BASO PRASAD AND ORS. A

v.

STATE OF BIHAR

NOVEMBER 24, 2006

[S.B. SINHA AND MARKANDEY KATJU, JJ.] B

Penal Code, 1860—Section 302 read with Section 34—Prosecution for—Murder of one person—By single gun shot injury—5 accused—All the eye-witnesses stating one accused responsible for the injury caused to the deceased—Firing by other accused not proved—Courts below convicting all the accused under Section 302 read with Section 34 IPC—Plea that medical evidence was inconsistent with ocular evidence—On appeal, held—Charge of murder of deceased proved—Accused responsible for causing death of deceased held guilty—Other accused did not share common intention—Hence acquitted extending benefit of doubt—Medical evidence was not inconsistent with ocular evidence—Arms Act, 1959—Section 27. C D

Evidence—Medical evidence and ocular evidence—Inconsistency between—Effect of—Held: Though the Court should take expert opinion into consideration, but appreciation of evidence is Court's job—Reference of ocular evidence over medical evidence or vice versa is to be decided by the Court—In case of such inconsistency defence should seek explanation from the doctor. E

Appellants-accused 5 in number were prosecuted for having caused death of one person. Prosecution case was that while the family members of the deceased were on the roof (first floor) of their house, the accused, who have their joint residential house at some distance, came on their roof (second floor) armed with rifles. They started brickbatting and abusing the deceased. When deceased went to the roof of his house, accused started firing. One of the bullets hit the deceased and he died on the spot. PWs 4 to 8 were the eye-witnesses to the incident. Informant-PW-7 lodged FIR stating therein that two accused including accused 'B' attributed to the act of firing. F G

During trial, PW-4 attributed the act of firing to accused 'B' alone. Other eye-witnesses though attributed firing by other accused, but stated that accused 'B' was responsible for the injury caused to the deceased. Presence

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A of blood at the spot and seizure, thereof was categorically stated by PW-2 (independent witness) and PWs 4 to 8. Trial Court on the basis of the evidence adduced by prosecution held the accused guilty of commission of an offence under Section 302/34 IPC. They were also found guilty under Section 27 of Arms Act, 1959. The appeal against the conviction was dismissed by High Court.

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In appeal to this Court, appellants-accused contended that there were discrepancies between medical evidence and ocular evidence and thus the time of death is doubtful in view of presence of rigor mortis in the four limbs and that in view of nature of injuries caused to the deceased, firing must have C taken place from a close distance; that investigation was perfunctory as no blood was found at the spot, no gun was recovered and no sign of firing was noticed; and that even if the occurrence had taken place, only accused 'B' was responsible and participation of other accused having common intention to commit the offence was not proved.

D Dismissing the appeal filed by accused 'B' and allowing the appeal filed by other accused, the Court

HELD: 1.1. Whereas 'B' alone fired a shot which had hit the deceased, there is no evidence brought on record to show that any other accused did so. No gun shot injury was suffered by any person. The deceased has also suffered E only one gun shot injury. No sign of firing was found on the walls or any other part of the building. No cartridge was recovered. Even no other person had suffered any injury by reason of hurling of brick bats. Having regard to the materials brought on records, in this case although the prosecution has proved the charge of committing the murder of the deceased, it has failed to F establish that the accused had any common intention in relation thereto. 'B' alone was, thus, responsible therefor. Had the other accused shared common intention they would have also fired. No such evidence having been brought on record, benefit of doubt must be extended to the other accused persons. [449-C-G]

1.2. Although the investigation was conducted in a slipshod manner, but G the presence of blood at the spot of occurrence as also seizure thereof had categorically been stated by PW-4, PW-5, PW-6, PW-7, PW-8 and PW-2. It is, thus, not correct to say that no blood was found at the spot. [438-C-D]

1.3. In the First Information Report, it was categorically stated that the appellants had indulged in brick batting. The statement to the said effect was H proved by PW-4, PW-5, PW-6, PW-7, PW-8 and other eye-witnesses in their

depositions before the court. There had been firing from the side of the appellants has not only been disclosed in the First Information Report but also stated by the witnesses. [438-F-H] A

2.1. It cannot be said that in view of the medical opinion with regard to presence of rigour mortis in the four limbs of the deceased time of death as claimed by the prosecution is doubtful. The exact time of death cannot be established scientifically and precisely, only because of presence of rigour mortis or in the absence of it. The incident took place in the winter season. The deceased was aged about 50 years. Rigour mortis, thus, would be well marked. Rigour mortis, appears after two to three hours. It is well developed from head to foot in about 12 hours. The age, muscular condition and activity before death, manner of death and atmospheric conditions are relevant factors. [439-D; 442-A-B; 443-D-E] B C

Mangu Khan and Ors. v. *State of Rajasthan,* [2005] 10 SCC 374 and *Thangavelu* v. *State of T.N.,* [2002] 6 SCC 498, referred to.

