

BALVIR SINGH

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v.

STATE OF MADHYA PRADESH

(Criminal Appeal No.1115 of 2010)

FEBRUARY 19, 2019

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[R. BANUMATHI AND R. SUBHASH REDDY, JJ.]

Penal Code, 1860 – ss. 341, 302 r/w. 34 – Arms Act – s. 25(1A) r/w. s.27 – Prosecution case was that PW-2, PW-13 and victim were going on a motorcycle, on the way, they were stopped by accused (No.1 to 4) – Accused No.2 and 3 caught hold of victim and accused No.1 fired on the face of the victim from a very close range – Victim died instantly – Incident was witnessed by PW-2, 3 & 13 – Trial Court convicted accused (No.1 to 4) u/s. 341, 302 r/w. 34 IPC and accused No.1 was also convicted u/s. 25(1A) r/w. s.27 of Arms Act – Conviction affirmed by the High Court – Accused (No.1 to 3) preferred appeal – Appellants-accused contended that there were material contradictions and inconsistencies in the testimony of eye witnesses PW-2, 3 & 13 – Held: So long as the evidence of eye witnesses is found credible and trustworthy, their evidence cannot be doubted on the ground of minor contradictions – In instant case, PW-2, 3 & 13 had given a consistent and clear account of the incident – The alleged contradictions in the testimony of the eye witnesses urged by the appellant are trivial and it does not affect the case of the prosecution – The contradictions pointed out in the evidence of PW-2, 3 & 13 were normal discrepancies which are due to normal errors of observations which, do not effect trustworthiness of the witnesses.

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Evidence – Consistent versions of prosecution witnesses on the touchstone of medical evidence – Appellant contended that there were inconsistencies between the evidence of eye witnesses and medical evidence – Held: The evidence of eye-witnesses are the eyes and ears of justice – Merely because victim sustained injuries of different shapes, on the opinionative medical evidence, the consistent evidence of eye-witnesses cannot be doubted – In instant case, the inconsistencies pointed out in the evidence of eye-witness inter se and the alleged inconsistencies between the evidence of

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A *eye-witnesses and that of the medical evidence are minor contradictions and they do not shake the prosecution case – Thus, the consistent version of PW-2, 3 and 13 cannot be decided on the touchstone of medical evidence.*

B *Penal Code, 1860 – s.34 – Common intention – Trial Court convicted accused (No.1 to 4) u/ss.341, 302/34 IPC – Conviction affirmed by the High Court – On appeal, held: If accused Nos. 2 and 3 had shared common intention, they would also had attacked the victim, but they were only alleged to have caught hold of the victim – Prosecution did not bring in evidence that there was prior meeting of minds and that accused Nos. 2 and 3 were having knowledge that their brother-accused No.1 was armed with Katta – Thus, conviction of accused Nos. 2 & 3 u/s. 302 r/w s.34 set aside.*

Disposing of the appeals, the Court

D **HELD: 1. PWs 2, 3 and 13 had given a consistent and clear account of the incident. All the three eye witnesses have attributed specific overt act of beating the victim-deceased with *lathi* to accused ‘B’, specific overt act of chasing the victim and holding him by accused No.2 and accused No.3 and the specific overt act of firing at the victim to accused No.1. Upon consideration of the evidence of eye witnesses PWs 2, 3 and 13, the trial court found that the evidence of the eye witnesses is credible and trustworthy. [Para 13] [554-C-D]**

F **2. Contention of the appellants is that the occurrence was a blind murder and testimony of the eye witnesses PWs 2, 3 and 13 are not reliable as the same suffers from material contradictions and inconsistencies. The alleged contradictions in the testimony of the eye witnesses that are being urged by the appellants are trivial i.e. with respect to the number of blows given to the victim-deceased with *lathi* by accused ‘B’, part of the body where the bullet was shot and the distance from where accused no.1 fired at victim etc. Such contradictions pointed out in the evidence of the three eye witnesses are minor which do not affect the core of the prosecution case. The discrepancies pointed out in the evidence of eye witnesses regarding the number of blows, the distance between appellant-accused no.1 and victim, and the part of the body of victim where the bullet hit are may be due to normal**

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errors of observation narrating the occurrence, which they have witnessed. The power of observation differs from person to person witnessing an attack. While the prime event of attack and the weapon are observed by a person, other minute details of number of blows, the distance from which the fire was shot might go unnoticed. So long as the evidence of eye witnesses is found credible and trustworthy, their evidence cannot be doubted on the ground of minor contradictions. [Para 14] [554-E-H; 555-A]

