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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on 12th May, 2017*
Judgment Pronounced on ____December, 2017
Judgment Pronounced on 3rd January, 2018

\+ **CRL.A. 54/2004**

R.S. DAHIYA ..... Appellant
Through : Mr.D.C.Mathur, Senior Advocate with Mr.D.K. Mathur, Advocate

versus

STATE (THROUGH NCT OF DELHI) ..... Respondent
Through : Ms. Aashaa Tiwari, APP for the State with Inspector Rajeev Kumar, Northern Range, Crime Branch

\+ **CRL.A. 81/2004**

SHER SINGH ..... Appellant
Through : Mr. Dayan Krishnan, Senior Advocate with Mr.Lovekesh, Advocate

versus

GOVT. OF NCT OF DELHI ..... Respondent
Through : Ms. Aashaa Tiwari, APP for the State with Inspector Rajeev Kumar, Northern Range, Crime Branch

\+ **CRL.A. 198/2004**

ANIL KUMAR ..... Appellant
Through : Mr. R.N. Mittal, Senior Advocate with Ms. Suman Rani, Advocate

versus

STATE ..... Respondent
Through : Ms. Aashaa Tiwari, APP for the State with Inspector Rajeev Kumar, Northern Range, Crime Branch.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J.

1. This is a classic case when the guardians of law became its transgressors and the whole might of the State came down upon one individual, who belonged to a weaker section of society, inevitably causing his death. Neither is this a first as experience has shown that incidents of custodial violence and death continue unabated. The situation is aggravated by shoddy investigation and hostility of witnesses as the prosecution is also undertaken by the kith and kin of the accused. In the case before us, the testimony of the father of the deceased Teg Bahadur (PW-1) portrays an harrowing tale wherein his son Jagannath ('deceased') was mercilessly beaten to death by the officers of Lahori Gate Police Station.
2. All the three appeals arise out of a common judgment and order on the point of sentence have been heard together and are being disposed of by a common judgment. For the ease of reference, the appellant in Crl.A. 54/2004 is referred to as '*appellant Dahiya*'; the appellant in Crl.A. 81/2004 is referred to as '*appellant Sher Singh*'; and the appellant in Crl.A. 198/2004 is referred to as '*appellant Anil Kumar*'.
3. The appellants have impugned the judgment dated 06.01.2004 whereby the appellant Anil Kumar has been convicted under Sections 302/330/348 of the Indian Penal Code, 1860 ('IPC'); while the appellants Dahiya and Sher Singh are convicted under Section 304 Part II read with Section 34 IPC. The appellants have also impugned the order on the point of sentence dated 13.01.2004 whereby appellant Anil

Kumar has been sentenced to undergo life imprisonment and also fine of Rs.80,000/- and in default of payment of fine to further undergo rigorous imprisonment of 1 year for the offence punishable under Section 302 IPC; rigorous imprisonment for two years and fine of Rs.1,000/- and in default thereof to further undergo rigorous imprisonment for one month for the offence punishable under Section 330 IPC; and rigorous imprisonment for six months and fine of Rs.500/- in default thereof to further undergo rigorous imprisonment of 15 days for the offence punishable under Section 348 IPC. By the impugned order on the point of sentence, the appellants Dahiya and Sher Singh have been sentenced to rigorous imprisonment for a period of five years and fine of Rs.50,000/- each, in default thereof to further undergo rigorous imprisonment of nine months for the offence punishable under Section 304 Part II read with 34 IPC. We may also add that one of the co-convicts of the appellants, namely Manohar Lal Narang (appellant in Crl.A. 53/2004) died during the pendency of his appeal and accordingly, his appeal stands abated by order dated 18.02.2016.

4. The case of the prosecution is that the deceased was working with Seth Brothers Perfumeries Pvt. Ltd., Tilak Bazar, Delhi in the capacity of a peon-cum-watchman and on 01.05.1991 had gone to the shop at 9:30 PM for his night duty. The next morning, his father Teg Bahadur went to the shop at about 8:45 AM and found that the shop was locked and his son/deceased was absent. Teg Bahadur was told by one, Babu, a *beedi*-cigarette vendor, that the deceased had been taken by the police to PS Lahori Gate. Thereafter, Teg Bahadur along with his friend Mohd.Idris (PW-7) went to PS Lahori Gate. Upon enquiry, Teg

Bahadur was directed to go to the second floor of the police station where the deceased, Ram Prashad and an auto rickshaw driver were sitting on the floor and 5-6 other persons, of which three were in uniform, were also present there. At the time, Ram Prashad was being beaten by appellant Anil Kumar (then Constable) and the deceased was sitting on the floor with his face swollen and being unable to speak. Appellant Anil Kumar permitted the auto driver to leave the police station after writing something on his palm. Teg Bahadur requested Ct.Anil Kumar to release his son, but he was asked to pay Rs.500/-; to which Teg Bahadur said that he would have to arrange for the same and accordingly, he went with Mohd.Idris (PW-7).

5. The version of the prosecution continues as Teg Bahadur met Naresh Kumar (PW-4), working in the same office as the deceased, and obtained Rs.300/-; as he already had Rs.200/- with him. Teg Bahadur went back to the police station and found the deceased sitting on the floor, who informed that he was beaten by all the police officials who came in the room. After sometime, Manohar Lal Narang (since deceased) and appellant Anil Kumar entered into the room. Teg Bahadur told Ct.Anil Kumar that he had brought Rs.500/- to secure the release of his son; however, appellant Anil Kumar demanded a sum of Rs.5,000/-. Teg Bahadur showed his inability to pay the sum, when Ct.Anil Kumar started giving blows on the shoulder and back of the deceased. Teg Bahadur requested appellant Anil Kumar not to beat his son and promised to arrange the funds. Teg Bahadur went to the office of the deceased and made a call to Sh.M.D.Jethwani, Advocate (PW-3). Teg Bahadur then went back to the police station and saw Manohar Lal Narang threatening his son as to why he had involved his employee

Ram Prashad in the incident and then Narang started beating the deceased with blows and kicks and kicked him on his chin pursuant to which, the condition of the deceased deteriorated and he started vomiting blood. Appellant Anil Kumar also started beating the deceased. As the condition of the deceased became serious, Ct.Anil Kumar alongwith Teg Bahadur removed the deceased initially to Irwin Hospital. As the deceased could not be admitted there, the deceased was taken to St.Stephen Hospital, where other officers including appellant SI Sher Singh and appellant Dahiya had also arrived. Teg Bahadur was told by senior police officers not to implicate them. Deceased succumbed to his injuries on 10.05.1991 and the postmortem was conducted by Dr.Bharat Singh (PW-20).

6. *Challan* against all accused persons was filed. On 16.01.1997, charge against all of them was framed by the Trial Court under Section 304 Part II read with Section 34 IPC for having in furtherance of their common intention committed culpable homicide not amounting to murder by causing the death of Jagannath/deceased with knowledge that it was likely to cause his death. Separate charge was framed against the appellants under Sections 330/348 read with Section 34 IPC for having illegally attempted to extract confession from the deceased and Ram Prashad and having caused hurt upon the said persons by illegally confining them for the said purpose.

7. When the final arguments commenced before the Trial Court, the Trial Court came to the conclusion that it was a fit case to frame a charge under Section 302/34 IPC and accordingly, an additional charge under Section 302/34 IPC was framed against the appellants on 17.10.2002, to which all of them pleaded not guilty. Thereafter, all the appellants and

co-convict Manohar Lal Narang had prayed for re-calling of all the prosecution witnesses; however, the Trial Court finding the request to be vexatious and made only to delay the disposal of the case, rejected the request by a detailed order dated 28.01.2003.

8. In this background, the Trial Court convicted all the accused before it by the impugned judgment and order on the point of sentence as already detailed in the aforegoing paragraphs. Before this Court, all the three appellants have been represented by separate counsel with some similarity in the arguments.

SUBMISSIONS OF APPELLANT DAHIYA

9. Mr.Dinesh Mathur, learned senior counsel appearing on behalf of the appellant Dahiya, submits that the judgment and order on sentence is contrary to law and facts. Learned senior counsel submits that the Trial Court has erred in convicting the appellant Dahiya for an offence under Section 304 Part II read with Section 34 IPC. It is further contended that there is not even a whisper of evidence against appellant Dahiya. Mr.Mathur contends that the prime witness relied upon by the prosecution Teg Bahadur (PW-1), father of the deceased, has not mentioned anything about the participation of appellant Dahiya or his role in the alleged incident. Further, there is no evidence on record to show that the appellant Dahiya, in any way, illegally confined the deceased. PW-1 never even deposed as to the presence of the appellant Dahiya in the Police Station at the time of the alleged incident nor the same was reported to him, so as to there being any lapse on his part to take action against the culprits. It has also been contended before us that the Trial Court failed to consider that for the application of Section

34 IPC, it is essential that the accused joined in the doing of a particular act and in the present case, the appellant was not even present at the time of the incident and hence, he could not have been convicted with the aid of Section 34 IPC.

10. Learned senior counsel further contends that guilt is established under Section 34 IPC when common intention is coupled with participation or presence and omission. In the present case, appellant Anil Kumar has been convicted under Section 302/330/348 IPC whereas the appellant Dahiya has been convicted under Section 304 Part II IPC.; as the Trial Court has not held that the appellant Dahiya shared any common intention with appellant Anil Kumar, the conviction of the appellant with the aid of Section 34 IPC is bad in law.

11. Mr.Mathur also submits that the prosecution was biased against the appellant Dahiya, which is writ large upon going through the questions put to the appellants under Section 313 of the Code of Criminal Procedure, 1973 ('Cr.P.C.'). Question 5 put to the appellant Dahiya in his statement under Section 313 Cr.P.C. was as under:

> "*Q.5. It is further in evidence against you that in the room in the police station there were 5-6 police persons <u>including you</u>, your co-accused Sher Singh and one Babu Ram. What have you to say?*
> *A. It is incorrect.*"
>
> (<u>Emphasis Supplied</u>)

12. Learned senior counsel submits that the question put was fatually incorrect. Teg Bahadur (PW-1) in his testimony never stated that the appellant Dahiya was present in the room. Further, the question put to the other co-accused appellant Anil Kumar, appellant Sher Singh and co-convict Manohar Lal Narang (since deceased) did not even mention

the presence of the appellant Dahiya.

13. Mr.Mathur further submits that there is nothing on record to show that the appellant Dahiya caused the death of the deceased, neither such an act has been attributed to this appellant nor any role has been ascribed. To say that this appellant had participated in the crime merely because he was the head of the Police Station is not sustainable as there must be specific evidence against the appellant before he can be punished. It is further submitted that mere omission of an act by itself cannot be a ground to convict the appellant Dahiya for custodial death. There is no evidence on record to show that there was any sharing of common intention to commit the crime. Mr.Mathur also submits that the appellant Dahiya, based on the complaint filed, had acted promptly and as per Chapter 25 of the Punjab Police Rules suspended Constable Anil Kumar immediately. To substantiate his arguments, Mr.Mathur has relied upon the judgment of the Apex Court in ***Shri Kishan* v. *State of U.P.*, (1972) 2 SCC 537: AIR 1972 SC 2056** (paragraph 6) to submit that to invoke Section 34 against the appellant, active participation is a must. Reliance is also placed on ***Ninaji Raoji Baudha* v. *State of Maharashtra*, AIR 1976 SC 1537: (1976) 2 SCC 117** (paragraph 12); ***Rama Nand* v. *State of Himachal Pradesh*, (1981) 1 SCC 511** (paragraph 27); ***Hiralal Mallick* v. *State of Bihar*, AIR 1977 SC 2236: (1977) 4 SCC 44** (paragraph 6); ***Chittarmal* v. *State of Rajasthan*, AIR 2003 SC 796: (2003) 2 SCC 266** (Head Note B and paragraphs 14 and 16); ***Pandurang* v. *State of Haryana*, AIR 1955 SC 206 (1)** (paragraphs 31 and 33); ***B. Parichhat* v. *The State of M.P.*, AIR 1972 SC 535: (1972) 4 SCC 694** (paragraph 22); ***Mohd. Faizan Ahmad* v. *State of Bihar*, (2013) 2 SCC 131** (paragraphs 15-18); and ***Sarwan***

***Singh Rattan Singh* v. *State of Punjab*, AIR 1957 SC 637 (1)** (paragraph 12).

14. Mr.Mathur also submitted that no question had been put to the appellant Dahiya regarding sharing a common intention with his co-accused, role played by him or the fact that he had knowledge of the incident. Relying upon ***Sharad Birdhichand Sarda* v. *State of Maharashtra*, (1984) 4 SCC 116** (paragraph 143) to submit that unless a circumstance appearing against the accused is put to him in his examination under Section 313 Cr.P.C., the same cannot be used against him. Reliance is also placed on ***Ajay Singh* v. *State of Maharashtra*, (2007) 12 SCC 341** (paragraphs 12-15).

15. Mr.Mathur has also submitted that the addition of the charge of Section 302 IPC by the Trial Court on 17.10.2002 was also unlawful as no sanction was obtained under Section 197 Cr.P.C. Drawing the attention to the sanction order dated 29.07.1993, learned senior counsel submitted that the sanction was granted only for Section 304 IPC and not 302 IPC, thus, the Trial Court could not have framed the charge for murder against any of the accused.

SUBMISSIONS OF APPELLANT SHER SINGH

16. Mr.Dayan Krishnan, learned senior counsel for the appellant Sher Singh, submits that the conviction of the appellant and consequent punishment imposed upon him is contrary to the facts and law and is based upon an incorrect reading of the evidence. The Trial Court has failed to appreciate that in the facts of the present case, Section 34 IPC has no application as there is no evidence, either direct or circumstantial, to justify the invocation of Section 34 IPC. Moreover,

the Trial Court has failed to appreciate that nowhere in the testimonies of the prosecution witnesses, documentary evidence or even through circumstantial evidence has it been shown that the appellant, in any manner, either connived with any of the co-accused or had any common intention or did any overt or other act towards the furtherance of the crime. In the absence of any evidence establishing the meeting of minds, the appellant Sher Singh could not have been convicted with the aid of Section 34 IPC.

17. Learned senior counsel substantiates his arguments by contending that the Supreme Court has laid down in its various judgments that in case of an offence involving physical violence, for the application of Section 34 IPC, it is essential that such accused must be physically present at the time of the commission of the crime for the purpose of facilitating or accomplishment of the criminal act. In the present case, the physical presence of the appellant Sher Singh at the scene of the crime has not been conclusively proved beyond doubt. He submits that the Trial Court has committed a grave error in appreciating the evidence by relying upon the testimony of Teg Bahadur (PW-1). It is submitted that PW-1 is an interested witness being the father of the deceased. PW-1 had during his examination in-chief had named the appellant SI Sher Singh as also being present at the site at 9:30 AM in the morning of 02.05.1991; whereas PW-1 had contradicted his statement in-chief during the cross-examination and had categorically stated that on 02.05.1991, he had reached the Police Station at 9:30 AM or slightly before that and appellant Sher Singh was not present at that time. The omission of the Trial Court to take note the categorical stand of PW-1 in his cross-examination has led to gross injustice. Mr.Krishnan

concludes that the presence of the appellant has not been established at the time of the offence.

18. Additionally, learned senior counsel submits that the Trial Court has erroneously returned a finding that the deceased was mercilessly beaten all during the intervening night of 01-02 May, 1991. The finding is not supported by any credible piece of evidence and hence is liable to be set-aside.

19. Alternatively, it is contended that there is no evidence to show that the beatings were meted out by the appellant nor there is any evidence to show meeting of minds. No questions in this regard were put to the appellant Sher Singh in his statement under Section 313 Cr.P.C.

20. Mr.Krishan submits that the Trial Court proceeded under a false notion that the appellant was present in the room and his sharing a room with the deceased would *ipso facto* mean that he had knowledge of the beatings administered to the deceased. Both the observations are incorrect and contrary to the evidence on record. Mere suspicion is insufficient to come to the finding of guilt. Reliance is placed on ***Raju Pandurang Mahale* v. *State of Maharashtra*, (2004) 4 SCC 371** (paragraph 16).

21. It is submitted that the appellant was neither the supervisor of Ct.Anil Kumar nor was he in his division; he came under the division of ASI Suresh Kumar, who shared his room with the appellant as noted by the Trial Court. The factum of appellant Anil Kumar not coming in the division of the appellant is evident from the Duty Roster dated 02.05.1991 at Page Nos. 23 and 24 (seized vide Seizure Memo Ex.PW-15/A). No role has been attributed to the appellant nor was any injury caused by the appellant Sher Singh.

22. Learned senior counsel submitted that the only other circumstance against the appellant is his signature on the statement of Tag Bahadur recorded under Section 161 Cr.P.C. (Ex.PW-1/A). In this regard, he submits that the statement (Ex.PW-1/A) was recorded in the presence of PW-4, which is further corroborated by the testimony of PW-1 and therefore, this fact cannot be used against the appellant.

23. Mr.Krishnan has relied upon the judgment of the Apex Court in ***Sadashio Mundaji Bhalerao* v. *State of Maharashtra*, (2007) 15 SCC 421** (paragraphs 29 and 31) to submit that even in cases of custodial deaths, convictions cannot be sustained *de hors* the evidence and its admissibility according to law.

24. It is lastly submitted that the appellant cannot be convicted even with the aid of Section 106 of the Indian Evidence Act, 1872 until the prosecution is able to establish the presence of the appellant Sher Singh in the room at the time of the commission of the offence. To substantiate his argument, learned counsel relied upon the judgment of the Supreme Court in ***Prithipal Singh* v. *State of Punjab*, (2012) 1 SCC 10** (paragraph 53).

SUBMISSIONS OF APPELLANT ANIL KUMAR

25. Mr.R.N.Mittal, learned senior counsel appearing on behalf of the appellant Anil Kumar, at the very outset submits that Section 217 Cr.P.C. provides that whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and accused would be entitled to recall or re-summon and examine any witness with reference to such alteration or addition. Therefore, the dismissal of the application of the appellant by the order dated 28.01.2003 is not only

against the provisions of law, but has also occasioned grave miscarriage of justice and caused prejudice to the appellant and hence, the conviction is liable to be set aside.

