

(2010) 05 RAJ CK 0069

In the Rajasthan High Court

Case No : Criminal Appeal No's. 344 and 10 of 1983

State of Rajasthan and Others

APPELLANT

Vs

Iqbal and Another

RESPONDENT

Date of Decision : 11-05-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 299, 313

Penal Code, 1860 (IPC) — Section 24, 300, 302, 304(11), 307

Citation : (2011) 1 RLW 209

Hon'ble Judges : Narendra Kumar Jain, J; Meena V. Gomber, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Meena V. Gomber, J.—Vide impugned judgment and order dated 3.12.1982, accused Mustaq had been convicted for having committed murder of Surendra Singh @ Suresh and causing simple injury by sharp weapon to his brother Ramesh Singh. He had been sentenced to undergo rigorous imprisonment for life and a fine of Rs. 250/-; in default of payment of fine to further undergo rigorous imprisonment for two months and six months" simple imprisonment and a fine of Rs. 250/- in default to undergo one month"s simple imprisonment respectively.

2. The other co-accused Iqbal and Rauf had been acquitted for lack of sufficient evidence against them.

3. Being dis-satisfied by the acquittal of the two co-accused namely Iqbal and Rauf from the offence u/s 302 read with Section 34 IPC, the State of Rajasthan also preferred appeal.

4. Both the appeals are being decided together as they arise out of the common order dated 13.12.1982 passed by Sessions Judge, Kota in Sessions Case No. 13/1981.

5. The incident is dated 4.7.1980. The version of the prosecution has been unfolded in the written report Ex.P/1 given by PW-1 Ramesh Singh (injured and

brother of deceased) which subsequently formed the basis of the FIR.

6. Briefly stated the facts as stated in Ex.P/1 are that on 4.7.1980 at about 1.30 p.m. when the F.I.R. lodger Ramesh Singh was at his shop situated at Motor Stand, Sripura, Kota, PW-4 Ramu, tea vendor came and informed him that his brother Surendra Singh was being beaten after being surrounded by Mushtaq, Rauf and Iqbal and that Mushtaq was having a knife in his hand. On receipt of this information, he rushed to Ramesh whose place was only a minute away. He on reaching there, saw the Mushtaq, Rauf and Iqbal had surrounded his brother and Mushtaq's knife was open.

7. On being asked about the reason by him, Mushtaq answered if he had come to save him he should be settled first and saying this Mushtaq, in order to kill Ramesh Singh gave a knife blow on his stomach but he could not succeed as he saved himself and it only cut his bush shirt. Mushtaq gave second blow, on knife which inflicted injury on his right shoulder near the neck which started bleeding.

8. Since Rauf and Iqbal had captured Surendra Singh when complainant tried to save him at that time Mushtaq pierced the knife in Surendra's abdomen with intention to kill him which resulted into his fall on the spot.

9. As per F.I.R., PW-2 Gajendra and PW-3 Lachhu were present at that time. Since the condition of his brother was serious, he took him to Kaithoonipole Police Station wherefrom he was taken to the hospital in an Autoriksha.

10. It is relevant to mention here that PW-1 Ramesh Singh had informed the names of three assailants, the time and venue of occurrence to the A.S.I. Mohan Singh PW-12 which was registered as Rapat Roznamcha No. 176 at 1.45 p.m. on 4.7.1980 itself exhibited as Ex.P/15. Thereafter the written report Ex.P/1 is said to have been given by PW-1 Ramesh Singh in the hospital to PW-12 Mohan Singh, A.S.I. whereupon the case u/s 307/34 IPC was registered at P.S. - Kaithoonipole by A.S.I. Mohan Singh which, consequent upon the death of Surendra Singh, during the intervening night of 8.7.1980 and 9.7.1980, was converted into an offence u/s 302 and 302/34 I.P.C.

11. After completion of investigation, charge-sheet against Mushtaq, Rauf and Iqbal was filed before M.J.M. (2) South, Kota, accused Iqbal was absconding so against him a note u/s 299 Code of Criminal Procedure was made in charge-sheet, and the same was committed to Sessions Judge, Kota.

