
(1997) 03 DEL CK 0064

In the Delhi High Court

Case No : Criminal Appeal No. 201 of 1993

Sunil Kumar and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 21-03-1997

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (1997) 3 AD 918 : (1997) CriLJ 3380 : (1997) 66 DLT 870

Hon'ble Judges : Kripa Shankar Gupta, J;Arun Kumar, J

Bench : Division Bench

Advocate : Sandeep Sethi and Seema Gulati, for the Appellant;

Judgement

K.S. Gupta, J.

(1) This appeal by Sunil Kumar, Satish Kumar, Jal Singh and Ramphal is directed against the judgment dated 24/11/1993 of an Additional Sessions Judge convicting them u/Section 302 read with Section 34, Indian Penal Code and order of even date sentencing them to imprisonment as under:

(I) Sunil Kumar—Imprisonment for life and a fine of Rs. 5,000.00. In default of payment of fine to further undergo rigorous imprisonment for two years.

(II) Satish Kumar—Imprisonment for life and a fine of Rs. 5,000.00. In default of payment of fine to further undergo rigorous imprisonment for two years.

(III) Ramphal and Jal Singh—Imprisonment for life and a fine of Rs.3,000.00 each. In default of payment of fine to further undergo rigorous imprisonment for six months.

(2) Vide impugned judgment and order Satish Kumar was also convicted u/ Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for five years and a fine of Rs. 5,000/ -. In default of payment of fine he is to further undergo rigorous imprisonment for one year.

(3) Case of the prosecution, in brief, is that on 22/02/1989 on receipt of a copy of D.D. No. 18-H, Si Khushi Ram Public Witness Public Witness 22 Along with ASIs Ram Pyara Singh. Rama Nand, Constables Raj Kumar Public Witness Public Witness 16 and Mahender Singh reached house No. G. 1792-93. Jahangir Pun and there Public Witness Public Witness 22 learnt that injured Kailash had been taken to Hindu Rao Hospital. Leaving behind both the ASIs and Constable Mahender Singh for surveillance, Public Witness Public Witness 22 Along with Public Witness Public Witness 16 left for Hindu Rao Hospital. Public Witness Public Witness 22 collected Mlc Ex. Public Witness Public Witness 10/A of Kailash from the Hospital. In the Mlc Ex. Public Witness PW-10/A Kailash was reported by Dr. Vikas Public Witness Public Witness 10 to have been brought dead. Public Witness Public Witness 1 RamKumar, brother of Kailash met Si Khushi Ram Public Witness Public Witness 22 in the Hospital. Public Witness PW22 recorded PW I's statement Ex. Public Witness Public Witness I/A that he was celebrating the birthday of his daughter at house No. G-1792-93 and in the function Public Witness Public Witness 7 Raju S/o Khema Ram, Public Witness Public Witness 2 Raju S/o Mehar Lal and Public Witness Public Witness 3 Mehar Lal S/o Neki Ram had come to participate amongst other persons. At about 9.30 p.m. Raju Public Witness Public Witness 7 having taken his meals was taking food for his family and he was with him. When both of them reached in front of house No.G-1801-02, Satish Kumar was seen standing there with scooter No. DEM-97. Satish Kumar told Public Witness Public Witness 7 "Saley Bheekh Mangtey Firtey Ho, Sharam Aani Chahiya (you move about begging and should be ashamed of it). When Public Witness Public Witness 7 asked Satish Kumar not to say like that, a quarrel ensued. There was exchange of hot words in which RamPhal, Jal Singh and Sunil Kumar also joined. On hearing noise, Kailash (since deceased) came there. In the meantime, Jal Singh, who resides in the neighborhood and is a relative of Satish Kumar, asked Satish Kumar to shoot them as they move about in the street talking non-sense. Ram Phal too told Satish Kumar to shoot them. Thereupon Satish Kumar and Sunil Kumar entered into the said house and reached the Chhajja (balcony abutting in the street) on the first floor. Sunil Kumar after loading the gun handed it over to Satish Kumar where from he fired at Kailash. Bullet entered the right cheek of Kailash and he fell down in the street. Blood started coming out and Kailash was taken to hospital by him and "Raju" Public Witness Public Witness 2.

