

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

% Reserved on: March 06, 2017

Decided on: May 25, 2017

+ **CRL.A. 524/2016**

GULFAM

..... Appellant

Represented by: Mr.K.Singhal, Ms. Vani
Singhal, Mr. Sachin Agarwal
and Mr. Ajay Kumar,
Advocates.

versus

STATE NCT OF DELHI

..... Respondent

Represented by: Ms. Meenakshi Chauhan, APP
with SI Manoj, PS Kanjhawala.

+ **CRL.A. 1726/2014**

SHAHBUDDIN

..... Appellant

Represented by: Mr. Harsh Prabhakar and Mr.
Salman Hashmi, Advocates.

versus

STATE (NCT) OF DELHI

..... Respondent

Represented by: Ms. Rajni Gupta, APP with SI
Manoj PS Kanjhawala.

+ **CRL.A. 1744/2014**

RAJESH @ PUTIYA

..... Appellant

Represented by: Ms. Sanjam Chawla, Ms.
Gulshan Khan and Mr.
Munawwar Naseem,
Advocates.

versus

STATE NCT OF DELHI Respondent
Represented by: Ms. Meenakshi Chauhan, APP
with SI Manoj PS Kanjhawala.

+ **CRL.A. 10/2015**

BHOLU Appellant
Represented by: Mr. F. Haq. and Mr. Momin
Fazal, Advocates.
versus

STATE (NCT OF DELHI) Respondent
Represented by: Ms. Rajni Gupta, APP with SI
Manoj PS Kanjhawala.

+ **CRL.A. 172/2015**

WASIM Appellant
Represented by: Mr.K.Singhal, Ms. Vani
Singhal, Mr. Sachin Agarwal
and Mr. Ajay Kumar,
Advocates.
versus

STATE NCT OF DELHI Respondent
Represented by: Ms. Rajni Gupta, APP with SI
Manoj PS Kanjhawala.

+ **CRL.A. 466/2015**

SIRAJ Appellant
Represented by: Mr.K.Singhal, Ms. Vani
Singhal, Mr. Sachin Agarwal
and Mr. Ajay Kumar,
Advocates.
versus

STATE NCT OF DELHI

..... Respondent

Represented by: Ms. Rajni Gupta, APP with SI
Manoj PS Kanjhawala.

+

CRL.A. 887/2015

ASIF

..... Appellant

Represented by: Mr. B.S. Chowdhary and Ms.
Sneh Lata, Advocates.

versus

STATE (NCT) OF DELHI

..... Respondent

Represented by: Ms. Rajni Gupta, APP with SI
Manoj Kanjhawala.

+

CRL.A. 712/2016

RIZWAN

..... Appellant

Represented by: Mr. Harsh Prabhakar, Mr.
Salman Hashmi, Mr. Anirudh
Tanwar and Mr. Jay Kumar
Bhardwaj, Advocates.

versus

THE STATE OF NCT OF DELHI

..... Respondent

Represented by: Ms. Rajni Gupta, APP with SI
Manoj PS Kanjhawala.

+

CRL.A. 443/2015

SITA RAM & ANR.

..... Appellants

Represented by: Mr.K.Singhal, Ms. Vani
Singhal, Mr. Sachin Agarwal
and Mr. Ajay Kumar,
Advocates.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Represented by: Ms. Rajni Gupta, APP with SI
Manoj PS Kanjhawala.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Appellants Gulfam, Shahbuddin, Rajesh @ Putiya, Bholu, Wasim, Siraj, Asif, Rizwan, Sita Ram and Kailash have been convicted for offences punishable under Sections 353/34 IPC, 307/34 IPC, 429/34 IPC, Sections 3 and 4 of the Prevention of Damage to the Public Property Act, 1984 (in short 'PDPP Act') and Section 8 punishable under Section 13 of the Delhi Agriculture Cattle Preservation Act, 1994 (in short 'DACP Act') read with Section 34 IPC. Asif has also been held guilty for offence punishable under Sections 25/27 Arms Act vide impugned judgment dated 1st October, 2014 which has been challenged in the present appeals besides the order on sentence dated 29th October, 2014.

2. Learned counsel for the appellants Gulfam, Wasim, Siraj, Sita Ram and Kailash, Mr. K. Singhal, in Crl. Appeal Nos. 524/2016, 172/2015, 466/2015, 443/2015 respectively submits that the conviction of the appellants is based on confessional statements of the accused and co-accused. Further prosecution witnesses were examined in a hurry, statements of the ten accused were recorded on 9th July, 2014 and arguments were heard on 20th August, 2014 and 10th September, 2014. Thereafter, the learned Trial Court proceeded to examine CW-1 Inspector Sudesh Kumar on 23rd September, 2014, the then SHO, Vijay Vihar and part of the raiding party. On the statement of this witness the entire prosecution case has been based, though this witness was not cited as a prosecution witness. Conviction of the appellants is based on conjectures and surmises. Though charge for

offence punishable under Sections 307/34 IPC was framed for firing however, the learned Trial Court convicted the appellants for offence punishable under Sections 307/34 IPC for pelting stones on the police vehicle. In any case the sentence of imprisonment for ten years awarded for offence punishable under Sections 307/34 IPC merely on the allegations of pelting stones on the Police Gypsy is highly excessive. The damage to the public property was not proved by mechanical inspection. No crime team was called at the spot. On the basis of the photographs, negatives whereof were not proved, the learned Trial Court held that there was a bullet mark on the police gypsy.

3. CW-1 is an unreliable witness as he went beyond the prosecution case to say that Bholu was also present at the spot. Without any mechanical inspection merely on the basis of photographs, that too, without any negatives, conviction for offence punishable under Sections 3 and 4 of the PDPP Act cannot be maintained. Further the sentence of five years rigorous imprisonment on this count is also highly excessive. The appellants have been convicted for offence punishable under Sections 353/34 IPC in a mechanical manner without there being any evidence on this count.

4. Despite the fact that the pickup van containing meat was deposited in the malkhana, as per PW-11 Constable Jai Prakash, the same pickup van loaded with meat was taken to Ghazipur for destroying the meat. In his deposition he has given the number of the vehicle to be the same as that deposited in the malkhana. The only appellants arrested at the spot were Wasim, Kailash, Sita Ram and Asif. Rest of the appellants were not apprehended at the spot and no test identification parade (TIP) was got conducted. Dock identification of the accused for the first time in the Court

cannot be relied upon in the absence of the TIP specially in a case where the witnesses had a fleeting glimpse of the accused even as per their version.

5. No proper expert opinion was proved to show that the meat allegedly found in the vehicle belonged to that of cows. Moreover, a bare perusal of the photographs, even if relied upon, would reveal that there was no place for ten assailants to stand in the vehicle with the same already loaded with meat. Though there is no evidence that any of the appellants killed the cows they have been convicted for the offence punishable under Sections 429/34 IPC and awarded rigorous imprisonment for a period of five years. Reliance is placed on the decisions reported as 1979 (3) SCC 319 Kanan & Ors. vs. State of Kerala, 1994 (5) SCC 188 Mehraj Singh (L/NK) vs. State of U.P., AIR 1994 SC 1133 Balkar Singh vs. State of Punjab, 1998 (4) SCC 494 Mohd. Iqbal M. Shaikh vs. State of Maharashtra, 1999 (3) SCC 54 Vijayan vs. State of Kerala, AIR 1999 SC 1557 Chandrakant Murgayappa Umrani & Ors. vs. State of Madhya Pradesh, 2001 (6) SCC 145 Takhaji Hiraji vs. Thakore Kubersingh Chamansing & Ors., JT 2002 (10) SC 424 Sukadev Giri vs. State of Orissa, 2008 (7) SCC 277 Nagraja vs. State of Karnataka, 2010 (7) SCC 697 Siddanki Ram Reddy vs. State of A.P., 2011 (7) SCC 421 Bhajan Singh @ Harbhajan Singh & Ors. vs. State of Haryana, 2013 (3) SCC 440 OMA @ Omprakash & Anr. vs. State of T.N., 2015 (6) SCC 623 Iqbal & Anr. vs. State of U.P., 1990 CriLJ 68 Parmod Kumar vs. The State, 1995 SCC OnLine Del 418 Ten Singh vs. State (Delhi Admn. and 2014 SCC OnLine Del 3923 Mohd. Bilal & Anr. vs. State.