3. In the present case, the contradictions pointed out in the evidence of PW-2, PW-3 and PW-13 are only normal discrepancies which are due to normal errors of observation which do not affect the trustworthiness of these witnesses. [Para 16] [555-F]

4. Apart from the gunshot injuries which caused the death, there were nine other injuries found on the body of victim-deceased. PW-9-Doctor opined that the injuries sustained by the victim on his back and arms were of different shapes and therefore, there is a possibility that they must have been caused by different weapons. In an attack on the person, the nature of injuries sustained depends upon the manner of attack and how the person was positioned and the resistance offered by him. Victim was indiscriminately attacked by accused 'B' with *lathi* and there is possibility of the victim sustaining injuries of different shapes. Merely because victim sustained injuries of different shapes, on the opinionative medical evidence, the consistent evidence of eye witnesses cannot be doubted. It is well settled that the oral evidence has to get primacy since medical evidence is basically opinionative. [Paras 25, 26] [558-F-H; 559-A-B]

5. The inconsistencies pointed out in the evidence of eye-witnesses *inter se* and the alleged inconsistencies between the evidence of eye-witnesses and that of the medical evidence are minor contradictions and they do not shake the prosecution case. The evidence of eye witnesses are the eyes and ears of justice. The consistent version of PWs 2, 3 and 13 cannot be decided on the touchstone of medical evidence. [Para 27] [559-E]

6. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance

A 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 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.
Criminal act mentioned in Section 34 IPC is the result of the
concerted action of more than one person and if the said result
was reached in furtherance of common intention, each person is
liable for the offence as if he has committed the offence by himself.
[Para 33] [561-C-E]

7. Though it is stated that accused Nos.2 and 3 were
present along with accused No.1, the fact remains that they were
not armed. After being hit by accused 'B' on the back when
victim-deceased ran, accused Nos.2 and 3 are alleged to have
followed him and accused no.2 allegedly caught the right arm of
victim and accused no.3 held the left arm of victim. It is also
brought in evidence that accused 'B' was giving *lathi* blows to
victim even when he was running. If accused Nos.2 and 3 have
shared the common intention, they would also have attacked the
deceased; but they were only alleged to have caught hold of the
deceased. The prosecution did not bring in evidence that there
was prior meeting of minds and that accused Nos.2 and 3 were
having knowledge that their brother accused no.1 was armed with
katta. The evidence adduced by the prosecution is not convincing
to hold that accused Nos.2 and 3 also shared the common
intention with the accused no.1 and other accused 'B' in
committing the murder of victim. Conviction of accused Nos. 2
and 3 under Section 302 read with Section 34 IPC is, therefore,
liable to be set aside. However, conviction of the appellant/
accused No.1 under Sections 302 IPC, 341 IPC and Section
25(1A) read with Section 27 of the Arms Act and the sentence of
life imprisonment imposed upon him is affirmed.
[Paras 37 and 38] [563-B-F]

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Appabhai and Another v. State of Gujarat (1988) Suppl. SCC 241; Annareddy Sambasiva Reddy and Others v. State of Andhra Pradesh (2009) 12 SCC 546 : [2009] 6 SCR 755 ; Rammi alias Rameshwar v. State of M.P. (1999) 8 SCC 649 : [1999] 3 Suppl. SCR 1; Ramanand Yadav v. Prabhu Nath Jha and Others (2003) 12 SCC 606 ; Ramesh Singh alias Phooti v. State of A.P. (2004) 11 SCC 305 – relied on.

State of Uttar Pradesh v. Ram Kumar and Others (2017) 14 SCC 614 ; State of U.P. v. Krishna Gopal and Another (1988) 4 SCC 302 ; [1988] 2 Suppl. SCR 391; Balu @ Bala Subaramaniam and Another v. State (UT of Pondicherry) (2016) 15 SCC 471 : [2015] 12 SCR 1096 ; Dhanna v. State of M.P. (1996) 10 SCC 79 : [1996] 4 Suppl. SCR 28 – referred to.

Case Law Reference

(1988) Suppl. SCC 241	relied on	Para 15	D
[2009] 6 SCR 755	relied on	Para 16	
[1999] 3 Suppl. SCR 1	relied on	Para 16	
(2017) 14 SCC 614	referred to	Para 19	E
(2003) 12 SCC 606	relied on	Para 26	
[1988] 2 Suppl. SCR 391	referred to	Para 26	
(2004) 11 SCC 305	relied on	Para 34	F
[2015] 12 SCR 1096	referred to	Para 35	
[1996] 4 Suppl. SCR 28	referred to	Para 35	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1115 of 2010.