26. Mr.Mittal has drawn our attention to paragraph 8 of the order dated 28.01.2003 of the Trial Court, where it has observed that there was no fresh evidence on record, but in view of nature of injuries sustained by the deceased allegedly inside the Police Station and the accused persons having not invoked any exception under Section 300 IPC during cross-examination of the witnesses, the request for re-summoning the witnesses appears to be vexatious ploy to delay the disposal of the case. Learned senior counsel relies upon the judgment of the Apex Court in ***Jasvinder Saini* v. *State (Govt. of NCT of Delhi)*, (2013) 7 SCC 256** (paragraphs 8 and 14) to submit that the amendment of a charge based upon a new charge cannot be done mechanically. Reliance is also placed on ***Umesh Kumar* v. *State of A.P.*, (2013) 10 SCC 591** (paragraph 27) to submit that upon addition of charges, it is a legal requirement to recall witnesses. Learned senior counsel has also relied upon a judgment of a single judge of the Madhya Pradesh High Court in ***Vikas and Others* v. *State of M.P.*, 2001 Cr LJ 3665: 2001 SCC OnLine MP 198** (paragraphs 3 and 21) to submit that, in such cases, the courts are bound to grant permission to recall witnesses. Relying upon the aforegoing judgments, it is submitted that the Trial Court has only given reasons in respect of formal or hostile witnesses and nothing has been said about the evidence of the eye-witness (PW-1) or the medical evidence. It is submitted that having regard to the essentials of Section 300 IPC, it was incumbent upon the Trial Court to permit the appellant to re-call atleast the eye witness and the medical witnesses to

cross-examine them in respect of the nature of the injuries to meet the added charge. The appellant was ultimately convicted for the added charge and hence, the there is a gross miscarriage of justice and prejudiced a fair trial. Reliance was also placed on the judgment in ***Shamnsaheb M. Multtani* v. *State of Karnataka*, (2001) 2 SCC 577: AIR 2001 SC 921** (paragraphs 30 - 33), wherein the Supreme Court had found that a conviction under Section 304-B IPC after a trial for the offence under Section 302 IPC led to serious miscarriage of justice.

27. Learned senior counsel submitted that as the order dated 28.01.2003 of the Trial Court was patently illegal and a legal question in respect of the trial can be raised at the appellant stage and therefore, the order can be challenged before this Court at this stage. The failure of the appellant to file a revision immediately after the order cannot be construed as accepting the addition of charge.

28. On the merits of the matter, Mr.Mittal submitted that the Trial Court and the prosecution primarily relied upon the testimony of Teg Bahadur (PW-1), which is not permissible in law. In this regard, his submissions are as under:

    (i) PW-1 was an interested witness as being the father of the deceased and hence, his testimony should not have been relied upon without corroboration;

    (ii) The deposition of PW-1 is unreliable as he had deposed that his friend Mohd. Idris (PW-7) had accompanied him to the police station, while PW-7 has specifically stated nothing about the beating administered to the deceased;

    (iii) No *mens rea* could be imputed to the appellant and the finding of the Trial Court that the motive was to extract a confession is

fallacious as the appellant was not competent to record a confession; the same was never the case of the prosecution or any such statement would have been admissible in evidence;

(iv) It has come in the testimony of PW-1 that the deceased stated that all police persons coming in the room beat him, the appellant had put the head of the deceased between his knees and given fists blows on his back, the appellant had slapped the deceased and given him fist blows on his face and temple; however, no such allegation was made by the witness in the statement recorded by the SDM (Ex.PW-1/E) which is clearly an improvement making the testimony unreliable; and

(v) The testimony is unbelievable as if the appellant had demanded money for the release of the son of PW-1, Teg Bahadur (PW-1) would have approached the higher police officials, which he did not do so.

29. Learned senior counsel for appellant Anil Kumar also submitted that there is no documentary evidence on record to show that the deceased was ever taken to the Police Station nor has any officer deposed as to the same. Further, the deceased was also not involved in any case and there was no occasion for the police to take him to the police station. Hence, the prosecution has been unable to prove that the deceased was ever taken to the Police Station.

30. It was next contended that the prosecution is guilty of withholding the necessary and crucial witnesses as even as per the story of the prosecution, the deceased was brought to the police station along with one Sh.Ram Prasad and a three-wheeler driver, but neither of them were examined. The failure to do so goes to the root of the case of the

prosecution and the Trial Court has clearly erred in convicting the appellant as a negative inference should have been drawn against the prosecution.

31. Relying upon the Post Mortem Report (Ex.PW-20/A), learned senior counsel submitted that the injuries on the back and shoulder of the deceased were simple abrasions and therefore, at best a case of Section 323 IPC is made out against the appellant. As per the Post Mortem Report (Ex.PW-20/A), injury no.2 (scabbed abrasion 9x2 cms. over the left Pronto Povital region around injury no.1) had resulted in the death of the deceased and as per the evidence on record, the injury was caused by co-convict Manohar Lal Narang (since deceased) and not the appellant. It was Manohar Lal Narang (since deceased) who had kicked the deceased with his boot on his chin and given him fist blows on temple, which resulted in deterioration of his condition. The injuries attributed to the appellant are simple in nature and in the absence of meeting of minds with Manohar Lal Narang (since deceased), the appellant could not have been held to have caused the death of the deceased. It is also contended that the Trial Court has erred in convicting the appellant under Section 302 IPC, even when the accused who had inflicted the fatal wound was convicted under Section 304 Part II IPC.

32. It is also contended that in the absence of any intention to cause the death of the deceased, the appellant could not have been convicted under Section 302 IPC. The injuries cause by the appellant were also simple in nature and thus, it also cannot be said that the appellant had knowledge that they will cause the death of the deceased. Additionally, the factor that the death occurred after 8-9 days shows that the gravity

of the injuries was not serious. Accordingly, the appellant could not have been convicted under Section 302 IPC and only a case under Section 304 Part II IPC was made out.

33. Learned senior counsel next contended that the present case would also be covered under Exception 3 to Section 300. To this end, he relies upon a report of the Bureau of Police Research and Developments detailing the Functions, Role and Duties of a Constable; more particularly paragraph 38 of the Report to submit that the duties include prevention and detection of crime and maintenance of law and order and to perform all tasks connected with the beat area and thereby to help prevention of offences. Mr.Mittal submits that admittedly the appellant was a beat Constable in the area and it is alleged against the appellant Anil Kumar that to enquire from deceased Jagannath, Ram Prasad and Dharam Pal, who were allegedly running a flesh trade, he brought them to the Police Station. He had brought them in the room of his Divisional Officer and, thus, he did not conceal them from his superiors. Hence, so far as the action of appellant Anil Kumar is concerned, it is the lawful discharge of duty of a Constable and would be covered under Exception 3 to Section 300.

34. A faint endeavour has also been made by learned counsel for the appellant to show that the deceased was suffering from epilepsy and as per death summary, anti-epilepsy drugs were administered which resulted in stopping of seizures.

SUBMISSIONS OF THE STATE

35. *Per contra*, Ms.Tiwari, learned counsel for the State, submitted that the order dated 28.01.2003 of the Trial Court rejecting the request of the

accused to recall witnesses has attained finality. Moreover, there is no obligation on the part of the Court to recall witnesses when the charges are amended. Reliance is placed on two judgments of the Kerala High Court titled ***Moosa Abdul Rahiman* v. *State of Kerala*** reported as **1982 Crl. L.J. 1384 (FB)** and **1982 Crl. L.J. 2087** to submit that there is no duty upon the Court to ask the accused whenever they wanted to re-examine witnesses. Further, in the present case, after the charge was amended the prosecution had stated that they do not wish to summon additional witnesses. No application was made on behalf of the defence and only an oral request was made to re-summon witnesses, which was refused and the order has attained finality.

36. Ms.Tiwari further submits that the appellants Anil Kumar and Sher Singh were present in the room when deceased Jagannath was mercilessly beaten. Appellant Anil Kumar had initially demanded Rs.500/- and thereafter Rs.5,000/-. The evidence of PW-1 stands fully corroborated by the evidence of Naresh Kapoor (PW-4). It is also contended that even when the condition of deceased Jagannath deteriorated, appellant Anil Kumar did not provide him medical attention. If medical attention was provided, his life could have been saved. Ms.Tiwari also contends that attempt of police officers was to save their skin, rather than to save the life of an innocent person which is evident from the fact that despite the precarious condition of Jagannath, he was initially taken in a rickshaw to a private hospital to avoid escalation of the matter and from it becoming public and only when the private hospital refused to admit the deceased, he was taken to St.Stephens Hospital as a last resort. The deposition of PW-1 clearly states the role played by the appellant Anil Kumar. This included

denying water when the deceased asked for it under the pretense that he was acting. He had further wasted valuable time in taking the deceased to the hospital. Learned counsel further submits that evidence on record shows that Jagannath was dragged from a room on the second floor to the *verandah* at ground floor.

37. It is submitted that the evidence of Ct.Satish Kumar (PW-10) (driver of the appellant Dahiya) would show that between 3 PM to 7 PM, the appellant Dahiya was at the police station. She further contends that the appellant Dahiya is also guily of creating false evidence to show that he was not in the Police Station. The same would be an incriminating evidence against him and would prove his guilt. The presence of appellant Dahiya and the fact of him being the SHO of the Police Station stand proved. It is impossible that a person who was mercilessly beaten and was crying and was dragged from second floor to ground floor and at the same time the SHO concerned, who was present in the police station, was not a party to the act or was ignorant about it is not plausible.

38. As regards appellant Sher Singh, Ms.Tiwari submitted that the deceased was beaten in his room. The presence of the appellant Sher Singh stands proved and he did nothing to prevent the beating. Learned counsel relied upon judgments in ***Suresh and Another* v. *State of U.P.*, AIR 2001 SC 1344** (paragraphs 23, 37 and 51) and ***Mohd. Saleem* v. *The State*, 2013 [3] JCC 1647 (Del) (DB)** (paragraph 23) to submit that common intention may even be inferred from omission to do a particular act and the meeting of minds can be inferred from the facts proved.

39. Ms. Tiwari has also placed reliance on ***Mahipal* v. *State of Delhi*, 225**

(2015) DLT 242 (paragraphs 70 - 72); ***State* v. *Ranbir Singh*, 166 (2010) DLT 427** (paragraphs 33 - 36); ***Munshi Singh Gautam (D)* v. *State of M.P.*, AIR 2005 SC 402: (2005) 9 SCC 631** (paras 6, 7, 8 and 29); ***Sahadevan alias Sagadevan* v. *State*, AIR 2003 SC 215: (2003) 1 SCC 524** (paragraphs 19, 22 and 26); ***State of M.P.* v. *Shyamsunder Trivedi and Ors.*, JT 1995 (4) SC 445: (1995) 4 SCC 262** (paragraphs 13, 15, 16 and 17 - 20), ***Gauri Shanker Sharma* v. *State of U.P.*, AIR 1990 SC 709: 1990 Supp SCC 656** (paragraphs 6, 14 and 16); ***D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416**; ***Smt. Nilabeti Behera @ Lalita Behera* v. *State of Orissa*, AIR 1993 SC 1960: (1993) 2 SCC 746**; and ***Kamla Devi and Anr.* v. *Govt. of NCT of Delhi*, 84 (2000) DLT 348 (DB)**.

REJOINDER SUBMISSIONS OF THE APPELLANTS

40. In rejoinder, Mr.Mathur submitted that neither the role of the appellant Dahiya is established nor his presence is established. Merely because, the appellant Dahiya was the SHO of the Police Station cannot be a ground to punish him for an act committed by a Constable. Learned senior counsel contended that there is nothing on record to show that the deceased was dragged from the second floor to the ground floor. Even otherwise, mere omission on the part of the appellant cannot be a ground to convict him, it should be an illegal omission.

41. Mr.Krishnan, learned senior counsel for the appellant Sher Singh, has submitted that there is no evidence that any injury was caused by the appellant Sher Singh or that he was in the supervisory capacity of appellant Ct.Anil Kumar. In fact, he belonged to a different division. It is contended that merely because he shared a room with the ASI Suresh

Kumar where the deceased was allegedly beaten is not enough to convict him.

42. Learned senior counsel for the appellant Anil Kumar has submitted that amendment of charge on the same set of evidence is not permissible. If the charge is amended to incorporate a graver offence, then witnesses should have been allowed to be re-examined. In response to the two judgments cited by Ms.Tiwari, he submits that in **1982 Crl. L.J. 1384 (FB)**, a reference was answered that there is no legal duty of the Trial Court to ask the parties whether they would like to recall the witnesses already re-examined, however, paragraph 12 says "*still it is desirable.*" In the other case reported at **1982 Crl. L.J. 2087**, it has been observed that "*.... since no reasons were given the order was set aside.*" Therefore, Mr.Mittal concluded that the appellant being declined to re-examine the public witnesses, i.e. the father and the doctor, has resulted in great illegality and prejudice to the appellant.

43. We have heard the learned counsel for the parties, carefully examined the record and considered the rival contentions. Two technical contentions have been urged by the learned senior counsel for the appellants: *first*, pertaining to the legality of the addition of charge under Section 302 IPC in the absence of a specific sanction under Section 197 Cr.P.C.; and *second*, the addition of charge without permitting the appellants to re-summon prosecution witnesses has led to miscarriage of justice. We deem it appropriate to deal with these objections prior to divulging into the evidence of the present case.

ABSENCE OF SPECIFIC SANTION FOR SECTION 302 IPC

44. Mr.Mathur had contended that the addition of a charge under Section

302 IPC on 17.10.2002 is unlawful as no sanction was obtained under Section 197 Cr.P.C.

45. The sanction order dated 29.07.1993 (Ex.PW-23/A) was issued against the appellants has been proved by Sh.Ranjan Mishra (PW-23), LDC, Home Department, Govt. of NCT, Delhi. It is fruitful to extract the sanction order in its entirety below:

> " *ORDER*
>
> *WHEREAS on a careful perusal of case FIR No.430/91 dated 2-12-91 registered at P.S. Lahori Gate, Delhi and other material placed on records* [sic: record] *it appears to the Lt. Governor, National Capital Territory of Delhi that wh* Ill./- *as (i) Const. Anil Kumar No. 979/N. (ii) Inspector Rajinder Singh Dahiya, No.D-1/606, (iii) SI. Sher Singh, No.D-1175 and (iv) Const. Babu Lal No.456/N on 1/2-5-91 one Jagan Nath s/o. Sh. Tek Bahadur, r/o Shakar Pur, Delhi was brought by Const. Anil Kumar, No.979/N and kept him in wrongful confinement/detention and was subjected to torture at P.S. Lahori Gate and got admitted in St. Stephens Hospital, and remained unfit to make any statement, and he died in the hospital on 10-5-91. Inquest proceedings u/s 176 Cr.P.C. were conducted by SDM Kotwali and statements of witnesses were recorded. It has been established that Sh. Jagan Nath died due to multiple injuries suffered while in illegal detention at P.S. Lahori Gate and succumbed to the injuries in the commission/omission against the norms of the authorised and legal liabilities of them.*
>
> *2. AND WHEREAS it further appears to the Lt. Governor of National Capital Territory of Delhi that prima facie the said constable Anil Kumar No.979/N, (ii) Inspector Rajinder Singh Dahiya No.D-1/606, (iii) SI. Sher Singh and (iv) Ct. Babu Lal No.456/N have deliberately, maliciously, mischievously misused their powers by doing the allege acts of wrongful confinement/detention of Shri Jagan Nath and tortured him at P.S. Lahori Gate, Delhi and causing injuries without any rhyme or reason which is an act punishable under sections 119, 179, 181, 201, 214, 218, 304, 323, 330,*

348, and 34 IPC.

3. NOW THEREFORE in exercise of the powers conferred by Section 197 of the Code of Criminal Procedure, 1973 read with the Govt. of India, Ministry of Home Affair's Notification No.11011/2/74-UTI (i), dated 20-3-74, the Lt. Governor of the National Capital Territory of Delhi hereby grants sanction to the initiation of criminal proceedings in the court of the competent jurisdiction against the said (i) Inspr. Rajinder Singh Dahiya, No.D-1/606 (ii) SI. Sher Singh, No.D-1175, (iii) Constable Babu Lal No.456/N and (iv) Constable Anil Kumar No.979/N for committing the said offence(s) punishable u/s 119, 179, 181, 201, 214, 218, 304, 323, 330, 348, 385 and 34/IPC."

46. At first blush, there seems to be merit in the submissions of learned senior counsel, however, we also notice that the addition of Section 302 IPC was also based on the same facts. In this regard, we deem it appropriate to notice Sub-section (5) of Section 216 Cr.P.C., which reads as under:

"***216. Court may alter charge.–***

...

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction had been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."

(Emphasis Supplied)

47. The Privy Council in ***Gill and Another* v. *The King*, AIR 1948 PC 128** was faced with a situation where the sanction was granted under Section 161 and 420/120-B IPC, while the Chief Presidency Magistrate had convicted the appellant under Section 165/120-B IPC. Tersely put, the appellant Gill was convicted of using his office for favouring the

appellant Lahiri in granting tenders. The charge was amended to Section 161/120-B IPC. The appellant/accused Gill had contended as the new charge was based on different facts, new sanction was required. The Federal Court had while keeping Section 230 of the Code of Criminal Procedure, 1898 [*pari materia* to Section 216 (5) Cr.P.C., 1973] found that once sanction had been granted, the subsequent course of proceedings were regulated by the Code of Criminal Procedure and the amended charge was permissible. On appeal by special leave, the Privy Council, relying upon Section 230 of the Code of Criminal Procedure, 1898 concurred with the judgment of the Federal Court that the amended charge was maintainable and observed that "*as has been pointed out in the earlier part of this judgment, the whole of the facts, which would justify equally a charge under s. 120B read with s. 420 and a charge under s. 120B read with s. 161, are stated in the complaint originally filed by the Deputy Superintendent of Police, which at the same time exhibited the sanctions already obtained.*" The Privy Council went on to hold that "[*i*]*t was an inference … that the same facts were before the sanctioning authority when the sanction was given.*"

48. In ***Food Inspector, Ernakulam and Another* v. *P.S. Sreenivasa Shenoy*, (2000) 6 SCC 348**, the respondent was charged under the Prevention of Food Adulteration Act, 1954 had contended that the giving of fresh report by subsequent analyst about the adulteration of food warranted fresh sanction/consent, which was rejected by the Apex Court observing as under:

> "*25. Nor would the alternative contention advanced by Shri Romy Chacko, learned counsel for the respondent, based on Section 216(5) of the Code of Criminal Procedure, help the*

respondent. That section deals with alteration of charges framed by courts. The section enables the court to alter or add to any charge at any time before judgment is pronounced. Sub-section (5) thereof reads thus:

...

26. What is intended is that a prosecution, which requires previous sanction, cannot be started without such sanction even by way of amending the charge midway the trial. If the amended charge includes a new offence for which previous sanction is necessary then prosecution for such new offence cannot be started without such sanction. However, the second limb of the sub-section makes it clear that if sanction was already obtained for prosecution on the same facts as those on which the new or altered charge is founded then no fresh sanction is necessary.

27. The facts on which prosecution is founded under the Act were broadly that the accused had sold adulterated toor dal to the Food Inspector on 15-4-1996. Variation regarding the reasons or the data by which two different analysts had reached the conclusion that the sample is adulterated is not sufficient to hold that the basic facts on which the prosecution is founded, have been altered. Hence Section 216(5) of the Code would not improve the position of the accused for the purpose of obtaining fresh consent on the facts of this case."

