Supreme Court of India
Bharwad Mepa Dana & Another vs State Of Bombay on 10 November, 1959
Equivalent citations: 1960 AIR 289, 1960 SCR (2) 172
Author: S Das
Bench: Das, S.K.

PETITIONER:
BHARWAD MEPA DANA & ANOTHER

Vs.

RESPONDENT:
STATE OF BOMBAY

DATE OF JUDGMENT:
10/11/1959

BENCH:
DAS, S.K.
BENCH:
DAS, S.K.
SARKAR, A.K.
HIDAYATULLAH, M.

CITATION:
1960 AIR 289 1960 SCR (2) 172
CITATOR INFO :
R 1963 SC 174 (11)
R 1968 SC 43 (6)
F 1974 SC 323 (6,9)
R 1974 SC1567 (6)
RF 1975 SC1917 (14)
R 1976 SC1084 (12)
R 1976 SC2207 (51)
MV 1982 SC1325 (69)

ACT:
Criminal Trial-Murder-Unlawful assembly-Common object-Acquittal of some, conviction of less than five-Legality of-Common intention-No proof who gave fatal blows-Effect of-Indian Penal Code, 1860 (XLV of 1860), ss. 34 and 149.

HEADNOTE:
Twelve named persons, including the two appellants, were charged with having formed an unlawful assembly with the common object of committing the murder of three persons. The Sessions Judge acquitted seven of the accused but convicted five under s. 302 read with 149 and s. 302 read with 34 of the Penal Code. He sentenced the appellants to death and the other three to imprisonment for life. On

appeal, the High Court acquitted one of the other three convicted persons but maintained the conviction and sentences of the appellants and the two others. The High Court held that there were ten to thirteen persons in the unlawful assembly though the identity of all the persons except four had not been established, that all these persons had the common object and the common intention of killing the victims and that the killing was done in prosecution of the common object of the unlawful assembly and in furtherance of the common intention of all. The appellants contended that they having been charged with sharing the common object and common intention with certain named persons, it was not

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open to the High Court to hold that they shared the common object or the common intention with certain other unspecified persons or with some of the persons who had been acquitted, and that in the absence of any finding that the appellants gave the fatal blows they could not be held constructively liable for the murders either under s. 149 or S. 34, Penal:Code, for blows given by some unknown persons.

Held, that the appellants had been rightly convicted. Even though the number of convicted persons was less than five the High Court could still apply s 149 in convicting the four persons. There was nothing in law which prevented the High Court from finding that the unlawful assembly consisted of the four convicted persons and some unidentified persons, who together numbered more than five. In doing so the High Court did Dot make out a new unlawful assembly different from that charged ; the assembly was the same assembly but what had happened was that the identity of all the members had not been clearly established.

Kapildeo Singh v. The King, [1950] F.C.R. 834, Dalip Singh v. State of Punjab, [1954] S.C.R. 145 and Nay Singh v. State of Uttar Pradesh, A.I.R. 1954 S.C. 457, applied.

There was no difficulty in the application of s 34, Penal Code as the number of convicted persons was four and there was a clear finding that they shared the common intention with some others whose identity was not established. Even if it was not known which particular person or persons gave the fatal blows, once it was found that the murders were committed in furtherance of the common intention of all, each one of such persons was liable for the murders as though they had been committed by him alone. The section was intended to meet a case where members of a party acted in furtherance of the common intention of all but it was difficult to prove exactly the part played by each of them.

Wasim Khan v. The State of Uttar Pradesh, [1956] S.C.R. 191, referred to.

Prabhu Babaji Navle v. The State of Bombay, A.I.R. 1956 S.C. 51, distinguished.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 72 of 1959.

Appeal by special leave from the judgment and order dated the 2nd April, 1959, of the Bombay High Court at Rajkot, in Confirmation Case No. 2 of 1959 and Crl. Appeal No. 32 of 1959, arising out of the judgment and order dated February 18, 1959, of the Court of the Sessions Judge of Madhya Saurashtra, at Rajkot in Sessions Case No. 18 of 1958.

