

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.494 of 2014**

Arising Out of PS. Case No.-21 Year-2011 Thana- SAMHO District- Begusarai

Shambhu Choudhary Son of Late Chandra Shekhar Choudhary Resident of
village - Akbarpur Nayatola Dhanha, P.S. Samho in the District of Begusarai

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

WITH

CRIMINAL APPEAL (DB) No. 418 of 2014

Arising Out of PS. Case No.-21 Year-2011 Thana- SAMHO District- Begusarai

1. Jai Kishore Choudhary son of Sitaram Choudhary
2. Ram Pravesh Choudhary son of Ram Nandan Choudhary
Both resident of village - Naya Akbarpur, Tola Dhanha, P.S. Samho, District
- Begusarai

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

WITH

CRIMINAL APPEAL (DB) No. 442 of 2014

Arising Out of PS. Case No.-21 Year-2011 Thana- SAMHO District- Begusarai

1. Sudhir Choudhary
2. Sunil Choudhary Both S/o Devo Choudhary
3. Kaushal Choudhary S/o Bhagirath Choudhary
4. Upendra Choudhary @ Mahanth S/o Late Rameshwar Choudhary
All Residents of Village Akabarpur (Dhandha), P.S. Shamho, District
Begusarai.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s



Appearance :

(In CRIMINAL APPEAL (DB) No. 494 of 2014)

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
Mr. Ritwaj Raman, Advocate
Mrs. Vaishnavi Singh, Advocate
Mr. Ritwik Thakur, Advocate
Mrs. Anita Kumari Singh, Advocate

For the Respondent/s : Mr. Bipin Kumar, APP

(In CRIMINAL APPEAL (DB) No. 418 of 2014)

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
Mr. Ritwaj Raman, Advocate
Mrs. Vaishnavi Singh, Advocate
Mr. Ritwik Thakur, Advocate
Mr. Ravi Ranjan, Advocate

For the Respondent/s : Mr. D. K. Sinha, APP

(In CRIMINAL APPEAL (DB) No. 442 of 2014)

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
Mr. Ritwaj Raman, Advocate
Mrs. Vaishnavi Singh, Advocate
Mr. Ritwik Thakur, Advocate
Mr. Dharmendra Kumar Singh, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, APP

CORAM: HONOURABLE MR. JUSTICE A. M. BADAR

and

HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 23-12-2022

Criminal Appeal bearing No.418 of 2014 has been filed by appellant/accused No.1 Jai Kishore Choudhary and appellant/accused No.6 Ram Pravesh Choudhary. Criminal Appeal bearing No. 442 of 2014 has been filed by appellant/accused No.2 Kaushal Choudhary, appellant/accused No.4 Sudhir Choudhary, appellant/accused No.5 Sunil Choudhary and appellant/accused No.7 Upendra Choudhary. Criminal Appeal bearing No.494 of 2014 has been filed by appellant/accused No.3 Sambhu Choudhary. They all are convicted by the impugned judgment of offences punishable



under Section 302 read with Section 149 and 120B of the Indian Penal Code as well as under Section 27 of the Arms Act. For the offence punishable under Section 302 read with Section 149 of the IPC, each of them is sentence of suffer imprisonment for life apart from imposition of fine of Rs.1,000/- (One Thousand) and default sentence of one month. Similar sentence is awarded to them for the offence punishable under Section 120B of the IPC. For the offence punishable under Section 27 of the Arms Act, they all are sentenced to suffer rigorous imprisonment for one year apart from imposition of fine of Rs.1,000/- (One Thousand) and default sentence of simple imprisonment for one month. These appellants along with acquitted accused No.8, Mukesh Choudhary had faced the subject trial during pendency of which another charge sheeted accused Balram Choudhary absconded and his trial was accordingly separated by the learned Trial Court. One more accused in the subject crime, namely, Tuntun Choudhary @ Chhotu Sukla is still facing trial for the subject crime. By these appeals, appellant/accused Nos.1 to 7 are challenging the said judgment and order dated 05.05.2014 and 07.05.2014 respectively, passed by the learned 3rd Additional Sessions Judge, Begusarai in Sessions Trial No.461 of 2012/0005799 of 2013 by which they have been convicted and



sentence as indicated above. As these appeals are arising out of the same trial and same judgment and order of conviction, these appeals are being decided by this common judgment.

2. Facts leading to the prosecution of the appellants who shall be referred to in their original capacity for the sake of convenience, projected from the police report are thus:

(A) PW 4 Manju Devi (the First Informant) along with her husband Ramashrey Choudhary (since deceased) as well as her two sons Binod Choudhary (PW 2), Awadh Choudhary (P.W.3) and daughter in law Bina Devi (P.W.1) used to reside in their house at village Akbarpur, Nayatola Dhanha falling under jurisdiction of Police Station Samho, District Begusarai. Accused persons were also resident of the same village. Subodh Choudhary – son of First Informant, Manju Devi and Ramashrey Choudhary (since deceased) was earlier murdered by accused persons and in that crime absconding accused Balram Choudhary was undergoing pre-trial detention. For getting said Balram Choudhary bailed out in the offence of commission of murder of Subodh Choudhary, the members of prosecuting party were being pressurized to withdraw the said prosecution. However, as members of the prosecuting party



were not acceding to the said direction of the accused persons, absconding accused Balram Choudhary, who at the relevant time was in jail had conspired with acquitted accused No.8 Mukesh Choudhary as well as other accused persons and by hatching the conspiracy, Ramashrey Choudhary was done to death in the following manner at his house at about 7:00 to 7:30 P.M. of 08.05.2011 by the accused persons as well as absconding accused Balram Choudhary, deceased accused Chandrashekhar Choudhary and the accused who is still facing trial, namely, Tuntun Choudhary @ Chhotu Sukla.

(B) Deceased Ramashrey Choudhary along with his wife Manju Devi (P.W.4), his sons Binod Choudhary (P.W.2), Awadh Choudhary (P.W.3) and daughter-in-law Bina Devi (P.W.1) were sitting in the courtyard of their house in the evening hours of 08.05.2011. The lantern was burning in that courtyard.

(C) At about 7:00 to 7:30 P.M. of that day i.e., 08.05.2011 all the accused persons and others came at the 'Aangan' of the house of the prosecuting party. They were armed with rifles and guns. Upon seeing them, P.W.2 Binod Choudhary and P.W.3 Awadh Kishore Choudhary managed to hide themselves behind the gunny bags kept in front of the wall



of the house. The accused persons and others started questioning P.W.4 Manju Devi as to whereabouts of her sons as well as her husband. P.W.4, Manju Devi and her daughter-in-law P.W.1 Bina Devi then retorted by saying that Subodh Kumar has already been killed by them.

