

BRIJLALA PD. SINHA ETC.

v.

STATE OF BIHAR

JULY 13, 1998

[M.K. MUKHERJEE AND G.B. PATTANAİK, JJ.]

Penal Code, 1860 : Sections 302/34

Circumstantial Evidence- Three innocent persons killed by police officials- Incident tried to be shown as encounter--Case registered- On circumstantial evidence, accused convicted under Section 302/34 and sentenced to death--On appeal, conviction upheld by the High Court-- However, death sentence of three accused commuted to life imprisonment- On appeal, Held : Evidence of PWs 7 and 8 was believed by the courts below--Evidence of PW 7 was corroborated by that of PW 8- The fact of the accused leaving for the place of occurrence and returning back with dead bodies with bullet injuries clearly established--Vehicle of the deceased persons had bullet marks whereas that of the accused did not have any- Fact of accused implanting country made pistols in the vehicle of deceased persons also established- No explanation given as to the killing--Chain of circumstances was complete to hold the accused guilty--Evidence Act, 1872.

S.34 Common Intention- All the other accused except one went together to the place of occurrence- Initially went to chase the vehicle- On finding the van stationary fired indiscriminately--Killed the deceased persons--Held- Intention to kill the deceased persons developed at the very place of occurrence- Death occurred due to the shots from 303 rifles of the Constables--One of the accused left for the place of occurrence half an hour later- No proof of his revolver being used--Only evidence was the non-explanation of as regards use 9 cartridges supplied to him a year before-- Evidence of driver who took him to the place of occurrence not taken-- Hence it cannot be said that he shared common intention.

Sentence- Sessions Court awarded death sentence to all the six accused- High Court commuted the death sentence of only three accused Constables to life imprisonment- Held- High Court swayed away by the fact of trial being a sensational one though it was not a rarest of rare cases.

Indian Evidence Act, 1872 : Sections 11--Alibi- Accused pleaded alibi

A *on the ground of his being transferred to Gaya about six months ago. Held: Presence of the accused at the police station of the place of occurrence stated by more than nine PWs. No attempt was made to call for and prove the station diary of the police station to prove his presence there. Hence nothing on record to establish his plea of alibi.*

B Appellant DN was the Station House Officer of the Barachatti Police Station. On the day of occurrence, early in the morning, appellant JK informed DN that a Maruti Van had been speeding up with criminals who were also firing indiscriminately. The appellant police officials, immediately, left the police station to chase the said van. When the van stopped on account
C of a traffic jam, the chasing appellants, after coming near the van, fired indiscriminately as a result of which three persons amongst the occupants of the van were killed. Their dead bodies were taken to the police station where DN made entry in the Station Diary stating therein that as the occupants of the van started firing at the police personnel, they also resorted to firing and in the course of occurrence three persons from the van were
D found dead. Four days thereafter a written report was received by the Superintendent of Police, Gaya alleging therein that police officials have committed murder of three persons as their demand for one lakh rupees could not be fulfilled; on the basis of the complaint Case No. 148/93 was registered. The Sessions Judge, Relying upon the circumstantial evidence held the appellants/accused guilty under Section 302/34 Indian Penal Code,
E 1860 and sentenced them to capital punishment.

On appeal and reference for confirmation of death sentence, the High Court, upheld the conviction and the death sentence in respect of accused persons namely DN, BP and VF but commuted the death sentence of the
F other three accused Constables to life imprisonment as they were subordinate policemen who were acting under the direction of their superiors.

In appeals to this Court, it was contended that in the absence of any direct evidence as to the occurrence and the prosecution having relied on the circumstantial evidence, the circumstance proved cannot be held to be of
G conclusive nature; as such the conviction under Section 302/34 IPC was unwarranted. As regards the sentencing it was contended that the Courts below had been swayed away by the fact that the case was a sensational one. It was also contended that there was no material evidence to attract Section 34 even if a common intention could develop at the spur of the moment.
H Conviction of the appellant BP was challenged on the ground that as per

PWs 7 and 8, BP had not gone with DN; rather he had gone in a private jeep and the prosecution was guilty of suppressing the evidence of driver of the said jeep. It was also contended that there was no evidence of the use of BP's revolver and mere non-explanation for cartridges could not be concluded to mean that those were used at the place of occurrence. On behalf of the appellant VF it was also contended that since admittedly he had been transferred since July, 1993 to Gaya, his plea of alibi had been rejected erroneously.

The respondents contended that the circumstances established in the case were sufficient to prove the charge beyond reasonable doubt and the entire chain of circumstances was complete and therefore, the conviction and sentence of the appellants under Section 302/34 was justified.

Disposing the appeal, this Court

HELD : 1.1. The law relating to circumstantial evidence no longer remains *res integra* and is settled that the circumstances proved should lead to no other inference except that of the guilt of the accused, so that the accused can be convicted of the offences charged with. Before the court records conviction on the basis of circumstantial evidence it must satisfy that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused. [546-C-D]

1.2. PWs 7 and 8 are two Constables, who had been posted at Barachatti Police Station on the relevant date of occurrence. These two witnesses have been believed by the Sessions Judge as well as by the High Court. The evidence of the PW 7 has been fully corroborated by PW 8. On the evidence of these two witnesses it can be safely held that the prosecution had established beyond reasonable doubt that all police officers excluding accused BP on getting information from accused JK went together in a Maruti Van with their arms and ammunition chasing the alleged criminals and then returned back with three dead bodies as well as another Maruti Van. The evidence of PW 7 further establishes the fact that the Maruti Van which had been brought by toeing was found to be damaged and blood marks were also seen on the said vehicle. He further stated that the dead bodies brought by the police had bullet injuries on them. [546-F; 547-A-C]

1.3. The prosecution evidence clearly establishes the fact that the

A speeding vehicle had to stop at 71 Mile Post on account of a traffic jam and the police personnel could easily approach the said vehicle, which was immobile. It is also established beyond reasonable doubt that the vehicle in which the deceased persons were moving had several bullet marks at its body and pieces of bones and blood marks had also been found in the said vehicle as stated by PW 58. [547-C-D]

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1.4. The statement of the accused DN, Ex 25/1 that the occupants of Maruti Van Started firing at the police personnel has been falsified by the fact that the police vehicle did not have a single mark of bullet on its body. Then again the two country made pistols which were supposed to have been seized from the Maruti Van by DN under Ex 17/1 had been sent to ballistic expert for examination and the report of the expert Ex 19/2 was that it was not at all in a fit condition to be used. It is further established on examination of the cartridges which had been sent to the Forensic Science Laboratory, and supposed to have been used from the country made pistols by the occupants of the Maruti Van that those cartridges have not been fired from the country made pistols which clearly falsifies the statement of DN that occupants of Maruti Van had opened fire at the police party itself. Clothes seized from the Maruti Van as well as the clothes of the deceased from their person had been sent to Forensic Science Laboratory for being examined and the report Ex 16/2 indicates the user of copper bullets and lead bullets which corroborates the statement of DN that police party had resorted to fire at the Maruti Van.