Jai Gopal Sethi, B. L. Kohli and K. L. Hathi, for the appellants.

H. J. Umrigar, D. Gupta for R. H. Dhebar, for the respondent.

1959. November 10. The Judgment of the Court was delivered by S. K. DAS J.-This is an appeal by special leave. The two appellants are Mepa Dana and Vashram Dana. The learned Sessions Judge of Rajkot tried them along with ten other persons for various offences under the Indian Penal Code, including the offence of murder punishable under section 302 read with ss. 149 and 34 of the Indian Penal Code. Of the twelve persons whom he tried, the learned Sessions Judge acquitted seven. He convicted five of the accused persons. The two appellants were sentenced to death, having been found guilty of the offence under section 302 read with s. 149, as also s. 302 read with s. 34, Indian Penal Code; the other three convicted persons were sentenced to imprisonment for life. No separate sentences were passed for the minor offences alleged to have been committed by them. All the convicted persons preferred an appeal to the High Court of Bombay. There was also a reference by the Sessions Judge under s. 374, Code of Criminal Procedure, for confirmation of the sentence of death passed on the two appellants. The appeal and the reference were heard together and by Its judgment pronounced on April 2, 1959, the High Court affirmed the conviction of four of the convicted persons, namely, the two appellants and two other convicted persons who were accused nos. 1 and 11 in the trial court. The High Court allowed the appeal of accused no. 8 and set aside the conviction and sentence passed against him. It is worthy of note here that as a result of the judgment pronounced by the High Court, the number of convicted persons came down to four only. We are emphasising this circumstance at this stage, because one of the arguments advanced on behalf of the appellants with regard -to their convictions for the offence punishable under S. 302 read with S. 149 centres round this fact. We bad earlier stated that the number of persons whom the learned Sessions Judge tried was twelve only. However, the prosecution case which we shall presently state in a little greater detail was that there were altogether thirteen accused persons who constituted the unlawful assembly and committed the offences in question in prosecution of the common object of the assembly or in furtherance of the common intention of all. One of them, however, was a juvenile and was tried by a Juvenile Court under the Sau- rashtra Children Act, 1956. That is why the number of accused person,; before the learned Sessions Judge was twelve only. The case record before us does not disclose the result of the trial in the Juvenile Court, though it has been stated on behalf of the appellants that that trial ended in an acquittal.

It, is necessary now to state what the prosecution case against the twelve accused persons was. There is a village called Nani Kundal within police station Babra in the district of Madhya

Saurashtra. In that village lived one Shavshi, who had four sons called Kurji Harji, Mitha, and Virji. One Dana Bharwad, described as accused no. 1 in the trial court, also lived in the same village. He had three sons called Amra, Mepa and Vashram. We have already stated that Mepa and Vashram are the two appellants before us. In the beginning of the year 1958 Amra was murdered and Harji and Mitha were tried for that murder by the learned Sessions Judge of Rajkot. He, however, acquitted them on May 14, 1958. This caused dissatisfaction to Dana and his two sons Mepa and Vashram. On July 14,1958, Harji Mitha, and Virji went to a place west of the village where they had a cluster of huts. This place was north of another cluster of huts belonging to Dana. When the aforesaid three brothers were engaged in some agricultural operations, they were, attacked by a mob of persons led by the two appellants who were armed with axes. Harji was pounced upon and felled by blows. He managed to get up and ran towards the village. Simultaneously, Mitha and Virji also ran more or less in the same direction. The three brothers were, however, pursued. Kurji, the fourth brother, and other relatives of Shavshi ran towards the place of occurrence. Kurji was the first to arrive and the prosecution case was that Kurji was struck down by the two appellants and other members of the unlawful assembly. He died then and there. Harji was then assaulted for the second time and he also fell down and died then and there. Lastly, Mitha was surrounded and assaulted. He also fell down and died there. The mother of the four brothers, Kurji, Harji, Mitha and Virji, as soon as she came to know of the death of three of her sons, arrived at the place of occurrence. She then went to the shop of one Kalidas, a leading resident of the village. There she met one Arjan who was a village chowkidar. Arjan was informed of what had happened and he went to village Barwala, where a police out-post was situated. He informed one Anantrai who was in-charge of that out-post. Anantrai prepared an occurence report which he sent to the officer-in-charge of Babra Police Station. This was the first information of the case. Babra is situate at a distance of about thirteen or fourteen miles from village Nani Kundal, and the Sub-Inspector of Police arrived at the village at about 10-45 p.m. Thereafter, an investigation was held, and the thirteen accused persons were sent up for trial.

