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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRIMINAL APPEAL No.176/2000**

Date of decision: 11th September, 2015

RAJ KUMAR Appellant

Through Ms. Inderjeet Sidhu and Ms. Divya,
Advocates.

versus

STATE Respondents

Through Ms. Aashaa Tiwari, APP.

CRIMINAL APPEAL No.204/2000

BHAGWAN DASS AND OTHERS Appellant

Through Ms. Inderjeet Sidhu and Ms. Divya,
Advocates.

versus

STATE Respondents

Through Ms. Aashaa Tiwari, APP.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J. (ORAL):

This common judgment would decide the appeals filed by Raj
Kumar and Sher Singh @ Shera challenging their conviction under Section

302 read with Section 34 of the Indian Penal Code, 1860 (IPC, for short) for murder of Amar Singh @ Amaria and under Section 307 read with Section 34 IPC for attempt to murder Dharma @ Pappu by the impugned judgment dated 9th February, 2000. By order on sentence dated 15th February, 2000, the two appellants have been sentenced to imprisonment for life, fine of Rs.25,000/- and in default, undergo simple imprisonment for a period of one year for the offence under Section 302 read with Section 34 IPC. For the offence under Section 307 read with Section 34 IPC, the two appellants have been sentenced to rigorous imprisonment of five years, fine of Rs.5,000/- and in default, to undergo simple imprisonment of three months. Out of the fine, if realised, it stands directed that Rs.50,000/- would be paid as compensation to the legal heirs of Amar Singh @ Amaria and Rs.25,000/- would be paid as compensation to injured Dharma @ Pappu.

2. The impugned judgment acquits Budh Ram and Thakur Dass from the charges under Sections 302 and 307 read with Section 34 IPC. The State and the victims have not challenged the said findings. Bhagwan Dass, father of Sher Singh @ Shera a co-appellant in CrI.A. 204/2000, died during the pendency of the present appeal as recorded in the order dated 1st May, 2006.

3. We refrain from and do not deem it necessary to refer to the entire evidence on record and would prefer to deal with the primary issue raised

by the two appellants Raj Kumar and Sher Singh @ Shera.

4. FIR No.290/1991 was registered at police station Sultan Puri on the basis of the information and statement given by Hira Lal, who had appeared and deposed before the trial court as PW2. The said FIR registered on 6th November, 1991, at about 4.30 A.M., was regarding the occurrence on the Diwali night at about 10.15 P.M. on 5th November, 1991. Hira Lal (PW2) in the court deposition has stated that, at about 10:15 PM on 5th November, 1991, he was present at the sweet shop of one Pappu, where Raju i.e. Raj Kumar, the landlord and one of the appellant, was also present. Hira Lal (PW2) along with Lal Chand (PW4) had gone there to drink milk. They had seen four persons, namely, Raju, Sher Singh @ Shera, Thakur and brother of Shera (Budh Ram) were fighting and quarrelling with Pappu. Shera threw the sweets kept in the shop. Agitated Pappu, had picked up a *palta* (a type of *karchi*) and had threatened that he would kill Shera and others. In the meanwhile, Amria came to the spot and snatched the *palta* from the hands of Pappu. Raju had then exclaimed that 'Maro Salon Ko Inkey Dam Par Hi Yeh Dookan Khali Nahi Karta' (beat them, he is not vacating the shop because of the support from others). Shera, then snatched the *palta* from the hands of Amaria, had struck him on his (Amaria's) head. In the meanwhile, Bhagwan Dass (since deceased) left the spot stating that he would bring his gun. Bhagwan Dass (since deceased) went to the roof of his house and thereafter had fired 7-8 shots

from his gun. Dharma cried that he had sustained gunshot injury. Hira Lal (PW2) and Lal Chand (PW4) had concealed themselves under a *Chhattri* (*chajja*). Amaria was taken to Deen Dayal Hospital by his brother and others, where he was declared as brought dead. Police had taken measurements at the crime scene and prepared the site plan on his i.e. Hira Lal's (PW2) instructions. PW-2 had also identified the *palta* and the licensed gun Ex.P1, which was seized from Bhagwan Dass (since deceased) and has affirmed that the police had taken the said gun, 7-8 empty cartridges and 18 live cartridges into possession vide seizure memo Ex.PW2/E. At this stage itself we deem it appropriate to record that as per the ballistic report, the empty cartridges were fired from the said gun.