(Emphasis Supplied)

49. Therefore, it is clear that sanction is granted on the particular set of facts and not provisions of law. In the present case, the addition of the charge under Section 302/34 IPC was based on the same facts upon which the sanction dated 29.07.1993 was granted. The factum of injuries being caused to the deceased while detained in the Police Station and his succumbing to his injuries thereafter was the basis of the sanction order and the same facts led to the framing of the additional charge. Accordingly, no fresh sanction was required by the prosecution as the additional charge was premised on the same facts on which the

sanction order dated 29.07.1993 was granted.

50. We may also notice the judgment of a coordinate bench of this Court in ***Ranbir Singh*** **(Supra)**, wherein in a case of custodial death the sanction was granted for Section 304, while the accused/respondent was charged under Section 302; in this background, the bench held as under:

> "*24. The last aspect urged by learned counsel for the respondent was that the sanction for prosecution of the respondent was for offences punishable under Section 304 of IPC and not under Section 302 of IPC under which the respondent was charged.*
> *25. We would first like to deal with the last issue itself which is the nature of sanction required to prosecute a police official. In the present case, sanction was obtained. The sanction was for the act/offence committed by the respondent. There could thus be no question of the sanction being confined to a particular provision of the IPC. ...*"
>
> (Emphasis Supplied)

51. Accordingly, the contention must be rejected as without any merit.

DENIAL OF OPPORTUNITY TO RE-SUMMON PROSECUTION WITNESSES

52. Mr.Mittal had relied upon Section 217 Cr.P.C. to contend that when the charge under Section 302/34 IPC was added by the Trial Court, an opportunity should have been extended to the accused/appellants to re-summon the prosecution witnesses. It is also contended that the same has led to serious miscarriage of justice. On the converse, the learned counsel for State has contended that there was no duty upon the Trial Court to re-call witnesses.

53. Prior to dealing with the contention of the parties, we deem it appropriate to state the background in which the charge was added. After the arguments were heard and the matter was to come up for

judgment, the Trial Court decided to frame an additional charge of 302/34 IPC. Accordingly, the additional charge was framed on 17.10.2002. On the next date of hearing, the learned counsel for all the accused made an oral request for re-summoning all the prosecution witnesses. This request was turned down by a detailed order dated 28.01.2003.

54. We proceed to analyse the judicial pronouncements relied upon by the parties. In ***Jasvinder Saini* (Supra)**, the Trial Court had added the charge of Section 302 IPC in a proceeding in which charge of Section 304-B IPC following the direction given in ***Rajibir @ Raju & Anr.* v. *State of Haryana*, AIR 2011 SC 568**, which was affirmed by the High Court. The Apex Court observing that at the initial framing of charge, the Trial Court had come to the specific conclusion that there was no evidence to frame a charge under Section 302 IPC had limited the charges to Section 304-B IPC held that the direction in ***Rajibir* (Supra)** was not to be followed mechanically without regard to the nature of evidence in the case. The relevant paragraph reads as under:

> "*14. Be that as it may, the common thread running through both the orders is that this Court had in Rajbir case [Rajbir v. State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149 : AIR 2011 SC 568] directed the addition of a charge under Section 302 IPC to every case in which the accused are charged with Section 304-B. That was not, in our opinion, the true purport of the order passed by this Court. The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court.*
>
> *15. It is common ground that a charge under Section 304-B*

IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304-B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304-B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir case [Rajbir v. State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149 : AIR 2011 SC 568] . The High Court no doubt made a half-hearted attempt to justify the framing of the charge independent of the directions in Rajbir case [Rajbir v. State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149 : AIR 2011 SC 568] , but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by the High Court."

(Emphasis Supplied)

55. Mr.Mittal had also relied upon the following phrase in ***Umesh Kumar*** **(Supra)**:

"*27. ...In case charges are framed the accused has to face the trial, charges can be added/altered at any stage of the trial, before the pronouncement of the judgment to suit the evidence adduced before the court, under the provisions of Section 216 CrPC. The only legal requirement is that a*

witness has to be recalled as provided under Section 217 CrPC when a charge is altered or added by the court."

56. At the same time, it is settled that "[*a*] *decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings.*" [Viz. ***Commissioner of Income Tax* v. *Sun Engineering Works (P) Ltd.*, (1992) 4 SCC 363** (paragraph 39); also see ***N.K. Gupta* v. *Secretary, Railway Board*, MANU/DE/3454/2016** (paragraph 12); and ***Vidur Impex and Traders Pvt. Ltd.* v. *Pradeep Kumar* Khanna, 241 (2017) DLT 481: 2017 SCC OnLine Del 8925** (paragraphs 137 and 145)]

57. The Supreme Court in ***Umesh Kumar* (Supra)** was dealing with two appeals from the order of the High Court of Andhra Pradesh whereby the High Court had quashed the chargesheet in respect of the offence under Section 468 IPC while refusing to quash for the offences under Section 471, 120-B and 201 IPC. In this background, the Court while examining the scope of Section 482 Cr.P.C. and whether the quashing by the High Court attained finality as curtailing the power of the Trial Court to frame a charge at a later stage, had generally discussed the scheme for inquiry/trial provided in the Cr.P.C. in aforequoted paragraph 27. Hence, the observation quoted in paragraph 53 aforegoing cannot be said to be the *ratio* of the judgment, but only mere passing comment and thus, it cannot be read to construe that there is a mandatory requirement in all cases of addition of charge to recall

witnesses.

58. A Single Judge of the Madhya Pradesh High Court in ***Vikas*** **(Supra)** was deciding a revision petition from the order of the Trial Court rejecting the application under Section 217 Cr.P.C. for recalling of witnesses, pursuant to an additional charge adding Section 149 IPC to the charge already framed. The Trial Court had rejected the application on the ground that Section 149 IPC is not independently punishable, it did not hold that the request was vexatious or to defeat the ends of justice. The High Court held that since Section 149 IPC was a substantive offence, the accused were to be given fullest opportunity to defend themselves and hence, set-aside the order of the Trial Court. Again, the judgment does not lay an absolute principle that the Courts are bound to grant permission to recall witnesses, on the contrary, it specifically held that "[*t*]*he learned Special Judge has also not indicated that the petition has been filed with a purpose of vexation or delay or defeating the ends of justice*" (paragraph 22).

59. On the other hand, Ms.Tiwari had relied upon two judgments of the Kerala High Court in ***Moosa Abdul Rahiman*** **(Supra)** reported as **1982 Crl. L.J. 1384 (FB)** and **1982 Crl. L.J. 2087**. In the former, the Full Bench of the High Court was deciding a reference regarding whether the courts are under a duty to ask the accused whether they wanted a fresh trial on the amended charge? While answering the question in the negative, the High Court observed as under:

> "*6. S. 216 of the Code confers the power on the court to alter or add to any charge at any time before the judgment is pronounced. We are not concerned in this case with the applicability or otherwise of the other sub-sections of that section. S. 217 deals with the situation where the court in exercise of the power under S. 216 has altered or added to a*

charge after the commencement of the trial. The statute provides that the prosecution and the accused shall be allowed to recall or resummon, and examine with reference to such alteration or addition, any witness who may have been examined. This statutory right is subject to an exception. The exception operates when the prosecutor or the accused seeks such a recall and re-examination of the witnesses but the court considers that such desire to recall or reexamine the witness is motivated by objectionable purposes, such as vexation, delay or defeating the ends of justices.

7. Due emphasis has to be given to the fact that the recalling or resummoning of the witnesses is with reference to the alteration or addition in the charge and such recalling or resummoning is of "any witness who may have been examined". These ingredients of the section, to our mind, indicate that the opportunities statutorily conferred, have to be availed of either by the prosecution or by the accused depending upon the requirements of one party or the other. Among the large number of witnesses who may have been examined, it may be, chat the alteration or addition to the charge necessitates the recalling and examination of only a few of the witnesses; it may even happen that in a given case it may be totally unnecessary to recall, or resummon any of the witnesses who had been examined. It is entirely for the prosecution or the accused to decide for itself or himself as to whether any witnesses at all should be recalled and re-examined or to choose such of those witnesses whose re-examination is necessitated in the light of the alteration of, or addition to, the charge. It goes without saying that once a decision is made to avail of such an opportunity, a request in that behalf should ordinarily be granted, unless the court specifically overrules such a request in the light of the considerations stipulated in that behalf for declining such request. The section does not, on its wording, cast a duty or obligation on the court to enquire of the prosecution or of the accused whether either party would like to recall or re-summon the witnesses. ...

...

12. Having expressed our view on the true import and effect of the section, we must, however, observe that it is safer and

desirable that the courts, in such situations, do enquire of the prosecution or the accused, as to whether they would like to exercise the right to recall or resummon the witnesses or to have further witnesses examined as provided in the section. This, however, is not a statutory requirement and is only a rule of prudence. If a circular is issued in that behalf by this court, we feel, it would serve as a proper guidance for the subordinate courts."

(Emphasis Supplied)

60. In ***Moosa Abdul Rahiman*** **(Supra) (1982 Crl. L.J. 2087)**, the Division Bench of the High Court reiterated the same and finding that the Trial Court had not held that the request was for the purpose of vexation or delay or defeating the ends of justice, set-aside the convictions and remanded the matter back with a direction to allow recalling of witnesses.

61. We may also notice that there have been instances where the High Court have denied the request of the accused to re-examine/re-call witnesses pursuant to an alteration of charge. In ***Amar Singh*** **v.** ***State of Punjab*****, (1998) 4 RCR (Cri) 784** (paragraphs 10 - 14), the High Court of Allahabad had set-aside the order of the Trial Court allowing re-call of witnesses finding that the accused had already been charged for the major offence and no additional evidence was required for the additional charge. The Punjab and Haryana High Court in ***Maroof Rana*** **v.** ***State of U.P.*****, 2013 (3) ACR 2541** (paragraphs 10 - 15) had refused to interfere in the order of the Trial Court not granting opportunity to further cross-examine the witnesses as it found that there was no prejudice, the request was clearly vexatious and the addition of the charge did not change the substratum of the evidence.

62. We also deem it appropriate to reproduce Section 217, which reads as

under:

> "***Section 217. Recall of witnesses when charge altered.–*** *Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed—*
>
> *(a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;*
>
> *(b) also to call any further witness whom the Court may think to be material.*"
>
> (Emphasis Supplied)

63. The corresponding provision Section 231 in the old Code of Criminal Procedure, 1898 did not contain the second limb, now in Section 217 (a) underlined above, and thus, bound the court to grant such request. The Law Commission in its 41st Report recommended the revision of the provision to add the second limb. The recommendation was as under:

> "*19.5. Under section 231, whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused "shall be allowed" to recall or re-summon and examine, with reference to such alteration or addition, any witness already examined. Where an application is made for re-summoning of such witnesses, the court is bound to grant it, and cannot refuse it on the ground that the alteration is of such nature that it cannot affect the evidence. Now, it may happen that the application for recalling and re-summoning the witness is made only for the purpose of vexation or delay or defeating the ends of justice. In such cases, the court should have a power to refuse the application. If the evidence of a witness is of a purely formal character and the other party merely desires to prolong the proceedings by taking advantage of the right given by the*

section, there is no reason why it be mandatory for the court to re-summon the witness."

(Emphasis Supplied)

64. From the aforegoing discussion, it is clear that Section 217 (a) gives a statutory right to the parties to recall/re-summon whenever the charge is altered or added and the Courts should ordinarily accede to such request, however, the same is subject to one exception, i.e. when the Court comes to the conclusion that the request so made is for a purpose of vexation or delay or defeating the ends of justice.

65. We proceed to consider whether the addition of the charge under Section 302/34 IPC was done in a mechanical manner as frowned upon by the Apex Court in ***Jasvinder Saini* (Supra)**? We think not. Prior adding the charge, the Trial Court had given a detailed order dated 04.10.2002 recording cogent reasons for the same after examining the evidence on record and only then proceeded to add the charge. Thus, it cannot be said that the charge was added mechanically.

66. The other aspect to be considered whether the Trial Court turned down the request of the accused for valid and cogent reasons? The Trial Court had found the request of the accused to be vexatious and made only to delay the disposal of the case, the reasons for coming to the conclusion were as under:

    (i) The addition of the charge was not necessitated by any fresh evidence, but owing to the nature of injuries and failure of the accused to invoke any exception under Section 300 IPC;

    (ii) The accused wanted to re-examine all the witnesses including the ones who had turned hostile and were not cross-examined previously; and

(iii) The counsel for the accused before the Trial Court did not contend that they had left out any points in their cross-examination.

67. In our view, the Trial Court was justified in declining the request of the accused. The very fact that all the witnesses were requested to be recalled exemplifies that the only reason for doing so was to delay the proceedings. No doubt ordinarily the courts should grant the request of the accused to recall/re-summon the witnesses upon the adding/altering of charges, however, the legislature has in its wisdom inserted the second limb in Section 217 (a) as per the recommendation of the Law Commission. The provision is to be used scarcely when the Court comes to the specific conclusion that the request is for the purpose of vexation or delay or defeating the ends of justice. In the present case, we find that the Trial Court has given a specific finding giving valid and cogent reasons for the same and thus, there is no infirmity in its order.

68. To argue at this stage that the Trial Court should have in its wisdom allowed the recall of only the eyewitness (PW-1) and the medical witnesses is also of no effect. As observed by the Full Bench of the Kerala High Court in ***Moosa Abdul Rahiman*** **(Supra) 1982 Crl. L.J. 1384 (FB)** (paragraph 7), it is completely for the prosecution or the defence to decide which witnesses are required by it in view of the altered charge. It is not the obligation of the Court to sift through the request of the party and decide the testimony of which witnesses will have a bearing on the charge. Accordingly, in the present case, the accused had a statutory right to recall/re-summon witnesses, which they chose to utilize in a manner to vex or delay the proceedings; which

request was rightly rejected by the Trial Court. The accused can no longer have any grievance in respect of the relevant witnesses which should have been re-summoned. Additionally, even today, it has not been alleged that some questions were left out or what questions were additionally required to defend from the added charge. Barring the bare allegation that the rejection of the request has prejudiced the defence, nothing is forthcoming as to how prejudice was caused to the accused/appellants. Hence, the contention must be rejected.

EVIDENCE OF THE PROSECUTION

69. We proceed to examine the evidence led by the prosecution.

70. The father of the deceased Teg Bahadur was examined as PW-1 before the Trial Court, who deposed that on 05.05.1998, the deceased was his son and used to work in the shop of Seth Brothers at Tilak Bazar, Delhi. The deceased used to work in the shop during the day and used to sleep there in the night as he was also working as a watchman in the shop. On 01.05.1991, the deceased had come home after finishing his day duty at about 8:15 PM. They had dinner together and watched television. The deceased was hale and hearty. At 9:30 PM, he went to the shop alone for his night duty. On the next day, i.e. 02.05.1991 at about 8:45 AM, PW-1 went to the shop where the deceased used to work with his food. The shop was locked. A *beedi*-cigarette vendor known as Babu, who used to sit infront of the Shop, told him that his son had been taken to Lahori Gate Police Station. As PW-1 did not have the courage to go to the police station alone, he called Idris and went to the police station with him. Idris used to live in the lane behind the shop of Seth Brothers and was known to the deceased and he used

to visit the deceased. Immediately upon entering the police station, one Constable stopped him. He told the Constable that his son had been brought to the police station in the night and the said constable pointed towards another constable telling PW-1 to enquire from him. PW-1 asked the other constable, who informed him that his son/deceased was on the second floor in the second room from the staircase. He further deposed that he along with Idris went to the room, where he found his son, Ram Prasad and a three-wheeler scooter driver sitting on the floor of the room. He learnt that the scooter driver had been brought to the police station along with his son. He deposed that there were five or six police personnel in the room, out of which three were in police uniform and the remaining were in plain clothes. The police personnel present in the room included the appellant Anil Kumar, appellant Sher Singh and one Babu Ram. The appellant Anil Kumar was giving beatings to Ram Prasad while his son was sitting on the floor. The face of his son/deceased was swollen, he was unable to speak and was very terrified. Teg Bahadur (PW-1) enquired from appellant Anil Kumar as to why they had brought his son to the police station; in response, appellant Anil Kumar told him that the deceased used to indulge into womanizing. At this point, the appellant Anil Kumar took the scooter driver into the *verandah* and told him to go after noting his address and instructing him to return at 9 PM. The scooter driver stated that he will be halted at the gate downstairs, when appellant Anil Kumar noted something on his palm and told him to show it to anyone who halts his egress. During this time, PW-1 talked to the deceased and asked him as to why he had been brought to the police station. The deceased informed that he had been forcibly brought to the police station for no

fault of his. The deceased further stated to PW-1 that since the scooter driver had been left, he would also be released and he should not give any money to the police. After that, he enquired from appellant Anil Kumar as to why he had been brought to the police station? Appellant Anil Kumar also told him that his son used to indulge into womanising. The witness defended his son by saying that he was not like that and had his family and children. He asked appellant Anil Kumar to release his son, to which the appellant Anil Kumar demanded Rs.500/- for the release. Since PW-1 did not have the money with him, he told appellant Anil Kumar that he was going to arrange the money. Appellant Anil Kumar also came out of the room and informed that he will not accept anything less than Rs.500/-. While coming out of the room, appellant Anil Kumar told the other policemen sitting in the room to take care of his son and Ram Prasad.

71. PW-1 further deposed that he went to the shop of Seth Brother at about 11 or 11:30 AM. The owner of the shop had not come, however, they met N.K. Kapoor, who was working as a typist in the shop. He told him everything and asked for Rs.300/- as he already had Rs.200/- with him. Mr.Kapoor gave him Rs.300/-. At this point, Idris parted ways and went to his shop. PW-1 then went to the Lahori Gate Police Station and went upstairs. 2 or 3 police persons were present in the room. His son and Ram Prasad were sitting on the floor in the same condition as he had left them. He asked the police persons about appellant Anil Kumar, they told him that appellant Anil Kumar had gone for some work and will come back shortly. PW-1 talked to the deceased and the deceased told him that during the night every policeman, who came to the room, gave him a beating. The witness then came to the *verandah*

and waited for appellant Anil Kumar. Then he came downstairs and waited. Some relatives of Ram Prasad were also waiting outside the police station. Appellant Anil Kumar and the employer of Ram Prasad went upstairs unnoticed by PW-1 owing to his nervousness. A relative of Ram Prasad informed PW-1 that appellant Anil Kumar and the employer had gone upstairs. The witness then proceeded upstairs. Teg Bahadur (PW-1) had also identified the employer of Ram Prasad as the co-convict Narang (since deceased). The deceased and Ram Prasad was sitting in the room in the same condition; Mr.Narang was sitting in the room alongwith two or three other police persons in the room. He informed appellant Anil Kumar that he had brought the Rs.500/- and asked him to take the money and release his son. Inturn, the appellant Anil Kumar asked him as to where he and his son used to work. To which he responded that his son used to work with Seth Brothers and he was working with Mr.M.D. Jethwani, Advocate. Appellant Anil Kumar then told him that he would have to give Rs.5,000/- and only then he will release his son. The witness pleaded his inability saying that he is a poor person and could not pay that much money. PW-1 deposed that he pleaded the appellant Anil Kumar with folded hands, but he did not agree. Appellant Anil Kumar then started beating his son. Appellant Anil Kumar put the head of his son between his knees, rolled up his sleeves and gave fist blows on the back of his son. He then started beating his son with elbows. Appellant also gave slaps and fist blows on the face and temple of the deceased. The witness became terrified and asked appellant Anil Kumar not to beat his son. He also stated that he will arrange the money as quickly as possible.

