

(1989) 08 RAJ CK 0037

In the Rajasthan High Court

Case No : Criminal Murder Reference No. 1 of 1989, Cr. Appeal No. 71 of 1989
and Cr. (Jail) Appeal No. 81 of 1989

State of Rajasthan

APPELLANT

Vs

Asha alias Ashanand and Others
 Asha alias Ashanand
and Others Vs State of Rajasthan

RESPONDENT

Date of Decision : 18-08-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 354, 366
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (1989) 1 RLW 484 : (1989) 2 WLN 437

Hon'ble Judges : S.S. Byas, J;Farooq Hasan, J

Bench : Division Bench

Judgement

S.S. Byas, J.—By his judgment dated February 2, 1989, the learned Sessions Judge convicted the accused Ashanand alias Asha u/s 302 IPC and sentenced him to death with a fine of Rs 100/-. By the same judgment, he convicted the accused Mohan Singh and Chitaria alias Chitar Singh u/s 302/34, IPC and sentenced each of them to imprisonment for life with a fine of Rs. 100/-, in default of the payment of fine to further undergo one months rigorous imprisonment. The learned Sessions Judge has submitted the proceedings u/s 366(1) Cr.PC for confirmation of the death sentence. As usual, the three convicts have come up in appeals to challenge their conviction. We have thus two matters before us namely (1) the reference for confirmation of the death sentence and (2) the appeals of the convicts.

2. The incident is alleged to have taken place at about 5.00 p.m. on 6-3-1987 at Rawat-Bhata Bus-stand in the city of Kota in which one cripple Chetu Ram alias Chetu Sindhi aged about 50 years was done to death. Briefly narrated, the prosecution case is as follows:

3. The deceased Chetu Ram operated a kerosene shop in a log-cabin near the bus stand of Rawat Bhata road in the city of Kota. The location of the log-cabin

has been shown by mark "X" in site plan Ex.P-1. At about 5.00 p.m. on 6-3-1987 he was sitting in his log-cabin. PW 5 Suresh Kumar. PW 7 Farid and PW 9 Ashok Kumar were standing near the log-cabin. While they were talking with each other, the three accused Ashanand, Mohan Singh and Chitar Singh came there on a motor cycle. Accused Ashanand was timing the vehicle while the other two Mohan Singh and Chitar Singh were on the pillion. The motor cycle was stopped near the log cabin of Chetu Ram. Accused Ashanand had a plastic mug filled with acid. He poured the acid on Chetu Ram. Accused Mohan Singh and Chitar Singh landed blows to Chetu Ram with knives. Chetu Ram fell down. There was profuse bleedings from his wounds. The clothes he was wearing got drenched with the acid and the blood of his wounds. There were acid burns, on his body. The three accused thereafter mounted on the motor cycle and ran away. Accused Mohan Singh and Ashanand had also received acid burn injuries in the incident. PW 7 Farid and PW 9 Ashok Kumar hired an auto rickshaw and took Chetu Ram in it to M.B.S. Government Hospital, Kota. The Doctor on duty examined Chetu Ram and declared him dead. Ashok Kumar (PW 9) went to the Police Station Gumanpura and presented written report Ex.P 16 of the incident at about 6.30 p.m. on the same day. The police registered a case u/s 302/34 IPC and proceeded with investigation. The Station House Officer Samrath Singh PW 11 immediately deputed some cops to reach the place of incident and keep a watch there. He himself reached there at about 8.00 p.m. and inspected the site but as it was night, he postponed the further spot investigation for the next day. He also went to the hospital and found the victim's dead body lying there. Next day he again went on the spot, inspected it and prepared the site plan Ex. P1. He collected blood stained soil from there. He also seized one pair of Chappies and a woollen journey having acid burns lying in the log-cabin. All these articles were seized and sealed. He then went to the hospital and prepared the inquest report of the victim's dead body. The medico legal autopsy over the victim's dead body was conducted at about 11.00 a.m. on 7-3-1987 by Medical Jurist Dr. Man Mohan Singh (PW 2). The Doctor noticed the following ante mortem injuries over the dead body:

- (1) Incised wound 2" x 1/2" x 1" deep obliquely on the Rt side of Neck Posterior aspect tapering down words & towards Ed;
- (2) Incised wound 1 1/2" x 1/2" x 1" on the back of Neck transversal; & centrally placed. Tapering towards Rt. side;
- (3) Incised wound 1" x 1/2" x 1/2" on the occipital scalp obliquely placed tapering down words Rt;
- (4) Incised wound 1" x 1/2" x 1/4" on the Lt. arm 3" below shoulder on the outer side obliquely placed;
- (5) Incised wound 1" x 1/2" x 1/2" obliquely placed on the Lt. axilla;
- (6) Incised wound 1-1/2" x 1/2" x 3/4" on the anterior axillary fold Lt. side;

(7) Incised wound 1/2" x 1/2" x 1/2" on the dorsum of 1st phalanx of thumb Lt. longitudinally placed tapering down wards;

(8) Incised wound 2" x 3/4" x 3/4" on the back of Rt side on the lateral border of scapula tapering down words obliquely placed;

(9) Incised wound 1-1/2" x 1/2" x 1/2" transversely placed on the upper & lateral aspect of Rt. thigh. 4" below the iliac crest;

(10) Acid burns, whole scalp, whole face, neck front of back, Rt. upper arm and forearm & hand Lt. upper arm. forearm and hand upper half of chest spotty burns on the abdomen Whole of the Lt. thigh, lower half of Rt. thigh & lower half of both legs and foot.

4. In the opinion of Dr. Sharma, the cause of death was shock and haemorrhage caused by multiple injuries and extensive burns. The Doctor prepared the post mortem examination report Ex.P 7 & Ex. P 8. The clothes of the deceased which he was wearing at the time of the incident containing acid burns and blood stains were seized and sealed. Accused Ashanand was arrested on 8-3-1987 and in consequence of the informations furnished by him one knife and one underwear were recovered from his house. The underwear had acid burns Accused Mohan Singh was arrested on 14-3-1987. On their medical examination, acid burns were found on their person. Accused Chitar Singh was arrested on 17-6-1987. On chemical examination, the clothes of the deceased and the underwear of accused Ashanand were found having Sulphuric acid burns. The clothes of the deceased were also found stained with human blood. On the completion of the investigation the Police submitted a crime report against the three accused Ashanand. Mohan Singh, Chitar Singh in the court of Additional Chief Judicial Magistrate (3), Kota who in his turn committed the case for trial to the court of Sessions. The learned Sessions Judge framed charges under Sections 302 and 302/34, PC against all of them to which they pleaded not guilty and faced the trial. They denied that they went to the log-cabin of the deceased victim Chetu Ram and killed him. Accused Ashanand and Mohan Singh in their statements recorded u/s 313, Cr.PC stated that they had taken Jeep RJF 3031 to the workshop and there when they were taking out the battery, the battery fell down. They thus received acid burns on their person. In support of its case, the prosecution examined 11 witnesses and filed some documents. In defence, the accused examined 8 witnesses. The common defence taken by the accused persons was that some unknown sikh terrorists came mounting over a motor cycle to the log cabin of Chetu Ram. They threw acid on him and landed knife blows to him. Chetu Ram was thus killed by the unknown terrorists. On the conclusion of trial the learned Sessions Judge disbelieved the defence version of the incident and held the charges duly proved against all the three accused. The accused were consequently convicted and sentenced as mentioned at the very outset.

5. We have heard the learned Public Prosecutor assisted by the Advocate for the

complainant and the learned Counsel for the accused. We have also gone through the case file carefully. We shall first take up the appeals of the accused.

6. Learned Counsel for the accused did not challenge the testimony of Dr. Sharma (PW 2) relating to the cause of the death of Chetu Ram. We, therefore, need not touch his evidence at length. It may however, be pointed out that nine ante mortem and multiple acid burns were found on the victim's dead body. Dr. Sharma stated that the nine incised wounds were sufficient in the ordinary course of nature to cause death. He also stated that the deceased had 60% burns which in themselves again were sufficient in the ordinary course of nature to cause death. The death of Chetu Ram was thus homicidal and not natural.

7. It may be recalled that three accused were convicted by the trial court on the strength of the direct evidence of the eye witnesses PW 5 Suresh Kumar, PW 7 Farid and PW 9 Ashok Kumar, each of whom has claimed to have seen the incident from its commencement to the end. PW 9 Ashok Kumar is the person who lodged the First Information Report Ex.P 16 of the incident at the Police Station. The learned Sessions Judge treated them as witnesses of truth and accepted what they testified as true despite some discrepancies in their evidence. The main thrust of the arguments of Mr. Dhankar is that the three eye witnesses are absolutely unreliable and what they stated is totally false. In short, their credibility has been seriously challenged by Mr. Dhankar. It would be, therefore, useful to briefly read the evidence of these three ocular witnesses.

