

(2015) 07 DEL CK 0254

In the Delhi High Court

Case No : Criminal A. 392, 399/1998 and 439 of 2013

Atambir Singh and Others

APPELLANT

Vs

State of Delhi

RESPONDENT

Date of Decision : 29-07-2015

Acts Referred:

Arms Act, 1959 — Section 27

Criminal Procedure Code, 1973 (CrPC) — Section 157, 161

Penal Code, 1860 (IPC) — Section 299, 302, 307, 308, 324

Citation : (2015) 3 CCR 432 : (2016) CriLJ 568 : (2015) 222 DLT 163

Hon'ble Judges : Sanjiv Khanna, J; R.K. Gauba, J

Bench : Division Bench

Advocate : Vivek Sood, Senior Advocate and M.L. Yadav, for the Appellant;
Varun Goswami, APP, Advocates for the Respondent

Judgement

R.K. Gauba, J—On 12.06.1995 Jitender Kumar son of Sh. Jagdish, 23 years old R/o D-301, Janakpuri was brought to Hindu Rao Hospital by PCR officials (Head Constable Harpal Singh) at about 6:10 PM with stab wounds. He was examined against MLC (Ex. PW-16/A) and given medical treatment. He succumbed to the injuries during treatment and was declared dead at 0210 hours of 13.06.1995. FIR No. 233/95 (Ex. PW-13/A) was registered against this backdrop in P.S. Adarsh Nagar in the course of investigation into which evidence statedly came to be gathered additionally about the death of Jitender Kumar being homicidal and about attempt having been made to commit murder of Mohinder Singh (PW-6) and Rahul (PW-20) in the course of same occurrence.

2. The appellants Sukhwant Singh @ Babla (accused No. 1 in trial Court record), (Crl.A. No. 399/1998), Atambir Singh @ Chota Babla (accused No. 2 in trial Court record) (Crl.A. No. 392/1998) and Virender Singh @ Jyoti (accused No. 3 in trial Court record) (respondent in Crl.A. No. 439/2013) were brought to trial on the basis of report of investigation into aforementioned FIR. They were charged with offences punishable under Sections 302/34 and 307/34 IPC. The accused No. 1 (A-1) also faced additional charge for offence under Section 27 of

Arms Act since the investigation had statedly showed he had used his licensed fire arm (Pistol) for firing at PW-6 and PW-20 in an attempt to kill them. All three accused pleaded not guilty whereupon prosecution was called upon to adduce evidence. Mid-way the trial, accused No. 3 (A-3) Virender jumped bail and absconded. In due course, he came to be declared a Proclaimed Offender (PO).

3. The trial against accused No. 1 (A-1) and accused No. 2 (A-2) was concluded and resulted in judgment passed on 20.08.1998 by Sh. G.D. Dhanuka, Additional Sessions Judge (ASJ) finding both of them guilty as charged. After they had been convicted, the learned trial Judge passed the order on sentence on 25.08.1998 awarding imprisonment for life with fine of Rs. 1,000/- for the offence punishable under Sections 302/34 IPC (in default of payment of fine further RI for three months each) and Rigorous Imprisonment (RI) of seven years with fine of Rs. 1,000/- for the offence punishable under Sections 307/34 IPC (in default of payment of fine further RI for three months each) to both convicted persons besides RI for three years and fine of Rs. 1,000/- (in default payment of fine further RI for three months) to A-1 for the offence punishable under Section 27 Arms Act.

4. Virender (A-3) was later re-arrested and the trial against him reopened. In the said proceedings, some of the witnesses were recalled to give opportunity to him for cross-examination. On conclusion of the said proceedings, judgment was passed on 28.04.2001 by Sh. L.D. Mual, ASJ, holding that the prosecution had not been able to prove its case beyond reasonable doubts and extending the benefit on such account, and thus, acquitting A-3.

5. A-1 and A-2 are in appeal before this Court, assailing the judgment dated 20.08.1998 whereby they were convicted, submitting that conclusions have been drawn only on the basis of testimony of highly interested witnesses (PW-6 and PW-20) who were not reliable since their presence at the scene at the time of occurrence is suspect. The State, on the other hand, is in appeal challenging the judgment dated 28.04.2001 contending that the evidence adduced has not been properly appreciated and so acquittal of A-3 was incorrect.

6. It must be mentioned here that the trial Court record came to be misplaced after appeals had been preferred. On direction, the successor presiding officer of the trial Court(s) has reconstructed the record, to the extent possible, primarily with the assistance of counsel for the appellants. The reconstructed record has been received and made available to all sides and with regard to the credibility whereof no dispute has been raised. There are some documents/proceedings missing but it was confirmed by the learned counsel on all sides that this has not handicapped them in arguments nor caused any prejudice to the convicted appellants or the respondent in the State appeal.

7. Accused No. 3 (A-3) jumped bail during hearing on the appeal against his acquittal. Duress processes have failed to locate him or secure his presence. Besides issuing necessary directions for he to be traced and brought to Court, in

order not to allow further delay in these matters, on our directions, the Delhi High Court Legal Services Committee appointed Mr. Sumeet Verma, Advocate as amicus curiae for assistance on behalf of the said accused, respondent in CrI. Appeal No. 439/2013.

8. We have heard arguments at length and perused the available record.

9. The first information about the occurrence was received in Police Control Room (PCR) by Head Ct. Usha (PW-12) sometime around 5:47 PM regarding a quarrel (Jhagda) at D-40, Bhagat Singh Road, Adarsh Nagar, Delhi. She passed on this information on the wireless net-work, inter alia, to District Control Room, North West District, Delhi. The information reached P.S. Adarsh Nagar (hereinafter referred to as the "Police Station") where it came to be logged as D.D. entry No. 17/A. A copy of the said D.D. entry is part of the rukka (Ex. PW-21/C) which would be dispatched at about 08:10 PM by SI Banwari Lal (PW-21) through Ct. Pratap Singh (PW-3), to the Police Station for registration of FIR. The FIR on its basis was registered at 08:25 PM (Ex. PW-13/A) by Head Ct. Chet Ram (PW-13), Duty Officer (DO) at the Police Station at the relevant point of time.

10. The documents leading to the registration of FIR clearly show that no eye-witness was available till PW-21 (the first Investigating Officer) had dispatched the rukka from the scene of incident (B-42, Bhagat Singh Road, Adarsh Nagar). The FIR was registered for investigation into offences under Section 307 IPC and under Section 27 Arms Act on the basis, inter alia, of the information available at that stage about the injuries suffered by Jitender Kumar (the deceased) for which he had been taken to Hindu Rao Hospital ("the Hospital") by officials of Police Control Room (PCR) and discovery of a live round of ammunition noticed lying on a sewer lid at crossing of Bhagat Singh Road and Arya Samaj Road and a spent round of ammunition found embedded in the rear seat of Maruti Van No. DNB-1350 ("the Maruti Van" hereinafter) having entered the van after creating a hole near rear dickey.

