

14

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.A. 614/2013

Reserved on: 7th May, 2015

% Date of Decision: 14th July, 2015

MOHD USMAN ALIAS CHURI Appellant

Through: Mr.K.Singhal, Advocate.
Mr.Tanveer Khan, Advocate.

versus

STATE NCT OF DELHI Respondent

Through: Ms. Aashaa Tiwari, APP along with
SI Umesh Rana, P.S.Ashok Vihar, North West
District.

CRL.A. 650/2013

SITA RAM Appellant

Through: Mr. Ravindra S Garia & Mr. S.S. Rawat,
Advocates.

versus

STATE GOVT OF NCT OF DELHI Respondent

Through: Ms. Aashaa Tiwari, APP along with
SI Umesh Rana, P.S.Ashok Vihar, North West
District.

x

CRL.A. 938/2013

BHUTNA Appellant

Through: Mr. Chetan Anand, Advocate.

versus

STATE (GOVT OF NCT) OF DELHI AND ANR. ... Respondents

15

Through: Ms. Aashaa Tiwari, APP along with
SI Umesh Rana, P.S.Ashok Vihar, North West
District.

CRL.A. 983/2013

AZAD ALIAS PATIYA Appellant

Through: Mr. K. Singhal, Advocate.

versus

STATE (GOVT OF NCT) OF DELHI AND ANR. . Respondents

Through: Ms. Aashaa Tiwari, APP along with
SI Umesh Rana, P.S.Ashok Vihar, North West
District.

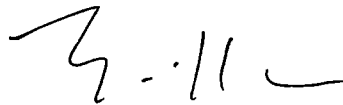
CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J:

For detailed order, see Criminal Appeal No. 579/2013, titled
Praveen Kumar Alias Pappu Alias Puran Saxena versus State,
pronounced today.


(SANJIV KHANNA)
JUDGE


(ASHUTOSH KUMAR)
JUDGE

July 14, 2015
VKR

* IN THE HIGH COURT OF DELHI AT NEW DELHI

16

+ CRL.A.NO. 579/2013

Reserved on: 7th May, 2015

% Date of Decision: 14th July, 2015

PRAVEEN KUMAR ALIAS PAPPU ALIAS PURAN
SAXENA

..... Appellant

Through: Ms. Anita Abraham, Advocate.

versus

STATE

..... Respondent

Through: Ms. Aashaa Tiwari, APP along with SI
Umesh Rana, P.S.Ashok Vihar, North West
District.

CRL.A. 614/2013

MOHD USMAN ALIAS CHURI

..... Appellant

Through: Mr.K.Singhal, Advocate.
Mr.Tanveer Khan, Advocate.

versus

STATE NCT OF DELHI

..... Respondent

Through: Ms. Aashaa Tiwari, APP along with
SI Umesh Rana, P.S.Ashok Vihar, North
West District.

CRL.A. 650/2013

SITA RAM

..... Appellant

Through: Mr. Ravindra S Garia & Mr. S.S. Rawat,
Advocates.

versus

STATE GOVT OF NCT OF DELHI

..... Respondent

Through: Ms. Aashaa Tiwari, APP along with
SI Umesh Rana, P.S.Ashok Vihar, North
West District.

CRL.A. 938/2013

BHUTNA

..... Appellant

Through: Mr. Chetan Anand, Advocate.

versus

STATE (GOVT OF NCT) OF DELHI AND ANR. ... Respondents

Through: Ms. Aashaa Tiwari, APP along with
SI Umesh Rana, P.S.Ashok Vihar, North
West District.

CRL.A. 983/2013

AZAD ALIAS PATIYA

..... Appellant

Through: Mr. K. Singhal, Advocate.

versus

STATE (GOVT OF NCT) OF DELHI AND ANR. . Respondents

Through: Ms. Aashaa Tiwari, APP along with
SI Umesh Rana, P.S.Ashok Vihar, North
West District.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J:

Five appellants Praveen Kumar @ Pappu @ Puran Saxena, Sita Ram, Azad @ Patiya, Bhutna and Mohd. Usman @ Churi impugn their conviction under Section 302 read with Section 34 of the Indian Penal Code, 1860 (IPC, for short) for having committed murder of one Jaggi at about 10 P.M. on 12th July, 2009, near Jhuggi No. A-93, Jailer Wala Bagh, Ashok Vihar, Phase-II, Delhi. The judgment under challenge dated 22nd December, 2012 arises from the charge-sheet filed in FIR No.330/2009, police station Ashok Vihar.

