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

\+ **CRL.A. 74/2001**

Reserved on: November 16, 2017
Date of decision: December 14, 2017

AVINASH KUMAR ...Appellant
Through: Mr. M.L. Yadav, Advocate.

versus

STATE ...Respondent
Through: Ms. Radhika Kolluru, APP.

With

\+ **CRL.A. 88/2001**

KULDEEP SINGH ...Appellant
Through: Mr Shishir Mathur, Advocate.

versus

STATE ...Respondent
Through: Ms. Radhika Kolluru, APP.

With

\+ **CRL.A. 89/2001**

SAHENSHER PAL ...Appellant
Through: Mr. Anupam S. Sharma with Ms. Prachee Satija, and Mr. Prakarsh Airyan,Advocate.

versus

STATE ...Respondent
Through: Ms. Radhika Kolluru, APP.

With

\+ **CRL.A. 91/2001**

SUSHIL KUMAR ...Appellant
Through: Mr. Mukesh Kalia, Advocate.

versus

STATE ...Respondent
Through: Ms. Radhika Kolluru, APP.

With

\+ **CRL.A. 106/2001**

RAMESH CHAND ...Appellant
Through: Ms. Sunita Kapil with Ms. Pooja Soami, Advocates.

versus

STATE ...Respondent
Through: Ms. Radhika Kolluru, APP.

And

\+ **CRL.A. 118/2001 & CRL.M.A. No. 2013/2001**

CHOTTEY LAL ...Appellant
Through: Mr Shishir Mathur, Advocate.

versus

STATE ...Respondent

Through: Ms. Radhika Kolluru, APP.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA

JUDGMENT

% 14.12.2017

Dr. S. Muralidhar, J

Introduction

1.1 Six policemen belonging to the Special Staff (North-east) of the Delhi Police are appealing against their conviction for the murder of Dalip Chakraborty in 1995. He died on 8th August 1995 as a result of the injuries inflicted upon him by the Appellants while he was in their custody on the 30th and 31st July 1995.

1.2 More than two decades ago, the Supreme Court dealt with the issue of custodial violence in all its manifestations. In ***D.K. Basu v. State of West Bengal (1997) 1 SCC 416*** detailed binding guidelines were laid down with a view to preventing instances of custodial violence, which had witnessed a marked increase over the years. The judgment of Dr Justice A. S. Anand (as the learned Judge then was) acknowledged at the outset that:

> "Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of

the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society."

1.3 In the two decades since, the number of instances of custodial violence and custodial deaths in particular has not shown a decline. In its 113th Report regarding "injuries in police custody", the Law Commission of India (LCI) suggested incorporation of Section 114-B in the Indian Evidence Act, 1872 (lEA). In its 152nd Report in 1994 on 'Custodial Crimes', the LCI dealt with the issues of arrest and abuse of authority by the officials. It referred to the various statutory and Constitutional provisions. *Inter alia,* in the said report the LCI recommended an amendment to the Indian Penal Code 1860 (IPC), by inserting a new provision for punishing the violation of Section 160 Cr PC. The LCI further recommended inserting sub-section (lA) in Section 41 of the Cr PC for recording the reasons for arrest and Section 50A to mandate relatives being informed of the arrest.

1.4 In its 177th Report in 2001 on the 'Law relating to arrest', the LCI recommended inserting Section 55 A in the Cr PC that would mandate the person "having the custody of an accused to take reasonable care of the health and safety of the accused." The LCI's 185th Report in 2003 was a review of the lEA. There the LCI took note of the decision of the Supreme Court in S***tate of***

M.P. V. Shyam Sunder Trivedi (1995) 4 SCC 262, where it was observed that deaths in police custody were the "worst kind of crimes in civilized society, governed by rule of law. Men in 'khaki' are not above the law." The Supreme Court in that case further observed:

> "Keeping in view the dehumanising aspect of the crime, the flagrant violation of the fundamental rights of the victim of the crime and the growing rise in the crimes of this type, where only a few come to light and others don't, we hope that the Government and legislature would give serious thought to the recommendation of the Law Commission and bring about appropriate changes in the law...."

1.5 Recently in October 2017 the LCI submitted its 273rd Report on Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation. it devoted an entire chapter to 'Compensation for custodial torture/death' and after extensively reviewing the case law, concluded that the defence of sovereign immunity is not available to the officials of the enforcement machinery of the state to avoid liability for custodial torture and deaths. It reiterated the recommendation in its 113th and 152nd Reports that Section 114B be inserted in the lEA to ensure that in case a person in police custody sustains injuries, “it is presumed that those injuries have been inflicted by the police, and the burden of proof shall lie on the authority concerned to explain such injury."

1.6 The past five reports of the National Human Rights Commission show that the instances of deaths in police custody have not witnessed a marked decline. None of the legislative changes recommended by the LCI have been made yet.

The problem still stares at us in the face. It is in this backdrop that the Court proceeds to examine these appeals.

The present appeals

2.1 These six appeals, arising from FIR No. 231 of 1995 registered under Sections 365/302/395/452/34 IPC at Police Station (PS) Welcome, are directed against the impugned judgment dated 27th January 2001 passed by the learned Additional Sessions Judge (ASJ), Karkardooma, Delhi in Sessions Case No. 50 of 2000 convicting the Appellants for the offences under 452/365 and 302 read with Section 34 of Indian Penal Code (IPC). By the same judgment they were acquitted of the offence under Section 397 IPC.

2.2 The appeals are also directed against the order on sentence dated 30th January 2001 whereby for the offences under Section 302/34 IPC each of them was sentenced to undergo rigorous imprisonment (RI) for life each and to pay fine of Rs. 5,000 each and in default of payment of fine, to undergo RI for three years; to undergo RI for five years each and also to pay a fine of Rs. 2,000 each and in default of payment of fine, to undergo RI for one year for offence under Section 452/34 IPC; to undergo RI for five years and to pay a fine of Rs. 2,000 each and in default of payment of fine, to undergo RI for one year for offence under 365/34 IPC.

3. At the outset it requires to be mentioned that the Appellants were charged along with Constable (Ct.) Jagbir Singh (who has already been acquitted by a separate judgment dated 18th October 2000 of the trial Court) and Chand Singh

[Accused No. 9 (A-9)]. Of the 8 accused convicted, appeals have been filed by six of them. Ct. Sunder Lal (A-7) has apparently expired. The appeal filed by A-1 Dalip Singh stood abated since he expired during the pendency of these appeals.

Case of the prosecution

4. The case of the prosecution is that on the intervening night of 30th and 31st July 1995 the Complainant, Smt. Devshree Chakravarty, (PW-34) was present in her house at 488/5, C-3, Dilshad Garden, Delhi. At around 12.45 am in the night she saw about 12-15 persons having *lathies* in their hands coming towards her house. She closed the gate of her house. The said persons asked her to open the door but she declined. One of the persons scaled the wall of the house and entered at which point PW-34 bolted the door of the veranda from inside. The said person then opened the entrance door and all of them entered in the house. PW-34 raised an alarm. The said persons also forcibly entered in the *veranda* which was bolted by PW-34 from inside. She also noticed that two of them were having revolvers in their hands. PW-34 was made to stand in the corner of the room on the point of revolver. The accused persons demanded the keys of the almirah. They went in the adjoining room where her daughter was sleeping and she was kicked by one of them. The daughter was also made to stand on the point of revolver. Thereafter the said persons collected various articles including ornaments, papers and whatever they found in the room including kitchen ware.

