A FAINUL KHAN

v.

STATE OF JHARKHAND AND ANOTHER

(Criminal Appeal No(s). 937 of 2011)

B OCTOBER 04, 2019

[NAVIN SINHA AND B. R. GAVAI, JJ.]

Penal Code, 1860: ss.302/149 and ss.323/149 and s.147 – Conviction under – Plea of appellant that charge was framed under ss.302/149 and ss.323/149 against six persons but charge under s.147 was against four persons only and therefore was defective without aid of s.141 and s.146 – Held: Originally there were six accused – Two of them have since been deceased – Appellants were well aware that six of them were charged together for a common assault under ss.302/149 and 323/149 because of their sharing a common object – Appellants were also aware that two of the accused were carrying a deadly weapon, spears, and which were used for assault – Therefore, omission by the court in framing charge under s.147 alone against four persons only was a mere inadvertent omission – Moreover, objection about a defective charge, without any evidence of the prejudice caused, was raised for the first time in the instant appeal and for that reason also did not merit consideration.

Code of Criminal Procedure, 1973: s.313 – Plea of appellant that they were seriously prejudiced in their defence because proper opportunity to defend was denied under s.313 as the incriminating questions put to them were extremely casual and perfunctory – Held: s.313 incorporates the principle of audi alteram partem – It provides an opportunity to the accused for his defence by making him aware fully of the prosecution allegations against him and to answer the same in support of his innocence – But equally there cannot be a generalised presumption of prejudice to an accused merely by reason of any omission or inadequate questions put to him – Ultimately it will be a question to be considered in the facts and circumstances of each case including the nature of other evidence available, the kind of questions put to an accused, considered with anything further that the accused may state in his defence – In the facts of

the instant case, considering the nature of ocular evidence available of the injured witnesses P.Ws. 7 and 8 who were also cross-examined by the appellants, no prejudice was caused to the appellants – A specific question was put to the appellants that they participated in an unlawful assembly with the common object of murdering the deceased – Further, it was also put to them that they had caused injuries to P.W. 7 and 8 – Merely because no questions were put to the appellants with regard to the individual assault made by each of them, it cannot be said in the facts of the case that any prejudice was caused to them – Appellants did not offer any explanation or desire to lead evidence except for stating that they were falsely implicated.

Criminal Law: Absence of injury report of injured eye witnesses – Effect on prosecution case – Prosecution case was that P.W. 8 and deceased were going together when they were surrounded and assaulted by the accused persons – There was no lacunae in the evidence or cross-examination of the witness to doubt his presence and the injuries suffered by him in the same occurrence – P.W. 7, a resident of the locality and an independent witness also suffered injuries during the same occurrence – P.W. 8 during the course of his deposition also showed the scars caused to him by his injuries, noticed by the trial judge – The statement of the two witnesses also stated to have been recorded at the hospital – The fact that there was no injury report, can at best be classified as a defective investigation but cannot raise doubts about the credibility of their being injured witnesses in the same occurrence – The officer-in-charge of the police station where the deceased and injured were taken, specifically deposed that he submitted a request for the injury report of the witnesses and pursuant to which their injury reports were made available to him – Only thereafter the charge sheet was submitted by him – There was no material in his cross-examination to discredit his statements – Investigation, defect in.

Penal Code, 1860: ss.302/149 and ss.323/149 – Conviction under – Appellants were undoubtedly the members of an unlawful assembly some of whom were also armed with spears and assaulted the deceased – All the accused surrounded the deceased obviously to prevent his escape – The initial assault was made on the head of the deceased with the lathi by appellant-S – The deceased fell down

A *and when he was trying to stand up, he was assaulted by two persons with spears – P.W. 7 was assaulted on the head by appellant-F – In the fracas the fact that the assault by appellant-M landed on the thigh of the witness was not of much relevance – Likewise, P.W. 8 was assaulted by appellant-S on the face and head – The fact that the co-accused may have assaulted on the head again cannot be considered very relevant to eschew the absence of common object – No reason to interfere with the order of conviction.*