12. After hearing charge arguments, charges under Sections 302 and 324 IPC were read over to Mushtaq, whereas his two colleagues were charged u/s 302 read with 34 IPC. They denied the charges and claimed trial.

13. In order to substantiate its case, the prosecution examined as many as 13 witnesses and exhibited 21 documents as documentary evidence. Out of which PW-1 Ramesh, PW-2 Gajendra, PW-3 Lakshmi Chand @ Lachhu are claimed as eye-witnesses of the incident.

14. PW-1 Ramesh is the complainant, PW-2 Gajendra and PW-3 Lachhu are stated to be eye-witnesses in the FIR Ex.P/1, PW-4 Ramu is the one who is stated to have informed PW-1 Ramesh Singh about his brother being surrounded by the accused persons. PW-5 Kanhaiya is the witness of site plan Ex.P/8; PW-6 Abdul Salam is a witness for seizure of articles 1, 2 and 3 which are bush shirt, baniyan and pants being Ex.P/2 and P/3; PW-7 Ramcharan is a witness of inquest report Ex.P/8 and Fard Surat Hal Ex.P/9 which was made by PW-13 Bhanwar Lal, SHO, P.S. - Kaithoonipole at that time.

PW-8 Dr. Y.K. Sharma is the doctor who examined injured Surendra Singh on 4.7.1980 immediately after the incident and prepared the injury report Ex.P/10 where he found the stab wound in the abdomen being dangerous to life. He also examined PW-1 Ramesh Singh and found two simple sharp injuries on shoulder near neck which were recorded in Ex.P/11, injury report.

PW-9 Dr. M.M. Mishra, is the doctor who has conducted the post-mortem examination on he corpse of Surnedra Singh and prepared the post-mortem report Ex.P/12 and found that death was due to shock due to peritonitis and that peritonitis was as a result of injury to Liver, gall bladder and duodenum.

PW-10 Gheesa Lal Choudhary is the Magistrate who recorded the dying declaration Ex.P/13 at 5.22 p.m. in the M.B.S. Hospital before the injured Surendra Singh was taken to the operation theatre.

PW-11 Narendra Kumar Soni has been declared hostile by the Public Prosecutor. But he supports prosecution to the extent that somebody caused abdominal injury to Surendra Singh and that he had come to know about it. n his cross-examination by defence counsel, he tried to create suspicion on Ex.P/13 dying declaration stating that he had gone to visit Surendra Singh in he hospital and he found his friends sitting with him and that Surendra Singh was being tutored by them to allege Mushtaq for causing abdominal injury.

PW-12 Mohan Singh is the A.S.I. who recorded Rapat Roznamcha Ex./15 on 4.7.1980 at 1.45 p.m. and after handing over the charge to Purshottam, SHO, he took both the injured to M.B.S. Hospital. Ex.P/1 was endorsed by him and was sent to the Police Station for registering the case and chalking out formal F.I.R. He is also stated to have seized the articles 1, 2 and 3 being clothes of both the injured vide Exs.P/2 and P/3 and recorded the statement of PW-2 Gajendra Singh during investigation as Ex.P/4, of PW-3 Lachhu as Ex.P/5 and of PW-4 Ramu as Ex.P/7 and then he is stated to have arrested accused Rauf and Mushtaq vide arrest memo Exs.P/16 and P/17. He was confronted with the statement of Ramesh Singh wherein he claimed to have written a report as was told by the witnesses. He denied that he had torn the report given by Ramesh Singh and that he dictated Ex.P/1 report which has become foundation of this case.

PW-13 Bhanwar Lal, was the SHO on 9.7.1980 and he prepared the inquest report Ex.P/8 and "Fard Surat Hal" Ex.P/9 in the hospital on getting the

information of the death of Surendra Singh and handed over the corpse of Surendra Singh vide Ex.P/18 to his brother Ramesh Singh. On 2.10.1980, during investigation, he arrested accused Iqbal vide Ex.P/19 arrest memo and on the basis of disclosure statement dated 3.10.1980 Ex.P/20, he recovered knife Article 4 at his instance vide Ex.P/21 and then he filed the challan.