'Modi's Textbook of Medical Jurisprudence and Toxicology',21st Edn., at page 171; Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology' 6th Edn., at page 3.14, referred to. D

2.2. It cannot be said that medical evidence is inconsistent with the ocular evidence as in view of the nature of injury, firing must have taken place from a close distance. It is true, ordinarily, charring would take place, if firing is done from a distance of less than four feet. But in the present case, whereas in the body of the post-mortem report, the medical expert stated, 'the margin of wound charred and inverted' at another point, he in no uncertain terms stated that firing was done from long range and distance of firing would be from more than six feet. The possibility, therefore, of his commission of some mistake in the post-mortem report cannot be ruled out. It was on the said premise, it was incumbent upon the defence to bring the said fact to the notice of the doctor. Probably, knowing the futility of asking such a question, no such contention was raised either before the Sessions Judge or before the High Court. No such ground has also been taken before this Court. [443-D-G] E F G

Subhash and Anr. v. *State of U.P.,* [1976] 3 SCC 629; *Nath Singh and Ors. etc.* v. *State of U.P.,* [1980] 4 SCC 402; *State of Punjab* v. *Wassan Singh and Ors.,* (1981) 2 SC 1 and *Sidharth and Ors.* v. *State of Bihar,* [2005] 12 SCC 545, referred to. H

A **2.3. It is axiomatic, however, that when some discrepancies are found in the ocular evidence *vis-a-vis* medical evidence, the defence should seek for an explanation from the doctor. He should be confronted with the charge that he has committed a mistake. Instances are not unknown where the doctor has rectified the mistake committed by him while writing the post-mortem report. [443-G-H; 444-A]**

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Surinder Singh and Anr. **v.** *State of U.P.* **[2003] 10 SCC 26;** *State of Karnataka* **v.** *Papanaika and Ors.,* **[2004] 13 SCC180 and** *Anwar and Ors.* **v.** *State of Haryana,* **[1997] 9 SCC 766, referred to.**

C **2.4. Tattooing or charring shall depend upon the constituents of the propellant charge. It is in that context only wounds are classified by their external appearance as close contact, near contact and distant. The doctor in his evidence was categorical in stating that the wounds would not come within the purview of classification of near contact; but the wounds should be classified under 'distant contact'. [445-F-H]**

D

2.5. The nature of the gun will also have a role to play. The investigating officer did not make any attempt even to seize the gun. When the weapon was not seized, the question of examination of any ballistic expert would not arise. [446-A-B]

E *Nirmal Singh and Anr.* **v.** *State of Bihar,* **[2005] 9 SCC 725, referred to.**

2.6. Opinion of an expert is a relevant fact. The court may, thus, take the expert opinion into consideration. But appreciation of evidence is the court's job. It is, thus, for the court to arrive at an opinion as to which part of F **contradictory expert opinion should be accepted or whether in a given situation ocular evidence should be believed in preference to medical evidence or vice versa. [446-D-E]**

State of U.P. **v.** *Krishna Gopal and Anr.* **[1988] 4 SCC 302;** *Dhirajbhai Gorakhbhai Nayak* **v.** *State of Gujarat,* **[2003] 9 SCC 322 and** *Birendra Rai* G *and Ors.* **v.** *State of Bihar,* **[2005] 9 SCC 719, referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1169-1170 of 2005.

From the Common Judgment and Final Order dated 22-9-2004 of the H High Court of Patna, Bihar in Criminal Appeal No.294 of 2001 (D.B.) and in

Criminal Appeal No.314 of 2001(D.B.). A

Nagendra Rai, Sunil Kumar Verma, Anshul Raj, Fanish Kumar Raj, Pawan Kumar Singh, Abhishek and Rameshwar prasad Goyal for the Appellants.

Gopal Singh, Vimla Sinha and Nishakant Pandey for the Respondent.

The Judgment of the Court was delivered by : B

S.B. SINHA, J. Appellants five in number were proceeded against and convicted for commission of an offence of murder of one Shivnandan Prasad at about 07.00 a.m. on 13.12.1999. The parties are residents of the same village.

