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**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
HRISHIKESH ROY; J., MANOJ MISRA; J.**

September 21, 2023

CRIMINAL APPEAL NO. 688 OF 2011
SUNIL *versus* STATE OF NCT OF DELHI

CRIMINAL APPEAL NO. 689 OF 2011
RAVINDER *versus* STATE OF NCT OF DELHI

CRIMINAL APPEAL NO. 785 OF 2011
SHRI KRISHAN *versus* STATE OF NCT OF DELHI

Code of Criminal Procedure, 1973; Section 313 - To enable an accused to explain the circumstances appearing in the evidence against him, all the incriminating circumstances appearing against him in the evidence must be put to him. But where there has been a failure in putting those circumstances to the accused, the same would not *ipso facto* vitiate the trial unless it is shown that its non-compliance has prejudiced the accused. Where there is a delay in raising the plea, or the plea is raised for the first time in the Apex Court, it could be assumed that no prejudice had been felt by the accused. (Para 44)

Indian Penal Code, 1860; Section 302/34 or 307/34 - To fasten liability with the aid of Section 34 of the I.P.C. what must necessarily be proved is a common intention to commit the crime actually committed and each accused person can be convicted of that crime, only if it is in furtherance of common intention of all. Common intention pre-supposes a prior concert, though pre-concert in the sense of a distinct previous plan is not necessary as common intention to bring about a particular result may develop on the spot. The question whether there was any common intention or not depends upon the inference to be drawn from the proven facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted. (Para 29)

For Appellant(s) Mr. Sudarshan Rajan, AOR Mr. Mahesh Kumar, Adv. Mr. Ramesh Rawat, Adv. Mr. Rohit Bhardwaj, Adv. Mr. Hitain Bajaj, Adv. Mr. Ashutosh Gupta, Adv. Mr. Vijay Kumar Sharma, Adv. Mr. Nand Ram, Adv. Mr. Md Qamar Ali, Adv. Mr. Rajeev Khurana, Adv.

For Respondent(s) Mr. Shreekant Neelappa Terdal, AOR

J U D G M E N T

MANOJ MISRA, J.

1. These three appeals are against the judgment and order of the High Court of Delhi (in short "the High Court") dated 28.07.2009 passed in Criminal Appeal Nos. 962 of 2004; 977 of 2004; 981 of 2004; 14 of 2005; and 61 of 2005, by which Criminal Appeal Nos. 962 of 2004; 977 of 2004; 981 of 2004; and 61 of 2005, preferred by Sunil (appellant in Criminal Appeal No.688 of 2011), Shri Krishna (appellant in Criminal Appeal No.785 of 2011), Ravinder (appellant in Criminal Appeal No.689 of 2011) and Babu Ram @ Fauji (co-accused), respectively, were dismissed whereas Criminal Appeal No.14 of 2005 of co-accused Vijay was allowed. The net result of the impugned judgment and order is that the order of the trial court (i.e., Court of Additional Sessions Judge, Delhi), dated 08.11.2004, in Sessions Trial No.42 of 1999, arising out of FIR No.561 of 1998, P.S. Jahangir Puri,

convicting and sentencing Babu Ram @ Fauji, Sunil, Shri Krishan and Ravinder under Sections 302/307/34 of the Indian Penal Code (in short, "the I.P.C.") has been affirmed whereas conviction of co-accused Vijay has been set aside. It be noted that Babu Ram @ Fauji was also sentenced under Section 27 of the Arms Act, which has also been affirmed by the High Court. The sentence awarded to the appellants, namely, Sunil, Shri Krishan and Ravinder, which is impugned in these appeals, is as under:

- (i) Imprisonment for life with fine of Rs. 2000/-, coupled with a default sentence of six months R.I., under Section 302/34 I.P.C.; and
- (ii) Five years R.I. with fine of Rs. 1000/-, coupled with a default sentence of three months, under Section 307/34 I.P.C.

Introductory Facts

2. This is a case where, on account of indiscriminate firing by Babu Ram @ Fauji (nonappellant) from his licensed single barrel gun, two persons, namely, Anil Kumar and Vijay, suffered gunshot injuries and died; and 26 others received pellet injuries, some of them being grievous in nature.

3. Babu Ram, who fired the gun shots from his licensed gun, handed over his gun to the police along with 16 used and 4 live cartridges while setting up a plea of self-defence. The appellants before us and Vijay (who has been acquitted by the High Court) were roped in with the aid of Section 34 of the I.P.C. as persons who exhorted Babu Ram to fire gunshots.

4. According to the prosecution case, on 11.11.1998, there was tension in the locality as boys from the accused side had teased daughter of Lala Satpal. Giving vent to that tension, at about 3.00 pm, an altercation took place between Satpal and Shri Krishan whose son Sunil was present. Anil Kumar (one of the two deceased) i.e., brother of Mangat Ram (PW-2) took side of Satpal. Babu Ram (non-appellant) and his son Ravinder joined the altercation taking side of Shri Krishan. Thereafter, Shri Krishan, his son Sunil, Babu Ram and Babu Ram's son Ravinder left the place while extending threats that they would teach Satpal and his supporters a lesson. Soon thereafter, Babu Ram, Shri Krishan, Ravinder and Sunil appeared on the roof of PW-2's house and from there, on the instigation of Shri Krishan, Sunil and Ravinder, Babu Ram fired shots at the supporters of Satpal resulting in death of two persons and injuries to as many as 26 persons.

5. As, according to the prosecution, genesis of the incident was a dispute between two families on account of young male members of one family (i.e., of Sri Krishan) teasing female members of the other (i.e., family of Satpal), the relationship of accused persons *inter se* assumes importance, which is as below:

- (i) Shri Krishan is the husband of Babu Ram's sister;
- (ii) Sunil is son of Shri Krishan;
- (iii) Ravinder is son of Babu Ram; and
- (iv) Vijay (already acquitted) is a distant relative of Shri Krishan.

