

A.F.R.

Judgment reserved on 10.07.2025

Judgment delivered on 14.08.2025

Neutral Citation No. - 2025:AHC:138647-DB

Court No. - 45

Case :- CRIMINAL APPEAL No. - 4773 of 2005

Appellant :- Umesh

Respondent :- State of U.P.

Counsel for Appellant :- Rakesh Chandra Upadhyay, Meenendra Tripathi, Ram Kishore Gupta, Ram Milan Dwivedi, Ravindra Kumar Mishra, Shyam Sunder Tripathi, Tarun Kumar Tripathi

Counsel for Respondent :- Govt. Advocate

Along with

Case :- GOVERNMENT APPEAL No. - 114 of 2006

Appellant :- State of U.P.

Respondent :- Umesh and Others.

Counsel for Appellant :- Government Advocate

Counsel for Respondent :- Ravindra Kumar Mishra, Tarun Kumar Tripathi

Hon'ble Salil Kumar Rai, J.

Hon'ble Sandeep Jain, J.

Per: Sandeep Jain, J.

1. Criminal appeal No.4773 of 2005 has been preferred by the convicted accused Umesh against impugned judgement and order dated 14.09.2005 and 15.09.2005 passed by Sri Yogesh Kumar, Additional Sessions Judge, Court No.1, Hamirpur whereby he has been convicted in Sessions Trial No.246 of 2004 (State vs. Umesh and others), P.S. Muskura, District Hamirpur, arising out of Case Crime No.167 of 2004, under Section 302 I.P.C. and sentenced to undergo rigorous life imprisonment with a fine of Rs.1,000/- and in default of payment of fine to further undergo simple imprisonment for a period of 2 months. Besides this, accused Umesh has also been convicted in Sessions Trial No.247 of 2004 (State vs. Umesh), arising out of Case Crime No.169 of 2004, P.S. Muskura, District Hamirpur, under Section 25 of Arms Act and sentenced to undergo two years rigorous

imprisonment. Both the sentences have been ordered to run concurrently.

2. Government Appeal No.114 of 2006 has been preferred by the State of U.P. against the judgment and order dated 14.09.2005 passed by Sri Yogesh Kumar, Additional Sessions Judge, Court No.1, Hamirpur in Sessions Trial No.246 of 2004 (State vs. Umesh, Mahesh and Gore Lal), arising out of Case Crime No.167 of 2004, P.S. Muskura, District Hamirpur, whereby accused Umesh has been acquitted of the charge under section 504 and 506 I.P.C and Mahesh and Gore Lal have been acquitted of the charge framed against them under Section 302/34 I.P.C.

3. Since both the above appeals arise out of a single judgment and order, hence, they were connected and are being decided by a common judgment.

4. Factual matrix giving rise to these criminal appeals is that the First Information Report was lodged by Sushil Kumar (P.W.-1 at the trial) at Police Station Muskura, District Hamirpur. He submitted an application (Ex.Ka-1 at the trial), stating that a dispute had occurred about one and a half months prior to the incident between his brother, Ram Sharan Tiwari and the accused Umesh, concerning a coal furnace situated in village Kharela. Since then, Umesh had harboured enmity towards Ram Sharan Tiwari.

5. On 08.09.2004, Rakesh Kumar (P.W.-3 at the trial) and Ram Sajivan (P.W.-2 at the trial), had gone towards a liquor shop where Umesh was present. Umesh began to abuse and threaten Ram Sharan Tiwari. Subsequently, Ram Sharan Tiwari, Rakesh Kumar and Ram Sajivan left that place. Around 10:30 p.m., as they were passing in front of the house of Vasudev Kachi, intending to go there for a Ramayana recitation, Umesh along with his brother Mahesh and another person Gore Lal, surrounded Ram Sharan Tiwari. Umesh then shot Ram Sharan in the chest, resulting in his instantaneous death. Rakesh Kumar and Ram Sajivan then went to the house of Sushil Kumar and informed him of the incident.

6. Based on the application of Sushil Kumar, the FIR regarding this incident was registered on 09.09.2004, at 00:15 hours, as Case Crime No.167 of 2004, under Sections 302, 504 and 506 I.P.C. at P.S. Muskura, District Hamirpur, against the accused Umesh, Mahesh and Gore Lal. The investigation was assigned to S.O. Shailendra Singh (P.W.-6 at the trial). The check FIR is Ex.Ka-3 at the trial. A corresponding entry of FIR registration was also made in the G.D. at serial No.2 at 00:15 hours, a carbon copy of which is Ex.Ka-4 at the trial.

7. The '*Panchayatnama*' of the deceased, Ram Sharan Tiwari, was prepared under the direction of S.O. Shailendra Singh (P.W.-6 at the trial) between 6:30 a.m. and 8:30 a.m. on 09.09.2004. This document is Ex.Ka-7 at the trial.

8. The Investigating Officer (P.W.-6) also recovered plain soil and blood-stained soil from the spot. The Recovery Memo for these items is Ex.Ka-11 at the trial. Further, 315 bore bullet found near dead body of Ram Sharan Tiwari, was recovered by P.W.-6 on 09.09.2004. Its Recovery Memo is Ex.Ka-12 at the trial.

9. On the same day, a pair of black slippers(size 8 number), blood-stained pocket diary, a paper, pen and Rs.155/- (including four coins) belonging to the deceased Ram Sharan Tiwari, were recovered from the spot. The Recovery Memo for these items is Ex.Ka-13 at the trial. Further, a pair of size seven black slippers and a white 'angocha' (towel), allegedly belonging to the accused Gore Lal were also recovered from the spot by P.W.-6 in the presence of witnesses Ram Sajivan, Rakesh Kumar and others. The Recovery Memo for these items is Ex.Ka-14 at the trial.

10. The post-mortem examination of the deceased Ram Sharan Tiwari was conducted by Dr. D.C. Tiwari (P.W.-4 at the trial) on 09.09.2004 at about 3:00 p.m. The following ante-mortem injuries were found on the body:-

(i) "Gunshot wound of entry 1cm x 1cm on the centre of chest between two nipple margins of wound are inverted and abraded collar present. There is tattooing on the chest over an area of 14cmX14cm around the wound clotted blood present.

(ii) Gunshot wound of exit 1.5cm x 1.5cm on the left side of back of chest just below the angle of scapula(left) bone, margins of wound are everted and clotted blood present around the wound."

11. According to the Doctor (P.W.-4), Ram Sharan Tiwari died due to haemorrhage resulting from the ante-mortem

injuries, about one day prior to the post-mortem examination.

12. On 14.09.2004, accused Umesh was arrested at about 6:00 a.m. based on information from an informer. Following his arrest, Umesh disclosed to S.O. Shailendra Singh (P.W.-7) that he had murdered Ram Sharan Tiwari on 08.09.2004 and could lead them to the country-made weapon used in the crime. Later, at his pointing out, a 315 bore country-made weapon(*tamancha*) and an empty 315 bore cartridge lodged in its muzzle were recovered at about 7:00 a.m., which was concealed in a straw-filled room, of his dilapidated house in village Pahadi Bhetari. This recovery was made in the presence of public witnesses Ram Bodh and Jagmohan Yadav. As accused Umesh could not produce the requisite license under the Arms Act, Case Crime No. 169 of 2004, under Section 25 of the Arms Act was registered against him at P.S. Muskura, District Hamirpur, on 14.09.2004 at about 9:15 a.m.

13. The recovery memo for the country-made weapon and empty cartridge is Ex.Ka-16 at the trial.

14. During investigation, various items were sent to the Forensic Science Laboratory(FSL), Agra. These included the plain soil and blood-stained soil, the bullet recovered from the spot, currency notes, coins, a diary, a pen, a pair of slippers and a handkerchief belonging to the deceased, Ram Sharan Tiwari. Further, a pair of slippers and an '*angocha*' (towel) allegedly belonging to accused Gore Lal

along with Ram Sharan Tiwari's pant, shirt, vest(*baniyan*), underwear, '*kalawa*' (sacred thread) and other items, were also sent to the FSL. The FSL report, dated 16.05.2005 is Ex.Ka-22 at the trial. This report confirmed the presence of human blood on the blood-stained soil, currency note, diary, pen, a pair of slippers, pant, shirt, vest, underwear, '*kalawa*' and one other item belonging to the deceased, Ram Sharan Tiwari. However, no blood was found on the bullet, handkerchief of the deceased, slippers and the '*angocha*' allegedly belonging to accused Gore Lal.

15. The country-made weapon and the empty 315 bore cartridge, recovered at the pointing out of accused Umesh, were also sent to the FSL, Agra. It's report dated 03.06.2005 is Ex.Ka-23 at the trial. According to this report, the empty cartridge found in the muzzle of the country-made weapon, was indeed fired from it.

16. After the investigation, charge sheet in Case Crime No.167/04 was submitted by S.H.O. Aditya Kumar Dwivedi (P.W.-9 at the trial) against accused Umesh, Mahesh and Gore Lal under Sections 302/34, 504 and 506 I.P.C. on which cognizance was taken. Besides this, charge sheet under Section 25 Arms Act was submitted against the accused Umesh Chandra by S.I. Geetam Singh (P.W.-8), on which cognizance was taken by the trial court. The trial court framed charges against the accused Mahesh and Gore Lal, under Section 302 read with 34 I.P.C. and against accused Umesh under Sections 302, 504, 506

I.P.C. and Section 25 Arms Act. All the accused pleaded not guilty and claimed trial.

17. During trial, the prosecution examined the following witnesses, who proved the following documents/material objects:

S.No.	Witnesses	Document Proved
1.	First informant Sushil Kumar examined as P.W.-1	Proved the ' <i>Tehrir</i> ' as Ex.Ka-1
2.	Ram Sajivan examined as P.W.-2	Not proved any document
3.	Rakesh Kumar examined as P.W.-3	Not proved any document
4.	Dr. D.C. Tiwari examined as P.W.-4	Proved the post-mortem report of the deceased Ram Sharan Tiwari as Ex.Ka-2 and pant, shirt, <i>baniyan</i> , underwear, sacred thread (<i>janau</i>) and <i>kalawa</i> of deceased as material Ex-1 to material Ex-6.
5.	H.C.P Shyam Swaroop examined as P.W.-5	(i) Proved the check FIR of Case Crime No- 167/2004 as Ex.Ka-3 and carbon copy of G.D. Entry No.2 as Ex.Ka-4. (ii) Proved the check FIR of Case Crime No-169/2004 as Ex.Ka-5 and carbon copy of G.D. Entry No.12 as Ex.Ka-6.
6.	S.I. Shailendra Singh, 1 st Investigating Officer, examined as P.W.-6	(i) ' <i>Panchayatnama</i> ' of the deceased as Ex.Ka-7 and prosecution papers prepared for post mortem examination as Ex.Ka-8 to Ex.Ka-10. (ii) Recovery Memo of plain and blood-stained soil from the spot as Ex.Ka-11 and the Recovery Memo of 315 bore bullet as Ex.Ka-12 and these objects as material Ex-12 to 14. (iii) Recovery Memo of pair of black slippers, blood-stained diary, <i>baniyan</i> , a pen and Rs.155/- (including four coins) belonging to the deceased as Ex.Ka-13 and these objects as material Ex-7 to 11. (iv) The Recovery Memo of a pair of slippers and ' <i>angocha</i> ' belonging to accused Gore Lal as Ex.Ka-14 and these objects as material Ex-15 and 16. (v) Site Plan of Case Crime No.167/2004 as Ex.Ka-15.

