



A.F.R.
RESERVED

HIGH COURT OF JUDICATURE AT ALLAHABAD
CRIMINAL APPEAL No. - 3107 of 2013

Dinesh Chandra Shukla and 3 others

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s) : G.P. Dikshit, Mangla Prasad Rai,
Pradeep Chauhan, V.S. Singh

Counsel for Respondent(s) : Dharmendra Pratap Singh, Govt.
Advocate, Rama Shanker, Ray Sahab
Yadav

Court No. - 45

HON'BLE SALIL KUMAR RAI, J.
HON'BLE DR. AJAY KUMAR-II, J.
(Per: DR. AJAY KUMAR-II, J.)

1. Heard Sri Mangla Prasad Rai, learned Senior Counsel assisted by Sri Pawan Kumar Pandey, learned counsel for the appellants, Sri Vikas Goswami, learned Additional Government Advocate for the State-respondent, Sri Kamal Krishna, learned Senior Counsel assisted by Sri Vivek Kumar Singh, learned counsel for the informant and perused the record.

2. The instant Criminal Appeal under Section 374(2) of Cr.P.C. has been filed against the judgment and order dated 03.07.2013 passed by Additional District and Sessions Judge, Court No.3, Fatehpur in Session Trial No. 38 of 2009, under Sections 302/34 IPC, Police Station Kishunpur, District Fatehpur, whereby the appellants were convicted and sentenced for life imprisonment and fine of Rs.10,000/- each for the offence under Section 302 IPC, in default of payment of fine, they have to undergo one year additional rigorous imprisonment.

3. Prosecution story, in nutshell, as unfolded in Written Report/Tehrir (Ex.Ka-1), is as follows:

The informant Rajendra Singh got a registered sale deed of fallen down kutcha house in the name of his father Bhura Singh @ Shivsharan Singh from Awadhram. On 11.10.2008, the first informant and his father were going to Ram Swaroop for a compromise. Jhaller Singh was also following behind. When the talks of compromise were going on, just then, the appellant Dinesh Chandra Shukla armed with single barrel gun, the appellant Akhilesh Chandra Shukla and Anil Kumar Shukla armed with double barrel guns and Sunil Kumar Shukla armed with rifle (which was Ram Swaroop's licensed rifle), came there and after exhortation, they started firing, consequently, father of the first informant Bhura Singh became injured. Hearing the sound of firing, many peoples of the village came at the place of the incident and an atmosphere of terror was created in the village. The informant and Jhaller Singh took Bhura Singh in an injured condition to Vijaipur Hospital, where the deceased succumbed to his injuries.

4. On the basis of aforementioned Written Report/Tehrir (Ex.Ka-1), a First Information Report (Ex.Ka-2) as Case Crime No. 273/08, under Section 302/34 IPC, was registered on 11.10.2008 at 5:30 PM at Police Station Kishunpur, District Fatehpur against the accused.

5. On 12.10.2008, the autopsy of the deceased Bhura Singh was performed by PW-4 Dr. P.K. Pandey at the Vijaipur Hospital, who found two multiple firearm wounds on his person and as per opinion of the Doctor, the cause of death of the deceased was shock and hemorrhage due to ante-mortem firearm injuries.

6. The Investigating Officer (the then S.O. Kishunpur) Ram Swaroop Verma PW-5 started the investigation and after inspection of the spot, prepared the site plan (Ex.Ka-11). He recorded the statements of the informant as well as Jhaller Singh on 11.11.2008. He conducted the inquest proceedings and prepared the inquest report (Ex.Ka-5). He also prepared documents related to the post mortem of the deceased Bhura Singh and sent the body for the post mortem after sealing. He proved Letter to C.M.O. (Ex.Ka-6),

Sample Seal (Ex.Ka-7), Challan Nash (Ex.Ka-8), Photo Nash (Ex.Ka-9) and Letter to C.M.O. sent by R.I. (Ex.Ka-10). He inspected the crime scene and prepared its site plan (Ex.Ka-11). He recovered blood stained and plain soil and four 12-bore red coloured (K F Special make with brass base) empty cartridges and one plastic wad from the crime scene and prepared its recovery memo (Ex.Ka-12). Accused Dinesh Chandra Shukla and Sunil Kumar Shukla were arrested on 12.10.2008. He arrested Anil Kumar Shukla on 17.08.2008 and recovered DBBL gun used in the crime with its license. He prepared its recovery memo (Ex.Ka-13) and also prepared site plan of place of recovery of weapon of offence (Ex.ka-14). He obtained post mortem report and he also received photocopy of the sale deed and judgment of convictions regarding accused Akhilesh Chandra Shukla and Dinesh Chandra Shukla. He concluded the investigation against accused Dinesh Chandra Shukla, Anil Kumar Shukla and Sunil Kumar Shukla on 22.11.2008 and filed a charge sheet (Ex.Ka-15) under Section 302/34 IPC. Later on accused Akhilesh Chandra Shukla surrendered in Court and after recording his statement, he submitted a separate charge sheet (Ex.Ka-16) against him under Section 302/34 IPC on 20.12.2008.

7. Thereafter, cognizance was taken upon the said charge sheet and the case was committed to the Court of Sessions.

8. Accused appeared before the Court and after hearing both the parties, charges were framed under Section 302/34 IPC against the accused. The accused pleaded not guilty and claimed to be tried.

9. Trial started, in order to prove it's case, the prosecution adduced PW-1 informant Rajendra Singh (son of the deceased) PW-2 Jhaller Singh (eye witness of the incident and brother of the deceased), PW-3 Constable Santosh Kumar, (Scribe of Chik FIR), PW-4 Dr. P.K. Pandey (Autopsy Surgeon) and PW-5 Ram Swaroop Verma (Investigating Officer).

10. In support of oral version, following documents were filed and proved on behalf of the prosecution.

Written Report/Tehrir (Ex.Ka-1), First Information Report (Ex.Ka-2), G.D. of the registered case (Ex.Ka-3), Post Mortem Report (Ex.Ka-4), Inquest Report (Ex.Ka-5), Letter to C.M.O. (Ex.Ka-6),

Sample Seal (Ex.Ka-7), Challan Nash (Ex.Ka-8), Photo Nash (Ex.Ka-9), Letter to C.M.O. sent by R.I. (Ex.Ka-10), Site Plan (Ex.Ka-11) Memo of taking blood stained and plain soil and four empty cartridges into possession (Ex.Ka-12), Memo of personal search and recovery of one DBBL Gun No. 11908 along with License No. 2528 and arrest of the accused (Ex.Ka-13), Site Plan of place of recovery of weapon of offence (Ex.Ka-14), Charge Sheets (Ex.Ka-15 and Ex. Ka-16) and Forensic Science Laboratory Report (Ex.Ka-17).

11. After the prosecution evidence was over, all adverse/incriminating circumstances relied upon by the prosecution were disclosed to accused in question answer form for their version of occurrence as per mandate of Section 313 Cr.P.C. Accused denied all those adverse/incriminating facts put to them and said that the prosecution case is false, they are innocent and falsely implicated. Investigation was not done in fair and impartial manner.

12. The trial Court after having heard learned counsel for the parties and after going through the entire record, vide impugned judgment and order, convicted and sentenced the appellants-convicts under Section 302 IPC. Hence, feeling aggrieved with the said judgment and order, the appellants-convicts have filed the present criminal appeal.

13. Assailing the findings, learned Senior Counsel appearing for the appellants-convicts vehemently argued that the deceased Bhura Singh was having criminal history and was thus a man of bad character, therefore, he was murdered by someone else and the appellants-convicts have been falsely implicated in the present case. PW-1 and PW-2 both were not present on the spot and had not seen the incident. PW-2 has himself admitted in his cross-examination that he was not present on the spot and that is why he has not seen the injuries of the deceased. It has come in evidence that the concerned police station was situated prior to Vijaipur Hospital but the FIR was not registered promptly while bringing the deceased from the place of incident to Hospital, in the police station, which was on the way. The FIR has reached the concerned Magistrate on 15.10.2008 and thus, the FIR is anti timed and anti dated. There is inconsistency between the prosecution story and

the firearm injuries sustained by the deceased. The prosecution has not been able to establish the place of incident. As per the prosecution story, four empty cartridges were recovered from the spot but the FSL report is clear that those empty cartridges did not match with the recovered DBBL guns, which were allegedly used by the appellants in the incident and were recovered as murder weapons, even one SBBL gun allegedly used in the alleged incident, was also not recovered, therefore, the prosecution has miserably failed to prove that the alleged murder weapons were used in the incident by the appellants. The learned trial Court has failed to appreciate that rifle was not used in the incident, therefore, the appellant Sunil Chandra Shukla did not share common intention to murder.

14. Lastly, it was argued that no specific role of any of the appellants has been assigned. All the appellants have been convicted under section 302 IPC, without aid of Section 34 IPC. For recording of conviction under Section 302 IPC, learned trial Court was bound to record a finding that which shot hit the deceased and at which part of his body. As the prosecution has failed to prove the same, therefore, the aforesaid judgment of conviction is bad in law. The learned trial Court has misinterpreted the evidence available on record. The prosecution has miserably failed to prove the charges against the appellants-convicts, however by misreading the evidence, the learned trial Court has wrongly convicted and sentenced the appellants-convicts.

