Dharnidhar vs State Of U.P. & Ors on 8 July, 2010

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Bench: Swatanter Kumar, B.S. Chauhan

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 239 OF 2005

Dharnidhar .....Appellant

Vs.

State of U.P. .....Respondent

WITH

CRIMINAL APPEAL No. 429 OF 2005

Ram Sanehi & Ors .....Appellants

Vs.

State of U.P. .....Respondent

WITH

CRIMINAL APPEAL No. 430 OF 2005

Shiv Dayal .....Appellant

Vs.

State of U.P. .....Respondent

1

JUDGMENT

Swatanter Kumar, J.

The accused Ram Sanehi, Baladin, Ramadin, Shiv Dayal and Dharnidhar were tried for the murder of two persons differently, namely, Bahadur Singh and his father Pyare Lal in Sessions Trial No. 44 of 1989. The ld. Sessions Judge, Jhansi, vide its judgment dated 7th August, 1992 after finding all the accused guilty of different offences, including Section 302 of the Indian Penal Code (hereinafter referred to as "IPC") punished them. The order of punishment reads as under:

> "Accused Ram Sanehi, Ramadin, Baladin and Shiv Dayal are hereby sentenced to suffer life imprisonment under section 302/34, I.P.C. for committing murder of Bahadur Singh. They and accused Dharnidhar are also sentenced to life imprisonment under section 302/149, I.P.C. for committing murder of Pyare Lal. Accused Ram Sanehi, Ramadin, Baladin and Shiv Dayal are mentioned to the year's R.I. u/s 148 I.P.C. and accused Dharnidhar is sentenced to six month's R.I. u/s 147, I.P.C. All these sentences shall run concurrently.
>
> All the accused preferred appeals against the judgment of conviction and order of sentence before the High Court which also came to be dismissed vide judgment dated March 22, 2004, wherein the High Court declined to interfere either with the findings of conviction or order of sentence which consequently stood confirmed. Accused Dharnidhar filed Criminal Appeal No. 239 of 2005 against the judgment of the High Court, accused Ram Sanehi along with other accused filed an appeal being Criminal Appeal No. 429 of 2005 and Shiv Dayal preferred a separate appeal being Criminal Appeal No. 430 of 2005 against the judgment of the High Court. Thus, by this judgment we shall dispose of all the above three appeals as they are directed against the common judgment of the High Court and are based upon common evidence. The challenge to the judgment of the High Court and the Ld. Sessions Judge, inter alia, is primarily on the following grounds:
>
> i) The alleged eye witnesses PW1 and PW3 are family members of the deceased and as such are interested witnesses. The conviction of the appellants is based, primarily, on the statements of these witnesses, which as such, is liable to be set aside.
>
> ii) The prosecution has failed to prove any motive for the alleged commission of the crime. The appellants had no motive to commit the said crime and, therefore, the story put forward by the prosecution stands falsified.

iii) The evidence, including the evidence of Dr. P.N. Dwivedi (PW6) creates serious doubts in the case advanced by the prosecution. Particularly, when the Court had disbelieved Devi Singh, PW2, who is alleged to have been a witness to both the incidents, the Court ought to have come to the conclusion that the prosecution has failed to prove its case beyond any reasonable doubt. The conduct and role of the accused as attributed by the prosecution is not only improbable, but is impossible to be believed. It is contended that why would the accused leave the brother of deceased Bahadur Singh, who was standing there at the time of his murder and go all the way to kill his father Pyare Lal. Seeing this, in the light of the documentary and ocular evidence, benefit of doubt ought to have been given to the appellants.

iv) The learned trial Court as well the High Court has fallen in error of law in convicting accused Ram Sanehi, Baladin, Ramadin and Shiv Dayal with the aid of Section 34 and accused Dharnidhar with the aid of Section 149 of the IPC respectively. In the facts and circumstances of the case, the basic ingredients for application of these provisions had not been satisfied by the prosecution. Thus, the conviction is vitiated in law.

On the contrary, learned counsel appearing for the respondent has vehemently argued that there was sufficient documentary and expert evidence on record. The version of the eye witnesses cannot be doubted, their presence on the site was natural and they had no reason to falsely implicate all or any of the accused in the murder of their brother and father. It is contended that the version of eye witnesses is fully supported by expert evidence and the statement of the Investigating Officer. Once the prosecution is able to fully corroborate the incident as recorded in the FIR, the judgment under appeal cannot be interfered with.

In order to examine the rival contentions raised in the present appeals, it will be necessary for us to refer to the facts appearing from the case of the prosecution.