72. Teg Bahadur (PW-1) continued to depose that he again went to the shop

of Seth Brothers, however, the owner of the shop still had not come. He telephoned M.D.Jetwani, Advocate from the shop. At the time, Mr.Jethwani had left for the Income Tax office. PW-1 again narrated the facts to N.K.Kapoor. Kapoor told him that the owner had not come by that time and he would give the money as soon as the owner comes. He said that he would send the money to the police station. PW-1 immediately went to the police station. He told appellant Anil Kumar that the employers had not come to the shop so far and will come to the police station with the money as soon as they reach the shop. Co-convict Narang (since deceased) was sitting there. He started abusing the deceased angrily. He scolded the deceased for getting his servant Ram Prasad involved in this matter. Co-convict Narang gave fist blows on the face and temple of his son and kicked him with his boot on the chin. Condition of his son became serious and he started bleeding slightly from his injuries on the chin and mouth. Appellant Anil Kumar then said that the deceased was acting and started beating the deceased. Another policeman, who was having a stick, came towards my son and threatened him with a raised stick, but did not hit him. Ram Prasad tried to give water from a mug lying nearby. Appellant Anil Kumar scolded him and told him not to give water to his son saying that he was acting. The condition of his son became worse. Teg Bahadur (PW-1) rushed to save his son, but appellant Anil Kumar and co-convict Narang (since deceased) pushed him outside the room. As he was standing outside the room, he saw his son vomiting blood and falling down on his side. PW-1 rushed inside and saw his son profusely vomiting blood. Appellant Anil Kumar then said that the deceased was dirtying the room and he be taken out of the room. Appellant Anil Kumar and

another uniformed constable caught hold of the deceased from his legs and PW-1 picked him up from the side of the head and brought him out to the *verandah*. At the time, the deceased was unconscious. Someone gave PW-1 some water; he tried to pour the water in the mouth of the deceased, but the water did not go inside. The water spread out with blood. PW-1 then poured the remaining water on the head of the deceased. Teg Bahadur (PW-1) then started shouting and crying for help to save his son.

73. PW-1 further deposed that appellant Anil Kumar then said that the deceased should be taken to the doctor. Again the appellant Anil Kumar and one uniformed constable either of police or Home Guard picked up his son from his legs and PW-1 picked him up from the side of his head and got him downstairs. His clothes were stained with blood. The witness had wiped some blood from his mouth with his handkerchief and threw it there. Appellant Anil Kumar searched for a scooter or rickshaw. He stopped a rickshaw. PW-1 sat in the rickshaw with the head of his son/deceased in his lap. Appellant Anil Kumar and other constable started walking infront of the rickshaw while they followed in the rickshaw. They went to Naya Bans, but could not find the clinic of any doctor open. Appellant Anil Kumar then took them to Farash Khana, but again all the doctors' clinics were closed. Then the appellant took them to Fatehpuri to the shop of one Dr.Arora, but even that was closed. Appellant Anil Kumar then took to them to Haider Kuli, again no doctor was found. There was a compounder or some other person who told them that the condition of the deceased was very serious and he should be taken to the hospital immediately.

74. PW-1 proceeded to depose that appellant Anil Kumar then brought the

rickshaw to Fatehpuri infront of the Bata Shop and took a taxi from the crossing. Teg Bahadur (PW-1) sat on the rear seat with the head of his son in his lap. The appellant Anil Kumar and the other constable sat on the front seat. They took them to Irwin Hospital. While they were going to Irwin Hospital, two police persons were following them on a two wheeler. The taxi was stopped by the appellant Anil Kumar at a distance of 15-20 yards from the Emergency. Appellant Anil Kumar got down and started talking to the two police persons who had come on the scooter and thereafter, went inside the Emergency. After sometime, appellant Anil Kumar came out and told him that he was unable to get the deceased admitted and told him to get his son admitted on his own and tell the doctor that his son had been ill for sometime. PW-1 told the appellant Anil Kumar that his son was unconscious because of the beating given by him and he refused to say that his son was unwell for sometime. The appellant Anil Kumar then took the taxi via Darya Ganj, Old Delhi Railway Station and brought it near Novelty Cinema. Appellant Anil Kumar went inside the lane known as Rang Mahal to search for a doctor; while the other uniformed officer got down to drink water. PW-1 put the head of his son on the seat of the taxi and ran to Dua Sweets, the owner of which was known to him. From there he telephoned his employer Mr.M.D. Jethwani. He told him that the condition of his son/deceased was very serious and asked him to come to Novelty Cinema where their taxi was standing immediately.

75. PW-1 testified that Mr.M.D.Jethwani came there with his assistant within five minutes. On seeing the deceased, Mr.Jethwani told PW-1 that the condition of his son was very serious and he should be taken to the hospital at once. He sent his assistant with him. Thereafter, PW-1,

appellant Anil Kumar and the other constable alongwith the assistant brought the deceased to Stephen's Hospital. His son was admitted to Stephen's Hospital. At the time of admission of the deceased, the hospital demanded Rs.700/-. He called the employers of the deceased and he came and deposited the money in the hospital. His son was immediately taken inside. By the time, the senior police officers had also reached there. The employers of the deceased went to the doctor, who informed him that the condition of his son was very serious. He will have to be operated upon at once and blood will be required for the operation. The employer of the deceased sent their car and arranged the blood. The blood was sent inside. PW-1 kept on waiting outside for his son to gain consciousness. He deposed that the officers who had reached the hospital included appellants Dahiya and Sher Singh and other senior officials told him that appellant Anil Kumar was already in trouble and he should not give any statement against them. The son of PW-1 died on 09.05.1991. These police officers kept on telling him not to give statement till the time his son died. He deposed that his statement recorded on 02.05.1991 (Ex.PW-1/A) was signed by him and written by appellant Sher Singh. It was not read over to him and was got signed from him at night when he was very disturbed. He was made to sign upon this paper by police officers. He did not know the names of the senior officers who were present, but the appellants Dahiya and Sher Singh were also amongst the officers who asked him to sign besides other senior officers. At the time, the owners of the shop of his son N.K.Kapoor, etc. were also present. He clarified that he never gave the statement. On 29.05.1991, his statement was recorded by the SDM (Ex.PW-1/E).

76. Teg Bahadur (PW-1) was thoroughly cross-examined by the counsel for the accused. In his cross-examination, he stated that the deceased had been working with Seth Brothers for 16-17 years and he used to take food for him every morning. He further stated that Mr.Shyam Kumar Sethi, who was the assistant of Mr.Jethwani, had gone to the Stephen's Hospital with them. He stated that Ram Prasad used to sell *paan* etc. opposite to the shop of Seth Brothers in the morning and evening. He denied the suggestion that the deceased had not started vomiting blood after co-convict Narang (since deceased) gave him a beating. Co-convict Narang sat down. Thereafter, appellant Anil Kumar said that his son was acting and gave beatings to his son and his son started vomiting blood after that. He stated that his signatures were obtained on Ex.PW-1/A at about 1:30 or 2 AM and N.K.Kapoor was present at the time. He did not see what was written in Ex.PW-1/A; which was signed at Fatehpuri Police Post where they remained for about half an hour. PW-1 denied suggestion that the statement was given by him to the police. Teg Bahadur (PW-1) stated that on 02.09.1991 [sic: 02.05.1991], he had reached the police station at about 9:30 AM or slightly before that the appellant Sher Singh was not present at the time. He also denied the suggestion that he had falsely implicated appellant Sher Singh at the instance of other police officials.

77. Idris (PW-7) deposed on 07.11.2000 that he is running a radio shop in Sanjay Market, Delhi and knew the deceased for last 2-3 years from 1991 as he was running a shop near his neighbourhood. About 8-10 years back at about 10 PM, the father of the deceased, Teg Bahadur called him outside the shop of the deceased. He said that some police officials of Lahori Gate Police Station had taken his son Jagannath to

police station and that he should accompany him to the police station around 10 AM. One person in civil dress met him outside the gate of the police station; Teg Bahahdur asked him about his son. On this, the person asked Teg Bahadur to go to the 2nd floor upstair in the police station and PW-7 remained standing outside. Teg Bahadur returned after sometime and told him that the officials of PS Lahori Gate are not releasing Jagannath. PW-7 further deposed that thereafter, he returned to his shop and he did not know anything more about the case. The witness was declared to be hostile and cross-examined by the Addl.PP, however, nothing else came forth in his cross-examination.

78. The testimony Shahbuddin (PW-9) was recorded by the Trial Court on 13.03.2001, wherein he deposed that he had known the deceased for 8-10 years prior to the date of the incident. He used to work at Seth Brothers at Tilak Bazar. About 9 years ago at about 11:30 or 12 midnight, PW-9 was returning to his home from Farash Khana. When he reached near Seth Bros, he saw the deceased standing near the gate of his shop and one police official was also standing with him. Upon enquiry, the police official replied that he had to make some interrogation from the deceased, so he is taking the deceased to the police station. The deceased was taken by the police official in a TSR. He did not ask the name of the official and was unable to identify him as much time had elapsed. As the witness was resiling from his previous statement, he was cross-examined by the Addl. PP before the Trial Court, when he affirmed that he had seen the deceased and the police official talking to each other on 01.05.1991. He further affirmed that he had later come to know that the name of the police official was Anil Kumar. Upon the pointing of the appellant Anil Kumar by the

Addl.PP, PW-9 stated that appellant Anil Kumar was the person/constable who was talking to the deceased on that day.

79. HC Gopal (PW-15) deposed that on 02.12.1991, he was posted at Lahori Gate Police Station as record *moharar* and he produced the record, i.e. Daily Diary Register-A for the period 15.04.1991 to 26.05.1991, the Daily Register-B of the police station for the period 30.04.1991 to 19.05.1991, the Log Book of the vehicle DAE 6351 for the period 20.07.1990 to 10.05.1991 and the duty roster for the period 21.04.1991 to 20.07.1991 which was seized vide memo Ex.PW-15/A.

80. Const.Satish Kumar (PW-10) deposed that during May, 1991, he was posted as Constable driver in PS Lahori Gate and was deputed with the SHO, being appellant Dahiya. He further deposed that there was one more driver in the police station besides him, who was also deputed as the driver with the SHO/accused. On 02.05.1991, he was the duty driver with the appellant Dahiya in the police station and had come on duty on the day at about 9 AM. He deposed that he had taken the appellant Dahiya to the DCP office and then to PS Kotwali. They had also gone to Tis Hazari Court on the day, then to Fatey Puri Chowk and then returned to PS Lahori Gate at 3 PM. During the period, the appellant Anil Kumar did not meet them. After dropping appellant Dahiya, he along with operator Maharaj Singh went to the shop of M/s Punjab Tyre Store and came back to the police station at 7 PM. He met the SHO at the gate of the police station. The appellant Dahiya was with one other person and then the operator, PW-10, appellant Dahiya and the other person went to St. Stephen's Hospital. The witnesses was suppressing material facts and hence, was cross-examined by the Addl. PP. He denied the suggestion that on 02.05.1991 at about 3 PM when

he dropped the appellant Dahiya at the gate of PS Lahori Gate, appellant Anil Kumar met him and they started talking to each other.

81. The next prosecution witness is Const. Home Guard Mohan Lal (PW-12), who deposed that in the year 1991, he was posted as constable in Home Guard at PS Lahori Gate and was on duty on 02.05.1991 from 6 AM to 2 PM. He deposed that he was not given any instruction by any officer of the Police Station on the day and refused to recollect/know anything about the case relating to the deceased. As he was suppressing material facts, he was cross-examined by the Addl.PP before the Trial Court. PW-12 completely contradicted his previous statement (Ex.PW-12/A). He denied that he did not state to the Police in his statement that on 02.05.1991, HC Ranbir Singh, Duty Officer had entrusted to him the key of handcuffs; and had told him to go upstair in the room of appellant Sher Singh where three persons in handcuffs were sitting; and had further asked him to release the said persons and open their handcuffs so that they might answer the call of nature and that he was also asked by the duty officer to remain in the room to guard those persons or that all these three persons were sitting in the room of appellant SI Sher Singh. He was confronted with Ex.PW-12/A where it was so recorded. PW-12 further denied the suggestion that he had stated in his statement that all the three said persons were sitting in handcuffs and their handcuffs were tied with a cot and appellant Sher Singh was sitting on that cot, or that appellant Sher Singh was sitting on the cot at about 6:15 AM, or that thereafter, appellant Sher Singh had gone to the room of appellant Dahiya. Again, the witness was confronted with Ex.PW-12/A to no avail.

82. M.D.Jethwai (PW-3) deposed that he is a practising lawyer and Teg

Bahadur was working as a peon in his office since 1985. The deceased was the son of Teg Bahadur and was known to the witness since childhood. The deceased was working with one of his client's M/s Seth Brothers. On 02.05.1991, Teg Bahadur rang PW-3 saying that his son was lying unconscious in a taxi brought by one Anil Kumar. He then reached Novelty Cinema alongwith his junior advocate Shyam Kumar Sethi. He saw Teg Bahadur and his son the deceased lying unconscious in a taxi. He identified the appellant Anil Kumar as one who was present there alongwith one Home Guard. On seeing the deceased lying unconscious, he asked his junior Shyam Kumar Sethi to take the deceased and accompany him to St.Stephens Hospital. They went in the same taxi in which the deceased was lying unconscious. The witness was cross-examined by the counsel for appellant Anil Kumar, however, his testimony could not be impeached.

83. The clerk working in M/s Seth Brothers Perfumers Pvt. Ltd., i.e. Naresh Kapoor, was examined as PW-4, who deposed that he knew the deceased, who was working as in the same company as a *chowkidar*-cum-packer, etc. He used to live and stay in the company and sleep there in the office of the company. On 02.05.1991, PW-4 had come to the office of the company in Tilak Bazar, the deceased had not come on that day. The father of the deceased, Teg Bahadur came to him in the office on that day and told that his son Jagannath had been taken away by the police and the police was demanding Rs.500/- from him, for the release of his son. Teg Bahadur demanded Rs.300/- from him and he gave the said sum. Teg Bahadur left with the money. On the same day, Teg Bahadur came to him in the office and told him that the police was demanding Rs.5,000/- from him for the release of his son. He told him

that the owner of the company was not present and that he did not have that much amount with him. He told him to talk to Mr.Seth, owner of the company, when he would come and then Teg Bahadur went away. He further deposed that in the evening, he was informed by Mr.Seth that he had received telephonic information that the deceased was admitted in St.Stephens Hospital. Then, PW-4 alongwith Vinod Seth and Prem Seth went to St.Stephens Hospital. Vinod Seth deposited the medical expenses in the hospital. Prem Singh and PW-4 went to take blood as asked from Rohtak Blood Bank and handed over the same after bringing the blood. The deceased was operated upon for head injury. The statement of Teg Bahadur was recorded by the police in his presence and the same is Ex.PW-1/A.

84. Vinod Seth (PW-5) deposed that he is the director of M/s Seth Brothers Perfumers Pvt. Ltd. The deceased was employed in their firm and was working for long. He was working as a packer and *chowkidar*. On 02.05.1991 at about 5:30 PM, PW-5 came back from the factory to the office. At about 6:30 PM, he received a telephonic message from MD Jethwani, advocate, his tax consultant that their employee namely Jagannath is admitted in St.Stephen's Hospital and he should see him. PW-5 and Naresh, another employee, went to the Hospital alongwith the uncle of PW-5. The doctor told them to arrange blood for the operation of the deceased. He sent Naresh Kapoor for the blood and returned from the Hospital. He also deposed that some police personnel were also present in the hospital.

85. We may also notice that the MLC (Ex.PW-26/A) was made by Dr.K.V.Sharma (PW-26) wherein the names of Teg Bahadur (misspelled as Tek Bahadur), appellant Anil Kumar, Ram Gopal (Home

Guard) and Shyam Kumar Sethi figure as the persons who had brought the deceased. The time of arrival had been recorded at 5:15 PM on 02.05.1991 from Lahori Gate Police Station with the history of convulsions. In his cross-examination by the defence, PW-26 had stated that he did not observe an external injuries on the body of the deceased. This document is a patently a false document and belied by the testimony of the prosecution witnesses and the subsequent postmortem conducted. All that can be drawn by such a record is the names of the persons who had brought the deceased, which included the appellant Anil Kumar.

MEDICAL EVIDENCE

86. The deceased succumbed to his injuries on 10.05.1991. Dr.Bharat Singh (PW-20) and Dr.Anil Kumar (PW-21) had proved the postmortem report (Ex.PW-20/A). As per the testimony of PW-20, the following injuries were found on the body of the deceased:

> "*On examination we found the following injury on the body of the deceased:*
> 1. *stitch surgical wound 10 cm ling vertically placed over the left fronto parietal region.*
> *The wound shows sign of healing.*
> 2. *Scabbed abrasion 9 X 2 cms. over the left (L) fronto povital region arounf* [sic: around] *injury No.1.*
> 3. *Brownish blue bruise 4 X 4 cms. over the middle of forehead.*
> 4. *Brownish blue bruise 10 X 7 cms. over the neck just behind the (R) ear.*
> 5. *Brownish blue bruise 2 X 1 cm over (R) side of nose.*
> 6. *Brownish blue bruise 1.5 X 0.5 cms. over (l) side of Chin.*
> 7. *Brownish blue bruise 3 X 3 cms over the inner side of right knee.*
> 8. *Scabbed abrasion 0.5 X 0.5 cms over the inner side of right knee.*

9. *Brownish blue bruise 7 X 3 cms over middorsal aspect of right foot.*
10. *Scabbed abrasion 1.5 X 0.5 cms. just behind right media malleous* [sic: medial malleolus].
11. *Brownish blue bruise 1 X 0.7 cms over the inner part of base of thumb of R foot.*
12. *Brownish blue bruise 5 X 4 cms. over the R heel with necrosis of tissue over it.*
13. *Brownish blue bruise 5 X 4 cms. over the outer aspect of Left heel with necrosis of tissues over it.*
14. *Brownish blue bruise 1.5 cms. in diameter over the lathel malleous* [sic: lateral malleolus] *on left side.*
15. *Multiple small scabbed abrasions in an area of 13 X 7 cms. left side back of chest.*
16. *Scabbed abrasion 3 X 0.5 cms. over Right side middle back of chest.*"

87. PW-20 further deposed that all these injuries were not mentioned in the MLC No.119/91 of St.Stephen's Hospital made on 02.05.1991. Injuries no. 3 to 9, 11 and 14 were deep in character and on dissection showed more bruising in the deeper tissues as compared to superficial tissues. Injuries no. 2, 8, 10, 15 and 16 showed a hard scab. The hard scalp showed a fusion of flood underneath the left front prital region of the scalp, more so under and around injury no.6. He further opined that the cause of death was as a result of cerebral damage consequent to injury no.2. Injury no.1 had been caused by surgical intervention while injuries no. 2 to 16 have been caused by blunt force. All these injuries were *ante mortem* in nature about 8 days before the preparation of the report. Injury no.2 alongwith corresponding injury to brain were sufficient to cause death in ordinary course of nature.