15. Learned A.G.A. for the State and learned Senior Counsel for the informant vehemently opposed the submissions made on behalf of the appellants-convicts and submitted that the deceased purchased a fallen down house from one Awadhram and the appellants wanted to grab the same and got the land of this recently purchased house measured from one Advocate. When the deceased was talking to Ram Swaroop for the purpose of compromise regarding this recently purchased fallen house, the appellants came on spot and surrounded the deceased, who was at that time accompanied with his son (informant) and his elder brother Jhaller Singh. The deceased and both his companions tried to save their lives, then the appellants-convicts started

indiscriminate firing from the roof of Ram Swaroop Singh. The prosecution has proved the motive behind this murder. Both the eye witnesses, i.e. the informant and Jhaller Singh were present on the spot and had seen the incident. Both the eye witnesses have been cross-examined at length, but their depositions as far as manner of incident are concerned, is consistent. The documentary as well as medical evidence clearly establishes that the deceased suffered ante-mortem firearm injuries and he finally succumbed to his ante-mortem firearm injuries.

16. It was argued that the depositions of PW-1 and PW-2 are fully reliable, which find corroboration from the medical evidence available on record. It has come on record that all the appellants came on the spot together and started indiscriminate firing, therefore, all the appellants shared a common intention to murder. There is no reason for false implication of the appellants in the present case. There is no inconsistency in the prosecution version and the medical evidence, rather the depositions of PW-1 and PW-2 find full corroboration from the medical evidence available on record. The appellants have not denied the property dispute as well as the fact that the widowed daughter-in-law of Awadhram was working in the house of the appellants and even not a single suggestion has been given to the prosecution witnesses denying these facts.

17. It was lastly argued that FSL report is not helpful to the appellant as there is a possibility that actual murder weapons had not been recovered and that is why, the recovered weapons did not match with the recovered empty cartridges from the spot. The appellants-convicts have committed murder of the deceased with common intention and the learned trial Court while convicting the appellants has clearly stated so, in its conclusion recorded at page-24 of the impugned judgment. However inadvertently, section 34 IPC is missing. Section 34 IPC is not a substantive offence, thus, there is no merit in the appeal and learned A.G.A. as well as learned Senior Counsel for the informant, thus urged for dismissal of appeal.

18. In the light of above arguments, following questions arise for consideration of the present appeal.

1. Whether PW-1 and PW-2 were present on the spot at the time of incident and their depositions are reliable or not?

2. Whether there is any inconsistency in the prosecution version of the incident and the medical evidence of the deceased available on record.

3. Whether in the present case, the FIR can be said to be ante timed FIR or not?

4. Whether the Ballistic Report denying use of recovered firearm weapons, makes the prosecution story suspicious or not?

5. Whether the prosecution could be said to have proved it's case against the appellants-convicts beyond reasonable doubt?

ANALYSIS

ORAL EVIDENCE ON RECORD

19. In the present case, the prosecution has examined informant Rajendra Kumar PW-1 and Jhaller Singh PW-2 as eye witnesses of the incident. It is on the strength of depositions of these two eye witnesses clubbed with other evidence available on record, the learned trial Court has decided the case against the appellants-convicts. The evaluation of depositions of these two witnesses is very important to find out the involvement of appellants-convicts in the present incident. Therefore, the evaluation of their depositions will be dealt with later on in this judgment.

20. **PW-3 Constable Santosh Kumar** is a formal witness, who is scribe of the FIR. This witness has proved the FIR as Ex.Ka-2 and relevant G.D. as Ex.Ka-3. In his cross-examination, this witness has stated that the FIR was received in the Court concerned on 15.10.2008. No other FIR was registered on 11.10.2008.

21. **PW-4 Dr. P.K. Pandey**, Autopsy Surgeon has conducted the autopsy of the deceased Bhura Singh on 12.10.2008 and has proved post mortem report as Ex.Ka-4. The Autopsy Surgeon found following two multiple firearm injuries on his person:

(i) Multiple firearm entry wounds in an area of 40 x 30 cm, which were from below the neck to the chest and abdomen.

(ii) Multiple firearm wounds in an area of 6 x 18 cm on the left arm. Six small metal pellets were recovered from the body, which were sent to S.S.P, through the C.M.S.

22. This witness (PW-4) stated in his examination-in-chief that the age of the deceased was about 48 years. The deceased was of

average height and build. Post-mortem rigor mortis had passed from the upper part and was passing from the lower part; the mouth was closed and the eyes were opened. In internal examination, one and half liters of blood and clots were found between the lung membranes. Heart was found empty. There was a hole in the heart membrane. Both lungs were pale. There was a hole in the left ventricle of the heart and one pellet was recovered from inside it. The brain and brain membranes were pale (congested). In the opinion of this Autopsy Surgeon, the cause of death was shock and hemorrhage due to ante-mortem firearm injuries and the time of death was one day before the incident. He further deposed that it is possible that the deceased could have died on 11.10.2008. at 4:00 pm from fire arm injuries.

23. In his cross-examination, this witness (PW-4) has stated that there could be difference of 4-6 hours in the time of death. The deceased could have died around 8:00 pm on 11.10.2008. All injuries of the deceased were on the front part of his body and therefore, injuries have been inflicted from the front side. These ante-mortem injuries must have been inflicted at-least from the distance of more than one meter. He cannot tell whether all injuries of the deceased could have been caused even by a single fire. The direction regarding firearm injuries has not been stated; an expert can tell this. The deceased must have eaten food within 6 hours of his death.

24. From the deposition of this witness (PW-4), it is clear that the deceased sustained two ante-mortem firearm injuries on his two different parts of the body, one firearm injury was on his chest and abdomen portion and other injury was on his left arm. One pellet was also recovered by the Autopsy Surgeon from the left ventricle of the heart. A total of six small pellets were finally recovered from the body of the deceased, which were sent to S.S.P. and those pellets were also sent to Forensic Science Laboratory for examination. **Therefore, from the deposition of this Autopsy Surgeon, it is clear that the deceased (Bhura Singh) sustained two firearm injuries on left side of his body. The**

deceased could have sustained these injuries at the time of incident and he finally succumbed to his firearm injuries.

25. **The then S.O. Swaroop Verma** was the Investigating Officer, who has been examined as PW-5 and he in his examination-in-chief has deposed regarding investigation done by him. This witness has proved the inquest report and other police papers as Ex.Ka-5 to Ka-10. This witness has also proved various other prosecution papers like site plan, various recovery memos, charge sheets etc. as Exs. Ka-11 to Ka-16. The evidence related to this case was also sent by him to Forensic Science Laboratory, Lucknow for examination. He proved FSL report as Ex.Ka-17. He also proved one DBBL gun bearing No. 11908, which was recovered from the possession of accused Anil Kumar Shukla as Material Ex-1 and other gun of accused Akhilesh Chandra Shukla bearing No. 18755 as Material Ex-2. He also proved one plastic wad as Material Ex.3, four empty 12 bore cartridges (red-coloured, 'K F Special make with brass base) as Material Exs. 4, 5, 6 and 7. He also proved one sealed tin box containing plain soil as Material Ex.-8 and other containing blood stained soil as Material Ex.9. This witness has also been cross-examined at length. **He stated that as per the FIR, the informant Rajendra Kumar and Jhaller Singh both were the eye witnesses of the incident and both these witnesses were also present at the time of inquest, however, he has not made them witness of inquest. He conducted the inquest proceedings in Vijaipur Hospital. It is wrong to state that Written Report/Tehrir was prepared later on as anti timed and anti dated with his consultation. The place of incident is near Dharamshala. He has shown the spot from where he took plain soil and blood stained soil from bricks (this spot has been shown as pile of bricks near point 'B' in the site plan).** It was mentioned in the FIR that licensee rifle of Ram Swaroop was used in the incident, however, the same was found to be false. In the FIR, use of SBBL gun of accused Dinesh Chandra Shukla was mentioned, however, during the course of investigation, he came to know that the aforesaid licensee SBBL gun of accused Dinesh Chandra Shukla was already deposited. The

deceased was having criminal history, which has been recorded by him in the Case Diary. It is wrong to state that he has not conducted fair investigation in the matter. It is also wrong to state that he has filed false charge sheet against the accused.

Question No.1. Whether PW-1 and PW-2 were present on the spot at the time of incident and their depositions are reliable or not?

26. On the point of appreciation of oral evidence of a witness the Apex Court in **Balu Sudam Khalde v. State of Maharashtra, (2023) 13 SCC 365**, held the law in following words:

“Appreciation of oral evidence

25. *The appreciation of ocular evidence is a hard task. There is no fixed or strait jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:*

“I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eyewitness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness."

[See *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* [*Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, (1983) 3 SCC 217 : 1983 SCC (Cri) 728 : AIR 1983 SC 753] , *Leela Ram v. State of Haryana* [*Leela Ram v. State of Haryana*, (1999) 9 SCC 525 : 2000 SCC (Cri) 222 : AIR 1999 SC 3717] and *Tahsildar Singh v. State of U.P.* [*Tahsildar Singh v. State of U.P.*, 1959 SCC OnLine SC 17 : AIR 1959 SC 1012]

27. *In assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or put forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence."*

27. The Hon'ble Supreme Court in the case of **Bhagwan Jagannath Markad v. State of Maharashtra, (2016) 10 SCC 537**, explained that:

" 19. While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core

of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. Section 155 of the Evidence Act enables the doubt to impeach the credibility of the witness by proof of former inconsistent statement. Section 145 of the Evidence Act lays down the procedure for contradicting a witness by drawing his attention to the part of the previous statement which is to be used for contradiction. The former statement should have the effect of discrediting the present statement but merely because the latter statement is at variance to the former to some extent, it is not enough to be treated as a contradiction. It is not every discrepancy which affects the creditworthiness and the trustworthiness of a witness. There may at times be exaggeration or embellishment not affecting the credibility. The court has to sift the chaff from the grain and find out the truth. A statement may be partly rejected or partly accepted [Leela Ram v. State of Haryana, (1999) 9 SCC 525, pp. 532-35, paras 9-13 : 2000 SCC (Cri) 222] . Want of independent witnesses or unusual behaviour of witnesses of a crime is not enough to reject evidence. A witness being a close relative is not enough to reject his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The evidence may be closely scrutinised to assess whether an innocent person is falsely implicated. Mechanical rejection of evidence even of a "partisan" or "interested" witness may lead to failure of justice. It is well known that principle "falsus in uno, falsus in omnibus" has no general acceptability [Gangadhar Behera v. State of Orissa, (2002) 8 SCC 381, pp. 392-93, para 15 : 2003 SCC (Cri) 32] . On the same evidence, some accused persons may be acquitted while others may be convicted, depending upon the nature of the offence. The court can differentiate the accused who is acquitted from those who are convicted. A witness may be untruthful in some aspects but the other part of the evidence may be worthy of acceptance. Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as shock at the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness.