(D) Deceased accused Chandrashekhar Choudhary then exhorted to kill Ramashrey Choudhary who was sitting at the western side of Darwaja. In order to carry out that order, accused persons encircled Ramashrey Choudhary and under orders of deceased accused Chandrashekhar Choudhary, Tuntun Choudhary @ Chhotu Sukla fired a bullet at the chest of Ramashrey Choudhary. Appellant accused No.3 Sambhu Choudhary then fired another bullet at Ramashrey Choudhary. Upon being hit by the bullets, Ramashrey Choudhary fell down with bleeding injuries on his person and died instantaneously. Thereafter, all accused persons while firing bullets ran away from the spot of the incident.

(E) P.W.6 Karu Yadav, Police Station Officer of Police Station Samho received information regarding murder of a person at village Dhanah and accordingly he rushed at the village. He met P.W.4 Manju Devi at her Darwaja at about 8:00 P.M. of 08.05.2011 and recorded her first information report



which was also signed as witnesses by her sons P.W.2 Binod and P.W.3 Awadh Choudhary. By going back to the Police Station, P.W.6 Karu Yadav, PSI has registered offence vide Crime No. 21 of 2011 by drawing formal FIR. He took up investigation of the subject crime. P.W.6 Karu Yadav, PSI then inspected dead body of Ramashrey Choudhary and prepared inquest report Exhibit-6. He seized empty cartridges vide seizure memo Exhibit-7. The dead body was sent for autopsy and P.W.5 Dr. Ramesh Prasad, Medical Officer of the Sadar Hospital, Begusarai, conducted post mortem examination on the said dead body of Ramashrey Choudhary on 09.05.2011 and recorded the report of post mortem examination (Exhibit-3).

(F) Routine investigation followed. Statement of witnesses came to be recorded. On completion of investigation, the appellant/accused along with absconding accused Balram Choudhary and acquitted accused Mukesh Choudhary came to be charge sheeted. During the course of investigation, accused Chandrashekhar Choudhary died. As stated above, Tuntun Choudhary @ Chhotu Sukla is being tried vide separate sessions case.

3. The learned Trial Court was pleased to frame the charge and the same was read over and explained to the



accused persons. They pleaded not guilty and claim trial.

4. In order to bring home the guilt to the accused persons, the prosecution has examined in all six witnesses. Bina Devi – daughter-in-law of deceased Ramashrey Choudhary is examined as P.W.1. Binod Choudhary and Awadh Kishore Choudhary, who are sons of the deceased, are examined as P.W.2 and P.W.3. P.W.4 Manju Devi is the widow of the deceased and the First Informant of this case. Autopsy surgeon, Dr. Ramesh Prasad is examined as P.W.5. Investigating Officer, Karu Yadav, PSI is examined as P.W.6. Defense of the accused persons as gathered from the line of cross-examination of prosecution witnesses as well as from their statement under Section 313 of the Cr.P.C. is that of total denial. However, they did not enter in the defence.

5. After hearing the parties, the learned Trial Court was pleased to convict the appellant/accused and to sentence them as indicated in the opening para of this judgment.

6. We heard the learned counsel appearing for appellants/convicted accused at sufficient length of time. Following submissions are made by the learned counsel appearing for the appellants/convicted accused.

(i) Evidence of the prosecution is discrepant so



far as the spot of the incident is concerned. Investigating Officer, Karu Yadav (P.W.6) has stated that the incident took place at Sahan (vacant land) of the house of the prosecuting party where the dead body was found. He has stated that at that spot, there were pegs for tying animals and pot of fodder. However, evidence of prosecution witnesses who happens to be relatives of the deceased is to the effect that the incident took place at the Darwaja and some of them have spoken about the spot of the incident as Dalan of the house. Thus, the prosecution has failed to prove the spot of the incident when the place of occurrence itself has not been established then the entire prosecution case becomes suspect and the accused becomes entitle for acquittal. To buttress these submissions, reliance is placed on the following judgments.

(I) Ganesh Datt vs. State of Uttarakhand reported in AIR 2014 SC 2521.

(II) Balwan Singh vs. State of Haryana reported in (2005) 11 SCC 245.

(III) Syed Ibrahim vs. State of Andhra Pradesh reported in 2006 CRI. L. J. 4087.

(IV) Pohlu vs. State of Haryana 2006 reported in CRI. L.J. 532.



(V) Cr. Appeal (DB) Nos.433 and 492 of 1990, Ram Singhashan Singh and Others vs. State of Bihar decided by the Division Bench of Patna High Court on 13.08.2012.

(ii) The prosecution has failed to establish that there was sufficient source of light on the spot of the incident at the time of the incident. The accused persons allegedly entered in the 'Aangan' of the house all of a sudden. The prosecution has averred that P.W.2, Binod and P.W.3, Awadh managed to hide themselves and this fact indicates that there was no source of light on the spot of the incident. Therefore, it was not possible for the prosecution witnesses to identify the accused persons.

(iii) Though, it is averred that the FIR was registered on 08.05.2011, it had reached the Court on 16.05.2011 and, therefore, in every probability the FIR was antedated.

(iv) The incident took place in the village and in spite of this fact not a single independent witness is forthcoming. This fact makes the prosecution case doubtful.

(v) First version of the incident is suppressed by the prosecution as cross-examination of P.W.1, Bina Devi shows that, in fact, she had lodged the FIR by making first statement to police in respect of commission of cognizable offence and her



thumb impression was also obtained on that statement. Even P.W.4 Manju Devi has admitted the fact of investigation by police in respect of the incident from P.W.1 Bina Devi. This first version of the incident is not forth coming. Evidence of the prosecution is contradictory even in respect of seizure of empty cartridges. P.W.1 Bina Devi has deposed that those empties were taken in the night by police, however, the seizure list shows that those were seized on the next day of the incident i.e., on 09.05.2011. To buttress this submission regarding suppression of the first version of the incident, reliance is placed on following judgment :

(I) Kanhai Mishra vs. State of Bihar reported in (2001) 3 SCC 451.

(II) Nallabothu Ramulu vs. State of Andhra Pradesh reported in (2014) 12 SCC 261.

(III) State of Madhya Pradesh vs. Ratan Singh and Others reported in (2020) 12 SCC 630.

(vi) P.W.2, Binod and P.W.3, Awadh Kishore cannot be an eyewitness of the incident as they themselves have claimed that they hide themselves as soon as the accused persons entered in the courtyard. Similarly, report of post mortem examination coupled with evidence of the autopsy



surgeon shows that the deceased must be at the lower side when bullets were fired on him.

(vii) The prosecution has failed to establish that the accused persons were members of the unlawful assembly, the common object of which was to commit murder of Ramashrey Choudhary. Therefore, they cannot be made vicariously liable in the case in hand. To buttress this submission, reliance is placed on:

(I) Amerika Rai and others vs. State of Bihar reported in (2011) 4 SCC 677.

(II) Nagarjit Ahir vs. State of Bihar reported in AIR 2005 SC 722.

(III) Shiva Shankar Pandey and Others vs. State of Bihar reported in AIR 2002 SC 3151.

