
(2015) 04 AHC CK 0020

In the Allahabad High Court

Case No : Criminal Appeal Nos. 2194 and 2270 of 2004

Alok Singh and Nagendra Singh

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 01-04-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 207, 313, 374(2)
Penal Code, 1860 (IPC) — Section 299, 300, 302, 304, 34

Citation : (2015) 3 ALJ 707

Hon'ble Judges : Surendra Vikram Singh Rathore, J; Akhtar Husain Khan, J

Bench : Division Bench

Advocate : Nagendra Mohan, Anurag Singh Chauhan, Arun Kumar Singh, I.P. Singh and M.P. Srivastava, for the Appellant

Final Decision : Dismissed

Judgement

Akhtar Husain Khan, J.—Above Criminal Appeal No. 2194 of 2004 has been filed by accused appellants Alok Singh and Nagendra Singh and above Criminal Appeal No. 2270 of 2004 has been filed by accused appellant Purshottam Singh under Section 374(2), Cr.P.C. against judgment and order dated 12.10.2004 passed by learned Additional Sessions Judge/FTC-3, Pratapgarh in Sessions Trial No. 164 of 2002, State of U.P. v. Purshottam Singh and two others, whereby the learned Additional Sessions Judge/FTC-3, Pratapgarh has convicted accused appellant Purshottam Singh for offence under Section 302, IPC and accused appellants Alok Singh and Nagendra Singh for offence under Section 302 IPC read with Section 34, IPC and has sentenced thereunder each of them with imprisonment for life. We have heard Sri. Nagendra Mohan, learned counsel for accused appellants as well as Smt. Smiti Sahay learned Additional Government Advocate for State of U.P. We have perused record also.

2. In brief, relevant fact for determination of these appeals is that crime No. 187 of 2001, under Sections 302, 504 and 506, IPC was registered in police station Lalganj, district Pratapgarh at 4.05 p.m. on 30.10.2001 on written report, Exhibit

Ka-1, presented by complainant Digvijai Singh.

3. According to First Information Report, Exhibit Ka-1, version of prosecution is that on 30.10.2001 at about 10.00 a.m. in the morning, there took place an altercation between complainant Digvijai Singh and accused appellants Purshottam Singh, Alok Singh and Nagendra Singh along with co-accused Virendra Singh regarding immersion of idol, whereupon accused appellants challenged complainant to see him. Thereafter, at about 12 o'clock in noon, Suryabhan Singh alias Munna Singh and Satish Kumar Singh came to the house of complainant with wife of complainant. At that time complainant was at his house and accused Purshottam Singh and Virendra Singh armed with guns and accused Alok Singh and Nagendra Singh armed with Kattas were sitting at shop of accused Purshottam Singh in Tejgarh market and were abusing complainant. Suryabhan Singh alias Munna Singh asked them as to why they are abusing whereupon all the said accused exhorted to assault Suryabhan Singh alias Munna Singh and in the meantime accused appellant Purshottam Singh made fire causing injury to Suryabhan Singh alias Munna Singh. After having received injury, Suryabhan Singh alias Munna Singh fell down and became unconscious. Thereafter all the said four accused persons ran away from the spot making aerial firing and giving threat to the effect that if anyone came, he shall lose his life.

4. According to the FIR. Exhibit Ka-1, complainant Digvijai Singh as well as witnesses Lal Jai Singh, Bahadur Singh, Satish Kumar Singh, Prem Singh and Guru Prasad Singh have seen the occurrence, but they did not dare to come forward to save Suryabhan Singh alias Munna Singh.

5. According to FIR. Exhibit Ka-1, injured Suryabhan Singh alias Munna Singh was carried to Government Hospital, Pratapgarh where doctor declared him dead. Thereafter, leaving dead body of Suryabhan Singh alias Munna Singh in hospital, complainant went to police station Lalganj, district Pratapgarh and presented written report, Exhibit Ka-1 on the basis of which aforesaid Crime No. 187 of 2001, under Sections 302, 504 and 506, IPC was registered in said police station Lalganj and investigation was started by police. Inquest report of dead body of Suryabhan Singh alias Munna Singh was prepared and dead body was sent for postmortem in sealed cover after having completed necessary formalities. Thereafter police completed investigation in accordance with law, and submitted charge-sheet against accused appellants Purshottam Singh, Alok Singh and Nagendra Singh under Sections 302, 504 and 506, IPC, whereupon learned Magistrate concerned took cognizance and after having complied Section 207, Cr.P.C., committed the cause to the court of Session. Thereafter Sessions Trial No. 164 of 2002 was registered in the Sessions Court of Pratapgarh and was transferred to the court of learned Additional Sessions Judge/FTC-3 who framed charges against all accused appellants, namely, Purshottam Singh, Alok Singh and Nagendra Singh for offence under Section 302, IPC read with Section 34, IPC. Sections 504, and 506 IPC All the accused appellants pleaded not guilty and

claimed to be tried.