5. At that time Dalip Chakraborty, husband of PW-34, was not at home. Alok

Mukherjee (PW-33), a friend of the brother-in-law of PW-34 was present in the house. He went out of the house on hearing the noise of PW-34. Meanwhile, Dalip Chakraborty (deceased) accompanied by Amulya Sarkar (a domestic servant) and neighbour Gulshan Dutta returned to the house in an ambassador car. Two or three persons who had earlier entered in the house enquired of the deceased as to who Dalip Chakraborty was. When he answered in the affirmative, all the accused persons started beating him. They took the deceased in the police vehicle along with Amulya Sarkar, Gulshan Dutta and PW-33.

6. According to PW-33, the deceased was continued to be beaten on the Shahdara flyover and thereafter in the office of the Special Staff at Welcome. On the instructions of the police officials, the deceased was thereafter taken to Dev Nursing Home in Dilshad Garden in a critical condition. He was asked by the accused persons not to be taken to a government hospital. Meanwhile, PW-34 also reached Dev Nursing Home from where the deceased was referred to GTB Hospital. He was not attended to there as well and was shifted to Holy Family Hospital where he ultimately died on 8th August 1995.

7. Thereafter, inquest proceedings were conducted and the post-mortem on the dead body of the deceased was completed at the All India Institute of Medical Sciences (AIIMS). The FIR was registered on the complaint of PW-34. The prosecution examined 37 witnesses. 18 witnesses were examined for the defence.

8. The defence of the accused was that they have been falsely implicated in this

case by Inspector Mohan Chander (PW-36) attached the Operation Cell, Police Headquarter, New Delhi who at the relevant time was incharge of the Special Staff (North-East) and ACP S.L. Dua who allegedly were inimical to the accused persons. It was alleged that PW-36 and ACP S.L. Dua committed the crime and in order to save themselves they have falsely implicated the accused persons. The further submission was that even according to Ct. Sanjay (PW-35), he made the DD entries at the instance of PW-36. There were cuttings in the DD register which were not signed by him. These were also not reported to his senior officers. It is alleged that PW-36 had then tampered with DD entries with a view to falsely implicate the accused persons.

9. On the basis of the medical evidence of Dr. R.K. Sharma (PW-15), it was urged that it was the 'infarcts' and not the head injury that was the cause of death. Further the 'infarcts' might have been as a result of the hypertension that the deceased might have been suffering from. Moreover, the death occurred only on 8th August 1995 much after the detention of the deceased at the office of the Special Staff concluded. It was, therefore, contended that at the highest the offence under Section 323 IPC could be said to have been made out against the accused persons since the injury on the deceased was found to be simple nature. Referring to the deposition of Dr. R.K. Sharma (PW-15), it was sought to be contended that the injuries could also have been received by the deceased on account of a fall on a hard surface. If two views were possible on the injuries received by the deceased, then the view in favour of the accused had to be taken into account.

10. Further, it was submitted that the accused persons were also not named in the FIR by PW-34. It was submitted that the prosecution had failed to examine Inspector Dhillon who was the Investigating Officer (10) in this case. It was submitted that the log book, personal diary and DD register had not been seized by the lO immediately and that an adverse inference had to be drawn against the prosecution in that regard. The further submission was that the accused were fully justified in refusing to participate in the TIP as they had been produced with unmuffled faces in the Court and were "shown to the witnesses". According to the accused, the testimonies of PW-33 and PW-34 did not corroborate each other.

The trial Court judgment

11. The trial Court noted that the case of the prosecution essentially revolved around the statements of PW-34 (wife of the deceased), and Alok Mukherjee (PW-33). The trial Court found them to be consistent. The medical evidence fully corroborated the eye-witness accounts.

12. There was nothing on record to suggest that Inspector Mohan Chander (PW-36) and ACP S.L. Dua had in fact falsely implicated the accused persons with a view to saving themselves. There was nothing on record to suggest that PW-34 had entered into an agreement with Inspector Mohan Chander or ACP S.L. Dua. Further, PWs 33 and 34 hardly knew the accused prior to the incident. The mere fact that PW-36 did not inform the higher officers of the cuttings in the DD entries would not ipso facto render the case of the

prosecution weak particularly since the evidence of PW-33 and 34 remained unshaken.

13. The trial Court held that the evidence record proved that the accused were on patrolling duty on the intervening night of 30th/31st July, 1995. The lO of the case who conducted the enquiry could not be examined at the trial as he had left for Canada.

14. As far as offence under Section 397/34 IPC is concerned, it was noticed that neither PW33 nor PW34 had given details of the articles that had been removed from the house of the deceased. Even after the date of the incident, PW34 did not give any detail of any article missing from the house.

15. The trial Court held that the charges against all the accused for the offences under Section 452/365/302/34 IPC stood proved beyond reasonable doubt. All of them were acquitted for the offence under Section 397 IPC. They were sentenced in the manner noticed earlier.

Medical evidence

16. There are common grounds urged by all the Appellants apart from points specific to each of their appeals. One common ground is regarding the nature of injuries found on the deceased upon his post-mortem and the cause of death. It is contended that the evidence of Dr. R.K. Sharma (PW-15) does not support the case of the prosecution as far as the offence under Section 302 read with 34 IPC is concerned. In other words, it is contended that the injuries suffered by

the deceased would not in the ordinary course of nature be sufficient to cause his death. Reference is made to the medical records of the Holy Family Hospital.

17. Before proceeding to examine the medical evidence in some detail, it is necessary to recapitulate the case of the prosecution as well as the events that transpired, beginning with the intervening night of 30th/31st July 1995 at around 12.45 am, when the police party of the special staff (North-East District) comprising the accused persons picked up the deceased from his house after giving him severe beatings there. He was taken to the office of Special Staff and on the way he was subjected to further beatings on the Shahdara flyover. He remained in the office of the Special Staff and was subject to further beatings. This continued till around 5.35 pm. Thereafter the deceased, Alok Mukherjee (PW-33) and Amulya Sarkar were put in a TSR and sent to a private hospital.

18. It has come in the evidence of PW-33 that first they took the deceased to Dev Nursing Home, Dilshad Garden which is closer to the house of the deceased. Devshree Chakravarthy (PW-34) also reached there along with some neighbours. After the doctors there examined the deceased they asked him (deceased) to be taken to GTB Hospital. At the GTB Hospital MLC was prepared and X-ray was taken. However, the family of the deceased decided that since the deceased was not receiving sufficient treatment he should be taken to Holy Family Hospital in the intervening night of 31st July/1st August

1995. The deceased thereafter continued receiving treatment at the Holy Family Hospital till he expired on 8th August 1995.

19. After his expiry on 8th August 1995 the deceased was taken to AIIMS for his post-mortem. This was conducted by Dr. R. K. Sharma, (PW-15) Assistant Professor in the Department of Forensic Medicine along with Dr. D.N. Bhardwaj (PW-32), Dr. B.N. Yadav, Junior Demonstrator and Dr. Lalrozama (PW-16) at around 12.30 pm on 9th August 1995. The external injuries noticed on the body of the deceased were under:

> "1. Healed abrasion marks on the right forehead size 1 x 1 cm.
>
> 2. healed abrasion mark on right elbow joint posterior lateral aspect size 1 x 1 cm.
> 3. contused abrasion size 7.5 x 5 cms on the left gluteal region lateral to midline.
> 4. healed abrasion left elbow joint lateral aspect size .5 x .5 cms.
>
> 5. contused abrasion on left ear 5 x 2.5 cms on external ear.
>
> 6. contused abrasion right external ear 7.5 x 2.5 cms.
>
> 7. healed abrasion left dorsal and just below right joint size .5 x .5 cms."

20. As far as the internal examination was concerned, the following injuries were noted:

> "There are extravasation of blood in occipital area blood was around 50 grams. There was no fracture in the scalp. Bran was congested and oedematous weight 1300 gms subdural hematoma was present all over the right cerebral sphere blood was 200 grams. Petechial haemorrhages were present cowed brain. Infected area were present all over the brain. Rest of the internal organs were normal."