On 19.11.1988 at about 6.15 P.M. one Deo Pal, who was examined as PW1, had lodged the FIR in the Police Station at Kakkarwai stating that on the evening of 19.11.1988 at about 4.30 P.M., he along with his brother Devi Singh and one Kallu were sitting in the cattle shed of Jawahar, carpenter. He had gone to sharpen his sickle. After about 10 minutes, his brother Bahadur Singh (since deceased) came there to sharpen his gandasa. In the meanwhile, appellants Ram Sanehi, Baladin @ Balla, Shiv Dayal and Ramadin came there. Accused Shiv Dayal has a sphere and Ram Sanehi, Baladin and Ramadin had guns. Appellant Shiv Dayal inflicted sphere blow on the left shoulder of Bahadur Singh and thereafter, the three accused carrying guns fired from their respective guns. After receiving the bullet injuries, Bahadur Singh fell down and died. The witnesses, present there, were not able to save him because of the fear caused by the accused persons. After murdering Bahadur Singh, Ram Sanehi said that they had killed him and his father Pyare Lal should also be killed. Saying these words, the appellants proceeded towards the fields where Pyare Lal was watering his bajara crops. Deopal, Devi Singh and his wife Moola Bai were present in the field. At that time, appellant Dharnidhar also came there and joined the other appellants. Dharnidhar snatched the kulhari of Pyare Lal. Thereafter, the said three accused, who were carrying guns, fired on Pyare Lal. Sustaining

the fire arm injuries, Pyare Lal fell down. Not satisfied with the same, Dharnidhar then cut his neck with kulhari. Deopal then raised an alarm and made a hue and cry. Several village persons rushed towards the spot but before they could reach, the appellants escaped and went towards the jungle. This incident took place at about 4.45p.m. PW1 reported the matter to the police station, as already noticed, and on the basis of the report, H.C. Shiv Charan prepared the report (Ext.Ka 27) made endorsement on the same at the G.D. report (Ext. Ka 28) and registered the case against all the appellants under Sections 147, 149, 302 and 149 of the I.P.C.

The case was initially investigated by Ram Autar Mathur (PW 10) who went to the spot along with two constables but the investigation could not be completed because of paucity of light. Next morning the I.O. conducted inquest of the body of deceased Bahadur Singh and recovered one empty cartridge from the spot, collected blood stained and simple earth sample from the spot and prepared recovery memos. He also completed the investigation at the place of the murder of Pyare Lal. The dead bodies of Bahadur Singh and Pyare Lal were subjected to autopsy on 21.11.1988 by PW6, and he found the following injuries on the bodies of the deceased.

> "Postmortem report of Bahadur Singh Ante mortem injuries:-
>
> (1) Gun shot wound of entry 2 = cm x 2 cm x thoracic cavity deep on the left nipple. Blackening present. Direction from front to back. Margins inverted.
>
> (2) Gun shot wound of entry 1 cm x 0.75 cm x thoracic cavity deep on upper and medical portions of chest of right side, 2 cm below from medical margin of clavicle. Blackening present and direction from back to front and backwards. Margins inverted.
>
> (3) Two gun shot wounds of exit measuring 1 cm x 0.75 cm diameter in an area of 2 cm on right lower portion of back of chest. Corresponding to injury no.2.
>
> (4) Gun shot wound of entry 2 cm x 2 cm on left lower portion of back, 30 cm below from left shoulder joint, direction from left to right.
>
> (5) Gun shot wound of entry 2 cm x 1 cm x muscle deep on epigastria portion of abdomen 18 cm above from umbilicus. Direction front to back.
>
> (6) Gun shot wound of entry 2 cm x 1 cm on the epigtastrian portion of abdomen, 1 cm above from injury no. 5, Direction from front to back.
>
> (7) Contusion 4 cm x 3 cm on middle and front of forehead.
>
> (8) Contusion 5 cm x 2 cm on middle and right side of back of chest, 4 cm away from mid line.
>
> (9) Contusion 3 cm x 2 cm on lower and left side of back of chest.

(10) Incised wound 2 cm x 2 cm x muscle deep, 9 cm below from the left shoulder.

Internal examination showed that third and fourth ribs of left side and third rib of right side were fractured. Pleura was lacerated.

Both lungs were lacerated. Thoracic cavity contained about 1 = liters of liquid blood.

Peritoneal cavity contained about = liter of Liquid Blood. Stomach was lacerated and contained semi digested food material. Liver, gall bladder and spleen were lacerated, death was caused due to shock and hemorrhage resulting from ante mortem injuries.

The doctor recovered one cork and 21 metallic pellets from left lung and thoracic cavity.

One cork and 12 metallic shots were recovered from right lung, liver and thoracic cavity. Two corks, 18 metallic shots were recovered from spleen stomach and abdominal cavity.

Postmortem report of Pyare Lal Ante mortem injuries:-

(1) Incised wound 8 cm x 3 cm x bone deep on right lower jaw. 4 cm below from angle of mouth right side.

(2) Incised wound 10 cm x 6 cm x bone deep on front portion of neck. Under lying bone of cervical vertebrae No. 3 fractured. Soft tissues and muscle cut.

(3) Gun shot wound of entry 3 cm x 2 cm x muscle deep on lower and front portion of left arm.

Direction from left to right, 8 cm above from elbow joint. Blackening present. Margins inverted.

(4) Gun shot wound of exit 4 cm x 2 = cm on lower and front portion of left arm. Margins everted. Injury corresponding to injury no. 3.

(5) Gun shot wound of entry 2 cm x 2 cm x muscle deep on left exilla.

(6) Gun shot wound of entry 2 = cm x 1 = cm x thoracic cavity deep on left side of chest 11 cm below from left axilla. Blackening present, direction from left to right, Margins inverted. (7) Gun shot wound to exit five in number, smallest being = cm 2 x = cm and largest being 0.75 cm x = in an area of 12 cm x 6 cm on right portion of chest, 10 cm below from axilla right side and 18 cm above from right anterior supra iliac spines, Injury corresponded to injury no. 6.

