

Mohan Singh

Vs

State of M.P.

Criminal Appeal No. 551 of 1998

(G. B. Pattanaik, A. P. Misra JJ)

28.01.1999

JUDGMENT

A.P. Misra, J

1. The appellants have preferred the present appeal against the judgment dated 18th December, 1997 of the M.P. High Court (Gwalior Bench) convicting them under Section 302 read with Section 34 IPC. However, conviction and sentence of the accused Mohan Singh under Section 25/27 of the Arms Act by the trial court was set aside. Earlier the Trial Court convicted Mohan Singh (Appellant No. 2) under Section 302 IPC and under Section 25/27 of the Arms Act and sentenced him to the imprisonment for life and one year rigorous imprisonment, respectively and convicted and sentenced Ajay Singh, appellant No. 1, and Kailash, appellant No. 2, under Section 302/34 IPC to the imprisonment for life. However, since Ajay Singh died during the pendency of the appeal his appeal stood abated.

2. Admittedly both the complainant and the accused persons are close relatives, as the deceased Bhagat Singh was the son of the complainant, Ram Singh, (PW1), who is the real brother of the aforesaid accused Ajay Singh. Both the present appellants, namely, Mohan Singh and Kailash are the sons of Ajay Singh.

3. In short, the prosecution case is that on 26th April, 1980 at about 9 a.m. accused Mohan Singh had beaten Moti Chamar to which Veer Singh son of Ram Singh objected and had enquired as to why he had beaten Moti Chamar. Thereafter Mohan Singh stood up to beat him also. On the same evening at about 4 p.m. accused Ajay Singh Kailash Singh and one Daulat Singh went to Gajar on the motor cycle and beat the mother of Veer Singh, his brother Gajendra and his sister Meena. Ajay Singh and Daulat Singh were standing three and were exhorting to kill. Ajay Singh had a pistol. On seeing these they went out of the Dalan. Veer Singh's mother and Gajendra Singh received injuries, Meena was slapped by Kailash. Veer Singh thereafter asked Kalua to sleep at the door and took his mother, brother and sister on tractor to Vidisha. He disclosed this fact to Bhagat Singh who thereafter went to call his father Ram Singh from bazaar. Subsequently, Bhagat Singh and Ram Singh took meal and went to Gajar on the motor cycle. They reached there at 10 p.m. On hearing the noise of the motor cycle the accused Mohan Singh, Ajay Singh and Kailash came out of their house and went to the first floor. Kalua was sleeping in Dalan who also came out. Bhatat Singh on seeing the accused persons asked them as to why they were harassing him and beaten their Hali and mother. Being aggravated all the three accused persons went to the second floor and from there to the roof of the third floor. It is alleged thereafter Mohan Singh fired from his gun on Bhatat Singh thrice as a result of which he died on the spot. Thereafter Ram Singh, who was present there, went to the chowkidar Bihari and told him the occurrence. Subsequently, Bihari went to the spot and saw

the body. He proceeded thereafter to the Police Station and lodged a report in the morning of 27th April, 1980 at about 7 a.m. The report was prepared by Ajit Kumar Patil, PW11, who was then the Station-in-Charge, Vidisha, who in turn proceeded to the place of occurrence in village Gajar. He prepared panchanama of the dead body and took into custody the pellets found near the dead body. Sample of blood stained earth from there was also taken by him. He also prepared the site plan Ex. P.2. All the three accused were arrested on the same day. During investigation Mohan Singh disclosed about the .12 bore gun which he had kept inside his Kotha, one empty cartridge near the gun and also two empty cartridges (Memo Ex. P-6) Mohan Singh took him to his house and got recovered this .12 bore double barrel gun made in Czechoslovakia. Empty cartridge of .12 bore gun and two .12 bore empty cartridges were also got recovered from the drain. The recovered gun is article No. 2.

4. The accused persons denied the charges. They said that they have been falsely implicated on account of enmity as Ram Singh and Veer Singh wanted to take their property.

5. It is also not in dispute that accused persons as well as the complainant lived in the same house, but separately. Further, a year before the incidence there had been partition between the brothers including Ram Singh complainant and accused Ajay Singh, relating to their ancestral land. The following pedigree would reveal the relationship *inter se* between the accused and the complainant family which in turn will also reveal the motive of commission of the crime.

