
(1989) 07 PAT CK 0014
In the Patna High Court
Case No : Criminal Appeal No. 62 of 1986

Arbind Kumar Singh and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 18-07-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 107, 109, 114, 141, 145

Citation : (1990) 1 BLJR 393 : (1991) 1 PLJR 292

Hon'ble Judges : S.H.S. Abidi, J; S. Shamsul Hasan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.H.S. Abidi, J.—Appellant Arbind Kumar has been convicted under Sections 302 and 148 I.P.C. and has been sentenced to rigorous imprisonment for life and three years respectively. Appellant Raj Kumar Singh has been convicted under Sections 302/149 I.P.C. and has been sentenced to rigorous imprisonment for ten years. He has further been convicted under Sections 148, 324 and 326 I.P.C. and sentenced to rigorous imprisonment for three years under each count. Appellant Ram Babu Singh has been convicted under Sections 302/149 IPC and has been sentenced to rigorous imprisonment for ten years. He has further been convicted u/s 148, IPC and sentenced to rigorous imprisonment for three years. Appellant Raghunath Singh has been convicted under Sections 302/109 and 302/149 and has been awarded ten years rigorous imprisonment under each count. Further, he has been convicted u/s 148 IPC and sentenced to rigorous imprisonment for three years. However, Ranidhani Singh another accused has been acquitted.

2. The case of the prosecution was that on 12.1.82 in the morning at about 8 a. m. the informant Janak Singh (P. W. 6) along with his wife and sons were working in the Onion seedlings field, then all the accused came there and wanted to take water through northern portion of their field. As on the earlier occasion

the informant was not allowed to take water through the land of the accused persons so the informant and his men objected to the accused taking water through the informant's field. This resulted into altercation and exchange of abuses. Appellant Raghunath Singh said that the revolver has been purchased for them and so kill them. Then the appellants except Raghunath Singh took out their revolvers whereupon the informant got terrified. Appellant Arbind fired at the wife of the informant Smt. Jotiya who got the fire-arm injury and again on the order of Raghunath Singh, appellant Raj Kumar fired at Bisundeo Singh who got injuries below the elbow of the right hand. The informant also received injuries in his right hand, and so also Lakhi Singh (P. W. 5) got injuries. However, the revolver of appellant Rambabu Singh misfired. Alarm witnesses Surendra Singh, Bramhdeo Singh, Dinesh Singh (P. Ws. 2, 3 and 4) and others arrived at the spot. Smt. Jotiya succumbed to her injuries within ten minutes of the occurrence.

3. Hira Lal Singh (P. W. 8) the I.O. of Rajapakar Police Station on getting sudden information about firing being done in village Rajapakar-Kushwahatola made diary entry No. 149, dated 12.1.82 and proceeded for the place of occurrence along with the police force and recorded the fardbeyan (Ext. 4) of Janak Singh and sent the same for registration of the FIR being Ext. 5 at the police station and then he started investigation. He prepared the inquest report (Ext. 6). He also prepared injury reports of the injured and Bent the dead body of Smt. Jotiya for post mortem examination. He prepared a site plan and also got during the investigation a sketch map (Ext. 9) prepared by Dwarika Pd., Amin, (P. W. 9). After completing the investigation charge-sheet was submitted by him. Dr. Harinath Gupta (P. W. 7) had conducted the post mortem examination on 12.1.82 at about 7.20 p. m. over the died body of Jotiya and submitted the post mortem report (Ext. 2) and had found following injuries on her person:

One lacerated wound 1/2" x 1/2" x abdominal deep with charred skin margin on the front of abdomen 2 1/2" left of umbilicus directing backwards, downwards and right wards and opening into wound of exit 1/2" x 1/2" on the upper part of right buttock On dissection the perilonium, descending colon and small intestine was found ruptured at five places and the right hip bone was fractured in the upper part. There was huge accumulation of blood in abdominal cavity.

Time elapsed death within 24 hours. The injury was caused by fire arm, Death in the opinion of the Doctor was due to shock and hemorrhage caused by above noted injury.

This very Doctor had also examined Janak Singh (P. W. 6), Bisundeo Singh (P. W. 1) and Lakhi Singh (P. W. 5) and submitted his reports (Exts. 3, 3/1 and 3/2 respectively). Their injuries are as follows:

The injury of Janak Singh--1. One small rounded wound with blacken edges 1/4" x 1/4" x 1/4" on the upper part of front of forearm left side.

(ii) One small rounded wound with blacken edges 1/4" x 1/4" x 1/4" on the

upper part of front of right thigh.

(iii) One small rounded wound with blacken edges 1/4" x 1/4" on the posterior surface of right palm over the proximal phalangeal area of right thumb.

The injury of Bisundeo Singh--(i) One oval lacerated penetrating wound 1/4" in diameter in the back of middle of right forearm with fracture of radius bone passing through whole thickness of forearm wound of exit on the front of middle of forearm with lacerated avulsed injury 2 1/2" x 1-3/4" with muscle protruding the wound on the right forearm.

(ii) Two small rounded lacerated wound with blacken edges on the back of right hip 1/4" in diameter.

(iii) One small rounded lacerated wound with blacken edges on the middle of right thigh on the lateral surface 1/4" x 1/4" x 1/4".

(iv) One small rounded lacerated wound with blacken edges on the upper lateral surface of right arm- 1/4" x 1/4" x 1/4"

(v) One small rounded lacerated wound on the right side of abdomen on the middle portion. Age of injuries within 6 hours. Injury No. 1 was grievous in nature and rest were simple caused by fire-arm.

The injury of Lakhi Singh.--(i) One small rounded wound with blacken edges 1/4" x 1/4" x 1/4" on the front of left thigh upper part.

(ii) Abrasion 1/2" x 1/8" on the posterior surface of left forearm upper part, Age of injuries within 6 hours. Injuries were simple in nature caused by fire arm.