From the Judgment and Order dated 26.08.2008 of the High Court of Judicature at Jabalpur, Madhya Pradesh in Criminal Appeal No. 1124 of 1999

WITH

Criminal Appeal Nos. 1116 and 1119 of 2010.

A Raj Kishor Choudhary, Abdul Karim Ansari, Shakeel Ahmed,
Ms. Chitranjali Negi, Aftab Ali Khan, Sanjay Jain, Advs. for
the Appellant.

Mrs. Swarupama Chaturvedi, B. N. Dubey, Mukesh Kumar,
Ms. Indira Bhakar, Ms. Aparna Trivedi, Santanu Singh, Advs. for the
B Respondent.

The Judgment of the Court was delivered by

R. BANUMATHI, J. 1. These appeals arise out of the judgment
dated 26.08.2008 passed by the High Court of Judicature at Madhya
Pradesh at Jabalpur in and by which the High Court affirmed the
C conviction of the appellants (Accused No.1 to 4) under Sections 341,
302 and 302 read with 34 IPC and the sentence of imprisonment for life
imposed upon each of the accused. The High Court also affirmed the
conviction of the appellant/accused Harnam Singh under Section 25(1A)
read with Section 27 of the Arms Act and the sentence of three years
D rigorous imprisonment imposed upon him.

2. Briefly stated case of the prosecution is that on 11.03.1998 at
about 05.30 PM, Mohan Mehtar belonging to Scheduled Caste was going
on motor cycle along with Santosh Rai (PW-2) and Kamal @ Kamlesh
(PW-13) to Railway Colony. When they reached near Advocate
E Mishra's lane, accused Harnam Singh, Balvir Singh, Bhav Singh and
Bharat Thakur stopped the motor cycle driven by Santosh Rai (PW-2).
Accused Harnam Singh asked Mohan Mehtar to come down as they
wanted to talk with him. When Mohan Mehtar came down from
motorcycle, accused Bharat Thakur attacked Mohan with *lathi* on his
back. When Mohan Mehtar ran towards Advocate Mishra's lane to
F save himself, he was caught hold by accused Balvir Singh and Bhav
Singh and at that time, accused Harnam Singh fired with the country
made pistol on the face of Mohan from very close distance and the
bullet hit the brain and cornea of the left eye and Mohan died
instantaneously on the spot. The incident was witnessed by Santosh Rai
G (PW-2), Devendra Rai (PW-3) and Kamal @ Kamlesh (PW-13) and
others.

3. Informant Santosh (PW-2) lodged the complaint before the
Police Station Bina on the basis of which FIR No.114/98 was lodged on
11.03.1998 at 06.00 PM against the appellants for the offence punishable

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under Sections 341, 294, 323, 302, 506B, 34 IPC and under Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. Dr. P.K. Jain (PW-9) conducted the post-mortem of deceased Mohan Mehtar and opined that the death was due to gun-shot injury. The bullet hit the brain and cornea of left eye and remaining portion was completely missing. Gun powder was also found present in the eyes. Dr. Jain (PW-9) opined that death was caused due to brain centre present in the skull damaged due to the injuries sustained from the above cartridge which stopped the heart and respiration.

4. The accused persons were arrested and on the basis of their disclosure statement recorded under Section 27 of the Evidence Act, country made pistol of 0.315 bore was seized from the bottom shelf of the almirah in the house of accused Harnam Singh. The blood-stained clothes of Harnam Singh were also recovered. The seized pistol was sent to Forensic Science Laboratory, Sagar. Upon examination of the weapon, the pistol was found to be in operative condition. The damaged copper cartridge which was recovered from the body of the deceased did not have barrel marks. The ballistic expert therefore opined that the barrel marks were not sufficient for decisive matching. Upon completion of investigation, charge sheet was filed against the accused for the offences punishable under Sections 147, 148, 149, 341, 294, 323, 506B, 302 IPC and under Section 25 read with Section 27 of the Arms Act and under Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act in the court of Special Judge, Sagar, M.P.

5. To bring home the guilt of the accused, prosecution has examined fourteen witnesses and marked number of documents. On the side of the accused, Babu Lal (DW-1) was examined who had stated that the occurrence took place at 03:30 PM on 11.03.1998 and he had not seen any of the accused on the spot at the relevant point of time. All the accused were questioned under Section 313 Cr.P.C. about the incriminating evidence and circumstances and the accused denied all of them stating that a false case has been filed against them.