E [547-E-H; 548-A]

1.5. When the police personnel left the police station with arms in their hands and returned to the police station with three dead bodies, it was for them to explain under what exact circumstances the three people were killed. Non-explanation of the members of the police party indicating the circumstances under which three people were killed is an additional link in the chain of circumstances completing the chain to indicate that the three people were killed on account of firing by the police party. [548-B-C]

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2.1. The liability of one person for an offence committed by another in the course of a criminal act perpetrated by several persons will arise under Section 34 IPC only where such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention will, of course be difficult to get and such intention can only be inferred from the circumstances. But the existence of a common intention must be necessary inference from the circumstances

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established in a given case. A common intention can only be inferred from the acts the parties. Unless a common intention is established as a matter of necessary inference from the proved circumstances the accused persons will be liable for their individual act and not for the act done by any other person. For an inference of common intention to be drawn for the purposes of Section 34, the evidence and the circumstances of the case should establish, without any room for doubt that a meeting of minds and a fusion of ideas had taken place amongst different accused and in prosecution of it the overt acts of the accused persons flowed out as if in obedience to the command of a single mind. If on the evidence there is doubt as to the involvement of a particular accused in the common intention, the benefit of doubt should be given to the said accused persons. There is no dispute with the proposition that a common intention can develop at the spur of the moments and in the present case in view of the evidence of PWs 7 and 8 there being no intention to kill the occupants of Maruti Van when the police personnel left the police station on being informed that miscreants are speeding up in a Maruti Van, such a common intention could have developed at 71 Mile Post. [549-A-E]

2.2. The bundle of circumstances clearly established the fact that the accused persons except accused BP went together with their respective arms and ammunitions in the police vehicle and at 71 Mile Post finding the miscreants in a stationary Maruti Van, Started firing indiscriminately through their respective weapons which ultimately resulted in the killing of three persons and as such the intention to finish up the occupants of the Maruti Vab developed at the very place suddenly. Therefore, the two police officers would be equally liable as the three constables, notwithstanding the fact that death occurred on account of receiving shots from 303 rifles used by the three constables. [550-F-G]

2.3. Neither the ballistic report nor the Forensic Science Laboratory report indicate that the revolver that had been given to accused BP had at all been used at 71 Mile Post. The only evidence which possibly can be said to have been established, so far as accused BP is concerned is that there was some shortage of cartridges which had been supplied to him and no explanation had been offered by him. But merely for such shortage of 9 rounds of cartridges, which had been supplied to accused BP a year before the date of occurrence, it is difficult to come to the conclusion that at 71 Mile Post, accused BP who left the police station half an hour after accused DN and others had left, had at all used his revolver and therefore, from the circumstances established against accused BP it is difficult to hold that he also shared the common intention which developed at 71 Mile Post. Not only the prosecution evidence established the fact that he left the police station

A half an hour after the police party headed by accused DN had left chasing the Maruti Van but also there is no iota of material so far as accused BP is concerned to establish by meeting of mind of said BP with the other police party who resorted to firing at 71 Mile Post. The jeep in which accused BP went was being driven by a private driver and he would have been the best person to indicate the role played by accused BP but unfortunately the prosecution had not examined the said driver and no explanation has been offered as to why the said driver had not been examined. In the aforesaid circumstances, there is considerable doubt as to the involvement of accused BP in sharing the common intention of killing the three persons.

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[552-D-H; 553-A]

C 3. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence. Under Section 11 of the Evidence Act, 1872 collateral facts having no connection with the main fact except by way of disproving any material fact proved or asserted, can be admitted in evidence. In other words the facts proved as such which make the existence of the fact so highly improbable as to justify the inference that is never existed, but such fact had to be established by the persons who take the plea. If VF by evidence has established that he was present elsewhere at the relevant time when the occurrence took place then he cannot be held guilty of the offence. But in the present case, the presence of VF at Barachatti Police Station on 05-12-1993 has been stated by PWs 7, 8, 17, 19, 28, 58, 59, and 64. Even PW 64 the then SP of Gaya also stated about the presence of the accused VF at Barachatti Police Station on 05-12-1993. No attempt was made by accused VF to call for and prove the Station Diary of Civil Lines Police Station dated 05-12-1993 to establish that he was present at Civil Lines Police Station on the relevant date. Thus there is not an iota of material available on record to establish the plea of alibi of accused VF and under such circumstances the Courts below had no other option than to reject such a plea. [551-E-H; 552-A]

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G 4. The High Court had not kept in view the several decisions of this Court and has not examined the circumstances proved while considering the question of sentence but on the other hand has been swayed away by the fact that trial was a sensational one and therefore, the officials must be awarded the extreme penalty of death. It is not a correct appreciation of the law on the subject dealing with the award of death penalty, even if conviction under H Section 302/34 is sustained. [553-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 149 of 1998 Etc. A

From the Judgment and Order dated 28.11.97 of the Patna High Court in D.R.C. No. 5/96 with CrI. A. No. 422 of 1996.

U.R. Lalit, V.A. Mehta, Rajinder Singh, K. B. Sinha, Subodh Lalit, K. L. Taneja, Smt. Minoti Mukherjee, K. K. Srivastava, Manish K. Choudhary, S. K. Verma, Ranjit Kr., Ms. Anu Mohla, M. Qamaruddin, Mrs. M. Qamaruddin, Jawed Ashique Warsi and B. B. Singh for the appearing parties. B