4. The accused in defence denied the prosecution case and alleged that the occurrence as said by the prosecution has taken place in a different manner. The accused also gave a counter-version contained in the fardbeyan given at the Sadar Hospital, Hajipur at 3.30 p m, the same day against Shyamnandan Singh and others which was recorded by Sub-Inspector of Police, Hajipur Police Station in which it was said that on that very day (12.1.82) at about 8 a. m the informant (Raghunath Singh) and his family members-Rajkumar Sinmgh, Ram Babu Singh and Ramdeni Singh were irrigating the Makai field. Then Shyamanand Singh, Mahesh Singh, Satyanarain Singh with revolvers; Surendra Singh with Farsa; Lal Singh with Bhala; Janak Singh with Kudal; Bisundeo Singh with Lathi; Lakhi Singh with revolver and Ramswaroop Singh came and they cut the drain stopped the irrigation. Ramswaroop Singh ordered them to kill whereupon Mahesh Singh fired at Rajkumar Singh (appellant No. 2) at his hand, Shyamnandan Singh fired hitting Rambabu (appellant No. 3) at the left palm. In the meanwhile Jotiya Devi came to intervene and in the meantime Lakhi Singh fired from his gun which hit Jotiya Devi in her abdomen and she died. Other accused also fired from their revolvers. Bisundeo Singh and Janak Singh were also injured. They were empty-handed and the informant had got only Kudal and so they ran from there and went direct to the hospital. The injured from the side

of the accused were badly injured. There was previous dispute also between the parties. This incident is said to have been seen by Ramdeni Singh, Muneshwer Singh who had come to the place of occurrence before the altercation. The injured were not in a position to give the statement. The two injured Raj Kumar and Ram Babu were examined the same day by Dr. H.N. Gupta (P. W. 7) at 11 and 11.10 a. m. respectively and he had found the following injuries (Ext. A) on their person:

The injury of Rajkumar.--(i) Lacerated injury 3" x 3 1/4" x full thickness of left palm with multiple fracture of bones of left hand on lateral side with thumb assont and margins blackened and charred.

Age of injuries within 4 hours. Nature of injuries grievous. It was caused by fire-arm.

The injury of Ram Babu Singh.--(i) Lacerated wound 3 1/4" x 3 1/4" with whole thickness of Palm of left hand with multiple fracture of bones and laceration of tendons and muscles with blacken margin of skin of left palm.

(ii) One lacerated wound 2/3" x 1/8" x skin on the back side of right palm at the hate and inner side of right thumbs. Age of injuries within 4 hours Injuries No. (i) was grievous and No. (ii) was simple in nature.

Both injuries were caused by fire arm.

5. Three witnesses in defence have been examined by the accused. They are D.W. 1 (Munna Singh) who has proved counter FIR (Ext. A) of Raghunath Singh. Amarjeet Singh (D.W. 2) and Darshan Singh (D.W. 3) have proved some papers (Ext. D & F) and the signatures thereon.

6. The prosecution in support of its case produced nine witnesses. They are Bisundeo Singh, injured, (P.W. 1), Surendra Singh, Bramhdeo Singh and Dinesh Pd. Singh (P.Ws. 2, 3 and 4 respectively) who are eye witnesses of the occurrence; Lakhi Singh (P.W. 5) an injured who has been tendered; Janak Singh informant (P.W. 6); Dr. H.N. Gupta (P.W. 7) who had conducted postmortem examination on the dead body of the deceased and examined the injuries of the injured from both sides, Hira Lal Singh (P.W. 8) the I.O. of this case and Dwarika Pd. Singh (P.W. 9) who has prepared the sketch reap of the place of occurrence. The learned trial court after considering the entire material on the record convicted and sentenced the appellants as said above.

7. Learned Counsel for the appellants has urged that in this case the prosecution has not come out with correct version and the genesis of the occurrence has been concealed which is borne out from the counter FIR and so the case or the prosecution is liable to be thrown out on that score. Next it was contended that the accused wanted to cut the Nali and stop the irrigation and so they were aggressors and the accused had a right of self-defence. It was argued that the prosecution has concealed the injuries in the FIR received by appellants, but in the statement in court they have tried to explain the same which shows that the

prosecution party was not coming with clean hands and further the explanation that has been given by the prosecution about the injuries of the appellants is not in consonance with the medical evidence, and so in view of the conflict between the oral and medical evidence about the injuries of the accused the version of the prosecution is shaken. It was also contended that on the acquittal of Ramdeni Singh, the conviction of the appellants under Section 302/149 IPC is not maintainable and when the conviction under Section 302/145 IPC is not maintainable, the appellants also could not be convicted with the aid of Section 34 IPC as no charges have been framed in respect of the said offence. Further from the facts of the case nothing has come out that there was common intention of the accused to commit the offence. The distance of firing as given out by the oral and medical evidence in conflicting 7-A. The death of Smt. Jotiya well proved by the evidence of P. Ws. 1 to 5 as well as eye witnesses, the I.O. (P.W. 8) who has prepared the inquest report and the Doctor (P.W. 7) who had conducted the postmortem examination.

8. To appreciate the contentions of the learned Counsel for the appellants, the evidence led by the prosecution will have to be scrutinised. Janak Singh (P.W. 6), the informant in this case, has supported the case of the prosecution as given out in the fardbeyan saying that on 12.1.82 at about 8 a. m. while he along with his wife and sons were working in the Onion seedling field the accused came there and wanted to take water through the northern portion of their field. The informant objected to that as earlier the accused had stopped him to take water. On account of that there was altercation and exchange of abuse whereupon on the order of Raghunath Singh that the revolver has been purchased for the informant party and so they should be killed, the appellant Arbind Kumar fired at the wife of the informant Smt Jotiya who got an arm injury and then appellant Rajkumar fired on Bisundeo Singh who got the injury below the right elbow. The informant also received injury. The revolver of appellant Rambabu Singh misfired. Smt. Jotiya died on the spot. In his statement in court this witness has tried to explain the injuries of the accused saying that Rambabu tried to fire but he got injury from his own weapon. Appellant Raj Kumar also tried to fire but the barrel of his gun got busted and so he got injuries in his hand. He also admitted that as to how the accused received injuries was not said by to the police. He said that from the field of Radhe Singh towards east there is no Nali irrigation and that from the boring of Radhe Singh water never went towards east. He admitted that when the I.O. went to the place he and his sons along with the witnesses were present and no Nali was shown to the I.O. and that it was not a fact that I.O. found a Nali towards north from the field of Brajmohan and that there was not no sign of taking water that through that Nali and that it was not a fact that the I.O. had got a cutting mark in Mali at on place which was repaired by filling the mud. He has said that water is taken from one field to another field. He has not said in his fardbeyan that Raghunath Singh. Arbind Singh, Raj Kumar Singh and Rambabu Singh came and they began to take water through the field from the northern portion. He says that he has given his fardbeyan that they

began to take water through the field. He says that he had not said so before the police. He says that his statement was not taken by the I.O. after the farabeyen.