Ram Lal

Ajay Singh, Ram Singh, Pratap Singh, Shambhoo, Bhawani, Kalyan

(Accused), Complainant Sons, (adopted Veer Singh) (dead) Sarju Bai Widow, (died issue less) (Adopted Gopal Singh)

Mohan Singh, Kailash, (Adopted Prahlad)

(Accused), (Accused)

Gopal Singh, Jaswant Singh

Bhagat Singh (Deceased in occurrence) Prahalad, Veer Singh, Gajendra

6. The prosecution case is that the aforesaid Shambhoo Singh had died leaving his widow Sarju Bai, who had adopted Prahlad Singh S/o Ram Singh, the complainant. Similarly, Veer Singh, PW10, another son of the complainant was also adopted by another brother Pratap Singh. The aforesaid six brothers *inter se* had about 1400-1450 bighas of land for which the aforesaid partition took place. The complainant alleged that the accused Ajay Singh had given 250 bighas of land to him and kept with him the rest of the land though he was only entitled for 700 bighas of land as Sarju Bai had adopted his son and she was living with him. In order to prove the motive of commission of the crime the prosecution relied on the statement of Veer Singh, PW10, who stated that he was taken in adoption by Pratap Singh. On the day of the incidence at 9 a.m. his servant Moti Chamar was beaten by Mohan Singh accused and was turned out. When he went to Mohan Singh and enquired from him as to why he had beaten Moti Chamar, he stood up even to beat him. He further deposed that he heard the cries of his mother, Kala Bai, his brother Gajendra and sister Meena. On the same evening at about 4 p.m. when accused Ajay Singh, Kailash and Daulat Singh came on the motor cycle, he actually saw the accused-Kailash, who was beating his mother, when Ajay Singh and Daulat Singh

at that time were exhorting him to beat. Thereafter they went out. This background clearly expresses the grouse subsisting because of the partition *inter se* between the complainant and the accused, leaving them in tension in words and action. The day's incidence at 9 a.m. and 4 p.m. clearly expresses the outrage of the accused party. The prosecution case is when Ram Singh, (PW1), and deceased Bhagat Singh reached below the house of the accused and complained about their behaviour, as aforesaid, further aggravated the tenseness, this background led to commission of the crime on the same day resulting into firing by Mohan Singh accused resulting into the death of Bhagat Singh.

7. In this case there are two eye witnesses Ram Singh, PW1, the father of the deceased and Kalua, PW3.

8. Learned senior counsel for the appellants, Shri U.R. Lalit, challenged the findings of the High Court and the trial court, firstly, on the ground that since post mortem report of Dr. G.P. Tamarkar, PW4, shows blackening of the skin on each of the injuries recorded, belies the prosecution case that the accused fired on the deceased Bhagat Singh from the roof of the third floor. Blackening means fired from a close range, not from the roof of the third floor. Second, by recovery of two guns on 12 bore on the pointing of Mohan Singh which is article No. 2. Another .12 bore gun which turned out to be licensed in the name of Ram Singh recovered in the information of the complainant though from the Dalan of the accused Ajay Singh, which is article No. 1. Next point pressed was that there was not sufficient light when the incidence is said to have taken place, viz., at 11 p.m. to recognise and confirm as to who among the aforesaid three accused fired which resulted into the death of Bhagat Singh. Lastly, but feebly submitted that the FIR does not disclose the details of commission of the offence including the part played by each of the said three accused persons. This led into improvement and concoction of the prosecution story.

9. Learned counsel for the accused, Mr. Lalit, submitted with vehemence with reference to the first point that the alleged firing on the deceased Bhagat Singh by Mohan Singh from the roof of the third floor is in conflict with the post mortem injuries recorded by Dr. D.P. Tamarkar, PW4. For ready reference one of such recorded injury No. 1 is reproduced below :

"Fire arm would placed over right side of chest (P. Torn) above (Rt) nipple, oval wound inverted edges size 1.25 cm x 1 cm, surrounding *skin blackened clotted blood was present around the wound*. On explosion the wound was going from right to left side obliquely. There was ruptured of intercostal muscle (Rt) side, plura, Right lung ruptured. The charra was stucked in thorasic wall left side under the skin of the level of 6th rib in anterior axiliring line producing an area of acheymas over skin where it was lodged."