(IV) Khairuddin and Others vs. State of West Bengal reported in AIR 2013 SC 2354.

(V) Pandurang Chandrakant Mhatre vs. State of Maharashtra reported in (2009) 10 SCC 773.

(VI) Parshuram Pandey and Others vs. State of Bihar reported in AIR 2004 SC 5068.

(VII) Kuldip Yadav and Others vs. State of Bihar reported in (2011) 5 SCC 324.



(viii) It is faintly argued that there is no proper examination of the accused persons under Section 313 of the Cr.P.C. by placing reliance on **Anand Ramchandra Chougule vs. State (2019) 8 SCC 50** and judgment in **Cr. Appeal (DB) No. 393 of 2014, Bhim Yadav vs. State of Bihar**, decided on 09.09.2022.

7. The learned Additional Public Prosecutor supported the impugned judgment by arguing that evidence of the investigating officer shows that the incident took place at the door of house of the deceased and the dead body was also found at the door of the house of the deceased. It is argued that evidence of the prosecution is consistent and, therefore, the appeals deserves to be dismissed.

8. We have considered the submissions so advanced and we have also perused the records and proceedings. We have gone through the oral as well as documentary evidence and we have carefully perused the judgments cited by the learned counsel for the appellants.

9. According to the prosecution case, the accused persons after hatching the conspiracy and by forming an unlawful assembly with common object, had committed murder of Ramashrey Choudhary on 08.05.2011 at his house. Therefore,



it is necessary to ascertain whether the prosecution has established the fact that Ramashrey Choudhary died homicidal death on 08.05.2011. The factum of death of Ramashrey Choudhary is not disputed by the defence. There is clear, cogent and consistent evidence of his wife PW 4 Manju Devi, his daughter-in-law PW 1 Bina Devi and his sons PW 2 Vinod Choudhary and PW 3 Awadh Kishore Choudhary to the effect that Ramashrey Choudhary died on 08.05.2011 and this evidence remained unchallenged. Evidence of PW 6 Karu Yadav, Police Station Officer of Samho Police Station, shows that by visiting the spot of the incident he had conducted inquest punchnama which is at Exhibit-6. The inquest punchnama shows that dead body of Ramashrey Chodhary was having fire arm injuries on the chest and other parts of his body. Autopsy of dead body of Ramashrey Choudhary was conducted by PW 5 Dr. Ramesh Prasad, Medical Officer of the Sadar Hospital Begusarai and his version is to the effect that Ramashrey Choudhary died because of Cardio Respiratory failure caused by shock and haemorrhage from laceration of left lung and heart. This medical witness has deposed that he found inlet wound on left interior and upper part of chest cavity deep with blackening of margin, of size 3" X 1.5". This autopsy surgeon found



another inlet wound on right iliac bone of size 2” X 1” into bone deep with blackening of margin. He noticed exit wound on left back and lower part of the chest lateral to vertebra. Another exit wound noted on the dead body was on posterior upper part of left thigh of size 2” X 1”. Apart from this there were multiple pellets on right region of pelvis and upper left thigh. There is nothing in cross examination of this witness to doubt his version. This medical evidence coupled with ocular evidence of relatives of the deceased goes to show that the prosecution has proved that deceased Ramashrey Choudhary died homicidal death on 08.05.2011.

10. Now let us examine whether the accused persons or any of them, by forming an unlawful assembly after hatching a criminal conspiracy had committed murder of deceased Ramashrey Choudhary. To establish this fact, the prosecution is relying on evidence of inmates of house of the deceased who are certainly natural witnesses to the incident of murder of Ramashrey Choudhary, which took place in his house. The defence is seriously contending that the spot of the incident is not proved by the prosecution and when the place of occurrence is not established then the accused persons become entitled for acquittal. Let us therefore examine evidence of each



and every prosecution witness who was inmate of the house where the incident took place, giving special attention to their version about details of the house in question as well as the place in the house where Ramashrey Choudhary was done to death.

11. The criminal law was set in motion by first informant Manju Devi, widow of deceased Ramashrey Choudhary by lodging the FIR Exhibit-4. She is examined as PW 4 by the prosecution. As per her version at about 7:15 pm of 08.05.2011 she along with her daughter-in-law PW 1 Bina Devi and her sons PW 2 Binod and PW 3 Awadh Kishore were at the Aangan of their house. At that time Tuntun Choudhary (the accused who is facing trial separately) along with other accused persons came in her Aangan. She has categorically named all appellants as persons who had entered in her house and stated that her son managed to hide themselves on arrival of the accused. Thereafter, as deposed by PW 4 Manju Devi, Chandra Shekhar Choudhary (accused who died during investigation) questioned her as to where are her sons and threatened that if the case is not withdrawn then the entire family shall be murdered. She further testified that then Tuntun Choudhary fired a bullet at the left side of the chest and appellant-accused No. 3 Shambhu



Choudhary fired a bullet on right side below west of her husband Ramashrey Choudhary. Then all the accused persons ran away. She further stated that thereafter police came, she gave her statement to police and put her thumb impression on that statement and then her sons signed on that statement.

Though PW 4 Manju Devi, in her chief examination, has not stated about the exact spot at the house where her husband was killed, in cross examination she has stated that bullets were fired at her husband at the Darwaja of the house and she was just four steps away when the bullets were fired at her husband. It is elicited from her cross-examination that she was following the accused and was just one step behind them when her husband was fired. In cross-examination she reiterated that only two persons fired bullets at her husband and dead body of her husband was then lying two to three cubits away from the thatched house. She further stated in her cross-examination that police inquired firstly from her daughter-in-law and statement of her daughter-in-law came to be recorded. So far as description of her house is concerned, in cross-examination PW 4 Manju Devi has stated that Aangan of her house is of size 8 X 8 cubits and the Dalan of the house is made up of dried grass.



12. It is thus clear from evidence of PW 4 Manju Devi who was natural witness to the incident of killing of her husband at her house that Tuntun Choudhary and appellant-accused No. 3 Shambhu Choudhary had fired bullets at her husband Ramashrey at the Darwaja of her house and then dead body of her husband was lying two to three cubits away from the thatched house. Her version undoubtedly shows that her house was a small house having Aangan of just eight by eight cubits and in front of Darwaja, the Dalan was there which was made up of dried grass. Though in cross-examination of this prosecution witness there was no attempt to bring on record what is Dalan, it is a matter of common knowledge that the Dalan is a place just outside the Darwaja of the house for sitting male members and outsiders. This widow has stated that after firing bullets at him, dead body of her husband Ramashrey Choudhary was lying two to three cubits away from her thatched house. This implies that her husband collapsed in the front portion of the Darwaja after being hit by the bullets.