6. Learned counsel for the appellants Shahbuddin and Rizwan, Mr. Harsh Prabhakar, in CrI. Appeal Nos. 1726/2014 and 712/2016 submits that the prosecution has failed to establish as to how the police officers could

have an enduring impression of the features of the appellants when they could not see them for more than few minutes specially when it was night hours with no artificial source of light available. In the FIR name of one Shahbuddin @ Bhura, r/o Village Ajrala, PS Sadar Mundali, District Meerut, U.P. was mentioned as disclosed by the co-accused apprehended at the spot, whereas appellant Shahbuddin is son of Abdul Rashid, r/o House No.519, Gali No.3, Purani Chungi, Rampur Road, Hapur, U.P. Thus, the identity of the appellants does not coincide with the information disclosed in the FIR. The appellant Shahbuddin was arrested after more than three years. Shahbuddin was neither arrested on the pointing out of any member of the raiding party nor any TIP was conducted. The appellants could not be convicted for offence punishable under Section 307 IPC with the aid of Section 34 IPC as the firing was done by Asif when the accused got down from the vehicle and started running to escape. There is no evidence led to show that Shahbuddin or Rizwan were aware that Asif was in possession of a Katta. Further the Katta was not fired at the raiding team while the raiding team was following the pickup van carrying the accused persons but while apprehending Asif. Thus at the time of firing, there was no common intention shared by the accused persons. The learned Trial Court created motive in the impugned judgment which was not even the case of the prosecution.

7. Learned Trial Court misdirected itself in law by placing reliance on the evidence of Dr. Narender Dabas, PW-8 and Dr. Neeraj Bhargava, PW-9 to come to the conclusion that the flesh of the slaughtered animals allegedly recovered from the pickup van was that of cows. The slaughtered animals were not sent to FSL and no report was thus received. Further no link

evidence has been produced to show that the two slaughtered animals produced for inspection before PW-8 and PW-9 were the same animals which were recovered from the alleged offending vehicle wherein the appellants were reportedly travelling. There are contradictions in the testimony of PW-8 and PW-9. Mere absence of cross-examination of PW-8 and PW-9 does not automatically result in a finding of guilt under the provisions of DACP Act.

8. Learned Trial Court erred in observing that the accused involved in the present case were part of the dreaded gang of cattle slaughters from Mewat when no evidence was led to indicate that the accused hailed from Mewat. No witness deposed that the appellants were part of the dreaded gang of cattle slaughter from Mewat. Even assuming that they hailed from the said region, no adverse inference can be drawn on this count alone. The learned Trial Court pressed into service the confessional statements to return a finding about the alleged modus operandi and place from where the cattle were picked up and slaughtered. Further reliance of the learned Trial Court on the electronic satellite map, screenshot of the spot of occurrence obtained from Google, without formal proof and in the absence of a certificate under Section 65B of the Indian Evidence Act was impermissible. In any case the sentence awarded is highly excessive as Shahbuddin and Rizwan have not been previously convicted or involved in any offence. Reliance is placed on the decisions reported as 2003 (9) SCC 444 *Moti & Ors. vs. State of U.P.*, 2012 (2) SCC 34 *Kailash Gour & Ors. vs. State of Assam*, 2017 SCC OnLine SC 27, *Md. Sajjad @ Raju @ Salim vs. State of West Bengal* and 2009 SCC OnLine Del 1668 *State of NCT of Delhi vs. Shiv Charan Bansal & Ors.*

9. Learned counsel for appellant Bholu, Mr. F. Haq in Crl. Appeal No. 10/2015 contends that the appellant was arrested on the disclosure statements of the co-accused wherein they stated that meat was unloaded at the shop of Bholu. Bholu was not named in the FIR nor arrested at the spot nor any of the co-accused disclosed about the presence of Bholu in the incident. Though the case of the prosecution was that Bholu was not present at the spot however, on the improved statement of CW-1 learned Trial Court held that Bholu was also present at the spot and involved in the offence. It is the case of the prosecution that from his godown three slaughtered cows were recovered. When the alleged recovery was made from the godown, Bholu was not present. There is no evidence led to show that the godown from where the three slaughtered cows were recovered was either in the tenancy of Bholu or owned by him. No public witness was associated with the recovery. Thus Bholu cannot be convicted for the recovery of the slaughtered cows from the godown also.

10. Learned counsel for Rajesh @ Putiya, Ms. Sanjam Chawla in Crl. A. No.1744/2014 adopting the arguments raised by Mr. Harsh Prabhakar, Advocate and Mr. K. Singhal Advocate in addition submits that the learned Trial Court heavily relied upon the photographs which were taken from a mobile phone which original mobile phone was never produced. The person who took the photographs on the mobile phone was not examined. No certificate under Section 65B of the Indian Evidence Act was produced. CW-1 deposed that he endorsed whatever SI Mahabir Singh did. However, SI Mahabir Singh did not appear as a witness. CW-1 is not the author of the photographs. The photographs show meat loaded in the pickup van however, there is no background showing where the pickup van was found.

Though Rajesh was arrested belatedly, no TIP was conducted and he was identified in the Court for the first time which identification cannot be relied upon. No recovery has been made pursuant to the arrest of Rajesh. Though as per the disclosure statements of the co-accused one Putiya was involved however, in his place Rajesh was arrested. Reliance is placed on the decision of Kailash Gour (supra).

11. Learned counsel for the appellant Asif, Mr. B. S. Chowdhary in Crl. A. No. 887/2015 adopting the arguments above noted further contends that the alleged recovery of Katta has been planted on the appellant Asif. Even as per the case of the prosecution, firing was only on the bonnet of the police gypsy. Thus Section 307 IPC is not attracted. Though no charge for offences punishable under Sections 25 and 27 Arms Act was framed against Asif however, he has been convicted for the same.

12. Learned APP for the State Ms. Rajni Gupta responding to Crl. A. Nos. 1726/2014, 10/2015, 172/2015, 466/2015, 887/2015, 712/2016 and 443/2015 submits that the common intention of all the convicts to commit the offence punishable under Section 307/34 IPC is established beyond reasonable doubt from the evidence on record in the form of statements of PW-22 Inspector Jasmohinder Chaudhary, PW-28 HC Rohtash, PW-31 Constable Pawan Kumar and CW-1. Appellants Wasim, Kailash, Sita Ram and Asif were apprehended at the spot besides Mohd. Saleem (PO) and Mohd. Yakub, since deceased. Pursuant to the disclosure statements of the accused apprehended at the spot recoveries were made which are admissible in evidence. Soon after the incident desi kattas (country made pistol with live cartridge) were recovered from both Asif and Mohd. Saleem (PO). Presence of fire arms with the accused itself shows that the accused shared the

common intention of committing the offence which if death would have been caused would have amounted to murder. Besides two desi kattas, four knives, three iron rods and bag full of stones (mountain rocks) were recovered from the pickup van used by the accused for attacking the police personnel chasing the pickup van.

13. PW-29 HC Subhash and PW-31 Constable Pawan Kumar deposed that when they tried to stop the pickup van UP 14 M 7786 by putting stones on the middle of the road and CW-1 Sudesh Kumar, SHO PS Vijay Vihar tried to obstruct the pickup van by putting his official gypsy on the road, the driver of the pickup van again escaped by turning the van on the other side and the accused persons sitting in the pickup van simultaneously started throwing stones on the police party to deter them from following. Although actual firing was done by Asif but all the remaining accused shared common intention as defined under Section 34 IPC and are liable for the acts of each other. Reliance is placed on the decisions reported as AIR 1924 Calcutta 257 King Emperor vs. Barendra Kumar Ghose, AIR 1933 Lahore 819 Indar Singh vs. Emperor, AIR 1933 Allahabad 528 Irshadullah Khan & Ors. vs. Emperor and 1995 JIJ 742 Mantha @ Badri Prasad vs. State of M.P. (DB).

14. Disclosure statements of the accused arrested at the spot revealing the names of the co-accused is admissible under Section 27 of the Indian Evidence Act as held by the Hon'ble Supreme Court in 2014 (14) SCC 640 Mehboob Ali vs. State of Rajasthan. No FSL report was required to prove the identification of the body parts of the animal which was duly proved by the testimony of the expert witnesses PW-8 and PW-9. Reliance is placed on the decision reported as 2015 CriLJ 476 Somnath vs. State of Chhattisgarh.