6. Prosecution examined PW. 1 complainant Digvijai Singh, PW.2 Guru Prasad Singh, PW.3 Satish Kumar Singh, PW.4 Dr. P.S. Misra, PW.5 Inspector Om Naresh Singh, PW. 6 Inspector O.P. Rai, PW.7 HCP Ram Pal Chaudhary and PW.8 Sub-inspector Anirudh Kumar Singh.

7. After prosecution evidence, statements of all accused were recorded under Section 313, Cr.P.C. All of them stated that they have been falsely implicated and the witnesses of fact have given false evidence due to animosity.

8. DW. 1 Ali Ahmad alias Sadhu and DW.2 C.P. 405 Suresh Kumar Misra were examined on behalf of accused appellants in defence.

9. Learned Additional Sessions Judge/FTC-3, Pratapgarh heard arguments of the parties and passed impugned judgment and order dated 12.10.2004 whereby he has convicted and sentenced accused appellants as mentioned above.

10. Learned Additional Sessions Judge has acquitted all accused appellants for offences under Sections 504/506, IPC. State has filed no appeal against acquittal of accused appellants for said offences.

11. Learned counsel for accused appellants contended that accused appellants are innocent and have been falsely implicated. Whole version of prosecution is false and concocted. The witnesses of fact, namely, PW. 1 complainant Digvijai Singh, PW.2 Guru Prasad Singh, PW.3 Satish Kumar Singh are not reliable witnesses and their presence at the place of occurrence is highly doubtful. Learned counsel for accused appellants contended that conviction recorded by trial court is against law as well as against evidence.

12. Learned counsel for accused appellants prayed that both the appeals should be allowed and accused appellants should be acquitted.

13. Learned counsel for appellants contended as an alternative argument that even on facts alleged in the First Information Report and evidence on record, accused appellants cannot be convicted for offence under Section 302, IPC.

14. Learned Additional Government Advocate contended that conviction recorded by trial court against each accused appellant is in accordance with law and evidence. He further contended that evidence on record is sufficient to convict the accused appellant Purshottam Singh for offence under Section 302, IPC and accused appellants Alok Singh and Nagendra Singh for offence under Section 302, IPC read with Section 34, IPC. Learned Additional Government Advocate contended that both the appeals filed by accused appellants have no merit and should be dismissed.

15. We have considered the submissions made by learned counsel for the parties.

16. In view of the submissions made by learned counsel for the parties, first of all, we have to see as to whether witnesses of fact and occurrence, namely, PW.

1 Digvijai Singh, PW.2 Guru Prasad Singh and PW.3 Satish Kumar Singh are not reliable witnesses and learned trial Court has committed error in placing reliance upon their statements to convict accused appellants.

17. After having gone through entire evidence on record, it is apparent that out of 8 witnesses examined by prosecution, PW. 1 Digvijai Singh, PW.2 Guru Prasad Singh and PW.3 Satish Kumar Singh are eye-witnesses of fact and occurrence.

18. In his statement, PW. 1 Digvijai Singh has proved First Information Report, Exhibit Ka-1 and has supported the prosecution story narrated in the First information Report, Exhibit Ka-1. PW.1 Digvijai Singh has stated in his statement that he is eye-witness of occurrence. He has further stated that PW.2 Guru Prasad Singh and PW.3 Satish Kumar Singh are also eye-witnesses.

19. PW. 1 complainant Digvijai Singh has stated in his statement on oath that after occurrence, he carried injured Suryabhan Singh alias Munna Singh by jeep to Hospital, Pratapgarh where doctor declared him dead. Thereafter he prepared report, Exhibit Ka-1, and presented the same in police station Lalganj, district Pratapgarh.

20. PW. 2 Guru Prasad Singh has stated in his statement on oath that on the day of occurrence, he came back to Tejgarh after darshan of Chandrikan Devi and was sitting at the medical store of Lal Jai Singh, Bahadur Singh. He has further stated in his statement on oath that at about 11.45 a.m. Suryabhan Singh alias Munna Singh and Satish Kumar Singh came with their sister. At that time, accused Purshottam Singh and two or three other persons were abusing complainant Digvijai Singh. Suryabhan Singh alias Munna Singh and Satish Kumar Singh asked as to why they are abusing whereupon accused Purshottam Singh fired at Suryabhan Singh alias Munna Singh and after having received injury, Suryabhan Singh alias Munna Singh fell down.

21. PW.2 Guru Prasad Singh has stated in his statement on oath that he came to know later on the names of three persons who were with accused appellants Purshottam Singh. Their names were Alok Singh, Nagendra Singh and Virendra Singh. PW.2 Guru Prasad Singh has identified accused appellant Nagendra Singh and Alok Singh before Court at the time of his statement.

