PETITIONER:
BANWARI

Vs.

RESPONDENT:
STATE OF UTTAR PRADESH

DATE OF JUDGMENT:
14/02/1962

BENCH:
DAYAL, RAGHUBAR
BENCH:
DAYAL, RAGHUBAR
KAPUR, J.L.
SARKAR, A.K.

CITATION:
1962 AIR 1198 1962 SCR Supl. (3) 180

ACT:
Criminal, Trial--Three commitment orders for three offenses -Offenses tri able at one trial-Sessions Judge recording all evidence in one trial-Legality of trial--Charges-Power of Sessions Judge to substitute charges framed by Committing Magistrate-Murder-Common Intention Indian Penal Code, 1860 (Act XLV of 1860), s. 34-Code of Criminal Procedure, 1898 (V of 1898), ss. 226, 234, 239, 537.

HEADNOTE:
Banwari armed with a gun and Ram Charan armed with an axe were going together when they met Lakhan. After some talk Banwari shot at and killed Lakhan. They then proceeded together for some distance when they met Bhagwan. After some talk Banwari shot at and killed Bhagwan. Thereupon the villagers started pursuing them and they ran and Banwari shot and injured Narayan. One report was lodged of the three incidents and the police sent up three charge sheets. The Magistrate made three orders of commitment framing charges against the two appellants under s. 302 and s.307 read with s. 34 Indian Penal Code respectively in respect of the first incident, under s. 302 read with s. 34 in respect of the second incident and under s. 307 read with s. 34 in respect of the third incident. The Sessions judge framed certain charges describing them as amended charges, under s. 302 read with s. 34 against both accused for the murder of Lakhan, under s. 302 against Banwari for the murder of Bhagwan and under s. 307, against Banwari for the attempted murder of Narayan. He recorded the entire evidence in one trial and by a common judgment convicted Banwari and Ram Charan and sentenced the former to death and the latter to imprisonment for life. The appellants contended that the trials were illegal as the procedure followed by the Sessions judge was not warranted by law, that Ram Charan's conviction for the murder of Bhagwan and attempted murder of Narayan was bad as he was not tried for those offenses and that the conviction of Ram Charan with the aid of s. 34 was bad as he had no common intention with Banwari to commit any of the offenses.
Held, that though the procedure of recording evidence in one trial with respect to offenses which were the subject of

different trials was unwarranted the trials were not vitiated
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on this account. The procedural error 'Was curable under ss. 537 of the Code of Criminal Procedure.
The three offenses with which the appellants were charged were of the same kind and one joint trial of those offenses was justifiable under s. 234 Code of Criminal Procedure. A joint trial of both the appellants for the three offenses each of which was alleged to be committed by them jointly within twelve months would have been justifiable under ss. 231 and 239 of the Code. Even if there were three committal orders the Sessions judge could try the accused at one trial if the provisions of ss. 234 to 239 permitted a joint trial. In the present case the Sessions judge did not purport to consolidate the committal orders and try the accused at one trial though really that is what actually happened when he recorded evidence in one case only and presumably examined the accused also once. The trial was not vitiated by any procedural error nor had any prejudice been shown to have been caused to the appellants.
Payare Lal v. The State of Punjab, (1962) 3 S.C.R. 328, referred to.
Ram Charan had been charged for all the offenses for which be was convicted. The so-called amended charges framed by the Sessions judge were really additional charges and not in substitution of the charges framed by the Magistrate. The Sessions judge had no power to drop any charges under which the accused had been committed for trial ; he could frame a charge, or add to or otherwise alter the charge as the case may be where a person was committed for try without a charge or with an imperfect or erroneous charge. But the conviction of Ram Charan could not be sustained. He did nothing in any of the three incidents. The facts and circumstances of the case did not establish that he had a common intention with Banwarl to commit any of the offenses. There was no allegation that he had enmity with any of the victims or that there was any preconcert between him and Banwari From the fact that he was in the company of Banwari all along no inference of common intention could be drawn. The question of his dissociating from Banwari did not arise when he had not associated himself in the first instance with him.