2. By order on sentence dated 12th February, 2013, the appellants have been sentenced to imprisonment for life for the offence under

18
Section 302 read with Section 34 IPC. Fine of Rs.5,000/- each has been imposed. In default, the appellants have to undergo simple imprisonment for six months. Benefit of Section 428 of the Code of Criminal Procedure, 1973 has been granted.

3. The primary challenge in these appeals is to the findings of the trial court accepting the eye witness account given by Hari Ram Saroj (PW1) and Lalmani Saroj (PW7), inter alia, on the ground that they had not seen the occurrence but are planted and tutored eye witnesses. It is pleaded that since there is grave doubt and debate as to the place of actual occurrence and the investigation being faulty and full of gaps, benefit of doubt should be given to the appellants. The appellants Praveen and Mohd. Usman have pleaded that the trial court has erred in relying upon the testimony of Hari Ram Saroj (PW1), recorded on 29th April, 2010, for in his subsequent examination on 19th November, 2010, this witness did not identify and implicate them. Lalmani Saroj (PW7) also has not deposed about the involvement of Praveen and Mohd. Usman. On behalf of the appellant Mohd. Usman, it is pleaded that his name is not mentioned in the FIR (Ex.PW4/B), which was recorded on the basis of the statement made by Hari Ram Saroj (PW1) to the police. The appellants have also pleaded that the purported third eye-witness Angrahit Chaudhary (PW3) did not support the prosecution version. In the alternative, it is pleaded that Section 34, IPC would not be applicable as the appellants did not share a common intention and each of them could be individually held liable for the specific injuries attributed to them.

4. The prosecution, in the present case, primarily relies upon the eye-witness account given by Hari Ram Saroj (PW1) and Lalmani Saroj (PW7), brother and father of the deceased Jaggi. PW-1, in his deposition recorded on 29th April, 2010, has averred that he was

19
running a ration shop at Jailer Wala Bagh and his younger brother, the deceased Jaggi, used to work in his shop. On 12th July, 2009, when PW1 along with Lalmani Saroj (PW7), Angrahit Chaudhary (PW3) and the deceased Jaggi, were present in the shop, the five appellants, whom he correctly identified in the Court, came and started abusing them. Jaggi had protested and enquired from Praveen the reason for such behaviour. Praveen had then retorted and curtly stated that Jaggi claimed himself to be a social reformer. Jaggi pleaded that he had not made any such claim. Praveen was having a sword, Sita Ram was having a meat cutting knife, Bhutna was having an iron rod (*saria*), Usman was having a double-edged knife and Patia was having a knife. Bhutna gave a *saria* blow to Jaggi, who, in order to save himself, ran away from the spot, but was chased and overpowered near Jhuggi No.A-93, Jailer Wala Bagh. Hari Ram Saroj (PW1), Lalmani Saroj (PW7) and Angrahit Chaudhary (PW3) followed them. The appellant Praveen hit the deceased Jaggi with a sword and others, namely, Sita Ram, Usman, Patia and Bhutna gave blows with knives and *saria*. Jaggi fell down and became unconscious. The appellants fled away from the spot. PW-1 claimed that he did not intervene to save his brother Jaggi since he was frightened. However, he had protested loudly and people had gathered at the spot. Someone had informed the police, after which a PCR van reached the spot. Jaggi was rushed to Sunder Lal Jain Hospital in the PCR van. Hari Ram Saroj (PW1) had accompanied him to the hospital. Jaggi was declared as 'dead' in the hospital. Thereafter, the SHO and other police officers came to the hospital and statement of PW1 marked Ex.PW1/A was recorded. PW1 had thereupon accompanied the police officers to the place of occurrence, which was inspected. Blood was lifted from the spot with the help of cotton swabs. A blood-stained stone lying at the spot was

22

chiseled and lifted. PW1 testified that in Ex.PW1/A, he had inadvertently failed to name Usman as he was shocked and frightened at that time. However, when the police came to the spot after about two hours, PW1 had given the name of Usman in his supplementary statement dated 13th July, 2009. PW1 knew the five appellants from before and much prior to the occurrence. PW1's examination-in-chief, as noticed above, was recorded on 29th April, 2010. PW1 was re-called and examined on 19th November, 2010, i.e. after more than seven months. On the said date, in his examination-in-chief, PW1 identified the sealed *pulandas* containing clothes of the deceased and various weapons of offence except the sword. The said sword was taken out from a *pulanda* bearing the seal of FSL. There was mud on the entire blade of the sword. In his cross-examination, PW-1 professed that the accused had inflicted 2-3 *saria* blows on public persons, who had tried to save his brother. PW1 denied the suggestion that he had falsely implicated the appellant Usman in his supplementary statement. On his cross-examination by the counsel for the appellant Praveen, PW-1 accepted that he had signed his statement after going through its' contents. Thereafter, PW-1 professed that the police had pointed out towards the appellant Praveen when he had come to the Court for deposition on the last date of hearing. He did not have any business or other dealings and was not acquainted with the appellant Praveen, prior to the incident. Significantly, in the earlier portion of the cross-examination by the counsel for the appellant Praveen, PW-1 had stated that the appellant Praveen was residing in the Sawan Park area, but he could not tell the exact location or house number. The distance between PW-1's house and Sawan Park was about one kilometer, but he had never visited the house of Praveen. He deposed that Praveen was also known as Pappu. He did not know the name of Praveen's

