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IN THE HIGH COURT OF DELHI AT NEW DELHI

*Judgment reserved on 19th November, 2018
Judgment pronounced on 04th February, 2019*

+ **CRL.A. 234/2016**

PRADEEP DABAS

....Appellant

Through: Mr. Siddharth Luthra, Senior advocate
with Mr.R.S. Malik, Mr. Kumar Vaibhav and
Mrs. Aayushi S. Khazanchi, Advocates

Versus

THE STATE.

.... Respondent

Through: Mr. Ravi Nayak, APP with insp. Ajay Kumar,
I.O (Original), PS Bholaswa Dairy

+ **CRL.A. 236/2016**

YOGESH@ SONU THARU

.... Appellant

Through: Mr. Siddharth Luthra, Senior advocate
with Mr.R.S. Malik, Mr. Kumar Vaibhav and
Mrs. Aayushi S. Khazanchi, Advocates

Versus

THE STATE.

...Respondent

Through: Mr. Ravi Nayak, APP with insp. Ajay Kumar,
I.O (Original), PS Bholaswa Dairy

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J

CRL.A. 234/2016 & CRL.A. 236/2016

1. The present Appeals are instituted on behalf of the appellants under Section 374(2) of the Code of Criminal Procedure, 1973, (hereinafter referred as “Cr.P.C.”) against the impugned judgment of conviction dated 28.01.2016 and order on sentence dated 30.01.2016 passed by the Court of ASJ, Rohini Court, Delhi , (FIR No. 725/2013, P.S. Vijay Nagar, West Delhi), registered under section 302/34 of the Indian

Penal Code, 1860 (herein after referred as “IPC”) along with section 25/27 of the Arms Act, 1959 whereby both the appellants were sentenced to undergo rigorous imprisonment for life and fine of Rs.25,000 and in default of payment of fine to further undergo imprisonment for a period of six months for the offence punishable under section 302/ 34 IPC. Appellant No.1 was further sentenced to undergo rigorous imprisonment for a period of five years and fine of Rs. 5,000 and in default of payment of fine to undergo simple imprisonment for a period of one month for the offence punishable Under section 27 of the Arms Act.

2. The brief facts of the case, as distinguished by the learned Trial Court are as under: -

“(i) On 28.12.2013, vide DD no. 95-B, it was recorded that one person had sustained bullet injury and had died on the spot. In response thereto, the police reached at the Flat no. 235-236, pocket 15, Sector 24, Rohini, Delhi situated on the second floor (hereinafter referred to as “the scene of crime” or “the spot” or “the said flat”) and found dead body of Vikas@Vicky. Crime team reached at the spot and took the photographs. At the spot, son of maternal uncle (Mama) of Vikas namely Deepak Mann the eye witness, was present and made a statement on the basis of which FIR was lodged against both the accused.

(ii) According to the statement of Deepak Maan (the complainant and the eye witness), on 28.12.2013 at about 9.30PM, he telephonically called Vikas @ Vicky. That time, Vikas told him that he was at the said flat where a party was going on and asked him to come over there. After some time, Vikas came to pick him from the bridge at Sector 24, Rohini in a car and

he along with him went to the said flat where Deepak, Rohit, Pradeep Kumar, Pradeep Dabas (the accused No.1), Sonu Tharu (the accused No.2), Vikas and their 3-4 more friends were celebrating the birthday of Manish. They all consumed liquor. At the time of cutting the birthday cake, some altercations took place between the accused no.2 and Vikas. The accused no.1 took side of the accused no.2 and asked Vikas as to how he was talking like that with the accused no.2 who was his dearest friend. That time, the accused no.1 took out his pistol and fired at once and the bullet hit the rack of the kitchen and he stated that his target never got missed. Thereafter, the accused no.1 handed over the pistol to the accused no.2. subsequently, the complainant went to the kitchen to take the match box to lit the cigarette and that time, Vikas standing at the gate of kitchen. The moment complainant turned after picking the match box, he noticed that the accused no.1 took the pistol from the accused no.2 and fired on Vikas. Thereafter, both of them ran away from the spot, Vikas fell down on the floor and blood was oozing. He and Pradeep Kumar noticed that Vikas had died.

(iii) Inspector Ajay Kumar lifted the exhibits from the spot and prepared the site plan at the instance of eye witness. Postmortem was done on the dead body of Vikas.

(iv) On 02.01.2014, on the secret information, both the accused were arrested at Kanjhawala Stand with the accord car No. DL-3CAK-8810.

(v) On 04.01.2014, both the accused made the disclosure statement wherein they disclosed that they could get recovered the pistol and clothes worn by them from the village Tharu. In pursuance thereto, at the instance of the accused no. 1, one pistol, the clothes and one magazine having one live cartridge were recovered from the village Tharu. At the

instance of the accused no. 2, the clothes worn by him at the time of incident were recovered from the village Tharu.

(vi) IO got prepared the scaled site plan.

(vii) After investigation, IO filed the charge sheet against both the accused.”

(viii) Charge under section 302/34 IPC was settled against both the accused for murder of Vikas @ Vicky. Charges under section 25/27 Arms Act were settled against the accused No.1. Both the accused pleaded not guilty and claimed trial.”

3. In order to bring home the guilt of the appellants the prosecution examined 35 witnesses in all. The statement of the appellants was also recorded under Section 313 of the Code of Criminal Procedure wherein they pleaded their innocence by denying all the incriminating circumstances and claimed to have been falsely implicated by prosecution. Appellants chose not to lead any evidence in their defence.
4. Mr. Siddharth Luthra, learned senior counsel appearing on behalf of the appellants argued that the impugned order is perverse, illegal and bad in law and is based on mere conjectures and surmises; that the Learned single Judge has wrongly relied upon the testimony of PW-19 who has been introduced by the prosecution as a star witness; learned senior counsel further submitted that PW-19 was not an eye witness and being a close relative of the deceased his evidence cannot be made the sole basis for convicting the appellants. Highlighting this contention, learned senior counsel argued that the name of PW-19 (Deepak Mann) neither finds mention in PCR form (**Ex. PW 4/A**) and

crime team report (**Ex-PW 13/A**) nor photographs were filed by the IO to show the presence of PW-19 (Deepak Mann).