8. PW 9 Ashok Kumar who lodged the FIR Ex.P 16 stated that at about 5 or 5.30 p.m. on the day of the incident, Farid (PW 7), Suresh Kumar (PW 5) and he came together at the Rawat-Bhata bus stand and were standing near the log-cabin of Chetu Ram. They had a bicycle with them. While they were talking with each other, a motor cycle came there. The three accused Ashanand, Chitar Singh and Mohan Singh were there on the vehicle. The deceased Chetu Ram Sindhi was sitting in his shop (log-cabin). Accused Ashanand poured acid on Chetu Ram from a plastic mug. Chetu Ram fell down and tried to get up. Accused Mohan Singh caught hold of Chetu Ram and Chetu Ram again fell down. Accused Ashanand took out a knife from his pocket and inflicted blows with it to Chetu Ram. Accused Chitar Singh thereafter again poured acid on Chetu Ram. Chetu Ram became unconscious. The three accused mounted on the motor cycle and went away taking the acid bottle with them. Farid, Suresh Kumar and he took Chetu Ram in an auto-rickshaw to the Government Hospital for treatment where he passed away in no time. He then went to the Police Station, Gumanpura and presented written report Ex.P 16 of the occurrence.

9. PW 5 Suresh Kumar also gave more or less the same narration of the incident. He deposed that Farid (PW 7), Ashok Kumar (PW 9) and he were standing near the shop of Chetu Ram at about 6.00 p.m. on the day of incident. The three accused Ashanand, Mohan Singh and Chitar Singh came there on a motor cycle. Accused Ashanand poured acid from a plastic mug on Chetu Ram. Chetu Ram fell down. Accused Mohan Singh caught hold of him and accused Ashanand struck

blows to him with a knife. Accused Chitar Singh also poured acid from a bottle on Chetu Ram. Taking Chetu Ram to be dead the three accused left the place and went away on the motor cycle with the plastic mug and knife etc. Farid (PW 7) and Ashok Kumar (PW 9) took Chetu Ram to the Government Hospital where he breathed his last.

10. PW 7 Farid stated that at about 5 or 5.30 p.m. on the incident, he and Ashok Kumar (PW 9) were standing near the shop of Chetu Ram, Suresh Kumar (PW 5) also came there after some time. Chetu Ram was sitting in his shop. While they were talking to each other, the three accused Ashanand, Chitar Singh and Mohan Singh came there on a motor cycle. Accused Ashanand was driving the vehicle. They stopped the motor cycle at the shop of Chetu Ram. Accused Ashanand took the acid-tin (Dibba) from accused Mohan Singh and poured the acid on Chetu Ram. Chetu Ram fell down. Accused Mohan Singh caught hold of him and accused Ashanand struck blows to him with a knife. Accused Chitar Singh had an acid bottle. He also poured acid on Chetu Ram. Taking Chetu Ram to be dead, the three accused Ashanand, Chitar Singh and Mohan Singh mounted the motor cycle and ran away. Suresh Kumar (PW 5), Ashok Kumar (PW 9) and he took Chetu Ram to the hospital where he died in no time. Ashok Kumar (PW 9) went to the Police Station to lodge the report of the incident.

11. The main features of the evidence of the three eye witnesses in a nut-shell are that they were standing near the shop of the deceased Chetu Ram. The three accused came there mounting on a motor cycle. Accused Ashanand and Chitar Singh poured acid on Chetu Ram. Accused Ashanand Mohan Singh caught hold of Chetu Ram. Accused Asha Nand also inflicted injuries with a knife to Chetu Ram. The three accused mounted on the motor cycle and ran away. These three witnesses took Chetu Ram to the Government Hospital where he died in no time. Ashok Kumar (PW 9) went to the Police Station, Gumanpura and presented written report Ex P 16 of the incident. These are the broad and main features of the narration of the incident given by these three eye witnesses.

12. Mr. Dhankar launching a full scale attack on the evidence of these three witnesses contended vehemently that none of them had seen the incident and they had falsely introduced themselves as ocular witnesses. He raised a number of grounds to show that none of them could be present at the place of incident when it took place.

