

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

% Judgment Reserved on: 28.07.2009
Judgment delivered on: 01.09.2009

Crl. Appeal No. 189/2009

MOHAN LAL @ TONY & ORS. Appellant

Vs

STATE (NCT OF DELHI) Respondent

Crl. Appeal No. 196/2009

DAYA SHANKER @ RAJU @ CHHOTE Appellant

Vs

STATE (NCT OF DELHI) Respondent

Crl. Appeal No. 204/2009

RAKESH @ PAHELWAN Appellant

Vs

STATE (NCT OF DELHI) Respondent

Advocates who appeared in this case:

For the Appellants : Mr B.S. Chowdhary, Ms Chitra Goswami &
Mr Pradeep Sharma, Advocates
For the Respondent : Mr Amit Sharma, Addl. Public Prosecutor

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

1. Whether the Reporters of local papers may be allowed to see the judgment ?
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

RAJIV SHAKDHER, J

1. These are the appeals filed under Section 374 of the Code of Criminal Procedure, 1973 (hereinafter referred to in short as 'Cr.P.C.') against the common judgment and sentence dated

20.02.2009 passed by the Additional Session Judge (FTC)/West/Delhi (in short the 'ADJ').

2. The case of the prosecution is: On the night of 10th & 11th August 2000, an information was received at Police Station Rajouri Garden, Delhi by ASI Jora Singh (PW9) at about 2.10 a.m. from duty constable Kamal at Deen Dayal Upadhaya (in short the 'DDU') Hospital that one Jaswinder Kaur @ Gogi, wife of Mohan Lal, had been admitted to the hospital in an injured condition. This information was dutifully entered as DD Entry 23A (Ex. PW9/A). ASI Jora Singh (PW9) communicated this information to SI Naresh Kumar (PW19) for further inquiry.

2.1 S.I. Naresh Kumar (PW19) along with ASI Prem Singh (PW3) visited the DDU hospital. Further inquiry revealed that the injured was Jaswinder Kaur (PW8). Jaswinder Kaur (PW8) was accompanied by her friend Babbal to the DDU hospital. Babbal has since died due to burn injuries. A criminal case with respect to that was also registered. S.I. Naresh Kumar (PW19) recorded the statement of Babbal (Ex. PW19/A). Since Babbal, as indicated above, died during the course of trial, she could not be examined.

2.2 At about 3.35 a.m., constable Mukesh Kumar (PW4) brought a rukka to police station Rajouri Garden which was sent by S.I. Naresh Kumar (PW19), based on which FIR No. 818/2000 (Ex. PW9/B) was registered under Section 307/34 of the Indian Penal Code, 1860 (in short the 'IPC').

2.3 Between 25.08.2000 and 04.09.2000, all the three appellants/accused were arrested in the said case. They were offered an

opportunity of a test identification proceeding (in short 'TIP'), which the appellants/accused declined. This fact was recorded by the learned Magistrate vide order dated 09.09.2000. After completion of investigation a chargesheet was filed and all three appellants/accused were sent up for trial. By an order dated 05.10.2001 all three appellants/accused were charged under Section 307/34 of the IPC.

2.4 All three appellants/accused pleaded 'not guilty' and claimed trial. The prosecution in order to prove its case, cited 19 witnesses. The appellants/accused in their defence did not cite any witness. However, the statement of the appellants/accused was recorded under Section 313 of the Cr.P.C.

2.5 The case of the prosecution is largely pivoted around the testimony of its star witness, i.e., Jaswinder Kaur @ Gogi (PW8). The testimony of Jaswinder Kaur (PW8) revealed that she was a widow, whose husband had died in 1997. About 4 to 5 years prior to the date of the incident, she got acquainted with appellant/accused Mohan Lal @ tony. The wife of the appellant/accused Mohan Lal, one Lakshmi according to Jaswinder Kaur (PW8), had been murdered. Jaswinder Kaur (PW8) maintained a live-in relationship with appellant/accused Mohan Lal. The appellant/accused Mohan Lal had children from his earlier marriage with Lakshmi.

