HIGH COURT OF MADHYA PRADESH, JABALPUR

Cr. Appeal No.	**: 1535/2006**
Parties Name	**:** Ramvishwas Patel @ Balua and another **Versus** State of M.P.
Cr. Appeal No.	**: 1753/2006** Sujan alias Ram Sujan **Versus** State of M.P.
Bench Constituted	**:** Hon'ble Shri Justice R.S. Jha & Hon'ble Smt. Justice Nandita Dubey, JJ.
Judgment delivered by	**: Hon'ble Shri Justice R.S. Jha**
Whether approved for reporting	**:** Yes/No
Name of counsel for parties	**: For Appellant:** Shri Dilip Parihar, Amicus Curiae through Legal Aid. **For respondent/State** : Shri Ajay Shuka, learned G.A.
Law laid down	**:**
Significant paragraph numbers	**:**

J U D G M E N T
(15.11.2017)

Per: R.S. Jha, J.

Both these appeals arise out of the same incident and are, therefore, heard and decided concomitantly by this common judgment.

2. These appeals have been filed by the appellants being aggrieved by judgment dated 19.07.2006 passed by the First Additional Sessions Judge, Satna in S.T. No. 19/2005 by which the trial court has held the appellants guilty of an offence

punishable under section 302 of the Indian Penal Code and sentenced them to undergo life imprisonment.

3. The prosecution case, in brief, is that the appellants committed the murder of the deceased Shri Krishna on 10.11.2004 at about 4.00 PM by assaulting him with a Lathi/stick and inflicting injuries on his head and face which resulted in fracture of the frontal bone as well as maxillary bone, breaking of teeth and haemorrhage.

4. According to the prosecution, on 10.11.2004 when the deceased along with his wife P.W-1 Sukhmanti was returning to the village by a country road through the field on a motor cycle bearing registration no. MP-19 4814 (Suzuki Max R-100), he asked P.W-1 Sukhmanti, who was travelling along with him as a pillion rider, to get-off the motor cycle as the country road was bad and was difficult to negotiate whereupon she got-off the motor cycle while the deceased slowly moved ahead while Sukhmanti (PW-1) followed him on foot.

5. According to the prosecution case, while PW-1 Sukhmanti was following her husband, the three appellants who were hiding in the grass beside the road lying in wait, sprang up and attacked the deceased with Lathis/sticks and inflicted injuries on his head and body on account of which the deceased fell down and thereafter the appellants continued to assault the

deceased. According to the prosecution, PW-1 Sukhmanti raised an alarm on account of which their two children PW-2 Savita Saket and PW-3 Pawan Kumar Saket immediately ran to the spot and saw the appellants running away from the place of incident. PW-1 Sukhmanti thereafter raised a hue and cry and informed her brother-in-law PW-5 Ramroop and thereafter went and lodged a report at Police Station, Sabhapur District Satna.

6. The investigation in the matter was conducted by PW-3 Upendra Kumar Tripathi whereafter a charge sheet under section 302/34 of the I.P.C. was filed against the three appellants.

7. The trial court, while assimilating the oral and documentary evidence on record, has relied upon the statement of PW-1 Sukhmanti, the sole eye witness to the incident as well as the medical evidence of Dr. C.S. Payasi (PW-10) to record a finding of guilt against the appellants and has convicted all three of them for an offence punishable under section 302 of the I.P.C. and sentenced them for life.

8. The learned counsel for the appellants submits that there is only one eye witness i.e. PW-1 Sukhmanti and there are several discrepancies in her statement which makes the same unreliable. The learned counsel for the appellants points out

that there are several omissions and contradictions between the F.I.R. lodged by her, EX. P/23/D2 and the case diary statement (Ex. D/3) of PW-1 Sukhmanti, on the one side, and the statement made by her in the court and in such circumstances, in view of the omissions and contradictions in her statement the same could not have been made the sole basis by the court below for recording a finding of guilt against the appellants.