13. The first ground taken by Mr. Dhankar is that the three eye witnesses Suresh Kumar, Farid and Ashok Kumar are residents of different localities in the city of Kota and they had no occasion to assemble at the place of incident on that day when it took place. It was argued that PW 5 Suresh Kumar admitted in cross-examination that he used to sell articles of general merchandise on a hand driven trolley in Subzimandi which is nearly 1 km away from the place of incident. He further admitted that there was good sale in the evening hours. PW 7 Farid admitted in cross examination that his house is nearly 2 kms. away from the place of incident. He was a driver of some tempo PW 9 Ashok Kumar stated that

his house is situate near two or three kilometers away from the place of incident and he used to sell the ready-made clothes of Bara Khamba locality which again is at the same distance from the place of incident. It was argued by Mr. Dhankar that these eye witnesses are residents of the different localities having different occupations. None of them is a resident of the locality where the incident took place. It was, therefore, not possible that they would assemble together at the place of incident when it took place. We have given our anxious consideration to the contention and find no force in it.

13-A. It is true that these eye witnesses are residents of different localities situate at some distance from the place of incident. But only on account of this, it cannot be said that they had not assembled at place of incident. PW 9 Ashok Kumar gave an explanation that when they were going together and reached the Rawat-Bhata bus stand, they wanted to take betel leaf. They, therefore, stood at the place of incident and started talking with each other. He further stated that on the day of incident, none of them went on work. The explanation given by PW 9 Ashok Kumar is plausible and not unfounded. PW Ashok Kumar further stated in cross examination that Suresh Kumar, Farid and he are friends. It appears that the three eye witnesses are friends and they together went on a stroll and spree as generally happens among the friends. There is nothing unnatural that these three friends were together on a stroll and came to the place of incident. The contention of Mr. Dhankar thus fails.

14. It was next argued by Mr. Dhankar that the version of the incident given during trial is materially different from that given by the eye witnesses Ashok Kumar PW 9 in the FIR Ex. P 16 lodged by him. It was argued that in the FIR, the version of the incident is that accused Ashanand poured acid on Chetu Ram and accused Mohan Singh and Chitar Singh struck blows to him with knives. But during trial this version was materially changed. During trial, the three eye witnesses stated that accused Ashanand poured the acid on Chetu Ram. Thereafter Chetu Ram was caught hold by accused Mohan Singh. Accused Ashanand then inflicted blows to him with a knife. Thereafter accused Chitar Singh poured acid again on Chetu Ram. It was argued that the version of the infliction of blows to Chetu Ram by Ashanand as stated during trial has not been mentioned in the FIR Ex.P 16. In FIR Ex.P 16, the infliction of blows with a knife has been assigned to accused Mohan Singh and Chitar Singh. During trial, it was not stated by the eye witnesses that accused Mohan Singh and Chitar Singh, inflicted blows with knife to Chetu Ram. Likewise, during trial, it was stated by the eye witnesses that accused Chitar Singh poured acid on Chetu Ram but in FIR Ex.P 16 pouring of acid on Chetu Ram by accused Chitar Singh has not been mentioned. It was argued that these discrepancies on vital points show that none of the eye witnesses was present on the scene of incident. It is true that the discrepancies mentioned above are there in FIR 16 and the evidence of the ocular witnesses give during trial. However, the facts remain despite these discrepancies that acid was thrown on Chetu Ram by accused Ashanand. The facts of infliction of knife injuries to Chetu Ram is there in FIR Ex.P 16 and is also

there in the evidence of the eye witnesses given during trial. The assailants were there and it was probably due to some confusion on the part of the Ashok Kumar (PW 9) that the infliction of injury in FIR was assigned to accused Ashanand. This discrepancy does not destroy the main core of the prosecution case that injuries to Chetu Ram were inflicted with a knife by one or the other of three assailants. Minor or slight discrepancies in the testimony of eye witnesses should be overlooked when credibility of version is not shaken. This discrepancy between the FIR and the evidence during trial does not shake the credibility of the version of the incident.