7.	S.O. Shailendra Singh, 2 nd Investigating Officer examined as P.W.-7.	(i) Proved the Recovery Memo of country-made 315 bore weapon and empty cartridge recovered at the pointing out of accused Umesh as Ex.Ka-16 and these objects, including three test cartridges as material Ex-17 to 19(corrected number according to trial court judgment) (ii) Site plan of the recovery spot as Ex.Ka-17.
8.	S.I. Geetam Singh examined as P.W.-8. He is the Investigating Officer of Case Crime No.169/04 against accused Umesh under Arms Act.	Proved the Site Plan of Case Crime No.169/2004, as Ex.Ka-18, the sanction granted by the District Magistrate under the Arms Act as Ex.Ka-19 and the charge sheet submitted against the accused Umesh Chandra under the Arms Act as Ex.Ka-20.
9.	S.O. Aditya Kumar Dwivedi, 3 rd Investigating Officer of Case Crime No-167/2004 examined as P.W.-9.	Proved the charge sheet submitted against the accused in Case Crime No. 167/2004 as Ex. Ka- 21.

18. The accused in their statements under Section 313 Cr.P.C. have admitted that the first informant Sushil Kumar along with witnesses Ram Sajivan and Rakesh Kumar are residents of their village Pahadi Bhetari, police station Muskura but they have denied the prosecution story of murder of Ram Sharan Tiwari. The accused have submitted that they have been falsely implicated in this case due to enmity.

19. Learned counsel for the convicted accused-appellant and acquitted accused-respondents submitted that the first informant Sushil Kumar P.W.-1 is not an eye witness of the alleged incident. The F.I.R. in this case has been registered ante-time. In reality, it was registered in the next morning, which makes the whole prosecution case doubtful, which is proved from the '*Panchayatnama*' and

prosecution papers prepared for getting post-mortem examination of the body of deceased Ram Sharan Tiwari. It was further submitted that P.W.-2 Ram Sajivan and P.W.-3 Rakesh Kumar are not reliable witnesses, who have given evidence against the accused persons due to enmity. It was further submitted that the statement of P.W.-2 and P.W.-3, under Section 161 Cr.P.C., was recorded with considerable delay making their whole testimony unreliable. P.W.-2 and P.W.-3 stated that they identified the accused persons in electric light, but from the evidence of D.W.-3, it was proved that at the time of the alleged incident, there was no electric supply in the village, there was no source of light, it was pitch dark and as such it was impossible for P.W.-2 and P.W.-3 to identify the assailants. It was further submitted that the alleged recovery of country-made weapon and cartridge from accused Umesh was doubtful because his disclosure statement was not recorded and proved in accordance with law, by P.W.-7 and further no independent witness in support of the alleged recovery was examined by the prosecution. Further, it was not proved from the report of FSL that the alleged recovered country-made weapon, was used in the commission of offence. It was further submitted that the prosecution failed to prove the motive of the crime, as well as the existence of common intention on the part of the accused Mahesh and Gore Lal with accused Umesh, as such, they had been rightly acquitted by the trial court.

20. With these submissions, it was prayed that the Criminal Appeal preferred by accused Umesh be allowed

and the Government Appeal against the acquittal filed by the State, against accused Mahesh and Gore Lal be dismissed.

21. Learned A.G.A. for the State submitted that the incident took place at 10:30 p.m. on 08.09.2004, which was witnessed by P.W.-2 and P.W.-3, who informed the first informant P.W.-1 regarding the incident promptly and thereafter F.I.R. regarding the incident was lodged on the night of 08/09.09.2004 at 00.15 hours at police Station Muskura against all the three accused Umesh, Mahesh and Gore Lal and in this F.I.R. P.W.-2 and P.W.-3 were named as eye witnesses. He further submitted that F.I.R. in this case was promptly registered in which all the material facts relating to the incident were narrated and the F.I.R. version was proved in accordance with law by the prosecution witnesses. He further submitted that the spot of occurrence was proved from the recovery of blood stained soil, objects belonging to deceased, bullet of 315 bore and a pair of slippers and '*angocha*' of accused Gore Lal. Further P.W.-2 and P.W.-3 proved that accused Mahesh and Gore Lal jointly gave an exhortation to co-accused Umesh to commit the crime and after the commission of crime, both Mahesh and Gore Lal fled from the spot, who were chased. The conduct of accused Mahesh and Gore Lal before and after the commission of crime proved that they had common intention with convicted accused Umesh, for committing the murder of Ram Sharan Tiwari, but the trial court recorded a perverse finding that the prosecution failed to prove any motive on the part of the accused

Mahesh and Gore Lal. Learned A.G.A. further submitted that the prosecution proved the motive on the part of the accused persons for committing the crime. Just before the incident, in the presence of P.W.-2 and P.W.-3, an altercation took place between the deceased and accused Umesh, in which Umesh abused and threatened the deceased with dire consequences. Prior to this, a dispute took place between the deceased and accused Umesh regarding breaking of a coal furnace, due to which accused Umesh bore enmity towards deceased Ram Sharan. Learned A.G.A. further submitted that in a case based on direct ocular evidence, prosecution is not required to prove motive of the offence, but in this case prosecution proved the motive of the offence. He further submitted that P.W.-2 and P.W.-3 are independent and unrelated witness, who were having no enmity with the accused persons. Further P.W.-2 and P.W.-3 and all the accused are residents of the same village Pahadi Bhetari, who were known to each other, as such, there is no dispute regarding the identification of the accused persons. P.W.-2 and P.W.-3 had specifically mentioned that they saw and recognized the accused persons in the torch and electric light. Further since accused Umesh openly expressed his displeasure towards the deceased for showing his attitude(*rangbazi*) at the liquor vend and accused Mahesh and Gore Lal made an exhortation at the spot, as such, the accused persons were also recognized by their voice by P.W.-2 and P.W.-3. It was further submitted that only one conclusion is possible in the facts and circumstances of the case, that all the accused had common intention to murder Ram Sharan

Tiwari and in furtherance of that common intention, accused Umesh shot dead Ram Sharan Tiwari with a country-made weapon. In view of this uncontroverted and reliable evidence, the trial court committed grave error by recording a perverse finding that the prosecution failed to prove its case against acquitted accused Mahesh and Gore Lal. Learned A.G.A. submitted that in the light of the above evidence on record, the Criminal Appeal filed by convicted accused Umesh be dismissed and the Government Appeal filed against acquittal of accused Umesh(for acquittal under Section 504,506 I.P.C), Mahesh and Gore Lal(for acquittal under Section 302/34 I.P.C) be allowed and thereafter, they also be convicted.

22. We have heard, learned counsel for both the parties and perused the record.

23. First informant Sushil Kumar (P.W.-1) deposed in his examination-in-chief that on 08.09.2004 at about 10:35 p.m. Ram Sajivan (P.W.-2) and Rakesh Kumar (P.W.-3) came to his house and informed him about the incident. He claimed that he was awake at that time. Thereafter he along with his uncle Ram Sanahi, Sunil and Manikchand etc. reached in front of the house of Vasudev where he saw the dead body of his brother Ram Sharan. He further deposed that he left Santram etc. near the dead body and returned to his house, where he dictated the application to his younger brother Vimal, which he proved as Ex. Ka-1 during trial, and thereafter he gave the application at Police Station Muskura, on the basis of which F.I.R. was

registered in this case. P.W.-1 further deposed that accused Umesh used to visit Raju Mishra of village Kharela where work of coal furnace used to take place and regarding the same furnace, an altercation took place about one and half months prior to the incident, between deceased Ram Sharan and accused Umesh and due to this, accused Umesh bore enmity towards Ram Sharan. He further deposed in his examination-in-chief that his brother Ram Sharan, P.W.-2 and P.W.-3 had gone in night at about 9:00 p.m. towards a liquor vend, where they met accused Umesh, who abused Ram Sharan and threatened him with dire consequences, thereafter Ram Sharan, P.W.-2 and P.W.-3 went towards Chamardha pond to defecate and accused Umesh had also gone to his house. He further deposed that after defecating, the above three persons, were going to participate in Ramayana recital at the house of Babbu Pandit.

24. P.W.-1 deposed in cross-examination that police station Muskura is at a distance of about 7 Km from his village and by cycle he can reach the police station in about 45 minutes. He further deposed that the incident occurred in front of the house of Vasudev Kachi, who resides therein with his family members. He admitted that he had scribed the application (Ex.Ka-1) at his house from Vimal Kumar. He claimed that he received the information regarding the incident at about 10:35 p.m. and at that time he was viewing television and was present at his house and on getting this information, he went to the spot where the dead body was lying and at that time Santram

was present near the dead body and after seeing the dead body, he returned to his house and thereafter had got the Ex. Ka-1 scribed by Vimal. He further stated that the spot of occurrence is at a distance of about 300 meters from his house. He remained at the spot for about 10 to 15 minutes. It took about half an hour to get the Ex.Ka-1 scribed and thereafter he, Manikchand and Sunil proceeded to the police station on a horse cart, where they reached in about half an hour. After getting the F.I.R. registered they waited at police station for about one and half hours, thereafter, the police personnel along with them returned to the village. He returned with the police personnel in jeep. P.W.-2 and P.W.-3 met the police personnel in the morning when *Panchayatnama* of the dead body was conducted at about 8:30 a.m. He had not accompanied the dead body to the police station, but had gone to the place where the post mortem examination was conducted. He further admitted that the altercation regarding the coal furnace between deceased Ram Sharan and accused Umesh had not occurred in his presence. It occurred at Kharela which is at a distance of about 12-13 k.m. from his village. He further claimed that the coal furnace neither belonged to deceased Ram Sharan nor to accused Umesh, rather it belonged to Raju Mishra. He denied the suggestion that Ram Sharan was murdered in the night at about 11-12 p.m. and he became aware of it in the morning.

25. From the evidence of Sushil Kumar (P.W.-1) it is evident that he is not an eye-witness of the incident. At

the time of the incident, he was awake at his house viewing television then at about 10:35 p.m. he was informed about the incident by Ram Sajivan (P.W.-2) and Rakesh Kumar (P.W.-3). Then he went to the spot where he saw his brother Ram Sharan lying dead. Then he returned back to his house and thereafter dictated the application to Vimal, which he later proved as Ex.Ka-1. Later on, on the basis of which, F.I.R. in this case was registered at police station Muskura.

26. From the evidence of P.W.-1 it is also evident that prior to the incident, an altercation took place between the deceased Ram Sharan and accused Umesh about one and half months back, regarding the coal furnace and since then, accused Umesh bore enmity towards Ram Sharan. It is further proved that on the day of the incident, at about 9:00 p.m. Ram Sharan, Ram Sajivan (P.W.-2) and Rakesh Kumar (P.W.-3) had gone towards a liquor vend where they met accused Umesh, who had abused Ram Sharan and threatened him with dire consequences and thereafter Ram Sharan, Ram Sajivan (P.W.-2) and Rakesh Kumar (P.W.-3) had gone towards Chamardha pond for defecating and accused Umesh had proceeded towards his house. It is true that the above altercations did not occur in the presence of P.W.-1 but still he was having knowledge about them and as such, proved that accused Umesh bore enmity towards his deceased brother Ram Sharan.