C

On 13.12.1999 at about 06.30 a.m., the deceased was milking a buffalo. His other family members including the wife of his brother (informant Krishna Deo Prasad-PW-7), nephew Sunil Prasad and others were brushing their teeth at the roof of their house. Brijnandan Prasad and others have their joint residential house at some distance from the house of the deceased. They allegedly came over the roof of their house armed with rifles and started brick- D batting and abusing the brother of the informant alleging that they had burnt a heap of straw belonging to them. When Shivnandan Prasad went to the roof of the house, allegedly the appellants started firing. One of the bullets hit Shivnandan Prasad on his chest. An alarm was raised. The first informant reached near his brother and found him dead. A First Information Report was lodged at about 10.00 a.m. on the same day before Chandi Police Station. The E distance between the place of occurrence and the Chandi Police Station is said to be about 10 k.m.

The prosecution in support of its case examined five witnesses, amongst whom the eye-witnesses, being Satrughan Prasad (PW-4), Chandrakanti Devi F (PW-5), Sunil Kumar (PW-6), Krishnadeo Prasad (PW-7) and Mahapati Devi (PW-8).

The learned Sessions Judge relying on or on the basis of the evidence adduced by the prosecution and in particular the deposition of the eye-witnesses found the appellants guilty of commission of an offence under G Section 302/34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for life. A fine of Rs.5,000/- was also imposed upon each of them. They were also found guilty under Section 27 of the Arms Act and were convicted to undergo rigorous imprisonment for one year. The appeals preferred by the appellants have been dismissed by a Division Bench of the High Court. H

A Mr. Nagendra Rai, the learned Senior Counsel appearing on behalf of the appellants, would raise the following contentions in support of the appeals.

(1) The prosecution version on the basis whereof the judgment of conviction and sentence has been arrived, at is improbable and the same is falsified by medical evidence.

B

(2) If the occurrence had taken place in the morning, as alleged by the prosecution, the post-mortem examination having been conducted at 03.00 p.m. on the same day, it was not possible to find presence of rigour mortis in all the four limbs and furthermore keeping in view the distance from which the firing had taken C place, the doctor would not have found margin of wound having been charred.

(3) The manner in which the incident took place as disclosed by the prosecution having been prevaricated from stage to stage should not be relied upon, inasmuch as in the First Information D Report it was alleged that three persons fired, whereas in the statements made under Section 161 of the Code of Criminal Procedure, the witnesses attributed firing to all the accused, whereas in evidence some of the witnesses attributed the act of firing only on the Brijnandan Prasad.

E (4) The investigation was perfunctory, as no blood was found at the spot; no gun was recovered; no sign of firing was noticed.

(5) It is improbable that although there had been indiscriminate firing, nobody else would have suffered any injury.

(6) Even if the occurrence had taken place, it was only Brijnandan F Prasad who had fired and, thus, participation of others having common intention to commit the said offence has not been proved.

Mr. Gopal Singh, the learned Standing Counsel appearing on behalf of the State of Bihar, on the other hand, would submit :

G

(1) At the place of occurrence blood was seized, which has been proved by some of the eye-witnesses as also PW-2.

(2) The witnesses examined on behalf of the prosecution has further proved that the appellants had indulged in brick batting.

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(3) The firing by the appellants and in particular Brijnandan Prasad has categorically been stated by all the witnesses. A

Before adverting to the rival contentions, as noticed hereinbefore, we may notice that on the same day, the brother of the appellants Bhuvan Mahto was said to have been done to death wherefor a First Information Report was lodged in which the first informant and the deceased were said to be the accused, but it is accepted that in the said case also being Chandi P.S. Case No. 374 of 1999, a charge-sheet has been filed wherein also the appellants have been made accused and not the informant or the deceased. B

The homicidal nature of the death of the deceased is not in dispute. The autopsy report of Dr. Prabhat Keshaw corroborates the homicidal nature of death. In his deposition, he stated : C

"Rigour mortis present in all four limbs.

Injury No. (i) One lacerated wound on occipital region on scalp 1½" x 1" x scalp deep. D

(ii) One lacerated wound on right side of chest at the length of second inter-coastal space 1½" lateral to the external margin 2" x 1" x cavity deep size, margin of wound charred and inverted, wound of entry.

E

(iii) Third rib fractured.