(8) Gun shot wound of entry 1 cm x 1 cm x abdominal cavity deep on upper and left portion of abdomen, 10 cm above from umbilicus, Blackening present. Margins inverted. Directions from front to back.

(9) Abrasion 5 cm x 1 = cm on right lower front portion of thigh, 7 cm above from knee joint.

(10) Abrasion 2 cm x 2 cm on the rest of the middle finger of right hand.

Internal examination showed that brain was pulpy. Third cervical vertebrae was fractured. Pleura was lacerated. Larynx, trachea and bronchi were cut. Both lungs were lacerated. Neck was cut. Abdominal cavity contained about 200 ml liquid blood. Stomach was lacerated. Liver was partially lacerated.

Cause of death was shock and hemorrhage resulting from ante mortem injuries.

The doctor recovered one cork, one big metallic shot and two small metallic shot from stomach, 2 corks and 5 small metallic shorts were recovered from right and left lung."

The prosecution had amongst others examined Deopal, PW1, Devi Singh, PW 2 and Manohar, PW 3 who had claimed to be the eye witnesses to either or both of the murders. During the course of investigation, recoveries were made upon the statements made by the accused. Thakur Das, PW 7 was an independent witness for the recovery of sphere, as pointed out by accused Shiv Dayal. The investigation of the case was conducted by different officers. H.C. Shiv Charan Singh, PW 11 was posted as Head Muherer and he had prepared (Ext. Ka 27) as well as registered the case in GD as (Ext.Ka 28). PW1 and PW2 had fully supported the case of the prosecution. The blood marks were found at both the places of occurrence. After completing the investigation, challan under Section 173 of the Criminal Procedure Code (hereinafter referred to as `Cr.P.C.') was filed before the Court of competent jurisdiction. After the case was committed to the Court of Sessions, all the accused were tried in accordance with the law. Statement under Section 313 Cr.P.C. was recorded and finally, as noticed above, they were convicted and sentenced by the trial Court and the same was sustained by the High Court, giving rise to the present appeals.

The arguments raised on behalf of the appellants, in fact, can be discussed together inasmuch as they are based upon somewhat common submissions. There is no doubt that PW1 and PW2, both are related to the deceased. The contention raised before us is that both of them are interested witnesses and have not stated true facts before the Court and thus, their statements should be entirely disbelieved. We are unable to find any merit in this contention. It has come on record that Pyare Lal was pursuing a case in which members of the family of the accused persons were involved in a murder. There was apparently some anger and rift between the families. According to the story of the prosecution, they had come prepared to kill Bahadur Singh as well as Pyare Lal as they were carrying guns, sphere etc. The deceased were attacked by the accused in the presence of their brothers, who could not intervene and save them because of the fear of the gun fire and the manner in which the incident occurred. It was but natural for the prosecution to produce PW1 and PW2 as the main eye witnesses as they had actually seen the occurrence and they have been believed by the trial Court, as well as by the High Court. Even before us, no serious attempt has been made and infact, nothing appears from the record to show that these two witnesses were not present on the site. There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the

facts and circumstances of a given case. In the case of Jayabalan v. U.T. of Pondicherry [(2010)1 SCC 199], this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under:

> " 23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.
>
> 24. From a perusal of the record, we find that the evidence of PWs 1 to 4 is clear and categorical in reference to the frequent quarrels between the deceased and the appellant. They have clearly and consistently supported the prosecution version with regard to the beating and the ill-treatment meted out to the deceased by the appellant on several occasions which compelled the deceased to leave the appellant's house and take shelter in her parental house with an intention to live there permanently. PWs 1 to 4 have unequivocally stated that the deceased feared threat to her life from the appellant. The aforesaid version narrated by the prosecution witnesses, viz. PWs 1 to 4 also finds corroboration from the facts stated in the complaint."

Similar view was taken by this Court in Ram Bharosey v. State of U.P. [AIR 2010 SC 917], where the Court stated the dictum of law that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown over- board, but has to be examined carefully before accepting the same. In the light of the above judgments, it is clear that the statements of the alleged interested witnesses can be safely relied upon by the Court in support of the prosecution's story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons, who are closely related to the deceased. When their statements find corroboration by other witnesses, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then we see no reason why the statement of so called `interested witnesses' cannot be relied upon by the Court. In the present case, the circumstances are such that we cannot find any error in the concurrent findings of fact recorded by the Trial Court, as well as by the High Court that these two witnesses were present at the respective places and had actually seen the occurrence. Their statements about gun fires, as well as the injuries caused by the kulhari and sphere respectively are duly supported by the medical evidence, as well as by the statements of the investigating officers. Thus, we find that the contention raised on behalf of the

appellants is liable to be rejected.