(4) After making endorsement Ex. Public Witness Public Witness 22/B, statement Ex. Public Witness Public Witness 1 /A was sent by PW 22 through Public Witness Public Witness 16 for registration of case and on the basis thereof Fir (carbon copy Ex. Public Witness Public Witness 21/A) was recorded by Hc Satya Pal Singh Public Witness Public Witness 21. Investigation of the case was taken up by Inspector Om Prakash, Sho Public Witness Public Witness 19. Blood, control earth and two blood-stained Chappals lying in front of house No.G-1801-02 and an empty cartridge found lying on the roof of the house were lifted and after converting into separate parcels and sealing with the seal of "OPS" were taken

into possession Along with scooter No. DEM-97 vide memo Ex. Public Witness Public Witness 5/A by Public Witness Public Witness 19. Public Witness Public Witness 19 also prepared the rough site-plan and inquest papers and sent the body of Kailash for autopsy. Post mortem was conducted on 23/02/1989 by Dr. L.T. Ramani Public Witness PW14 and he found the following injuries on the person of the deceased :

"EXTERNALInjuries:1. An irregular laceration present vertically oblique on the right cheek 2W"x "." depth to be ascertained.2. Superficial laceration obliquely present "" medial on injury No. 1 on the lower lip right side size 1" x "" x skin deep.3. An abrasion 1" x 3/4" on the left zygoma region.4. An oval laceration on the right side lower part of the neck just above the middle of right clavicle, size 2"" x 3/4" x ? There were irregular abrasions around this wound.5. Multiple punctured laceration (16) and most of them were below near outer margin of injury No. 4, size 3 ml. in diameter.6. A small abrasion "" x "" in front of both knees. There was no evidence of tattooing or burning effect around injuries No. 4 & 5.Internal Examination: Scalp tissues were normal, skull bones were intact, brain was pale, neck tissues showed effusion of blood on the right side and around clavicular area. Hyoid bone and thyroid cartilage were intact. Trachea was normal. There was a fracture of right clavical. There was massive blood clot around right clavicle and anterior chest wall. 1st to 5th ribs were fractured on the right side interiorly into multiple fragments and 6th and 7th ribs were fractured near their posterior ends. All the lobes of right lung showed multiple perforation more on the upper lobe. Right chest cavity was full of blood. 24 pellets mostly disfigured and flattened were recovered from the right chest cavity and right lung. Left lung was normal. Heart was normal. Stomach was full containing semi-digested food material. Other abdominal organs were normal. Injuries were ante mortem injuries No. 1-5 were caused by gunshot fired from near range. Injury No. 6 was caused by blunt force/fall. Injuries to the neck and chest structures were sufficient to cause the death in the ordinary course of nature. Death was due to the hemorrhagic shock consequent to fire arm injuries. Time since death was about 18 hours."

(5) Case of the prosecution further is that Sunil Kumar and Jal Singh were arrested on 24/02/1989 while Satish Kumar and Ram Phal on 25/02/1989 by Inspector Om Prakash Public Witness Public Witness 19. On interrogation Satish Kumar made a disclosure statement Ex. Public Witness Public Witness 19/A and pursuant there to go recovered a single barrel gun Ex. Pi from the and (loft) of house No. G-1801-02, Jahangir Puri. Gun Ex. Pi after converting into a parcel and sealing with the seal of "OPS" was seized vide memo Ex. PW 19/M by Public Witness Public Witness 19. Case property including the recovered gun and empty cartridge was sent to CfsI and Exs. Pa to Pd are CfsI reports. On 17/03/1989, Public Witness Public Witness 18 Balbir Singh, Assistant Draftsman was taken to the place of occurrence. He took notes and measurements on the pointing out of RamKumar Public Witness Public Witness 1 and on the basis thereof he prepared the scaled site plans Exs. Public Witness Public Witness 18/A and B with their

marginal notes. After recording the statements of Public Witness PWs and completing investigation, the charge-sheet was filed against the accused persons.

(6) In the statement u/Section 313, Criminal Procedure Code, plea taken by accused Sunil Kumar is that on 22/02/1989, Ram Kumar Along with his companions came to house No .G-1801-02 and misbehaved with the womenfolk of the family. He was severely beaten by them as a result whereof he became unconscious. Ram Phal and Satish Kumar who had gone to Sonapat in the morning on 22/02/1989, came to know of the incident later on.