15. The appellants not apprehended at the spot refused to take part in the TIP and hence the plea that they could not be identified belatedly for the first time in the Court is required to be rejected. Reliance is placed on 2003 (6) Scale 698 Munna vs. State, NCT of Delhi and 2010 SCC OnLine Del. 1659 Guddu vs. State. Since nothing has been elicited in the cross-examination of the witnesses nor suggestions given to the witnesses, the pleas now being taken in the present appeals cannot be considered as the witnesses had no chance to explain the same. The plea that there was no visibility at the time of incident being wee hours of the morning deserves to be rejected for the reason the time of incident was 4.40 AM in the morning on 14th May, 2010, which is summer season. Further no cross-examination or suggestion has been given to the witnesses regarding the absence of source of light.

16. Version of the appellant Bholu that he was not present at the spot and hence cannot be convicted for offences charged with is belied by the evidence of CW-1 who deposed about his presence at the spot. Even though charge for offence punishable under Sections 25/27 Arms Act was not framed against Asif however, he can still be convicted for the same as a mere omission or error in the framing of charge does not vitiate the finding or sentence by the competent Court unless there is a failure of justice occasioned thereby which the appellant Asif has failed to demonstrate. Non-examination of SI Mahabir Singh, the complainant and member of the raiding party was for the reason that he was deputed to Sudan and thus could not be examined during the course of the trial however, every act of SI Mahabir Singh was witnessed by Inspector Sudesh Kumar CW-1 who has deposed and thus proved the incident and the documents prepared by SI Mahabir Singh as he had seen SI Mahabir Singh writing and signing in his

official capacity. No explanation has been rendered by any of the accused in their statements recorded under Section 313 Cr.P.C., therefore, the same is required to be treated as an additional link in the chain of circumstances.

17. Learned APP Ms. Meenakshi Chauhan, responding to Crl. A. Nos.524/2016 and 1744/2016 adopting the arguments of Ms. Rajni Gupta, learned APP submits that there was sufficient time for the police officials to identify the accused as they were following the pickup van and thereafter at the spot also the appellants were chased. Further six accused were apprehended at the spot. Testimony of police officials who were the eye witnesses and victims could not be discredited merely because they were police officials. Non-examination of the negatives of the photographs or mechanical inspection of the gypsy having not been got conducted does not affect the prosecution case as sufficient evidence has been led by the prosecution to prove the offences alleged against the appellants. PW-8 and PW-9 the expert witnesses were not cross-examined and hence their testimony has gone unchallenged. No overt act is necessary to attract Section 34 IPC and it has to be seen whether the accused acted with prior concerted mind or pre-planning. Reliance is placed on the decisions reported as AIR 1925 PC 1 Barendra Kumar Ghosh vs. King Emperor, AIR 1955 SC 216 Pandurang & Ors. vs. The State of Hyderabad. PW-11 deposed about weightment of the meat, which was found to be 1210 Kg. and destruction of the same at Ghazipur. The pleas now being taken cannot discredit the evidence of PW-11. DW-2 Shiv Lal the defence witness was not an eye witness and his evidence is hearsay, thus not admissible in evidence. Dossiers of all the accused were placed on record before the learned Trial Court to show their involvement in number of cases of theft/robbery of

cattle. Hence, the findings of the learned Trial Court, the judgment of conviction of the appellants and order on sentence are not liable to be set aside.

18. Before dealing with the individual appellants and contentions relevant to them it would be appropriate to deal with the evidence on record and legal issues common to all the appeals.

19. During the course of trial, prosecution examined nine eye witnesses to the occurrence, that is, PW-22 Inspector Jasmohinder Chaudhary, PW-24, HC Surender Dahiya, PW-26 HC Hari Chand, PW-27 HC Rakesh Kumar, PW-28 HC Rohtash, PW-29 Constable Subhash, PW-30 Constable Dhanraj, PW-31 Constable Pawan Kumar and PW-32 SI Praveen Atri. They were all members of the raiding party and deposed about the incident, arrest of six accused at the spot and their disclosure statements. SI Mahabir Singh, the Investigating Officer was not examined and CW-1 was examined by the Court who besides deposing about the incident, also deposed about all the documents prepared by SI Mahabir Singh.

20. It would be thus relevant to note the testimony of PW-22 as the testimony of other eye witnesses is also in sync with this deposition with minor variations which will be dealt with later on: -

“On 14.05.2010 I was posted as Sub Inspector in special staff of outer district. After the incidence of cow slaughtering in outer district a special team comprising of officials of special staff, outer district and police station Vijay Vihar was constituted to apprehend the criminals involved in the crime. On the same day all the members of the team were present in police station Vijay Vihar during the night and at about 3 AM information was received by SI Mahavir Singh through the secret informer that criminals involved in such crime would be coming/passing through the area of outer district in a pickup

van and the last digits of the van are 7786. It was also informed by the informer that there might be slaughtered cows in the van and the criminals might be carrying deadly weapons. This information was shared by SI Mahavir with Insp. Sudesh Kumar, SHO PS Vijay Vihar and other members of the team. A raid was planned and an entry in this regard was made by SI Mahavir Singh vide DD No.8A. After getting briefing from Insp. Sudesh Kumar and SI Mahavir Singh the team along with the secret informer proceeded towards the place where the suspected criminals were suppose to come. All the team members had gone there by private vehicles. At about 4-4.15 AM the team was again briefed by SI Mahavir Singh on Rani Khera village road towards the road that leads to Mundka Phatak. After proper briefing the staff was deployed by SI Mahavir Singh. In the meanwhile Insp. Sudesh Kumar along with staff had also reached there in the official gypsy.

At about 4.45 AM a white colour pickup van bearing No.UP-14M-7786 was seen coming from Mundka fatak side and proceedings towards Rani Khera village. On the pointing out of secret informer all the members of the team were put on alert by signaling that the criminals have arrived. As per plan HC Surender Dhaiya and Ct. Pawan had already been directed to put big stones in the middle of the road to force stop the vehicle. The driver of the pickup van was indicated to stop the vehicle but since he did not stop so as per the plan HC Surender and Ct. Pawan put big stones on the road in order to stop the said vehicle but they steered the vehicle to one side and tried to escape from there. SHO PS Vijay Vihar was already waiting on the road in his official gypsy while we followed the pickup van on our vehicles, SHO PS Vijay Vihar tried to obstruct the pickup van by putting his official gypsy on the road but the driver of the pickup van again escaped by turning the vehicle on the other side and the persons sitting in the pickup van simultaneously started throwing stones on us. One stone hit the official gypsy of the SHO PS Vijay Vihar which resulting into smashing of the front glass/wind screen of

the official gypsy. We somehow managed to overtake the pickup van and stopped the same after about 50 meters. Finding themselves surrounded the driver of the pickup van was compelled to stop the same and all the persons sitting inside it jumped out and started running in different directions. One of the persons who was trying to escape fired at police party which hit the bonnet of the gypsy of the SHO PS Vijay Vihar. HC Rohtash and Ct.Sandeep overpowered the said person who had fired and managed to apprehend him and snatched the katta from his hand. In the meanwhile another accused who was running away also took out a katta and as soon as he was about to fire on the police officials following him he was apprehended by HC Surender Dahiya with the help of Ct. Hari Chand and Ct. Kuldeep. Four other persons who were trying to escape were also apprehended by the other members of the police party whereas 5-6 persons managed to escape from the spot. The persons who were apprehended were then interrogated and their names were disclosed as Asif i.e. the person who had fired on the police party which fire had hit the bonnet. The second person was Mohd. Salim who was apprehended by HC Surender Dahiya and others with a katta in his hand when he was about to fire on the police party third was Yakub, fourth was Wasim, fifth was Sita Ram and one person was Kailash. I can identify all these persons and also some of them who had escaped by pointing out towards them.

At this stage, witness has correctly identified the accused Shahbuddin, S/o Abdul, accused Rizwan, Rajesh @ Puteya by pointing out towards them and not by names as the persons who had managed to escape from the spot.

At this stage witness has correctly identified the accused Wasim, Sita Ram, Kailash, Asif by name and also by pointing out towards them as the persons who were apprehended at the spot.

There were two kattas recovered from the hands of assailants i.e. one was recovered from the hand of Asif and

Salim were handed over to SI Mahavir Singh. The pickup was then inspected and it was found to contain three slaughtered and skinned cows and one plastic katta in open condition containing stones. When the search was conducted inside the cabin four knives and three pointed rods and three hooked iron rods were recovered by SI Mahavir Singh under the driver seat.

Thereafter SI Mahavir Singh prepared the rukka and send the same to the police station for registration of the case and also seized the various rods, knives and kattas/country made pistols recovered at the spot. After the registration of the case Insp. Gajender Singh SHO Kanjhawala to whom the further investigation were marked had come to the spot and conducted the further proceedings.