The second contention raised on behalf of the appellants is that the prosecution has failed to prove any motive for the commission of the crime, and in absence of clear and emphatic motive, the order of conviction is liable to be set aside and the accused are entitled to acquittal. This submission, firstly, is based on misreading of the record and secondly, it is devoid of any merit. It has come on record that one Umrao, father of appellant Ram Sanehi was murdered. Bahadur Singh (deceased) was prosecuted for the said murder. Pyare Lal (deceased), father of Bahadur Singh, was doing pairvi on behalf of and along with Bahadur Singh, in which he was finally acquitted. It is also the case of the prosecution that there was enmity between these persons and all other appellants and the family of Ram Sanehi, appellant. The evidence of PW1, PW2 and PW3 indicates that the relations between these two families were quite strained, and the way the crime has been committed clearly indicates that the family of Ram Sanehi would have been unhappy with the acquittal of Bahadur Singh in that murder case. This itself indicates some kind of motive for committing the crime in question. Be that as it may, it is not always necessary for the prosecution to establish a definite motive for the commission of the crime. It will always be relatable to the facts and circumstances of a given case. It will not be correct to say as an absolute proposition of law, that the existence of a strong or definite motive is a sine qua non to holding an accused guilty of a criminal offence. It is not correct to say that absence of motive essentially results in the acquittal of an accused if he is otherwise found to be guilty. In the case of Babu Lodhi vs. State of U.P. [(1987) 2 SCC 352], this Court took the view that in so far as the adequacy of motive is concerned, it is not a matter which can be accurately weighed on the scales of a balance. In Prem Kumar vs. State of Bihar [(1995) 3 SCC 228] the Court discussed the concept of motive as applicable to Indian criminal jurisprudence and held as under:

"5. .....The Courts below have concurrently held that the motive suggested by the prosecution against the accused persons is established. When there is sufficient direct evidence regarding the commission of the offence, the question of motive will not loom large in the mind of the court. It is true that this Court has held in State of U.P. v. Moti Ram [(1990) 4 SCC 389] that in a case where the prosecution party and the accused party were in animosity on account of series of incidents over a considerable length of time, the motive is a double-edged weapon and the key question for consideration is whether the prosecution had convincingly and satisfactorily established the guilt of all or any of the accused beyond reasonable doubt by letting in reliable and cogent evidence.

Very often, a motive is alleged to indicate the high degree of probability that the offence was committed by the person who was prompted by the motive. In our opinion, in a case when motive alleged against the accused is fully established, it provides a foundational material to connect the chain of circumstances. We hold that if motive is proved or established, it affords a key or pointer, to scan the evidence in the case, in that perspective and as a satisfactory circumstance of corroboration. It is a very relevant, and important aspect - (a) to highlight the intention of the accused and

(b) the approach to be made in appreciating the totality of the circumstances including the evidence disclosed in the case. The relevance of motive and the importance or value to be given to it are

tersely stated by Shamsul Huda in delivering the Tagore Law Lectures (1902) - The Principles of the Law of Crimes in British India, at page 176, as follows:

> `But proof of the existence of a motive is not necessary for a conviction for any offence. But where the motive is proved it is evidence of the evil intent and is also relevant to show that the person who had the motive to commit a crime actually committed, it, although such evidence alone would not ordinarily be sufficient. Under Section 8 of the Evidence Act any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact'."
>
> However, in cases which are entirely or mainly based upon and rest on circumstantial evidence, motive can have greater relevancy or significance (Babu Lodhi and Prem Kumar's case (supra). But it is equally true that when positive evidence against the accused is clear in relation to the offence, motive is not of much importance. Mere absence of motive, even if assumed, will not per se entitle the accused to acquittal, if otherwise, the commission of the crime is proved by cogent and reliable evidence (State of Punjab vs. Kuljit Singh [2003 (2) RCR (Criminal) 629]. Significance of relevancy of motive would primarily depend upon the facts and circumstances of a given case. In the case in hand, there are eye witnesses whose version is supported by expert and other evidence. Their statements find corroboration and infact, they completely fit in with the case put forward by the prosecution and there is hardly any occasion for the Court to doubt the version of the prosecution. Firstly, we find that there exists some motive for Ram Sanehi and other appellants, who are his family members, to commit the crime, but in case of direct and clear evidence, there is no need for the Court to attach undue emphasis or importance to the motive behind the crime. The principles afore stated would clearly apply to the facts of the present case and we cannot find fault in the concurrent judgments, which is the subject matter of the present appeals.

It is further argued that there are some variations or doubts in the statements of the doctor and the eye witnesses. Emphasis was placed on the fact that the trial Court, in para 6 of its judgment, disbelieved Devi Singh, PW 2, and thus the obvious conclusion ought to have been that the prosecution has failed to bring home the guilt of the accused. This contention, again, does not impress us. Witnesses have been examined in the Court after a considerable lapse of time. It is neither unnatural nor unexpected that there could be some minor variations in the statements of the prosecution witnesses. Both PW1 and PW2 were the relations of both the deceased and were eye witnesses to the occurrence. Certain part of the statement of Devi Singh, PW2, have been doubted by the trial Court, in view of the fact that at one place he stated that he had gone to village Durkhuru on the date of the occurrence and thereafter, in reply to the Court's question he was consistent with his statement made under Section 161 of the Cr.P.C. as well as the examination-in-chief, that he had gone to village Durkhuru on the day subsequent to the date of the occurrence. The statement of PW2 does not really, in any way, vitiate the case of the prosecution which is aptly supported by the statements of PW1, PW2, PW6 and the statements of other witnesses. PW 6 has clearly stated that the dead bodies of the deceased contained the injuries of gun fire as well as that of kulhari and

sphere. It will be useful to refer to the statement of this witness, particularly, with reference to gun shots, bhala as well as kulhari.