11. It has been the case of the prosecution that soon after the first Investigating Officer (the first IO) had sent his rukka to the Police Station for registration of the FIR, PW-6 and PW-20 came to the scene and informed him that the incident, in which Jitender Kumar @ Montu had been injured, had occurred in their presence sometime after 05:30 P.M. on 12.06.1995. They also claimed that in the course of the incident in which A-1, A-2 and A-3 had participated, the stab injury was inflicted on the person of Jitender by A-3 with active assistance of the other two and that when both these witnesses had tried to intervene, A-1, who was carrying a pistol in his hand, had fired in their direction and, thus, attempting to cause their death.

12. From the narration of the events in the prosecution case, the evidence led during the trial and the line of cross-examination of the material witnesses by the defence, certain facts emerge as undisputed and beyond the pale of any controversy. Before proceeding further, the same may be noted at this stage.

13. A-1 and A-3 are real brothers. Reference has come in the evidence of a commercial property located in Adarsh Nagar which is owned by A-1 and A-3. The lower portion of this property is in use as an eating house in the name and style of Shahi restaurant. It was brought out by the defence itself during cross-examination of PW-6 that A-2 was working as a manager under A-1 and A-3 in the said restaurant during the relevant period. The upper floor portion of the building is used as Alishan Guest House. The place where Shahi restaurant is located is concededly at a walking distance from the place of occurrence mentioned earlier. The evidence further shows that Kushal Cinema in Jahangirpuri, which would also be referred in the narration, is hardly ten minutes away on foot from the said place.

14. The prosecution concedes that Mohinder Singh (PW-6), Rahul Maheshwari (PW-20) and Jitender (the deceased) have had involvement in criminal cases. PW-20 during his cross-examination himself stated that on 12.06.1995, the date of incident, he and the deceased had gone together to Tis Hazari Courts for appearing in a case pertaining to Police Station Jahangirpuri in which both of them were co-accused. The cases in which PW-20 had been involved included two under Section 302 IPC of Police Station Narela and Jahangirpuri and one under Section 506 IPC of Police Station Adarsh Nagar. Similarly, PW-6 admitted his involvement in certain criminal cases including one of murder (he was brought to the Court for deposition as an under-trial prisoner) and another of Police Station Alipur involving offence under Arms Act. He admitted his involvement in yet another case of murder relating to Police Station Jahangirpuri in the past though he explained he had been since acquitted of that charge.

15. During the course of arguments on the appeals, questions were raised as to the place of residence of the deceased at the relevant point of time. In the MLC (Ex. PW-16/A) of the deceased, the examining medical officer (PW-19) had noted two addresses. The first address is described as House No. D-301, Jahangirpuri and the other as A-118, Mukherjee Nagar. Clearly, the second address was added later on. The deceased had been brought to the hospital by Head Constable Harpal Singh of PCR. At the time of arrival in the hospital at 06:10 P.M., per MLC, the deceased was conscious though drowsy. PW-19 confirmed that the pulse rate was 126 per minute though the blood pressure was un-recordable. Apparently, the victim with incised wound on the left inter-scapular area about three inches long and another incised wound on the chin one inches long. He was still alive but his condition would have deteriorated on the way to hospital from scene of occurrence. All that is shown recovered from his person is cash amount in the sum of Rs. 1,802/- which was handed over by the medical officer to the IO through Duty Constable. In these circumstances, it can safely be inferred that the two addresses, one of Jahangirpuri and the other of Mukherjee Nagar, would have been disclosed by the victim (the deceased). It may have been ascertained from some papers, or corrected subsequently when relatives or known persons had arrived. The fact that Jahangirpuri address was the ordinary place of residence of the deceased has come out clearly in the testimony of PW-6 and

PW-20 and stands fully corroborated from the evidence particularly of Jagdish Lal (PW-2), father of the deceased who along with Nand Lal (PW-1) had identified the dead body before postmortem examination on 13.06.1995. The insertion of another address on the MLC, we add, would not dispel or negate their affirmative testimonies.

16. That the incident had occurred in front of House No. D-42, Bhagat Singh Road, Adarsh Nagar, a place depicted in graphic detail in the scaled site plan Ex. PW-10/A prepared by Sub-Inspector Manohar Lal (PW-10) is proved by material which is beyond reproach. D.D. No. 17-A which is part of the rukka Ex. PW-21/A refers to this place as the place of occurrence communicated through PCR network. When the first IO (PW21) arrived at the said place, he found blood lying at several places. Having learnt that the injured had been taken to the hospital, he proceeded there, leaving Constable Pratap Singh (PW-3) behind for guarding the scene. He found victim Jitender @ Montu admitted with injuries noted as caused by sharp weapon but unfit for giving any statement. He had not come across any eye-witness either at the scene or in the hospital. When he returned to the scene of incident and inspected it closely, he found a live round of ammunition on the sewer cover and a spent bullet embedded in the rear seat of the Maruti Van to which reference has already been made. The Van belonged to Ramesh Chander (PW-24), resident of House No. D-29, Bhagat Singh Road located close by. PW-4 on his part has confirmed that while sleeping inside the house, he had heard noise at about 05:00 P.M. or 05:30 P.M. and when he came out he saw a crowd of persons who had gathered and learnt there that a firing incident had taken place. PW-4 himself may not have heard the firing but he confirmed that his car was hit as pallet of a bullet was recovered from its body, the shot having created a hole. The evidence of PW-21 leaves no room for doubt that this spent bullet found embedded in the rear seat was a part of the evidence recovered during the investigation. It may be mentioned here that the prosecution proved the cartridge found on the sewer cover as Ex. P-3, described in the evidence as a live cartridge, the same and the spent bullet recovered from the body of the Van having been seized formally in the presence of PW-6 and PW-20 vide seizure memos Ex. PW-6/A and Ex. PW-6/B respectively.

17. That Jitender Kumar @ Montu suffered a homicidal death is also a fact which cannot be disputed. We note the evidence, on basis of which we thus conclude, hereinafter.

18. The MLC (Ex. PW-16/A) was proved by Dr. N.R. Tuli (PW16) in absence of its author Dr. Dushyant who had since left the services of the hospital and whose presence could not be initially procured. Later, Dr. Dushyant himself appeared as PW19 and proved the MLC that had been prepared by him. On the basis of such record, it was brought out that Jitender @ Montu was brought the hospital by the PCR official at 06:10 PM on 12.06.1995. His medical examination showed that he had suffered incised wound on the left inter-scapular area of 3 inch long besides incised wound on the chin of the length of 1 inch. The injuries suffered had been

caused by a sharp edged weapon. Clearly, the victim required medical attention and aid and so was referred to emergency surgery.