(7) Plea taken by accused Ram Phal is that on 22/02/1989 he Along with his son Satish Kumar had gone to Village Rampur Kundal in District Sonapat as his cousin had died. After cremation, ashes of the deceased cousin were taken by him, Satish Kumar and brother of the deceased to Hardwar for immersion in the Ganges as per religious rights. After performing the religious rights when they came to Delhi on 25/02/1989, they learnt that the police was on look-out for them. He and Satish Kumar surrendered before the police and they have been falsely unlicated in this case.

(8) Likewise is the statement made by accused Satish Kumar.

(9) In the statement u/s 313, Criminal Procedure Code plea taken by accused Jal Singh is of plain denial.

(10) Case of the prosecution is based on the ocular evidence and the recoveries of 12 bore fire cartridge Ex. P5 and gun Ex. PI. 24 lead pellets recovered from the body of Kailash, deceased by Dr. L. T. Ramani Ex. Public Witness Public Witness 14 are stated to have come from Ex.P 5 which was fired from Ex. PI.

(11) Contention advanced by Mr. Sandeep Sethi appearing for the accused appellants was that Public Witness Public Witness 7 Raju S/o Khema Ram, who is the prime witness of the prosecution, has not supported the prosecution case and the statements of the remaining purported eye-witnesses being closely related to the deceased cannot be safely acted upon in regard to the alleged occurrence. Ocular evidence led by the prosecution consists of the statements of Ram Kumar Public Witness Public Witness I, Public Witness Public Witness 2 Raju S/o Mehar Lal, Mehar Lal Public Witness Public Witness 3, Prem Singh Public Witness Public Witness 4, Mange Ram Public Witness Public Witness 5, Public Witness Public Witness 7 Raju S/o Khema Ram and Gian Chand Public Witness Public Witness 8. Public Witness PWs 4 & 7 have, however, turned hostile. It is not in dispute that Public Witness PWs 1 & 8 are the brothers while Public Witness Public Witness 5 is the father of deceased Kailash. PW 3 is the brother-in-law (jeeja) of the deceased. To appreciate the contention referred to above, discussion in brief of the statements of the aforesaid Public Witness PWs has become necessary.

(12) Ram Kumar Public Witness Public Witness 1 has deposed that on Fe 22/02/1989 around 9.30 p.m. He was celebrating .the birthday of his daughter

and had invited guests including Raju s/o Khema Ram, Mehar Lal and Raju s/o Mehar Lal. After taking meals Raju s/o Khema Ram was carrying meals for the children. He accompanied him to see him off and when they reached in front of house No. G-1801-02, he saw accused Satish Kumar standing near a two-wheeler scooter and he abused Raju s/o Khema Ram. In the meantime, accused Ram Phal and Jal Singh came there. Ram Phal directed Sunil Kumar and Satish Kumar to load the gun. Both of them rushed inside the house. Sunil Kumar loaded the gun and handed the same over to Satish Kumar. This happened on the chhajja of the house. Accused Jal Singh uttering that these people move about in the street talking non-sense, asked Satish Kumar to shoot them. Satish Kumar fired a gun shot and the bullet hit Kailash on the right cheek and he fell down. Kailash was taken in a tempo by them to Hindu Rao Hospital where he was declared dead. Kailash had come to the place of occurrence after hearing the noise .Si Khushi Ram met him in the hospital and recorded his statement. In cross-examination he has denied the suggestion that accused Satish Kumar and Ram Phal were away to Village Rampur Kundal in District Sonapat and were not present at the time the occurrence took place.

(13) Raju Public Witness Public Witness 2 has deposed that birthday of the daughter of Ram Kumar Public Witness Pwi was being celebrated at the house of Public Witness Public Witness 1. Around 9.30 p.m. he followed Raju s/o Khema, who was taking food for his children. When they reached near the house of Ram Phal, Satish Kumar accused told Raju s/o Khema Ram that he was begging and on the latter protesting, an altercation ensued. In the meantime, accused SunilKumar, Ram Phal and Jal Singh came out of the houses. Jal Singh exhorted Satish Kumar to shoot them. Ram Phal asked Jal Singh to bring the gun and after he brought it, the same was handed over to Sunil Kumar. Sunil Kumar loaded the same and gave it to Satish Kumar who fired a shot which hit Kailash on the left cheek. He and RamKumar removed Kailash to Hindu Rao Hospital. When cross-examined, he stated that he reached the place of occurrence on hearing the noise and Kailash was with him. He emphatically denied the suggestion that a death had taken place in the family of accused Ram Phal on that day.