JUDGMENT:
CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 80 of 1961.
Appeal by special leave from the judgment and order dated December 8, 1960 of the Allahabad
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High Court in Criminal Appeal No. 1517 of 1960 and Referred No. 104 of 1960.
A.S. R. Chari, O. P. Rana and K. K. Sinha. for the appellants.
G. C. Mathur and C. P. Lal, for the respondent.
1962. February 14. The Judgment of the court was delivered by
RAGHUBAR DAYAL, J.-Banwari and Ram Charan appeal, by special leave, against the order of the Allahabad High Court, dismissing their appeal and confirming their conviction by the 11 Additional Sessions Judge, Etawah. Banwari was convicted of the offenses under s. 302 Indian Penal Code for committing the murder of Lakhan Singh and Bhagwan Singh and

also for an offence under s. 307 Indian Penal Code, for having attempted to Commit the murder of Babu Singh. Ram Charan was convicted of the same three offenses read with s.34, Indian Penal Code.

The facts leading to the appeal are these, Banwari, a Lodh by caste, and Ram Charan, armed with a gun and axe respectively, passed the field of Lakhan Singh, Lakhan Singh asked Banwari as to where he was going. Banwari replied that he was going for shooting birds. Lakfian Singh turned back. Banwari fired two shots at Lakhan Singh. Lakhan Singh fell down and died.

Banwari and Ram Charan, thereafter, proceeded south-wards and at a distance of about six or seven furlongs, met Bhagwan Singh, who was grazing his cattle. Bhagwan Singh questioned Banwari as to where he was going. Banwari said he was going to shoot crocodiles in the river. Bhagwan Singh said there were no crocodiles in the river and asked Banwari to go back and look to his work. When Bhagwan Singh turned towards south, Banwari fired a shot at him, Bhagwan

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Singh sat down. Banwari again fired a shot at him. He further fired two more shots, Bhagwan Singh died.

The village people pursued the two appellants and Banwari fired at them. He fired at Babu Singh, but hit Narayan Singh.

One report was lodged at the Police Station with respect to these incidents. The police, after enquiry, sent up three charge-sheets under a. 173, Code of Criminal Procedure. The Magistrate registered three cases, one with respect to the murder of Lakhan Singh, another with respect to the murder of Bhagwan Singh and the third with respect to the offence under s. 307 Indian Penal Code, for shooting at Babu Singh and Naravan Singh. Ultimately be committed both the accused for trial to the Sessions Court in each of the cases. Sessions Trials Nos. 34, 37 and 38 of 1960 were registered on the basis of those three committal orders.

In the case with respect to the murder of Lakhan Singh, the Magistrate framed one charge under a. 302, Indian Penal Code, against Banwari and another charge against Ram Charan for an offence under s. 302 read with s. 34, Indian Penal Code.

In the proceedings with respect to the murder of Bhagwan Singh, he framed one charge against both the accused Banwari and Ram Charan, for an offence under s. 302 read with s. 34, Indian Penal Code.

Lastly, in the proceedings under s, 307, he again framed a common charge against both the accused for an offence under a. 307 read with s. 34 Indian Penal Code.

At the commencement of the hearing of the Sessions Trial No. 34 of 1960 on July 18, 1960, on which date presumably the other two Sessions

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Trials were also fixed for hearing; the learned Sessions Judge framed certain charges describing them as amended charges. In Sessions Trial No. 34 of 1960, he framed a charge against Banwari and Ram Charan for an offence under s. 302 read with s. 34 Indian Penal Code with respect to the murder of Lakshan Singh. In Sessions Trial No. 37 of 1960 be framed an amended charge against Banwari under s. 302 Indian Penal Code, for his committing the murder of Bhagwan Singh. In Sessions Trial No. 38 of 1960 he framed an amended charge against Banwari of an offence under s. 307 Indian Penal Code, for having shot at Babu Singh and Narayan Singh with such intention and knowledge and in such circumstances that if by that act he had caused the death he

would have been guilty of murder. He read over and explained the amended charges to the accused.

In the proceedings of the Court dated July 18, 1960 the learned Sessions Judge noted:

> "The amended charge was read out in Court and explained to the prisoner (section 271, Criminal Procedure Code) who pleads not guilty.
> The S.T 37/60 and 38/60 are consolidated with the case and evidence is recorded in the present case (under section 234 Cr.. P.C.).
> The L.D.G.C. opened his case and examined the following witnesses."