21. The opinion of PW-15 as regards the cause of death was as follows:

> "The cause of death was as a result of head injury. Injuries no. 1 to 7 and head injury were ante-mortem in nature, likely to be caused by blunt force. Head injury was sufficient in ordinary course of nature to cause of death, however, viscera was preserved to rule out poisoning."

22. The report signed by PW-15 was handed over along with viscera for onward transmission for toxicological analysis. After the receipt of the CFSL report, which gave a negative result of common poison, PW-15 gave the cause of death as "comma as a result of head injury which was ante-mortem in nature caused by blunt force. Head injury was sufficient in ordinary course of nature to cause death."

23. PW-15, was subjected to extensive cross-examination in which he gave the following reply:

> "It is correct that infarces were present all over the brain as already mentioned by me in report and these were sufficient to cause death in ordinary course of nature. It is correct that infarcts as detected on the brain of the deceased might not have been produced on the brain because of the injuries on the brain. These infarcts even could have been caused even without any injury on the head of this deceased or any other person. Volunteered. These infarcts could be possible by high blood pressure.
>
> Question: I put to you that whether death in this case was because head injuries or because of the emanation of the infarcts.
>
> Answer: Head injuries were not cause of the death but infarcts also

were cause of death in this case – But in common medical term we call infarcts as an injury known as cerebrovascular accident.

By haemo – we mean in common language as collection blood in the brain below layer of the brain called durea."

I agree with Modi's view on subdural haematoma period's evaluation – But only when the patient gets no medical treatment and does not have other associated injury to the brain or some other vital organs.

Question: I put to you that can subdural haematoma be caused by local inflammation after 40 years of age in persons having heat-problems and chronic alcoholism and chronic diseases of kidney or bleeding disorders?

Answer: It is true that subdural haematoma may be caused by above mentioned causes and also by trauma to the brain."

24. Following the reply given by him to the effect that the injuries mentioned in the post-mortem report could be caused by fall against a hard surface, the Court put the following questions to PW-15:

Court Question : Would the head injury No. 1 and the other injuries no. 2 to 7 cause of death of the deceased in case there were no infracts found on the brain.

Answer: It is not possible to say whether these injuries namely head injuries could have caused death as the events were over-shadowed by the presence of infracts.

Court Question: Could the head injury along detailed at no. 1 in the post-mortem report cause death in the ordinary course?

Answer: It is not possible."

25. The above replies were given on 27th January 1997. PW-15 was again called on 27th July 2000 and further questioned by the Court itself, as under:

> "Court Question: Did you mention in your report that the infarcts noted by you were chronic or acute?
> Ans.: The infarcts were acute in nature and were present all over the brain.
>
> CQ: Would it be correct if I put to you that acute infarctions cannot be caused because of high blood pressure/hypertension or some heart disease and that such infarctions can be caused only with a manual injury to the head and brain?
>
> Ans: It is incorrect. In majority of the cases, such multiple and defused infarcts in the brain are caused as a result of hypertension or underlying heart disease.
>
> CQ: Did you mention the size of the infarcts or their appropriate number?
>
> Ans: I did not mention the number and size of the infarct. However, these were spread all over the brain.
>
> CQ: What was the colour of the infarcts?
> Ans: It was all a pale area.
>
> CQ: Would it be true that blood would not extravasations in the adjoining brain tissues or any part of the brain in case infarcts were produced as a result of some underlying diseases, i.e., heart ailment, hypertension etc.?
>
> Ans: It is correct that in case of cerebra infarcts as a result of underlying disease no extravagation of blood is seen in the brain tissue and in the adjoining areas of the brain. Sometimes in cases of uncontrolled or

untreated hypertension, the blood vessels in the brain rapture and may cause hematoma or extravagation in the brain tissues - but in that case, infarcts would not cause on the brain surface.

CQ: Dr. Saheb you had given a clear and specific opinion about the cause of death in this case by stating in your chief-examination and your report Ex.PW-15/A – cause of death was come as a result of head injury which was ante-mortem in nature and caused by blunt force – head injury was sufficient in the ordinary course of nature to cause death and in answer to a question by the defence recorded at page No. 3 of your statement dated 27th January 1997 – you had stated 'Head injuries were not cause of the death but infarcts alone were cause of death in this case – in common medical term we call infarcts as an injury known as CAVA (cerebrovascular accident) – is it not a self-contradictory statement and if so, please clarify the position?

Ans.: It is correct that CVA are classified as injury according to the clinical treatment/text books. In this case, following injuries are present internally in the head:

a. extravagation of blood – in both occipital lobos, subdural hematoma present over the cerebral hemisphere, petichial haemorrhages, they were traumatic in nature.

b. Infracted areas as mentioned all over the brain are non-traumatic in nature.

The cause of death in this case was as a result of infracted areas. Injury given at point *a* given is not sufficient to cause death in this case.

CQ: Dr. Saheb, it appears that you are not completing ignoring your own finding by telling that injuries given at point *b* above were alone the cause of death unrelated with the injury given at point *a* above despite the fact that the injuries said to have been sufficient to cause

death in this case were opined by you to have been caused by blunt force.

Ans: I would again clarify that opinion expressed by me in my post-mortem report was purely of a clinic in nature as we normally write in our clinical notes or case sheets in the hospital.

CQ. Dr. Saheb, it appears that at my above question has not been fully answered, since I wanted you to explain the position vis-a-vis to the injuries which you have opined as being ante-mortem in nature and caused by blunt force, will you please clarify and simplify your stand?

Ans: I wish to clarify that injuries no. 1 to 7 and injury as mentioned at point *a* (mentioned above) caused by blunt force while injury mentioned at point *b* (mentioned above) may be due to underlying diseases.

Xxxx by Shri R.S. Hooda, Advocate for all accused persons Nil opportunity given."

26. Great emphasis has been laid by learned counsel for the accused on the reply given by Dr. R.K. Sharma (PW-15) that "Head injuries were not cause of the death but infarcts also were cause of death in this case." It is sought to be suggested that there was no external injury that could be related to the infarcts that could be said to have actually caused the death. It is further sought to be suggested that the deceased may have been suffering from hypertension, i.e. 'high blood pressure' which had actually resulted in the infarcts and which therefore may have caused the death.

27. The condition in which the deceased was at the time of being brought to the Holy Family Hospital is evident from the documents of that hospital. A note

written by Dr. Renee G. Kulkami, Radiologist on August 1995 to Dr. Ravi Bhatia after performing the CT scan on the head stated inter alia as under:

> "Non contrast enhanced computed tomography of the head has been done in view of recent history of head injury.
>
> Posterior fossa, fourth ventricle appear normal.
>
> A hyperdense extracerebral collection is seen in the right fronto parietal region, with attenuation values in the range of clotted blood. A small intracerebral contusion is seen in the deep parietal region, with an associated inter hemispheric bleed.
>
> The overlying sulci are effaced and the frontal horn of the right lateral ventricle compressed. There is a midline shift of approximately 1.5 cm to the contra lateral side. The third ventricle is partially visualized. Basal cisterns are fairly well preserved.
>
> Appearances and attenuation values of the rest of teh neuroparenchyma are normal.
>
> Impression: Acute subdural haematoma in the right fronto parietal region, with associated cerebral edema and significant mass effect.
>
> - Small right parietal intracerebral contusion.
> - Acute interhemispheric bleed."

28. On the next date, i.e, 2nd August 1995 after the enhanced computed tomography of the brain was performed, the following report was sent:

> "Follow-up pre-contrast enhanced computed tomography of the brain has been performed. Present examinations have been compared with previous study dated 1.8.95.
>
> Posterior fossa, fourth ventricles appear normal.

There is evidence of a thin but extensive subdural haematoma seen over right cerebral hemisphere, and appears more or less unchanged (15-12).