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Dismissing the appeals, the Court

HELD: 1. Originally there were six accused. Two of them have since been deceased and the fate of one is not known. The appellants were well aware that six of them were charged together for a common assault under Sections 302/149 and 323/149 because of their sharing a common object. The appellants were also aware that two of the accused were carrying a deadly weapon, spears, and which were used for assault. Therefore, no prejudice was caused to the appellants and the omission by the court in framing charge under Section 147 alone against four persons only was a mere inadvertent omission. The objection about a defective charge, without any evidence of the prejudice caused, has been raised for the first time in the instant appeal and for that reason also merits no consideration. [Para 9][931-D, F-H]

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2. P.W. 8 and the deceased were going together when they were surrounded and assaulted by the accused persons. There was no lacunae in the evidence or cross-examination of the witness to doubt his presence and the injuries suffered by him in the same occurrence. P.W. 7, a resident of the locality and an independent witness also suffered injuries during the same occurrence. However, P.W. 6 does not appear to be eye witness. The witness was at home and reached the place of occurrence after hearing the commotion by which time the deceased was lying on the ground. P.W.7 deposed that P.W.6 reached after him. P.W. 7 deposed of assault by appellant-S upon P.W. 8 with lathi and also upon the witness himself by appellants-F and M causing injuries on his head and right hand. Appellant-M is also stated to have assaulted the witness on his thigh with lathi. P.W.8 deposed that the accused surrounded him and the deceased. Appellant-S

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assaulted the deceased on the head. The witness was assaulted on his face, head and hand with the lathi. Both the witnesses deposed that they were then taken to the hospital along with the deceased where their injuries were examined. P.W. 8 during the course of his deposition also showed the scars caused to him by his injuries, noticed by the trial judge. The statement of the two witnesses is also stated to have been recorded at the hospital. The fact that there was no injury report, can at best be classified as a defective investigation but cannot raise doubts about the credibility of their being injured witnesses in the same occurrence. P.W. 11, the officer-in-charge of the police station where the deceased and injured were taken, has specifically deposed that he submitted a request for the injury report of the witnesses and pursuant to which their injury reports were made available to him. Only thereafter was the charge sheet was submitted by him. There was no material in his cross-examination to discredit his statements. [Para 10][932-A-F]

3. Section 313, Cr.P.C. incorporates the principle of *audi alteram partem.* It provides an opportunity to the accused for his defence by making him aware fully of the prosecution allegations against him and to answer the same in support of his innocence. But equally there cannot be a generalised presumption of prejudice to an accused merely by reason of any omission or inadequate questions put to an accused thereunder. Ultimately it will be a question to be considered in the facts and circumstances of each case including the nature of other evidence available, the kind of questions put to an accused, considered with anything further that the accused may state in his defence. In the facts of the instant case, considering the nature of ocular evidence available of the injured witnesses P.Ws. 7 and 8 who were also cross-examined by the appellants, and the evidence of P.W. 11, no prejudice was caused to the appellants. A specific question was put to the appellants that they participated in an unlawful assembly with the common object of murdering the deceased. Further, it was also put to them that they had caused injuries to P.W. 7 and 8. Merely because no questions were put to the appellants with regard to the individual assault made by each of

A **them, it cannot be said in the facts of the case that any prejudice has been caused to them. [Paras 11- 13][932-G; 933-F-G; 934-A-C]**

Suresh Chandra Bahri v. State of Bihar **1995 Suppl (1) SCC 80 : [1994] 1 Suppl. SCR 483 - relied on.**

B **4. The appellants were undoubtedly the members of an unlawful assembly some of whom were also armed with spears and assaulted the deceased. All the accused surrounded the deceased obviously to prevent his escape. The initial assault was made on the head of the deceased with the lathi by appellant-S. The deceased fell down and when he was trying to stand up, he was assaulted by two persons with spears. P.W. 7 was assaulted on the head by appellant-F. In the fracas the fact that the assault by appellant-M landed on the thigh of the witness is not of much relevance. Likewise, P.W. 8 was assaulted by appellant-S on the face and head. The fact that the co-accused may have assaulted on the head again cannot be considered very relevant to eschew the absence of common object. [Para 17][936-F-H]**