6. Upon consideration of oral and documentary evidence, the trial court convicted the accused and sentenced them to undergo imprisonment as under:-

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Accused	Conviction	Sentence
Harnam Singh (A1)	Section 341 IPC Section 302 IPC	R.I. for one month Life imprisonment with fine of Rs. 1,000/-
B	Section 25(1A)/27 of Arms Act	R.I for three years with fine of Rs. 1,000/-
Balvir (A2) Bhav Singh (A3) Bharat Singh (A5)	Section 341 IPC Section 302/34 IPC	One month R.I. Life imprisonment with fine of Rs. 1,000/- each

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The accused were acquitted of the charge under Sections 147, 148, 506B IPC and Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The trial court acquitted accused Suraj from all the charges. Being aggrieved, the appellants have preferred appeal before the High Court which came to be dismissed by the impugned judgment. Being aggrieved, the appellants are before us. Accused Bharat Singh have not preferred any appeal before us.

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7. The learned counsel for the appellants *inter alia* submitted that it is a case of blind murder and that the FIR is ante dated as it contains the Inquest No.10/98 and the eye witnesses were introduced in the FIR which suffers from manipulations. It was submitted that the medical evidence is completely contrary to the evidence adduced by eye witnesses on two counts namely:- (i) number of weapons used and the injuries; and (ii) distance from which the shot was fired. It was urged that as per the FSL Report, there was no sufficient barrel marks in the cartridge for decisive matching with the pistol allegedly recovered from the appellant Harnam Singh and this raises serious doubts about the occurrence and the involvement of appellant Harnam Singh. It was further submitted that as per the evidence of Babu Lal (DW-1), the incident took place at 03.30 PM and it was a blind murder and the High Court and the trial court failed to take into consideration the evidence of Babu Lal (DW-1). The learned counsel appearing for the appellants Balvir Singh and Bhav Singh urged that the eye witnesses PWs 2, 3 and 13 are not reliable witnesses and the courts below erred in invoking Section 34 IPC for convicting appellants Balvir Singh and Bhav Singh under Section 302 IPC read with Section 34 IPC.

8. Taking us through the impugned judgment and other materials on record, the learned counsel appearing for the State submitted that the conviction of the appellants is based upon the evidence of eye witnesses Santosh Rai (PW-2), Devendra Rai (PW-3) and Kamal (PW-13) which is corroborated by the medical evidence and FSL Report and the conviction of the appellants-accused does not warrant any interference.

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9. We have carefully considered the submissions of the learned counsel for the appellants and the State and perused the impugned judgment and the evidence and materials on record.

10. Santosh Rai (PW-2) and Kamal (PW-13) who were going along with deceased Mohan on the motor cycle, are the eye witnesses. The prosecution has also examined Devendra Rai (PW-3) as another eye witness. In his evidence, PW-2 stated that on 11.03.1998 at 05.30 PM, he was riding the motor cycle and deceased Mohan and Kamal (PW-13) were with him on the motor cycle. PW-2 had stated that on being stopped by appellant Harnam Singh, Mohan got down from the motor cycle and accused Bharat gave him a blow of *lathi* on his back. After the deceased was so attacked with blow of *lathi*, there was scuffle and the deceased ran away towards Advocate Mishra's lane to save himself. PW-2 further stated that at that time appellant Harnam Singh exhorted to catch hold of Mohan and accused Balvir (A2) and Bhav Singh (A3) caught hold of Mohan. Appellant Harnam Singh went close to Mohan and shot him on his face with his country made pistol. PW-13 who was sitting behind Mohan on the motor cycle has also clearly spoken about the occurrence and thus corroborated the evidence of PW-2.

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11. Devendra Rai (PW-3) had also corroborated the evidence of PW-2 that he saw the motor cycle being stopped by appellant Harnam Singh and that he took Mohan towards the street. PW-3 stated that when Mohan got down, first blow of *lathi* was hit at his waist by accused Bharat and when Mohan ran towards the street, on being exhorted by Harnam Singh, accused Balvir Singh and Bhav Singh caught hold of Mohan and appellant Harnam Singh fired at the face of Mohan from country made pistol. PW-3 had spoken about the presence of PW-2 and PW-13 at the scene of occurrence along with deceased Mohan.

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12. Case of prosecution is assailed on the ground that it was a blind murder and that there were actually no eye witness and the eye witnesses were introduced in the FIR which was prepared subsequently.