Substantially, the defence of the appellants was that they had been falsely implicated out of enemity and had nothing to do with the murder of the three brothers, Kurji, Harji and Mitha. The case of Dana, accused No. 1, was that on the day in question his son Mepa was pursued and attacked by Harji, Mitha and Kurji. Thereupon, Dana went there to save his son Mepa and received an injury on his left band. He then ran away from the scene of occurrence. He disclaimed any knowledge of the attack on Kurji, Harji and Mitha. The prosecution examined ten eye-witnesses. Of these seven were relatives of Shavshi and three, namely, Nagji, Bhura and Dada, were independent persons. The learned Sessions Judge accepted substantially the evidence of the ten eyewitnesses, but decided not to act on the testimony of the relatives of Shavshi unless there was other independent corroborative evidence or circumstance. Proceeding on that basis, the learned Sessions Judge found that the three independent witnesses Nagji, Bhura and Dada, corroborated the evidence of the relatives with regard to four of the five accused persons, namely, the two appellants and accused nos. 1 and 11. As against accused no. 8, the learned Sessions Judge relied upon the evidence relating to the discovery of an axe, which was stained with human blood, as a corroborative circumstance. In the result he convicted the two appellants and accused nos. 1, 8, and 11. The High Court was not satisfied with the evidence against accused no. 8. As to the common object or common intention of the persons who constituted the unlawful assembly, it said:

"From the prosecution evidence, there is no doubt whatsoever that more than five persons were operating at the scene of offence, though the identity of all the persons has not been established except the accused nos. 1, 2, 3 and 11. There is no doubt on the prosecution evidence that more than five persons, i.e., as many as ten to thirteen persons took part in this offence. Therefore, there is no doubt that these persons had formed themselves into an unlawful assembly. From the prosecution evidence, it is clear that the common object of these persons was to commit murders and that these persons entertained common intention to murder the victims. There is also evidence to show that all these persons carried heavy axes. Therefore, there is no doubt that the offences under sections 147, 148, 302/149 and 302/34 of the Indian Penal Code had been committed and that the accused nos. 1, 2,3 and 11 are liable to be convicted for these offences."

We proceed now to state the arguments which have been advanced before us on behalf of the appellants. The main argument is that the conviction of the appellants for the offence of murder, with the aid of either s. 149 or s. 34, Indian Penal Code, is bad in law and cannot be sustained. Learned counsel for the appellants has submitted that his clients are liable to be convicted and punished for the individual acts of assault which are proved against them; but in the circumstances of this case, they cannot be convicted of the offence of murder. This argument learned counsel had developed in two different ways.

He has pointed out that the prosecution put up a definite case that thirteen named persons formed an unlawful assembly, the common object of which was to kill the three brothers earlier named; twelve of them were tried by the learned Sessions Judge who acquitted seven and the High Court acquitted one more. This brought the number to four, but the High Court found that there were more than five persons, that is as many as ten to thirteen persons who took part in the offence. This finding, so learned counsel has submitted, amounts to this; the four convicted persons formed an unlawful assembly , with the necessary common object, either with some of the acquitted persons or with certain unspecified persons, who were never put on trial on the same indictment and about whom no indication was given by the prosecution either in the charge or in the evidence led. His contention is that in view of the finding of the High Court which resulted in the number of convicted persons falling below the required number of five, it was not open to the High Court to make out a case of a new unlawful assembly consisting of the four convicted persons and certain unspecified persons; nor could any of the acquitted persons be held, in spite of the acquittal, to be members of an unlawful assembly, for their acquittal is good for all purposes and the legal effect of the acquittal is that they were not members of any unlawful assembly. Thus, learned counsel has contended that the conviction of the appellants for the offence of murder with the aid of s. 149, Indian Penal Code, is bad in law. This is the first of the two ways in which he has developed his argument.