> "The injury No. 10 of Bahadur was possible by the Bhala which was exhibit - 1. The witness has been shown the sphere/Bhala the injury No. 1 to 6 can be caused by fire arms injuries No. 7 & 8 can be caused to fallen when fallen. But at one time both the injuries caused which is not possible. The injuries No. 9 may be caused by fall. These injuries caused and it may be possible that these injuries caused on dated 19.11.88 at 4.30 o' clock in the evening. These injuries were normal but these injuries are sufficient for death.
>
> I had seized from the body of the deceased one cork and 21 metal pallets from the left side's lungs. One Cork and 12 pallets were seized from the right lung and from forensic cavity of muscles. 2 Corks and 18 pallets were recovered from the lever and stomach cavity.
>
> From the body of the deceased one Baniyan and one Chaddi, One Lungi was recovered and after preparing its Bundles were given to the constable.
>
> The injury No. 1 and 2 by Kulahdi Ex2 was possible to have occurred. Axe was shown to the witness injury No.3 to 8 is possible to could be caused by falling on the ground. These injuries were sufficient to cause death. These injuries could have been possibly caused on 19.11.88 at about 4.30 in the evening.
>
> One cork one big pellet and two small pellets' were recovered from his level and two corks and five small pallets were recovered from his left and right lever. These articles were handed over to the constable after sealing it. That from the body of the deceased one Kurta, One Dhoti, One Baniyan and One ring of Coper were recovered which were sealed and handed over to the Constable who had come with."

This witness was cross examined at some length, but nothing favourable to the accused could come on record. The statement of this witness clearly shows that there were gun shot injuries on the bodies of both the deceased as well as sphere and kulhari injuries on their shoulder and neck respectively. Thus, medical evidence fully corroborates the statements of PW1 and PW3. Even if the statement of Devi Singh, PW2, is ignored, there is no reason whatsoever before the Court to doubt the version given by PW1 and PW3. Their presence at the site was natural. In addition to this, it must be noticed that upon the statement of Shiv Dayal, the sphere (Ext. Ka 1) was recovered from the bushes of the village Kharwanch in presence of Thakur Das, PW 7, and Kanhaiya Lal. Thakur Das, PW 7, appeared as a witness and corroborated the evidence of Ranjit Singh, PW 9. The sphere was sent for chemical and serological examination. The report of the Chemical Examiner and Serologist (Ext. Ka 32) was received and it showed that the sphere contained human blood. The involvement of accused Shiv Dayal along with other accused persons, the recovery of the weapons and the fact that human blood was traced on the recovered weapon completes the chain of events relating to the commission of the crime. It will not be in conformity with the settled canons of

criminal jurisprudence to disregard the evidence merely because Devi Singh, PW 2, had made a variable statement which could be the result of confusion or lack of understanding the question in its proper perspective, more so, when he immediately in answer to the Court's question, stated, that he had gone to village Durkhuru on the day subsequent to the commission of the crime and not on the same day. It will be unfair, in any case, to disbelieve the presence of PW1 and PW3 at the respective places of occurrence and their statements, merely because PW2's statement creates certain doubts as regards his presence. As already noticed, the counsel for the appellant had, with some vehemence, argued about the unnatural conduct attributed by the prosecution to the accused. It was argued that brother of deceased Bahadur Singh was right in front of the accused at the place of first occurrence, and they would have killed him rather than going to the other site to kill Pyare Lal, the father of deceased Bahadur Singh. This argument hardly cuts ice, much less, leads to any favourable conclusion for the accused. There is specific evidence on record which has been noticed by the High Court as well as by the Trial Court that Bahadur Singh was prosecuted for the murder of Umrao, Ram Sanehi's father and was acquitted. The case was contested by Pyare Lal, father of Bahadur Singh. We have already indicated that there is some motive apparent for commission of the crime, which further indicates in the light of this evidence that they preferred to kill Bahadur Singh and his father Pyare Lal. This cannot be said to be unnatural or of such a nature that it is not normally expected of a person intending to commit a crime.

Another reason is the statement of PW3. PW3, Manohar is the son of the deceased Pyare Lal and has supported the case of the prosecution. If this witness was lying, then he would have certainly deposed that he also was an eye-witness to the first occurrence i.e. murder of Bahadur Singh. However, in his examination-in-chief, he has specifically deposed that he was an eye-witness only to the murder of Pyare Lal, his father and never referred to the murder of his brother, Bahadur Singh. The truthfulness and bona fide of this witness can hardly be doubted. He has further deposed that Dharnidhar had not come with other accused but had suddenly entered there and snatched the kulhadi from his father. With that kulhadi, he has caused injury on the neck of the deceased Pyare Lal. If this witness was to falsely implicate all the accused, nothing preventing him from stating that Dharnidhar had come with all other accused and they together attacked the deceased and also that he was a witness to the murder of Bahadur Singh and that even Dharnidhar was involved in the murder of his brother. His statement is fully supported by PW1, as well as the Investigating Officer. If they were falsely implicated, in all probability, PW1, PW2 and the Investigating Officer could have named Dharnidhar in relation to the first occurrence, i.e. murder of Bahadur Singh. The attempt was also made to create a dent in the case of the prosecution on the ground that Jawahar, who was stated to be present, was not examined by the prosecution and was the only independent witness. Thus, adverse inference should be drawn against the prosecution for this purpose. This contention has rightly been rejected by the learned trial Court and for correct reasons. The prosecution has filed an affidavit that the said witness has been won over by the accused and thus he was not examined. The Courts have already relied upon the judgment of this Court in Mst. Balbir Kaur vs. State of Punjab [1997 Crl.L.J. 273] and observed as under:

> "It is undoubtedly the duty of the prosecution to lay before the Court all material evidence available to it which is necessary for unfolding its case; but it would be unsound to lay down as a general rule that every witness must be examined even

> though his evidence may not be very material or even it is known that he has been won over or terrorized. In such a case, it is always open to the defence to examine such witnesses and the Court can also call such witness in the box in the interest of justice under Section 540 Cr.P.C."

Therefore, we have no hesitation in rejecting this contention raised on behalf of the appellants.

Still another aspect of this case is that when the accused were being examined under Section 313 Cr.P.C., they, barely, denied the incident and stated that there were land disputes. No evidence in that behalf had been adduced by the accused persons. Even if this statement is assumed to be correct, now the accused cannot turn their back and deny the existence of dispute between the parties. This would further be one of the links in the chain completing the crime of murder. Besides giving a general denial even to the basic facts, the accused in the last two questions put to them by the Court, in their statements under Section 313 of the Cr.P.C., stated that Deopal etc. are from the same family and they have falsely given evidence against them. They also stated that Deopal and the family of the deceased wanted to grab their land and, therefore, they have falsely implicated them in the present case. It is a settled principle of law that the statement made by the accused under Section 313 of the Cr.P.C. can be used by the Court to the extent that it is in line with the case of the prosecution. The same cannot be the sole basis for convicting an accused. In the present case, the statement of accused before the Court, to some extent, falls in line with the case of the prosecution and to that extent, the case of the prosecution can be substantiated and treated as correct by the Court. The legislative intent behind this section appears to have twin objects. Firstly, to provide an opportunity to the accused to explain the circumstances appearing against him. Secondly, for the Court to have an opportunity to examine the accused and to elicit an explanation from him, which may be free from the fear of being trapped for an embarrassing admission or statement. The proper methodology to be adopted by the Court while recording the statement of the accused under Section 313 of the Cr.P.C. is to invite the attention of the accused to the circumstances and substantial evidence in relation to the offence, for which he has been charged and invite his explanation. In other words, it provides an opportunity to an accused to state before the Court as to what is the truth and what is his defence, in accordance with law. It was for the accused to avail of that opportunity and if he fails to do so then it is for the Court to examine the case of the prosecution on its evidence with reference to the statement made by the accused under Section 313 of the Cr.P.C. In Hate Singh Bhagat Singh vs. State of Madhya Bharat [AIR1953 SC 468], while dealing with Section 342 of the old Cr.P.C. equivalent to Section 313 of the present Cr.P.C. observed that answer of the accused given can be used in other enquiries or trials for other offences. In the case of Narayan Singh vs. State of Punjab [(1963) 3 SCR 678 a Three Judge Bench of this Court held as under:

> "Under Section 342 of the Cr.P.C. of Criminal Procedure by the first Sub-section, insofar as it is material, the Court may at any stage of the enquiry or trial and after the witnesses for the prosecution have been examined and before the accused is called upon for his defence shall put questions to the accused person for the purpose of enabling him to explain any circumstance appearing in the evidence against him. Examination under Section 342 is primarily to be directed to those matters on which evidence has been led for the prosecution to ascertain from the accused his version or

explanation if any, of the incident which forms the subject matter of the charge and his defence. By Sub-section (3), the answers given by the accused may "be taken into consideration" at the enquiry or the trial. If the accused person in his examination under Section 342 confesses to the commission of the offence charged against him the Court may, relying upon that confession, proceed to convict him, but if he does not confess and in explaining circumstance appearing in the evidence against him sets up his own version and seeks to explain his conduct pleading that he has committed no offence, the statement of the accused can only be taken into consideration in its entirety.

Following the law laid down in Narayan Singh's case (supra) the Apex Court in State of Maharashtra v. Sukhdeo Singh [1992 CriLJ 3454] further dealt with the question whether a statement recorded under Section 313 of the Cr.P.C. can constitute the sole basis for conviction and recorded a finding that the answers given by the accused in response to his examination under Section 313 of the Cr.P.C. of 1973 can be taken into consideration in such an inquiry or trial though such a statement strictly is not evidence and observed in paragraph 52 thus:

Even on the first principle we see no reason why the Court could not act on the admission or confession made by the accused in the course of the trial or in his statement recorded under Section 313 of the Cr.P.C.....

It is thus well established in law that admission or confession of accused in the statement under Section 313 of the Cr.P.C. recorded in the course of trial can be acted upon and the Court can rely on these confessions to proceed to convict him."

