

(2008) 09 RAJ CK 0081
In the Rajasthan High Court

Pankaj, Krishna Murti and Another and Koshlendra @ Kaushal	APPELLANT
Vs	
State of Rajasthan	RESPONDENT

Date of Decision : 03-09-2008

Acts Referred:

Arms Act, 1959 — Section 25, 3
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106, 114, 134, 25, 26
Penal Code, 1860 (IPC) — Section 302, 307, 34, 452

Citation : (2009) CriLJ 1568

Hon'ble Judges : Shiv Kumar Sharma, J; Mahesh Bhagwati, J

Bench : Division Bench

Judgement

Shiv Kumar Sharma, J.—The roars of gun fire echoed inside the sugarcane juice's shop on March 19, 1998 at 11 AM when out of four persons sitting at the shop, one opened fire at Raj Kumar (since dead). The appellants, four in number, were put to trial for having committed murder of Raj Kumar before learned Additional Sessions Judge (Fast Track) No. 1 Bharatpur. Learned Judge vide judgment dated August 3, 2002 convicted and sentenced them as under:

Koshlendra @ Kaushal, Krishna Murti and Jitendra Kumar:

Under Section 302/34 IPC:

Each to suffer imprisonment for life and fine of Rs. 1000/-, in default to further suffer simple imprisonment for two months. Pankaj:

Under Section 302 IPC:

To suffer imprisonment for life and fine of Rs. 1000/-, in default to further suffer simple imprisonment for two months.

Under Section 3/25 Arms Act:

To suffer rigorous imprisonment for two years and fine of Rs. 500/-, in default to further suffer simple imprisonment for one month.

Sentences were ordered to run concurrently.

2. The prosecution story is woven like this:

On March 19, 1998 around 12.30 PM informant Ram Babu (Pw.8) submitted a written report (Ex.P-7) at Police Station Mathura Gate, Bharatpur stating therein that on the said day around 11.00 AM while the informant was sitting at his shop of sugarcane juice, Pankaj, Kaushal and two others came to his shop. After consuming juice they sat in side the shop. When Raj Kumar, elder brother of informant, came to the shop, Pankaj called him. No sooner did Raj Kumar enter inside the shop, Pankaj took out Katta (country made gun) from his pant and opened fire at Rajkumar that hit on his neck. As a result of fire Rajkumar fell down and became unconscious. All the four assailants thereafter fled away. Rajkumar was removed to hospital at Bharatpur and from there he was referred to Agra Hospital. On that report, a case was registered under Sections 452, 307 and 34 IPC and investigation commenced. Rajkumar succumbed to his injuries on March 25, 1998 at Agra and Section 302 IPC was added. The dead body of deceased was subjected to post mortem examination. After completion of investigation charge sheet was filed. In due course the case came up for trial before the court of learned Additional Sessions Judge (Fast Track) No. 1 Bharatpur. Charges under Sections 452, 302, 302/34 IPC and 3/25 Arms Act were framed. The appellants denied the charges and claimed trial. The prosecution in support of its case examined as many as 24 witnesses. In the explanation u/s 313 CrPC, the appellants claimed innocence. Three witnesses in support of defence were examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated herein above.

3. Prior to his death injury received by Rajkumar was examined vide injury report (Ex.P-5), which reads as under:

One punctured lacerated wound with bleeding circular in shape of 1cm x 1cm x soft tissue to bone deep on right side neck region on sterno mastoid muscle line to middle part.

Edges & margin is verted with collar of contusion.

No burning, blackening & tattooing seen, sulgesmic of wound of entry of fire arm.

4. As per post mortem report (Ex.P-6) drawn by Dr. B.B. Sharma (Pw.7), the cause of death was shock and hemorrhage due to antemortem injuries.

5. Super structure of prosecution case is founded on the dying declaration (Ex.P-19) of Rajkumar allegedly recorded at 10.45 PM on March 19, 1998 at GGMI Nursing Home Agra by Naresh Pal Gangwal (Pw.21), who was SDM at Bharatpur. In support of the testimony of Naresh Pal Gangwal, the prosecution examined Ram Babu (Pw.2) as eye witness of the occurrence. Testimony of Ram Babu gets corroboration from the evidence of Shyam Sunder (Pw.5), who had seen appellant Pankaj with Katta and three others coming out of the shop.