His second argument wider in scope and embraces both ss. 149 and 34, Indian Penal Code, and it is this. He has pointed out that though the finding is that the two appellants assaulted Harji and Kurji with their axes, there is no finding as to who gave the fatal blows to these brothers. Kurji had as many as four ante mortem injuries, three on the neck and head and one on the arm. His death was due to a depressed fracture of the right temporal bone and a fissured fracture of the parietal and occipital bones. Harji had has many as thirteen ante mortem injuries including a fracture of the skull. So far as Mitha was concerned, he had sustained a fracture of the frontal bone of the left side

of his head, a crushed fracture of the nose and socket of the left eye, and a fracture of the maxillar bones on both sides; in other words, Mitha's skull was practically smashed in. The contention of the learned counsel is that in the absence of any finding that the appellants or the convicted persons alone caused the aforesaid fractures by the blows given by them, the appellants cannot be held constructively liable, either under s. 149 or s. 34, Indian Penal Code, for blows given by some unknown person when the prosecution made no attempt to allege or prove any such case. It is argued that even assuming that the convicted persons, four in number, had the necessary common intention of killing the three brothers, none of them would be liable under s. 34 Indian Penal Code, for the acts of an unknown person or persons who might have given the fatal blows unless the prosecution alleged and proved that the criminal act was done in furtherance of the common intention of the convicted persons and those others whose identity was not known; and where thirteen named persons are said to have committed a murder in furtherance of the common intention of all, it is not open to the prosecution to say, on acquittal of nine of those persons, that the remaining four committed the murder merely on the finding that they bad a common intention but without any proof whatsoever that they or any of them gave the fatal blows.

The two arguments overlap to some extent, though the first is applicable specifically in respect of the charge under s. 149, Indian Penal Code, and the second to both ss. 149 and 34, Indian Penal Code. We shall presently consider these arguments. But before we do so, it is necessary to state that much confusion could have been avoided in this case if the two charges-one under s. 149 and the other under s. 34were not mixed up: the difference between the two sections has been pointed out in several previous decisions of this Court, and though we consider it unnecessary to reiterate that difference, we must state that the difference should have been kept in mind and the two charges should not have been rolled up into one as was done in the present case. We are satisfied, however, that no prejudice was caused and the appellants have had a fair trial.

To go back to the arguments urged on behalf of the appellants; it is necessary, first, to understand clearly what the finding of the final Court of fact is. We have earlier quoted that finding in the very words in which the learned Judges of the High Court expressed it. That finding stated-(1) there was no doubt that more than five persons constituted the unlawful assembly, though the identity of all the persons except those four who were convicted was not established ; (2) that the total number of persons constituting the unlawful assembly was ten to thirteen; (3) that all the ten to thirteen persons had the common object and common intention of killing Kurji, Harji and Mitha; and lastly (4) that the killing was done in prosecution of the common object of the unlawful assembly and in furtherance of the common intention of all, and the appellants took a major part in the assault on two of the brothers, Kurji and Harji. The question that arises now is this: in view of these findings of the High Court, can it be said that the High Court wrongly applied s. 149, because the number of convicted persons was only four? We think that the answer must be in the negative. We may say at once that the High Court does not find that the unlawful assembly con- sisted of the four convicted persons and some of the acquitted persons. That clearly is not the finding of the High Court, because it says that " the identity of all the persons has not been established except that of accused nos. 1, 2, 3 and 11. " The finding of the High Court really means that the four convicted persons and some other persons whose identity was not established, totalling ten to thirteen in number, constituted the unlawful assembly. Therefore, it is unnecessary in the present case to embark on a discussion as