The possibility of the accused being falsely implicated in this case, in our opinion, stands ruled out. The statement of the afore- referred witnesses, read in conjunction with the documents filed on record, expert evidence, recovery of weapons and blood stained earth, clearly establishes beyond reasonable doubt, the guilt of the accused.

Having discussed the merits of the case, we would now proceed to deal with the last contention raised on behalf of the appellant-accused that the Court could not have convicted all the accused with the aid of Section 34 and/or 149 IPC. There is no doubt that Shiv Dayal has been attributed a common role for the second incident and has been convicted on the basis of Section 34 and/or 149 IPC. As per the case of the prosecution there were 5 persons involved in the commission of the crime. Shiv Dayal was stated to have given sphere blow to the deceased Bahadur Singh and thereafter with the intention to kill Pyare Lal, moved together with the other accused to the site where Pyare Lal was murdered. Dharnidhar had joined Ram Sanehi, Baladin, Ramadin and Shiv Dayal. Thus, there were 5 persons who constituted a common unlawful assembly and were carrying weapons with an intention to commit an offence. They had knowledge and intention in mind that they are going to kill Pyare Lal, as is evident from the evidence on record. The learned counsel appearing for the appellants contended that there was neither any common object nor any intention on the part of the accused to kill Pyare Lal and for that matter, even Bahadur Singh. They have been

falsely implicated in the case by the prosecution. As far as the plea of false implication is concerned we have already rejected it and as far as their involvement in the commission of crime in terms of Section 34 IPC is concerned, it is obvious that a criminal act has been committed by them in furtherance of a common intention, and each of them was liable to be prosecuted for the same, once they had murdered Bahadur Singh. PW1, who was an eye witness to the said murder, in his examination-in-chief stated as under:

> "These persons are present in the court now. Shiv Dayal has been thrown the bhala to my brother namely Bahadur which was hit to his left shoulder sides chest portion.
>
> Then Ramsanehi, Balaprasad and Ramadin had fired with their own riffles respectively. My brother Bahadur fallen on the ground we persons who were present there has not said any word on account of fear. Then Ram Sanehi said that we have killed him Now his father Pyarelal is to be killed. Saying such words these persons have been gone the court yard. After their departure I have seen my brother Bahadur. He was dead. My brother Bahadur was lay down in the court yard which was in front door of the Jawahar Badhai. I Devi and Lally have been followed to Ram Sanehi and others and reached to the court yard of the field where my father was busy in storing the jwar. My brother Manohar and mother Mula bai were present there. I have seen that these four accused were present there. In the meanwhile Dharnidhar came from some where/or from some place Dharnidhar has snatched the Kulhadi (an axe) from the hands of my father. Ram Sanehi, Baladin alias Balla & Ramadin had fired on my father from their own riffles. My father lay down on the ground. Dharnidhar was cutting the neck of my father. We have started shouting. After hearing the shouting so many persons rushed out here. But they could not reach at the spot. After seeing the crowd of people of the village these accused persons have been run out to the jungle area. My father had been fallen at the distance of 7 steps away from the Mahua Tree in the Ladaiya fields. When the accused persons left that place at that time we had gone to seen the condition of my father."

(emphasis supplied) Let us examine the judgments of this Court in relation to common intention and commission of crime by the members of an unlawful assembly. It is a settled principle of law that to show common intention to commit a crime it is not necessary for the prosecution to establish, as a matter of fact, that there was a pre-meeting of the minds and planning before the crime was committed. In the case of Surendra Chauhan vs. State of Madhya Pradesh [AIR 2000 SC 1436], this Court held that common intention can be developed on the spur of the moment. Also, under Section 34, a person must be physically present at the place of actual commission of the crime. The essence is the simultaneous consensus of the minds of persons participating in the criminal act and such consensus can be developed on the spot. It is not mandatory for the prosecution to bring direct evidence of common intention on record and this depends on the facts and circumstances of the case. The intention could develop even during the course of occurrence. In this regard reference can be made to Ramaswamy Ayhangar vs. State of Tamil Nadu [(1976) 3 SCC 779] and Rajesh Govind Jagesh vs. State of Maharashtra [(1999) 8 SCC 428]. In other words, to apply Section 34, two or more accused should be present and two factors must be established i.e.