15. In the backdrop of evidence led by the prosecution, the accused were examined u/s 313 Code of Criminal Procedure wherein they alleged false implication. Accused Iqbal denied any disclosure statement or recovery of knife at his instance.

16. They examined two witnesses in defence and tried to prove that it was Friday and the shops of Ansari Thela works and Sultan Hind Music Centre were closed and therefore, the case was false.

17. The learned trial Judge, after hearing the parties and analysis of evidence and perusal, recorded the finding of conviction of Mushtaq and acquittal of his two co-accused as mentioned above and it is these findings which are the subject matter of the these two appeals.

18. We have heard the rival contentions of both the sides and minutely scanned the record before us.

19. The judgment of learned trial Court was mainly assailed by the learned Counsel for the accused on the following grounds:

(i) The first submission was that the deceased Surendra Singh died on account of his suffering from jaundice. As per Dr. MM Mishra (PW-9), liver and gall bladder are affected in case of jaundice and in deceased's case also, they were affected.

(ii) The second submission was that the genesis of occurrence has been suppressed which makes the whole prosecution story doubtful.

(iii) The third submission was that the recovery of knife at the instance of Iqbal does not link accused Mushtaq with the crime.

(iv) The fourth submission was that there was no motive to kill the deceased.

(v) The fifth submission made by the defence counsel was that the dying declaration was tortured and same could not be made the basis of conviction.

(vi) Alternatively, it was submitted that if at all the Court comes to a finding of conviction, the offence, at the most, can be said to be made out u/s 304 Part (II) and not u/s 302 IPC.

20. On the other hand, learned Public Prosecutor supported the finding of learned trial Judge with regard to accused Mushtaq but assailed the finding of acquittal recorded for co-accused Rauf and Iqbal and contended that they be held guilty for the offence they were charged with i.e. under Section" 302/34 IPC.

21. As regards the first submission, the discussion of Medical evidence is

necessary.

22. PW-8 Dr. Y.K. Sharma, Medical Jurist examined injured Surendra Singh at the request of Police Station - Khaithoonipole, Kota on 4.7.1980 at 5.25 p.m. and found following injury on his person as recorded in Ex.P/10 and as stated in his examination-in-chief.

Stab wound transverse in right hypochondrium $3/4 \times 1/4$ " into penetrating into abdominal cavity $2 1/2$ " above and lateral to right umbilicus.

23. The injury was opined to have been caused by sharp, weapon and opinion till operation was reserved. General condition of the person was found to be very poor and B.P. and pulse were not recordable. Dying declaration according to the doctor, had been recorded even before the medical examination.

24. According to him, Surendra Singh was operated/After operation of Surendra Singh, he found injuries on his Liver, gall bladder, lacerommentum and second part duodenum and therefore he opined the injury to be grievous and dangerous to life.

25. In his cross-examination, he deposed that the width of the blade of the weapon should be more than $1/4$ " and that all the layers of abdomen were affected. According to him, when he examined him, treatment had already commenced but the layers of abdomen had not been stitched. The patient was admitted at 2.00 p.m. on 4.7.1980. He admitted that Liver, gall bladder, omentum duodenum are repairable but only when the injuries are not extensive but in this case when he examined, it was bleeding and the pressure bandage applied in the beginning could not stop internal bleeding.

26. He denied that said injury could be possible by a forceful fall on a sharp substance because according to him, in that contingency, other injuries would also be accompanied which is not the case here, he admitted that he was not associated with the operation of the patient.

27. PW-9 Dr. M.M. Mishra, Medical Jurist, conducted post-mortem of the deceased Surendra Singh on 9.7.1980 at 9.00 a.m. and found following injuries as stated in his examination in chief:

(1) Stitched wound shape on right para medial region and on right epigastric area, plus umbilical area plus hypochondriac area of abdomen, longitudinal limb of 6" long and transversely limb was 2" long stitches were intact.