XXXXXXXXXX by counsel Sh. Ayub Ahmed Qureshi, by counsel Sh. Mohd. Mehtab, by counsel Ms Naiem Jahan Heena and by counsel Ms. Kusum Sah for all the accused persons.

As soon as the accused were apprehended the secret informer left the spot in another vehicle. The informer had left around 5 AM. It is correct that I am not a witness to any of the documents. Vol. I was present at the spot at the time of the investigations but did not sign any of the documents which were prepared by Insp. Gajender Singh or by SI Mahavir Singh. The Mundka Rani Khera road is a single road. It is wrong to suggest that it is a motorable road with a heavy traffic round the clock. Vol. there is very little traffic on the said road. In my presence SI Mahavir did not lift any chance prints allegedly recovered from the hands of Asif and Mohd. Salim. The rukka was written by SI Mahavir at the spot itself while sitting inside the official gypsy. I think it was HC Surender Dahiya who had taken the rukka to PS Kanjhawala and it was around 9 AM (morning) on 14.05.2010. HC Surender Dahiya and Insp. Gajender Singh returned at the spot when I was still present there at around 10.30 AM. IO SI

Mahavir Singh had requested some public persons to join the proceedings after the katta was recovered from the hands of Asif and Salim but none agreed but I was not aware if any notice for refusal was given by him to them. I am not aware if IO had prepared any other document before preparing the rukka. I left the spot at around 12:30 -1 PM (afternoon). Vol. from the spot we had gone to PS Kanjhawala. I had not made any arrival entry in the PS. Vol. IO can inform if he had made some combine entry. It is wrong to suggest that I was not a part of any police team or that I was not present at the spot and that is the reason my signatures are not present on any of the documents. It is wrong to suggest that because of non presence at the spot I am not aware of any details regarding the manner of preparation of documents and conduct of investigations by SI Mahavir. It is wrong to suggest that I am planted witness only to lend the creditability to the prosecution version regarding the incident. It is wrong to suggest that there was no such incidents as claimed by me or that the accused persons have been falsely implicated and wrong identified by me in the court only to work out the blind case.”

21. In addition to the testimony of the nine police witnesses, CW-1 also deposed regarding the sketch Ex.PW-24/B of a country made pistol recovered from Asif and seized vide memo Ex.PW-24/D. He also proved the recovery of pistol and the seizure memo Ex.PW-24/C from Saleem. He deposed about the three knives recovered from the driver's cabin of the offending vehicle UP 14M 7786 and the photographs of the knives taken at the spot vide Ex.CW-1/B9. He identified the photographs and the case property which were also seized by SI Mahabir Singh as Ex.CW-1/B1 to CW-1/B11. He identified the photographs of the pointed rods, hooks, cartridges. He also exhibited the various offending articles recovered from

the pickup van. Besides the facts noted above it would also be relevant to note portion of the testimony of CW-1 relating to the incident at the spot:-

“On S.A.

On 14.05.2010 I was working as SHO PS Vijay Vihar. On that day a secret information was received by SI Mahavir. This information was lodged vide DD no. 8A at 3.15 AM. The contents of secret information was conveyed to senior officers. A joint team comprising myself, SI Mahavir and other staff of PS Vijay Vihar and the police officials of Special Staff, Outer District. Thereafter the police team reached at the place pointed out by the secret informer i.e. at Mundka-Ranikhera Road near Ranikhera Village. I reached the spot separately from the team in my official Gypsey bearing no. DL 1C 4854. The member of raiding party were also briefed and they were deployed at the spot by SI Mahavir.

At about 4.45 AM one pick up van bearing number UP 14 M 7786 came. We had blocked the road by putting heavy stones on the road. We had blocked the road by putting heavy stones on the road. The driver of the said vehicle had tried to drive the vehicle by putting his van on Kachcha Road. We all staff started following the said vehicle with our vehicles. The persons sitting the pick up van started pelting stones on my Gypsy but finding surrounded by the police officials from all side, the pick up van stopped and the person sitting in the pick up van started running away. In this process one person had fired while he was being stopped which hit the bonnet of my gypsy. The said person was surrounded by us and chased and caught by HC Rohtash and his team. On interrogation the name of this person was known as Asif. At this stage the witness has correctly identified accused Asif by pointing out towards him as the person who had fired at him which fire hit the bonnet of his gypsey. Ct. Kuldeep, HC Surrender and Ct. Hari Chand had apprehended the other boy who was known Salim. Ct. Pawan, Ct. Ajit, HC Rakesh, Ct. Subhash and Ct. Dhanraj had apprehended the four accused persons. On interrogation their names were known as Kailash, Sita Ram,

Wasim and Yakoob. The remaining accused persons succeed in running away from spot. During interrogation the accused Asif, Saleem, Wasim, Kailash, Sita Ram and Yakoob disclosed the names of other associates who escaped from the spot as Bholu, Gulfam, Rajesh @ Putia and Siraj all residents of UP, Rajasthan and Delhi. Bholu is from Raghbir Nagar and Siraj resident of Meerut.”

22. Two major contentions of learned counsels for the appellants challenging their conviction for offence punishable under Sections 307/34 IPC are that charge for offence punishable under Sections 307/34 IPC was framed for firing at the police party however, they have been convicted for the offence punishable under Sections 307/34 IPC for pelting stones on the police party/vehicle and that since firing was done by Asif while escaping, the other appellants did not share any common intention for offence punishable under Section 307 IPC.

23. Prosecution witnesses of the raiding party as well as CW-1 have consistently deposed that that after CW-1 tried to obstruct the pickup van by putting his official gypsy on the road, the driver of the pickup van again escaped by turning the vehicle on the other side and the persons sitting in the pickup van simultaneously started throwing stones on them, out of which one stone hit the official gypsy of CW-1. Further after the pickup van stopped, occupants of the pickup van started running away and in the process one accused i.e. Asif fired, which according to CW-1, hit the bonnet of his gypsy. During the investigation, the stones which were seized from the vehicle were fairly big stones and if they would have hit any of the member of the police party, the impact would have been capable of causing death. Thus the contention of the learned counsels for the appellants that Section

307 IPC would attract, if at all only against Asif who fired at the police party and not against the others is required to be negated. No doubt, neither any mechanical inspection of the car was done nor were the photographs proved with the negatives, however, it is well settled that to prove the offence punishable under Section 307 IPC the intention of the accused has to be seen and it is not necessary that an injury should ensue from the act done. From the consistent deposition of the witnesses of the raiding party it can safely be held that the occupants of the pickup van hit at the police party with big stones/mountain rocks with the common intention to evade their being followed by the raiding party and to cause injury which would have resulted in death if the stone had hit any member of the police party. No mechanical inspection of the gypsy is necessary nor photographs, to prove the allegations that the occupants of the pickup van with a common intention threw stones at the raiding party thus amounting to offence punishable under Section 307/34 IPC.

24. Hon'ble Supreme Court in the decision reported as 2004 (6) SCC 485 Bappa @ Bapu vs. State of Maharashtra & Anr. held:

“7. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in

order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

25. Contention raised by the learned counsels for the appellants that as charge was framed for offence punishable under Sections 307/34 IPC for firing, they could not have been convicted for offence punishable under Sections 307/34 IPC for pelting stones on the police party is required to be rejected for the reason it is well settled that the conviction cannot be set aside merely due to an error in the charge and the accused has to demonstrate the prejudice caused on account of an error in framing the charge.

26. Hon'ble Supreme Court in the decision reported as 2012 (9) SCC 650 Bhimanna vs. State of Karnataka while dealing with the issue of an error in charge held:

24. In such a fact situation, a question also arises as to whether a conviction under any other provision, for which a charge has not been framed, is sustainable in law. The issue is no longer res integra and has been considered by the Court time and again. The accused must always be made aware of the case against them so as to enable them to understand the defence that they can lead. An accused can be convicted for an offence which is minor than the one he has been charged with, unless the accused satisfies the court that there has been a failure of justice by the non-framing of a charge under a particular penal provision, and some prejudice has been caused to the accused. (Vide Amar Singh v. State of Haryana [(1974) 3 SCC 81:1973 SCC (Cri) 789: AIR 1973 SC 2221].)