22. PW. 3 Satish Kumar Singh has stated in his statement on oath that Suryabhan Singh alias Munna Singh was his nephew and Neelam Singh, wife of complainant Digvijai Singh is his niece. He has further stated in his statement on oath that on the day of occurrence he had gone to the house of complainant Digvijai Singh with Suryabhan Singh alias Munna Singh and Neelam Singh. He had reached there at about 11.45 a.m. or 12 noon. At that time, accused Purshottam Singh, Alok Singh Nagendra Singh and co-accused Virendra Singh were abusing Digvijai Singh. Suryabhan Singh alias Munna Singh went to the shop of Purshottam Singh to ask said accused persons as to why they are abusing. PW.3 Satish Kumar Singh has stated in his statement on oath that he as well as Digvijai Singh also followed Suryabhan Singh alias Munna Singh and

when Suryabhan Singh alias Munna Singh asked said persons as to why they are abusing, all the said accused persons exhorted, whereupon accused appellant Purshottam Singh made fire at Suryabhan Singh alias Munna. After having received injury, Suryabhan Singh alias Munna Singh fell down.

23. In site-plan of place of occurrence, Exhibit Ka-4, prepared and proved by PW. 6 Inspector O.P Rai, place of occurrence has been shown by letter "B" and house of complainant Digvijai Singh has been shown by letter "A". PW. 6 Inspector O.P. Rai has shown in site-plan medical store of Lal Jai Singh, Bahadur Singh with letter "D".

24. PW.2 Guru Prasad Singh has stated in his statement that he had returned after Darshan of Chandrikan Devi and was sitting at medical store of Lal Jai Singh Bahadur Singh at the time of occurrence. In cross-examination, defence has given suggestion to him that he was not present at the place of occurrence, but he has denied suggestion given by defence. Admittedly, place of occurrence is situated within market Tejgarh. Sitting of PW.2 Guru Prasad Singh in market after return from Darshan is natural. Investigating officer has shown medical store in site plan, Exhibit Ka-4, where PW.2 Guru Prasad Singh was sitting.

25. PW. 3 Satish Kumar Singh has stated that deceased Suryabhan Singh alias Munna Singh is his cousin and Neelam Singh, wife of complainant Digvijai Singh is his niece and he had gone to the house of the complainant with his wife Neelam Singh and deceased Suryabhan Singh at the time of occurrence. Defence has given suggestion in cross examination of PW. 3 Satish Kumar Singh that being member of the family, he is giving false evidence. PW. 3 Satish Kumar Singh has negated this suggestion given by defence. But the suggestion given by the defence shows that PW. 3 Satish Kumar Singh is related to the complainant.

26. After having gone through whole of statement of PW.3 Satish Kumar Singh, we are of the view that Neelam Singh, wife of complainant Digvijai Singh is his niece, is admitted to defence. Reason stated by PW.3 Satish Kumar Singh for his presence at the time and place of occurrence cannot be said to be unreliable and unnatural.

27. As mentioned above, house of complainant has been shown in the site-plan, Exhibit Ka-4, in the vicinity of place of occurrence and shop of accused Purshottam Singh. It is apparent from version of First Information Report, Exhibit Ka-1, as well as statement of PW. 1 complainant Digvijai Singh that when Suryabhan Singh alias Munna Singh and PW.3 Satish Kumar Singh came to house of complainant Digvijai Singh with his wife, all the accused persons were sitting at the shop of Purshottam and were abusing complainant Digvijai Singh, whereupon Suryabhan Singh alias Munna Singh went to accused persons to ask as to why they are abusing, whereupon present occurrence has taken place.

28. In the above situation, it is but natural that PW. 1 complainant Digvijai Singh and PW.3 Satish Kumar Singh have followed Suryabhan Singh alias Muna Singh.

29. Place of occurrence alleged by prosecution is corroborated by site plan, Exhibit Ka-4, as well as statement of investigating officer PW.6 Inspector O.P. Rai.

30. In the case of Dharamveer and Others Vs. State of U.P., AIR 2010 SC 1378 : (2010) CLT 619 : (2010) CriLJ 2393 : (2010) 2 Crimes 31 : (2010) 2 JT 592 : (2010) 2 SCALE 776 : (2010) 4 SCC 469 : (2010) 3 SCR 162 : (2010) 3 UJ 1531 , Hon"ble Apex Court has observed as follows:--

"Why appellant did not cause injury to these witnesses cannot be explained by prosecution. It will require entering into their mind. Human behaviour is something strange. Merely the fact that these witnesses did not suffer any injury will not make their evidence untrustworthy".