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Shobhit Chamar v. State of Bihar, **(1998) 3 SCC 455 : [1998] 2 SCR 117;** *Fahim Khan v. State of Bihar* **(2011) 13 SCC 142 : [2011] 5 SCR 577;** *Sukha v. State of Rajasthan* **[1956] SCR 288 – relied on.**

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Masalti v. State of U.P., **AIR 1965 SC 202 : [1964] SCR 133;** *Ranvir Yadav v. State of Bihar*, **(2009) 6 SCC 595: [2009] 7 SCR 653;** *Samsul Haque v. State of Assam*, **(2019) (11) SCALE 458;** *Najabhai Desurbhai Wagh v. Valerabhai Deganbhai Vagh and Ors.*, **(2017) 3 SCC 261 – referred to.**

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Case Law Reference

	[2009] 7 SCR 653	**referred to**	**Para 3**
G	**(2019) (11) SCALE 458**	**referred to**	**Para 3**
	(2017) 3 SCC 261	**referred to**	**Para 6**
	[1994] 1 Suppl. SCR 483	**relied on**	**Para 14**
	[1998] 2 SCR 117	**relied on**	**Para 15**
H	**[2011] 5 SCR 577**	**relied on**	**Para 7**

[1956] SCR 288	**relied on**	**Para 16**	A
[1964] SCR 133	**referred to**	**Para 17**	

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 937 of 2011.

From the Judgment and Order dated 28.05.2009 of the High Court of Jharkhand at Ranchi in Criminal Appeal (DB) No. 211 of 2000. B

With

Criminal Appeal Nos. 939, 938 of 2011.

Sidharth Luthra, Sr. Adv., Sudarshan Rajan, Dr. K. B. Sounder Rajan, Mahesh Kumar, Vijay Kumar Sharma, Ms. Mehaak Jaggi, Ms. Ankita Tiwari, P. Narasimhan, Advs. for the Appellant. C

Anil K. Jha, Jayesh Gaurav, Ms. Diksha Ojha, Ms. Priyanka Tyagi, Kuldeep Rai, T. Mahipal, Advs. for the Respondents.

The Judgment of the Court was delivered by D

NAVIN SINHA, J.

1. The appellants are aggrieved by their conviction under Section 302/149 of the Indian Penal Code (IPC) sentencing them to rigorous imprisonment for life, along with conviction under Sections 323/149 and 147 IPC, sentencing them to varied terms of imprisonment under the same. The sentences have been directed to run concurrently. E

2. The occurrence is said to have taken place on 01.11.1983at about 06.30 PM. The accused were variously armed with spears and lathis. P.W. 7 and 8 are stated to be injured eye witnesses. P.W 6 also claimed to be an eye witness. The police report was lodged by P.W. 8 at the hospital. F

3. Learned Senior Counsel Shri Sidharth Luthra making the lead arguments on behalf of the appellants submitted that charge was framed under Sections 302/149 and 323/149 IPC against six persons. But the charge framed under Section 147 was defective being against four persons only and without the aid of Sections 141 and 146. It was next submitted that the appellants have been seriously prejudiced in their defence because proper opportunity to defend was denied under Section 313 of the Code of Criminal Procedure,1973 (Cr.P.C.) as the incriminating G

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A questions put to them were extremely casual and perfunctory in barely two pages. All relevant questions with regard to the accusations were not put to the appellants, denying them the opportunity to present their defence. It cannot be considered as a mere irregularity, to hold that no prejudice has been caused to the appellants. Emphasising the inconsistency in the prosecution evidence it was submitted that P.W. 7 claims lathi injury on his thigh and leg, but P.Ws. 6 and 8 are silent on the role of appellant Fainul Khan, and appellant Mir Shaukat is stated to have assaulted on the thigh of P.Ws. 6 and 7 when according to the F.I.R. he hit on the head of P.W. 8. Reliance in support of the submissions was placed on ***Masalti vs. State of U.P.***, AIR 1965 SC 202, ***Ranvir Yadav vs. State of Bihar***, (2009) 6 SCC 595 and ***Samsul Haque vs. State of Assam***, (2019) SCC Online 1093; 2019 (11) SCALE 458.