25. Further, the defect must be so serious that it cannot be covered under Sections 464/465 CrPC, which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that

there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the charges has led to a failure of justice, this Court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

26. This Court in Sanichar Sahni v. State of Bihar [(2009) 7 SCC 198: (2009) 3 SCC (Cri) 347 : AIR 2010 SC 3786] , while considering the issue placed reliance upon various judgments of this Court particularly on Topandas v. State of Bombay[AIR 1956 SC 33 : 1956 Cri LJ 138] , Willie (William) Slaney v. State of M.P. [AIR 1956 SC 116 : 1956 Cri LJ 291], Fakhruddin v. State of M.P. [AIR 1967 SC 1326 : 1967 Cri LJ 1197] , State of A.P. v. Thakkidiram Reddy [(1998) 6 SCC 554 : 1998 SCC (Cri) 1488 : AIR 1998 SC 2702] , Ramji Singh v. State of Bihar [(2001) 9 SCC 528 : 2002 SCC (Cri) 760 : AIR 2001 SC 3853] and Gurpreet Singh v. State of Punjab [(2005) 12 SCC 615 : (2006) 1 SCC (Cri) 191] and came to the following conclusion: (Sanichar Sahni case [(2009) 7 SCC 198 : (2009) 3 SCC (Cri) 347 : AIR 2010 SC 3786] , SCC p. 204, para 27)

“27. Therefore ... unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory.”

A similar view has been reiterated in Abdul Sayeed v. State of M.P. [(2010) 10 SCC 259: (2010) 3 SCC (Cri) 1262]

27. *In Shamnsaheb M. Multtani v. State of Karnataka [(2001) 2 SCC 577: 2001 SCC (Cri) 358 : AIR 2001 SC 921]* this Court explained the meaning of the phrase “failure of justice” observing that the superior court must examine whether the issue raised regarding failure of justice is really a failure of justice or whether it is only a camouflage. The court must further examine whether the said aspect is of such a nature, that non-explanation of it has contributed to penalising an individual, and if the same is true then the court may say, that since he was not given an opportunity to explain such aspect, there was “failure of justice” on account of non-compliance with the principles of natural justice. The expression “failure of justice” is an extremely pliable or facile an expression which can be made to fit into any situation of a case.

28. *The court must endeavour to find the truth. There would be “failure of justice” not only by unjust conviction but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and safeguarded but they should not be overemphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence. “Prejudice”, is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there has been serious prejudice caused to him with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then the accused can seek benefit under the orders of the court. (Vide Nageshwar Shri Krishna Ghobe v. State of Maharashtra [(1973) 4 SCC 23:1973 SCC (Cri) 664], State v. T. Venkatesh Murthy [(2004)*

7 SCC 763 : 2004 SCC (Cri) 2140 : AIR 2004 SC 5117], Rafiq Ahmad v. State of U.P. [(2011) 8 SCC 300 : (2011) 3 SCC (Cri) 498] and Rattiram v. State of M.P. [(2012) 4 SCC 516: (2012) 2 SCC (Cri) 481 : AIR 2012 SC 1485])

27. In the statements under Sections 313 Cr.P.C. the explanation of the appellants was sought for pelting stones with a common intention and they have cross-examined the witnesses also on that count; hence no prejudice caused has been shown by the appellants on this count. However, on facts which of the appellant can be held to have shared the common intention to commit the offence under Section 307 IPC will be dealt with later.

28. Section 353 IPC punishes for assault or criminal force to deter public servant from discharge of his duty. Thus not only Asif, who fired at the police party and was arrested, Wasim, Sita Ram and Kailash also not only did not stop on being asked, rather they tried to avoid the obstruction created by the police party to stop the pickup van and also pelted stones on the police party. From the oral evidence of the witnesses and even in the absence of mechanical inspection of the gypsy and photographs being proved without the negatives, it can safely be held that appellants whose presence at the spot is established on record and who used criminal force to deter public servants in discharge of their duty have been rightly convicted for offence punishable under Sections 353/34 IPC and not in a mechanical manner.

29. The next limb of arguments of learned counsels for the appellants is that none of the witnesses saw the appellants killing animal which is a substantive offence and merely by possession of cow meat it cannot be held that the appellants are guilty for offence punishable under Sections 429/34

IPC; it has not been proved that the meat found in the pickup van was of cows and the link evidence has not been proved.

30. To prove that meat found in the pickup van was of slaughtered cows, the prosecution has examined two doctors. PW-8 Dr. Narender Dabas working in the Veterinary Hospital, MCD Rohini deposed that he inspected the slaughtered animals in the tempo TATA-407 parked at PS Rohini South and found two slaughtered cows which he could make out from the skin attached to the hooves of the slaughtered animals. Similarly, PW-9 Dr. Neeraj Bhargava, Veterinary Surgeon, Veterinary Hospital, Badli who also inspected the vehicle, found two slaughtered cows duly identified from the skin attached to the hooves. Both these witnesses have not been cross-examined. Thus, it can be safely held that the meat in the TATA-407 was of the slaughtered cows.

31. Learned counsel for the appellants contended that as per the testimony of PW-11 he took the pickup van with the meat for destruction of the same whereas the same was deposited in the malkhana. PW-1 Retd. HC Vijay Singh, the moharar malkhana appeared in the witness box and in his evidence by way of affidavit Ex.PW-1/1 which was tendered in examination-in-chief stated that vide Ex.PW-1/A he deposited the articles in the malkhana. The articles deposited in the malkhana were the weapons of offence recovered, the cement bag with stones etc. It does not state about the deposition of the pickup van bearing No.UP 14 M 7786 Mahindra in the malkhana which was only brought to the police station. Further PW-11 stated that on 14th May, 2010 he was posted at PS Kanjhawala and on the directions of the SHO on that day he went to Ghazipur at 4.30 PM along with the meat pickup van bearing No.UP 14 M 7786 for destroying the

recovered meat. After he reached Ghazipur, the meat was weighed at the MCD weighing machine and was found to be 1210 kgs. Thereafter, he got the meat destroyed and the vehicle was brought to the police station and handed over to the SHO. This witness has not been cross-examined by any of the accused and thus his testimony has gone unchallenged. Therefore, the challenge of learned counsels for the appellants that the prosecution has failed to prove the link evidence deserves to be rejected.

32. However, the issue still remains whether the appellants can be convicted for offence punishable under Section 429 IPC because there is no evidence that any witness saw them killing the animals though they were found in possession of the killed animals. The appellants have been convicted under Section 429 IPC with the aid of Section 34 IPC which requires an overt act unlike with the aid of Section 120B IPC which punishes every conspirator of the crime.

33. Section 429 IPC provides as under:

“429. Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees.—Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

34. Section 429 IPC aims at punishing the killing, poisoning or maiming a particular category of animals detailed in the Section. None of the witnesses have deposed having seen any of the appellants killing, maiming or poisoning or rendering useless any of the cows. In order to constitute an act

of mischief under Section 429 IPC there must be a physical injury caused from a physical cause.

35. Section 425 defines mischief as under:

“425. Mischief.—Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits “mischief”.

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly. ”

36. Thus, for punishing an accused for offence punishable under Section 429 IPC the fact that the accused caused the act of mischief is required to be proved. As noted above, in the present case there is no material whatsoever to come to the conclusion that the appellants killed the cows though they were found in possession of the slaughtered cows. Mere possession of the slaughtered cows cannot be held to be an offence punishable under Sections 429 IPC for which the appellants have been charged.

37. Section 114 of the Indian Evidence Act, 1872 and illustration (a) thereof provide as under:

“114 Court may presume existence of certain facts. —The Court may presume the existence of any fact which it

thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustrations the Court may presume—

- (a) *That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;”*

38. Dealing with this illustration the Hon’ble Supreme Court in the decision reported as 2011 (11) SCC 666 State of Rajasthan vs. Talevar & Anr. held:

“12. Thus, the sole question remains to be decided whether adverse inference could be drawn against the accused merely on the basis of recoveries made on their disclosure statements.

13. In Gulab Chand v. State of M.P. [(1995) 3 SCC 574 : 1995 SCC (Cri) 552 : AIR 1995 SC 1598] this Court upheld the conviction for committing dacoity on the basis of recovery of ornaments of the deceased from the possession of the person accused of robbery and murder immediately after the occurrence. In Geejaganda Somaiah v. State of Karnataka [(2007) 9 SCC 315: (2007) 3 SCC (Cri) 135 : AIR 2007 SC 1355] this Court relied on the judgment in Gulab Chand [(1995) 3 SCC 574: 1995 SCC (Cri) 552: AIR 1995 SC 1598] and observed: (Geejaganda case[(2007) 9 SCC 315: (2007) 3 SCC (Cri) 135 : AIR 2007 SC 1355] , SCC p. 328, para 28)

“28. ... ‘4. ... that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the facts and

circumstances of the case and the nature of evidence adduced.’ [Ed.: As observed in Gulab Chand case, (1995) 3 SCC 574, p. 577, para 4 : 1995 SCC (Cri) 552, p. 555, para 4.] ”

It has been indicated by this Court in Sanwat Khan v. State of Rajasthan [AIR 1956 SC 54 : 1956 Cri LJ 150] , that no hard-and-fast rule can be laid down as to what inference should be drawn from certain circumstances.