The Judgment of the Court was delivered by

PATTANAİK, J. These five appeals are directed against the judgment dated 28.11.1997, of the Patna High Court passed in Criminal Appeal No. 459 of 1996 and Death Reference No. 5 of 1996. All the accused appellants are police officials. All of them were convicted under Section 302/34 IPC and were directed to be hanged till they are dead by the learned Additional Session Judge, Gaya. Accused appellant Dudh Nath Ram, in addition, was convicted under Section 201 IPC but no separate sentence was awarded. The High Court, on appeal, being preferred by the accused persons and reference being made for confirmation of death sentence under Section 366 of the Criminal Procedure Code affirmed the conviction of all the accused appellants under Section 302/34, but on the question of sentence while the High Court affirmed the death sentence awarded against Dudh Nath Ram - appellant in CrI. Appeal No. 218 of 1998, Brijlala Prasad Sinha - appellant in Cr. Appeal NO. 149 of 1998, and Victor Fedeles - appellant in CrI. Appeal No. 279 of 1998, commuted the death sentence as against accused Dinesh Singh, Deo Narain Ram, Jaikaran Yadav and sentenced them to undergo imprisonment for life, who are the appellants in Criminal Appeal Nos. 280-82 of 1998. The main ground for giving sentence of imprisonment for life as against the aforesaid three appellants is that they were merely the constables and obeyed the commands of their superior officers and, as such, their case would not come within the test laid down by this Court to bring it as a rarest of rare case. C
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Broadly stated the prosecution case sought to be established through different witnesses is that accused Dudh Nath Ram was the Station House Officer of Barachatti Police Station in the State of Bihar. On the early morning of 5th of December 1993 while Dudh Nath was taking tea Jaikaran informed that a Maruti Van has been speeding up with criminals and there has been indiscriminate firing from the said Maruti vehicle. On getting this information G
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- A the accused Police Officials immediately left the Police Station to chase the Maruti Van. The Maruti Van, however, was forced to stop on account of a traffic jam. The chasing police officials came near the Maruti Van and started firing at the Van indiscriminately in consequence of which 3 persons from amongst the occupants of the Maruti Van were killed and their dead bodies were then removed in the Police Jeep to the Police Station. Dudh Nath then
- B made entry in the Station Diary stating therein that as the occupants of the Maruti Van started firing at the police personnel, the police personnel resorted to firing and in course of the occurrence 3 persons were found dead. It may be stated at this stage that prosecution tried to establish a case that the
- C accused police officers after chasing the Maruti Van and finding the van to be immobile on account of traffic jam surrounded the said van and dragged Rajesh and Khedan from the vehicle and demanded a sum of Rs. 1 lakh, but when Rajesh could not accede to the request then he and Khedan were shot dead from the close range and the driver who was sitting on the driving seat was also gunned down. This part of the prosecution case, however, could not be established as none of the prosecution witnesses unfolded this part of the
- D prosecution case. It may be further stated that a written report was submitted to the Superintendent of Police, Gaya on 9.12.1993, alleging therein that the police officials have committed murder of three persons as their demand of one lakh of rupees could not be fulfilled and on the basis of the said report Barachatti Case No. 148/93 was registered and the investigation of the said
- E case was taken up by the C.I.D. Patna under Government Order and it is on completion of the investigation of the said case charge-sheet was submitted against the accused persons and on being committed to the Court of Sessions the accused persons stood their trial. The accused persons pleaded not guilty and according to them a false case has been foisted. The prosecution examined as many as 65 witnesses and exhibited a large number of documents. The
- F prosecution witnesses who were supposed to unfold the manner in which the incident took place at 71 Mile Post on G.T. Road, namely, PWs 2, 4, 5, 9, 10, 11, 12, 17, 18, 20, 22, 35, 40, 52, 53, 54, 56, 57, 60 and 61 all became hostile and were cross-examined by the prosecution. Similarly, PWs 13, 15, 16, 21, 30, 46, 47, and 49 were also tendered by the prosecution cross examined and
- G consequently their evidence could not be pressed into service in establishing the charges against the accused persons. PWs 6, 7, 8, 9, 14, 19, 33, 34, 38, 39, 50, 51, 58, 59, 62, and 64 are the police personnel examined in this case. PWs 24 and 55 are the formal witnesses to the seizure on the seizure list. There is no dispute that on the date of occurrence of 5.12.1993 at 71 Mile Post at about 7.30 a.m. 3 persons were killed. But in the absence of any direct
- H testimony as to the manner in which they were killed the prosecution case

hinges upon the circumstantial evidence. The learned Session Judge relying upon the evidence of PWs 63 and 65 came to hold that deceased Rajesh Dhawan alongwith Khedan Yadav and Vinay Kumar Mishra proceeded from Ranchi to Varanasi in the night of 3.12.1993. On the basis of the evidence of PWs 23, 41, 42, 44, 45, and 48 the learned Session Judge came to hold that Rajesh Dhawan had made purchases at Varanasi on 4.12.1993. The witnesses also further revealed that two other persons had accompanied Rajesh Dhawan. PW 65 established the fact that she had a telephonic talk with her husband from Varanasi on 4.12.1993 at 7.00 p.m. On the basis of the evidence of PWs 26, 27, 28, 29, 31 and 32 the learned Session Judge came to hold that the vehicle in which deceased Rajesh Dhawan was travelling with other persons developed certain defect and misfiring was noticed at 7.00 a.m. on 5.12.1993. On the basis of the evidence of PWs 7 and 8, who are the two constables present at Barachatti Police Station the learned Session Judge came to hold that early in the morning accused Jaikaran came and informed while Dudh Nath Ram and others were taking tea at the Police Station, that some dacoits are speeding up in a Maruti Van and while speeding up they are also firing from their revolver. Thus the aforesaid prosecution evidence clearly establishes the fact that five accused appellants excepting accused Brij Lala Prasad Sinha moved in a Police Jeep chasing the Maruti Van on being informed that the miscreants are speeding up in a Maruti Van and while so speeding up are indulging in firing from their weapons. The said PWs 7, 8 and 9 also stated in the Court that on 5.12.1993, the accused persons returned to Barachatti Police Station with three dead bodies and the damaged Maruti Van No. BR-14B/7407 and this fact is also corroborated by the evidence of PWs 58, 59 and PWs 27, 28, 29, 31 and 32. Accused Dudh Nath Ram was the Officer in-charge of Barachatti Police Station. He immediately after arriving at the Police Station got a case registered-Barachatti P.S. Case No. 146/93 stating therein that after chasing the Maruti Van near 71 Mile Post on G.T. Road when they found the van to be stationary they challenged the occupants of the Maruti Van and when the occupants of the said Van started firing at the Police personnel, the Police personnel retaliated by firing and in course of such firing 3 occupants of the Maruti Van were killed. This part of the case which could have been accepted as a defence version has not at all been established in as much as there is no iota of material to indicate that the occupants of the Maruti Van had at any point of time fired at the Police officers nor there has been any mark of violence on the Police Van which unhesitatingly point out that false defence plea had been taken by the accused persons more particularly, accused Dudh Nath Ram who was the Officer in-charge of Barachatti Police Station on the relevant date of occurrence. It is significant

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A to notice that though the Officer in-charge accused Dudh Nath Ram is supposed to have made a written report indicating the manner in which the 3 occupants of the Maruti Van were killed in an police encounter, but such written statement or the so called FIR did not reach the higher officers of the Police Department and in fact from the evidence of PWs 58 and 64 the learned Sessions Judge came to hold that until arrival of the higher officers of the State no FIR was lodged by accused Dudh Nath Ram. On examining different seizure lists made by Dudh Nath Ram on the relevant date of occurrence and the inherent inconsistencies in those seizure lists the learned Session Judge came to the conclusion that in order to suppress the truth and to cover up the truth the seizure list was prepared later on as an after thought which indicates the guilty mind of the accused persons. In the aforesaid seizure list two country made pistols and two live cartridges were alleged to have been seized from the Maruti Van and those arms and ammunitions had been sent to Forensic Science Laboratory, Patna, for examination. The evidence of PW 34 and his reports Exhibit 16 and 16/1 clearly indicates that the cartridges found near the dead bodies of the deceased persons could not be fired from the country made pistols seized near the dead bodies and those pistols were defective. The report also further revealed that the said pistols had never been used. The aforesaid evidence clearly belies the defence theory that the occupants of the Maruti Van were speeding up by firing from their arms on the relevant date. The dead bodies of the 3 occupants of the Maruti Van were sent to the Gaya Hospital for post mortem examination and doctor PW 1 conducted the autopsy on the dead bodies of the said 3 persons. The post mortem reports are Exhibits 1, 1/1 and 1/2. The evidence of PW 1 clearly establishes the fact that the appearance blackening of margins on the wounds on the bodies of the deceased persons is suggestive of the fact that the fire arm has been used approximately within 18 inch. The learned Session Judge, therefore, came to the conclusion that the deceased persons had been shot at from a very close range. The learned Session Judge also relied upon Exhibits 13/22, 13/23 and 13/24 which happened to be the photographs of the deceased persons and on that basis read with the evidence of doctor PW 1 came to hold that it cannot be the result of an encounter in which case there should have been some distance between both the parties but in the case in hand the distance between the parties was very close. The evidence of PWs 58 and 59 who had visited the place of occurrence on 6.12.1993 alongwith Dudh Nath Ram, Victor Fedles and Brijlala Pradsad establishes the fact that they did not find any mark of violence at a distance of 25 meters from the G.T. Road in the north side where it was alleged one dead body was found in the bush. They also did not find any mark of blood or mark of violence. The learned Session Judge analysed the evidence of PWs