6. To prove its case, the prosecution examined 56 witnesses. On the other hand, the appellants including Babu Ram examined 15 defence witnesses. As Babu Ram took the plea of self-defence, the trial court as well as the High Court examined his defence plea in detail. The defence plea taken by Babu Ram was that a mob had surrounded his house and threatened to torch it. Therefore, to disburse the mob, shots were fired. This defence was carefully examined by the trial court as well as the High Court with reference to the

site plan and the evidence led. After examining the same, it was found that persons who died including those who received injuries were on Street No. 300 whereas the house of Babu Ram had no opening on Street No. 300. Rather, its opening was on Street No. 400. The High Court noticed that even the back wall of the house of Babu Ram did not abut Street No. 300 where the incident occurred. Not only that, the evidence brought on record established that gunshots were fired from the roof-top of Mangat Ram's house (i.e. House No.354) upon persons who were standing or moving on Street No.300. In this scenario, the defence plea was found unacceptable and was therefore discarded by the trial court as well the High Court. Detailed reasons in that regard can be found in paragraphs 45 to 57 of High Court's judgment, extracted below:

"45. In our opinion there is hardly much scope for raising a dispute pertaining to the defence of Babu Ram of having acted in self-defence. The defence is a sham.

46. The site plan, Ex.PW-56/A, prepared by Inspector Sajan Singh and the site plan to scale Ex.PVJ-7/A prepared by Tirath Raj Singh PW-7, to which we have made a detailed reference in para 11 above, show that deceased Vijay and Anil were shot dead at street No.300. Mangat Ram PW-2 also was shot at in street No.300. PW-8, PW-9, PW-13, PW-14, PW-15 and PW27 have categorically stated that they received the gunshot injuries when they were in street No.300. These witnesses may be related to the two young boys who were shot dead as also to Mangat Ram, the complainant, but said fact alone would not render suspect their testimonies. The said six witnesses are all residents of block-D and have their houses on gali No.300 and thus their presence at the spot is natural. That all of them received gunshot wounds itself establishes their presence at the spot. A related witness is not an interested witness on account of being the relation of the complainant. An interested witness is one who has a motive to secure the false conviction of the accused and to achieve the same deposes falsely. As held in the decision reported as State of Rajasthan v. Smt Kalki & Anr (1981) 2 SCC 752:-

"As mentioned above, the High Court has declined to rely on the evidence of P.W.I on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased", and (2) there were discrepancies in her evidence. With respect, in our opinion, both the grounds are invalid. For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True, it is she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested'. In the instant case P.W. 1 had no interest in protecting the real culprit, and falsely implicating the respondents."

47. Besides, the other prosecution witnesses namely PW-17, PW-23, PW-29, PW-30, PW-33, PW-34, PW35, PW-36, PW-37, PW-38, PW-39, PW-40, PW-41. PW-42, PW-43, PW-44 and PW-46 are not related to the deceased or Mangat Ram. Said witnesses have deposed that they received gunshot wounds on 11.11.1998 at around 3/3:30 PM. Out of said 17 witnesses, PW-23, PW-29, PW-33, PW-37, PW-38, PW-39, PW-40, PW-41, PW-42, PW-43, PW-44 and PW-46 have categorically deposed that they were present at Gali No.300 when they received the gunshot wounds. The other witnesses have not stated as to where they were standing when they received the gunshot wounds. PW-23, PW-29, PW-33, PW-37, PW-38, PW-39, PW-40, PW-41, PW-42, PW-43, PW-44 and PW-46 are not related to each other or to the deceased or to any other witness of the prosecution, They would have no motive to falsely depose. The testimony of said witnesses establishes that the firing was directed towards people who were on street No.300. The house of Babu Ram is abutting street No.400, which as noted in para 11 above, runs parallel to street No.300 and the two streets are separated by a row of houses constructed back to back. In no way can an unruly crowd which has assembled on street No.300 set on fire any house which is

on street No.400. Further, the falsity in the testimony of the defence witnesses who claim that Babu Ram, acting in defence of his house and himself and his family members, fired from the roof of his house is apparent from the fact that standing on the roof of house No.366 which is the house of Babu Ram, it is just not possible to hit anybody standing on street No.300. A little bit of geometry would show the same. Standing on any point at the roof of the house of Babu Ram, the straight line connecting the said spot from any portion of his roof to any spot on street No.300 would pass through the roof and the walls of house No. D-355, D-356 and D-357 abutting street No.300 on its northern boundary.

48. Besides, there is no evidence of any kerosene oil or petrol being detected outside the house of Babu Ram. This also falsifies the defence version that the riotous mob was threatening to burn down the house of Babu Ram.

49. No doubt, FIR Ex.PW-19/D-3 has indeed been registered at 9:10 PM which evidences rioting in DBlock, Jahangir Puri, but therefrom it does not stand proved that the defence version is correct. It is also true that photographs of the house of Babu Ram show that the door of his house has been broken and brick bats have been thrown towards his house.

50. What has happened is evident. After Babu Ram fired indiscriminately and shot dead two persons on the street and injured 26 more on the street i.e. street No.300, it was apparent that the crowd retaliated. The site plan Ex.PW-7/A shows that the houses on the streets of D-Block Jahangir Puri have a front of 10' and a depth of 23'.10". Jahangir Puri is a resettlement colony where slum dwellers have been relocated. Tiny plots ad measuring 10' x 23'.10" have been allotted to the rehabilitated slum dwellers by the government. The population density in the colony is extremely heavy. Huge crowds can gather in densely populated areas within seconds. It is apparent that the angry crowd sought vengeance against Babu Ram after Babu Ram had created mayhem in the area. That 16 rounds were fired by Babu Ram is not disputed by him. By no stretch of imagination can firing of 16 rounds be belittled. If a man fires 16 rounds on a crowd causing death of 2 and injuring 26 others, the crowd is bound to retaliate.

51. From the evidence of the witnesses of the prosecution it is apparent that some quarrel regarding eve teasing had taken place on street No.300 involving the families of Satpal and accused Shri Kishan who is the brother-in-law of Babu Ram. Even the defence witnesses have spoken of an 'eveteasing incident. The difference is, as per the defence witnesses the victim of the eve teasing incident was Seema, the daughter of Shri Kishan and as per the prosecution witnesses the aggressors were the family members of Shri Kishan. There is commonality in the testimony of both sets of witnesses that Babu Ram left street No.300 taking along with him his sister Sushila and Seema. The difference in the two versions is regarding the presence of the co-accused. As per the witnesses of the prosecution, some of them have spoken of all co-accused being present at street No.300, with some excluding the presence of coaccused Vijay. It is thus apparent that whatever be the cause of the spat on the public street, Babu Ram retrieved himself safely from the street and reached his house.