(2) Operation stitched wound 1" long with rubber drainage tube on right lumbar area of abdomen on the lateral side. Stitches intact.

28. On internal examination, he found abdominal wall, muscles, stitched below the external stitched wound. Peritonium cavity filed with greenish yellow fluid about 500 cc foul smelling. Peritonium discoloured greenish yellow all over. All abdominal viscera large intestine etc. discoloured, greenish yellow, (i) Stitched wound $1/2$ " long on II part of duodenum, stitches intact, (ii) Stitched $1/2$ " long

on lesser omentum, (iii) Stitched wound 3/4" long on anterior border of liver. Stitches intact, (iv) Stitched wound on gall bladder 3/4" long, stitches intact.

29. In his opinion, cause of death was due to shock, due to Peritonitis. The post mortem report Ex.12 is proved by him. According him, Peritonitis was as a result of injuries to liver, gall bladder and duodenum.

30. In his cross-examination, he reiterated that Peritonitis had occurred due to injuries and failure of liver and gall bladder and that all the layers of abdomen were stitched. The conjunctiva found suggested that the deceased must have suffered from jaundice some days before his death.

31. Now the question is as to what "Peritonitis and "Peritonium" are. It is necessary to deal with said terms because the judgment of trial Court has also been strongly assailed on the ground that the liver and gall bladder of deceased were damaged because of his suffering from jaundice for a few days before the death and that he died not because of abdominal injury but because of jaundice.

32. Peritonitis, as defined in Wikipedia, is an inflammation of the peritoneum, the serous membrane which lines part of the abdominal cavity and viscera. Peritonitis may be localized or generalized, and may result from infection (often due to rupture of a hollow organ as may occur in abdominal trauma or appendicitis) or from a non-infectious process.

Peritonium is the serous membrane that forms the lining of the abdominal cavity or the coelom. It covers most of the intra abdominal organs-in higher vertebrates and in some invertebrates. It is composed of a layer of mesothelium supported by thin layer of connected tissues. The Peritonium both supports the abdominal organs and serves as the conduit for their blood and lymph vessels and nerves.

Duodenum is the first section of the small intestine in most higher vertebrates including mammals, reptiles and birds.

33. It is established from the above evidence of both the medico legal experts who examined deceased Surendra immediately after the incident on 4.7.1980, at 5.25 p.m. and the other who conducted post-mortem examination of the "corpse", that the death of deceased was not natural and that it was homicidal and that he died because of abdominal injury which was caused by sharp weapon and which affected his liver and gall bladder piercing all abdominal walls.

34. Now this Medico Legal Experts' evidence oral and documentary evidence, both is to be read in the light of evidence of eye-witnesses and other circumstances so as to see as to what offence is made out against the accused.

35. Learned trial Judge has placed reliance on the statements of PW-1 Ramesh and PW-2 Gajendra (to the extent he supports the prosecution by separating the chaff from grain by appreciating his evidence) along with the statements of PW-8 Dr. Y.K. Sharma, PW-9 Dr. M.M. Mishra, PW-10 Gheesa Lal Choudhary and PW-12 Mohan Singh along with the documentary evidence Ex.P/1, Ex.P/13, Ex.P/15,

Ex.P/10, Ex.P/12 and other link evidence, and came to the finding of conviction of accused Mushtaq u/s 302 IPC.

36. Since the said finding has been assailed by the accused, it is necessary to look into the evidence which is made the basis of the finding by learned trial Judge.