13. We can get exact description of house of the prosecuting party from version of PW 1 Bina Devi who happens to be daughter-in-law of the deceased and an eyewitness to the incident. So far as incident is concerned, PW 1 Bina Devi has



deposed that at about 7:00 pm of 08.05.2011 she along with her mother-in-law PW 4 Manju Devi and Brothers-in-law PW 2 Binod and PW 3 Awadh Kishore were present in the Aangan of her house. All appellants-accused persons with Tuntun Choudhary came there with rifles and guns. Her brothers-in-law managed to hide themselves. At that time her father-in-law Ramashrey Choudhary was sitting at the Dalan. The accused persons questioned him as to whether he will withdraw the case or not. Thereafter deceased accused Chandra Shekhar Choudhary ordered and Tuntun Choudhary fired first bullet at Ramashrey Choudhary. Thereupon, as stated by PW 1 Bina Devi, appellant-accused No. 3 Shambhu Choudhary fired second bullet at Ramashrey Choudhary and all accused persons ran away.

14. PW 1 Bina Devi was subjected to searching cross-examination on behalf of all accused persons. In her cross-examination it is brought on record that Ramashrey Choudhary was sitting at Darwaja and the distance between Aangan and Darwaja is just 1 cubit. In between Aangan and Darwaja of the house there was bamboo matting. She further disclosed in her cross-examination that area at the Darwaja of her house was small to accommodate only 4 to 5 persons and when her father-



in-law Ramashrey Choudhary was at Darwaja, the accused persons reached there and fired bullets at him. This material elicited from cross-examination of PW 1 Bina Devi makes it crystal clear that Darwaja area of the house and Dalan is virtually the same place as front area of Darwaja of the house is used for sitting by the visitors as well as the male members of the house and in the case in hand, the house was so small that Darwaja and Dalan was virtually the same and that is why PW 1 Bina Devi in her chief examination has stated that her father-in-law was sitting at Dalan whereas in cross-examination she described the place of sitting of her father-in-law as Darwaja. To make the matter more clear, further cross-examination of PW 1 Bina Devi is relevant. She has stated that her house is facing eastern direction and it is made up of dried grass and straws. In other words, she described her house as a thatched house. Spot of occurrence is clarified from the material brought on record from cross-examination of PW 4 Manju Devi whereat she has stated that after sustaining bullet wounds at the Darwaja of her house, the dead body of her husband Ramashrey Choudhary was lying 2 to 3 cubits away from the thatched house. PW 1 Bina Devi clarified the structure of her house by stating that Aangan of her house was surrounded by the bamboo matting and area of



the Aangan was 10 to 8 cubits. She stated that the house is comprising of two rooms made up of Pukka construction. Darwaja area of her house as per version of this witness Bina Devi is just to accommodate 4-5 persons and her father-in-law was at Darwaja when the accused persons fired at him.

15. Thus, evidence of this witness makes it clear that the house where the incident took place was so small that it had Aangan of 8 to 10 by 8 to 10 cubits, Darwaja area large enough only to accommodate 4 to 5 persons and two rooms. This witness has made it clear that on exhortion of Chandra Shekher, Tuntun Choudhary and appellant-accused No. 3 Shambhu Choudhary had fired bullets at deceased Ramashrey Choudhary at the Darwaja area of the house. In cross-examination this witness has stated that there was no fodder pot or pegs for tying animals on east and west side of the house. Nothing further is elicited on this aspect. So far as lodgment of the FIR is concerned, PW 1 Bina Devi has stated that her statement was recorded on the spot of the incident and thereafter statement of her brothers-in-law and mother-in-law came to be recorded. She stated that she put her thumb impression on her statement. As far as the question of identification of the accused is concerned, her cross-examination reveals that though she is a



Pardanashi lady, she was knowing the accused persons by their name as well as by their face. She as well as her mother-in-law PW 4 Manju Devi had duly identified the accused persons while they were in dock.

16. PW 2 Binod Choudhary – son of the deceased has stated that at 7:00 pm of 08.05.2011 he along with his mother PW 4 Manju Devi, another brother PW 3 Awadh Kishore and PW 1 Bina Devi were present in the Aangan of their house whereas his father Ramashrey Choudhary was at the Darwaja of his house. He further testified that at that time accused persons came with rifles and guns. He as well as PW 3 Awadh Kishore managed to hide themselves behind stakes of gunny-bags kept in front of the wall. Lantern was burning at the Aangan at that time. He further stated that deceased accused Chandra Shekhar then asked his father as to why cases are not being withdrawn and he would kill his father. This witness testified that his father was sitting at the Dalan of dried grass. Thereupon Tuntun Chodhary and appellant-accused No. 3 Shambhu Choudhary had fired bullets at his father and his father died on the spot of the incident. This witness is a witness to the inquest report (Exhibit-6) as well as seizure memo (Exhibit-7). In cross-examination PW 2 Binod Choudhary has stated that



kerosene lamp was burning at his house and lantern was burning at the Aangan of his house at the time of the incident. He was hiding himself in between the stacks of gunny bags and the wall of his house. There were no animals where her father was sitting. This witness has also stated that Aangan of his house was of size 8 to 10 cubits area.

17. It is worthwhile to note that even evidence of PW 2 Binod Choudhary goes to show that the house in question was a small house with small Aangan and a Dalan made up of a dried grass at the Darwaja of the house. No attempts were made in the cross-examination to show that the Dalan was at a far of place from the Darwaja of the house. Considering the fact that the house was having small Aangan and small area at Darwaja which could accommodate only 4-5 persons. It can not be said that the Dalan was not part of the Darwaja and it was situated at some far of place. Half hearted cross-examinations on this aspect is of no assistance to the defence on this aspect.

18. PW 4 Awadh Kishore Choudhary another son of the deceased has stated that the incident took place at about 7:00 pm of 08.05.2011 when he along with PW 4 Manju, PW 2 Binod and PW 1 Bina Devi were at the Aangan of his house and when his father Ramashrey Choudhary was at the Darwaja of



his house. As testified by this witness, the accused persons came there with weapons, they questioned his mother about whereabouts of her husband and sons and by going to the Darwaja they further questioned his father whether he will withdraw the case or not. Then as per version of PW 3 Awadh Kishore, Chandra Shekhar Choudhary gave an order to open fire and the assailants fired bullets at his father Ramashrey Choudhary. This witness is also a witness to the inquest notes and seizure memo (Exhibit-7) by which empties were seized by the investigating officer.

19. In cross-examination of PW 3 Awadh Kishore Choudhary it is brought on record that he was hiding himself when he heard sounds of gunshot and then saw his father dead. At that time, as per version in cross-examination of this witness his mother PW 4 Manju Devi and his sister-in-law PW 1 Bina Devi were in the Aangan himself. This witness has not named the specific accused who had fired bullets at his father because in all probability he was hiding himself when fire was opened on his father. In that sense this witness can not be termed as eyewitness to the actual moment of firing bullets at his father by the accused persons but he had certainly noticed accused persons coming in his house with arms and then heard



sound of gunshots after he had managed to conceal himself. This witness has stated the size of his house as a house having Aangan of 7 to 8 cubits surrounded by the stalk matting and Darwaja having area of 10 X 10 cubits. He further clarified that part of his house is Pukka whereas part of his house is having Kacchha construction. He testified that his father was lying at the Darwaza area of the house.