58, 59 and 62 and then held that the story of encounter as alleged by the defence could not be believed. Exhibit 17/1 is the Register indicating the supply of fire arms to the accused persons Dudh Nath Ram, Brijlala Prasad Sinha and Victor Fedles. PW 38 examined by the prosecution indicated in his evidence that the rounds of cartridges which he had supplied to the aforesaid accused police officers. Even the Register Exhibit 18 series corroborates the aforesaid factum of supply of cartridges. Later on the accused persons have surrendered their arms and ammunitions together with empty cartridges from which the learned Sessions Judge came to hold that the accused persons must be held to have utilised those cartridges in killing the 3 persons who were the occupants of Maruti Van on the relevant date of occurrence. The photograph of Maruti Van BR-14B/7407 in which the deceased persons were travelling clearly demonstrated the fact that the glasses of the said Van were broken and there were marks of firing on the Van. On the other hand, there was not an iota of damage to the vehicle in which the police officers were chasing and the learned Sessions Judge, therefore, came to the conclusion that the firing was made only by the accused persons and not from the side of the deceased persons. The learned Session Judge relying upon the evidence of PW 58 came to the conclusion that even though the Supdt. Of Police, Gaya had ordered that PW 58 would investigate into the case but Dudh Nath Ram never handed over the charge of investigation to him for quite some time. His evidence further indicated that when he searched for the Station Diary and asked about it from Munshi Shabir Ahmad, the Station Diary was not available at the Police Station and he was told that Dudh Nath Ram had taken away the same. Even the Station Diary was not available on 8.12.1993 when PW 58 wanted the same. Non availability of the Station Diary at the Police Station and the reply of Munshi Shabir Ahmad to PW 58 that the same has been taken away by the accused Dudh Nath Ram was relied upon by the learned Session Judge as an additional link in the chain of circumstances to establish the case beyond reasonable doubt and in completing the chain. The learned Session Judge also relied upon the evasive answer which the accused persons had given in their examination under Section 313 Cr. P.C. and ultimately came to hold that these police officials have brutally fired at the stationary vehicle on account of which 3 occupants of the vehicle were killed. After noticing the law on the question of circumstantial evidence and on the circumstances established in the case by the prosecution witnesses the learned Sessions Judge came to hold that there is no hesitation in mind that the accused persons committed brutal murder of 3 innocent persons who had no criminal antecedents and rather they were civilised persons of the society. The learned Session Judge, therefore, held the accused persons guilty under Section 302/

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- A 34 IPC. Though accused persons stood charged under Section 379/149 but the learned Sessions Judge came to hold that the said allegations of theft of Rs. 20,000 had not been satisfactorily proved by the prosecution and as such he acquitted the accused persons of the said charge. So far as the charge under Section 120B IPC is concerned the learned Sessions Judge came to hold
- B that the prosecution had failed to prove said charge beyond any reasonable doubt and acquitted them of this charge. So far as the charge under Section 201 IPC is concerned on an analysis of the prosecution evidence the learned Sessions Judge came to hold that the accused Dudh Nath Ram alone is guilty of the said offence and other accused persons cannot be held guilty of those charges and as such they were acquitted of the said charges. Coming to the
- C question of sentence the learned Sessions Judge was of the opinion that 3 innocent civilians having been killed brutally in the hands of the accused persons who are police personnel and on whose shoulder the safety of the civilians lies and who are deemed to be the protector of the society and they have killed the 3 civilians without any provocation and resistance the case should be held to be one of the rarest of rare cases in which the accused
- D persons deserve capital punishment and accordingly directed that each of them should be hanged till they are dead.

- On appeal by the accused persons and a reference having been made for confirming the sentence of death under Section 366 of the Code of Criminal Procedure, the High Court by the impugned judgment came to the
- E conclusion that the prosecution in this case has been handicapped in adducing the evidence regarding the actual manner of occurrence and also regarding the participation of individual accused in the commission of the crime for which they have been charged, tried and convicted. But on re-appreciating evidence establishing the circumstances, the High Court agreed with the
- F conclusion of the learned trial Judge that the prosecution has been able to establish that the accused persons brutally murdered three occupants of the Maruti Van by resorting to fire from a close range. The High Court further came to the conclusion that it appears to be the absurd proposition and it indicates that there has been good deal of fabrication and manipulation for
- G distorting and destroying the evidence in this case from the very beginning and it further appears that the police personnel in this case were very much conscious of this fact that innocent persons have been killed and in order to save their neck, they started making preparation of their defence at that very stage. On re-appreciation of the evidence the High Court agreeing with the learned Sessions Judge held that the stand of the defence that the occupants
- H of Maruti Van BR-14B/7407 had opened fire at the police party necessitating

opening of fire by the police party at the Maruti Van is wholly falsified. The further plea that two country-made pistols were recovered near the dead body of the deceased is also falsified from the report Ex. 16/1. Ultimately, the High Court came to the conclusion that the victims have been killed by the police in a show of fake encounter and it appears that the circumstances leading to this occurrence are most unfortunate for a civilised society and the police force is meant for protecting the law abiding citizens from anti-social elements and to come to the rescue of the citizens of onslaught from the mighty and influential persons but the role of police in this case appears to have been reversed. On a scrutiny of evidence, the High Court also came to the conclusion that it appears to be true that actually the killing had taken place in a deliberate manner because the deceased failed to fulfil their demand of money. The High Court ultimately came to the conclusion: "it is thus clear that all the six appellants in this case have participated in the commission of this ghastly and gruesome murder which was committed in a most indecent manner which was likely to shake the confidence of people in the law and order machinery of the State." Having come to the aforesaid conclusion and coming to the question of sentence the High Court was of the view that the sentence of death awarded against three accused, namely, Dudh Nath Ram, Brijala Prasad Sinha and Victor Fideles does not require any interference but so far as the sentence of death awarded against the other three accused, namely, Dinesh Singh, Deo Narayan Ram and Jaikaran Yadav are concerned, they being subordinate policemen and were acting under the order and direction of their superiors, the extreme penalty of death sentence cannot be awarded to them, and therefore, it commuted their sentence to life imprisonment. Thus by the impugned judgment of the High Court in case of 3 of the accused persons, namely, Dudh Nath Ram, Brijlal Prasad Sinha and Victor Fideles the sentence of death was confirmed and in case of other three accused persons the sentence of death was commuted to life imprisonment.