to the legal effect of the acquittal of nine of the accused persons, except to state that we may proceed on the footing that the acquittal was good for all purposes and none of those nine persons can now be held to have participated in the crime so that the remaining four persons may be held guilty under s. 149, Indian Penal Code. That does not, however, conclude the matter. Nothing in law prevented the High Court from finding that the unlawful assembly consisted of the four convicted persons and some unidentified persons, who together numbered more than five. We have advisedly said, ',Nothing in law etc"; for, whether such a finding can be given or not must depend on the facts of each case and on the evidence led. It is really a question of fact to be determined in each case on the evidence given therein. Learned counsel for the appellants has argued before us, as though it is a matter of law, that it was not open to the High Court to come to the finding to which it came, because the prosecution case was that thirteen named persons constituted the unlawful assembly. We are unable to accept this argument as correct. We do not think that there was any such legal bar as is suggested by learned counsel, though there may be cases where on the facts proved it will be impossible to reach a finding that the convicted persons, less than five in number, constituted an unlawful assembly with certain other unspecified persons not mentioned in the charge. That consideration apart, any mere error, omission or irregularity in the charge will not invalidate the finding in this case as -a matter of law. So far as the finding can be said to have travelled beyond the letters of the charge, the appellants have not proved any prejudice, and in the absence of prejudice no complaint can now De made of any defect in the charge.

Learned counsel has then submitted that the finding of the High Court makes out a case of a new unlawful assembly which is different from that suggested by the prosecution case. We do not think that that view is correct either. The assembly is the same assembly, but what has has happened is that the identity of all the members of the unlawful assembly has not been clearly established though the number has been found to be more than five. We do not think that it is unusual for witnesses to make mistakes of identity when a large number of persons are concerned in committing a crime; in any event it is a question of fact to be decided in each case and is not a question of law. Much reliance has been placed by learned counsel for the appellants on the following observations in Archbold's Criminal Pleading, Evidence and Practice (Thirty-fourth edition, pp. 200-201).

"Where Several prisoners are included in the same indictment, the jury may find one guilty and acquit the others, and vice versa. But if several are indicted for a riot, and the jury acquit all but two, they must acquit those two also, unless it is charged in the indictment, and proved, that they committed the riot together with some other person not tried upon that indictment." Similar observations occur in Hawkins's Pleas of the Crown (2 Hawk. c. 47, s. 8) That on an indictment for a riot against three or more, if a verdict acquit all but two, and find them guilty; or on an indictment for a conspiracy, if the verdict acquit all but one, and find him guilty, it is repugnant and void as to the two found guilty in the first case, and as to the one found guilty in the second, unless the indictment charge them with having made such a riot or conspiracy simul cum aliis juratoribus ignotis; for otherwise it appears that the defendants are found guilty of -an offence whereof it is impossible that they should be guilty; for there can be no riot where there are no more persons than two, nor can there be a conspiracy where there is no partner. Yet it seems agreed, that if twenty persons are indicted for a riot or' conspiracy, and any three found guilty of the riot, or any two of the conspiracy, the verdict is good." We do not think that these observations help the appellants in the

present case. They relate to the effect of a verdict of the jury at common law, which may be either (a) general, or (b) partial or (c) special. In a special verdict, the facts of the case are found by the jury, the legal inference to be derived from them being referred to the court. If, therefore, the jury find only one man guilty of conspiracy and two guilty of a riot, they are really finding the defendants (to use the phraseology of Hawkins) " guilty of an offence whereof it is impossible that they should be guilty; for there can be no riot where there are no more persons than two, nor can there be a conspiracy where there is no partner." Obviously, the. observations refer to those cases where the verdict of the jury does not and cannot imply that there were more than one conspirator, or more than two persons in a riot. This is made clear by the further statement that " if twenty persons are indicted for a riot or conspiracy, and any three found guilty of the riot, or any two of the conspiracy, the verdict is good." The legal position is clearly and succinctly put in Harris's Criminal Law (Nineteenth edition, p. 474.) " When several persons are joined in one indictment the jury may convict some and acquit others. In some cases, however, the acquittal of one may render the conviction of the other or others impossible; in conspiracy, for example, at least two of the prisoners must be convicted, and in riot at least three, unless those convicted are charged with having been engaged in the conspiracy or riot with some other person or persons not tried upon that indictment."