20. This is the evidence in respect of the incident coming from the mouth of near and dear ones of the deceased Ramashrey Choudhary. It is well settled that near and dear ones of the deceased never spare a real culprit to rope in an innocent person in an incident where life of their close relative is lost. There can be possibility of implicating as many as persons in such incident when the case is that of more than one accused but as a matter of rule it can not be said that relatives are not witnesses of truth. At the most, evidence of their relatives is required to be scrutinized with care and caution in order to rule out possibility of false implication of some of the accused when the case is that of more than one accused persons. Analysis of evidence of all these witnesses which we have done in foregoing paras makes it clear that all these prosecution witnesses have duly identified the accused persons as persons who had entered



in their house. They had attributed role of actual killing of Ramashrey Choudhary only two assailants, namely, Tuntun Choudhary and appellant-accused No. 3 Shambhu Choudhary. As per their version, deceased accused Chandra Shekhar had ordered to eliminate Ramashrey Choudhary. However, all these prosecution witnesses, who are sons, wife and daughter-in-law of the deceased, have not attributed any overt-act to any of the other accused persons. Their version regarding the incident of actual firing at deceased Ramashrey Choudhary by appellant-accused Shambhu Choudhary remained unshaken during the course of cross-examination.

21. Now let us examine the theory sought to be propounded by the defence that the spot of the incident is not established by the prosecution. For this purpose heavy reliance is placed on evidence of PW 6 Karu Yadav, the Investigating Officer. Undisputedly, this Investigating Officer has not drawn the map of the place of occurrence. In his evidence he has stated that he inspected the spot of the incident and continued to depose further that Darwaja was situated in front of the house of the deceased. He further deposed that on front side of the Darwaja there was an open land (Sahan) and the deceased was sitting at the western Darwaja. This Investigating Officer



further deposed that on the spot of incident there is lot of blood and six empties. During cross-examination, PW 6 Karu Yadav has reiterated that he inspected the spot. He further stated that on vacant land (Sahan) of deceased Ramashrey Choudhary he found fodder pot, Khuta (peg for tethering animal) and the dead body was lying there. There was blood on the ground. With this cross-examination it was sought to demonstrate by the learned counsel for the appellants that some of the witnesses are stating that the firing tookplace at Darwaja, some are stating that the deceased was at the Dalan when he was fired at by the accused persons. The Investigating Officer is stating that the dead body was lying at the Sahan (Open land) and, therefore, the spot of the incident in not proved.

22. We are not in agreement with these submissions of the learned counsel for the appellants for the reason that the house in question, where the incident took place, as seen from the evidence of the inmates of the house was a small house made up of pukka as well as kuchcha construction. Two rooms were made up of kuchcha construction whereas other portion was made up of dried grass. 'Aangan' area was just 8 to 10 by 8 to 10 cubits and Darwaja area was so small as to accommodate only four to five persons. The Dalan in



common parlance is space in front of the Darwaja where outsiders visiting the house sit and considering the small area of the house where the incident took place the Darwaja area and the Dalan were the same place and it is not possible to distinguish these two places separately. The material elicited from cross-examination of the prosecution witnesses shows that Dalan which was at the front portion of the Darwaja was made of dried grass meaning thereby that the land at that place was an open land. With half hearted cross-examination of prosecution witnesses, we cannot accede to the submission of the learned counsel for the appellants that Darwaja area is different and Dalan area is totally different area so also Sahan is a different area. In fact, all these terms were used to demonstrate the space outside the Darwaja of the house and in this case the different witnesses are naming this place by using different terms. However, it conveys the same meaning, i.e., in front portion of Darwaja of house of the deceased. The incident of firing is proved to have taken place in the house of the deceased and precisely in the front portion of the Darwaja of the house where ultimately the dead body was found. The Investigating Officer might have used the term as Sahan and other witnesses might have used the term Dalan or Darwaja to describe the place of



occurrence but the fact remains that in front of the Darwaja of the small house, the dead body of Ramashrey Choudhary was found lying. That apart ocular evidence of the eyewitnesses that the deceased was fired at by using fire-arms by appellant-accused Shambhu Choudhary is not shattered at all and as such description of the place where actually the dead body was found lying pales into insignificant.

23. Similar is the position in respect of the finding of fodder pot and Khuta at the Sahan area of the small house of the prosecuting party. Much capital is sought to be made up of this version of PW 6 Karu Yadav, the Investigating Officer to demonstrate that the place of occurrence is not proved. For this purpose stray sentence in cross-examination of PW 1 Bina Devi is sought to be made use of out of the context. To some question of the defence she answered that they were not tying cattles. She has also stated in cross-examination that Bathan and Nad (fodder pot and pegs) were not on east west side. These statements in cross-examination of PW 1 Bina Devi cannot be used to mean that place of occurrence becomes suspect. Nothing turns out by such meaningless cross-examination of PW 1 Bina Devi coupled with version in cross-examination of the Investigating Officers. Hence, we reject the



submission of the learned counsel for the appellants that place of incident is not proved by the prosecution and, therefore, the prosecution case becomes suspect. The Ruling so cited by the learned counsel for the appellants are of no assistance because they proceeded on their own facts.

24. Version of eyewitnesses which we have dealt up in foregoing paragraph is fully corroborated by the version of PW 5 Dr. Ramesh Prasad who had conducted autopsy on dead body of Ramashrey Choudhary. During autopsy, two entry wounds of bullets were found on the dead body apart from corresponding exit wounds. Similarly, multiple pellet injuries were found on dead body of Ramashrey Choudhary during the course of post mortem examination. Thus, eyewitness account given by the prosecution witnesses is gaining corroboration in material particular from this medical evidence and we see no reason to reject version of the inmates of the house where the incident took place regarding the mode and manner in which the deceased was done to death. Similarly finding of empties from the spot which came to be seized by the Investigating Officer PW 6 duly corroborates the version of eye witnesses.

25. The house where the incident took place was a residential house, naturally having source of light in the



evening hours. Evidence of prosecution witnesses is showing that lantern was burning at the 'Aangan' and kerosene lamp was burning in the house. Therefore, it cannot be said that there was no sufficient light on the spot of the incident in order to enable the prosecution witnesses to see the assailants.

26. It is contended that first version of the incident is suppressed by the prosecution because PW 1 Bina Devi seems to be the First Informant of this case. PW 1 Bina Devi is a rustic villager and she appeared in the witness box after more than one and half years of the incident. Similar is the case of PW 4 Manju Devi. They were not knowing the exact meaning of first information report. The sequence of interrogation stated by them cannot be given any overbearing importance because ultimately congruous version of both these witnesses is in tune with the prosecution case. Had PW 1 Bina Devi given some another version of the incident prior to the FIR of PW 4 Manju Devi then she would have deposed before the court accordingly and not in tune with the prosecution case. Moreover, no question was put up to PW 6 Karu Yadav, the Investigating Officer who had recorded the first information report of PW 4 Manju Devi on this aspect. Unless and until relevant questions are put up to the Investigating Officer on this



aspect of lodgment of the FIR, it cannot be said that the first version of the incident was communicated to the Investigator by PW 1 Bina Devi and not by PW 4 Manju Devi. In this view of the matter Rulings cited by the learned counsel for the appellants has no application to the facts of the instant case.