6. We have heard rival submissions.

7. At the outset we deem it necessary to narrate the principles governing dying declaration, laid down by the Apex Court in various judgments. They are as under:

(i) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination K. Ramachandra Reddy and Another Vs. The Public Prosecutor,

(ii) Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. Rasheed Beg and Others Vs. State of Madhya Pradesh,

(iii) A dying declaration which suffer from infirmity cannot form the basis of conviction. Ram Manorath and Others Vs. State of Uttar Pradesh,

8. Rule 6.22 of the Rajasthan Police Rules, 1965, which lays down the procedure as to in what manner dying declaration should be recorded, reads as under:

6.22 Dying declaration (1) A dying declaration shall, whenever possible, be recorded by a Magistrate.

(2) The person making the declaration shall, if possible, be examined by a medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement.

(3) If no Magistrate can be obtained, the declaration shall, when a gazetted officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case.

9. In the instant case the prosecution is not able to prove beyond reasonable doubt that Rajkumar was in a fit state of mind to make a lucid statement. Dr. Vanay Singh (Pw.6), who first examined Rajkumar on March 19, 1998 at 12.45 PM categorically stated in the injury report that Rajkumar was unconscious. Naresh Pal Gangwal (Pw.21) although deposed that he got fitness certificate from the duty doctor but neither the fitness certificate was placed on record nor the duty doctor was examined. A look at alleged dying declaration (Ex.P-19) reveals that it was recorded at 10.45 PM on March 19, 1998 i.e. after 10 hours of the first examination of Rajkumar. It is difficult to believe that Rajkumar, who was unconscious at 12.45 PM would have regained consciousness at 10.45 PM. Dr. B.L. Meena (Dw.3) after examining operation Notes (Ex.P-12) and Discharge record (Ex.P-13) of Rajkumar opined that he could not have regained consciousness at 10.45 PM. In our opinion, the dying declaration (Ex.P-19) is a suspicious document and it cannot be acted upon. Testimony of Naresh Pal Gangwal appears to us as untrustworthy.

10. That takes us to the ocular evidence adduced by the prosecution. Informant Ram Babu (Pw.8) in his deposition stated that on March 19, 1998 around 11 AM while he was at his shop Pankaj, Kaushal and two others came to the shop. After

consuming juice, they sat in side the shop. At the same time his elder brother Rajkumar came to the shop. Pankaj called Rajkumar inside the shop. When Rajkumar went inside Pankaj took out Katta (country made gun) from his pant and opened fire at Rajkumar that hit on his neck. As a result of which Rajkumar fell down and became unconscious. Leaving Rajkumar at the shop the assailants fled away. Rajkumar was removed to hospital Bharatpur, from where he was referred to Agra hospital.

11. Shyam Sunder (Pw.5) deposed that at the time of incident he was at the barber shop, situated near the shop of informant. Hearing noise of fire when he went out he saw Pankaj armed with revolver. Pankaj was accompanied by three other persons.

12. Anil Singh Chauhan (Pw.24), who investigated the case, deposed that he arrested the appellant Pankaj vide memo Ex.P-15. After the arrest Pankaj gave information (Ex.P-24) about Katta allegedly used in commission of offence. Katta got recovered at the instance of Pankaj vide memo Ex.P-18. Thereafter sanction (Ex.P-25) was accorded by the District Magistrate Bharatpur to prosecute Pankaj u/s 3/25 Arms Act.

13. Harish Chand (Pw.9) Armour, after examining Katta, drew the report Ex.P-11, wherein it was stated that Katta was fit for firing action.

14. Fact situation emerges from the material on record may be summarized thus:

(i) Ram Babu (Pw.8) is the sole eye witness of the occurrence.

(ii) According to Dr. B.B. Sharma (Pw.7), who performed autopsy on the dead body, cause of death was shock and hemorrhage.

(iii) Katta, allegedly used in commission of offence, got recovered at the instance of Pankaj by Anil Singh Chauhan IO (Pw.24).

(iv) According to Harish Chand Armour (Pw.9) Katta was serviceable firearm.

(v) The District Magistrate Bharatpur vide order dated May 16, 1998 (Ex.P-25) accorded sanction to prosecute Pankaj u/s 3/25 Arms Act.

