

(1995) 12 SHI CK 0014
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 54 of 1995

Mangal Singh @ Mangat Ram

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 22-12-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125, 127, 154, 161
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 323, 34

Citation : (1995) 4 ILR HP 2965

Hon'ble Judges : L.S. Panta, J;A.L. Vaidya, J

Bench : Division Bench

Advocate : T.R. Chandel, D.C. Jishtu and M.A. Khan, for the Appellant; Shyama Dogra, D.A.G., for the Respondent

Final Decision : Allowed

Judgement

Lokeshwar Singh Panta, J.—These four appeals being Criminal Appeal Nos. 54 of 1995 (Mangal Singh @ Mangat Ram v. State of Himachal Pradesh), 85 of 1995 (Bhagi Ram v. State of Himachal Pradesh from Jail) 93 of 1995 (Talve Ram v. State of Himachal Pradesh from Jail) and 94 of 1995 (Rup Chand v. State of Himachal Pradesh, from Jail), arise out of one and the same incident and are directed against a single judgment dated 9.12.1994 passed by Additional Sessions Judge, Kullu. They have been heard together and decided by this common Judgment.

2. The Appellants were charge-sheeted and tried for committing the murder of Raghubir Gorkha (Nepali National) husband of Smt. Kali Devi (PW-15) in furtherance of their common intention and causing injuries to PW-15 Smt. Kali Devi on 25.1.1994 at 10 PM at village Kothidhar, Tehsil and District Kullu. They were convicted for offence u/s 302 read with Section 34 of the Indian Penal Code and sentenced to suffer life imprisonment and to pay a fine of Rs. 5000/- each. In default of payment of fine, the Appellants were to undergo simple

imprisonment for two months each. However, they were acquitted u/s 323 read with Section 34 of the Indian Penal Code. Through these appeals, the Appellants have questioned their conviction and sentences. For the sake of convenience, the accused shall be referred to hereinafter by the number assigned to them in the trial court judgment as accused i.e. Talve Ram (A-1), Mangal Singh (A-2), Rup Chand (A-3) and Bhagi Ram (A-4).

3. According to the prosecution case complainant Smt. Kali Devi (PW-15) was earlier married to one Kalu Ram. After her divorce with him, she was married to Raghubir. They had been residing at Kothidhar, Tehsil and District Kullu. Raghubir had constructed "Dhara" (temporary structure) at Kothidhar and planted an orchard there. During the intervening night of January 25 and 26, 1994 Raghubir was sleeping in Dhara alongwith his wife PW -Smt. Kali Devi. One Chenku son of Shri Mast Ram (PW-19) aged about six years was also sleeping with them being their relation. After some time somebody called out from outside asking them about the location of the house of A-1. The complainant woke up her husband and lighted a kerosene lamp. Raghubir called out and inquired as to who was calling from outside. A-1 replied that "Mein Tera Bapp Hun" (I am your father). As soon as the door was opened, it is alleged that all the accused persons forcibly took Raghubir into the nearby field. PW Smt. Kali Devi chased them, but she was pushed away by A-4. She fell down on the stump of Kail tree and her head struck with it resulting in an injury. She ran away from there in order to save her life. She sustained injuries on her legs with the barbed wire fixed in the orchard while running away. It is alleged that the accused persons assaulted her husband with sticks, stones, fists and leg blows. Karam Chand (PW-16) who was standing near the Dhara witnessed the incident. The complainant first went to the house of Nathu Ram (PW-18) in the village requesting him for help. But Nathu Ram declined to accompany her on the ground that his mother was seriously ill. Then she went to the house of her God brother Mast Ram (PW-19) in village Kharatal. Mast Ram and his wife accompanied her to the Dehra, but Raghubir was not found there. They woke up Chenku and came to the house of Mast Ram for the night. On the next" morning the complainant went to Panchayat Ghar at Shirar where the members of the Gram Panchayat were holding their general meeting. Haminder Mahant (PW-17), Pradhan and Jog Ram, Up-Pradhan were also present in the meeting. She informed them about the incident. PW Haminder Mahant sent Jog Ram, Up Pradhan in search of Raghubir. Jog Ram made a telephone call to the Pradhan at about 3.30 PM informing him that the dead body of Raghubir was lying in the deceased's orchard. He accordingly made a telephonic call about the incident to the Police Station at Kullu. The message so conveyed telephonically was recorded at Police Station, Kullu vide roznamcha rapat (Ext. PW-25/A) by Inspector Paras Ram (PW-25). PW Paras Ram himself proceeded to the spot and recorded the statement of complainant. Smt. Kali Devi u/s 154 Code of Criminal Procedure (Ext.PN) on the basis of which formal FIR (Ext.PO) was registered. He inspected the spot and found three stones (Exts.P-1 to P-3) lying near the dead body and by the side of