88. Dr.Bharat Singh (PW-20) was cross-examined by the counsel for the co-convict Manohar Lal Narang (since deceased), wherein he answered two questions, which we extract in their entirety below:

"*Q:* *In your report injury No.2 could not be caused by hitting with tools.*

Ans: *If we look injury No.2 with its internal impact then the likelihood of this injury being cause with hitting with shoes is unlikely.*

Q.2. *Can injury No.2 be caused by hitting against a wall or falling on hard substance?*

Ans *This is possible. If the injured is hit by striking against the wall or falling on hard substance violantly/forced* [sic: violently/forced]."

89. Prior to dealing with the submissions of the counsel for the parties, we deem it appropriate to summarized them *in seriatim*. Mr.Mathur, learned senior counsel for appellant Dahiya submitted that:

(i) There is not even a whisper of evidence against the appellant Dahiya as even PW-1 has not ascribed any role to him;

(ii) Neither appellant Dahiya was present in the police station at the relevant time nor the matter was reported to him;

(iii) In the absence of sharing any common intention with the other accused, the appellant Dahiya could not have been convicted with the aid of Section 34 IPC merely owing to his omission; and

(iv) The sharing of common intention was not put to the appellant during his examination under Section 313 Cr.P.C. and hence, the circumstance cannot be used against him.

90. Mr.Krishan, learned senior counsel for the appellant Sher Singh, had contended as under:

(i) The appellant Sher Singh could not have been convicted under Section 34 IPC in the absence of any meeting of minds or overt act on his part;

(ii) The presence of the appellant Sher Singh at the time of the incident has not been established;

(iii) No question regarding the meeting of minds or beatings by the appellant were put to the appellant Sher Singh in his examination under Section 313 Cr.P.C.;

(iv) Mere sharing the room where the deceased was kept would not be sufficient to convict the appellant Sher Singh;

(v) Recording of statement of Teg Bahadur (Ex.PW-1/A) cannot be taken as an incriminating circumstance as the same was recorded in the presence of PW-4; and

(vi) Appellant Sher Singh cannot be convicted with the aid of Section 106 of the Evidence Act until his presence is established.

91. Learned senior counsel Mr.R.N. Mittal for the appellant Anil Kumar submitted as under:

(i) The testimony of Teg Bahadur (PW-1) is unreliable;

(ii) It has not been proved that the deceased was ever taken to the police station;

(iii) The prosecution is guilty of withholding necessary and crucial witnesses as Ram Prasad and the three-wheeler driver, who allegedly had been brought along with the deceased to the police station, have not been produced;

(iv) The fatal blow [Injury No.2 in the postmortem report (Ex.PW-20/A)] can be attributed to co-convict Narang and in the absence of meeting of minds, the appellant Anil Kumar could not have been convicted under Section 302;

(v) In the absence of any intention to cause death and the nature of injuries being simple, only a case under Section 304 Part II IPC was made out; and

(vi) The present case would be covered under Exception 3 to Section

300 and hence, the appellant Anil Kumar could not have been convicted for murder.

92. Ms.Tiwari, learned APP for the State, submitted that:

(i) The presence of the appellants Anil Kumar and Sher Singh was established in the room in which the deceased was kept;

(ii) The guilt of the appellants is also patent from the failure on their part to provide proper medical attention to the deceased as till the end, they tried to save their own skin;

(iii) It is against appellant Dahiya that he was the SHO of the police station and the testimony of PW-10 would show his presence and hence, it is not possible for anything to continue for so long without his consent and connivance; and

(iv) The presence of appellant Sher Singh coupled with omission on his part to intervene in the matter clearly shows the meeting of minds with his co-accused; and

(v) The cases pertaining to custodial violence and deaths are to be treated at a different footing.

93. Appreciation of evidence in a case involving custodial violence or death is never an easy task. The courts are posed with numerous false evidences and hostile witnesses. It is often hard to find eyewitnesses as the offence is committed behind the closed doors of the police station and as in the present scenario, the public is largely ignorant of the activities behind the doors. The police witnesses often stay true to their brethren than the truth. They even resort to making false records and entries. Where there are public witnesses, they face the hardships in deposing against the *khakhi* colour and may be dissuaded from coming forward. The investigation is also undertaken by other police officials,

whose interests lie in shielding the protectors and obscuring the truth leading to faulty investigations. A simple example would be the fact that despite the deceased stating that every police personnel coming in the room had assaulted him, no attempt was made to identify them. As a necessity, the courts have held that in such cases, the benefit of faulty investigations should not go to the accused. Accordingly, while analysing evidence, the courts must not be ignorant of these ground realities in dealing with such cases and only proceed in such a manner.

94. Such difficulties were highlighted in ***Gauri Shankar Sharma*** **(Supra)** wherein the Apex Court overturned the finding of acquittal by the High Court and restored the conviction recorded by the Trial Court as the entries relied upon by the High Court to exclude the presence of the appellant no.1 therein were found to the false as belied by ocular evidence. In this background, it was observed as under:

> "*15. ...The High Court should have realised that cases are not unknown where police officers have given inaccurate accounts to secure a conviction or to help out a colleague from a tight situation of his creation. The High Court should also have realised that it is generally difficult in cases of deaths in police custody to secure evidence against the policemen responsible for resorting to third degree methods since they are in charge of police station records which they do not find difficult to manipulate as in this case. It is only in a few cases, such as the present one, that some direct evidence is available. In our view the reasons assigned by the High Court are too weak to stand judicial scrutiny.*
>
> *...*
>
> *17. For the above reasons we dismiss Appeal No. 111 of 1979 preferred by A-3 as we are satisfied that his conviction is correctly recorded. We allow the State's Appeal No. 477 of 1979 and restore the conviction of A-1 recorded by the trial court by setting aside his acquittal by the High Court. On the question of sentence a fervent appeal was made by his*

counsel that having regard to the passage of time and the changed circumstances A-1 should not be sent to jail and the sentence of fine should suffice. We are unable to accede to this request. The offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency. We, therefore, do not think we would be justified in reducing the punishment imposed by the trial court."

(Emphasis Supplied)

95. The facts of ***Shyamsunder Trivedi*** **(Supra)** tell an interesting tale wherein what was described as 'uncivilized method of interrogation' had taken another toll on one Nathu Banjara; who was brought to the police station Rampura for interrogation in a murder case. During the course of interrogation, Nathu died and as the postmortem showed after sustaining multiple contusions over his body. The information of the death of the poor Nathu leaked and the members of the Bar of Rampura kept a watch over the police station. The dead body was then removed in a jeep by the respondents therein with the ultimate object of cremating it as a *lavaris*. Numerous false entries (*roznamcha* and *pachnamas*) were created by respondent no.1 therein/Sub-Inspector to shield the perpetrators of the crime. The Trial Court had acquitted all the accused, while the High Court had only convicted the SI under Sections 218, 201 and 342 IPC. The State preferred an appeal to the Apex Court, which found the approach of the High Court showing lack of sensitivity, clinging to exaggerated adherence to the establishment of

proof beyond reasonable doubt and in ignorance of the ground realities. The Supreme Court found that the circumstances of Nathu being brought to the police station, his death as a result of extensive injuries, the presence of the respondents and their participation in the disposal of the body and the creation of false documentary evidence had been proved and convicted the officers/respondents under Sections 304 Part II/34 IPC and Sections 201 and 342 IPC as well as upheld the conviction recorded of the SI by the High Court. In respect of trial in a case of custodial death, the Supreme Court observed as under:

> "*17. The High Court erroneously overlooked the ground reality that rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available, when it observed that 'direct' evidence about the complicity of these respondents was not available. Generally speaking, it would be police officials alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues, and the present case is an apt illustration, as to how one after the other police witnesses feigned ignorance about the whole matter.*
>
> *18. From our independent analysis of the materials on the record, we are satisfied that Respondents 1 and 3 to 5 were definitely present at the police station and were directly or indirectly involved in the torture of Nathu Banjara and his subsequent death while in the police custody as also in making attempts to screen the offence to enable the guilty to escape punishment. The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a "could not care less" attitude in appreciating the evidence on the record and thereby condoning the barbarous third degree methods which are still being used at some police stations, despite being illegal. The exaggerated adherence to and insistence upon the*

establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in 'Khaki' to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards perishing. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may lose faith in the judiciary itself, which will be a sad day.

19. ... The courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the majesty of law has prevailed."

(Emphasis Supplied)

[See ***Shakila Abdul Gafar Khan* v. *Vasant Raghunath Dhoble,* (2003)**

7 SCC 749 (paragraphs 6-7)]

96. The Supreme Court in ***Sahadevan alias Sagadevan*** **(Supra)** upheld the conviction of the in-charge of the police station and the SI finding the circumstances that Vadivelu/deceased was brought to the police station in interrogation of a double murder and was assaulted by the appellants and ultimately found dead after a search directed by the Madras High Court in a *habeas corpus* petition filed by the family of Vadivelu and that Vadivelu was last seen with the appellants. The records were tampered and a false story concocted about Vadivelu escaping from the police station. We may notice two contentions which were raised by the appellants: *first*, that there were inconsistencies in the evidence of the prosecution case and *second*, that no motive was attributed to the appellants. In respect of the first, the Court found that the case had a chequered career because of involvement of police officers and found some material witnesses had turned hostile and others had tried to help the defence to the best possible extent, however, it observed that "*it has become the duty of the courts below to find out the truth as to the prosecution case*" and relying upon ***Ram Bihari Yadav*** **v.** ***State of Bihar,*** **(1998) 4 SCC 517** observed that "[*i*]*n a situation like this ... the benefit of an act or omission of the investigating agency, should not go to the accused in the interest of justice*." As regards the second contention, the Apex Court held that the absence of motive does not hamper a conviction when circumstances proved the guilt of the accused.

97. Observations similar to ***Shyamsunder Trivedi*** **(Supra)** were made by the Apex Court in ***Munshi Singh Gautam*** **(Supra)**; wherein while dismissing the appeal of one of the officers from Police Station

Shahjahanabad, Bhopal against his conviction by the Trial Court and dismissal of appeal by High Court, the Supreme Court observed as under:

> "*6. Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues — and the present case is an apt illustration — as to how one after the other police witnesses feigned ignorance about the whole matter.*
>
> *7. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice-delivery system suspect and vulnerable. In the ultimate analysis society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach at times of the courts as well, because it reinforces the belief in the mind of the police that no harm would come to them if one prisoner dies in the lock-up because there would hardly be any evidence available to the prosecution to directly implicate them in the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crime in a civilised society governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in "khaki" to consider themselves to be above the law and sometimes even to become a law unto themselves. Unless stern measures are*

taken to check the malady of the very fence eating the crop, the foundations of the criminal justice-delivery system would be shaken and civilisation itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with.

8. ... The courts are also required to have a change in their outlook, approach, appreciation and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the truth is found and the guilty should not escape so that the victim of the crime has the satisfaction, and that ultimately the majesty of law has prevailed."

(Emphasis Supplied)

98. In ***State* v. *R.P. Tyagi*, 153 (2008) DLT 693**, a coordinate bench of this Court was faced with a situation where one Mahender, whose accomplice was suspected to have stabbed a police official, was kept in jail and beaten to death by the officials of police station Vivek Vihar. The Bench upheld the order of guilt, but modified the conviction from Section 302 IPC to Section 304 Part II IPC, holding as under:

"*31. ...The courts must not lose sight of the fact that death in police custody is perhaps the worst kind of crime in a civilized society governed by the law. Torture in police custody flouts the basic rights of the citizens as recognized by the Constitution of India and is against the basic principles of human dignity of life and liberty of an individual as envisaged in the Preamble to the Constitution. The men in uniform should not consider themselves to be above the law and sometimes even to become law unto themselves. In cases of the police tortures and excesses, stern measures are*

required to be taken so that common man may not lose faith in the law enforcement machinery and the foundations of the criminal justice delivery system is further strengthened. Nothing is so dehumanizing as the conduct of the police officer in inflicting torture of any kind on a person in their custody. The courts are also required to adopt a more deterrent stance, particularly in cases involving custodial torture and death."

(Emphasis Supplied)

99. The accused/appellant/SHO before this Court preferred an appeal to the Supreme Court, which dismissed the appeal while modifying the sentence vide its decision reported as ***R.P. Tyagi* v. *State (Govt. of NCT of Delhi),* (2009) 17 SCC 445** (paragraph 11). While doing so, the Apex Court highlighted that delay in disposal of criminal case leads to destruction of the prosecution leading to even the relatives of the victims turning hostile leading the courts to stretch the evidence to arrive at a conclusion of guilt.

100. This Court in ***Ranbir Singh* (Supra)** was dealing with an appeal by the State against an order of acquittal recorded by the Trial Court. One, Dayal Singh had succumbed to the third degree measures of extracting confession by the police in an investigation into a case pertaining to theft in the house of his ex-employer. The prosecution was able to prove that the deceased had no injuries when he was picked up by the police and it was during the time when he was in custody with the police that he suffered fatal injuries leading to his death. In this background, it was held that it was upon the defence/respondent to show how and from where such injuries were caused. Ultimately, bench set-aside the order of acquittal and convicted the appellant under Section 304 Part I IPC. The relevant portion of the judgment reads as

under:

> "*28. The respondent has admitted that the deceased was throughout in his custody. The deceased was without injuries when his custody was taken over by the respondent. Injuries on the dead body of the deceased have been found in the post mortem report, which has been proved by PW-19/Dr. R.K. Sharma. It was thus for the respondent to explain how so many injuries could have been caused, details of which have been set out in para 18 above.*
>
> *...*
>
> *34. In our considered view, once the deceased was without physical injuries, his health condition albeit not very strong, was known to the respondent and the respondent had been asked specifically to be careful, the various injuries appearing on the body including head injuries at the time of post mortem clearly point out towards only one fact alone i.e. the deceased was subjected to third degree treatment during interrogation, causing considerable physical injuries on his body which he could not withstand and died as a consequence of injuries, more specifically the head injury. The respondent has not been able to show as to how and from where such injuries could have been caused and the story of the head being struck, with an iron rod in the jeep is completely belied apart from the fact that it does not explain the other injuries. PW-12/Kamta Pandey has deposed that there was no rod or pipe with which head of the passenger could strike nor was any such brakes applied by which the head could have struck anything causing the injury. The respondent in his statement under Section 313 of Cr.P.C. has, in fact, stated that the deceased died because of his illness.*"
>
> (Emphasis Supplied)

101. We may also notice that an appeal was preferred to the Supreme Court, being Crl. A. 1146/2010, which was abated on 22.01.2013 on the death of the appellant.

102. In ***Prithipal Singh*** **(Supra)** relied upon by Mr.Krishnan, the Apex Court was facing an appeal from an order of the High Court upholding

the conviction of the appellants for causing the custodial death of one Jaswant Singh Khalra, a human rights activist exposing the misdeeds of the police killing innocent people. The Trial Court and the High Court had, *inter alia*, convicted the appellant DSP and ASI under Section 302/34 and sentenced to life imprisonment; the Apex Court upheld the conviction observed as under:

> "*86. Police atrocities are always violative of the constitutional mandate, particularly, Article 21 (protection of life and personal liberty) and Article 22 (person arrested must be informed the grounds of detention and produced before the Magistrate within 24 hours). Such provisions ensure that arbitrary arrest and detention are not made. Tolerance of police atrocities, as in the instant case, would amount to acceptance of systematic subversion and erosion of the rule of law. Therefore, illegal regime has to be glossed over with impunity, considering such cases of grave magnitude.*"

103. On the other side of the spectrum, is the judgment of the Apex Court in ***Sadashio Mundaji Bhalerao* (Supra)**, wherein the High Court had set-aside the acquittal recorded by the Trial Court and convicted the appellants. The division bench found that the testimonies of the prime prosecution witnesses, i.e. other detainees, being unreliable in view of the previous antecedents and the manner in which they had described the incident. In this background, the Court found that the only incriminating circumstance of last seen was insufficient to pin the guilt on the accused, while observing as under:

> "*30. It is true that the deceased was last seen in the custody of the police and thereafter he was not found alive. Though the police has made an attempt to cover up the story by registering a case under Section 224 IPC but that was closed shortly thereafter. Therefore, in this background to draw inference from these circumstances, the guilt of the accused*

about is very difficult.

31. We are conscious that there is a rise in incidents of custodial deaths but we cannot completely dehors the evidence and its admissibility according to law convict the accused. We cannot act on presumption merely on a strong suspicion or assumption and presumption. We can only draw presumption which is permissible under the law and we cannot rush to the conclusion just because the deceased has died in the police custody without there being any proper link with the commission of the crime.

32. Learned Senior Counsel for the State, Mr Shekhar Naphade very fairly submitted that despite the strong loopholes in the prosecution case the strongest circumstance which stands against the appellants is that the deceased was in the custody of the police and that he was last seen alive in the custody of the police. Thereafter, he was not seen alive. Therefore, presumption should be drawn of the guilt of the accused. Commission of crime with reference to this type of presumption is perverse. It is true that the accused involved are police personnel but we cannot stand to condemn the whole police station just on the basis of only circumstantial evidence of the deceased last seen in the custody of the police and thereafter he was not reported alive."

(Emphasis Supplied)

104. There have also been calls for legislative changes in the field. The National Police Commission in its 4th Report in the year 1980 noticed the prevalence of custodial torture etc. and observed that nothing is so dehumanising as the conduct of police in practising torture of any kind on a person in their custody. The Commission noticed with regret that the police image in the estimation of the public has badly suffered on account of the prevalence of this practice in varying degrees over the past several years and noted with concern the inclination of even some of the supervisory ranks in the police hierarchy to countenance this practice in a bid to achieve quick results by short-cut methods.