(14) Mehar Lal Public Witness Public Witness 3 has stated that on the date of occurrence he was present at the house of Ram Kumar Public Witness Public Witness 1 to attend the birthday of his daughter. When Raju S/o Khema Rani and Ram Kumar reached near the house of Ram Phal, he was standing outside the gate of house of Ram Kumar. On hearing the noise he went there. Kailash too reached there. Ram Phal, Satish Kumar and Jal Singh abused Raju S/o Khema Ram. Rani Phal asked Satish Kumar to shoot them. Whereupon Satish Kumar climbed the chhajja and fired a shot from the gun at Kailash. Before that SunilKumar had brought the gun and after loading had handed it over to Satish Kumar. In cross-examination he denied the suggestion that Satish Kumar fired a gun shot in the air and did not aim at Kailash. Kailash was standing at a distance of about 10-11feet from the chhajja from where Satish Kumar fired while standing.

(15) Mange Ram Public Witness Public Witness 5 while supporting the prosecution case has testified that at the time of occurrence he was standing outside the house and on hearing noise he rushed towards house No. G-11-02. Kailash was also present there. Accused Jal Singh exhorted Sunil Kumar and Satish Kumar to shoot Kailash. Ram Phal accused asked Sunil Kumar to bring the gun. Sunil Kumar handed over the loaded gun to Satish Kumar who fired a shot at Kailash. In cross-examination he stated that the police lifted the fired cartridge from the lane where the incident took place. Likewise is the statement made by Gian Chand Public Witness Public Witness 8.

(16) Although Prem Singh and Raju S/o Khema Ram Public Witness Public Witness 7 in their depositions have not supported the prosecution case is regard to the occurrence but both of them have admitted that birthday of the daughter of Ram Kumar Public Witness Public Witness 1 was being celebrated at his house around 9.15 or 9.30 p.m. on the date incident took place.

(17) Discussion on the point at hand will remain incomplete, without referring to the testimonies of Dr. Vikas Public Witness Public Witness 10 and Si Khushi Ram Public Witness Public Witness 22, Kailash deceased on being taken to Hindu Rao Hospital was examined by Public Witness Public Witness 10. It is in the deposition of Public Witness Public Witness 10 that on 22/02/1989 Kailash was admitted in the Hospital by one Raju s/o Mehar Lal and he declared him as having brought dead at 10.20 p.m. Mlc Ex. PW 10/A is in the hand of Public Witness Public Witness 10.

(18) It is in the deposition of Si Khushi Ram Public Witness Public Witness 22 that on receipt of a copy of DD report Ex. Public Witness Public Witness 22/A he Along with ASIs Rama Nand, Ram Pyara Singh and Constables Raj Kumar and Mahinder Singh visited house No. G-1801, Jahangir Puri and there he learnt that the injured had been removed to Hindu Rao Hospital. He along with Constable Raj Kumar rushed to the Hospital and obtained the Mlc of Kailash who had been declared brought dead. Ram Kumar, brother of deceased Kailash met him in the Hospital and he recorded his statement Ex. Public Witness Public Witness I/A. After making endorsement Ex. Public Witness Public Witness 22/B that statement was sent through Constable RajKumar to P.S. Jahangir Puri for registration of a case.

(19) In the Mlc Ex. Public Witness Public Witness 10/A name of Raju Public Witness Public Witness 2 is noted as the person who brought Kailash deceased to the Hospital. This endorsement coupled with the testimony of Dr. Vikas Public Witness Public Witness 10 leaves no room for doubt that it was Raju Public Witness Public Witness 2 who brought Kailash deceased to the Hospital in injured condition around 10.20 p.m. i.e., after about 50 minutes of the occurrence. There was no occasion for Raju Public Witness Public Witness 2 to have taken the deceased to Hospital immediately after the occurrence if he was not present at the place of occurrence.