19. Jitender died, during treatment in the hospital, at 02:10 AM on 13.06.1995. The Investigating Officer (PW21) speaking with reference to DD No. 26A (Mark-B) testified to the fact that the intimation about the death was received in the police station at 02:45 AM on 13.06.1995. The case was, thereafter, taken over by Inspector Swatantra Kumar (PW18) for investigation, in the course of which he prepared death report (Ex. PW18/A) and made a formal request for post-mortem examination of the dead body through application (Ex. PW18/C). It may be added here that the document described as brief facts (Ex. PW18/B) is a part of the proceedings drawn by PW18. Reference would need to be made to this document (Ex. PW18/B), later in the context of the arguments that have been raised on behalf of three accused. For present purposes, suffice it to note that the dead body was submitted for post-mortem examination which came to be conducted by Dr. Alexander (PW7) leading to autopsy report Ex. PW7/A.

20. The post-mortem examination report (Ex. PW-7/A) has been proved by the autopsy doctor. It noted the following external injuries:

"1. Oblique incised wound on the right infra-mandibular margin of size 3.2 cms x 17 cm x 2.2 cm. The medial edge is higher than the lateral edge. Both the edges are acute. Both the upper and lower margins are sharp. Tailing of the wound is seen towards the lateral edge. Superiorly the centre of the wound is 3.5 cms below the level of right angle of mouth. The medial and lateral edges are 3.3 cms and 3.7 cms below the level of right angle of mouth respectively. Medially the medial edge is 1 cm away and lateral edge is 5 cms away from the median plane, anteriorly respectively. Inferiorly the centre of the wound is 144 cms above the level of heel.

2. Oblique stab wound on the left lower aspect of back of chest. Size 10 cms x 3 cms x chest/abdomen cavity deep. The lateral edge is higher than the medial edge. Both the edges are acute. Both the upper and lower margins are sharp. Tailing of the wound seen towards the medial edge. Superiorly the centre of wound is 34 cms below the level of nape of neck. Medially, the centre of the wound is 5.5. cms away from the posterior median plane. The medial edge and the lateral edge are 1.8 cms and 10.4 cms away from the posterior median plane respectively. Inferiorly the centre of the wound is 102 cms above the level of left heel. The medial and lateral edges are 100 cms and 104 cms above the level of left heel respectively. The direction of the wound is downwards medially and anteriorly."

21. On internal examination, the autopsy doctor, inter-alia, found that :--

"Peritoneal cavity contains approximately 50 ml. of blood and blood clots. Stomach contains 200 ml of yellowish semi digested food particles with smell of alcohol. Small and large intestines are normal and intact. Liver is pale and intact. Right kidney is pale and intact. Spleen is pale and intact. Left kidney is not

present (Surgical nephrectomy done). Blood clots are present all around the side of left kidney. All the structures of pelvis and neck and spine are normal and intact."

22. The autopsy doctor also noticed that the second stab wound had passed through 11th rib on left side and mid-scapular line into the plural cavity posterior dome of left side diaphragm and left kidney (size of the wound being 1.9 cm).

23. The track of the second injury was noted by the autopsy doctor as under :--

"Skin-fascia muscles of the left lower aspect of chest -11th rib of left side had mid-scapular line-into the pleural cavity-posterior dome of left side diaphragm-left kidney."

24. In the opinion of PW7, death had occurred due to shock and haemorrhage resulting from injuries which were found to be consistent with the history given in the documents submitted prior to the autopsy. The autopsy doctor opined that both the injuries had been caused by a sharp edged weapon/object, the second injury being sufficient to cause death in the ordinary course of nature. The injuries were noted to be of recent origin.

25. The query of the IO about any bullet injury having been sustained by the deceased was answered in the negative. The autopsy doctor preserved blood sample which was passed on to the Investigating Officer.

26. It is nobody's case that the injuries noted in the autopsy could have been suffered accidentally or were self-inflicted. Given the very nature thereof, there can be doubt that they were inflicted by the assailant(s) intentionally. The prosecution relies on the eye-witness account of Mohinder Singh (PW6) and Rahul Maheshwari (PW20) in this regard. We need not even refer to such ocular evidence in detail at this stage. The same would need to be discussed, in due course, in the context of questions about culpability of the three persons brought to trial. Having regard to the part of the body where the second injury was inflicted, its depth and extent to which it had caused damage, it is obvious that it was caused either with intention of causing death or with knowledge that it was likely to cause death within the mischief of Section 299 of Indian Penal Code and, therefore, we affirm the findings and the conclusion of the learned trial judge that death of Jitender @ Montu was a case of culpable homicide.

27. As noted earlier, the appellant Sukhwant Singh @ Babla (A-1) and respondent Virender Singh @ Jyoti (A-3) are real brothers, both sons of Balwant Singh. It has been brought out through the testimony, inter-alia, of SI Banwari Lal (PW21) and Inspector Swatantra Kumar (PW18) that after the initial intimation, the former had first visited the scene of incident and then proceeded to the hospital from where he returned to the spot and then sent his rukka for registration of FIR at 08:10 PM. During his first visit to the hospital, prior to the sending of rukka, he had been joined by PW18 there at about 07:30 PM. At that time, the members of the family of the victim (Jitender Kumar @ Montu) had

already arrived there. The fact that the family had learnt about the admission of Jitender Kumar @ Montu in the hospital in an injured state and had immediately rushed there would find resonance elsewhere in the evidence, to be specific in the testimony of PW6 & PW20 to which we may revert later.

28. The involvement of the three accused persons, who faced trial, had figured in the investigation on the same night. This fact came to be brought out through cross-examination of SI Banwari Lal (PW21) (on 18.02.1998) when it was suggested to him by the defence that the house of A-3 had been raided during the same night.

29. Be that as it may, it is undisputed that A-1 Sukhwant Singh and A-2 Atambir Singh surrendered themselves before Inspector Swatantra Kumar (PW18) in the police station at about 06:30 PM on 14.06.1995. The evidence of SI Radhey Shyam (PW5) and that of Inspector Swatantra Kumar (PW18) confirms that both of them were formally arrested after personal search vide memos Ex. PW18/E & Ex. PW18/F. Though reference has come to the disclosure statement (Ex. PW15/A) and to the pointing out memo (Ex. PW15/B), statedly prepared during interrogation, the same are rendered inadmissible for the reason no further fact or physical object could be discovered in their wake.

30. It is, nonetheless, important to note here that at the time of his surrender, Sukhwant Singh (A-1) had also produced before the Investigating Officer (PW18 Inspector Swatantra Kumar), his pistol (Ex. P-1), arms license (Ex. P-2) and one live cartridge (Ex. P-3). The investigating officer prepared the sketch of the pistol and live cartridge on a sheet of paper (Ex. PW5/A), sealed it in a parcel with seal of "SK" and took over the said parcel and the arms license formally vide seizure memo (Ex. PW5/B). It may be added here that the pistol, thus handed over by A-1 to the IO on 14.06.1995, was a fire arm made in Italy, caliber 7.65, and was held along with the cartridge of the same bore against arms license issued by competent authority in the State of Haryana (valid upto 26.12.1996).

