/34 of the Indian Penal Code, 1860 and under Section 25/27 of the Arms Act and Section 9(b) of the Indian Explosives Act.

22. Police submitted charge-sheet on conclusion of the investigations. Court framed charges as against all the appellants, on December 15, 2008, under Sections 302 and 34 of

the Indian Penal Code, 1860. The appellants claimed to be innocent and were tried.

23. At the trial, prosecution examined 20 witnesses. Prosecution relied upon various documentary and material evidences to bring home the charges. On conclusion of the evidence of the prosecution, the appellants were examined under Section 313 of the Criminal Procedure Code where they claimed to be innocent and falsely implicated.

24. The maker of the written complaint and the brother of the victim deposed as P.W.1. He stated that the victim was murdered on June 25, 2007, at 9:30 a.m. in the morning on the village kancha road in front of the house of Mahat Sheikh. At that time, the victim was going to the field with tiffin for the labourers who were working in the agricultural field at Shalbari. He named seven persons along with others who killed his brother the victim. He stated that, the accused persons assaulted the victim with bombs, fire arms and sharp cutting weapons indiscriminately. The victim died instantaneously at that place.

The accused persons fled away.

25. P.W.1 stated that, the police officer asked him to hand over the complaint to him. He was not able to write at that point of time and as such, he got the written complaint written by Rejaul Mondal. He tendered the written complaint in evidence which was marked as Exhibit-1. He stated that the police prepared the inquest report over the deadbody of the victim. He tendered the inquest report which was marked as Exhibit-2. He identified all the accused persons in Court.

26. The doctor who performed the Post Mortem on the deadbody of the victim deposed as P.W.2. He stated about the injuries that he found on the deadbody of the victim. He identified 17 injuries that he found on the deadbody of the victim. He stated that, in his opinion, the death was due to shock of haemorrhage resulting from the injuries suffered by the victim which was ante-mortem and homicidal in nature. He went on to further opine that, if a person was assaulted indiscriminately with sharp cutting weapon then the injuries as noted on the

body of the victim may occur and that such person may die instantaneously. The Post Mortem Report of the victim was tendered in evidence and marked as Exhibit-3. Cross-examination of the Post Mortem doctor was declined.

27. P.W.3 is the son of the victim. He saw the incident. He stated that, the victim was killed in front of the house of Mahat Sheikh on the kutchra road of the village at about 9 to 9:30 a.m. in the morning. He named the appellants in the two appeals as the persons involved in the assault on the victim leading to his murder. He identified all the appellants in Court. He stated that at the time of the incident P.W.8 sustained bullet injury on his leg. He stated that the victim died on the spot instantaneously and that the accused persons fled away. He identified his signature on the inquest report which was marked as Exhibit-2/1.

28. P.W.4 is another eye-witnesses to the incident. He corroborated the statements made by P.W.3. He named all the appellants in the two appeals as the persons sitting in front of

the house of Mahat Sheikh and on seeing the victim, commenced assault on the victim with sharp cutting weapons and fire arms. He saw the victim die. He also saw the appellants to flee away. He stated that P.W.8 was standing beside them and that P.W.8 sustained bullet injury. He stated that there was a land dispute between Jamal and his brother Goni and victim. He identified all the appellants in Court. He identified his signature on the inquest report which was marked as Exhibit-2/2. In cross-examination, P.W.4 stated that, he did not state anything to the police officer though they met him.

29. P.W.5 is a relative of the victim and a resident of the village. He stated that, the victim was murdered at 9/9:30 a.m. He corroborated the version of the incident given by the previous prosecution witnesses. He identified his signature on the inquest report which was marked As Exhibit-2/3. He identified all the appellants present in the Court.

30. In cross-examination, P.W.5 stated that, he met the police officer one hour after the incident that he was interrogated by

the police in the afternoon on the date of the incident. He stated that, he told the police that the victim was attacked with fire arms and bombs.