[Emphasis supplied]

10. The emphasis was, blackening of skin clearly indicates that the firing was from a very close range which contradicts the prosecution case that the firing by the accused-Mohan Singh was from the roof of the third floor which could not be a firing from a close range. He also referred to the deposition of the Doctor, PW4, that by blackening of skin he meant deposition of the smoke. On the other hand learned Senior counsel, Mr. K.N. Shukla, for the prosecution referred to the recording of the injury by the same Doctor in the same report through a diagram that the shape of injury was oval which indicates that the injuries must have been caused from a higher pedestal. He submits this corroborates with the prosecution story as accused is said to have fired from the roof of the third

floor, i.e., from the higher plane to the deceased Bhagat Singh who was standing down below on a Chabutra on a lower plane, along with him was his father Ram Singh, PW1.

11. The question is how to test the veracity of the prosecution story especially when it is with some variance with the medical evidence. Mere variance of the prosecution story with the medical evidence, in all cases, should not lead to the conclusion, inevitably to reject the prosecution story. Efforts should be made to find the truth, this is the very object for which courts are created. To search it out, the courts have been removing chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is onerous duty of the court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused. For this, one has to comprehend the totality of the facts and the circumstances as spelled out through the evidence, depending on the facts of each case by testing the credibility of eye witnesses including the medical evidence, of course after excluding that parts of the evidence which are vague and uncertain. There is no mathematical formula through which the truthfulness of a prosecution or a defence case could be concretised. It would depend on the evidence of each case including the manner of deposition and his demands, clarity, corroboration of witnesses and overall, the conscience of a judge evoked by the evidence on record. So courts have to proceed further and make genuine efforts within judicial sphere to search out the truth and not stop at the threshold of creation of doubt to confer benefit of doubt. Under this sphere we proceed now to test the submission of the learned counsel for the accused with reference to the blackening found by the doctor under the injuries in the post mortem report.

12. We find as aforesaid there is another part of the deposition of the same Doctor with reference to the same injuries when he records that the shape of the wounds was oval indicating the injuries being caused from a higher pedestal. In Taylor's Principle and Practice of Medical Jurisprudence, 12th Ed., at page 297, it says :

"The position of the wound of entrance usually marks a part of the body which was at the moment of discharge facing the muzzle of the weapon, and in a straight line with the barrel; it therefore indicates with precision whether the victim was facing the muzzle or with him back or side to it. Where the weapon is set at a slant to the body the bullet may strike the skin and enter through a distinctly *oval hole* the 'approach' side of which is a graze widening out into the actual entry, or it may tear across the surface of the skin leaving only a groove or split."

13. In Modi's text book of Medical Jurisprudence and Toxicology 21 Ed. at Page 264, it says :

"The wound of entrance in distant shot is usually smaller than the projectile due to the elasticity of the skin, and round when the projectile strikes the body at a right angle and oval when it strikes the body obliquely. The edges of the wound are inverted and the striking bullet covered with grease and smoke causes also a collar of abrasion contrusion, *which looks like a dark ring*, showing two zones, the inner of grease and the out of abrasion. Where there is a close shot that is in the range of powder blast and flame is within 1 to 3 inches for small arms there is a collar of soot and grease (if present on the bullet) around the circular wound of entry. Signed

hairs may be seen if the body is not covered with clothing. When it is fired beyond a distance of 12 inches there are no powder marks of soot or heat effects around the wound."

14. In the present case the doctor found the injuries oval in shape, denoting shot was from a slanting position downwards right to left. The prosecution case is that deceased was standing on Chabutra under a neem tree thus any shot, if it is from close range could either be from Chabutra, which would be on level with the deceased thus it could not make oval shape hole and if it was shot from below the Chabutra, the oval shape would not be downwards but upwards. We find the post mortem report and evidence of the doctor that injuries recorded was oval in shape, journey of pellets being downwards and right to left all indicating and corroborating the prosecution story of firing from the roof top which is on the right side of the place where the deceased was standing.