5. Learned Senior counsel further submitted that testimony of PW-22 (Mukesh Malik) PW-24 (Manish Dabas), PW-30 (Rohit Dabas), PW-31 (Pradeep Kumar), PW-13 (Inspector, Anil Kumar) proves that PW-19 (Deepak Mann) was not present at the time of commission of crime and his unnatural behavior supports his absence. Learned Senior counsel pointed out during the course of arguments that when the argument and fight ensued between the appellants and the deceased, and the appellant no.1 fired a shot which hit the wooden rack, PW-19 (Deepak Mann) being closely related to Vikas @ Vicky (the deceased), failed to intervene or hold back the appellant no.1 from firing the second round. Strangely enough PW-19 (Deepak Mann) in his testimony admits that he did not accompany the deceased to the hospital which is also borne out from the postmortem report (**Ex.PW-14/B**) as per which constable Vinod had taken the body of the deceased to the hospital and PW-20 (Anil Dabas) identified the same. Learned senior counsel cited ***Din Dayal vs. Raj Kumar @ Raju & Ors.*** reported in (1998) CCR 69 (SC). The relevant para is as under:-

“Witness Din Dayal had accompanied the deceased to the hospital but after reaching there he did not disclose the name of the accused to the Police Constable who was on duty even though he disclosed other facts regarding the incident. This circumstance has been relied upon by the High Court together with some other reasons for doubting truthfulness of the evidence of this witness. The High Court has also referred to the improvements made by Din Dayal and those

improvements clearly indicate that they were deliberately made with a view to make the presence of other eye witnesses acceptable. Having gone through the evidence we find that the view taken by the High Court is not unreasonable and no interference is called for by this Court.”

6. Learned Senior counsel while pointing out irregularities and infirmities in the investigation submitted that learned trial court had wrongly relied upon the testimony of PW-19 (Deepak Mann) that two bullets were fired whereas there is evidence to prove that one bullet was found in the body of the deceased and as per the crime team report two bullet marks were seen on the wall.
7. Learned Senior counsel further submitted that as per the case of the prosecution the weapon of offence was recovered from an open field. The fact that no independent witnesses were produced to confirm this recovery and that the place from where the weapon was recovered was open to all, there is every possibility that the weapon of offence is planted.
8. Learned senior counsel further submitted that the trial court has erred in not appreciating the application of PW-19 (Deepak Mann) under Section 311 Cr.P.C wherein he prayed for his re-examination stating that he was not an eye witness to the incident.
9. Learned Senior counsel further submitted that the report of the ballistics expert does not suggest that the bullets were fired from the same weapon which was allegedly recovered from the spot. The alleged weapon is not connected with the empty cartridges which were recovered from the spot of the incident and further it was

submitted by the counsel that the investigation throughout was defective and the procedure under Section 166 Cr.P.C. was not followed in recovering the weapon.

10. Subsequently, learned senior counsel submitted that no Test Identification Parade was conducted hence the identification of the appellants has not been established in the present case. In order to substantiate his contention, the learned senior counsel relied upon ***Amarjeet @Minto &ors vs. State*** reported in ***2015 II AD (Delhi) 235***.

The relevant para is as under: -

“The Apex Court has time and again ruled that where the complainant and the accused persons are not known to one another, in the absence of a TIP, the identification of the accused persons for the first time in Court should not be relied upon”

11. In corollary of events another argument raised by the appellant No.2 is that he was wrongly implicated for the offence punishable under Section 302 of the IPC as nothing incriminating under Section 34 of IPC is made out against the appellant no.2 by the prosecution.
12. Learned senior counsel further submitted that none of the witnesses have deposed against appellant no.2 and no evidence was collected against him hence the conviction of appellant no.2 under Section 302 of the IPC read with Section 34 of the IPC is baseless and vague. Mere presence of the accused together is not sufficient to hold that they shared the common intention to commit the offence in question. It is necessary that the intention of each one of ‘several persons’ be known to each other for constituting common intention. Under this Section, a person must be physically present at the time of actual commission of

the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture.

13. Further learned senior counsel concluded his arguments by submitting that no case under section 302 of the IPC is made out and at best the appellants could have been convicted under section 304, Part I and Part II of the IPC as the incident took place on account of a minor altercation between the parties and the appellants had no intention to kill the deceased. The appellant No.2 neither exhorted appellant No.1 to commit the crime nor the prosecution has proved on record that there was prior meeting of minds for committing the offence.
14. Mr. Ravi Nayak, learned counsel appearing on behalf of the State challenged the arguments on behalf of the appellants that PW-19 (Deepak Mann) was not present at the spot submitted that Rukka (**Ex-PW-19/A**) was prepared by PW-32 (SI, Virender Singh) at the instance of PW-19 (Deepak Mann). The call data records of PW-19 (Deepak Mann) (**Ex. PW-25/C**) and the call data records of the deceased (**Ex. PW-16/M**) when examined, proved that they were in continual contact prior to the occurrence of the alleged incident. He further added that as per the case of the prosecution the deceased had called PW-19 (Deepak Mann) to attend the birthday party of his friend PW-24 (Manish Dabas) where the alleged incident took place. It is further argued by learned counsel for the State that infact PW-19 (Deepak Mann) had sought help of PW-31 (Pradeep Kumar) soon after the shooting took place and it was PW-31 (Pradeep Kumar) who had made a call to the brother of the deceased, PW-20 (Anil Dabas)

informing him about the incident which was admitted by PW-31 (Pradeep Kumar), though he turned into a hostile witness later.