(20) Ram Kumar Public Witness Public Witness 1 and Raju Public Witness Public Witness 2 claim to have removed Kailash deceased to the Hindu Rao Hospital after the occurrence. If Public Witness Public Witness 1 had not accompanied the deceased, there was no opportunity for him to be present in the Hospital and to make the statement Ex. Public Witness PW1/A to Si Khushi Ram Public Witness Public Witness 22. It was this statement sent by Public Witness PW22 at 11.10 p.m. on the basis whereof case Fir No. 66/89 came to be registered at P. S. Jahangir Puri against the accused persons. Thus, the presence of both Public Witness PWs 2 & 1 at the spot at the crime the occurrence took place is fully proved.

(21) It is in the depositions of Ram Kumar Public Witness Public Witness I, Raju Public Witness Public Witness 2, Mehar Lal Public Witness Public Witness 3, Mange Ram Public Witness Public Witness 5 and Gian Chand Public Witness Public Witness 8 that the birthday of the daughter of Public Witness Pwi was being celebrated at Public Witness Public Witness I's house around 9.15/9.30 p.m. on the date of occurrence and this part of their statements is even supported by Prem Singh Public Witness Public Witness 4 and Raju S/o Khema Ram Public Witness Public Witness 7. That being so, there was every likelihood of Public Witness PWs 3, 5 & 8 being related to Public Witness Public Witness 1 to be present at Public Witness Public Witness 1's house around the aforesaid time. Place of occurrence is nearby the house of Public Witness Public Witness 1. Thus, the presence of the said Public Witness PWs 3, 5 & 8 who claim to have reached there on hearing the noise, was also probable and natural at the scene of occurrence. Statements of Public Witness PWs 1, 2, 3, 5 & 8, who fully support the prosecution story in the main, inspire confidence and cannot be brushed aside being unreliable on the ground of their being related to the deceased and not being supported by Public Witness PWs 4 & 27, as urged on behalf of the accused.

(22) This brings us to the alleged recoveries of the gun Ex. P 1 and the fired cartridge Ex. P5. Submission advanced by Mr. Sethi was that the investigation is tainted inasmuch as not even a single paper is in the hand of Public Witness Public Witness 19 Inspector Om Prakash, who is the Investigating Officer of the case. Further as per the admission made by Gian Chand Public Witness Public Witness 8, gun was seized on the spot by the police, on 22/02/1989 but the recovery thereof is being shown on the pointing out of accused Satish Kumar on 25/02/1989 by the prosecution and the recovery in question is thus fake.

(23) Gun Ex. P1 is alleged to have been recovered by Inspector Om Parkash Public Witness Public Witness -19 and Constable Rambir Singh Public Witness Public Witness 23 is stated to be a witness to that recovery. IT is in the deposition of Public Witness Public Witness 19 that investigation of this case was entrusted to him under the orders of ACP/DCP and on 25/02/1989, he apprehended accused Satish and Ramphal from Old Delhi Railway Station. On interrogation Satish Kumar made a disclosure statement Ex. Public Witness Public Witness 19/1 and pursuant thereto he got recovered a single barrel gun

from the stand of his house. After preparing the sketch of the gun Ex. Public Witness PW19/L, same was converted into a cloth parcel and sealed with the seal of "ORS" and taken into possession vide memo Ex. Public Witness Pwi 9 /M. Gun was deposited with MHCM the same day and was sent to CfsI Along with other case property on 13/03/1989. In cross-examination he has admitted that not a single document of this case is in his hand. According to him, he did not record any of the documents because of injury in his right hand. He sustained injury in the right hand in the middle of February, 1989 and he was incapable of preparing the documents for about 1" or 2 months. In his deposition Public Witness Public Witness 23 has corroborated the statement of Public Witness Public Witness 19 on the point of recovery of the gun in question by accused Satish Kumar.

(24) Obviously Public Witness Public Witness 19 has furnished plausible Explanation about non-recording of the documents in the case and the investigation, Therefore, cannot be said to be tainted on the ground of the memos being not in the hand of the Investigating Officer.

