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RahisuddIn and Others Vs. State

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Court : Delhi

Decided On : Sep-20-2013

Judge : G. S. Sistani

Appellant : RahisuddIn and Others

Respondent : State

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI Crl.Appeal. No.202/2009 Judgment reserved on 13th September , 2013 Judgment pronounced on 20th September , 2013 % % # Rahisuddin & Others Through: .. Appellants Mr. Randhir Jain, Advocate Versus $ State Through: ..... Respondent Mr. Pawan Sharma, Advocate CORAM: HON'BLE MR. JUSTICE G.S. SISTANI G.S. SISTANI, J.

1. Present appeal has been filed by the appellants against the judgment dated 11.02.2009 and the order on sentence dated 19.02.2009 passed by the learned Additional Sessions Judge in FIR No.94/2003, PS Mansarover Park under section 307/34 IPC. The learned trial court has convicted the appellants under section 307 read with section 34 of the Indian Penal Code (hereinafter referred to as IPC). Appellant no.1, Rahisuddin; appellant No.3, Ali Jaan; and, appellant No.4, Shaukin Ali were sentenced to undergo rigorous imprisonment for a period of six years while appellant no.2, Alimuddin was sentenced to undergo rigorous imprisonment for a period of five years. A fine of Rs.5000/- each was imposed on the appellants and in default of payment of which, the appellants were sentenced to undergo a

further simple imprisonment for a period of five months. All the appellants were granted benefit of section 428 of the Code of Criminal Procedure, 1973.

2. Brief facts of the case, as noticed by the learned Additional Sessions Judge in the judgment dated 11.02.2009 are that a case was registered against the appellants herein on a complaint made by the complainant, Shahzad alleging that on 16.03.2003, the complainant PW-1, Shahzad alongwith his maternal uncle PW-3, Yamin Ali had gone to Ashok Nagar to meet his maternal grandfather PW-2, Sh. Shahid Ahmed. At about 9.30 PM, when the complainant and his maternal uncle reached near the M.I.G Flats while returning back to their home, all the accused persons (appellants herein) were standing on the road and on seeing the complainant and his maternal uncle, the appellants started abusing and assaulting them. In the meantime, appellant no.2, Alimuddin exhorted appellant no.1, Rahisuddin to finish the complainant Shahzad. Appellant no.2, Alimuddin caught hold of the complainant, Shahzad, while appellant no.4, Shaukin and appellant no.3, Ali Jaan caught hold of PW-3, Yamin. Thereafter appellant No.1 took out a katta like weapon from his trouser and fired upon the complainant, who tried to save himself and the bullet hit him on his left arm. On this, PW-3 Yamin shouted Bachao Bachao. All the appellants fled away from the spot. The complainant was taken to GTB Hospital and was admitted there. Charge-sheet was filed. Post-trial, the learned trial court found all the four appellants guilty for the offence punishable under section 307, IPC read with section 34, IPC.

3. The prosecution has examined ten witnesses. Statements of the appellants were recorded under section 313, Cr.P.C. The appellants have also examined themselves under section 315, Cr.P.C in their defence. It will be relevant to reproduce the evidence of the material witnesses. PW-1, Shahzad deposed in his examination-in-chief as under: On 16.2.2003 at about 8/8:30 p.m. I had gone to Ashok Nagar at the house of my nana in the relation, namely, Shahid Ahmad and my maternal uncle Yameen Ali was also with me. At about 9/9:30 p.m. I along with Yameen Ali left the house of Shaheed Ahmad and started coming to our house at Chand Bagh. When we came near M.I.G. flats near Ashok Nagar then accused persons met me and they started assaulting as also abusing me. The accused Rahisuddin, who has married to my sister Farzana had divorced her on which a

case had been filed against him and which was pending. The accused Rahisuddin told me to withdraw the said case otherwise I would be killed by him. On this, my maternal uncle Yameen had been beaten by the accused Ali Jaan and Shaukeen, present in the court today. I was caught hold of by the accused Alimuddin and was given three/ four slaps by the accused Rahisuddin. Alimuddin had told the accused Rahisuddin to finish me of by killing me so that the story ends at that time. On this the accused Rahisuddin had taken out a katta from the dub of his trouser and had fired upon me from the same. I had tried to save myself at that time and the bullet from the katta fired by the accused Rahisuddin had hit me on my left arm. It had exited also from my arm at that time. My maternal uncle Yameen had shouted for help, at that time I had became unconscious. I had regained consciousness at the G.T.B. Hospital where I was medially examined. I had given my statement to the police which is Ex.PW-1/A, bearing my signature at point-X thereon. I can identify the shirt worn by me at that time and which was having blood stains on it. It was of off white colour having check of black colour on it.

4. In his cross-examination by counsel for appellant, PW-1 Shahzad has deposed as under: I had told the police that I had gone to the house of Shahid Mohamed at about 8/8:30 p.m. on that day. (confronted with the statement Ex.PW-1/A, wherein the time only 8:00 p.m. is mentioned) I had told the police that the accused Rahisuddin had stated that either I withdraw the case filed against him or otherwise I would be killed by him. (confronted with the statement Ex.PW-1/A, wherein the words that he would be killed on the part of the accused Rahisuddin is not mentioned. I cannot say whether I had stated to the police that I had been given slaps by the accused Rahisuddin. (confronted with the statement Ex.PW-1/A, wherein, it is not so recorded). I had told the police that the accused Rahisuddin had taken out the katta from the dub of his trouser. (confronted with the statement Ex.PW-1/A, wherein, the taking out of the katta from the dub of the trouser is not mentioned). It is incorrect to suggest that the accused had not met me at the alleged place of occurrence or that they had never extended threats to me. It is further incorrect to suggest that no such incident as deposed by me had taken place or that all the allegations as levelled by me against the accused in respect of the alleged incident are false, fabricated and afterthought. It is further incorrect to suggest that I have inflicted the injuries upon myself. MIG flats were on

my right hand side. I cannot tell in which direction my face was at that time. There was a wall on my left hand side. The road was behind me. I am illiterate. I cannot say as to from which side Yameen was caught hold of by the accused Ali Jaan and Shaukeen as I was at a little distance from them. It might be about 7/8 feet. Yameen was facing the other side from me and the back was towards me. Blood has also fallen on the spot. I had not told the police that my blood had fallen on the spot. My statement had been recorded by the police at the hospital in the night of the day of the incident, when I had regained consciousness. At that time my maternal uncle Yameen was also present there along with the police. Accused persons assaulted me for about 15/20 minutes. Police did not ask to me as to how much time the incident took place. I was taken to the hospital by my maternal uncle. I cannot tell the directions. At the time of the incident no one was passing through that place. However, the passersby passed through the place. Police did not prepare site plan of place of incident in my presence. I cannot tell in whose presence the site plan was prepared. I was not with police when the accused persons were arrested. Yamin Ali was with police when accused persons were arrested. Accused fired the shot at me from the distance of about 4/5 feets. I do not know if police seized any empty cartridge or any other article from the place of incident. I cannot say as to how many cases are pending between the accused and myself / my relations. I had not told to the police that Shaukeen and Ali Jaan had caught hold of me. I did not go to the police station for lodging the report. Vol. I was in the hospital when police recorded my statement. Yamin Ali, my maternal uncle, was also in the hospital when my statement was recorded. I was semi conscious at that time. It is incorrect to suggest that I am deposing falsely.

5. In his examination-in-chief, PW-2, Shahid Ahmed, grandfather (nana) of the complainant deposed as follows: On 16.03.2003, at about 8:00 p.m., Yamin and Shahzad came to my house to pay a visit to me. They left my house at about 9:15 p.m. There (sic they) were talking that Farzana, sister of Shahzad was deserted by Rahisuddin and her life has been ruining (sic ruined). In the morning hour, police came to my house to inquire as to whether Shahzad and Yamin Ali came to meet me previous night. At that juncture, police informed me that Shahzad was shot at during previous night.