27. Ram Sajivan (P.W.-2) deposed in his examination-in-chief that he knew accused Umesh and Mahesh, who are

residents of his village besides accused Gore Lal, who is a resident of another '*mohalla*' but Gore Lal used to remain in the company of accused Umesh and Mahesh. He deposed that he knew the first informant's brother Ram Sharan who was murdered in the night of 08.09.2004 at about 10:30 p.m. in front of the house of Vasudev Kachi. He further deposed that Ram Sharan was murdered by shooting in the chest by accused Umesh from a country made weapon (*tamancha*). He further deposed that at the time of incident, he and Rakesh Kumar(P.W.-3) were with Ram Sharan and were returning from Chamardha pond after defecation and were going to attend recital of Ramayana being held at the house of Babbu Pandit and when they reached near the house of Vasudev Kachi then accused Umesh, Mahesh and Gore Lal met. Accused Umesh was armed with '*tamancha*', who said to Ram Sharan that he was showing attitude(*rangbazi*) at the liquor vend and then, jointly accused Gore Lal and Mahesh exhorted that Ram Sharan be killed and acting on this exhortation accused Umesh fired from '*tamancha*' on Ram Sharan, who died on the spot. He further claimed that he identified the accused in the light of bulb hanging on an electric pole situated in front of the house of Vasudev, as well as, in the light of the bulb hanging in front of the house of Ramphal. Beside this, accused Mahesh was also lighting a torch. He further stated that Santram had also witnessed this incident and he had left Santram on the spot, before he and Rakesh Kumar (P.W.-3) proceeded to inform Sushil Kumar (P.W.-1/ first informant) about the incident. He further proved that prior to the above

incident, on the same day at about 9:00 p.m. he, Ram Sharan and Rakesh Kumar (P.W.-3) had gone towards a liquor vend where they met accused Umesh, who threatened Ram Sharan because previously he had a hand in breaking the coal furnace. He further proved that all the three persons i.e. he, Ram Sharan and Rakesh Kumar had proceeded to Chamardha pond and accused Umesh had also proceeded to his house. He also proved that a month prior to the above incident, in Kharela Village, an altercation occurred between Ram Sharan and Umesh regarding a coal furnace and since then, accused Umesh bore enmity towards Ram Sharan. He further claimed that they had challenged the accused persons after the incident, then accused Umesh and Mahesh fled. They had a scuffle with accused Gore Lal due to which a pair of slippers and '*angocha*' belonging to him, was left behind before he fled. This witness identified his signature on the recovery memo of the pair of slippers and '*angocha*' belonging to the accused Gore Lal, prepared and subsequently proved by P.W.-6 Shailendra Singh as Ex.Ka-14.

28. P.W.-2 denied the suggestion in the cross-examination that accused Gore Lal was not having any friendship with accused Umesh and Mahesh. He stated that he was present in the village Kharela when the altercation took place between accused Umesh and Ram Sharan, regarding the coal furnace, which occurred in front of the gate of Badshah Singh at Charkhari Road, from which Badshah Singh's house is at a distance of about 500 meters and at

that time, Badshah Singh was not present at the spot. He claimed that he along with Umesh and Ram Sharan were present at that time, but neither any assault took place during the altercation nor any complaint was made at the police station. He admitted that his statement was recorded by the Investigating Officer about a month after the incident at the police station in which, he had told him that the incident at village Kharela occurred in his presence, but if this has not been mentioned in his statement, then he cannot specify it's reason. He further stated that if the Investigating Officer has mentioned that the incident in Kharela took place 2-2 ½ month prior to the incident then he cannot specify it's reason. He further denied the suggestion that no altercation occurred in village Kharela between Umesh and Ram Sharan Tiwari. He further stated that on the day of the incident, they neither took liquor from the liquor vend nor reached the shop of Udal, but returned from the liquor vend and then proceeded towards Chamardha pond for defecation. After defecation, they remained present at a well situated near the pond for about 1-1.15 hours and continued talking, after which they proceeded to attend the Ramayana recital which was being held at the house of Babbu Pandit, which is at a distance of about 300 meters from the well. The Ramayana recital was going on since 5-6 days, which was organized by the villagers, but there was no festival. He further stated that the house of the first informant is at a distance of about 100 meters from the house of Babbu Pandit. He further stated that when the altercation occurred in front of liquor vend, then besides them, none

was present. The salesman of the liquor vend was sitting inside the vend, after closing it. The vend closes at about 10:00 p.m. He was not aware that the vend remained open the whole night. He disclosed that it took them about 10 minutes to reach the spot from the well, which is at a distance of about 40-45 meters from the well. He proved that he saw the accused from a distance of 2-3 hands, and at that time they had crossed the door of Vasudev Kachi's house and had reached the chabutara. He further proved that he had heard them(accused) talking about the allegation of showing attitude (*rangbazi*) levelled against them at the vend, but he was neither afraid of its consequences nor they had attempted to flee. Accused Umesh fired from a distance of about 2-3 hands and at that time, Umesh and Ram Sharan Tiwari were facing one another. Ram Sharan Tiwari fell instantly after being shot, he could not run. He further proved that only one shot was fired at the spot and thereafter, the accused fled in the direction from which they had arrived at the spot. He further stated that they tried to apprehend accused Gore Lal and chased him, but he fled. He further stated that they proceeded towards the house of first informant(Sushil Kumar) one minute after the incident and it took them 4-5 minutes to reach there and at that time Sushil Kumar was watching T.V. He and P.W.-3 remained at first informant's house for about ten minutes and after informing P.W.-1 about the incident, he and P.W.-3 had left for their house. He further stated that from the house of Vasudev Kachi towards east at a distance of about 8-10 paces, there is an electric pole on which a bulb was lit and in its light, they

witnessed the incident. He further stated that he had not told this to the Investigating Officer because he had not enquired about this. He further admitted that he had not told the Investigating Officer that at the time of the incident accused Mahesh was having a torch in his hand because this was not asked from him by the Investigating Officer. He stated that he met the Investigating Officer on the spot at about 6:00 – 6:30 a.m. and at that time the '*Panchayatnama*' proceedings were going on. The dead body was sealed and taken in a tractor. He remained present in the village. Thereafter, on the second day of the incident he proceeded to his sister's matrimonial house situated in village Bagra, Tehsil Sarila, District Hamirpur due to fear and he returned after about 15 days to his village and thereafter, he remained present in his village.

29. Rakesh Kumar P.W.-3 deposed in his examination-in-chief that he knows accused Umesh, Mahesh and Gore Lal. Umesh and Mahesh are real brothers whereas accused Gore Lal is having good terms with them. He also knows Sushil Kumar, who was the brother of the deceased Ram Sharan, who was murdered about 7-8 months back in the night at 10-10.30 p.m., on the way, in front of the house of Vasudev Kachi. Ram Sharan was shot dead by Umesh from a country made weapon and at that time, he and Ram Sajivan were with Ram Sharan. He further deposed that they were returning after defecation from Chamardha pond and were going to participate in the Ramayana recital being held at the house of Babbu Pandit and during this, when they reached near the house of Vasudev Kachi,

then accused Umesh, Mahesh, Gore Lal came, Umesh was armed with '*tamancha*', who said to Ram Sharan that he was showing attitude(*rangbazi*) at the liquor vend and at that moment, accused Mahesh and Gore Lal exhorted accused Umesh by saying that "*it is a good opportunity, he should not escape, shoot him dead*" and on this exhortation, Umesh shot Ram Sharan in the chest with a '*tamancha*'. He further deposed that they challenged the accused, then accused Mahesh and Umesh fled and they tried to apprehend accused Gore Lal, but in the scuffle he fled leaving his slippers and '*angocha*' behind. He further deposed that he identified accused in the light of electric bulb hanging from the pole and also in the torch light held by accused Mahesh. He further claimed that the incident was also witnessed by Santram. He further stated that on that day before the incident, at about 09:00 p.m. he, Ram Sajivan and Ram Sharan had gone towards the liquor vend, where they met Umesh, who abused Ram Sharan and threatened him with dire consequences on the pretext that he was involved in breaking the furnace and thereafter Umesh had proceeded towards his house and they had gone to Chamardha pond for defecation. This witness identified his signature on the recovery memo Ex.Ka-14 prepared by P.W.-6 while taking into possession the slippers and '*angocha*' of accused Gore Lal.

30. P.W.-3 admitted in his cross-examination that he was aware that in village Kharela a coal furnace had been broken about one and a half months prior to the incident, but he was not present at that time. He was not aware

that regarding the above coal furnace, any report was registered or not. He further stated that he had told the Investigating Officer that the accused Umesh had threatened Ram Sharan with dire consequence on the pretext of his hand in breaking coal furnace, but if that is not recorded in his statement, then he cannot give any reason for it. He also stated that he reached the liquor vend from the house of Ram Sajivan and all three came together. They stayed at the house of Ram Sajivan for 10-15 minutes. They had gone to Ram Sajivan's house because Ramayana recital was being held at the house of Babbu Pandit which was in progress since 4-5 days, but they had not participated in it.

31. He further stated that two days prior to the incident, he had gone to the house of Babbu Pandit for participating in the Ramayana recital. On the day of the incident, Ram Sajivan and Ram Sharan had also intended to participate in the Ramayana recital. He further stated that they had gone to the liquor vend for purchasing *Guthka*. The *Guthka* shop is at a distance of 15-20 paces from the liquor vend, towards the horse-cart stand. They had not entered the liquor vend because accused Umesh had met them, but, even if accused Umesh had not met them, even then they would not have gone inside the liquor vend. He further stated that on the day of the incident after altercation with Umesh at the liquor vend they had not gone to purchase *Guthka*, but had proceeded straightaway to the Chamardha pond for defecation where they took 7-8 minutes and thereafter, washed their hands and face

with hand-pump water and thereafter, they remained seated at the well for about 45 minutes, where they spent their time talking and thereafter, proceeded from the pond to the house of Babbu Pandit for taking part in the Ramayana recital, then in front of the house of Vasudev Kachi, the incident occurred. He further stated that at the time of the incident, all three of them i.e. he, Ram Sajivan and Ram Sharan were in line, with Ram Sharan in the centre. He was towards his(Ram Sharan) left and Ram Sajivan, towards right of Ram Sharan and when Ram Sharan was shot, even at that time, they were going in a line. He further stated that the passage in front of Vasudev Kachi's house is about 4-5 feet wide and the *Chabutara* of Vasudev Kachi's house is about 7-8 hands wide and 10-12 hands long. He further stated that the I.O. had called him at about 6:30-7:00 a.m. and till that time, the body of deceased Ram Sharan was lying on the spot. He had shown the spot and also the place to I.O. from where, he and Ram Sajivan had seen the incident. He further stated that only one shot was fired at the spot of occurrence. The accused arrived at the spot from the northern side and after firing, they returned in the same direction. He neither saw the empty cartridge of 315 bore at the spot in the night nor in the morning. The I.O. sealed the dead body of Ram Sharan in his presence. He remained at the spot for about one and a half to two hours. Thereafter, dead body was taken in a tractor for postmortem, but he had not accompanied the dead body. He remained present in the village, in his house. He further stated that at the time of the incident, Ram Sharan and Umesh were facing

each other and Umesh shot Ram Sharan from a distance of 2-3 paces. They had chased the accused for 8-10 paces after the incident. Ram Sajivan (P.W.-2) had a scuffle with Gore Lal for about a minute. He had shown to the I.O. the electric pole from which a bulb was hanging in whose light he saw the incident and if the I.O. had not shown the electric pole in the site plan, then he cannot specify its reason. He admitted that he had not told the Investigating Officer that he saw the incident in the light of an electric bulb because the Investigating Officer had not asked him about it. He further admitted that he had not told that at the time of the incident, accused Mahesh was having a torch and in that torch light, he saw the incident. He further stated that Investigating Officer recorded his statement about 2-3 days after the incident at the police station. After the incident, he straight away proceeded to the house of the deceased, for informing him about the incident, where he remained for 2-4 minutes and from there, he proceeded to his house. He further stated that Santram was also present at the time of the incident. He denied the suggestion that he had not witnessed the incident and was a pocket witness of the police.