52. We have already discounted the defence version, in view of evidence on record, of the crowd following Babu Ram and surrounding his house. We have already held that the evidence establishes indiscriminate firing by Babu Ram on the persons in street No.300 and the fact that his house abuts street No.400 evidences that the firing was not to scare the crowd which had surrounded the house of Babu Ram. We have already held that for anyone to be standing on street No.300 it is just not possible to set on fire any house on street No.400. We have already held that by standing on any spot on the roof of Babu Ram's house it was just not possible to shoot any person on street No.300.

53. **The inevitable conclusion is, that as claimed by the witnesses of the prosecution, Babu Ram jumped from the roof of his house on to the roof of House No.D-354 of Mangat Ram and standing at the roof of Mangat Ram's house at the spot marked '4' on the site plan Ex.PW-7/A, indiscriminately fired 16 shots, all directed downwards on the persons in**

street No.300, with specific targets being Mangat Ram and his family members against whom Babu Ram had a grievance of being the sympathizers of Lala Satpal.

54. Besides, the right of self-defence is a self-limiting right and authorizes the person acting in self-defence to use only such force which is reasonable and commensurate with the danger to body or to property. No doubt, defence of a dwelling house stands on a different footing and law has always looked with special indulgence on a man who is defending his dwelling against those who try to unlawfully evict him, for: the house of everyone is to him as his castle and fortress.

55. The indiscriminate firing by Babu Ram cannot be justified under any circumstances.

56. The testimony of the witnesses of the prosecution and the defence, though with a difference qua the origin of a spat on the public street, establishes a public spat on a public street involving the families of Sri Krishan and Lala Satpal. The evidence, as held above, establishes that Babu Ram fired from the roof of the house of Mangat Ram and targeted people on street No.300 where the spat between the family members of Shri Krishan and Lala Satpal took place. It is apparent that Babu Ram was led into firing because he learnt of the quarrel going on in street No.300. It is obvious that Babu Ram had come to aid of his sister and his brother-in-law. It is obvious that Babu Ram has acted with vengeance and not to protect himself or his house. It is not the case of Babu Ram that his sister's house or the family members of his sister who were on street No.300 were in danger and he did the firing to protect them.

57. Looked from any angle whatsoever, Babu Ram cannot escape the consequence of his acts.”

7. As far as co-accused Vijay is concerned, the High Court allowed his appeal by giving him the benefit of doubt as only one witness had alleged about his participation.

8. In respect of the appellants Sunil, Shri Krishan and Ravinder, the High Court observed that Mangat Ram (PW-2), Ashok Kumar (PW-8), Kashmere Lal (PW9), Darshana (PW-13), Raj Kumar (PW-14) and Sushil Kumar (PW-15), who were all injured in the firing, have categorically deposed that those accused were present with Babu Ram at the time of altercation and they all left simultaneously with Babu Ram and were noticed at the roof top exhorting Babu Ram to fire. The High Court observed that though there had been minor variations in the testimony of witnesses as to which accused did what, but such minor variations were natural as memory fades with passage of time and it is difficult for anyone to remember each and every minute aspect of the incident. Consequently, by relying on their testimony, all appeals were dismissed.

9. We have heard Sri Sudarshan Rajan, learned counsel for the appellants and Shri Jayant K. Sud, learned Additional Solicitor General, for the State (NCT of Delhi).

Submissions on behalf of appellants

10. The learned counsel for the appellants submitted that it is a case where the principal accused, namely, Babu Ram, had admitted that he opened fire at the mob from his licensed weapon. Once such is the position, the court was required to carefully consider whether the appellants, who were part of the family, were implicated due to general animosity, by assigning role of exhortation to them. Further, as per prosecution case, gunshots were fired from the roof-top at people who were on the street. It would thus be difficult for the witnesses present on the street to gauge as to who was exhorting and who was not, particularly, when there were more than three persons at the roof-top. Moreover, it is well settled that mere presence with the assailant is not enough to assume that all of them share common intention with the principal accused and that the criminal act has been done in furtherance of the common intention of all. Otherwise also, the prosecution evidence is not clear whether the gunshots fired at the two deceased i.e., Anil and Vijay were in furtherance of the common intention of all the accused. Therefore, even if it is

assumed that at some stage the appellants had exhorted Babu Ram to fire shots, in absence of clear and cogent evidence that Babu Ram was instigated/exhorted to fire shots at the two deceased, the appellants cannot be convicted for the offence punishable under Section 302 with the aid of Section 34 of the IPC. Thus, in a worst-case scenario, the appellants can only be convicted under Section 307/34 of the I.P.C. It was argued that since each of the three appellants have already served more than five years of sentence, which they were awarded for offence punishable under Section 307/34 of the I.P.C., their appeals be allowed and their sentence be reduced to the period of sentence already undergone for the offence punishable under Section 307/34 of the I.P.C.

11. In addition to above, the learned counsel for the appellants submitted that the trial of the appellants suffers from a fundamental defect inasmuch as the incriminating circumstance about the appellants exhorting/instigating Babu Ram to fire shots at the two deceased/public/injured, was never put to the appellants while recording their statements under Section 313 of the Code of Criminal Procedure, 1973 (in short, “the Cr.P.C.”). Hence, the incriminating circumstance appearing in the evidence qua exhortation/instigation of the main accused by the appellants would have to be eschewed from consideration.

12. The learned counsel for the appellants cited number of decisions on two broad propositions, namely,

(A) As to when, based on the role of exhortation, conviction can be sustained with the aid of Section 34 of the I.P.C. The decisions cited were:

- (i) ***Balu Alias Bala Subramaniam & Another v. State (UT of Pondicherry)***¹;
- (ii) ***Kulwant Singh alias Kulbansh Singh v. State of Bihar***²,
- (iii) ***Jainul Haque v. State of Bihar***³;
- (iv) ***Hardev Singh & Another v. The State of Punjab***⁴;
- (v) ***Mewa Ram & Another v. State of Rajasthan***⁵;
- (vi) ***Mohan Singh & Another v. State of M.P.***⁶;
- (vii) ***Zahoor & Others v. State of Uttar Pradesh***⁷;
- (viii) ***Bishnupada Sarkar & Another v. State of West Bengal***⁸.