20. *Exaggerated to the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape. [Gangadhar Behera case, (2002) 8 SCC 381, p. 394, para 17]*

31. *As already observed, the discrepancies of trivial nature could not be the basis of rejecting the evidence of injured eyewitnesses nor non-examination of some of the witnesses be a ground to reject the prosecution case when injured eyewitnesses were examined.*

32. *We may also refer to the judgment of this Court in Masalti v. State of U.P. [Masalti v. State of U.P., AIR 1965 SC 202 : (1965) 1 Cri LJ 226 : (1964) 8 SCR 133] to the effect that the evidence of interested partisan witnesses though required to be carefully weighed, the same could not be discredited mechanically. When a crowd of unlawful assembly commits an offence, it is often not possible to accurately describe the part played by each of the assailants. Though the appreciation of evidence in such cases may be a difficult task, the court has to perform its duty of sifting the evidence carefully.*

28. In the light of above well settled legal position regarding appreciation of oral evidence of eye-witnesses, we shall now be evaluating the depositions of PW-1 Rajendra Kumar and PW-2 Jhaller Singh.

29. **PW-1 the informant Rajendra Singh** in his examination-in-chief has stated that his father has got a sale deed of the house and plot executed from Awadhram on 07.10.2008. The aforesaid house and plot is situated in front the house of Ram Swaroop Singh and Awadhram used to live therein alongwith his family. During rain, the said house fell down because of which, Awadhram started to live in another house. Awardhram's widowed daughter-in-law Rupa Devi

used to live in the aforesaid house regarding which, sale deed was executed by Awadhram, all the accused used to provide shelter to Rupa Devi and she also used to work in the houses of accused Dinesh Chandra etc. Awadhram was also having 6-7 bighas of agricultural land and accused wanted that after his death, agricultural land and house would come in the name of Rupa Devi and they will take these from Rupa Devi. For this reason, all the accused alongwith Rupa Devi got a measurement of the aforesaid house and plot from Advocate Akhilesh Chandra Shukla and talked about filing of a civil suit. On this, they suspected that they would not get the possession of the house mentioned in the sale deed and their money would be lost, therefore, informant, his father and his uncle (called as 'Dada') Jhaller Singh went to Ram Swaroop Singh for a compromise. Ram Swaroop Singh was having acquaintance and good relations/rapport with Dinesh Chandra and that is why they had gone to Ram Swaroop.

30. PW-1 further stated that they were talking with Ram Swaroop Singh in front of door of his house, then accused Dinesh Chandra Shukla, carrying single barrel gun, Akhilesh Chandra Shukla, carrying double barrel gun, Anil Kumar Shukla, carrying a double barrel gun and Sunil Kumar Shukla, carrying a rifle in their hands, came there and exhorted to kill them and also said that they (informant's side) should not be allowed to escape. Seeing themselves surrounded, they all ran towards Dharamshala and then aforesaid four accused climbed onto the roof of Ram Swaroop Singh's house and reached near the corner of the roof and started indiscriminate firing. When these peoples were firing, then he and his grandfather hid behind the wall of Bhagat Singh's house. **His father was on the road at southern-western corner of Bhagat Singh's house, where he was shot.** After his father was shot, they took his father to Vijaipur Hospital in an injured condition on a motor-cycle and he died upon reaching the Hospital.

31. PW-1 further stated that he got scribed the Written Report/Tehrir from Neeraj Singh and presented the same in the police station on the same day. He proved the Written Report/Tehrir as Ex.Ka-1. The said incident had happened at 4:00 pm on 11.10.2008. After this incident, case for the house and plot related to the sale deed, was

filed in the Munsif Court, Khaga, which is still pending. Accused Akhilesh Chandra Shukla was convicted under Section 302 IPC in a case of Khaga. Accused Dinesh Chandra Shukla was also sentenced to five years imprisonment in a case under Section 307 IPC, Police Station Kishunpur. He and his uncle (PW-2) have witnessed the said incident. The Investigating Officer recovered blood stained, plain soil and four empty cartridges 12-bore from the spot and recovery memo was prepared and his signature was obtained on the same. The aforesaid recovery memo is available on record.

32. The examination-in-chief of this witness was recorded on 17.05.2010, however on an adjournment application of the defence, cross-examination of this witness was deferred for the next day. This witness was cross-examined on 19.05.2010 and 20.05.2010. In his cross-examination, this witness denied having knowledge that how many criminal cases were pending against his father. This witness denied the defence suggestion that the alleged incident had happened at a different time, in different situation and at a different place. He stated that they went to Ram Swaroop Singh for a compromise. He cannot tell that why the aforesaid fact is not written by the Investigating Officer in his statement. Rupa Devi is the wife of Madhurendra and is having one son and one daughter at the time of incident. She was residing in the house in question alongwith her children much before the execution of the sale deed. They went to Ram Swaroop for a compromise. The fact of compromise was not decided before hand and it is not that the accused fired during compromise. The place where the compromise was being talked, was shown to the Investigating Officer at the time of spot inspection. The Investigating Officer had done the spot inspection and had prepared the map at the same time. **There is an old Neem tree at the door of Ram Swaroop and charpai, takhat, etc. are not kept under it. The door of Ram Swaroop's house faces the east.** It was the month of October and was not dark at all. The discussion regarding compromise was not going on inside the house of Ram Swaroop, however, it was going on outside of his house.

33. PW-1 further stated in his cross-examination that the place where the compromise was being discussed was situated at the distance of 10-12 feet south from the main door of Ram Swaroop. The aforesaid fact narrated by this witness in his cross-examination corroborates site plan (Ex.Ka-11) of the place of incident. It has been shown in site plan (Ex.Ka-11) that the main door of the house of Ram Swaroop is situated on eastern direction and discussions were going on at some distance in southern direction from his main door. He further deposed that he got written in his report that at the time of incident, Sunil Kumar was carrying licensee rifle of Ram Swaroop Singh and had fired. He got written this in Written Report/Tehrir on the basis of suspicion. His father was not injured by the rifle as it hit the ground. He had got written the fact of rifle in the Written Report/Tehrir on the basis of suspicion that is why it was put in bracket. Except for the above matters, he did not write anything in his report on the basis of suspicion. Where they were standing the house of Bhagat Singh was approximately 25-30 steps to the south and Bhagat Singh's door opens in front of Ram Swaroop's house (this fact also corroborate the site plan). He further confirmed door of Bhagat Singh will be 20-25 steps to the south from the place, where they were standing and talking about the compromise. Bhagat Singh has a quite long and wide house. Adjacent to western wall of Bhagat Singh's house is the residential house of Sushil Kumar Singh. The path adjacent to the south of Sushil Kumar's house, is to the east-west. To the south of Sushil Kumar's house is Chavi Nath Maurya's house, to the east-south of Chavi Nath Maurya's house is the Dharamshala. This Dharamshala is longer in the east-west direction and it's door open in the north direction, i.e., towards the back of Bhagat Singh's house. A path goes east-west between Bhagat Singh's southern wall and the Dharamshala, it was behind this southern wall that he and his uncle hid at the time of incident. They were hiding at the southern corner of Bhagat Singh's house and he had shown this place to the Investigating Officer. These facts also corroborates the site plan (Ex.Ka-11).

34. PW-1 further stated in his cross-examination that when they were running, he was leading, his uncle was behind him and his father was behind his uncle. **His father was shot, while standing.** He and his uncle were sitting at that time. They were sitting two steps behind the corner of the southern wall of Bhagat Singh's house. In total, 5-6 shots were fired from the roof of the spot, i.e. the place of incident. There was parapet on the south side of the roof of Ram Swaroop Singh's house and accused fired from two steps away from this parapet, however, neither he nor his uncle has received any injury because there was a wall between them, which belongs to Bhagat Singh. After getting injured, his father fell on his right side. He did not take his father to his home from the spot, but he took him to Vijaipur Hospital. He and his uncle took his father to the Hospital on motorcycle from the murder spot. Four empty cartridges of 12-bore were recovered from the spot. He signed the recovery memo.