6. In the cross-examination by counsel for appellant, PW-2, Shahid Ahmed deposed: It is incorrect that on account of inimical relations, I had deposed false facts. It is incorrect that Shahzad and Yamin had not visited my house on 16.3.2003. It is incorrect that I had deposed false facts.

7. In his examination-in-chief, PW-3, Yamin has deposed as under: On 16.3.2003 at about 8:15 p.m. I along with Shahzad had gone to house of Shahid Ahmed at Ashok Nagar, Delhi. At about 9:30 p.m. we left for our house. When we reached near MIG Flat, Ashok Nagar, Delhi, all the four accused persons reached there. Rahisuddin questioned Shehzad as to why he was not withdrawing his cases, when Farzana has been divorced by him. Allimuddin exhorted Rahisuddin to fire a shot at Shahzad, since he would not buzz otherwise. At that juncture, Rahisuddin took out a country made pistol and fired a shot at Shahzad. As soon as Shehzad took a dive, shot pierced through his left hand. I cried loudly for help. Shahzad also cried for help. At that juncture, the accused persons run away towards Wazirabad, Delhi. Accused Alijaan and Shaukin had over powered me, when the aforesaid incident was going on. I took Shahzad to GTB Hospital, Shahdara for treatment.

8. In his cross-examination by counsel for appellant, PW-3, Yamin deposed as under: Farzana had filed a maintenance petition against Rahisuddin, which petition stands disposed of. It is incorrect that accused persons had not met me at the place of incident. It is further incorrect that Rahisuddin had not fired a shot at Shahzad. It is further incorrect that accused persons had not caught hold of me. It is incorrect that accused Shaukin and Alijaan had not overpowered me. It is incorrect that accused Alimuddin had not overpowered Shahzad. Accused Alijaan and Shaukin had not overpowered Shahzad. Accused Alijaan and Shaukin had taken me in their grip, while accused Alijaan was in my front and accused Shaukin was on my back. Alimuddin had overpowered Shahzad from his back encircling his waist from his hands. Shahzad and Alimuddin were at a distance of two or three paces from me. By pace I mean, a distance of one foot. Shahzad was wearing a full sleeved shirt of cream colour. Again said, he was wearing a shirt of white colour. I had seen a country made pistol in possession of Rahisuddin. I had seen country made pistol in movies etc. Barrel of said country made pistol was of twelve inches. I cannot give dimension of its butt. Barrel was having circumference

of approximately half inch. It is incorrect that I had not seen a country made pistol in possession of Rahisuddin. Rahisuddin was at a distance of one or one and a half meter from Alimuddin and Shahzad. From that distance, Rahisuddin fired a shot on Shahzad. I took Shahzad to hospital in a three wheeler scooter. I am not aware as to where statement of Shahzad was recorded by police, since by that time, I had left hospital. Shirt of Shahzad was seized and handed over to police by doctor, in my presence. It was torn from the place where gunshot was sustained. Buttons of the said shirt were broken by the doctors to remove it out of the body of Shahzad. In East of scene of crime, Ashok Nagar is locate. On its West, Shahdara Loni Road, was there. On North, MIG flats were there and on South there was government school. When I was overpowered by the accused persons, I was facing towards East. Shahzad and Alimuddin were also facing towards East at that time. It is correct that prior to 16.03.03 me and accused persons were in inimical terms, which inimical relations were continuing. Accused persons were arrested by police on 17.03.03. It is incorrect that no such incident took place. It is further incorrect that on account of inimical relations, I made a false statement against the accused persons. The incident lasted for one and a half minute.

9. In his examination-in-chief, PW-6, Dr. Sunil Patodia, GTB Hospital, Shahdara, Delhi deposed as under: On 16.03.2003 at 10.45 p.m., patient Shahzad was brought in the hospital by Yamin with alleged history of gunshot. He was conscious and oriented with stable vitals. On local examination, a bullet injury was noted on left humerus. An entry wound was noted at the junction of upper and lower half of humerus entirely. Dimension of the wound was 4X4 cm. An exit wound was also noted on posterior region of humerus with the dimension of 15X9 cm. I prepared MLC, Ex.PW6/A, which is in my hand bears my signature and is correct. Later on injuries were opined to be of simple in nature.

10. In his cross-examination by counsel for appellant, PW-6, Dr. Sunil Patodia deposed as under: Shot was not fired at the victim from a close range. I cannot opine the range from which, it was fired on the victim. Tattooing and charring were not present on the wound, which occurred when a shot is fired from a range of two to three feet. History was recorded at the instance of injured. In gunshot injuries, pellet injuries are also sustained by the victim. I am not in a position to tell the

diameter and length of the cartridge, which made the entry wound. There was no swelling present over the injury. .... Exit wound was extensively lacerated wound. Extensively lacerated wound may occur in close range as well as in long range. It is incorrect that an extensively lacerated wound would not occur from a long range fire. No foul smell was emanating from the injury. It is incorrect that I prepared the MLC with connivance of victim, hence those facts are not mentioned by me

11. In his examination-in-chief, PW-10, SI Pratap Singh, deposed that: On 16.3.2003, I was posted at PS M.S. Park, Delhi. On that day, copy of DD No.43B, which is Ex.PW7/A, was assigned to me for action in the matter. At about 11:10 p.m., I along with Sanjeev Constable reached for GTB Hospital, where Shahzad was found admitted. I collected his MLC. He was being medically examined and was fit for statement. I recorded statement of Shahzad, which is Ex.PW1/A. I recorded rukka, Ex.PW10/A, and gave it to Ct. Sanjeev for registration of a case, who proceeded for PS at about 1:00 am. Witness Yamin was present in the hospital. I proceeded for the spot with Yamin and reached there at about 1:30 a.m. I inspected the spot and prepared site plan at his instance, which is Ex.PW10/B. I had made efforts to trace country made pistol used by the accused, but no recovery was effected. I concluded investigation. I submitted record to the SHO.

12. In his cross-examination by counsel for appellant, PW-10, SI Pratap Singh deposed as follows: It is incorrect that there is cutting at point X on Ex.PW4/A. It is incorrect that name Yamin has been recorded over that cutting. It is incorrect that statement Ex.PW1/A was recorded by me at the instance of Yamin and not at the instance of complainant. It is incorrect that name of Shahzad was there at point X, which was cut and name of Yamin was recorded thereon. It is incorrect that cutting at point X on Ex.PW4/A has been done by me after conspiring with injured party. It is incorrect that statement, Ex.PW1/A, has been later on replaced by me for the original statement. I had inquired from Shahzad and Yamin as to from what distance a shot was fired and they told that it was fired from a very close range. It is incorrect that I had not investigated the case fairly.

13. In his examination-in-chief, DW-1, Alimuddin deposed as under: On 16.3.2003 at about 9:30 p.m., I was present at my house, along with my family members. I

had met Shahjad that day. I am not aware where he was residing in those days. I am not aware about any incident, which occurred with Shahjad that day. After divorce of sister of Shahjad my relations were cordial with Shahjad. Again said our relations with Shahjad became strange after divorce of his sister. Initially thereafter Shahjad lodged a dowry case, one assault case and the other assault case on we people. He had lodged one or two cases against us. Be became inimical qua we people.

14. In his cross-examination by learned additional public prosecutor, DW-1, Alimuddin deposed as under: It is correct that I had not stated before any authority that on 16.3.2003 at 9:30 p.m., I was present at my house. Again said, I had gone to DCP and I do not recollect whether I narrated these facts before him or not. It is incorrect that I used to pressurize Shahjad to withdraw his cases. It is incorrect that when Shahjad did not bulge under our pressure then an attempt was made on his life by we people on 16.3.2003. It is incorrect that I had deposed false facts.