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A There is no merit in the contention that there were no eye witnesses for the occurrence and that it was a blind murder. Santosh Rai (PW-2) and Kamal (PW-13) have explained as to how they happened to be with deceased Mohan by going along with him on the motor cycle. Likewise, PW-3 has also stated that at about 05.00 PM-06.00 PM, he had gone to the Jhansi Gate which is on the other side of the railway line and at that time, he saw PW-2, PW-13 and Mohan coming on the motor cycle. The presence of all the three witnesses as spoken by them is natural and both the courts below held that their evidence inspires confidence. It is pertinent to note that the FIR registered at 06.00 PM on 11.03.1998 also contains the names of PW-2, PW-3 and PW-13.

C 13. PWs 2, 3 and 13 had given a consistent and clear account of the incident. All the three eye witnesses have attributed specific overt act of beating the deceased with *lathi* to accused Bharat Singh, specific overt act of chasing the deceased and holding him by accused No.2-Balvir Singh and accused No.3-Bhav Singh and the specific overt act of firing at the deceased to accused No.1-Harnam Singh. Upon consideration of the evidence of eye witnesses PWs 2, 3 and 13, the trial court found that the evidence of the eye witnesses is credible and trustworthy.

E 14. Contention of the appellants is that the occurrence was a blind murder and testimony of the eye witnesses PWs 2, 3 and 13 are not reliable as the same suffers from material contradictions and inconsistencies. The alleged contradictions in the testimony of the eye witnesses that are being urged by the appellants are trivial i.e. with respect to the number of blows given to the deceased with *lathi* by accused Bharat Singh, part of the body where the bullet was shot and the distance from where Harnam Singh fired at Mohan etc. Such contradictions pointed out in the evidence of the three eye witnesses are minor which do not affect the core of the prosecution case. The discrepancies pointed out in the evidence of eye witnesses regarding the number of blows, the distance between appellant Harnam Singh and deceased Mohan and the part of the body of deceased where the bullet hit are may be due to normal errors of observation narrating the occurrence, which they have witnessed. The power of observation differs from person to person witnessing an attack. While the prime event of attack and the weapon are observed by a person, other minute details of number of blows, the distance from which the fire was shot might go unnoticed. So long as

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the evidence of eye witnesses is found credible and trustworthy, their evidence cannot be doubted on the ground of minor contradictions. A

15. It is fairly well settled that the minor discrepancies in the evidence of the eye-witnesses do not shake their trustworthiness. In *Appabhai and Another v. State of Gujarat* 1988 Supp SCC 241, the Supreme Court held as under:- B

“13. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.....”. C D

16. The well-settled principle that minor discrepancies in the oral testimony of the witnesses do not affect the trustworthiness of the witnesses, has been reiterated in *Annareddy Sambasiva Reddy and Others v. State of Andhra Pradesh* (2009) 12 SCC 546 and *Rammi alias Rameshwar v. State of M.P.* (1999) 8 SCC 649. In the present case, the contradictions pointed out in the evidence of Santosh Rai (PW-2), Devendra Rai (PW-3) and Kamal (PW-13) are only normal discrepancies which are due to normal errors of observation which, in our view, do not affect the trustworthiness of these witnesses. E F

17. Credibility of Devendra Rai (PW-3) is assailed on the ground that he is involved in about 10-15 criminal cases including a murder case. During his cross-examination, a suggestion was put to him that accused No.2-Balvir Singh had given testimony against PW-3 and he has enmity towards Balvir Singh and his family and therefore, he is falsely deposing against the accused Nos.1 to 3 who are real brothers. It was also suggested to PW-3 that his father has registered a case G

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- A against accused Harnam Singh and Balvir Singh and that they were acquitted in the said case about which PW-3 denied having any knowledge. PW-3 has denied being involved in any criminal case; however, he has admitted that proceedings under Section 110 Cr.P.C. were initiated against him. Testimony of PW-3 cannot be doubted on the ground that he is involved in criminal cases or that he is inimical towards Balvir Singh and Harnam Singh. It is pertinent to note that name of PW-3 has been mentioned even in the FIR that he had gone with deceased Mohan on the motor cycle. The antecedents of the prosecution witnesses cannot be the ground for doubting their version. This is all the more so, when the courts below have recorded concurrent findings of fact holding that the testimony of the witnesses is credible and acceptable.

18. **Re: Contention – Mention of Inquest Number in the FIR** The learned counsel appearing for appellant Harnam Singh has drawn our attention to the FIR - Column No.11, Inquest Report – Case No.10/98 and contended that the FIR contains the Inquest No.10/98 whereas the number of FIR has not been mentioned in the Inquest Report. It was urged that the very mention of Inquest Number in the FIR and non-mentioning of FIR Number in the Inquest Report raises serious doubt about the time and the manner of occurrence as alleged by the prosecution. Refuting the said contention, the learned counsel appearing for the State submitted that the FIR which gives an option to mention inquest number as against that column in the printed form, inquest number was handwritten and it cannot be said that the FIR was registered subsequent to the inquest.