2.6 On 10.08.2000, appellant/accused Mohan Lal visited 58/59, T.C. Camp, Raghubir Nagar, Delhi (in short 'T.C. Camp'), where his children from his marriage with Lakshmi, were residing. Jaswinder Kaur (PW8) also reached T.C. Camp, in the evening hours. On reaching T.C. Camp, she found apart from appellant/accused Mohan

Lal, the other appellants/accused, i.e., Daya Shanker @ Raju & Rakesh @ Pahelwan, also present. At T.C. Camp, Jaswinder Kaur (PW8) entered into a conversation with the other appellants/accused which veered around the murder of Lakshmi. Jaswinder Kaur (PW8) along with the three appellants/accused left T.C. Camp at about 10 p.m. in a maruti car. While moving around in the car, Jaswinder Kaur (PW8) along with all the appellants/accused drank whisky, and also had their meals. In the course of the journey, once again, a quarrel broke out between the Jaswinder Kaur (PW8) and the appellants/accused over the murder of Lakshmi. At this juncture, Jaswinder Kaur (PW8) who was sitting in the front passenger seat of the car along with the appellant/accused Mohan Lal, who was driving the car, with the other appellants/accused Daya Shanker @ Raju and Rakesh @ Pahelwan in the back seat, was physically assaulted. After some time, all four reached the house of Babbal, that is, the friend of Jaswinder Kaur (PW8). On reaching there, they got to know that she had gone to her aunt's house for the night. Thereupon, all four proceeded to the house of Babbal's aunt. It is at this point in time that matters became worse. When Jaswinder Kaur (PW8) entered the house of Babbal, where she was met by Babbal, she was both terrified and perplexed. The reason being that, the quarrel over the death of Lakshmi had continued between the four, through the journey, and all this while, the appellants/accused made accusation against Jaswinder Kaur (PW8) that she was involved in the murder of Lakshmi. The quarrel continued in Babbal's aunt's house. In this fracas, Rakesh @ Pahelwan hit Jaswinder Kaur (PW8) with the revolver; a bullet got fired, which hit the left side of Jaswinder Kaur's (PW8) leg. Immediately thereafter, the accused/Daya Shanker,

Babbal and her husband, Ranjeet poured liquor on Jaswinder Kaur's (PW8) wound. Jaswinder Kaur (PW8) was thereafter, bundled into the maruti car, in which all four had travelled to the Babbal's aunt's house and took her to DDU hospital. On reaching the DDU hospital, the appellants/ accused left Jaswinder Kaur (PW8) to fend for herself. Jaswinder Kaur (PW8) was admitted for treatment by the staff of DDU hospital. It is here that Jaswinder Kaur (PW8) was operated.

3 At the trial, the prosecution examined Dr. P.S. Sarangi (PW1), Surgical Specialist at the DDU hospital. Dr. Sarangi proved the MLC (Ex. PW1/A). Dr. Sarangi deposed that since the doctors who had examined Jaswinder Kaur (PW8), i.e., Dr. Manoj, Dr. Vivek Sharma & Dr. S.K. Bhagat were no longer in the service of the hospital and their present whereabouts were not known, he had offered to prove the MLC as he was in a position to identify their hand writing and signatures having seen them writing and signing papers in the past in the course of his official duty. The MLC (Ex. PW1/A), amongst others, referred to the following injury being inflicted on Jaswinder Kaur (PW8):

*“(1) CLW (app 1x1m) over medial side left leg
CLW (app 4x3m) over lateral side left leg
CLW (app 1x1m) over medial side right leg
(2) Palpable hard substance (bullet?) over lateral
side right leg.”*

3.1 Dr. Dewan Seth (PW2), who was at the relevant point of time, the radiologist at the DDU hospital, had examined the x-ray no. 5514-15 dated 25.09.2000. He further deposed that there was evidence of fracture of upper and left fibula.

3.2 ASI Prem Singh (PW3) deposed primarily with regard to the fact that he had accompanied S.I. Naresh Kumar (PW19), Constable Mukesh Kumar (PW4) to the DDU hospital, and thereafter, to the place of the incident.