15. Now, we proceed to examine the testimony of eye witnesses, their credibility and trustworthiness. In the present case there are two eye witnesses, Ram Singh, PW1, and Kalua, PW3. We find the evidence of these two eye witnesses are of unimpeachable character and in spite of their long cross-examination nothing worth could be said to have been eroded, even learned counsel for the appellants before us could not point out any incongruity, unreliability or contradiction or their testimony being at variance to distrust them. According to the prosecution case Ram Singh, PW1, came along with the deceased Bhagat Singh on the motor cycle near the accused house and Kalua, PW3, who was sleeping in the Dalan also came out after hearing the noise of the motor cycle.

16. Ram Singh, PW1, stated that on the day of occurrence he received information from his son Bhagat Singh in Bazaar Vidisha, where he had gone that Kailash, Daulat Singh and Ajay Singh entered his house and had beaten his wife, his son Gajendra and his daughter Meena. Then his wife, son and the daughter also reached Vidisha when he saw the hand of his wife bandaged where she also disclosed that the accused had beaten them after entering their house. This fact was also corroborated by Gajendra Singh. On hearing this he returned back and after taking meal proceeded to Village Gajar with Bhagat Singh on motor cycle driven by Bhagat Singh. After reaching there Bhagat Singh parked his motor cycle near neem tree. On hearing the noise of the motor cycle Kalua, PW3, has also come. He was sleeping in the Dalan of the house of my portion. This witness further deposed that at the time when we saw the accused, they were standing on the second floor and then they reached the roof of the third floor of their portion of the house. Gun was in the hand of Mohan Singh alone. First, Mohan Singh in reply to the query of the deceased used abusive and threatening language at which the deceased retorted why you are abusing, then Ajay Singh exhorted to kill him in abusive language, followed by Kailash. This led to the firing of one shot by Mohan Singh followed by two more shots by him. Bhagat Singh fell down and died. Thereafter, Ajay Singh shouted, whoever come in front, we will kill him. Out of that fear nobody came out.

17. PW3, deposed that between 10 and 11 p.m. he woke up with the noise of the motor cycle of Ram Singh and Bhagat Singh who reached there, it was parked near the Neem tree and Mohan Singh, Ajay Singh and Kailash were standing in the Gokh of Ajay Singh. It was the moon-lit night and a lantern was also burning in the Gokh. The incidence started when Bhagat Singh asked as to why they had beaten his hali and mother, i.e., referring to the incidence which happened earlier on the same day. Thereafter all the accused persons went inside the house and went on the roof of the third floor. According to this witness Mohan Singh had a gun while Ajay Singh and Kailash had no weapon in their hands. The role attributed to these two accused were exhortation. On Bhagat Singh questioning Mohan Singh about his indecent conduct earlier, he abused him to which Bhagat Singh retorted not to abuse. On this accused Ajay Singh exhorted Mohan Singh to kill him and not to

worry as we will see the consequences. It is only thereafter Mohan Singh spread barrel of his gun and fired at Bhagat Singh as a result of which he died. Thereafter Ram Singh went to the Chowkidar, PW2, and told him to report the matter to the police. PW2 thereafter lodged the FIR. Admittedly he is not an eye witness but reports on asking by Ram Singh and of course after seeing the dead body, he goes and lodges the FIR early next morning. Further we find in the present case prosecution has established the place of occurrence as Station-incharge, PW11, proves it through the recovery of the pellets and the blood found there, further prosecution has proved the recovery of both the guns from the house of the accused.