21

father but knew that he belonged to either Mainpuri or Etah (U.P.). In his re-examination by the Additional Public Prosecutor, PW-1 deposed that he had not known Praveen by face and had never seen him prior to the occurrence, in spite of being confronted with portion A to A of statement Ex.PW1/A, wherein it is recorded that Praveen was a criminal and was known to him very well since prior to the occurrence. He denied the suggestion that he was deposing falsely regarding identity of Praveen due to fear and pressure put up by the family members of Praveen or that he had been won over by them.

5. In Ex.PW1/A, the substratum of the FIR, it is stated that PW1 had known Praveen prior to the occurrence. PW1 had certainly identified Praveen in his examination-in-chief recorded on 29th April, 2010. Even in the initial portion of the cross-examination on 19th November, 2010, PW1 had mentioned that he knew that the appellant Praveen was residing in Sawan Park and that he either belonged to Mainpuri or Etah. He denied the suggestion that the appellant Praveen had been implicated falsely at the instance of the police, yet in the re-examination by the Additional Public Prosecutor, PW1 made a pretence that he did not know Praveen by face when confronted with Ex.PW1/A. PW1 proclaimed that the police had pointed towards the appellant Praveen when he had come to the Court for his deposition. It is pertinacious that Praveen's name is mentioned in Ex.PW1/A. Moreover, in his examination-in-chief recorded on 29th April, 2010, PW-1 had affirmed that on 19th July, 2009, the police had come to the place of occurrence along with the appellants Praveen, Usman, Sita Ram and Patia and at that time, PW1, his father Lalmani Saroj (PW7) and Angrahit Chaudhary (PW3) were present and pointing out memos were prepared.

22

6. In light of the aforesaid facts, we think that the part-deposition of Hari Ram Saroj (PW-1) i.e. a portion of his cross-examination on behalf of the appellant Praveen and re-examination recorded on 19th November, 2010, should be treated as a false and incorrect testimony. We accept the prosecution version that Hari Ram Saroj (PW-1) had identified and referred to Praveen as one of the culprits in the Court as stated by him in his deposition recorded on 29th April, 2010 and also mentioned in his statement marked Ex.PW1/A. Another reason as to why we have accepted the said position is the factum that the name of the appellant Praveen is also mentioned in the rough site plan (Ex.PW24/B), which was prepared on 13th July, 2009, by ACP Pratap Singh (PW24) on the basis of identification and pointing out by PW1. PW24 has specifically deposed that after the FIR was registered on 13th July, 2009, at about 1.10 A.M., he along with PW-1, ATO Bahadur Singh and ASI Devraj had come to the spot and the site plan in question (Ex.PW24/B) was prepared at the instance of Hari Ram (PW1). It is obvious that specific details of the culprits were revealed by Hari Ram Saroj (PW1), the complainant. The police, at that stage, had not conducted any enquiry and could not have ascertained and known the said details from another source.

7. On the question of presence of PW-1 at the spot of occurrence, we accept the prosecution version for several reasons which are obvious and perceptible. Since the place of occurrence was PW1's shop and nearby area only, his presence was natural and normal. The description given by PW-1 about the occurrence is lucid and elaborate. It bears a substantial ring of truth around it. Noticeably, PW-1 had accompanied and taken the deceased to the hospital in the PCR van.

8. The presence of PW1 stands affirmed by HC Ashok Kumar (PW19). PW19 has stated that on 12th July, 2009, at about 10.30 P.M.,

23
he had received a call from the Control Room regarding a quarrel and murder at Jailer Wala Bagh. PW19, along with his staff, reached Jhuggi No.A-93, Jailer Wala Bagh, where he found a person lying in a pool of blood in an injured condition. Family members of the injured were also present there. On inquiry, he came to know that the injured person was known as Jaggi. He wanted to take the injured to BJRM hospital, but Hari Ram Saroj (PW-1) had insisted that his injured brother should be taken to Sunder Lal Jain Hospital, Ashok Vihar, as BJRM hospital was located at a greater distance. Later on, PW19 came to know that the deceased Jaggi had succumbed to his injuries.