19. FIR is a printed format which contains Column No.11 – “Inquest Report”. Column No.11 of the FIR, of course, contains the Inquest No.10/98. Merely because the FIR contains inquest number, it cannot be said that the FIR was registered subsequent to the inquest. In *State of Uttar Pradesh v. Ram Kumar and others* (2017) 14 SCC 614, the Supreme Court held that “*the mere fact that on the inquest report FIR No. was written by different ink cannot be the basis for observing that the FIR was ante-timed or ante-dated*”. On being questioned, Investigating Officer S.D. Khan (PW-14) has stated that he has registered the Inquest Report 10/98 with regard to the death of deceased Mohan under Section 174 Cr.P.C. As seen from the evidence of PW-2, after the occurrence, dead body of Mohan was lying twenty

yards away from the road and he went to the police station to lodge the complaint via Lallu fourway and Sarvodya fourway. The inquest being done at the spot and FIR being registered at the Police Station under Sections 302, 506B, 341, 294, 323, 34 IPC and Section 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, mention of inquest number in the FIR does not affect the prosecution case nor does it affect the credibility of the eye witnesses.

20. **Delay in FIR** – For the occurrence on 11.03.1998 at 05.30 PM, FIR No.114/98 was registered on the same day at 06.00 PM. As per the evidence of Constable Radhey Shyam (PW-10), FIR was handed over before the Court of JMFC, Bina on 12.03.1998. So far as the contention regarding delay in receipt of the FIR in the court, the trial court held that not sending the FIR immediately to the Court after its registration, cannot be put against the prosecution case since after 05.30 PM, the court timing gets over and in these circumstances, production of FIR before the Court on the next day during the court timings does not indicate that the FIR is ante dated. The case of prosecution, in our view, cannot be doubted on the ground of delay in receipt of the FIR in the court.

21. **Re: Contention - Inconsistency between the Medical Evidence and Oral Evidence** – In his evidence, PW-2 has stated that Harnam Singh fired shot at Mohan's face and PWs 3 and 13 stated that Harnam Singh fired at the left eye of Mohan. As pointed out earlier, in his evidence, Dr. P.K. Jain (PW-9) stated that the cornea and remaining part of the left eye was completely missing and a bullet was found near the cerebellum. Gun powder was found present in the eyes of the deceased. PW-9 opined that the cause of death was due to damage of brain centre present in the skull due to injuries caused by the cartridge which resulted in stoppage of heart beat and respiration. As per the opinion of Dr. Jain (PW-9), death was caused mainly due to bullet hit in the brain. On being questioned, PW-9 stated that the fire was from a close distance as seen from the presence of gun powder in the left eye of the deceased. Dr. Jain has opined that since there were marks of gunshot around the left eye, the shot must have been fired from very close distance of about one foot.

22. Contention of the appellant is that PW-2 in his evidence stated that Harnam Singh was about 1-2 yards away from deceased Mohan at

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A the time when the bullet was fired. It was therefore contended that the contradictions regarding the distance from which the accused Harnam Singh fired at Mohan raises serious doubts about the prosecution case.

23. Of course, PW-2 has stated that when Harnam Singh fired, he was at a distance of 1-2 yards away from Mohan; but PWs 3 and 13
B have clearly stated that the deceased was held by appellants Balvir Singh and Bhav Singh and Harnam Singh fired at the deceased from a close distance. As pointed out earlier, accused Balvir Singh and Bhav Singh were said to be holding the hands of the deceased and it is possible that the gun shot hit at the eyes of Mohan. All three eye witnesses have
C consistently stated that Harnam Singh fired the gunshot at the face of Mohan. The variation in the evidence of PW-2 as to the distance from which the bullet was fired cannot be said to be fatal affecting the prosecution case.

24. It has been urged by the learned counsel for the appellant Harnam Singh that the doctor who conducted the post-mortem had not
D marked the track of the bullet in his report. It was submitted that when the deceased was shot, the position of his face was upwards and when the face is up, it is doubtful that Harnam Singh could have fired at the eyes of the deceased. As pointed out by the trial court, during the course of scuffle and when the deceased was running away to save himself,
E the position of the face of deceased cannot be ascertained as being upwards or not so as to doubt the prosecution version that the gunshot hit at the left eye of Mohan. The above contention advanced on the basis of the opinion of the doctor cannot affect the oral evidence of the eye witnesses.