15. It was next argued that PW 5 Suresh Kumar and PW 7 Farid in their affidavits Ex. DI dated 23-6-1987 and Ex. D 4 dated 20-6-1987 stated that they had not seen the incident and were not present when the present took place. It was argued that in view affidavits Ex D 1 and Ex. D 4, the testimony of PW 5 Suresh Kumar and PW 7 Farid during trial that they had seen the incident becomes highly suspicious and no credence should be given to them. It is true that in his affidavit Ex, D 4 Farid and in his affidavit Ex. D 1 Suresh Kumar. PW 5 denied to have seen the incident and even to be present the place when it took place. Both these witnesses during trial admitted their signatures on these affidavits but stated that their signatures on these affidavits were procured forcibly by one Tillu who is the real brother of accused Ashanand. It appears that attempts were made to win over and enfranchise these two witnesses and they therefore appended their signatures on these affidavits. We shall presently see that Tillu who was the real brother of accused Ashanand and who was later on killed was a terror in the locality. It appears that Tillu same how or other managed to get these two affidavits from these witnesses. The explanation furnished by them as it was Tillu who managed to procure these affidavits from them has a ring of truth.

16. It was then contended that the three appellants were not known to PW 7 Farid and PW 9 Ashok Kumar before the incident No test identification was got conducted during trial. As such their evidence is not dependable. The contention has no substance PW 7 Farid and PW 9 Ashok Kumar admitted that the three appellants were not known to them before this incident. In his cross examination PW 7 Farid deposed that the names of the appellants were stated to him by PW 5 Suresh Kumar and PW 9 Ashok Kumar PW 9 Ashok Kumar in his cross examination repeated the same thing that the names of the appellants were stated to him by Farid PW 7. He also stated that he knew the appellants before hand though he did not knew their names. Suresh Kumar PW 5 stated that he knew the three appellants since long. The names of the appellants have been mentioned in the FIR Ex. P-16 lodged within less than two hours of the incident. This promptness in lodging the FIR indicates that the names of the appellants were not falsely introduced. The contention thus holds no ground

17. The next contention raised by Mr. Dhankar is PW 7 Farid and PW 9 Ashok Kumar are persons of bad antecedents and they are involved in some criminal

cases As such it would not be free from risk in placing reliance on them and to accept their evidence at the face value, PW 7 Farid admitted in his cross examination that in all four criminal cases were instituted against him and one or two of which are still pending trial. PW 9 Ashok Kumar in his cross-examination admitted that two or three cases including one of murder were pending trial against him. It is true that criminal cases are pending against these two witnesses Farid and Ashok Kumar but simply on account of the pendency of criminal cases against them, it cannot be said that they are witnesses of shady character. The pendency of some criminal cases does not dub them as persons of bad antecedents of poor moral fibre The essential question while assessing their evidence is whether they had any ill-will or bias against the appellants so as to falsely implicate them. It does not appear from the material on record that they had any enmity or animosity against any of the appellants. We are, therefore, unable to discard their evidence only because of the pendency of some criminal cases against them

18. The next contention raised is that in the FIR Ex.P-16, the name of one Omi as one of the culprits has been mentioned who came along with three appellants Omi was found innocent during investigation and no challan was therefore, filed against him. Even during trial, the three eye witnesses have denied that Omi was present. It was argued that the false inclusion of Omi's name in FIR Ex.P-16 makes the evidence of eye witnesses highly suspicious. We have taken the contention into consideration and find no substance in it. The false implication of some person as an accused in the FIR cannot be taken to be a good and sufficient ground for rejecting the evidence of the eye-witnesses against the other culprits if their evidence is acceptable against them We have, therefore, no hesitation in rejecting the contention.

19. It was next contended by Mr. Dhankar that the three eye witnesses who claimed to be present on the spot through out the incident made no efforts to render any help to the victim. They remained standing silently. This inaction and stoic resignation on their part shows that they were not present on the scene of occurrence as alleged by them. It is true that three eye witnesses made no efforts to rescue the victim or render any help to him. But their evidence cannot be whittled down on this reason. The culprits had acid and knife. They poured the acid on the victim and inflicted knife injuries to him, In these circumstances, it would be unwise to expect from the eye witnesses that they would come forward and thereby invite risk to their person. Apart from that persons act and react differently in their own way. In *Rana Partap and Others Vs. State of Haryana*, their Lordships observed in para 6 of the judgment:

Every person who witnesses a murder reacts in his own way Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing Some start wailing Some start shouting for help Others run away to keep themselves as far removed from the spot as possible Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the

assailants. Every one reacts in his own special way. There is no set rule of natural reaction To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

The contention thus fails.