14.

15. ...

16. ...

17. ...

18. Thus, the law on this issue can be summarised to the effect that where the only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. It also depends on the nature of the property so recovered, whether it was likely to pass readily from hand to hand. Suspicion should not take the place of proof.”

39. Thus merely because the appellants were allegedly found in possession of the slaughtered cows the presumption that they killed the animals cannot be raised. Therefore, the appellants are liable to be acquitted of the charge for offence punishable under Section 429 IPC. However, having been found in the possession of the flesh of slaughtered agriculture cattle the conviction of the appellants whose presence at the spot is established for offence under Section 8 punishable under Section 13 of the DACP Act is made out.

40. Learned counsels for the appellants have strenuously challenged the conviction for offences punishable under Sections 3 and 4 of the PDPP Act and the resultant sentence of rigorous imprisonment of five years on this count. Testimonies of CW-1, PW-22, PW-24, PW-26, PW-27, PW-28, PW-29, PW-30 and PW-31 are consistent that when the police gypsy started following the pickup van, the occupants of the pickup van started pelting stones at the gypsy resulting in damage to the vehicle. Even in the absence of mechanical inspection, from the evidence of these witnesses and absence of specific cross-examination on this aspect it can safely be held that the prosecution has proved beyond reasonable doubt that damage to public property was caused.

41. Indubitably, accused whose presence at the spot is not established cannot be held guilty for offences punishable under Sections 307/34, 353/34 IPC, Sections 8/13 DACP Act and Sections 3/4 PDPP Act. From the evidence of the witnesses as noted above it has been proved beyond reasonable doubt that appellants Asif, Wasim, Kailash and Sita Ram were present and apprehended at the spot. Thus the prosecution has proved that appellants Asif, Wasim, Kailash and Sita Ram have committed offences punishable under Sections 307/34 and 353/34 IPC, Section 8 read with Section 13 of the DACP Act and Sections 3 and 4 of the PDPP Act.

42. Appellant Asif was apprehended at the spot. He fired at the police party while running away which is evident from the testimonies of CW-1 and the nine police witnesses and the weapon of offence/firearm (desi katta) was seized at the spot vide seizure memo Ex.PW-24/D. PW-7 Dr. N.P. Waghmare, Assistant Director, FSL appeared in the witness box and exhibited his opinion stating that the weapon of offence recovered from the

appellant Asif was a country made pistol, besides the ammunitions which were both covered under the Arms Act and were in working condition. However, as contended by learned counsel for Asif, no charge for offences punishable under Sections 25/27 Arms Act was framed against him.

43. There is a difference between an error in charge and no charge being framed. As noted above no charge for offences punishable under Sections 25/27 Arms Act was framed against Asif. It is not the case that a charge for a major offence was framed and Asif has been convicted for a minor offence. In the absence of any charge framed on this count, Asif cannot be convicted for offence punishable under Sections 25/27 of the Arms Act.

44. Constitution Bench in the decision reported as AIR 1956 SC 116 Willie (William) Slaney vs. State of Madhya Pradesh held:

“97. The framing of a charge in trial of cases in which a charge is required to be framed, is one of the important elements in the mode of a trial. On the charge framed, after it has been explained to the accused, the plea of guilty or not guilty is recorded. If the accused pleads guilty, certain consequences follow. If he pleads not guilty, the trial must proceed according to law. When a charge is not framed, obviously no plea of the accused with reference to it is taken and the trial has proceeded without such a plea. Is the framing of a charge and the recording of the plea of the accused merely a ritual or a fundamental provision of the Code concerning procedure in a criminal trial? I think it is the latter. Are the express provisions of the Code as to the manner in which a trial is to proceed to be ignored, or considered as satisfied, merely because the Court explained to the accused as to what he was being tried for? I apprehend not. For to do so is to replace the provisions of the Code by a procedure unwarranted by the statute itself. In my opinion, a total absence of a charge from start to finish in a case where the law requires a charge to be framed, is a contravention of the

provisions of the Code as to the mode of trial and a conviction of the accused of an offence in such a case is invalid and the question of prejudice does not arise. None of the decisions of the Privy Council suggest that in such a case the conviction will be deemed to be valid by virtue of the provisions of Section 535, unless the Court is satisfied that there has been a failure of justice.

45. Following the Constitution Bench decision in Willie Slaney (supra) Hon'ble Supreme Court in the decision reported as 2003 (11) SCC 534 Sohan Lal @ Sohan Singh & Ors. vs. State of Punjab held:

"7. Section 211 of the Code of Criminal Procedure requires that the charge against the accused be precisely stated. Sub-section (4) of Section 211 of the Code of Criminal Procedure specifically requires that the law and section of the law against which the offence is said to have been committed shall be mentioned in the charge. The learned counsel for the respondent State, relying on Section 464 of the Code of Criminal Procedure, urged that failure to specify Section 109 in the charge-sheet against Sohan Lal was a mere irregularity which would not vitiate the trial without proof of prejudice to the accused. We cannot agree. The learned counsel for the accused is fully justified in his submission that failure to frame a charge with regard to the substantive offence of Section 109 IPC has certainly prejudiced the accused in the trial court. The accused Sohan Lal @ Sohan Singh was called upon to face trial only for the charge under Section 304-B IPC. Neither a charge under Section 302 IPC nor under Section 109 IPC, was levelled against him in the charge-sheet. In the absence of a charge being framed against the accused Sohan Lal under Section 302 or 109 IPC, it would certainly cause prejudice to him, if he is convicted under either of these offences at the end of the trial. In our view, it was not permissible for the trial court to convict the first accused Sohan Lal for the offence under Section 302 read with Section 109 IPC. His conviction under Section 302 read with Section 109 IPC is, therefore, illegal and is liable to be set aside. The

High Court erred in upholding the conviction of Sohan Lal @ Sohan Singh under Section 302 read with Section 109 IPC and dismissing his appeal.”

46. In view of the discussion aforesaid though conviction of appellant Asif is upheld for offences punishable under Section 307/34 and 353/34 IPC, Section 8 read with Section 13 of the DACP Act and Sections 3 and 4 of the PDPP Act, he is acquitted for offences punishable under Sections 25/27 of the Arms Act.

47. Appellant Shahbuddin was not apprehended at the spot. As per the disclosure of Asif, Wasim, Sita Ram and Kailash, Shahbuddin @ Bhura R/o Village Ajerala, Police Station Sadar, Mandali, District Meerut was one of the accomplices who succeeded in running away. The police party as noted above comprised of PWs 22, 24, 26, 27, 28, 29, 30, 31 and CW-1 besides SI Mahabir who could not be examined. Shahbuddin, the appellant herein was arrested on 1st July, 2013. Shahbuddin who was arrested and faced trial was Shahbuddin S/o Abdul Rashid R/o H.No.519, Gali No.3, old Chungi, Rampur Road, Hapur (UP). Thus, the description of Shahbuddin as given in the disclosure statement of the co-accused does not match with the description of Shahbuddin who faced the trial. Further Shahabuddin was not arrested at the instance of any member of the raiding party. There is no material to show how PW-35 SI Sudhir Rathi identified Shahbuddin S/o Abdul Rashid R/o H.No.519, Gali No.3, Old Chungi, Rampur Road, Hapur (UP) as co-accomplice of Asif, Wasim, Kailash and Sita Ram.

48. As per the case of the prosecution, Shahbuddin S/o Abdul Rashid was arrested on 1st July, 2013. No disclosure statement was recorded on the said date and the one on record Ex.PW-35/A was recorded on 4th July, 2013.