25. Apart from the gunshot injuries which caused the death, there were nine other injuries found on the body of deceased Mohan. Mohan sustained bruise on the left arm, left side of the chest; contusion and lacerated wound in the middle of the head and incised wound on the left side of the chin. Dr. Jain (PW-9) opined that the injuries sustained by the deceased on his back and arms were of different shapes and therefore,
G there is a possibility that they must have been caused by different weapons. In an attack on the person, the nature of injuries sustained depends upon the manner of attack and how the person was positioned and the resistance offered by him. Mohan was indiscriminately attacked by accused Bharat Singh with *lathi* and there is possibility of the deceased

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sustaining injuries of different shapes. Merely because deceased Mohan sustained injuries of different shapes, on the opinionative medical evidence, the consistent evidence of eye witnesses cannot be doubted. A

26. It is well settled that the oral evidence has to get primacy since medical evidence is basically opinionative. In **Ramanand Yadav v. Prabhu Nath Jha and others**(2003) 12 SCC 606, the Supreme Court held as under:- B

“17. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as is claimed to have been inflicted as per the oral testimony, then only in a given case the court has to draw adverse inference.” C

The same principle was reiterated in **State of U.P. v. Krishna Gopal and another** (1988) 4 SCC 302, where the Supreme Court held “that eyewitnesses’ account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.” D

27. The inconsistencies pointed out in the evidence of eye-witnesses *inter se* and the alleged inconsistencies between the evidence of eye-witnesses and that of the medical evidence are minor contradictions and they do not shake the prosecution case. The evidence of eye witnesses are the eyes and ears of justice. The consistent version of PWs 2, 3 and 13 cannot be decided on the touchstone of medical evidence. E

28. **Recovery of pistol and FSL report** - Based on the confessional statement of appellant-Harman Singh, a country made pistol (Article ‘A’) was recovered from the bottom shelf of the almirah in the house of appellant-Harman Singh. Recovery of country made pistol from the house of appellant-Harman Singh is proved by the evidence of IO S.D. Khan (PW-14). F G

29. Ext.-P30 is the FSL report as per which the pistol (Article ‘A’) is a country made pistol which was found to be in operative condition and the testing was successfully done. The bullet recovered from the body of deceased Mohan was marked as EB1. In the FSL report, expert H

A opined that the barrel marks found on the cartridge were not sufficient for decisive matching. The FSL report reads as under:-

B “Exhibit A1 is one Country Made Pistol, which is made to fire 0.315” bore Cartridge. It is in working condition. It’s Barrel is found to have remnants of firing. It is not possible to say with scientific certainty the last time this was fired. It can be fired to cause injury likely to cause death.”

C Exhibit EB1 is one 0.315" bore cartridge like bullet. It is copper jacketed/of soft point and is partially damaged. It does not have marks of regular firing. It has barrel marks which are not sufficient. Thus in absence of matching it is not possible to say whether this is fired from Exhibit A1 or any other similar pistol like Exhibit A1.” [underlining added]

D From the FSL report (Ext.-P30), it is made clear that the pistol recovered from accused Harnam Singh was in working condition and that the fatal injuries could be caused from using the said country made pistol (Article ‘A’) recovered from appellant-Harman Singh.

E 30. Learned counsel appearing for the appellant-Harnam Singh submitted that as per the FSL report, the experts could not give a definite opinion that whether the bullet has been fired from the country made pistol recovered from appellant-Harman Singh or any other similar pistol like the said pistol. It was therefore, submitted that the prosecution has failed to prove that the recovered bullet from the body of deceased has been fired from the pistol (Article ‘A’) and therefore, the overt-act of firing cannot be attributed to appellant-Harnam Singh. In the FSL report, it is stated that bullet was “*a fired and partially damaged Copper Cartridge/Soft Point Bullet with blood like substance on the same*”.

F The FSL report further states that the cartridge does not have marks of regular rifling and the barrel marks found are not sufficient for decisive matching. All that the FSL report states is that the barrel marks are not sufficient to give decisive matching. When the case of the prosecution is based on the eye-witnesses, the indecisive opinion given by the experts

G would not affect the prosecution case.

H 31. The next point falling for consideration is whether the trial court and the High Court were right in convicting the accused Nos.2 and 3 under Section 302 IPC read with Section 34 IPC that they have acted in furtherance of common intention in committing the murder of Mohan.