15. We have heard the learned counsel for the parties and perused the material on record.

Testimony of prosecution witnesses, whether the presence of PW-19 at the spot is proved

16. Learned senior counsel for the appellants laboured hard to contend that PW-19 was not present at the time of commission of crime and he has been introduced to falsely implicate the appellants. At the outset, we deem it appropriate to scrutinize the evidence of PW-19 (Deepak Mann), PW-31 (Pradeep Kumar), PW-32 (SI Virender Singh), PW-33 (Inspector, Ajay Kumar) and PW-6 (Ct. Babu Lal). PW-19, Deepak Mann during his examination in chief deposed as under: -

“I am working at a mobile repairing shop at Karol Bagh. On 28.12.2013 I was coming from Karol Bagh to my house. I was about to reach Rithala Metro Station. It was about 9.25 PM. I made a telephonic call to my cousin (son of my Bua) namely Vikas @ Vicky. He informed me that he is in sector 24, Flat No. 235-236, Rohini who also informed me that a birth day party is going on there and called me also there. I walked till the bridge where my cousin Vikas @ Vicky came in the Accent car and picked me. Thereafter we reached at Flat No. 235-236 where Rohit, Pradeep Kumar, Sonu @ Tharu, Pradeep Dabas, Manish, Mukesh, other two three boys, myself and Vicky were celebrating the birth day of Manish. None else was present there. We all had taken one-two pegs. The birth day cake was being cut and during this Vikas @ Vicky had some altercation with Sonu @ Tharu. Pradeep Dabas asked Vikas @ Vicky as to how he is

talking is with Sonu @ Tharu, (kahaki too SonuTharu se kaisebolraha hai, yehmerajigri dost hai). Pradeep Dabas took out his gun and fired towards the kitchen which hit towards the wooden rack. The accused Pradeep had handed over his gun to SonuTharu and Pradeep Dabas told that his target does not miss. (uskanishanakabhikhalinahijaata.) Vicky was at the gate of Kitchen and the birth day cake was cut off. I went to take the match box from the kitchen. As I came back after taking the match box, the accused Pradeep Dabas had taken the pistol from SonuTharu and fired towards Vikas @ Vicky and ran away from the spot. After receiving the bullet injury, Vikas @ Vicky fell down and blood started oozing. I and Pradeep Kumar had checked the body of Vikas @ Vicky but he had expired on the spot. I asked Pradeep Kumar to inform Anil Bhai. Anil Bhai came there who also inspected the body of Vikas @ Vicky. Anil Bhai informed the police.

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No other persons with the name of Deepak other than me, was present in the birthday party.”

17. The witness PW-19, Deepak Mann during his cross examination deposed as under: -

“The police had met me in relation to the investigations only once which was on 28.12.2013.

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It is correct that when there was firing there was a loud noise but it is wrong to suggest that large number of public persons had also gathered. Vol. nobody had come to the spot or collected. I am not aware of the owner of the flat. The first time when I went to this flat was to give a phone to my cousin Vikas @ Vicky. I did not ask my cousin Vikas in what capacity he was present in the said flat. It is wrong to suggest that I was

aware that my cousin Vikas @ Vicky had taken forcible possession of this flat and I am deliberately concealing this fact from the court.

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I did not make a call to Vikas @ Vicky from my shop. I did not call Vikas @ Vicky frequently. Vol. it was once in about 10-15 days. When my brother Vicky told me come to the party which was going on, I did not tell him that I was not invited. Vol. we had discussed that we would go home together and that is why I went. My brother Vikas had come to pick me up at about 9:30-9:40 PM. I cannot tell the registration number of the vehicle in which he had come. Vol it was a Accent car of white color. I did not inquire from him as to who was the owner of the car.

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I cannot tell the cause for the dispute between Vikas @ Vicky and others. I had tried to intervene in the altercation which took place between Vikas @ Vicky and others. Vol. I was trying to catch hold of Vikas “main Vikas ko pakarkarchorachurayakararahatha”.

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Police had come to the spot in my presence. Media and Press had also come there. I did not make any statement to the Media of being an eye witness to the incident nor I came before the Media. Vol. I was in a state of shock and nervousness “ghabragayatha”. Police had prepared some documents on which I had signed at the spot.”

18. PW31, Pradeep Kumar (one of the person who was also present at the time of commission of the crime) during his examination in chief deposed as under: -

“I do not remember the number of Flat or pocket number. I alongwith Pawan bhai, Dr. Shashi, Honey, Manish, Rohit Dabas, Pradeep Kumar, Sonu and other boys were celebrating birthday party. We were taking liquor also in the party. At about 9:30PM I found that Pradeep Dabas was having some vomiting problem and SonuTharu had taken him somewhere else. I do not know as to where Yogesh @ SonuTharu had taken him. I had gone to the bathroom where I heard the voice of fire shot and shouting. I immediately came out from the bath room. I found Vikas @ Vicky in a pool of blood. He was having bullet injury in his face. I did not see the assailant as everybody was running here and there. I checked the body of Vicky @Vikas but he was no more. I informed the brother of deceased, namely Anil Dabas. He came to the spot and made a call to the police at 100 number. PCR came to the spot incident and thereafter the local police also came there.”

19. PW-32, SI Virender (Investigation officer of the case) during his examination in chief deposed as under: -

“That in the receipt of DD No.95B already Ex.PW5/A regarding firing upon one person who died at the spot and he along with Ct. Babu Lal reached at flat no. 235-236, Pocket 15 Sector 24, Rohini and reached on the second floor and found a person lying in the pool of blood whose name was known as Vikas @ Vicky. I inspected the body and found gun shot injury below left eye and near the nose. Inspector Ajay Kumar alongwith staff and the crime team reached the spot. The crime team inspected the spot and prepared the crime team report already Ex. PW13/A. the photographer of the crime team had taken the photographs of the dead body and scene of crime vide photographs already EX. PW9/A-1 to EX. PW9/A-23. One Deepak Maan who was present the son of maternal uncle of

deceased Vikas @ Vicky met us as eye witness. I recorded the statement of Deepak Maan which is already EX. PW19/A bearing his signature at point A, attested by me and bearing my signature at point B. I prepared the rukka Ex. PW32/A bearing my signature at point A. The said rukka was sent to the police station through Ct. Babu Lal for getting the case registered. On the directions of the senior officer, further investigation of this case was handed over to Inspector Ajay Kumar."

20. PW-32, SI Virender (Investigation officer of the case) during his cross examination deposed as under: -

"I was on my private motorcycle at that time. I reached the spot at about 11.00PM. PCR officials were already present at the spot when I reached there. I did not make any inquiry from the PCR regarding the eye witnesses. The crime team photographer reached the spot at around 11.15PM.

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I cannot tell whether any eye witness had gone to the crime team and informed them that he had seen the incident. It is wrong to suggest that till the time crime team remained at the spot there was not eye witness. I remained at the spot till about 12.40AM (midnight) i.e. for about 40 minutes. No press or media had come to the spot till that time. It is wrong to suggest that I am concealing the presence of press and media at the spot at that time. Ct. Babu Lal remained with me till about 12.30AM. The statement of Deepak Maan was recorded in my presence.