(B) Incriminating circumstances not put to the accused while recording his statement under Section 313 of the Cr.P.C. must be eschewed from consideration. The decisions cited were:

- (i) ***Hate Singh v. State of Madhya Bharat***⁹;

¹ (2016) 15 SCC 471

² (2007) 15 SCC 670

³ (1974) 3 SCC 543

⁴ (1975) 3 SCC 731

⁵ (2017) 11 SCC 272

⁶ (1999) 2 SCC 428

⁷ (2011) 15 SCC 218

⁸ (2012) 11 SCC 597

⁹ AIR 1953 SC 468

- (ii) ***Sujeet Biswas v. State of Assam***¹⁰;
- (iii) ***Sharad Birdichand Sharda v. State of Maharashtra***¹¹;
- (iv) ***Samsul Haque v. State of Assam***¹²; and
- (v) ***Maheshwar Tigga v. State of Rajasthan***¹³.

Submissions on behalf of the State

13. On behalf of the State (NCT of Delhi) it was submitted that, as per the evidence, after the altercation, Babu Ram left the place with the appellants while extending threats that they shall teach a lesson to the other side and their supporters. Soon thereafter, they all appeared at the roof top and the appellants were noticed exhorting Babu Ram to attack the other side and their supporters. Gunshots were fired in furtherance thereof, causing death of two persons and injuries to 26 others. In such circumstances, all the accused exhibited common intention to cause such bodily injury to persons which they knew it is likely to cause death of the person to whom it is caused. Further, multiple gunshots were fired. Therefore, it is a clear case that the appellants who exhorted the assailant had shared common intention with him.

14. Regarding the incriminating circumstance of exhortation being not put to the accused appellants while recording their statements under Section 313 CrPC, it was submitted that even if it was not put to them, they suffered no prejudice, which is clear from the following circumstances: (a) the appellants were throughout represented by their counsel; (b) the statement of witnesses was recorded in presence of the appellants/their counsel; (c) their counsel specifically cross-examined the witnesses in respect of their statement qua exhortation by the appellants; and (d) the FIR of the incident, which disclosed their role as that of an instigator, was put to them. It could, therefore, be taken that they were fully aware of the incriminating circumstances appearing against them in the prosecution evidence. Yet, they took no plea before the trial court or the High Court of any kind of prejudice caused to them. Thus, this plea, raised for the first time before this Court, ought not be entertained.

15. In support of his submissions, the learned counsel for the State cited decisions on two broad propositions, namely,

(a) Conviction with the aid of Section 34 of the I.P.C can be recorded for the role of exhortation. The decisions cited were:

- (i) ***Gulab v. State of Uttar Pradesh***¹⁴¹⁵; and
- (ii) ***Sandeep v. State of Haryana***¹⁵

(b) Unless prejudice is shown to have been caused to the accused, failure to put any incriminating circumstance, by itself, would not vitiate the trial. The decisions cited were:

- (i) ***Nar Singh v. State of Haryana***¹⁶;

¹⁰ (2013) 12 SCC 406

¹¹ (1984) 4 SCC 116

¹² (2019) 18 SCC 161

¹³ (2020) 10 SCC 108

¹⁴ (2022) 12 SCC 677

¹⁵ SCC Online SC 642

¹⁶ (2015) 1 SCC 496

- (ii) ***Alister Anthony Pareira v. State of Maharashtra***¹⁷; and
- (iii) ***Satyavir Singh Rath, ACP & Others v. State***¹⁸.

Discussion and Analysis

16. We have considered the rival submissions and have perused the record carefully. Before we deal with the submissions, it would be useful to recapitulate facts which have been found proved, and regarding which there is no serious dispute, namely,

- (a) The incident had its genesis in an altercation between two families i.e, Sri Krishan's family on one side and Satpal's family on the other. The reason for the altercation was one family accusing the other of their girls being teased by other family's boys.
- (b) All gunshots which caused injuries to the two deceased as well as to twenty-six others, were fired by Babu Ram (nonappellant) who has been convicted and sentenced under Section 302 of the I.P.C.
- (c) The gun which Babu Ram used to fire shots was licensed to him.
- (d) Babu Ram was present at the time when altercation between the two sides took place.
- (e) Babu Ram is brother-in-law of Shri Krishan.
- (f) Babu Ram's house opens on Street No. 400 whereas Satpal's house opens on Street No.300. Though exact location of Shri Krishan's house is not disclosed in the site plan prepared in connection with the case, however, from his address, which is disclosed as D-291, Jahangir Puri, Delhi, it appears that his house is near Satpal's house (which is D-294), and on same Street No.300.

17. The place where the incident took place is a congested colony. The location of the two Streets i.e., Nos. 300 and 400 and the houses in between them has been described in detail in paragraph 11 of the High Court's judgment, the correctness of which has not been seriously challenged. Thus, to have a clear picture of the spot, we deem it appropriate to extract paragraph 11 of the impugned judgment below:

"11. As per the two site plans, street No.400 and street No.300 in D Block Jahangir Puri, run parallel to each other along the west-eastern directions. Street No.400 is towards the north and street No.300 is towards the south. The width of street No.400 is 16".6". The width of street No.300 is 15".10". The distance between the two streets is 47".8". This distance between the two streets is not an empty space but consists of a row of houses having a depth of 23".10". To make it clear, one row of houses being House No.361 to 368 have a depth of 23".10" and these houses abut street No.400. Back to back to these houses are a row of houses bearing No.353 to 359 with each house having a depth of 23".10". These houses open towards street No.300. Opposite to the row of houses bearing No.353 to 359 on street No.300 are house Nos.298 to 293. It is apparent that the doors of house No.353 to 359 open in the southern direction on to street No.300 and the doors of house Nos.298 to 293 open towards the northern direction on to street No.300. On the site plan, the spots where Anil and Vijay were shot at have been marked 1 and 2. They are at a distance of 3".6" and 3" respectively from the boundary wall of house No.295 and house No.294. Spot where Mangat Ram was shot at is shown at point No.3 which is also at a distance of about 3" from the boundary wall of house No.297. The spot wherefrom Babu Ram is stated to have fired is shown as spot No.4 and is on the roof of house No.354 belonging to Mangat Ram. The site plan shows that house No.366 of Babu Ram is back to back with house No.355 of Ramesh Chand

¹⁷ (2012) 2 SCC 648

¹⁸ (2011) 6 SCC 1

and house No.354 of Mangat Ram is adjacent to the house of Ramesh Chand towards the west of house of Ramesh Chand.