Mr. Rajinder Singh, learned senior counsel appearing for appellant Dudh Nath Ram, Mr. U.R. Lalit, learned senior counsel appearing for appellant Brij Lala Prasad Sinha, Mr. V.A. Mohta, learned senior counsel appearing for appellant Victor Fideles, assailed the conviction of their respective clients, inter alia on the ground that in the absence of any direct evidence as to the occurrence at 71 Mile Post and the prosecution having relied on the circumstantial evidence, the circumstances proved cannot be held to be of a conclusive nature so as to exclude every hypothesis but that of guilt and as such, the conviction under Section 302/34 is wholly unwarranted. It was further contended that the ballistic expert's report being to the effect that the

A revolvers of these police officers had not been used and the post mortem report of the three deceased persons having established that death occurred on account of injuries caused by pellets which are from the rifles used by the constables, the learned Session Judge and the High Court committed serious error in convicting the police officers under Section 302/34. On the question of sentence it was contended, that even if a conviction under Section 302/34 can at all be sustained but the case cannot be held to be a rarest of rare case warranting extreme penalty of death. According to the learned senior counsel the High Court as well as the learned Session Judge have been swayed away by the fact that the case is a sensational one in the State of Bihar as three innocent citizens have been killed from the gun shots of the police officers. If the sensation and emotion of the Courts are taken out from the purview of consideration, of the evidence adduced, no aggravating circumstances have been established so as to inflict the extreme penalty of death sentence. It was also urged by the learned senior counsel that the Courts below committed error in coming to the conclusion that the police officials must have used their revolvers from the mere fact that certain cartridges have been supplied to them but the number of cartridges deposited is less than the number of cartridges supplied. According to the learned senior counsel there is not an iota of material to establish any prior planning or meeting of mind of the accused police officers and the prosecution evidence clearly establishes that since Jaikaran stated that some dacoits are fleeing away in a Maruti Van the police officials chased them and then came back with the dead bodies of three persons and, therefore, there is no material evidence to attract Section 34 even if a common intention could develop at the spur of the moment. Mr. U.R. Lalit, learned senior counsel appearing for appellant Brij Lala Prasad Sinha, in addition, to the aforesaid arguments also contended that ASI Brij Lala did not go with accused Dudh Nath Ram as has been indicated by PWs 7 and 8. He went in a private jeep which had been kept at the Police Station and the prosecution is guilty of suppressing the evidence of the said driver of the jeep. There is no evidence of any ballistic expert that the revolver of Brij Lala was used on the date of occurrence and merely for non-explanation of 9 rounds of cartridges no conclusion can be arrived at that those 9 rounds of cartridges had in fact been used at 71 Mile Post, particularly when there has been no seizure of such cartridges from the place of occurrence. According to Mr. Lalit, learned senior counsel it has no doubt been established that the dead bodies of three persons were brought to the Police Station in the jeep in which Brij Lala had gone but that by itself cannot bring home the charge under Section 302/34 as against accused Brij Lala Prasad. Mr. Lalit, learned senior counsel also contended that the

examination of accused Brij Lala under Section 313 Cr. P.C. has been perfunctory and the relevant incriminating materials have not been put which has caused serious prejudice and, therefore, the conviction of accused Brij Lala Prasad under Section 302/34 is vitiated.

Mr. Mohta, learned senior counsel appearing for Victor Fideles in addition to the arguments advanced by Mr. Rajinder Singh, learned senior counsel contended that the plea of alibi raised by accused Victor ought to have been accepted, since admittedly, he had been transferred since July 1993 to Gaya and the Courts below committed error in rejecting the pleas of alibi. He also contended that the cartridges have been issued to Victor on 19.11.1992 and the cartridges deposited in Malkhana was on 30.12.1993 and any shortage of cartridges during this period of more than a year would not lead to the conclusion that the cartridges were used on the date of occurrence. According to Mr. Mohta, learned senior counsel, positive evidence of the ballistic expert being the revolver of Victor had not been used the Courts below committed error in convicting him under Section 302/34 even if it is established that he had accompanied Dudh Nath Ram from the Police Station in chasing the Maruti Van, and at any rate the award of extreme penalty of death, according to Mr. Mohta, learned senior counsel, is wholly unjustified.

Mr. Sibbal, learned senior counsel appearing for the three constables attacked the judgment of the High Court on the ground that it proceeds on mere conjectures and not on legal evidence adduced in the case. According to Mr. Sibbal, the learned senior counsel the circumstances established through prosecution evidence do not unhesitatingly point out towards the guilt of the accused persons and, therefore, the conviction of the accused appellant under Section 302/34 is unsustainable in law.

Mr. Sinha, learned senior counsel appearing for the State of Bihar, on the other hand, contended that no doubt, there is no direct evidence as to the manner in which three occupants of Maruti Van were killed and all the prosecution witnesses who were to establish the same turned hostile and does not support the prosecution case. But according to Mr. Sinha, learned senior counsel the circumstances established in the case in hand are sufficient to prove the charge beyond reasonable doubt and the entire chain of circumstances is complete, and therefore, no error has been committed in finding the accused appellants guilty of offence under Section 302/34. According to Mr. Sinha, learned senior counsel, the chain of evidence as against the accused persons is so complete that it does not leave any

A reasonable ground for a conclusion consistent with innocence of the accused and on the other hand, it only points out that within all human probability it is the accused persons who are the perpetrators of the crime who have killed the three innocent persons who were occupants of the Maruti Van on the fateful day. According to Mr. Sinha when the dead bodies of three innocent persons were brought to the Police Station which has been established beyond reasonable doubt by the evidence of PWs 7 and 8 and the explanation offered by accused persons that there was an encounter in which these persons have been killed has not been established at all and no other explanation is forthcoming in such a case an additional link is established in the chain of circumstances to complete the chain and, therefore, the High Court was wholly justified in recording a conviction under Section 302/34 IPC. Mr. Sinha, learned senior counsel also urged that looking at the brutality with which three innocent persons were murdered from a close range by firing at them by police officers the High Court was justified in affirming the death sentence as against three accused persons and this Court should not interfere with the said sentence of death. According to Mr. Sinha, learned senior counsel, the evidence of PWs 7 and 8 clearly establishes the fact that Jaikaran came and narrated that Some miscreants are speeding on a Maruti Van and are simultaneously firing from the said vehicle and on hearing the same all the accused persons except accused Brij Lala Prasad moved together being fully armed with their respective revolvers and rifles. The prosecution evidence also is categorical to the fact that the speeding Maruti Van was forced to stop at 71, Mile Post on account of traffic jam. The evidence of PWs 7 and 8 further indicates that the police party headed by Dudh Nath Ram returned back with three dead bodies on the private jeep in which Brij Lala Prasad had proceeded to the place of occurrence after Dudh Nath Ram and others had left. The prosecution evidence also further establishes the fact that the Maruti Van was found to be having marks of bullets which establishes the fact that the police party had fired at the Maruti Van. The Inquest Report prepared by Dudh Nath Ram at 8.00 a.m. at the Police Station Exhibits 3, 3/1 and 3/2 indicates that Dudh Nath Ram knew the names of the victims and, therefore, it is not a case of unknown persons fleeing away on a Maruti Van as deposed to PWs 7 and 8. Though the prosecution evidence indicates that from the scene of offence some arms and ammunitions were recovered but the report of the Forensic Science Laboratory Exhibit 16 establishes the fact that those arms had only been implanted as those were not in a condition to be used. According to Mr. Sinha, learned senior counsel, the prosecution evidence indicating replacement of Exhibit 4 by its copy to office of CID suggests the guilty mind of accused Dudh Nath Ram. The learned senior counsel also urged that the