9. The learned counsel for the appellants also submits that in the instant case the statement of PW-1 Sukhmanti does not find support from the medical evidence on record. It is submitted that the statement of PW-1 Sukhmanti, before the court below, to the effect that the appellants jointly assaulted the deceased whereupon he fell down and they continued to assault him even thereafter, does not find support from the medical evidence on record specifically Ex. P/16, the postmortem report and the deposition of the doctor PW/10 Dr. C.S. Payasi, from a perusal of which it is evident that there are only six injuries on the body of the deceased out of which injury nos. 5 and 6 could not have been caused by a lathi/stick.

10. It is submitted that a perusal of Ex. P/16, the postmortem report, and the statement of PW-10 Dr. C.S. Payasi, makes it further clear that there are no lathi/stick injuries on any part of

the body of the deceased except the face even though there is a specific statement made by the alleged eye witness PW-1 Sukhmanti to the effect that the appellants delivered several lathi blows on the body of the deceased.

11. It is submitted by the learned counsel for the appellants that in view of the numerous omissions and contradictions in the statement of PW-1 Sukhmanti, the same could not have been relied upon by the court below to record a finding of guilt against the appellants and as the court below has done so, the finding recorded by the court below suffers from perversity and deserves to be set aside.

12. The learned Government Advocate appearing for the State, per contra, submits that there is sufficient oral and documentary evidence available on record which has been properly analyzed by the court below to arrive at a finding of guilt against the appellants and in such circumstances, no case for interference in the impugned judgment is made out.

13. Having heard the learned counsel for the parties and having carefully perused and examined the statements of PW-1 Sukhmanti, PW-2 Savita Saket, PW-3 Pawan Kumar Saket, PW-4 Sudarshan, PW-5 Ramroop, PW-6 Balmik Mishra, PW-10 Dr. C.S. Payasi and PW-12 Sukhdev along with the statement of the Investigating Officer PW-13 Upendra Kumar Tripathi, it is

evident that the prosecution has been able to establish the fact that the deceased Srikrishna was assaulted by the appellants and that he suffered four injuries on the head and face on account of which he died.

14. As per the statement of PW-10 Dr. C.S. Payasi as well as the postmortem report Ex. P/16, it is evident that the deceased had a bone deep lacerated wound 4 x 3 cm in size on the frontal bone above the left eye brow which had irregular margins, a lacerated wound 3 x 6 cm thick cutting through the entire thickness of the left lower lip, another lacerated wound which had cut through the entire thickness of left upper lip and that he had lost six upper teeth and eight lower teeth. The postmortem report further indicated that injury no.1 resulted in fracture of the frontal bone on the left side due to which there was heavy bleeding and clotting and that the right maxillary bone had also been fractured. According to the doctor, all the injuries have been caused by hard and blunt objects and that the injuries were ante mortem. According to the postmortem report there were no other injuries on the body except injuries nos. 5 and 6 which were abrasions on the right neck with a contusion and another contusion on the left side at the root of the neck and left side of the chest including sternum and this injury was blue and black in colour.

15. The statement of PW-1 Sukhmanti, who is an eye witness to the incident, also ratifies the fact that all the three appellants together assaulted the deceased with sticks/lathis on the head as a result of which he succumbed to the injuries sustained by him. This part of her statement is supported by the medical evidence on record, while the part of her statement regarding inflicting repeated blows on other parts of the body is a natural exaggeration made by a distraught wife which in the light of the facts of the present case would not render the truthful part of her statement unreliable. The trial court has also held that each one of the appellants has inflicted injury on the head of the deceased with a common intention of committing his murder and therefore has accordingly held the appellants guilty of offence punishable under section 302 of the I.P.C.

16. The prosecution has also been able to establish that the appellant-Sujan @ Ramsujan in Cr. Appeal No. 1753/2006 harboured animosity towards the deceased on account of the fact that the wife of appellant Sujan alias Ramsujan was the Sarpanch while the deceased was the Secretary and that there was a dispute between them in respect of mis-appropriation of Panchayat funds and that there was animosity between the deceased and the other two appellants in respect of a land

dispute regarding which the deceased had obtained an injunction against the appellants.