31. P.W.6 is a co-villager and a relative of the victim. He corroborated the incident of assault on the victim as narrated by the previous prosecution witnesses. He identified the appellants in Court.

32. P.W.7 is a seizure list witness. P.W.8 is another eye-witness and resident of the village. He corroborated the prosecution witnesses with regard to the assault of the appellants on the victim. In cross-examination he stated that, there was an Warrant pending as against his name.

33. P.W.9 is the seizure list witness. P.W.10 is the son of the victim and also a seizure list witness. P.W.11 is a police Constable and a seizure list witness of the seizure made on July 5, 2007. P.W.12 is a Sub Inspector of police and a seizure list witness of July 5, 2007.

34. P.W.13 is an eye-witness and a relative of the victim. He

corroborated the narration of the incident by the other eye-witnesses leading to the murder. He stated that, P.W.8 was injured due to a gun shot. He is also a witness to the seizures made by the police.

35. P.W.14 is a seizure list witness. P.W.15 is an eye-witness and a co-villager. He stated that he heard the sound of bomb bursting and firing and of shooting of fire arms. He arrived at the locale and found the appellants armed with fire arms and sharp cutting weapons assaulting the victim. He named the appellants as the persons assaulting the victim. He stated that P.W.8 also received injury on his person. He identified the appellants in Court. P.W.15 is a relative of the victim.

36. P.W.16 is a police personnel who started the investigation of the police case. He stated that during investigation, he arrested four accused persons. He spoke of recovery of sharp cutting weapon used in the assault and murder. He submitted chargesheet against 10 accused persons.

37. P.W.17 is an Assistant Sub Inspector of police who wrote the formal First Information Report. The formal First Information Report was tendered in evidence and marked as Exhibit-9.

38. P.W.18 is the Constable who brought the G.D. Entry Book. G.D. Entry No.1524 dated June 25, 2007, a copy of the same in certified manner was tendered in evidence and marked as Exhibit-10.

39. P.W.19 is a police personnel who was one of the persons responding to the incident first in point of time. He narrated about the conduct of the police subsequent to the receipt of the information with regard to the incident.

40. P.W.20 is the scribe of the written complaint. He stated that, he wrote the written complaint on the basis of the instruction of P.W.1.

41. On the conclusion of the evidence of the prosecution, the accused persons were examined under Section 313 of the Code of Criminal Procedure, where they claimed themselves to be innocent and falsely implicated.

42. The victim died on June 25, 2007. The post mortem on the dead body was conducted by P.W. 2, who was the post mortem doctor. Such post mortem was conducted on June 25, 2007 itself. P.W. 2 stated that, he found various injuries on the dead body of the victim. The injuries that P.W. 2 found on the dead body of the victim are as follows:

- “1. Sharp-cut injury on vault of head sagittally measuring 3” X ½” X scalp deep.
2. Sharp-cut injury on right side of vault of head obliquely 1” away from Injury No. 1 above measuring 3” X ½ “ X scalp deep.
3. Lacerated injury on pinna of right ear with fracture of ear cartilage measuring 1 ½ “ X ½ “ X cartilage deep.
4. Multiple bruise marks like rail track on right side of back of chest on upper part-average size being 6” X 1” (5 such).
5. Lacerated injury on left cheek transversely measuring 1” X ½ “ X bone deep.
6. Multiple abrasion on front of neck.
7. Fracture right radius on lower part (internal fracture) with bruise marks over the fracture measuring 3” x 2”.
8. Rail track like bruise marks on left side of front of chest obliquely measuring 5” X 1” (two such).