35. We have carefully perused the whole deposition of this witness. He (PW-1) has been extensively cross-examined on two different dates. The deposition of this witness as far as date, time, place and manner of incident is concerned, is consistent in both his cross-examination as well as examination-in-chief. This witness was cross-examined at length as far as place of incident is concerned, he has answered all the questions relating to the place of incident including various houses, directions of various pathways on the spot and he has answered every question in his cross-examination very precisely and his answer qua place of incident, fully corroborates the contents of site plan. The manner of incident is also fully corroborated by the particulars mentioned in the site plan. It has been clearly shown in the site plan (Ex.Ka-11) that when they were talking to Ram Swaroop, they were standing at point 'A' from where they ran towards southern direction and took shelter of southern wall of Bhagat Singh's house. In front of southern wall of Bhagat Singh's house, a Dharamshala is situated. He has clearly depicted the position of houses of Bhagat Singh, Sushil Kumar Singh and Chavi Nath Maurya. He has also clearly depicted the position of point 'A' from the main door of Ram Swaroop. It is

clearly shown in the site plan that this witness and his uncle were sitting at point 'C' and 'D' at the time of indiscriminate firing and his father was at point 'B' at the time, when he was shot. There is no contradiction in his whole deposition regarding the date, time, place and manner of incident. The documentary as well as ocular medical evidence also corroborates the deposition of this witness that the deceased sustained ante-mortem firearm injuries at the time of incident. **As his deposition is consistent, therefore, we are of the considered opinion that this witness was present on the spot at the time of incident and had seen the incident. This witness has narrated the whole incident and we find his deposition a reliable one.**

36. **PW-2 Jhaller Singh** in his examination-in-chief has stated that his brother Bhura Singh got a sale deed of a fallen down ruined house of Awadhram on 7.10.2008. This ruined house was situated in front of Ram Swaroop Singh's house. Before this incident, Awadhram had moved to another house. Rupa Devi is the daughter-in-law of Awadhram, who is a widow. Dinesh Chandra and Akhilesh Chandra used to give her (Rupa Devi) protection. They earlier wanted to take Awadhram's house by coaxing and misleading Rupa Devi. Rupa Devi used to do household work at the accused's house. The incident is dated 11.10.2008 and time of incident was about 4:00-4:15 pm. The said accused got measurement of the ruined house from a lawyer and when his brother came to know about this fact, then he and his brother Bhura Singh and son of Bhura Singh, (Rajendra Singh) went together to the accused's benefactor Ram Swaroop Singh for the reason that accused were measuring the aforesaid recently purchased ruined house. As soon as they reached to Ram Swaroop and started talking, then at that very moment, Dinesh Chandra armed with a single barrel gun, Akhilesh Chandra armed with a double barrel gun, Anil Kumar armed with a double barrel gun and Sunil Kumar armed with a rifle arrived there and challenged them that they shall not be allowed to escape and exhorted to kill them. After this, when they saw themselves surrounded, then they ran towards the southern direction towards the Dharamshala from the south-west side of Shyam Sundar's

house, then the accused entered Ram Swaroop's house, climbed onto the roof and all four accused started firing simultaneously. The pellets from the fire hit Bhura Singh due to which, Bhura Singh fell at that very spot. They (PW-2 and PW-1) were hiding behind Bhagat Singh's wall. Seeing Bhura Singh fall, they ran towards their home and took Rajendra Singh's motorcycle. Thereafter, he (PW-2) and Rajendra (PW-1) took Bhura to Vijaipur Hospital. The accused had already fled away from the spot, after shooting. As soon as they took Bhura Singh on the motorcycle in front of the hospital, he breathed his last. Thereafter, they (PW-1, PW-2 and Neeraj) went straightway to the police station and Written Report/Tehrir was prepared. Inquest report of his brother Bhura was prepared in his presence. Dinesh Chandra is a convict under Section 307 IPC and Akhilesh Chandra is a convict under Section 302 IPC.

37. The examination-in-chief of PW-2 was recorded on 16.12.2010 and his cross-examination was deferred on the request of defence and he was cross-examined at length on 18.12.2010. In his cross-examination, this witness stated that he is also known by another name Abhilash Singh and they are four brothers, he is eldest and thereafter Bhura Singh (who is the deceased) and whose other name is Shiv Saran Singh. Shiv Baran Singh alias @ Bhullu Singh is his third brother and the name of his fourth brother is Shiv Shankar Singh. **The aforesaid statement makes it clear that this witness is elder brother of the deceased and that is why son of the deceased PW-1 calls this witness as Dada meaning thereby as Tau (i.e. uncle).** He also denied having any knowledge that his brother Bhura Singh had gone to jail several times in several criminal cases. His brother Bhura Singh got a sale deed of Awadhram's house in his name, just four days before the incident. He had seen the aforesaid house, at that time, one room was built in the said house and rest of the house had fallen down. At the time of incident, no one was living therein and Awadhram was alive. Awadhram has three sons, the eldest son's name is Ayodhya, the second's name is Madhurendra and the third's name is Surendra. Rupa Devi's husband was Madhuredra. People told me that accused got measured the land relating to aforesaid sale deed

from an Advocate, that is why he stated so in his examination-in-chief.

38. He (PW-2) stated in his cross-examination that this incident happened in the south direction from Shyam Sunder's house from the place of incident. There was a temple 15-20 feet ahead. From the temple, this incident happened on the way to the north. This path goes from north to south and the temple is situated in the southern side of this path. The incident happened on this path. The aforesaid particulars qua the place of incident, narrated by this witness in his cross-examination finds corroboration from site plan (Ex.Ka-11)

39. This witness further stated in his cross-examination that he had seen and heard the sound of the fire. At that time, his face was towards the south and Rajendra was also standing at that time. **The deceased Bhura Singh was ten paces south to him. Rajendra was five paces south of Bhura Singh. At the time of fire, Rajendra Singh's face was towards the south and Bhura Singh's face was towards the west. These fires came from the west direction.** The place from where the fire came and where the fire hit, there was a house in between. The fire of rifle did not hit Bhura Singh. Pellets came out from his body and one of the accused had a rifle, but he cannot say that whose rifle it was. At the time of incident, whether Ram Swaroop had a rifle or not, he do not know. He cannot say that whether rifle used in this incident was licensed or not. There is only one house of Ram Swaroop in the village, which has two main doors, both open towards the east direction. The distance between these two doors was about 25-30 feet. **There is also a Neem tree at Ram Swaroop's door.** It was not written in the report that the accused climbed onto the roof of Ram Swaroop's house and fired, which fire hit Bhura Singh. **He had not seen injuries of Bhura Singh. He cannot say whether blood was found on the ground or not, when the Investigating Officer visited, because he was not present on the spot at that time.** The police came to the village after the incident. The distance between Vijaipur outpost and the Hospital

was about 40 feet. The Police Station Kishunpur is situated at the distance of 8 km from Vijaipur. It is wrong to state that he had not seen any incident. It is also wrong to state that his brother sustained injuries at some other places, at some other time and in different circumstances. It is also wrong to state that no one had seen the incident.

40. Thus, both PW-1 and PW-2 have been cross-examined regarding the place of incident and they have answered all the questions and description of place of incident finds full corroboration from the site plan prepared by the Investigating Officer. The incident started at place 'A', where the deceased and his family members were surrounded by the appellants, thereafter they ran towards southern direction and PW-1 and PW-2 took shelter of wall of Bhagat Singh' house. The deceased was behind PW-1 and PW-2 and was at point 'B' when he was shot. However, PW-1 and PW-2 were at point 'C' and 'D' shown in the site plan. All the particulars of the houses and the pathways shown in the site plan have been fully corroborated by these two witnesses in their depositions. **Therefore, the prosecution has successfully established the place of incident, which started from point 'A' and culminated at point 'B' (as shown in site plan (Ex.Ka-11), where the deceased was shot.**

41. It was argued that PW-2 in his cross-examination has stated that he had not seen the injuries of the deceased as he was not present at the spot. We have carefully perused this part of deposition of PW-2. The above paragraph as recorded in page-10 of the deposition of PW-2 cannot be read together to reach on aforesaid proposed conclusion. This paragraph consists of several lines. Learned Defence Counsel has first asked the question whether this witness had seen the injuries of the deceased or not. To this question, this witness has clearly stated that he had not seen the injuries of the deceased. Thereafter, learned Defence Counsel asked altogether different question regarding another aspect that whether he can tell that the Investigating Officer found any blood from the ground or not. On this specific question, this witness has clearly answered that as he was not present at that

time (.i.e. time of spot inspection) on spot, therefore, he cannot tell that Investigating Officer found any blood from the spot or not. Lastly, this witness has answered that he had not seen that any gun shot struck on any wall, roof etc or not. The answer that he was not present on the spot specifically relates to visit of the Investigating Officer on the spot after the incident, therefore, the answer to this question cannot be related to the answer where witness specifically stated that he had not seen the injuries of the deceased. The learned trial Court in its judgment has also dealt with this specific aspect and the trial Court also came to the conclusion that second statement relates to the visit of Investigating Officer after the incident. The above conclusion of trial Court is well reasoned and supported by the evidence available on record. Therefore, it cannot be said that he was not the eye witness of the incident. **In our considered opinion, PW-2 is an eye witness of the incident, who has consistently deposed regarding the date, time, place and manner of incident.**

42. The deposition of this witness (PW-2) as far as date, time place and manner of incident is concerned, remained consistent throughout. In spite of extensive cross-examination, the defence failed to bring out any fact in his cross-examination, which makes the presence of this witness on spot suspicious one. This witness was present at the time of incident and had narrated the same. The particulars stated by this witness regarding the place of incident find corroboration from the site plan (Ex.Ka-11) also. **We have carefully gone through the deposition of this witness and found that he was present on spot at the time of incident and his deposition is a reliable one.**

43. It was strenuously argued by the learned counsel for the appellant that P.W.1 and P.W.2 in spite of being eye witnesses and also in spite of being present on spot at the time of inquest proceedings, had not signed police papers including the inquest report, therefore, they are not the eye witnesses and were not present on the spot. There is no requirement of law that an eyewitness, who if present on the spot at the time of inquest proceedings, is required to sign the inquest report and other

recovery memos so as to prove his presence on the spot as well as to prove that he is an eye witness of the incident.