5. Testimony of Lal Chand (PW4) affirms the version and narration by Hira Lal (PW2) that at about 10-10.30 P.M., they were present at the shop of Pappu Halwai and had noticed that the Halwai and the appellant Raju were quarrelling with each other. Appellant Shera came to the spot and had thrown Pappu Halwai to the ground. In retaliation, Pappu Halwai had picked up the *palta* from a *Karahi* and had threatened the four persons, present there. Amaria intervened and had snatched the *palta* from Pappu Halwai. Raju had protested and shouted that Pappu Halwai was not vacating the shop because of Amaria. Shera snatched the *palta* from Amaria and then hit him (Amaria) on his head. Bhagwan Dass (since deceased) while shouting abuses, had moved away and went to the roof of

his house. He took out his gun and had warned that he would see each one of them. Bhagwan Dass (since deceased) fired 7-8 shots causing injuries on Dharma and Amaria. To protect themselves, they had hidden themselves under a porch. After the firing stopped, Lal Chand (PW4) and Hira Lal (PW2) ran away and made a telephone call to the police. Amaria was taken to a nursing home and then to a hospital, where he was declared as brought dead. In his examination-in-chief, Lal Chand (PW4) has stated that Bhagwan Dass (since deceased) had fired with his gun and the appellant Shera had inflicted the *palta* blow. Amaria and Raju had spoken as to the reason or motive; Pappu Halwai was not vacating the shop. Lal Chand (PW4) had asserted that Om Prakash (acquitted) had caught hold of Amaria and Thakur (acquitted) had hurled abuses but did not inflict injuries to anyone. Lal Chand (PW4) had also identified the gun Exp-1 used in the occurrence.

6. Dharma (PW6), the injured eye witness, has similarly deposed regarding his visit to the shop of Pappu Halwai on Diwali night at about 9.30 P.M. Over there, he had noticed Raju and Pappu Halwai were quarrelling and protesting as he had been asked to vacate and handover possession of the shop. Raju who was present threw the sweets and Shera who had come there, had joined him. Pappu Halwai had got agitated when Raju started throwing the sweets. Shera caught hold of Pappu Halwai by his neck. Thereupon, Pappu Halwai took out the *palta* from a *karahi*.

Amaria to avoid bloodshed took the *palta* from the hands of Pappu Halwai. Bhagwan Dass (since deceased) then came to the spot and Shera and Raju had exclaimed that Pappu Halwai was not vacating the shop. Bhagwan Dass (since deceased) had stated that “saley khali nahi kar rahey, enko pakar lo aur main apni bandook ley kar aata hoon” (these fools are not vacating, catch them and I am bringing my gun). Om Prakash, another son of Bhagwan Dass (since deceased) also came to the spot and joined them. Shera snatched the *palta* from the hands of Amaria and struck the same on Amaria’s head. Amaria started bleeding. Thereafter, Shera and Raju along with another person went upstairs. Bhagwan Dass (since deceased), who was on the first floor shouted “Bhoon dalo salon ko” (finish them) and then started firing. He fired two rounds, in which Amaria had sustained injuries on his head and fell down. Dharma (PW6) also sustained injuries on his legs, chest and groin and fell down. Thereafter, he did not know what had happened. He came home after six days and had learnt that Amaria had died.