105. Thereafter, the Apex Court in ***State of U.P.* v. *Ram Sagar Yadav*, (1985) 1 SCC 552** (paragraph 20) highlighted the need to look into the law with regard to the burden of proof as in cases of violence in the custody of the police, there are only police witnesses who choose to remain silent, which results in "*persons, on whom atrocities are perpetrated by the police in the sanctum sanctorum of the police station, ...*[being] *left without any evidence to prove who the offenders are.*" Then the Law Commission of India *suo moto* took up the subject on its own and in its 113th Report titled '*Injuries in Police Custody*' recommended the insertion of the following provision in the Evidence Act:

> "*114B. (1) In a prosecution (of a police officer) for an offence constituted by an act alleged to have caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the court may presume that the injury was caused by the police officer having custody of that person during that period.*
> *(2) The court, in deciding whether or not it should draw a presumption under sub-section (1), shall have regard to all the relevant circumstances, including, in particular (a) the period of custody, (b) any statement made by the victim as to how the injuries were received, being a statement admissible in evidence, (c) the evidence of any medical practitioner who might have examined the victim, and (d) evidence of any magistrate who might have recorded the victim's statement of attempted to record it.*"

106. The Law Commissioner in its 152nd Report relating to custodial crimes while reiterating the recommendation of inclusion of Section 114B in the Evidence Act, further recommended legislative changes penalizing the refusal of officers recording information regarding cognizable offence and also recommended the formation of an alternative judicial

authority empowered to conduct preliminary inquiry. It further noticed that Section 27 of the Evidence Act, by its very existence, has created an impression or an urge to resort to means not desirable or legitimate and recommended its repeal or its suitable amendment. Similar recommendations have been made in the 185th Report. Despite the recommendation and the difficulties repeatedly highlighted by the Courts, the legislature is yet to rise from its slumber and take note of the same.

107. Accordingly, we proceed to analyse the contentions raised by the learned counsel for the parties.

IMPROPER EXAMINATION UNDER SECTION 313

108. Mr.Krishnan and Mr.Mathur have submitted that appellants Dahiya and Sher Singh were not put any question regarding sharing of a common intention or meeting of minds during their examination under Section 313 Cr.P.C. and thus, the circumstance cannot be used against them. We find no force in the submission as it is settled law that mere non-examination does not vitiate the trial, the *onus* is upon the accused to show that he has been materially prejudiced by such non-examination.

109. A division bench of the Apex Court in ***Bijjoy Chand Potra* v. *The State,* AIR 1952 SC 105** had in the context of Section 342 of the Code of Criminal Procedure, 1898 had observed as under:

> "*10. The last contention put forward by the learned counsel for the appellant was that he was not examined as required by law under section 342 of the Criminal Procedure Code. It appears that three questions were put to the appellant by the Sessions Judge after the conclusion of the prosecution evidence. In the first question, the Sessions Judge asked the appellant what his defence was as to the evidence adduced against him; in the second question, the Judge referred to the*

> *dispute about the pathway and asked the appellant whether he had inflicted injuries on Kumad Patra and in the third question, the appellant was asked whether he would adduce any evidence. The facts of the case being free from any complications and the points in issue being simple, we find it difficult to hold that the examination of the appellant in this particular case was not adequate. To sustain such an argument as has been put forward, it is not sufficient for the accused merely to show that he has not been fully examined as required by section 342 of the Criminal Procedure Code, but he must also show that such examination has materially prejudiced him. ...*"
>
> (Emphasis Supplied)

[Also see ***Ajmer Singh* v. *The State of Punjab*, AIR 1953 SC 76** (paragraphs 9 and 10); and ***Ram Shankar Singh and Ors.* v. *State of West Bengal*, AIR 1962 SC 1239** (paragraphs 15 and 16)].

110. The position of law remains the same under the new Code [***Basavaraj R. Patil* v. *State of Karnataka*, (2000) 8 SCC 740**]. In ***Suresh Chandra Bahri* v. *State of Bihar***, **1995 Supp (1) SCC 80**, the appellants were held guilty for the triple murder of the wife and children of one of the appellants themselves. Both the Trial Court and the High Court had recorded an order of conviction whilst relying upon the incriminating circumstance of strong motive, i.e. the plan of the deceased to sale of her property and shift to America. On appeal to the Supreme Court, it was contended that the circumstance of motive was not put under Section 313 Cr.P.C.; which was rejected, while observing as under:

> "*26. Learned senior counsel Shri Sushil Kumar appearing for the appellant Raj Pal Sharma submitted that in view of the fact that no question relating to motive having been put to the appellants on the point of motive under Section 313 of the CrPC, no motive for the commission of the crime can be attributed to the appellants nor the same can be reckoned as*

circumstance against the appellants. It is no doubt true that the underlying object behind Section 313. Cr. P.C. is to enable the accused to explain any circumstance appearing against him in the evidence and this object is based on the maxim audi alteram partem which is one of the principles of natural justice. It has always been regarded unfair to rely upon any incriminating circumstance without affording the accused an opportunity of explaining the said incriminating circumstance. The provisions in Section 313, therefore, make it obligatory on the Court to question the accused on the evidence and circumstance appearing against him so as to apprise him the exact case which he is required to meet. But it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance but he must also show that such non-examination has actually and materially prejudiced him and has resulted in failure of justice. In other words in the event of any inadvertent omission on the part of the Court to question the accused on any incriminating circumstance appearing against him the same cannot ipso facto vitiate the trial unless it is shown that same prejudice was caused to him. In Bijoy Chandra v. State of West Bengal (1952) Criminal Law Journal 644 SC this Court took the view that it is not sufficient for the accused merely to show that he has not been fully examined as required by Section 342 of the Criminal Procedure Code (now Section 313 in the new Code) but he must also show that such examination has materially prejudiced him. The same view was again reiterated by this Court in Rama Shankar v. State of West Bengal AIR1962SC1239 In the present case before us it may be noted that no such point was raised and no such objection seems to have been advanced either before the Trial Court or the High Court and it is being raised for the first time before this Court which appears to us to be an after thought. Secondly, learned Counsel appearing for the appellants was unable to place before us as to what in fact was the real prejudice cause to the appellants by omission to question the accused/appellant Suresh Bahri on the point of his motive for the crime. No material was also placed before us to show as to what and in what manner the prejudice, if any, was caused

to the appellants or any of them.

27. Apart from what has been stated above, it may be pointed out that it cannot be said that the appellants were totally unaware of the substance of the accusation against them with regard to the motive part. In this regard a reference may be made to question Nos. 5, 6 and 7 which were put to the appellant Suresh Bahri in the course of his statement recorded under Section 313, Cr. P.C. The sum and substance of these questions is that from the prosecution evidence it turns out that the acquitted accused Y.D. Arya, the maternal uncle of the appellant. Suresh Bahri was living in a portion of the upper storey of his house at Delhi. He with the consent of Santosh Bahri, the mother of Suresh Bahri, was interfering in the family affairs as well as in business matters by reason of which the maternal uncle had to leave the house and that having regard to the future of her children Urshia Bahri not only wanted to manage the property but also to dispose of the same which was not liked by Suresh Bahri and with a view to remove Urshia Bahri from his way the appellant Suresh Bahri wanted to commit her murder. In view of these questions and examination of Suresh Bahri, it cannot be said that he was totally unaware of the substance of the accusation and charge against him or that he was not examined on the question of motive at all. In the facts and circumstances discussed above it cannot be said that any prejudice was caused to the appellant. The contention of the learned Counsel for the appellants in this behalf therefore has no merit."

(Emphasis Supplied)

111. A division bench of the Allahabad High Court in ***Mirza* v. *State of Uttar Pradesh,* 1996 Cr.LJ 472: 1996 (94) ALJ 258** had found that merely the failure to put the incriminating circumstance to the appellants regarding formulation of an unlawful assembly did not vitiate the trial as the accused persons had not been prejudiced on account of omission to put the question.

112. At the same time, it has been consistently held by the Apex Court,

including in ***Sharad Birdhichand Sarda*** **(Supra)** and ***Ajay Singh*** **(Supra)**, that in cases based on circumstantial evidence, each and every incriminating circumstance must be put to the accused.

113. The rationale of Section 313 is based in *audi alterum partem*, i.e. no one can be condemned unheard. This is of utmost significance in criminal trials as the life and liberty of the accused remains at stake. Thus, all the incriminating circumstances should be put to the accused in a manner for him to understand and enable him to put forth his case. At the same time, any lapse on the part of the courts to put a specific question does not *ipso facto* vitiate the trial. It remains incumbent upon the accused to show that he was prejudiced on account of such non-examination.

114. In the present case, both the appellants Sher Singh and Dahiya were extensively examined under Section 313 Cr.P.C. about the whole incident, from the bringing of the deceased to the police station, the beatings administered to his eventual removal to the hospital and his death. It is clear that each and every circumstance was put to the appellants and they repeated pleaded ignorance or denied their presence. There cannot be any doubt in their minds of the circumstances appearing against them. Now, common intention, as distinguished from motive, is something which is inferred from the surrounding circumstances and not an independent incriminating circumstance in itself.

115. Even otherwise, learned senior counsel have only pointed to the absence of such a question and have not alleged that the appellants/accused suffered prejudice owing to the lapse, if we may call it so. In our opinion, no prejudice has occasioned as when the

appellants were only giving bland denials and had pleaded ignorance to the whole incident, nothing different could have come in such a question. Learned senior counsel have also failed to point out anything. Accordingly, this contention of the learned counsel for appellants Dahiya and Sher Singh must be rejected as the appellants/accused were given ample of opportunity to explain the evidence against them and thus, proper homage had been paid to the principles of natural justice.

RELIABILITY OF TEG BAHADUR

116. It is rare to find an eyewitness account to the incident of a case of custodial death as the offence is committed inside the *sanctum sanctorum* of the accused and the only witnesses are the brethren of the accused, who often choose to remain true to their colour. However, in the present case, an eyewitness account of Teg Bahadur (PW-1), the father of the deceased who saw the condition of his son first hand, is available. Expectedly, learned senior counsel for the appellants have left no stone unturned to impeach the veracity of his testimony.

117. It has been contended before us that PW-1 is a interested witness as he is the father of the deceased. Such specious contentions have been rejected as far back as 1953 by a Full Bench of the Apex Court in ***Dalip Singh* v. *State of Punjab*, AIR 1953 SC 364**, wherein it was observed as under:

> "*27. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that here is a tendency to drag in*

an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

28. This is not to say that in a given case a Judge for reasons special to that case and to that witness cannot say that he is not prepared to believe the witness because of his general unreliability, or for other reasons, unless he is corroborated. Of course, that can be done. But the basis for such a conclusion must rest on facts special to the particular instance and cannot be grounded on a supposedly general rule of prudence enjoined by law as in the case of accomplices."

(Emphasis Supplied)

118. Similarly in ***State of U.P.* v. *Kishanpal*, (2008) 16 SCC 73**, the Apex Court repelled the contention that the witnesses relied upon by the High Court to convict the accused were 'interested witnesses' as they were close relatives of the deceased and observed:

"*8. As observed earlier, though the High Court accepted the testimony of PWs 1, 5, 7 and 9 while confirming the conviction and sentences of Onkar Singh has not given due credence to their testimonies in respect of other accused. This Court has repeatedly held that if the testimony of prosecution witnesses was cogent, reliable and confidence inspiring, it cannot be discarded merely on the ground that the witness happened to be relative of the deceased. The plea "interested witness" "related witness" has been succinctly explained by this Court in State of Rajasthan v. Smt. Kalki and Anr. 1981CriLJ1012 . The following conclusion in paragraph 7 is relevant:*

7. As mentioned above the High Court has declined to rely

on the evidence of PW 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased", and (2) there were discrepancies in her evidence. With respect, in our opinion, both the grounds are invalid. For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True, it is, she is the wife of the deceased; but she cannot be called an "interested" witness. She is related to the deceased. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested".

9. From the above it is clear that "related" is not equivalent to "interested". The witness may be called "interested" only when he or she has derived some benefit from the result of a litigation in the decree in a civil case, or in seeing an accused person punished. A witness, who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be `interested'.

10. The plea of defence that it would not be safe to accept the evidence of the eye witnesses who are the close relatives of the deceased, has not been accepted by this Court. There is no such universal rule as to warrant rejection of the evidence of a witness merely because he/she was related to or interested in the parties to either side. In such cases, if the presence of such a witness at the time of occurrence is proved or considered to be natural and the evidence tendered by such witness is found in the light of the surrounding circumstances and probabilities of the case to be true, it can provide a good and sound basis for conviction of the accused. Where it is shown that there is enmity and the witnesses are near relatives too, the Court has a duty to scrutinize their evidence with great care, caution and circumspection and be very careful too in weighing such evidence. The testimony of

related witnesses, if after deep scrutiny, found to be credible cannot be discarded. It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness, if otherwise the same is found credible. The witness could be a relative but that does not mean his statement should be rejected. In such a case, it is the duty of the Court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinizing the evidence of the interested witness. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement. The ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible. ..."

(Emphasis Supplied)

119. Recently, a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in ***Jite* v. *State,* MANU/DE/1791/2017** had also rejected the submission that the friends and father of the deceased were interested witnesses merely because of such relation in the absence of any enmity. The bench had even observed that "[*t*]*hese relations cannot ipso facto make them interested witnesses.*"

120. Even in the present case, nothing has been shown to impute any sort of enmity or animosity upon PW-1. He had no reason, whatsoever, to falsely implicate the accused and his testimony is also in consonance

with the other evidence on record. Nothing has come in the statements under Section 313 Cr.P.C. nor even alleged before us. Thus, we find no force in the submission.

121. We also do not find any force in the submission that the testimony of PW-1 is unbelievable as did not make a complaint to the higher police. It is not unnatural of persons from such a background to be hesitant to approach the police, let alone senior police officials against another police official only. We may also note that PW-1 did not initially have the courage to go to the police station in the first instance and had sought the company of Idris. Hence, to say that the natural conduct would have been to approach the higher officials is a fallacy.

122. We proceed to appreciate the evidence on record. The deceased Jagannath used to work in the shop of Seth Brothers as a packer and a night watchman (*chowkidar*). He also used to sleep in the shop. On 01.05.1991, the deceased had come home to have dinner with his family and thereafter, had gone back to the shop at about 9:30 PM for his night duty. At the time, the deceased was hale and hearty. At about 11:30 PM or 12 midnight, appellant Anil Kumar (then Constable) took the deceased from the shop to the Police Station Lahori Gate in a TSR under the pretext of interrogating him. The story breaks here as what transpired inside the police station is unknown. All the eyes inside the station, including Const. Home Guard Mohan Lal (PW-12), have turned hostile.

123. The story continues in the testimony of Teg Bahadur (PW-1) when he went on the next morning at about 8:45 AM to deliver the food to the deceased. He found the shop locked and learnt that his son had been taken to Lahori Gate Police Station. PW-1 sought the assistance of

Idris (PW-7) as he did not have the courage to proceed to the police station alone. Upon reaching the police station, he was directed to the second floor to the second room, i.e. the room of appellant Sher Singh and ASI Suresh Kumar. He found his son, one Ram Prasad and a three-wheeler scooter driver sitting on the floor. There were five or six persons in the room including appellants Sher Singh and Anil Kumar. Appellant Anil Kumar was beating Ram Prasad; while the deceased was sitting on the floor with his face swollen and unable to speak. What transpired in the police station, which changed the condition of the deceased from being hale and hearty the night before to having his face swollen even inhibiting his capacity to speak? We do not know. This remains in the exclusive knowledge of the appellants Anil Kumar and Sher Singh, which they have chosen not to disclose before the court. At this point, the scooter driver was released by appellant Anil Kumar. This gave an opportunity to the father (PW-1) to talk to his son/deceased; who informed him that he had been brought for no fault of his and that he would be released as the scooter driver had been left. Upon enquiry, appellant Anil Kumar informed PW-1 that his son was involved in womanising. The pleas of PW-1 seeking the release of his son fell on deaf ears and appellant Anil Kumar demanded Rs.500/- for the release of his son. PW-1 did not have the money with him and rushed to the shop of Seth Brothers to secure the sum.

124. There Teg Bahadur (PW-1) met Naresh Kapoor (PW-4), who used to work as a clerk in Seth Brothers and took Rs.300/- as he already had Rs.200/- with him. At this stage, Idris (PW-7) parted ways with him. Teg Bahadur (PW-1) returned to the police station to find his son and Ram Prasad sitting in the same condition as before. Two or three police

persons were also present in the room, however, appellant Anil Kumar was not present there. Again an opportunity was given to PW-1 to talk to his son, when he informed that in the night, every policeman, coming in the room, had beaten him. PW-1 then came downstairs and waited for appellant Anil Kumar. When appellant Anil Kumar and co-convict Narang (since deceased) slipped past him unnoticed. Upon going back upstairs, PW-1 informed appellant Anil Kumar that he had brought Rs.500/-; which were found insufficient at this stage by appellant Anil Kumar, who now demanded Rs.5,000/-. Being from humble means, Teg Bahadur (PW-1) showed his inability to pay the amount and once again pleaded with folded hands. Rather than hearing the plea of the perturbed father, appellant Anil Kumar started beating the deceased; in order to extort money from PW-1. The head of the deceased was caught between his knees by appellant Anil Kumar and beaten with fist blows on his back. Then elbow blows and slaps and fist blows on the face and temple were meted out to the deceased by appellant Anil Kumar. This terrified the already disturbed father Teg Bahadur (PW-1), who once again pleaded not to beat his son and promised to arrange the money.

125. PW-1 once again went to the shop of Seth Brothers, but such an amount could not be tendered by Naresh Kapoor (PW-4) and the owner of the shop had not come by then. PW-1 also tried to call his employer Mr.Jethwani (PW-3), advocate, but he had already left for the Income Tax Office. Naresh (PW-4) promised to send the money as soon as the owner came. PW-1 again went to the police station. He informed appellant Anil Kumar that the employers of the deceased would send the money when they come. At this point, co-convict Narang started

abusing the deceased alleging that he had got his servant Ram Prasad involved in the matter. Co-convict Narang gave fist blows on the face and temple of the deceased and kicked him with his boot on the chin. The deceased started bleeding from his injuries on his chin and mouth. Even at this stage, rather than showing compassion, appellant Anil Kumar alleged that the deceased was acting and again resumed his assault. Appellant Anil Kumar also thwarted an attempt to give water to the deceased again saying he was acting. Teg Bahadur (PW-1) was also pushed outside the room by appellant Anil Kumar and co-convict Narang. PW-1 then witnessed his son profusely vomiting blood and falling down on his side.

126. In converse of even the basic tenets of humanity, let alone what may be expected of someone in a disciplined force, appellant Anil Kumar said that the deceased was dirtying the room and removed him to the *verandah*. The deceased became unconscious. PW-1 was given water, but his attempt to give water to the deceased failed as it spread out with blood. It is spine-chilling even to imagine the plight of a father witnessing first-hand his son being beaten to a pulp by those in uniform. At this point, Teg Bahadur (PW-1) started crying and shouting for help.