31. Though, in the course of investigation at the scene of crime, the IO took necessary steps of collecting the relevant evidence in the nature of blood-stains, earth control etc., given the way the case developed eventually, only the seizure of live cartridge (Ex. P-3) from the sewer cover and the spent bullet from the rear seat of the Maruti Van would be of import. We would discuss this part of the evidence and its connection with the fire arm (Ex. P-1) handed over by A-1 Sukhwant Singh to the IO on 14.06.1997 at appropriate stage in this judgment. It need only be noted here that the said part of the evidence, sent to Central Forensic Science Laboratory (CFSL) resulted in a report dated 14.08.1995 confirming that the cartridge described as live bullet (Ex. P-3) found on the sewer cover, in the opinion of the ballistics expert, had come out as a projectile, upon being fired through the pistol of A-1 Sukhwant Singh. Similarly, the fired bullet found embedded in the rear seat of the Maruti Van, in the opinion of the ballistics expert, had been fired from the pistol of A-1 Sukhwant Singh.

32. The case of the prosecution rested on the narration of sequence of events by Mohinder Singh (PW6) & Rahul Maheshwari (PW20) in their respective statements under Section 161 Cr.P.C. recorded on 12.06.1995 after registration of the FIR. The substance of the same may be noted at this stage.

33. It is stated that Rahul Maheshwari (PW20) accompanied by the deceased had come to the house of Mohinder Singh (PW6) in village Bharala on 12.06.1995 whereafter all three of them went to Shahi restaurant in Adarsh Nagar for lunch. While they were sitting in the restaurant, at the ground floor, all the three accused came out from the Alishan Guest House located on the upper floor in the same building. Immediately, A-1 became abusive towards Mohinder Singh (PW6) and the deceased questioning them as to how they had dared to come and asked them to leave the place. It is stated that A-1 also shouted in words to the effect "tum bade dada bante ho" and also "tumhe us din ki nasihat yaad nahi hai hamare samne dadagiri karnewala bacha nahi hai". This led to exchange of hot words between A-1, on one hand, and Mohinder Singh (PW6) with the deceased, on the other. It appears that Rahul Maheshwari (PW20) was not privy to the incident which had been alluded to by A-1 in the above-noted utterance. On his asking, Mohinder Singh (PW6) told him about some altercation that had occurred 20-25 days ago involving, inter-alia, A-1 and the deceased.

34. Per the prosecution case, Mohinder Singh (PW6) & Rahul Maheshwari (PW20) also stated before the IO that both of them, with the deceased, had come out of Shahi restaurant and on the way in market of Adarsh Nagar, they took chhole bhatoore from a vendor, followed by visit to a paan shop (betel shop), but found it closed. It is stated that when the three of them were standing at the Chowk (scene of crime, referred to earlier) at about 05:30 PM, the three accused appeared there. A-1 Sukhwant Singh was armed with the pistol while A-3 Virender was armed with a knife. It is stated that A-1 Sukhwant Singh exhorted the others "aaj in teeno ko chhorna nahi hai, inko inki badtamizi ka maza chakhana hai". It is alleged that upon this exhortation, A-3 wrapped his arms around Jitender @ Montu (the deceased) from the front side ("aage se koli bhar li") thereby immobilizing him while A-2 gave a knife blow to him on his waist. The two witnesses tried to intervene but A-1 aimed his pistol at them and pressed the trigger. It is stated that sound of "tick" was heard, upon which both got scared and ran away in the direction of Rajan Babu Road. It is further alleged that A-1 gave a chase to these witnesses (PW6 & PW20) firing at them again in the pursuit.

35. It was further the version of Mohinder Singh (PW6) & Rahul Maheshwari (PW20) before the IO that both of them had fled away from the scene to reach Kushal Cinema in Jahangir Puri. Both sat in the vicinity of Kushal Cinema for about an hour and then went to house of Jitender @ Montu (the deceased) in Jahangir Puri. They found the said house locked and learnt that the family had gone to Hindu Rao Hospital as their son (reference to the deceased) had been injured. They then reached Hindu Rao Hospital where they met members of the

family of Jitender @ Montu and learnt about his status. Later, they returned to the scene of crime and presented themselves before the IO, offering their version.

36. As noted earlier, the trial had begun jointly against all three accused on the basis of charge framed. In the course of evidence that was led by the prosecution, Mohinder Singh (PW6) was examined and cross-examined on behalf of all three accused. The third accused A-3 jumped bail by the time the turn of examination of PW20 Rahul Maheshwari came. The trial was, thus, concluded against A-1 and A-2 leading to the judgment dated 20.08.1998 holding them guilty. Since the presence of A-3 was again secured later, when the trial against him re-commenced, amongst others, Rahul Maheshwari (PW20) was recalled and cross-examined further on his behalf on 23.09.2000.

37. It needs to be mentioned here that at the time of proceedings against A-1 & A-2, both Mohinder Singh (PW6) & Rahul Maheshwari (PW20) had deposed generally along the lines of the prosecution case. However, in the second leg of the proceedings, against A-3, when Rahul Maheshwari (PW20) was recalled for further cross-examination, he resiled from the original version and pleaded ignorance about the complicity of the three accused in the crime, taking the extreme position that he was not even present when the incident occurred since he was at home throughout on 12.06.1995 for the reason the market and traffic were closed due to call for "Delhi Bandh".

38. One Sessions Court in the judgment 20.08.1998 has relied upon the testimony of PW6 and PW20 retuning finding of guilty against A-1 and A-2. In the judgment dated 28.04.2001, another Sessions Court has disbelieved PW6 holding him not reliable noticing, inter-alia, the version of PW20 in his cross-examination, after recall.

39. Learned counsel for the accused persons have argued that word of Mohinder Singh (PW6) or Rahul Maheshwari (PW20) cannot be trusted on account of their criminal antecedents, reference to which has been made earlier in this judgment. The prosecution, on the other hand, counters by pointing out the involvement of A-1 and A-2 in criminal cases arising out of FIR No. 158/90 under Sections 324/34 IPC of Police station Model Town, FIR No. 02/91 under Section 307/34 IPC of Police Station Shalimar Bagh and FIR No. 128/92 under Section 308/34 IPC of Police Station Adarsh Nagar. In our view, it would not be fair to either side to draw conclusions as to the veracity of their respective claims with preconceived mind and predicated by the fact of criminal antecedents. The practice of viewing such evidence with caution and diligence out of prudence is required and necessary. [State of Uttar Pradesh Vs. Farid Khan and Others, AIR 2004 SC 5050 : (2004) 8 JT 322 : (2004) 8 SCALE 139 : (2005) 9 SCC 103 : (2004) AIRSCW 5746 : (2004) 7 Supreme 152 and Rama Shish Rai Vs. Jagdish Singh, AIR 2005 SC 335 : (2005) CriLJ 669 : (2004) 10 JT 594 : (2004) 9 SCALE 473 : (2005) 10 SCC 498 : (2004) AIRSCW 6713]. Judicial scrutiny needs to be objective and, therefore, conclusions must be drawn on the evaluation of the

intrinsic worth of the evidence adduced. The material indicating previous involvements in criminal cases may suggest the possibility of other persons being inimically placed with desire to cause harm to the victim (Jitender Kumar @ Montu) or to his associates (PW6 & PW20).