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It is wrong to suggest that his statement was never recorded in the presence of Ct. Babu Lal. It is wrong to suggest that Deepak Maan was called to the police station at about 3.00AM on 29.12.2013. It is

wrong to suggest that statement of Deepak Maan was recorded in the police station at the instance of Anil Kumar.”

21. PW-6, Ct. Babu Lal (police constable who accompanied PW-31, Virender during his examination in chief deposed as under:-

“on 28.12.2013 I received the information from the DO at about 10:30 PM. It took us hardly 15 mins to reach the spot of incident. I had reached the spot on the motorbike of SI Virender with him. Not many public persons were present on the ground floor. When I reached the spot along with SI Virender only PCR officials were present there and we were the first to reach from the local police. I was handed over the tehrir by SI Virender at about 12:30 AM when I first reached the spot. I went to the second floor along with SI Virender and remained there for about 10 minutes and after that I came to the ground floor. The SHO along with the other team reached at spot within 5-7 minutes of our reaching. I was sent to ground floor to stop public persons from coming up but cannot tell if the scene of crime was preserved by putting a tape to stop public persons. After I received the tehrir I went back to the police station on foot and reached there at about 12:50 AM and handed over the tehrir to the duty officer. After the registration of FIR I again started from PS at about 1:50 AM after the registration of FIR along with the original Tehrir and copy of FIR which I brought to the spot and handed over to the same to Inspector Ajay Kumar.”

22. PW-33, Inspector Ajay Kumar during his examination in chief deposed as under:-

“On 28.12.2013 I was posted at PS Vijay Vihar. On that day I was on patrolling duty in the area of PS Vijay Vihar. On the intervening night of

28/29.12.2013 at about 10.00PM I received a call that a man has been shot near Sovereign School, Sector 24, Rohini and I alongwith driver and operator reached at second floor H.No 235-236, Pocket 15, Sector 24, Rohini. SI Virender alongwith the complainant and another staff were already present there. The police officials of PS Begumpur had also arrived at the spot. In the mean time crime team also reached the spot and inspected the spot and prepared the crime team report already Ex. PW13/A. the photographer of the crime team had taken the photographs of dead body and scene of crime vide photographs already Ex.PW9/A-1 to Ex.PW9/A-23. One Deepak Maan who was the son of maternal uncle of deceased Vikas@ Vicky met us as eye witness. SI Virender recorded the statement of Deepak Maan which is already Ex.PW19/A.SI Virender Singh prepared the rukka and got the case registered through Ct. Vinod on the directions of the senior officers, further investigation of this case was handed over to me. I obtained the copy of FIR and original rukka from Ct. Vinod. I also inspected the spot and the body. I prepared the site plan Ex. PW33/A at the instance of complainant Deepak Maan which bearing my signature at point A. I broke floor with the help of hammer and chheni and collected the blood stained pieces of floor. I also lifted the front portion of the bullet and two empty cartridges having word 'KF 7.65MM from the kitchen of the said house and converted the same into parcel and sealed with the seal of AKS.'

23. From the perusal of the testimony of PW-19, Deepak Mann we find that many persons were present at the time of commission of crime. An altercation took place between the deceased and the appellants which led to death of Vikas @Vicky. PW-19 (Deepak Mann) categorically pointed out the involvement of both the appellants and

deposed that Pradeep Dabas took out his gun and fired towards the kitchen which hit towards the wooden rack. The accused Pradeep had handed over his gun to Sonu Tharu and Pradeep Dabas told that his target does not miss. (uska nishana kabhi khali nahi jaata.) Vicky was at the gate of Kitchen and the birth day cake was cut off. I went to take the match box from the kitchen. As I came back after taking the match box, the accused Pradeep Dabas had taken the pistol from Sonu Tharu and fired towards Vikas @ Vicky and ran away from the spot. After receiving the bullet injury, Vikas @ Vicky fell down and blood started oozing. I and Pradeep Kumar had checked the body of Vikas @ Vicky but he had expired on the spot. PW-19 (Deepak Mann) further reiterated his stand in the cross examination and highlighted the participation of both the appellants in the commission of crime. PW-31 (Pradeep Kumar) who later turned hostile has corroborated the testimony of PW-19 (Deepak Mann), to the extent that it was PW-19, who asked PW-31 to inform PW-20, Anil Dabas (brother of deceased) about the alleged incident, who admitted the same by deposing that ‘I informed the brother of deceased, namely Anil Dabas. He came to the spot and made a call to the police at 100 number’.

The case of the prosecution is that PW-19, Deepak Mann was an eye witness to the alleged crime which is further fortified by the testimonies of PW-32, SI, Virender (Investigating Officer of the case) and PW-6, Ct. Babu (who accompanied PW-32) and PW-33, Inspector Ajay Kumar (Investigating officer).

PW-32, SI, Virender testified that he met PW-19 at the spot and recorded his statement by deposing that One Deepak Maan who was present the son of maternal uncle of deceased Vikas @ Vicky met us as eye witness. I recorded the statement of Deepak Maan which is already EX. PW19/A. Relying upon the testimonies of PW-31 (Pradeep Kumar), PW-32 (SI Virender Singh), PW-33 (Insp. Ajay Kumar) and PW-6 (Ct. Babu Lal), it can be concluded that PW-31 (Pradeep Kumar) was present at the spot. He met PW-32 (SI, Virender Singh), PW-33 (Insp. Ajay Kumar) who investigated the present case and also PW-6 (Ct. Babu Lal) who had accompanied PW-32 (SI Virender Singh) and took the Rukka (Ex.-PW-19/A) to the police station on which the FIR was registered.