4. It was next submitted that P.W. 6 was not an eye witness to the assault. He had arrived upon hearing the commotion after the appellants had left and the deceased was lying on the ground. P.W. 6 also does also refer to the presence of P.W. 7 at the place of occurrence.

5. The evidence of P.Ws. 6 and 8 was sought to be discredited on account of their being related to the deceased. The claim of P.Ws. 7 and 8 to be injured eye witnesses was also challenged in absence of any injury report with regard to them. False implication of the appellants could not be ruled out in view of previous enmity having been admitted by the prosecution witnesses. P.W. 8 deposed that the deceased was assaulted on his head from behind and fell on his face, but no facial injury has been found on the deceased.

6. The deceased was assaulted with a spear by accused Siddiq and Zabbar. The allegations of assault by the appellants on the deceased with a lathi are omnibus, since only one bruise has been found on the upper arm. There existed no common object because in that event nothing prevented the appellants from individual assaults each on a sensitive part of the body of the deceased, such as the head. Alternatively, the three appellants at best may be liable for a lesser offence relying on ***Najabhai Desurbhai Wagh vs. Valerabhai Deganbhai Vagh and Ors.***, (2017) 3 SCC 261.

7. Learned counsel for the State submitted that there was no lacunae in the examination of the accused under Section 313 Cr.P.C. In any event the appellants have not been able to demonstrate any prejudice.

Moreover this objection cannot be raised at the present belated stage when it had not been raised at any earlier stage. Reliance was placed on ***Shobhit Chamar vs. State of Bihar***, (1998) 3 SCC 455 and ***Fahim Khan vs. State of Bihar***, (2011) 13 SCC 142.

8. The absence of any injury report with regard to P.Ws. 7 and 8 may at best be a case of defective investigation. It cannot discredit them as injured eye witnesses in view of the nature of their oral evidence and that of P.W. 11, the officer-in-charge of the Kisko police station where the deceased and the injured were taken for treatment. There are concurrent findings with regard to the presence of the appellants. There is ample evidence of the appellants sharing a common object with the co-accused.

9. We have considered the submissions on behalf of the parties as also perused the materials on record. Originally there were six accused. Two of them have since been deceased and the fate of one is not known. Section 464, Cr.P.C provides as follows:-

> "464. Effect of omission to frame, or absence of, or error, in charge.—(1) No finding, sentence or order by a Court of competent jurisdiction shall be 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 been occasioned thereby.
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The appellants were well aware that six of them were charged together for a common assault under Sections 302/149 and 323/149 because of their sharing a common object. The appellants were also aware that two of the accused were carrying a deadly weapon, spears, and which were used for assault. We are therefore of the considered opinion that no prejudice has been caused to the appellants and the omission by the court in framing charge under Section 147 alone against four persons only was a mere inadvertent omission. The presence of one bruise injury on the deceased is also not considered relevant in the facts of the case. The objection about a defective charge, without any evidence of the prejudice caused, has been raised for the first time in the present appeal and for that reason also merits no consideration.