9. Lacerated injury on front of middle 1/3rd. of left leg measuring 1" X ½ " X bone deep.
 10. Muscle haematomas seen after dissection around the neck.
 11. Multiple bruise marks on front of chest of varying shapes and sizes.
 12. Fracture sternum on middle part.
 13. Multiple muscle haematomas on front of chest. (seen after dissection).
 14. Fracture ribs on right side – 2nd, to 8th. ribs.
 15. Fracture ribs on left side – 2nd. To 6th. ribs.
 16. Both lungs – ruptured.
 17. Brain – haemorrhage."
43. P.W. 2 stated that, in his opinion, the death was due to shock and haemorrhage resulting from the injuries noted in the post mortem report. The injuries were ante mortem and homicidal in nature. The post mortem report was tendered in evidence and marked as exhibit 13. Cross-examination of the post mortem doctor was declined on behalf of the defence.

44. Therefore, on the basis of the deposition of P.W. 2 and of the post mortem report being exhibit 3 it can be said that the victim was murdered.

45. P.Ws. 1, 4, 5, 8 and 15 stated that, the appellants in the two appeals were involved in the assault on the victim leading to his death.

46. The contention was raised on behalf of the appellants as to the place of occurrence.

47. In the facts and circumstances of the present case, we find that, the prosecution witnesses, in unison stated that, the victim was assaulted on the village road in front of the house of Mahaut Sk. According to us, the place of occurrence was described variously by the different prosecution witnesses with the place of occurrence remaining the same. Various words were used by the prosecution witnesses to describe the same place of occurrence. Therefore, we find no ambiguity as to the place of occurrence of the incident.

48. Creditability of the oral testimonies of the prosecution witnesses were sought to be doubted on behalf of the appellants. It was, inter-alia, contended that, most of the prosecution witnesses examined were relatives of the victim.

49. The police complaint as also the deposition of the prosecution witnesses in unison stated that, there was a dispute regarding an immovable property between two family members. Victim and his family members were on one side and the appellant's family was on the other side of the divide regarding the dispute relating to an immovable property.

50. The factum of existence of disputes relating to an immovable property between the two family members was not demolished by the defence. On the contrary, it was established by the prosecution that there were disputes between two family members relating to an immovable property.

51. It is the claim of the prosecution that the motive for the murder was the dispute relating to an immovable property.

Motive takes a back-seat when there are eye witnesses implicating the accused in the incident.

52. In the facts and circumstances of the present case, eye witnesses deposed at the trial that, they saw the appellants to assault the victim leading to his murder. The incident occurred near the house of the victim while the victim was proceeding from his house to the agricultural field carrying tiffin for the labourers. It is, therefore, natural that the relatives of the victim were present at the place of occurrence. It is not being suggested on behalf of the defence that the presence of the relatives of the victim at the place of occurrence was unnatural.

53. The oral testimonies of all the eye witnesses to the incident are the same. They implicate all the appellants in the incident of assault leading to the murder. It is true that, some of the prosecution witnesses named most of the appellants as the assailants when such individual prosecution witness was at the box. However, they did not name one or two appellants in their oral testimony but they stated that, others were also involved.

Each of the prosecution witnesses, in fact, identified all the accused persons in Court at the trial as the assailants.

54. In the facts and circumstances of the present case, therefore, we cannot subscribe to the view that, since, P.W. 1 did not take the name of appellant no. 3 in the second appeal as an assailant, such appellant should be acquitted. Similarly, we also do not subscribe to the view that, one of the prosecution eye witness did not name the appellant nos. 5 and 6 in the first appeal as the assailant, they should be acquitted. All the appellants were implicated by the prosecution eye witnesses in the manner as discussed above.

55. Authorities on the aspect of delay in examination of the eye witnesses were cited at the bar on behalf of the appellants. In **Bhagwan & Anr.** (supra), the Hon'ble Supreme Court found that, a crucial aspect of the incident did not find place in the First Information Report and that the prosecution witness was unable to explain its absence. In such facts, the Hon'ble Supreme Court found the case of the prosecution to be not tenable.