24. It is pertinent to mention here that the presence of PW-19 (Deepak Mann) and PW-31 (Pradeep Kumar) is further established by the statement of PW-20, Anil Dabas (brother of the deceased) who in his testimony deposed that 'I received a phone on my mobile from the mobile phone number 9999567665 which was of Pradeep Kumar@Sonu at about 10.15 pm. He informed me that my brother was killed by Pradeep Dabas (tere bhai ko Pradeep Dabas ne goli maar di). I took my car and rushed at Flat no. 235-236, Sector-24, Rohini, Delhi. I found Deepak Maan, Pradeep Kumar and Mukesh Malik who were standing on the ground floor of the aforesaid address'
25. Further the presence of PW-19 (Deepak Mann) on the spot, at the time of commission of crime stands proved from the testimony of PW-25,

Chander Shekhar (Nodal Officer, Bharti Airtel Limited) who proved the call data records of mobile phone bearing no. 8800173537 (issued in the name of Shyam Prakash) (**EX.PW-25/C**) which was used by PW-19, Deepak Mann and call data records of mobile phone bearing no. 9211080085 (issued in the name of the deceased Vikas @ Vicky) (**Ex.PW-16/M**) which was used by the deceased Vikas @ Vicky at the time of commission of crime. Further, perusal of call data records (**Ex.PW-25/C**) reveals that from mobile phone number 8800173537, four calls were made on the mobile phone number 9211080085 from 21:18:23 to 21:36:04 on 28.12.2013 and the said facts are substantiated from CDR data **Ex.PW-16/O** (Call details of both the mobile phone numbers). From perusal of the call data record of **EX.PW-25/C** and **Ex.PW-16/M** an inference can be drawn that PW-19 (Deepak Mann) and the deceased Vikas @ Vicky were in constant touch before the alleged incident and PW-19 (Deepak Mann) was present at the spot at the time of commission of crime.

26. The aforesaid discussion clearly demonstrates that PW-19 (Deepak Mann) was present at the spot at the time of the alleged incident and his statement cannot be discarded on the basis of minor discrepancies which have arisen in the statement of the prosecution witnesses (**Ref. Krishnegowda and Ors Vs. State of Karnataka reported in (2017) 13 SCC 98, paragraph 25**). Hence, the contention of learned senior counsel that PW-19 (Deepak Mann) is a planted witness and is not a trustworthy witness, is without force.
27. Learned senior counsel for the appellants argued that PW-19 (Deepak Mann) was not an eye witness which he admitted as he filed an

application under Section 311 Cr. P.C. to be re-examined to testify that he had not witnessed the incident. The learned trial court dismissed the application under Section 311 C.r.P.C. holding rightly that PW-19 (Deepak Mann) had been won over and the application had been moved under Section 311 C.r.P.C. with an intent to derail the trial of the case.

Unnatural behaviour

28. Learned senior counsel pressed hard to contend that the conduct of PW-19 (Deepak Mann) was unnatural, despite being the cousin of the deceased, he chose not to protect the deceased when the first shot was fired, he neither raised any alarm nor intervened during the arguments between the deceased and the accused. There is no force in the submission made by learned senior counsel for the appellant in this regard. As discussed earlier, the prosecution has been able to establish the presence of PW-19 (Deepak Mann) at the time of the crime. His testimony has been corroborated by the statement of PW-32, SI, Virender (Investigating Officer of the case) and PW-6, Ct. Babu (who accompanied PW-32) and PW-33, Inspector, Ajay Kumar (Investigating officer) and PW-20, Anil Dabas (brother of the deceased). The Apex Court in a plethora of cases has repeatedly observed that there is no set rule as to how an individual behaves when he witnesses a crime and to discard the evidence merely on the ground that he did not react in a particular manner is wholly unrealistic. The Apex Court in the case of *State of Uttar Pradesh vs Devendra Singh* reported in *AIR 2004 SC 3690* has held as under: -

“In view of the rival submissions it has to be first seen whether prosecution has established its case. Strictly speaking, the case is not of circumstantial evidence. Human behavior varies from person to person. Different people behave and react differently in different situations. Human behavior depends upon the facts and circumstances of each given case. How a person would react and behave in a particular situation can never be predicted. Every person who witnesses a serious crime reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Some may remain tight-lipped overawed either on account of the antecedents of the assailant or threats given by him. Each one reacts in his special way even in similar circumstances, leave alone, the varying nature depending upon variety of circumstances. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way”

A similar view was taken by the Apex Court in ***Kathi Bharat Vajsur and Ors. vs. State of Gujarat*** reported in ***AIR 2012 SC 2163***. The relevant paras read as under: -

11. ... Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but

it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused. The court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner. In Rana Pratap v. State of Haryana Chinnappa Reddy, J., speaking for this Court succinctly set out what might be the behaviour of different persons witnessing the same incident. The learned Judge observed: [SCC p. 330, SCC (Cri) p. 604, para 6]

Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

23. We are in agreement with the above observations. When an eyewitness behaves in a manner that perhaps would be unusual, it is not for the

prosecution or the Court to go into the question as to why he reacted in such a manner. As has been rightly observed by his lordship O. Chinnappa Reddy, J., in Rana Pratap's case (supra.) there is no fixed pattern of reaction of an eyewitness to a crime. When faced with what is termed as 'an unusual reaction' of an eyewitness, the Court must only examine whether the prosecution story is in anyway affected by such reaction. If the answer is in the negative, then such reaction is irrelevant. We are afraid that the unusual behaviour of the injured eyewitness, PW6, will not, in anyway, aid the Appellants to punch a hole on to the prosecution story.

Interested witness

29. There is also no force in the submission of counsel for the appellant that the testimony of PW-19 (Deepak Mann) should be discarded, as he is an interested witness. It has been repeatedly held that the evidence of interested witnesses can be relied upon, provided they are trustworthy and reliable, but with caution. It would be worthwhile to reproduce herein the observations of this Court in ***Crl.A.No.470/2003, Harish Vs. The State***, reported at **2008 (147) DLT 608; 2008 (2) AD (Delhi) 405** particularly paragraphs 41 and 42, where the law laid down by the Apex Court with regard to admissibility of testimony of partisan/interested witness has been relied upon.

“41. It has been consistently held by the Apex Court that Courts must be cautious and careful while weighing such evidence given by witnesses who are partisan or interested, but such evidence should not be mechanically discarded. It will be useful to refer to the judgment of Masalte Vs. State of Uttar Pradesh,

reported at AIR 1965 Supreme Court 202, relevant portion of which is reproduced below: -

“14. Mr. Sawhney has then argued that where witnesses giving evidence in a murder trial like the present are shown to belong to the faction of victims, their evidence should not be accepted, because they are prone to involve falsely members of the rival faction out of enmity and partisan feeling. There is no doubt that when a criminal court has to appreciate evidence given by witnesses interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the court as genuine; whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses; Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to, failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.”

42. Similar view has also been expressed in the case of State of Punjab Vs. Karnail Singh, reported at AIR 2003 Supreme Court 3613:-

8. We may also observe that the ground that the witnesses being close relatives and consequently being partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this

Court as early as in Dalip Singh and others v. The State of Punjab (AIR 1953 SC 364) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: -

“We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in – Rajasthan’, (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel.”