18. Returning to the eye witnesses we find both these two eye witnesses PW1 and PW3 has fully corroborated the prosecution story. Their credibility has been upheld by the trial court and we also after going through their testimony fully approve this finding and uphold their testimony. Apart from these two eye witnesses there is also part corroboration by Jagannath Singh, PW6, who is a neighbour. His house is adjacent to the house of Ram Singh. He stated, he woke up on hearing the noise of firing of gun. Actually he heard the noise of three fires. He then went to the door of the house and heard 'Jee Saheb', the witness clearly stated he always called Ajay Singh as 'Jee Saheb'. He heard him saying that if any person of the village comes out he will be killed. On account of this he did not come out and he remained inside his house till 8 a.m. Scrutinising and examining the evidence we have no hesitation to conclude that the prosecution has proved to the hilt the story of firing by Mohan Singh from his roof top to the deceased Bhagat Singh. This unimpeachable evidence of these two eye witnesses fully corroborates with the other part of the medical evidence, viz., injuries oval in shape, direction downwards, pellets travelling right to left, i.e., that shot was fired from roof top of the third floor. In this light mere reference in the said report of blackening under the surface of the injuries by the Doctor could not be given credence for inferring that firing was from a close range. This by itself in no way dismantles the prosecution story. Learned senior counsel, Mr. M.N. Krishnamani, appearing for the impleaded party submitted that the blackening found could also be because of clotted blood found as recorded in the same report; "Skin blackened clotted blood was present around the wound." We find in this regard as aforesaid, Modi records :

"The wound of entrance in distance shot..... The edges of the wound are inverted and the striking bullet covered with grease and smoke causes also a collar abrasion contrusion, which *looks like a dark ring.*"

[Emphasis supplied]

19. In the case of *Shiv Shankar and others v. State, AIR 1953 All. 652*, with reference to the Medical Jurisprudence by Taylor it was held that sometimes blackness present in the area of the injury of ingress creates doubt. The path created by ingress of gun shot the internal skin comes out and therefore the core keeps on changing the colour. The skin of nearby area can be burnt or injury might not be burnt in accordance with the distance of opening the gun shot and there might be blackness or redness of the particles. In this decision also doctor found black margin below the gun shot wound. Relevant portions of the said decision incorporating Taylor's opinion is quoted hereunder.

"The nature of the wounds said to have been inflicted on account of the gun being placed on the chest and fired does not fit in with the allegation. It is true that the doctor was not questioned about it. In fact the doctor made the statement that these wounds were due to the gun being fired by being placed on the chest or from within a range of one yard. We are of the opinion that in this the doctor was wrong and

probably got misguided on account of the black margins of the wounds. The black margins of a wound are never due to the firing of the gun from very close range but are due to something different. Taylor says at page 430 of his Principles and Practice of Medical Jurisprudence, Volume I, 10th Edition :-

"The edges of the wound commonly show a narrow ring of discoloration due to the removal of a layer of epithelium by the passage of the bullet. The surrounding skin may be scorched or not, and there may be a zone of blackening or peppering with grains of powder according to the distance from which the weapon was fired."

And again at page 431 :-

"All entrance wounds, if examined, will be found to have a zone of denuded epithelium immediately surrounding the orifice. This is caused by the spin of the bullet and the investigation of the skin by the bullet and tends to dry and become discoloured shortly after death. It should not be confused with the marks due to powder for it gives no indication of range."

And again at 441 :-

"The bruised and dark appearance which a gun shot wound sometimes presents, even when the weapon is discharged at a distance from the body has led to the supposition that this effect was due to a burn and that the bullet burnt the parts which it touched, but this idea is not correct. The projectile never becomes sufficiently heated to acquire the power of burning."

Again Taylor says at page 430 :-

"We must distinguish between near wounds and far wounds. Usually when a weapon is discharged in contact with or within an inch or so of the body the gases which pass out with the bullet enter the tissues and thereafter expand causing tearing of the skin or clothes very often in the form of a cross or a split. Most of the powder is found inside the tissues, but there may be traces of blackening, burning and tattooing around the entrance hole..... If the weapon is discharged at a shot distance from the skin the effect of the gases is lost and the entrance wound looks like a hole which might be caused by pressing a lead pencil into the tissues; it is rounded with inverted edges and surrounded by a zone of singeing, blackening from the smoke and tattooing from the impaction of small particles of powder in the skin."

20. For all these reasons we have no hesitation to hold that recording of blackening of skin below the injury by the doctor *prima facie* may lead to the conclusion that firing of gun shot may be from a close range but in a given case, depending on other factors, as in the present case and in the light what the Taylor says, as aforesaid - "The black margins of a wound are never due to the firing of the gun from a very close range but are due to something different" the observation by the doctor could even be in cases where shots are not from a close range.