3.3 Constable Mukesh Kumar (PW4) had in his deposition mainly stated that he alongwith SI Naresh Kumar (PW19) and ASI Prem Singh (PW3) went to the DDU hospital, and thereafter carried the rukka to the police station on the basis of which the FIR was registered. After registration of FIR, a copy of the rukka was carried by Constable Mukesh Kumar (PW4) to the place where the incident took place, i.e., 304 T.C. Camp, Raghubir Nagar, Delhi. He further deposed that at the site he was met by SI Naresh Kumar (PW19) and ASI Prem Singh (PW3). At the site, SI Naresh Kumar (PW19) prepared the site plan in the presence of Babbal, who had accompanied him. ***He also deposed that the IO had lifted the blood samples and stained earth from the spot where the incident took place and sealed the same with his seal NK.*** He further deposed that a seizure memo was prepared which bore his signature at point 'A'. ***In his deposition, he also stated that from the site they went back to DDU hospital where they recorded the statement of Jaswinder Kaur (PW8). At that point Jaswinder Kaur (PW8) produced the blood stained chunni which she had tied to her injured leg.*** The blood stained salwar and chunni were seized and sealed by the IO with the seal NK and accordingly, a seizure memo PW4/B and PW4/C were prepared for the Chunni and Salwar respectively. He proved his signatures on the said seizure memo. It is important to note that in his cross-

examination, PW4 has stated that when they went back to the DDU hospital, they were unable to record the statement of Jaswinder Kaur (PW8) as she was unconscious.

3.4 Bitto (PW5), who was the nephew of the appellant/accused Mohan Lal, deposed that the appellant/accused Mohan Lal had purchased the maruti car bearing no. DL4CE 5853 which was used to ferry the appellants/accused and Jaswinder Kaur (PW8) to the house of Babbal's aunt and thereafter, to the DDU hospital, was, on paper, owned by him, whereas the real owner was appellant/accused Mohan Lal.

3.5 Constable Kamal Singh (PW6), who was posted as duty constable at DDU hospital, reported that on the night intervening 10th and 11th August, 2000, he was handed over by the CMO of the hospital, a sealed pulanda (packet) with the seal of the CMO which contained a bullet. He handed over the same to the IO, S.I. Naresh Kumar, who seized it and prepared a seizure memo (Ex. PW6/A) which bore his signature at point 'A'.

3.6 Constable Kailash (PW7) deposed with regard to the arrest of one of the accused Rakesh @ Pahelwan.

3.7 ASI Jora Singh (PW9), as indicated above, was the police officer who in the instant case received information, in the first instance, about the incident from DDU hospital.

3.8 Constable Anil Kumar (PW10) deposed with regard to the arrest of the other appellant/accused Daya Shankar @ Raju. He also deposed that appellant/accused Daya Shanker @ Raju had taken the police party to the place where the incident occurred and also

disclosed that the appellant/accused Rakesh @ Pahelwan was the one who had fired the bullet at Jaswinder Kaur (PW8).

3.9 Constable Bijender singh (PW11) deposed that on 23.10.2000 he had been assigned the duty of carrying five sealed samples to FSL, Malviya Nagar vide RC No. 245/01 and that he had deposited the sample with the FSL with the seal intact.

3.10 HC Rohtash, PW(12) deposed with regard to the fact that SI Naresh Kumar (PW19) had deposited with him, at the malkhana on 11.08.2000, a sealed packet containing the blood stained chunni and salwar. He further deposed that on 25.08.2000, a motor car bearing no. DL 4CE 5853 was also brought in for custody. Similarly, he deposed that on 07.10.2000, SI Dinesh Kumar had deposited one blood sample of Jaswinder Kaur (PW8), which was, duly sealed with the seal of CMO of the DDU hospital. He proved the signatures in the register being Ex. PW12/A. He further deposed that on 23.10.2000 five sealed parcels were handed over by him to constable Bijender Singh (PW11) vide RC No. 245/21 for being deposited in FSL, Malviya Nagar, as indicated above.

3.11 S.I Narender Kumar (PW13) deposed, with respect to the arrest of appellant/accused Mohan Lal, in FIR No. 234/2000 at Police Station Welcome. He also deposed that appellant/accused Mohal Lal had made a disclosure statement which is marked as Ex A, on which he proved a signature at point 'A'.

3.12 Inspector Ramesh Yadav (PW14) deposed with respect to the fact that he had submitted a photocopy of the FIR No. 935/2000 and

photocopy of the postmortem report pertaining to the deceased Babbal, the friend of Jaswinder Kaur (PW8).