15. The question for consideration now is as to whether the sole testimony of informant Ram Babu (Pw.8) can be relied upon. Before we consider the infirmities shown by learned Counsel for the appellants in the testimony of Ram Babu, it will be apt to know as to what is necessary for proof or disproof of a fact.

16. Section 134 of the Evidence Act lays down in clear terms that no particular number of witnesses is necessary for proof or disproof of a fact. Section 134 follows the maxim that evidence is to be weighed and not counted. Law does not insist on plurality of evidence. It is the quality of the witness which is significant in appraisal of evidence. So long as the single eye witness is wholly reliable witness, the Court has no difficulty in basing conviction on his testimony alone. In Anil Phukan Vs. State of Assam, it was indicated that it is only when the

courts find that the single eye witness is wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect.

17. The evidence of the sole eye witness has to be scrutinised with caution and circumspection. Conviction can be recorded on the basis of the statement of single eye witness provided his credibility is not taken by any adverse circumstance appearing on the record against him and the court at the same time is convinced that he is a truthful witness.

18. It is well settled that when ocular evidence is cogent, credible and trustworthy, minor variance, if any, is not of any consequence. Their Lordships of Supreme Court in *Krishnan and Another Vs. State Rep. by Inspector of Police*, indicated that witnesses are the eyes and ears of justice. Eye witnesses account would require a careful independent assessment and evaluation for its credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the credit of the witnesses, their performance in the witness box; their power of observation etc.

19. In *Masalti Vs. State of U.P.*, Constitution Bench of Hon"ble Supreme Court held that under the Evidence Act, trustworthy evidence given by a single witness would be enough to convict the accused persons.

20. In *State of Punjab Vs. Hardan Singh and Others*, it was indicated that conviction on the testimony of a single witness was permissible where his testimony was creditworthy and convincing.

21. In *Yakub Ismailbhai Patel Vs. State of Gujarat*, , it was observed that where testimony of a solitary witness inspires confidence conviction can be based on such testimony but the court should be cautious while examining such evidence and corroboration from other evidence can be sought.

22. Bearing aforequoted legal position in mind, we proceed to consider the contentions raised by the learned Counsel. In an attempt to demolish testimony of Ram Babu, learned Counsel canvassed that he is the real brother of deceased and his evidence is neither creditworthy nor convincing. He was not present at the time of incident. We have been taken through the statement of Ram Babu to show that although he lifted injured Raj Kumar, his clothes stained with blood never seized. Our attention was drawn towards galore embellishment and contradictions. Having closely scanned the testimony of Ram Babu, we find that it could not be shattered in the cross examination. Undisputably the juice shop of Ram Babu did exist in his residential house. Strangely in the cross examination, the Counsel representing Pankaj in the trial court, gave suggestion to Ram Babu that Raj Kumar was already inside the shop and as soon as the accused came, they opened fire at Raj Kumar. Ram Babu in reply to this suggestion stated that it was wrong.

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23. Testimony of Ram Babu gets corroboration from the evidence of Shyam Sunder (Pw.5), who had seen Pankaj coming out of the shop with Katta. Evidence of Ram Babu is further corroborated by the testimony of Anil Singh Chauhan IO (Pw.24) who got Pankaj arrested and recovered Katta on the basis of his disclosure statement.

24. Notwithstanding that Ram Babu is the real brother of deceased, we cannot discard his testimony. Since juice shop existed in the residential house of Ram Babu, his presence in the shop at the time of incident was quite natural. If IO did not seize blood stained clothes of Ram Babu it cannot be inferred that Ram babu was not present at the shop.

25. It is well settled that evidence of kith and kin of the deceased may be relied upon. The Apex Court in Krishna Ram and others Vs. State of Rajasthan, held as under: (Para 4)

We have gone through the evidence of the eye witnesses. No doubt Pws 1, 2, 3 and 6 are kith and kin of the deceased but they have given a truthful version of the whole occurrence. Even Ex.P-1 all the material particulars are mentioned particularly the fact that the deceased was dragged to the house of A-1 and that there he was tied and beaten. As noted already even A-1 admitted that the deceased was tied in his house but added that because of the scuffle between PW.6 and the deceased, latter was tied. Immediately after registering the crime, the SHO went to the house of A-1 and found the deceased tied and he was having bleeding injuries. Thus the time, place of occurrence and the cause of death are established beyond doubt. So far as the presence and participation of the appellants are concerned there are statements of the eye-witnesses consistently to this effect. Both the Courts below have given cogent and convincing reasons for accepting the evidence of the eye witnesses. The evidence adduced in defence is not at all material and the courts below have rightly rejected the same. The trial court acquitted Keshra Ram A-6 giving the benefit of doubt. In our view the same in any manner does not affect the evidence of eye witnesses who are the most natural witnesses. We see absolutely no merits in these appeals. The appeals are dismissed accordingly.