(25) Coming to the second limb of the submission referred to above, indisputably gun Ex. P 1 was a licensed one in the name of one of the accused Ram Phal. Satish Kumar and Sunil Kumar are the sons of Ram Phal and none of these three accused has either disclosed in their statements u/s 313, Criminal Procedure Code or given any suggestion to Public Witness Public Witness 19 or Public Witness Public Witness 23 as to how the gun reached the hands of Public Witness Public Witness 19 after the occurrence. Therefore, in all probabilities Public Witness Public Witness 19 may have come to possess Ex. PI in the manner deposed to by him and Public Witness Public Witness 23. It may be noticed that as per the deposition of Gian Chand Public Witness Public Witness 8 not only the gun was seized at the spot but accused Satish Kumar too was apprehended from thereby the police which is not even the case of Satish Kumar. According to this accused, he surrendered before the police on 25/02/1989. Prosecution too claims his arrest on 25/02/1989 but according to it, he was apprehended Along with Ram Phal from Old Delhi Railway Station. That being so, no importance can be attached to the part of the statement made by Public Witness Public Witness 8 that the gun was seized at the spot on 22/02/1989.

(26) Recovery of fired cartridge Ex. P 5 is stated to have been effected by Inspector Om Parkash Public Witness Public Witness 19. Mange Ram Public Witness Public Witness 5 is a witness to the seizure memo Ex. PW5/A pertaining to the fired cartridge. Further contention advanced by Mr. Sethi was that recovery of fired cartridge Ex. P5 is highly suspicious, in view of the contradictory statements as to the place of recovery made by Public Witness Public Witness 19, on the one hand, and Public Witness Public Witness 5, on the other hand.

(27) It is in the deposition of Public Witness Public Witness 19 that he visited house No. 1801-02, Jahangir Puri on 22/02/1989 around 9.30 p.m. and lifted blood, control earth, two bloodstained chappals Along with scooter No. DM-97 from the road in front of the said house besides lifting an empty cartridge lying

on the roof of the house and after converting them into separate parcels and sealing with the seal of "OPS" those were seized vide memo Ex.PW5/A by him. It is further in his cross-examination that the fired cartridge was found on the roof but in the seizure memo Ex. Public Witness PW5/A same is mentioned to have been found lying at the spot; that parcel containing fired cartridge was sent to the doctor conducting the post-mortem for eliciting his opinion. It is in the examination-in-chief of Public Witness Public Witness 5 that empty cartridge was lifted from the spot and was converted into a parcel and sealed. In cross-examination he has stated that empty cartridge was lifted by the police from the lane where the incident had taken place. Dr. L.T. Ramani Public Witness Public Witness 14, whose statement too is material, towards the end of his examination-in-chief has deposed that a sealed parcel sealed with the seal of "OPS" was produced by the police and the same was found to contain a used empty cartridge showing "KF special mark" and it was returned to the police. Correctness of this part of the statement made by Public Witness Public Witness 14 has not been assailed on behalf of the accused. If the recovery of the fired cartridge was not made by Public Witness Public Witness 19 prior to 23/02/1989, there was no occasion for him to have sent it to Public Witness Public Witness 14/02/1989. Minor inconsistency appearing in the statements of Public Witness Public Witness 19 and Public Witness Public Witness 5 was thus insufficient to doubt the recovery of Ex. P 5/02/1989 by Public Witness Public Witness 19.

(28) Prosecution seeks to connect gun Ex. Pi and the fired cartridge Ex. P5 with the crime on the basis of Cfsl report Ex. PA. B. Moitra, Senior Scientific Officer Grade-1 (Ballistic Cfsl, Public Witness Public Witness 24, is the author of this report. It is in the deposition of PW 24 that out of nine sealed parcels received in Cfsl on 13/03/1989 from Sho, Jehangir Puri, in case F.I.R. No. 66/89, parcels marked "D".P". "H". & "V were examined in Ballistics Division. Parcel "D" contained one 12 bore S.B.B.L. gun marked W/I by him bearing Serial No. 32236. parcel T" contained 24 blood stained and mutilated lead pellets. Parcel "H" contained one plastic bag containing one sweater with damages on the right collar, one sports pant and one underwear. Parcel "I" contained one 12 bore cartridge case marked C/I by him. It is further in his deposition that after detailed examination in the laboratory including test firing and comparison of the cartridges under the comparison microscope he came to the conclusion that 12 bore S.B.B.L. gun marked W/I of parcel "D" was in working order and had been fired through. No opinion on the time of its last firing could, however, be given. The 12 bore cartridge case marked C/I of parcel "V had been fired from 12 bore gun marked W/I of parcel "D". The 24 lead pellets of parcel "f could have come from the 12 bore cartridge marked C/I of parcel T. The damages on the right collar of the sweater of parcel "H" could have been caused by the firing of 12 bore cartridge marked C/I of parcel T. In cross-examination he stated that he had not determined the range from which the shot was fired and that there is no definite scientific test developed till date to determine the time when a weapon had been last fired. Gun marked W/I was a single barrel half choke gun. 24