20. Mr. Dhankar also contended that the incident took place in a broad day light near the bus stand where the shops are situate Any yet no person of the locality was examined in evidence by the prosecution This non examination of the independent persons of the locality is fatal to the prosecution. It was argued that instead of providing the persons of the locality in evidence, the prosecution examined the three witnesses who reside at different places. It was argued that the persons of locality must have seen the incident and yet none of them was examined. The non-examination of the independent persons is a serious matter. The contention again finds no favour with us. It is true that the incident had taken place near the bus stand where shops are situate around. It is again true that none or the locality has come forward to support the prosecution. How ever the non prosecution of the persons of the locality is not fatal. The trite position in law is that witnesses essential to the unfolding of the narrative, on which the prosecution case is based, should be examined by the prosecution. If some of the persons witnessing the crime have been examined, it is not at all necessary for the prosecution to examine all these persons present on the spot. Producing in evidence all those persons who were present on the spot would be superfluous and nothing but multiplying the evidence on the same fact Long back, in *Stephen Seneveratne v. The King* AIR 1936 PC 289, it was pointed out that the witnesses essential to the unfolding of the narrative, on which the prosecution case is based must be called The prosecution is not duty-bound to produce all the persons in evidence who were present on the spot. The law laid down by the Privy Council still holds the field with no departure.

21. Once we hold that the eye witnesses examined by the prosecution are witnesses of truth and no reasons are there to discard what they testified, the non-examination of the other witnesses becomes immaterial and such non-examination in no way, damages the prosecution case in *Pal Singh and Others Vs. State of U.P.*, it was observed:

The fact remains that after the High Court had believed the eye witnesses Nos. 1 and 2, and having found that their testimony was absolutely credit, worthy and truthful, it could not have rejected the prosecution case merely because some of the eyewitnesses mentioned in the FIR were not examined, in such cases, the question which has to be determined is not whether the absence of the examination of the independent witnesses would vitiate the prosecution case by itself but that the evidence actually produced is reliable or not. Once the Court gives a finding of fact that the evidence led by the prosecution is reliable and trust-worthy, the infirmities arising out of non-examination of witnesses will not be sufficient to put the prosecution out of Court.

22. Here in the instant case, there are no good and convincing reasons to discard the testimony of these three ocular witnesses. As such the non examination of the disinterested persons residing near the place of occurrence is no ground for disbelieving these three eye witnesses.

23. It was then argued that there is complete absence of motive in the instant case and that again is a serious circumstance to be taken into consideration. Mr. Dhankar is right that there is a complete absence of motive in the instant case. It is really surprising that the three appellants chose a crippled person as their target and that too without any motive. However, absence of motive in itself does not prove the innocence of the culprits. Absence of motive is only a circumstance to be taken into consideration in assessing the evidence adduced. The three eye witnesses have categorically stated that Chetu Ram was done to death by the appellants and by none else. As such the absence of motive does not persuade us to discard their direct evidence

24. Mr. Dhankar invited our attention to Ex. D-6 which is said to be an application addressed to the Superintendent of Police, Kota by the two sons of the deceased Chetu Ram and contended that something has been concealed by the prosecution. We may at once say that Ex. D 6 does not stand proved. No doubt it has been filed in defence but no evidence has been adduced by the appellants to show that it bears the signatures of the sons of the deceased and that they had submitted it to the Superintendent of Police. No endorsement is there on Ex D-6 by the Superintendent of Police. As such Ex. D-6 remains an unproved document of which no notice can be taken at all.

25. The next submission made by the learned Counsel for the appellants is that the accused have been falsely implicated because of the rivalry between Tillu-the real brother of accused Ashanand and one Naru PW 9 Ashok Kumar is the ally of Naru and PW 5 Suresh Kumar and PW 7 Farid are admittedly the friends of Ashok Kumar. It was Naru who had engineered the false implication of the appellants. It is true that PW 9 Ashok Kumar in his cross examination admitted that in the two criminal cases pending against him, one Naru alias Narender is co-accused with him. Naru and Tillu are now no more alive on account of their murders. It appears that both of them were gangsters. It may be that there was rivalry between them. But from this, it cannot be inferred that the three eye witnesses would play in the hands of Naru alias Narender and would act as his henchment to falsely implicate the appellants. There is absolutely no material to arrive at this conclusion. The contention, therefore, fails.