the head of the deceased which were blood stained. They were taken into possession through recovery memo. (Ext.PW-17/A). Sample of the blood-stained earth was also collected from the spot. All the articles were separately sealed in a parcel with seal "A". The Investigating officer got the Tatima (Ext PE) of the place prepared from Patwari Surinder Kumar (PW-3). He prepared the Inquest Report (Ext.PW-17/B) and also site plan of the spot (Ext.PW-25/B). He dispatched the dead body of Raghubir to the District Hospital Kullu for conducting post-mortem examination. Doctor Om Pal (PW-5) conducted the post-mortem at 1.05 PM (afternoon) on 27th January, 1994. He gave his report (Ext.P-J). He noticed the following injuries on the person of the deceased:

- i) There was a fracture of the nazal bone.
- ii) There were two lacerated wounds on the left side of forehead measuring 1.1" x 2.2". The underlying bone was visible and the clotted blood was present over the wound and also on the scalp hair.
- iii) There was a lacerated wound on left occipital parietal region in the size of 5-1/2 x 1/2" by 1/2" to 1" and underlying bone was visible.
- iv) there were two abrasions over the left thigh on the lateral aspect near left buttock.
- v) There were multiple parallel abrasions over the left side of the chest.
- vi) There was haemotoma present over the right temporal region in the size of 4" x 1".

4. Besides the above injuries, blood vomitus was found in the larynx and trachea. The heart contained clotted blood.

5. The Medical Officer handed over a portion of liver, spleen and kidney, small and large intestine alongwith its contents, blood from heart in sealed bottles and a packet containing white metal ring found on the person of the deceased and his underwear alongwith a bottle of preservative to the police. The doctor opined that the death of Raghubir was due to head injury leading to shock and death. The probable time that elapsed between injury and death was few minutes and between death and post-mortem was within 24 to 48 hours. According to his opinion, the injuries were sufficient to cause death in the ordinary course. The head injuries were ante-mortem which could have been caused by heavy stones if these were used like a weapon. In his cross-examination, Doctor had admitted that the head injury which caused the death of the deceased could be caused by a fall. He also said that other injuries suffered by the deceased could be caused if he had fallen down rolling.

6. The complainant was also medically examined by Doctor Mrs. Neena Lal (PW-4). She found an abrasion present on the forehead of the complainant, multiple abrasions on the right thigh near knee joint and bruise on right side of gluteal region. She issued medico legal certificate (Ext.PG).

7. A-1 was arrested on January 28, 1994 by Investigating Officer Paras Ram. He produced his coat (Ext.P-16) and trouser (Ext.P-17) which he was wearing to the Investigating officer. These clothes were taken into possession on February 1, 1994 vide Memo (Ext.PW-21/B). A-2 was arrested on January 31, 1994. He allegedly made disclosure statement (Ext.PW-24/A) u/s 27 of the Indian Evidence Act on February 3, 1994 in the presence of Yelu Ram (PW-24) and one Shanti Lal. He said that he had concealed one "Danda" (stick) (Ext.P-8) in the residence of A-1 and that he could get the same recovered. He led the Police party to the residence of A-1 at Chhota Jalahar, Phati Shilighar, Kothi Raison and got recovered the Danda in the presence of the witnesses. The Investigating officer prepared its sketch (Ext.PW-15/B). Site plan (Ext.PW-25/C) of the place of recovery was prepared. He produced sweater (Ext.P-14) and Pant (Ext.P-15) which he was wearing at the time of his arrest to the Police. A-3 was arrested on February 9, 1994. He produced his shirt (Ext.P-18) and Pant (Ext.P-19) which were taken into possession through recovery Memo (Ext.PW-22/A) in the presence of Kahan Singh (PW-22) and one Biri Singh. Lastly, A-4 was taken into custody on February 18, 1994. He allegedly made disclosure statement on February 16, 1994 in the presence of Hominder Mahant (PW-17) and Jog Ram u/s 27 of the Indian Evidence Act to the effect that the clothes which he had been wearing at the time of the alleged commission of the crime, had been concealed by him in the residence of A-1 in the corner of a room and that he could get them recovered. He led Police party to the place of recovery and got his coat (Ext.P-11), shirt (Ext.P-12) and pant (Ext.P-13) recovered vide Memo. (Ext.PW-17/D).