He says that he has said in the fardbeyan that Ramdeai Singh, Raghunath Singh, Arbind Singh, Raj Kumar Singh and Rambabu came and they said that they would take water through the field of the informant and they would see as to who stops them and this resulted into altercation and that the mar pit had taken place in the field where blood had fallen and that they had gone in the field of Brajmohan after the mar pit. He has denied the suggestion that he had along with others gone with preparation to stop the irrigation of the accused persons.

9. Bisundeo Singh (P.W. 1) is an injured witness who has corroborated the statement of the informant. He too says that Rambabu fired whereupon the barrel of his gun got broken and his own hand got injured and so also Raj Kumar got injury in his hand on account of the breaking of the barrel of his gun. From the boring of Radhey the distance of his boring is about 100 yards and on the date of occurrence from the boring of Radhey to the field of the accused there was no Nali for irrigation and when the I.O. had gone to the place of occurrence through his field up to the field of Raghunath there was no Nali and when the I.O. had gone through the north of the field of Radhey there was no Nali and adjacent towards north there was no Nali and when Nali was going to be constructed it was stopped by the father of this witness. He says that his mother had not done anything on account of which there may be a reason for the accused to feel annoyed.

10. Surendra Singh (P.W. 2) is also an eye-witness besides the informant and his son Bisundeo Singh. He says that on the date of occurrence at about 8 a. m. he was plucking grass and unwanted plants in his field which was adjacent to the place of occurrence towards east. He had seen the informant, his wife and sons working in the Onion field. Then Raghunath Singh and others came and said that they would take water through the Makai field of the informant whereupon Janak Singh said that he would not allow them to make Nali for taking the water through his field. He also deposed about the facts as has been said by the informant. He said that the land of the accused was never irrigated from the baring and so also the land of Brajmohan was not irrigated and there was no Nali existing earlier then the occurrence and towards east of the boring there was no Nali from east to west and no Nali was existing on the spot on the date of occurrence. He says that Janak Singh had shown the spot to the I.O. but no Nali was shown to the I.O. at the time of inspection. This witness said that he had not said to the police that Raghunath Singh had said that they would take water after making the Nali through the field of the informant, and that the informant had said that he would not allow the water to be taken to his field after making the Nali.

11. Bramhdeo Singh (P.W. 3) says that on the date ,of occurrence is about 3 Laggis towards east of his field. When the accused came, the informant his wife and sons were working in their Onion field and the accused said that they would

make Nali for taking water through the field of the informant which resulted into altercation and mar pit and firing by Arbind Singh and Raj Kumar Singh. The barrel of gun of Raj Kumar got broken which resulted into injury in his hand and so also Ram Babu got injuries on account of the breaking of the barrel of his gun. Similar is the statement of Dinesh Prasad Singh (P.W. 4) who says that on the date of occurrence at about 8 a. m. he had gone to Janak Singh for some work who along with his wife and others was working in his Onion field. Then the accused came armed and said that they had to construct a Nali for which Jaaak Singh objected and then altercation and firing took place. Two of the accused received injuries on account of breaking of the barrel of their respective guns. He has said in para 3 of the statement that on the date of occurrence the accused were not taking water through the field of the informant and that he has not said before the police that the accused wanted to take water through the field.

12. The last eye witness is Lakhi Singh who has been tendered by the prosecution. He was also injured. His injury report is Ext. 3/2. He has not been cross-examined.

13. This is the entire evidence led by the prosecution about the occurrence. P. Ws. 1, 5 and 6 are injured. They have been medically examined by Dr. H.N. Gupta on 12.1.82 and has given his report Ext. 3 series as mentioned above. So on that score atleast the presence of these witnesses on the spot is guaranteed. Surendra Singh, Bisundeo Singh and Dinesh Pd. Singh have also deposed about the occurrence Nothing has come out in their evidence to show that these witnesses are deposing falsely or that they are inimical or that they have got no reason to be on the spot. Thus from the evidence of injured as well as non-injured witnesses the prosecution has been able to establish that the accused came to the spot and wanted to take water which was objected to by the informant party resulting into altercation and firing by the accused which resulted to the injuries to the witnesses and also injuries to Smt. Jotiya who died. This occurrence also led to the injuries to two of the accused in their hands on account of breaking of the barrel of their gun.

14. As to the contentions of the learned Counsel for the appellants that the genesis of the occurrence has not been given, it has to be seen that the prosecution has given out a case that the accused persons were trying to make Nali through the field of the informant party which was objected and resisted by the informant resulting into firing causing injuries to Smt. Jotiya and then injuries to P.Ws. 1, 5 and 6. This origin or genesis of the offence has been explained by the prosecution witnesses as seen above. The accused by way of counter FIR as well as in defence have said that they were attacked by the informant party and that they have set up their own case. It is to be seen how far the cross case has got its effect upon the prosecution, how far the injuries said to have been received by the accused have got effect upon the case of the prosecution and further how far the prosecution has been able to explain the injuries of the accused and what is the effect of its non-explanation in the FIR.

Origin or genesis of the occurrence is relevant and important and it has been dealt with in several decisions of the Supreme Court as well as of the High Courts.

15. In the case of *State of Bihar v. Met. Khurshid* AIR 1971 SC 2263 at page 2270 para 7, the Supreme Court observed:

It seems to us, however, that the finding of the High Court that there was a clash between the respondent on the one side and the deceased on the other about the time and the place of occurrence is not vitiated as there is some material to support this finding. Once this finding is accepted then it must follow that the prosecution has not put forth the genesis and the manner of the occurrence fully. The prosecution has not been able to explain why the respondent should suddenly take in his head to attack the deceased while he was in the company of three persons, mentioned above, and there must have been some immediate reason why this incident took place. If there is a doubt as to the origin of the fight the benefit must go to the respondent.

In the case of *Mohar Rai and Bharath Rai Vs. The State of Bihar*, it has been observed that the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in case of altercation is a very important circumstance from which the court can draw the following inferences: (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version; (2) that: the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore evidence is unreliable; (3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

16. In a later decision of *Puran Singh and Others Vs. The State of Punjab*, , after relying upon the case of *State of Gujarat Vs. Bai Fatima and Another*, , it was held in para 20 at page 1985 by the Supreme Court that if the prosecution did not come out with the true version of the nature and origin of the occurrence, they cannot blame the Court if the entire version presented by them is rejected. Their Lordships again observed in para 19 at page 1985 that in the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded indeed mystery, which is sufficient to demolish the entire prosecution case. In the case of *Lakshmi Singh and Others Vs. State of Bihar*, , it was observed:

It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on most material point and therefore their evidence of unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

17. A Division Bench of our Court in the case of Sita Ram Pandey and Others Vs. The State of Bihar, . observed:

In our opinion, simply because no other hoofs marks were found or noticed by the Investigating Officer, that part on the prosecution story regarding the genesis cannot be doubted. That apart, it is firmly settled that motive or the genesis of the occurrence is not of much importance where the occurrence is supported by the positive eye witnesses.