... ”.

18. From the observations of the High Court extracted above, what transpires is that in between Street Nos.300 and 400 there are two rows of houses, back to back. One row of houses have their opening towards north on Street No.400, whereas the other have their opening towards south on Street No.300. The third row of houses, south of Street No. 300, have their opening towards north on Street No.300. Satpal's house is in that row, whereas Babu Ram's house is towards north, opening on Street No.400.

19. As per the evidence, altercation preceding the incident of firing took place on Street No.300. After the altercation, Babu Ram left that place, went to his house on Street No.400, fetched his gun and fired shots at the public present on Street No.300 from roof of one of the row houses, which, according to the prosecution, is house of Mangat Ram. A close scrutiny of the site plan would suggest that the place where gunshot injuries were suffered could not have been targeted if gunshots had been fired from the roof top of Babu Ram's house. Therefore, both the courts below disbelieved Babu Ram's plea that he fired gunshots in self-defence to disburse the crowd which had surrounded his house.

Role of the Appellants

20. Now, we shall examine the evidence as regards the role of the appellants. Before we do that, it would be pertinent to note that the two deceased, namely, Anil and Vijay, are not related to Satpal, the person with whom Shri Krishan and his family (i.e., the accused side) had an altercation. Therefore, to show that all the accused had a common intention to cause bodily harm to persons who suffered injuries including the ones who succumbed to the injuries, prosecution has used a word *Himayati* (i.e., supporter) of Satpal to describe the victims. And to bring home the charge against the appellants, the prosecution case is that all the accused persons exhibited common intention as they simultaneously left the place where altercation was taking place to go to Babu Ram's residence to pick up the gun. Not only that, they appeared together at the roof-top when shots were fired on Satpal's supporters.

Some of the testimonies in respect of appellants' role

21. PW-2 (Mangat Ram), brother of deceased Anil, stated that Shri Krishan, his son Sunil, Babu Ram and his son Ravinder after altercation left the spot threatening Lala Satpal and his supporters that they would be taught a lesson; soon thereafter, all of them came to the roof of Babu Ram's house and then jumped on to the roof of PW-2's house, which shares back wall with Babu Ram's house; and from there, Babu Ram opened fire while appellants were exhorting him not to spare Satpal or anyone who had supported him.

22. PW-9, Kashmere Lal, gives a more lucid account of the incident. He states that on 11.11.1998, at about 3 pm, while he was in his house, altercation started between Satpal and Shri Krishan over some incident relating to teasing of Satpal's daughter. In the meantime, Sunil came and so did Babu Ram and his son. They started shouting that they would not spare the people of the *Gali* (street) as they have harassed Shri Krishan. Thereafter, all four accused left extending threats. Soon thereafter, they appeared at the roof of Babu Ram's house. Then Babu Ram started firing. The first shot hit Anil. Second shot hit right leg of Mangat Ram. Thereafter, Babu Ram fired indiscriminately, and many people received pellet injuries. When Babu Ram was firing indiscriminately, the other

accused, namely, Sunil, Shri Krishan and son of Babu Ram, were instigating Babu Ram not to spare any of Satpal's *Himayati* (supporter).

23. PW-8 Ashok Kumar, father of deceased Vijay, tried to be specific about the sequence of events. He stated that accused Fauji @ Babu Ram first fired a shot in the air from his gun; then accused shouted that they would not spare anyone; thereafter, Shri Krishan and Sunil told *Fauji* to fire at persons whom they point at; Ravinder and Vijay also shouted that no one should be spared; simultaneously other accused also told *Fauji* to fire at persons whom they point at, so that no *madadgar* (i.e., supporter) of Satpal is spared; then *Fauji* fired, a bullet hit Anil @ Kala, the deceased, as also Mangat Ram; thereafter, accused Sunil and Ravinder pointed towards PW-8's son Vijay and exhorted *Fauji* to fire at him; in consequence, *Fauji* fired at PW-8's son, the shot hit him and he died; whereafter, *Fauji* started firing indiscriminately resulting in injuries to several persons.

24. During cross-examination, Ashok Kumar (PW8) stated that,-- he had witnessed the altercation; after the accused left, he went behind them; he, however, did not notice if any of his relatives were near the place of altercation; the accused went towards Babu Ram's house whereas he went to his own house; after reaching his house, he put on his shoes, then, after 4/5 minutes, he heard gun shots; he immediately came out of his house to notice people running helter-skelter; the firing continued for about 20/25 minutes; he did not sustain any injury and no pellet came towards his house; he had no enmity with the accused prior to the incident, rather they had been attending each other's functions; accused had cordial relations with the deceased Vijay; he had never appeared as a witness against the accused in any other case nor made any complaint against them; he and his family never favoured Satpal; his elder son, besides the deceased Vijay, was in the house at that time.

25. At this stage, we may observe that Mangat Ram (PW-2) (i.e. brother of the deceased Anil) too, was not aware of any kind of animosity between any of the accused and Anil. There is no clarity in PW-2's statement about Anil taking side of Satpal while he was in an altercation with Shri Krishan. In fact, during cross-examination, PW-2 stated that,-- the altercation took place at a distance of about 10-12 paces from the place where he was lying on his cot; at that time, Sushil (his other brother) and Anil (the deceased) were inside the house; at the time of altercation between Lala and Shri Krishan, Ravinder, Vijay and Babu were not there; Babu Ram arrived at the place of altercation at about 2.45 pm and stayed for about 10 minutes; he cannot say as to how many persons came there; he cannot tell as to how many persons remained with Satpal, when Babu Ram left. PW-2 specifically added that neither he nor his brother Anil were supporter of anyone. He, however, clarified that he saw accused standing on the roof, five minutes after they left the place of altercation. He also added that from the place where he was lying on the cot, Babu Ram could not be seen. Further, he could not tell as to how many minutes the firing continued as he, and his brother, sustained injuries and were removed to the Hospital. In respect of the role played by the appellants, PW-2 stated that his brother Anil was coming from the other side, when Babu Ram was instigated to fire at him. PW-2 clarified that neither he nor Anil had any previous enmity with Babu Ram or any other accused person and that neither he nor his brother ever supported Lala Satpal.