32. **Common intention of Accused Nos.2 and 3:-** As discussed earlier, eye witnesses PWs 2, 3 and 13 have consistently stated that on being attacked by accused Bharat with *lathi* on the back, when deceased Mohan ran towards the street, accused No.2-Balvir Singh and accused No.3-Bhav Singh ran after him and said to have caught hold of Mohan and at that time, Harnam Singh fired from the country made pistol on the face of Mohan. Case of the prosecution is that accused Nos.2 and 3 were present along with Harnam Singh and accused Bharat who were armed with pistol and *lathi* respectively. The appellants Balvir Singh and Bhav Singh were unarmed and when Mohan ran towards the street, on exhortation by Harnam Singh, accused Nos.2 and 3 ran after Mohan and caught hold of him.

33. 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 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. Criminal act mentioned in Section 34 IPC is the result of the concerted action of more than one person and if the said result was reached in furtherance of common intention, each person is liable for the offence as if he has committed the offence by himself.

34. Observing that the inference of common intention is to be drawn from the conduct of the accused, in ***Ramesh Singh alias Phooti v. State of A.P.*** (2004) 11 SCC 305, the Supreme Court held as under:-

“12. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held guilty. By introducing Section 34 in the Penal Code the legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act

- A is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principle of joint liability in doing the criminal act based on a common intention.
- B Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered from the manner in which the accused arrived at the scene and mounted the attack, the determination and concert with which the attack was made, and from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (See *Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra* (1970) 1 SCC 696)”
- C
- D
- E The decision in *Ramesh Singh* was referred to in *Balu @ Bala Subaramaniam and another v. State (UT of Pondicherry)* (2016) 15 SCC 471.
- F 35. In the light of above principles, let us consider whether the prosecution has proved that accused Nos.2 and 3 had the common intention and acted in furtherance of the common intention. Initially, there were five accused and the accused were charged under Sections 147 and 149 IPC along with other charges. Since accused Suraj was acquitted of the charges, placing reliance upon *Dhanna v. State of M.P.* (1996) 10 SCC 79, the trial court invoked Section 34 IPC to convict
- G accused Nos.2 and 3 under Section 302 IPC read with Section 34 IPC.
36. Whether the courts below were right in convicting accused Nos.2 and 3 by invoking Section 34 IPC, is the point falling for consideration?
- H 37. Deceased Mohan and accused Harnam Singh were working in the railways and regarding the money transactions, there was enmity

between them. It is brought in evidence through PW-2 that 2-3 days prior to the incident, there were arguments and quarrel between accused Harnam Singh and deceased Mohan near the house of PW-2. Accused No.2-Balvir Singh and accused No.3-Bhav Singh are the real brothers of accused No.1-Harnam Singh. Though it is stated that accused Nos.2 and 3 were present along with accused Harnam Singh, the fact remains that they were not armed. After being hit by accused Bharat on the back when Mohan ran, accused Nos.2 and 3 are alleged to have followed him and accused Balvir Singh allegedly caught the right arm of Mohan and accused Bhav Singh held the left arm of Mohan. It is also brought in evidence that accused Bharat was giving *lathi* blows to Mohan even when he was running. If accused Nos.2 and 3 have shared the common intention, they would also have attacked the deceased; but they were only alleged to have caught hold of the deceased. The prosecution did not bring in evidence that there was prior meeting of minds and that accused Nos.2 and 3 were having knowledge that their brother accused Harnam Singh was armed with *katta*. The evidence adduced by the prosecution is not convincing to hold that accused Nos.2 and 3 also shared the common intention with the accused Harnam Singh and other accused Bharat in committing the murder of Mohan. Conviction of accused Nos. 2 and 3 under Section 302 read with Section 34 IPC is, therefore, liable to be set aside.

38. Conviction of the appellant/accused No.1 Harnam Singh under Sections 302 IPC, 341 IPC and Section 25(1A) read with Section 27 of the Arms Act and the sentence of life imprisonment imposed upon him is affirmed and Criminal Appeal No.1119 of 2010 is dismissed. Accused Harnam Singh shall surrender himself within four weeks from the date of this judgment to serve the remaining sentence, failing which, he shall be taken into custody.

39. Conviction of accused No.2-Balvir Singh and accused No.3-Bhav Singh under Section 302 IPC read with Section 34 IPC and Section 341 IPC is set aside and they are acquitted of the charges under Section 302 IPC read with Section 34 IPC and Section 341 IPC and their appeals Criminal Appeal No.1115 of 2010 and Criminal Appeal No.1116 of 2010 are allowed. Bail bonds of the accused Balvir Singh and Bhav Singh shall stand discharged.