127. Only now, did appellant Anil Kumar said that the deceased should be taken to the hospital. Even at this point, appellant Anil Kumar was not motivated by the desire to save the life of the deceased, but was actuated solely by the desire to save his own skin. Rather than making a sincere attempt to provide medical aid to the deceased, who was unconscious and profusely vomiting blood, appellant Anil Kumar reached for a scooter or rickshaw. Thereafter, PW-1 sat in the rickshaw with the head of the deceased in his lap while appellant Anil Kumar and

another constable walked infront of the rickshaw. The deceased was not taken to any government hospital to avoid the complications of paperwork and he was taken in a rickshaw from one place to another to find a doctor. They were led to Naya Bans, then Farash Khana, Fatehpuri and Haider Kuli. At Haider Kuli, a compounder met them and informed that the condition of the deceased was very serious and he required medical aid immediately. Even then, appellant Anil Kumar took the rickshaw to Fatehpuri and hired a taxi. Two police persons were following them on a two wheeler. They took him to Irwin Hospital and halted the taxi at a distance 15-20 yards. The police officials then went inside the Emergency Ward and came outside and informed that PW-1 will have to get his son admitted on his own. They also told Teg Bahadur (PW-1) to lie that the deceased had been ill for sometime; which was refused by PW-1. Again, appellant Anil Kumar did not admit the deceased on his volition as he may have to disclose the incident. He took the taxi via Darya Ganj to Novelty Cinema. Appellant Anil Kumar went inside a lane called Rang Mahal in search of a doctor; while other policeman got down to drink water. Given the opportunity, PW-1 ran to Dua Sweets and telephoned his employer Mr.Jethwani (PW-3). Mr.Jetwani, Advocate (PW-3) alongwith his junior Shyam Kumar Sethi reached the spot within five minutes. It was only on the intervention of the employer of PW-1 that the deceased was taken to St.Stephen's Hospital and admitted. The employer of the deceased (PW-5) came to the hospital with PW-4. They were informed that the deceased was to be operated upon immediately. Blood was arranged by PW-4 and PW-5. Appellants Dahiya and Sher Singh and other senior officials also reached the hospital; who told PW-1 not to

give any statement against them. All the officials proceeded to try to hush up the event. Appellant Sher Singh recorded the alleged statement of Teg Bahadur, i.e. Ex.PW-1/A, which was not made by Teg Bahadur and was gotten signed from him by taking the benefit of his perturbed state.

128. In the whole story, all the police officials acted in a ruthless manner with the sole aim of saving themselves from any liability. It was not till the intervention of PW-3 that they even agreed to provide proper medical aid to the deceased.

129. It was contended before us that the testimony of PW-1 is unreliable as Idris (PW-7) remained silent regarding the beatings despite it being the case of the prosecution that he had accompanied Teg Bahadur (PW-1). Indubitably, PW-7 has not testified anything regarding the beatings and deposed that that he remained outside the police station and was declared hostile. It is settled law that the testimony of a hostile witness need not be disregarded *in toto* and the part of the testimony inspiring confidence may be relied upon. We need not burden this opinion with judicial pronouncements in this regard, suffice to mention that one may usefully refer to ***Radha Mohan Singh @ Lal Saheb and Ors.* v. *State of U.P.*, (2006) 2 SCC 450** (paragraph 7); ***Jodhraj Singh* v. *State of Rajasthan*, (2007) 15 SCC 294** (paragraphs 11 - 14); ***Paramjeet Singh* v. *State of Uttarakhand***, **(2010) 10 SCC 439** (paragraph 15 - 20); ***Raja* v. *State of Karnataka*, (2016) 10 SCC 506** (paragraph 32); and ***Arjun* v. *State of Chhattisgarh*, (2017) 3 SCC 247** (paragraph 15). Accordingly, the Trial Court had rightly relied upon the testimony of PW-7 to the extent it corroborates the surrounding circumstances of the incident. Similarly, it cannot be used to impeach the veracity of the

eyewitness account of PW-1, which we find to be otherwise reliable and consistent.

130. Mr.Krishnan had drawn the attention of this Court to the contradiction in the testimony of PW-1 regarding the presence of appellant Sher Singh when Teg Bahadur (PW-1) had reached the police station. PW-1 had in his examination-in-chief deposed that appellant Sher Singh was present in the room; while during cross-examination stated that appellant "*Sher Singh was not present at that time*." Such contradiction can easily be attributed to the lapse of memory as the testimony was recorded after a long gap of 7 years. It was incumbent upon the Addl.PP before the Trial Court to re-examine the witness with regard to the contradiction. Having failed to do so, this portion cannot be relied upon without corroboration. Be that as it may, we find that the presence of appellant Sher Singh in the police station established from the entries in the Daily Diary Registers (seized vide Ex.PW-15/A), as per which, appellant Sher Singh had returned to the police station on 01.05.1991 at 10:50 PM from an arrangement (recorded in DD 53-B). Thereafter, there is no entry to show that appellant Sher Singh had left the police station in the night. It is only at 12:55 PM on 02.05.1991 that appellant Sher Singh departed from the police station for conducting a raid (recorded in DD 22-B). Thus, it stands proved that in the intervening night of 01-02.05.1991, appellant Sher Singh was present in the police station.

131. It has also been contended that the non-examination of Ram Prasad and the three-wheeler scooter driver who were brought to the police station alongwith the deceased goes to the root of the matter. The withholding of such evidence should lead to a negative inference against the

prosecution. Upon examination of the Trial Court record, we find that the TSR driver was Dharampal @ Pappu, who could not be served and his appearance secured before the Trial Court despite repeated attempts. Similarly, Ram Prasad (alleged servant of co-convict Narang) could not be traced. PW-27 has categorically stated to this effect. In this background, it cannot be said that the prosecution was guilty of withholding evidence. Even otherwise, the benefit of such an omission should not be given to the accused [See ***Ram Bihari Yadav*** **(Supra)** and ***Sahadevan alias Sagadevan*** **(Supra)**].

132. Accordingly, we are of the view that the prosecution was able to establish the complete sequence of events given in paragraphs 122 to 128 aforegoing. We must now analyse the offences committed by the appellants herein.

133. Extensive arguments were led about the scope and applicability of Section 34 IPC. In ***Pandurang*** **(Supra)**, the Apex Court was faced with the appeal of three persons sentenced to death by the High Court. The evidence showed that five persons had attacked the deceased armed with weapons. All five had been convicted; however, appeal was preferred by only three. The Supreme Court after analysing the testimonies of the eyewitnesses and the medical evidence sustained the conviction of only two appellants under Section 302, to whom the fatal blows were ascribed. As regards the third, the Court found that there was nothing to show common intention and thus, he could not be convicted with the aid of Section 34 IPC converting his conviction to one under Section 326 IPC. The relevant paragraphs read as under:

> "*33. Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a*

man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: Mahbub Shah v. King Emperor [72 IA 148 at 153 and 154] . Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: Barendra Kumar Ghosh v. King-Emperor [72 IA 148 at 153 and 154] and Mahbub Shah v. King-Emperor [52 IA 40 at 49] . As Their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".

34. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose.

35. In the present case, there is no evidence of any prior meeting. We know nothing of what they said or did before the attack, not even immediately before. Pandurang is not even of the same caste as the others Bhilia, Tukia and Nilia are Lambadas, Pandurang is a Hatkar and Tukaram a Maratha. It is true prior concert and arrangement can, and indeed

often must, be determined from subsequent conduct as, for example, by a systematic plan of campaign unfolding itself during the course of the action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or a meeting together subsequently. But, to quote the Privy Council again,

> *"the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case".*

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". (Sarkar's Evidence, 8th Edn., p. 30).

(Emphasis Supplied)

134. In ***B. Parichhat*** **(Supra)**, the Apex Court reserved the judgment of the High Court in convicting three appellants, who had been acquitted by the Trial Court, finding that when several persons simultaneously attack a person then unless a pre-arranged plan is proved then the persons would be individually liable for their acts.

135. A division bench of the Supreme Court in ***Shri Kishan*** **(Supra)** was dealing with a case wherein the appellants had as an offshoot to a trifling incident between two urchins had attacked the deceased with *lathis*. Both the Trial Court and the High Court had convicted them under Section 302/34 IPC. Interestingly, the High Court had given a finding that the common intention of the assailants was limited to giving a severe beating to the deceased and the appellant who had

caused the fatal injury could not have been ascertained. In this background, the Apex Court while converting conviction to one under Section 325/34 IPC, observed as under:

> "*7. The above finding as well as the broad circumstances of the case go to show that the common intention of the accused was to cause grievous injury to the victim. The fact that one of them exceeded the bound and gave a fatal blow on the head of the deceased would make him personally liable for the fatal injury, but so far as the other three are concerned, they can be held liable only for the injuries which were caused in furtherance of the common intention and not for the fatal injury. As it is not possible on the material on record to find out as to which one of the accused gave the fatal blow, there is no escape from the conclusion that each one of the four accused can only be guilty of the offence under Section 325 read with Section 34 Indian Penal Code. We accordingly alter the conviction of each of the accused-appellants from under Section 302 read with Section 34 Indian Penal Code to that under Section 325 read with Section 34 Indian Penal Code. Each of them is sentenced to undergo rigorous imprisonment for a period of five years on that count. The sentence of rigorous imprisonment for a period of one year awarded to each of the accused under Section 323 read with Section 34 Indian Penal Code would run concurrently with the above sentence. The appeal is allowed to that extent.*"
>
> (Emphasis Supplied)

136. Mr.Mathur, learned senior counsel for the appellant Dahiya, had also relied upon the judgment in ***Ninaji Raoji Baudha*** **(Supra)**. The High Court therein had converted the conviction of the appellants from one under Section 325 IPC to Section 302/34 IPC for causing the death of one Bhonaji. There were two incidents. The first incident was a result of a petty quarrel between the deceased and his sons Samadhan and Rambhau one hand and the party of the appellants on the other. After the first incident, Bhonaji and his sons had gone back home; Bhonaji

was sitting on the *oota* outside, while Samadhan was tending to his wounds inside. The appellants came in search of Samadhan and passed Bhonaji on the first instance, it was when Bhonaji gave an indication of approaching the police that the attention of the two appellants was diverted to him. They gave numerous blows to the deceased, one of which proved fatal. The Apex Court converted the punishment to one under Section 325/34 IPC as the common intention was not established and the fatal blow could not be attributed to either of the appellants. The relevant portion reads as under:

> "*12. The evidence on record therefore went to show that the appellants did not have the common intention of giving a beating to Bhonaji when they reached his house for, as has been shown, they found him sitting outside the house on his "oota" but passed him by in search of Samadhan who was dressing his injuries inside the house. Bhonaji asked Tulsi Ram chowkidar to make a report and to get ready a bullock cart for going to the police station. It was then that injuries were inflicted on his person by the appellants Ninaji and Raoji. Out of those injuries, one was a forceful blow on the head which caused a depressed fracture and fissures all over, and resulted in the ultimate death of Bhonaji. The other injuries were on the neck (back side), knees on the right elbow of the deceased and were simple injuries. As has been shown, there was no reliable evidence on the record to prove whether the fatal blow on the head was caused by Ninaji or Raoji. The other blows did not fall on any vital part of the body, and, in the absence of evidence to establish that their common intention was to cause death, it appears that the appellants had the common intention of causing grievous injury with the lathi and the "khunt". They could therefore be convicted of an offence under Section 325 read with Section 34 IPC and not Section 302 read with Section 34 IPC.*"
>
> (Emphasis Supplied)

137. In ***Hiralal Mallick*** **(Supra)**, the Apex Court was dealing with the

appeal of a person, who alleged to be 12 years old at the time of the incident, had along with his two elder brothers attacked the deceased with swords provoked by a stone-hit on the head of their father. The assailants had fell the deceased on ground and struck on the skull and neck. The High Court had converted the conviction from 302/34 IPC to 326/34 IPC. On appeal, the Supreme Court upheld the conviction while emphasizing the requirement of a personalised approach to the degree of criminality despite the fatal outcome. Justice V.R. Krishna Iyer, giving the opinion for the bench, had eloquently observed as under:

> "*6. When a crime is committed by the concerted action of a plurality of persons constructive liability implicates each participant, but the degree of criminality may vary depending not only on the injurious sequel but also on the part played and the circumstances present, making a personalised approach with reference to each. Merely because of the fatal outcome, even those whose intention, otherwise made out to be far less than homicidal, cannot, by hindsight reading, be meant to have had a murderous or kindred mens rea. We have, therefore, to consider in an individualised manner the circumstances of the involvement of the appellant, his nonage and expectation of consequences. When a teenager, tensed by his elders or provoked by the stone-hit on the head of his father, avenges with dangerous sticks or swords, copying his brothers, we cannot altogether ignore his impaired understanding, his tender age and blinding environs and motivations causatory of his crime.*"
>
> (Emphasis Supplied)

138. We may also refer to a judgment rendered by a full bench of the Apex Court in ***Suresh and Another*** **(Supra)** wherein the Court was dealing with two appeals. We are only concerned with the appeal against the acquittal of one Pavitri, who had been acquitted by the High Court. The case pertained to the slaughter of the family of the brother-in-law of

Pavitri. The role attributed to Pavitri was of standing outside the house while her husband and brother hacked the whole family into pieces using an axe and choppers over a dispute of land. The matter was referred to the full bench over the scope of Section 34 IPC. The bench upheld the acquittal of Pavitri while extensively dealing with the scope of Section 34, which we deem appropriate to extract in extenso. Justice R.P. Sethi for himself and Justice B.N Aggarwal observed as under:

> "*38. Section 34 of the Indian Penal Code recognises the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.*
>
> *…*
>
> *40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for*

which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in Satrughan Patar v. Emperor[AIR 1919 Pat 111 : 20 Cri LJ 289] held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.

41. In Barendra Kumar Ghosh v. King Emperor [AIR 1925 PC 1 : 26 Cri LJ 431 : 52 Cal 197] the Judicial Committee dealt with the scope of Section 34 dealing with the acts done in furtherance of the common intention, making all equally liable for the results of all the acts of others. It was observed:

> *"[T]he words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, 'act' includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any offence is committed by means of several acts whoever intentionally cooperates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'. By Section 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a*

criminal act' in the first part, because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to cooperate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

Referring to the presumption arising out of Section 114 of the Evidence Act, the Privy Council further held:

"As to Section 114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition; Abhi Misser v. Lachmi Narain [ILR (1900) 27 Cal 566 : 4 CWN 546] . Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. Section 114 deals with the case where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitory. Because participation de facto (as this case shows) may sometimes be obscure in detail, it is established by the presumption juris et de jure that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by Section 114 brings the case within the ambit of Section 34."

...

44. Approving the judgments of the Privy Council in Barendra Kumar Ghosh [AIR 1925 PC 1 : 26 Cri LJ 431 : 52 Cal 197] and Mahbub Shah [AIR 1945 PC 118 : 46 Cri LJ 689] cases a three-Judge Bench of this Court in Pandurang v. State of Hyderabad [AIR 1955 SC 216 : 1955 Cri LJ 572] held that to attract the applicability of

Section 34 of the Code the prosecution is under an obligation to establish that there existed a common intention which requires a prearranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of all. This Court had in mind the ultimate act done in furtherance of the common intention. In the absence of a prearranged plan and thus a common intention even if several persons simultaneously attack a man and each one of them by having his individual intention, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section. In a case like that each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any or the other. The Court emphasised the sharing of the common intention and not the individual acts of the persons constituting the crime. Even at the cost of repetition it has to be emphasised that for proving the common intention it is necessary either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference and "incriminating facts must be incompatible with the innocence of the accused and incapable of explanation or any other reasonable hypothesis". Common intention, arising at any time prior to the criminal act, as contemplated under Section 34 of the Code, can thus be proved by circumstantial evidence.

...

50. Again a three-Judge Bench of this Court in State of U.P. v. Iftikhar Khan [(1973) 1 SCC 512 : 1973 SCC (Cri) 384] after relying upon a host of judgments of the Privy Council and this Court, held that for attracting Section 34 it is not necessary that any overt act must be done by a particular accused. The section will be attracted if it is established that the criminal act has been done by one of the accused persons in furtherance of the common intention. If this is shown, the liability for the crime may be imposed on any one of the person in the same manner as if the act was done by him alone. In that case on proof of the facts that all the four accused persons were residents of the same village and Accused 1 and 3 were brothers who were bitterly

inimical to the deceased and Accused 2 and 4 were their close friends, Accused 3 and 4 had accompanied the other two accused who were armed with pistols; all the four came together in a body and ran away in a body after the crime, coupled with no explanation being given for their presence at the scene, the Court held that the circumstances led to the necessary inference of a prior concert and prearrangement which proved that the "criminal act" was done by all the accused persons in furtherance of their common intention.

...

52. In Surendra Chauhan v. State of M.P. [(2000) 4 SCC 110 : 2000 SCC (Cri) 772] this Court held that apart from the fact that there should be two or more accused, two factors must be established — (i) common intention, and (ii) participation of the accused in the commission of the offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability. Referring to its earlier judgment this Court held: (SCC p. 117, para 11)

"11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. (Ramaswami Ayyangar v. State of T.N. [(1976) 3 SCC 779 : 1976 SCC (Cri) 518 : AIR 1976 SC 2027]) The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. (Rajesh Govind Jagesha v. State of Maharashtra [(1999) 8 SCC 428 : 1999 SCC (Cri) 1452])

To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

53. For appreciating the ambit and scope of Section 34, the preceding Sections 32 and 33 have always to be kept in mind. Under Section 32 acts include illegal omissions. Section 33 defines the "act" to mean as well a series of acts as a single act and the word "omission" denotes as well a series of omissions as a single omission. The distinction between a "common intention" and a "similar intention" which is real and substantial is also not to be lost sight of. The common intention implies a prearranged plan but in a given case it may develop on the spur of the moment in the course of the commission of the offence. Such common intention which developed on the spur of the moment is different from the similar intention actuated by a number of persons at the same time. The distinction between "common intention" and "similar intention" may be fine but is nonetheless a real one and if overlooked may lead to miscarriage of justice."

(Emphasis Supplied)

139. The distinction between Section 34 and 149 IPC has been stated by the Supreme Court in ***Chittarmal*** **(Supra)** and is not relevant for the purpose of the present case. The observations regarding Section 34 IPC have already been covered under the aofegoing pronouncements and we need not refer to them once again.

140. A coordinate bench of this Court in ***Babloo @ Babu*** **v.** ***State,*** **2013 Cri LJ (NOC 578) 209** had observed as under:

"*15. ...Section 34 makes a co-perpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section 34 to apply there should be common intention between the co-perpetrators, which means that there should be community of purpose and common design or pre-arranged plan. However, this does not mean that co-perpetrators should have engaged in any discussion, agreement or valuation. For Section 34 to apply it is not necessary that the plan should be pre-arranged or hatched for a considerable time before the criminal act is performed. Common intention can be formed just a minute before the actual act happens. Common intention is necessarily a psychological fact as it requires prior meeting of minds. In such cases, direct evidence normally will not be available and in most cases whether or not there exists a common intention has to be determined by drawing inference from the facts proved. This requires an inquiry into the antecedents, conduct of the co-participants or perpetrators at the time and subsequent to the occurrence. The manner in which the accused arrived, mounted the attack, nature and type of injuries inflicted, the weapon used, conduct or acts of the co-assailants/perpetrators, object and purpose behind the occurrence or the attack etc. are all relevant facts from which inference has to be drawn to arrive at a conclusion whether or not the ingredients of Section 34 are satisfied. We must remember that Section 34 comes into operation against the co-perpetrators because they have not committed the principal or main act, which is undertaken/performed or is attributed to the main culprit or perpetrator. Where an accused is the main or final perpetrator, resort to Section 34 is not necessary as the said perpetrator is himself individually liable for having caused the injury/offence. A person is liable for his own acts. Section 34 or the principle of common intention is invoked to implicate and fasten joint liability on other co-participants. Further, the expression/term "criminal act" in Section 34 IPC refers to the physical act, which has been done by the co-perpetrators/participants as distinct from the effect, result or consequence. In other words, expression "criminal act" referred to in Section 34 is different from "offence". For*

example, if A and B strike Lathi at X, the criminal act is of striking lathis, whereas the offence committed may be murder, culpable homicide or simple or grievous injuries. The expression "common intention" should also not be confused with "intention" or "mens rea" as an essential ingredient of several offences under the Code. Intention may be an ingredient of an offence and this is a personal matter. For some offences mental intention is not a requirement but knowledge is sufficient and constitutes necessary mens rea. Section 34 can be invoked for the said offence also. (Refer Afrahim Sheikh v. State of West Bengal, AIR 1964 SC 1263). Common intention is common design or common intent, which is akin to motive or object. It is the reason or purpose behind doing of all acts by the individual participant forming the criminal act. In some cases, intention, which is ingredient of the offence, may be identical with the common intention of the co-perpetrators, but this is not mandatory.