Thus, the prosecution is expected to give out the origin of the offence and if certain facts such as to how the accused got injuries, have not been explained then the origin of the offence gets shrouded in mystery which may be sufficient to demolish the prosecution case and benefit of the same must go to the accused. But even the origin of mar-pit is not clear yet if the offence itself is made out by the credible and positive evidence of the eye-witnesses then that evidence is to be believed. Here in this case as the evidence goes, the FIR does not give out as to where and he is the accused received the injuries. But in the statement in Court the prosecution witnesses have tried to explain the same. The FIR is not a substantive piece of evidence and it can be used only for corroborating and contradicting its maker when he appears in Court as a witness and its value must always depends on the facts and circumstances of a given case. Further, the FIR can by no means be utilised for contradicting or discrediting the other witnesses as observed by the Supreme Court in the case of Dharma Rama Bhagare Vs. The State of Maharashtra, .

18. Not only the informant in his evidence in Court but other witnesses have given out about the injuries of the two injured appellants. Further, it may be noted that the name of the two appellants and their participation has already been given in the FIR. While deposing the informant and other witnesses have given out about the manner in which the two accused persons had received the injuries. In the case of Bhagwan Tana Patil Vs. The State of Maharashtra, , the injuries of the accused were explained by the prosecution witnesses in the Court which was accepted by the Court. In the case of Mitter Sen and Others Vs. The State of U.P., , in the FIR lodged by Raghubir Prayag the names of Sajjan Kumar and Lachmi Chand who are said to have come with lathis and began to assault the appellants and their exercise of right of private defence was not mentioned, though the names of other persons were mentioned and further there was no explanation in the FIR as to how the appellant Nos. 2 and 3 had received injuries. Their Lordships did not accept the explanation of the injuries received by the

accused persons. In another case of *Ishwar Singh Vs. State of U.P.*, also a similar situation arose about the non-explanation of the injuries of the accused. The FIR had reached the court with inordinate delay and some witnesses were not examined whose examination should have been done by the prosecution and also there was difference in the account given by the prosecution witnesses as appearing from the FIR and further there was non-examination of material witnesses coupled with the fact that there was absence of any statement in the FIR as to the injuries received by some of the accused. Their Lordships of the Supreme Court did not accept the case of the prosecution.

19. In the recent decisions of the Supreme Court in the case of *Harikishan Singh v. State of Bihar* AIR 1988 SC 883, after referring to the decisions of *Mohar Rai and Bharath Rai Vs. The State of Bihar*, ; *Lakshmi Singh and Others Vs. State of Bihar*, ; *Bhaba Nanda Sarma and Others Vs. State of Assam*, ; *Bankey Lal and Others Vs. State of U.P.*, ; *Ramlagan Singh and Others Vs. State of Bihar*, ; *Bhagwan Tana Patil Vs. The State of Maharashtra*, ; *Onkarnath Singh and Others Vs. The State of U.P.*, ; *Jagdish Vs. State of Rajasthan*, ; *Munshi Ram v. Delhi Administration* AIR 1968 SC 702; *State of Gujarat Vs. Bai Fatima and Another*, , the Supreme Court (at page 868 in paragraphs 18 and 20) has observed:

"We have referred to the above decisions in extenso in order to consider whether it is an invariable proposition of law that the prosecution is obliged to explain the injuries sustained by the accused in the same occurrence and whether failure of the prosecution to so explain the injuries on the person of the accused would mean that the prosecution has suppressed the truth and also the genesis or origin of the occurrence. Upon a conspectus of the decisions mentioned above, we are of the view that the question as to the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. The burden of proving the guilt of the accused is undoubtedly on the prosecution. The accused is not bound to say anything in defense. The prosecution has to prove the guilt of the accused beyond all reasonable doubts. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of the guilt of the accused beyond any reasonable doubt, the question of the obligation of the prosecution to explain the injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and in what circumstances injuries have been inflicted on the person of the accused.

* * * * * All the decisions of this Court which have been referred to and discussed above, show that when the Court has believed the prosecution witnesses as convincing and trustworthy, the Court overruled the contention of the accused that as the prosecution had failed to explain the injuries sustained by the accused in the same occurrence, the prosecution case should be

disbelieved and the accused should be acquitted. Thus, it is not the law or invariable rule that whenever the accused sustains an injury in the same occurrence, the prosecution has to explain the injuries failure of which will mean that the prosecution has suppressed the truth and also the origin and genesis of the occurrence.

20. Thus following these observations and looking to the evidence it is clear that, though the informant has not given out in the FIR as to how the two appellants have received injuries in their hands, yet not only the other eye-witnesses but the informant also gave out in their evidence in Court that the accused received injuries on account of the bursting of the barrel of their guns. The evidence of these witnesses does not suffer from any infirmity or contradiction. The prosecution evidence as scrutinized above has proved the guilt of the accused to the heel beyond reasonable doubt, and so there was no obligation on the part of the prosecution to explain the injuries sustained by the accused, yet in the evidence in Court all the witnesses have explained the injuries. Even if the explanation given by the informant in Court may not be considered as it may be an improvement in his statement in Court, yet the other parts of the evidence about the participation of the accused, is cogent and reliable. Further more evidence of the other prosecution witnesses about the participation of the accused and receiving of the injury is also cogent and reliable. The prosecution has stood on its leg firmly and has not been shaken in cross-examination and further the prosecution is not getting any jolt on account of any delay in the FIR, non-mentioning of the names of the witnesses and other details and so it cannot be said that the origin and genesis of the occurrence has been concealed.