31. In view of proposition laid down by Hon"ble Apex Court, PW. 1 complainant Digvijai Singh and PW.3, Satish Kumar Singh may not be disbelieved on the ground that they have sustained no injury.

32. After having considered all facts and circumstances of the case and evidence on record, there is no sufficient ground to disbelieve presence of PW.1 complainant Digvijai Singh, PW.2 Guru Prasad Singh and PW.3 Satish Kumar Singh at the time and place of occurrence.

33. PW.1 complainant Digvijai Singh has admitted in cross-examination that PW.2 Guru Prasad Singh is brother-in-law (Sala) of his father-in law's brother Raghubar. But testimony of a witness cannot be disbelieved merely on the ground of relationship as Hon"ble Apex Court has held in the case of Dharamveer and Others Vs. State of U.P., AIR 2010 SC 1378 : (2010) CLT 619 : (2010) CriLJ 2393 : (2010) 2 Crimes 31 : (2010) 2 JT 592 : (2010) 2 SCALE 776 : (2010) 4 SCC 469 : (2010) 3 SCR 162 : (2010) 3 UJ 1531 .

34. Occurrence is alleged to have taken place on 3.10.2001 at 12 noon. F.I.R has been lodged on the same day at 4.05 p.m. as is evident from chik FIR. Exhibit Ka-6 and G.D., Exhibit Ka-7 as well as statement of PW. 7 HCP. Ram Pal Chaudhary. In his statement on oath as well as in FIR., Exhibit Ka-1, PW. 1 complainant Digvijai Singh has specifically stated that after occurrence, he carried injured Suryabhan Singh alias Munna Singh to Government Hospital, Pratapgarh where doctor declared him dead. Thereafter, he prepared FIR., Exhibit Ka-1, and presented the same in police station Lalganj. In cross-examination, PW.1 complainant Digvijai Singh has stated that distance between hospital and police station Lalganj is 40 kilometers.

35. Considering all facts and circumstances of the case, it is apparent that FIR is prompt and there is no reasonable ground to assume that FIR is ante timed.

36. In the case of Sheo Shankar Singh Vs. State of Jharkhand and Another, AIR 2011 SC 1403 : (2011) CriLJ 2139 : (2011) 2 Crimes 1 : (2011) 2 JT 367 : (2011) 2 RCR(Criminal) 634 : (2011) 2 SCALE 449 : (2011) 3 SCC 654 : (2011) 2 SCC(Cri) 25 : (2011) 4 SCR 312 : (2011) 2 UJ 985 : (2011) AIRSCW 1845 : (2011) 2 Supreme 33 , Hon"ble Apex Court has held that prompt filing of FIR

and prompt medical examination of injured eliminates possibility of the witness being a planted witness.

37. PW. 1 Digvijai Singh is complainant and PW.2 Guru Prasad Singh and PW. 3 Satish Kumar Singh are witnesses named in FIR, Exhibit Ka-1. In view of above proposition laid down by Hon"ble Apex Court in the case of Sheo Shankar Singh Vs. State of Jharkhand and Another, AIR 2011 SC 1403 : (2011) CriLJ 2139 : (2011) 2 Crimes 1 : (2011) 2 JT 367 : (2011) 2 RCR(Criminal) 634 : (2011) 2 SCALE 449 : (2011) 3 SCC 654 : (2011) 2 SCC(Cri) 25 : (2011) 4 SCR 312 : (2011) 2 UJ 985 : (2011) AIRSCW 1845 : (2011) 2 Supreme 33 , promptness in lodging FIR eliminates possibility of concoction and increases credibility of version of FIR., Exhibit Ka-1, as well as presence of witnesses named in FIR., Exhibit Ka-1.

38. In FIR., Exhibit Ka-1, as well as in his statement on oath, PW. 1 complainant Digvijai Singh has stated that he carried injured Suryabhan Singh alias Munna Singh to Government Hospital, Pratapgarh where doctor declared him dead. Thereafter, he prepared FIR., Exhibit Ka-1, and presented the same in police station Lalganj.

39. In the information sent by Government Hospital, Pratapgarh to police station Kotwali, Pratapgarh, Exhibit Kha-1, proved by PW.4 Dr. P.S. Mishra in cross-examination, the name of person who brought deceased to Hospital, Pratapgarh has been mentioned "Ishwar Dayal Singh son of Ayodhya Prasad". In said information, Exhibit Kha-1, Suryabhan Singh alias Munna Singh (deceased) was brought by complainant Digvijai Singh has not been mentioned. But merely on this ground, statement on oath made by PW.1 Digvijai Singh that he carried Suryabhan Singh alias Munna Singh to hospital cannot be belied. In cross-examination, PW. 1 Digvijai Singh has stated at page 19 that in hospital he stayed for half hour and after having written FIR, he went to police station Lalganj by Bullaro jeep of Pramod Singh. He has further stated in his cross-examination that Pramod Singh had met him in the hospital.