Epsilateral ventricle is markedly compressed third ventricle is near completely obliterated and there is a moderate to severe shift of midline structures to left side. Cortical sulci are effaced completely while basal cisternal spaces are partially obliterated.

There is evidence of a few small abnormal patchy but well defined hypodense areas seen in deep frontal, parietal occipital white matter regions (9-13).

Appearance and attenuation values of rest of the neuroparenchyma are normal.

CT findings are those of right sided extensive thin subdural bleed, marked cerebral swelling and a few fresh infarcts in deep white regions as described above. No fresh intracranial bleed is seen."

29. A careful perusal of the cross-examination of Dr. Sharma reveals that the question was put to him in the cross-examination whether the head injury could be said to have caused death of the deceased in case there are no infracts found on the brain. In other words Dr. Sharma was asked to choose whether the death was because of the head injury or because of the infracts. The possibility of infracts having been caused by the extensive blood collection in the brain resulting from the injury to the brain was not specifically put to him. This explains his answer: "head injuries were not cause of the death but infarcts also were cause of death in this case."

30. It must be remembered that cross-examination of Dr. Sharma was happening more than a year after his post-mortem report where it was clearly written by him that the cause of the death was the head injury. It is possible that Dr. Sharma did not have access to the medical reports of Holy Family Hospital when he gave the above answer in his cross-examination. However, from the records of the Holy Family Hospital it is clear that there existed cerebral hematoma in the brain as a result of injury even on F* August 1995. It was also clear that there was acute subdural hematoma and the entire exercise of enhanced computed tomography was done "in view of recent history of head injury." Therefore, it was misleading to disconnect the internal extravasation of blood from the head injury and make it appear that the deceased died of infarcts unconnected with his head injury.

31. Ms. Radhika Kolluru, learned APP, has placed before the Court medical literature on traumatic brain injury (TBI). In a treatise on 'Brain & Spine' by Mayfield TBI is described as under:

> "TBI is an injury to the brain caused by a blow or jolt to the head from blunt or penetrating trauma. The injury that occurs at the moment of impact is known as the primary injury. Primary injuries can involve a specific lobe of the brain or can involve the entire brain. Sometimes the skull may be fractured, but not always. During the impact of an accident, the brain crashes back and forth inside the skull causing bruising., bleeding, and tearing of nerve fibers (Fig. 1). Immediately after the accident the person may be confused, not remember what happened, have blurry vision and dizziness, or lose consciousness. At first the person may appear fine, but their condition can decline rapidly. After the initial impact occurs, the brain undergones a delayed trauma – it swells –

pushing itself against the skull and reducing the flow of oxygen-rich blood. This is called secondary injury, which is often more – damaging than the primary injury."

32. It is also pointed out that secondary brain injury occurs "as a result of the body's inflammatory response to the primary injury. Extra fluid and nutrients accumulate in an attempt to heal the injury. In other areas of the body, this is a good and expected result that helps the body heal. However, brain inflammation can be dangerous because the right skull limits the space available for the extra fluid and nutrients. Brain swelling increases pressure within the head, which causes injury to parts of the brain that were not initially injured. The swelling happens gradually and can occur upto 5 days after the injury."

33. In the present case from the records of the Holy Family Hospital dated 2nd August 1995 it is plain that 'marked cerebral swelling' and a few 'fresh infarcts' were seen in the deep white matter regions. Clearly, therefore, this was secondary brain injury as a result of the injuries suffered by the deceased while he was in custody. Further, no attempt was made by the accused to demonstrate from the medical records that the deceased was suffering from hypertension. It is unlikely that the doctors treating him would not have noted this fact. Since it was the case of the accused that the infarcts found in the brain of the deceased were as a result of hypertension, the burden lay on them to prove it. This they plainly failed to do.

34. Learned counsel for the Appellants referred to an article titled 'Forensic

Pathology" authored by Mr. Bernard Knight which warns against "unwarranted speculation or 'Quincy' style of over-interpretation, which was the bane of forensic pathology in former years and is still practised too much even today, to the detriment of the good reputation of the speciality." In the present case, there is no danger of 'over-interpretation'. The said medical records of the deceased bear out that the infarcts found in his brain were as a result of subdural hematoma which in turn was as a result of the injuries to his brain. In an article "Cerebral Infarction after Traumatic Brain Injury : Incidence and Risk Factors" authored by Dong-Hyeon Bae and Hyoung-Joon Chun it has been observed that "cerebral infarction after brain trauma has also been recognized as a potential secondary injury."

35. The theory of the defence that the external injuries, including the ones to the brain, could be as a result of falling on a hard surface, appears farfetched in the present case. In 'Forensic Medicine and Toxicology" authored by J.B. Mukherjee it is explained that:

> "Abrasions resulting from friction against rough surface during fall from a height, will be mostly noticed over prominence of elbows, knees. hands, sides of limbs and trunk and may or may not be associated with contusions, lacerations, fracture dislocations or other serious internal injuries."

36. In the same treatise it is noted that head injuries can occur from (i) An impact of some object against a fixed head (ii) An impact of some object against a head free to move (iii) An impact of the head against some relatively stationary object, causing sudden arrest of motion." However, in the facts of the

present case, it is highly impossible that the deceased while in police custody somehow injured himself by falling against a hard surface or object. In any event, there is no such evidence led by the prosecution which can persuade the Court in that direction.

37. It was then contended that there were no visible external injuries that could be said to have resulted in the death in the ordinary course of nature. It was pointed out that there was fracture of the skull and, therefore, the head injury was not serious. This submission proceeds on the erroneous premise that for death to result from injuries, such injuries have to necessarily be obvious and visible. In the present case, the records show that even on the first day when he was brought to the Holy Family Hospital, there was subdural haematoma and extravagation of blood in the brain. This was as a result of the head injury spoken of by PW-15 when he wrote out the post-mortem report. That it was not a visible injury hardly matters. Death can be caused as a result of even internal injuries to vital parts, in this case the brain.

38. The Court is satisfied that the head injury suffered by the deceased while he was in the custody of the Special Staff (North-East District) was in fact a TBI which resulted in subdural haematoma. The infarcts seen in the brain even on 1st August 1995 was not as a result of any hypertension suffered by the deceased. The TBI manifested as an increased swelling which was noticed on the second day by the doctors of the Holy Family Hospital. The medical records clearly established the link between the head injury and the ultimate

death of the deceased. The net result is that the head injury inflicted on the deceased while in custody was sufficient in the ordinary course of nature to have caused his death. The Court, therefore, also rejects the plea of the accused that in the present case the injury on the head should be treated as a simple injury.

The evidence of interested eye witnesses

39. The next common ground of attack is the depositions of the two eye witnesses PW-33 and PW-34. They are sought to be discredited because they are interested witnesses and that they were acting in connivance with PW 36 and SL Dua to falsely implicate the accused. It is further pointed out that there were two other persons present while the deceased was taken away by the Special Staff. Of these, Amulya Sarkar was not examined and Gulshan Datta (PW-19) turned hostile. Therefore, according to the counsel for the accused, it was unsafe to base the conviction of the accused on the testimonies of PWs 33 and 34 who in any event were untrustworthy as they made numerous improvements in Court over their previous statements to the police during investigation. This, therefore, calls for a detailed examination of the depositions of PWs 33 and 34. PW-34 is the wife of the deceased. PW-33 is a friend of her brother-in-law, who happened to be staying in their house on the fateful night.