A 10. P.W. 8 and the deceased were going together when they were surrounded and assaulted by the accused persons. We do not find any lacunae in the evidence or cross-examination of the witness to doubt his presence and the injuries suffered by him in the same occurrence. P.W. 7, a resident of the locality and an independent witness also suffered injuries during the same occurrence. However, we are not satisfied that
B P.W. 6 is an eye witness. The witness was at home and reached the place of occurrence after hearing the commotion by which time the deceased was lying on the ground. P.W.7 deposed that P.W.6 reached after him. P.W. 7 deposed of assault by appellant Sainul upon P.W. 8 with lathi and also upon the witness himself by appellants Fainul and Mir
C Shaukat causing injuries on his head and right hand. Appellant Mir Shaukat is also stated to have assaulted the witness on his thigh with lathi. P.W.8 deposed that the accused surrounded him and the deceased. Appellant Sainul assaulted the deceased on the head. The witness was assaulted on his face, head and hand with the lathi. Both the witnesses
D deposed that they were then taken to the hospital along with the deceased where their injuries were examined. P.W. 8 during the course of his deposition also showed the scars caused to him by his injuries, noticed by the trial judge. The statement of the two witnesses is also stated to have been recorded at the hospital. The fact that there is no injury report, in our opinion, can at best be classified as a defective investigation but
E cannot raise doubts about the credibility of their being injured witnesses in the same occurrence. The fact that P.W.8 may be related to the deceased or previous enmity existed, are irrelevant in the facts of the case. P.W. 11, the officer-in-charge of the Kisko police station where the deceased and injured were taken, has specifically deposed that he
F submitted a request for the injury report of the witnesses and pursuant to which their injury reports were made available to him. Only thereafter was the charge sheet was submitted by him. We do not find any material in his cross-examination to discredit his statements.

11. Section 313, Cr.P.C. incorporates the principle of *audi alteram partem.* It provides an opportunity to the accused for his defence by
G making him aware fully of the prosecution allegations against him and to answer the same in support of his innocence. The importance of the provision for a fair trial brooks no debate.

"**313.*Power to examine the accused***.—(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain

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any circumstances appearing in the evidence against him, the Court— A

(*a*) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(*b*) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: B

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (*b*).

(2) No oath shall be administered to the accused when he is examined under sub-section (1). C

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed. D

(5) The court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section." E

12. But equally there cannot be a generalised presumption of prejudice to an accused merely by reason of any omission or inadequate questions put to an accused thereunder. Ultimately it will be a question to be considered in the facts and circumstances of each case including the nature of other evidence available, the kind of questions put to an accused, considered with anything further that the accused may state in his defence. In other words, there will have to be a cumulative balancing of several factors. While the rights of an accused to a fair trial are undoubtedly important, the rights of the victim and the society at large for correction of deviant behaviour cannot be made subservient to the rights of an accused by placing the latter at a pedestal higher than necessary for a fair trial. F G H

A 13. In the facts of the present case, considering the nature of ocular evidence available of the injured witnesses P.Ws. 7 and 8 who have also been cross-examined by the appellants, and the evidence of P.W. 11, we are of the considered opinion that no prejudice has been caused to the appellants. A specific question was put to the appellants that they participated in an unlawful assembly with the common object B of murdering the deceased. Further, it was also put to them that they had caused injuries to P.W. 7 and 8. Merely because no questions were put to the appellants with regard to the individual assault made by each of them, it cannot be said in the facts of the case that any prejudice has been caused to them. The questions asked being similar we consider it C proper to extract it with regard to one of the appellants. The appellants did not offer any explanation or desire to lead evidence except for stating that they had been falsely implicated. Questions asked to Fainul Khan are extracted hereunder:

> "Question: As has been stated by the prosecution witnesses, on D 1st November, 1983 you along with other accused participated in an unlawful assembly and took part in fighting. It that true?
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> Answer: No. It is wrong.
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> Question: It has also been said that you participated in the common object of the unlawful assembly of murdering Rabbani Khan. Is E that true?
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> Answer: It is wrong.
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> Question: It has also been said the during the said incident, you had also caused injuries upon Nabiul hasan Khan, Eshanul Khan, Mir Tarabul and Mir Sanif. Is this true? F
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> Answer: No. It is wrong.
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> Question: Do you want to say anything in your defence?
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> Answer: We have been falsely implicated."