40. It is apparent from inquest report, Exhibit Ka-8 that information of death of deceased Suryabhan Singh alias Munna Singh has been sent by Hospital to police station Kotwali Pratapgarh on 30.10.2001 at 5.40 p.m. after departure of complainant Digvijai Singh from Hospital to police station Lalganj. Therefore, non-mentioning of name of complainant Digvijai Singh in information Exhibit Kha-1 as the person who brought deceased in Hospital is not sufficient to disbelieve PW. 1 complainant Digvijai Singh

41. In the case of Sampath Kumar Vs. Inspector of Police, Krishnagiri, AIR 2012 SC 1249 : (2012) 2 JCC 1185 : (2012) 3 SCALE 271 : (2012) 4 SCC 124 : (2012) AIRSCW 2765 : (2012) AIRSCW 2763 : (2012) 2 Supreme 561 , Hon"ble Apex Court has held that, "minor contradictions are bound to appear in the statement of truthful witnesses as memory sometimes plays false, sense of observation differs from person to person."

42. In the case of State of U.P. Vs. M.K. Anthony, AIR 1985 SC 48 : (1985) CriLJ 493 : (1984) 2 SCALE 728 : (1985) 1 SCC 505 , Hon"ble Apex Court has held that, "every honest and truthful witness may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals."

43. In the case of Faquira Vs. State of U.P., AIR 1976 SC 915 : (1976) CriLJ 677 : (1976) 1 SCC 662 : (1976) SCC(Cri) 151 : (1976) 8 UJ 86 , Hon"ble Apex Court has held that, "minor discrepancy guarantees that witnesses are not tutored."

44. In the case of State of U.P. Vs. Krishna Master and Others, AIR 2010 SC 3071 : (2010) CriLJ 3889 : (2010) 8 JT 240 : (2010) 7 SCALE 597 : (2010) 12 SCC 324 : (2011) 1 SCC(Cri) 381 : (2010) 9 SCR 563 : (2010) AIRSCW 4733 : (2010) 6 Supreme 193 , Hon"ble Apex Court has held that, "prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies to the root of the matter or pertain to insignificant aspects thereof."

45. In the case of State of U.P. Vs. Krishna Master and Others, AIR 2010 SC 3071 : (2010) CriLJ 3889 : (2010) 8 JT 240 : (2010) 7 SCALE 597 : (2010) 12 SCC 324 : (2011) 1 SCC(Cri) 381 : (2010) 9 SCR 563 : (2010) AIRSCW 4733 : (2010) 6 Supreme 193 , Hon"ble Apex Court has further held that, "the basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole."

46. We have gone through whole statement of PW. 1 Digvijai Singh, PW.2 Guru Prasad Singh and PW.3 Satish Kumar Singh. In view of the principle laid down by Hon"ble Apex Court in aforesaid pronouncements, we are of the view that there are no material contradictions in statements of these witnesses to disbelieve their statements.

47. Perusal of statement of PW.4, Dr. P.S. Mishra as well as post mortem report of deceased Suryabhan Singh alias Munna, Exhibit Ka-2 shows that post mortem of deceased Suryabhan Singh has been conducted by PW. 4 Dr. P.S. Mishra on 3.10.2001 at 10.40 p.m. In post mortem, one ante mortem fire arm injury has been found on his body. In post mortem report, Exhibit Ka-2 time of death has been mentioned half day and PW. 4 Dr. P.S. Mishra has stated in his statement on oath that death of deceased Suryabhan Singh alias Munna Singh might have occurred on 3.10.2001 from 12 noon to 2.00 p.m., Post mortem report Exhibit Ka-2 as well as statement of PW.4 Dr. P.S. Mishra fully corroborates the version of FIR, Exhibit Ka-1 as well as statements of PW. 1 Digvijai Singh, PW.2 Guru Prasad Singh, and PW.3 Satish Kumar Singh.

48. In view of discussion made above, we are of the view that P.W. 1 Digvijai Singh, PW.2 Guru Prasad Singh and PW.3 Satish Kumar Singh are reliable

witnesses and there is no reasonable ground to disbelieve them.

49. In the case of Nirpal Singh and Others Vs. State of Haryana, AIR 1977 SC 1066 : (1977) CriLJ 642 : (1977) 2 SCC 131 : (1980) SCC(Cri) 580 : (1977) 2 SCR 901 , at page-649, Hon''ble Apex Court has held that if witnesses examined are believed, the question of inference for non-examination does not arise.

50. In view of principle laid down by Hon''ble Apex Court, no adverse inference may be drawn against prosecution for non-examination of other witnesses.