9. The MLC (Ex.PW10/A) proved by Dr. Alam (PW10), records the name of the deceased as Jaggi s/o Lal Mani, age 25 years, resident of Jhuggi No. A-100, Jailer Wala Bagh, Ashok Vihar. The said MLC was prepared by Dr. Rakesh Kumar of Sunder Lal Jain Hospital. Dr. Alam (PW-10), CMO of the said hospital, had identified the signature and handwriting of Dr. Rakesh Kumar, who had left services of the hospital and whose whereabouts were unknown. The MLC was recorded on 12th July, 2009, at about 11 P.M. It is noticeable that the FIR in question (Ex.PW4/B), was recorded at about 1.10 A.M. on 13th July, 2009, i.e. within about two hours of the deceased being admitted to the hospital. Importantly, the aforesaid fact not only finds mention in the FIR but was also proved by HC Lalu Ram (PW4), who had recorded the said FIR as well as the DD entry No.4A marked Ex.PW4/C. By the said DD entry, intimation about recording of the FIR was sent to the senior police officers and the *Ilaka* Magistrate through Ct. Manoj (PW11). Subsequently, DD entry No.12A was recorded and a copy of the FIR was sent to the Metropolitan Magistrate, Rohini Court.

10. Ct. Manoj (PW11) has stated that at about 2.15 A.M. on 13th July, 2009, the duty officer gave him the FIR (Ex.PW4/B) and he delivered the same to ACP Ashok Vihar, DCP North-West and Joint CP/NR at their respective residences. Similarly, Ct. Bijender Singh (PW14) has deposed that at about 1 A.M. on 13th July, 2009, the SHO had handed over the *rukka* to him for registration of the FIR at Police Station, Ashok Vihar. At about 2.15 A.M., he had collected a copy of the FIR (Ex.PW4/B) from the duty officer, went to the spot of occurrence i.e. Jailer Wala Bagh and handed over the same to the IO. 24

11. In these circumstances, we do not find any merit in the contention of the appellants that there was delay in recording of the FIR. In fact, the same was recorded promptly and in the most expeditious manner. Similarly, the contention of the appellants predicated on the crime team report cannot be accepted. The said report marked Ex.PW13/A does mention the FIR number and also states that the deceased Jaggi was murdered, but does not mention the names of the accused persons. This, to our mind, is inconsequential as there is no specific column regarding the same in the prescribed form.

12. SI Matadin Meena (PW-13), Incharge, Mobile Crime Team has testified that on 13th July, 2009, he had received a call from the SHO, Police Station, Ashok Vihar and had reached the place of occurrence i.e. Jhuggi no.A-89, Jailer Wala Bagh, Ashok Vihar. Blood was spilled in front of the aforesaid jhuggi. Blood-stained human hair were also lying there. He had prepared the crime team report, Ex.PW13/A, which records his presence at the spot from 1.35 A.M. to 2.15 A.M. on 13th July, 2009. (Contention referring to the jhuggi number has been discussed below).

13. Lalmani Saroj (PW-7), father of the deceased, has identically deposed about the presence of the appellants Sita Ram, Patia and

25

Bhutna as PW-1. The first two persons were armed with a knife and Bhutna was having a *saria* in his hand and when questioned, they started beating Jaggi claiming that he thinks himself to be too much. Jaggi had tried to save himself by running away but was chased. Jaggi had pleaded before them with folded hands but no mercy was shown. Jaggi, in order to save himself, entered the quarter of one Bhajan, which was located at a small distance but he was followed and given blows with knife and rod. Bhutna gave a *saria* blow on the head of Jaggi. The appellant Patia had slit the throat of Jaggi with a knife. Jaggi fell down and became unconscious. Thereafter, the appellants and their associates fled away. Lalmani Saroj (PW-7) and Hari Ram Saroj (PW-1) had rushed Jaggi to Sunder Lal Jain Hospital, where the doctors declared him as 'dead'. Police came to the hospital and post-mortem of the dead body of Jaggi was conducted. During his cross-examination by the Additional Public Prosecutor, PW7 has stated that he could not say whether Praveen, resident of Sawan Park and Usman @ Churi had come along with Sita Ram, Patia and Bhutna. He was confronted with his statement under Section 161 Cr.P.C. marked Mark. PW7/A, wherein names of Praveen and Usman @ Churi were mentioned. PW-7 denied having seen Praveen with a sword and Usman with a knife. He also denied the suggestion that Jaggi had questioned Praveen as to why he was abusing him. PW-7 voluntarily stated that he had not seen Praveen. However, he accepted as correct the suggestion that Jaggi was caught and was given a *saria* blow by Bhutna and knife blows by Sita Ram and Patia near Jhuggi No.A-93. He also accepted that they had shouted for help. Several suggestions attributable to specific acts by Praveen and Usman were denied. He even denied the suggestion that on 19th July, 2009, at about 8 P.M., the appellants Praveen, Patia, Sita Ram and Usman had come to the spot