15. In his examination-in-chief, DW-2, Rahisuddin deposed as under: From outside, we have cordial relations with Shahjad, brother of Farjana. However, Shahjad is inimical qua me and my family members. Shahjad lodged 6-7 cases against me and my family members. On 16.3.2003, at about 9:30 p.m., I was present at my house. I am not aware as to where Shahjad was on 16.3.2003. On that night, I had not gone to Ashok Nagar within the jurisdiction of M.S. Park, Delhi. Neither me nor my associates had made any attempt on the life of Shahjad on that day or on any other day. I am having codial relations with Yamin, his maternal uncle. I am not aware why Yamin and Shahjad had deposed against me.

16. In his cross-examination by learned additional public prosecutor, DW-2, Rahisuddin deposed as under: When I was produced before the Magistrate of the area, after my arrest in this case, I told him that on 16.3.2003 at about 9:30 p.m., I was present at my house. It is incorrect that on 16.3.2003, at 9:30 p.m., I was not present at my house. The place of incident is at a distance of 3-4 kilometers from our house. It is incorrect that me and my associates fired a shot on Shahjad. It is incorrect that Yamin was with Shahjad at that time. It is incorrect that I had deposed false facts.

17. In his examination-in-chief, DW-3, Shaukeen deposed as under: On 16.3.2003, at about 9:30 p.m., I was sleeping at my house. On that night, neither me nor my father nor Rahisuddin nor Alijaan had attempted on the life of Shahjad that night. They are inimical qua us. We are having cordial relations with our side from them.

18. In his cross-examination by learned additional public prosecutor, DW-3, Shaukeen deposed as under: It is incorrect that on 16.3.2003, at 9:30 p.m., we were present at traffic rotary Ashok Nagar, Delhi and fired a shot at Shahjad. It is incorrect that Yamin was with him at that time.

19. In his examination-in-chief by learned additional public prosecutor, DW4, Alijaan deposed as under: On 16.3.2003, at 9:30 p.m., I was present at my house. I am not at inimical terms qua Shahjad and Yamin. A false case has been lodged against me. They are inimical qua me and my family members. On that day, at 9:30 p.m., I had not seen him in the area of Ashok Nagar, within the jurisdiction of P.S. M.S. Park, Delhi.

20. In his cross-examination by learned additional public prosecutor, DW-4, Alijaan deposed as under: I am not aware why Shahjad and Yamin is inimical qua me. It is incorrect that I conspired with Rahisuddin and made attempt on the life of Shahjad. It is incorrect that I was involved in the crime and that is why Shahjad had named me as an offender. It is incorrect that I had deposed false facts. Ashok Nagar traffic rotary is at a distance of three kilometers from my house. We do not go to Ashok Nagar to purchase goods. It is incorrect that I had deposed false facts.

21. The counsel for appellants has submitted that the judgment dated 11.02.2009 passed by the trial Court convicting the appellants is based on conjectures and surmises and is bad in law. It is further submitted by counsel for appellants that the learned trial court has failed to weigh the evidence and has lost sight of the fact that the appellants have been falsely implicated by the complainant who was inimical towards the appellants as appellant no.1, Rahisuddin had divorced Farzana, sister of the complainant/Shahzad. It is contended by counsel for appellants that the appellants were not even present at the alleged place of incident and at the relevant time, all the appellants were present at their respective

homes as has been stated by them in their examinations under section 315, Cr.P.C.

22. It is vehemently argued by counsel for appellants that the trial court has failed to observe the fact that the complainant has a history of enmity against the appellants and have initiated innumerable criminal proceedings against them. It is contended by Mr.Jain that the appellants have filed a complaint with the National Human Rights Commission to enquire into the matter and have also moved a complaint to the Commissioner of Police, Delhi and other police officials including the DCP (Vigilance).

23. It is strongly urged by counsel for appellants that the conviction of appellants under section 307, IPC is in utter violation of law since the act as alleged by the complainant Shahzad falls short of satisfying the ingredients of section 307, IPC. From the circumstances alleged by the complainant PW-1, Shahzad, it cannot be inferred that there was an intention to kill. It is contended by the counsel that it is the case of the prosecution itself that the alleged gunshot had missed complainant, PW-1, Shahazad. Counsel submits that the alleged place of incident was lonely, dark and there was no passerby and thus had there been any intention on the part of the appellants to kill the complainant, as has been imputed to them, the appellants could have easily fired a second shot. It is submitted that the same clearly proves that no case is made against the appellants under section 307, IPC. It is further contended by the counsel that if the intention had been of killing the complainant, appellant No.1 Rahisuddin would have shot at the chest of the complainant and not at the arm. Reliance has been placed on the case of Hari Kishen & State of Haryana v. Sukhbir Singh reported in AIR 1988 SC 2127 and more particularly at para 7 which reads as under: 7. In the first question as to acquittal of the accused under Sections 307/149 IPC, some significant aspects may be borne in mind. Under Section 307 IPC what the court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of attempt to murder. Under Section 307 the intention precedes the act attributed to accused. Therefore, the

intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention. In this case, two parties in the course of a fight inflicted on each other injuries both serious and minor. The accused though armed with ballam never used the sharp edge of it. They used only the blunt side of it despite they being attacked by the other side. They suffered injuries but were not provoked or tempted to use the cutting edge of the weapon. It is very very significant. It seems to us that they had no intention to commit murder. They had no motive either. The fight as the High Court has observed, might have been a sudden flare up. Where the fight is accidental owing to a sudden quarrel, the conviction under Section 307 is generally not called for. We, therefore, see no reason to disturb the acquittal of accused under Section 307 IPC. 24. Further reliance has been placed on Pravat Kumar Misra v. State of Orissa reported in 1996 Cri LJ 4357 and more particularly at para 9 which reads as follows: 9. On a conspectus of the prosecution case coupled with the evidence led in support thereof, I concur with the findings of both the courts below that it was the accused who assaulted PW 8 and caused injuries on his person. The above being my finding, the next question arise whether an offence under section 307, IPC could be made out. The injuries noticed by the doctor PW 5 were all simple in nature and the same in his opinion were not sufficient to cause death in ordinary course of nature. This suggests that the accused had no intention to cause the death of the injured what he intended was to give him a beating and to cause injuries. Had he intended to put an end to the life of the injured, he would have given fatal blows when he had sufficient time and opportunity for it. In that view of the matter, I am of the opinion that the offence committed by the accused clearly falls within the ambit of section 324 and not section 307, IPC. 25. The counsel for appellants submits that the conviction of appellants under section 307, IPC is bad in law since the trial court has ignored the fact that no bone injury has been caused to the complainant and the only injury alleged to be caused is injury on the left arm which has been opined to be an injury simple in nature by PW-6, Dr. Sunil Patodia, who prepared the MLC of the complainant. It is further contended by the counsel that

the injury was caused on the left arm, that is to say, a non-vital part of the body and alleged injury has not been opined to be fatal.

26. Alternatively, counsel for the appellants submits that no case is made out against the appellants under section 307 and offence established if any, is under section 324 of the IPC. Counsel submits that in view of the same, the appellants should be released on probation. The counsel has placed reliance on paras 13 and 20 of Shiv Singh v. State reported in 1975 Cri LJ 704 which are as under: 13. The only question which remains for consideration is as to what offence has been made out and what should be the appropriate sentence to be imposed upon the accusedappellant. In this connection reference may be made first to the injuries caused on Srimati Angoori. She was examined by Dr. H. P. Goel P.W. 3 on 19th June 1969. She received one incised wound on the left side of the neck and three punctured wounds on the left arm and the left back. These injuries were simple and had been caused by a weapon like a spear. Dr. Goel has deposed that these injuries were not sufficient in the ordinary course of nature to cause death.