21. A counter FIR Ext. A has been lodged by Raghunath Singh-appellant on 12.1.82 at about 3.30 p.m. in respect of the occurrence dated 12.1.82 at 8 a.m. on the basis of the fardbeyon said to have been given by him to the S.I. of the Hajipur Police Station at the Sadar Hospital, Hajipur. For this FIR Munna Singh (D.W. 1) has said that he had gone to the Sadar Hospital from the police station on O.D. slip and recorded the fardbeyan of Raghunath Singh at the hospital. Appellant Raghunath Singh in his statement u/s 313 Cr.P.C. has not said anything about this fardbeyan, It is not coming on the record as to what happened to the FIR lodged by the accused persons. Learned Counsel for the appellants has not been able to give out anything about the same nor any material has been brought on the record. The appellants-accused are said to have been medically examined at the Sadar Hospital by Dr. H.N. Gupta (P.W. 7). His statement is that on 12.1.82 at about 11 a. m. he had examined appellant Raj Kumar Singh and at 11.10 am. he examined appellant Ram Batu Singh. Appellant Raj Kumar had received only one injury which was grievous and Ram Babu received two injuries out of which one is simple and the other is grievous. The accused persons rushed to the hospital and thereafter a fardbeyan was given by appellant Raghunath. Appellants Raghunath, Arbind and accused-Ramdeni, though acquitted, were not injured. Appellant Raghunath or any other in his behalf could have rushed to the police station but he did not go to it which shows that they accused wanted to

go the hospital first to create medical evidence which shows that they have got a plan to prepare the defence. Though the contents of the FIR in the absence of any statement by Raghunath Singh about the same cannot be accepted but it appears that the FIR has been lodged at the same time, so the presence of the accused at that time is admitted by the accused themselves. The accused, therefore, cannot giggle out from the prosecution version against them. Rather they have themselves admitted their presence at the relevant time, though with different version which has not been proved by any evidence.

22. It was next contended by the learned Counsel for the appellants that the appellants had got a right of self-defence as their injuries during the course of the same transaction have not been explained and further from the material on the record it appears that the accused were flowing water which was stopped by the informant party. As to the contention of the self-defence on account of the non-explanation of the injuries of the accused it has been seen above in the case of *Hare Kishan Singh v. State of Bihar* (supra) that it was not obligatory on the prosecution to explain the injuries of the accused suffered in the same transaction. Already in the case of *Onkarnath Singh and Others Vs. The State of U.P.*, it has been observed by the Supreme Court in para 35:

In some cases, the failure of the prosecution to account for the injuries of the accused may undermine its evidence to the core and falsify the substratum of its story, while in others it may have little or no advance effect on the prosecution case. It may also, in a given case, strengthen the plea of private defence set-up by the accused. But it cannot be laid down as an invariable proposition of law of universal application that as soon as it is found that the accused had received injuries in the same transaction in which the complainant party was assaulted, the plea of private defence would stand *prima facie* established and the burden would shift on to the prosecution to prove that those injuries were caused to the accused in self-defence by the complainant party. For instance where two parties come armed with a determination to measure their strength and to settle dispute by force of arms and in the ensuing fight both sides receive injuries, no question of private defence arises.

23. In the case of *Hare Kishan Singh v. State of Bihar* (supra) their Lordships dealt with the matter in para 19 at page 868:

The accused may take the plea of the right of private defence which means that he had inflicted injury on the deceased or the injured person in exercise of his right of private defence. In other words, his plea may be that the deceased or the injured person was the aggressor and inflicted injury on the accused and in order to defend himself from being the victim of such aggression, he had inflicted injury on the aggressor in the exercise of his right of private defence. As has been held in *Munshi Ram's case* AIR 1968 SC 702 (supra) the burden of establishing the plea of private defence is on the accused and the burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. It, therefore, follows that simply because the

accused has received injuries in the same occurrence, it cannot be taken for granted that the deceased or the injured person was the aggressor and consequently, he had to defend himself by inflicting injury on the deceased or the injured person.

Thus, the plea that on account of the receiving injuries in the same transaction the appellants cannot raise the plea of self-defence and so this contention has got no force.

24. As regards the plea of self-defence on the ground that from the evidence of the prosecution itself it appears that the Nali was in existence and the informant party did not allow the appellants to take water to their field, the evidence of the witnesses will have to be scrutinized. As mentioned above, the informant-Janak Singh says when the accused came to his field then they said after constructing the Nali they would take water through his field. In cross-examination he has said that no Nali was constructed for taking water from the field of Ragho Singh towards east and from the boring of Ragho Singh water never went towards east. When the I.O. went to the spot then he was present there and his son and witnesses were also present there and the I.O. was not shown any Nali and it is not so that the I.O. had found Nali from the field of Brajraohan towards north or that there was any sign of taking therein. Further he has said that it is not so that the I.O. found Nali out at one place which was prepared after the filling the earth. Bisundeo (P.W. 1) son of the informant and one of the injured says that the accused wanted to make Nali through his field which was objected to by his father who said that he would not allow them take water through his field. In cross-examination he has said that on the date of the occurrence from the boring of Radhe up to the field of the accused there was no Nali for taking water. He also says that when the I.O. reached the spot there was no Nali from the field of Ranghunath through the field of the informant. He further said that when the accused wanted to construct Nali through the field of the informant then his father stopped it. P.W. 2 Surendra Singh said that Raghunath Singh had said that to construct the Nali through the field of the informant and take water whereupon the informant said that he would not allow them to take water through his field. He has said in cross-examination that the field of the accused was never irrigated through the boring and so also the field of Brajmohan. Before the occurrence there was no Nali and there was no Nali from the boring from east to west and there was no Nali on the date of occurrence. The I.O. was not shown any Nali towards east.

25. Brahmdeo (P.W. 3) has said that when the accused came they would construct Nali through the field of the informant which was objected to by the informant. In para 3 he has further said that there was no Nali from the boring of Radhe towards east or up to the place of occurrence or from the field of Brajmohan towards north. He was standing at the place where there was a talk of making Nali and aaloo (Potato) was in the field of Brajmohan where the occurrence took place. He said that he did not tell before the Police that

Raghunath, Ramdeni, Rambinod and Ram Babu said that they would construct Nali for water and Janak Singh said that he would not allow to construct the Nali. Dinesh Singh (P.W. 4) has also said about the resistance and objection by the informant on constructing the Nali through his field by the accused. On the date of occurrence the accused were not taking water for irrigation and he has said that he had not said before the police that the accused started taking water through the field of the informant. He has said on the date of occurrence there was no Nali through the field of the informant. The occurrence had taken place for constructing the Nali and there was no Nali from the boring of Radhe Singh upto the field of the appellants. However, the I.O. has said that he had found a Nala towards north of the aaloo field and the accused were taking water from the field of Radhe towards their field through this Nala and this Nala has been shown in the sketch map from the boring towards west up to 8249. He has further said that he had written in the diary as to whether the Nali was old or new. He also said that he found sign of taking water. In view of this evidence of the prosecution it appears that the accused wanted to take water through the field of the informant which was resisted by the informant. Even in the FIR the informant said that the accused wanted to take water through his field in the northern portion which was objected to by the informant by saying that they would not allow the water to be taken through his own field. So if the accused wanted to make Nali through the field of the informant, definitely they had got no right to make Nali and take water through the field of the informant without his permission. The informant party was well within jurisdiction to objection to that one and in these circumstances no right of self-defence accrued to the appellants. So this plea of self-defence on this score also fails.