9. Again in Masalti and others v. The State of U.P. (AIR 1965 SC 202) this Court observed: (pp. 209-210 para 14): “But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses..... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.” 10. To the same effect is the decision in State of Punjab v. Jagbir Singh, (AIR 1973 SC 2407) and Lehna v. State of Haryana, (2002 (3) SCC 76). As observed by this Court in State of Rajasthan V. Smt. Kalki and another, (AIR 1981 SC 1390), normal

discrepancies in evidence are those who are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however, honest and truthful a witness may be. Material discrepancies are those who are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do so. These aspects were highlighted in Krishna Mochi and others v. State of Bihar etc. (JT 2002 (4) SC 186)."

Further, the Apex Court in the case of ***Brahmswaroop and another vs State of UP*** reported in ***AIR 2011 SC 280*** has held as under: -

"Merely because the witnesses are closely related to the deceased persons, their testimonies cannot be discarded. Their relationship to one of the parties is not a factor that effects the credibility of a witness, moreso, a relation would not conceal the actual culprit and make allegations against an innocent person. A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of its' false implication. However, in such cases, the court has to adopt – a careful approach and analyse the evidence to find out whether it is cogent and credible evidence."

30. Applying the law laid down in the judgments quoted above we may safely conclude that though PW-19 (Deepak Mann) is a close relative of the deceased but his connection with the deceased does not come in the way of his genuine and credible testimony.

Relevance of TIP in the present case

31. The learned senior counsel for the appellants vehemently argued that the identification of the accused in commission of crime is of paramount importance and the same should not be ignored.
32. The Apex Court in the case of **Kanta Prashad v. Delhi Administration** reported in **AIR 1958 SC 350** has held as under: -

“As for the test identification parade, it is true that no test identification parade was held. The appellants were known to the police officials who had deposed against the appellants and the only persons who did not know them before were the persons who gave evidence of association, to which the High Court did not attach much importance. It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification would be a matter for the courts of fact and it is not for this Court to reassess the evidence unless exceptional grounds were established necessitating such a course.”

33. The aforesaid judgment was followed by the Apex court in the case of **Raju Manjhi vs State of Bihar** reported in **AIR 2018 SC 3592**. The relevant para is reproduced as under: -

“The identification parade belongs to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold

a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact.”

34. Applying the law laid down in the above rulings, we are of the considered view that TIP was not required in the present case as the name and details of the accused were known to PW-19 (Deepak Mann). It has been established that the appellants and PW-19 (Deepak Mann) were present at the spot at the time of commission of crime and remained at the spot of the alleged incident for a reasonably good time with the entire gathering at the birthday ceremony. The identity of the appellants was no where under suspicion, thus the contention of learned senior counsel that identification of the appellants through TIP was of paramount importance holds no ground.

Recovery of the weapon

35. Learned Senior Counsel for the appellants contended that the recovery of the alleged weapon used in the commission of the crime is doubtful as the same was recovered from an open ground which has an unrestricted entry and it is highly improbable that it was not noticed by any of the passerby during the interregnum period from the time of commission of crime till the recovery of alleged weapon of offence. In this regard, it is relevant to scrutinize the testimony of PW-18, Ct. Ram Saran and PW-33, Ajay Kumar. PW-18, Ct. Ram Saran during his examination in chief deposed as under: -

“That on 04.01.2010 he along with PW-33 and both the accused went to Village Tharu, District Sonipat Haryana. Accused no.1 got recovered one pistol and his clothes and accused no.2 got recovered the clothes worn by him at the time of the incident. PW-33 prepared the sketch of pistol and cartridges along with magazine Ex.PW-18/A and seized them vide Ex.PW-18/B. The car was taken into possession vide seizure memo Ex.PW-17/H. Clothes were taken into possession vide seizure memo Ex.PW-18/E and Ex.PW-18/F. He also proved a document EX.PW-18/C and Ex.PW-18/D. He identified both the accused in the Court. He also identified pistol Ex.P-1, one cartridge Ex.P-2, one mustered colour pant and one white colour T-shirt having print of “Strange Days” Ex.P-4 and one dark green pant and grey colour T-shirt Ex.P-5.”

36. PW-18, Ct. Ram Karan during his cross examination deposed as under:

“That at the time of arrest accused persons made no attempt to escape and no driving licence was recovered from the possession of any accused. No recovery was made pursuant to the disclosure statement dated 02.01.2014. At the time of recovery on 04.01.2014. PW-33 had called Pradhan Villagers and by passers to join the proceedings. The public persons refused to join the investigation despite request of PW-33. He admitted that the spot of recovery was accessible to all but on court question he answered that the spot of recovery though accessible but was not visible to all.”

37. PW-33, Inspector, Ajay Kumar during his examination in chief deposed as under: -

“both the accused persons have disclosed in their supplementary disclosure statements that they can get recovered the pistol used in the incident and the clothes

which they were wearing at the time of incident from the fields of village Tharu. In pursuant to their disclosure statement. The accused Pradeep Dabas took us to the fields of village Tharu Distt. Sonapat Haryana and pointed out towards a polythene containing pistol which was used by them and thrown the same there. I lifted the said polythene bag and checked the same and found to contain one pistol of 7.65mm. On checking the magazine of the pistol I found one live cartridge. I prepared the sketch of pistol, magazine and one live cartridge vide already **Ex. PW 18/A** bearing the signature of Ct. Ram Karan at point A my signature at Point B and signatures of Pradeep Dabas at point C. The said pistol, magazine and the live cartridge were converted into parcel and sealed with the seal of AKS. Sealed parcel was taken into possession vide seizure memo already Ex.PW18/B bearing the signatures of Ct. Ram Karan at point A, my signatures at Point B and signatures of Pradeep Dabas at point C. The accused Pradeep Dabas had also got recovered one polythene bag lying in the field of Tharu Village which was found to contain his clothes. I Checked the said polythene bag and found to contain one grey coloured sweater having word 'TH/85' and one green coloured pant with a tag of Emric Blue which were worn by the accused Pradeep Dabas at the time of incident”

38. PW-33, Inspector, Ajay Kumar during his cross examination deposed as under: -

“We remained at the spot for about to two and half hours. During this period of large number of public persons passed through the area but they did not join the investigation despite my request.

xxxxx

xxxxx

xxxxx

I did not prepare any site plan of the place of recovery to all. On Court Question: The spot of recovery though accessible was not visible to all.”