37. It is not out of place to mention here that Ex.P/15 Rapat Roznamcha No. 176 given by PW-1 Ramesh Singh at 1.45 p.m. on 4.7.1980 itself at Khaithoonipole Police Station is a document which shows that the matter was reported within 15 minutes of the incident (stated to have taken place at 1.30 p.m.) as PW-1 Ramesh and injured Surendra Singh (as he then was) straight away went to the Police Station, Khaithoonipole and informed about the place, time of incident as well as names of assailants being being

38. As is clear from above that in Ex.p/15, all the necessary facts i.e. name of assailants the weapon being knife, time of occurrence 1.30 p.m. being "Abhi-Abhi" and place of occurrence, all had been mentioned. The only difference in Ex.P/1 and Ex.P/15 is that specific overt acts of individual i.e. Mushtaq, Rauf and Iqbal had not been assigned whereas the role which is assigned to Rauf and Iqbal in Ex.P/1 is to the effect that they caught hold of Surendra Singh while Mushtaq was piercing the knife in his abdomen.

39. In view of Ex.P/15, the argument of learned Counsel for the accused that the genesis of occurrence has been suppressed, goes away. As Ex.P/15 was the first version of PW-1 which is given within 15 minutes of the occurrence. Therefore, even if there was some report stated to have been written through Raghunath and torn by the police personnel, also does not affect the prosecution case adversely so far as accused Mushtaq is concerned.

40. PW-1 Ramesh Singh has fully supported Ex.P/1 as well as Ex.P/15 in his examination-in-chief and in his cross-examination. Although he was put to a lengthy cross-examination but he could not be shattered on this count. He has completely corroborated the facts mentioned in Ex.P/1.

41. In his cross-examination, he admitted that he was undergoing the sentence of life imprisonment for the murder of Naaka but according to him, his appeal was pending before Hon'ble High Court. He admitted that his shop was about a furlong away from the place of occurrence and that Shankar Dhobi's shop was situated near the place of occurrence, but according to him, the moment all this started, all the shop-keepers started closing their shops and left the place. He deposed that it hardly took him two to three minutes to reach the spot.

42. He reiterated that as soon as he reached, Mushtaq tried to inflict injury on him and on his moving away, his shirt was cut and other two injuries were inflicted on his right shoulder and when he turned, Mushtaq pierced the knife in his brother's abdomen. He was confronted with his previous statement so as to establish that there was some altercation between Mushtaq and Surendra Singh

on the issue of his working with Ansari Thelewala, but the same could not be established.

43. It is true that PW-4 Ramu who is said to have informed PW-1 Ramesh, has turned hostile and has not, in any way, supported the prosecution case. PW-2 Gajendra Singh and PW-3 Lachhu had been stated to be the eye-witnesses in Ex.P/1. However, PW-3 Lachhu has also been declared hostile and has not supported the prosecution story at all, but PW-2 Gajendra Singh who was also permitted to be cross-examined, has admitted the presence of Lachhu PW-3 at the time.

44. We note that for unexplainable reasons, the learned Public Prosecutor requested to cross-examine PW-2 Gajendra Singh, which was allowed by the Court. Probably he was not using the words which were desired to be spoken of through his mouth by the learned Public Prosecutor.

On numerous occasions, the Court has encountered such a situation, law on the subject has been clarified time and again. If a witness of the prosecution is unable to comprehend a question or while answering a question, omits certain details, which are desirous to be brought on record, it is always open for the learned Public Prosecutor to seek permission of the Court to put a leading question or give a suggestion to the witness. This is the procedure which is required to be followed in such a situation and not get a witness declared hostile. Be that as it may, continuing with a descriptive reference to the testimony of PW-2 Gajendra Singh, suffice would it be to note that he deposed that Mushtaq gave a knife blow to Surendra Singh in his stomach. It is from that he has not named other accused to have held the deceased.

45. PW-2 Gajendra Singh, in his cross-examination has deposed that he was standing at the time of occurrence in front of Shankar Dhobi's shop and Mushtaq, at that time, was drinking water from Gurail's hotel. Surendra Singh was also standing with him. At that time accused Mushtaq came to Surendra Singh and both abused each other. Mushtaq, according to him, was all alone. Soon after this altercation between them, PW-1 Ramesh Singh came running and asked Mushtaq as to why he was beating his brother, whereupon Mushtaq told that if he had come to save him, let him be settled first. Saying this, he inflicted injury on his shoulder near the neck and when Surendra Singh tried to save Ramesh Singh, Mushtaq inflicted knife injury in his abdomen and Mushtaq ran away from the place of occurrence.