17. The trial court on the basis of aforesaid oral and documentary evidence on record has recorded a finding of guilt against the appellants.

18. In the instant case, it is urged by the learned counsel appearing for the appellants that even if the statement of PW-1 Sukhmanti is accepted as it is , it is evident that she has not stated as to which appellants inflicted which injury o9r the fatal injury and whether the other appellants also inflicted injuries on the head of the deceased. It is submitted that in the absence of the prosecution establishing this fact, the conviction of all the three appellants under section 302 simplicitor of the I.P.C. without the aid of section 34 of the I.P.C. is contrary to law and illegal.

19. We are of the considered opinion that in the facts of the present case, even in case the prosecution has failed to establish as to which of the three injuries was inflicted by which of the appellants and the absence of a charge under section 302 read with section 34 of the IPC would not be fatal to the case of the prosecution specially in view of the fact that the appellants were well aware of the prosecution case regarding common intention since the very beginning and the

commission of the murder by the appellants of the deceased is established and therefore in view of the provisions of section 464, 465 of the Cr.P.C. even if, there is irregularity in framing of charge, the same would not render the judgment of the trial court bad in the absence of any prejudice to the appellants and conviction of the appellants is to be treated not just under section 302 of the IPC but also under section 302/34 of the I.P.C.

20. The law in this regard is well established. In the case of **Willie (William) Slaney vs The State Of Madhya Pradesh, AIR 1956 SC 116,** a Constitution Bench of the Supreme Court while considering the effect and impact of defect in charges framed in a criminal case, has held as under:-

> “43. Now, as we have said, sections 225, 232, 535 and 537(a) between them, cover every conceivable type, of error and irregularity referable to a charge that can possibly arise, ranging from cases in which there is a conviction with no charge at all from start to finish down to cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that whatever the irregularity it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the

State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction. Every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done, what we are concerned to see is whether the accused bad a fair trial, whether he knew what be was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. If all these elements are there and no prejudice is shown the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one.

44. to 55. xxx xxx xxx

56. Now what is an accused person entitled to know from the charge and in what way does the charge in this case fall short of that? All he is entitled to get from the charge is-

(1) the offence with which he is charged, section 221(1),Criminal Procedure Code,

(2) the law and, section of the law against which the offence is said to have been committed, section 221(4),

(3) particulars of the time, section 222(1) and

(4) of the place, section 222(1), and

(5) of the person against whom the offence is said to have been committed, section 222(1), and

(6) when the nature of the case is such that those particulars do not give him sufficient notice of the

> matter with which he is charged, such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose, section 223.

He is not entitled to any further information in the charge: see Illustration (e) to section 223 of the Code:

> "A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B".

57. It is clear from this that when the case is one of murder, the accused is not entitled to be told in the charge how it was committed, whether with a pistol or a lathi or a sword. He is not entitled to know from the charge simpliciter any further circumstance. How then is he expected to defend himself? He has the police challan, he has the evidence recorded in the Committal Court, he hears the prosecution witnesses and he is examined under section 342 of the Code. It is these proceedings that furnish him with all the necessary, and indeed vital, information, and it is his duty to look into them and defend himself. It will be seen that if the logic of the appellant's contention is carried to its fullest extent the accused could complain of prejudice because be was not told in the charge whether a pistol was used for the crime or a sword and if a pistol, its calibre and bore and the type of cartridge.