39. From the perusal of the testimony of PW-18 (Ct. Ram Karan) and PW-33 (Inspector Ajay Kumar) we find that the recoveries were affected pursuant to the disclosure made by the appellants on their pointing out. The appellants were accompanied with police personnel and soon after the arrest they were taken to the fields in Village Tharu, District, Sonapat from where the weapon of offence and clothes were recovered. Even if it is presumed that the recovery was made from an open spot then there is nothing under Section 27 of the Indian Evidence Act which renders the statement of the accused persons to be inadmissible, as far as the same is proved. To substantiate the same reliance is placed on ***State of Himachal Pradesh v. Jeet Singh*** reported in ***AIR 1999 SC 1293***. The relevant para reads as under: -

“There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence Under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.”

40. From the testimonies of the witnesses we further find that the place from where the recoveries were effected is a barren land, which was surrounded by the fields, having growth on all the sides and the place from where the recoveries were effected is neither visible nor is available for use to general public. Further, testimony of PW-18 (Ct. Ram Karan) and PW-33 (Inspector, Ajay Kumar) remained consistent and corroborates the manner in which the articles were recovered at the instance of both the appellants.

Ballistics Report and Recovery of the cartridges

41. While considering the ballistic report to encapsulate whether the pistol shots were fired from the same firearm as that of the weapon which was recovered from the supplementary disclosure statement of the accused persons. We throw some light on the testimony of PW-26 (Puneet Puri), Senior Scientific Officer (Ballistic), FSL. The relevant portion of the testimony is reproduced as under: -

“on opening the first parcel, one improvised pistol of 7.65 mm bore and one 7.65mm cartridge were taken out and marked as Ex.F1 and A1 by me. On opening the second parcel two 7.65mm cartridge cases and one deformed bullet were taken out and marked as Ex. EC1 and EB1 respectively by me. On opening the third parcel, one deformed bullet was taken out and marked as Ex. EB2 by me.

On examination I found out that the improvised pistol marked Ex.F1 was in working order. Test fire was conducted successfully by using the cartridge marked Ex.A1 and one 7.65mm cartridge out of five 7.65 mm cartridges received for test firing. The test fired cartridge case were marked as TC1, TC2 and the two recovered test fired bullets were marked as TB1 and

TB2. The 7.65mm cartridge case marked Ex.EC1 and EC2 were fired empty cartridges and had been fired through the improvised pistol marked Ex.F1 as the individual characteristics firing pin marks and breech face marks present of Ex.EC1, EC2 and on test fired cartridge cases marked as TC1 and TC2 were found identical when examined under the comparison microscope. The deformed bullets mark Ex.EB1 and EB2 were corresponding to the bullets of 7.65mm cartridge and no further opinion could be possible as the individual characteristics of striation marks present of Ex.EB1 and EB2 were insufficient for comparison for opinion the improvised marked Ex.F1 was a fire arm and the cartridge marked A1, cartridge cases Ex.EC1, EC2 and the deformed bullets marked Ex.EB1 and EB2 were ammunition as defined in the arms act, 1959. The exhibits were then resealed with the seal of PP FSL DELHI. my detailed report in this regard is Ex.PW26/A bearing my signatures at point A on various pages

At this stage, parcel No.1 has been produced by MHC (M) in open condition opened during the examination of PW18. One improvised pistol, one test fired cartridge case and one test fired bullet are taken out and shown to the witness who has correctly identified the same as examined by him. The pistol is already Ex.P1 test fired cartridge case and test fired bullet are collectively Ex.P2.

At this stage parcel No.2 has been produced by MHC(M) bearing the seal FSL PP DELHI which is broken open and the two empty cartridges and one bullet are taken out and shown to the witness who has correctly identified the same as examined by him. Two empty cartridges and one bullet are Ex.P6. at this stage Parcel No.3 has been produced by the MHC (M) bearing the seal of FSL PP DELHI which is broken open and the one bullet is taken out and shown to the

witness who has correctly identified the same as examined by him. The same is Ex.P7”.

42. Further to negate the abovementioned contention of the appellants, reliance can be placed on the case of **Anvaruddin v. Shakoor** reported in (1990) 3 SCC 266, the Apex Court considered the effect of obscure and oscillating evidence of the ballistic expert. The Court observed that:

“10.....In this nebulous state of the evidence of the ballistic expert we are of the view that the High Court was wholly wrong in doubting the direct evidence of the three eye-witnesses on this ground. Where the expert evidence is obscure and oscillating, it is not proper to discredit the direct testimony of the eye-witnesses on such uncertain evidence. In such a situation unless the evidence of the eye-witnesses is shaken by some glaring infirmities, it would not be proper to doubt the correctness of their statements....”

43. The same was reiterated by the Apex Court in the case of **Brijpal Singh v. State of M.P.** reported in (2003) 11 SCC 219, this Court observed as under: -

“there was reliable ocular evidence of the Accused having shot the deceased. However, the ballistic expert as in this case reported that though both the guns were found to have been discharged recently, the empty cartridges that were seized from the spot did not match the rifle that was recovered. This Court observed that normally, if the eyewitness's evidence is absolutely acceptable, then such evidence could be accepted even if there is some contradiction in the medical or ballistics reports. However, the oral evidence was not found acceptable in this case. In contrast, we find the oral evidence in the present case, particularly that of P.W. 1, to be completely

acceptable and truthful. There is no iota of evidence on record which would suggest any motive on his part to falsely implicate the accused. We might add that there is no evidence as argued by the learned Counsel for the Respondent, that the police conspired to frame the Accused who was a congress leader and had protested against police high handedness”.

44. Therefore, by relying upon the above testimony of the ballistic officer and law laid down by the Apex Court, it can be said that the evidences produced by the ocular witness cannot be discarded solely on the report of ballistic expert. Where the ocular evidence is reliable, his testimony shall be accepted even if it contradicts the medical and ballistics report. In view of the above, it can be opined that the bullets were fired from the same fire arm which was recovered at the behest of the accused persons and the same is illuminated by the evidences on record.