PW-17 HC Devender Singh appeared in the witness box and stated that on 1st July, 2013, he received a secret information that one person by the name of Shahbuddin wanted as an accused in the present case and had been declared a proclaimed offender was present in Hapur. He shared the information with senior officers and thereafter went to Hapur bypass. The informer disclosed that there was a cattle fare at Tehsil Gulwathi and Shahbuddin was present there. At the Gulwathi Cattle Fare, Shahbuddin was arrested on the pointing out of the informer. On interrogation, the appellant confirmed his name as Shahbuddin S/o Mohd. Rashid R/o Aliganj, Rampur Road, Hapur. Though PW-35 stated that he collected the disclosure statement of Shahbuddin from Special Staff Office however, PW-17 in his cross-examination stated that he did not record the disclosure statement of Shahbuddin at any point of time.

49. Prosecution also examined PW-19 HC Gulab Singh who was also part of the team which apprehended the appellant Shahbuddin on 1st July, 2013. He deposed in sync with PW-17 about the raid having been made on the secret information and apprehension of Shahbuddin from cattle fare at the instance of the secret informer. Though he stated that disclosure statement of Shahabuddin was recorded but no disclosure statement of Shahabuddin was placed on record.

50. PW-35 deposed that on 1st July, 2013, an information was received in the Police Station from HC Devender Singh, Special Staff, Outer District regarding apprehension and arrest of Shahbuddin, who had been sent to judicial custody till 4th July, 2013. In the evening, PW-35 went to the office of Special Staff and obtained the documents relating to kalandara, arrest, personal search and disclosure statement made by the accused. As noted

above disclosure statement purportedly made on 1st July, 2013 has not been exhibited. As per PW-35, on 4th July, 2013, Shahbuddin was produced before the learned Metropolitan Magistrate in muffled face and with the permission of learned Magistrate, he interrogated Shahbuddin and thereafter arrested him vide memo Ex.PW-4/A and recorded his disclosure statement vide memo Ex.PW35/A. No recovery pursuant to Ex.PW-35/A was made and thus the said disclosure statement is not admissible in evidence.

51. Neither PW-35 nor PW-17 nor PW-19 deposed that an application for TIP of Shahbuddin was filed by them after his arrest. Further the application if any filed for the TIP or the proceedings thereon have not been exhibited during the trial. Further though four witnesses, that is, PWs-22, 28, 30 and 31 identified Shahbuddin in Court to be the accused who ran away, they just had a fleeting glimpse of Shahbuddin whereas two witnesses i.e. PW-22 and PW-27 failed to identify Shahbuddin even in Court.

52. In view of the nature of evidence on record showing that there is a difference in the parentage and address of Shahbuddin in the disclosure statement of the co-accused and the one who was arrested and that no evidence has been led by the prosecution to prove that TIP of Shahbuddin was got conducted and he refused the same so that an adverse inference could have been drawn, benefit of doubt has to be granted to the appellant. Shahbuddin is thus acquitted of all the charges.

53. As per the case of the prosecution, Gulfam succeeded in running away from the scene of crime. His name appeared in the disclosure statement of the four co-accused Asif, Wasim, Sita Ram and Kailash arrested at the spot. In their disclosure statement, they stated that their accomplices who managed to run away included Gulfam R/o Idgah Road. No parentage of Gulfam was

given nor any description was given by the witnesses in the FIR and in their statements recorded under Section 161 Cr.P.C. Gulfam was arrested on 9th April, 2013 after nearly 3 years of the incident.

54. As per the testimony of PW-18 HC Neeraj Rana of the Special Staff, on 9th April, 2013 a secret information was received that one person belonging to the cow slaughtering gang who is proclaimed offender in the present case and whose associates were earlier arrested, would be coming to Mangolpuri Railway Station. Gulfam S/o Ismail R/o Hapur Chungi, Meerut was arrested while walking near Safal Dairy side towards Manglopuri Railway Station on the pointing out of the secret informer. He was arrested under Section 41.1(c) Cr.P.C. and information sent to PS Kanjhawala. PW-18 deposed having recorded the disclosure statement of Gulfam, however, the same has not been exhibited.

55. Admittedly, arrest of Gulfam was not on the identification of a member of the raiding party. PW-35 having received information from PW-18 on 9th April, 2013 about apprehension of Gulfam and that he would be produced before the learned Metropolitan Magistrate on 10th April, 2013 went to the Court and requested for the formal arrest of Gulfam. PW-35 deposed that Gulfam was produced in Court with his face unmuffled. He then formally arrested Gulfam S/o Ismail and recorded his disclosure statement however, since no recovery was made pursuant to the disclosure statement, the same is not admissible in evidence.

56. It is pertinent to note that the address of Gulfam mentioned in the disclosure statement of Gulfam and that as mentioned in the disclosure statement of the co-accused recorded on the day of incident i.e. 14th May, 2010 is different. The explanation of PW-35 in his cross-examination is that

he was not required to get conducted TIP of Gulfam, for the reason he was specifically named in the FIR thus obviating the need to conduct TIP. Gulfam was named in the disclosure statement of the co-accused and not in the statement of the witnesses. The witnesses had a fleeting glimpse of Gulfam while the accused was pelting stones on the police party and/or while he was fleeing away. Thus, not conducting TIP on the ground that Gulfam was named in the FIR was an error in investigation. Moreover, the TIP could also not be conducted for the reason Gulfam was produced in unmuffled face in Court, thereby giving occasion to the witnesses to see him earlier.

57. In the deposition before the Court though PW-24, PW-26, PW-27 identified Gulfam as the person who escaped however, they were unable to name him. Though PW-28 named Gulfam, he was unable to identify him. PW-29 neither named nor identified Gulfam and the only witness who identified and named him was PW-30. Further the witnesses who identified Gulfam, identified him through the dossier as he was exempted from appearing in Court on the said date.

58. This Court is of the opinion that reliance cannot be placed on the testimony of these witnesses regarding identification of Gulfam as they had only a fleeting glimpse of Gulfam on 14th May, 2010 and in Court through the dossier. Thus this Court deems it fit to grant benefit of doubt to Gulfam. He is thus acquitted of all charges.

59. On 14th May, 2010 four accused who were apprehended at the spot did not name their accomplice as Rajesh but as Putiya. Rajesh @ Putiya was arrested by PW-15 HC Raj Kumar on 22nd April, 2013 at Shamshan Ghat Road, Sector 8, Rohini after receipt of a secret information. Disclosure

statement of Rajesh @ Putiya was recorded by PW-15 on the same date vide memo Ex.PW-15/B however, no recovery was made pursuant to the same thus the same is not admissible in evidence.

60. PW-15 arrested Rajesh @ Putiya under Section 41.1(c) Cr.P.C. Information about the arrest of Rajesh @ Putiya was sent to PS Kanjhawala which was marked to PW-20 SI Arun Lather, on 22nd April, 2013 vide DD No. 72B exhibited as Ex. PW-20/A. On 26th April, 2013 PW-20 went to the office of Special Staff and recorded the statement of the official staff who arrested Rajesh @ Putiya and also obtained the copy of the Kalandara Ex. PW-15/C. On 3rd May, 2013, he filed an application before the learned Metropolitan Magistrate for producing Rajesh @ Putiya before the Court which was rejected by the learned Metropolitan Magistrate and he was directed to approach the Superintendent, Jail. On 8th May, 2015 he went to the Jail and formally arrested Rajesh @ Putiya vide arrest memo Ex. PW-20/B and recorded his disclosure statement Ex. PW-20/C. On 9th May, 2013 Rajesh @ Putiya was produced in Court of learned Metropolitan Magistrate and while being produced he was identified by SI Mahabir Singh who was the complainant of the case. From the evidence of PW-20 it is clear that sufficient time had elapsed when Rajesh @ Putiya was formally arrested and no TIP was got conducted. Further, SI Mahabir Singh who identified Rajesh @ Putiya in the Court has not been examined as a witness. Rajesh @ Putiya was identified by PWs. 22, 26, 27, 28, 29 and 31 by pointing out from the dossier but none of them was able to name him. As noted above, no TIP was conducted of Rajesh @ Putiya and for the first time, he was identified by the witnesses in Court who just had a fleeting glimpse while pelting

stones and/or escaping after a period of four years and that too from the dossier.

61. In view of the aforesaid discussion, the identification of Rajesh @ Putiya by the witnesses for the first time in Court that too, through the dossier is not sufficient to convict the appellant of the offences charged with. Thus this Court deems it fit to grant benefit of doubt to Rajesh @ Putiya. He is acquitted for the charges framed.

62. Siraj was arrested by PW-14 ASI Suresh Rana of Special Staff, Outer District on 4th September, 2012 pursuant to secret information from near the office of Delhi Jal Board, Sector 8, Rohini, Delhi. He was arrested and his disclosure statement was recorded vide memos Ex.PW-14/A and PW-14/C respectively. However, since no recovery was made pursuant to the disclosure statement, the same is of no value.