58. Now when several persons join in the commission of a crime and share a common intention, it means that each has the requisite intention in himself; the fact that others share it does not absolve any one of them individually, and when the crime is actually committed in pursuance of the common intention and the accused is present at its commission, the crime becomes the offence actually committed because of section 114 of

the Indian Penal Code. Section 114 does not create the offence nor does section 34. These sections enunciate a principle of criminal liability. Therefore, in such cases all that the charge need set out is the offence of murder punishable under section 302 of the Indian Penal Code committed by the accused with another and the accused is left to gather the details of the occurrence as alleged by the prosecution from other sources. The fact that be is told that he is charged with murder committed by himself with another imports that every legal condition required by law to constitute the offence of murder committed in this way was fulfilled: section 221(5) of the Criminal Procedure Code."

21. The aforesaid law laid down by the Supreme Court has been held to be good, valid and applicable, even after amendment to the Criminal Procedure Code in 1973 by the Supreme Court in the case of **Vutukuru Lakshmaiah Vs. State of Andhra Pradesh, 2015 (11) SCC 102:-**

"13. First, we shall advert to the issue of non-framing of charge under Section 149 IPC. While dealing with the said issue, in ***Willie (William) Slaney v. State of M.P.*** **(supra) Vivian Bose, J**., observed that every reasonable presumption must be made in favour of the accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. The learned Judge proceeded to state that all said and done, the Court is required to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against

him were explained to him fairly and whether he was given a full and fair chance to defend himself. Thereafter, Bose, J. proceeded to observe thus:-

> "45. In adjudging the question of prejudice the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been, misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the facts, prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand; also it will always be material to consider whether objection to the nature of the charge, or a total want of one, was taken at an early stage.
>
> If it was not, and particularly where the accused is defended by counsel (**Atta Mohammad v. King-Emperor,** AIR 1930 PC 57 (2) it may in a given case be proper to conclude that the accused was satisfied and knew just what he was being tried for and knew what was being alleged against him and wanted no further particulars, provided it is always borne in mind that "no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused" (**Abdul Rahman v. King-Emperor,** AIR 1927 PC 44).
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> But these are matters of fact which will be special to each different case and no conclusion

on these questions of fact in any one case can ever be regarded as a precedent or a guide for a conclusion of fact in another, because the facts can never be alike in any two cases “however” alike they may seem. There is no such thing as a judicial precedent on facts though counsel, and even Judges, are sometimes prone to argue and to act as if there were.”

14. Chandrasekhara Aiyar, J., in his concurring opinion stated thus:- (**Willie Slaney** supra)

“84. A case of complete absence of a charge is covered by Section 535, whereas an error or omission in a charge is dealt with by Section 537. The consequences seem to be slightly different. Where there is no charge, it is for the court to determine whether there is any failure of justice. But in the latter, where there is mere error or omission in the charge, the court is also bound to have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.”

After so stating, the learned Judge opined that generally in cases of omission to frame a charge is not per se fatal. Eventually, he ruled thus (Willie Slaney supra) :-

“86. Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled-up one involving the

> direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable.
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> In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant." (**emphasis supplied**)

15. After 1973 Code came into existence, two-Judge Bench in ***Annareddy Sambasiva Reddy v. State of A.P***. (2009) 12 SCC 546, relying on the principles enunciated in *Willie (William) Slaney* (supra), has opined that the legal position stated by the larger Bench would hold good after enactment of Code of Criminal Procedure, 1973 as well in the light of Sections 215, 216, 218, 221 and 464 contained therein. Proceeding further, the Court has ruled:- (*Annareddy Sambasiva Reddy* supra)

> 61. "Is non-mentioning of Section 149 in Charge 4 and Charge 5 a fundamental defect of an incurable illegality that may warrant setting aside the conviction and sentence of the appellants? We do not think so. Non-framing of a charge under Section 149 IPC, on the face of the charges framed against the appellants would not vitiate their conviction; more so when

> the accused have failed to show any prejudice in this regard. The present case is a case where there is mere omission to mention Section 149 in Charges 4 and 5 which at the highest may be considered as an irregularity and since the appellants have failed to show any prejudice, their conviction and sentence is not at all affected. Tenor of cross-examination of PW 1 and PW 3 by the defence also rules out any prejudice to them."