26

with the police staff and had pointed out the place of occurrence, inspite of being confronted with his statement Ex.PW7/B. PW7 did not identify the sword (Ex.PW20/T).

14. Failure of Lalmani Saroj (PW7) to identify Praveen is clearly an afterthought. Testimony of PW-7, father of the deceased, was recorded on 11th March, 2011, i.e. nearly one year after the first deposition of Hari Ram Saroj (PW-1), which was recorded on 29th April, 2010. PW7 has towed the line and tried to endorse PW1's testimony recorded on 19th November, 2010. We have already noted how PW-1 in his testimony recorded on 19th November, 2010, after initial hesitation, had tried to exonerate Praveen. We have rejected the said part of PW1's testimony. For the same reason, we would like to discard and disbelieve PW7's version that he did not know Praveen and that neither was Praveen present at the spot of occurrence nor did he use a sword. The said portion of PW7's testimony is unbelievable and should not be accepted.

15. However, the case against Usman is debatable and tenuous. Usman's name is not mentioned in the FIR Ex.PW4/B or in the *rukka* Ex.PW1/A. The FIR is descriptive and specifically names the four appellants but Usman is not identified and named. The said exhibits do not state or refer to another assailant, who could not be seen or was seen but not identified. The deceased Jaggi was chased and followed, with the assailants attacking and inflicting injuries. It is not a case where a large group of persons or a crowd of assailants had attacked. Ex.PW1/A specifically in numerical terms states that the assailants were four in number. As noticed above, an unscaled site plan was prepared after recording the FIR when Hari Ram Saroj (PW1) and ACP Pratap Singh (PW24) had visited the scene of crime on 13th July, 2009. The unscaled site plan gives details of the four appellants,

27
namely, Praveen, Patia, Sita Ram and Bhutna, but does not mention or name Usman. It is noticeable that in the police diary dated 13th July, 2009, it is recorded that immediately after preparation of the site plan, supplementary statement of Hari Ram Saroj (PW1) was recorded, in which he had given the name of Usman. This does not appear to be correct, for the name of Usman would have then found mention in the unscaled site plan. In fact, one would expect that the supplementary statement under Section 161 CrPC, should have been recorded earlier. This would have been natural. Thus, it is apparent and lucid that the name of Usman as the fifth perpetrator was introduced later.

16. The First Information Report is vivid and descriptive. It does not reflect an element of hesitation or ambivalence on the part of Hari Ram Saroj (PW1). In his statement, Hari Ram Saroj (PW1) has stated that he was residing at A-103, Jailerwala Bagh, Ashok Vihar, Phase 2, Delhi and was also running a ration shop from there. He had two elder brothers and a younger brother named Jaggi who had a *kabari* shop. At about 10 P.M. on the date of incident i.e. 12th July, 2009, he, his father, Angrahit Chaudhary and his brother Jaggi were present at the shop and at that time, one Pappu (Praveen), a resident of Sawan Park, whom he knew, came there with Sita Ram, Bhutna and Patiya and started abusing Jaggi. He and his father tried to persuade Praveen and other appellants not to abuse but they continued hurling abuses. Praveen had a sword, Sita Ram was having a knife, Bhutna was having as saria, Patia was having a rod and all of them started beating Jaggi. Jaggi ran to save himself and his father and Angrahit Chaudhary pleaded for mercy to spare Jaggi. They started chasing him and assaulted him near Jhuggi No. A-93, Jailer Wala Bagh. Praveen had attacked with a sword on the head of Jaggi and on his instigation, Sita Ram, Bhutna and Patiya had also inflicted injuries with the rod and

knives. Jaggi fell down and became unconscious. The complainant raised an alarm and people gathered at the spot. Thereupon, the perpetrators fled away from the spot. On receipt of the information, a PCR van reached the spot and his brother Jaggi was removed to Sunder Lal Jain Hospital, where he was declared as 'brought dead'.