20. In the result, therefore, this appeal is partly allowed. The conviction of the accused-appellant for the offences under Sections 307 and 302, IPC are set aside. He is instead convicted under Sections 324 and 304, Part (II) IPC and sentenced to two years and five years' rigorous imprisonment respectively. Both the sentences to run concurrently. But instead of being sent to Jail the appellant is given benefit of Section 4 of the First Offenders Probation Act and is directed to execute a personal bond with two sureties as mentioned above. The appellant is on bail. He need not surrender. His bail-bonds are hereby discharged, subject to the conditions noted above. 27. Mr.Jain also contends that the conviction is bad in law since there is no cogent evidence to establish the guilt of appellants. The alleged injury on the person of complainant Shahzad is a self-inflicted injury which is evident from the testimony of PW-6, Dr. Sunil Patodia, who prepared the MLC of the complainant, that there was no tattooing and charring on the wound, neither any foul smell emanated nor were any pellet injuries sustained by the complainant. It was further pointed out by the counsel that it is impossible that the entry wound was 4X4 cm in size while the exit wound was 15X9 cm. The counsel contends that the testimony of PW-6 falsifies the theory of gunshot injury which is also evident

from the fact that no weapon of offence has been recovered nor have any cartridges, pellets or blood stained earth been found.

28. Per contra, counsel for the respondent submits that there was no infirmity in the judgment of the trial court and the appellants have been rightly convicted under section 307 read with section 34, IPC. The evidence of the injured has been corroborated by the testimony of eye-witness PW-3, Yamin and PW-2 Shahid Ahmed has also led credence to the testimony of PW-1, Shahzad.

29. The counsel for the respondent contends that the intention to kill can be conclusively inferred from the circumstances in which the incident took place. There was a pre-arranged plan, pursuant to which the appellants were waiting for the complainant at the place of incident and as soon as the complainant and Yamin Ali arrived at the spot, the appellants started abusing and assaulting them. The appellant No.2, Alimuddin exhorted appellant No.1, Rahisuddin to finish the complainant. Thereafter, Rahisuddin took out a katta from the dub of his trouser and shot at the complainant. Thus, the fire arm was not only used to threaten the complainant but was also used to fire a shot at the complainant. While drawing the attention of the court to the location of the injury which is the upper portion of the body, counsel for respondent submitted that appellant No.1 Rahisuddin shot at the chest of the complainant, but since the complainant took a dive in order to save himself; the bullet just missed his chest and hit him on the left arm, which leads to a very clear inference that the intention of the appellants was to kill the complainant/Shahzad. Counsel next submits that ingredients of the offence under section 34, IPC have been clearly satisfied in the present case in as much as the appellants had gathered at a lonely spot and waited for the complainant party to arrive.

30. Counsel for respondent has also pointed out that PW-6, Dr. Sunil Patodia has clearly deposed before the court that complainant Shahzad was brought to the hospital with an alleged history of gunshot and on local examination a bullet injury was noted on his left humerus. He further deposed that an entry wound was noted at the junction of upper and lower half of humerus and an exit wound was also noted on posterior region of humerus. Thus, medical evidence on record also

falsifies the case set up by the appellants.

31. It is next submitted that the plea of alibi set up by all the appellants has not been corroborated by any family member of either of the appellants and the appellants have failed to bring any of their family members in the witness box. It is further contended by the counsel that a plea of alibi which is not established by independent evidence has to be read against the appellants. Counsel for respondent has submitted that the prosecution has been able to establish the guilt of the appellants without any shadow of doubt and that there is no reason for this court to interfere in the reasoned judgment and order on conviction passed against the appellants.

32. I have heard the counsel for the parties and have perused the entire evidence on record. I have also perused the impugned judgment dated 11.02.2009. The arguments of the counsel for appellants are summarised as under: Admittedly, PW-1 and PW-3 have inimical relations with the appellants and thus their testimony cannot be relied upon. Medical and forensic evidence clearly establishes the innocence of appellants. No weapon has been recovered nor any cartridges, pellets or blood stained earth removed by the police. Alternatively, conviction under section 307, IPC is bad in law since there was no intention to kill the complainant and the alleged injury on the person of complainant is simple in nature. Appellants have been falsely implicated in the case since they were not present at the scene of occurrence at the relevant time.

33. Arguments of counsel for respondent can be summarised as under: Prosecution has proved the guilt of the appellants beyond any reasonable doubt. The appellants have failed to establish the plea of alibi. Testimony of PW-1 is duly corroborated by the testimony of eyewitness PW-3, Yamin Ali. The medical and forensic evidence clearly establishes that there was a gunshot injury on the person of the complainant.

34. On a careful perusal of the record, I find that the case of the prosecution primarily rests upon the evidence of PW-1, Shahzad and PW-3, Yamin Ali, who were eye-witnesses to the incident of crime. In his examination- in-chief, PW-1, Shahzad, who is also the complainant and the injured in the present case, has

deposed that on 16.03.2003 at about 8/8.30 p.m, he had gone to the house of his nana PW-2, Shahid Ahmed along with his maternal uncle PW-3, Yamin Ali. He further deposed that at about 9/9:30 pm he along with PW-3, Yamin Ali left the house of PW-2, Shahid Ahmad for his house in Chand Bagh and when they reached near M.I.G Flats of Ashok Nagar, the appellants met them and started abusing and assaulting them. Appellant No.1, Rahisuddin threatened the complainant (PW-1) to withdraw the case which had been filed by the complainants sister against Rahisuddin and if the same was not done then Rahisuddin stated that he would kill the complainant (PW-1). It has also been deposed by PW-1 that PW-3, Yamin Ali was beaten by appellants Ali Jaan and Shaukin Ali while appellant No.2, Alimuddin had caught hold of the complainant and appellant No.1, Rahisuddin slapped him three-four times. PW-1 has further deposed that thereafter, appellant No.2, Alimuddin exhorted appellant No.1, Rahisuddin to finish PW-1 and on which Rahisuddin took out a katta from the dub of his trouser and fired upon the complainant, PW-1. PW-1 tried to save himself and the bullet hit him on his left arm and exited from the arm. PW-3 Yamin Ali shouted for help and PW-1 became unconscious. In his cross-examination by the counsel for appellants, PW-1 reiterated that appellant No.1, Rahisuddin had at first threatened to kill him if the case against him was not withdrawn and then on the exhortation of appellant No.2, Alimuddin, appellant No.1, Rahisuddin took out a katta from the dub of his trouser and fired at PW-1, from a distance of 4/5 feet, who tried to save himself and the bullet hit him on his left arm. In the cross-examination, PW-1 negated the suggestion that he had deposed falsely against the appellants due to ill will or enmity. 35.I find that the testimony of PW-1, Shahzad has been fully corroborated by PW-3, Yamin Ali who was an eye-witness to the occurrence. In his examination-in-chief, PW-3 has deposed that on 16.03.2003 at about 8.15 pm, he and PW-1 had gone to the house of PW-2, Shahid Ahmed (nana) at Ashok Nagar, Delhi. He further deposed that he and PW-1 (complainant) left the house of PW-2 at around 9.30 pm and when they reached near the M.I.G Flats of Ashok Nagar all the four appellants were already standing there. Appellant No.1, Rahisuddin questioned PW-1 as to why was he not withdrawing the cases against Rahisuddin. It has also been deposed by PW-3 that appellants, Shaukin and Alijaan had then overpowered him and appellant,