32. Dr. D.C. Tiwari (P.W.-4) deposed in his examination-in-chief that he conducted the post-mortem examination of deceased Ram Sharan Tiwari on 09.09.2004. During post-mortem examination, a fire arm entry wound was found on the centre of chest and a fire arm wound of exit was found on the back of the chest. The third rib of deceased was fractured towards the left side, left lung was

lacerated, left and right atrium of the heart was also lacerated. The abdominal cavity was filled with blood. He opined that deceased died about a day prior to the post-mortem examination, due to excessive haemorrhage, as a result of ante-mortem injury caused to him. This witness has proved the post-mortem examination report of deceased Ram Sharan Tiwari as Ex.Ka-2 and has further stated that his death could have occurred due to fire arm injury caused by '*tamancha*' on 08.09.2004 at about 10:30 p.m. This witness further proved the clothes etc. found on the body of the deceased at the time of post-mortem examination as material Ex-1 to 6. In the cross-examination this witness stated that the deceased could have died in the night of 8/9.09.2004. between 12:00 mid night and 1:00 a.m. He opined that since the small and large intestine of the deceased were filled with faeces, it appeared that deceased had not defecated prior to his death. Since the stomach of the deceased was empty, it appeared that he had not taken meals, within 5-6 hours, prior to his death, and he had not found any liquor in the stomach. He admitted that he had found a hole in the *baniyan* and shirt worn by the deceased at the time of incident, but there was no blackening on it. He further opined that the assailant must have been towards right of the deceased because the bullet after entering the chest, had travelled towards the left. He further admitted that tattooing was present on the injury. He further opined that if the injury was caused from a revolver then the shot must have been fired from a distance of about six inches and if a gun had been used, then the distance would be

about one foot, but in exceptional cases, this distance could be up to three feet and injury no.1 could have been caused by a 12 bore weapon.

33. From the combined evidence of P.W.-2 Ram Sajivan and P.W.-3 Rakesh Kumar, it is evident that just prior to the incident on the night of 08.09.2004 at about 9:00 p.m., these two witnesses along with Ram Sharan had gone towards a liquor vend, where they met accused Umesh, who abused Ram Sharan Tiwari and threatened him with dire consequences because previously about 1 ½ months back, he had taken active part in breaking a coal furnace. P.W.-2 specifically mentioned in his cross-examination that when in village Kharela, coal furnace was broken, then an altercation occurred between accused Umesh and deceased Ram Sharan Tiwari and at that time he was present. P.W.-3 admitted in the cross-examination that although at that time, he was not present, but he was aware of the incident. It is proved that Ram Sharan Tiwari had managed to get a coal furnace broken about one and a half month prior to the incident, which had annoyed accused Umesh and an altercation had taken place between them and due to this, accused Umesh bore enmity towards Ram Sharan Tiwari and in furtherance of that, he was murdered. It is proved from the evidence of P.W.-2 and P.W.-3 that accused Umesh was having enmity with Ram Sharan Tiwari and had also threatened him with dire consequences.

34. As such, the prosecution has succeeded in proving the motive of the incident.

35. From the evidence of P.W.-2 and P.W.-3, it is proved that on the day of the incident, after having altercation at the liquor vend, where accused Umesh had abused and threatened Ram Sharan Tiwari with dire consequences, P.W.-2, P.W.-3 and Ram Sharan Tiwari had proceeded towards Chamardha pond for defecation and after defecating, when they were returning to attend Ramayana recital at the house of Babbu Pandit, then in front of Vasudev Kachi's house accused Umesh, Mahesh and Gore Lal met them, and at that time accused Umesh was armed with a '*tamancha*'. It is also proved that accused Umesh made a verbal statement, expressing his displeasure at the attitude(*rangbazi*) shown by Ram Sharan Tiwari at the liquor vend. That verbal statement of accused Umesh proved that he was still having a grudge with Ram Sharan Tiwari and wanted to take revenge from him.

36. From the evidence of P.W.-2 and P.W.-3, it is proved that just prior to the incident, accused Gore Lal and Mahesh gave an exhortation by saying that this is a good opportunity, hence, he should not escape and be killed and acting on this exhortation, accused Umesh fired a single shot at Ram Sharan Tiwari's chest from '*tamancha*', killing him instantly. Both P.W.-2 and P.W.-3 proved that the fire arm injury was caused on the chest of Ram Sharan Tiwari, which is corroborated from the testimony of Dr. D.C. Tiwari (P.W.-4), who in the post-mortem examination of

deceased, found a fire arm wound of entry in the centre of chest and an exit wound of fire arm on the back of the chest. Around the fire arm wound of entry, tattooing was found in an area of 14 cm x 14 cm, alongwith clotted blood. P.W.-2 specifically stated in cross-examination that Umesh fired at Ram Sharan Tiwari from close distance, approximately from a distance of about 2-3 hands and at that time they were facing one another and only one shot was fired. Similarly, P.W.-3 stated in cross-examination that when Umesh fired at Ram Sharan, they were facing one another and Umesh fired at Ram Sharan from a distance of about 2-3 paces. Since tattooing was found on the fire arm wound of entry, as such, it is evident that Ram Sharan was shot from close proximity. If the length of hand and muzzle of '*tamancha*', are together(because the tamancha was held in hand) taken into consideration, then from the ocular evidence of P.W.-2 and P.W.-3 it is proved that accused Umesh shot Ram Sharan from a distance of about 3 feet, which is also corroborated from the testimony of doctor P.W.-4, according to which, tattooing can only be caused if a person is shot from close proximity i.e. from a distance of less than 3 feet.

37. In view of this, the ocular evidence regarding the manner in which deceased Ram Sharan Tiwari was shot dead, is also corroborated by the medical evidence on record.

38. It is also evident from the evidence of P.W.-2 and P.W.-3 that at the time of the incident accused Mahesh,

Umesh and Gore Lal were present. It is also proved that accused Mahesh is the real brother of accused Umesh. It is also proved that Gore Lal was having friendship with accused Mahesh and Umesh, who used to remain in their company. It is also proved that just prior to the incident on seeing Ram Sharan, accused Umesh had verbally expressed his displeasure regarding the attitude(*rangbazi*) shown by Ram Sharan at the liquor vend and thereafter, accused Gore Lal and Mahesh had jointly exhorted accused Umesh by saying that today is a good opportunity, he(Ram Sharan)should not escape and be killed and thereafter, acting on this exhortation, accused Umesh shot dead Ram Sharan with a single shot of '*tamancha*'. It is proved that accused Umesh was exhorted to kill Ram Sharan by accused Gore Lal and Mahesh. It is also proved that accused Gore Lal and Mahesh neither stopped Umesh from shooting Ram Sharan nor they remained present at the spot after the incident, instead, they along with Umesh fled, who were chased and P.W.-2 and P.W.-3 also had a scuffle with Gore Lal, during which his slippers and '*angocha*' were left behind, which were recovered by P.W.-6 in the next morning, regarding which recovery memo Ex. Ka-14 was proved by P.W.-6 during trial, on which P.W.-2 and P.W.-3 had admitted their signatures. It is also proved that accused Mahesh and Gore Lal knew prior to the incident, that accused Umesh was armed with a '*tamancha*' and due to this reason, they gave an exhortation to kill Ram Sharan. Otherwise, if they were not aware that accused Umesh was having a '*tamancha*' in his possession, then there was no purpose of giving an

exhortation to him, to kill Ram Sharan. This conduct of accused Mahesh and Gore Lal prior to the incident, simply proves that they were aware that accused Umesh was having a '*tamancha*' in his possession and by using it, Ram Sharan could be killed. Besides this, if Mahesh and Gore Lal were not having common intention to kill Ram Sharan with Umesh, then, since they were in close proximity to accused Umesh, they could have very well stopped him or at least made an effort to prevent Umesh from shooting Ram Sharan, but no such positive action was taken by them. Even after the incident, if accused Mahesh and Gore Lal were not having common intention to kill Ram Sharan with Umesh, then, they could have remained present at the spot. The evidence of P.W.-2 and P.W.-3 proves that accused Mahesh and Gore Lal also fled, who were chased by the above witnesses and during this chase, a scuffle took place between the witnesses and accused Gore Lal, during which the slippers and '*angocha*' of Gore Lal were left behind, but he ultimately managed to flee. The conduct of the accused Mahesh and Umesh, prior to and after the incident, proves that they had common intention with accused Umesh to kill Ram Sharan Tiwari.

39. The trial court acquitted accused Mahesh and Gore Lal on this ground that on the day of the incident i.e. 08.09.2004 at 09.00 PM in the altercation that took place between Ram Sharan and accused Umesh at the liquor vend, both the accused Mahesh and Gore Lal were not present and only accused Umesh had threatened Ram Sharan with dire consequences and subsequently, at the

time of the incident, accused Mahesh and Gore Lal were unarmed. In the opinion of the trial court, if all the three accused had planned to murder Ram Sharan, then certainly accused Mahesh and Gore Lal would have arrived at the spot, armed with lathi, danda or fire-arm. It was further opined by the trial court that in order to convict the accused under Section 34 I.P.C it must be proved that the real accused and his accomplice, were having a well planned scheme and the accomplice also participated in the commission of the offence.

40. In the opinion of the trial court, there was neither any planning nor any common intention on the part of the accused Mahesh and Gore Lal, with accused Umesh, to murder Ram Sharan, hence, the trial court acquitted them.

41. In view of the above findings recorded by the trial court, we have to examine what are the ingredients for 'common intention' as per Section 34 I.P.C. The law on this subject is well settled. The Apex Court in the case of ***Rajkishore Purohit Vs. State of M.P. (2017) 9 SCC 483***, while considering the common intention, held as under:-

“9. Common intention is a state of mind. It is not possible to read a person’s mind. There can hardly be direct evidence of common intention. The existence or non-existence of a common intention amongst the accused has to be deciphered cumulatively from their conduct and behaviour in the facts and circumstances of each case. Events prior to the occurrence as also after, and during the occurrence, are all relevant to deduce if there existed any common intention. There can be no straight jacket formula. The absence of any overt act of assault, exhortation or possession of weapon cannot be singularly determinative of absence of common intention.