(iv) One lacerated wound on left side of back at bare area, just below the lower the lower border of scapula 1 ½" x 1" x cavity deep size, margin of wound everted, wound of exit. Both injury No. II & IV are inter connected with each other. F

(3) On dissection, skull, brain and brain matter intact, right lung perforated, left lung intact, arch of aorata intact contents 3-4 ounces of undigested food materials, liver, splin, both kidneys intact, gasses ficle matters present in small and large intestine respectively. The bladder was half full. Time elapse since death within 24 hours. G

(4) In my opinion death occurred due to shock and haemorrhage caused by above noted injury caused by fire-arm. May be by rifle. The above noted injuries are sufficient for death. This post mortem report is in my pen and signature mark Exh. 4."

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A In his cross-examination, he stated that the distance of firing was more than 6 feet and was from long range, i.e. beyond 6 feet; although he could not say the exact distance. He, however, could not state that the injury was from parallel height or from higher height. In regard to the presence of rigour mortis, it was stated :

B "....The start of rigour mortis depends on the temperature and weather conditions, but in this case rigour mortis developed after three hours. In all turn limbs developing of rigour mortis take 18 hours in such types of cases...."

The deceased met instantaneous death. Although the investigation C was conducted in a slipshod manner, but the presence of blood at the spot of occurrence as also seizure thereof had categorically been stated by PW-4, PW-5, PW-6, PW-7, PW-8 and PW-2. PW-2, Kapil Prasad, is an independent witness. He categorically stated:

D "...Blood stained soil and brick bats were also seized by the police in my presence and prepared the seizure list..."

It is, thus, not correct to say that no blood was found at the spot.

He reiterated his statement in the cross-examination in the following terms :

E "The police seized blood stained soil, bricks etc. in my presence. I cannot say the length and breadth of the bricks. I do not remember the area of the place from where the blood was seized. The soil might be 4-5 hundred grams...."

F We may also notice that in the First Information Report, it was categorically stated that the appellants herein had indulged in brick batting. The statement to the said effect was proved by PW-4, PW-5, PW-6, PW-7, PW-8 and other eye-witnesses in their depositions before the court. This part of the prosecution is not under challenge before us.

G We may also notice the fact that there had been firing from the side of the appellants has not only been disclosed in the First Information Report but also stated by the witnesses. We would, however, examine the effect of the depositions of the said witnesses, in this behalf, a little later.

H We may notice that according to PW-3, the firing took place from a

distance of about 50- 60 feet, whereas according to PW-4, the distance was anything between 40-45 feet. Both PW-7 and PW-8 stated that the distance from which the firing took place was about 40-45 feet. A

It is also not in dispute that whereas prosecution witnesses PW-4, PW-7 and PW-8 also stated that the appellants were in the second floor of their house, whereas the deceased, informant and others were in the first floor of their house. However, the difference of height of the respective buildings is not brought on records. B

The discrepancies between the medical evidence and ocular evidence, however, as noticed hereinbefore, have been raised on two counts, namely, (i) rigour mortis in four limbs were found; and (ii) in view of the injury sustained by the deceased, the firing must have taken place from a close distance. C

We must, however, state that before the High Court, the second contention was not raised. Even before the learned Sessions Judge the only contention raised was in regard to the time of death and with reference to the presence of rigour mortis in all the four limbs. In the grounds of the Special Leave Petition also, the question in regard to the possibility of the deceased having been fired upon from a close distance has not been raised. D

We may deal with the question as regards presence of rigour mortis. E

In 'Modi's Textbook of Medical Jurisprudence and Toxicology', 21st Edn., at page 171, it is stated :

> "Rigor mortis generally occurs, while the body is cooling. It is in no way connected with the nervous system, and it develops even in paralyzed limbs, provided the paralyzed muscle tissues have not suffered much in nutrition. It is retarded by perfusion with normal saline. F
>
> Owing to the setting in of rigor mortis all the muscles of the body become stiff, hard, opaque and contracted, but they do not alter the position of body or limb. A joint rendered stiff and rigid after death, if flexed forcibly by mechanical violence, will remain supple and flaccid, but will not return to its original position after the force is withdrawn; whereas a joint contracted during life in cases of hysteria or catalepsy will return to the same condition after the force is taken away. G H

A Rigor mortis first appears in the involuntary muscles, and then in the voluntary. In the heart it appears, as a rule, within an hour after death, and may be mistaken for hypertrophy, and its relaxation or dilatation, atrophy or degeneration. The left chambers are affected more than the right. Post-mortem delivery may occur owing to contraction of the uterine muscular fibres.