Alimuddin exhorted appellant, Rahisuddin to fire a shot at PW-1 Shahzad. Consequently, appellant Rahisuddin took out a country made pistol and fired at PW-1 who in order to save himself took a dive and the bullet pierced through his left arm. The appellants ran away towards Wazirabad, Delhi. In the crossexamination, PW-3 Yamin Ali affirmed that appellants Shaukin and Alijaan had overpowered him while appellant, Alimuddin had overpowered Shahzad from the back encircling his waist. He has further deposed that Shahzad and Alimuddin were at a distance of two to three feet from him. After carefully reading the testimonies of PW-1 and PW-3, I find that there are no material discrepancies. It has been categorically stated by PW-1 as well as by PW-3 that appellant Alimuddin had exhorted appellant Rahisuddin to kill PW-1 and pursuant to which appellant, Rahisuddin fired a shot at PW-1. The testimony of PW-1 duly stands corroborated by PW-3 on all material aspects. I have also gone through the testimony of PW-2, Shahid Ahmed who has deposed in his examination-in-chief that on 16.03.2003, at about 8 PM, PW-1, Shahzad and PW-3, Yamin Ali had visited his house and had left around 9.15 pm. PW-2 has deposed that in the morning of the next day, police had visited his house to enquire if PW-1 and PW-3 had visited him on the previous night i.e the night on which the alleged incident had taken place. PW-2 further stated that he was informed by the police that PW-1 had been shot at in the night. Thus PW-2, Shahid Ahmed clearly affirmed that both PW1 and PW-3 had visited his house on the night of the incident, which further lends credence to the version of PW-1 and PW-3.

36. Learned counsel for the appellant has however sought to contend before this court that the testimony of PW-1 and PW-3 cannot be relied upon in view of the forensic evidence on record. Learned counsel has pointed out that PW-6, Dr. Sunil Patodia has deposed before the court that there was no tattooing, charring and nor any foul smell emanated from the wound, which usually occurs in case of a gunshot injury from a close range. Refuting the contention of counsel for appellants, the counsel for respondent has submitted that this is not a case of a shot fired from a close range rather it was a distant shot. Learned counsel for the respondent has relied upon a handout from the book- Forensic Medicine and Toxicology, J.B. Mukherjee, Volume 1, Academic Publishers, Calcutta, New Delhi to show that the MLC supports the case of the prosecution as when there is a

distant shot, i.e., when firing range is beyond 2 feet, there is no blackening, tattooing or charring on the wound. The extract reads as under:

D. Distant Shot When firing range is beyond 2 feet, features will be: (a) (b) (c) The wound of entry is usually circular in shape, but may be of the same size or even smaller than the bullet because of elasticity of skin; will be associated with usual zone of abraded collar contused-lacerated inverted skin margins, and a little bigger dirt collar. There will be no evidence of any burning, singeing, blackening and tattooing. The wound of exit will be usually slightly bigger than the wound of entry but the two may be similar sizes, when no obstruction on the way out was encountered by the bullet. 37. I have also gone through CD Fields Expert Evidence, 4th edition, Delhi Law House which describes scorching/charring, blackening and tattooing as under:

Scorching - Scorching is also known as burning or charring. Scorching is the discoloration resulting from burning by the flame or hot gases that issue from a firearm.....the presence of scorching is a clear indication that the firearm has been discharged from the close range. The liberated hot gas travels only to limited distance which varies with the firearm. Burrard states that: with service rifle scorching may occur upto six inches and with a revolver or a pistol upto 2 or 3 inches.

Blackening- Blackening is also known as smudging. Blackening generally consists, wholly or largely of smoke (made up of very minute particles of carbon of that order from the one thousand of a millimetre to one-hundredth of a millimetre in diameter) produced by combustion of the powder, but with smoke there may be also a small proportion of large black particles, consisting of carbon or carbonaceous matter..... .....Burrard states-that blackening with a high power rifle such as a service rifle, can occur upto 9 inches, and with a revolver or pistol upto about 6 inches the range, however, naturally being increased when black powder is used, which Burrard estimates in the case of a revolver of self-loading pistol to be about 8 inches while with a shot-gun it is about 12 inches.1 Tattooing- tattooing is also known as peppering. Tattooing, as its name indicates, is the marking of an object caused, in the case of weapon firing bullets, by unburnt or partly burnt

powder grains, which is much more common with revolvers and self-loading pistol than with rifles owing to the less complete combustion of the powder in shot-barrelled weapons. It is caused by the embedding of unburnt or semiburnt powder particles into the surface of the target. These particles are bit heavier than the smoke particles and that is the reason why they are carried to a longer distance and cause tattooing to a distance of roughly about one and half times the blackening range. The intensity of tattooing depends upon the quality and age of the gun powder used in the ammunition used. 38. It is further stated in Taylors Principles and Practice of Medical Jurisprudence (Vol. I, 10th Edn, at p.

441) under the heading burning of the wound that it is impossible to state rules as to the precise distance from which it is possible to produce mark of burning, for this depends on the quantity and nature of the powder, the method of charging, and the nature of the weapon. It is unusual, however, to get marks of burning beyond a yard or a yard and a half with a shot-gun, or at more than half a yard with a revolver.

39. PW-1, complainant has deposed in his cross-examination that appellant Rahisuddin had fired the shot at him from a distance of about 4/5 feet. PW-3, Yamin Ali has also deposed in his cross-examination that appellant 1 W.E. Gibbs, Clouds and Smoke, p. 130 No.1, Rahisuddin had fired a shot at PW-1, Shahzad from a distance of about 1.5 metres (i.e approx 5 feet/59 inches). As per the forensic material reproduced above, a shot fired from a distance of more than 2 feet would not result in any tattooing, charring or blackening of the wound. Thus in my opinion, the forensic evidence on record does not come to the aid and rescue of the appellants. I have also carefully gone through the deposition of PW-6, Dr. Sunil Patodia who had prepared the MLC of the complainant, Shahzad. PW-6 has deposed in his examination-in-chief that on 16.03.2003 at about 10.45 pm, patient Shahzad was brought to the GTB Hospital with an alleged history of gunshot injury. He was conscious and oriented with stable vitals. PW-6 has deposed that on local examination, a bullet injury was noted on the left humerus and an entry wound was noted at the junction of upper and lower half of humerus entirely. He also opined about the dimensions of the wound to be of 4X4 cm and that an exit wound was also noted on posterior region of humerus with the dimension of 15X9

cm. Thus, it is evident from the testimony of PW-6 that there were entry and exit wounds at the person of the complainant, Shahzad and as pointed out by counsel for respondent, the exit wound was much bigger than the entry wound as it occurs in cases of shots beyond 2 feet. Thus, in view of the above I find no force in the contention of the counsel for appellants that the MLC falsifies the theory of gunshot injury.

40. Coming back to the testimony of PW-1 and PW-3, learned counsel for the appellants has contended that PW-1, Shahzad and PW-3, Yamin Ali have falsely deposed against the appellants as appellant No.1, Rahisuddin had divorced the sister of the complainant, who had thus become inimical to the appellants. It is further the contention of counsel that PW-3 is an interested witnesses who has deposed falsely to secure conviction of the appellants, and his testimony cannot be relied upon. On this point, it would be appropriate to refer to the case of Nallabothu Venkaiah v. State of A.P. reported in (2002) 7 SCC 117, wherein the Apex Court has observed as under:

13. We have already quoted the reasoning rendered by the High Court acquitting Accused 3, 4, 5, 7, 8 and 10. The aforesaid finding has been rendered by the High Court without discussing the depositions of PWs 1 to 3 and by a cryptic order. The witnesses are inimically disposed to the accused alone would be no ground to throw away their otherwise reliable, natural and creditworthy statement. The test, in such circumstances, as correctly adopted by the trial court, is that if the witnesses are interested, the same must be scrutinized with due care and caution in the light of the medical evidence and other surrounding circumstances. Animosity is a double-edged sword and it can cut both sides. It can be a ground for false implication. It can also be a ground for assault. We are constrained to deprecate the manner in which the High Court threw away the eyewitness account of PWs 1 to 3 on the ground of animosity albeit without any discussion. 41. It was also expressed by the Apex Court in State of U.P. v. Kishanpal and Others reported in (2008) 16 SCC 73 as under:

17. The plea of interested witness, related witness have been succinctly explained by this Court in State of Rajasthan v. Kalki2 The following conclusion in para 7 is

relevant: (SCC p.