pellets examined by PW 24 are the same Which were recovered from the body of Kailash deceased at the time of post-mortem by Dr. L.T. Ramani, Public Witness Public Witness 14. We have carefully scrutinised the testimony of Public Witness Public Witness 24 and find absolutely no reason to disagree with him in regard to the conclusions arrived at by him that the gun Ex. P 1 was in working order and had been fired through; that the fired cartridge Ex. P5 had been fired from Ex. P1 and that 24 lead pellets could have come from the fired cartridge Ex. P1.

(29) It was next argued on behalf of the accused that the prosecution story in regard to accused Satish Kumar having fired a gun shot from the chhajja of the house at Kailash does not find support from the testimony of Dr. L. T. Ramani Public Witness Public Witness 14. In the site-plan Ex. Public Witness Public Witness 19/A distance of the place from where the gun was fired works out to approximately 17 feet. However, in his deposition Dr. Ramani Public Witness Public Witness 14 opined that the gun was fired from about 2 to 4 feet range. Quoting a para from the book "Essentials of Forensic Medicines and Toxicology" by Dr. K.S. Narayan Reddy, identical point was dealt with by the Additional Sessions Judge on pages 43 & 44 of the impugned judgment thus :

"THE characters which are to be found in the wound received from the shot of a gun fired from intermediate range are summarised as follows :Intermediate Range (1 to 5 metres) : At a distance of 1.5 metres, the shot mass enters the body in one mass, producing a round defect, a little larger in diameter than the bore of the barrel. The margins are abraded and show some scalloping, often referred to as "rat hole". Annular or linear abrasions are caused by the impact of the "clothing against the stretched skin during the penetration of the shot enmasse. At a distance of 2 metres, the shot mass begins to spread and individual pellet holes may be detected. The wound of entry is irregular. Wad may be found deep inside the wound. At a distance of 3 metres the central aperture is surrounded by separate openings in an area of about 8to 10 cms in diameter. As muzzle-target distance increases, the main entrance defect progressively becomes smaller and individual pellet wounds become more numerous. Occasionally, several individual pellet entrance wounds are contiguous, producing scalloped defects which are larger than the individual round or elliptical skin perforations. Dr. L.T. Ramani has specifically stated that no wad was found in the wound. The dispersion of pellets, as is apparent from the wounds described in the external injuries Nos. 1 to 6, would suggest that the gun was fired at least from a distance of five; to six metres, and not from 2 to 4 feet, as has been stated by Dr. L.T. Ramani One finding of Dr. L.T. Ramani is that the direction of injury was from above /downward and slightly from front to back if the victim is in standing posture. This finding supports the prosecution story that the gun was fired from the "chhajja". The distance of the place from where the gun was fired works out to approximately 17 feet, as is shown in the site-plan Ex. Public Witness PW19/A. The spread of pellets as is apparent from the injuries Nos. 1 to 6 also suggest that the gun was fired from about the same distance. It would appear from the evidence of Public Witness Public Witness 24, B. Moitra,

Ballistics Expert, that the gun Ex. P 1 is a half-choke gun. This would mean that there could not be much spread of pellets even at a distance of 15 to 20 feet. This finding also suggests that the wounds on the body of Kailash (deceased) were not received from a gun fired from near range."

(30) On a careful consideration of the matter, we find no reason to take a view different from that taken by the Additional Sessions Judge in the aforesaid two paras of the judgment.