8. The Investigating Officer moved an application (Ext.PW-23/B) to Shri Indar Ram (PW-23) Chief Judicial Magistrate, Kullu on February 1, 1994 requesting him to record the statement of Karam Chand (PW-16) an alleged eye-witness of the occurrence, u/s 164 Code of Criminal Procedure The statement of the witness so recorded was Ext.PW-16/B. It was found during investigation of the case that A-1 in order to create false evidence, came to the Teachers' Home at Kullu on January 26, 1994 and approached its Manager Tek Chand (PW-8) to make an entry in the register of the said Home showing his stay there during the intervening night of January 25/26, 1994. The Manager realized an amount of Rs. 15/- from A-1 vide receipt (Ext.PM) and made an entry in the register (Ext.P-5) to that effect at serial No. 675. Receipt Book (Ext.P-4) and the register (Ext.P-5) were also taken into possession. Reports (Exts.PW-25/E to PW-25-H) were received from the Forensic Science Laboratory, Bharari (Shimla) and according to report (Ext.PW-25/F) blood stains were found on Pant (Ext.P-19) of A-3 but they were not sufficient for analysis. Human blood of group "AB" was found on the blood stained earth collected from the spot on one of the stones, sweater (Ext.P-14) belonging to A-2 and Danda (Ext.P-8). Blood stains were also found on the Pant (Ext.P-15) of A-2, but they were insufficient for the purpose of analysis as reported in (Ext.PW-25/H). Blood group of the deceased was also "AB" as reported in Exhibit PW-25/J.

9. During the investigation, it was further revealed that wife of A-1 a resident of Tehsil Jogindernagar in District Mandi, filed a petition u/s 125 Code of Criminal Procedure in the Court of SDJM, Jogindernagar claiming maintenance from him. The said petition was allowed and an application u/s 127 Code of Criminal Procedure for the recovery of the maintenance amount was pending in the aforesaid court. A-1 was not appearing in the proceedings in the court, therefore, SDJM, Jogindernagar Shri Pritam Singh (PW-7) issued a warrant of arrest against him. Such warrant was marked by Head Constable Gian Chand (PW-1), MHC, Police Station Jogindernagar on January 19, 1994 to LHC Panjku Ram (PW-2) vide - Roznamcha report (Ext.PA). LHC Panjku Ram accordingly came in search of A-1 to village Shirar in Kullu District. He met Raghubir there and inquired from him about the whereabouts of A-1. Raghubir told LHC Panjku that A-1 resided in the village Jalahar and was working in a jungle there. Raghubir accompanied the Police officials to Jalahar where he identified A-1 who was accordingly arrested. A-1 was produced vide report (Ext.PB) in the court of SDJM Jogindernagar on January 22, 1994 from where he was later on released on bail on the same day. It is alleged that since Raghubir had led to the arrest of A-1, the latter had threatened to see him later on and that in order to wreck vengeance, all the accused in furtherance of their common intention committed the murder of Raghubir and also caused simple hurt to his wife while she was trying to save her husband. The accused are reported to be belonging to Tehsil Jogindernagar in District Mandi and they were working in village Jalahar in District Kullu near the Dhara of the deceased at the relevant time as labourers. -After completion of the investigation, charge-sheet was laid against the accused persons u/s 302 and 323 read with Section 34 of the Indian Penal Code in the Court of Chief Judicial Magistrate, Kullu on April 27, 1994. As" the case was exclusively triable by the court of Sessions, the same was committed by the Chief Judicial Magistrate on May 19, 1994. The Court of Sessions framed charges against the accused on May 28, 1994 under the aforesaid Sections to which they pleaded not guilty and claimed trial.

10. The prosecution to bring home guilt to the accused examined, as many as 25 witnesses. The accused were examined u/s 313 Code of Criminal Procedure and denied the incriminating allegations leveled against them. Talve Ram (A-1) admitted his arrest by Jogindernagar Police on January 21, 1994 and was released on bail on January 22, 1994 by the SDJM. Jogindernagar. After his release, he went to his house on January 22, 1994 and came to Government School at Kararsu in Kullu District and collected school record of his children. Then he went to village Karaun in Kullu District and stayed there on January 25, 1994. He came to Government school, Chhatanseri in Kullu District and collected his children's school record. He stayed in the Teachers' Home for the night and left for his native place on January 26, 1994. He was picked up by the Jogindernagar Police on 28.1.1994 while he was going to attend the court at Jogindernagar. He stated that it was a false case foisted upon him. Mangal Singh alias Mangat Ram alias Haiku (A-2) said that he was arrested by the Police at

village Himri on January 30 or 31 where he was working as labourer at the relevant time. He stated that he was tortured at the Police station so that a false case could be made out against him. Rup Chand (A-3) also stated that on 21.1.1994 he had gone to Nagwain where he stayed till 11.2.1994 when he was arrested by the Police. He said that a false case has been registered against him whereas he is an innocent. Bhagi Ram (A-4) stated that he was arrested by the Police on February 11, 1994 at Nagwain where he had gone on January 21, 1994 and stayed there till the date of his arrest. He also denied his involvement in the alleged crime and said that it was a false case against him. The Appellants led no defence evidence.