26. As regards the prosecution plea that the barrel of the country-made pistol used by the appellants had got broken and had caused injuries to the accused themselves, it appears that a country made pistol was found and the barrel was broken. No hard and fast rule can be set about a country made pistol in what manner it would work. The evidence of the eye-witnesses is there that the barrel got busted and that evidence is being supported by the medical evidence also. So it will not have any effect specially when the prosecution is to explain its case which it has proved and further the prosecution is not bound to explain the injuries of the accused in the same transaction as said by the Supreme Court.

27. It has been contended by the learned Counsel for the appellants that as the accused Ramdeni, though found as a member of the unlawful assembly had no overt act to his credit so he has been acquitted and so on that score the conviction of the appellants u/s 149 IPC was untenable and even now the court cannot convict the appellants u/s 34, IPC also. As to this contention the judgment of the trial court shows that the court below had found Ramdeni as a member of the unlawful assembly but as no overt act are assigned to him so he was acquitted giving him benefit of doubt. The courts have throughout been holding that if the accused is a member of the unlawful assembly, he is liable for conviction u/s 149 IPC, even though there is no overt act by him. It is sufficient

if it is established that the accused shared the common object of the unlawful assembly. The latest decision of the Supreme Court in the case of Lalji and Others Vs. State of U.P., , has very clearly given out the position at page 756 (para 9 & 10) as follows:

Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus, this section created a specific and distinct offence. In other words it created a constructive or vicarious liability of the member of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredient of the section the question that he did nothing with his own hand would be immaterial. He cannot put forward the defence that he did nothing with his own hands commit the offence committed in prosecution of the object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together armed with lathis and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability u/s 149. It must be noted that the basis of the constructive guilt u/s 149 is more membership of the unlawful assembly, with the requisite common object or knowledge.

Thus once the court hold that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it.

28. In case of Mohan Singh Vs. State of Punjab, , the Supreme Court has to deal with such a situation where two of the five accused were acquitted. Their Lordships deal with the difference between Sections 149 and 34 I.P.C. It has been said at page 178 (para 8):

One of the essential ingredients of Section 149 is that the offence must have been committed by any member of an unlawful assembly and Section 141 makes it clear that it is only where five or more persons constituted an assembly that an unlawful assembly is born, provided, of course, the other requirements of the said section as to the common object of the persons composing that assembly are satisfied. In other words, it is an essential condition of an unlawful assembly that its membership must be five or more. The argument, therefore, is that as soon as the two were acquitted, the membership of the assembly was reduced from five to three and that made Section 141 inapplicable which inevitably leads to the result that Section 149 cannot be invoked against the appellants. In our opinion, on the facts of this case this argument has to be upheld. We have already observed that the point raised by the appellants has to be dealt with on the assumption that only five persons were named in the charge as persons composing the unlawful assembly and evidence led in the course of the trial is confined only to the said five persons. If that be so, as soon as two of the five named persons are acquitted the assembly must be deemed to have been composed of only three persons and that clearly cannot be regarded as an unlawful assembly.

Their Lordships further observed at page 180 in para 13:

That inevitably takes us to the question as to whether the appellants can be convicted u/s 302/34, Like Section 149, Section 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34. In some ways the two sections are similar and in some cases they may overlap. But, nevertheless, the common intention which is the basis of Section 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-in-concert and necessarily postulates the existence of a pre-arranged plan and that must mean a prior meeting of minds, it would be noticed that cases to which Section 34 can be implied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention.

Their Lordships finding that there was close relationship between two appellants held that they shared the common intention. In the result the conviction of the

appellants was altered from Section 302 read with Section 149 to Section 302 read with Section 34 I.P.C.

29. In such a situation when Ramdeni has been acquitted by the trial Court, whether the conviction of the remaining four accused out of the only five accused can be maintained even with the aid of Section 34, I.P.C. if from the evidence on the record common intention of the accused is made out. In the case of Lachman Singh and Others Vs. The State, it has been observed that where there is a charge u/s 302 read with Section 149 and the charge u/s 149, disappears because of the acquittal of some of the accused, a conviction u/s 302 with Section 34 I.P.C. is good enough, though there is no separate charge u/s 302 read with Section 34 I. P. C. provided; on the facts of the case the accused could have been charge-sheeted under Sections 302/34, IPC. Later in the case of Karnail Singh v. State of Punjab AIR 1954 SC 204 similar view was taken by their Lordships of the Supreme Court In the case of Willie (William) Slaney Vs. The State of Madhya Pradesh, their Lordships of the Supreme Court considered all these matters after referring to the decisions in Lachman Singh v. State (supra); Karnail Singh v. State of Punjab (supra); Radha Rani Bhargava Vs. Hanuman Prasad Bhargava, and Nanak Chand Vs. The State of Punjab, and held the view that Section 34 of the Code could be resorted to in case of failure of Section 149 on account of acquittal of any one of the only five accused, in case there is material on the record from which it would be detected that there was a pre-arranged plan and there was a common intention. In the case of Mohan Singh Vs. State of Punjab, similar view was there and the same is being followed by all the Courts. Even a Division Bench of our Court in the case of State of Bihar v. Sarju Bhumij 1987 PLJR 709 has held that the conviction can be made with the aid of Section 34 I.P.C. if no prejudice is likely to be caused. In the case of Gupteshwar Nath Ojha and Another Vs. State of Bihar, the Supreme Court has dealt with this matter as follows:

From the judgment of the High Court, it appears that the question of common intention was considered but there is no finding to reach a conclusion that there was an unlawful assembly with a common object and there is also no finding that in pursuance of the common object of the unlawful assembly, the acts were committed by the members of that assembly. Learned Counsel appearing for the State in view of this contended that even if the appellants could not be convicted with the aid of Section 149 IPC they can safely be convicted with the aid of Section 34 as the common intention can even be inferred from the circumstances that all these persons assaulted the deceased and other prosecution witnesses simultaneously and on these basis the conviction of the appellants could be justified u/s 302 Part II read with Section 34. It is no doubt true that in a case like this, if the facts are not sufficient for a conviction with the aid of Section 149, the conviction can be maintained with the aid of Section 34 and therefore the case of the appellants can be considered in that light as well.