10. Though judicial precedents with regard to common intention stand well entrenched, it will be sufficient to refer to State of Rajasthan vs. Shobha Ram, (2013) 14 SCC 732, observing as follows :-

“10. Insofar as common intention is concerned, it is a state of mind of an accused which can be inferred objectively from his conduct displayed in the course of commission of crime and also from prior and subsequent attendant circumstances. As observed in Hari Ram v. State of U.P.(2004)8SCC146, the existence of direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. Therefore, in order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence before a person can be vicariously convicted for the act of the other.”

11. Motive for the assault existed because the accused were aggrieved by the meeting summoned. The assault was planned in a gathering, where escape would have been easy, in the chaos that would follow the assault. The accused persons came together in a car to facilitate a quick get-away. Exhortation was made by respondent no.2, when the accused were at very close quarters to the deceased. The firing was done from a distance of about 6 inches. Respondent no.2 and accused no.4 provided cover at this time. There is nothing in the conduct of respondent no.2 to draw any inference that he was taken by surprise, when the co-accused opened fire. Rather than provide help to the deceased and his relatives, respondent no.2 immediately escaped from the place of occurrence in the chaos that followed, indicative of his awareness of the common intention. The sequence of events, and the manner in which the occurrence took place, manifests a pre-concerted plan and a prior meeting of minds. It was not the case of respondent no.2 that he was taken by surprise and was unaware that the co-accused was carrying a revolver or that they had no intention to kill the deceased. If common intention by meeting of minds is established in the facts and circumstances of the case, there need not be an overt act or possession of weapon required, to establish common intention.

12. In Ramaswami Ayyangar vs. State of Tamil Nadu, (1976) 3 SCC 779, explaining the essence and purport of common intention, it was observed as follows :-

“12.....The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim, or may otherwise facilitate the [commission of crime]. Such a person also commits an ‘act’ as much as his co-participants actually committing the planned crime.”

(emphasis supplied)

42. The Apex Court in **Damodar Vs. State of U.P. (2005) 1 SCC 543** while considering that whether only exhortation can attract application of Section 34 I.P.C., held as under:-

“5. It was argued before us that the mere fact that the appellant exhorted his companion to fire at the deceased is not sufficient for the application of Section 34 IPC. It was sought to be contended that there was no prior meeting of minds and, therefore, it cannot be said that what was done by Ravindra Singh was pursuant to the common intention of both the accused.

6. It is not possible to accept this contention. The facts of the case disclose that murders have taken place on both sides. While the deceased was being tried for the murder of the uncle of the appellant, Ravindra Singh was being tried for the murder of the son of the deceased. The parties are well-known to each other. It so happened that on the day of occurrence, while the deceased was proceeding ahead, he was noticed by the appellant herein who was in the company of Ravindra Singh, who was carrying a loaded country made pistol. He exhorted Ravindra Singh to kill the deceased whereafter Ravindra Singh fired at the deceased from behind and killed him. If these facts cannot be disputed, there can be no doubt about the application of Section 34 IPC. It was pursuant to the common intention of both that Ravindra Singh fired at the deceased resulting in his death. Having heard the parties and perused the records, we find nothing which may lead us to hold that the allegation of exhortation by the appellant is not true.”

43. The Apex Court in the case of ***Gulab vs State of Uttar Pradesh (2022) 12 SCC 677*** (by 3 Judges) while considering the applicability of Section 34 I.P.C, held as under:-

“29. In Dhanpal v. State (NCT of Delhi) [Dhanpal v. State (NCT of Delhi), (2020) 5 SCC 705 : (2020) 3 SCC (Cri) 188] , the appellant had exhorted a co-accused to kill the deceased. The exhortation was not repeated by the eyewitnesses in identical terms. Further, it was also alleged that there was no neutral witness since all the eyewitnesses were related to the deceased and there was a delay in lodging the FIR. Aniruddha Bose, J. speaking for the two-Judge Bench of this Court observed : (SCC pp. 709-10, paras 8 & 11)

“8. There are sufficient materials, however, to establish that the three appellants had returned together to the place of occurrence and attacked the deceased victim with Dhanpal exhorting to kill Ajay. They had grappled the victim and said Kamal inflicted multiple injuries on him with the knife. On the basis of evidence disclosed, the trial court and the High Court [Sanjeev v. State, 2009 SCC OnLine Del 2868] found that there was prior meeting of minds of all the four convicts and all the three appellants had intention common with that of Kamal. On this point, the ratio of the judgment of this Court in Asif Khan v. State of Maharashtra [Asif Khan v. State of Maharashtra, (2019) 5 SCC 210 : (2019) 2 SCC (Cri) 484] is relevant. In an earlier case, Rajkishore Purohit v. State of M.P. [Rajkishore Purohit v. State of M.P., (2017) 9 SCC 483 : (2017) 3 SCC (Cri) 749] , it has been held that to establish common intention to cause murder,

overt act or possession of weapons by all the accused persons is not necessary. In Richhpal Singh Meena v. Ghasi [Richhpal Singh Meena v. Ghasi, (2014) 8 SCC 918 : (2014) 6 SCC (Cri) 424] , the ratio is that in the event the nature of the assault is such that the target person is likely to die from the injuries resulting therefrom, the accused must be deemed to have known the consequences of his act.

11. We find the approach of the trial court and the High Court in appeal was proper in dealing with the discrepancies pointed out on behalf of the appellants. The delay in registering the FIR has been explained properly and judgment of conviction cannot fail for that reason. It is a fact that the eyewitnesses were known to the deceased and there was no neutral witness. But for that factor alone we cannot exonerate the appellants, particularly since the court of first instance and the first appellate court have already examined the evidence and given their findings in favour of the prosecution. We do not find any error in the judgment of conviction and order of sentence so far as the appellants are concerned. All the three appeals are dismissed.

30. Recently in Sandeep v. State of Haryana [Sandeep v. State of Haryana, (2022) 14 SCC 812 : 2021 SCC OnLine SC 642] , a two-Judge Bench of this Court held that an exhortation given by an accused immediately before a co-accused fired a shot killing the deceased would prove his involvement in the crime beyond reasonable doubt. Accordingly, this Court upheld the conviction of the accused under Sections 302 and 34IPC.

*31. The evidence on the record clearly establishes a common intention in pursuance of which the appellant exhorted Idrish to kill the deceased. **The prosecution is not required to prove that there was an elaborate plan between the accused to kill the deceased or a plan was in existence for a long time. A common intention to commit the crime is proved if the accused by their words or action indicate their assent to join in the commission of the crime.** The appellant reached the spot with a lathi, along with Idrish who had a pistol. The appellant's exhortation was crucial to the commission of the crime since it was only after he made the statement that the enemy has been found, that Idrish fired the fatal shot. **The role of the appellant, his presence at the spot and the nature of the exhortation have all emerged from the consistent account of the three eyewitnesses.**"*

(emphasis supplied)

44. From the above law laid down by the Apex Court, it is evident that the common intention is a state of mind of accused which can be inferred objectively from his conduct displayed in the course of commission of crime and also from prior and subsequent attendant circumstances. It has been further held that existence of direct proof of common

intention is seldom available, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. It is evident that in the case of **Raj Kishore Purohit (Supra)** all the accused came together in a car, exhortation was made by one accused from close quarters and thereafter another accused fired from a close distance and thereafter, all fled in a car. In such circumstances, it was held by the Apex Court that there was common intention among all the accused to commit the crime. It was further held that in such situation, there need not be an overt act or possession of weapon is required, to establish common intention.

45. Similarly, in the case of **Damodar (supra)** on the exhortation of the appellant, another accused Ravindra Singh fired from his country made pistol causing death and in such circumstance, it was held that the murder took place pursuant to the common intention of both the accused.

46. In the case of **Gulab(supra)**, the appellant reached the spot armed with a lathi, alongwith Idrish, who had a pistol. On the exhortation of appellant, Idrish fired the fatal shot. In such circumstance, it was held that the appellant had common intention with Idrish to commit murder.

47. The laid down by the Apex Court in the case of **Damodar(supra), Rajkishore Purohit(supra) and Gulab(supra)** is fully applicable on the facts of this case. From the evidence of P.W.-2 and P.W.-3, it is proved that

accused Mahesh and Gore Lal knew prior to the commission of offence, that accused Umesh was having in his possession a country-made weapon (*tamancha*) and due to this specific knowledge, they gave an exhortation to accused Umesh to kill Ram Sharan Tiwari by saying that '*today is a good opportunity to kill, he should not escape, he be killed*' and acting on this exhortation, Umesh fired a single shot from his '*tamancha*' at Ram Sharan Tiwari, who died instantly on the spot. The accused Mahesh and Gore Lal, were in close proximity to accused Umesh, who neither prevented accused Umesh from shooting Ram Sharan Tiwari nor remained present at the spot, after the incident, who were chased by P.W.-2 and P.W.-3, during which a scuffle took place between accused Gore Lal and P.W.-2 and P.W.-3, as a result of which the slippers and '*angocha*' of accused Gore Lal were left behind, which were taken into possession in the next morning by P.W.-6. All the above facts and circumstances duly prove that accused Mahesh and Gore Lal were having common intention with accused Umesh to murder Ram Sharan. As such, the trial court recorded a perverse finding, acquitting them, on the sole ground that they were not having any common intention with accused Umesh to murder Ram Sharan Tiwari.

48. The principles governing scope of interference by the High Court, in an appeal filed by the State for challenging acquittal of the accused, recorded by the trial court, has been considered by the Apex Court in the case of **Babu**

Sahebagouda Rudragoudar and others vs. State of Karnataka (2024) 8 SCC 149, as under:-

“39. This Court in Rajesh Prasad vs. State of Bihar(2022)3SCC471 encapsulated the legal position covering the field after considering various earlier judgments and held as below:

“29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: [Chandrappa case(2007)4SCC415] SCC p. 432, para 42)

‘42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

40. Further, in H.D. Sundara vs. State of Karnataka(2023)9SCC581, this Court summarized the principles governing the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378 Cr.P.C. as follows: (SCC p. 584, para 8)

“8. ... 8.1. The acquittal of the accused further strengthens the presumption of innocence;

8.2. The appellate court, while hearing an appeal against acquittal, is entitled to reappraise the oral and documentary evidence;

8.3. The appellate court, while deciding an appeal against acquittal, after reappraising the evidence, is required to consider

whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record;

8.4. If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible; and

8.5. The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible.”

41. Thus, it is beyond the pale of doubt that the scope of interference by an appellate Court for reversing the judgment of acquittal recorded by the trial Court in favour of the accused has to be exercised within the four corners of the following principles:

41.1 That the judgment of acquittal suffers from patent perversity;

41.2. That the same is based on a misreading/omission to consider material evidence on record; and

41.3. That no two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record.

42. The appellate Court, in order to interfere with the judgment of acquittal would have to record pertinent findings on the above factors if it is inclined to reverse the judgment of acquittal rendered by the trial Court.”

49. It is clear that the Appellate Court can only interfere in the judgment of acquittal rendered by the trial court, if after appreciation of evidence on record, it is of the opinion that beyond reasonable doubt, only the conclusion of guilt of accused is possible, not otherwise. If the view taken by the trial court is a possible view, even then, the Appellate Court cannot over turn the order of acquittal on the ground that, another view is also possible.