27. With this it needs to conclude that the prosecution has established the fact that the accused persons including appellant-accused No.3 Shambhu Choudhary entered in the house of deceased Ramashrey Choudhary and on exhortion by deceased accused Chandra Shekhar Choudhary, appellant-accused No.3 Shambhu Choudhary had fired a bullet causing death of Ramashrey Choudhary. This incident took place at Darwaja area of his house and his dead body was found lying in front of Darwaja area of the house. Now let us examine whether it is proved by the prosecution that the accused persons formed an unlawful assembly with a common object of committing murder of Ramashrey Choudhary and in that process the deceased was done to death by firing bullets at him.

28. We have carefully perused the case laws cited on this subject by the learned counsel for the appellants. We propose to reproduce paragraph No.38 to 40 from the judgment in the matter of **Kuldip Yadav**(Supra) which reads thus:



“38. In Allauddin Mian v. State of Bihar [(1989) 3 SCC 5 : 1989 SCC (Cri) 490] this Court held: (SCC pp. 16-17, para 8)

“8. ... Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be



likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of any one or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of Section 149 IPC.”

39. *It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its*



members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC.

40. *In Rajendra Shantaram Todankar v. State of Maharashtra [(2003) 2 SCC 257 : 2003 SCC (Cri) 506] this Court has once again explained Section 149 and held as under: (SCC pp. 263-64, para 14)*

“14. Section 149 of the Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of



that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed,



though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149—either clause—is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act.”

29. At this juncture, it is necessary to put on record the concept of vicarious liability as envisaged by Section



149 of the Indian Penal Code. It hardly needs to mention that Section 149 IPC does not create separate offence. It creates a constructive or vicarious liability for acts done in prosecution of the common object of that assembly, by all members of unlawful assembly. Vicarious liability envisaged by Section 149 of the IPC extends to rope in every member of such assembly only when:-

- a. the acts done in prosecution of the common object of the unlawful assembly and
- b. such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object of the unlawful assembly. The word “knew” is indicative of a state of mind at the time of commission of the offence and cannot be interpreted to mean “might have known”.

Thus once the Court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of common object of that assembly, or such, as the members or the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly, is to be held guilty of that offence. This is because everyone must be taken to have intended the probable and natural result of the combination of



the acts in which he joined. Thus Section 149 IPC makes every member of an unlawful assembly at the time of committing of the offence, guilty of that offence on establishing the criteria stated above. If such conditions as stated above are fulfilled, then it is not open to the court to see as to who actually did the offensive act. The court cannot then further require the prosecution to prove which of the member of the unlawful assembly did which of the offensive act. Every member of such unlawful assembly then becomes responsible of the acts of offence committed by another members, in prosecution of the common object of such assembly. It needs to be kept in mind that whether a member of such unlawful assembly was aware as regards to likelihood of the commission of a particular offence in prosecution of common object can be gathered from all surrounding circumstances like nature of the assembly, arms carried by it, behaviour of members of such assembly at or before the occurrence etc.

30. Having said so, we must hasten to add that the court is required to determine the issue in every case before it as to 'whether the offence was committed by any member of the unlawful assembly in prosecution of the common object or whether an offence was such as the members of that assembly



knew to be likely to be committed.’ The accused should not, merely by reason of his association with other members of an unlawful assembly be held vicariously liable for each and every offence committed by his associates, which he himself neither intended nor knew to be likely to be committed. Members of an unlawful assembly may have community of object only upto a certain point. Beyond that point they may differ in their objects. In such fact situation, the knowledge possessed by each member as to what offence is likely to be committed in prosecution of their common object shall also vary. Whether a member of an unlawful assembly was aware as regards likelihood of commission of another offence or not would depend upon facts and circumstances of each case such as background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and behaviour of the members soon before, at and after commission of the crime etc. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of an unlawful assembly. Mere presence in an unlawful assembly cannot render a person liable



unless there was a common object and the accused was actuated by that common object. The word object means the purpose or design. In order to make it common it must be shared by all. It does not require a prior concert and common meeting of minds before the attack.

31. Viewed from this angle if we adverts to the happening at the time of the incident which is proved from evidence of prosecution witnesses, namely, PW 1 Bina Devi, PW 2 Binod Choudhary, PW 3 Awadh Kishore Choudhary and PW 4 Manju Devi then it becomes crystal clear that accused persons accompanied by Tuntun Choudhary came to the house of deceased Ramashrey Choudhary and on exhortion of Chandra Shekhar Choudhary i.e., the deceased-accused, Tuntun Choudhary and appellant-accused No. 3 Shambhu Choudhary had fired bullets on Ramashrey Choudhary causing his death. None of the prosecution witnesses is alleging any overt act on the part of rest of the accused persons who are appellants before us. True it is that once an accused is proved to be a member of the unlawful assembly having a particular common object then it is not required to prove overt act on his part but as a rule of prudence behavior of that particular accused at the time of the incident becomes relevant in order to ascertain whether he had



shared common object of the unlawful assembly. In the case in hand, none of the prosecution witnesses has stated about any act on the part of appellants before this Court except appellant-accused No. 3 Shambhu Choudhary. Their mere presence on the scene of occurrence is spoken by these prosecution witnesses without attributing any misbehavior to them during the course of the incident. For making out the case for imposition of vicarious liability on rest of the appellants/accused persons it was incumbent on the part of the prosecution to establish by clear and cogent evidence that the offence of commission of murder of Ramashrey Choudhary was committed to accomplish common object of the unlawful assembly and all the appellants before this Court including appellant/accused No.3 Shambhu Choudhary were sharing that common object of the unlawful assembly. In the case in hand, conduct attributed to these appellants of mute spectator during the course of the incident without even utterance of any word during the course of the incident creates a doubt as to whether these appellants were sharing common object of the unlawful assembly. Even no fire arm came to be seized from the appellants during the course of investigation and the active role of killing Ramashrey Choudhary is attributed by eyewitnesses only to



appellant/accused No. 3 Shambhu Choudhary. As nothing is said about conduct or utterances, any of other appellant/accused by the prosecution witnesses, on complete consideration of entire prosecution evidence, a serious doubt arises as to correctness of the prosecution case that each of the appellant accompanying Tuntun Choudhary and Shambhu Choudhary intended to kill or to injure Ramashrey Choudhary or his sons. Therefore, it is unsafe to resort to the principle of vicarious liability for imposing penal liability regarding the subject crime on the appellants/accused before this Court except appellant-accused No. 3 Shambhu Choudhary. He is certainly liable individually for the act of firing bullet at Ramashrey Choudhary causing the death. However rest of the appellants/accused deserves benefit of doubt in the instant case.