26. A close examination of the statement of these witnesses would reveal that, though they disclose the presence of the accused-appellants with Babu Ram at the roof-top as also that they were instigating Babu Ram not to spare the supporters of Satpal, they are not specific and consistent about the two deceased (i.e., Anil and Vijay) being targeted by Babu Ram at the instigation of the present appellants. Absence of cogent evidence that

Babu Ram was instigated/exhorted to fire shots at the two deceased assumes importance as, from the testimony of these witnesses, neither Vijay nor Anil was a supporter of the rival faction i.e., Satpal with whom the accused party had animosity. In such circumstances, the question that would arise is whether for the murder of the two deceased, namely, Vijay and Anil, could it be said that the appellants shared a common intention with the assailant Babu Ram so as to warrant their conviction under Section 302 I.P.C. with the aid of section 34 I.P.C.

Whether based on the evidence led, the appellants could be convicted for the offence of murder of Anil and Vijay with the aid of Section 34 I.P.C. or only for the offence punishable under Section 307 I.P.C. read with 34 I.P.C.

27. Before we dwell on the aforesaid issue, it would be useful to examine the law as to when conviction with the aid of Section 34 of the I.P.C. could be made. In *Pandurang, Tukia and Bhillia v. State of Hyderabad*¹⁹, this Court observed:

“33. Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: Mahbub Shah v. King-Emperor. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: *Barendra Kumar Ghosh v. King- Emperor* and *Mahbub Shah v. King-Emperor*. As their Lordships say in the latter case, “the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

34. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example, when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose.”

(Emphasis supplied)

28. In *Balu alias Bala Subramaniam*¹, this Court held:

“11. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that: (i) there was common intention on the part of several persons to commit a particular crime, and (ii) the crime was actually committed by them in furtherance of that common intention. The essence of liability under Section 34 IPC is simultaneous conscious mind of persons participating in the criminal action to bring about a particular result. Minds regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. **Common intention implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Common intention is an intention to commit the crime actually committed and each**

¹⁹ AIR 1955 SC 216

accused person can be convicted of that crime, only if he has participated in that common intention.”

(Emphasis supplied)

After observing as above, in paragraph 15, it was observed:

“15. Under Section 34 IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation.

The question whether there was any common intention or not depends upon the inference to be drawn from the proven facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.”

(Emphasis Supplied)

29. What is clear from the decisions noticed above is, that to fasten liability with the aid of Section 34 of the I.P.C. what must necessarily be proved is a common intention to commit the crime actually committed and each accused person can be convicted of that crime, only if it is in furtherance of common intention of all. Common intention presupposes a prior concert, though pre-concert in the sense of a distinct previous plan is not necessary as common intention to bring about a particular result may develop on the spot. The question whether there was any common intention or not depends upon the inference to be drawn from the proven facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.

30. In *Mewa Ram & Another*⁵, the accused appellant had exhorted to kill the complainant, but the person killed was someone else. There was no evidence to indicate that the accused-appellant had stated anything about killing the deceased. In that backdrop, this Court while holding that the accused-appellant could not be convicted with the aid of Section 34 of the I.P.C., by placing reliance on earlier decisions of this Court, observed:

“12. What is to be noticed from the aforesaid is that exhortation given by appellant Mohan Lal was to kill complainant Harbans Singh. There is no evidence, apart from the said exhortation which has been produced by the prosecution to show that the appellant Mohan Lal had stated anything about the killing of the deceased Deputy Singh. This is the fundamental mistake committed by the Trial Court and repeated by the High Court in using the said exhortation on the part of Mohan Lal insofar as killing of Deputy Singh is concerned. Under what circumstances, Deputy Singh was shot at by Mewa Lal is not discernible from the record when the dispute was between the two brothers (appellants herein) on the one hand and complainant Harbans Singh on the other. On these facts, it cannot at all be said that there was any common intention of the accused persons to kill Deputy Singh.

13. It is noticed that there is fundamental difference between common intention and joint intention. Section 34 of the I.P.C. talks of common intention which is an intention to commit the crime actually committed and each accused person can be convicted of that crime, only if he has participated in that common intention and to fasten with the same liability as that of the main accused who was perpetrator of the crime.”

31. Reverting to the case at hand, when we examine the facts of this case, we notice that the two deceased were Anil and Vijay. The accused party had no animosity or grudge qua them (i.e., the two deceased). The prosecution evidence is that all the four accused

left together from the place where altercation had occurred and soon all of them were seen at the roof-top of PW-2's house from where Babu Ram opened fire with a view to teach a lesson to those who had supported the rival faction. Neither PW-2 nor PW8, whose brother and son, respectively, had died, stated that the two deceased had supported Satpal (i.e., the rival group). Rather, according to them, the two deceased had no enmity with any of the accused persons. Further, statements of witnesses are not consistent as to establish beyond reasonable doubt that the appellants had exhorted Babu Ram to fire shots at Anil or Vijay i.e., the two deceased. The evidence, which is consistent, is about exhorting Babu Ram not to spare Satpal's supporters. But there is no evidence that the two deceased were Satpal's supporters. In our view, that general exhortation is not sufficient to fasten them with vicarious liability for shots fired by Babu Ram at the two deceased, particularly, when the testimony of witnesses is not consistent whether the two deceased were shot before or after the exhortation made by the appellants. However, what is certain from the evidence is, that the assailant Babu Ram had the gun as well as motive to use it, inasmuch as his relative Shri Krishan was insulted during altercation. Moreover, Babu Ram had taken a vow to teach supporters of the other side a lesson. In that kind of a scenario, even if Babu Ram had not been instigated by any of the other accused, he might have fired from his weapon to stamp his authority and, therefore, killing of the two deceased could be his own individual act for which he alone would be liable. In these circumstances, to clinch a conviction of the appellants for the murder of the two deceased with the aid of Section 34 of the I.P.C., the prosecution was required to lead clear and cogent evidence that the shots fired by Babu Ram at the two deceased were in furtherance of common intention of all. In absence whereof, as is in the case at hand, in our considered view, it would be extremely unsafe to convict the appellants with the aid of Section 34 of the I.P.C. for the offence of murder.