22. In the case of **Mohan Singh Vs. State of Bihar, 2011 (9) SCC 272**, while considering a similar question in respect of the appellants therein, who had been convicted for an offence punishable under Section 120-B of the Indian Penal Code, for criminal conspiracy for murder in the absence of the charge under Section 302 of the IPC, the Supreme Court after taking into consideration the provisions of Sections 214, 211, 215, 464 of the IPC, relying upon the Constitution Bench decision in the case of **Willie Slaney (supra), Rawalpenta Venkalu and another Vs. The State of Hyderabad AIR 1956 SC 171, K. Prema S. Rao Vs. Yadla Srinivasa Rao, 2003 (1) SCC 217, Dalbir Singh Vs. State of U.P. 2004 (5) SCC 334, State of U.P. Vs. Paras Nath Singh 2009 (6) SCC 372 and Annareddy Sambasiva Reddy Vs. State of A.P. 2009 (12) SCC 546,** held as under:-

> "27. In view of such consistent opinion of this Court, we

> are of the view that no prejudice has been caused to the appellant for non-mentioning of Section 302 I.P.C. in the charge since all the ingredients of the offence were disclosed. The appellant had full notice and had ample opportunity to defend himself against the same and at no earlier stage of the proceedings, the appellant had raised any grievance. Apart from that, on overall consideration of the facts and circumstances of this case we do not find that the appellant suffered any prejudice nor has there been any failure of justice."

23. The law laid down in the case of **Willie Slaney** (supra) has again been affirmed and relied upon by the Supreme Court in the case **Anant Prakash Sinha Vs. State of Haryana and another 2016 (6) SCC 105**.

24. In the case of **Gurpreet Singh Vs. State of Punjab 2005 (12) SCC 615** the question raised was in similar terms as the one raised in the present case, wherein the accused were convicted of an offence punishable under Section 302 of the IPC, without any specific charge under Section 34 of the IPC, and without there being any evidence to indicate that as to which of the appellants had inflicted the fatal injury. The Supreme Court while rejecting the contention of the appellants regarding fatal defect in the prosecution case in this regard again relied upon the constitution bench decision in the case of **Willie Slaney** (supra) and has held as under:-

> "13. Learned Senior Counsel next submitted that in any

view of the matter, conviction of the appellants under Section 302 IPC simpliciter is unwarranted as there is no evidence to show that any of the two appellants inflicted fatal injury. It has been further submitted that their conviction cannot be altered, by this Court, to under Section 302 read with Section 34 IPC for sharing the common intention as no charge was framed under Section 302 read with Section 34 IPC but the charge was framed under Section 302 IPC simpliciter. It has been further submitted that at the highest, the appellants can be convicted by this Court under Section 326 IPC for causing grievous injury to the deceased by dangerous weapons. Reliance in this connection was placed upon a three Judges' Bench decision of this Court in the case of **Shamnsaheb M. Multtani v. State of Karnataka** (2001) 2 SCC 577. In that case, charge was framed under Section 302 IPC and the accused persons were acquitted by the trial court. When the matter was taken in appeal by the State, High Court reversed the order of acquittal but convicted accused under Section 304B IPC which was challenged before this Court. After taking into consideration the provisions of Section 464 of the Code of Criminal Procedure, this Court laid down that a conviction would be valid even if there is omission or irregularity in the framing of charge provided the same did not occasion a failure of justice. In the said case, Court came to the conclusion that by non-framing of the charge under Section 304B IPC, there was failure of justice and the accused was prejudiced thereby in view of the fact that under Section 113B of the Evidence Act, there was a statutory presumption against the accused which he was entitled to rebut and no such opportunity of rebuttal was afforded to him in the absence of

charge. This being the position, this Court set aside the conviction under Section 304B IPC, remitted the matter to the trial court, directing it to proceed from the stage of defence evidence. Therefore, the said decision is quite distinguishable and has no application to the present case.