63. PW-21 SI Rajesh Kumar of PS Kanjahawala stated that on 4th September, 2014 he received the information about arrest of Siraj. On 11th September, 2012 he obtained the permission from the learned Metropolitan Magistrate and on 12th September, 2012 went to the Central Jail, Tihar and formally arrested Siraj vide memo Ex. PW-21/B. He also recorded his disclosure statement vide Ex.PW-21/C however, since there is no recovery pursuant to the disclosure statement the same is not admissible in evidence. On the next date, that is, 13th September, 2012 Siraj was produced before the learned Metropolitan Magistrate and remanded to judicial custody.

64. As noted from the deposition of the two witnesses it is evident that no effort was made to get the TIP of Siraj conducted. Siraj was not arrested at the pointing out of any member of the raiding party. The only witness who identified Siraj in the Court was PW-27 and that too, by name. Though

present in Court Siraj could not be identified by the said witness. The other witness who identified Siraj as the person present who escaped from the spot was CW-1. As noted above, the witnesses had only a fleeting glimpse of the accused either while running away and/or pelting stones and on the identification of these two witnesses that too after nearly four years, it would be unsafe to convict Siraj. Thus this Court deems it fit to grant benefit of doubt to Siraj. He is acquitted for the charges framed.

65. In respect of Rizwan, the only witness produced by the prosecution is PW-13 Constable Sunil who stated that he was posted at PS Kanjhawala and had accompanied PW-35. He deposed that on 16th February, 2013 they were posted at PS Kanjhawala and went to Rohini Court where Rizwan was produced and after interrogating him, he was arrested vide memo Ex.PW-13/A and his disclosure statement recorded vide memo Ex.PW-13/B. Application for Test Identification of Rizwan was filed on 5th June, 2013 when he was produced in muffled face and he refused. Though arrested on 16th February, 2013 and taken to various places and pointing out memos were prepared, TIP was sought to be conducted for the first time only on 5th June, 2013. Rizwan refused TIP on the ground that police officials had taken his photograph. Even in the deposition before Court, PW-22, PW-24, PW-30 and PW-31 pointed out towards Rizwan whereas PW-27 named him but did not identify him as the person who had escaped from the spot. As noted above, the witnesses had a fleeting glimpse of the accused either while running away and/or pelting stones and on such identification by the witnesses that too after nearly four years, it would be unsafe to base the conviction. Thus, this Court deems it fit to grant benefit of doubt to Rizwan. He is acquitted for the charges framed.

66. Learned counsels for Bholu has seriously challenged his presence at the spot and states that his name came in the disclosure statements of the co-accused stating that meat was supplied to the godown of Bholu and that recovery of meat could be done from the godown of Bholu. Except CW-1 no witness stated that Bholu was one of the accused who was present and escaped from the spot. As noted above no previous statement of this witness was recorded. Moreover, the case of the prosecution in the FIR was that the meat was supplied to the godown of Bholu and not that he escaped from the spot. Considering the nature of evidence and the fact that Bholu's name appears only in the disclosure statement that too in regard to the fact that meat was to be delivered at the godown of Bholu, conviction of Bholu cannot be based on the sole testimony of CW-1. Thus this Court deems it fit to grant benefit of doubt to Bholu in respect of his presence at the spot.

67. Further the prosecution has sought to prove the recovery of meat from the godown of Bholu. As contended by learned counsel neither at the time of recovery Bholu was present at the godown nor was any document collected to show that Bholu either owned or possessed the godown from where the recovery was made so that he can be held to be in conscious possession of slaughtered cows. Thus, Bholu is entitled to the benefit of doubt on this count as well.

68. From the consistent testimony of the witnesses, arrest memos and disclosure statements of the accused it can safely be held that Asif, Wasim, Kailash, Sita Ram, Saleem (P.O.) and Yakub (deceased) were apprehended at the spot. In view of the discussion aforesaid conviction of appellants Wasim, Sita Ram, Kailash and Asif who were apprehended at the spot is upheld for offences punishable under Sections 307/34 IPC, 353/34 IPC,

Sections 3 and 4 of the PDPP Act and Section 8 read with Section 13 of the DACP Act. Appellants Gulfam, Siraj, Rajesh @ Putiya, Rizwan, Shahbuddin and Bholu are acquitted as the prosecution has not proved beyond reasonable doubt their involvements in the offences charged with.

69. As regards the quantum of sentence, Wasim, Sita Ram, Kailash and Asif have been awarded sentence for rigorous imprisonment for a period of ten years and fine of ₹10,000/- in default whereof to undergo simple imprisonment for one month for offence punishable under Section 307 IPC, rigorous imprisonment for a period of two years for offence punishable under Section 353 IPC, rigorous imprisonment for a period of five years and ₹200/- fine in default whereof to undergo simple imprisonment for a period of one week under Sections 3 and 4 of the PDPP Act and rigorous imprisonment for a period of one year for offence punishable under Section 8 read with Section 13 of the DACP Act.

70. Though the charge on the appellants for offence punishable under Section 307 IPC was for firing however, they have been convicted for offence punishable under Section 307 IPC for pelting stones, except Asif who fired at the police party while escaping and has been convicted on this count as well. The sentence of rigorous imprisonment for a period of ten years for offence punishable under Section 307 IPC qua Wasim, Sita Ram and Kailash is on the higher side as no previous conviction of these appellants has been proved and further they have been convicted only for pelting stones with the intention that if injury would have caused the same would have caused murder. Thus the sentence of Wasim, Sita Ram and Kailash is reduced to rigorous imprisonment for a period of five years and to pay a fine of ₹10,000/- and in default whereof to undergo simple

imprisonment for a period of two months for offence punishable under Section 307/34 IPC. As regards Asif, since he fired on the police party while running away, besides pelting stones and is also involved in a number of other cases, he is directed to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹30,000/- and in default whereof to undergo simple imprisonment for a period of six months for offence punishable under Section 307/34 IPC. The sentence of appellants Asif, Wasim, Sita Ram and Kailash for rigorous imprisonment for a period of two years is maintained for offence punishable under Section 353/34 IPC. As regards sentence of Asif, Wasim, Kailash and Sita Ram for offence punishable under Sections 3 and 4 of PDPP Act, the same is reduced to rigorous imprisonment for two years with fine of ₹2,000/- in default whereof to undergo simple imprisonment for one week. The sentence awarded to Asif, Wasim, Kailash and Sita Ram of rigorous imprisonment for a period of one year for offence punishable under Section 8 read with Section 13 of the DACP Act by the learned Additional Sessions Judge is maintained. Asif, Wasim, Sita Ram and Kailash are acquitted of offences punishable under Sections 429/34 IPC. The sentences are directed to run concurrently.

71. The impugned judgment of conviction is upheld to the extent of conviction of Asif, Wasim, Sita Ram and Kailash for offences punishable under Sections 307/34 IPC, 353/34 IPC, Section 3 and 4 of PDPP Act and Section 8 read with Section 13 of the DACP Act and the order on sentence is modified as above. Crl. A. Nos. 887/2015, 172/2015 and 443/2015 are disposed of modifying the impugned judgment of conviction against Asif, Wasim, Sita Ram and Kailash only to the extent that they are acquitted for offence punishable under Sections 429/34 IPC. Their conviction for

offences punishable under Sections 307/34 IPC, 353/34 IPC, Section 3 and 4 of PDPP Act and Section 8 read with Section 13 of the DACP Act is upheld. Order on sentence of Asif, Wasim, Sita Ram and Kailash is modified as stated hereinbefore. Asif, Wasim, Sita Ram and Kailash will undergone the remaining sentence.

72. Crl.A. Nos. 1726/2014, 524/2016, 1744/2014, 466/2015, 712/2016, and 10/2015 are allowed. Judgment of conviction and order on sentence qua appellants Shahbuddin, Gulfam, Rajesh @ Putiya, Siraj, Rizwan and Bholu are set aside. Shahbuddin, Gulfam, Rajesh @ Putiya and Rizwan, who are in custody, be released forthwith if not required in any other case. During the pendency of the appeals the sentence of Siraj and Bholu was suspended by this Court. Their bail bond and the surety bonds are discharged.

73. Trial Court record be sent back.

74. Copy of the order be sent to the Superintendent Tihar Jail for updation of record.

(MUKTA GUPTA)
JUDGE

MAY 25, 2017

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