32. Though it is faintly argued by the learned counsel for the appellants that provisions of Section 313 Cr.P.C. are not complied in the instant case, we will have to deal with such submission. It would be apposite to quote provision of Section 313 Cr.P.C. for better understanding of the issue. It reads thus:-

“313. Power to examine the accused.-

(1) In every inquiry or trial, for the purpose of enabling the accused personally to



explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under subsection (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.”

33. Legislative provision enshrined in Section 313 of the Cr.P.C. is based on the principle of natural justice described



in maxim ‘*audi alteram partem*’ - meaning thereby that nobody should be condemned unheard. Principle of fair trial requires that all incriminating circumstances appearing against the accused must be put to him in order to afford him an opportunity of explaining those circumstance. The trial Court is duty bound to question the accused on the evidences and circumstances appearing against him in order to enable the accused to understand the exact case which he is required to meet and whether or not to adduce any evidence in his defence. The material which is not put to the accused is required to be eschewed from consideration. At this stage, we may quote the law laid down by the Hon’ble Apex Court in **Sharad Birdhi Chand Sarda Vs. State of Maharashtra (AIR 1984 SC 1662)** wherein it is held thus:

“As these circumstances were not put to the Appellants in their statement under Section 313 of the Code of Criminal Procedure they must be completely excluded from consideration because the Appellants did not have any chance to explain them. This has been consistently held by this Court as far back as 1953, wherein the case of Hata Singh Bhagat Vs. State of Madhya Bharat MANU/SC/0073/1951; AIR 1953



SC 468 this Court held that any circumstances in respect of which an accused was not examined under Section 342 of the Code of Criminal Procedure cannot be used against him. Ever since this decision there is a catena of authorities of this Court uniformly taking the view that unless the circumstances appearing against an accused is put to him in his examination under Section 342 of Section 313 of the Criminal Procedure Code, the same cannot be used against him... It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court in this view of the matter the circumstances, which were not put to the Appellant in his examination under Section 313 of the Code of Criminal Procedure have to be completely excluded from consideration.”

(Emphasis is supplied by me)

Even in the case of State of Maharashtra Vs. Sukdeo Singh and Another (AIR 1992 SC 2100), their Lordship have observed as follows-

“The trial Judge is not expected, before he examined the



accused under Section 313 of the Code, to sift the evidence regarding any incriminating material to determine whether or not to examine the accused as that material. To do so, would be to prejudice the evidence without hearing the prosecution under Section 314 of the Code. Therefore, no matter how weak or scanty prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation thereon.”

34. Whenever material circumstances are not put to the accused in order to enable him to explain the incriminating evidence appearing against him, the following course of action is available to the appellate Court:

(A). Whenever a plea of non-compliance of Section 313 Code of Criminal Procedure is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate Court



any reasonable explanation of such circumstance, the Court may assume that the accused has no acceptable explanation to offer.

(B). In the facts and circumstances of the case, if the appellate Court comes to the condition that no prejudice was caused or no failure of justice was occasioned, the appellate Court can hear and decide the matter upon merits.

(C). If the appellate Court is of the opinion that non-compliance with the provisions of Section 313 of the Code of Criminal Procedure has occasioned or is likely to have occasioned prejudice to the accused, the appellate Court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 of the Code of Criminal Procedure and the trial Judge can be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh.

(D). The appellate Court may decline to remit



the matter to the Trial Court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.

35. In the case in hand, it is not demonstrated by the learned counsel for the appellants as to which of the incriminating circumstances were not put up to the accused for tendering their explanation. On the contrary it was put up to the accused persons that at about 7:15 pm of 08.05.2011, they had formed an unlawful assembly and in prosecution of the common object of that assembly, Ramashrey Choudhary was done to death by firing bullets at him in the 'Aangan' of his house at village-Akbarpur Nayatola Dhanha. Further it is not pointed out to us as to how the accused persons are prejudiced because of their improper examination under Section 313 of the Cr.P.C. as nothing is demonstrated to show prejudice caused to the accused on this point. We are unable to accept the argument of the learned counsel for the appellants that provisions of Section 313 of the Cr.P.C. were not complied by the learned trial Court thereby entitling the appellant/accused for acquittal.

36. Now comes the question whether the accused



persons are liable for conviction and resultant sentence for committing the offence of criminal conspiracy. It is case of the prosecution that Subodh Choudhary – son of deceased Ramashrey Choudhary was earlier murdered by accused persons and in that crime, absconding accused Balram Choudhary was under going pretrial detention. First enabling Balram Choudhary to seek bail in that offence, members of the prosecuting party were pressurized to withdraw that prosecution. On refusal to accede that request, the appellants/accused persons along with absconding accused Balram Choudhary and acquitted accused No. 8 Mukesh Choudhary hatched conspiracy to kill Ramashrey Choudhary and under that conspiracy Ramashrey Choudhary was done to death.

37. It is settled principle of law that criminal conspiracy is hatched to commit an illegal act which is an offence punishable under law. It is not essential that the accused person must do an overt act and mere agreement between two or more persons to commit an illegal act is sufficient to constitute the offence of criminal conspiracy. It is also not necessary that the object of the conspiracy should have been achieved for it to be considered as an offence. Even if the conspiracy fails on account of abandonment or detection before commission of



offence, the very act of entering into an agreement by the co-conspirators is itself an offence and punishable under the law. Undoubtedly, criminal conspiracies are hatched in secrecy and can only be perceived by actions of the participants and the same can be established on the basis of circumstances brought on record.

38. Section 120A of the IPC defines the offence of criminal conspiracy and it reads thus :

120A. Definition of criminal conspiracy -

When two or more persons agree to do, or cause to be done -

- (1)an illegal act, or
- (2)an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy :

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

Bare perusal of this definition of criminal conspiracy makes it clear that if circumstances in a case when



taken together on their face value are indicating meeting of minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal committed by illegal means, then, the offence of criminal conspiracy punishable under Section 120B of the IPC is made out. In the matter of **John Pandian vs. State** reported in **JT 2010(130) SC 284** the Hon'ble Apex Court has held that a few bits here and a few bits there on which prosecution relies, cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. It is necessary to quote observations of the Hon'ble Apex Court in the matter of **Keharsingh vs. State (Delhi Administration)** reported in **AIR 1978 SC 1883**. Ingredients of the offence of criminal conspiracy are explained by the Apex Court in the following manner in paragraphs 271 and 272 which read thus :

“271. It will be thus seen that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to Ss. 120-A and 120-B, IPC would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy.



272. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Gerald Orchard of University of Canterbury, New Zealand (Criminal Law Review 1974, 297 at 299) explains the limited nature of this proposition :

“Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties “actually came together



and agreed in terms” to pursue the unlawful object; there need never have been an express verbal agreement, it being sufficient that there was “a tacit understanding between conspirators as to what should be done.”