3.13 S.I. Gulshan Nagpal (PW15) deposed with respect to the fact that on 27.08.2000 when he was posted in Police Station Welcome, accused Mohan Lal was arrested in FIR No. 234/2000, in which case he made a disclosure statement which is marked as EX. A and bore his signature at point 'B'.

3.14 S.I. Narender Kumar (PW13), SI Gulshan Nagpal (PW15) and SI K.P. Shah (PW16) deposed the manner in which the accused Mohan Lal was arrested in the case. It is important to note that SI K.P. Shah (PW16), who is posted as special staff in North-West Distt, had received information about collection of certain bad characters in H. No. 98, Welcome. When they reached there, they were confronted by certain boys and ladies. They were shot at; and it is here that appellant/accused Mohal Lal was arrested.

3.15 ASI Sushila PW 17 deposed that on 28.08.2000 she received information from SI K.P. Shah (PW16) at about 11.00 a.m. about the arrest of appellant/accused Mohan Lal, in FIR no. 234/2000. This information was reduced by her to writing in DD No. 10A (Ex. PW16/A).

3.16 Sh. Sanjeev Aggarwal, Learned ARC, Tis Hazari, Delhi (PW18) deposed with regard to the correctness of the TIP proceedings dated 09.09.2000 with respect to the appellants/accused Rakesh @ Pahelwan and Daya Shanker @ Raju.

3.17 S.I. Naresh Kumar (PW19), who is the investigation officer (I.O.) of the case, deposed with regard to the fact that how he had

received information as regard the injured Jaswinder Kaur (PW8) being treated at DDU hospital; his interrogation with Jaswinder Kaur's (PW8) friend Babbal and the fact that he recorded her statement with regard to the events, as they transpired, which led to the injury of Jaswinder Kaur (PW8). He also deposed with regard to the fact that he had made out a rukka which was sent with Constable Mukesh Kumar (PW4) for registration of the FIR. He specifically testified that he had prepared the site plan (Ex. 19/C) of the spot where the incident had taken place. ***In his deposition, he specifically stated that at the spot of the incident, he had found blood and that he had lifted the blood with the help of cotton which was sealed in a packet and accordingly a seizure memo (Ex. PW4/A) was prepared.*** He further stated that he went back to the DDU hospital on 11.08.2000 where he met Jaswinder Kaur (PW8), who handed over a blood stained chunni and salwar which was also seized and a seizure memo (Ex. PW4/B and Ex. PW4/C respectively) was prepared by him. He also deposed that it was constable Kamal Singh (PW6) who handed over to him a sealed packed containing a bullet; which he seized and prepared a seizure memo (PW6/A). He also testified that the appellant/accused Rakesh @ Pahelwan was arrested on 28.08.2000; as also with respect to the information that was received with regard to the arrest of the appellant/accused Mohan Lal on 28.08.2000, in FIR no. 234/2000 at Police Station Welcome, North-West Distt. As regards the appellant/accused Daya Shanker @ Raju he deposed that he was arrested on 31.08.2000. He categorically deposed that in the present case the appellant/accused Mohan Lal was arrested on 01.09.2000. He also deposed with regard to the fact that Babbal, friend of

Jaswinder Kaur (PW8), had died in 2000, and a FIR No. 935/2000 under Section 302 was registered at Police Station Rajouri Garden. **In his cross examination SI Naresh Kumar (PW19) admitted that he had neither found the empty shell nor the weapon of offence from which the bullet was alleged to have been fired. He also admitted that at the time of the incident Jaswinder Kaur (PW8) was in a drunken condition.** He further volunteered that Jaswinder Kaur (PW8) was forced to consume liquor.