32. Now, the question that falls for our consideration is whether the appellants could escape their liability for the offence punishable under Section 307 with the aid of Section 34 of the I.P.C. In our view, the answer to it would depend on whether the appellants including Babu Ram committed any one or more of the acts specified in Section 300 of the I.P.C.²⁰ in furtherance of common intention of all, had the person(s) injured succumbed to their injuries.

²⁰ "300. Murder.- Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or- Secondly.-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or- Thirdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or- Fourthly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

- (a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.
- (b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.
- (c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

33. The evidence in the instant case is that indiscriminate firing continued for long, some say for 20 to 25 minutes. As many as twenty-six persons on Street No.300 received pellet injuries. Notably, 16 empty cartridges were seized from Babu Ram. Evidence is that the appellants were with the accused Babu Ram, exhorting him not to spare Satpal's supporters, and pointing at targets. Though, evidence might not be specific as to who in particular was targeted at the behest of the appellants but the very fact that indiscriminate firing continued for long, say 20-25 minutes and the appellants were found present and exhorting Babu Ram to fire, in our view, it could be said with certainty that the appellants had knowledge that the act which Babu Ram was exhorted to commit was so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death of a person (See Section 300 (Fourthly) of the I.P.C along with illustration (d) thereto). Therefore, the gunshots fired by Babu Ram at several by-standers/supporters of Satpal, if not all, could be said to be a criminal act done by several persons in furtherance of the common intention of all. *A fortiori*, even though it might not be safe to hold the appellants vicariously liable for the offence of murder of the two deceased persons for the reasons already detailed above, but looking at the nature of the incident, the number of persons injured and the role attributed to the appellants, we are of the considered view that the appellants are liable to be convicted for the offence punishable under Section 307 with the aid of Section 34 of the I.P.C. Thus, in our considered view, the finding of the courts below to that extent does not call for any interference.

Effect of not putting the incriminating circumstance of exhortation to the appellants while recording their statements under Section 313 of the Criminal Procedure Code, 1973.

34. The question that now falls for our consideration is whether, on account of not putting the incriminating circumstance of exhortation to the appellants while recording their statements under Section 313 CrPC, appellants' conviction with the aid of Section 34 of the I.P.C. stood vitiated.

35. A perusal of the record would reflect that all the accused including the appellants were charged by a common charge framing order dated 17.01.2001, which reads as under:

"I, R. K. Sharma, Additional Sessions Judge, Delhi do hereby charge Babu Ram @ Fauji son of Raghuvveer

Dayal; Shri Krishan son of Jwala Prasad, Sunil son of Shri Krishan; Vijay son of Lala Ram and Ravinder son of Babu Ram as under:

That on 11.11.1998 at 3 pm at Gali D-300 near House No. 286, Jahangir Puri, Delhi within the jurisdiction of P.S. Jahangir Puri, Delhi you all in furtherance of your common intention did commit murder of deceased Anil Kumar @ Kala and Vijay by intentionally killing them and thus committed an offence punishable under Section 302/34 I.P.C.

Secondly, on the said date, time and place, you all in furtherance of common intention caused injuries to 26 persons, namely, Smt. Sateshwari, Mangat Ram, Anju, Pradeep, Sunny, Ramdev, Marium, Naim, Zafar, Matluf Ali, Saleem, Zubeda, Raj Kumar, Tarun, Bundu, Darshana, Mohd. Shahid, Vasudev, Priya Sanjay, Chander Kala, Mohini Devi, Anwari, Gulsher, Hamid Mohd. and Shahid Ahmed with such intention and under such circumstances that if by the said injuries the accused appellants had caused the death of said persons, you would have been guilty of murder and thus committed an offence punishable under Section 307/34 I.P.C. and within my cognizance.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual."

And I hereby direct that you all be tried by this court for the said offence.

Signed

ASJ, Delhi

Dated 17.01.2001”

36. As exemplars, some of the questions that were put to the accused appellants to elicit their response, under Section 313 CrPC, to the incriminating circumstances appearing against them in the prosecution evidence, are being extracted below:

“(i) It is in evidence against you that on 11.11.98 a statement was made by one Mangat Ram, collectively contained in ruqqa Ex. PW2/A on which formal FIR was recorded, carbon copy of which is Ex.PW19/E. What have you to say?

(ii) It is further in evidence against you that on 11.11.1998 at about 3 pm at Gali No.D-300 wali, near House No. 286, Jahangir Puri, you along with other co-accused in furtherance of common intention did commit the murder of Anil Kumar @ Kala and Vijay by intentionally killing them. What have you to say?

(iii) It is further in evidence against you that on the said date, time and place, you along with your co-accused in furtherance of common intention caused injuries to 26 persons, namely, Smt. Sateshwari, Mangat Ram, Anju, Pradeep, Sunny, Ramdev, Marium, Naim, Zafar, Mutluf Ali, Salma, Zubeda, Raj Kumar, Tarun, Bundu, Darshana, Mohd. Shahid, Vasudev, Priya Sanjay, Chander Kala, Mohini Devi, Anwar, Gulshan, Hamid Mohd. and Shahid Ahmed with such intention and under such circumstances that if by the said injuries you had caused the death of said person, you would have been guilty of murder and thus committed an offence under Section 307/34 I.P.C. What have you to say?

(iv) It is further in evidence against you that on the said date, time and place, co-accused Babu Ram used a firearm while committing the offences punishable under Section 302/307/34 I.P.C and thus committed an offence u/s 27 of Arms Act. What have you to say?”

Apart from the incriminating circumstances extracted above, various other pieces of evidence such as injury reports, recovery memorandums, autopsy/ medical reports, etc. were put to the accused appellants while recording their statements under Section 313 CrPC.

37. The appellants denied the incriminating circumstances and stated that, - they were not present at the spot; they have been falsely implicated in this case because of being relatives of Sushil and Babu Ram; there was commotion in the locality, therefore they went to the house of their relatives to know the truth; there they were detained by the police and falsely implicated at the instance of the complainant.

38. On perusal of the records pertaining to recording of statement under Section 313 CrPC, we find that the gist of the testimony of various witnesses delineating the exact role played by the appellants was not put to the appellants for the purposes of recording their statement. However, whether this by itself would vitiate their conviction is a question which needs determination.