In Topan Das v. The State of Bombay (1), this Court proceeded on the same principle, viz., that according to (1) [1955] 2 S.C.R. 881.

the definition of criminal conspiracy in s. 120-A,Indian Penal Code, two or more persons must be partners to such an agreement and one person alone can never be held guilty of criminal conspiracy for the simple reason that he cannot conspire with himself. That was a- case in which four named individuals- were charged with having committed criminal conspiracy, but three were acquitted of the charge. The distinction between that case and the case under our consideration lies in this: in Topan Das's case it was not possible to find, after the acquittal of three persons out of the four charged, that there was any partner to the conspiracy whereas in the case before us the finding is that there were ten to thirteen persons who constituted the unlawful assembly with the necessary common object but the identity of four only has been established. The point under discussion arose in the decisions of the Allahabad High Court, viz., Harchanda v. Rex (1), and Gulab v. State (2), the latter over-riding the earlier decision. The decision in Gulab's case proceeded, however, on the footing that it was open to the appellate court to find that some of the acquitted persons had been wrongly acquitted, although it could not interfere with such acquittal in the absence of an appeal by the State Government-an aspect regarding which it is not necessary to say anything in this case.

There are two other decisions, one of the Federal Court and the other of this Court. In Kapildeo Singh v. The King (3), the prosecution case was that 60 or 70 men constituted the unlawful assembly, but the appellant in that case was charged with thirteen others -with having committed certain offences in furtherance of the common object of the unlawful assembly. The appellant was found guilty, but the thirteen others who were charged along with the appellant were acquitted as they were not properly identified. One of the contentions raised in the Federal Court was that in all fourteen persons having been charged with rioting and thirteen of them having been acquitted, (1) (1951) I.L.R. 2 All. 62.

(2) (1952) I.L.R. 2 All. 726.

(3) (1950) F.C.R. 834.

it could not be hold that there was any unlawful assembly of five or more pet-sons whose common object was to commit an offence. With regard to this contention, it was observed at pp. 837-838 :

" The essential question in a case under s. 147 is whether there was an unlawful assembly as defined in s. 141, I. P. C., of five or more than five persons. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and even when it is possible to convict less than five persons only, s. 147 still applies, if upon the evidence in the case the court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified. In the present case, there is such a finding and that concludes the matter."

We consider that these observations -apply with equal force in the present case, and we do not think that the distinction sought to be made by learned counsel for the appellant on the basis that in Kapildeo's case (1), the prosecution allegation was that there were 60 or 70 men in the unlawful assembly, makes any difference in the legal position. The same view was expressed again by this Court in Dalip Singh v. State of Punjab (2):

" Before section 149 can be called in aid, the court must find with certainty that there were at least five persons sharing the common object. A finding that three of them 'may or may not have been there' betrays uncertainty on this vital point and it consequently becomes impossible to allow the conviction to rest on this uncertain foundation. This is not to say that five persons must always be convicted before section 149 can be applied. There are cases and cases. It is possible in some cases for Judges to conclude that though five were unquestionably there the identity of one or more is in doubt. In that case, a conviction of the rest with the aid of section 149 would be good. But if (1) [1950] F.C.R. 834.

(2) [1954] S.C.R. 145,150.

that is the conclusion it behoves a court, particularly in a murder case where sentences of transportation in no less than four cases have been enhanced to death, to say so with unerring certainty."

The same view was reiterated in Nar Singh v. State of Uttar Pradesh (1). We have stated earlier what the finding in the present case is: it is a clear finding-a finding with certainty-that the number of persons who constituted the unlawful assembly was more than five, though the identity of four only has been established; and the killing was done in prosecution of the common object of the entire unlawful assembly Therefore, we see no serious difficulty in applying s. 149, Indian Penal Code, in the present case.