44. Hon'ble Supreme Court in **Brahm Swaroop and Another Vs. State of U.P., A.I.R. 2011 Supreme Court 280** in para 7 of this judgment has categorically held that evidence of eye witnesses cannot be discarded, if their names do not figure in the inquest report prepared at the earliest point of time. The inquest report cannot be treated as substantive evidence but may be utilized for contradicting the witnesses of inquest. The whole purpose of preparing an inquest report is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating as in what manner, or by what weapon or instrument such wounds appear to have been inflicted. The object of the proceedings under Section 174 Cr.P.C. is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and if so, what was its apparent cause.

45. Similarly, Hon'ble Supreme Court in **Radha Mohan Singh Vs. State of U.P., (2006) 2 SCC 450** in para 15 has clearly held that an investigation under Section 174 Cr.P.C. is limited in scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so, what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under Section 174. In **Shakila Khader v. Nausher Gama AIR 1975 SC 1324** the contention raised that non-mention of a person's name in the inquest report would show that he was not an eye witness of the incident was repelled on the ground that an inquest under Section 174 Cr.P.C. is concerned with establishing the cause of death and only evidence necessary to establish it need be brought out. The same view was taken in **Eqbal Baig v. State of Andhra Pradesh, AIR 1987 SC 923**, that the non-mention of name of an eye-witness in the inquest report could not be a ground to reject his testimony. The view taken in **Podda Narayan v. State**

of A.P. (supra) was approved by a three-Judge Bench in **Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853** and it was held that the testimony of an eye-witness could not be discarded on the ground that their names did not figure in the inquest report prepared at the earliest point of time. There is absolutely no requirement in law of mentioning the details of the FIR, names of the accused or the names of the eye-witnesses or the gist of their statement nor it is required to be signed by any eye-witness. **Therefore, the contention of learned counsel for the appellants that P.W.1 and P.W.2 are not the eyewitnesses as they have not signed the inquest report or other police papers, is wholly devoid of merit.**

46. PW-1 in his deposition has clearly stated that when the Investigating Officer arrived at Vijaipur Hospital, at that time, he alongwith PW-2 and other family members were present. Even PW-2 has clearly stated in his examination-in-chief that the inquest was conducted in his presence. Therefore, we find no force in the arguments so raised by the learned counsel for the appellants and in our considered opinion, both PW-1 and PW-2 are the eye witnesses of the incident and their depositions cannot be thrown on the ground that inspite of both these witnesses being eye witnesses, they were not the witnesses to the inquest report. **Therefore, we find that both PW-1 and PW-2 were present on the spot at the time of incident and are reliable eye witnesses. Thus, Question No. 1 is answered in 'Affirmative'.**

Question No. 2. Whether there is any inconsistency in the prosecution version of the incident and the medical evidence of the deceased available on record.

47. It was argued that there is inconsistency in the prosecution version of the incident and the medical evidence, while relying upon the fact that alleged gun shot injuries were sustained by the deceased from front side, while running away from the assailants. The learned trial Court has dealt with this aspect at page-20 of the judgment. PW-1 and PW-2 both have consistently deposed that when they all (i.e. PW-1, PW-2 and the deceased) ran to save their lives, the deceased was in the last. PW-1 and PW-2 were running fast and took protection of the southern wall of Bhagat Singh's

house. The deceased was running behind and had arrived near the southern corner of Bhagat Singh's house. PW-2 in his cross-examination has clearly stated that when shot hit his brother Bhura, his (the deceased's) face was towards west and fires were coming from western direction. At this particular point of time, it is clear that PW-1 and PW-2 had already taken shelter of southern wall of Bhagat Singh's house, however the deceased was little behind and had merely reached near the western-southern corner of Bhagat Singh's house. It is quite possible that at this point of time, he might have looked backward to find out that whether he is out of firing range of the assailants or not. This possibility is strengthened by the statement of PW-1 that at that time, the deceased's face was in the western direction and shots were coming from western direction and at that time, shots fired by the assailants hit the deceased. We have carefully perused the site plan (Ex.Ka-11) and found that the deceased was at point 'B' and was not yet fully protected from southern wall of Bhagat Singh. He was just looking back when his face was in the western direction, a shot hit him while turning back, his left front side became open and that is why, shots struck on his left side of chest and left front hand. Therefore, we are of the considered opinion that there is no inconsistency in the prosecution version of the incident as well as medical evidence available on record. We find strength from the judgment of Apex Court in **State of Bihar v. Ram Padarath Singh (1998) 6 SCC 240**, where Apex Court has observed at page 246 in para 9 as under:

"9. The High Court also observed that it was not believable that Mangal had the courage to turn back and see what the assailants were doing after they had killed Boudhu. **What the High Court failed to appreciate was that it was not a matter of courage but it was the instinct of self-preservation which could have prompted Mangal to look back, as he was also being chased. His brother was chased and beaten by the accused who were sworn enemies. It was for that reason that he had started running away from that place. It was therefore not only probable but quite natural for him after covering some distance to look back to find out whether he was being chased or not. Therefore, the evidence of the eyewitnesses that while running away Mangal was shouting "bachao bachao" and the shot fired by Dilip had hit him on his thigh, when he had turned back for a moment while running, was really not inconsistent with the medical evidence and deserved to be accepted.**"

Thus Question No. 2 is answered in 'Negative'.

Question No. 3. Whether in the present case, the FIR can be said to be ante timed FIR or not?

48. It was vehemently argued that the FIR is anti timed and anti dated. To press this argument, learned counsel for the appellants submitted that the FIR has been seen by the learned Chief Judicial Magistrate on 15.10.2008, meaning thereby that the FIR has been registered at a later date and later time.

49. The Apex Court in **Jafel Biswas v. State of W.B. (2019) 12 SCC 560** at page 565 in para 18 has reiterated the purpose and scope of Section 157 Cr.P.C. as under:

"18. In State of Rajasthan [State of Rajasthan v. Daud Khan, (2016) 2 SCC 607 : (2016) 1 SCC (Cri) 793] in paras 27 and 28, this Court has laid down as follows: (SCC pp. 620-21)

"27. The delay in sending the special report was also the subject of discussion in a recent decision being Sheo Shankar Singh v. State of U.P. [Sheo Shankar Singh v. State of U.P., (2013) 12 SCC 539 : (2014) 4 SCC (Cri) 390] wherein it was held that before such a contention is countenanced, the accused must show prejudice having been caused by the delayed dispatch of the FIR to the Magistrate. It was held, relying upon several earlier decisions as follows: (SCC pp. 549-50, para 31)

31. In this context, we would like to refer to a recent decision of this Court in Sandeep v. State of U.P. [Sandeep v. State of U.P., (2012) 6 SCC 107 : (2012) 3 SCC (Cri) 18] wherein the said position has been explained as under in paras 62: (SCC p. 132)

"62. As far as the said contention is concerned, we only wish to refer to the reported decision of this Court in Pala Singh v. State of Punjab [Pala Singh v. State of Punjab, (1972) 2 SCC 640 : 1973 SCC (Cri) 55] wherein this Court has clearly held that (SCC p. 645, para 8) where the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the court then, however improper or objectionable the delay in receipt of the report by the Magistrate concerned be, in the absence of any prejudice to the accused it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable.

28. It is no doubt true that one of the external checks against antedating or ante-timing an FIR is the time of its dispatch to the Magistrate or its receipt by the Magistrate. The dispatch of a copy of the FIR "forthwith" ensures that there is no manipulation or interpolation in the FIR. [Sudarshan v. State of Maharashtra, (2014) 12 SCC 312 : (2014) 5 SCC (Cri) 94] If the prosecution is asked to give an explanation for the delay in the dispatch of a copy of the FIR, it ought to do so. [Meharaj Singh v. State of U.P., (1994) 5 SCC 188 : 1994 SCC (Cri) 1391] However, if the court is convinced of the prosecution version's truthfulness and trustworthiness of the witnesses, the absence of an explanation may not be regarded as detrimental to the prosecution case. It would depend on the facts and circumstances of the case. Rattiram v. State of M.P., (2013) 12 SCC 316 : (2014) 1 SCC (Cri) 635"

50. Therefore, in cases where the date and time of the lodging of the FIR is questioned, the report becomes more relevant. But mere delay in sending the report itself cannot lead to a conclusion that the trial is vitiated or the accused is entitled to be acquitted on this ground. In every case, from the mere delay in sending the FIR to the Magistrate, the Court would not conclude that the FIR has been registered much later in time than shown. On delayed dispatch of FIR, some prejudice has to be proved by accused.

51. The Apex Court in **Mehraj Singh V. State of UP (1994) 5 SCC 188**, at page 195 in para 12 has observed as under:

“12. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report.”

52. The Allahabad High Court in **Rampal Singh and Others V. State of UP 2021 SCC OnLine All 195** has observed that two external tests had been relied in **Mehraj Singh v. State of U.P.; (1994) 5 SCC 188**. First external test is the report sent to the magistrate under Section 157 Cr.P.C. and the second external test is the copy of the FIR sent with the dead body, for postmortem examination and its reference on the inquest report.

53. The Apex Court in **Rama Devi v. State of Bihar (2024) 10 SCC 462** addressing the same principle has clearly observed that it is trite law that a delay in forwarding the FIR to the jurisdictional Magistrate is not fatal to the prosecution case. When there is a delay in forwarding the FIR to the jurisdictional Magistrate and the accused raises a specific contention regarding the same, they must demonstrate how this delay has prejudiced their case. Mere delay by itself is not sufficient to discard and disbelieve the case of the prosecution. If the investigation starts in right earnest and there is sufficient material on record to show that the accused were named and pinpointed, the prosecution case can be accepted when evidence implicates the accused. The requirement to dispatch and serve a copy of the FIR to the jurisdictional Magistrate is an external check against ante dating or ante timing of the FIR to ensure that there is no manipulation or interpolation in the FIR. If the court finds the witnesses to be truthful and credible, the lack of a cogent explanation for the delay may not be regarded as detrimental.