4. At this stage, it is important to take note of a very disturbing fact, which is that, the statement of all the three appellants/accused recorded under Section 313 of the Cr.P.C. are identical. As a matter of fact, a perusal of the statement of the appellants/accused would show that there has been a complete non-application of mind in recording the statement of the appellants/accused under Section 313 of the Cr.P.C. This is evident from one singular example. Each accused was asked the following question, which is serialized as Q.4. Both the question and the answer are identical. A bare perusal of the question and the answer, which is extracted below, would show that there is mechanical approach adopted by the court below to what is a very crucial part of the trial of a case:

Statement of accused Mohan Lal @ Tony under Section 313 Cr.P.C. without oath

Q.4 It is in evidence against you accused Mohan Lal that your children were residing at H. NO. 58-59, T.C. Camp, Raghubir Nagar and on 10.08.2000, during evening time, you had gone to see your children at the said house. What have you to say?

Ans. It is correct.

Statement of accused Rakesh @ Pahelwan under Section 313 Cr.P.C. without oath

Q.4 It is in evidence against you accused Mohan Lal that your children were residing at H. NO. 58-59, T.C. Camp, Raghubir Nagar and on 10.08.2000, during evening time, you had gone to see your children at the said house. What have you to say?

Ans. It is correct.

Statement of accused Daya Shanker @ Raju under Section 313 Cr.P.C. without oath

Q.4 It is in evidence against you accused Mohan Lal that your children were residing at H. NO. 58-59, T.C. Camp, Raghubir Nagar and on 10.08.2000, during evening time, you had gone to see your children at the said house. What have you to say?

Ans. It is correct.

5. Based on the aforesaid, it was submitted by the learned counsel for the appellants that there is no evidence against the appellants/accused and hence offences under Section 307/34 of the IPC were not made out. He submitted that there was no evidence of common intention to cause the death of Jaswinder Kaur (PW8). In this regard, he relied upon the testimony of Jaswinder Kaur (PW8) to show that in her cross-examination it has clearly been revealed that the bullet got fired because of an altercation and that when Jaswinder Kaur (PW8) was injured an attempt was made to help her by pouring liquor on the wound and then taking her to the hospital. He submitted that a close perusal of the statement of Jaswinder Kaur (PW8) would show that appellants/accused Mohan Lal and Daya Shankar @ Raju had not participated in the offence, in as much as, the testimony of Jaswinder Kaur (PW8) would show that both the appellants/accused Mohan Lal and Daya Shanker @ Raju had entered the room after Rakesh @ Pehalwan had allegedly fired the bullet. He submitted that Jaswinder Kaur (PW8) has further testified that accused Mohan Lal and her children had tried to save her. The

learned counsel for the appellants submitted that the court below had failed to appreciate that for convicting a person in respect of an offence under Section 307/34 of the IPC it was essential for the court to come to a conclusion that there was, firstly, an intention or knowledge or the necessary mens rea to commit murder and this intention was followed by an act to fulfill the intention. He submitted that the events of 10.08.2000, which have come to light by virtue of the testimony of Jaswinder Kaur (PW8), would show that she accompanied the appellants/accused willingly from the deceased Lakshmi's house at T.C. Camp, where the appellant/accused Mohan Lal and the other two appellants/accused Rakesh @ Pahelwan & Daya Shanker @ Raju had assembled, till the house of Babbal, a friend of Jaswinder Kaur (PW8), and thereafter to the house of Babbal's aunt. He submitted that there was no evidence to show that at any point in time, the appellants/accused had shared a common intention or that there was a prior meeting of mind to commit the murder of Jaswinder Kaur (PW8). The learned counsel in support of his submission relied upon the judgment of the Supreme Court in ***Rangaswami vs State of Tamilnadu AIR 1989 SC 1137***. The learned counsel also submitted that presently the appellant/ accused Rakesh @ Pehalwan, who is alleged to have fired the bullet, has already undergone sentence of nearly six and a half years, out of the seven years awarded to him by the trial court. He submitted that the prosecution had miserably failed to prove its case. The testimony of Jaswinder Kaur (PW8) was unreliable. The forensic evidence did not support the case of the prosecution.