51. In the case of Brahma Swaroop and others v. State of U.P., reported in AIR 2011 SC 280, Hon''ble Apex Court has held that if the evidence of eye witnesses is trustworthy and believed by the Court, the question of motive becomes totally irrelevant. As concluded above, evidence of PW. 1 Digvijai Singh, PW.2 Guru Prasad Singh and PW.3 Satish Kumar Singh is trustworthy. Therefore, the question of motive is irrelevant in this case. Even then, PW. 1 Digvijai Singh has mentioned motive or cause of occurrence in FIR, Exhibit Ka-1 and has proved the same in his statement on oath.

52. Learned counsel for the appellants has contended that PW. 1 Digvijai Singh has stated in cross-examination that the accused appellants caught the singers of Ismail Band Party of Chandrikapur booked by him. But DW. 1 Ali Ahmad alias Sadhu who is master of said Band Party has negated the version of PW. 1 complainant Digvijai Singh.

53. We have considered submissions made by learned counsel for the appellants. As mentioned above, FIR., Exhibit Ka-1, is prompt and specific motive/cause of occurrence has been alleged in the FIR, Exhibit Ka-1, and the same has been supported by PW 1 complainant Digvijai Singh in his statement on oath. In such circumstances, we are of the view that motive or cause of occurrence alleged by prosecution cannot be disbelieved on the basis of statement of DW. 1 Ali Ahmad alias Sadhu produced by defence.

54. In view of discussion made and conclusion drawn above, we are of the view that learned trial Court has rightly placed reliance on statements of PW. 1 complainant Digvijai Singh, PW.2 Guru Prasad Singh and PW.3 Satish Kumar Singh.

55. Now we shall consider as to whether allegations made in FIR, Exhibit Ka-1, as well as in statements of PW.1 complainant Digvijai Singh, PW.2 Guru Prasad Singh and PW.3 Satish Kumar Singh are sufficient to convict accused appellants Nagendra Singh and Alok Singh for offence under Section 302, IPC read with Section 34, IPC and accused appellant Purshottam Singh for offence under Section 302, IPC.

56. According to prosecution when Sury-abhan Singh alias Munna Singh (deceased) and PW.3 Satish Kumar Singh came to the house of complainant Digvijai Singh with his wife, accused appellant Purshottam Singh and co-accused Virendra Singh armed with guns and accused appellants Nagendra Singh and

Alok Singh armed with Kattas were sitting on the shop of accused appellant Purshottam Singh and were abusing complainant Digvijai Singh. Suryabhan Singh alias Munna Singh went to ask as to why they were abusing. All the said persons exhorted and in the meantime accused appellant Purshottam Singh fired at Suryabhan Singh alias Munna Singh causing fatal injury. Allegedly, accused appellants Nagendra Singh and Alok Singh were armed with Kattas but they did not make any fire.

57. PW. 1 complainant Digvijai Singh and PW.3 Satish Kumar Singh have stated that all the four accused persons exhorted to assault Suryabhan Singh alias Munna Singh whereupon accused appellant Purshottam Singh opened fire. Statements of these witnesses do not show that alleged exhortation given by all accused was to make fire at Suryabhan Singh alias Munna Singh and to cause him fatal injury.

58. PW.2 Guru Prasad Singh has stated nothing about exhortation given by accused persons.

59. Considering whole facts and circumstances of the case, we are of the view that it is difficult to hold that accused appellants Nagendra Singh and Alok Singh had intention to kill Suryabhan Singh alias Munna Singh and accused appellant Purshottam Singh has fired at Suryabhan Singh alias Munna Singh causing fatal injury to him in furtherance of common intention of accused appellants Nagendra Singh and Alok Singh.

60. Learned Additional Government Advocate has placed reliance upon pronouncement of Hon"ble Apex Court in the case of Abdul Sayeed Vs. State of Madhya Pradesh, (2010) 4 Crimes 86 : (2010) 10 JT 434 : (2011) 1 RCR(Criminal) 550 : (2010) 10 SCC 259 : (2010) 8 UJ 4037 of said pronouncement is relevant to quote below:

"50. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch as this section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the persons concerned had shared a common intention (Vide Krishnan and another Vs. State of Kerala, (1996) 6 AD 521 : AIR 1997 SC 383 : (1996) CriLJ 4444 : (1996) 7 JT 613 : (1996) 6 SCALE 362 : (1996) 10 SCC 508 : (1996) 5 SCR 405 Supp : (1996) AIRSCW 3754 and Harbans Kaur and Another Vs. State of Haryana, AIR 2005 SC 2989 : (2005) CriLJ 2199 : (2005) 3 JT 233 : (2005) 9 SCC 195 : (2005) 2 SCR 450 : (2005) 1 UJ 671)."