40. The legal position as regards interested witnesses is that their evidence must be scrutinised carefully for possible inconsistencies. In ***Jayabalan v. UT of Pondicherry (2010) 1 SCC 199***, it was explained by the Supreme Court that a pedantic approach cannot be applied while dealing with the evidence of an

interested witness. It was held:

> "23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

Evidence of PW-33

41. In his deposition PW-33 stated that on 29^^ July 1995 he had come to the house of the deceased and he remained there. On the intervening night of 30th/31st July 1995 he was taking rest. At around 11 pm after dinner, the deceased along with Amulya Sarkar and Gulshan Dutta (PW-19) went out in his ambassador car. He stated that at 12.45/1.00 am in the night he heard some noise, as well as noise of PW-34 (wife of the deceased). When he asked the persons who entered, they told that they were from the Special Staff Cell of the Delhi Police. They declined to show their identity cards when asked for by PW-33. He somehow went out after scaling the wall of the house and called some other persons in the street. In the meanwhile, the deceased, accompanied by Amulya Sarkar and PW-19, came there in an ambassador car. The three/four persons who had entered the house enquired as to who they were and after confirming his identity immediately started beating the deceased. They took the deceased inside the house and kept him beating even inside the house.

42. PW-33 stated that the deceased kept asking for a glass of water even while

he was beaten in the house but he was not allowed to even take water. PW-33 stated that the accused persons took all of them i.e. the deceased, PW-33, Amulya Sarkar and Gulshan Datta (PW-19) in a Nissan vehicle and on the way at the Shahdara flyover, the deceased was again taken out from the Nissan vehicle and was again given beating there. Then they took them to Special Staff Office where the deceased was again given beatings. The deceased was kept separate from PW-33, Amulya Sarkar and PW-19. At around 5 am on 31st July 1995 PW-33 was told by Amulya Sarkar that the deceased was lying in a very bad shape. Thereafter, on the directions of the police officials, they took the deceased to Dev Nursing Home, from where he was referred to GTB Hospital and ultimately was shifted to Holy Family Hospital.

43. As far as PW-33 was concerned, a common submission by all the counsel for the accused was that his presence in the house on the fateful night itself was doubtful. His evidence makes it apparent that PW-33 was present throughout, i.e., in the house and then the Shahdara flyover and later in the office of Special Staff. PW-33 was subjected to extensive cross-examination but nothing came out of it.

44. Although PW-19, the other person present turned hostile, and Amulya Sarkar was not examined, the deposition of PW-33 appears natural and probable and inspires confidence. He fully corroborates PW-34 regarding the deceased being beaten up at his house. He stated that when they reached Shahdara flyover

"all three vehicles were stopped and deceased Dalip Chakraborty was made to alight (from) the Alwyn Nissan by 3-4 persons and those 3-4 persons again started beating Dali Chakraborty and after giving him beating there, he was again put in the Alwyn Nissan and we were all brought to Special Staff office in Welcome by those persons. I, Gulshan Dutta and Amulya Sarkar were made to sit in one room of that office but they again started thrashing deceased Dalip Chakraborty in the court yard of that office. I was also given one/two slaps and made to sit with directions to stay calm. I, Gulshan Dutta and Amulya Sarkar were also given danda beatings on our hands and we were very badly scared."

45. Regarding what happened in the office of the Special Staff at Welcome, PW-33 has described the events as under:

"Deceased Chakraborty was being beaten by those persons continuously in the Court yard, and, as a result of the beating, Dalip Chakraborty fell on the ground. Dalip Chakraborty, after his fall on the ground was taken in one room of the office and we three were made to sit in the same, earlier room. I cannot say as to what further treatment was made out with Dalip Chakraborty in the room however some grooming sound was coming from the other room. But I do not know whose sound was that. All those persons then told me, Amulya Sarkar and Gulshan Dutta to lay down for taking rest, and then they left the office leaving one of them in that office."

46. He was told in the morning of July 1995 at about 5 am that the deceased was lying in the room in a very bad shape having urinated and eased out and bleeding from his mouth, nostrils where blood had clotted and,

"on being so told, Amulya Sarkar was asked by me to clean deceased Dalip Chakraborty as the attendant there had told us that there was none to do this, I myself saw Dalip Chakraborty lying in that condition in that room. We then kept attending to Dalip Chakraborty and then after some time some staff members started coming there and then some officials

also came there and saw us and Dalip Chakraborty and some of them enquired out names etc. Gulshan Dutta was permitted to leave around 10/11 am but I and Amulya Sarkar were not so permitted and we were asked by the staff there to attend to Dalip Chakraborty and thus at about 6.30 pm."

47. On the above material aspects there is nothing much that has emerged in his cross-examination that can be said to support the defence of the accused. As far as the identification of the accused, PW-33 stated as under:

"The witness now pointed out towards accused Avinash Kumar, Dalip Singh, Sanser Pal, Sushil Kumar Sharma, Sunder Lai, Ramesh and states that these accused had come inside the house and he now points towards accused Chotte Lai, Chand Singh, and states that these two accused had stayed outside Chakraborty's house that night and had not entered the house. Three more persons were there who had entered the house that night but they are not present in the Court and I can identify if they are shown to me. The witness pointed out towards accused Avinash Kumar, Dalip Kumar, Sanser Pal and Sushil Kumar and states that these were four accused who were giving beating to deceased Dalip Chakraborty inside the house, while dragging him from his car to the house, on Shahdara flyover and also to the special staff office. The witness again points out towards Avinash and stated that this accused had very brutally beaten the deceased by hitting him with fists, kicks and *dandas.*"

48. No doubt there were some improvements made by PW-33 over his previous statement (Ex. PW-33/DA) with which he was confronted. However, the desperate argument that he was not at all present at the spot deserves to be rejected. PW-33.may not have himself seen the beating of the deceased that took place in the office of the Special Staff but he was clear that continuous moaning and groaning sounds emanating from the nearby room was that of the

deceased. The statement of PW-33 in his cross-examination that his mental condition was such at the time that he was not in a position to give details of so many things appears to be natural and probable. The Court has not been persuaded by the accused to hold that PW-33 is not a reliable and trustworthy witness.

Evidence of PW-34

49. As far as PW-34 is concerned, the common criticism of counsel for all the accused is that many of them were shown to PW-34 at the Crime Branch office; that the accused were produced with unmuffled faces and therefore they were justified in declining to participate in the TIP; their identification by PW-34 in the Court was, therefore, to no avail. It is also pointed out that PW-34 made the constant improvements over her previous statements to the police and in her various representations to the authorities including the NHRC.

50. A perusal of the evidence of PW-34 reveals one refrain: viz., her previous statement was not properly recorded in the first instance by SI Jai Narain. At the first available opportunity soon after her husband's death she started giving complaints in this regard to the authorities. Therefore, this cannot be dismissed as an afterthought or 'improvement'. It must also be remembered that this was a case where the police were investigating the conduct of their own force.

51. Considering that the incident took place in her house past midnight on the intervening night of 30th/31st July 1995, PW-34 is a natural witness. There are some material aspects on which her deposition remained unshaken in cross-

examination. One is that when she asked the persons entering who they were, they said that they were from the Special Staff. They refused to show their identity cards to her. PW-34 also spoke about their deciding to cut off the telephone lines when they saw her picking up the phone to make a call.

52. Although it was sought to be argued by the accused that initially PW-34 had not mentioned the presence of PW-33 in the house, the record reveals that both in her statement to the police under Section 161 Cr PC on 31st July 1995, and during inquest in her statement to the SDM, she mentions the presence of PW-33, PW-19 and Amulya Sarkar in the house. In the Court, her examination in- chief clearly mentions the presence of Alok Mukherjee (PW-33) whom she described 'friend of my brother-in-law'.

53. PW-34 was herself threatened by the accused by pointing a revolver to her head. The persons who arrived started collecting various articles including papers, ornaments, and whatever they could find further "including even kitchen ware." She also clearly remembered what happened when her husband who had been outside the house with Gulshan Dutta (PW-19) and Amulya Sarkar arrived. The persons who had entered her house, after verifying the identity of the deceased, started beating him with *danda* and *lathies* and also gave him kick blows. She was also clear that while they started taking away her husband he "wanted a glass of water but he was not even allowed to take water". She mentioned that the accused took with them the deceased, Amulya Sarkar, Gulshan Dutta and Alok Mukheijee.