6. As against this Mr Amit Sharma, learned APP submitted that a shared common intention could easily be adduced from the testimony of the prosecution witness, in particular, that of Jaswinder Kaur (PW8). He contended that the testimony of the said witness would show that an altercation ensued between Jaswinder Kaur (PW8) and the appellants/accused over the involvement of Jaswinder Kaur (PW8) in the murder of Lakshmi, wife of appellant/accused Mohan Lal. The quarrel which erupted at the house of the deceased Lakshmi continued while Jaswinder Kaur (PW8) travelled with the appellants/accused in the car to the house of Babbal, and thereafter to the house of Babbal's aunt where Babbal was staying for the night. He submitted that Jaswinder Kaur (PW8) in her testimony has clearly deposed that while she was sitting in the front passenger seat of the car, which was driven by the appellant/accused Mohan Lal, the other two appellants/accused Daya Shanker @ Raju and Rakesh @ Pehalwan, assaulted her physically. This peculiar behavior of Mohan Lal @ Tony continued even when they reached Babbal's aunt's house where Jaswinder Kaur (PW8) got injured by virtue of bullet fired from the revolver of the appellant/accused Rakesh @ Pahelwan. It was the learned APP's submission that appellant/accused Mohan Lal allowed such assault to take place not only when they were travelling in the car which he was driving but also at Babbal's aunt's house. Mr Amit Sharma, APP submitted that for the purposes of holding that the appellants/accused shared a common intention, active participation of all appellant/accused was not necessary. In other words he submitted the fact that when the bullet was fired by the appellant/accused Rakesh @ Pahelwan, the other two appellants/accused Mohan Lal and Daya Shanker @ Raju were not in the room

would in no way effect the case of the prosecution if the circumstantial evidence, as it does in this case, point to a shared common intention to murder Jaswinder Kaur (PW8).

7. I have heard the learned counsel for the appellant as well as Mr Amit Sharma, APP. In my view, in order to hold the appellants guilty of the offence under Section 307/34 of the IPC it would be important to unearth the intention of the appellants/accused. Undoubtedly, the intention of the appellants/accused should be a shared common intention prior to the commission of the crime. In other words the evidence should unequivocally establish prior concert to murder the victim, and in ascertaining this intention the attendant facts and circumstances are crucial. Therefore, the seriousness of the resultant injury, or even case where there is no injury is not always determinative of the fact whether or not an offence under Section 307 and 34 of the IPC has been committed. Section 307 of the IPC is basically an offence, which brings within its fold, an attempt to commit murder. Therefore, whether there is presence of relevant mens rea to commit murder, which is followed by an act; would have to be necessarily proved by the prosecution either by direct or circumstantial evidence. Section 307 of the IPC, as is evident from a bare reading, is in three parts. Where there is an attempt, but it does not result an injury, the punishment, which may be imposed, can extend upto 10 years. However, where the attempt results in the victim being 'hurt' or 'injured' then the offender is liable to be punished either with a sentence of imprisonment for life or to such sentence as described in the first part. The third part relates to an offender who is already under the sentence of imprisonment for life and who commits an offence, as described under Section 307, which

results in a hurt. In such a situation the offender can be punished with death. With the aforesaid legal parameters what requires to be seen is whether the prosecution has been able to prove its case beyond a reasonable doubt.

8. Jaswinder Kaur (PW8) is thus the pivotal witness on which the edifice of the prosecution's case is built. Therefore, a close scrutiny of Jaswinder Kaur (PW8) testimony is vital. A careful perusal of the testimony of Jaswinder Kaur (PW8) would show that on the fateful day 10.08.2000, she met the appellant/accused Mohan Lal @ Tony at the house of his former deceased wife Lakshmi situate at T.C. Camp; where evidently he had gone to meet his children. At T.C. Camp, the appellants/accused Daya Shanker @ Raju as well as Rakesh @ Pahelwan were also present, according to Jaswinder Kaur (PW8). Jaswinder Kaur (PW8) has testified that it is at T.C. Camp that an altercation erupted between her and the other appellants/accused over the death of Lakshmi. In her deposition, she admits that accusations were hurled at her, by the other appellants/accused, in regard to her involvement in the murder of Lakshmi. It seems strange that despite this quarrel Jaswinder Kaur (PW8) travelled with the appellants/accused to the house of her friend Babbal. On her own admission, in her journey in the car from the house of the deceased Lakshmi to the house of Babbal, she was physically assaulted. At the same time she also testified that prior to the assault she shared food with appellants/accused in the car, in which, they travelled to Babbal's house. On her own admission, the appellants/accused also consumed liquor in the car. Though she denies having consumed liquor, her MLC (Ex. PW1/A) demonstrates otherwise. It is also accepted by her that she was aware of the fact