The learned Sessions Judge opened his judgment with the following observation:

> "Three Sessions trials Nos. 34, 37 and 38 of 1960, in which both Banwari and Ram Charan figure as accused persons, were beard together and are being disposed of by on(,, judgment.
> Banwari accused stands charged under section 302 Indian Penal Code for having committed the murders of Lakhan Singh
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> and Bhagwan Singh and also under section 307 Indian Penal Code for having made an attempt to kill Narayan Singh on 12th November, 1959, in village Boorhadana, police station Dibiapur. He along with Ram Charan has further been charged under section 302 read with 34 and 307 read with 34 of the Indian Penal Code for having in furtherance of their common intention committed the above murders and made an attempt to kill Narayan Singh."

In his order at the end of the judgment the learned Additional Sessions Judge said:

> "'Banwari accused is found guilty under section 302 of the Indian Penal Code for the murder of Lakhan Singh and is convicted and sentenced to death. He is further found guilty under section 302 of the Indian Penal Code for the murder of Bhagwan Singh and is convicted and sentenced to death for this incident also. He shall be. hanged by the neck till he be dead.
> He is further found guilty under section 307 of the Indian Penal Code and is convicted and sentenced to eight years R.I.
> The other accused Ram Charan is found guilty under section 302 read with 34 of the Indian Penal Code for the murder of Lakhan Singh and is Convicted and sentenced to life imprisonment. He is further found guilty under section 302 read with 34 of the Indian Penal Code for the murder of Bhagwan Singh and is convicted and sentenced to life imprisonment on this count also. He is further found guilty under section 307 read with 34 of the Indian Penal Code and is convicted and sentenced to five years R. 1. The sentences shall run concurrently. He is in custody and shall be detained to serve out his sentences.
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> This judgment governs all the Sessions Trials Nos. 34, 37 and 38 of 60 and a copy of it shall be placed on the records of'S.T. Nos. 37

and 38 of .60 ."

The criminal appeal filed by the appellants in the High Court perported to be an appeal against the order of the Sessions Judge in Criminal Sessions Trial Nos. 34, 37 and 38 of 60 and the grounds taken in the appeal were that the conviction was against the weight of evidence on the record, that no offence was made out from the evidence of the prosecution witnesses and that the sentence was too severe. The High Court considered the case proved against the appellants and dismissed their appeal.

Mr. Chari, for the appellants, has urged the following points:

(1) Ram Charan, appellant, was not tried for the offenses of committing the murder of Bhagwan Singh and of attempting to murder Babu Singh and Narayan Singh, as the learned Sessions Judge tried the appellants with respects to the offenses mentioned in the amended charges which were read and explained by him to the accused, and therefore Ram Charan's conviction for those two offenses was bad,

(2) The Sessions Judge conducted three separate trials on the basis of the three commitment orders, but recorded evidence in one case only i. e., in Sessions Trial No. 34 of 1960. Such a procedure which in a way amounted to the amal-gamation of the three Sessions Trials into one, was not warranted by the provision of the Code of Criminal Procedure and that this error in the mode of trial, being not curable under is. 537 of the Code; vitiated it.

(3) If the trial be held to be valid, the

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sentence of death on Banwari errs on the side of severity.

(4)The conviction of Ram Charan is bad as there is no evidence on the record that the various offenses were committed by Banwari in furtherance of the common intention of both Banwari and Ram Charan. In the absence of any evidence about previous concert and of Ram Charan's having any motive to join in the commission of the offenses, the fact that Ram Charan was with Banwari at the time the three offenses were committed is insufficient to convict him .

Mr. Matbur, for the State, has urged that the learned Sessions Judge framed amended charges in addition to the charges framed by the Magistrate, that both the appellants could be legally tried for the various offence.% in one trial and that Ram Charan's conviction is correct.