50. From the discussion made herein before, it is proved that, on the basis of the evidence of P.W.-2 and P.W.-3 only one view is possible, that accused Mahesh and Gore Lal were having common intention with accused Umesh, to murder Ram Sharan Tiwari.

As such, the trial court has recorded a perverse finding that they were not having common intention with the accused Umesh, to murder Ram Sharan Tiwari. The trial court committed grave illegality in acquitting the accused Mahesh and Gore Lal, which requires interference by this Appellate Court. Accordingly, the Government Appeal insofar as, it challenges unjustified acquittal of accused Mahesh and Gore Lal, deserves to be allowed.

51. The Government Appeal also challenges the acquittal of accused Umesh by trial court for the offence under Section 504 and 506 I.P.C. The trial court acquitted the accused Umesh, only on the ground that the prosecution failed to prove the specific words of abuse uttered by him, and further he had not threatened to kill Ram Sharan.

52. The Apex Court in the case of ***B.V. Ram Kumar vs State of Telangana And Another (2025)3SCC475***, while considering the applicability of Section 504 I.P.C to the facts of the case before the Court, held as under:-

“22. For appreciating the necessary ingredients required to substantiate a charge under Section 504IPC, a reference in this regard may be made to the judgment of this Court in Fiona Shrikhande v. State of Maharashtra [Fiona Shrikhande v. State of Maharashtra, (2013) 14 SCC 44 : (2014) 1 SCC (Cri) 715] , wherein the Court discussed the essential ingredients of Section 504IPC. The Court held as follows : (SCC pp. 49-50, paras 13-14)

“13. Section 504IPC comprises of the following ingredients viz. (a)intentional insult, (b)the insult must be such as to give provocation to the person insulted, and (c)the accused must intend or know that such provocation would cause another to break the public peace or to commit any other offence.

The intentional insult must be of such a degree that should provoke a person to break the public peace or to commit any other offence. The person who intentionally insults intending or knowing it to be likely that it will give provocation to any other person and such provocation will cause to break the public peace or to commit any other offence, in such a situation, the ingredients of Section 504 are satisfied. One of the essential elements constituting the offence is that there should have been an act or conduct amounting to intentional insult and the mere fact that the accused abused the complainant, as such, is not sufficient by itself to warrant a conviction under Section 504IPC.

14. We may also indicate that it is not the law that the actual words or language should figure in the complaint. One has to read the complaint as a whole and, by doing so, if the Magistrate comes to a conclusion, prima facie, that there has been an intentional insult so as to provoke any person to break the public peace or to commit any other offence, that is sufficient to bring the complaint within the ambit of Section 504IPC. It is not the law that a complainant should verbatim reproduce each word or words capable of provoking the other person to commit any other offence. The background facts, circumstances, the occasion, the manner in which they are used, the person or persons to whom they are addressed, the time, the conduct of the person who has indulged in such actions are all relevant factors to be borne in mind while examining a complaint lodged for initiating proceedings under Section 504IPC”

(emphasis supplied)

23. Thus, upon reading the complaint as a whole, if the Magistrate comes to a conclusion, prima facie, that there has been an intentional insult made by the accused to the complainant so as to provoke the latter to break the public peace or to commit any other offence, then only the act complained of would fall within the ambit of Section 504IPC. The law does not mandate that the complainant should verbatim reproduce each word or words capable of provoking him/her to commit breach of peace or any other offence. The background facts, circumstances, the occasion, the manner in which the offending words are used, the person to whom they are addressed, the time, the conduct of the person who has indulged in such actions are all relevant factors to be borne in mind while examining a complaint lodged for initiating proceedings under Section 504IPC.

24. Further, this Court in Mohd. Wajid v. State of U.P. [Mohd. Wajid v. State of U.P., (2023) 20 SCC 219] , while discussing Section 504IPC, propounded the test for considering the circumstances wherein, an abusive language takes the form and shape of an intentional insult and held thus : (SCC paras 29-31)

“29. Section 504IPC contemplates intentionally insulting a person and thereby provoking such person insulted to breach the peace or intentionally insulting a person knowing it to be likely that the person insulted may be provoked so as to cause a breach of the public peace or to commit any other offence. Mere abuse may not come within the purview of the section. But, the words of abuse in a particular case might amount to an intentional insult provoking the person insulted to commit a breach of the public peace or to commit any other offence. If abusive language is used intentionally and is of such a nature as would in the ordinary course of events lead the person insulted to break the peace or to commit an offence under the law, the case is not taken away from the purview of the section merely because the insulted person did not actually break the peace or commit any offence having exercised self-control or having been subjected to abject terror by the offender.

30. In judging whether particular abusive language is attracted by Section 504IPC, the court has to find out what, in the ordinary circumstances, would be the effect of the abusive language used and not what the complainant actually did as a result of his peculiar idiosyncrasy or cool temperament or sense of discipline. It is the ordinary general nature of the abusive language that is the test for considering whether the abusive language is an intentional insult likely to provoke the person insulted to commit a breach of the peace and not the particular conduct or temperament of the complainant.

31. Mere abuse, discourtesy, rudeness or insolence, may not amount to an intentional insult within the meaning of Section 504IPC if it does not have the necessary element of being likely to incite the person insulted to commit a breach of the peace or an offence and the other element of the accused intending to provoke the person insulted to commit a breach of the peace or knowing that the person insulted is likely to commit a breach of the peace. Each case of abusive language shall have to be decided in the light of the facts and circumstances of that case and there cannot be a general proposition that no one commits an offence under Section 504IPC if he merely uses abusive language against the complainant.”

(emphasis supplied)

25. Needless to say, that mere abuse, discourtesy, rudeness or insolence does not amount to an intentional insult within the meaning of Section 504IPC. Furthermore, it would be immaterial that the person who has been insulted and provoked did not actually break the peace or commit any offence.

26. Section 504IPC consists of two parts. Firstly, the actus reus—being the intentional insult which gives rise to the provocation.

Secondly, the mens rea i.e. the intention or knowledge on the part of the accused that such intentional provocation is likely to cause the person insulted to break public peace or commit any other offence. The animus nocendi in Section 504IPC is that the accused should “intentionally insult” the other person with the intention or knowledge that the provocation caused by such insult is likely to result in the commission of breach of public peace or any other offence by the person who has been so insulted. The offence is said to be complete once the accused person makes “intentional insult” with the aforesaid mens rea. Hence, intention or knowledge on the part of the accused person that his actions of making “intentional insult” have the potential to provoke the person insulted is sine qua non for the commission of the offence under Section 504IPC.

27. The natural corollary of the above discussion is that if the accused does not intend to give provocation, the offence is not made out. An insult without an “intention to insult” is not punishable under Section 504IPC. Further, “intentional insult” must be of such a degree that it has the potential to provoke a reasonable person to break the public peace or to commit any other offence.

28. It is trite that whether the person provoked further commits an illegal act or not is immaterial to draw the conclusion of culpability under Section 504IPC. The “intentional insult” and provocation must be so proximate and close that the accused has either the intention or the knowledge that the intentional insult made by him is likely to cause the provoked person to break public peace or commit some other offence. However, what would be the nature of “intentional insult” causing provocation, to draw culpability under Section 504IPC would depend upon the facts and circumstances of each case.

29. The test to be applied to determine if the intentional insult made by the accused is sufficient to cause provocation is that of a reasonable person i.e. if the insult is sufficient to provoke any reasonable person to break peace or commit any other offence, only then the accused will be liable for the offence under Section 504IPC.”

(emphasis supplied)

53. Criminal Intimidation is defined under Section 503 I.P.C, which reads as under:-

“Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.”

54. Punishment for Criminal Intimidation is prescribed under Section 506 I.P.C, which reads as under:-

“Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

If threat be to cause death or grievous hurt, etc.—And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.”

55. As per the law laid down by the Apex Court in the case of **B.V. Ram Kumar(supra)**, it is clear that, it is not necessary for the prosecution to verbatim reproduce each word uttered by the accused while abusing the victim. The prosecution is only bound to prove that an intentional insult was made by the accused with the intention or knowledge, that the provocation caused by such insult is likely to cause any reasonable person to break the public peace or commit any other offence. It is immaterial that the person insulted and provoked, did not actually break the peace or commit any offence.

56. From the evidence of P.W.-2 and P.W.-3 it is proved that on the day of the incident at about 9:00 p.m. at liquor vend, accused Umesh abused Ram Sharan and threatened him with dire consequences. It is true that the above witnesses have not mentioned the specific words uttered in abuse, by Umesh, at that time but, it is proved that an

intentional insult was committed by the accused with the knowledge that Ram Sharan could have broken public peace or committed any other offence. It is also true that Ram Sharan after the abuse, had not reacted to it, but this conduct of Ram Sharan is immaterial. We are of the opinion that, in the facts and circumstances of the case, the prosecution has proved beyond doubt, that an offence under Section 504 I.P.C was committed by Umesh.

57. As per the definition of Criminal Intimidation under Section 503 I.P.C., any threat given to a person to injure him, his property or reputation with intent to cause alarm to that person, amounts to Criminal Intimidation. It is not necessary that the threat should be to kill someone. From the evidence of P.W.-2 and P.W.-3, it is also proved that Umesh at the liquor vend threatened Ram Sharan with dire consequences, which falls within the definition of Criminal Intimidation. The trial court recorded a perverse finding that since neither specific words of abuse were proved by the prosecution nor accused Umesh threatened Ram Sharan to kill, as such the accused had not committed any offence under Section 504 and 506 I.P.C.

58. We are of the opinion that the prosecution has proved beyond reasonable doubt that accused Umesh also committed offence under Section 504 and 506 I.P.C., as such the Government Appeal

insofar as it relates to acquittal of accused Umesh for offence under Section 504 and 506 I.P.C., also deserves to be allowed.

59. It is true that in the first information report, it is not mentioned that P.W.-2 and P.W.-3 saw the incident in the light of a bulb hanging on an electric pole, in the vicinity of the spot of occurrence and also, in the light of the torch held by accused Mahesh. It is well settled that F.I.R. is not an encyclopedia and as such, each and every minute detail of the occurrence, need not be elaborated in it.

60. In their testimony P.W.-2 and P.W.-3 specifically mentioned that they identified the accused persons in the light of a bulb which was hanging on an electric pole, in front of the house of Vasudev Kachi, as well as, in the torch light held by accused Mahesh. Both P.W.-2 and P.W.-3 admitted in their cross-examination that they had not told the above facts to the Investigating Officer because they were not asked in this regard. It is also proved that P.W.-2, P.W.-3 and accused are resident of the same village Pahadi Bhetari, who are well known to one another. It is also proved that just before the incident, both the accused Mahesh and Gore Lal had given a joint exhortation to accused Umesh, to kill Ram Sharan Tiwari and acting on this exhortation, accused Umesh shot dead Ram Sharan Tiwari with a '*tamancha*'. It is also proved that prior to the

shooting, accused Umesh had verbally expressed his displeasure to Ram Saran regarding the attitude(*rangbazi*) shown by him at the liquor vend. It was not for the first time that P.W.-2 and P.W.-3 were meeting the accused, as such, in the facts and circumstances of the case, P.W.-2 and P.W.-3 could very well have identified them, from their voice, even if it is assumed that there was no source of light at the spot, at the time of occurrence.