54. PW-34 gave a call to the police fi-om her neighour's phone and the local police arrived but they did not record her statement saying that "they would not take any statement against Special staff police." The next morning, some persons known to her husband went to the P.S. Welcome from where they called her on phone and conveyed that the condition of her husband is very serious. She also received another call from them that they would bring her husband at about 5 pm. PW-34 stated that at about 6.30 pm the deceased was brought in a TSR by Amulya Sarkar and Alok Mukherjee to Dev Nursing Home.

55. Her description of what happened thereafter till the deceased died at Holy Family Hospital is consistent with the case of the prosecution. She mentioned how one of the police officials who was sitting in the Maruti car on the date of the incident was instructing the team of the Special Staff how they should proceed. She mentioned how the said official had offered her money for keeping quiet and also undertook to pay the hospital expenses, PW-34 was fair to state "2-3 persons from their side had also donated blood but I cannot say if they donated blood in their right name or under some false name. But that blood could not be used as my husband could not be operated upon and he died, because of injuries, on August 1995 in Holy Family."

56. PW-34 stated from the name tag on the uniform she was able to know the officer who was sitting in the maruti car as ACP S.L. Dua. She stated "no proceedings were initiated against ACP S.L. Dua despite my several efforts and

my pointing out this fact to some authorities, ..." This belies the argument of some of the accused that PW-34 had connived with ACP S.L. Dua to malign them.

57. PW-34 was also able to identify the individual accused who had come to her house on the fateful night. She identified Avinash Kumar, Dalip Singh, Shanser Pal and Chotte Lai. As far as Chand Singh was concerned, she stated that "he had not entered her house but he kept standing outside her house in the lane." She also pointed out "towards accused Chand Singh and Jagbir Singh states that she did not see them either inside her house or in the lane that day." She correctly identified Kuldeep Singh, Dalip Singh, Chotte Lai, Sushil Kumar, Ramesh Chand, Sunder Lai, Shanser Pal and Avnesh Kumar. All of them except Chottey Lai had entered the house. She recalled that Dalip Singh was having a revolver that day. Her cross-examination spread over several months and dates. However, nothing useful for the accused (Appellants herein) emerged in that process.

58. On behalf of some of the accused, it was sought to be suggested that one Jagdish, who had earlier worked as a driver for the deceased, was the one who had attacked the accused and caused injuries. PW-34 had acknowledged that two or three weeks earlier to the incident, Jagdish and some other persons had come to their house and "they were showing some pistols and we raised noise and they ran of which we had lodged a report in the PS." Even some days prior to the incident on 30 July 1995, Jagdish ‘who was drunk at the time’ was

giving some beatings and was turned out. However she clearly denied that it was Jagdish who had taken away her husband on 30th/31st July 1995.

59. On each material aspect, the Court finds that there has been no doubt created regarding the veracity of the version of PW-34. There is no reason why the Court should disbelieve PW-34 on any aspect. The Court is not satisfied that the witness (PW-34) made improvements over the previous statement at every stage in the trial. Her testimony appears to be trustworthy and reliable and can form the basis of proceeding to determine the guilt of the accused in the present case.

60. Neither PW-34 nor PW-33 knew any of the accused prior to the incident. They were complete strangers to the accused. There was no reason for either of them to falsely implicate any of the accused. The suggestion repeatedly made of false implication of accused at the instance of ACP S.L. Dua and Inspector Mohan Chander has not been able to^ubstantiated by any of the accused. The suggestion to this witness was that he was deposing falsely "at the instance of higher police officials and that we reported against the accused persons on being pressured by the higher police officials" had absolutely no basis whatsoever.

61. As far as PW-34 is concerned, she has lost her husband and PW-33 is concerned, he lost a close family friend. The incident was traumatic for both of them and definitely unforgettable. Their identification of the accused has withstood severe cross-examination. Their evidence suffered no major

discrepancy and contradictions. In the considered view of the Court, the testimonies of both PW-33 and PW-34 are by themselves sufficient to prove the guilt of the accused. It is unfortunate that in the case involving culpability of the members of the police force, they too complained of their identification being compromised because of being produced in the courts of the MM in unmuffled faces for the purpose of TIP. This is an aspect that requires to be looked into by the police itself. Nevertheless in the present case this does not detract from the reliability of the evidence of PW-34 and PW-33.

Other grounds

62. The evidence of Inspector Mohan Chander (PW-36) is important from the point of view of those of the accused who were present near the TSR when the deceased along with Alok Mukheijee and Amulya Sarkar were being taken to the hospital from the office of the Special Staff. He has named SI Dalip Singh, SI Kuldeep Singh, HC Shanser Pal, HC Chottey Lal as being present near the TSR at that time i.e. 4.35 pm. This witness also speaks about the entries of arrival and departure of police personnel in the office of the Special Staff.

63. Much has been made, by all the learned counsel for the accused, about the cutting and overwriting in the entries regarding particular officers/police personnel coming to or going from the office. It is urged that the said cuttings/over-writing in the registers as regards the time of arrival and departure gave reasons to doubt the truthfulness of the evidence in that regard.

64. Even PW-36 admits in his cross-examination that there are such cuttings/over-writings. However, he appears to not have reported to his seniors about it. The trial Court is right in holding that this lone factor would by itself not justify discarding the entire testimony of PW-36. The Court has been shown the registers in original. The cutting and overwriting is not such as to give rise to grave doubts on the case of the prosecution itself. The entries are in sequence and there was no need for anyone to tamper the record only to falsely implicate the accused. The refrain that this entire case was a false one and has been thought out only by PW-36 and ACP Dua has not been able to be established by the accused. In fact the application by the prosecution under Section 319 Cr PC to summon Mr. Dua was rejected by the trial Court which order was affirmed subsequently both by the High Court and the Supreme Court. Therefore there is no basis for the bald allegation that it was PW-36 aril AGP Dua who connived with PW-34 to get the accused falsely implicated in this case.

65. Much has been made by all the counsel for the accused about the failure of the prosecution to examine the IO. This, according to the Court, is by itself not fatal to the case of the prosecution. The stage of examination of an 10 is usually at the end of the trial. In the present case the trial has gone on for over five and a half years. There appear to be valid reasons for the non-availability of the IO. In such trials spread over several years, it is not unusual for the IO who has retired during the pendency of the trial to be unavailable to take the stand for a variety of reasons. In such event, if the other evidence on record is sufficient to

prove the case of the prosecution, the failure to examine the IO per se would not make a difference to the outcome.

Section 34IPC

66. Once it is clear that death of the deceased was homicidal the question is whether all the accused can be held responsible for the death by invoking Section 34 of the IPC. On this aspect again there are more or less similar arguments by learned counsel for the accused. One common argument is that unless there is an overt act attributed to each of the persons it would be wrong to convict such persons with the aid of Section 34 IPC. Reliance is placed on the decisions in ***Ramashlsh Yadav v. State of Bihar (1999) 8 SCC 555, Nagaraja v. State of Karnataka (2008) 17 SCC 277, Munni Lai s/o Gokul Teri v. State of Madhya Pradesh (2009) 11 SCC 395, Daya Shankar v. State of UP (2009) 11 SCC 492***. Among the most recent judgments, a reference is made to the decision in ***Raju v. State of Chhattisgarh (2014) 9 SCC 299***. Among the earlier decisions, a reference is made to decision of the Supreme Court in ***Dharam Pal v. State of Haryana (1978) 4 SCC 440***. Learned APP on the other hand referred to two decisions in ***Bakhtawar v. The State of Haryana AIR 1979 SC 1006 and Karam Singh v. State of Punjab 1993 Crl LJ 3673***.