As to the application of s. 34 Indian Penal Code, we consider that the legal position does not admit of any doubt or difficulty. Four persons have been convicted of murder on the finding that all of them and some others had the common intention of killing three brothers; the appellants took part in the assault in furtherance of the common intention, and it is riot disputed that the common intention was achieved by murdering the three brothers, Kurji, Barji and Mitha. The number of convicted persons is more than one, and it does not fall below the required number. What then is the difficulty in applying s. 34, Indian Penal Code? Learned counsel says: "We do not know who gave the fatal blows ". We accept the position that we do not know which particular person or persons gave the fatal blows; but once it is found that a criminal act was donein furtherance of the common intention of all, each of such persons is liable for the criminal act as if it were done by him alone. The section is intended to meet a case in which it may be difficult to distinguish between the acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. The principle which the section embodies is participation in some action with the common intention of committing a crime ; once such participation is established, s. 34 is at once (1) A I.R 1959 S.C. 457,459.

attracted. In the circumstances, we fail to see what difficulty there is in applying s. 34, Indian Penal Code, in the present case. In the course of his arguments learned counsel has suggested that some of the acquitted persons might have given the fatal blows and as they have been acquitted, the appellants cannot be constructively liable for their acts. We do not think that this a correct way of looking at the matter. We are proceeding in this case on the basis that the acquittal is good for all purposes, and we cannot bring in the acquitted persons for an argument that they or any of them gave the fatal blows. It is necessary to refer now to two decisions of this Court with regard to the application of s. 34, Indian Penal Code. Learned counsel for the respondent has relied on Wasim Khan v. The State of Uttar Pradesh (1). In that case the High Court found that the appellant along with two others committed the offences of robbery and murder; but the two co-accused were acquitted. It was observed that on the finding of the High Court the appellant could be convicted by the application of s. 34, even though the two co-accused of the appellant were acquitted. That was a case in which the number came down to one by the acquittal of the two co- accused. The present case is a much stronger case in the matter of the application of s. 34, because the number of convicted persons who participated in the criminal act in furtherance of common intention of all is four. In Prabhu Babaji Navle v. The State of Bombay(2) the appellant along with four others was charged under s. 302 read with s. 34, Indian Penal Code; four others were acquitted. The question was if the appellant could be convicted under s. 34 after the acquittal of four others. Here again the number fell to one, that is, below the required number. It was observed: If these four persons are all acquitted, the element of sharing a common intention with them disappears; and unless it can be proved that he shared a common intention with actual murderer or (1) [1956] S.C.R. 191.

(2) A.I.R. 1956 S.C. 51.

murderers, he cannot be convicted with the aid of s.

34. of course he could have been charged in the alternative for having shared a common intention with another or others unknown. But even then, the common intention would have to be proved

either by direct evidence or by legitimate inference. It is impossible to reach such a conclusion on the evidence in this case once the co-accused are eliminated because the whole gravamen of the charge and of the evidence is that the appellant shared the common intention with those other four and not with others who are unknown." This decision can be distinguished on two grounds: (1) the number fell below the required number and (2) it was not possible to reach a conclusion in that case that the appellant shared the common intention with another or others unknown. In our case the number of convicted persons is four and each of them had the necessary common intention ; secondly, there is a clear finding that they shared the common intention with some others whose identity was not established. The decision in Prabhu Babaji Navle (1) does not, therefore, stand in our way.

Lastly, there is the question of sentence. Learned counsel for the appellants has submitted that the lesser sentence should be imposed, and he has given three reasons in support of his submission: (1) that Amra, brother of the appellants, was murdered earlier in the year; (2) that the father of the appellants was also convicted but was not - given capital punishment, though he must have influenced the appellants; and (3) there is no finding that the appellants caused the fatal injuries. We have examined the evidence and it shows clearly enough that the appellants played a leading part and, so far as Kurji and Harji were concerned, took a major part in assaulting them with heavy axes. The High Court also carefully considered the sentence imposed on the appellants and came to the conclusion that having regard to the enormity of the crime, viz., three premeditated and cold-blooded (1) A.I.R. 1956 S.C. 51 murders and the part played by the appellants, it would not be justified in imposing the lesser sentence. We see no good reasons for differing from the High Court and interfering with the sentence.

For the reasons given above, the appeal fails and is dismissed.

Appeal dismissed.