(31) It is now settled law that common intention to commit a crime can develop at the spur of the moment and no overt act is needed on the part of an accused against whom criminal liability is sought to be fastened With the aid of Section 34, IPC. In the facts and circumstances of the case, we are not impressed with yet another argument advanced by Mr. Sethi, Advocate, that by invoking Section 34, Indian Penal Code accused Jal Singh ought not to have been convicted for the murder of Kailash.

(32) Relying on the decisions in *Sital Singh Vs. State of Punjab*, and *Ramesh Laxman Pardesi v. State of Maharashtra*, : [1987]2SCR339 , it was further urged by Mr. Sethi that the offence allegedly committed by the accused falls in Part I of Section 304 instead of Section 302, Indian Penal Code for which they have been convicted. In *Sital Singh's* case (supra) gun shot injury inflicted to the deceased was on a no vital part of the body and taking into consideration that fact also the conviction was altered from u/s 302 to Section 304 Part I, IPC.

(33) In *Ramesh Laxman Pardesi* (supra) it being a case of single knife blow, the conviction was altered from one u/s 302 to Section 304, Part I, IPC. Dr. Ramani Public Witness Public Witness 14 in addition to external injuries noted at Serial Nos. 1 to 5 in postmortem report Ex. Public Witness Public Witness 14/A had also found fracture of right clevical, fractures of 1stto 5th ribs of the anterior chest wall, on the right side; fractures of 6th and 7th ribs near their posterior ends and multiple perforation more on the upper lobe of the right lung of Kailash deceased. He further found 24 lead pellets mostly disfigured and flattened embedded in the right chest cavity and the right lung of the deceased. According to Public Witness Public Witness 14 injuries to the neck and the chest structure of the deceased were sufficient to cause death in the ordinary course of nature. Thus, both the aforesaid decisions are distinguishable on facts. Looking at the seat and the extent of the injuries suffered by Kailash and the circumstances of the case, offence committed by the accused squarely falls u/s 302, Indian Penal Code and the Additional Sessions Judge, therefore ,had rightly convicted the accused u/s 302 read with Section 34,IPC.

(34) It was lastly canvassed on behalf of the accused that the Additional Sessions Judge committed grave error in not accepting the plea of alibi raised by accused Satish Kumar and Ram Phal. Needless to repeat that plea taken by both of them is that they had gone to Village Rampur Kundal in District Sonapat to attend the cremation of Ram Kumar on 22/02/1989 and returned to Delhi on

25/02/1989 after immersion of the ashes of the deceased in the Ganges at Hardwar. Gopal Singh, Sarpanch, Village Rampur Kundal, Dw 2, and Satbir Singh, elder brother of Ram Kumar deceased, Dw 3, who have been examined in support of the plea of alibi, have deposed that Ramphal and Satish Kumar attended the cremation of Ram Kumar on 22/02/1989 in the after noon and both of them stayed in the village till 24/02/1989. It is, significant to point out that a suggestion was putting cross-examination to Mehar Lal Public Witness Public Witness 3 that accused Satish Kumar fired a gun shot in the air without aiming at Kailash deceased which was emphatically denied by him. This suggestion clearly goes to indicate that Satish Kumar admits his presence at the spot at the time the incident took place around 9.30 p.m. on 22/02/1989. Further, both the said accused at the time of the recording of their statements u/s 313, Criminal Procedure Code on 10/08/1995 had disclosed their being in Government service. Presumably they were also in Government service on 22/02/1989. Both these accused could not have attended the cremation of Ram Kumar in the afternoon in Village Rampur Kundal without having obtained leave from their offices. For the reasons best known to them did not get the office records summoned to show that they were on leave on the said date. Also taking into consideration the statements of the eye witnesses, plea of alibi raised by both the said accused cannot be accepted and the Additional Sessions Judge was, Therefore, fully justified in rejecting that plea.

(35) Appellants were, thus, rightly convicted and sentenced by the Additional Sessions Judge.

(36) In the result, the appeal is dismissed. Appellants Ram Phal and Jal Singh, who are on bail, will surrender forthwith before the concerned Additional Sessions Judge for being taken into custody to serve out the sentences of life imprisonment awarded to them.