26. Yet another contention raised by Mr. Dhankar is that the FIR Ex. P-16 is not an innocent document. It was not the spontaneous outcome from PW 9 Ashok Kumar who admitted that he wrote it as the Station House Officer wanted him to write. It was argued that FIR Ex. P-16 was thus written at the behest of the Investigating Officer. The contention is bizarre. The Investigating Officer Samrath Singh (PW 11) in his cross examination categorically denied that he had dictated Ex P-16 to Ashok Kumar (PW 9). He stated that PW 9 Ashok Kumar appeared at

the police station having written report Ex. P 16 with him. The whole of Ex. P 16 is in the hand written of PW 9 Ashok Kumar. It appears that on account of some variations between the contents of Ex. P 16 and the statement given in court by Ashok Kumar (PW 9), he (Ashok Kumar) in a haste stated that it was written as the Investigating Officer wanted him to write. The accused get no benefit only because PW 9 Ashok Kumar stated that FIR Ex. P. 16 was written by him at the dictate of the Investigating Officer. The FIR Ex P-16 is a genuine document. It is not a suspicious document as contended by Mr. Dhankar.

27. No other contention was raised regarding the credibility of the testimony of the eye witnesses. There may be some infirmities in the evidence of the eye witnesses but they do not shake their credibility. In Inder Singh and Another Vs. The State (Delhi Administration), their Lordships observed:

Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary, that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for Police presentation of fool-proof concoction.

28. The learned Sessions Judge accepted the evidence of the three eye witnesses as true. On a deep and careful scrutiny of their statements, we are unable to take a view different from that taken by the trial court. Their evidence was rightly accepted as dependable and sufficient to show that Chetu Ram was done to death by the appellants and none else.

29. There is yet another circumstance to connect the appellants with the commission of the offence. Acid burns were found on the person of accused Ashanand when he was arrested on 9-3-1987 as per injury report Ex.P 9. Acid burns were also found on the person of accused Mohan Singh when he was arrested on 15-3-1987 as per injury report Ex P 10. These injury reports have been proved by PW 3 Dr. Srivastava the then Medical Jurist, Government Hospital, Kota. The defence taken is that these two accused took a jeep for repairs to the workshop of PW 1 Mohd. Shafi. While these two accused were taking out the battery from the jeep it fell down and thus they sustained acid burns. We find no substance in this defence and the testimony of PW 1 Mohd. Shafi. Such sort of defence can be manufactured easily at my time. The defence was rightly rejected.

30. The accused also tried to show that some Sikh terrorists had committed the murder of Chetu Ram. A few witnesses were examined to defence. It is again incredible that Chetu Ram was killed by the Sikh terrorists. The defence in this respect was again rightly discarded by the trial court.

31. Accused Chitar Singh had Mohan Singh have been convicted u/s 302 with the aid applicability of Section 34, IPC. The evidence of the eye witnesses is that the

three appellants came together mounting on a motor cycle. They got down from the vehicle together. They poured acid on the victim and inflicted knife blows to him. They thereafter mounted on the motor cycle and ran away. When there is joint and concerned attack, it implies common intention on the part of all the accused persons. The culprite came together on the spot and left the spot together. From these facts it can be safely inferred that they had formed a common intention to kill Chetu Ram. Section 34, IPC was, therefore, correctly applied by the trial court.

32. For the reasons discussed above, we are of the opinion that the appellants were rightly convicted u/s 302 or 302/34 IPC. No interference is called for. Their appeal against conviction must fail.

33. The question which now survives for consideration is whether the sentence of death awarded to the accused Ashanand should be confirmed. Whether a death sentence should or should not be awarded to an accused in a given case was discussed at length in *State of Rajasthan v. Heera* 1885 RLW 37 to which one of us (Hon'ble Mr. Justice S.S. Byas) was a party. The provisions of Section 354(3) Cr PC and the various pronouncements made by the Apex Court from time to time were noticed. The sentence of death in the words of the Apex Court is to be awarded in the rare of the rarest cases. The case of accused Ashanand does not come within that category. We see no special reasons in the instant case for imposing the extreme penalty on the accused. It is not a fit case where the accused Ashanand should be condemned to death. We accordingly, commute his sentence of death to one of imprisonment for life.

34. In the result, we maintain the conviction of the appellant Ashanand u/s 302 and the other two appellants Mohan Singh and Chitar Singh u/s 302/34 IPC. The sentence of imprisonment for life awarded to Mohan Singh and Chitar Singh is maintained. Their appeals are consequently dismissed. We however, commute the sentence of death awarded to accused Ashanand to one of imprisonment for life. The appeal of accused Ashanand is dismissed subject to the modification regarding the sentence u/s 302 IPC. The reference for confirmation of death sentence is rejected.