21. In *Karnail Singh and others v. State of Punjab, AIR 1971 SC 2119*, this Court held that where it is proved beyond doubt that the evidence of the eye witnesses are trust worthy in a case where the accused person committed murder by gun shots, the inconsistency between the opinion of expert and the eye witnesses relating to the distance from which gun shots were fired carries no weight. If

the eye witnesses stand the test of their credibility they have to be believed. Looking to the present case we see even the doctor's opinion is not clear as he admitted that he cannot give clear opinion about the distance from which the shot was fired. But he records that it was fired from higher pedestal which corroborates with the prosecution story. This, coupled with the fact that the eye witnesses also corroborate to the same effect, the submission on behalf of the accused for all the aforesaid reasons with respect of the first point

22. Next submission relates to the recovery of two guns of .12 bore which is said to cast doubt on the prosecution case as licence of one of them is in the name of Ram Singh, PW1. The recovery of two fire arms are, one which is recovered on the pointing of Mohan Singh from his house on 27th April, 1980 and the other which was licensed in the name of complainant Ram Singh, PW1, is recovered on the information given by this very witness, PW1, recovered from the Dalan of the accused Ajay Singh on 28th April, 1980. This point was pressed to create a doubt as to which one was used to commit the offence. The High Court has rightly referred to the judgment of the trial court with approval on this point. The trial court has given good and cogent reason for not accepting this part of the submission on behalf of the accused. Learned counsel for the accused submitted that it is not recorded in the seizure memo that the gun, Article No. 1, was seized from the doctor in the Dalan of Ajay Singh to show it to be in possession of Ajay Singh. In this regard the trial court referred to the statement of Mohan Singh who admitted that he was keeping a 12 bore gun with one empty cartridge and two empty cartridges in the drain of his house. IN this regard a seizure memo, Ex. P6, was also prepared. The gun, Article No. 2, and dry cartridges, Article 10, wet cartridges, Articles 11 and 12, were seized on the indication of Mohan Singh and the seizure memo, Ex. P-7, was prepared. Parsu Ram, DW4, clearly stated that those articles were got seized voluntarily by Mohan Singh and he has given this statement voluntarily. The trial court rightly concluded that Articles 10, 11 and 12 (cartridges) were seized inside the house of Mohan Singh on his indication. The case of Ram Singh is if there is any gun licensed in his name then it must be with accused Ajay Singh as on partition he never gave such a gun to him, however, the said Ram Singh did say, when he was washing his face at the hand pump in the morning on 28th April, 1980, then he saw the gun and a belt of the cartridges hanging at a peg outside the house of Ajay Singh in his dalan. Thereafter when investigation officer came then he told the officer about the said gun on which the investigation officer did collect the said gun after going there along with Kalua, PW3, and one Jagannath and brought the said gun. The trial court rightly concluded based on the evidence and the report of ballistic expert, that the introduction of the second gun would have no bearing on the trustworthiness of the proof of the use of the specified gun in the said incidence.

23. Next it was submitted as there was paucity of light it was not possible for the eye witnesses to see the accused and to identify as to who out of the aforesaid three accused used the firm arm and who exhorted Mohan Singh to fire. We find the prosecution witnesses have stated it was a moon-lit night and even a lantern was burning in the Dalan of Ajay Singh, coupled with the fact that the accused were not only known but were closely related belonging to the same family hence their appearances, voice being known, there would be no difficulty for the witnesses in recognising the accused persons in a moon lit night with lantern burning. Eyewitnesses clearly stated that the firing was done by the accused Mohan Singh to which we have no hesitation to accept. Lastly, a feeble submission was made that the FIR does not record details about the part played by each accused persons in commission of the crime, hence prosecution story is an after thought to implicate the accused. We again do not find any substance in this submission, since it is not in dispute that the FIR was lodged by Chowkidar, PW2, who admittedly was not an eye witness. Ram Singh told PW2 who came to the scene later to get the FIR lodged as then on his son's death he must be in remorseful mood. PW2 did see the dead body of Bhagat Singh and then went to the Police Station

and lodged the FIR. It is but natural the man recording the FIR if not an eye witness, no details could be expected to be incorporated in it. It is also natural Ram Singh after seeing his son dead could not have been in a mood to give details except to request the chowkidar to lodge a report. Thus we do not find any merit to this last submission. In view of the aforesaid findings, we clearly come to the conclusion that the prosecution has proved to the hilt the crime committed by the accused Mohan Singh by killing Bhagat Singh by 12 bore gun beyond all reasonable doubt.