54. In the light of above well settled proposition of law, we have carefully perused the oral and documentary evidence with regard to the date and time of registration of the FIR (Ex.Ka-2). A perusal of the FIR, (Ex.Ka-2) reveals that same was registered at 17:30 pm on

11.10.2008. It is also clear that the aforesaid FIR was sent through post from the police station and the concerned Circle Officer had ordered to send the aforesaid FIR to the Court concerned on 12.10.2008. Although, the Circle Officer has made his signature in blue ink and had not recorded the date in blue ink, but order, designation and date have been written in red ink. The date is clearly legible to be 12.10.2008. The informant Rajendra Kumar PW-1 in his deposition has clearly stated that from the spot, he and his uncle took the victim to Vijaipur Hospital, where his father died upon reaching the Hospital. Thereafter, he got scribed Written Report/Tehrir (Ex.Ka-1) and got registered the FIR (Ex.Ka-2). He has clearly stated that the aforesaid incident had happened on 4:00 pm on 11.10.2008. This witness has been extensively cross-examined, however, his deposition as far as, these two above facts are concerned, remains uncontroverted. The brother of the deceased and uncle of the informant Jhaller Singh @ Abhilash Singh PW-2 has also deposed on the similar lines. The depositions of both these witnesses, are consistent and corroborative to each other depositions. A perusal of the Written Report/Tehrir (Ex.Ka-1) also reveals that both these witnesses took the deceased to Vijaipur Hospital from the spot and when they arrived at Hospital, victim died just after reaching the Hospital. Thereafter, they went to the concerned police station and aforesaid Written Report/Tehrir was scribed and FIR was registered. The concerned police station is situated at a distance of 14 km from the place of incident. The informant PW-1 and PW-2 firstly travelled to Vijaipur Hospital and thereafter they went to the concerned police station for registration of the FIR.

55. It was argued that instead of promptly lodging the FIR first in the concerned police station, which was situated prior to Vijaipur Hospital, the deceased was taken to the Hospital, therefore, on this ground, the FIR was also said to be ante timed. There is no force in the argument so raised by the learned counsel for the appellants, because after some incident, when victim sustains some grievous injuries, in that eventuality, saving of life of the victim is far more important than lodging the FIR, specially when family members of

the victim are there. It is their (family members) foremost duty to make all efforts to save the life of victim. Therefore, there is nothing suspicious in bringing the victim first to Vijaipur Hospital, before lodging of the FIR. As the time of incident is about 4:00 pm and FIR has been registered at 5:30 pm, therefore, there seems to be no delay in lodging the FIR. From the chronology of the above events, it is clear that victim was firstly taken to Vijaipur Hospital and only thereafter the informant reached the concerned police station for lodging the FIR. In our considered opinion, the FIR has been promptly lodged.

56. It was vehemently argued that FIR was received in the office of learned Chief Judicial Magistrate on 15.10.2008, therefore, FIR is anti timed and anti dated. However, we have perused the inquest report (Ex.Ka-5). A perusal of the inquest report (Ex.Ka-5) reveals that the concerned S.H.O. started the inquest on 11.10.2008 at 18:45 pm and concluded at 19:45 pm on same day. The inquest proceedings were conducted on the same day in Vijaipur Hospital, which was situated at the distance of 6 km from the concerned police station. The case crime number and sections, under which the FIR has been registered, are clearly written on the top of Ex.Ka-5. After inquest, Letter to CMO (Ex.Ka-6), Sample Seal (Ex.Ka-7), Challan Nash (Ex.Ka-8) and Photo Nash (Ex.Ka-9) were prepared by the Investigating Officer, the then S.O. on 11.10.2008 with case crime number, sections of IPC. The G.D. (Ex.Ka-3), wherein details of case crime number and sections under which crime has been registered with brief description of contents of Written Report/Tehrir, was also recorded. All these documents were produced before the Autopsy Surgeon, at the time of conducting the post mortem examination of the deceased and have been signed by him with his stamp and date. The post mortem examination of the deceased was conducted on 12.10.2008, meaning thereby that all those documents were clearly available at the time of post mortem examination of the deceased. Therefore, only on the ground that FIR was allegedly received in the office of learned CJM on 15.10.2008, does not make the FIR as anti timed and anti dated. In our considered opinion, the FIR has been

promptly lodged, there is no delay in lodging the same and the same cannot be treated as anti timed and anti dated. Moreover, the prompt and early reporting of the incident by PW-1 to the police with all vivid details gives an assurance regarding truth of his version of incident. **Question No.3 is answered in 'Negative'.**

Question No. 4. Whether the Ballistic Report denying use of recovered firearm weapons, makes the prosecution story suspicious or not?

57. Lastly, it was argued that FSL report has denied the use of recovered firearms in the incident. As per the prosecution story, the licensed guns, (which were used in the incident) were recovered and four empty cartridges 12-bore were recovered from the spot, but FSL report is categorically clear that three 12-bore empty cartridges recovered from the spot, were not fired from two DBBL guns (which were recovered from two of the appellants) and as far as fourth 12-bore empty cartridge is concerned, there was no sufficient individual characteristics to make a comparison with recovered DBBL guns. We have carefully perused the FSL report available on record. It is true that FSL report does not support the use of recovered guns as far as three 12- bore empty cartridges recovered from the spot is concerned, however, fourth empty cartridge could not be compared for lack of sufficient characteristics, therefore, there is no definite opinion regarding this regarding this fourth empty cartridge. However, the aforesaid FSL report is clear that all the four empty cartridges were cartridges of some firearm. Moreover, six pellets recovered from the body of the deceased, were also sent for FSL examination and finding number three of FSL report clearly states that those pellets are small deformed lead pellets, which appear to be fired pellets, meaning thereby that the aforesaid pellets recovered from the body of the deceased, were actually fired from some firearm and this part of FSL report supports the prosecution story to this extent.

58. At this juncture, we would like to cite some case laws of Hon'ble Apex Court . In **Vineet Kumar Chauhan v. State of U.P. (2007) 14 SCC 660**, at page 664 in para 11 while affirming the

ratio laid down in **Gurcharan Singh v. State of Punjab AIR 1963 SC 340**, it has been observed that:

"11. It cannot be laid down as a general proposition that in every case where a firearm is allegedly used by an accused person, the prosecution must lead the evidence of a ballistic expert to prove the charge, irrespective of the quality of the direct evidence available on record. It needs little emphasis that where direct evidence is of such an unimpeachable character, and the nature of injuries, disclosed by the post-mortem notes is consistent with the direct evidence, the examination of ballistic expert may not be regarded as essential. However, where direct evidence is not available or that there is some doubt as to whether the injuries could or could not have been caused by a particular weapon, examination of an expert would be desirable to cure an apparent inconsistency or for the purpose of corroboration of oral evidence."

Furthermore the Apex Court in para 13 of this judgment has also observed that:

*"13. In the instant case, having regard to the ocular evidence adduced by the prosecution, there is no reason to discard the prosecution theory that the injury as a result whereof Smt Premwati suffered complete paralysis of both the lower limbs, etc. was caused by a bullet fired from a revolver. The nature of the injury as proved by Dr. P.S. Ahlawat (PW 5), under whose treatment the deceased remained at Moradabad and Dr. S.P. Singh (PW 7), who had conducted the post-mortem examination is wholly consistent with the prosecution version. It is clear that the bullet recovered by PW 7 at the time of post-mortem of the victim had traversed to thoracic spine through the neck from the face near the angle of the jaw, hitting the fifth thoracic vertebra, badly damaging the underlying spinal cord. **We are therefore, of the view that on the facts of the present case the absence of ballistic expert's evidence is not fatal to the case of the prosecution, notwithstanding the fact that the forensic science laboratory in its report dated 18-2-1991 had not expressed a definite opinion about the bullet recovered from the place of occurrence.**"*

59. **The Apex Court in Rakesh and Another V. State of UP (2021) 7 SCC 188, has observed that so far as the submission on behalf of the accused that as per the ballistic report, the bullet found, does not match with fire-arm/gun recovered and therefore, use of gun as alleged is doubtful and therefore, benefit of doubt must be given to the accused is concerned, the aforesaid cannot be accepted. At the most, it can be said that the gun recovered by the police from the accused may not have been used for killing and therefore, the recovery of the actual weapon used for killing can be ignored and it is to be treated as if there is no recovery at all. For convicting an accused recovery of the weapon used in commission of offence is not a sine qua non. Therefore, merely because the ballistic report shows that the bullet recovered does not match with the gun recovered, it is not possible to reject the credible and reliable deposition of PW-1 and PW- 2.**

60. In the light of above proposition of law, we have carefully perused the depositions of eye witnesses, and in the present case, the depositions of PW-1 and PW-2 are consistent that two DBBL guns, one SBBL gun and one rifle were used in the incident, however as the appellants had licensee guns, therefore, it was easy for PW-1 and PW-2 to presume that assailants licensee guns have been used in the incident. It has also come on record that in the FIR it was mentioned that appellant Sunil Kumar Shukla was carrying Ram Swaroop's licensee rifle, however, PW-1 and PW-2 have clearly stated in their depositions that aforesaid fact was got written in the Written Report/Tehrir on the basis of suspicion. During the course of the investigation, it was found by the Investigating Officer that the aforesaid licensee rifle of Ram Swaroop was not involved in the crime. The Investigating Officer also found that DBBL gun of appellant Dinesh Chandra Shukla was already deposited before the crime. Therefore, only two DBBL guns were recovered, which were licensee guns of Akhilesh Shukla and Anil Kumar Shukla.