7. Vishnu (PW10) is also an eye witness, who had seen Dharma, Amaria and Pappu Halwai at the latter’s Halwai shop. Raju, the landlord had come there and thrown the tray on which sweets were kept. Heated exchange followed and Bhagwan Dass (since deceased) came and supported Raju, the landlord. Shera and Raju were asking Pappu Halwai to vacate the shop. Pappu Halwai, flustered and upset had then lifted the

palta with an intention to hurt Raju, Shera and Prakash. Amaria, who was present at the spot, snatched the *palta* from the hands of Pappu Halwai and advised him not to fight. Shera, thereafter, snatched the *palta* from the hands of Amaria and gave a strong blow from the said *palta* on the head of Amaria, who started bleeding profusely. The old man [reference is to Bhagwan Dass (since deceased)] had gone upstairs stating that he would bring his gun. Bhagwan Dass (since deceased) stood on the terrace (chajja) and fired. Amaria who was already in injured condition fell down. Dharma went forward to see Amaria and Bhagwan Dass (since deceased) fired once again and Dharma sustained a bullet injury on his leg.

8. What is clearly discernible from the statement of the four witnesses and in fact, also from the version given by Hira Lal (PW2), to the police which became the substratum of the FIR, is the factum that Shera had snatched the *palta* from the hands of Amaria and had hit Amaria with the said *palta*. Bhagwan Dass (since deceased), who was present shortly before the said injury on Amaria's head, had by then gone to his house stating that he would get his gun. Bhagwan Dass (since deceased) did not come back but had proceeded to the terrace of his house and had fired the shots. Amaria was hit and had suffered gunshot wounds and died. Dharma had suffered gunshot injuries. The two appellants Raju and Shera were not present with Bhagwan Dass (since deceased) on the roof when Bhagwan Dass (since deceased) had resorted to and had fired from his gun. In fact,

both Raju and Shera were not with Bhagwan Dass (since deceased) at the time of firing. The eye witnesses in seriatim have deposed that Shera had hit the *palta* on the head of Amaria. Later on, they had seen Bhagwan Dass (since deceased) with the gun on the terrace of his house.

9. The unscaled and scaled site plans marked Ex.PW28/A and Ex.PW12/A, respectively, indicate the shop of Pappu Halwai and the house of Bhagwan Dass (since deceased) from where the shots were fired. They are located at some distance and are not adjacent or in front of each other. Deceased Amaria and Dharma had suffered gun shot injuries while standing on the street in front of the house of Bhagwan Dass (since deceased). Hira Lal (PW2) has testified that initially the quarrel had taken place in front of the shop and later on the site of occurrence/quarrel was in front of Bhagwan Dass's house. The distance between the shop of Pappu Halwai and house of Bhagwan Dass (since deceased) as deposed by Hira Lal (PW2) was about 45 feet. Dharma (PW6) has stated that the distance between the house of Bhagwan Dass (since deceased) and shop of Pappu Halwai was about 30-40 feet. Lal Chand (PW4) has accepted that in Street No.4-5, there were 40-50 houses. Thus, the firing was at a distance and not in front or outside the shop of Pappu Halwai.

10. Section 34 IPC gives statutory recognition to the principle that if two or more persons intentionally act jointly or in concert, then each one of them would be liable for the act of the other. The common intention which

permeates their action pre-supposes prior concert. Such pre-concert and planning may develop at the spot or at spur of the moment and even during the course of the commission of the offence, but such concert or plan should precede the act constituting the offence. Existence of common intention is a question of fact, which has to be proved primarily by way of inference from the circumstances in a given case. Thus, Section 34 postulates and requires an element of participation resulting in the ultimate criminal act. This Section does not envisage a separate act by all the accused persons for being held responsible for the ultimate criminal act. The word “act” can denote a single or multiple series of acts. The word “act” can also include omission and an accused may be liable and convicted under Section 34 for sharing common intention if his passivity is with an intention of assisting in furtherance of common intention of all. Ergo, criminal intent for the purpose of invoking section 34 IPC may be overt or covert either by active presence or by a distant direction indicating jointness in the commission of the “act” (see *Tukaram Ganpat Pandare Vs. State of Maharashtra*, AIR 1974 SC 514). Presence of those, which in one way or the other facilitates execution of common design, would tantamount to actual participation.