11. After recording the evidence of the parties and hearing the learned Public Prosecutor and the defence counsel, the trial Judge found the Appellants guilty of murder of Raghubir, convicted and sentenced them as aforesaid. However, they were acquitted for offence u/s 323 read with Section 34 of the Indian Penal Code. Now the Appellants have filed these four appeals separately; one directly and rest three through jail against the order of conviction and sentences.

12. The learned Counsel for the Appellants have contended that Kali Devi (PW-15) is close relation of the deceased and she is an interested witness. Apart from that there are inherent improbabilities in her deposition and there are also contradictions in her evidence. It has also been contended by the learned Counsel that PW-5, the Doctor who held post mortem on the body of the deceased Raghubir found stone injury on the head being injury No. 1 and had opined that due to the head injury leading to the shock and death caused by stone, Raghubir had died. Such injury therefore, cannot be attributed the Appellants and the said fact runs counter to the depositions to the eye-witnesses. It has also been contended that the ingredients of the common intention of the Appellants and also the motive have not been established by the prosecution. The learned Counsel also contended that the alleged statement made by Karam Chand (PW-16) u/s 164 Code of Criminal Procedure was not recorded in accordance with the basic requirement of law and as such, such statement cannot be relied upon.

13. Such contentions of the learned Counsel for the Appellants were, however, disputed by Ms. Shyama Dogra, learned Deputy Advocate General for the State and it has been strongly contended by her that incident of murder had taken place before the eyes of PW-15 who has deposed very convincingly, how the murder of the said deceased had taken place. There is no material contradictions in the evidence of eye-witness. Simply because PW-15 is a close relation of the deceased, her evidence cannot be discarded. Learned Counsel for the State has, therefore, submitted that there is no merit in these appeals and the same should be dismissed. It is in the light of the submissions made by the learned Counsel for the parties, we propose to scrutinise both oral and documentary evidence brought on the record.

14. The prosecution has mainly relied upon the evidence of the alleged eye-

witness Smt. Kali Devi (PW-15), wife of the deceased. She deposed that she alongwith her husband were sleeping in their "Dhara" during the fateful night alongwith Chenku S/o Mast Ram (PW-19) in the meantime, somebody called from outside asking them to tell about the location of the house of A-1. She woke up her husband and also lighted a kerosene lamp. When her husband inquired as to who was calling from outside, A-1 told that it was he who was his father. Then all the Appellants took her husband forcibly into the field downward Dhara. She also chased them but A-4 pushed her away as a result she fell on the stump of Kail tree and sustained injury on her head. She ran away from there and while running she sustained injuries on her legs with the barbed wire. She stated that the Appellants assaulted her husband with sticks, fist and leg blows and stones. Thereafter, she went to the house of Nathu Ram (PW-18) to seek his assistance, but he did not accompany her on the ground that his mother was seriously ill. Then she went to the house of PW Mast Ram who alongwith his wife accomoanied her. They searched for her husband who was not found in the Dhara. They woke up Chenku from the Dhara and all of them went to the house of PW Mast Ram for the night. On the next day she went to the Panchayat Ghar at Shirar, where the Gram Panchayat meeting was being held. She informed Pradhan Hominder Mahant (PW-17) about her husband being missing. She admits that in her statement recorded u/s 154 Code of Criminal Procedure (Ext.PN) she did not mention the name of A-2. She stated that her husband identified A-1 before the constable when he came to serve him with the summons and on that score A-1 was nursing grudge against her husband. When she was confronted with portion "A" to "A" of her statement (Ext.DA) recorded u/s 161 Code of Criminal Procedure , she admitted having made such statement in which it finds stated that immediately on the opening of the door somebody dragged her husband and someone said from outside that "I am your father". In this statement, she has not mentioned the names of the Appellants. She has also admitted that the name of A-2 was told to her by someone after 10-12 days of the occurrence. She again said that his name was told to her by the Police officials. She had not mentioned in her statement (Ext.DA) that the Appellants were having sticks with them. She stated that her husband was assaulted by the Appellants near her Dhara at a distance of 5-6 ft. and she was pushed away in her court-yard itself. This portion of the statement contradicts her earlier version in which she stated that the Appellants forcibly took her husband into field downwards her Dhara. She stated that Appellants assaulted her husband with sticks, stones and blows. She had not mentioned that one person was witnessing the incident. She did not identify that person nor she knew his name. She specifically states that there was no electricity supply at her residence and the kerosene lamp was without chimney. She admitted that she stated about the enmity of A-1 with her husband because she had suspicion upon him and A-1 never disclosed about his enmity with her husband. In her statement (Ext.PN), she stated that A-4 gave a blow on the head of her husband with Danda and other Appellants also started beating him with Danda. This portion of the statement is contrary to her deposition pledged on oath in the court in which she