common intention and participation of the accused in the crime. Section 34 moreover, involves vicarious liability and therefore, if intention is proved but no overt act is committed, the section can still be invoked. In the present case all the 4 accused had gone together armed with three guns and one sphere and after shouting, making their minds clear, had fired at Bahadur Singh causing gun injuries and sphere injury on his shoulder. The learned Trial Court, besides recording the finding against the accused on motive and referring to the recovery of the sphere, has also, in great detail, dealt with the injuries caused by the accused upon the two deceased. In terms of the medical reports proved by PW 6, (being Ext. K3 and K4), there were four gun shots on the body of each of the deceased and in addition thereto one incised wound near the shoulder of Bahadur Singh and two incised wounds on the neck of Pyare Lal. The medical evidence is clear that these injuries could be caused by gun, sphere and kulhari. The attending circumstances fully support the case of the prosecution. PW1 and PW3, who were present at the different places of occurrence, have frankly stated that they were to intervene and save their brother and father but because of the fear of the gun they could not do so. Having found the above four accused guilty on the strength of Section 302 read with Section 34 of the IPC, the Trial Court held all the 5 accused are guilty of Section 302 read with Section 149 of the IPC for the murder of Pyare Lal. It has been shown in the evidence that after committing the murder of Bahadur Singh, they moved to the fields where Pyare Lal was watching his bajra crop, after having clearly made up their minds and with a common object to kill Pyare Lal. Once they reached the spot, they were joined by Dharnidhar, who also participated in the commission of the crime and in fact, played an active role by snatching the kulhari of the deceased and causing injury on his neck. The said injury and the gun injuries proved to be fatal, which ultimately resulted in the death of Pyare Lal on the spot itself. In fact, it is not even expected of the prosecution to assign particular or independent roles played by each accused once they are members of unlawful assembly and have assaulted the deceased persons, which resulted in their death. Every person of such an unlawful assembly, can be held to be liable. In the case of Sheo Prasad Bhore v. State of Assam [(2007) 3 SCC 120], this court took a similar view.

In the case of Md. Ankoos vs. Public Prosecutor, High Court of A.P. [AIR 2010 SC 566], this Court held as under:

> "28. .....Section 149 IPC creates constructive liability i.e. a person who is a member of the unlawful assembly is made guilty of the offence committed by another member of the same assembly in the circumstances mentioned in the Section, although he may have had no intention to commit that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly. The legal position is also fairly well settled that because of a mere defect in language or in the narration or in form of the charge, the conviction would not be rendered bad if accused has not been affected thereby....."

In the case of Pandurang Chandrakant Mhatre v. State of Maharashtra [(2009) 10 SCC 773], this Court enunciated the principle that under Section 149, two ingredients are required to be satisfied. Firstly, there has to be the commission of an offence by any member of an unlawful assembly. Secondly, such offence must have been committed in prosecution of the common object of that assembly or must be such that the members of that assembly knew it to be likely that the offence

would be committed. The Court held as under:

> "65. Section 149 IPC creates a specific and distinct offence. Its two essential ingredients are:
>
> (i) commission of an offence by any member of an unlawful assembly and;
>
> (ii) such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew it be likely to be committed.

66. In Masalti v. State of U.P. [AIR 1965 SC 202], this Court exposited:

> "17...What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common object specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly."
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> xxx xxx xxx xxx
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> 71. Having carefully examined the testimony of eye-witnesses, we find that prosecution has been able to establish that party of assailants comprised of more than five persons and that they formed unlawful assembly. It is also seen from the evidence that at least five persons chased the deceased and then attacked him. These members of the unlawful assembly who chased and attacked the deceased definitely shared common object of causing murder of Suresh Atmaram Gharat. A-1 had died during pendency of the appeal before the High Court and, therefore, nothing further needs to be said about his role."

The principles controlling the application of provisions of Section 149 have been quite well settled by now. Years back, the bench of this court in Masalti v. State of U.P. [1964 (8) SCR 133] declared the dictum of law that the prosecution has to prove against a person, who is alleged to be a member of an unlawful assembly, that the person constitutes the assembly and has entertained along with the other members of the assembly, the common object, as defined by Section 141 of the IPC. The

crucial question to be determined in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects. For determination of the common object of the unlawful assembly, the conduct of each of the members of the said assembly before the attack, at the time of attack and thereafter, as well as the motive for the crime are some of the relevant considerations. However, the time of forming an unlawful intent is not material because it is possible that in a given case an assembly, which is lawful to begin with, subsequently becomes unlawful. In other words, unlawful intent can develop during the course of the incident at the spot co instanti. [Maranadu v. State by inspector of Police, Tamil Nadu (2008) 16 SCC 529].

If we see the facts of the present case, it is obvious that the four accused were together and had openly declared their intention to kill Pyare Lal. They were then joined by Dharnidhar, in furtherance of this common object, to commit an offence In this manner an unlawful assembly was formed. Dharnidhar assaulted Pyare Lal with a kulhari. Thus, every one of them participated in the commission of the crime, besides the fact that they had a common object to kill Pyare Lal. In these circumstances, we are unable to find any legal or other infirmity in the judgment of the Trial Court, as well as that of the High Court in holding that the four accused, in the case of murder of Bahadur Singh, were guilty of the offence under Section 302 read with Section 34. Furthermore, in the case of the deceased Pyare Lal, all five of the accused were guilty of the offence under Section 302 read with Section 149 IPC. Besides this fact, accused Ram Sanehi, Ramadin, Baladin and Shiv Dayal accused had also committed an offence under Section 148 of the IPC while accused Dharnidhar had committed an offence under Section 147 of the IPC.

In view of the above elaborate reasoning, we do not find any merit in the contentions raised on behalf of the appellants in all the appeals. The same are therefore rejected. Thus, we are unable to persuade ourselves to interfere in the judgment of the conviction or even in the order of sentence for that matter. Without hesitation we dismiss these appeals.

.....J. (DR. B.S. CHAUHAN) .....J. (SWATANTER KUMAR)
New Delhi, July 8, 2010