11. Section 34 IPC refers to the “act” done by one as a united act of the immediate perpetrator and his confederates present at that time who were participants to the act. It does not differentiate between the first degree and

the second degree of participation or who is the principal participant. The said provision has to be read with Sections 35 and 37 IPC and, therefore, each of such persons, who joins the act, as stated in Section 35, would get covered under Section 34 IPC. For elucidation, judgment of Sethi J. in ***Suresh and Anr. Vs. State of U.P.***, AIR 2001 SC 1344 is illustrative as it elaborately expounds the legal position. This decision refers to an earlier decision in ***Barendra Kumar Ghosh vs. King Emperor***, AIR 1925 PC 1, wherein the Judicial Committee dealing with the scope of Section 34 had observed:-

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

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

(emphasis supplied)

Referring to the presumption arising out of Section 114 of the Evidence Act, it was further held:

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

(emphasis supplied)

12. Nevertheless, the essence of the section is that there should be

simultaneous consensus of mind or co-participation in the criminal action.

This intent is mandatory and essential. It has to be established by inference from conduct and facts. In CrI.A. No.429/2013, **Babloo @ Babu vs. State** decided on 10th May, 2013, it has been observed:-

“15. On the question of common intention under Section 34 IPC, the appellants have relied upon **Mithu Singh v. State of Punjab** 2001 (4) SCC 193, **Ajay Sharma v. State of Rajasthan** 1999 (1) SCC 174, **Suresh & Anr v. State of U.P.** 2001 (3) SCC 673, **Raj Kumar v. State** Vol. 89 (2001) DLT 237 (DB).

Section 34 IPC reads as under:-

“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.”

Section 34 makes a co-perpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section 34 to apply there should be common intention between the co-perpetrators, which means that there should be community of purpose and common design or pre-arranged plan. However, this does not mean that co-perpetrators should have engaged in any discussion, agreement or valuation. For Section 34 to apply it is not necessary that the plan should be pre-arranged or hatched for a considerable time before the criminal act is performed. Common intention can be formed just a minute before the actual act happens. Common intention is necessarily a psychological fact as it requires prior meeting of minds. In such cases, direct evidence normally will not be available and in most cases whether or not there exists a common intention has to be determined by drawing inference from the facts proved. This requires an inquiry into the antecedents, conduct of the co-participants or perpetrators at the time and subsequent to the

occurrence. The manner in which the accused arrived, mounted the attack, nature and type of injuries inflicted, the weapon used, conduct or acts of the co-assailants/perpetrators, object and purpose behind the occurrence or the attack etc. are all relevant facts from which inference has to be drawn to arrive at a conclusion whether or not the ingredients of Section 34 are satisfied. We must remember that Section 34 comes into operation against the co-perpetrators because they have not committed the principal or main act, which is undertaken/performed or is attributed to the main culprit or perpetrator. Where an accused is the main or final perpetrator, resort to Section 34 is not necessary as the said perpetrator is himself individually liable for having caused the injury/offence. A person is liable for his own acts. Section 34 or the principle of common intention is invoked to implicate and fasten joint liability on other co-participants. Further, the expression/term “criminal act” in Section 34 IPC refers to the physical act, which has been done by the co-perpetrators/participants as distinct from the effect, result or consequence. In other words, expression “criminal act” referred to in Section 34 is different from “offence”. For example, if A and B strike Lathi at X, the criminal act is of striking lathis, whereas the offence committed may be murder, culpable homicide or simple or grievous injuries. The expression “common intention” should also not be confused with “intention” or “mens rea” as an essential ingredient of several offences under the Code. Intention may be an ingredient of an offence and this is a personal matter. For some offences mental intention is not a requirement but knowledge is sufficient and constitutes necessary mens rea. Section 34 can be invoked for the said offence also. (Refer *Afrahim Sheikh & Ors. Vs. State of West Bengal*, AIR 1964 SC 1263). Common intention is common design or common intent, which is akin to motive or object. It is the reason or purpose behind doing of all acts by the individual participant forming the criminal act. In some cases, intention, which is ingredient of the offence, may be identical with the common intention of the co-perpetrators, but this is not mandatory.