stated that the Appellants inflicted injuries on the person of her husband with stones as well. It appears that the story of pelting stones by the Appellants on the deceased had been introduced in the court after the receipt of medico legal certificate (Ext.PG). " Doctor Om Pal has specifically stated that the head injuries could be caused by heavy stones if they were used like a weapon. According to his opinion, the injured died due to head injury. The version of PW Smt. Kali Devi is contrary to the medical evidence. She also involved A-2 not named in the FIR (Ext.PO) or statement (Ext.PN). There are certain material contradictions and improvements in her version. It has come in her evidence that there was no light outside her Dhara and the time of occurrence was stated to be at 10 PM. The conduct of this witness is not fair. If her version about dragging her husband by the Appellants to the fields is accepted, then there was no necessity for her to bring Mast Ram (PW-19) to her Dhara in the night in search of her husband. She stayed with PW Mast Ram in his house during the night without making an attempt to trace out her husband alongwith Mast Ram and his wife. It was UP Pradhan Jog Raj who found the dead body of the deceased lying in the orchard of the deceased on the next day. If she knew that her husband was dragged by the Appellants into the field, she could have asked PW Mast Ram, Pradhan Haminder Mahant or Up Pradhan to trace out her husband in the field. She did not say this fact to any witness. It has also come in her evidence that her husband used to quarrel with her. It has also come in her statement (Ext.PN) that different types of stones were lying around the dead body and there were injuries on the entire body of her husband. It has come in the evidence of the Doctor that other injuries suffered by the deceased could be caused if he had fallen down rolling. The dead body of the deceased was found in the field at a distance of 40-50 feet from her Dhara as stated by her in her latter portion of the cross-examination which contradicts her earlier statement in which she said that her husband was assaulted near Dhara at a distance of 5-6 feet. She has not stated in her deposition that the Appellants had common intention to kill her husband. On assessment of her entire evidence, we find that it was not possible for her to have seen the occurrence at a distance of about 40-50 feet from her Dhara where the Appellants alleged to have inflicted stone injuries upon the person of the deceased because it was all darkness outside and the kerosene lamp was burning inside the Dhara. Her initial case was that lathi blows were inflicted by the Appellants upon the person of the deceased but according to the medical evidence, the deceased died due to stone injuries. Who inflicted the stone injuries on the person of the deceased is a mystery. It has come in the evidence of Mast Ram (PW-19) that when he reached in Dhara there was no light in it. It has also come in evidence of PW-15 that when she tried to intervene A-4 pushed her and she ran away. Till that time no fatal assault was inflicted on the person of the deceased. She stated that A-4 followed her while she was running. She has not stated that thereafter he came back to the scene of occurrence which according to her version is at a distance of 40-50 yards from her Dhara. This statement excludes the presence of A-4 at the scene of occurrence where the deceased was alleged to have been given blows. The presence of kerosene lamp

burning inside the Dhara itself is a doubtful factor as found from the evidence of Mast Ram (PW-19). Even assuming there was a burning kerosene lamp inside the Dhara it was highly unbelievable that PW Smt. Kali Devi could have seen the Appellants giving Danda or stone blows to the deceased at a place of occurrence which admittedly, was at a distance "of 40-50 feet from the said Dhara which place admittedly, was dark. From perusal of the spot map (Ext.PE) prepared by the Patwari, distance between the said Dhara and the place of incident has been shown 18 Karam (about 81 feet).

15. No doubt, FIR is not substantive evidence. However, when the author of the report-consistently speaks with a version given in FIR, then the Court can look into the evidence as well as the earlier version, not for the purpose of mere scrutiny of the evidence, but to examine whether the very version given by this witness could be accepted and if the court finds the earliest version to be suspicious and if the witness completely falls in line with such a version, then such evidence also becomes suspicious. In the present case PW Smt. Kali Devi in her statement u/s 154 Code of Criminal Procedure (Ext.PN) described every detail of the incident although it has come in the evidence that she is an illiterate rustic woman. On the basis of that statement FIR (Ext.PO) was recorded giving minute description of the incident. She is an interested witness and falls in line verbatim and repeats the same in a parrot like manner in the court, naturally that creates some amount of suspicion about her veracity. If her evidence becomes doubtful then the evidence of the chance, witnesses P Ws.17 and 19 do not merit acceptance.