67. In ***Dharam Pal v. State of Haryana (supra)*** the principles behind conviction on the basis of the common intention were explained thus:

> "14. It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as

well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf.

15. A criminal Court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender. As already stated, there is no evidence to justify the conclusion that Surta and Samme Singh, appellants shared the common intention with Dharam Pal to commit the murder of Sardara Singh or to make an attempt on the life of Singh Ram and that the said acts were committed by Dharam Pal in furtherance of the common intention of all the appellants. The common intention denotes action in concert and necessarily postulates a pre-arranged plan or prior meeting of minds and an element of participation in action. As pointed out above, the common intention to commit an offence graver than the one originally designed may develop during the execution of the original plan e. g. during the progress of an attack on the person who is intended to be beaten but the evidence in that behalf should be clear and cogent or suspicion, however strong, cannot take place of the proof which is essential to bring home the offence to the accused."

68. In ***Nagaraja v. State of Karnataka*** {supra), the Supreme Court explained in

paras 18 and 19, as under:

> "18. For invoking the provisions of Section 34 IPG, at least two factors must be established: (I) common intention, and (2) participation of the accused in the commission of an offence. For the aforementioned purpose although no overt act is required to be attributed to the individual accused but then before a person is convicted by applying the doctrine of vicarious liability not only his participation in the crime must be prove but presence of common intention must be established. It is true that for proving formation of common intention, direct evidence may not be available but then there cannot be any doubt whatsoever that to attract the said provision, prosecution is under a bounden duty to prove that the participants had shared a common intention. It is also well settled that only the presence of the accused by itself would not attract the provisions of Section 34 IPG. Other factors should also be taken into consideration for arriving at the said conclusion. The accused persons were not related to each other, they did not have any family connection; they have different vocations. It has not been established that they held any common animosity towards the deceased.
>
> 19. A general and vague statement made by one of the prosecution witnesses would not prove motive. It may be true that the common intention may develop suddenly at the spot but for the said purpose, the genesis of the occurrence should have been proved. The prosecution has failed to establish why and how a quarrel had started. The prosecution even has not proved as to why Accused I was carrying the iron rod even before the quarrel with the deceased started or as to whether the Appellant was aware of this. It has also not been shown that he along with other accused persons came to assault the deceased. The Appellant ordinarily was expected to be at his workplace only. His presence at the spot, therefore, has sufficiently been explained."

69. In ***Munni Lai v. State of Madhya Pradesh*** (supra) it was emphasized that "the mere fact that he was in the company of the accused who were armed

would not be sufficient to attract Section 34 IPC. It is undisputed that appellant was not armed and he had no animosity with the deceased."

70. In ***Raju @ Devendra Choubey v. State of Chhattisgarh*** (supra), again on facts it was held that the accused who was entitled to the benefit of doubt "was merely seen by the witness as standing outside the house when the witness came home. Mahesh did not even act as a guard; he did not prevent Anil Kumar (PW 21) from entering the house. There is no evidence of the formation or sharing of any common intention with the other accused." This decision is in particular relied upon by some of the accused to whom an overt act has not been attributed.

71. In the first place it requires to be noticed that many of the above decisions were not in the context of per se police officials fully trained, distending on the house of armed and the other, victim being unarmed. The situation here is quite different. A specially trained police force, which is called Special Staff, is obviously a carefully chosen team of competent police officers who are fully trained in interrogation and investigation cells. When such team is assembled in order to conduct a raid, the team is aware of the purpose for which it is being sent. There has to be some element of pre-planning. Although the individual members of such team may not be precisely told where they have to go, as trained policemen they are expected to know that the mission for which they have been assembled is successfully accomplished. This would include apprehending a person suspected of committing or having committed a

cognisable offence, and in that process, if there is resistance, then to use the minimal force necessary to take the person into custody.

72. In other words, it is clear to the members of the Special Staff, whenever they are called upon to perform a particular task, they are not going on some excursion but for a very specific official work where their skills as policemen would be tested. The aspect of members of such a Special Staff sharing a common intention therefore has to be viewed in the above context.

73. Specific to the case on hand, when the accused assembled to undertake the raid on the house of the deceased past midnight, they were proceeding on the basis of some secret information that the deceased was having in his possession illegal arms which otherwise could not be expected to be found out except by conducting the raid. It appears that the above mission somewhere went terribly wrong. This is clear from a note prepared by Inspector Mohan Chander (PW-36) on 31st July 1995 which is marked PW-36/AX. He begins the note by saying that information was received from the 'most trusted informer' that the deceased (Dalip Chakraborty) in the company of two more accomplices 'have been operating in Delhi and committing robberies and also possess illegal weapons'. This note indicates that acting on the information SI Dalip Singh, SI Kuldeep Singh, HC Shanserpal and HC Chotte Lai had picked up Dalip Chakraborty and brought him "at small hours of 31st July 1995 to Special Staff office (North East District), Delhi for interrogation and verification of the information". PW-36 further noted that "all the above officers and men

interrogated Dalip Chakraborty who denied having committed such crime in Delhi." PW-36 then expressed the apprehension that "in their over zealousness to get details of his criminal activities and the particular of his accomplices as well in the area of their operation, they would have used ***mild thrashing*** which might have caused injuries like abrasion on the right side of forehead, left wrist and elbow, on the right lower abdomen and contusion." He notes that at about 5 pm Dalip Chakarvorty complained of indisposition and was referred to GTB hospital. PW-36 stated in this note that Salim and Kanwar Singh residents of Dilshad Garden approached the officers and "requested that they would take him for medical treatment to which they readily agreed. He was handed over to them as they were well known to members of the Special Staff."

74. It is clear, therefore, when the members of the Special Staff went on the raid, they were fully aware why they were doing so. Consequently, the case law cited by learned counsel for the accused as regards the application Section 34 IPC may not entirely apply to the facts on hand.

75. It is not in dispute that the deceased and his other 'associates' were unarmed. They were facing a posse of police personnel who were, apart from being armed, also adept at inflicting severe bodily injuries by their sheer physical strength and special training that they have received in that regard. In that sense comparing members of the Special Staff with other groups of assailants may be inapposite. Secondly, when one person is left outside for keeping watch, he is not doing that without any intention to participate in the

activity undertaken by all of them. In the present case, Chottey Lal was keeping a watch outside to ensure that nobody came to the rescue of the deceased. In other words, he was making sure that the members of the Special Staff who had entered the house were not prevented in any manner from carrying out the task of arresting the deceased. Therefore, even though an overt act of inflicting an injury on the deceased may not be attributed to Chottey Lal, it would be incorrect to say that he played no active part in the crime.

76. Further overt acts have been spoken to by PW-34 as far as beatings in the house was concerned. Overt acts have been broadly referred to by PW-33 as far as beatings at Shahdara flyover were concerned. As regards beatings in the office of the Special Staff, there may have been no eye witnesses as such except that PW-33 was in the adjoining room and heard the anguished noises of the deceased. He heard the beatings given by the accused to the deceased. There is nothing to show that each of the accused did not, in some way or the other, participate in the commission of crime. This is undoubtedly an endeavour collectively undertaken by all the accused belonging to the Special Staff who shared a common intention.

Individual cases

77. We now come to the individual cases. On behalf of Avinash Kumar, it is sought to be suggested that although PW-34 clearly pointed out towards Avinash Kumar and stated that he was the person who scaled over the wall and entered the house and then opened the gate for the other persons to enter the

house, the Court should accept his explanation in response to Question 5 in his statement under Section 313 Cr PC that since he had fractured his leg and a rod had been fixed, he was unable to jump.