40. It has been argued that Mohinder Singh (PW6) and Rahul Maheshwari (PW20) are witnesses who are wholly unreliable. The counsel submitted that it is admitted position that there had been altercation between the two sides some 20-25 days prior to the date on which Jitender Kumar @ Montu was stabbed. The witnesses and the deceased very well knew that Shahi restaurant was owned by A-1 and A-3 in which A-2 was employed as their manager. And yet, these three persons decided to visit the said restaurant for lunch, as if to dare the other side. This, per the argument, smacks of intentions which could not be acceptable as normal conduct.

41. On first blush, it does sound odd that the two witnesses accompanied by the deceased would go for lunch to the restaurant of the accused persons. Rahul Maheshwari (PW-20) may not have been aware about the quarrel that took place three weeks ago but since the deceased and Mohinder Singh (PW-6) were directly involved in the said quarrel, they would have been slow in coming to the Shahi restaurant. Be that as it may, it was at the worst an unnecessary provocation. There is no merit in the argument that the witnesses and the deceased may be harbouring unholy intentions since it has not been suggested at any stage of the trial that they indulged in any aggressive posturing.

42. It was submitted that the story narrated by Mohinder Singh (PW6) and Rahul Maheshwari (PW20) does not appeal to reason as it is not explained as to how, after both of them with the deceased left Shahi restaurant and had gone away from the scene, the accused persons could have known their exact location so as to pursue and attack.

43. The evidence has clearly shown that there is not much distance between Shahi restaurant and the place of occurrence. If the accused persons had been provoked by the visit of PW-6 and PW-20 accompanied by the deceased to their restaurant, it was not difficult after they had been shoed away, to locate their presence in the nearby area, even on foot. The evidence does not show use of any motor vehicle for transportation. The question as to how the accused could have known the exact location of the victim and his associates need not even be answered by the prosecution. It is a matter of special knowledge of the accused, and accused alone.

44. The counsel further argued that while it may be accepted that Mohinder Singh (PW6) and Rahul Maheshwari (PW20) had become scared because of the stabbing by A-3, and firing by A-1, it is inconceivable that they would not rush to the police, at least to seek protection, if not report the incident. Instead, it was pointed out, the evidence of these witnesses shows that they claim to have run upto Kushal Cinema in Jahangir Puri, wasted full one hour there (in wait for no

useful purpose), without making any effort to make direct contact with the police or with family of the victim, even though the police post or pickets and facilities for phone calls were available en-route. It was argued that this conduct is not only unnatural but is indicative of fear of police and so does not jell with the events that had statedly occurred.

45. The counsel further submitted that the evidence shows that when Mohinder Singh (PW6) and Rahul Maheshwari (PW20) had come to the hospital, after finding the house of the victim in Jahangir Puri locked, they met his family and the police in the hospital. It is argued that the fact that Mohinder Singh (PW6) and Rahul Maheshwari (PW20) did not lodge any report with the police about the incident offering their own evidence in support at such stage shows that possibility cannot be ruled out that these witnesses have been planted later.

46. Going by the version of PW-6 and PW-20, their close associate had been seriously wounded by stabbing in their presence. When they had tried to go to his rescue, one of the assailants (A-1), armed with a pistol, had aimed the weapon at them and opened fire. They have explained in detail that, on feeling scared, they ran for their dear life in the direction of Kushal Cinema in Janakpuri, even while the armed assailant was pursuing them continuing with the firing. It has been brought out by the defence itself that PW-6 and PW-20 had been on the wrong side of law in the past. In the given circumstances, wherein the provocation for the attack appears to have come, may be unwittingly, from their side, their first concern was to ensure their own personal safety. We are not inclined to disbelieve their explanation that it was for these reasons that they waited for about one hour in the vicinity of Kushal Cinema, doing nothing. With the stabbing and firing in the back of their mind, they would be first collecting their wits before moving on first to inform the family of the stabbed victim, following thereafter to the Hindu Rao Hospital and then on to the scene of incident offering their own evidence. There is nothing unnatural about this sequence of events in the aftermath of the crime involved here.

47. It was submitted that there is no explanation as to why Mohinder Singh (PW6) and Rahul Maheshwari (PW20) did not go to Mukherjee Nagar house of the deceased which was located close-by and instead chose to proceed to Jahangirpuri which would be farther in distance.

48. There is no merit in the above submission. It has already been noted by us earlier that the family of Jitender Kumar was living not in Mukherjee Nagar but in Janakpuri. Therefore, there was no question of the two witnesses going in the direction of Mukherjee Nagar.

49. In an effort to show that PW6 may not even have witnessed the incident, it was pointed out that he spoke about the knife blow given to Jitender Kumar @ Montu by A-3 "on the right side waist" which is contrary to situs of the fatal stab wound noted in MLC and autopsy report. It was also submitted that the autopsy report indicates another incised wound on the mandibular part which is not even

affirmed by PW6 and which, given the part of the body affected, would have been very noticeable to the eyewitness.

50. Indeed, the stab injury which proved fatal was inflicted on the left lower aspect of back of chest as noted in the autopsy report by PW-7 which corresponds to what was recorded in the MLC by PW-19. Statement of PW-6 about the stab wound on the right side, thus, was not correct. But, noticeably, PW-20 in his testimony during the trial of the two convicted appellants had given the correct account coinciding with the medical evidence. The learned counsel for the State argued that PW-6 may have been referring to the "right side" relatively, from the perspective of his position vis-?-vis the deceased/victim. The said possibility apart, the fact remains that no one questioned PW-6 to seek clarity in the light of the contents of MLC and autopsy report. The expression "waist" has apparently been used in English translation for the word "Qamar" (in Hindustani). In our opinion, this discrepancy in mentioning the right flank does not mean Mohinder Singh (PW-6) could not have witnessed the stabbing. His evidence, corroborated (in first proceedings) by the word of PW-20, unmistakably shows that when Jitender @ Montu was stabbed by A-2 after he had been rendered immobilized by A-3 holding him from the front. The wrong impression carried by PW-6 about the particular side of the body where stab injury was caused cannot detract us from the conclusion that stabbing actually took place in his presence.

51. The further defence argument is with reference to the "Brief Facts" (Ex. PW18/B) prepared by the IO for purposes of death report and application for post-mortem examination. This document dated 13.06.1995 sets out the background facts on same lines as of rukka/FIR. It makes no reference to the version added by PW6 & PW20 to the knowledge of the IO. This, the counsel argued, shows that these witnesses had not come up till 13.06.1995.

52. We are not impressed. The purpose of the document Ex. PW-18/B was only to bring to the knowledge of the autopsy doctor the requisite background facts. The facts incorporated in the same were sufficient to assist in reaching appropriate conclusions as to the cause of death. The autopsy doctor would not be interested in the identity of the assailants or, for that matter, of the witnesses to the occurrence. The version of PW-6 and PW-20 about the events leading to the crime from such document is, therefore, inconsequential.