G 14. In ***Suresh Chandra Bahri vs. State of Bihar***, 1995 Suppl (1) SCC 80, itwas observed as follows :

> "26…..It is no doubt true that the underlying object behind Section 313 CrPC is to enable the accused to explain any circumstance appearing against him in the evidence and this object is based on H the maxim *audi alteram partem* which is one of the principles of

natural justice. It has always been regarded unfair to rely upon any incriminating circumstance without affording the accused an opportunity of explaining the said incriminating circumstance. The provisions in Section 313, therefore, make it obligatory on the court to question the accused on the evidence and circumstance appearing against him so as to apprise him the exact case which he is required to meet. But it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance but he must also show that such non-examination has actually and materially prejudiced him and has resulted in failure of justice. In other words in the event of any inadvertent omission on the part of the court to question the accused on any incriminating circumstance appearing against him the same cannot ipso facto vitiate the trial unless it is shown that some prejudice was caused to him. In *Bejoy Chand Patra* v. *State of W.B.*, AIR 1952 SC 105, this Court took the view that it is not sufficient for the accused merely to show that he has not been fully examined as required by Section 342 of the Criminal Procedure Code (now Section 313 in the new Code) but he must also show that such examination has materially prejudiced him. The same view was again reiterated by this Court in *Rama ShankarSingh* v. *State of W.B.*,1962 Suppl(1)SCR 49….."

15. In ***Shobhit Chamar (supra)***,considering the nature of ocular evidence notwithstanding the infirmities at the stage of Section 313, Cr.P.C., it was observed as follows:

"18. ….In the case before us, the prosecution case mainly rested upon the ocular evidence of eyewitnesses. On conclusion of the prosecution evidence, the trial court did put the necessary questions relating to the evidence of eyewitnesses to both the appellants and thereafter recorded the answers given by them.

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24. We have perused all these reported decisions relied upon by the learned advocates for the parties and we see no hesitation in concluding that the challenge to the conviction based on non-compliance of Section 313 CrPC first time in this appeal cannot be entertained unless the appellants demonstrate that the prejudice has been caused to them. In the present case as indicated earlier,

A the prosecution strongly relied upon the ocular evidence of the eyewitnesses and relevant questions with reference to this evidence were put to the appellants. If the evidence of these witnesses is found acceptable, the conviction can be sustained unless it is shown by the appellants that a prejudice has been caused to them. No such prejudice was demonstrated before us and, therefore, we are unable to accept the contention raised on behalf of the appellants."

16. Notwithstanding our conclusions as aforesaid that there has in fact been no irregularity in procedure under Section 313 Cr.P.C. much less any prejudice caused to the appellants we shall now deal with the issue whether the appellants could at this stage raise objections with regard to the same. In ***Sukha vs. State of Rajasthan,*** 1956 SCR 288,it was observed as follows :-

"35. …..We have recently decided that we will be slow to entertain question of prejudice when details are not furnished; also the fact that the objection is not taken at an early stage will be taken into account. There is not a hint of prejudice in the petition filed by the appellants here in the High Court for leave to appeal to this Court; nor was this considered a ground for complaint in the very lengthy and argumentative petition for special leave filed in this Court. The only complaint about prejudice was on the score that there was no proper examination under Section 342 of the Criminal Procedure Code. We decline to allow this matter to be raised."

17. **Masalti** (supra) concerned a case of death sentence and it does not appear that attention was invited to ***Sukha*** (supra). In view of the above discussion we regret our inability to consider the alternative submission of Shri Luthra. The appellants were undoubtedly the members of an unlawful assembly some of whom were also armed with spears and assaulted the deceased. All the accused surrounded the deceased obviously to prevent his escape. The initial assault was made on the head of the deceased with the lathi by appellant Sainul. The deceased fell down and when he was trying to stand up, he was assaulted by two persons with spears. P.W. 7 was assaulted on the head by appellant Fainul. In the fracas the fact that the assault by appellant Mir Shaukat landed on the thigh of the witness is not of much relevance. Likewise, P.W. 8 was assaulted by appellant Sainul on the face and head. The fact that the co-accused may have assaulted on the head again cannot be considered very relevant to eschew the absence of common object.

18. We, therefore, find no reason to interfere with the conviction of the appellants. The appeals are dismissed. The appellants are stated to be on bail. Their bail bonds are cancelled and they are directed to surrender forthwith to serve out remaining period of sentence. A

Devika Gujral Appeals dismissed.