46. This witness has also been declared hostile as he has not supported the prosecution story with regard to accused Rauf and Iqbal being with Mushtaq and catching told of Surendra Singh.

47. In his cross-examination by the defence counsel, above statements of his could not be shattered and he corroborated the statement of PW-1 that Mushtaq pierced the knife straight in the abdomen and that other shopkeepers did not come for help. He also admitted the presence of Lachhu and Narendra Singh at

the spot.

48. The link witness PW-6 Abdul Salam has proved Ex.P/2 seizure memo of clothes of injured.

49. PW-11 N.K. Soni has also been declared hostile and has also not supported the prosecution story in this regard. On the contrary, he has tried to establish that the dying declaration recorded in the hospital was tutored.

50. PW-10 Gheesa Lal Choudhary, Magistrate who recorded the dying declaration at 5.22 p.m. on 4.7.1980, has proved Ex.P/11 stating that he had obtained the certificate Ex.P/3 from the doctor before recording the same. According to him, before recording the statement, he had seen two persons standing at the back side of the injured and that he sent them out. Further that dying declaration was recoded before the patient was shifted to the operation theatre.

51. In the dying declaration Ex.P/11, deceased admitted that there was some strainness between him, Mushtaq, Rauf and Iqbal and that all the three surrounded him and on his brother coming for rescue, Mushtaq inflicted injury on his shoulder near the neck and thereafter Mushtaq gave a knife injury in his stomach. At that time, Iqbal and Rauf caught hold of him. he also deposed about the presence of Lachhu and Gajendra. He reiterated that in his abdomen, only Mushtaq had inflicted one knife injury.

52. The Investigating Officer PW-12 has proved the other investigation and has also admitted that Ex.P/15 Rapat Roznamcha was registered and that he accompanied both of them to the hospital.

53. One of the arguments advanced by defence counsel is that the weapon of evidence i.e. knife is stated to have been recorded at the instance of Iqbal on his disclosure statement dated 3.10.1980 whereas there is only one knife Article 4 which is said to have been used by Mushtaq and the recovery of knife is also after many a days of the incident.

54. In the light of over-whelming evidence i.e. ocular in particular and the dying declaration of the deceased coupled with other circumstances, in our considered opinion this particular aspect does not adversely affect the prosecution case, it is worth mentioning that accused Mushtaq was arrested immediately so was Rauf but Iqbal was absconding and charge-sheet was filed against him u/s 299 Code of Criminal Procedure

55. We have carefully scanned the evidence in this regard. It is clear that death was homicidal and that the author of the sole injury in the abdomen of Surendra Singh has been clearly proved to be accused Mushtaq.

56. Now the question which has been raised is that whether the deceased died because of jaundice or because of abdominal injury. This argument was raised because of the fact that Dr. M.M. Mishra, PW-9 opined that cause of death was due to shock due to Peritonitis. We have already dealt with Peritonitis and also

Peritonium (supra). The doctor has clarified in his examination in chief and also in cross-examination that all the layers of abdomen-were pierced and that Peritonitis had occurred due to the injury as well as failure of Liver and gall bladder.

57. However, he has deposed in the cross-examination that Liver and gall bladder are so vascular that even when they are repaired chances of blood coming are not ruled out. According to him, Peritonitis was as a result of injury in the Liver and gall bladder, duodenum. He found stitched wounds on II part of duodenum, on lesser omentum, on anterior border of liver, on gall bladder of 1/2" 1/2 and 3/4" respectively. On internal examination, he found the abdominal wall, muscles, stitched below externally stitched wound.

58. The elaborate discussion of evidence leads us to arrive at a conclusion that the death of deceased was homicidal and not because of jaundice.