16. Section 34 IPC also uses the expression “act in furtherance of common intention”. Therefore, in each case when Section 34 is invoked, it has to be examined whether the criminal offence charged was done in furtherance of the common intention of the participator. If the criminal offence is distinctly remote and unconnected with the common intention, Section 34 would not be applicable, but if the criminal offence was done or performed is attributable, is primarily connected or was a known or reasonably possible outcome of the preconcert/ contemporaneous engagement or a manifestation of the mutual consent for carrying out common purpose, it will fall within the scope and ambit of the act done in furtherance of common intention. Thus, the word “furtherance” propounds a wide scope but the same should not be expanded beyond the intent and purpose of the statute. ***Russell on Crime***, 10th edition page 557, while examining the word "furtherance" had stated that it refers to "the action of helping forward" and "it indicates some kind of aid or assistance producing an effect in the future" and that "any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony." An act which is extraneous to the common intention or is done in opposition to it and is not required to be done at all for carrying out the common intention, cannot be said to be in furtherance of common intention. [Refer judgment of R.P. Sethi J. in ***Suresh Vs. State of U.P.***, (2001) 3 SCC 673].”

13. When we apply the aforesaid principles with reference to the term “common intention” under Section 34 IPC to the facts as deposed and proved on record, we have to hold that the present appellants Raj Kumar @ Raju and Sher Singh @ Shera did not share common intention with Bhagwan Dass (since deceased), who had gone to his house, picked up the gun, possibly loaded it, proceeded to the terrace and had fired. At that time, the two appellants were not present or seen with Bhagwan Dass (since deceased). Shera had earlier inflicted the wound on the head of

Amaria with the *palta*. None of the eye witnesses have deposed or stated that the appellants Raju or Shera had shouted or called upon Bhagwan Dass (since deceased) to fire or had caught hold of the deceased or the injured. No such assertion or allegation has been made. The essence and proof that there was simultaneous consensus of mind of Raju or Shera with Bhagwan Dass (since deceased) is missing. Their presence at the spot would not establish common intention. In Criminal Appeal No.484/2011, ***Mohd. Saleem Vs. The State***, decided on 31st May, 2013, it has been held:-

“.....A co-perpetrator, who shares a common intention, will be liable only to the extent that he intends or could or should have visualized the possibility or probability of the final act. If the final outcome or offence committed is distinctly remote and unconnected with the common intention, he would not be liable. This test obviously is a case or fact specific and no strait jacket universal formula can be applied. Two examples quoted in Bashir’s case are relevant and explain the widest and broad boundaries of Section 34. Allahabad High Court however warned that the ambit of section 34 IPC should not be extended so as to hold a person liable for remote possibilities, which were not probable and could not be envisaged.”

14. In these circumstances, we do not think that the appellants Raju and Shera shared a common intention with the act of firing by Bhagwan Dass (since deceased). This firing from the roof/ terrace by Bhagwan Dass (since deceased) was sudden and abrupt. The said act could not be treated as an act in furtherance of common intention of the present appellants i.e. Raju and Shera.

15. Therefore, the appellants Raju and Shera cannot be held liable for the act of firing and the resultant injuries caused to Amaria and Dharma. At the same time on the aforesaid legal ratio, expounding the scope of Section 34 IPC, it has to be held that Raju and Shera had shared common intention when the appellant Shera had hit the *palta* on the head of Amaria (see paragraphs 16 and 17 below). To this extent, both of them would be jointly liable for the offence i.e. the act of hitting of the *palta* on the head of Amaria. The said act though attributed to Shera, would implicate Raju under section 34 IPC.