B

In the voluntary muscles rigor mortis follows a definite course. It first occurs in the muscles of the eyelids, next in the muscles of the back of the neck and lower jaw, then in those of the front of the neck, face, chest and upper extremities, and lastly extends downwards to the muscles of the abdomen and lower extremities. Last to be affected are

C the small muscles of the fingers and toes. It passes off in the same sequence. However, according to H.A. Shapiro this progress of rigor mortis from proximal to distal areas is apparent only, it actually starts in all muscles simultaneously but one can distinguish the early developing and fully established stage, which gives an indication of

D the time factor.

Time of Onset.- This varies greatly in different cases, but the average period of its onset may be regarded as three to six hours after death in temperate climates, and it may take two to three hours to develop. In India, it usually commences in one to two hours after

E death."

In Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology' 6th Edn., at page 3.14, it is stated :

"Rigor mortis (rigor-rigidity; mortis-of death) is a condition

F characterized by stiffening and shortening of the muscles which follow the period of primary relaxation. It is due to chemical changes involving the structural proteins of the muscle fibres and indicates the molecular death of its cells.

The contractile element of the muscle consists of protein filaments

G of two types, viz., myosin and actin, which are arranged and organized interdigitating manner. In the relaxed state, the actin filaments interdigitate with myosin filaments only to a small extent but when the muscle contracts, they interdigitate to a great extent due to the presence of ATP (adenosine triphosphate). The production and utilization of ATP are constantly balanced in life. After death, ATP is resynthesised

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for a short time depending upon the glycogen available locally, but after this glycogen is used up, ATP cannot be resynthesised. This leads to the fusion of myosin and actin filaments into a dehydrated stiff gel resulting in the condition known as rigor mortis. During rigor mortis, the reaction of muscle changes from slightly alkaline to distinctly acid owing to the local formation of lactis acid. Rigor mortis persists until autolysis of myosin and actin filaments occurs as a part of putrefaction. When autolysis occurs, the muscles soften and secondary relaxation sets in.

Rigor mortis can also be broken by mechanical force. Thus, if a limb, which is stiff due to rigor, is flexed forcibly at a joint, the limb becomes flaccid and will remain so thereafter. This is known as breaking of rigor mortis. Existing rigor mortis is broken down at least partially in the process of removal of the body from the crime scene to mortuary, and this may mislead the doctor in estimation of time since death. It is therefore essential to make a note of its stage of development while visiting the crime scene.

All muscles of the body, voluntary and involuntary, are affected by rigor. It first appears in involuntary and then in voluntary muscles. It is not dependent on the nerve supply as it also develops in the paralysed limbs. It is tested by (1) attempting to lift the eye lids (2) depressing the jaw, and (3) gently bending the neck and various joints of the body."

At page 3.16 it is stated :

"The medico-legal importance is as follows : (1) It is a sign of death (2) It helps to estimate the time since death. (3) It may give information about the position of the body at the time of death and if it has been altered after rigor has set in. As for example, if a person dies with the hands and legs supported against a brick wall and the position of the body has been changed after rigor set in, the hands and legs would remain raised in an unnatural position (without support)

The factors which influence rigor mortis are : age and condition of the body (2) mode of death, and (3) surroundings.

Age and condition of the body : In children and old people, rigor develops earlier than in the adults. The onset of rigor is later and the duration longer in the strong muscular person. The more feeble or

A poorly developed the muscles, the more rapid is the time of onset, and the shorter the duration"

The exact time of death, therefore, cannot be established scientifically and precisely, only because of presence of rigour mortis or in the absence of it.

B

In *Mangu Khan and Others* v. *State of Rajasthan* [2005] 10 SCC 374, this Court rejected a similar contention, opining :

"....In the first place, neither post-mortem report suggests that the death had taken place exactly 24 hours before the post-mortem was C conducted. All that the post-mortem reports say is that the death had occurred within 24 hours prior to PM examination. Undoubtedly, the post-mortem examination was carried out at 11.00 a.m./12 noon on 11-7-1997. In other words, the post-mortem reports suggest that the death might have occurred any time after 11.00/12.00 noon of 10-7- D 1997. The contention urged by reference to textbooks on forensic medicine to show the time within which rigor mortis develops all over the body also has no factual basis. It depends on various factors such as constitution of the deceased, season of the year, the temperature in the region and the conditions under which the body has been E preserved. The record indicates that the body was taken from the mortuary. We notice that there is no cross-examination, whatsoever, of the doctor so as to elicit any of the material facts on which a possible argument could have been based. If these are the circumstances, then the presence of rigor mortis all over the body by itself cannot warrant the argument of the learned counsel that the F death must have occurred during the previous night. Acceptable ocular evidence cannot be dislodged on such hypothetical basis for which no proper grounds were laid."