30. Section 34 IPC implies an element of participation if action on the part of the

accused persons. Though the acts may be different and there may be variations in their character but they must have the element of common intention. This common intention is to be gathered from the acts and conduct of the accused persons preceding, attending and succeeding the occurrence. In the case of *Hare Kishan v. State of Bihar* (supra) the Supreme Court observed at page 1651 (para 9):

It is clear that so far as those who participated in the incident it could not be doubted that they shared the common intention to beat the deceased and other prosecution witnesses and in this view of the matter so far as Gupteshwar Nath Ojha is concerned whose participation in the incident is clearly found by the High Court and also by the Sessions Court, his conviction u/s 304 read with Section 34 IPC can be justified.

31. Though it is necessary that to attract Section 34 of the Code every person should be attributed with the allegation of assault and causing hurt to anybody, yet some overt act is essential as observed by the Supreme Court in the case of *Hare Kishan Singh v. State of Bihar* (supra) in para 28 at page 871:

Common intention u/s 34 IPC is not by itself an offence. But, it creates a joint and constructive liability for the crime committed in furtherance of such common intention. As no overt act whatsoever has been attributed to the appellants, Ram Kumar Upandhya and Sheo Narain Sharma, it is difficult to hold, in the facts and circumstances of the case, that they had shared the common intention with Hare Krishna Singh and Paras Singh of Dhobha. When these two appellants were very much known to the eye witnesses, non-mention of their names in the evidence as to their participation in firing upon the deceased, throws a great doubt as to their sharing of the common intention. The convictions and sentence of these two appellants also cannot therefore, be sustained.

32. Sometimes the common intention may be to commit a minor offence but any one may commit a major offence. Then; what will be the position has been explained in the case of *Dharam Pal and Others Vs. State of Haryana*, in which the Supreme Court in paras 14 and 15 has mentioned as follows:

It may be that when some persons start with a prearranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf.

The common intention denotes action in concert and necessarily postulates a pre-arranged plan or prior meeting of minds and an element of participation in action. As pointed out above, the common intention to commit an offence graver than the one originally designed may develop during the execution of the original plan. during the progress of an attack on the person who is intended to be

beaten but the evidence in that behalf should be clear and cogent for suspicion, however strong, cannot take place of the proof which is essential to bring home the offence to the accused.

33. A Division Bench of this Court in the case of Rambali v. State of Bihar 1989 Cri. L.J. 764 following the observations in the case Dharampal v. State of Haryana (supra) has observed at page 771 in para 11:

A Criminal Court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. This law, which has been candidly stated, has to be applied with no exception, but one has to bear in mind that together with several persons assaulting the victim and their individual acts going to show that they were not refraining themselves from committing a homicide, the meeting of minds in course of the occurrence is writ large in what they individually do. In the sense of one principal offender, there may not be any, but each may be charged for his individual act with the burden of the intention to kill, when they act in concert when the victim is killed their vicarious liability is proved.

34. Here in the present case, as the evidence shows, the appellants along with acquitted accused Ramdeni had come to the place of occurrence armed with weapons and wanted to take water through the field of the informant and when it was objected to by the informant, Raghunath Singh said that he had purchased the weapons for them and so to kill, whereupon firing was done by appellant Arbind Kumar due to which Smt. Jotiya died and from the firing of appellant Raj Kumar P. Ws. 1, 5 and 6 received injuries. However, the pistol of appellant Ram Babu misfired. So from this it appears that the accused persons had come with the pro-plan for causing atleast grievous injuries to the informant party or any one on his behalf who would obstruct in the construction of the Nali and so they actually fired resulting into the death and injuries as mentioned above. Thus the causing of the death was not the common intention but was the individual act of Arbind Kumar and so he is liable to be convicted u/s 302 IPC and sentenced to rigorous imprisonment for life. The judgment of the trial court about his conviction and sentence is therefore upheld.

35. So far as appellant-Raj Kumar is concerned, he has fired from his pistol which caused injury to Bisundeo, Lekhi and Janki (P. Ws. 1, 5 and 6). Out of the four injuries, injury No. 1 of Bishundeo was grievous while the rest three were simple injuries caused to P.W. 5 and 6 were simple in this way appellant Raj Kumar who used fire arm voluntarily caused grievous injury and also simple injuries and so he is liable to be convicted u/s 326 IPC.

As regards appellant-Rambabu, he has fired from his pistol which did not hit anybody. He has shared the common intention causing injuries and so in execution of the plan he fired from pistol which misfired. So there is overt act of firing which brings him within the mischief Section 34 IPC. So he is liable to be

convicted u/s 326 read with Section 34 IPC.

36. So far as appellant-Raghunath Singh is concerned, he has also come with the common intention to irrigate the field and to cause injuries by fire arms. He was not armed with any weapon but he was an order giver. His overt act of exhortation is there. Moreover he has shared the common intention thus creating a joint and constructive liability for the crime committed in furtherance of the common intention. His overt act of exhorting the accused persons to commit the offence has been well proved by the material on the record. In the FIR it has been said-"Dekhthe kye ho, inlogon ke waste pistol kharida hai, sabhi salon ko jaan se mar do" According to P.W. 1 Raghunath Singh said-"goli chalakar maro inlogon ke wasie revolver liya hai". P.W. 2 said-"Raghunath Singh bole ki goli maro". P.W. 3 said-"Raghunath Singh bole goli chalao kya dekhta hai". P.W. 4 said-"tum log kya takta ho goli chalao". P.W. 6 said-"Raghunath Singh ne hukum diya ki kya dekhta hai sale ko maro".

Thus from this evidence it is clear that from the very beginning even in the FIR the role of exhortation to shoot has been given out and that has been supported by the witnesses in their statements in court. Out of these witnesses P. Ws. 1, 5 and 6 are the injured witnesses whose presence on the spot is guaranteed because of the injuries. From the evidence of these P. Ws. 1, 2, 3, 4 and 6 it does not appear that their evidence suffers from any infirmity or any laches on account of which they should be disbelieved. So their evidence is reliable. Though evidence of exhortation has been treated as a very weak typed of evidence but as seen above on scrutiny the offence of exhortation by appellant-Raghunath Singh is well proved. So it cannot be brushed aside. Law does not permit to brush aside or ignore cogent, reliable and believable evidence merely on whimsical ground of leniency and weak evidence. Thus he is liable for joint and constructive liability for the crime committed and also for abetment of the offence committed by the appellants-Raj Kumar and Ram Babu and so he is liable for conviction under Sections 326/109 IPC.