26. In Ram Lakhan and others Vs. State of U.P., held that the evidence of close relatives of deceased is not liable to be rejected on ground of interested witnesses. What is necessary is that Court should scrutinize evidence of such witness carefully.

27. In Baitullah and another Vs. State of U.P., Hon"ble Supreme Court held that evidence of interested witness cannot be discarded merely on ground that he is interested. It is normally expected that witness would not leave out real culprits and rope in innocent persons.

28. In *Tapubha Bhagvanji and Others Vs. State of Gujarat*, the Apex Court held as under: (Para 12)

The witnesses examined on behalf of the prosecution are witnesses who in normal course of event are expected to know about the incident. Their deposition do not reveal any good reason for rejecting their evidence as untrustworthy or unreliable. Nothing has been brought on record either in cross examination of the witnesses concerned or in any other evidence to show any good reason as to why they should falsely implicate the accused in the case. Thus rejection of their testimony on ground that they are interested witnesses being in relation of deceased, not proper.

29. In *Angnoo and Others Vs. State of Uttar Pradesh*, the Apex court held that the fact of relationship would add to value of his evidence because he would be interested in getting the real culprit, rather than innocent persons, punished.

30. In *Bolineedi Venkataramaiah and Others Vs. State of Andhra Pradesh*, the Apex Court considered the case where there was bitter enmity between prosecution party and accused party, group of persons chased deceased and inflicted injuries. The presence of witnesses at place of occurrence was not found doubtful. It was held that being interested witnesses their evidence was subjected to greater scrutiny. Specific overt acts attributed to accused. Corroboration of overt acts by medical and circumstantial evidence was found. Only those accused to whom specific overt acts had been attributed consistently by all witnesses were convicted. The plea that some of the accused were acquitted, the same evidence cannot be accepted against other accused, was not found tenable.

31. In *Kartik Malhar Vs. State of Bihar*, , the Apex Court indicated that "we may also observe that the ground that the witness being a close relative and consequently being partisan witness should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh and Others Vs. State of Punjab*, in which this Court expressed its surprise over the impression which prevailed in the minds of the members of the bar that relatives were not independent witness Speaking through Vivian Bose J., the Court observed para 25 of *Dalip Singh and Others Vs. State of Punjab*,

We are unable to agree with the learned Judges of the High Court that the testimony of the two eye witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the facts of seven men hangs on their testimony, we know of no such rules. If it is grounded on the reason that they are closely related to the deceased we are unable to concur.

32. In *Thangaiya v. State of Tamil Nadu* 2005 Cri.L.J. 684 the Apex Court observed as under:

In a murder trial by describing the independent witnesses as "chance witnesses"

it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence. In instant case, the plea of the accused that PW-3 was chance witness" who has not explained how he happened to be at the alleged place of occurrence, it has to be noted that the said witness was an independent witness. There was not even a suggestion to the witness that he had any animosity towards the accused. Therefore, there is no substance in the plea that evidence of independent witness which is clear and cogent is to be discarded.

33. Since offence was committed in the shop situated in the dwelling house, presence of Ram Babu at the time of incident cannot be doubted. The minor discrepancies in his evidence shown by learned Counsel for the appellant, rather lend assurance to the credibility of the prosecution case.

34. Learned Counsel next contended that since recovery of katta at the instance of appellant Pankaj was planted by the police, it could not have been relied upon. We do not see any substance in this contention also. A look at the material on record goes to show that after appellant Pankaj volunteered information about Katta, the IO got it recorded u/s 27 of the Evidence Act and pursuant to the information katta was recovered at the instance of appellant Pankaj.