61. It is also true that *Panchayatnama* of the deceased was prepared the next morning and according to P.W.-6, since there was no light at the spot of occurrence, as such, *Panchayatnama* could not be prepared in the night. But this statement of P.W.-6 cannot be read in the manner that, there was no source of light at all, at the place of occurrence. It is also possible that by the time P.W.-6 reached the spot in the night, there was no electric supply, or the available light was insufficient to prepare *Panchayatnama* in the night.

62. It is true that in the site map Ex.Ka-15, no electric pole or source of light is mentioned but, it is well settled that lapses conducted by the Investigating Officer cannot give any benefit to the accused, till such lapse is of such a consequence that the whole trial has been vitiated.

63. We are also conscious that the accused examined Jagdamba Prasad as D.W.-3, the operator

of electric sub-station, Muskura in the trial court, in order to prove that at the time of incident, i.e. in the night of 08/09.09.2004, there was no electric supply in the village Pahadi Bhetari, as such, P.W.-2 and P.W.-3 could not have identified the accused in the light of an electric bulb.

64. We have perused the testimony of D.W.-3, who has mentioned in his examination-in-chief that there was no electric supply in village Pahadi Bhetari from his electric sub-station on 08.09.2004 at 10:30 p.m. In order to prove the above fact, he produced a register in which he admitted that the relevant entry was not in his hand writing. He also stated that electric supply was resumed in the night, but stopped at 5:05 a.m. He further deposed in his examination-in-chief that there was no electric supply from his electric sub-station to village Pahadi between 01.09.2004 and 14.10.2004, but in cross-examination admitted that the pages of register, which he produced in the court, have neither been numbered nor been attested by any officer. He admitted that the entries made in the register on 08.09.2004 are not in his hand writing. He further admitted that it is mentioned in the register that on 08.09.2004, lineman Baijnath had gone to village Pahadi for checking the transformer at 9:35 p.m. According to the register, previously also Bhura, who worked as a patrol man in his department, had gone on 01.09.2004 for checking the transformer.

65. It is surprising that if the transformer supplying electricity to village Pahadi was damaged from 01.09.2004 till 14.10.2004, then, what was the need to get it checked on 08.09.2004, by the lineman Baijnath. Since neither the person making the entry dated 08.09.2004 in the register was examined in the trial court nor the number of pages in the register had been authenticated by a responsible officer of the electricity department, as such, the entries made in the register produced in the trial court, cannot be deemed credible. This is also proved from the observations recorded by trial court during examination of D.W.-3, that after initial entry dated 24.11.2004 and after the final entry dated 06.12.2004, ten pages were found torn in the register.

66. In view of the above facts, the evidence adduced by the accused, for proving that there was no electric supply in the night of 8/9.09.2004 in village Pahadi Bhetari is not reliable and as such needs to be discarded.

67. The accused also examined Maujilal as D.W.-1 in order to prove that the first informant Sushil Kumar P.W.-1 and others had not gone in his horse cart, neither in the night of 08/9.09.2004 nor in the next morning, to register FIR at police station Muskura. Sushil Kumar P.W.-1 stated in his cross-examination that the horse cart used by him belonged to his fellow villager Moti s/o Zeenat Kori.

P.W.-1 was not suggested in cross-examination that he used the horse cart of D.W.-1, for going to the police station. D.W.-1 admitted in cross-examination that he was giving testimony in the Court on the request of accused Gore Lal and accompanied him to the Court. In view of this, the testimony of D.W.-1 cannot be deemed reliable and is liable to be discarded.

68. It is the case of the prosecution that deceased Ram Sharan, P.W.-2 and P.W.-3 were going to the house of Babbu Pandit to attend Ramayana recital, when the incident took place, but according to Babbu Pandit D.W.-2, neither on that day nor 2-3 days prior to it, any Ramayana recital was held at his house. D.W.-2 was examined to discredit the testimony of P.W.-2 and P.W.-3. He admitted in his cross-examination that he was not aware that Ramayana recital was held somewhere else in the village or not. He admitted that Ramayana recital is conducted in his village, but denied having organized any such recital at his house. He further admitted that he received the summon to appear in the Court from accused Mahesh. Although he denied the suggestion that he was giving testimony in the court, at the instance of accused Mahesh, but in the facts and circumstances of the case, the evidence of D.W.-2 cannot be deemed reliable and is liable to be discarded.

69. In this case, after the incident, the Investigating Officer S.I. Shailendra Singh P.W.-6 collected plain soil and blood stained soil from the spot, as well as the bullet of 315 bore lying near the dead body of Ram Sharan Tiwari, and proved the recovery memo of the above objects as Ex.Ka-11 and Ex.Ka-12 and these objects as material Ex-12, 13 and 14. Besides this, a pair of slippers, blood stained pocket diary, a paper, a pen, Rs.155/- alongwith 4 coins, belonging to deceased Ram Sharan were also recovered from the spot of occurrence and the recovery memo was proved by P.W.-6 as Ex.Ka-13. The above objects belonging to the deceased were also produced in the trial court and proved as material Ex-7 to 11. All these objects prove the spot of occurrence.

70. From the perusal of the records, it is evident that the statement of P.W.-3 Rakesh Kumar under Section 161 Cr.P.C. was recorded on 11.09.2004 by Shailendra Singh P.W.-7. P.W.-7 also stated in the cross-examination that he searched P.W.-2 Ram Sajivan but he was not traceable and any information regarding him was also not available, as such, his statement could not be recorded.

71. Aditya Kumar Dwivedi P.W.-9 proved in examination-in-chief that statement of Ram Sajivan P.W.-2 under Section 161 Cr.P.C was recorded on 09.10.2004 at the police station. P.W.-2 Ram Sajivan stated in his cross-examination that on the

second day after the incident, he left for the house of in-laws of his sister situated in village Bagra, tehsil Sarila, District Hamirpur, after the murder of Ram Sharan, because of fear and he returned to his village after about 15 days and thereafter, he remained present in the village.

72. We are of the opinion that, since P.W.-2 was not present in the village, hence his statement could not be recorded by the Investigating Officer. The prosecution has proved that there was no deliberate delay in recording his statement, as such, the testimony of P.W.-2 cannot be termed doubtful on this ground.

73. It is the case of the prosecution that accused Umesh was arrested on 14.09.2004 at about 06.00 a.m. on the basis of information provided by an informer. Thereafter, he made a disclosure statement, and at his pointing out a country made weapon (*tamancha*) of 315 bore alongwith an empty cartridge of 315 bore trapped in it's muzzle, wrapped in plastic, concealed beneath the straw, in the ruins of his house, was recovered at about 7:00 a.m., which was allegedly used in the commission of crime. The recovery memo of the above objects was proved by P.W.-7 as Ex.Ka-16. Besides this, P.W.-7 also proved the above country made weapon as material Ex-17(number of exhibit corrected by trial court from 12 to 17 in it's judgment), empty cartridge as material Ex-18(number of exhibit

corrected by trial court from 13 to 18 in its judgment). The country made weapon and empty cartridge recovered at the instance of the accused Umesh were sent for forensic examination to the Forensic Science Laboratory(FSL), Agra whose report dated 12.07.2005 is Ex.Ka-23 on record, according to which, the empty cartridge(EC-1) was found to have been fired from the country made weapon(*tamancha*) recovered at the instance of accused Umesh.

74. Learned counsel for the accused-appellant Umesh challenged the above recovery under Section 27 of the Evidence Act, on the ground that since no independent witness was examined to prove the recovery, as such the recovery was wholly doubtful. He further submitted that recovery was not effected in accordance with the law laid down by the Apex Court in the case of ***Boby vs. State of Kerala (2023)15 SCC 760***. He further submitted that since no empty cartridge was recovered from the spot, as such, it is not proved that the country made weapon recovered at the pointing out of the accused Umesh, was used to commit the offence, and as such the alleged recovery does not link the accused with the crime.

75. The Apex Court in the case of ***Boby(supra)*** while considering the recovery effected under Section 27 of the Evidence Act, held as under:-

“31. It will also be relevant to refer to the following observations of this Court in *State of Karnataka v. David Rozario* [*State of Karnataka v. David Rozario*, (2002) 7 SCC 728 : 2002 SCC (Cri) 1852] : (SCC p. 733, para 5)

“5. ... This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. **It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence.** The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. **The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information.** It is now well settled that recovery of an object is not discovery of a fact envisaged in the section. Decision of the Privy Council in *Pulukuri Kotayya v. King-Emperor* [*Pulukuri Kotayya v. King-Emperor*, 1946 SCC OnLine PC 47 : (1946-47) 74 IA 65 : AIR 1947 PC 67] is the most-quoted authority for supporting the interpretation that the “fact discovered” envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (See *State of Maharashtra v. Damu* [*State of Maharashtra v. Damu*, (2000) 6 SCC 269 : 2000 SCC (Cri) 1088] .)”

32. A three-Judge Bench of this Court recently in *Subramanya v. State of Karnataka* [*Subramanya v. State of Karnataka*, (2023) 11 SCC 255] , has observed thus : (SCC pp. 299-300, paras 76-78)

“76. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:

‘27. How much of information received from accused may be proved.—Provided that, when any fact is proved to have been discovered in consequence of information received from a

person accused of any offence, in the custody of a police officer; so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.'

77. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.

78. If, it is say of the investigating officer that the appellant-accused while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes, etc. then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence, etc. When the accused while in custody makes such statement before the two independent witnesses (panch witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or bloodstained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."

(emphasis supplied)

76. From the perusal of the recovery memo Ex.Ka-16 proved by P.W.-7 in the trial court, it is evident that after the arrest of accused Umesh on 14.09.2004 at about 06:00 a.m., he disclosed that

he shot dead Ram Sharan on 08.09.2004 in the presence of witness by a country made weapon (*tamancha*) and he placed that weapon in his dilapidated house, in a room having a khaprail roof and concealed that weapon beneath the straw by wrapping it in a plastic sheet.

77. On the basis of this specific information, P.W.-7, at the pointing out of the accused Umesh, recovered the country made weapon(*tamancha*) of 315 bore and an empty cartridge of 315 bore was also found in its muzzle, from village Pahedi Bhetari, in the presence of independent witnesses Rambodh and Jagmohan Yadav. This recovery of '*tamancha*' was effected from the dilapidated house of accused Umesh, from a room having khaprail roof, which was filled with straw. The '*tamancha*' was found wrapped in plastic, concealed in straw, at about 07:00 a.m. The above recovery was not effected from an open public place. Moreover this recovery was effected in the presence of two independent witnesses Rambodh and Jagmohan Yadav, but it is also true, that the prosecution has not examined the above independent witnesses, in order to prove the above recovery, but non- examination of independent witness cannot make the recovery doubtful.

78. Further, from the perusal of recovery memo Ex.Ka-16, it is evident that, the first part of it discloses the specific statement made by the

accused Umesh, after his arrest. After the disclosure, the police party alongwith two independent witnesses Rambodh and Jagmohan Yadav, were taken by accused to his house, from where recovery was effected at his pointing out. It is apparent that the procedure mandated by Apex Court in the case of **Boby(supra)**, to be followed while effecting recovery under Section 27 of Evidence Act, has been followed by P.W.-7 while preparing recovery memo Ex.Ka-16 in this case, which he has also proved during trial.