14. On behalf of the State, reference was made to a decision of this Court in the case of **State of A.P. v. Thakkidiram Reddy and Ors**. (1998) 6 SCC 554, , in which case charge was framed under Section 302 IPC simpliciter but eleven accused persons were convicted under Section 302/149 IPC by the trial court. When the matter was taken to the High Court, conviction of one accused under Section 302/149 IPC was maintained but that of all other ten accused persons reversed and they were acquitted of the charge. Against the order of acquittal of the ten accused persons, State of Andhra Pradesh filed an appeal before this Court whereas the accused whose conviction was upheld by the High Court also preferred an appeal. This Court, following the decision of the Constitution Bench in the case of **Willie (William) Slaney v. State of M.P.**,(supra) , upheld the order of conviction but reversed the acquittal of five accused persons out of ten and restored their conviction under Section 302/149 IPC recorded by the trial court. After taking into consideration the provisions of Section 464 and 465 of the Code, it was laid down that unless it could be shown from the evidence of witnesses as well as a statement of the accused under Section 313 of the Code that there was a failure of justice and thereby accused was prejudiced, the appellate court would not be justified in refusing to convict the accused for the offence under Section 302/149 IPC merely because

charge was framed under Section 302 IPC simpliciter and not under Section 302/149 IPC. The court thus observed in paras 10-11 which read thus:-

> "10. Sub-Section (1) of Section 464 of the Code of Criminal Procedure, 1973 ('Code' for short) expressly provides that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact (emphasis supplied) been occasioned thereby. Sub- section (2) of the said section lays down the procedure that the Court of appeal, confirmation or revision has to follow in case it is of the opinion that a failure of justice has in fact been occasioned. The other section relevant for our purposes is Section 465 of the Code; and it lays down that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the proceedings, unless in the opinion of that Court, a failure of justice has in fact been occasioned. It further provides, inter alia, that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have

been raised at an earlier stage in the proceedings.

11. This Court in **Willie (William) Slaney v. The State of M.P.**, elaborately discussed the applicability of Sections 535 and 537 of the Code of Criminal Procedure, 1898, which correspond respectively to Sections 464 and 465 of the Code, and held that in judging a question of prejudice, as of guilt, courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. Viewed in the context of the above observations of this Court we are unable to hold that the accused persons were in any way prejudiced due to the errors and omissions in the charges pointed out by Mr. Arunachalam. Apart from the fact that this point was not agitated in either of the Courts below, from the fact that the material prosecution witnesses (who narrated the entire incident) were cross examined at length from all possible angles and the suggestions that were put forward to the eye witnesses we are fully satisfied that the accused persons were not in any way prejudiced in their defence. While on this point we may also mention that in their examination under Section 313 of the Code, the accused

persons were specifically told of their having committed offences (besides others) under Sections 148 and 302/149 IPC. For all these reasons we reject the threshold contention of Mr. Arunachalam.

15. Further, it has been reiterated by this Court in the case of **Ramji Singh and Anr. v. State of Bihar** (2001) 9 SCC 528 wherein also charge was framed under Section 302 simpliciter but conviction was under Section 302 read with Section 34 IPC and it was laid down that conviction under Section 302 read with Section 34 IPC was warranted as the accused person shared the common intention to cause death of the victim and no prejudice was caused to them because of non-framing of charge under Section 302 read with Section 34 IPC.

16. In the present case, it cannot be said that the accused persons were prejudiced merely because charge was framed under Section 302 IPC simpliciter and no charge was framed under Section 302 read with Section 34 IPC. From the evidence of two eyewitnesses, namely, PWs 2 and 3 it would appear that the accused persons shared the common intention to cause death of the victim. They were cross-examined at length from all possible angles and from the suggestions that were put forth to the eyewitnesses, we are fully satisfied that the accused persons were not in any manner prejudiced in their defence. That apart, in their examination under Section 313 of the Code, the appellants were specifically told that they along with other accused persons armed with kirpan came to the place of occurrence and assaulted the deceased whereafter they fled away which shows that appellants shared the

common intention to cause death of the deceased."