Yet again in *Thangavelu* v. *State of T.N.* [2002] 6 SCC 498, this G Court observed :

"We have heard learned counsel and carefully looked into the material on record. From the evidence of PW-5, the doctor, we find that there is a possibility that the incident in question might have occurred about 39 hours prior to the post mortem. Though in the H examination in chief, PW-5 has stated that the time between the death and post mortem could be 16 to 24 hours which fits in with the

prosecution case, in the cross examination he has very clearly stated that in this case death would have been caused about 39 hours before the post mortem which would be sometime after 5.30 p.m. on 15.12.1990. This the doctor has stated by taking into consideration the time and month of the incident as also the time required for the setting of rigor mortis and passing off of the same. According to the doctor, in the month of December in a place like Erode the rigor mortis may set in after about 2 to 3 hours after the death. He has stated that for the rigor mortis to reach from the leg to head, it would take 12 hours and the same would remain in existence for about another 12 hours. Thereafter, it would gradually diminish in the reverse direction i.e. from head to leg taking about another 12 hours and on this basis when he examined the body of the deceased, he found the rigor mortis had reversed almost to the end of the legs. By this process he came to the conclusion that the death in question must have occurred about 39 hours before post mortem...."

The incident took place in the winter season. The deceased was aged about 50 years. Rigour mortis, thus, would be well marked. Rigour mortis, as noticed hereinbefore, appears after two to three hours. It is well developed from head to foot in about 12 hours. The age, muscular condition and activity before death, manner of death and atmospheric conditions are relevant factors. We, therefore, do not find any merit in the said contention of Mr. Rai.

So far as the contention in regard to distance of firing is concerned, it is true, ordinarily, charring would take place, if firing is done from a distance of less than four feet, as has been noticed in some of judgments of this Court in *Subhash and Another* v. *State of U.P.* [1976] 3 SCC 629, *Nath Singh* and *Others etc.* v. *State of U.P.* [1980] 4 SCC 402, *State of Punjab* v. *Wassan Singh and Others* (1981) 2 SC 1 and *Sidharth and Others* v. *State of Bihar* [2005] 12 SCC 545.

In some cases, medical evidence may corroborate the prosecution witnesses; in some it may not. The court, however, cannot apply any universal rule whether ocular evidence would be relied upon or the medical evidence, as the same will depend upon the facts and circumstances of each case. No hard and fast rule can be laid down therefor.

It is axiomatic, however, that when some discrepancies are found in the ocular evidence *vis-a-vis* medical evidence, the defence should seek for an

A explanation from the doctor. He should be confronted with the charge that he has committed a mistake. Instances are not unknown where the doctor has rectified the mistake committed by him while writing the post-mortem report.

In *Surinder Singh and Another* v. *State of U.P.* [2003] 10 SCC 26, it was held :

B

"One of the pleas raised by learned counsel for the appellants was that the injuries as noticed by the doctor are at variance with the ocular evidence. On a close reading of the evidence of eye-witnesses and the doctor's report there is no noticeable variance. The mere fact that doctor said that injuries appeared to be on one side of the body
C and the witnesses said that attacks were from different sides, is too trifle an aspect. When three persons are attacking a person, the witnesses naturally get shocked. This is normal human conduct and the immediate reaction is to save the victim and to stop the assailants from further attacks. That is precisely what has been done by the eye-
D witnesses. It is only when the medical evidence totally improbabilises the ocular evidence, that the Court starts suspecting the veracity of the evidence and not otherwise."

[See also *State of Karnataka* v. *Papanaika and Others* [2004] 13 SCC180].

E In *Anwar and Others* v. *State of Haryana* [1997] 9 SCC 766, this Court observed :

"....It is true that Dr Jai Kishan (PW 9) who conducted the autopsy in his post-mortem examination report described Injury 1 as being incised wound 20 cms x 2 cms causing fracture of the underlying
F bone. He further noticed lacerated wounds on the neck of the right ear of the size 1 cm x 1/2 cm causing fracture of the underlying bone. While giving evidence in the court, he described an incised wound as Injury 1 and lacerated wounds as Injury 1-A. *He further testified that it was a bona fide mistake in not describing these two injuries separately.* Mr Sushil Kumar urged that Dr Jai Kishan (PW 9) has
G made material improvement in his evidence before the court to suit the prosecution and to lend support to the evidence of eyewitnesses and, therefore, such an improved version which demolishes the evidence of eyewitnesses be not accepted. This submission, is an attractive one but having regard to the facts and circumstances of this case, it
H is not possible to accept the same. The consistent evidence of both