16. Sequentially, the next question which arises for consideration is whether the appellant Raju and Shera, who had shared the common intention, would be liable for culpable homicide amounting to murder or an offence of a lower degree. We have no doubt that Shera had intentionally hit the *palta* on the head of Amaria. It is also obvious that Raju, the landlord had gone to the shop of Pappu Halwai with the intention to settle scores and ask him to vacate the shop. As per the facts, proved and established, Shera had first thrown the sweets on the ground. This had led to retaliation, which was normal and natural and Pappu Halwai had threatened Shera by picking up the *palta*. Deceased Amaria had then intervened and tried to pacify Pappu Halwai and had taken away the *palta* from Pappu Halwai's hands. Shera had then snatched or took away the *palta* from hands of Amaria and had hit him i.e. Amaria on his head. No

doubt, Amaria was a third party, but Raju and Shera had grievance against him for he was supporting Pappu Halwai. Noticeably, both Raju and Shera were unarmed before the strike was made. Bhagwan Dass (since deceased) had shouted that he would get his gun and had left the spot to go to his house. Bhagwan Dass (since deceased) had not returned and was not present, when the *palta* blow was inflicted.

17. In view of the facts narrated above, we agree and hold that Raju had shared common intention and the act of Shera would be covered under the expression “in furtherance of common intention”. The strike on the head by Shera using the *palta* was not distinctly remote and unconnected with the common intention. It was primarily connected or a reasonably possible outcome of the preconcert or contemporaneous engagement or a manifestation of the mutual consent for carrying out a common purpose. Raju would be liable for the said act committed in furtherance of common intention, even if he had not put forward a helping hand to directly aid or assist the strike by Shera on the head of Amaria. Raju’s presence and his previous conduct, reflects and indicates common intention. Four persons had proceeded to Pappu Halwai’s shop to ask and compel him to vacate the same by using abusive language or even force.

18. We would now examine the post mortem report to ascertain the cause of death i.e. whether the deceased Amaria had died because of the strike on the head with the *palta* hit or due to gun shot wounds. Answer to

the said question would be a significant factor in determining the offence perpetrated by the appellant Shera and Raju; whether it was culpable homicide simplicitor, or culpable homicide amounting to murder or attempt to commit murder, etc. The post mortem was conducted by Dr. L.T. Ramani (PW20) on 6th November, 1991, who had submitted his report marked Ex.PW20/A. As per the said report and deposition of Dr. L.T. Ramani (PW20), the following external injuries were noticed:-

“1. Incised look wound on the left side of forehead 9 c.m. × 2 c.m. × cranial cavity deep placed obliquely.

2. Incised looking wound on the left left side forehead 2 c.m. medial of injury no.1 size 9 c.m. × 3 c.m. × cranial cavity. There were multiple depressed fractures of the bone beneath.

3. Laceration over left temporal parietal area 8 c.m. × 2.5 c.m. × cranial cavity placed obliquely, with four small rounded punctures at the peripheral part of this wound.

There was no evidence of blackening or singeing of hair around.

4. An irregular laceration 2 c.m. × 2 c.m. with inverted scalp margins communicating with cranial cavity over left temporal parietal region.

Scalp margins were inverted and there was no blackening around the wound.

On internal examination, Dr. L.T. Ramani (PW20) has opined:-

“On internal examination multiple fractures of left parietal bone, frontal bone of the left side and left temporal bone one hole of 1.5 × 0.5 c.m. was seen on the middle of parietal bone on the rt. side. Another

round hole of 0.4 x 0.4 c.m. was seen lateral to the previous hole. Another large wound 2.5 c.m. diameter was seen on the left parietal bone beneath external injury no.4. The brain was lacerated and showed generalised subdural haemorrhage. Seven pellets were recovered from the brain matter. Neck tissues were normal, Hyoid bone was intact. Trachea was normal, Ribs were intact, lung and heart were normal, stomach contained 3 to 4 ounces of digested food. Other abdominal organs were normal.”