56. In **Brahmananda Nanda** (supra), the case of the prosecution rested upon the oral evidence of one prosecution witness, who was claimed to be an eye witness. The Hon'ble Supreme Court found it difficult that such eye witness did not disclose the name of the respondent to the police and waited for a long period of time to give out the name.

57. In the facts of the present case, some of the prosecution witnesses were examined by the police immediately on the police reached the place of occurrence. Such prosecution witnesses did give out the names of all the appellants as assailant to the police.

58. **Balakrushna** (supra) found the facts and circumstances of the case in which reliance was placed and evidence of a witness when no justifiable reason by the Investigating Authority for a number of days. Such witness was also found to be not truthful on material aspects of the case and trying to conform to the evidence of other witnesses.

59. As noted above, in the facts of present case, there are a number of eye-witnesses, who were present at the place of

occurrence and who were examined by the police at the relevant point of time. Such prosecution witnesses implicated all the appellants before us in the incident of assault and told the police about the same at the relevant point of time.

60. In **Hamid Mondal & Ors. (supra)** it was found in the facts of that case that, there was a delay in recording the statement of the eye-witnesses and such delay was not sufficiently explained. The facts and circumstances of the present case as discussed above are different.

61. It is the contention of the appellants that, merely because of the appellants being found congregated at one particular place and an incident of crime occurring at such place, by the help of Section 34 of the Indian Penal Code, 1860, they should not be convicted unless, the Court finds that the appellants acted in furtherance of the common intention.

62. Section 34 of the Indian Penal Code, 1860 and its ramifications was discussed by the Hon'ble Supreme Court in **Jasdeep Singh alias Jassu (supra)** which observed as follows:

“21. Section 34 IPC creates a deeming fiction by infusing and importing a criminal act constituting an offence committed by one, into others, in pursuance to a common intention. Onus is on the prosecution to prove the common intention to the satisfaction of the court. The quality of evidence will have to be substantial, concrete, definite and clear. When a part of evidence produced by the prosecution to bring the accused within the fold of Section 34 IPC is disbelieved, the remaining part will have to be examined with adequate care and caution, as we are dealing with a case of vicarious liability fastened on the accused by treating him at par with the one who actually committed the offence.

22. What is required is the proof of common intention. Thus, there may be an offence without common intention, in which case Section 34 IPC does not get attracted.

23. It is a team effort akin to a game of football involving several positions manned by many, such as defender, mid-fielder, striker, and a keeper. A striker may hit the target, while a keeper may stop an attack. The consequence of the match, either a win or a loss, is borne by all the players, though they may have their distinct roles. A goal scored or saved may be the final act, but the result is what matters. As against the specific individuals who had impacted more, the result is shared between the players. The same logic is the foundation of Section 34 IPC which creates shared

liability on those who shared the common intention to commit the crime.

24. The intendment of Section 34 IPC is to remove the difficulties in distinguishing the acts of individual members of a party, acting in furtherance of a common intention. There has to be a simultaneous conscious mind of the persons participating in the criminal action of bringing about a particular result. A common intention qua its existence is a question of fact and also requires an act "in furtherance of the said intention". One need not search for a concrete evidence, as it is for the court to come to a conclusion on a cumulative assessment. It is only a rule of evidence and thus does not create any substantive offense.

25. Normally, in an offense committed physically, the presence of an accused charged under Section 34 IPC is required, especially in a case where the act attributed to the accused is one of instigation/exhortation. However, there are exceptions, in particular, when an offense consists of diverse acts done at different times and places. Therefore, it has to be seen on a case to case basis.

26. The word "furtherance" indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion.

27. There may be cases where all acts, in general, would not come under the purview of Section 34 IPC, but only those done in furtherance of the common intention having adequate connectivity. When we speak of intention it has to be one of criminality with adequacy of knowledge of any existing fact necessary for the proposed offense. Such an intention is meant to assist,

encourage, promote and facilitate the commission of a crime with the requisite knowledge as aforesaid.