35. Section 27 of Evidence Act lays down an exception to the rule that a confession made by an accused person whilst he is in custody must be excluded from evidence and permits the admission of such a confession under the conditions prescribed by it. The law in India on the subject dealt with in Section 27 is wider than the common law in England. It appears from the provisions of Section 27 that it has been taken bodily from the English law. In both the laws there is a greater solicitude for a person who makes a statement at a stage when the danger in which he stands has not been brought home to him then for one who knows of the danger. In English Law, the caution gives him a necessary warning and in India the fact of his being in custody of a police officer serves the purpose.

36. Section 27 seems to be based on the view that if a fact is actually discovered in consequence of information given some guarantee is afforded thereby than the information was true and accordingly can be safely allowed to be given in evidence. It is not correct to presume that information given by the accused u/s 27 is compelled testimony, so as to attract Article 20 of the Constitution.

37. In *Prakash Chand Vs. State (Delhi Administration)*, the Apex Court held that the evidence of circumstance simpliciter that an accused led a police officer and pointed out the place where weapon was found hidden, would be admissible as conduct, u/s 8, irrespective of whether any statement made by him contemporaneously with or antecedent to such conduct falls within the purview of Section 27.

38. In *Rammi @ Rameshwar etc. Vs. State of Madhya Pradesh*, , the Apex Court held thus: (Paras 11&12)

Regarding the recovery of weapons, the prosecution could utilise statements attributed to the accused on the basis of which recovery of certain weapons was effected. Section 27 of the Evidence Act permits so much of information which lead to the discovery of a fact to be admitted in evidence. Here the fact discovered by the police was that the accused had hidden the blood stained weapons. In that sphere what could have been admitted in evidence is only that part of the information which the accused had furnished to the police officer and which led to the recovery of the weapons.

True, such information is admissible in evidence u/s 27 of the Evidence Act, but admissibility alone would not render the evidence, pertaining to the above information, reliable. While testing the reliability of such evidence the court has to see whether it was voluntarily stated by the accused.

39. In *Himachal Pradesh Administration Vs. Om Prakash*, the Apex Court interpreted Section 27 of Evidence Act thus:

A fact discovered within the meaning of Section 27 must refer to a material fact to which the information directly relates. In order to render the information admissible the fact discovered must be relevant and must have been such that it constitutes the information through which the discovery was made. What should be discovered is the material fact and the information that is admissible is that which has caused that discovery so as to connect the information and the fact with each other as the "cause and effect" that information which does not distinctly connect with the fact discovered or that portion of the information which merely explains the material thing discovered is not admissible u/s 27 and cannot be proved. The concealment of the fact which is not known to the police is what is discovered by the information and lends assurance that the information was true. No witness with whom some material fact, such as the weapon of murder, stolen property or other incriminating article is not hidden, sold or kept and which is unknown to the police can be said to be discovered as a consequence of the information furnished by the accused. What makes the information leading to the discovery of the witness admissible is the discovery from him of the thing sold to him or hidden or kept with him which the police did not know until the information was furnished to them by the accused.

40. In *Ghanshyam Das v. State of Assam* (2005) 13 SCC 387 the Supreme Court held that evidence regarding pointing the place where weapon was thrown and

its recovery can be looked into to throw light on the conduct of accused u/s 8. It was observed as under: (Para 5)

Another incriminating circumstance which corroborates the case of the prosecution is that the appellant led the IO PW.12 to Kharbhanga riverside and pointed out the place where he had thrown away the Khukri. According to the evidence of PW.12 the IO and PW.6, the Khukri was recovered from the river with the help of a diver. Though both the courts have eschewed this circumstance from consideration on the ground that no information was recorded by PW.12 the IO so as to attract Section 27 of the Evidence Act, we are of the view that the evidence of PW.12 and PW.6 to the effect that the accused led them to the spot and pointed out the place where the Khukri was thrown, which fact stands confirmed by its recovery, can be looked into to throw light on the conduct of the accused u/s 8 of the Evidence Act.