The aforesaid injuries were ante mortem in nature and in the report Ex.PW20/A, Dr. L.T. Ramani (PW20) has stated that injury Nos.1 and 2 were possibly caused by some heavy cutting weapon and injury Nos.3 and 4 were caused by a fire arm i.e. gunshot injuries from a distant range. However, Dr. L.T. Ramani in the post mortem report (Ex.PW20/A) and his oral deposition, has not specifically indicated whether injury Nos.1 and 2 by themselves were sufficient to cause death in the ordinary course of nature. The post mortem report is rather ambiguous on this aspect and records:-

“Injuries were antemortem, Injuries no.1 & 2 were caused by some heavy cutting weapon and injuries no.3 and 4 were caused by fire arm. (gun shot injuries fired from distance range). Injuries to the skull were sufficient in the ordinary course of nature to cause death. Death was due to cranio-cerebral injury. Time since death was about 18 hours. Clothes, scalp hair and sample of blood and pellets were preserved, sealed and handed over to the police along with sample of seal”

19. The cause of death, as per PW20's, was cranio-cerebral injury but it is not indicated whether cranio-cerebral injury was result of injury Nos.3

and 4 or a result of injury Nos.1 and 2 or a combined result of the aforesaid injuries. Learned Additional Public Prosecutor had drawn our attention to Ex.PW28/C1, which is an opinion given Dr. L.T. Ramani (PW20) regarding the weapon of offence and is dated 12th December, 1991. PW20 has not deposed or testified regarding this opinion. The said opinion (Ex.PW28/C1) records that a *palta* (khocha) was shown to the said doctor, who had recorded that the same had a flat and wide blade with milk deposits and blood stains on both sides. The total length of palta was 90.5 cm including the blade. It records that injury Nos.1 and 2 were possible by the *palta* shown to PW20 by the police. The aforesaid report would not help and assist us finding an answer to the question. In fact the confusion and ambiguity gets confounded and muzzled. When such doubt or debate exists, and cannot be resolved with a substantial degree of certainty, the benefit would go to the accused i.e. the appellants herein.

20. In view of the aforesaid medical opinion and ocular evidence on record, we do not think that the offence committed by Shera and by Raju with application under section 34 IPC would fall under Section 300 IPC or Part 1 of Section 304 IPC, but would certainly constitute an offence under section 307 IPC. We say so because we cannot state and hold it is proved with certainty that injury Nos 1 and 2 would have resulted in death, but an assault with force was made.

21. In view of the aforesaid discussion, we are of the opinion that the

appellants are entitled to acquittal under Section 307 read with Section 34 IPC for the charge of having attempted murder of Dharma. Appellant Shera would be liable for the offence under Section 307 IPC for having caused injuries to deceased Amaria. Appellant Raju would be also liable under section 307 read with section 34 IPC for the injuries caused to Amaria.

22. The last issue relates to quantum of punishment or sentence. It is pointed out that the appellant Shera has suffered incarceration of about six years and eight months before he was released on suspension of sentence in this appeal vide order dated 18th July, 2006. He had earned remission of one year and five months. The offence in question, as noted, was committed in the year 1991. We feel that the punishment undergone would be sufficient. However, the appellant Shera as directed by the impugned order of sentence will pay fine of Rs.25,000/- within a period of six weeks from today. In case of default and on failure to pay the said fine, he will undergo simple imprisonment for a period of six months. The fine once realised, will be paid as compensation to the legal heirs of Amar Singh @ Amaria. Appellant Raju, has already suffered incarceration of about four years and six months. For the reasons indicated above, Raju is sentenced under Section 307 IPC to the period already undergone. He shall also pay fine of Rs.25,000/- within a period of six weeks from today and in default, undergo simple imprisonment for a period of six months. The fine, if paid,

will be released to the legal heirs of Amar Singh @ Amaria as compensation.

23. The appeals are accordingly disposed of.

(SANJIV KHANNA)
JUDGE

(R.K. GAUBA)
JUDGE

SEPTEMBER 11, 2015
NA/VKR