17. We accept and agree that every omission or absence of name of an accused in the FIR would not necessarily result in acquittal. However, the Court must examine absence of name of a known person in the FIR with caution and care to rule out false indictment. Each case must be examined on its own strength and weaknesses in view of the factual matrix. In the present case, doubt and debate as to involvement of Usman remains unresolved and a question mark.

18. On this aspect, we would also rely upon the testimony of Lalmani Saroj (PW7) who has not implicated or named Mohd. Usman as one of the perpetrators. We are conscious and aware that Lalmani Saroj (PW7) has also not named Praveen as the perpetrator but on the said aspect, we have referred to the examination-in-chief of Hari Ram Saroj (PW1) recorded on 29th April, 2010 and the subsequent changed assertion by PW1 in his examination recorded in November, 2010. The presence of Mohd. Usman at the spot, therefore, appears to be doubtful and debatable, and accordingly, we feel that Mohd. Usman should be given the benefit of doubt.

19. Learned counsel for the appellants Praveen, Sita Ram, Bhutna and Patiya have also referred to the scaled site plan (Ex. PW5/A) and the cross-examination of Lalmani Saroj (PW7) with reference to the place of occurrence. The scaled site plan (Ex. PW5/A) was prepared on 20th August, 2009 after the police visited the site on 19th August, 2009. We would prefer to rely upon the unscaled site plan marked Ex. PW24/B, which was prepared on 13th July, 2009, at the instance of

29

Hari Ram Saroj (PW1). The said site plan specifies the location of the Jhuggi Nos. A-93 and A-53. Jhuggi No. A-53 is mentioned as the place where the appellants Praveen, Sita Ram, Bhutna and Patiya had started the quarrel with Jaggi. It indicates point 'A' in front of Jhuggi No. A-93 was the place where the four of them had assaulted Jaggi with a sword, iron rod and knives and where blood of the deceased had spilled.

20. The MLC (Ex. PW10/A) records the address of the patient/deceased Jaggi as Jhuggi No. A-100, Jailer Wala Bagh, Ashok Vihar. As per depositions of Hari Ram Saroj (PW1) and Lalmani Saroj (PW7), Jaggi was a resident of A-103, Jailer Wala Bagh, Ashok Vihar, where the two deponents also resided. It is apparent that the Jhuggi number mentioned in the MLC (Ex. PW10/A) is wrong. The two witnesses Hari Ram Saroj (PW1) and Lalmani Saroj (PW7) were subjected to cross-examination and asked questions regarding Jhuggi number A-100, but they did not affirm and accept the suggestions. On the question of place of offence, our attention was also drawn to the crime team report (Ex. PW13/A), wherein the place of offence is mentioned as Jhuggi No. A-89 outside Jailer Wala Bagh in the intervening night of 12th & 13th July, 2009. Referring to the two site plans marked Ex.PW5/A and Ex.PW24/B, scaled and unscaled respectively, it was highlighted that in the unscaled site plan (Ex.PW24/B), Jhuggi No. A-53 has been shown at the end in the right hand corner, whereas in the scaled plan (Ex. PW5/A), the last Jhuggi at the end of the road is numbered A-103. The said Jhuggi, as per the prosecution version and the deposition of Hari Ram Saroj (PW1) and Lalmani Saroj (PW7), was the residence and shop of Hari Ram Saroj (PW1) and the residence of the deceased. On the said aspect, our attention was drawn to the oral statement of Hari Ram Saroj (PW1)

30

and Lalmani Saroj (PW7) that the occurrence had started in front of Jhuggi number A-53 and the fatal injuries were caused in front of Jhuggi number A-93.

21. We have examined the said contentions in some depth as there is some discrepancy. However, on a careful scrutiny and in-depth examination, we have no hesitation in accepting the testimony of Hari Ram Saroj (PW1) and Lalmani Saroj (PW7) that fatal blows were inflicted in front of Jhuggi number A-93. This is the place from where blood-stained earth was recovered. Ct. Bijender Singh (PW14), HC Ashok Kumar (PW19) and the photographer HC Jagdish Kumar (PW15) have all referred to the said Jhuggi. Angrahit Chaudhary (PW3), whose presence is deposed to by Hari Ram Saroj (PW1) and Lalmani Saroj (PW7) as an eye-witness, did not substantially support the prosecution case, but he has accepted that he had seen the deceased Jaggi lying unconscious with injuries on his body near Jhuggi No. A-93. Jaggi was then surrounded by a lot of persons and someone had called the police. Jaggi was rushed to Sunder Lal Jain Hospital and was declared brought dead. Angrahit Chaudhary (PW3) professed that he did not know the names of the culprits. In his cross-examination, PW3 acknowledged that the deceased Jaggi was moved to Sunder Lal Jain Hospital and that he had also visited the said hospital. Daya Shankar (PW8), another neighbour of the deceased, has affirmed the location where the incident had taken place. He has deposed that at about 7.30 PM, when he was having dinner at his residence i.e. A-79, Jailer Wala Bagh, he heard the noise and came out. From his telephone, a call was made to the police and he had seen the deceased Jaggi in an injured condition.