78. Avinash Kumar examined himself as DW-18 and stated that on 19th December 1991 while he was on duty he met with an accident and fractured his leg as a result of which a rod was inserted in his leg. The doctor gave him a certificate stating that he was capable of light duty only and since then he was doing only light duties.

79. PW-34 is clear when she states that he was scaling the wall of the house and opened the gate of the house for the other to enter. As regards his fracture, he appears to have suffered it in 1991, around four years previous to the incident. The medical records produced by him do not show that on the date of incident, he was not capable of scaling the house. His participation in the offence has been clearly established by the prosecution.

80. Chottey Lal claimed parity with Chand Singh who was acquitted by the trial Court. Unlike Chand Singh, Chottey Lal has been named by both PW-34 and PW-33. Both have stated that he was standing out in the gali and did not enter the house. His role has been already discussed. The argument that no witness saw him even touch the deceased does not impress the Court at all. He was there throughout. Then there is the evidence of PW-36 who saw Chottey Lal standing near the TSR when PW-20 and PW-26 took him to the hospital. Merely because the site plan does not exactly show the location of Chottey Lal

would not mean that he was not present at the spot.

81. It was urged that this particular circumstance was not put to Chottey Lal in his statement under Section 313 Cr PC. On a perusal of the charge, it is seen that the offence of commission of house trespass, kidnapping and murder of the deceased were attributed to all the accused. That he was charged with sharing a common intention with other accused in the commission of the offences is clearly indicated in the charge itself. Therefore, Chottey Lal was aware throughout as to what he was required to defend himself against. In the circumstances, the failure to put a particular circumstance to him under Section 313 Cr PC cannot be said to have caused him prejudice so as to warrant his acquittal.

82. Turning now to Kuldeep Singh, the argument again was that while PW-34 spoke about his presence in the house, she does not attribute any overt act to him. For the reasons already noticed above, once Section 34 IPC is invoked and it is proved that all the accused shared a common intention, the absence of an overt act would not make a difference per se. He was present throughout i.e. even after the deceased was removed from his house and taken to the office of the Special Staff. The evidence on record clearly proves that the deceased was beaten even during the journey from the house. Kuldeep Singh therefore was also one of the participants in the crime. It is futile to argue that he should be shown to have been continuously involved in the beatings to the deceased and that his mere presence near the TSR would be insufficient to hold him guilty of

the offences with which he has been charged. Kuldeep Singh and the other accused are part of the Special Staff of the Delhi Police who are specially trained for such operations. Clearly, he was an active participant in the entire exercise. His conviction for the offence with the aid of Section 34 IPC is fully justified.

83. As far as Ramesh Chand is concerned, it is contended that he was not named by PW-33 but certainly he was named by PW-34 and identified by her. The arguments on behalf of Sahenser Pal were to the effect that the eye witnesses had to pass the reliability test. For the reasons already discussed, he has been identified by both PWs 33 and 34 who have been consistent on the material aspects. Their evidence is sufficient to sustain his conviction.

84. Consequently, the Court rejects the plea of the accused that each of them could not have been found to be guilty of the offences with the aid of Section 34 IPC. Now the Court moves to the last portion of determining the nature of the offence.

Nature of the offence

85. From the order framing charge it is evident that as far as the present appeals are concerned, the Court is concerned with the conviction of the Appellants for the offences of trespass (Section 452/34 IPC), kidnapping and abduction (Section 365/34 IPC) and murder (Section 302/34 IPC). As far as the offences of trespass and kidnapping are concerned, the Court is not persuaded to hold that the trial Court erred in convicting the Appellants for the said offences.

There is sufficient evidence to prove the commission of the said offences by the Appellants beyond reasonable doubt.

86. The major substantive offence is the one under Section 302/34 IPC. The question that has been posed is whether the offence answers the description of 'murder' under Section 299 read with 300 IPC that of culpable homicide not amounting to murder? The deceased was in custody of the accused from the intervening night of 30th/31st July till about 5 pm on 31st July 1995. He ultimately succumbed to the injuries inflicted upon him, slightly over a week later, on 8th August 1995.

87. In ***Nadodi Jayaraman etc. v. State of Tamil Nadu 1993 Crl.L.J. 426***, the facts there that due to trade union rivalry the deceased subsequently succumbed to the injuries suffered. Only one injury proved to be fatal. The trial Court had acquitted the accused on the ground that the accused had no common intention to murder the deceased. The Court converted the conviction from Section 302 read with Section 34 IPC to Section 302 Part II IPC since, "the prosecution having failed to establish and attribute the injury which proved to be fatal to the accused."

88. On the part of the accused, reliance was placed on the series of judgments to show how the benefit of doubt should be given to the accused whether there is a discrepancy between the eye-witness evidence and medical evidence. Reliance was placed on the decision in ***State of M.P. v. Sewa Singh (2007) 11 SCC 295.*** However, the Court finds that the said judgment turned on its own

facts. The acquittal was on account of post-mortem not revealing external or internal injury whereas in the present case there was both external or internal injury as shown by the post-mortem itself. Moreover, the manner of inflicting the injuries and their description in the post-mortem report do not contradict each other.

89. Reliance was placed on the decision in ***Munshi Singh Gautam (Dead) v. State of M.P. (2005) 9 SCC 631*** which was again the case of death as a result of custodial torture. There, the Court confirmed the conviction of the Appellant under Section 304 Part II IPC. The following observations of the Court in the said case would be relevant:

> "7. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact-situation and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system suspect and vulnerable. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach at times of the courts as well because it reinforces the belief in the mind of the police that no harm would come to them if one prisoner dies in the lock-up because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society, governed by the rule of law and poses a serious threat to an orderly civilized society. Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the mal-treatment of detainees/under-trial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in 'Khaki' to consider

themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crops, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading, towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of judiciary itself, which if it happens will be a sad day, for anyone to reckon with."

90. In ***R.P. Tyagi v. State (Govt. Of NCT of Delhi) (2009) 17 SCC 445,*** the Court explained the earlier decisions in ***Virsa Singh v . State of Punjab 1958 SCR 1495*** and ***Laxman Kalu Nikalje v. The State of Maharashtra AIR 1968 SC 1390*** to the effect that intention must be "to cause precise injury likely to cause death and that also" If the case falls within the third part of Section 299 then it is punishable under the second part of Section 304 IPC as culpable homicide not amounting to murder. In ***Ranjha v. State of Punjab AIR 1996 SC 2741*** there was one fatal injury among other injuries inflicted and in those circumstances since it is clear which of the accused that fatal injury. The conviction was converted to one under Section 302 read with 34 IPC to under Section 304 Part II IPC.

91. In the present case, therefore, the Court is satisfied that although the culpability of the accused for the homicidal death of the deceased has been proved beyond reasonable doubt, the evidence of the prosecution does not precisely point out which of the accused caused the fatal injuries. Consequently, in the present case also, the conviction of the Appellants for the

offences under Section 302/34 IPC are converted to one Section 304 Part II read with Section 34 IPC.

Sentence

92. Many of the accused have served close to six years of imprisonment and were thereafter released on bail. These are all uniformed policemen who are expected to maintain the law and order and are not to take law and order in their own hands. They are expected to act responsibly with a view to protecting the life and liberty of the citizens.

93. Keeping in view the above circumstances, the Court sentences each of the Appellants to eight years rigorous imprisonment for the offence under Section 304 Part II IPC. It declines to interfere with the sentences and punishments for the other offences, the fines and default sentences awarded by the trial Court. All these sentences are directed to run concurrently.

94. The bail bonds of the Appellants and surety bonds shall stand cancelled. They shall surrender forthwith to complete the remainder of their sentence.

95. The appeals are disposed of in the above terms.

S. MURALIDHAR, J

I.S. MEHTA, J

DECEMBER 14, 2017/*Rm*