28. The existence of common intention is obviously the duty of the prosecution to prove. However, a court has to analyse and assess the evidence before implicating a person under Section 34 IPC. A mere common intention per se may not attract Section 34 IPC, sans an action in furtherance. There may also be cases where a person despite being an active participant in forming a common intention to commit a crime, may actually withdraw from it later. Of course, this is also one of the facts for the consideration of the court. Further, the fact that all accused charged with an offence read with Section 34 IPC are present at the commission of the crime, without dissuading themselves or others might well be a relevant circumstance, provided a prior common intention is duly proved. Once again, this is an aspect which is required to be looked into by the court on the evidence placed before it. It may not be required on the part of the defence to specifically raise such a plea in a case where adequate evidence is available before the court.”

63. **Gadadhar Chandra (supra)** is of the view that, common intention contemplated by Section 34 of the Indian Penal Code, 1860 presupposes prior consent. “It requires meeting of minds. It requires a pre-arranged plan before a man can be vicariously convicted for the criminal act of another. The criminal act must be done in furtherance of the common intention of all the accused. In a given case, the plan can be formed suddenly.”

64. **Lakshmi Singh & Ors. (Supra)** deals with a situation where, there was a failure on the part of the prosecution to explain the injuries caused to the accused. There was a failure on the part of the prosecution to send the bloodstained earth for chemical examination and truth and falsehood became inextricably mixed so as to render the entire case of the prosecution untrustworthy.

65. In the facts of the present case, it cannot be said that, any of the accused suffered any injuries. The defence was unable to raise any justifiable or reasonable doubt in order to succeed.

66. As noted above, the prosecution witnesses saw all the appellants assault the victim. The victim ultimately succumbed to the injuries. The post-mortem doctor noted seventeen injuries on the body of the victim. The appellants are ten in number. Given the nature of injuries and the materials established at the trial and also the history of property disputes, it cannot be said that the appellants did not act in furtherance of the common intention of murder.

67. All the appellants were established to be participating in the assault on the victim. There was animosity between the appellants and the victim and his family members. There is nothing on record to suggest even remotely that any of the appellants withdrew himself from the congregation assaulting the victim.

68. It is the contention of the appellants that, P.W.8, who claimed himself to be injured in the incident, did not produce any medical document to substantiate the injury and, therefore, his testimony as an injured eye-witness, should be disbelieved.

69. Apart from P.W.8, there are other eye-witnesses produced by the prosecution to establish the charges as against the appellants. At least two of the prosecution eye-witnesses stated that, P.W.8 did receive bullet injury. True, no medical document corroborating the fact that, P.W.8 received the bullet injury was produced at the trial. Even if we are to discard the testimony of P.W.8 as an injured eye-witness, then, his presence in the place of occurrence is established by other prosecution eye-witnesses.

Even, if we are to discard the entirety of the testimony of P.W.8, then also, other prosecution eye-witnesses squarely implicate each of the appellants in the offence of murder of the victim.

70. The GD Register for the relevant period was produced before the Court by P.W.18. Certified portion of the relevant entry of the GD entry was tendered in evidence and marked as “Exhibit-10”.

71. We find no substance in the contention of the appellants that, there was unexplained delay in producing the First Information Report before the learned Magistrate. The First Information Report was registered immediately on receipt of the information of the crime. We find no delay with regard thereto.

72. In such circumstances, we find no merit in the two appeals.

73. CRA 176 of 2021 and CRA 230 of 2021 are **dismissed**.

74. The period of detentions suffered by the appellants pre-trial, during trial and post-conviction be set off against the sentences imposed by the learned Trial Judge.

75. A copy of this judgment and order along with the trial court records be transmitted to the appropriate Court forthwith.

76. Pending applications, if any, stands rejected.

77. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Debangsu Basak, J.)

78. I Agree.

(Md. Shabbar Rashidi, J.)