The first question therefore to determine is whether the learned Sessions Judge framed amended charges in addition to the charges which had been framed by the Magistrate and for the trial of which the Magistrate. had committed the appellants to the Court of Sessions, or he substituted those charges in the place of the ones prepared by the Magistrate. The learned Sessions Judge, in his judgment, has clearly said in the paragraphs quoted above, that Banwari ,stood charged for the three offenses simpliciter and also jointly with Ram Charan for the three offenses read with s. 34, Indian Penal Code,. This clearly indicates that he did not contemplate the amended charges to be in substitution of the charges framed by the Magistrate. This is also indicated by two further facts.

The learned Sessions Judge had no power, under the Code of Criminal Procedure, to drop any charges under which the accused had been committed .for trial. He can in the exercise of the powers under

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s. 226 of the Code of Criminal Procedure, frame a charge, or add to or otherwise alter the charge as the case may be in oases where a person is committed for trial without a

charge or with an imperfect or erroneous charge. As the Magistrate had not framed a charge under s. 302, Indian Penal Code, simpliciter, with respect to the murder of Bhagwan Singh and a charge under s. 307, simpliciter, for attempting to murder Babu Singh and Narayan Singh, the learned Sessions Judge thought it necessary to frame such charges against him and he did an. Banwari was not charged by the Magistrate under s. 302 read with s. 34, Indian Penal Code for the offence of committing the murder of Lakhan Singh and therefore the Sessions Judge prepared the charge against both Banwari and Ram Charan with respect to such an offence. It is only this amended charge which was in reality in substitution of the charge framed by the Magistrate. Or, it may be said, that this amended charge was the charge framed by the Magistrate, but amended by the Sessions Judge by adding the name of Banwari among the persons charged and altering the language as a consequence of it.

Lastly, the final order of the learned Sessions Judge recorded conviction of Banwari for the offenses simpliciter and of Ram Charan for those offenses read with s. 34, Indian Penal Code. At that stage, there was no point in recording the conviction of Banwari with respect to the charges for the various offenses read with s. 34, Indian Penal Code. It was' however, desirable that at the commencement of the trial Banwari charged both for offenses simpliciter and for offenses read with s. 34, Indian Penal Code, to avoid any contention in future in case he be convicted for an offence with which he was not actually charged, i. e. convicted of an offence read with s. 34, Indian Penal Code when there was no such charge against him or be convic-

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ted of an offence simpliciter there being no charge for that offence.

We are therefore of opinion that there is no force in the argument that Ram Charan was convicted of an offence with which he was not charged and tried by the Sessions Judge.

The learned Sessions Judge did not comply with the provisions of a. 271 of the Code of Criminal Procedure inasmuch as he did not read over and explain the charges framed by the Magistrate. This omission on his part, however, does not vitiate, the trial in view of s. 537 of the Code when it is not shown that any prejudice has resulted to the appellants on account of this omission.

The procedure of recording evidence with respect to the offenses which were the subject of different Sessions Trials in the proceedings of one Sessions Trial alone, is not certainly warranted by the provisions of the Code of Criminal Procedure. Every separate trial must proceed separately with result that every proceeding, including the recording of evidence, in each trial should be separate. The question, however, is whether this wrong procedure adopted by the learned Sessions Judge, has vitiated the trial, irrespective of the fact whether prejudice has been caused to the accused or not.

It is contended for the State that both the appellants, Banwari and Ram Charan, could have been tried at one trial for the offenses they were charged with in view of the provisions of as. 234 and 235 ofthe Code of Criminal Procedure. We are of opinionthat the provisions of a. 235 Cr. P. C.would not have justified one trial for these offenses. We do not have the three charge sheets submitted by the police to the Magistrate, but the fact that three charge-sheets were submitted and that the Magistrate made three commitment orders indicate that the prosecution did

not come to Court with the allegation that three offenses
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were committed in the course of the same transaction. However, we agree that the provisions of ss. 234 and 239 of the Code of Criminal Procedure would have justified the joint trial of the appellants for the offenses they were charged with and tried.