4. Next question is whether prosecution has proved its case against the accused Kailash Singh under Section 302 read with Section 34 or not ? It is admitted case that he has not used any fire arm nor any active role is assigned to him. The role assigned to him is merely exhortation. In order to test the prosecution evidence, it is necessary to record sequence of events preceding the alleged exhortation by him to test whether his case falls under Sec. 34 IPC or not ? Admittedly, it is not a case of pre-determined, planned case of common intention of the three accused to kill the deceased Bhagat Singh. Prosecution story reveals that emotion developed on the spot when complainant Ram Singh and Bhagat Singh came near the house of Ajay Singh accused where two other accused, namely, their sons Mohan Singh and Kailash Singh were also there. Thus it is to be seen whether any such common intention with a common design developed also in the mind of Kailash to kill the deceased ? According to Ram Singh, the eye witness when he reached the neem tree which is in front of the house of Ajay Singh the accused Ajay Singh, Mohan Singh and Kailash Singh came out from Gokh and went to turn from second floor to the third floor. After the initial altercation with Bhagat Singh the accused Mohan Singh shouted with threatening and abusing words to Bhagat Singh deceased which were as following; "Abe Sale Kutte Ab Bol Tujhe Abhi Bhai Tata Dete Hai", on which Bhagat Singh replied why are you abusing from above ? It is on this the accused Ajay Singh, their father, then exhorted his son Mohan Singh with the following words "Mar Sale Ko Jo Kuch Hoga Nipat Lenga (Kill him whatever happen we will face it)". It is only thereafter it is alleged that his other son Kailash also exhorted Mohan Singh with the words "Mar Sale Ko (Kill him)". The consequence of events clearly shows, the very language expressed by Mohan Singh first, clearly, indicates, the clear intention of the accused Mohan Singh first, clearly indicates, the clear intention of the accused Mohan Singh to do away with Bhagat Singh. It is expressed with rage. If there was any infirmity in his resolve it fully matured when what followed, viz., the exhortation by Ajay Singh the father of Mohan Singh. The aforesaid words of the father could infuriate anyone including Mohan Singh to do the ultimate, namely, killing of Bhagat Singh. It is at this point of time when common intention between the two accused matured, if at all. So far as Kailash is concerned he had no role. He is introduced lastly when it is said that he also said "Mar Sale Ko" which may mean both kill him or beat him. Except for this no other role is assigned to this accused at the point of the incidence. Looking to the preceding strong abusing and threatening language used both by the other two accused which indicates common intention if at all matured then the exhortation words attributed to this accused, does not bring home beyond doubt of common intention with common design maturing to kill the deceased so far as the participation of this third accused. Firstly, it is the weakest language used out of the three and is attributed to have been expressed in the last. We find the common intention really matured and concluded much earlier to the time when the role of this accused is introduced. On the facts and circumstances of this case and in the absence of anything more this by itself does not lead to the conclusion so far as the accused Kailash is concerned that his exhortation was also with the same common intention to kill Bhagat Singh.

25. In the cross-examination when PW1 was confronted, whether such words were expressed by Kailash or not and whether he got it recorded with police or not this witness stated that I told this thing to the police but police might not have recorded it. This apart except for the similar repetition by the other eye witness Kalua, PW3, even he could not refer to any other role played by Kailash

except *introduction of the said words*. Thus we conclude that the prosecution has not proved beyond all reasonable doubt that the accused Kailash Singh also formed part of the common intention to kill Bhagat Singh. So we grant benefit of doubt to him.

26. In view of the aforesaid finding, we conclude that so far as the appeal of accused Mohan Singh is concerned the conviction and sentence is maintained and his appeal fails but the appeal of accused Kailash Singh is allowed and his conviction and sentence under Section 302 read with Section 34 IPC is set aside. It is directed that the accused Kailash Singh be set at liberty forthwith unless required in connection with any other offence. Accordingly, this appeal is partly allowed.