16. It has been admitted by Mast Ram (PW-19) that complainant Kali Devi and her husband Raghubir were his tenants earlier to the incident. He has admitted in his cross-examination that the dead body of deceased Raghubir was lying at a distance of about 150 yards from his Dhara. Shri Haminder Mahant (PW-17) was Pradhan of the Gram Panchayat Shirar at the relevant time. He stated that PW Kali Devi came to the Panchayat Ghar at 8.30 AM on 26.1.1994 and informed him that her husband had been assaulted by some one during the previous night. However, lateron he changed his statement stating therein that she had named A-1 , A-3 and A-4. In his cross-examination, he deposed that he knew the deceased" and PW Kali Devi for the last 3/4 years prior to recording his statement. He has also admitted that one stone was lying on the head of the deceased whereas remaining two stones were lying beneath the head at the time when the dead body was recovered by the Police in his presence on 27.1.1994.

17. PW Smt. Kali Devi attributed the motive of murder against A-1 on the ground that her husband told the name and address of A-1 to the Police who came from Jogindernagar Police Station with summon, arrested and taken him to Jogindernagar about 7/8 days prior to the incident. It has come in the evidence that the Appellants are rustic villagers belonging to Tehsil Jogindernagar in District Mandi and are doing the work of Charanies (labourers engaged for sawing wood). There is not an iota of evidence brought on the record by the

prosecution that A-1 or any of the Appellants had any motive to kill the deceased. It is incomprehensible why the Appellants had murdered Raghubir without any conceivable motive or reason. The reason given by PW Smt. Kali Devi is not sufficient reason or motive to kill her husband.

18. The prosecution next relied on the statement (Ext.PW-16/B) made by Karam Chand (PW-16) and recorded by Chief Judicial Magistrate, Kullu on 1.2.1994 u/s 164 Code of Criminal Procedure. In this statement the witness stated that on 25th January, 1994, A-1 a resident of Barot " side in Tehsil Jogindernagar who was working * as a labourer in jungles and residing in an orchard owned by Amar Singh a businessman from Amritsar came to his Dhara at Himgiri at about 10 A.M. He deputed him to bring two bottles of liquor from the village. A-1 and A-2 consumed the liquor. In the evening A-1 and A-2 took him to the house of A-1. The Appellants, wife of Appellant No. 1 namely, Shyami and wife of A-3 namely Lahauli were also present there. During the night time at about 8 P.M. A-1 took him and other Appellants to the Dhara of Gorkha Bhadur situated in the jungle. The Appellants made him to stand at some distance from that Dhara and they went to the Dhara of Bhadur Gorkha. He stood at a distance of about 50 yards. It was dark night. A-2 called out Bhadur Gorkha in a loud voice. Said Gorkha came out from his Dhara and immediately A-2 gave beatings to him with Danda which he was holding in his hand whereas other Appellants attacked him with stones. All of them came back to the quarter of A-1 and slept there and on the next morning he alongwith A-2 got up and returned to their quarter. He could not disclose this episode to anyone as A-2 warned him that in case he deposed about the incident to anyone, then they would slap him. Looking at his statement, he has given detailed description of the incident as recorded in the statement (Ext.PN) made by PW-15 on the basis of which FIR (Ext.PO) was recorded. However, he turned hostile to the prosecution at the time of deposition in the court. In his deposition on oath, he denied the presence of A-1 in his Dhara at Himri on 25.1.1994. He stated that the statement made by him before Chief Judicial Magistrate, Kullu was made under the pressure of the Police. He admitted that at the time when the statement was made, the Police was not present in the court room, but he had been threatened by the Police that in case he did not make statement favourable to the Police, he would also be arrested in the present case. He also stated that the Chief Judicial Magistrate had not informed him that he was free to make a statement voluntarily and not under any pressure nor he was given time to recollect upon. In his cross-examination conducted by the Public Prosecutor, he admitted that the Police constantly interrogated him on January 30 and 31, 1994. He denied the contents of his statement (Ext.PW-16/B) in toto. He further stated that the Police had told him not to disclose to the court that he had been asked by the Police to make a statement favourable to it. He said that whatever he was told by the Police, he deposed before the learned Chief Judicial Magistrate and he was tutored by the Police to make such a statement. He denied the suggestion- of the Public Prosecutor that he was an associate of the Appellants. He also stated that he did

not know the Appellants at all. The learned Counsel for the Appellants have contended that the statement of this witness recorded u/s 164 Code of Criminal Procedure can be used only to corroborate or contradict the witness. Since he has totally denied the making of such statement in the court, no reliance can be placed on such statement. In support of their contentions they have relied upon State of Delhi v. Shri Ram Lohia 1960 CriL.J.679. In that case, the Hon''ble Judges of the Apex Court said that statements recorded u/s 164 Code of Criminal Procedure are not substantive evidence in a case and cannot be made use of except to corroborate or contradict the witness. An admission by a witness that the statement of his was recorded u/s 164 of the Code and that what he had stated there was true would not make the entire statement admissible; much less could any part of it be used as substantive evidence in the case. In view of this observation, the statement of PW-16 u/s 164 Code of Criminal Procedure cannot be used as a substantive evidence in coming to the conclusion that he had been won over or having made such statement. He has resiled from his statement u/s 164 and it cannot be relied upon as corroborating piece of his subsequent evidence before the court below.