61. Proposition laid down by Hon"ble Apex Court in the above pronouncement makes it clear that to convict accused with aid of Section 34 of the Indian Penal Code, it is necessary to prove that act complained of has been committed in furtherance of common intention of accused. But in view of discussion made and conclusion drawn above, it is difficult to hold that accused appellants Nagendra Singh and Alok Singh had intention to kill Suryabhan Singh alias Munna Singh

and accused appellant Purshottam Singh has fired at Suryabhan Singh alias Munna Singh causing fatal injury to him in furtherance of common intention of accused appellants Nagendra Singh and Alok Singh.

62. In view of discussion made and conclusion drawn above, we are of the view that conviction of accused appellants Nagendra Singh and Alok Singh recorded by trial Court for offence under Section 302, IPC read with Section 34, IPC is not sustainable and said accused appellants are entitled to benefit of doubt.

63. But after having gone through the entire facts and evidence on record, we are of the view that prosecution has proved beyond doubt that accused appellant Purshottam Singh has caused culpable homicide of deceased Suryabhan Singh alias Munna Singh by causing fire arm injury.

64. Now we have to see as to what offence is made out against accused appellant Purshottam Singh in view of allegation made in F.I.R. and evidence on record.

65. Learned counsel for accused appellant contended that it is apparent from version of prosecution that accused appellant Purshottam Singh was on his shop and opened fire on provocation given by Suryabhan Singh alias Munna. His case is fully covered with Exception 4 of Section 300, I.P.C. Therefore, in view of facts alleged by prosecution, only offence under Section 304 Part II of I.P.C. is made out.

66. Learned counsel for accused appellants placed reliance on following pronouncements of Hon"ble Apex Court:

1. K. Ravi Kumar Vs. State of Karnataka, (2014) 4 CCR 578 : (2015) 1 Crimes 7 : (2015) 1 DMC 159 : (2015) 1 JCC 430 : (2015) 1 RCR(Criminal) 189 : (2015) 1 SCJ 514 ,

2. Balkar Singh Vs. State of Uttarakhand, (2009) 15 CompCas 366 : (2009) CriLJ 2980 : (2009) 5 JT 1 : (2009) 4 SCALE 507 : (2009) 15 SCC 366 : (2009) 5 SCR 242 .

3. Rampal Singh Vs. State of U.P., (2013) 115 CLT 339 : (2012) CriLJ 3765 : (2013) 1 Crimes 407 : (2012) 3 Crimes 183 : (2012) 3 JCC 2062 : (2012) 7 JT 10 : (2013) 1 RCR(Criminal) 363 : (2012) 6 SCALE 574 : (2012) 8 SCC 289 : (2012) AIRSCW 4211 : (2012) 5 Supreme 56 , and

4. Manjeet Singh Vs. State of Himachal Pradesh, (2014) AIRSCW 4195 : (2014) 7 JT 365 : (2014) 5 SCALE 648 : (2014) 5 SCC 697 .

67. In the case of K. Ravi Kumar Vs. State of Karnataka, (2014) 4 CCR 578 : (2015) 1 Crimes 7 : (2015) 1 DMC 159 : (2015) 1 JCC 430 : (2015) 1 RCR(Criminal) 189 : (2015) 1 SCJ 514 after having considered Exception 4 of Section 300 of the Indian Penal Code in the light of its various previous judgments, Hon"ble Apex Court has drawn conclusion on the facts of the case that offence under Section 304 Part II of the Indian Penal Code is made out.

Relevant part of the judgment of Hon''ble Apex Court is quoted below:

"16...However, the fact remains that it was an outcome of sudden outburst and heated exchange with no predetermined motive per se to kill her. Fourthly, no conclusive evidence was adduced by the prosecution to prove any kind of constant quarrel ever ensued in the last 9 long years between the couple and that too for a cause known to others which could lead to killing Padma or whether any unsuccessful attempt was ever made by the appellant to kill her in past and lastly, we have not been able to see from the post-mortem report that any stab injury 7 on Padma's body was caused nor was prosecution able to prove that any bloodstained knife from the place of occurrence was recovered at the instance of the appellant or of any witness.

17. In the light of the aforementioned reasons, which, in our opinion, emerge from the evidence on record, we are of the considered view that these reasons are sufficient to give benefit of Exception 4 to Section 300, IPC to the appellant and enables the Court to hold that the offence in question was not murder but it was an offence of culpable homicide not amounting to murder as specified in Exception 4 to Section 300 and hence punishable under Section 304 Part II, IPC".

68. In the case of Rampal Singh Vs. State of U.P., (2013) 115 CLT 339 : (2012) CriLJ 3765 : (2013) 1 Crimes 407 : (2012) 3 Crimes 183 : (2012) 3 JCC 2062 : (2012) 7 JT 10 : (2013) 1 RCR(Criminal) 363 : (2012) 6 SCALE 574 : (2012) 8 SCC 289 : (2012) AIRSCW 4211 : (2012) 5 Supreme 56 , Hon''ble Apex Court has considered Sections 299 and 300 of the Indian Penal Code and after having gone through its various previous judgments has drawn conclusion that on the facts of the case, offence under Section 304 Part I of the Indian Penal Code is made out.