754) 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 2 (1981)2 SCC 752:

1981. SCC (Cri) 593 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. 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.

18. The plea of defence that it would not be safe to accept the evidence of the eyewitnesses 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 scrutinise 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.

19. 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 scrutinising the evidence of the interested witness.

20. 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. (Vide State of A.P. v. Veddula Veera Reddy3, Ram Anup Singh v. State of Bihar4, Harijana Narayana v. State of A.P5, Anil Sharma v. State of Jharkhand6, Seeman v. State7, Salim Sahab v. State of M.P8, Kapildeo Mandal v. State of Bihar9and D. Sailu v. State of A.P10) 21. In Kulesh Mondal v. State of W.B.11 this Court considered the reliability of interested/related witnesses and has reiterated the earlier rulings and it is worthwhile to refer the same which reads as under: (SCC pp. 580-81, para

11) 11. 10. We may also observe that the ground that the [witnesses being close relatives and consequently being partisan witnesses,]. should not be relied upon, has no substance. This theory was repelled by this Court as early as in 3 (1998)4 SCC 145:

1998. SCC (Cri) 817 (2002)6 SCC 686 :

2002. SCC (Cri

5. (2003)11 SCC 681 :

2004. SCC (Cri

6. (2004)5 SCC 679:

2004. SCC (Cri

7. (2005)11 SCC 142 :

2005. SCC (Cri

8. (2007)1 SCC 699 : (2007)1 SCC (Cri

9. (2008)16 SCC 99: AIR 2008 S

10. (2007)14 SCC 397 : (2009)1 SCC (Cri) 898 : AIR 2008 S

11. (2007)8 SCC 578 : (2007)3 SCC (Cri

4. Dalip Singh v. State of Punjab12 in which surprise was expressed over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J.

it was observed: (AIR p. 366, para

25) 25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar v. State of Rajasthan13 (AIR at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel. 11. Again in Masalti v. State of U.P.14 this Court observed: (AIR pp. 209-10, para

14) 14. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be 12 AIR 1953 SC 364 AIR 1952 S

14. AIR 1965 S

13. cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct. 12. To the same effect is the decision in State of Punjab v. Jagir Singh15, Lehna v. State of Haryana16.... As observed by this Court in State of Rajasthan v. Kalki17 normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a partys case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi v. State of Bihar18.*

42. Thus it is a settled position of law that the courts have to be cautious while relying on the testimony of a relative standing as a witness and have to carefully scrutinise his testimony, however the testimony of such a witness cannot be thrown away merely on the ground that he was a relative of the injured person/victim of the crime. It is further settled law that inimical relations with the accused is also no ground to reject the testimony of a witness. In the facts of this case, I find that merely because PW-1 and PW-3 had strained relations with the appellants, it is no ground by itself to disbelieve their otherwise unimpeachable testimony. A careful perusal of the evidence would show that there are no material discrepancies in the testimony of PW-1 and PW-3 and nothing has been 15 (1974) 3 SCC 277:

1973. SCC (Cri) 886 (2002) 3 SCC 76:

2002. SCC (Cri

17. (1981) 2 SC

18. (2002) 6 SCC 81:

2002. SCC (Cri

16. brought on record by the counsel for appellants to impeach the creditworthiness of PW-1 and PW-3. Although it has been pointed out that while as per PW-1 the incident lasted for about fifteen to twenty minutes and as per PW-3 the incident took place for about one and half minute, I find that the time sense of people varies as per their calculations, and the minor anomaly pointed out regarding the duration of the incident cannot be a ground to discredit the entire evidence given by PW-1 and PW-3.

43. The counsel for appellants has further vehemently argued that the case of the prosecution is farce since no incriminating material has been recovered by the investigating officer. I find no merit in the aforesaid contention and concur with the view of the trial court which has rightly placed reliance on the case of Lakhan Sao v. State of Bihar reported in (2000) 9 SCC 82 wherein the Apex Court has held that non-recovery of a pistol or spent cartridge does not detract from the case of the prosecution, where direct evidence is acceptable. A further reliance has been placed by the learned trial court on Krishna Mochi & Ors. v. State of Bihar reported in (2002) 6 SCC 81 wherein the Apex Court took a similar view and held that [i].t has been then submitted on behalf of the appellants that nothing incriminating could be recovered from them, which goes to show that they had no complicity with the crime. In my view, recovery of no incriminating material from the accused cannot alone be taken as a ground to exonerate them from the charges, more so when their participation in the crime is unfolded in ocular account of the occurrence given by the witnesses, whose evidence has been found by me to be unimpeachable.

I further find that though no spent cartridges/weapon has been recovered, the blood stained shirt of the injured PW-1, Shahzad was seized by the police. The

eye-witness to the incident, PW-3, Yamin Ali has categorically deposed about the firing of the gunshot. In his crossexamination, PW-3, Yamin Ali has further deposed that the shirt of PW-1 was seized and handed over to the police by the doctor in his presence. He has deposed that the shirt was torn from the place where gunshot was sustained and buttons of the shirt were removed by the doctor to remove the shirt from the body of PW-1. PW-1, Shahzad has also identified his blood stained shirt. PW-10, SI Pratap Singh who was the investigating officer in this case has also deposed in his examination-in-chief that constable Jasbeer had given him a sealed parcel bearing the seal of GTB Hospital stated to be containing blood stained shirt of the injured which was taken into possession and deposited in the malkhana. Thus the shirt was identified by PW-1 before the trial court and the fact that the left sleeve of the shirt was missing, adds further credence to the case of the prosecution.

44. Lastly, it has been contended by counsel for appellants that at the relevant time, all the appellants were present at their homes and none of them was present at the alleged place of incident. The appellants have examined themselves as defence witnesses under section 315 of Cr.P.C. and have deposed that at the relevant time, they all were present at their respective homes. Before going further, it would be relevant to reproduce the view expressed by the Apex Court on a plea of alibi in the case of Munshi Prasad v. State of Bihar reported in (2002) 1 SCC 351:

2. ..... The word alibi, a Latin expression means and implies in common acceptation elsewhere: it is a defence based on the physical impossibility of participation in a crime by an accused in placing the latter in a location other than the scene of crime at the relevant time, shortly put, the presence of the accused elsewhere when an offence was committed. This Court in Dudh Nath Pandey v. State of U.P19 has the following to state in regard to the plea of alibi: (SCC p.173, para

19) The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at

the relevant time that he could not be present at the place where the crime was committed. Distance thus would be a material factor in the matter of acceptability of the plea of alibi 3. Without attributing any motive and taking the evidence on its face value, therefore, it appears that the place of occurrence was at 400-500 yards from the place of Panchayat and it is on this piece of evidence, the learned advocate for the State heavily relied upon and contended that the distance was far too short so as to be an impossibility for the accused to be at the place of occurrence - we cannot but lend concurrence to such a submission: a distance of 400-500 yards cannot possibly be said to be presence elsewhere - it is not an impossibility to be at the place of occurrence and also at the Panchayat meet, the distance being as noticed above: the evidence on record itself negates the plea and we are thus unable to record our concurrence as regards acceptance of the plea of alibi as raised in the appeal. Before drawing the curtain on this score, however, we wish to clarify that the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution - a lapse on the part of the defence witnesses cannot be differentiated and be treated differently than that of the prosecutors witnesses. 45. Applying the law laid down in Munshi Prasad (supra), I find that considering the distance between the place of crime and the alleged place of presence of appellants, it cannot be concluded that the appellants were so far away from the place of occurrence that there was a physical impossibility of their presence at the scene of offence. The appellants do not satisfy the criteria of being present elsewhere so as to make their 19 (1981)2 SCC 166:

1981. SCC (Cri) 379: AIR 1981 SC 911 presence at the scene of occurrence virtually impossible. Furthermore, though the appellants have resorted to the plea of alibi deposing that at the relevant time they all were present at their respective homes, but I find that they have failed to bring any of their family members in the witness box to corroborate their stand. No material evidence has been placed on record to corroborate the plea of alibi other than the deposition of the appellants themselves under section 315, Cr.P.C. In view of above, I am of the opinion that

the appellants have failed to establish the plea of alibi.