these eyewitnesses was that A-2 had fired from his pistol on Baddal causing firearm injuries on his head and this evidence, in our opinion, is quite a credible one. Both these witnesses have referred to the firearm injury on Baddal on his head whereas lacerated wounds were found behind the right ear. In an assault of this nature, the exact description as regard to location of the firearm injury might be not accurate but that by itself would not render their evidence untrustworthy. It needs to be mentioned that the medical evidence is an opinion evidence which is used to lend corroboration to the evidence of eyewitnesses. If the medical evidence is found to be totally inconsistent with the ocular evidence on a given set of facts, it would be permissible for the court to reject the ocular evidence. As far as the facts of the present case are concerned as pointed out earlier, the inconsistency between the ocular evidence and the medical evidence is of a very minor nature and we do not think it proper to reject the evidence of these two eyewitnesses on that score"

[Emphasis supplied]

Whereas in the body of the post-mortem report, the medical expert stated, 'the margin of wound charred and inverted' at another point, he in no uncertain terms stated that firing was done from long range and distance of firing would be from more than six feet. The possibility, therefore, of his commission of some mistake in the post-mortem report cannot be ruled out. It was on the said premise, it was incumbent upon the defence to bring the said fact to the notice of the doctor. Probably, knowing the futility of asking such a question, no such contention was raised either before the Sessions Judge or before the High Court. No such ground has also been taken before us.

Tattooing or charring shall depend upon the constituents of the propellant charge. It is in that context only wounds are classified by their external appearance as close contact, near contact and distant.

The doctor in his evidence was categorical in stating that the wounds would not come within the purview of classification of near contact; but the wounds should be classified under 'distant contact'.

The authorities like Taylor and HWV Cox in their treatises, state in details as to how the post-mortem examination should be conducted.

A The nature of the gun will also have a role to play. Unfortunately, the investigating officer did not make any attempt even to seize the gun. When the weapon was not seized, the question of examination of any ballistic expert would not arise. [See *Nirmal Singh and Another* v. *State of Bihar* [2005] 9 SCC 725].

B Section 45 of the Indian Evidence Act, 1872 reads as under :

> *"45. Opinions of experts.* When the Court has to form an opinion upon a point of foreign law or of science or art, or as identity of handwriting or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, or in
> C questions as to identity of handwriting or finger impressions are relevant facts.
>
> Such persons are called experts".

Opinion of an expert, therefore, is a relevant fact. The court may, thus,
D took the expert opinion into consideration. But appreciation of evidence is the court's job.

It is, thus, for the court to arrive at an opinion as to which part of contradictory expert opinion should be accepted or whether in a given situation ocular evidence should be believed in preference to medical evidence or vice
E versa.

In *State of U.P.* v. *Krishna Gopal and Another* [1988] 4 SCC 302, this court has observed :

> "It is trite that where the eyewitnesses account is found credible
> F and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the orality of the trial process. Eyewitnesses account would require a careful independent assessment and evaluation for their credibility
> G which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the credit of the witnesses;
> H their performance in the witness box; their power of observation etc.

Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation." A

Yet again in *Dhirajbhai Gorakhbhai Nayak* v. *State of Gujarat* [2003] 9 SCC 322, this Court held :

"...As regards the alleged discrepancy between the medical evidence and ocular evidence, it is to be noted that a combined reading of the evidence of PW 9 who examined the deceased after he was brought to the hospital and PW 7 who conducted the post-mortem, it is clear that there is no discrepancy in the medical evidence *vis-a-vis* ocular evidence. Only in respect of Injury 1, there appears to be some confusion but that does not dilute the prosecution evidence. It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses account which has to be tested independently and not treated as variable keeping in view the medical evidence as constant. (See *State of U.P. v. Krishna Gopal.*)" B C D

In *Birendra Rai and Others* v. *State of Bihar* [2005] 9 SCC 719, this Court observed :

"....We do not attach much significance to the fact that some of the wounds showed an upward trajectory. A bullet may possibly be deflected if it hits a hard surface. The fact remains that all the shots fired have caused wound of entry as well as exit wound, and from the description of the wounds given by the doctor it appears that the firing was done from very close range. The evidence of the witnesses is to the same effect. They have clearly stated that they came near the deceased after firing took place. There was indiscriminate firing at the deceased who fell down after receiving the first injury. One cannot assume that the deceased was lying still in one posture after falling on the ground. He must have been writhing in pain when several shots were fired at him, and in that process several injuries were caused to him. So viewed, we find no inconsistency between the ocular evidence and medical evidence on record." E F G

It was further observed :

"...It was submitted that if several shots were fired, some pellets would have been found at the place of occurrence. It is the case of the prosecution that no pellets were found. For this reason alone we H

A cannot discard the case of the prosecution. If pellets were found at the place of occurrence it would have further strengthened the case of the prosecution, but in the absence of such evidence one has to rely upon the ocular evidence which if found reliable, may be acted upon...."