evidence of PW 58 clearly indicates that pieces of bones and blood marks were found from the Maruti Van. Then against the Kurta and Pyjama of deceased Rajiv on being examined was found to have been shot at with copper and lead bullet as per exhibit 16/2. According to the learned senior counsel PW 38 establishes the fact that revolvers and rifles were entrusted to the accused persons and these accused persons also deposited their revolvers and rifles as well as the cartridges and no explanation was offered for the shortage of cartridges. Mr. Sinha, learned counsel also submitted that the post mortem report exhibit I series as well as the evidence of PW 1 clearly establishes the fact that firing at the deceased had taken place from a very close range. Dudh Nath Ram, in addition, made an extra judicial confession to PW 25. Mr. Sinha also submitted that Statement recorded by Dudh Nath Ram contains an admission on his part that as there was an encounter the police party fired at the Maruti Van and ultimately three people were killed but the so called encounter is falsified by the fact that the police jeep did not have a single mark of violence. On these circumstances established by the prosecution evidence the only conclusion that can be arrived at is that the accused persons mercilessly fired at the Maruti Van in consequence of which three innocent persons were killed, and therefore, all of them could be held liable under Section 302/34 IPC. On the question of sentence Mr., Sinha, learned senior counsel submitted that three officers have been rightly awarded the death sentence and the High Court perhaps was justified in commuting the sentence of death to imprisonment for life in case of three subordinate police officers who had obeyed the commands of their superiors.

Before we examine the correctness of the rival submissions in the light of evidence adduced and the circumstances established, it would be appropriate to notice one feature in this case, namely, the examination of the accused persons under Section 313 Cr.P.C. has been highly perfunctory. In course of hearing, therefore, we had called upon the counsel appearing for the accused persons to indicate whether they would prefer the matter being remitted to the Sessions Judge for proper examination of the accused under Section 313 Cr.P.C. by bringing to their notice all the relevant incriminating material against them which the prosecution seeks to rely upon. But all the counsel appearing for different accused persons unanimously stated that they would not like the matter to be remanded again in view of protraction of the litigation since they feel that no prejudice can be said to have been caused to the accused persons for such a perfunctory examination of the accused under Section 313 Cr. P.C. In view of the aforesaid State of affairs we proceed to examine the correctness of the rival submissions at the Bar.

A As has been stated earlier there is no evidence to indicate the manner in which the three persons in the Maruti Van were killed. Conclusion on the same, therefore, has to be arrived at from the circumstantial evidence. In a case of circumstantial evidence the prosecution is bound to establish the circumstances from which the conclusion is drawn must be fully proved; the circumstances should be conclusive in nature; all the circumstances so established should be consistent only with the hypothesis of guilt and inconsistent with the innocence; and lastly the circumstances should to a great certainty exclude the possibility of guilt of any person other than the accused See, [1992] 2 SCC 300. The law relating to circumstantial evidence no longer remains res integra and it has been held by catena of decision of this court that the circumstances proved should lead to no other inference except that of the guilt of the accused, so that, the accused can be convicted of the offences charged. It may be stated as a rule of caution that before the court records conviction on the basis of circumstantial evidence it must satisfy that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused. It is not necessary to delve into any further, on the law on the subject which has now been crystallised by several decisions of this Court. Bearing in mind the aforesaid principles let us examine the circumstances said to have been proved by the prosecution by unimpeachable evidence. Since three of the appellants have been sentenced to death by the learned Sessions Judge and said sentence had been affirmed by High Court, we thought it appropriate to examine the reliability of the prosecution evidence and the circumstances so proved by such evidence to find out whether all the links in the chain are complete or not. PWs 7 and 8 are the two Constables, who had been posted at Barachatti police station on the relevant date of occurrence. These two witnesses have been believed by the learned Sessions Judge as well as by the High Court and nothing has been pointed out to us in this Court to discard their testimony, in fact no argument has been advanced on that score. According to PW 7 on the early morning of 5th December, 1993, while Dudh Nath Ram and Victor were at the police Station, Jaikaran Yadav came there and said that criminals are moving ahead firing shots. Getting this information the Officer In-charge, Dudh Nath Ram, Victor and two Constables and a Havildar went on a Maruti Van and Brij Lala later on went by a private jeep which used to remain at the police station. Further evidence of PW 7 is that when these officers returned back to the police station they had brought

three dead bodies in the jeep with them and they had also brought one Maruti Van by toeing. This evidence of PW 7 has been fully corroborated by PW 8 who was also posted at the police station on the date. On the evidence of the aforesaid two witnesses it can be safely held that the prosecution has established beyond reasonable doubt that all the police officers excluding Brij Lala Prasad on getting information from Jaikaran went together in a Maruti Van with their arms and ammunitions chasing the alleged criminals and then returned back with three dead bodies as well as another Maruti Van. The evidence of PW7 further establishes the fact that the Maruti Van which had been brought by toeing was found to be damaged and blood marks were also seen on the said vehicle. He further stated that the dead bodies brought by the police people had bullet injuries on them. The prosecution evidence clearly establishes the fact that the speeding vehicle had to stop at 71 Mile Post on account of a traffic jam and the police personnel could easily approach the said vehicle, which was immobile. It is also established beyond reasonable doubt that the vehicle in which the deceased persons were moving had several bullet marks at its body and pieces of bones and blood marks has also been found in the said vehicle as stated by PW-58.

So far as accused Dudh Nath Ram is concerned, he was the officer in-charge of Barachatti Police Station and he made several fabrications and manipulations which the High Court itself has found and his own statement which is Exhibit 25/1 clearly indicates that the police personnel resorted to firing when the occupants of Maruti Van started firing at them. The statement that occupants of Maruti Van started firing at the police personnel has been falsified by the fact that the police vehicle did not have a single mark of bullet on its body. Then again the two country made pistols which were supposed to have been seized from the Maruti Van by Dudh Nath Ram under Exhibit 17/1 had been sent to the ballistic expert for examination and the report of the expert Exhibit 19/2 was that it was not at all in fit condition to be used. It is further established on examination of the cartridges which had been sent to Forensic Science Laboratory supposed to have been used from the country made pistols by the occupants of the Maruti Van that those cartridges have not been fired from the country made pistols which clearly falsifies the statement of Dudh Nath Ram that occupants of Maruti Van had opened fire at the Police party which necessitated the opening of fire by the police party itself. That part of the statement of Dudh Nath thus having been falsified the further admission of Dudh Nath that police party fired at the Maruti Van remains and can be utilised as against Dudh Nath as an admission, though the other accused persons will not be bound by any such admission of Dudh

A Nath. Cloths seized from the Maruti Van as well as the cloths of the deceased from their person had been sent to Forensic Science Laboratory for being examined and the report Exhibit 16/2 indicates user of copper bullets and lead bullets which corroborates the statement of Dudh Nath that police party had resorted to fire at the Maruti Van. When the police personnel left the Police Station with arms in their hands and returned to the Police Station with three dead bodies, it was for them to explain under what exact circumstances three people were killed. The exact circumstances pleaded in defence by Dudh Nath Ram to the fact that when occupants of Maruti Van started firing at the police party the police party also fired at them has been belied, as already discussed. Non-explanation of the members of the police party indicating the circumstances under which three people were killed is an additional link in the chain of circumstances completing the chain to indicate that three people were killed on account of firing by the police party. In this connection it would be appropriate to notice that the post mortem examination held by PW 1 through the post mortem reports Exhibit 1 series as well as the oral evidence of PW 1 and his findings unequivocally indicates that the police party resorted to firing at the three deceased persons from a very close range. This also runs counter to the defence case that it is an encounter in which the police personnel resorted to firing when the occupants of the Maruti Van started firing at the police personnel. In addition to all these circumstances unerringly pointing to the fact that three people were killed on account of firing from the police party, the conduct and behaviour of Dudh Nath Ram in taking away the Station Diary Book from the Police Station, which was made available only on 9.12.1993, which is also established from the evidence of PW 58 and the conclusion of the High Court that there has been a good deal of fabrication and manipulation in distorting and destroying the evidence from the very beginning goes a long way to establish the culpability of accused Dudh Nath Ram.