53. Learned counsel for the convicted appellants, and amicus curiae for the acquitted respondent, submitted that the investigation of the case at hand has not been fair and that the charge has been falsely set up with evidence that was planted. It was argued that there is no explanation as to how PW20 SI Banwari Lal learnt that the victim had been taken to Hindu Rao Hospital for treatment. HC Harpal Singh of PCR has not been examined. His testimony only would have shown as to how the name of the victim (Jitender Kumar @ Montu) and his address came to be ascertained.

54. Of course, the evidence of Head Constable Harpal Singh of PCR would have

brought in better clarity on the aspects pointed out. But, given the status of the victim ("conscious but drowsy") as noted in the MLC recorded at 06:10 P.M., and the proven fact that it was Head Constable Harpal Singh of PCR who had transported him from the scene to the hospital, it may be safely concluded that the particulars of the victim would have been gathered from him by the PCR staff on the way or in the hospital. Having regard to the nature of injuries suffered, this would be part of the basic drill of the PCR staff since they would need to bring the particulars of the victim. Further, as submitted by the learned counsel for the State, the name of the hospital where the victim had been taken by the PCR was not difficult to be found out by the IO not only from the PCR but also because it is the hospital generally allocated for such purposes for the area in question.

55. It was argued that though IO would have reached the scene of incident soon after 05:30 PM, registration of the FIR was deliberately delayed. The counsel argued that there is no proof of dispatch or delivery of special report under Section 157 Cr.P.C. to the concerned Metropolitan Magistrate.

56. We do not find any inordinate or undue delay in the registration of FIR in the case at hand. The incident came to the notice of the police at about 05:47 P.M. on 12.06.1995, vide D.D. No. 17-A. The IO first reached the place where the crime had been committed. After inspecting the scene and having learnt that the victim had been taken to the hospital, he rushed there. On finding that the victim was unfit for statement, the IO returned to the scene and prepared his rukka. He dispatched it for registration of FIR at 08:10 P.M. The FIR was registered at 08:25 P.M. Clearly, the FIR was registered promptly.

57. It was argued that scaled site plan (Ex. PW10/A) does not reflect the location of the witnesses or the direction in which they had run away from the scene. The criticism is factually incorrect. The plan does depict not only the place of occurrence but also the direction in which the witnesses had run away, pursued by the assailants.

58. It was next submitted that both PW6 and PW20 are on record to state that when A-1 had pulled the trigger, bullet had not come out of the pistol. It was further argued that the fact that A-1 had voluntarily surrendered his licensed fire arm and live cartridge shows that he had no guilty conscience. The counsel argued that if A-1 was actually armed with pistol, and the intention was to cause death, it does not sound logical as to why he would not use such weapon and instead expect his associate (A-3) to use a knife. This, in the submission of the defence, shows that there was actually no firing with the weapon.

59. The arguments ignore the evidence adduced by the prosecution proving beyond doubt that at least two bullets had been fired from the pistol. One spent bullet was found embedded in the rear seat of the Maruti Van of a local resident parked near his house. The other, described as "misfired" bullet, was found on the sewer cover and seized as "live" bullet. When PW6 & PW20 spoke about the

bullet not having come out of the pistol, it is apparent that they are referring to the one which misfired. The cartridge had been ejected upon the trigger being pulled, but it came out and fell on the road. This is why PW6 and PW20 further added that they had heard the sound "tuk". The recovery of the live bullet, (misfired one) from the sewer cover lends credence to their version. From this, we cannot deduce that no firing took place. Both PW6 and PW20 (in his version prior to recall) spoke about A-1 giving them a chase and firing during pursuit. The recovery of the spent cartridge from the Maruti Van provides corroboration to their word in such regard.

60. There can be no general assumption that if a group of assailants out to cause harm, is in possession of a fire-arm and a knife, they would invariably prefer to use the former as weapon of attack. The evidence, ocular as well as medical, unmistakably shows that knife was actually used to cause serious injuries on the person of Jitender Kumar @ Montu. The evidence further shows that the fire-arm was also used. In this context, the spent cartridge recovered from the body of the Maruti Van stands sufficient testimony. Since the fire arm was held by A-1 against an arm license, his name having figured amongst the assailants, he had probably no choice but to surrender it. The act of surrender of the fire-arm with just one live cartridge, at the time of his own arrest, cannot demonstrate innocence.

61. The defence has argued that even though SI Banwari Lal (PW20) had found a live bullet lying on the sewer cover in open and had also discovered the spent cartridge embedded in the rear seat of the Maruti Van, he did not take them into his possession immediately.

62. Though PW20 had noticed the live bullet lying on the sewer cover and also seems to have discovered at that stage the spent cartridge from the body of the Maruti Van, he did not immediately proceed to effect formal seizures and, rightly so, because that would be a step in investigation. His first priority was to get the FIR registered. The rukka concludes with request to the police station for the photographer to be arranged. Apparently, the IO wanted to await the crime team to carry out its task before he started collecting the evidence from the scene of crime. This would be the correct and proper approach.

63. It was urged that the CFSL report affirming connection of the said fire arm with the two projectiles (one live and other a spent cartridge) found at or about the scene of crime be not believed. In the submission of learned counsel, the report has been procured. They argued that material on record shows that PW18 Inspector Swatantra Kumar had arranged for purchase of five live cartridges of the same bore on 14.07.1995, presumably for the purpose of getting the fire-arm tested. Though the said five live cartridges additionally arranged had also been sent to CFSL, there is no clarity as to status thereof. The argument advanced is that the said five live cartridges were misused to arrange for a positive report against the accused.

64. It is clear from evidence on record that five cartridges arranged by the IO were not used in the FSL. The opinion has been given by FSL on the basis of the live cartridge surrendered by A-1 and seized with pistol. Therefore, the above submissions are devoid of substance.

65. Learned defence counsel submitted that given the position taken by Rahul Maheshwari (PW20) after his recall for cross-examination during the continued trial against A-3, it is not safe to base any conclusions on his testimony. It was pointed out that PW20 is on record to state that he had given the earlier testimony (examination-in-chief) under pressure from police. It was argued that the version of PW20 at that stage showed that he was not even present when the incident involving stabbing of Jitender Kumar @ Montu took place and that this would not only render the testimony of other witness (PW6) highly suspect but puncture the prosecution case beyond repair.

66. The submission is that the reasons why the learned ASJ in the judgment dated 28.04.2001 ordered acquittal of A-3 cannot be said to be perverse and it being impermissible for the appellate court to supplant the view of the trial court with its own conclusions, it would be unfair to permit the contrary view taken in the judgment dated 20.08.1998 to stand.