Section 234 allows the trial of a person accused of three or less number of offenses of the same kind committed within the space of twelve months, and provides that offenses of the same kind are those which are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law. The two offenses under s. 302 with respect to the murder of Lakhan Singh and Bhagwan Singh are punishable under the same section of the Indian Penal Code with the same amount of punishment. In view of the proviso to s. 234, an offence of attempting to commit an offence is of the same kind as that other offence. Thus, the offence under a. 307 Indian Penal Code, is of the same kind as the offence under s. 302. The three offenses of which the appellants were charged, therefore, are of the same kind and one joint trial of those offenses would therefore be justified under s. 234 of. the Code.

Section 239 lays down the joinder of persons at one trial and provides that persons accused of more than one offence of the same kind within the meaning of a. 234 committed by them jointly within a period of twelve months could be charged and tried together. Therefore, the trial of both Banwari and Ram Charan for the aforesaid three offenses each of which was alleged to have been committed by them jointly within twelve months, would have been justified.

The learned Sessions Judge did not, however purport to try the appellants at one trial, As is clear from the record that he proceeded with the three trials but just recorded evidence in only one.
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It has been urged that amalgamation of three different Sessions Cases is not warranted by the provisions of the Code of Criminal Procedure. The Code simply provides by as. 233 to 239 that ordinarily each distinct offence must be separately tried except in cases covered by the provisions of as. 234 235, 236 and 239. It is clear that if separate commitments had been made of such distinct offenses, which did not come within the exception to a. 233, they could not be tried at one trial by consolidating those three cases. But this does not mean that if there had. been separate commitments of person who could be tried together at one trial, or of the same person for offences which could be tried together at one trial, the accused could not be tried at one trial. It often happens that, persons accused of committing a particular offence or offenses jointly or in the course of the same transaction are not put up for trial at the same time, usually for the reason that some of them were not available. They may be available later on and sub-sequently committed for trial. If no trial has proceeded with respect to the first commitment by that time, the Sessions Judge is not bound to have two separate trials, one with respect to each commitment. He can certainly try all the accused at one trial and in that way consolidate the proceedings on the two committal orders in one. The committal order just gives the Sessions Court, cognizance over the trial of the persons committed. The committal order does not bind the Sessions Judge to try those persons alone at one trial, who have been committed by the particular committal order. The question of the trial of

the various committed persons does not depend on the number of committal orders, but on the provisions of as. 233 to 239 of the code. If one trial can be justified under those provisions and there is no prejudice to the accused, the Sessions Judge can certainly consolidate the committal orders in those cases and try the accused
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at one trial. He may, for the purpose of the trial, frame a fresh charge with appropriate counts against the accused, in substitution of the charges framed by the Magistrate in the different committal proceedings If the persons have been committed by one committal order alone with respect to different offenses which could not be tried at one trial in accordance with these. sections, the joint trial of those persons on those charges would be illegal. This makes it clear that the validity of a joint trial before the Sessions Judge is dependent on the fact whether the provisions of the Code justify one joint trial or not.

We therefore hold that though a Sessions Judge cannot try at one trial persons committed under different committal orders with respect to distinct offenses whose joint trial is not warranted by the provisions of ss.234 to 239 of the Code, he is competent to try at one trial persons who can be tried at one trial under the provisions of those sections even if there had been separate committal orders.

In the present case, however, the learned Sessions Judge did not purport to consolidate the committal orders and try the accused jointly at one trial, though really that is what actually happened when he recorded evidence in one case only and presumably he examined the accused also once. He heard the arguments once and he actually delivered one common judgment in all the three Sessions Trials. There therefore does not really arise in the present case the question that the Sessions Judge wrongly amalgamated or consolidated the three Sessions Trials. In the circumstances of this case the trial is not vitiated by any procedural error nor has any prejudice been shown to have been caused in the conduct of the trial or its result.

We have already said that the proceedings in each separate trial should be separate and that on
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that basis the procedure adopted by the learned Sessions Judge was wrong. The question for determination, then, is whether his following the wrong procedure vitiates the trial and the conviction of the appellants or is curable under s. 537 of the Code.

We are of opinion that such a defect does not invalidate the trial in view of s. 537 of the Code.