59. The only issue in this regard which has been debated at the Bar and in respect thereof we have to take a decision in appeal, is whether the testimony of PW-1, PW-2, PW-8, PW-9, PW-10, PW-12 and other link evidence leads to proving the offence punishable u/s 302 IPC or conversion of offence punishable u/s 304 Part II IPC.

60. In Virsa Singh Vs. The State of Punjab, Vivian Bose, J. speaking for the Court, explained the meaning and scope of Clause (3) of I.P.C. It was observed that the prosecution must prove the following facts before it can bring a case u/s 300, "thirdly". In para Nos. 12, 13 and 16 at pages 467 and 468, it was held as under:

12. To put it shortly, the prosecution must prove the following facts before it can bring a case u/s 300, "thirdly";

First, it must establish, quite objectively, that a bodily injury is present; Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and, Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

13. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder u/s 300, thirdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is

sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries - that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional.

16. The learned Counsel... The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.

61. These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh's case (supra) for the applicability of clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz., that the injury found to be present was the injury that was intended to be inflicted.

62. Thus, according to the rule laid down in Virsa Singh's case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend the intention of causing death, the offence would be murder.

63. There is no doubt if the prosecution proves an act, natural consequence of which would be a certain result and no evidence or explanation is given, then a Court may, on a proper direction, find that the accused as guilty of doing act with the intent alleged. That is exactly the position here. No evidence or explanation is given about why the accused pierced knife into the abdomen of the deceased with such force that it penetrated all the abdominal walls and injured the Liver and Gall Bladder causing internal bleeding. In the absence of evidence or reasonable explanation that the accused did not intend to stab in the stomach

with a degree of force sufficient to penetrate that far into the body, or to indicate that this act was regrettable accident and that he intended otherwise, it would be perverse to conclude that he did not intend to inflict the injury that he did.

64. Even if for the sake of argument, the other co-accused caught hold deceased Surendra Singh, then also as held in the matter of Ramashish Yadav and Others Vs. State of Bihar, it was held that accused persons who caught hold of deceased cannot be said to have shared common intention with accused, inflicting blows, it requires a pre-arranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and that declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be a pre-arrangement or pre-meditated concert. Here in this case, there is no such evidence.

65. Before concluding we may highlight that in the instant case, there is not one, but two pieces of incriminating evidence against the Appellant Mushtaq. The first is the dying declaration of the deceased which has been proved through the testimony of the Judicial Magistrate PW-10 Sh. Gheesa Lai Choudhary and the second is the post-mortem report of the deceased and the testimony of PW-8 Dr. M.M. Mishra. The two documentary evidences and the testimony of PW-1 Ramesh Singh and PW-2 Gajendra categorically go to prove the offence and rule out the possibility of the injury in the abdomen of the deceased not being the cause of death. It is thus not a case of dying declaration alone being the material available with the Court. Thus the authorities which relate to the law pertaining to whether should conviction be sustained when the dying declaration is the only evidence are not applicable in the facts of the instant case.

66. It is true in a serious charge, as that of murder, where the life and liberty of an accused is at stake, technical and doctrinal approach to problems has to be eschewed and the matter has to be approached with prudence keeping in view the fact that a fact is treated to be proved, as defined in the Evidence Act, when after considering the matters before it, the Court either believes to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

67. While considering the question whether the accused had a particular intention, in the absence of any other evidence to show the intention, the same has to be gathered from the act. This is premised on common sense principle that every person intends to act in the manner in which he/she has acted.

68. In criminal law, intention of a person is gathered with reference to the circumstances surrounding the actual act and which in the present case is clearly established.

69. As regards motive, it is settled law that it is not necessary to prove motive but if in a criminal case, motive as a circumstance is put forward, it must be fully

established like any other incriminating circumstance which is not the case here.

70. Other two accused Rauf and Iqbal have been acquitted by the learned trial Judge on the basis of lack of evidence against them.