46. Counsel for appellants has further strongly urged that the conviction of appellants under section 307, IPC is bad in law since no cogent evidence has been led by the prosecution to prove that there was an intention to kill the complainant. The counsel contends that if the intention had been to kill PW-1, appellant Rahisuddin would have fired at the chest of PW-1. On this point, it would be relevant to reproduce section 307, IPC which reads as under: 307. Attempt to murder - Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned. 47. It would be apposite to also refer to the case of Vasant Vithu Jadhav v. State of Maharashtra reported in (2004) 9 SCC 31, the Apex Court observed as under:

9. ..... To justify a conviction under this section (S.307), it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

10. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, it is not correct to acquit an accused of the charge under Section 307 IPC merely because the injuries inflicted on the victim were in the nature of a simple hurt.

11. This position was highlighted in State of Maharashtra v. Balram Bama Patil2021 , in Criminal Appeal No.1034 of 1997 decided on 4-2-2004 , and22in Criminal Appeal No.1179 of 1997 decided on 11-2-2004 12. In Sarju Prasad v. State of Bihar23 it was observed in para 6 that mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not by itself sufficient to take the act out of the purview of Section 307.

13. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstance that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 IPC. The determinative question is intention or knowledge, as the case may be, and not nature of the injury. 20 (1983)2 SCC 28:

1983. SCC (Cri) 320 Girija Shankar v State of UP, (2004)3 SC

22. R. Prakash v. State of Karnataka, (2004)9 SC

23. AIR 1965 SC 8143: (196501 CriL

21. 14. In the case at hand the accused fired the gun from a very close range of about 6-8 feet aiming at the victim when he was sleeping. The bullet broke into pieces and three such pieces struck the victim. Both intention and knowledge in terms of Section 307 can be attributed to the accused. Therefore, the High Court was justified in recording conviction of the accused-appellant under Section 307 IPC. 48. On the point of Section 308, IPC, the Apex Court in Sarju Prasad v. State of Bihar reported in AIR 1965 SC 843, held that an intention to kill can be imputed

to a person who fired the shot at the victim in such circumstances that but for the intervening fact it would have amounted to murder in the normal course of events though no fatal injury has been sustained. The relevant portion of the judgment is reproduced as under:

3. It is common ground that the act for which the appellant has been convicted under Section 307 consisted of causing an injury in the vital region of Shankar Prasads person but that no vital organ of Shankar Prasad was actually cut as a result of this injury. Learned counsel for the appellant, therefore, contends that the injury was a simple one and that as it was not such as was in the ordinary course of nature likely to result in death the offence falls not under Section 307 but under Section 324 IPC. According to learned counsel, before a person can be found guilty of the offence of an attempt to commit murder the prosecution must establish that the actual act which the assailant is shown to have committed was such as would in the ordinary course of nature have resulted in death and that here as the injury was a simple one, no vital organ of Shankar Prasad having been damaged, it does not fall within the purview of Section 307 IPC. It was no doubt held in R. 25 v. Cassidy24 which was followed in Martu v. Queen that for a person to be convicted under Section 307 IPC the act done must be an act done under such circumstances that death might be caused if the act took effect, that is to say, the act must be capable of causing death in the natural and ordinary course of things. But these decisions were not followed by the 26 same High Court in Emperor v. Vasudeo B. Gogte . There is a large body of decisions of other High Courts to the same effect as the decision in Gogte case. There, Beaumont, C.J.

referring to Cassidy case has observed: If the reasoning of the learned Judges in that case be right as to the construction of Section 24 (1867) 4 BHC (Cr.C) 17 (1913) 15 Bom L

26. (1932) 56 Bo

25. 307 and if the act committed by the accused must be an act capable of causing death in the ordinary course, it seems to me that logically the section could never have any effect at all. If an act is done which in fact does not cause death, it is impossible to say that that precise act might have caused death. There

must be some change in the act to produce a different result, and the extent to which the act done must be supposed to be varied to produce the hypothetical death referred to in Section 307 is merely a question of degree. If a man points at his enemy a gun which he believes to be loaded but which in fact is not loaded intending to commit murder (which is Cassidy case1), it is no doubt certain that no death will result from the act. But equally certain is it that no death will result if the accused fires a revolver at his enemy in such circumstances that in fact, whether through defect of aim, or the activity of the target, the bullet and the intended victim will not meet. If, however, Section 307 does not cover the case of a man who fires a gun at his enemy with intent to kill him but misses his aim, it is difficult to see how the section can ever have any operation. 4. After pointing out that this decision was not followed by the Allahabad High Court in QueenEmpress v. Niddha27 the learned Chief Justice continued: The words under such circumstances refer to acts which would introduce a defence to a charge of murder, such as, for instance, that the accused was acting in self-defence or in the course of military duty. But if you have an act done with a sufficiently guilty intention and knowledge and in circumstances which do not from their nature afford a defence to a charge of murder, and if the act is of such a nature as would have caused death in the usual course of events but for something beyond the accuseds control which prevented that result, then it seems to me that the case falls within Section 307. 5. Thus according to the learned Chief Justice the act to fall within Section 307 must be such that but for the intervention of some circumstance it would, if competed, have resulted in death. There is no evidence in this case that a fatal injury or an injury to a vital organ was prevented by any intervening circumstance.

6. All these decisions were considered by this Court in Om Prakash v. State of Punjab28 and though Cassidy case was not expressly dissented from the actual vie

28. (1891)14 All 38 (1962)2 SCR 254 taken by this Court is more in consonance with the view taken by Beaumont, C.J.

in Geogte case3 and the view taken by the Allahabad High Court in Niddha case than that taken in Cassidy case no injury was in fact occasioned to the victim Sir Earnest Hotson, the then acting Governor, due to a certain obstruction. Even so, the assailant Gogte was held by the court to be jointly under Section 307 because his act of firing a shot was committed with a guilty intention and knowledge and in such circumstances that but for the intervening fact it would have amounted to murder in the normal course of events. This view was approved by this Court. Therefore, the mere fact that the injury actually inflicted by the appellant did not cut any vital organ of Shankar Prasad is not by itself sufficient to take the act out of the purview of Section 307. 49. It would be also be relevant to note the observation of the Apex Court in Liyakat Mian v. State of Bihar reported in AIR 1973 SC 807 which is as under:

8. Quite clearly the conviction of the appellant is based on the concurrent conclusions of facts by the two courts below based on appreciation of evidence both of which have relied upon the testimony of the eyewitnesses including PWs 3, 11, 13 and 15. Insofar as the question of the conviction of Jashim Mian is concerned the only point somewhat seriously pressed before us is that no offence under Section 307, IPC can be considered on the present evidence to have been made out. The submission is not easy to accept. Burhan Mahaton was shot at by Jashim Mian alias Sahajad Mian from fairly close quarters. According to Dr K.N. Singh (PW 14 who had examined the injured person there were found on him multiple pellet wounds on the left half of abdomen with one big lacerated wound 1X 2 X3 by charring of skin and multiple pellet wounds with charring of skin on the left half of the left arm. Both injuries, according to him had been caused by a fire-arm like a gun. Some pellets were actually extracted from the injuries of the injured person and some according to him were still in his body. It was this very doctor who had sent information to the police for making arrangement for recording Burhan Mahatons dying declaration .Now by this act of shooting at Burhan Mahaton from such close quarters, had Jashim Mian caused Burhan Mahatons death, then, he would certainly have been guilty of murder. His guilt is thus quite clearly established on the plain language of Section 307 and on the reasonable consequences which must be assumed to flow from the act of shooting indulged in by him. Knowledge to this effect can legitimately be imputed to him. This

submission is, therefore, wholly unacceptable. 50. Applying the settled position of law, I find that PW-1 who has been duly corroborated by PW-3 has deposed that appellants Shaukin and Ali Jaan had overpowered PW-3, Yamin Ali while appellant Alimuddin had overpowered PW-1, Shahzad. Thereafter, appellant Rahisuddin threatened PW-1 that if the cases filed against him were not withdrawn then he would kill PW-1. In the meantime, appellant Alimuddin exhorted appellant, Rahisuddin to kill PW-1 and immediately thereafter appellant, Rahisuddin took out a firearm from his trouser and shot at PW-1. It has further been categorically deposed by PW-1, Shahzad as well as PW-3, Yamin Ali that when appellant, Rahisuddin shot at PW-1, he in order to save himself, took a dive; as a result of which the bullet pierced his left arm. A study of the MLC of PW-1 would also reveal that a bullet injury was noted on his left humerus and an entry wound was noted at the junction of upper and lower half of humerus entirely. There was also an exit wound on posterior region of humerus with dimensions of 15X9 cm. In view of the testimonies of PW-1 and PW-3 which have been duly supported by the MLC of the injured (Shahzad), I find force in the contention of counsel for the respondent/State that the bullet was fired at the chest of PW-1 but since PW-1 took a dive to save himself, the bullet hit his left arm. I further find that this is not a case of chance or accidental meeting of the two parties. The appellants knew the whereabouts of the respondents and waited for them at a lonely spot near the MIG Flats of Ashok Nagar, Delhi. Considering the fact that the firearm was not only shown by appellant Rahisuddin to threaten the complainant but after the exhortation by appellant Alimuddin, appellant, Rahisuddin, fired at PW-1, it can be conclusively inferred that the mens rea was followed by actus reus which necessarily brings the act under the ambit of section 307, IPC.

51. Having said that, at the same time, I find force in the contention of counsel for the appellants that appellants Ali Jaan and Shaukin Ali had no role to play in the gun-shot injury inflicted upon the victim, and hence they cannot be said to share a common intention to kill the victim, PW-1 (Shahzad), under section 307 read with section 34, IPC. It would be appropriate to reproduce section 34, IPC herein: Acts done by several persons in furtherance of common intention.- When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him

alone. 52. In Arun v. State reported in (2008) 15 SCC 501, the Apex Court has elaborately discussed the law with regard to section 34 which reads as under:

30. Section 34 is only a rule of evidence and does not create a substantive offence. In Barendra Kumar Ghosh v. King Emperor29, the Privy Council has pointed out: (IA p.

51) 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. 29 AIR 1925 P

31. In Hardev Singh v. State of Punjab30 this Court observed that: (SCC p.735, para

9) 9. The common intention must be to commit the particular crime, although the actual crime may be committed by any one sharing the common intention. Then only others can be held to be guilty. (emphasis supplied) 32. In this case murderous assault on the deceased by A-4 was his individual act. There is no evidence suggestive of any common intention to commit the murder. Circumstances are completely lacking compelling us to draw any inference that A-4 and A-5 together shared common intention to commit the murder and in furtherance of such common intention A-4 shot dead the deceased.

33. In Dharam Pal v. State of Haryana31 this Court laid down the test when Section 34 IPC is applicable and held: (SCC pp. 446-47, paras 14-15) 14. It may be that when some persons start with a prearranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf.

15. A criminal court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to

be constructively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must b

31. (1975)3 SCC 731 :

1975. SCC (Cri) 186 (1978)4 SCC 440 :

1979. SCC (Cri) 61 : AIR 1978 SC 1492 apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender. (emphasis supplied) 34. In Brijlala Pd. Sinha v. State of Bihar32 this Court in clear and categorical terms laid down that: (SCC p.713, para

11) 11. Unless a common intention is established as a matter of necessary inference from the proved circumstances the accused persons will be liable for their individual act and not for the act done by any other person. For an inference of common intention to be drawn for the purposes of Section 34, the evidence and the circumstances of the case should establish, without any room for doubt, that a meeting of minds and a fusion of ideas had taken place amongst the different accused and in prosecution of it, the overt acts of the accused persons flowed out as if in obedience to the command of a single mind. If on the evidence, there is doubt as to the involvement of a particular accused in the common intention, the benefit of doubt should be given to the said accused person. 53. In Girija Shankar v. State of UP reported in (2004)3 SCC 793, the Apex Court observed as under:

9. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by

another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common 32 (1998)5 SCC 699 :

1998. SCC (Cri) 1382 intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab33 the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

10. The section does not say the common intentions of all, nor does it say an intention common to all. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed 34 in Chinta Pulla Reddy v. State of A.P Section 34 is applicable even if no injury has been caused by the

particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused. 54. Applying the settled law to the facts of the present case, I find that although there is no doubt that all the appellants were physically present at the scene of occurrence, but mere physical presence is not enough. To bring a case under the ambit of section 34, IPC, it must be established tha

34. (1977)1 SCC 746 :

1977. SCC (Cri) 177 : AIR 1977 S

1993. Supp(3) SCC 134 :

1993. SCC (Cri) 875 : AIR 1993 SC 1899 the offence was committed in furtherance of their common intention. I find that it has been established beyond doubt that appellant No.2, Alimuddin had exhorted appellant No.1, Rahisuddin to finish the complainant, Shahzad consequent to which appellant no.1, Rahisuddin, took out a katta from the dub of his trouser and fired on Shahzad (PW-1). However, in the present case, there is no direct or circumstantial evidence to show that appellants Ali Jaan and Shaukin Ali had any knowledge of appellant no.1, Rahisuddin carrying a deadly firearm. There is nothing put on record to show that appellants, Shaukin Ali and Ali Jaan shared the common intention to kill the complainant or that there was a pre-concert or earlier meeting of minds or to infer that the common intention to kill complainant Shahzad had developed on the spot. Such common intention can only be imputed to appellant No.2, Alimuddin who had exhorted appellant No.1, Rahisuddin to kill the complainant.

55. Thus, having analysed the facts and circumstances of the present case in view of the settled position of law and the rival contentions raised, I am of the firm view that it has been established beyond any reasonable doubt that appellants, Rahisuddin and Alimuddin are guilty of attempt to commit murder under section 307 read with section 34, IPC. However as held above, appellants Ali Jaan and Shaukin Ali cannot be said to share the common intention with appellants, Alimuddin and Rahisuddin to kill the complainant, Shahzad and I do not find appellants Ali Jaan and Shaukin Ali to be guilty under section 307 read with

section 34, IPC.

56. Accordingly, the judgment dated 11.02.2009 and order on sentence dated 19.02.2009 passed by the learned Additional Sessions Judge against appellant No.1, Rahisuddin and appellant no.2, Alimuddin is upheld. In so far as appellant no.3, Ali Jaan, and appellant No.4, Shaukin Ali are concerned, the judgement dated 11.02.2009 passed by the trial Court stands reversed and they are held not guilty under section 307 read with section 34, IPC. Bailbonds of appellants no.3 and 4 be cancelled and the sureties stand discharged.

57. The case is disposed of in above terms. Let copy of this order be sent to the trial court for taking appropriate action against appellant no.1 and 2. G.S.SISTANI, J SEPTEMBER 20 2013 msr

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