In. Payare Lal v. The State of Punjab (1) this Court said :

> "In regard to this section (s. 537), it was said by the Pi-ivy Council in Pulukuri Kottoya v. King Emperor (L. R. 74 1. A. 65), at p. 75,
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> ,"When a trial is conducted in a manner different from that proscribed by the Code (,,is in N. A. Subramania Iyer's case, L. R. 28 T.A. 257), the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537, and none the less so because the irregularity involves, as must Pearly always be the case, a breach of one or more of the

very comprehensive provisions of the Code.'
It seems to us that the case falls within the first category mentioned by the Pi,ivy Council. This is not a case of irregularity but want of competency."

As already held, the impugned procedure adopted by the learned Sessions Judge in the, present case does not relate to the competency of the Court to try the various offenses at one trial.

(1) [1962] 3 S.C.R 328.

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The amendment made in a. 537 of the Code by the Code of Criminal Procedure (Amendment) Act, 1955 (Act XXVI of 1955) does not in any way go in favour of the appellants as the result of the amendment is that the Scope, of s.537 is made wider, covering cases of misjoinder of charges as well.

We therefore hold that the trial of the appellants bad been valid.

Banwari has been sentenced to death under s. 302 Indian Penal Code. Mr. Chari urges that Banwari must have shot at Lakhan Singh as a result of the latter giving provocation as alleged by Banwari in his statement as, otherwise, there was no motive for his shooting at Lakhan Singh and that therefore the lesser penalty for the offence of murder would be the proper Sentence against him. We do not agree. The Courts below disbelieved Banwari's version of the conversation with Lakhan Singh. Even if that conversation be believed, we do not think that should have provoked him to such an extent that he should have fired at Lakhan Singh not only once, but also a second time. There could be no justification for his firing at Bhagwan Singh who is not said to have given any provocation even. Banwari fired several shots at Bhagwan Singh. In the circumstances, we do not see any reason to consider the sentence of death to. be unjustified and to reduce it.

So far as Ram Charan is concerned, we are of opinion that his conviction cannot be sustained. He did nothing at Any of the three incidents. His conduct in remaining with Banwari throughout cannot lead to any conclusion that he had common intention with Banwari to shoot at Lakhan Singh or Bhagwan Singh or Babu Singh and Narain Singh, what to say of his having a common intention with Banwari to commit the murder of the first two.

It is not the case of the prosecution that Banwari and Ram Charan had any enmity with any of

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the victims or that they had prearranged between themselves to pick up any sort of conversation or quarrel with Lakban Singh or Bhagwan Singh and then to shoot at them. All the incidents happened by accident. If Lakhan Singh and Bbagwan Singh had not questioned Banwari, probably, nothing would have happened. They questioned him and for some reason Banwari fired at them. He might have considered that their questions to him as to where he was going was an indirect reference to his going armed and a sort of reflection on his possessing a gun.

The Courts lbeow imputed common intention to Ram Charan on account of his not disassociating himself from the activities of Banwan. The question of disassociation did not arise when he had not associated himself in the first instance with Banwari's activities. He was probably much bewildered at the conduct of Banwari in shooting Lakhan Singh down as Lakhan Singh or any one else would have been. After the shooting of Lakhan Singh both Banwari and Ram Charan are said to have just proceeded towards the south.

It was after Bhagwan Singh had been shot dead that they took to their heels. Ram Charan could not have anticipated a second incident with Bhagwan Singh. There was no reason for their prearranging the shooting of Bhagawan Singh, Ram Charan's running away simultaneously with the running away of Banwari after the shooting of Bhagwan Singh could have been motivated by the instinct of saving himself from the villagers who could have thought that he was a party to the various incidents. When Courts could consider his presence in that light, the villagers could have thought on those lines much more easily. His running away, therefore, is no indication of his guilty conscience. It was the result of his anticipating popular reaction. In the circumstances, his possessing an axe at the time was not for committing any violence against Lakhan Singh or the
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other victims. He had it with him either as a matter of course or for doing the work he might have been doing that day. We are therefore of the opinion that Ram Charan had no common intention with Banwari in his acts towards the various victims of the incident and that he has been wrongly convicted.

We therefore dismiss the appeal of Banwari and allow the appeal of Ram Charan and acquit the latter of the offenses he has been convicted of.

Appeal partly allowed.