61. The depositions of PW-1 and PW-2 that aforesaid licensee rifle of Ram Swaroop, was assigned to Sunil Kumar on the basis of their suspicion seems to be bona-fide as no role whatsoever has been assigned to Ram Swaroop in the incident, which could have been easily assigned by them. It is the case of the prosecution that PW-1 and PW-2 and the deceased went to Ram Swaroop for a compromise and were talking with him, when they were surrounded by the appellants, no further role of Ram Swaroop has been assigned, either in the FIR or in their depositions. Therefore, we are of the considered opinion that aforesaid fact (i.e. Sunil Kumar Shukla was carrying Ram Swaroop's rifle) seems to be got written in the FIR on the basis of bona-fide suspicion. The depositions of PW-1 and PW-2 are consistent that Akhilesh Shukla and Anil Shukla were armed with DBBL guns, Dinesh Chandra Shukla was armed with SBBL gun and Sunil Kumar Shukla was armed with rifle. Recovery of 12-bore empty cartridges from spot proves that DBBL and SBBL guns have been used in the incident. A total four 12-bore empty cartridges have been recovered from the spot and the deceased has also suffered firearm injuries and during his post mortem

examination, Autopsy Surgeon has recovered six pellets from his body. Recovery of four cartridges has been duly proved by the prosecution. The aforesaid four 12-bore empty cartridges and six pellets were sent to FSL for examination and these recovered cartridges and pellets are found to be fired ones. The depositions of PW-1 and PW-2 fully corroborates each other depositions as far as date, time, place and manner of incident is concerned, their depositions are further corroborated by the particulars specifically shown in the site plan. Their depositions are also corroborated by the ante-mortem injuries found on the body of the deceased, therefore, in the peculiar facts and circumstances of the case, at the maximum it can be presumed that the licensee guns of the appellants were actually not used in the crime and actual weapons (i.e. 2 DBBL guns, one SBBL gun and one rifle) which were used in the crime, were not got recovered from the appellants, therefore, FSL report does not cast any shadow on the truthfulness of the prosecution story. **Question No. 4 is also answered in 'Negative'.**

Question No. 5 Whether the prosecution could be said to have proved its case against the appellants-convicts beyond reasonable doubt?

62. As per the FIR, purchase of fallen down mud house of Awadhram by Bhura Singh on 07.10.2008 was the motive behind the crime. Law is well established that first information report is not an encyclopedia. It is not the requirement of law that every minute details with description of every event leading to the commission of crime with detail sequencing of crime is required to be mentioned in the first information report. A very brief description of motive has been assigned in the Written Report/Tehrir (Ex.Ka.-1). The present case is based on direct evidence. Therefore, the lack or absence of motive is inconsequential when direct evidence establishes the crime. However, in the present case, the depositions of PW-1 and PW-2 are consistent that the deceased Bhura Singh purchased a fallen down ruined house of Awadhram on 07.10.2008 through a registered sale deed. Appellants earlier wanted to take this house by misleading the widowed daughter-in-law of Awadhram namely, Rupa Devi. Rupa Devi used to do house-hold work at the accused house. A perusal of site plan (ExKa-11), reveals that this disputed

fallen down house is situated near the house of appellant Dinesh Chandra Shukla. The deceased Bhura Singh as well as PW-1 and PW-2 got information that the appellants got measurement of their recently purchased house because of which, they apprehended that they will not obtain the possession of aforesaid house. Therefore, they approached Ram Swaroop Singh in this matter for compromise and when they were talking with Ram Swaroop Singh, they were surrounded by the appellants and finally this incident had happened. PW-1 and PW-2 have deposed that the appellants have committed the murder of the deceased in furtherance of their common intention. Therefore, in view of their depositions as eye witnesses of the crime, motive in the present case, pales into significance. However, the prosecution has been able to prove the aforesaid motive against the appellants.

63. It was vehemently argued that PW-1 and PW-2 have denied the criminal history of the deceased, therefore, the prosecution story cannot be believed. Admittedly, the deceased Bhura Singh was having criminal history and the Investigating Officer collected the same during the course of investigation and has also given details of seven criminal cases, which were pending against the deceased, in his deposition. However, admittedly, the appellant Akhilesh Chandra Shukla was convicted in a case of murder and appellant Dinesh Chandra Shukla was convicted under Section 307 IPC (as in their statements under Section 313 Cr.P.C., both these appellants have stated that their appeal against conviction were pending at that time) meaning thereby that both, the deceased and the assailants i.e. appellants, were having criminal history to their credit at that stage and appellants Akhilesh Chandra Shukla and Dinesh Chandra Shukla were having criminal history of conviction. Feigned ignorance of criminal history of the deceased Bhura Singh by PW-1 and PW-2 does not automatically make the prosecution story suspicious one. In the present case, the prosecution has proved the motive behind the commission of murder of the deceased Bhura Singh. Two of the appellants were convicted in two different cases of murder and attempt to murder, therefore, we find no force in the argument of learned counsel for the appellants that

the denial of having any knowledge of criminal history on the part of PW-1 and PW-2 makes the prosecution story doubtful. Therefore, it cannot be presumed that on account of criminal history, the deceased was murdered by someone else at some other place, in other circumstances.

64. From the perusal of the records, it is reflected that blood stained soil collected by the Investigating Officer from the place of incident, was not forwarded to find out the origin of blood. However, it is an omission on the part of the Investigating Officer indicative of defective investigation and in the light of trustworthy depositions of PW-1 and PW-2. This part of omission on the part of the Investigating Officer does not affect the prosecution version and in our considered opinion, the appellants are not entitled to get any benefit out this defective part of investigation by the Investigating Officer.

65. Lastly, it was argued that without assigning any specific role of the appellants, they have been wrongly convicted under Section 302 IPC without aid of section 34 IPC and therefore, their conviction is bad in law.

66. The FIR was lodged under Section 302/34 IPC, the charge sheet was also filed under Section 302/34 IPC. The learned trial Court also framed charges against the appellants under Section 302 read with 34 IPC, even in the statements recorded under Section 313 Cr.P.C., it was specifically asked in question no. 1 that the firing was resorted to with common intention to murder Bhura Singh. Learned trial Court in its conclusion at page-24 of the judgment has clearly held that the accused in a pre-planned manner with common intention used firearms to kill Bhura Singh. However, while passing the order of conviction and sentence, the learned trial Judge has convicted the appellants under Section 302 IPC alone. It seems to be mere an irregularity. Learned trial Court has concluded that accused were sharing common intention. Law is well settled that section 34 IPC is not a substantive offence in the present case, not only FIR was registered under Section 302/34 IPC but after investigation, the charge sheet was also submitted under the same section. The charges were also framed under Section 302

read with section 34 IPC and even under Section 313 Cr.P.C., they were specifically asked regarding their common intention to murder.

67. A three Judges Bench of Hon'ble Supreme Court has dealt with scope of interpretation of Section 34 IPC in **Suresh and another vs. State of U.P. (2001) 3 SCC 673**. In this judgment Hon'ble Supreme Court has expressed its view in the light of several judicial pronouncement by starting privy council to Supreme Court. The most relevant paragraphs 19, 22, 23, 24, 37, 38, 39, 41 and 50 are reproduced herein-below:-

"19. Hence, under Section 34 one criminal act, composed of more than one act, can be committed by more than one persons and if such commission is in furtherance of the common intention of all of them, each would be liable for the criminal act so committed."

"22. Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34, e.g. the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons, in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why Section 34 cannot apply in the case of those two persons indicated in the illustrations."

23. Thus to attract Section 34 IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons."

24. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such an act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32 IPC. So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC."

"37. For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused sharing such intention."

38. Section 34 of the Penal Code, 1860 recognizes the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

39. The dominant feature for attracting Section 34 of the Penal Code, 1860 (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in *Satrughan Patra v. Emperor* [AIR 1919 Pat 111 : 20 Cri LJ 289] held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied."

"50. Again a three-Judge Bench of this Court in *State of U.P. v. Iftikhar Khan* [(1973) 1 SCC 512 : 1973 SCC (Cri) 384] after relying upon a host of judgments of the Privy Council and this Court, held that for attracting Section 34 it is not necessary that any overt act must be done by a particular accused. The section will be attracted if it is established that the criminal act has been done by one of the accused persons in furtherance of the common intention. If this is shown, the liability for the crime may be imposed on any one of the person in the same manner as if the act was done by him alone. In that case on proof of the facts that all the four accused persons were residents of the same village and Accused 1 and 3 were brothers who were bitterly inimical to the deceased and Accused 2 and 4 were their close friends, Accused 3 and 4 had accompanied the other two accused who were armed with pistols; all the four came together in a body and ran away in a body after the crime, coupled with no explanation being given for their presence at the scene, the Court held that the circumstances led to the necessary inference of a prior concert and prearrangement which proved that the "criminal act" was done by all the accused persons in furtherance of their common intention."