What constitutes an offence of criminal conspiracy is further explained by the Hon'ble Apex Court in the matter of State of Tamil Nadu Vs. Nalini reported in 1999 Cri. L.J. 124 and the relevant observations read thus :-

“The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive action evidencing their joining of conspiracy. It has been said that a criminal conspiracy is a partnership in crime and there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy any act done by any of them pursuant to the agreement is in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution of furtherance of the common purpose is deemed to



have been said, done or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purpose.”

In the matter of **Nalini (supra)**, according to prosecution case, the former Prime Minister Late Shri Rajiv Gandhi was killed in a bomb blast as a result of conspiracy to eliminate him. While allowing the appeal partly, the Hon'ble Supreme Court has considered important points relating to conspiracy which was allegedly hatched by accused persons. It is apposite to cull out those points in order to appreciate as to how the offence of criminal conspiracy can be made out.

- (a) Association of accused with one of main accused or even his knowledge about conspiracy would not make him conspirator as agreement is sine quo non of agreement.
- (b) Accused harbouring main accused persons knowing fully well their involvement in the commission of offence is itself not sufficient to infer that he was member of conspiracy.
- (c) If accused had no knowledge of conspiracy as per evidence produced then his mere association with main conspirator would not make him member of the conspiracy.



(d) If main conspirator is looking after the welfare of the accused who has lost his leg and meeting his medical expenses, then in the absence of any evidence to the contrary, that would not import accused with the knowledge of conspiracy.

(e) Wireless message showed that only main accused conspirators knew the object of conspiracy. So if accused said that he had strong suspicion that targetted person was Rajiv Gandhi, but it would certainly not make him member of conspiracy without something more.

(f) It is not necessary for the conspirator to be present at the scene of crime. If evidence showed that the accused was in thick of conspiracy then his plea that he derived the knowledge of incident after the explosion is not tenable specially when he himself had purchased the battery which he knew will be used for explosion of human bomb.

(g) Mere association with LTTE hard core militant or the fact that those militants turned out to be the persons responsible for the killing of Rajiv Gandhi, would not make them member of any conspiracy to kill the targetted person.

39. For suggesting even prima facie material to infer criminal conspiracy, it is necessary for the prosecution to point out as to how it was hatched. That can be inferred from the circumstances specially declaration, acts and conduct of



conspirators. Need of meeting of minds of conspirators for doing illegal act is sine-quo-non. What is prima facie required to show is the respondent/discharged accused was having object to accomplish and hence a plan or scheme was framed by accused persons including the respondent/discharged accused for accomplishing that object and that there was agreement or understanding between them for accomplishment of the object by executing the same in the manner decided by them. At this juncture, observations of the Hon'ble Apex Court in the matter of **State of Uttar Pradesh vs. Sanjay Singh** reported in **1994 SSC (Supp) (2) 707** can be quoted with advantage. Paragraphs 18 and 20 of that judgment read thus :

“18. At the highest, the prosecution can only suggest from the circumstances what is or may be the motive for any particular act. However, motive is not a sine qua non for bringing the offence of murder or of any crime home to the accused. At the same time the absence of ascertainable motive comes to nothing, if the crime is proved to have been committed by a sane person but to make out a case by proof of a motive alone that too Suspicion of motive apparently tending towards any possible crime, is not only a very unsatisfactory but also a dangerous process, because circumstances do not always lead to



particular and definite inferences and the inferences themselves may sometimes be erroneous.

20. This Court in Century Spinning & Manufacturing Co. Ltd. v. State of Maharashtra while examining the scope of Section 251(A) sub-sections (2) and (3) of the old Code corresponding to Sections 239 and 240 of the new Code has made the following observation: (SCC p. 291, para 17: AIR p. 552, para 16) "... If on this material, the Court comes to the conclusion that there is no ground for presuming that the accused has committed an offence, then it can appropriately consider the charge to be groundless and discharge the accused. The argument that the Court at the stage of framing the charges has not to apply its judicial mind for considering whether or not there is a ground for presuming the commission of the offence by the accused is not supportable either on the State Of U. P vs Dr. Sanjay Singh on 27 January, 1994 plain language of the section or on its judicial interpretation or on any other recognised principle of law. The order framing the charges does substantially affect the person's liberty and it is not possible to countenance the view that the Court must automatically frame the charge merely because the prosecution authorities, by relying on the documents referred to in Section 173, consider



it proper to institute the case. The responsibility of framing the charges is that of the Court and it has to judicially consider the question of doing so. Without fully advertent to the material on the record it must not blindly adopt the decision of the prosecution."

40. In the case in hand, there is no iota of evidence to infer that the appellants/accused persons hatched conspiracy for committing murder of deceased Ramashrey Choudhary. Therefore, we are not in a position to uphold conviction of the appellants-accused persons for the offences punishable under Section 120B of the Indian Penal Code.

41. Similarly except appellant/accused No.3 Shambhu Choudhary, the prosecution has not proved that rest of the appellants/accused had used fire-arm in contravention of provisions of Section 5 of the Arms Act during the course of incident and, therefore, for want of evidence on this aspect these appellants/accused persons are entitled for acquittal on that count.

42. In view of foregoing discussion we proceed to pass the following order:-

I. Cr. Appeal (DB) No.494 of 2014 of appellant/accused No. 3 Shambhu Choudhary is partly allowed.



His conviction for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code as well as Section 120B of the Indian Penal Code is quashed and set aside. Instead he is convicted for the offence punishable under Section 302 of the Indian Penal Code and is sentenced to suffer imprisonment for life apart from imposition of fine of Rs.1,000/- (one thousand) and in default he is directed to undergo simple imprisonment for one month. His conviction and resultant sentence for the offence punishable under Section 27 of the Arms Act is maintained.

II. Cr. Appeals (DB) bearing Nos. 418 of 2014 and 442 of 2014 of appellant/accused No.1 Jai Kishore Choudhary, appellant/accused No.6 Ram Pravesh Choudhary, appellant/accused No.4 Sudhir Choudhary, appellant/accused No.5 Sunil Choudhary, appellant/accused No.2 Kaushal Choudhary and appellant/accused No.7 Upendra Choudhary @ Mahanth are allowed. The impugned judgment and order of their conviction and resultant sentence is quashed and set aside. They are acquitted of offences punishable under Section 302 read with Section 149 of the Indian Penal Code and Section 120B of the Indian Penal Code as well as under Section 27 of the Arms Act. The bailors are discharged from the liabilities of



their bail bonds.

43. Let the Lower Court Records be sent back to
the learned Court below with a copy of this judgment and order.

(A. M. Badar, J)

(Alok Kumar Pandey, J)

Mkr/Aditi/-

AFR/NAFR	AFR
CAV DATE	29.11.2022
Uploading Date	23.12.2022
Transmission Date	23.12.2022