69. In the case of Manjeet Singh Vs. State of Himachal Pradesh, (2014) AIRSCW 4195 : (2014) 7 JT 365 : (2014) 5 SCALE 648 : (2014) 5 SCC 697 , Hon''ble Apex Court has considered thirdly of Section 300 of Indian Penal Code as well as Exceptions of this Section and has drawn conclusion on the facts of the case that offence under Section 304, IPC is made out.

70. In the case of Balkar Singh Vs. State of Uttarakhand, (2009) 15 CompCas 366 : (2009) CriLJ 2980 : (2009) 5 JT 1 : (2009) 4 SCALE 507 : (2009) 15 SCC 366 : (2009) 5 SCR 242 also Hon''ble Apex Court has considered Sections 299 and 300 of Indian Penal Code and has drawn conclusion that on the facts of the case, offence under Section 304 Part I is made out.

71. We have carefully considered the facts of the case. According to prosecution, on the day of occurrence at about 10 a.m., an altercation took place between complainant Digvijai Singh and accused appellants along with one co-accused Virendra Singh regarding immersion of idol. Thereafter at about 11.45 a.m. or 12 noon, Suryabhan Singh alias Munna Singh (deceased) came to the house of complainant Digvijai Singh along with PW. 3 Satish Kumar Singh and Neelam Singh, wife of complainant Digvijai Singh. At that time, accused appellant

Purshottam Singh and co-accused Virendra Singh armed with guns and accused appellants Nagendra Singh and Alok Singh armed with Kattas were sitting on the shop of accused appellant Purshottam Singh and were abusing complainant Digvijai Singh. Suryabhan Singh alias Munna Singh went to ask as to why they were abusing. Accused appellant Purshottam Singh opened fire at him. There is nothing on record to show that firing by accused appellant Purshottam Singh is the outcome of sudden provocation and heated exchange.

72. In the case of Raghbir Singh and Others Vs. State of Haryana, AIR 2009 SC 1223 : (2008) 12 JT 254 : (2009) AIRSCW 499 : (2008) 8 Supreme 196 , Hon"ble Apex Court has held that an accused pleading the right of self-defence need not prove it beyond reasonable doubt. It is enough if he establishes facts which on the test of preponderance of probabilities makes his defence acceptable. The plea can be established either by letting in defence evidence or from the prosecution evidence itself but cannot be based on speculation or mere surmises.

73. In view of principle laid down by Hon"ble Apex Court in the above case, it is apparent that no inference can be drawn in favour of defence merely on surmises or speculations. Defence has to establish probabilities for such inference either by evidence of prosecution or by leading evidence.

74. DW.2 CP. 405 Suresh Kumar has proved history sheet, Exhibit Kha-1, of deceased Suryabhan Singh alias Munna Singh. But merely criminal history of deceased is not sufficient to hold him aggressor.

75. Post mortem report, Exhibit Ka-2 as well as statement of PW. 4 Dr. P.S. Misra shows that ante mortem fire arm injury found on dead body of deceased Suryabhan Singh alias Munna Singh was on upper part of body and was sufficient in ordinary course to cause death. Seat of injury indicates that the injury has been caused either with intention to cause death or with intention to cause such bodily injury as is likely to cause death.

76. After having gone through whole facts and circumstances of the case as well as evidence on record, we are of the view that the case of appellant Purshottam Singh is not covered with Exception 4 of Section 300 of Indian Penal Code. His case is fully covered with Section 300 of Indian Penal Code.

77. In view of conclusion drawn above, we are of the view that offence under Section 302, IPC is proved against accused appellant Purshottam Singh and learned trial Court has committed no error in recording his conviction for offence under Section 302, IPC. Sentence awarded by trial Court for offence under Section 302, IPC is not excessive also.

78. In view of conclusion drawn above, Criminal Appeal No. 2270 of 2004 Purshottam Singh v. State of U.P filed by accused appellant Purshottam Singh has no merits and is dismissed accordingly.

79. In view of conclusion drawn above, Criminal Appeal No. 2194 of 2004, Alok

Singh and Nagendra Singh v. State of U.P. filed by accused appellants Alok Singh and Nagendra Singh is allowed. Conviction and sentence recorded by trial Court against these accused appellants is set aside and they are acquitted.

80. Bail bonds of these accused appellants are cancelled and sureties are discharged.

81. Accused appellant Purshottam Singh is in jail to serve sentence awarded. Send copy of judgment to trial Court/Sessions Court for information and necessary action.