It is true that on the circumstances proved the conclusion is irresistible that three occupants of Maruti Van were killed at 71 Mile Post on account of firing from the police personnel, but when the police personnel left the Police Station on being informed by Jaikaran that miscreants are speeding up in a Maruti Van they had no intention of killing those persons. At least there is nothing in the evidence of PWs 7 and 8 to indicate that the police personnel left the Police Station with the intention of killing the miscreants. The question, therefore, arises whether all the police personnel can be held guilty by taking recourse to Section 34 of the Indian Penal Code in the killing of the three occupants of the Maruti Van or only some of them can be held responsible?

The liability of one person for an offence committed by another in the course of a criminal act perpetrated by several persons will arise under Section 34 of the Indian Penal Code only where such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention will, of course be difficult to get and such intention can only be inferred from the circumstances. But the existence of a common intention must be a necessary inference from the circumstances established in a given case. A common intention can only be inferred from the acts of the parties. Unless a common intention is established as a matter of necessary inference from the proved circumstances the accused persons will be liable for their individual act and not for the act done by any other person. For an inference of common intention to be drawn for the purposes of Section 34, the evidence and the circumstances of the case should establish, without any room for doubt that a meeting of minds and a fusion of ideas had taken place amongst difference accused and in prosecution of it the overt acts of the accused persons flowed out as if in obedience to the command of a single mind. If on the evidence there is doubt as to the involvement of a particular accused in the common intention, the benefit of the doubt should be given to the said accused person. There is no dispute with the proposition that a common intention can develop at the spur of the moment and in the case in hand in view of the evidence of PWs 7 and 8 there being no intention to kill the occupants of Maruti Van when the police personnel left the Police Station on being informed that miscreants are speeding up in a Maruti Van, such a common intention could have developed at 71 Mile Post but the question for consideration is what is the evidence in the present case to indicate that in fact such common intention had developed at 71 Mile Post and further what are the overt acts committed by some of the accused persons to rope in all the police officers, as has been stated earlier. All the accused persons excepting Brij Lala Prasad left together in a vehicle with their arms and ammunitions on being informed that some miscreants are speeding up in a Maruti Van. Dudh Nath Ram was the Station House Officer of Barachatti Police Station. The three police officers, namely, Dudh Nath Ram, Victor Fedels and Brij Lala Prasad were armed with revolvers which has been established from the entries in the Register of Arms and Ammunitions maintained in the office and Exhibited as Exhibit 18 series. The other 3 constables had been supplied with rifles and after the incident those rifles had been seized. Report of the Director of Forensic Science Laboratory Exhibit 16/6 indicates that the 303 calibre rifles bearing nos. 35893, AA-0511 and 28896, which had been supplied to the three constables were in working order and can be used for effective fire arms. As a result of microscopic examination of the fired shells it was concluded that

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A the fired shells had been fired from the three rifles. So far as the three
revolvers which had been supplied to the three police officers, namely, Dudh
Nath Ram, Victor and Brij Lala Prasad, the report indicated that those also can
be used as an effective fire arm but the sign of the firing can not be detected
as barriers and chambers had clearly been cleaned after firing. The said report
B also indicated that the firing had been done at least 8 rounds on the Maruti
Van through 303 barrel weapons in downward Direction.

From the post-mortem report it further transpires that from the dead
bodies of three deceased persons missiles were recovered and on examination
of those missiles in the Forensic Science Laboratory it is established that the
C same had been fired from 303 rifles. This fact establishes that death of three
persons occurred on account of firing from 303 rifles which had been used
by the three Constables but at the same time the vehicle in which the three
deceased persons were moving as well as the bundles of sarees inside the
vehicle on being examined was found to have been fired at by 38 Revolvers
D which Revolvers had been given to accused Dudh Nath Ram and accused
Victor, as per the statement of PW - 38. From the aforesaid circumstances
proved, the conclusion becomes irresistible that at 71 Mile Post the police
party resorted to firing from a close range on the Maruti Van and its occupants
which was immobile and this firing had been made not only from the rifles
E possessed by the three Constables but also from the revolvers possessed by
the police officials though factually the three persons got killed on receiving
bullet shots from 303 rifles. It is also established that the cartridges supplied
to accused Dudh Nath Ram and Victor and cartridges received back did not
tally and there was no explanation for the shortage of such cartridges. These
bundle of circumstances clearly established the fact that all the accused
F persons except accused Brij Lala Prasad who went together with their respective
arms and ammunitions in the police vehicle though initially went to chase the
miscreants who were told to have been speeding up in a Maruti Van but at
71 Mile Post finding the said Maruti Van stationary, indiscriminately started
firing through their respective weapons which ultimately resulted in the killing
of three persons and as such intention to finish up the occupants of the
G Maruti Van developed at the very place suddenly and therefore the two police
officers would be equally liable as the three constables notwithstanding the
fact that death occurred on account of receiving shots from 303 rifles used
by the three Constables. In addition to the aforesaid clinching circumstances
against the five police officials excepting accused Brij Lala Prasad, so far as
Dudh Nath Ram is concerned the additional links in the chain of circumstances
H have been established from the fact that he had taken away the stationary