22. Scaled site plan (Ex. PW5/A) was prepared by SI Manohar Lal (PW5) after visiting the spot on 19th August, 2009. PW5 claimed that

31

the said site plan was prepared on the pointing out of the complainant and after preparation of the draft notes and measurement. These rough notes and measurements, PW5 asserted, were destroyed after the site plan was prepared. There is a lapse as in the scaled site plan (Ex. PW5/A), as Jhuggi No. A-53 is not shown and indicated. We would, therefore, prefer to rely upon the unscaled site plan (Ex. PW24/B) which was prepared at the spot itself immediately after the incident on 13th July, 2009. While examining the contentions raised, we cannot be oblivious and must take judicial notice of the fact that the incident had taken place in a jhuggi cluster where numbers are given as a matter of convenience. The tenements were very small as is clear from the testimony of Hari Ram Saroj (PW1) and Lalmani Saroj (PW7) who have stated that jhuggis were built in an area of 10x10 sq. ft., and the distance between their jhuggi and jhuggi no. A-93 was 8 to 10 jhuggis. We think the jhuggi number, by itself, cannot be a ground to disregard and negate the oral testimony of Hari Ram Saroj (PW1) and Lalmani Saroj (PW7). The contentions, on this account, have to be rejected. We would not give undue importance to the jhuggi numbers in the given facts of the present case. We should concentrate and focus on the core testimony of the eye witnesses Hari Ram Saroj (PW-1) and Lalmani Saroj (PW-7), and whether their version is corroborated by attending circumstances and evidence.

23. Ethyl alcohol was found in the blood sample of the deceased Jaggi as per the FSL Report Ex. PW17/A. However, this would not dilute or negate the prosecution case. It would not be correct to disbelieve the ocular testimonies of Hari Ram Saroj (PW1) and Lalmani Saroj (PW7) as to the factum that the four appellants, namely Patia, Sita Ram, Praveen and Bhutna were the perpetrators of the offence in question. There is nothing to suggest that the deceased

Jaggi had suffered injuries due to an accidental fall as he was drunk or there was grave and sudden provocation. 32

24. Section 34 IPC refers to common intention and incorporates principle of vicarious liability when an accused shares the common intention with the actual perpetrator of the crime. The two essential requirements of Section 34 are (1) common intention; and (2) participation of the accused in the commission of the offence. The common intention can be a result of a premeditated decision between two or more accused, or in a given case, common intention can develop at the spur of the moment at the scene of crime. Section 34 IPC, which enacts principle of joint liability for the commission of an offence, importantly, does not refer to 'common intention of all' or the 'intention common to all'. Common intention has to be inferred as direct evidence of common intention is seldom available. Nevertheless, the appellants' Praveen, Sita Ram, Bhutna and Patiya have pleaded lack of common contention, relying upon the following elucidation in ***Virender Singh vs. State of M.P.*** 2010 (8) SCC 407:-

"57. Section 34 intends to meet a case in which it is not possible to distinguish between the criminal acts of the individual members of a party, who act in furtherance of the common intention of all the members of the party or it is not possible to prove exactly what part was played by each of them. In the absence of common intention, the criminal liability of a member of the group might differ according to the mode of the individual's participation in the act. Common intention means that each member of the group is aware of the act to be committed."

25. We are afraid that the appellants are reading the aforesaid quotation out of context. The above quotation does not support the plea raised by the appellants. In order to appreciate the said quotation, we would like to refer to two earlier paragraphs, namely paragraphs 42 and 56 of the same decision which read as under:

33

“42. Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence, there must be a pre-arranged plan and a pre-meditated concert between the accused persons, for doing the act actually done, though there might not be a long interval between the act and the pre-meditation and though the plan may be formed suddenly. In order that Section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case, it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Section 34.

xxx

56. Section 34 can be invoked even in those cases where some of the co-accused may be acquitted, provided it can be proved either by direct evidence or inference that the accused and the others have committed an offence in pursuance of the common intention of the group. (Vide *Prabhu Babaji Navle v. State of Bombay* [AIR 1956 SC 51].”