Common intention

45. Learned senior counsel for appellant no.2 contended that appellant no.2 was wrongly booked under Section 34 of the IPC as there is nothing to connect the appellant no.1 and 2 with the commission of crime nor any evidence that appellant no.2 shared a common intention with appellant no.1 to commit the crime.

In this regard, it is relevant to understand the scope of Section 34 of IPC and applicability of the same in the present case. Common intention is a state of mind. There can hardly be direct evidence of common intention. Intention occupies a symbolic place in criminal law. Section 34 deals with a situation, where an offence requires a

particular criminal intention or knowledge and is committed by several persons. In order to test the applicability of Section 34 of IPC in the present case it is relevant to examine the sequence of events which proves the involvement of appellant no.2 in the commission of the crime.

46. PW-19 (Deepak Mann) in his testimony deposed that he along with the deceased, the appellants, Rohit, Pradeep Kumar, and others persons were celebrating the birthday of Manish. They all enjoyed a few drinks (1-2 pegs), after which an altercation took place between the deceased and the appellant no. 2 to which the appellant no. 1 objected and took the side of the appellant no.2. PW-19 (Deepak Mann) deposed that soon after the altercation between the deceased and appellant no.2 '*Pradeep Dabas took out his gun and fired towards the kitchen which hit towards the wooden rack. **The accused Pradeep had handed over his gun to Sonu Tharu and Pradeep Dabas told that his target does not miss. (uska nishana kabhi khal inahi jaata.)** Vicky was at the gate of Kitchen and the birth day cake was cut off. I went to take the match box from the kitchen. As I came back after taking the match box, **the accused Pradeep Dabas had taken the pistol from Sonu Tharu and fired towards Vikas @ Vicky and ran away from the spot.** After receiving the bullet injury, Vikas @ Vicky fell down and blood started oozing”.*
47. Perusal of the testimony of PW-19 (Deepak Mann) shows that the fulcrum of alleged charges against the appellant no.2, was the altercation between the deceased and appellant no.2. After the first pistol shot was fired, the appellant no. 2 was aware of the

consequences but failed to defuse the situation. The appellant no.2 had the opportunity to prevent such an unfortunate incident when the pistol was handed over to him by the appellant no.1. Subsequently appellant No.1 took the pistol from the appellant no.2 and took a shot at the deceased which resulted in the murder of the Vikas @ Vicky.

48. Further both the appellants fled from the spot together after the commission of the crime. The call data records of the appellants (**EX.PW-16/K**) and (**Ex. PW-16/S**) further prove that after the alleged incident they were together. The weapon of offence and clothes were disposed of by the appellant no.1 with the help of appellant no.2 at his native place i.e Village *Tharu*, District Sonipat. The arrest of appellants while travelling together in the car, bearing No. DL 3CAK 8810 also proves the involvement of appellant no. 2 in the alleged offence. Further we may rely on the judgment of the apex court wherein, it has been held that prior consent is not required to construct common intention on part of the accused. It is held in the case of ***Pandurang v. State of Hyderabad*** reported in ***AIR 1954 SC 706*** that:-

“that prior concert need not be something always very much prior to the incident, but could well be something that may develop on the spot, on the spur of the moment.”

The Apex court in the case of ***RamaswamiAyyangar v. State of Tamil Nadu*** reported in ***AIR 1976 SC 2027*** has held as under: -

“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.”

49. The Apex court in the case of ***Rajkishore Purohit vs State of Madhya Pradesh*** reported in **AIR 2017 SC 3588** has held as under: -

“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”

“The absence of any overt act of assault, exhortation or possession of weapon cannot be singularly determinative of absence of common intention,”

50. Common intention means unity of criminal behaviour which results in something for which an individual would be responsible, if it were all done by himself alone. It is apparent on record that the shot was fired by appellant no.1 from his pistol but it is also true that the *mens rea* to save the deceased by appellant no.2 was also not present. The sequence of the events, unfolded in the present case, depicts the comprehensive involvement of appellant no. 2 in the commission of crime. Therefore, in light of above judgments and other evidences discussed above, we find that appellant no.2 was equally involved in the commission of the crime.

Defective investigation

51. Another argument raised by the appellants is that the police while conducting search and recovery of the alleged weapon of crime, failed to follow the procedure prescribed under the Code of Criminal

Procedure. To unf the law behind it, reliance can be placed on *State of Karnataka v. K. Yarappa Reddy* reported in *2000 SCC (Crl.) 61* wherein, this Court occasioned to consider the similar question of defective investigation as to whether any manipulation in the station house diary by the Investigating Officer could be put against the prosecution case and observed that criminal justice should not be made a casualty for the wrongs committed by the investigating officers. This Court, in Paragraph 19, held as follows:

“19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the Court be influenced by the machinations demonstrated by the Investigating Officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the Court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by the investigation officers. Criminal Justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case.”

52. The Apex court in the case of ***Ram Bali v. State of Uttar Pradesh*** reported in (2004) 10 SCC 598, reiterating the judgment of ***Karnel Singh v. State of M.P*** reported in (1995) 5 SCC 518 had observed as under: -

“in case of defective investigation the court has to be circumspect while evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective”.

53. As far as the contention of learned senior counsel for the appellant with regard to conviction under Section 304, Part I and II of the IPC is concerned, in our considered view, for the reasons discussed above, the present case does not fall under the exceptions carved out under Section 300 of the IPC.

Conclusion

54. The prosecution has proved its case against the appellants beyond reasonable doubt and while considering the chain of events and material evidence on record we are of the view that the appellants are guilty of the aforementioned offences.
55. In our view, therefore, the chain of circumstances as recited above coupled with the law laid down by the Apex Court, unerringly leads to one conclusion, that is the guilt of the accused persons. From the above discussion, it is proved that the appellants are the perpetrators of crime and they have been rightly convicted and sentenced by the learned trial court for the offences punishable under Sections 302/34 respectively.

56. The present appeals are dismissed. The order of conviction and order on sentence recorded against the appellants is therefore upheld.
57. Bail bonds are cancelled. The appellants shall surrender before the Superintendent Jail, Tihar Jail on 18.02.2019.
58. Copy of the order be sent to Superintendent Jail, Tihar Jail.
59. Trial Court record be sent back.

SANGITA DHINGRA SEHGAL, J

SIDDHARTH MRIDUL, J

FEBRUARY 04, 2019

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