41. In *Geejagandi Somaiah v. State of Karnataka* (2007)9 SCC 315 the Apex Court observed as under:

Section 25 of the Evidence Act mandates that no confession made to a police officer shall be proved as against a person accused of an offence. Similarly Section 26 of the Evidence Act provides that confession by the accused persons while in custody of police cannot be proved against him. However, to the aforesaid rule of Sections 25 to 26, there is an exception carved out by Section 27. Section 27 is a proviso to Sections 25 and 26. Such statements are generally termed as disclosure statements leading to the discovery of facts which are presumably in the exclusive knowledge of the maker. Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence. (Para 21)

As Section 27 is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid Section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 the Evidence Act. (Para 22)

Besides Section 27 of the Evidence Act, the courts can draw presumption u/s 114, illustration (a) and Section 106 of the Evidence Act. In the instant case also, the disclosure statements were made by the accused persons on the next day of the commission of the offence and the property of the deceased was recovered at their instance from the places where they had kept such properties, on the same day. In the absence of explanation of the accused as to legitimate or origin of their possession of articles belonging to the deceased, keeping in view of the

time within which the murder was supposed to have been committed and the body found and the articles recovered from the possession of the accused, an inference can safely drawn that not only the accused was in possession of those articles belonging to the deceased but also committed murder of the deceased. The articles belonging to the deceased were in possession of the accused who had voluntarily disclosed and as such presumption u/s 114 of the Evidence Act was clearly applicable. (Para 28, 29 and 19)

42. We cannot approach the action of Anil Singh Chauhan, Investigating Officer (Pw.24) with initial distrust. The investigating officer had no enmity with the appellant. Even if, independent person fails to support the recovery of incriminating articles at the instance of appellant, it cannot be presumed that recovery of firearm at the instance of appellant is untrustworthy. The Supreme Court in *State Govt. of NCT Delhi v. Sunil* (2001)¹ SCC 652 indicated in para 21 thus:

It is for the accused, through cross examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.

43. As a result of the above discussion, we find that the prosecution has established charges u/s 302 IPC and 3/25 Arms Act against appellant Pankaj beyond reasonable doubt.

44. Coming to the charge u/s 302/34 IPC against appellants Kaushlendra @ Kaushal, Krishna Murti and Jitendra Kumar, we find that at the time of incident they were present inside the shop with appellant Pankaj. The prosecution however could not establish that they shared joint responsibility for the criminal act of Pankaj. According to Ram Babu (Pw.8) when Rajkumar was called by Pankaj inside the shop, Pankaj was not armed with Katta. It is only after Raj Kumar entered inside the shop, that Pankaj took out Katta from his pant and opened fire at Raj Kumar. In such a situation Kaushlendra @ Kaushal, Krishna Murti and Jitendra Kumar cannot be held guilty u/s 302/34 IPC.

45. In *Gopi Nath @ Jhallar Vs. State of U.P.*, , the Apex Court indicated that:

Section 34 IPC lays down the rule of joint responsibility for criminal acts performed by plurality of persons who joined together in doing the criminal act, provided that such commission is in furtherance of the common intention of all of them. Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the

whole of the criminal action ? be it that it was not over or was only a covert act or merely an omission constituting an illegal omission. The Section is, therefore, attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a preconcerted or prearranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inference deducible from the circumstances of each case.

46. In *Suresh and Another Vs. State of U.P.*, , the Apex Court had occasion to consider Section 34 IPC and it was held thus:

The dominant feature for attracting Section 34 IPC is the element of participation in absence resulting in the ultimate "criminal act". For appreciating the ambit and scope of Section 34, the preceding Sections 32 and 33 have always to be kept in mind. u/s 32 acts include illegal omissions. Section 33 defines the "act" to mean as well a series of acts as a single act and the word "omission" denotes as well a series of omissions as a single omission. The "act" referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The Section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability u/s 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention.

47. We cannot draw presumption of constructive intention against appellants Kaushlendra @ Kaushal, Krishna Murti and Jitendra Kumar since they did not preconceive as to what Pankaj was intending to do.

48. For these reasons, we dispose of the instant appeal in the following terms:

(i) We allow the appeal of Kaushlendra @ Kaushal, Krishna Murti and Jitendra Kumar and acquit them of the charge u/s 302/34 IPC. These appellants are on bail, they need not surrender and their bail bonds stand discharged.

(ii) We find no merit in the appeal of Pankaj and the same accordingly stands dismissed. Conviction and sentence of appellant Pankaj under Sections 302 IPC and 3/25 Arms Act are maintained.

(iii) The impugned judgment of learned trial court stands modified as indicated above.