16. Section 34 IPC also uses the expression "act in furtherance of common intention". Therefore, in each case when Section 34 is invoked, it has to be examined whether the criminal offence charged was done in furtherance of the common intention of the participator. If the criminal offence is distinctly remote and unconnected with the common intention, Section 34 would not be applicable, but if the criminal offence was done or performed is attributable, is primarily connected or was a known or reasonably possible outcome of the preconcert/contemporaneous engagement or a manifestation of the mutual consent for carrying out common purpose, it will fall within the scope and ambit of the act done in furtherance of common intention. Thus, the word "furtherance" propounds a wide scope but the same should not be expanded beyond the intent and purpose of the statute. Russell on Crime, 10th edition page 557, while examining the word "furtherance" had stated that it refers to "the action of helping forward" and "it indicates some kind of aid or assistance producing an effect in the future" and that "any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony." An act which is extraneous to the common intention or is done in opposition to it and is

not required to be done at all for carrying out the common intention, cannot be said to be in furtherance of common intention. [Refer judgment of R.P. Sethi J. in Suresh v. State of U.P., (2001) 3 SCC 673].

(Emphasis Supplied)

141. We need not dwell further upon the scope of Section 34 IPC and proceed to analyse the case before us. We have already recorded the incident in paragraphs 122-128, the question now posed to us is whether the conviction of appellants Sher Singh and Dahiya can be sustained with the aid of Section 34 IPC. As regards appellant Sher Singh, he had facilitated the whole crime by detaining the deceased in his room all throughout the night, when as per the deceased's own telling every police personnel coming in the room gave him a beating. Evidence also shows that the appellant Sher Singh remained in the police station all throughout the night. It was also contended that ASI Suresh Kumar was the senior of appellant Anil Kumar, who shared the room with appellant Sher Singh, however, during investigation, it revealed that ASI Suresh Kumar had left the police station for U.P. in the night itself. The room remained under the command of appellant Sher Singh; who utilized it for the detention of the deceased and allowing him to be beaten to a condition that he could not even speak when PW-1 came in the morning. Nothing has come from the defence about what happened behind the doors of his room. It stands established that the appellant Sher Singh had detained the deceased in his room throughout the night when he was beaten black and blue by every police personnel coming in the room. Such actions could not have taken place without the nod of appellant Sher Singh. This clearly shows that he shared the common intention of causing such injuries to the deceased. Another factor bears

upon us being the recording of the statement (Ex.PW-1/A) of Teg Bahadur (PW-1) during the fateful night, which is patently false in order to protect other personnel and senior officers of the police station. Accordingly, it is clear that the appellant Sher Singh shared the common intention with other personnel of the police station. The question remains as to what was the extent of the intention? From an analysis of the circumstances, the intention of causing death cannot be made out and only knowledge that such acts are likely to cause death can be imputed. Thus, his conviction under Section 304 Part II with the aid of Section 34 IPC cannot be faulted with.

142. We may also notice the judgment of the Apex Court in ***Anup Singh* v. *State of Himachal Pradesh*, AIR 1995 SC 1941**, wherein one Bhagwan Singh was detained in a police post by two constables and then found dead. Though the physical presence of the Assistant Sub-Inspect (ASI) Anup Singh was not proved throughout, the Supreme Court upheld his conviction while observing as under:

> "*6. In so far as Anup Singh, appellant is concerned, the main argument advanced by Mr. Shah, learned senior counsel, appearing for him is to the effect that he does not figure anywhere physically in the prosecution case and his convictions have been recorded barely on inferences. The argument prima facie, appears attractive, but on closer scrutiny does not stand the test of reasonableness. It is undefined that Anup Singh was the in charge of the Police Post and while so, the in charge of the lock-up. Thus being the in charge, he was supposed to have come to the Police Post at one time or the other during 24 hours of the day. Leaving apart his civil or departmental liability to be accountable for all what happens in the Police Post, he cannot escape to say that the criminal deeds committed by his Constable should confine to the Constable alone, when those deeds were committed and are deemed to have committed*

with his tacit consent and connivance. It is not necessary that he should have physically been present all the time when the confinement of Bhagwan Singh was continued between 30-8-1975 to 12-9-1975 and beaten in this interval. There is no evidence that Kasumpti Police Post had a large building or that the police had lot of business to transact from which it could be urged that the detention of Bhagwan Singh may have escaped the notice of Anup Singh, ASI. Thus we are more than satisfied about the complicity of Anup Singh in the crime, convicted as he is with the aid of Section 34, I.P.C. for the offence charged. We thus see no reason to upset his convictions. Equally, we cannot distinguish his case on the question of sentence also when his co-accused who have similarly been convicted and have undergone the sentence imposed on them. His appeal thus fails. Such a Singh, as said before, has since died during the pendency of his appeal. His appeal is dismissed as abated. Raghubir Singh's appeal is dismissed on merit. The appeal of Anup Singh too gets dismissed on merit. Ordered accordingly."

(Emphasis Supplied)

143. Though the police station in our case was large, but the whole incident took place in the room of appellant Sher Singh, which at the time was in his exclusive control. Appellant Sher Singh was present in the police station in the night and yet, every police personnel entering in the room had the audacity to beat the deceased. The same can by no means without the consent and connivance of appellant Sher Singh.

144. As far as the role of appellant Dahiya is concerned, the Trial Court had observed as under:

"*66. Common intention has to be inferred from the circumstances. There is always no direct evidence of common intention. The SHO Inspector R.S.Dahiya is the highest rung in the ladder in the hierarchy of the police officer who are accused before this court. He was on duty in the police station on the relevant date. Ex.PW11/A is the site plan of the police station showing the second floor. The SHO Inspector*

R.S.Dahiya is the Station House officer. He is the Commander in Chief of the police station. Without his knowledge nothing could have gone on in the police station. Deceased Jagganation had been brought to the police station in the early hours of 01.05.91 i.e. after about 12 midnight as stated by PW-9, he was removed to St.Stephen Hospital at by about 4.00 p.m in the evening hours, till that time for almost 26 to 28 hours he remained in the police station and was being severely beaten. He was dragged out of the police station and put on a rickshaw when he was bleeded [sic: bleeding] *profusely. It is difficult to imagine that he has been dragged down out from the second floor to the ground floor and the SHO Inspector R.S.Dahiya had no idea about the comings and goings or the happenings in the police station. This is unbelievable. In my view without his active knowledge Ct.Anill Kumar* [sic] *could not have administered these beatings to Jagganath. The story as narrated by PW-1 was narrated under stress of the grave crime which had occurred. ... Admittedly Teg Bahadur was hail and hearty when he was brought to the police station. This is again fortified by the testimony of PW-1 and there is no reason to disbelieve him. This is also fortified by their* [sic: the] *testimonies of PW6 and PW8, the mother and wife of the deceased. Testimony of PW10 clearly establishes that between 3.00 pm to 7.00 p.m Inspector R.S.Dahiya was without car and driver. He was in the police station. At least* [sic] *till that time, i.e by 3.00 p.m; he should have been fully aware of the happenings in the police station.*"

145. A careful reading of the judgment of the Trial Court would show that it was persuaded by primarily three reasons to find appellant Dahiya guilty, i.e. (1) him being the SHO of the police station; (2) creation of false evidence in the form of DD entries etc. to shield his subordinates and himself, and (3) the presence of appellant Dahiya between 3 PM to 7 PM on 02.05.1991. We are of the opinion that neither (1) nor (3) can be used as an incriminating circumstance, especially in the absence of anything to show that appellant Dahiya had knowledge of the incident.

At the same time, we are in concurrence with the observation of the Trial Court that appellant Dahiya had infact tinkered with evidence in order to shield the culprits of the offence. Be that as it may, the same remains insufficient to prove a charge of Section 304 Part II read with Section 34 IPC against the appellant. In this regard we may refer to the judgment of the Apex Court in ***Sarwan Singh Rattan Singh*** **(Supra)**, relied upon by Mr.Mathur, wherein the Apex Court had found the sole circumstance of purchase of a pistol incompetent to convict the appellant and observed that there is a difference "*between "may be true" and "must be true" there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence.*"

146. Similar observations were made by the Supreme Court in ***Mohd. Faizan Ahmad*** **(Supra)**, wherein the appellant had been convicted by the Trial Court and upheld by the High Court in a heinous offence of kidnapping of three children, confining them in a tunnel and torturing them for more than 5 months. The appellant was labelled as a mastermind of the offence owing to prior enmity with a parent of the children. The High Court had relied upon the factum of previous removal from service, threats extended by the appellant therein, he presence in the locality on the day the children were kidnapped and a subsequent telephone call to a witness warning him to not harass the appellant and upheld the conviction of the appellant. Upon appeal, the Supreme Court found only one incriminating circumstance against the appellant, i.e. that he had been seen in the locality on the day of kidnapping. None of the children had ascribed any role to the appellant. In this background, the Supreme Court acquitted the appellant, while

observing as under:

> "*15. The material witnesses have expressed suspicion but there is not a single credible piece of evidence linking the appellant to the crime in question. We have no manner of doubt that the offence is grave; the children were abducted and kept in a tunnel for over five months and anonymous calls were made for ransom. The accused whose involvement in such crimes is proved must be dealt with with a firm hand, but the seriousness or gravity of the crime must not influence the court to punish a person against whom there is no credible evidence. The trial court, therefore, erred in convicting the appellant.*
>
> *…*
>
> *17. We have already noted that except PW 11 Takki Imam nobody has said that the appellant was seen in the locality on the day of the incident. That he was employed in PW 4 Nusrat Bano's telephone booth and was removed from the service because of his bad conduct appears to be true. But, even if the story that he used to give threats to the prosecution witnesses and demand his dues is accepted, it does not further the prosecution case. There is no evidence on record to establish that infuriated by his removal from service and non-payment of dues, the appellant masterminded the plot to abduct the children or played any active role in abducting them. If a telephone call was received making ransom demand and making grievance about alleged ill-treatment of the appellant, the police should have traced the calls and identified the caller. The police have failed to do so. Criminal courts recognise only legally admissible evidence and not far-fetched conjectures and surmises.*
>
> *18. The High Court's observation that there was a preconceived plan to abduct the children would not be applicable to the appellant because there is nothing on record to establish that the appellant met the co-accused and planned a strategy to abduct the children and demand ransom. His case stands on a different footing from that of the other accused. The case of the other accused will have to be dealt with on its own merit. The High Court was carried away by the heinous nature of the crime and, in that, it lost sight of the basic principle underlying criminal jurisprudence*

> *that suspicion, however grave, cannot take the place of proof. If a criminal court allows its mind to be swayed by the gravity of the offence and proceeds to hand out punishment on that basis, in the absence of any credible evidence, it would be doing great violence to the basic tenets of criminal jurisprudence. We hope and trust that this is just an aberration.*"
>
> (Emphasis Supplied)

147. In the present case, the mere fabrication of evidence is not sufficient to sustain the conviction of appellant Dahiya under Section 304 Part II/34 IPC. We may also notice that when the chargesheet dated 27.11.1992 was filed, the allegations against appellant Dahiya were under Sections 119, 218 and 214 IPC and not under Section 304 IPC. The relevant portion is as under:

> "*...On the basis of evidence on record Insp. Rajender Singh Dahiya the then SHO Lahori Gate not only concealed the commission of offence in his own police station by has fabricated false evidence framed in-correct record for the purpose of saving his subordinate from legal punishment and wrote at* [sic: a] *report Under Section 24.4 (1) P.P.R. He also offered compensation to the complainant in order to hush up the case and finally he intentionally did not apprehend the accused person and as such committed the offences U/S 119, 218, 214 I.P.C. respectively. ...*"
>
> (Emphasis Supplied)

148. However, the Trial Court failed to frame any charge under the provisions without giving any reasons thereof. In this background, the conviction of appellant Dahiya under Sections 304 Part II/34 IPC must be interfered with and in the absence of any charge, he cannot be convicted of the offence actually committed by him, resultantly, we acquit him of the charges framed against him.

149. The final appellant is Anil Kumar. His unnerving role has already been

described by us in great detail. The Trial Court has convicted him under Section 302 IPC and sentenced to life imprisonment. Before us, the submissions of Mr.Mittal are threefold: *first*, the fatal blow was struck by co-convict Narang (deceased); *second*, the nature of injuries can only sustain a conviction under Section 304 Part II IPC; and *third*, the action of appellant Anil Kumar would be covered under Exception 3 to Section 300 IPC. The first contention must be rejected at the outset as being factually incorrect. As per medical evidence, injury no.2 (Scabbed abrasion 9 X 2 cms. over the left (L) fronto povital region) had caused the death of the deceased. PW-20 has categorically denied that the injury could have been caused by hitting of shoes and thus, the hit by Narang from his boot to the chin of the deceased could not have caused the fatal injury. The situation of deceased did not deteriorate after the hits given by Narang and he only bled slightly from his chin and mouth. It was consequent to the beatings administered thereafter by appellant Anil Kumar that the deceased started vomiting blood and fell on his side, which could have caused the injury.

150. As far as the nature of injuries is concerned, Dr.Bharat Singh (PW-20) has opined that injury no.2 alongwith corresponding injury to brain were sufficient to cause death in the ordinary course of nature. This coupled with the fact that appellant Anil Kumar administered incessant beatings on a the deceased would lead to the inevitable conclusion that appellant Anil Kumar had inflicted such bodily injuries with the intention of causing the bodily injuries which were sufficient to cause death in the ordinary course of nature.

151. Even the contention regarding applicability of Exception 3 of Section 300 fails to persuade us. Though Mr.Mittal had contended the action of

appellant Anil Kumar was under the lawful discharge of duty as he had brought the deceased, suspected of running a flesh trade, to the room of his superior. We find it completely out of place that such a contention has been raised when there is neither any evidence to support the same nor was it stated by the appellant Anil Kumar in his statement under Section 313 Cr.P.C. Thus, it is clearly an afterthought. Had it been so, it was incumbent on appellant Anil Kumar to step in the witness box and deposed regarding the same. The burden remains on the defence to prove the same, which it has clearly failed to do [***Satyavir Singh Rathi, ACP* v. *State*, (2011) 6 SCC 1** (paragraph 44)]. Even otherwise, we do not find any merit in the contention. Exception 3 to Section 300 reads as under:

> "*Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.*"
>
> (Emphasis Supplied)

152. Even a cursory perusal of the provision would show that in order to invoke the exception, the following essentials must be satisfied:

(1) the person accused of murder must be a public servant as defined in Section 21 IPC;

(2) the act must have been done in good faith;

(3) the offender must have believed the act to be lawful and necessary for the due discharge of this duty as a public servant; and

(4) the act must have been done without any ill-will towards the victim.

153. In the present case, the actions of appellant Anil Kumar can by no

means be alleged to be in the advancement of public justice; but, on the contrary are in derogation of it. Even if everything presumed to be true, then the action would have been legal until bringing of the deceased for interrogation. Appellant Anil Kumar then even failed to record an entry in the daily diary regarding the deceased. Could the beatings administered to the deceased be labelled as under the belief that they were lawful or necessary? The answer would be a clear 'No'. Even a constable cannot be under the belief that custodial violence for the purpose of interrogation is necessary, let alone lawful. The act was wholly unlawful and thus, cannot come under the scope of the Exception. We may also fruitfully refer to the following paragraph in Rattanlal and Dhirajlal, *Law of Crimes* (26th Ed., Bharat Law House 2007):

> "*Where the act of public servant is wholly unlawful and illegal, he cannot invoke this exception. The underlying object of this exception is to extend some protection to those public servants who in discharge of their duties exceed their power. Obviously, therefore, the exception does not apply to those persons who take on themselves an act without any colour of authority or grossly in excess of their lawful powers. ...*"

154. Even if we assume that the appellant Anil Kumar had acted in good faith and all acts attributed to him were under the orders of his superiors; even then, the acts cannot come under the Exception [See ***Queen-Empress* v. *Subha Naik and Others*, (1898) ILR 21 Mad 250**].

155. Mr.Mittal had also handed over a portion of some report allegedly from the website of the Bureau of Police Research and Development. We have only be handed over a print of the homepage of the erstwhile website and two pages of the report. Despite efforts, we have been

unable to check the authenticity of the report; even otherwise, the "*prevention or detection of crime or maintenance of law and order*" cannot encompass the actions attributed to appellant Anil Kumar and law and thus, cannot come to his aid. Accordingly, in the absence of any evidence and the essentials remaining unfulfilled, the contention must be rejected.

156. To conclude, we uphold the conviction of the appellant Anil Kumar under Sections 302, 330 and 348 and the sentence imposed by the Trial Court. The conviction and sentence of appellant Sher Singh is also upheld. Appellant Dahiya is acquitted of the charges against him.

157. At the same time, we notice that PW-2 in his report (Ex.PW-2/F) had also recommended departmental action against the accused/appellants. Incase such disciplinary proceedings have not been initiated, we direct the concerned authority to initiate disciplinary proceedings against the appellants herein. Disciplinary proceeding should also be initiated against appellant Dahiya for his role in fabrication of evidence and also as to how such a state of affairs was prevailing under his supervision. We clarify that the charges shall not be limited by the grounds mentioned by us in this paragraph.

158. Accordingly, Crl.A. 54/2004 is allowed, while Crl.A. 81/2004 and Crl.A. 198/2004 are dismissed.

159. The sentence of appellants Anil Kumar and Sher Singh had been suspended during the pendency of the appeal by orders dated 22.05.2007 and 08.03.2004 respectively and are stated to be on bail. They shall surrender within 10 days from today.

160. The personal bond and surety furnished by appellant Dahiya are discharged.

161. Copy of this judgment be sent to the concerned Jail Superintendent(s) for updating the jail record.

162. Trial Court record be sent back along with a copy of this judgement.

G. S. SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

DECEMBER_____, 2017
JANUARY 3RD 2018
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