39. In *Tara Singh v. State*²¹, this Court had the occasion to deal with the object of Section 342 of the Criminal Procedure Code, 1898 which is in *pari materia* Section 313 CrPC. In that context, speaking for the Bench, Vivian Bose, J. observed:

“38. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and

²¹ AIR 1951 SC 441: 1951 SCC Online SC 49

must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned."

(Emphasis supplied)

40. In *Alister Anthony Pareira v. State of Maharashtra*²², summarising the law relating to examination of an accused under Section 313 CrPC, this Court observed:

"61. From the above, the legal position appears to be this: the accused must be apprised of incriminating evidence and materials brought in by the prosecution against him to enable him to explain and respond to such evidence and material. Failure in not drawing the attention of the accused to the incriminating evidence and inculpatory materials brought in by prosecution specifically, distinctly and separately may not by itself render the trial against the accused void and bad in law; firstly, if having regard to all the questions put to him, he was afforded an opportunity to explain what he wanted to say in respect of prosecution case against him and secondly, such omission has not caused prejudice to him resulting in failure of justice. The burden is on the accused to establish that by not apprising him of the incriminating evidence and the inculpatory materials that had come in the prosecution evidence against him, a prejudice has been caused resulting in miscarriage of justice."

(Emphasis supplied)

41. In *Nar Singh*¹⁶, this Court had the occasion to review a series of decisions and summarise the law as to the courses available whenever a plea is raised before an appellate court that there has been a failure in putting certain incriminating circumstances to the accused while recording his statement under Section 313 CrPC. In that context, it was observed:

"30. Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:

30.1 Whenever a plea of non-compliance of Section 313 CrPC is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer.

30.2 In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.

30.3 If the appellate court is of the opinion that noncompliance with the provisions of Section 313 CrPC has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 CrPC and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh.

²² (2012) 2 SCC 648

30.4 The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.”

(Emphasis supplied)

42. In ***Shobhit Chamar & Another v. State of Bihar***²³, this Court, after examining a series of decisions, held that a challenge to the conviction based on non-compliance of Section 313 CrPC first time in the appeal before the Supreme Court cannot be entertained unless the appellants demonstrate that prejudice has been caused to them. The relevant observations, as contained in paragraph 24, are extracted below:

“24. We have perused all these reported decisions relied upon by the learned advocates for the parties and we see no hesitation in concluding that the challenge to the conviction based on non-compliance of Section 313 CrPC first time in this appeal cannot be entertained unless the appellants demonstrate that the prejudice has been caused to them. In the present case as indicated earlier, the prosecution strongly relied upon the ocular evidence of the eyewitnesses and relevant questions with reference to this evidence were put to the appellants. If the evidence of these witnesses is found acceptable, the conviction can be sustained unless it is shown by the appellants that a prejudice has been caused to them. No such prejudice was demonstrated before us and, therefore, we are unable to accept the contention raised on behalf of the appellants.”

(Emphasis supplied)

43. Building on the observations of this Court in ***Shobhit Chamar***²², which have been extracted above, in ***Satyavir Singh Rathi, ACP & Others***¹⁸, it was observed:

“77. ... These observations proceed on the principle that if an objection as to the Section 313 statement is taken at the earliest stage, the court can make good the defect and record an additional statement as that would be in the interest of all but if the matter is allowed to linger on and the objections are taken belatedly it would be a difficult situation for the prosecution as well as the accused.

78. In the case before us, as already indicated, the objection as to the defective 313 statements had not been raised in the trial court. We must assume therefore that no prejudice had been felt by the appellants even assuming that some incriminating circumstances in the prosecution story had been left out. We also accept that most of the fifteen questions that have been put before us by Mr. Sharan, are inferences drawn by the trial court on the evidence. The challenge on this aspect made by the learned counsel for the appellants, is also repelled.”

(Emphasis supplied)

44. From the decisions noticed above, the legal position that emerges, *inter-alia*, is that to enable an accused to explain the circumstances appearing in the evidence against him, all the incriminating circumstances appearing against him in the evidence must be put to him. But where there has been a failure in putting those circumstances to the accused, the same would not *ipso facto* vitiate the trial unless it is shown that its non-compliance has prejudiced the accused. Where there is a delay in raising the plea, or the plea is raised for the first time in this Court, it could be assumed that no prejudice had been felt by the accused.

45. In the instant case, though we could not find that the incriminating circumstance pertaining to appellants exhorting the main accused Babu Ram was specifically put to the appellants, they were aware of the prosecution case against them as, vide question no.(i), they were apprised of the FIR lodged by PW-2 which delineated their role as the ones who

²³ (1998) 3 SCC 455

exhorted the main accused Babu Ram to fire gunshots. Further, vide question no.(iv) it was clarified that gunshots were fired by Babu Ram. And questions (ii) and (iii) indicated that the appellants were being proceeded against as they had participated in the crime by sharing common intention with the main accused. Taking the above into account as also that the appellants were throughout represented by their counsel and had cross-examined the prosecution witnesses, yet they raised no such plea, either before the trial court or the High Court, it can safely be assumed that the appellants had suffered no prejudice on that count. More so, when the case of the appellants was of complete denial i.e., that they were not present at the time of occurrence, which was disbelieved by the trial court as well as the High Court. We are therefore of the considered view that the conviction of the appellants is not vitiated for alleged non-compliance of the provisions of Section 313 CrPC.

Conclusion

46. In view of our discussion above, though we find the conviction of the appellants under Section 302 read with Section 34 of the I.P.C. unsustainable, we uphold the conviction of the appellants under Section 307 read with Section 34 of the I.P.C. and hereby affirm the sentence awarded to the appellants for the offence punishable under Section 307/34 of the I.P.C. Consequently, the appeals are partly allowed. The conviction and sentence of the appellants under Section 302 read with Section 34 of the I.P.C. is set aside and the appellants are acquitted of the said charge. However, their conviction and sentence under Section 307 read with Section 34 of the I.P.C. as awarded by the trial court and affirmed by the High Court is maintained and hereby affirmed. The appellants are reported to be on bail. Their bail bonds are cancelled. They shall surrender forthwith to serve out the remaining sentence, if any, as awarded by the trial court under Section 307/34 of the I.P.C. If the appellants have already served out the sentence awarded to them under Section 307/34 I.P.C., they need not be taken into custody, after verification of the records/custody certificates.

47. With the aforesaid directions, all the three appeals stand disposed of.

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