that the appellant/accused Rakesh @ Pahelwan was in possession of a revolver, while the other appellant/ accused Daya Shanker @ Raju was in possession of a knife. What makes it even more strange is that, after they reached Babbal's house she made no attempt to get away from the appellants/accused. As a matter of fact, Jaswinder Kaur (PW8) has deposed that from there she travelled with the appellants/accused to the house of Babbal's aunt as Babbal was not available in her house, and was reportedly spending the night at her aunt's house. The incident is alleged to have taken place in the house of Babbal's aunt. A close scrutiny of her testimony would show that while she says that one of the appellant/accused Rakesh @ Pahelwan hit her with the revolver, there is no clarity as to whether he had actually pointed the revolver at her to kill, when the shot was fired. She also testified that Daya Shanker @ Raju, Babbal and her husband poured liquor on her wound, and thereafter she was bundled into the car, by the appellants/accused, and taken to DDU hospital. A close scrutiny of her testimony also shows that, there is an attempt to shield appellant/accused Mohan Lal which is evident from her deposition where she has categorically stated that accused Mohan Lal did not give her 'substantial beatings' and that, he and his children tried to save her. This behavior of appellant/accused Mohan Lal is incongruous with his inaction in not protecting Jaswinder Kaur (PW8) from physical assault by appellant/accused Daya Shanker @ Raju & Rakesh @ Pahelwan while she was travelling with the appellants/accused in the car. This aspect becomes even more apparent from the fact that in her cross-examination Jaswinder Kaur (PW8) has stated that accused Mohan Lal and Daya Shanker @ Raju entered the room after accused Rakesh @ Pehalwan had fired the

shot. Based on her testimony, I am unable to persuade myself to come to a conclusion that prior to the incident, there was a meeting of mind and a shared common intention to eliminate Jaswinder Kaur (PW8). If this was so, that is, if there was a common intention, the appellants/ accused could have committed the offence at any time during Jaswinder Kaur's (PW8) journey in the car with them from deceased Lakshmi's house to the house of Babbal's aunt where the incident is alleged to have taken place. There is no evidence whatsoever placed on record by the prosecution to enable me to come to a conclusion that there was such meeting of mind prior to commission of the alleged offence.

8.1 As a matter of fact, the testimony of Jaswinder Kaur (PW8) does not inspire confidence. She seems an untrustworthy witness in so far as her testimony vis-a-vis the person who was responsible for inflicting the injury. The reason for this is while there is no denying the fact that Jaswinder Kaur (PW8) was injured, she, in the first instance, on being admitted to DDU hospital did not disclose the identity of the assailants.

8.2 It is no doubt true that a great weight is to be given to the testimony of an injured witness. The reason being that such a witness would not ordinarily screen the real offender and involve in his place an innocent person. But this principle, that a person can be convicted on the basis of the sole testimony of an injured witness, would apply to a witness whose testimony is trustworthy and wholly reliable. If it is shown that there is material infirmity and falsehood impregnated in the evidence of such a witness, it would not be safe to convict an accused solely on the evidence of an injured witness

without independent corroboration by material evidence. See observations in ***Hari Har vs State of UP 1971 Cri. L.J. 1578 (All.) paragraph 5 at page 1580; Vijai Shanker Misra vs State 1984 All. L.J. 1316 paragraph 22 at page 1323; L.L. Kale vs State of Maharashtra & Ors. (2000) 1 SCC 295 paragraph 8 & 9 at page 298-300; and Desraj vs State 1969 ALJ 784.*** In the present case, it is clear that the testimony of the injured Jaswinder Kaur (PW8) is not reliable.