68. In **Ram Naresh Vs. State of U.P. (2024) 1 SCC 443**, the appellant challenged the judgment of trial Court and High Court whereby he was convicted under Section 302 read with Section 34 IPC on the ground that there was no common intention on his part and therefore, Section 34 IPC cannot be applied so as to convict

him (appellant). The Hon'ble Supreme Court while rejecting his argument observed as under:-

"11. Assistance has been taken of para 26 of the decision of this Court in Krishnamurthy v. State of Karnataka (2022) 7 SCC 521, which is reproduced herein below: (SCC p. 537)

"26. Section 34IPC makes a co-perpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section 34 to apply there should be common intention between the co-perpetrators, which means that there should be community of purpose and common design or prearranged plan. However, this does not mean that co-perpetrators should have engaged in any discussion, agreement or valuation. For Section 34 to apply, it is not necessary that the plan should be prearranged or hatched for a considerable time before the criminal act is performed. Common intention can be formed just a minute before the actual act happens. Common intention is necessarily a psychological fact as it requires prior meeting of minds. In such cases, direct evidence normally will not be available and in most cases, whether or not there exists a common intention has to be determined by drawing inference from the facts proved. This requires an inquiry into the antecedents, conduct of the co-participants or perpetrators at the time and after the occurrence. The manner in which the accused arrived, mounted the attack, nature and type of injuries inflicted, the weapon used, conduct or acts of the co-assailants/perpetrators, object and purpose behind the occurrence or the attack, etc. are all relevant facts from which inference has to be drawn to arrive at a conclusion whether or not the ingredients of Section 34I PC are satisfied. We must remember that Section 34 IPC comes into operation against the co-perpetrators because they have not committed the principal or main act, which is undertaken/performed or is attributed to the main culprit or perpetrator. Where an accused is the main or final perpetrator, resort to Section 34IPC is not necessary as the said perpetrator is himself individually liable for having caused the injury/offence. A person is liable for his own acts. Section 34 or the principle of common intention is invoked to implicate and fasten joint liability on other co-participants."

12. A plain reading of the above paragraph of Krishnamurthy case reveals that for applying Section 34IPC there should be a common intention of all the co-accused persons which means community of purpose and common design. Common intention does not mean that the co-accused persons should have engaged in any discussion or agreement so as to prepare a plan or hatch a conspiracy for committing the offence. Common intention is a psychological fact and it can be formed a minute before the actual happening of the incidence or as stated earlier even during the occurrence of the incidence."

69. Therefore, law of common intention can be crystallized that it is not a substantive offence and does not create an offence by itself. It is a rule of evidence that recognizes principle of constructive liability. To attract Section 34 IPC two conditions are indispensable. First condition is that the criminal act consisting of a series of acts must have been done not by one person alone, but by more than one person. The second condition is that doing of every such individual act cumulatively resulting in commission of criminal offence, must have been in furtherance of the common intention of all such persons. When both conditions are proved, then each of the accused is liable for the criminal act as if it was done by him alone. The accused who is to be fastened with liability on the strength of

Section 34 IPC, should have done some act, which has nexus with the offence and such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of offence, but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. **The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. Even where there is no evidence of prior meeting of minds, but when sequence of events which unfolded during course of occurrence clearly indicates the pre determination of mind of the accused persons not to cause injury alone but to kill the deceased, their common intention can be inferred from such circumstance. Direct proof of common intention is generally difficult to obtain and therefore, it is not necessary to adduce direct evidence of common intention, which may be inferred from surrounding circumstances and the conduct of the parties. Common intention is a state of mind of an accused which may be inferred objectively from his conduct displayed in the course of commission of crime as also prior and subsequent attendant circumstances.**

70. In **Gurpreet Singh vs. State of Punjab, (2005) 12 SCC 615**, the appellant was convicted under Section 302 IPC, however, Hon'ble Apex Court found that fatal injuries could not be attributed the appellant but finding common intention in the incident, without their being any charge framed under Section 34 IPC, the conviction of the appellant was altered from section 302 IPC to one under Section 302 read with section 34 IPC, while rejecting the appeal of the appellants.

71. Therefore, even when the charge under Section 34 IPC is not framed, but the prosecution has led the evidence regarding

common intention of the assailants and the witnesses have also been cross-examined with respect to such evidence being led by the prosecution, then the assailants can be convicted with the aid of section 34 IPC.

72. The Hon'ble Apex Court in State of **M.P. v. Balveer Singh, (2025) 8 SCC 545**, has held that when eyewitness are examined at length, it is quite possible for them to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. The role of courts in such circumstances assumes greater importance and it is expected of the courts to deal with cases like one in hand, in a more realistic manner and not allow the criminals to go scot-free on account of procedural technicalities, perfunctory investigation or insignificant lacunas in the evidence as otherwise serious crimes would go unpunished.

73. From the depositions of PW-1 and PW-2, it is crystal clear that all the appellants arrived on the spot, armed with deadly weapons and surrounded the deceased, the informant and Jhaller Singh. Soon after surrounding the deceased and his family members, they exhorted to kill them. The deceased, the informant and Jhaller Singh ran to save their lives and the appellants, thereafter climbed onto the roof of Ram Swaroop's house and started indiscriminate firing on the deceased and his family members, who were running to save their lives. However, PW-1 and PW-2 saved their lives by taking shelter of southern wall of Bhagat Singh's house, but the deceased could not take shelter of this wall and was running behind PW-1 and PW-2 and had arrived near the corner of this wall and when he saw back, he was hit with gun shots, which were being fired by the appellants. The deceased sustained firearm injuries and fell down on the spot, thereafter all the appellants ran away from the spot with their deadly weapons. Therefore, the above chain of events and surrounding circumstances, clearly establishes that the appellants arrived on spot with their common intention to murder the deceased and his family members and in furtherance of this common intention, they firstly surrounded the deceased and his

family members and when they ran, the appellants fired indiscriminately on them after climbing onto the roof of Ram Swaroop's house. The appellants' conduct starting from their arrival on the spot and lastly their leaving from the place of incident after commission of crime, clearly establishes their pre-arranged plan and common intention to murder. Therefore, the prosecution has successfully proved common intention to murder the deceased on the part of the appellants and the learned trial Court has also clearly held so in its conclusion recorded at page-24 of the impugned judgment. However, in operative portion of the order of judgment and order of sentence, section 34 IPC is missing, which is a minor irregularity.

74. As per the FIR, both the informant and Jhaller Singh are the eye witnesses of the incident. Both these witnesses have consistently stated that when the deceased, informant and Jhaller Singh were talking to Ram Swaroop Singh regarding compromise, then the appellants came on spot, who were armed with deadly weapons and exhorted to kill them. When both these witnesses and deceased found themselves surrounded by them, they all ran towards Dharamshala, upon which, the assailants climbed onto the roof of Ram Swaroop's house and after reaching the corner, they started indiscriminate firing, the deceased sustained gun shot injuries. He was at the southern-western corner of Bhagat Singh's house. Both these witnesses have consistently stated that they took the deceased on a motorcycle from the spot to Vijaipur Hospital, where on arrival, victim died. Thereafter, they went to the concerned police station for registration of the FIR. Both PW-1 and PW-2 have been cross-examined at length regarding manner of incident, place of incident and areas surrounding the place of incident as well as directions of the spot. PW-1 and PW-2 have clearly answered all the questions so put to these witnesses and their respective answers find corroboration from the site plan (Ex.Ka-11). There is no contradiction whatsoever regarding date, time, place and manner of incident. There is only one minor contradiction in the depositions of PW-1 and PW-2 that as per PW-1, they (i.e. PW-1 and PW-2) were sitting when gun shots hit his father

and as per PW-2, they were standing when gun shots hit this brother. However, their depositions are consistent that when gun shots hit the deceased, he (the deceased) was standing and they (i.e. PW-1 and PW-2), were behind the southern wall of Bhagat Singh's house, which minor contradiction is a natural one and does not affect the prosecution story at all. The oral as well as documentary evidence establishes that the deceased had died on account of sustaining gun shot injuries and those injuries could have been caused at 4:00 pm on 11.10.2008. The prosecution has successfully proved the common intention of the appellants behind commission of crime.

75. The ocular as well as documentary medical evidence supports the prosecution version, even the FIR has been promptly lodged giving brief description of the incident as well as motive behind the incident. The prosecution has successfully proved the motive behind the incident. Thus from the totality of the circumstances, the prosecution has successfully proved its' case against the appellants-convicts beyond reasonable doubt. **Question No. 5 is thus, answered in 'Affirmative'.**

76. In the light of foregoing discussions and considering the entire aspects of the matter and looking to the circumstances, under which the present offence has been committed, we are of the view that the impugned judgment and order passed by the trial Court is well thought and well discussed and the trial Court has rightly held that the prosecution has succeeded to prove the guilt of the appellants-accused beyond reasonable doubt. The conviction in the case in hand is a right ending and sentence as imposed is proper. As such, the impugned judgment and order passed by the trial Court is liable to be upheld and the Appeal having no force is liable to be dismissed.

77. No good ground to interfere in the well reasoned judgment of the trial court is made out. Thus, there is no merit in the present criminal appeal. Consequently, the judgment and sentence dated 03.07.2013 passed by Additional District and Sessions Judge, Court No. 3, Fatehpur in Sessions Trial No. 38 of 2009, under Sections 302/34 IPC, Police Station Kishunpur, District Fatehpur, qua

appellants-convicts Dinesh Chandra Shukla, Anil Kumar Shukla, Sunil Kumar Shukla and Akhilesh Chandra Shukla, under Section 302 IPC, is hereby '**Affirmed**', while altering the same from Section 302 IPC to Section 302 read with Section 34 IPC.

78. The appellants are on bail. Their bail bonds and sureties shall stand cancelled and they are directed to be taken back to the custody forthwith to serve the remaining part of the sentence imposed upon them by the trial Court.

79. The record of the 'Trial Court' be sent back immediately with a copy of this judgment for necessary information and compliance.

80. The present appeal fails and is hereby **Dismissed**.

81. Pending applications, if any, stand disposed of accordingly.

Date: 17.07.2026

Monika

(Dr. Ajay Kumar-II,J.) (Salil Kumar Rai,J.)