67. The defence places reliance on Krishna Govind Patil Vs. State of Maharashtra, AIR 1963 SC 1413 : (1964) 1 SCR 678 , to argue that A-3 having been acquitted, allowing the conviction of A-1 and A-2 to stand would be improper. The fact situation in the case cited at bar was different from the one before us. In the said case, three of four accused had been acquitted of the charge under Section 302 read with Section 34 IPC while the fourth one stood convicted of the charge under Section 302 read with Section 34 IPC. This, in the facts of the said case, the Supreme Court ruled, was an impossible position and "mutually destructive finding" since the allegation of it being an act committed "conjointly" had been disbelieved.

68. It is well settled and has been the consistent view of the Supreme Court that in an appeal against acquittal, the appellate court possesses full and unfettered power to review at large all evidence and to reach the conclusion that, upon such evidence, the order of acquittal should be reversed. It is rather under bounden duty to scrutinize the probative material de novo. Undoubtedly, it must bear in mind that rebuttable innocence attributed to the accused in the case of acquittal stands on a weightier footing. In this view, it would be slow in upsetting the findings returned by the trial court if supported by convincing reasons and comprehensive consideration. If, however, the view taken by the trial court upon such review, reappreciation and reconsideration of the evidence is found to be unreasonable or perverse leading to serious illegality, the appellate court would not hesitate in interfering and reaching its own conclusion. Thus, if the evidence recorded in the judgment of acquittal shocks the conscience of the appellate court or shows that norms of legal process have been disregarded or substantial and great injustice had been done, the same can be interfered with. [Surajpal

Singh and Others Vs. The State, AIR 1952 SC 52 : (1952) CriLJ 331 : (1952) 1 SCR 193 ; The State of Bombay Vs. Rusy Mistry and Another, AIR 1960 SC 391 ; Sanwat Singh and Others Vs. State of Rajasthan, AIR 1961 SC 715 : (1961) CriLJ 766 : (1961) 3 SCR 120 ; Jadunath Singh and Others etc. Vs. State of Uttar Pradesh, AIR 1972 SC 116 : (1972) CriLJ 29 : (1971) 3 SCC 577 : (1971) SCC(Cri) 124 : (1971) 3 UJ 789 ; Damodarprasad Chandrikaprasad and Others Vs. State of Maharashtra, AIR 1972 SC 622 : (1972) CriLJ 451 : (1972) 1 SCC 107 : (1972) SCC(Cri) 110 : (1972) 2 SCR 622 : (1972) 4 UJ 321 ; Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, AIR 1973 SC 2622 : (1973) CriLJ 1783 : (1973) 2 SCC 793 : (1973) SCC(Cri) 1033 : (1974) 1 SCR 489 ; Chandrappa and Others Vs. State of Karnataka, (2007) CriLJ 2136 : (2007) 3 JT 316 : (2007) 3 SCALE 90 : (2007) 4 SCC 415 : (2007) 2 SCR 630 ; State of Orissa and Another Vs. Mamata Mohanty, (2011) 112 CLT 46 : (2011) 2 SCALE 377 : (2011) 3 SCC 436 : (2011) 2 SCC(L&S) 83 : (2011) 2 SCR 704 : (2011) AIRSCW 1992 : (2011) AIRSCW 1332 ; Jugendra Singh Vs. State of U.P., AIR 2012 SC 2254 : (2012) CriLJ 3005 : (2012) 3 JCC 2218 : (2012) 5 SCALE 691 : (2012) 6 SCC 297 : (2012) AIRSCW 3170 : (2012) 4 Supreme 132 ; State of Madhya Pradesh Vs. Dal Singh and Others, (2013) 6 AD 475 : AIR 2013 SC 2059 : (2013) CriLJ 2983 : (2013) 3 JCC 2010 : (2013) 8 JT 625 : (2013) 3 RCR(Criminal) 1 : (2013) 7 SCALE 513 : (2013) 14 SCC 159 ; and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Another, AIR 2013 SC 3334 : (2013) CriLJ 4212 : (2013) 4 JCC 2481 : (2013) 11 JT 395 : (2014) 1 RCR(Criminal) 1 : (2013) 10 SCALE 129 : (2013) 12 SCC 796 .

69. Upon perusal of the judgment of acquittal, we find that the learned Additional Sessions Judge has discarded the evidence of PW20 from consideration mainly on account of somersault at the stage of cross-examination after recall. This, to our mind, was not a correct approach. It had to be remembered that PW20 had consistently supported the version of PW6 in all material particulars throughout the trial against A-1 and A-2. It was on 23.09.2000, more than five years after the occurrence, that he changed position in the trial against A-3. Noticeably, there has been no effort to impeach the testimony of Mohinder Singh (PW6) on the ground Rahul Maheshwari (PW20) was not with him at the time the incident took place. In our view, the chronology of events itself shows that PW20 had been won over. In these circumstances, it was not correct to ignore his earlier testimony on oath which corroborated not only the evidence of PW6, the other eye witness, but also the other circumstantial evidence. [Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, AIR 1991 SC 1853 : (1991) CriLJ 2653 : (1991) 3 Crimes 82 : (1991) 3 JT 151 : (1991) 2 SCALE 80 : (1991) 3 SCC 627 : (1991) 3 SCR 1].

70. Learned Additional Sessions Judge while rejecting the case of prosecution against A-3 gave importance, in our assessment unduly so, to the fact that the victim (Jitender Kumar @ Montu) had not indicated the name of the assailant to the doctor at the time of his MLC. This was not an appropriate way for appreciating the MLC. The medical officer examining him would not even be

interested in ascertaining the name of assailant. His focus would be to examine the nature of injury and advice/arrange appropriate arrangement. Failure, assuming there was one on the part of the victim, to disclose the name of the assailants to the medical officer would not result in any doubt as to the veracity of the evidence adduced [Pattipati Venkaiah Vs. State of Andhra Pradesh, AIR 1985 SC 1715 : (1985) CriLJ 2012 : (1985) 2 Crimes 746 : (1985) 2 SCALE 358 : (1985) 4 SCC 80 : (1985) 17 UJ 1048].

71. Learned Additional Sessions Judge in the judgment of acquittal also made adverse comments against the prosecution on the ground of non-recovery of the knife and absence of medical opinion as to the possible use of such weapon. He further observed that there is possibility of PW6 being under influence of alcohol ("drunk") at the relevant point of time for the reason the post-mortem examination report noted recovery of "some alcoholic substance from the abdomen of the deceased".

72. We do not agree with the above views of the learned Additional Sessions Judge. The non-recovery of knife used in the crime is inconsequential. The medical opinion confirms the ocular evidence about the fatal injury having been caused with sharp cutting instrument. Since the weapon of offence (knife) itself was not recovered, there could be no occasion for opinion of the autopsy doctor to be gathered in such respect. The stab wound was inflicted sometime around 05:30 PM on 12.06.1995. Death occurred in the hospital at 02:10 AM on 13.06.1995. The postmortem examination was conducted from 12:30 PM on 13.06.1995. Smell of alcohol from the semi-digested food particles found in the stomach cannot, by itself, lead to the conclusion that the deceased had consumed alcohol. Alcoholic smell could have come about also for reasons other than consumption of alcohol. Even if the possibility of consumption of liquor by PW6 is to be believed, it does not lead to the inference for Mohinder Singh (PW6) also would have consumed liquor or be under its influence.