19. Ms. Shyama Dogra, learned Deputy Advocate General has contended that Shri Indar Ram, Chief Judicial Magistrate has appeared as PW-23 and stated that the statement u/s 164 Code of Criminal Procedure was made by the witness voluntarily without any pressure of the Police. In his statement, Chief Judicial Magistrate has stated that the statement made by the witness was dictated by him to his Reader Atma Ram between 3 PM to 3.20 PM in Hindi. The statement so made by the witness was thereafter read over and explained to him who accepted the same to be correct and signed by him. Thereafter, he called the Investigating Officer in his Chambers and told him that he could copy out the statement which he did. In his cross-examination, he admitted that the application (Ext.PW-23/B) was presented by Inspector Paras Ram and witness Karam Chand was also accompanying the Inspector. The application was presented to him in his Chambers because at that time he was sitting in his Chambers. He showed his lack of knowledge whether Inspector Paras Ram or any other Police official was present in the court room when the statement was recorded. The version of the witness cannot be made use of against Karam Chand witness. The learned Deputy Advocate General has relied upon Harish Kumar Vs. State (Delhi Administration), In that case the Hon''ble Judges of the Supreme Court observed:

The evidence of an independent witness cannot become suspect" merely because the statement u/s 164 Code of Criminal Procedure was got recorded by the Police. Perhaps with a view to see that he would be gained over, the police in its usual precaution has got his statement recorded u/s 164 Code of Criminal Procedure It might be that there is an attempt to pressurise him by getting the statement u/s 164 and the prosecution attempted to pin him down to the statement given to them. But that ground should be taken as a caution to scrutinize his evidence and subject it to critical examination." In that case the

evidence of the independent witness was consistent with his evidence made in the court. As stated above, in the present case, the witness has totally resiled from his earlier statement made u/s 164 Code of Criminal Procedure and the facts of Harish Kumar's case (Supra) are entirely different than the present case. The statement made by PW Karam Chand u/s 164 cannot be treated as substantive evidence of the facts stated and not to be relied upon.

20. The learned Counsel for the Appellants next contended that the prosecution has not proved by leading satisfactory evidence who caused the fatal injury to the deceased and certainty of the common intention of the Appellants to commit murder. In support of their contention, learned Counsel have relied upon Pandurang, Tukia and Bhillia Vs. The State of Hyderabad, , Shri Kishan and Others Vs. State of U.P., and Hardev Singh and Anr. v. The State of Punjab 1975 CLR 293.

21. We have gone through these Judgments. It is well established that a common intention pre-supposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by Section 34 IPC because there was no prior meeting of minds to form a pre-arranged plan. In a case like that each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case. The plan could arise and be formed suddenly. At last, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference, or the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis. In Yallappa and Others Vs. State of Karnataka, it was said that common intention can generate on the spot and such common intention can be inferred from the facts and circumstances of the case and nature of injuries caused by the accused. We have assessed the evidence of the prosecution witnesses. After assessment of the evidence, we think that the evidence is not cogent and convincing, and that, there is no sufficient evidence to show that the Appellants shared the common intention and therefore, we think they are entitled to the benefit of doubt. A sweeping statement has been made by PW Smt. Kali Devi that they had the common intention without further corroboration. There is no material on record to show as to who gave the fatal blow. If the intention were to kill Raghubir, there was no necessity for a two phased attack firstly assaulting him at the door of the Dhara and than to drag him to the fields and to give the fatal blows. The motive of the crime is difficult to believe as it is not supported by the prosecution witnesses. It

is a case where common intention to cause death was totally lacking.