71. We have carefully scanned through the record and the judgment of the learned trial Judge and we find that in Ex.P/15 is a first version after 15 minutes of the incident and names of all the three accused were disclosed by PW-1 Ramesh Singh. However, no specific act was assigned to the accused Rauf and Iqbal. In Ex.P/1 report given at 5.00 p.m. in the hospital, they were alleged to have caught hold of deceased at the time when injury was inflicted by Mushtaq.

72. However, when confronted with the previous statement, PW-1 Ramesh Singh who is the real brother of the deceased, hence an interested witness, could not answer the specific overt-act not having been assigned to the other two accused. There is no such evidence on record showing the preconcert of mind. PW-4 Ramu who is stated to have informed about the three accused surrounding his brother has turned hostile and specially when there is only single injury on the person of deceased assigned to Mushtaq, we do not find that the case against other accused Iqbal and Rauf can be said to have been proved with the aid of Section 34 IPC.

73. Section 34 IPC does not create a substantive offence, it means that if two or more persons intentionally do a thing jointly, it is just the same as if each of them has done it intentionally. The constructive liability under this section would arise if following two conditions are fulfilled - (a) There must be common intention to commit a criminal act; and (b) there must be participation of all the persons in doing of such act in furtherance of that intention. Common intention requires a prior concert or pre-planning. Common intention to commit a crime should be anterior in point of time to the commission of the crime but may also develop at the instant when such crime is committed.

74. It is difficult, if not impossible, to procure direct evidence of common intention. In most cases it has to be inferred from the conduct of the accused persons and other relevant circumstances of the case. This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination with which the injury was inflicted, the concerted conduct of the accused persons during the commission of the offence and subsequent to the commission of the offence. In other words, intention has to be gathered from the acts of the accused persons and the attendant relevant circumstances enveloping the act. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit the offence with which he could be convicted.

75. It is worth mentioning that there is an evidence that Mushtaq was alone as per PW-2 Gajendra Singh at the time of incident. In these circumstances, we do not find any perversity or illegality in the finding of acquittal of co-accused u/s 302/34 IPC.

76. The accused Mushtaq has also been convicted u/s 24 IPC for causing two simple injuries on the person of PW-1 Ramesh. There is sufficient evidence in the form of statements of PW-1 Ramesh and PW-4 Ramu, corroborated with PW-8 Dr. Y.K. Sharma's evidence, who immediately after the incident examined Ramesh and found the following injuries as shown in Ex.P/11:

1. Incised wound 1 1/2" x 1/4" x 1/4 on posterior medial aspect of right shoulder region.

2. Incised wound 1 1/4" x 1/2" x 1/4" 1" anterior to injury No. 1.

77. Both injuries have been opined simple caused by sharp weapon in Ex.P/11 and as against this, there is no explanation from the accused side. The learned trial Judge has rightly reiterated the finding of fact of Surendra Singh (sic. Mushtaq) for the offence u/s 324 IPC for causing simple injuries by sharp weapon on the person of Ramesh Singh PW-1.

78. We do not find any perversity or illegality in the finding of learned trial Judge in this regard because of word "PERVERSE" has been dealt with in AIR 2009 SCW 6593 by Hon"ble Apex Court in para 32 while quoting the meaning of "PERVERSE" from various dictionaries. As per Stroud's Dictionary of words and Phrases, IV Edition, word "PERVERSE" means a verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.

79. After scanning through the entire evidence available on record, we do not find any such perversity or illegality.

80. On the basis of discussion made herein above, the Appeal No. 10/1983 filed on behalf of accused Mushtaq is devoid of merit and is dismissed and conviction of Mushtaq u/s 302 and 324 IPC is upheld.

81. The State Appeal No. 344/1983 stands dismissed.

82. Hence, conviction and sentence of accused-Mushtaq is upheld. He is on bail. He is directed to surrender before the trial Court for suffering the remaining sentence of imprisonment, falling which the trial Court shall take steps for his custody and to send him to jail for suffering remaining sentence.

83. The record be sent forthwith for doing the needful.