entry from the police station, he had prepared seizure list which contradicts each other, he had manipulated the records and documents and he had introduced the story of encounter which has not been established. Such manipulation of the police papers and the special diary entries made by Dudh Nath Ram together with his own statement that the police party fired at the Maruti Van make out a full proof case so far as accused Dudh Nath Ram is concerned. Dudh Nath Ram was the leader of the police party being Station House Officers, he took other police official team and chased the Maruti Van and then ultimately started firing at the Maruti Van from a close range as a result of which these three people killed. From the aforesaid circumstances established by the prosecution, we have no hesitation in affirming the conviction of all the accused persons excepting accused Brij Lala Prasad under Section 302/34 I.P.C. It would be appropriate to consider the arguments of Mr. Mohta, the learned senior counsel appearing for accused Victor that the Courts below had committed error in rejecting the plea of alibi. According to Mr. Mohta, the learned senior counsel Victor Fedles had been transferred to Gaya since July 1993 and the Station Diary of the Police Station indicates that he was on duty from 8.00 a.m. to 2.00 p.m. and it is, therefore, apparent that on the date of occurrence and at that relevant point of time he was present elsewhere in the Civil Lines Police Station and, therefore, the prosecution has failed to establish that he was at Barachatti Police Station on the early morning of 5th December, 1993. When a plea of alibi is raised by an accused it is for the accused to establish the said by positive evidence. Under Section 11 of the Evidence Act collateral facts having no connection with the main fact except by way of disproving any material fact, proved or asserted can be admitted in evidence. In other words the facts proved as such which make the existence of the fact so highly improbable as to justify the inference that it never existed, but such fact has to be established by the person who takes the plea. In other words if Victor by evidence has established that he was present elsewhere at the relevant point of time when the occurrence took place then Victor cannot be held guilty of the offence. But in the present case the presence of accused Victor at Barachatti Police Station on 5.12.1993 has been stated by PWs 7,8,17,19,28,58,59, and 64. Even PW 64 the then S.P. of Gaya also stated about the presence of accused Victor at Barachatti Police Station on 5.12.1993. No attempt was made by Victor to call for and prove the Station Diary of Civil Lines Police Station dated 5.12.1993 to establish that he was present at Civil Lines Police Station on the relevant date. Though the prayer was made in course of hearing of the argument to call for the Station Diary such prayer was rightly rejected by the learned Sessions Judge. There is thus not an iota of material available on record to establish the plea of alibi

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A of accused Victor and under such circumstances the Courts below had no other option than to reject such a plea. We are, therefore, unable to accept the submission of Mr. Mohta, learned senior counsel appearing for Victor that the plea of alibi has been illegally rejected. In our considered opinion, in the absence of any materials such a plea cannot be sustained. The question whether award of extreme penalty of death to accused Dudh Nath Ram and Victor is at all justified will be considered later.

But at this stage it will be appropriate to consider the sustainability of the conviction of accused Brij Lala Prasad under Section 302/34 I.P.C. The two star prosecution witnesses PWs 7 and 8 unequivocally indicate that Brij Lala Prasad did not accompany Dudh Nath Ram and other police officials in chasing the Maruti Van but left the police station after about half an hour by a private jeep which had been stationed at the police station. As has been indicated earlier when the police party left the police station they had no intention to kill anybody much less the three occupants of the Maruti Van and they had left for the purpose of arresting these persons who were alleged to be miscreants/dacoits and who were stated to have been speeding up in a Maruti Van by firing from the same Maruti Van. Neither the ballistic report nor the Forensic Science Laboratory report indicate that the revolver that had been given to Brij Lala Prasad had at all been used at 71 Mile Post. It is of course true that when the police party came Brij Lala Prasad also came together and the three dead bodies had been brought by them. The only evidence which possibly can be said to have been established, so far as, accused Brij Lala Prasad is concerned is that there was some shortage of cartridges which had been supplied to him and no explanation had been offered by him. But merely for such shortage of 9 rounds of cartridges, which had been supplied to Brij Lala Prasad, a year before the date of occurrence, it is difficult to come to the conclusion that at 71 Mile Post, Brij Lala Prasad who left the police station half an hour after Dudh Nath Ram and others had left, had at all used his revolver and therefore from the circumstances established against Brij Lala Prasad it is difficult to hold that he also shared the common intention which developed at 71 Mile Post. Not only the prosecution evidence established the fact that he left the police station half an hour after the police party headed by Dudh Nath Ram had left chasing the Maruti van but also there is no iota of material so far as accused Brij Lala Prasad is concerned to establish any meeting of mind of said Brij Lala Prasad with the other police party who resorted to firing at 71 Mile Post. Then again the jeep with which the Brij Lala Prasad went was being driven by a private driver and he would have been the best person to indicate the role played

by such Brij Lala Prasad but unfortunately the prosecution has not examined the said driver and no explanation has been offered as to why the said driver had not been examined. In the aforesaid circumstances, considerable doubt is entertained as to the involvement of accused Brij Lala Prasad in sharing the common intention of killing three persons in the Maruti Van, and therefore, in our considered opinion he is entitled to the benefit of doubt. We accordingly set aside the conviction and sentence passed against accused Brij Lala Prasad for the offence under Section 302/34 I.P.C. and direct that he be set at liberty unless required in any other case.

Coming to the question as whether for conviction under Section 302/34 I.P.C. the courts below are justified in awarding death sentence to accused Dudh Nath Ram and Victor, we find that the learned Sessions Judge as well as the High Court have not kept in view the principles enunciated by this Court in awarding of death sentence but on the other hand being swayed away by their own emotions on the ground that police officials took recourse to firing to helpless citizens. The death of three persons occurred not from the firing from revolvers held by Dudh Nath Ram and Victor but on account of firing from the 303 rifles held by the three Constables. It is true that the prosecution evidence establishes the fact that firing has taken place from a very close range but that by itself would not make out the case to be a rarest of rare cases justifying the extreme penalty of death. No aggravating circumstances have been indicated so far as accused Dudh Nath Ram and accused Victor are concerned to award the extreme penalty of death sentence. The judgment of the High Court starts with the expression that the case may be treated " as one of the most sensational trials of the recent years, so far as the State of Bihar is concerned and according to the High Court the murder is a diabolical one because three innocent persons have been killed by the police officers who were supposed to be the protectors of law abiding citizens." We are constrained to observe that the High Court has not kept in view the several decisions of this Court and has not examined the circumstances proved while considering the question of sentence but on the other hand have been swayed away with the fact that trial is a sensational one, and therefore, the officials must be awarded the extreme penalty of death. We do not find that it is not a correct appreciation of the law on the subject dealing with award of death penalty, even if a conviction under Section 302/34 I.P.C. is sustained. The learned Sessions Judge also came to the conclusion that the case can be treated to be a rarest of rare cases as police officials on whose shoulders the safety of citizens lie and are being the protectors of the society

A are accused for killing of three civilians without any provocation and resistance.

From the facts narrated and discussed in this judgment and the circumstances established through the prosecution evidence we do not find any aggravating circumstances as against Dudh Nath Ram and Victor to award death sentence against them merely because they happened to be the police officers and the constables at their commands might have resorted to fire from 303 rifles at their possession. In this view of the matter, while we uphold the conviction of accused Dudh Nath Ram and Victor under Section 302/34 I.P.C., we set aside the sentence of death awarded against them and commute the same to imprisonment for life.

C In the ultimate analyses, therefore, the conviction of appellant Brij Lala Prasad under Section 302/34 I.P.C. is set aside and he is acquitted of the said charge and is directed to be set at liberty forthwith unless required in any other case. Criminal appeal No. 149 of 1998 is accordingly allowed. Conviction of appellant Dudh Nath Ram and appellant Victor under Section 302/34 I.P.C. is upheld but the award of death sentence against them is commuted to imprisonment for life. Criminal Appeal No. 218 of 1998 and Criminal Appeal No. 279 of 1998 are disposed of accordingly. The conviction of appellants - Dinesh Singh, Deo Narain Ram and Jaikaran Yadav under Section 302/34 I.P.C. and the sentence of imprisonment for life is upheld and Criminal Appeal Nos. 280-82 of 1998 stand dismissed.

E

R.C.K.

Appeal disposed of.