73. The evidence adduced by the prosecution in general and the testimony of Mohinder Singh (PW6) in particular do not suffer from any infirmity. There is no reason why the eye witness account of Mohinder Singh (PW6) should be disbelieved. He withstood the cross-examination well. His evidence has been consistent and received corroboration from the other evidence on record inclusive of the statement of Rahul Maheshwari (PW20) during the trial of A-1 & A-2. The contrary version offered by Rahul Maheshwari (PW20) after he was recalled during the trial of A-3 is tainted and must be discarded.

74. In our considered view, the prosecution has brought home its case against A-1, A-2 and A-3 beyond pale of all doubts. It stands established that all the said three persons had pursued the victim (Jitender Kumar @ Montu), Mohinder Singh (PW6) and Rahul Maheshwari (PW20) from Shahi Restaurant to the place of occurrence, at which stage A-1 was armed with his loaded pistol and A-2 was carrying a knife. It is proved that on the exhortation of A-1, A-3 blocked the way of the deceased holding him from the front while A-2 gave a knife blow on his

back causing the fatal wound to which he succumbed later in the hospital.

75. It is not correct to contend that since the injury was caused on the back in the abdominal region, the case cannot fall in the category of murder. In the case at hand, the damage that was caused to the insides through the fatal wound is of import. Pertinent to note here that the second stab injury, which brought about the fatality, though aimed at the lower back of chest on the left side was so deep as to cut through the abdominal and pleural cavity reaching upto the left side diaphragm and harming even the left kidney. The reliance on judgments in *Kandaswamy Vs. State of Tamil Nadu*, (2008) 10 SCALE 315 : (2008) 11 SCC 97 ; *Chotte Lal Shrivastva @ Chotte v. State of NCT of Delhi*, 2012 Law Suit (Del) 1284 ; *Tamilmani Vs. The State*, (1997) CriLJ 144 and *Albert Ezung Vs. State Govt. of NCT of Delhi*, (2013) 4 ILR Delhi 2746 : (2013) 3 JCC 1695 is misplaced. In the facts and circumstances proved, there can be no doubt that the stab wound was caused with intention of causing death. Thus, the prosecution has proved the death of Jitender Kumar @ Montu to be a case of murder.

76. Learned counsel for A-3 argued that even if the facts narrated by PW6 were to be believed, sharing of common intention to kill cannot be attributed to him. He argued that requisite mens rea on the part of the said appellant is missing inasmuch as he is shown by the evidence to have only held the victim (Jitender Kumar @ Montu) from the front. Similar submissions have been made on behalf of A-1 on the reasoning that mere exhortation on his part cannot be used to infer that his design was to get Jitender Kumar @ Montu killed. Reliance is placed on *Ajay Sharma Vs. State of Rajasthan*, (1998) 6 AD 610 : AIR 1998 SC 2798 : (1998) CriLJ 4590 : (1998) 6 JT 378 : (1998) 5 SCALE 276 : (1999) 1 SCC 174 : (1998) AIRSCW 3160 ; *Ramashish Yadav and Others Vs. State of Bihar*, AIR 1999 SC 3830 : (2000) CriLJ 12 : (1999) 6 JT 560 : (1999) 5 SCALE 457 : (1999) 8 SCC 555 : (1999) 2 SCR 285 Supp : (2000) 1 UJ 69 : (1999) AIRSCW 3902 : (1999) 8 Supreme 6 ; *State of Uttar Pradesh Vs. Farid Khan and Others*, AIR 2004 SC 5050 : (2004) 8 JT 322 : (2004) 8 SCALE 139 : (2005) 9 SCC 103 : (2004) AIRSCW 5746 : (2004) 7 Supreme 152 ; *Paramjit Singh Vs. State of Punjab*, (2005) 10 SCC 143 and *Jaleshwar Singh Vs. State of Bihar*, (2009) CriLJ 3995 : (2009) 7 JT 572 : (2009) 7 SCALE 219 : (2009) 15 SCC 251 : (2009) 8 SCR 130 , to submit that Section 34 IPC cannot be invoked to rope in A-1 or A-3 for the culpability incurred by A-2 by his act of stabbing Jitender Kumar @ Montu to death.

77. We reject the above noted contentions. It is trite that in order to attract Section 34 IPC, it is not necessary that each one of the accused must have assaulted the deceased. It is enough if the evidence shows that they engaged in acts of commission or omission, may be separate, may be similar or diverse, in furtherance of a common intention [*Nandu Rastogi @ Nandji Rastogi and Another Vs. State of Bihar*, AIR 2002 SC 3443 : (2002) CriLJ 4698 : (2002) 7 JT 551 : (2002) 7 SCALE 177 : (2002) 8 SCC 9 : (2002) 3 SCR 30 Supp]. In the sequence of events proved, A-1 led the group armed with a pistol. It is after his

exhortation that A-3 blocked the way of the deceased and held him hostage in his arms rendering him an easy target for A-2 to inflict the fatal stab wound from behind. In the course of same transaction, A-1 used the fire arm aiming it at the two eye witnesses, apparently with an intention to liquidate both of them as well. Sharing of common intention on the part of all three is writ large.

78. For the foregoing reasons, we conclude that the view taken by the learned Additional Sessions Judge in the judgment dated 28.04.2001 acquitting A-3 was incorrect and misdirected and, therefore, unsustainable. In our view, there is no error, illegality or infirmity in the judgment dated 20.08.1998 whereby A-1 and A-2 were found guilty and convicted. Given the evidence on record, we hold that A-3 was wrongly acquitted.

79. Thus, we find that Crl. Appeal Nos. 392/1998 and 399/1998 of Atambir Singh @ Chota Babla and Sukhwant Singh are devoid of substance. The said appeals are dismissed. The impugned judgment dated 20.08.1998 and order on sentence dated 25.08.1998 stand affirmed.

80. We allow Crl. Appeal No. 439/2013 of the State against Virender Singh. The judgment dated 28.04.2001 of the Additional Sessions Judge acquitting the respondent in the said appeal, is set aside. He (Virender Singh) is held guilty and convicted for the offences punishable under Section 302/34 IPC and under Section 307/34 IPC. We direct that Virender Singh shall also undergo the sentence awarded against Atambir Singh @ Chota Babla and Sukhwant Singh for the offences punishable under Section 302/34 IPC and Section 307/34 IPC in terms of order on sentence dated 25.08.1998.

81. The three convicts viz. Atambir Singh @ Chota Babla, Sukhwant Singh and Virender Singh are directed to surrender within 15 days and undergo sentences awarded against each of them. We direct the learned Additional Sessions Judge presiding over the trial court (the Successor Court) and Station House Officer (SHO) of Police Station Adarsh Nagar to take necessary steps to ensure compliance with above directions in accordance with law.