8.3 Juxtapose the above with the following: The prosecution has not been able to produce either the weapon of offence or the empty shell. The bullet which was evidently extracted from the injured leg of Jaswinder Kaur (PW8), as per the FSL report, did not have any blood stain on it. As a matter of fact, the prosecution has not been able to establish as to whether the scene of the incident was the house of Babbal's aunt. The reason for the same is: SI Naresh Kumar (PW19) deposed that he collected blood stains from the spot on a cotton swab. The FSL report has clearly opined that no blood could be detected on the cotton swab. What makes matter worse for the prosecution is that the blood sample of Jaswinder Kaur (PW8), which was Ex. 5, could not be matched with the blood found on the Salwar as the sample had 'putrefied'. As regards the blood on the chunni, even though the FSL report states that the blood was of human origin, it could not be matched with the blood sample of Jaswinder Kaur (PW8). It is important to note that in the MLC, it has been clearly recorded that Jaswinder Kaur (PW8), at the time when she was admitted to the hospital, smelled of alcohol. It is also pertinent to note that in the MLC the initial examination did not establish

categorically that the injury was caused by a bullet. The prosecution attempted to establish the same by relying upon the testimony of constable Kamal Singh (PW6) who deposed that a sealed pulanda (packet) was handed over to him which contained the bullet, evidently removed after Jaswinder Kaur (PW8) was operated at DDU Hospital. SI Naresh Kumar (PW19) deposed that the said sealed pulanda (packet) with the seal of CMO, DDU Hospital was handed over by constable Kamal Singh (PW6). What the prosecution has not thereafter been able to establish is that whether the bullet, which was sent to FSL for examination, was the bullet which was lodged in the left leg of Jaswinder Kaur (PW8). Further, as to whether, the said bullet was the one which was fired by appellant/accused Rakesh @ Pahelwan, since the weapon of offence was not found by the prosecution. There is also a contradiction in the testimony of constable Mukesh Kumar (PW4), who, in his examination-in-chief, said that the statement of Jaswinder Kaur (PW8) was recorded by the I.O. immediately after he returned from the spot of incident to the hospital. He contradicted himself in the cross-examination when he deposed that on reaching the DDU hospital from the spot of the incident, they were not in a position to record the statement of Jaswinder Kaur (PW8) as she was still unconscious. The evidence, produced by the prosecution, does not inspire confidence, there are far too many untied ends. As stated above, testimony of Jaswinder Kaur (PW8) clearly seems designed to shield on the one hand appellant/accused Mohan Lal @ Tony and on the other frame the other appellants/accused Daya Shanker @ Raju and Rakesh @ Pahelwan.

9. The trial court's observation to effect that there was a shared common intention, in as much as, the appellant/accused Mohan Lal did nothing to protect Jaswinder Kaur (PW8) while she was beaten up and was a mute witness to the attempt to murder is, according to me, a misappreciation of the facts as well as the law. As observed above, in order to attract the provisions of Section 34 of the IPC, it was incumbent on the prosecution to prove, by direct or circumstantial evidence, that there was a prior meeting of mind as amongst the appellants/accused before the commission of offence. In the instant case, there is no evidence to show either a prior shared common intention or even evidence to show that the bullet was actually fired by the appellants/accused Rakesh @ Pehalwan, or that the other accused, were present at the spot, where the incident is said to have taken place. The prosecution has not examined any public witnesses. The testimony of Jaswinder Kaur (PW8) as observed in this instant case is completely unreliable. It seems the testimony of Jaswinder Kaur (PW8) is designed to frame the appellants/accused, if not all, at least the appellants/accused Daya Shanker @ Raju & Rakesh @ Pehalwan. Even if it is assumed that appellant/accused Rakesh @ Pehalwan did fire the shot, injured Jaswinder Kaur's (PW8), own testimony belies the fact that the shot was fired with an attempt to murder Jaswinder Kaur (PW8). Her own testimony seems to suggest that in the altercation the revolver fired and the bullet hit her. Her own testimony is suggestive of the fact that there was no attempt to murder Jaswinder Kaur (PW8).

10. In view of the discussion above, I am of the view that the prosecution has failed to establish its case beyond reasonable doubt as against all the appellants/accused. The benefit of doubt must go in

favour of the appellants/ accused. As a matter of fact, as noted hereinabove, the trial court has in my view compromised the defence of appellants/accused by recording their statement under Section 313 of the Cr.P.C. without due diligence and application of mind. Resultantly, the impugned judgment dated 20.02.2009 of the trial court is set aside; and the appeals are allowed. The appellants are acquitted. The appellants shall be set free, if they are not required in any other case.

RAJIV SHAKDHER, J

SEPTEMBER 01, 2009
kk