17. .....In view of the facts set forth above, we are of the opinion that the prosecution has succeeded in proving its case beyond reasonable doubt and conviction of the appellants under Section 302 IPC is liable to be altered to one under section 302 red with Section 34 IPC as fatal injury could not be attributed to them.

25. From the aforesaid law laid down by the Supreme Court, it is apparent that simply because the prosecution fails to establish as to which of the appellants has inflicted the fatal blow or that a specific and clear charge under Section 302 read with section 34 of the IPC, has not framed against the appellants, the conviction of all the appellants under Section 302 simplicitor of the IPC cannot be held to be bad in a case where the prosecution has established without reasonable doubt, the fact that the appellants have got together and committed the murder of the deceased. In view of the law laid down by the Supreme Court and the provisions of sections 464 and 465 of the Cr.P.C. in such a case, the conviction of the appellants cannot be set aside nor can the judgment of the trial Court be held to be unsustainable on such a ground and at best the conviction can be converted into one under Section 302/34 of the I.P.C.

26. As stated by us in the preceding paragraphs and as has

been held by the Supreme Court in the above quoted decisions, the test to determine as to whether such a conviction is bad is to determine whether the absence of such a charge has caused or resulted in any prejudice to the appellants.

27. When the facts of the present case are examined in the light of above law, it is clear that in the instant case, the prosecution case against the appellants from the very beginning has been that the appellants hid beside the road armed with lathis and thereafter jointly assaulted the deceased to commit his murder. The documents on record also establish that the charge-sheet filed against the appellants was under Section 302/34 of the IPC. Since the very beginning the case of the prosecution has been that the appellants got together with an intention of committing the murder of the deceased and, therefore, jointly assaulted him with lathis. Even in the examination of the accused, the first question that was put to them was that all the accused together assaulted the deceased with lathis and inflicted injuries on his person. The facts on record also establish that the appellants have also understood this aspect very clearly and have extensively cross-examined all the witnesses including PW-1 Sukhmanti and other witnesses in this regard. It is also evident from the

injuries on the person of the deceased that he has been inflicted with three blows on the face attributed to the three appellants, which have ultimately resulted in his death and it is on this count that the trial Court has held the appellants guilty of the offence punishable under Section 302 of the IPC.

28. The facts and record also clearly establish that the appellants have never objected to or assailed the trial on the ground of irregularity in framing of the charges and have throughout contested the case without any objection with a clear understanding of the prosecution case to the effect that they had committed murder of the deceased with a common intention of doing so.

29. From the aforesaid facts of the present case narrated by us, it is apparent that no prejudice whatsoever has been caused to the appellants because of the alleged irregularity in framing of the charnges against them.

30. In view of the aforesaid facts and circumstances and in the absence of any prejudice, once it is clearly established by the prosecution that all the appellants got together, assaulted the deceased and committed his murder, irregularity, if any, in framing charges against the appellants cannot be regarded as fatal, specifically in view of the interpretation given to Sections 464 and 465 of the Cr.P.C. by the Supreme Court in

the above mentioned decisions and, therefore, their conviction is upheld and shall be treated to be not just under Section 302 but also under Section 302/34 of the IPC as well.

31. In view of the aforesaid discussions and as a consequence thereof, we do not find any infirmity or illegality in the judgment of the trial Court warranting interference. The judgment of the trial Court dated 19.07.2006 passed by the First Additional Sessions Judge, Satna in S.T. No. 19/2005 is hereby affirmed and confirmed and the conviction of the appellants for an offence punishable under Sections 302 and 302/34 of the IPC is hereby upheld.

32. The appellants who are in jail shall remain incarcerated to undergo the remaining part of the sentence.

33. Both these appeals, filed by the appellants, being meritless are hereby dismissed.

(**R.S. Jha**)
Judge

(**Nandita Dubey**)
Judge

msp