B In *Nirmal Singh* (supra), it was held :

"Counsel then submitted that the prosecution has failed to prove that the *dalan* of the deceased was the real place of occurrence. This submission is based on the fact that no bloodstained earth was seized from the place of occurrence. It is true that no bloodstained earth was C seized from the place of occurrence but there is also evidence of several witnesses including the investigating officer that no blood had fallen on the earth. Eyewitnesses explained that on receiving the injury the deceased pressed his wound with his hands whereafter a piece of cloth was tied around the wound which soaked the blood D which may have come out. There was, therefore, no likelihood of the earth getting bloodstained. Counsel for the appellants submitted that the intestines were protruding as described in the inquest report, and in such a situation there must have been some bleeding. That may be so, but in view of the explanation offered by the prosecution witnesses it appears probable that no blood had fallen on the ground at the E place of occurrence. In any event, if some blood had fallen at the place of occurrence which the investigating officer failed to notice, that by itself will not be fatal to the case of the prosecution. We must observe that the investigation in this case has been most unsatisfactory and the investigating officer was not conscious of his responsibilities. The bloodstained piece of cloth which was wrapped around the wound F of the deceased appears to have been seized by the investigating officer, but when questioned as to why it was not sent for chemical examination, he answered that he had hung that piece of cloth on a guava tree in the police station. The statement is comical but discloses the utter non-seriousness with which the investigation was conducted. G *We had expected better from the investigating officer who was investigating a serious case of murder. However, for this reason we will not reject the case of the prosecution entirely."*

[Emphasis supplied]

We, therefore, are of the opinion that the second contention of the H

learned counsel also cannot be accepted. A

We, however, are not oblivious of one patent fact. In the First Information Report, the first informant, attributed the act of firing to Brijnandan Prasad and Sahdeo. PW-4, however, in his deposition before the court attributed the act of firing only to Brijnandan Prasad. According to him, other persons were only wielding rifles. Shivnandan Prasad fell down after receiving the gunshot B and died. He in his cross-examination also attributed the act of firing only to Brijnandan Prasad. PW-5 although stated that all the accused had started firing but even according to her Brijnandan Prasad fired shot which had hit the deceased on his chest. Evidence of PW-6 is also to the same effect that the shot which had hit his father on the chest was fired by Brijnandan Prasad. PW-7 and PW-8 also named Brijnandan Prasad. C

The prosecution case is that the dispute started on lighting of fire on a heap of straw. The accused allegedly hurled brick bats, which compelled the deceased to come to the roof to forbid them from doing so. Whereas Brijnandan Prasad alone fired a shot which had hit the deceased, there is no evidence brought on record to show that any other accused did so. No gun D shot injury was suffered by any person. The deceased has also suffered only one gun shot injury. No sign of firing was found on the walls or any other part of the building. No cartridge was recovered.

Even no other person had suffered any injury by reason of hurling of brick bats. Having regard to the materials brought on records, we are of the E opinion that in this case although the prosecution has proved the charge of committing the murder of the deceased, it has failed to establish that the accused had any common intention in relation thereto. Brijnandan Prasad alone was, thus, responsible therefor. Had the other accused shared common intention with Brijnandan Prasad, they would have also fired. No such F evidence having been brought on record, benefit of doubt must be extended to the other accused persons.

We, therefore, while holding Brijnandan Prasad guilty, are inclined to allow the appeal of the other appellants. The judgment of conviction and sentence passed against them is set aside. The appellants in Criminal Appeal No.1169 of 2005 shall be released forthwith, if not wanted in any other case. G

Criminal Appeal No.1169 of 2005 is, therefore, allowed and Criminal Appeal No.1170 of 2005 filed by Brijnandan Prasad is dismissed.

K.K.T. Crl. A. No. 1169 of 2005 allowed and Crl. A. No. 1170 of 2005 dismissed. H