37. Section 107 IPC says that a person abets the doing of a thing who instigates any person to do that thing. Section 109 IPC says-whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence. In the case of Trilok Chand Jain Vs. State of Delhi, the Supreme Court said:

The intention to aid the commission of the crime is the gist of the offence of abetment by aid.

38. A Division Bench of the Calcutta High Court in connection with the offence u/s 306 IPC which provides for the abetment of suicide has said that the word "instigation" literary means to goad or urge forward or to provoke, incite urge or encourage to do an act. It is something more than cooperation. In the case of Emperor v. Amiruddin Selebhoy Tyabjee AIR 1923 Bombay 44 at page 46 it was

observed:

Now a person is said to instigate another to an act when he actively suggests or stimulates him to the act by any means or language direct or indirect whether it takes the form of express solicitation or of hints, insinuation or encouragement [Russell on Crimes, p 164].

In the case of Emperor v. Surjya Kumar Sen and Anr. AIR 1934 Calcutta 221, Special Bench has observed that instigating raider or leader of a raid in which death is caused amounts to abetment of murder and all those who joined the raid or personally directed it were guilty of murder. In Re: Koganlti Appayya and Ors. AIR 1938 Mad 893 it was observed (at page 895 column 2).

It seems to me that the motive of the person who instigates is not the only determining factor; in other words, even if the object of the person who instigated another to commit a crime is to catch him in the act of committing the crime instigation by him nevertheless amounts to abetment of the offence, and the abettor must be regarded as an accomplice when the object of the instigation is to make the offender commit the offence, and the person who was instigated actually commits the offence.

In a case u/s 107 and 306 IPC recently the Supreme Court observed in Wazir Chand and Another Vs. State of Haryana, :

Reading Sections 306 and 107 together it is clear that if any person instigates any other person to commit suicide and as a result of such instigation the other person commits suicide, the person causing the instigation is liable to be punished u/s 306 of the Indian Penal Code for abetting the commission of suicide.

39. In the case of Gupteshwar Nalh Ojha v. State of Bihar (supra) their Lordships while dealing with the case of Bishwanath Ojha one of the accused have observed, at page 1651 (para 10):

So far as Bishwanath Ojha is concerned, Section 34 IPC could be used against him to make him liable for an offence u/s 304 Part II read with Section 34 only if his participation was established. It is clear that so far as participation is concerned there is a clear finding that he did not participate in the incident. The only act alleged against him was that he by shouting directed the other accused persons to beat the deceased and other prosecution witnesses. And it is for this positive act that he was independently charged with the aid of Section 114, IPC. This charge has been held not to be proved as he has been acquitted from this charge by the High Court and in view of this the only conclusion could be that he did not either shout or direct the other accused persons to attack the deceased or other prosecution witnesses. In absence of any overt act or even a shout or an oral statement he could not be convicted even with the aid of Section 34. As regards his conviction u/s 148 and the conviction of the other appellant u/s 147 is concerned, as discussed above, there is no material to come to a conclusion that they were members of an unlawful assembly and therefore conviction u/s

148 or 147 could not be sustained.

In the case of *Ishtiaq v. State of U.P.* 1987 SCC (suppl.) 241 the Supreme Court has said:

The only evidence against the appellant is that he has exhorted the accused Shan to fire at Aziz Begum from the top of the roof. We have given our anxious consideration to the evidence on this point, but we are not satisfied that the evidence as regards the exhortation is satisfactory. There is no room for reasonable doubt in so far as this part of the evidence is concerned and benefit of reasonable doubt must, therefore, go to the appellant.

4. Thus from all this it is clear that abetment, incitement, instigation exhortation or goading is caused by means of language or action directly or indirectly. A person who abets, incites, instigates goads urges or exhorts to do an offence is equally liable for the offence which is done by the person who has incited, instigated, exhorted, goaded or abetted as he must have been intended all the results that followed by such exhortation and the like. If the exhorter and the like is a member of the unlawful assembly and has exhorted the killer to kill a man then the exhorter being the member of the unlawful assembly is equally liable for the offence as he has shared the common intention to cause death. Thus the offence which is committed as a result of incitement exhortation, abetment, goading or instigation will bring the exhorter and the like on the same and equal footing as the person who committed the offence as a result thereof. But it must be borne in mind that the placing of temptation or to do an act by exhortation, incitement, goading or abatement will not be an offence unless the exhortation, incitement, goading or encouragement does not bring the result. That is to say if a person is incited, exhorted to commit murder then the offence of murder must be committed by the person as a result of or in pursuance of exhortation or incitement.

41. As regards the sentences of the appellants, Arbind Kumar has already been convicted u/s 302 IPC and sentenced to rigorous imprisonment for life. So far as the appellants Raj Kumar, Ram Babu and Raghunath Singh are concerned, they are suffering the ordeal of criminal prosecution since the year 1982. Further, they have remained in jail for some time. Appellant Raj Kumar has been refused bail by the learned C.J.M. on 21.9.82 but it appears that he has been granted bail by the learned Sessions Judge which he enjoyed till 28.1.86 on which date the order of conviction has been passed by the learned Sessions Judge. This appeal was filed on 11.2.86. Bail appears to have been refused to him by the High Court by order dated 12.1.88. So he is in jail since 21.8.86 for over more than three years. Similarly appellant Rambabu has been refused laid by the learned CJM on 29.1.82. But later on it appears that he has been granted bail and that he enjoyed till the order dated 28.1.86. He has been granted bail by the High Court by order dated 24.4.87 so he has been in Jail for about one and a half years. As regards appellant Raghunath Singh, he has been refused bail by the learned CJM of 29.1.82 and so also by the learned Sessions Judge and also by the High Court

by order dated 28.4.82. He again moved for bail before the learned CJM on the ground of illness which was refused on 24.6.82. However, on 28.6.82 the learned Sessions Judge has granted him bail and that benefit he availed till 28.1.86. High Court thereafter granted bail to him by order dated 17.2.86. So he too has been in jail for about seven to eight months. He is as old as said earlier the appellants are facing the ordeal of this trial since 1982. So it will be in the interest of justice while convicting the appellant Raj Kumar u/s 326 IPC, appellant Ram Babu under Sections 326/34 & 326/109 IPC, they are sentenced to the period already undergone by them. They are accordingly sentenced. Appellants Ram Babu and Raghunath Singh are on bail, their bail bonds are cancelled and they are discharged from the liability of their bail bond. Appellant Raj Kumar has already been refused bail so he may be in jail. He is ordered to be released forthwith unless wanted in some other cases.

42. In the result, this appeal is dismissed with the modification in the sentence of the appellants as said above.

S. Snamsul Hasan, J.

43. I agree.