22. The learned Counsel for the Appellants next contended that the weapon of offence i.e. Danda (Ext. P-8) alleged to have been recovered by A-2 from the house of A-1 after he made disclosure statement u/s 27 of the Evidence Act on 3.2.1994 has not been connected with the commission of the offence. Yellu Ram (PW-24) has been produced by the prosecution in support of the disclosure statement of A-2 and recovery of Danda. The witness did not support the prosecution case and was declared hostile. In his cross-examination conducted by the Public Prosecutor he denied the suggestion that A-1 made statement (Ext.PW-24/A). Similarly, he denied that A-2 recovered Danda from the roof of residence of A-1. . He stated that he signed disclosure statement (Ext.PW-24/A) and recovery memo (Ext.PW-15/A) on" the asking of the Police that it had recovered a Danda. In his cross-examination on behalf of the Appellants, he stated that a Police constable took out a Danda from the window when he was sitting outside the residence of A-1. The other witness of the disclosure statement and recovery of Danda, Shanti Lal was not produced by the prosecution to establish making of the disclosure statement by A-2 and also recovery of Danda (Ext.P-8). No doubt, Investigating Officer Paras Ram (PW-25) has deposed about the making of the disclosure statement by A-2 and on the basis of that statement Danda (Ext.P-8) was recovered at his instance. But that evidence has not been corroborated by any recovery witness and the recovery of Danda is of no consequence to the prosecution since the cause of death opined by the Doctor was due to stone injuries and not by Danda blows.

23. Ms. Shyama Dogra, learned Deputy Advocate General has contended that coat (Ext.P-11), shirt (ext.P-12) and Pant (ext.P-13) were recovered from the residence of A-1. Shirt (Ext.P-18) and Pant (Ext.P-19) were recovered at the instance of A-3. Similarly, sweater (Ext.P-14) and Pant (Ext.P-15) belonging to A-2 were recovered at his instance and all these clothes were found to be blood stained. We have perused the reports (Exts.PW-25/E, 25/F and 25/H) of the Scientific Officer (Chemical), State Forensic Science Laboratory, Shimla and found that either no blood was traced or the blood particulars were found insufficient for examination on the clothes alleged to have been recovered at the instance of A-1, A-2 and A-3 belonging to them. Therefore, the recovery of clothes belonging to these Appellants are of no consequence to conclude that these clothes were blood stained with the blood group of the deceased.

24. Lastly, the prosecution has relied upon the alibi pressed into service by A-1. Tek Chand (PW-8) was posted as a Manager in the "Teachers" Home" Sarwari Bazar Kullu since 1989. He stated that the "Teachers" Home" is used as Yatri Niwas, where the passengers and tourists used to stay for the night. He said that he knew A-1 for the last four years, as he had been visiting and staying in the said Home. A-1 had come on 26.1.1994 at 8.30 AM and demanded the receipt of his stay on 25.1.1994 in Home. He made entry in the register maintained by him. A-1 made payment of Rs. 15/- and ante dated receipt was issued in his

favour. The police took into possession receipt book (Ext.P-4) and register (Ext.P-5). In the register at page 59 serial No. 675 the name of A-1 is found mentioned which was made by him on 26.1.1994 at 8.30 A.M. In his cross-examination, he admitted that he did not remember exactly how many persons had stayed in the said home on 25.1.1994 nor did he remember how many persons had stayed on 24.1.1994. He admitted that there appears some overwriting at serial No. 675 in register (Ext.P-5) which was done by him in haste. We have perused the entry No. 675 of Ext.P-5. We find that the date of arrival of A-1 in the Home is given 25.1.1994 and date of departure on 26.1.1994 at 8.30 A.M. There is another entry at serial No. 676 of the same date. We find some over-writing over the date and time of arrival of A-1. Similarly, we find some over-writing in date of departure of A-1 which has been changed to 26.1.1994. It is settled law that the burden of proving alibi undoubtedly lies on the accused setting up the defence. But even so the burden of proving the case against the accused is upon the prosecution irrespective of whether or not the accused have made out a plausible defence. It is not necessary for an accused to render an explanation to prove his innocence and even if he renders a false explanation, it cannot be used to support the prosecution case against him and that the entire case must be proved by the prosecution itself. As discussed above in the earlier part of the Judgment, after assessment of the evidence, we think that the evidence of the prosecution is not cogent and convincing to hold the Appellants guilty for the commission of the murder of Raghubir. The plea of alibi even if it was found to be an afterthought would not lend support to the prosecution case against A-1.

25. No other point was urged by the learned Counsel for the parties.

26. We therefore, allow these appeals, set aside the order of conviction and sentences passed against the Appellants and the Appellants are acquitted of the charge levelled against them u/s 302 read with Section 34 of the Indian Penal Code. The Appellants are in jail, we direct that they shall be set at liberty at once unless their confinement is required in some other case against them. Fine if realized be refunded to them.

27. Shri T.R. Chandel and Shri D.C. Jishtu Advocates were appointed Amicus Curiae for the Appellants Talve Ram, Rup Chand and Bhagi Ram and argued the case with their usual vehemence. Before parting with the appeals, we record our appreciation for valuable assistance they rendered.