26. The argument that each of the perpetrators should be punished without resort to Section 34 IPC, for the injuries caused by them individually, negates and is anti-thesis to the spirit and purpose of Section 34 IPC. It is not necessary that the persons charged, adjudicated and held guilty of committing an offence with common intention must have acted identically or in the same manner. Acts may be different but must be actuated by the same common intention. Paragraph 57 in *Virendra Singh's case (supra)* quoted above expounds this aspect of Section 34 IPC, while noticing the general principle of criminal law that an accused is liable only for the act which he has done. Section 34 IPC, is enacted to meet a situation in which it is difficult to distinguish individual acts of members of a group who have acted in furtherance of common intention; or the necessity to prove exactly what role was played by each one of them (see *Sripathi vs.*

State of Karnataka 2009 (11) SCC 660; *State of Andhra Pradesh* 1993 suppl 3 SCC 134). 34

27. In *Girija Shankar vs. State of U.P.* 2004 (3) SCC 793, it has been held that the principle of joint liability under Section 34 IPC is only a rule of evidence and does not create a substantive offence. It makes a person liable for an offence committed by another, in course of a criminal act perpetrated by several persons, who in furtherance of the common intention, have joined in committing an offence. A person may participate and be engaged in a criminal act in different ways. Even a person not doing any particular act but only standing to prevent any prospective aid to the victim, may be guilty of committing the principal offence since he shares the common intention with the principal perpetrator. When we turn to the facts of the present case, we have referred to the deposition of Hari Ram Saroj (PW1) and Lalmani Saroj (PW7). The appellants Praveen, Sita Ram, Bhutna and Patiya had come armed with a sword, *saria* and knives. Abuses were hurled on Jaggi and when attacked, Jaggi tried to flee. Hari Ram Saroj (PW1) and Lalmani Saroj (PW7) had pleaded but the appellants followed and chased Jaggi and assaulted him and inflicted fatal injuries. Thus, Section 34 IPC has been rightly invoked and applied.

28. At this stage, it would be relevant to refer to the post mortem report of Jaggi (Ex.PW6/A) which was proved by Dr. K. Goel (PW6).

The report mentions and records the following injuries:

External injuries:

1. Lacerated wound 7 x 1 cms over right parietal and part of left parietal regions with crushed and contused margins.
2. Lacerated wounds 3 x 0.75 cms over right occipital region with contused and crushed margins.
3. Lacerated wound 5 x 1.25 cms over right temporal and mastoid region with crushed and contused margins. Depressed deformity seen all over underneath the above three injuries.
4. Incised wounds – 5 x 2 cms over top of right shoulder with tailing 0.5 cm long at anterior end, muscle deep and 6 x 2.5 cms muscle deep over upper lateral aspect of right arm with tailing 1.5 cms at lower end.

- 35
5. Three transverse incised wounds of sizes 13 cms, 11 cms and 8 cms over back of chest about 6 cms and 4 cms apart each other respectively.
 6. Compound fracture left tibia and fibula at upper middle 1/3 with laceration 1.5 x 0.5 cms with crushed margins and rail-road pattern.

Internal examination:

1. There were subscalp bruises, crushing and haematoma all over right parietotemporal occipital and medial part of left parital area.
2. Depressed comminuted fractures of right temporal bone into pieces.
3. Depressed fractures right parital bone in area 6 x 2.5 cms.
4. Brain matter was lacerated at right temporal lobe with contusions all over right parietotemporo occipital lobes.
5. Diffused subarchanoid hemorrhage all over right hemisphere.

Opinion: The cause of death was extensive craniocerebral injuries. Manner of death was homicidal. Craniocerebral injuries were sufficient to cause death in ordinary course of nature.

29. The photographs of the spot marked Ex. PW16/A1 to A5 indicate that Jaggi had bled profusely and the blood had spilled over at the ground and the walls.

30. In view of the aforesaid discussion, the appeals preferred by Praveen Kumar, Sita Ram, Azad @ Patiya and Bhutna are dismissed and their conviction and sentences are sustained. Appeal filed by Mohd. Usman is allowed and his conviction and sentence are set aside. Mohd. Usman will be released, unless he is required to be detained in accordance with law, in any other case.

30. The appeals are accordingly disposed of.

-sd-

(SANJIV KHANNA)
JUDGE

-sd-

(ASHUTOSH KUMAR)
JUDGE

July 14, 2015
NA/VKR/kkb

TRUE COPY
[Signature]
EXAMINER