79. We are of the considered opinion that the recovery of country made weapon(*tamancha*) at the instance of accused Umesh is credible.

80. The recovered country made weapon (*tamancha*) is of 315 bore and according to Doctor P.W.-4 the chest injury found on the body of the deceased Ram Sharan Tiwari, could have been caused by it. Since no empty cartridge was found at the spot, as such, it was impossible for the prosecution to prove scientifically that the country made weapon recovered at the pointing out of accused Umesh was the same, from which, shot was fired on Ram Sharan Tiwari. It is also true that a bullet was found on the spot, which corroborates the medical evidence that the bullet entered through chest and made an exit from the back side of the chest and dropped thereafter, on the ground.

It is settled law that the prosecution is not bound to prove the impossible things.

81. It is true that there is no link evidence to connect the '*tamancha*' recovered at the pointing out of the accused Umesh, with the crime, because no empty cartridge was found on the spot. A bullet was found on the spot, which was sent to the Forensic Science Laboratory (FSL), Agra on which no blood was found, as per FSL report Ex.Ka-22. The bullet was never sent to the FSL, as such, there is no evidence to prove that the bullet was fired from the same '*tamancha*', which was recovered at the pointing out of accused Umesh.

82. The Apex Court in the case of ***Rakesh and Another vs. State of Uttar Pradesh & Another, (2021) 7 SCC 188***, while considering the ballistic expert report, held as under:

*“12. Now so far as the submission on behalf of the accused that as per the ballistic report the bullet found does not match with the firearm/gun recovered and therefore the use of gun as alleged is doubtful and therefore benefit of doubt must be given to the accused is concerned, the aforesaid cannot be accepted. At the most, it can be said that the gun recovered by the police from the accused may not have been used for killing and therefore the recovery of the actual weapon used for killing can be ignored and it is to be treated as if there is no recovery at all. **For convicting an accused recovery of the weapon used in commission of offence is not a sine qua non.** PW 1 and PW 2, as observed hereinabove, are reliable and trustworthy eyewitnesses to the incident and they have specifically stated that A-1 Rakesh fired from the gun and the deceased sustained injury. The injury by the gun has been established and proved from the medical evidence and the deposition of Dr Santosh Kumar, PW 5. Injury 1 is by gunshot. Therefore, it is not possible to reject the credible ocular evidence of PW 1 and PW 2 — eyewitnesses who witnessed the shooting. It has no bearing on credibility of deposition of PW 1 and PW 2 that A-1 shot deceased with a gun, particularly as it is corroborated by bullet*

*in the body and also stands corroborated by the testimony of PW 2 and PW 5. **Therefore, merely because the ballistic report shows that the bullet recovered does not match with the gun recovered, it is not possible to reject the credible and reliable deposition of PW 1 and PW 2.***

(emphasis supplied)

83. The Apex Court in the case of ***State through the Inspector of Police vs. Laly @ Manikandan & Another, 2022 SCC Online SC 1424***, while considering the effect of non recovery of weapon on ocular evidence, held as under:

*“20. The submission on behalf of the accused that as the original informant - Mahendran has not been examined and that the other independent witnesses have not been examined and that the recovery of the weapon has not been proved and that there is a serious doubt about the timing and place of the incident, the accused are to be acquitted cannot be accepted. Merely because the original complainant is not examined cannot be a ground to discard the deposition of PW1. As observed hereinabove, PW1 is the eye witness to the occurrence at both the places. Similarly, assuming that the recovery of the weapon used is not established or proved also cannot be a ground to acquit the accused when there is a direct evidence of the eye witness. **Recovery of the weapon used in the commission of the offence is not a sine qua non to convict the accused. If there is a direct evidence in the form of eye witness, even in the absence of recovery of weapon, the accused can be convicted.** Similarly, even in the case of some contradictions with respect to timing of lodging the FIR/complaint cannot be a ground to acquit the accused when the prosecution case is based upon the deposition of eye witness.”*

(emphasis supplied)

84. From the law laid down by the Apex Court in the case of ***Rakesh (supra)*** and ***Laly @ Manikandan (supra)***, it is evident that, recovery of the weapon used in the commission of offence is not a *sine-qua-non* to convict the accused. If there is credible ocular evidence, then even in the absence of recovery of weapon, the accused can be convicted. Similarly, even if according to the ballistic expert report, the recovered bullet does not match

with the gun recovered, it is not possible to reject credible ocular evidence.

85. We are of the considered opinion that the prosecution case is based on credible ocular testimony of PW-2 & PW-3, who are neither related to first informant or the deceased nor have any enmity with the accused, whose testimony is trustworthy. In view of this, even if it is not scientifically proved that the *tamancha* recovered at the pointing out of accused Umesh, was used in the commission of the offence, even then, credible ocular evidence of P.W.-2 & P.W.-3 cannot be rejected. In our opinion, the prosecution has succeeded in proving it's case against all the accused beyond reasonable doubt.

CONCLUSION

86. To sum up, the first informant Sushil Kumar P.W.-1 is not an eye witness of the incident. He was told about the incident by P.W.-2 and P.W.3 at about 10:35 p.m. on 08.09.2004, then on 09.09.2004 at about 00.15 hours, FIR regarding the incident was registered by P.W.-1 at police station Muskura, in which all the accused persons are named. It is also proved that P.W.-2 and P.W.-3 were present at the spot and witnessed the incident. It is also proved that prior to the incident about one and a half months back, an altercation took place between accused Umesh with deceased Ram Sharan Tiwari

regarding breaking of a coal furnace, due to which accused Umesh harboured enmity towards Ram Sharan. It is also proved that just before the incident, at 09:00 p.m. on 08.09.2004, Ram Sharan, P.W.-2 and P.W.-3 had gone towards a liquor vend, where they met accused Umesh, who abused Ram Sharan Tiwari and threatened him with dire consequences, and thereafter Ram Sharan, P.W.-2 and P.W.-3 had gone to Chamardha pond for defecation and accused Umesh had proceeded to his house and when they were returning after defecation, in front of the house of Vasudev Kachi, accused met Ram Sharan Tiwari, P.W.-2 and P.W.-3 and from close proximity accused Mahesh and Gore Lal had jointly exhorted accused Umesh to kill Ram Sharan and acting on this exhortation, accused Umesh fired a single shot from country made weapon (*tamancha*) of 315 bore, which pierced the chest of Ram Sharan and made an exit from the back side, killing him instantaneously. It is also proved that the accused, P.W.-2 and P.W.-3 reside in the same village Pahadi Bhetari, who were known to each other, before the incident. P.W.-2 and P.W.-3 identified the accused from their voice and also in electric light. It is also proved that Mahesh and Gore Lal were having knowledge that accused Umesh was carrying a country made weapon and only because of this knowledge, they exhorted accused Umesh to kill Ram Sharan Tiwari. Accused Mahesh and Gore Lal neither made any attempt to prevent Umesh

from committing the crime nor remained present at the spot, after the commission of offence, but instead they fled, which proves that they were having a common intention with accused Umesh to commit the crime. It is also proved that after the incident, P.W.-2 and P.W.-3 attempted to apprehend the accused Gore Lal but in this scuffle, the slippers and '*angocha*' of accused Gore Lal were left behind, which were taken into possession by P.W.-6, the recovery memo of which was proved as Ex.Ka-14 and also, P.W.-2 and P.W.-3 identified their signatures on it. They also proved that these objects belonged to accused Gore Lal.

87. We are of the considered opinion that the place and the manner of the occurrence is proved beyond reasonable doubt. The Investigating Officer recovered blood stained soil, bullet, belongings of the deceased and a pair slipper and '*angocha*' of accused Gore Lal from the spot. The named FIR regarding the incident was lodged promptly. Although it was feebly submitted that the FIR was registered ante-time, we find that there is no evidence on record to suggest that FIR regarding the incident was lodged ante-time. It is proved that the Investigating Officer visited the spot just after registering the FIR, but the *Panchayatnama* of the deceased could not be prepared in the night, because light was not sufficient. It is also proved that P.W.-2 and P.W.-3 are neither related to first

informant nor they were having any enmity with the accused persons. The trial court only acquitted accused Gore Lal and Mahesh on the ground that the prosecution failed to prove any common intention on their part to commit the offence, because neither they had the motive to commit the crime nor they were armed at the time of offence. In the light of the law laid down by the Apex Court and on the basis of the credible ocular evidence on record, this reasoning of the trial court is perverse. The conduct of the accused Mahesh and Gore Lal before and after the occurrence, duly proves, that they had common intention with accused Umesh to commit the murder of Ram Sharan. On the basis of credible ocular evidence on record, only one conclusion is possible, that accused Mahesh and Gore Lal had the common intention to commit the crime with accused Umesh, as such, the trial court committed grave illegality in acquitting them.

88. The trial court also committed grave illegality in acquitting accused Umesh of the offence under Section 504 and 506 of I.P.C.

89. In view of the above discussion, the Criminal Appeal filed by accused Umesh for his conviction for offence under Section 302 I.P.C and 25 Arms Act deserves to be dismissed and the Government Appeal against acquittal of Umesh for offence under Section 504 and 506 I.P.C. and against acquittal of

accused Mahesh and Gore Lal for offence under Section 302/34 I.P.C., deserves to be allowed.

90. Accordingly, Criminal Appeal No.4773 of 2005(Umesh Vs. State of U.P.) is dismissed.

The impugned judgment and order dated 14.09.2005 and 15.09.2005, of trial court, convicting him under Section 302 I.P.C and 25 Arms Act and sentencing him to undergo rigorous life imprisonment alongwith a fine of Rs.1,000/- and in default of payment of fine, to further undergo two months simple imprisonment, for offence of murder and to suffer two years rigorous imprisonment for offence under the Arms Act, is affirmed.

91. Government Appeal No.114 of 2006(State of U.P. V. Umesh, Mahesh and Gore Lal) is allowed.

The impugned judgment and order dated 14.09.2005 of trial court in S.T. No.246/2004 acquitting Umesh under Section 504 and 506 I.P.C. and Mahesh and Gore Lal under Section 302/34 I.P.C. is set aside. The accused Mahesh and Gore Lal are convicted under Section 302/34 I.P.C, for having common intention to murder Ram Sharan Tiwari, and sentenced to undergo minimum sentence of simple life imprisonment alongwith a fine of Rs.1,000/- each and in default of payment of fine, to further undergo two months simple imprisonment.

92. Umesh is convicted under Section 504 and 506 I.P.C. and sentenced to undergo six months simple imprisonment for each offence. Both these sentences will run concurrently with the sentence earlier awarded to him by the trial court for offence under Section 302 I.P.C. and 25 Arms Act. Appellant Umesh is in jail.

93. Since, accused Mahesh and Gore Lal are on bail, they are directed to surrender in the trial court within a period of one month from today, to undergo the remaining sentence under Section 302/34 IPC, failing which, the trial court is directed to adopt coercive measures for securing their presence in accordance with law.

94. A copy of this judgment be sent to the trial court and the concerned jail authorities for compliance, through Registrar (Compliance), forthwith.

95. Office is directed to send back the trial court record. The trial court is directed to submit its Compliance report within 3 months.

Order Date:- 14.08.2025
Jitendra/Himanshu/Anurag/-

(Sandeep Jain, J.) (Salil Kumar Rai, J.)